

Working Paper:

**Law and Economy According to the Studies of Culture/
Wirtschaft und Recht nach der kulturwissenschaftlichen Auffassung**

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The paper's title makes a not entirely unpretentious allusion to the work of Rudolf Stammler, who spoke of a "materialist conception of history" (*materialistischen Geschichtsauffassung*) during his time.¹ Max Weber offered a scathing criticism of Stammler – who committed all of the world's conceivable categorial errors at once – and surpassed himself yet again in his sharpness and intellectual disgust in the unreleased marginal notes for Stammler's book.² This would arguably play an important role in Weber's economy of writing (*Schreibökonomie*). However, I do believe that correcting this, in the sense of replacing it with a cultural-scientific view as favored by Weber, never occurred in a systematic manner. Surely, his study of Protestantism can be interpreted as an example of the cultural-scientific analysis of economic activity, its motivations, and its structures, in which a cultural of capitalism emerges, namely as the "spirit" of capitalism, that rests upon the inadvertent consequences of religious action. But the study of Protestantism simply fails to take a look at the law; in the studies on law, which were once received as a "sociology of law" and have since been edited as "law" in the historic-critical edition, law's relation to economic law specifically is rather poorly developed – despite the fact that the chapter on "Economy and Society" was at one point designed to be anti-Stammler. This can be read in the historical-critical edition of Max Weber's writings on sociology of law (MWG I/22-3; edited by Werner Gephart and Siegfried Hermes) – that is, if you're willing to go to the trouble of struggling through this collage piece's "jungle edition".³ This paper will first recollect the controversy between Weber and Stammler in order to see which research questions can be gained from their dispute that have been lost in purely methodological debates (1). Subsequently, several thoughts on how law and economy can be analyzed as cultural-scientifically tangible phenomena will be discussed (2) to ultimately determine how the favored formula, if not campaign slogan, "Cultural Matters" can be applied to the "fight for the law" (3).

I. From the Critique of Stammler to 'verstehende' Sociology of Law

The Controversy between Max Weber and Rudolf Stammler

It is therefore a methodological dispute that draws Weber back to law and then serves as a methodological and substantive motif that drives Weber's outlining contribution. How could a methodological dispute fulfil this important pivotal function that can be traced down to the details of the argumentation in the presently edited text on *Die Wirtschaft und die Ordnungen*? To such an extent that Weber wrote to Hermann Kantorowicz in 1913 about his project on "interpretive sociology"⁴: "It is the attempt to *remove all* that is 'organicistic', Stammlerian, over-empirical, 'valid' (= valid as a *norm*) and to conceive of 'sociological constitutional studies' as the study of pure empirical typical *human action* [...]."⁵ Here, Weber could build on the latter's agreement that Stammler's work "lacked intellectual value", an assessment that Kantorowicz offered in his review of Stammler's *Die Lehre vom Richtigen Recht*. His critique was in fact so strongly formulated that Weber set his methodological differences with

¹ Stammler: *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* (own translation).

² Weber: R. Stammlers "Überwindung" der materialistischen Geschichtsauffassung.

³ Weber: *Recht* (hereinafter WG I/22-3).

⁴ Bruun and Whimster's translation of *verstehende Soziologie*, cf. Bruun and Whimster (Eds.): *Max Weber, Collected Methodological Writings*. – London/New York: Routledge 2012, pp. xxvii et seq., pp. 497 et seq.

⁵ Letter from Weber to Kantorowicz dated December 29, 1913, in: Weber: *Briefe 1913–1914*, pp. 442 et seq. (hereinafter MWG II/8) (own translation).

Kantorowicz aside and proclaimed “that regarding the *present question* I am certainly of your opinion and very pleased that in the continuation of my analysis of Stammler [...] I have been relieved of the task of also quelling the nonsense about ‘correct law’ [*richtiges Recht*] through the thorough work of someone with a greater calling”.⁶

It was not only Weber who had issues with Stammler. All other founders of sociology – including Georg Simmel,⁷ Ferdinand Tönnies,⁸ and Émile Durkheim (through the *Année Sociologique*)⁹ – dealt with Stammler’s views in a fundamental way. Streams of thought on the philosophy of law and legal theory at the turn of the century also remained fixated on Stammler. This can be seen, for example, in the works of authors such as Emil Lask¹⁰ and Gustav Radbruch. The latter, writing to Kantorowicz about the first edition of Stammler’s *Wirtschaft und Recht*, stated: “Upon repeated reading, I consider this work very excellent. In any case you should read it.”¹¹ It is only through Weber’s critique, which he describes to Kantorowicz as “felicitous” (*trefflich*), that Radbruch arrives at a more critical view of *Wirtschaft und Recht*. By looking at Stammler’s contribution to Paul Hinneberg’s handbook on *Wesen des Rechtes und der Rechtswissenschaft*,¹² it became apparent “that one did not need two thick volumes to express these thoughts”.¹³ The verdict by philosopher Karl Vorländer, on the other hand, is unreservedly positive, for he believes that Stammler “succeeded in his primary objective: to create the basis for social philosophy as a discipline”.¹⁴ He did so, and he continues to do so, by applying Kantian *Kritizismus* to an “almost completely unworked field”.¹⁵

How did Stammler’s views become so important, yet so damnable to Weber? And what is the importance of anti-Stammlerism for Weber’s *Die Wirtschaft und die Ordnungen*¹⁶ as well as for *Die Entwicklungsbedingungen des Rechts*?¹⁷ In an incredibly polemic appraisal of Rudolf Stammler’s work *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung*¹⁸, Weber scathingly criticizes the author, frequently using expletives. For instance, he speaks of the “monstrosity”¹⁹ of the book and admonishes the use of a “thicket of false truths, half-truths, incorrectly formulated truths und untruths hiding behind unclear formulations”.²⁰ He continues by criticizing “scholastic false conclusions and sophisms which render dealing with the book, due to the mostly negative result alone, an unpleasant and at the same time endlessly tedious and extremely rambling affair”.²¹ When measured against the methodology already available to Weber, Stammler’s attempt to search for a general law underlying the entirety of all social

⁶ Letter from Weber to Kantorowicz dated October 30, 1908, in: Weber: Briefe 1906–1908, p. 690 (hereinafter MWG II/5) (own translation).

⁷ Simmel: Zur Methodik der Sozialwissenschaft.

⁸ Tönnies: Besprechung von: Rudolf Stammler.

⁹ Simiand: Review of: Rudolf Stammler.

¹⁰ Lask: Rechtsphilosophie.

¹¹ Letter from Radbruch to Kantorowicz dated September 12, 1903, in: Radbruch: Briefe I (hereinafter GRG 17/1), pp. 33 et seq., at p. 33 (own translation).

¹² Stammler: *Wesen des Rechtes und der Rechtswissenschaft*, pp. 1-65.

¹³ Letter from Radbruch to Kantorowicz from January 22, 1907, in: GRG 17/1 (cf. supra, footnote 38), pp. 110 et seq., p. 111 (own translation).

¹⁴ Vorländer: Eine Sozialphilosophie auf Kantischer Grundlage, p. 216 (own translation).

¹⁵ Ibid., p. 197 (own translation).

¹⁶ MWG I/22-3, pp. 191-248.

¹⁷ MWG I/22-3, pp. 274-639.

¹⁸ Weber: R. Stammlers “Überwindung” der materialistischen Geschichtsauffassung.

¹⁹ Ibid., p. 94 (own translation).

²⁰ Ibid., p. 95 (own translation).

²¹ Ibid. (own translation).

reality, which even culminates in a “form” for which the wealth of reality is but “material”, cannot succeed. He overlooks the consensus reached by the “disciples of Kant” as well as insight offered by neo-Kantian epistemology – particularly that of Heinrich Rickerts – which holds that respective academic disciplines, or “forms” of social life in Stammler’s parlance, cannot be accessed as “self-contained worlds, independent in their own causal ranks”.²² Rather, they can only be regarded as “reality”, which is constituted by specific aspects and “dependent, only gained by means of abstraction from the wholeness of the unity of life”.²³ This alone prompts the project of achieving the power that forms the unity of social life to collapse – and with it the global formula of “law” as a “form of social life” Stammler supposedly found. This negative result is all the more remarkable as Weber himself, even in his essay on Stammler, emphasizes the role legal conceptualization can play as an “archetype” for the formation of socioeconomic concepts.²⁴

To this extent, the realm of legal terminology therefore does hold a special methodological position for social sciences according to Weber.²⁵ However, this special role of legal terminology and, by extension, law itself only comes into play once Stammler’s fundamental categorical error of confounding the empirical and normative validity of a rule has been resolved. According to the heterogeneity thesis of the “categories of judgment (‘be’ and ‘should’)”,²⁶ rules, and thus also legal rules, are not possible determinants of real action due their normative validity, but only because of the effect of the “conception of the ‘norm’ as a real *agens* of action”.²⁷ It is not the further differentiation of the concept of rule or validity, or even the rule-oriented constitution of the object of examination,²⁸ that is decisive here, but rather the ability to access law as a legitimate object of research using the science of reality, which seeks to causally contribute to the explanation of action by using the concept of actors and the empirical validity of a normative order.

This establishes the link to the *logos* essay in which the category of ‘consensus’ is elaborated upon and in turn provides the methodological considerations woven into *Die Wirtschaft und die Ordnungen* their conceptual and substantive acuity. Polemics, outrage, and horror over Stammler’s immoderateness – “how important St[ammler] finds himself”²⁹ –, conveyed with the help of artful invective and parody, should not blot out the paradoxical outcome: from the criticism of a fundamentalism of rules springs insight on how to address the empiric reach of normative orders without contravening the prohibition of confusion or causing an iniquity of spheres, simultaneously determining the material relationship of “Economics and Law” (*Wirtschaft und Recht*) more precisely. Neither a materialist nor a spiritualist conception, for instance, the causal “spirit of the law”, is then suitable. Instead, a methodologically-tenable and fundamental understanding of the economy’s relationship to society’s normative orders is appropriate, as well as an examination of this relation of sphere’s epochs or developmental conditions which befits the imaginative causality of law. The essay on Stammler thus directly

²² Ibid., p. 97 (own translation).

²³ Ibid. (own translation).

²⁴ Ibid., p. 138.

²⁵ Weber: Über einige Kategorien der verstehenden Soziologie, pp. 264 et seq. (own translation).

²⁶ Weber: R. Stammlers “Überwindung” der materialistischen Geschichtsauffassung, p. 119 (own translation).

²⁷ Ibid., p. 125 (own translation).

²⁸ Ibid., pp. 134 et seq.

²⁹ Marginal note in Max Weber’s copy of Stammler, *Wirtschaft und Recht*, p. 74 (visible in: Max Weber-Arbeitsstelle, BadW Munich) (own translation).

leads to the two basic texts on law presented by Weber: *Die Wirtschaft und die Ordnungen*³⁰ and *Die Entwicklungsbedingungen des Rechts*.³¹

A Critique of Materialist and Spiritualist Causality of Law and Economics

In the third section entitled *Bedeutung und Grenzen des Rechtszgangs für die Wirtschaft*, the relationship between law, conventions, and manners is not described as genetic but rather functional. Weber states that “legal order is not empirically ‘valid’ in reality as a result of the existence of the coercive apparatus, but because its validity has been lived and ‘practiced’, as ‘manners’ and conventions usually disapprove of flagrant deviations from behavior conforming to it”.³² As Weber extends the concept of law to non-state law; expands the cosmos of normative orders by including conventions, manners, and customs; and further constructs an interlinked validity construct of law, manners, and conventions, his preference for codified state law, as a guarantor of a law that suits the activities and developments of the market, becomes clear, for the “increasing intervention of codified orders is but one characteristic component in our observation of the processes of rationalization and societization, whose progressive reach into all communal action we will need to follow in all areas as a key driving force of development”.³³ Weber thus draws upon the “pure sociological legal doctrine” as an analysis of normative orders in the wake of the process of rationalization. This process is understood as a development that also produces rational law.

Although Weber had been arguing since the *Soziologentag* that economic and legal orders were in principle functionally independent of each other, it is particularly economic forces that Weber holds responsible for the development of “rational” law: “The universal rule of *market* societization demands, on the one hand, that law functions in a *predictable* way according to rational rules. On the other hand, the broadening of the market – which we will come to know as the characteristic tendency of market societization (*Marktvergesellschaftung*) – by virtue of its inherent consequences favors the monopolization and regulation of all ‘legitimate’ coercive power by *one* universalist coercive institution through the dissolution of all particularistic coercive constructs of estates and others typically resting on economic monopolies”.³⁴ In his “conclusion”, which is presented as a result although it is actually just him getting to the point, Weber resolved the issue of the relationship between law and economics by dissolving both the materialist claim of the determination of law through economics, and the spiritualist counterclaim of a logical determination of law through its normative regulation – as Stammler put it – instead of analyzing their interdependence. For one thing, law, according to Weber, not only protects property rights as the possibility to dispose of economic goods and services, but also personal or idealistic interests and other positions of authority. The change, or even revolution, of an economic order then becomes conceivable despite a continuation of the formal legal system.

Finally, the functional equivalency of legal regulations, institutions, and patterns of thought as brought about by different legal systems is investigated purely from the perspective of the effects they produce on the predictability of law for the economy. While legal guarantees often

³⁰ MWG I/22-3, pp. 191-248.

³¹ MWG I/22-3, pp. 274-639.

³² MWG I/22-3, p. 240 (own translation).

³³ *Ibid.*, p. 241 (own translation).

³⁴ *Ibid.*, p. 247 (own translation).

serve economic interests, the extent to which economic actions can be directed by law is subject to the inner barriers of any kind of forcible application as well as the inherent laws of economic motivation to act. Their aim can be to precisely not neglect economic chances for the sole reason of being able to act legally, especially when legal particularism is promoted by competing political associations. When comparing historical legal cultures, Weber argues that the state is by no means the sole legal guarantor of economic interests. Tribes, clans, and the like protect property, and chartal money can also be shown to exist in the absence of state guarantees. In a society that increasingly communicates through contracts, however, the state guarantee of private legal claims becomes even more important – despite the tradition of contractual legality i.e. *pacta sunt servanda* – for reasons of the loss “of faith in its sanctity”, as Weber explicitly states.³⁵

With this focus, the text goes beyond the context of the *logos* essay, even if it profits from the essay’s most fruitful category in the revision – the *Einverständnis*, or consensus. More than just an analysis of the interaction between law and economics in their basic relationship, the fundamental norm-theoretical considerations contained in *Die Wirtschaft und die Ordnungen* go beyond the economic sphere as a determinant force behind the “epochs of development” of this relationship and include the conditions for the development of law.³⁶ It should be noted that the latter do not merely serve as a function of the development of the political associative grouping as their placement and formulation in the *Einteilung des Gesamtwerkes* of 1914 (*Werkplan*)³⁷ would seem to suggest. Rather, these conditions are defined both in relation to their interplay with the religious, political, and economic spheres, and as a consequence of the inherent logic of the legal sphere.

II. Economy and Law through the Lenses of Culture, or: “Culture Matters”

It is the basic premise of the Käte Hamburger Center “Law as Culture” that law cannot be looked at using only a juristic lens but must also be seen through the eyes of the humanities, especially the “Kulturwissenschaften” – unfortunately not entirely congruent with the term “cultural studies”. The “law as culture paradigm” praises an enlarged concept of the law, including symbols, rituals, organizational structures, and narratives that go beyond the normative scope of decisions and statutes. It proved true that a relationship with the religious field is fundamental for understanding law, as law likewise competes in modernity for scarce resources to be untouchable, even sacred. The universal observation of globalization does not exclude the legal sphere; rather, law holds the potential to heal some of the consequences of globalization and even create new ones. Conflicts of legal cultures resulting from the spread of a *judicio-scape* beyond the nation-state is crucial for understanding today’s world. But without relating law to aesthetics, several inner-juristic items of the legal system, such as questions of style and the beauty of a decision, might remain unremarked, and the symbolic power of the representation of law in marbles and stones on canvases and installations, intended to strengthen

³⁵ Ibid., p. 247 (own translation).

³⁶ MWG I/22-3, pp. 191-248.

³⁷ MWG II/8, pp. 820-823.

“the force of law”, might be underestimated.³⁸ However, the irritating question remains whether a cultural turn in legal studies might not promulgate “culture” as a normative argument, allowing for cultural defense, cultural restraint, and the cultural founding of legitimate and legal differences regarding the decision of what is right or wrong for a whole society. But what about economic life?

“Culture” doesn’t have a good reputation: It is often linked with only “high” culture, excluding the culture of everyday life. Or it is – especially from the perspective of economists – looked at as a specifically “soft” matter, merely left to literary men, poets, and not the “tough guys” in science, economics, and society. Regarding economic life, few leaders would deny being personally interested in cultural matters, surrounding themselves and their enterprises with beautiful things, even looking at the aesthetic quality of their products in the good tradition of the arts and craft movement – a perfect web and product design, etc. However, who would explicitly maintain that culture is a precondition for economically efficient action, a means of production, even a fundamental resource of productivity? And who would go as far as to say that culture does not only matter but pays, measurable in dollars and euros? I would like to put forward this point by showing that culture matters:

- a. as the contextual variable of any economic action at different levels with regard to values, beliefs, basic attitudes toward the world, etc.;
- b. as a frame of reference in the economic exchange between different cultures, representing successful cooperation as well as economic failure;
- c. as an element of conflict and misunderstanding within multi-cultural MNCs.

If these propositions are true, veritable “entrepreneurs” should above all be specialists in culture! Though I am not sure I will be able to “convert” you all into members of the realm of culture, I’ll do my best. To add one necessary preface: The separation of culture, on the one hand, and economics, on the other, is certainly an over-simplification due to analytical purposes. The economic sphere is, of course, part of the “objective culture” as Simmel once said, and it is one of the main culture-producing forces in a society. The art of advertising, the spread of product-related lifestyles, impregnate a whole culture. Culture is a necessary side-effect of economics, if you will.

The question is: “does culture matter”,³⁹ also in regard to economic interests? Or is the economic outcome solely the result of economic reasoning, of rational action independent of any cultural impacts? This is the simple yet difficult problem that underlies our debate of law and economy when both are seen through the lens of culture. Be it from an “economist’s” or “jurist’s” point of view, one must define what culture is and what is to be understood by “culture” – in other words, the “meaning” of the term “culture”, its propensities, functions, and effects.

³⁸ For the research program of the Käte Hamburger Center “Law as Culture”, see Gephart (Eds.): *Rechtsanalyse als Kulturforschung*; Gephart and Suntrup (Eds.): *Rechtsanalyse als Kulturforschung II*.

³⁹ This article is inspired by the studies edited by Harrison and Huntington: “Culture Matters. How values shape human progress”; however, these aim primarily at developments in the Global South and minorities in the United States. The underlying question is, however, much broader!

The Meaning of “Culture” or the “Culture” of “Cultural” Studies

That said, one of the strongest arguments against cultural theory may be raised in pointing out that the actual term is badly defined, an object of salient controversies. In other words, it has been more a resource of intellectual conflict than one of consensual assessments. Let me say a few words on this controversial point: It is true that the meaning of culture varies according to disciplines. We speak about legal cultures that transcend the pure content of legal rules; we speak about criminal “cultures” as systems of practices and value orientations in juvenile delinquency and white-collar crime; and we would not refuse the label of “culture” to an orchestra and its specific culture of playing Beethoven. Moreover, we distinguish between different learning and research cultures in Germany and France, Great Britain and the United States, and differing traditions of innovation; we discuss the necessity and legitimacy of elites and so forth.

These examples reveal the common trait of culture: It is not a question of high or low, valuable or despicable culture, but rather something we do not choose, like our language which we use “by default”, if you will. It is something that is out of our immediate control, provided as soon as you are born into a society, a social system, a social interaction. It has to do with “tradition” as the non-reflected condition of action. And it is composed of distinguishable elements: symbols, such as language, norms of behavior, and formal and informal rules, as well as rituals and routine forms of social action that discharge the actor from permanent reflection, thereby creating, when practiced together, some collective feelings that produce solidarity and effervescence among those who adhere to the respective community.

Emile Durkheim as a Cultural Sociologist

In simple words, I am summarizing the cultural theory of Emile Durkheim, the founder of French sociology, that is embedded in the cultural conditions of France, the motherland of social sciences in the 19th century. To him, symbols, normative rules, and rituals established the core of the religious field, the “Elementary Forms of Religious Life”⁴⁰ as he called them then and as we now use them to conceptualize the realm of “culture”.⁴¹

While in Durkheim’s approach descriptive power emerges from the combination of a reduction of cognitive and emotional complexity in symbols, the limitation of action by norms, and the dynamics of interaction in symbolically guided rituals, Max Weber devoted his concept of “culture” directly to ethics. *Kulturwissenschaft* in German cultural tradition is not only opposed to the study of “nature”, but it presupposes a certain quality of man in general, namely to be a “*Kulturmensch*” endowed with the capacity to take a stance in the world and assign meaning to it.

Max Weber and Culture

“Transzendente Voraussetzung jeder *Kulturwissenschaft* ist *nicht* etwa, daß wir eine bestimmte oder überhaupt irgendeine ‘Kultur’ wertvoll finden, sondern daß wir

⁴⁰ Durkheim: *Les formes élémentaires de la vie religieuse*.

⁴¹ Gephart: *Strafe und Verbrechen*; Gephart: *Memory and the Sacred*. See also: Alexander (Eds.): *Durkheimian Sociology*. In regard to the concept of ‘culture’ and its relationship with the concept of ‘civilization’, see Durkheim: *De la division du travail social*; Durkheim and Mauss: ‘Note on the Concept of Civilization’. For a comparative overview of the relationship, see Albrecht: *Kultur und Zivilisation*.

Kulturmenschen sind, begabt mit der Fähigkeit und dem Willen, bewußt zur Welt *Stellung* zu nehmen und ihr einen *Sinn* zu verleihen.“⁴²

It is the ability of man to develop a medium to give a meaning to the meaningless stream of life, to shape it out of the principally open and infinite realm of causal nexuses, that gives “sense” to mankind. This is why, for an individualist like Weber, culture is manmade: “‘Kultur’ ist ein vom Standpunkt des *Menschen* aus mit Sinn und Bedeutung bedachter endlicher Ausschnitt aus der sinnlosen Unendlichkeit des Weltgeschehens.”⁴³ The constitution of culture is therefore the product of social actions. Giving meaning to the world is the result of cognitive acts, completed by emphatically evaluative acts of taking a stance. This is why culture is constituted by way of acts, even if it is not always re-invented from scratch everywhere.

When speaking about “*Unternehmens-*” and “*Wirtschaftskultur*” in German, this subjacent *ethical* and *creative* meaning of culture must be considered. Whereas Durkheim emphasizes a realm of traditional symbols, norms, and rituals and reiterates their collective force, Weber stresses that culture – formed as tradition – was created by man and is continuously constituted and reshaped by the active attitude of man as the creator of his world, bearing an inherent ethical bias. What kind of relationship exists between these sophisticated concepts of culture and the very profane meaning of globalization? Before going into these matters, a glimpse into the unfolding of culture in economics is indispensable.

Culture and Economics

Looking at the conception of “culture” as a creative force in social life, it would not be surprising to detect it as a productive force of economic life. However, the pure and sometimes poor economic paradigm tries to explain social life and actions according to the pursuit of self-interest and social structures, including economic ones, such as markets, which are depicted as the intended or unintended consequences of rational behaviour.

Although Adam Smith attached a great deal of importance to the ethical factor – speaking quite metaphorically of a “hidden hand” – it was once again the aforementioned Max Weber who destroyed the illusion of purely rational action. His thesis was radical and deserves to be considered in this context. The “Spirit of Capitalism”⁴⁴ or, as Weber explicitly put it, the “Culture of Capitalism”⁴⁵ consists under the dominance of rational action; rational structures; rational systems; a rational kind of “habitus” of the rational actor, for whom “time is money”; rationality in the sense of reliability of actions; and measurable return on capital in a generalized medium of interchange, i.e. money. But all this, which sets the West apart from different parts of the world, is established on a highly non-rational basis. The famous economic principle was not due to the inner logic of the problem itself that, once discovered, would start its heroic career in the rise of capitalism, but – according to Weber – it was bound to the most irrational sphere you can imagine: religion. Showing links between Protestant ethics, especially of the Calvinist wing, and occidental rationalism, he argued that a symbolic conception of the world,

⁴² „The transcendental premise of any Kulturwissenschaft is not that we find a certain, or even just any, culture valuable, but rather that we are “Kulturmenschen”, gifted with the ability and will to consciously take a position on the world and give it a purpose“, in: Weber: Die Objektivität sozialwissenschaftlicher und sozialpolitischer Erkenntnis, p. 182 (own translation).

⁴³ “‘Culture’, from man’s viewpoint, is a finite segment, charged with significance and meaning, of the meaningless endlessness of world affairs”, in: *ibid.* (own translation).

⁴⁴ Weber: The Protestant Ethic and the Spirit of Capitalism.

⁴⁵ This aspect is stressed in: Gephart, Handeln und Kultur, Frankfurt am Main 1998.

together with the unsolvable problem of salvation in Calvin's the predestination theory, urged the believer to bridge the horrible gap between the uncertainty of a predetermined destiny in hell and the wish to do something about it by way of a practical solution: In other words, to take worldly economic success as a mere sign to be possibly elected, no more and no less – no coercive power over sacred forces. Numerous traits of modern capitalism can be traced back to Protestant roots, a certain hastily habitus of worldly ascetism and economic success.

Business attire is a product of Protestant ethics and the spirit of fashion. However, its origin cannot be attributed to reading economic theory, but to being influenced subconsciously by that "spirit of capitalism" that came out of the Protestant movement – replacing monks' worldly ascetic orientation with worldly action, and creating a dynamic tradition of rational, economic, and reinvesting behavior that is religious in its origins though sacralized in its current impact on the "spirit" of capitalism.

Having shown that each of the other religions, including Buddhism, Jainism, Confucianism, Judaism, and Islam, etc., represented a different view of the world, this was taken as proof that culture, especially those systems of culture that shape our view of the world and determine our "standpoint" in it, namely religion, has an enormous impact on routinized ways of action, kinds of rational action that are awarded religiously to varying degrees, and cultural hinderances of such a "spirit" that looks at and acts in the world. I won't go into the details of critiques, conjectures, and refutations of Weber's thesis⁴⁶, for the most general hypothesis has not called into question the idea that religion rests at the foundation of not only the cultural sphere itself – to put it in Durkheim's words: "Dans le principe tout est religieux" – but even the seemingly most secular kind of actions, such as economic behavior.

This insight has enormous consequences for our attempts at both understanding and explaining intercultural economic interactions. Our most basic and most undisputable assumption in economic theory and practical action – the principle of rationality as an optimal relation of scarce means to contingent ends – is a product of the culture of rationalism, bearing invisible religious origins that are not necessarily accepted in all civilizations but instead very often contradicted. If our assumptions prove right, "culture" would be one key to economic development and a project of cultural adjustment. Even if the triumphant victory of capitalist culture has reached the most distant places of the world, everyone must deal with orientations that rest upon basic assumptions of the respective culture, including religious beliefs, interpretations, and attitudes towards the world that are adherent to ours. Finally, it would be part of *rational action* itself to take into account the interpretation of what is "rational" in specific cultures, where this principle should be posited in the hierarchy of other competing values, and where it overlaps other orientations.

Allow me to summarize: Economic, rational action is embedded in a cultural frame, infecting the economic principle itself – with the view on the world often religiously impregnated – and shaping the different "cultures of economics". What is the connection between this very fundamental insight, mostly neglected by pure economists, and understanding and explaining the process of "globalization"?

⁴⁶ For a systematic interpretation, see Schluchter: Religion und Lebensführung. An overview on critiques: Lehmann and Roth (Eds.): Weber's Protestant Ethic.

III. Some Consequences

The main thesis of this lecture asserts that the double cultural turn in the study of law and legal practices in the realm of normativity, on the one hand, and in the analysis of economic actions, processes, and structures of economic life, on the other, has not yet been transformed into a revised vision of the old-fashioned question of “law and economy”:

1. Law must be seen as a multidimensional practice composed of symbols, rituals, organizational structures, and norms – a practice of structuring the order of social spheres. At the same time, it is the medium of communication within social spheres and competes with other normative orders like habits, customs, and fashions.⁴⁷ –
2. Insofar as the constitution of society imposes a certain type of relationship between politics and economy, for example, by forbidding an amalgamation of the spheres through corruption or state actions in the economic field.
3. The inner-structure of economic life is likewise ordered according to basic principles like property rights, private autonomy, the regulation of the market, the delivery of types of economic action using a set of typical forms of contract, risk management, etc.⁴⁸
4. Situating the place of law and economics in society has changed in the history of mankind and in comparing civilizations.
5. There can be no doubt that “law and economy” is embedded in civilizational contexts. Weber’s analysis of the role of religiously impregnated worldviews stands for such a tradition. Unfortunately, his principal analysis of the relationship of *Wirtschaft und Recht*, which drew upon the highly criticized Stammler, has not yet been fused with his historical and comparative studies. The process of rationalization of the law in the occidental world is due to a complex combination of intrinsic and external conditions for the evolution of the law, where the religious factor, as analyzed in Judaism, Hindu-society, antique societies, Islamic cultures, and Protestantism, plays a major role. At the same time, there remains the analysis of economic development, mainly going the same direction of rationalization by way of specific structures typical of capitalism as an economic order – not to forget Weber’s analysis of the stock market. But at least to my understanding, these two strands have not been adjoined in the sense of comparatively analyzing the encounter of those two spheres in their specific civilizational contexts.
6. Beyond a reconstruction of Weber’s perspective, a look at some cultural turns in the sociology and anthropology of economic life must be noted.
7. A re-reading of Simmel’s⁴⁹ and Durkheim’s⁵⁰ writings as well as that of Marcel Mauss⁵¹ in the light of a cultural sociology of economic life seems to be promising, too. Simmel’s ingenious insights into the colors of money could be combined with Durkheim’s analysis of the role symbols play as a basis of society, looking specifically to the division of labor in society and the role of differentiation in Simmel’s early writings,⁵² which

⁴⁷ Regarding the multidimensionality of law within the ‘law as culture paradigm’, see: Gephart: Einführung. Das “Recht als Kultur”-Paradigma.

⁴⁸ For example, see Swedberg: Principles of Economic Sociology.

⁴⁹ Simmel: Philosophie des Geldes.

⁵⁰ Durkheim: De la division du travail social; Durkheim: Les formes élémentaires de la vie religieuse.

⁵¹ Mauss: Essai sur le don.

⁵² Simmel: Über soziale Differenzierung.

would create a bridge to current ways of theorizing of Niklas Luhmann's *Die Wirtschaft der Gesellschaft*.⁵³

8. Frédéric Lebaron's *Croyance économique*⁵⁴ may draw a line from the Durkheimian tradition to Christoph Deutschman's⁵⁵ identification of sacred traces in a market economy, so familiar for Simmel's use of the figure of "religioid" forms in economic life.⁵⁶
9. In this new image of economic life, the structural features must not be excluded but rather related to the culture of economy: weak and strong ties in creating jobs (the famous Mark Granovetter⁵⁷ thesis and its critique by Ronald S. Burt⁵⁸ as "structural holes"), the deconstruction of the market as being the outcome of constructions and not an autonomous mechanism (Mitchel Y. Abolafia⁵⁹), ethnographic studies about the Sicilian mafia (Diego Gambetta⁶⁰), etc.
10. The question how to name the new forms of capitalism has found no simple answer. Luc Boltanski and Eve Chiapello evoke a "new spirit of capitalism";⁶¹ Paul Windolf proposes the "capitalism of financial markets";⁶² and Deutschman looks for new "capitalist dynamics".⁶³
11. It is surprising how weak and rarissime references to both rules and normative orders in general as well as to the legal sphere have been defined, for example in the collection edited by Klaus Kraemer and Florian Brugger titled the *Schlüsselwerke der Wirtschaftssoziologie*.⁶⁴ Morals and markets is a well-known topic, and framing finance (Alex Preda⁶⁵) has been treated among others by Weber in his *Börsenschriften*.⁶⁶ Luc Boltanski's and Laurent Thévenot's readings of *La justification*,⁶⁷ however, contaminate the founding of economic practice.
12. A new paradigm of relating *Wirtschaft und Recht nach der kulturwissenschaftlichen Auffassung* (Law and Economy According to the 'Studies of Culture') had to take into account those developments that – at least to my mind – are not yet integrated into a comprehensive theoretical framework. Whether the metaphor of "sphere"⁶⁸, "field"⁶⁹, or "system"⁷⁰ is more apt for this type of analysis should be discussed.

⁵³ Luhmann: *Die Wirtschaft der Gesellschaft*.

⁵⁴ Lebaron: *La croyance économique*.

⁵⁵ Deutschmann: *Kapitalistische Dynamik*.

⁵⁶ See Simmel: *Die Religion*, p. 60f.; in the context of economy, see Simmel: *Philosophie des Geldes*.

⁵⁷ Granovetter: *Economic Action and Social Structure*.

⁵⁸ Burt: *Structural Holes*.

⁵⁹ Abolafia: *Making Markets*.

⁶⁰ Gambetta: *The Sicilian Mafia*.

⁶¹ Boltanski and Chiapello: *Le nouvel esprit du capitalisme*.

⁶² Windolf: *Was ist Finanzmarkt-Kapitalismus?*

⁶³ Deutschmann: *Kapitalistische Dynamik* (own translation).

⁶⁴ Kraemer and Brugger (Eds.): *Schlüsselwerke der Wirtschaftssoziologie*.

⁶⁵ Preda: *Framing Finance*.

⁶⁶ Weber: *Börsenwesen*.

⁶⁷ Boltanski and Thévenot: *De la justification*.

⁶⁸ See Gephart: *Sphären als Orte der okzidentalen Rationalisierung*.

⁶⁹ See Bourdieu: *Die Logik der Felder*.

⁷⁰ See Luhmann: *Soziale Systeme*, or Parsons: *The Social System*.

13. “Law as Culture” therefore enters a complex interaction with the economic sphere, as law is not only to be analyzed as a limiting condition to rational economic action,⁷¹ but as an independent symbolic and ritual reality within the places and times of justice that seek to fence in economic action, its institutions of market activities, the production and distribution of goods, the symbolic and ritual spaces of Mammonism, the temples of banks and virtualized stock exchanges, and so forth.⁷² The transcultural export of institutions is nowhere as conspicuous as in the economic line of globalization.⁷³ But we misunderstand the cultural-scientific access to the economic sphere if we only evaluate it according to the aspect of culturally-determined boundaries to economic rationality. Shadow economies, economic action within the Dawari area in Mumbai, for example, are based on distinct cultural preconditions and produce their own norms that can be found within the wider societal frame of the regulation of non-regulated living (as slums can be defined).⁷⁴ A deeper understanding of this founding relationship appears fruitful.
14. In the context of the ‘law as culture paradigm’, the following research problems therefore stand out:
- a. Transforming “Law and Economy” in transitional societies.
 - b. Explaining the global economy during the financial crisis of 2008, when bubbles burst as an implosion of social spheres, and the rules of the market as a game, a construct, and a myth. If, for instance, we were to inquire into the legitimate expansion of market logic and understand law as the demarcation of limits to boundless laws of the market, then it would become apparent that the marketability of goods and values cannot be conceived outside a civilizational context: The prohibition of taking interest in Jewish and Islamic discourses on economic ethics is a classic example.⁷⁵ Whether lines can be skipped for money, doctor’s appointments should be purchasable, trade in blood or organs should be permissible, the devaluation of securities should be monetizable, etc.:⁷⁶ Counteragents and the setting of limits through norms are all tied into cultural contexts that need to be decoded in the light of how the respective differentiation program of a society is shaped.
 - c. Do we have ideas for a renewed understanding of money or into the “nature of money”?⁷⁷ The alienating view of the symbolic wonder – which is also informed by sociology of religion – of how paper is transformed into bearer bonds with monetary value or how a strip of plastic morphs into a unit of value of, in principle, infinite worth. In other words: the insight that symbolic acts of

⁷¹ On this, see Gephart: *Gesellschaftstheorie und ökonomische Analyse des Rechts*.

⁷² See esp. the works by Stäheli, e.g. *Ökonomie: Die Grenzen des Ökonomischen*.

⁷³ See the extensive empirical work by the research group surrounding John W. Meyer, such as s.a.: *World Society*; illuminating also Rodrik: *One Economics, Many Recipes*; Milhaupt and Pistor: *Law & Capitalism*.

⁷⁴ See Appadurai: *Fear of Small Numbers: An Essay on the Geography of Anger*; Appadurai and Mack (Eds.): *India’s World*; further Fuchs: *Slum as Achievement*.

⁷⁵ From the context of our Käte Hamburger Center for Advanced Study in the Humanities “Law as Culture”, see esp. the work by Sakrani: *Das Verbot von Zinsnahme und Risikogeschäften*.

⁷⁶ On these and further examples, see notably Sandel: *What Money Can’t Buy*.

⁷⁷ Ingham: *The Nature of Money*.

negotiation, trade, and production possess inherent rights detached from economic rationality even beyond guild-like cultural boundaries and within the global economy also has consequences for the relationship between law and economy. For example, law acts as an institutional denier: It prohibits corruption and bonus services and penalizes business practices that carry special risk, while at the same time acting as a filter through which e-commerce models must pass in order to attain the recognition of being legally binding.

- d. Therefore, the legal ordering of a new digital world is at stake: internet contracts, virtual societies, and real contracts.⁷⁸ Does globalization through the internet cut across national boundaries not only in everyday communication and business affairs, but also in normatively framing digitality?
- e. With regard to the challenge of the humanities by way of the arts – a constant feature of the law as culture project at the Käte Hamburger Center in Bonn – the following question arises: What can be learned about the relationship of law and economics when the legal order allows for an artistic project like Maria Eichhorn’s stock company as a legally valid “Aktiengesellschaft” symbolizing the frozen dynamics of capitalism or the invention of a “proprietor-less” property in her Athens project during last *documenta* in 2017?⁷⁹

Conclusion

Let me resume by again formulating the general question that provoked us to take the risk of running into all the traps of an unresolved riddle in the history of the humanities: Why is the complex relationship between economy and law a fixed topos of both economic and legal analysis? And why do the humanities and cultural sociology remain so oddly silent on this issue? In modernity and its accompanying theoretical discourse, law and economy seem to inevitably part from each other, for determining the law based on client or class interests would conflict with the notion of a general law standing above all parties and the ideal of universalistic justice. An economic sphere that has not freed itself from outside influence through traditional orders could at the same time not even develop autonomy. Nevertheless, we know of complex sets of conditions and independencies, even if it appears impossible to derive concrete legal forms or legal institutions from their economic relations or reduce economic activity and its meta-reflection to their judicial forms in the conceptuality of economics – although the categories of law (contract, property, societal, etc.) have impacted strategies for conceptualization in economic theory. We think that this kind of reasoning is neither a game for the leisure class, as Thorsten Veblen has resumed his observations on capitalist behavior,⁸⁰ nor a kind of luxury, as Werner Sombart tried to characterize modern capitalism.⁸¹ However, we also long for some kind of entrepreneurship in Schumpeters’ sense, who, in the end was a

⁷⁸ On this, see for example Garapon and Lassègue: Justice digitale.

⁷⁹ For an overview of her work about the relationship of law and economics see Eichhorn et al.: Maria Eichhorn.

⁸⁰ Veblen: The Theory of the Leisure Class.

⁸¹ Sombart: Der moderne Kapitalismus.

professor at Bonn University, more realistically than Weber's imagined commitment that led him to Munich instead of Bonn.

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