

Werner Gephart

*From “Natural Law” to “Cultural Law”?  
“Culture” as a New Source of Normative Validity*

Introduction

Dear friends and supporters of the Käte Hamburger Kolleg “Law as Culture”

Liebe Freunde des Kanonischen Rechts und insbesondere Judith Hahn als neuer Fellow, ainsi que mon cher collègue et juriste Moussa Samb du Sénégal, assez loin de Bochum d’où vient Madame Hahn, Signora Daniela Bifulco da Napoli, jurista e constitutionalista and Erica de Wet, specialist in Public law from South Africa. Last but not least Dr. Wächter, who accompanies the Center from the side of the project manager, very welcome all of you, also from my side. As you have seen, to have a Geschäftsführende Direktorin by my side, will make my work much easier, being able to concentrate even more on the thematic focuses of the center in the future, as I hope.

Let me start with a look back on five years of “Law as Culture” merging in the formulation of a “Law as Culture Paradigm” that may be used for multiple purposes, as comparing legal cultures and reflecting legal reasoning in different cultural and social contexts, for example. In a second step, I would like to develop some ideas about “Culture” as an argument in legal discourse (II) in order to situate this questioning in the larger context of the debate about natural law arguments and culture-related topoi, tentatively at least in penal law, family law and constitutional law (III). I want to conclude with more general reflections of the sociological critique of natural law, the sociologist’s claim to find in society itself the solution to the normative problem, the legal historian’s assumption that history would produce a relatively rightful natural law, or to lay all normative power into the procedure itself, finally to ask where the reference to “culture” as a primary source of normative validity may lead to (conclusion).

## I. Looking back on five years of “law as culture”

The most important insight gained was that the thematic sequencing of ‘Law as Culture’ into precisely six research years by no means gave rise to artificial breaks in the process of thought development. On the contrary, it proved both a fruitful and practical basic guideline for diverse disciplines that – with a varying radius and rhythm – routinely moved beyond the supposed European center: into India, Asian countries and also the Arabic-Islamic world, including the region of the Israeli-Palestine conflict. Whereas the opening symposium was conceived as an overview of the overall topic,<sup>1</sup> subsequent years highlighted individual thematic focal points: The concept of law in a global world (Year 1), the constitutive relationship of law and religion (Year 2), law in the context of globalization (Year 3), the problem of encounters and conflicts between legal cultures (Year 4), as well as the relationship between law and other cultural phenomena, particularly literature, the visual arts, the media, architecture, etc. (Year 5). That said, we did pay particular attention to the transformation of law in the context of the ‘Arab Spring’ as part of our research question, observing the local and translocal normative upheaval that began in Tunisia in December 2010. This was an example of a process that was being registered worldwide, in which – under pressure from the ‘Arab street’ – purportedly secular, authoritarian regimes subscribed to the slogan of freedom, dignity and justice. They thereby ushered in revolutionary upheaval, the consequences of which were by no means clear at the time. That the newfound communicative freedom also applied to Islamist forces and their references to Sharia was unsurprising. And yet, it was not foreseeable how deep the division of these societies along a ‘secular’/‘religious’ fault line would run. This thematic emphasis was also reflected in the selection of Fellows (Hamadi Redissi, Sami Bostanji, Elizabeth Kassab, Asma Noura and last but not least: Sadik Al’Azm who was awarded with the Goethe-Medal in Weimar this summer)

The focal points were also showcased through the organization of a series of forum lectures, but also several larger events: the first conference on processes of transition in the Arab-Islamic world was organized by the Center in the university’s *Festsaal* in April 2011, the conference on the reference to Sharia was held in the following year (2012) and our last conference in Tunis, in February this year, was devoted to the issue of

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<sup>1</sup> Cf. the corresponding publication: Werner Gephart (Ed.): *Rechtsanalyse als Kulturforschung* [= Publication Series “Law as Culture”, Vol. 1], Frankfurt 2012.

The results of our reflection have been condensed into the last book of our series under the title “Rechtskulturen im Übergang- Legal Cultures in Transition”, as we have named our last publication.

We thus feel all the more proud that our main focus of a reconciliation of a “*secular*” and a “*religiously oriented validity culture*” has found a kind of indirect recognition by the Nobel prize committee honoring the historical moment, when the process of transition to a democratic political system and a correspondent legal culture was in its greatest danger:

“The Norwegian Nobel Committee has decided that the Nobel Peace Prize for 2015 is to be awarded to the **Tunisian National Dialogue Quartet** for its decisive contribution to the building of a pluralistic democracy in Tunisia in the wake of the Jasmine Revolution of 2011. The Quartet... established an alternative, peaceful political process at a time when the country was on the brink of civil war. It was thus instrumental in enabling Tunisia, in the space of a few years, to establish a constitutional system of government *guaranteeing fundamental rights* for the entire population, irrespective of gender, political conviction or religious belief.”

The greatest challenge during our voyage through the land of normativity was keeping the various strands of the discussion together, i.e. to depart from a broader definition of law as well as from its sacral dimension in order to recognize law as a transnational *judicioscape*, while also paying attention to the forms of representation and performance of law.

It was clear from the outset that the aesthetic dimension was to be understood as an independent source of insight. This was evidenced by the cooperation with former *artist in residence* Alexander Polzin, a sculptor, painter and stage designer: his bronze works, two of which were allowed to stay in the Center – one on the David and Goliath legend inspired by Caravaggio, another on the co-author of the Indian constitution, Dr. Ambedkar. This use of reflexive aesthetics for the purpose of gaining insights into law could be continued, *inter alia*, in the artist talk with Marcel Odenbach in the *Kunstmuseum Bonn* – part of the series “*recht im bild*” – where our research question was what could be learned about law from his painting of a judge’s robe (“*Abgelegt und Aufgehungen*” / “Removed and hung up”, 2013).

With **Ali Samadi Ahadi**, the medium of film moved to the fore, for instance in form of his rather tragic documentary (“The Green Wave”) or the genre of comedy (“45 Minutes to Ramallah”). The rich oeuvre of this multiple award-winning artist (Grimme Prize winner, founding member of the Academy of the Arts of the World in Cologne, winner of the German Film Critics’ prize for “best feature length film debut” “Salami Aleikum”) also prominently features a film script created during his tenure at the Center (“*Die Ministerin*”). The creation of an artist stipend, known as the “Georg Simmel Artist Stipend” since November 2013, thus seems indispensable. Tim Shaw from the Royal Academy, our latest artist in residence, who is currently preparing a great exhibition in San Diego and an opening in Belfast for his great

installation, has continuously challenged our understanding of the question from where the deontic power comes from when a work of art speaks to us...

We therefore seem to have been successful in not only bringing different knowledge cultures together in one location, but also providing a source of inspiration and interaction – beyond the fault lines of law and cultural science and reflexive, aesthetic practice. We consider our Center’s distinguishing feature to be how it brings up questions of daily life in a global world from diverse perspectives, as globalization theory pioneer and Fellow at the Käte Hamburger Center “Law as Culture” Martin Albrow reminded us in his newly published book.<sup>2</sup> The controversial circumcision decision by the District Court of Cologne, for instance, dramatically highlighted a conflict between the secular protection of physical integrity, the violation of which carries criminal law sanctions, and the claims of two confessional cultures to define their collective identity through precisely this incriminated act. The question forming the premise of the Center’s research has thus been validated:

*How can a normative commitment be created under the conditions of globalization and the rediscovery of religions, in which the plurality of normative projections are linked together as an agreeable multiple order, without constructing a new uniform law of normativity or lending a validity to the particular special realms that would result in the dissolution of normativity itself?*

In order to grasp this problem statement theoretically, one should add that we were not only concerned with Philosophy of Law and Sociology of Law, but to a certain extent also with John Searle’s concept of *deontic power*, which provides a link to the debate on *force du droit* in the work of Benjamin and Bourdieu. The development of a “Law as Culture” paradigm<sup>3</sup> thus emerges as a central result of the first project phase; a paradigm in which law is questioned as to its non-normative preconditions in interplay with the legal and cultural science disciplines that are challenged and inspired by aesthetic practice.

“Law as Culture” is also about the development, probation and consolidation of a frame of orientation and reference that we call the “Law as Culture paradigm”. This paradigm has developed as follows throughout the course of the first project phase:

1. The first research year led to the fruitful and new insight that a ***multi-dimensional concept of law*** can lead away from the limitations of a purely juridical and Occidental self-description as an order of norms. Such a concept expands traditional notions by identifying a symbolic dimension of law as the vicarious sign of representations and appeals to what is seen as right and just, the restraint of the effervescent forces of rage and revenge through the ritualization of procedure and the deontic power of the organization of courts and the legal community. Our Durkheim-conference in two weeks

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<sup>2</sup> Cf. Martin Albrow: *Global Age Essays on Social and Cultural Change* [= Publication Series “Law as Culture”, Vol. 5], Frankfurt 2014.

<sup>3</sup> Cf. also the introduction to Werner Gephart/Jan Christoph Suntrup (Eds.): *Rechtsanalyse als Kulturforschung II* [= Publication Series “Law as Culture”, Vol. 10], Frankfurt 2015 (forthcoming).

will give an opportunity to trace back the roots of this model to Durkheim's concept of social life!

2. The hypothesis formulated in the initial funding proposal that 'law' only attains a concrete form through its counterpart '*religion*' even in modernity was only strengthened in individual research work and colloquia, for instance between the sections of the German Sociological Association (DGS) on sociology of law and sociology of religion. The mysteries of the deontic power of the modern constitutional state cannot be simply resolved through the reference to its civil-religious fundament. The pursuit of the traces of the sacred lost<sup>4</sup> in law is not only the product of a religious melancholy, but also contributes to enlightenment about the dangerous illusion of secularism that supposedly did away with the Sacred. Be it as a perspective of alienation, as a real source of validity or as a structural elective affinity, sociology of religion's perspective on law (and its environs) leads to important insights, beyond the questions of religiously bound law. We are very happy that the role of Canon Law will be elucidated by our new Fellow Judith Hahn.
3. Conceiving of the relatively late special historical product of the nation state as the universal production site of law is utterly naïve. The way in which local, national and transnational normative orders are interwoven – neither hierarchically nor on the same level, but interlinked within a multi level model – underscores the necessity of paying more attention to the fact of globality in legal analysis. This analysis should not stop with the formulation of transnational orders of human rights, international economic law or 'Humanity's Law'. Rather, it should intersect vertical relationships of derivation and validity in order to devote more attention to competing validities, a permanent challenge to jurists and norm theorists. The culture argument tries to gain validity exactly through these issues!
4. A related issue is the heightened sensitivity towards clashes of validity between legal orders, but also those orders and powers that we consider to determine the world. This perspective of interwovenness and conflict requires that permanent attention be paid to the observation of legal facts. The crucifix judgments, the Cologne circumcision judgment, the controversy surrounding a Muslim as champion marksman in a Catholic shooting club fraternity, or most recently the appearance of a self-proclaimed 'Sharia police' in Wuppertal, demonstrate how present and relevant this topic is in Germany alone.

And it will be more present in the future. The "waves" or better: movements to avoid a misleading metaphor, of refugees carry with them a great amount of respective legal cultures that are not identical with the dominant ideas about the legal ordering of society. If it is true that legal cultures do have an impact on the construction of one's own identity and if it is also true that many refugees will suffer from traumas that affect their self image, the problem of integrating legal cultures in a well-balanced legal consciousness

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<sup>4</sup> Cf. the ninth volume of our publication series: Werner Gephart: *Traces of the Sacred Lost. Essays on Law, Culture and Religion* [= Publication series "Law as Culture", Vol. 9], Frankfurt 2015 (forthcoming).

may increase. Such a consciousness would properly acknowledge the dominant legal order while still leaving space for the identity-related conception of right and wrong in the new world.

Coming back to the world in motion: refugee movements do not just affect Europe and Germany but are a worldwide tendency: 60 million people in the world are fleeing from war, conflicts and persecution according to the United Nation's High Commissioner for Refugees. To make the figure more vivid: if they were conceived of as a nation, they would compose the 24th most populous country.

With regard to Germany, some figures may serve as a reminder: for the whole year until now we count 577 thousand people who have been registered as asylum seekers, not counting the possibly much higher number of non-registered people. There has been a big rise of refugees from Syria and Iraq with the effect of shifting the relations of religious affiliations in a substantive way. Whereas concrete numbers for 2014 tell us about a proportion of 63 percent with a Muslim background, current estimations go up to eighty percent. The probability of certain types of conflicts may thus be increased, namely conflicts originating in different or even antagonistic views of the role of religion in a modern society, equal rights for women and the right of every individual to sexual self-determination, freedom of speech and press. Furthermore, a divergent perception of history, especially in regard to anti-Semitism can play a role. Some sociologists [like Armin Nassehi] have also expressed concerns regarding threats of a masculinization of public spaces. All this creates a necessity for European societies to make strong efforts to include migrants by offering language qualification and working possibilities and at the same time convey the social norms in question.

Another field of tension opens up when looking at a more general legal conflict connected to the influx of refugees. As Seyla Benhabib puts it: "From a normative point of view, transnational migrations bring to the fore the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other." [Borders, Boundaries, and Citizenship, 2011]

It is the question about the freedom of movement versus the democratic right of exclusion. I have my great doubts whether we are able to solve those questions with the pure means of traditional jurisprudence. Instead, a reflective socio-cultural jurisprudence may be needed. The Frankfurt Cluster of "Normative Orders" is taking this way, which we have already very strongly been insisting on during the last five years!

5. To deny the aesthetic dimension inherent to legal facts and dismiss it as legal style, the art of abstraction or analytical power, and to assume that law, as a subsumptive power, could subjugate the world through beautiful legal concepts, would render law and the forces particularly closely linked to it such as politics, with its proclivity to violence, all the more dangerous: such a denial can make way for an aestheticization of law that masks power or even glorifies violence and, when taken to its extreme, leads to fascism and totalitarianism. A further key insight is to be found in the underlying relationship between law and: literature through the narrative dimension of law; sculpture through its laconic

dimension; visual arts through its representational power; music through its exceptional power to detach from representation and the representable; theater through its performative power, etc. Far from a tongue-in-cheek display of erudition, this relationship between the spheres of law and the arts represents a sharp analytical tool to measure the quality of legal cultures!

Our last year was devoted to a deepening of these questions, in which two points should be called to attention: on the one hand: we were wondering about the subjacent elective affinities of normativity structures in the arts and in the legal sphere; second: one still has to cope with a lot of prejudice concerning the aesthetic sphere in Germany whereas especially centers for Advanced Studies, in Nantes, in Marseille, develop more and more programs in order to bring the Humanities, the Social Sciences and “les sciences dures” more closely together with the arts! As part of the evaluation committee of the French Centers for Advanced Study, I could observe last week in Marseille that currently at the IMÉRA three fellows work with a double qualification in art and science and we decided to exchange with them about their experiences!

## II. Looking at the sixth year

In a concluding phase that we are entering now, the research results of the four thematic pillars and their transversal linkages will be joined together again. The problem statement can be summed up as follows: What are the consequences of insights into the historically and culturally differentiated correlations between law and religion (II), the placement of law and competing normative orders in a multidimensional process of globalization (III), the fanning-out of legal-cultural areas of tension (III), and the many faces of legal representation in literature, film, architecture, sculpture, music transcending the classical field of law and literature studies (V) for the question: which importance is to be given to ‘culture’ for the ‘correct law’? Does it constitute its own dimension of validity (Geltungsdimension) empirically and perhaps also normatively? When particularly religiously defined communities demand the applicability of their legal culture within an applicable legal order, does this imply a shift from a long-gone system of justice dominated by classes to one dominated by culture – from a Klassenjustiz to a ‘Kulturjustiz’ as I called it some twenty five years ago? This becomes especially clear when taking the example of the presence of Islamic law viz. its different schools of thought in occidental societies, on the one hand, but also in the multi-communitarian India. Within Europe, different legal-cultural modes of transmitting differences in validity (Geltungsdifferenz) emerge. France is characterized by its model of laicism, which segregates the spheres of law and religion in the public space. In Germany, on the other hand, the reality of the state church is recognized. Our next book will speak about this relationship.

In the Netherlands, the structural *verzuiling*, expanded by an additional Islamic ‘pillar’, is the subject of a tense debate on the limits of the traditional Dutch tolerance. In Great Britain and Canada, finally, concepts of the transmission of particular cultures of validity and legal-statal unity are undergoing rapid change.

Does a sort of transcultural jurisprudence emerge from this tendency? How does the idea of legal universalism relate to a particular right to rights? What is the role of procedural culture in the opening of a discursive space, in which different cultures’ claims to validity can be articulated? *Does culture become a ‘source of law’ of sorts?* Or does it not go beyond the symbolic legal décor, the outward appearance of legal practice, the observance of rituals, and the formal, organizational guarantees of law? One may assume that the question as to the relationship “Between Facts and Norms” (“Faktizität und Geltung”) cannot be dissociated from its cultural context. Likewise, the suspicion remains that an indiscriminate and to that extent ‘culturalistic’ acceptance of other legal cultures misses insights into the value-bound character of supposedly purely ‘formal’ legal cultures.

It is therefore possible to identify a key question that links the different phases of the Centre for Advanced Study together:

*How can a normative commitment be created under the conditions of globalization and the rediscovery of religions, in which the plurality of normative projections are linked together as an agreeable multiple order, without constructing a new uniform law of normativity or lending a validity to the particular special realms that would result in the dissolution of normativity itself?*

To this extent, the grappling with the definition of law is already to be seen in the context of this problem statement. Likewise, the question includes the findings of globalization, the return of the holy and that of battles for identity, which cannot be tackled with an additive model of law, but require a multidimensional perspective.

### III. From natural law to cultural law?

Finally some reflections should be devoted to the different fields of law.

To what extent does “Culture” matter as an alternative argument to “Nature” or “History/Tradition” and what kind of risk do we take when attributing this importance to “culture”. The question to be developed much more in detail during the following period has to be differentiated according to the different fields of law.

## 1. “Culture” as an element of penal imputation?

Even if criminal law and the purpose of punishment is shaped by the meaning of validity – here, I am following the cultural-scientific interpretation of criminal law dogma as developed by Günter Jakobs in his much-lauded volume “System der strafrechtlichen Zurechnung” (“System of Criminal Law Attribution”) – a meaning of validity, then, that stands within a socio-cultural context, universalistically framed legal cultures contain limits to how far such a meaning of validity can be undercut: For instance, the prohibition against killing and the corresponding felonies cannot be relativized by invoking injured honor. In other words, the cultural defense argument does not count.

And yet, at the level of legally relevant facts, can a sort of “cultural adequacy” be postulated in addition to the attempts to exclude circumcision – considered a priori an instance of violation of physical integrity – from criminal law norms by framing it as a culturally legitimate practice? – The Family Law resolution to this conflict followed another path, but such an interpretation lay in the air. Within the system of criminal law attribution in the sense of Günter Jakobs, this would be precisely the question: namely whether the “act” contains a communicative meaning that rebels against the social conception, denies it its validity and meaning or whether it contains a particular meaning of validity that, while particular, is culturally shared by others!

It remains fascinating to see which solutions this sociologically inspired doctrine of attribution leads that argues based on the communicative meaning of action and criminal law reaction thereto!

## 2. Family Law as Culture

During our joint conference “Family Law as Culture” we still had a chance to discuss the role of “culture” as a constraint or as a communalizing element in treating problems of family law in Europe.

But has there been a shared conviction among the members of the “Commission on European Family Law”? One could interpret the aims and intentions of harmonization by that commission as incompatible with a cultural bias assumption that anthropologists and sociologist and even the European Council proclaim when stating that family law “is very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonization”.<sup>5</sup> Masha

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<sup>5</sup> Council report on the need to approximate Member States’ legislation in civil matters of 16 November 2001, 13017/01 justciv 129, p. 114 (cited in: Masha Antakolskaia, Family Law and national culture: Arguing against the cultural constraints argument, in: Utrecht Law review 4, 2008, p. 25- 34 (p. 25). See also the various contributions by Katharina Boele-Woelki. She identifies a historical shift to a smaller cultural impact: ...”whereas cultural constraints, to my mind, no longer play such a dominant role in family law compared to some fifty years ago.” (in: Building on convergence and coping with divergence in the CEFL principles of

Antokolskaia has prominently argued against the so called ‘cultural constraint argument’. It entails – as far as I see – two elements: on the one hand, an empirically meant statement that family laws are embedded in different and unique cultural contexts, composed of heritage and traditions and secondly, a normative claim that these differences are unbridgeable, and can neither spontaneously converge nor deliberately be harmonized.

One has to go deeply into the legal culture debate in order to identify some differences between Lawrence Friedman,<sup>6</sup> on the one side, and perhaps David Nelken,<sup>7</sup> on the other, who have done most impressive studies in the field. We don’t have the time to revivify this debate in fast motion. But let me remind you of some of the arguments against the thesis of unique particularism: cross cutting affiliations simply go beyond the national borders, wherein a plurality of cultural orientations (such as the south and north dimension, for example) might prevail. Instead, progressive and conservative subcultures would have much more explanatory power, for example in the acceptance of same sex marriage patterns and divorce rules.

Beyond those differences on the progressive-conservative scale, all-embracing European values would cut across the cultural constraint argument of unbridgeable diversity, that is a kind of European family culture centered around “individualism and rationalism, personalism and intellectualism, rights-consciousness and dissolution of traditional authority, and respect for human rights”,<sup>8</sup> as the aforementioned Masha Antokolskaia has formulated. In other words: patterns of modernity.

Though the cultural constraint argument is refuted, the importance of a common *culture*, a pan-European culture at best embedded in Human rights convictions seems to be an underlying premise of the impressive work of the Commission on European Family Law. Once again: “Culture” matters as a legal argument, but we do not get rid of all the methodological problems of how to interpret the laws or other normativities, but we have to ask more clearly: what does the reference to culture mean when we try to find out the “correct law”, das richtige Recht?

### *Interlude:*

#### *The critique of natural law by the historical school and the “Methodenstreit”*

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European Family law, in: Masha Antolskaia (ed.) *Convergence and divergence of Family Law in Europe*, Antwerpen Oxford, 2007, pp. 253-270 (p. 256).

<sup>6</sup> Cf. Lawrence Friedman: *Legal culture and social development*, *Law & Society review* 4/1, 1969, p. 29-44.

<sup>7</sup> Cf. David Nelken: *Using legal culture: Purposes and Problems*, in: *ibid.* (ed.): *Using legal culture*, London 2012, p. 1-51.

<sup>8</sup> Masha Antakolskaia, *Family Law and national culture*, p. 33

The historical school had brought about a fundamental critique of the former “natural law theory”. Their preaching of “*Volksgesist*” left completely open and unresolved who was meant: the jurists as bearers of judicial enlightenment or the people, creating and deepening the gap between the people’s law and the jurists’ professional understanding of what the law is made of. In Max Ernst Mayer’s differentiation of “Rechtsnormen” (“legal norms”) and “Kulturnormen” (“cultural norms”), the validity of especially penal law is not bound to eternal imperatives but to the conjunction of “Rechtsnormen” and those “Kulturnormen” that the individual does recognize. Underpinning the role of “Geltung” by Emile Lask, as our conference about the normative complex could show last year, leads in his famous student Gustav Radbruch to an understanding of “Rechtswissenschaft” (“legal science”) as “Kulturwissenschaft” (“cultural science”), insofar as law interprets a “wertbezogene Wirklichkeit” (“value-related reality”), a term used by Heinrich Rickert, the informant of Max Weber in matters of value theory. Berolzheimer, to be short in my excursion on the history of legal theory, is courageous enough to metamorphose the “absolutely valid natural law” into “relative cultural law” differing from positive law in a higher ranking normative order that is governed by legal principles embedded in the legal consciousness of the people.

Turning to the vibrant methodological climate of Weimar, Erich Kaufmann, too, argued against the positivistic legend on the one hand and the idea of an eternal natural law, on the other. Instead, each generation had to instill into those supposedly eternal principles its own spirit in order to create a “proper cultural system” (“ein eigenes Kultursystem von individueller Werthaftigkeit zu schaffen”<sup>9</sup>). Hermann Heller’s methodological reflection still deserves some admiration when he formulates. “Die soziologische Deutung der geistigen Kulturhalte versteht diese nicht immanent, sondern als eine Form, in der sich eine gesellschaftliche Wirklichkeit selbst auslegt.”<sup>10</sup> Rudolf Smend finally, in interpreting the catalogue of fundamental rights as a “Kultursystem” (“cultural system”), brings back a German tradition to conceive “culture” as the aim of the State.

It is obvious that this interpretation of the state turns back to the issue of constitutional cultures...

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### 3. Constitutional Cultures and the Cultural Reference of Constitutional Argumentation

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<sup>9</sup> Kaufmann, S. 16

<sup>10</sup> „Sociological interpretation of mental cultural content does not conceive of them as something immanent, but as a form in which a social reality interprets itself“, Hermann Heller, Staatslehre, S. 47.

The constitution is not only the highest normative order in a hierarchically conceived legal order, but it is the constitution of the society, namely the structure of functional differentiation, the differentiation of social spheres. But the line between law and morals, economy and politics, culture and community life is drawn rather differently according to civilizational experiences. The latter are in themselves culturally shaped. And this makes the understanding of the legitimate place of cultural diversity in society not necessarily more clear.

Therefore, a main question for the constitutional debate will be: To what extent does the constitution attribute legitimacy to cultural differentiation without ending in the state of plural society, where centrifugal forces prevail instead of a culturally differentiated but integrated pluralism?

Matthias Herdegen's last book (*The Dynamics of International Law in a Globalised World. Cosmopolitan Values, Constructive Consent and Diversity of Legal Cultures*), to appear soon in our publication series, reveals the implication of the "Law as Culture perspective" to the application of international rules (ch.XV.). Particularly interesting is Herdegen's look at the ruling of the European Court of Human Rights in the case *S.A.S. vs. France*. The French parliament had passed a law 'prohibiting the concealment of one's face in public places'<sup>11</sup>. A resolution by the *Assemblée Nationale* had indicated the rationale behind this law, considering "...that radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic." The court's ruling underlined the "direct democratic legitimisation" of national authorities, thought to better placed to judge how to draw the necessary limits on the manifestation of one's own belief and religious practice than an international court. However, it could be argued that the reference to democratic legitimization, in this case, could be seen as a hidden way to privilege a "culture of the state", that in France relies on a very specific tradition to interpret what has to be understood by the term of laicism! This is certainly the basis for the Parliament's law making process. This remark is not meant to dispute the result, but it should be retained that here a religiously legitimized practice (whatever we may think about its inner religious validity) has been confronted with a culturally shaped conception of the state regarding cultural diversity, raising the question to who's culture the law gives validity!

## CONCLUSION

The provocative title of my talk "From natural law to cultural law. Changes of a validity culture?" was meant to trace a trend of normative argumentation, more than to denounce the factuality of cultural influences in the construction of normative orders.

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<sup>11</sup> Loi no. 2010-1192 du 11 octobre 2010

Let me describe, however, a kind of move from “nature” to history, by way of the critique of the historical school, thereby proposing historicity as a criterion of what is normatively valid, and from there to “culture” as a point of reference in arguing for a relatively valid historical and culturally bound law or even culture as the legitimate creator of new normative orders.

The critique of “natural law” as a type of legitimization was manifold: factual diversity versus supposed eternity; projection of one’s own political will into the mere form of natural law in form of the critique of natural law as an ideology (from Kelsen to Topitsch); the hiding of religious norms under the cover of eternity. Weber’s differentiated analysis of the factual use of natural law arguments should not be forgotten, though his contribution to the debate about “*Naturrecht und materiale Gerechtigkeit*” has remained largely unrecognized. That is why his analysis should be recalled here:

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Weber’s access to the problem of natural law according to the parameters of his problem statement concerning the conditions for the development of law cannot be oriented towards the character of super-positive dignity. It is rather oriented towards the question to what extent the belief in natural law empirically left its mark on positive legal orders. In other words, he seeks to investigate to what extent it had practical meaning for the behavior of creators, practitioners, and those interested in law, when “the conviction in the specific ‘legitimacy’ of certain legal maxims, [and] in the immediately binding power of certain legal principles that cannot be destroyed through any impositions of positive law, noticeable influences actual practical legal life”.<sup>12</sup> When he raises the question of the “law of laws” – as the hidden reference to Rudolf Stammler reveals<sup>13</sup> – as an object of sociology of law, Weber is concerned only with positivization and its effect on the rationalization of law.

His concept of natural law emerged from the disenchantment of a religious legitimization of law as “the specific and only consequent form of legitimacy of a law that can remain after religious revelations and the authoritarian sanctity of tradition and its carriers cease to exist.”<sup>14</sup> For this reason, it is at the disposal of revolutionary powers that overthrow the old orders. “Natural law”, according to Weber, is “the epitome of norms that are valid independently of all positive law and are preeminent towards it, whose dignity is not at the whim of arbitrary provisions but conversely legitimizes their power to bind.”<sup>15</sup> Such a broad concept of natural law also makes the legal historical school suspect of natural law, as its

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<sup>12</sup> “[...] wenn also die Überzeugung von der spezifischen ‚Legitimität‘ bestimmter Rechtsmaximen, von der durch keinerlei Oktroyierung von positivem Recht zu zerstörenden, unmittelbar verpflichtenden Kraft bestimmter Rechtsprinzipien, das praktische Rechtsleben wirklich fühlbar beeinflußt”, *ibid.*, p. 595.

<sup>13</sup> Cf. Stammler: *Wirtschaft und Recht*, pp. 477–630, where the “*Fünfte Buch*” (“fifth book”) deals with “*Das Recht des Rechtes*” (“the law of laws”).

<sup>14</sup> “[D]ie spezifische und einzig consequente Form der Legitimität eines Rechts, welche übrig bleiben kann, wenn religiöse Offenbarungen und autoritäre Heiligkeit der Tradition und ihrer Träger fortfallen”, Weber: *Entwicklungsbedingungen*, MWG I/22-3, p. 596.

<sup>15</sup> “[D]er Inbegriff der unabhängig von allem positiven Recht und ihm gegenüber präeminent geltenden Normen, welche ihre Dignität nicht von willkürlicher Satzung zu Lehen tragen, sondern umgekehrt deren Verpflichtungsgewalt erst legitimieren”, *ibid.*, pp. 595 et seq.

doctrine of legal sources postulates a super-positive preeminence of validity of customary law. Whereas Durkheim considers the German historical school of law one of the strongest opponents of timeless natural law, Weber attacks the “naturalist” elements of legal and sociological romanticism that either seek to lend the *Volksgeist* legal validity or appeal to “legal sentiment”. However, Weber distinguishes a “natural law legal rationalism” of the formal kind from this irrational naturalism of the historical school of law. It is for the former that he wishes to reserve the concept of natural law. The dual source of, on the one hand, the entelechial concept of nature of the Renaissance that ties in to Antiquity and thereby also covers the stoic natural law identified by Troeltsch and, on the other hand, the religious sources in Puritan sects pointed out by Jellinek<sup>16</sup>, viz. the baptistery singled out by Troeltsch<sup>17</sup>, form the conceptual background of the natural law dynamics in Modernity. Weber, while speculating on a radical formalization of the problem of natural law, is close to claiming a covert naturalism of the *reine Rechtslehre* when he states: “The natural law legitimacy of positive law can be either more closely tied to formal conditions or to substantive ones. The difference is gradual, for a purely formal natural law cannot exist: it would, after all, have to coincide with general legal terms that entirely lack content.”<sup>18</sup> Yet this is precisely what Kelsen elevates to the program of his “pure” legal doctrine that, seen from Weber’s perspective, can be understood as an exponent of formal natural law doctrine. “Substantive” natural law, however, offers the double measure of “nature” and “reason” that – in the contemporary legal-theoretical discussion – shifts towards the “nature of the matter” or the “logic of things”. Herein, Weber sees a categorical error from the outset, namely the confounding of the “*Geltensollenden*” (“ought to be valid”) with the “factually on average everywhere existent”. Here, in the brief history of natural law doctrines,<sup>19</sup> the antagonist Rudolf Stammler makes another appearance. He is accused of being unable to distinguish “natural law” from legal law and raises a natural law through his “law of laws” that can scarcely be justified in the name of Kant.

With almost prophetic clairvoyance, Weber sees the consequences that result from the crisis viz. the dissolution of natural law that is promoted by legal rationalism itself as well as by modern intellectualism: “But precisely this dying off of its meta-juristic anchoring counted among those ideological developments that increased the skepticism towards the dignity of the individual provisions of the legal order at hand, yet thereby, on the whole, extraordinarily promoted the factual conformability towards the power – now solely deemed utilitarian - of the respective forces acting as legitimate.”<sup>20</sup> To such an extent, at least, that the rule of

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<sup>16</sup> Cf. Jellinek: *Menschen- und Bürgerrechte*?; cf. further Stolleis: *Jellineks Beitrag*.

<sup>17</sup> Cf. Troeltsch: *Soziallehren*.

<sup>18</sup> “Die naturrechtliche Legitimität positiven Rechtes kann entweder mehr an formale Bedingungen geknüpft sein oder mehr an materiale. Der Unterschied ist graduell, denn ein ganz rein formales Naturrecht kann es nicht geben: es würde ja mit den ganz inhaltleeren allgemeinen juristischen Begriffen zusammenfallen müssen”, *ibid.*, p. 599.

<sup>19</sup> Cf. esp. *ibid.*, pp. 601–608.

<sup>20</sup> “Aber eben dieses Absterben seiner metajuristischen Verankerung gehörte zu denjenigen ideologischen Entwicklungen, welche zwar die Skepsis gegenüber der Würde der einzelnen Sätze der konkreten Rechtsordnung steigerten, eben dadurch aber die faktische Fügsamkeit in die nunmehr nur noch utilitarisch gewerthete Gewalt der jeweil sich als legitim gebarenden Mächte im  *Ganzen* außerordentlich förderten”, *ibid.*, p. 612.

injustice during National Socialism has been traced back to the downfall of natural law. This is something for which Weber would have presaged a sociological-historical explanation.<sup>21</sup>

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The normative weight of history apparently bears a close connection to the type of validity culture: Common law traditions must attribute great authority to historicity, something we find in religious law also, whether in Jewish legal cultures or in Islamic ones, where the binding force of a hadith is derived from the uninterrupted chain of narratives telling about the life of the Prophet and those that dispose of deontic power, according to the different legal cultures in Islam. Scholars of cultural studies have found the critical formula that must also be transferred to the normative complex: the danger of “invented traditions”!

“Culture”, finally, is far from being innocent: it may claim particular rights in a universalistic order, but it may also hide the underlying hidden political and economic interests. Further, it is juristically not very precise, because the understanding of what counts as cultural is so broad and far from any kind of consensus. To make judgements no longer in the name of the law, or in the name of the legal community, misleadingly still portrayed as “Im Namen des Volkes”, but instead to refer to the explosive forces of “culture” might lead to another kind of nightmare than the abuse of “natural law” in fascist systems, or the reference to the past in a traditional validity culture.

Let me close with a curious observation of a loop: Even when we are critical of natural law arguments – notwithstanding the impossibility to give a culture-free interpretation of the concept and the semantics of “nature” – the reference to the sphere of “nature” comes back in juristic argumentation: “Suffering” as the last resource of legitimizing human rights, as Upendra Baxi had so powerfully shown, leads back to nature, the nature of the body: It is a body-related legitimacy of human rights and of animal rights! – Pleading for a rational validity culture that tries to win its normative power from democratic procedures and the inherent values of a formal normative order is confronted with a new function of legal cultures never thought of before – and this in a post historic age: to foster and forge collective memory! And a further come-back cannot be denied: the urge to express one’s identity or collective identity not only in relation to a more or less glorious past, but also by way of the expression through law, when the legal culture becomes the bearer of identity claims going far beyond the narrow aim of eating halal or wearing a veil, but representing normativity as a cultural trait of collective identity, a right to difference.

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<sup>21</sup> As is well known, this is a very controversial claim. The view that the rule of the National Socialist system of injustice rested precisely – or at least also – on the disregard of traditional, formal rational law has a large degree of inherent plausibility.

The discourse about principles of normative validity has apparently not come to an end: the very old questions of Nature, Culture and History still run through the veins of legal cultures who strive for, in an idealistic view, the best solutions to normative problems that in the process of globalization are no longer separated and encapsulated in sharply divided legal spaces, but overlap and plead for hybrid solutions. Here, Nature becomes historicized, Culture is related to Nature, and History becomes the playground for competing visions of Culture and Society. But whenever the idea of a dual normative order is left, when the factual merges with normativity, no higher values exist than those that a poor reality offers to the makers of normativity, and then the dynamics of the normative complex are frozen to the facticity of normative banalities. This might be one important lesson for the reading of the so widespread cultures of injustice, where no criterion exists to question a law, that is not only endowed with symbolic power, deontic force of the law and theatrical dynamics, but also with the organizational power to systematically enforce the evil of injustice.