Report on the conference

The normative complex: Legal cultures, validity cultures and normativities

held April 9 and 10, 2014 in Bonn

The obscure realm of the normative

Having lurked in the shadows largely unnoticed for some time, the normative dimension of the social world has increasingly reemerged into the focus of observers in the social sciences and humanities in recent years. Whether it be the construct of political order in the "post-national constellation" (Jürgen Habermas), challenging universalistic projections and approaches through particular systems rationalities or validity claims footed on distinctive cultural features, or the microphysics of social life in which competing multi-normativities coalesce into specific validity constructs: The challenge of normatively and analytically capturing these problems of order are so multi-layered that they require a collective effort. It is for this reason that the Käte Hamburger Center for Advanced Study in the Humanities "Law as Culture" invited renowned researchers and academics from various disciplines to its international conference "The normative complex" in order to jointly "bring more light into the somber realm of the normative", as Werner Gephart, the Center's Director, formulated the cognitive and normative expectations in his opening remarks.

Cultural scientific expeditions into the realm of the normative

The first lectures highlighted the manifold approaches to legal-cultural issues. Ditlev Tamm (Kopenhagen) dedicated his lecture "Telling legal cultures" primarily to narrating law – a task that concerned him as a legal historian by nature, but which not only concerned academics, but also those affected by and those shaping a legal order. Legal practitioners, for instance, had their own methodological and conceptual legal culture according to which they systematized, interpreted and thereby lent meaning to law. By way of the example of Ethiopia, Tamm demonstrated how conflict-ridden narrative understanding of law can be in the colonial context, where people had to navigate the tension between formal and "traditional" law surrounding legal norms and procedures on a daily basis. India represented another such example, as the British colonial power had sought ways to communicate the law it imposed to the Indian populace. Tamm closed with a plea for a greater cultural-scientific openness within the discipline of legal history. The latter discipline, he contended, could no longer content itself with pure text-based research as such a myopic approach would overlook the symbolic and architectural embodiment of law, as could be seen in court buildings.

Jan Christoph Suntrup (Bonn) continued by recalling the multiplicity of meaning of the concept of legal cultures. Legal culture was not just an analytical concept, but could also be

related to a normative connotation – particularly for purposes of identity politics – in order to caption supposed developmental steps, demarcate the boundaries of affiliation or also articulate particular validity claims that deviate from the prevalent legal order. Suntrup criticized traditional sociology of law legal cultural research as influenced by Lawrence Friedman, Erhard Blankenburg and others, as having a reductionist understanding of culture that failed to conceive of law *in toto* as cultural practice. The project of investigating "Law as Culture", by contrast, was better equipped to understand the importance of symbols, organizational structures, orders of knowledge and narratives for the overarching meaning of a legal community and to investigate the intra- and inter-cultural potential for conflict of legal cultures. He also warned, and was joined in a later lecture by Marie-Claire Foblets in warning against culturalizing conflicts as a matter of principle and thereby neglecting the consequences of political power and socio-economic factors.

Joachim Savelsberg (Minneapolis/Bonn) traced the normativity of remembrance in his lecture.

The works of Durkheim already showed how memory was normatively constituted through certain representations of the world. At the same time, a view to different memorial and cultural theaters showed how political-strategic and moral norms influenced a specific form of remembrance. As Savelsberg pointed out, steering remembrance can serve a progressive policy of human rights, but can also – as was the case with Slobodan Milošević's propaganda – have as its object to summon up centuries-old ethnic conflict. Law is not unaffected by these developments: On the one hand, court proceedings, particularly the increasing number of international criminal tribunals, represented a form of processing the past in itself and produced its own consequences for the culture of remembrance. On the other hand, the emerging field of "Humanity's Law" (Rudi Teitel) was contested, as different actors, each with their own political interests in mind, competed for interpretative authority and instrumentalized memories and versions of history for their own purposes.

Pamela Feldman-Savelsberg (Northfield/Bonn) illustrated the dynamic processes of appropriation and mediation brought about by the increasing migration-induced contact between different cultural groups through the example of Cameroonian immigrants in Berlin. She provided deep insights into the pragmatic way of dealing with foreign legal norms and authorities, but also into the narrative and discursive processes of self-understanding within the migrant community and how they carried with them a special form of understanding law.

Contested validity cultures

In a world of "multi-normativity", as Klaus Günther pointed out in his contribution, the validity of law cannot simply be presupposed on account of competing normative order designs (morals, religions, customs and aesthetics). At the same time, the validity of law is not exhausted in the institutionally granted privilege of having the ultimate, authoritatively decisive say, but also rests in cultural processes of validation that go beyond these cultural processes. This was reason enough for Werner Gephart to present and open up for

discussion the concept of "validity culture" he had developed; a concept through which he sought to describe the "ethical and aesthetic style" that derives, justifies and makes explicit the "*Sollenscharakter*" (roughly: prescriptive character) of normative expectations. Empirical research should thus have as its object to determine the "normative power" of specific validity culture, i.e. to investigate the semantics, narratives as well as their symbolic and ritual forms and guarantees of order. In his opening lecture and on the occasion of the upcoming centenary of World War I, Gephart sketched out a "validity culture of the state of emergency" which suspended the established normative orders by referencing the exception in a pathos-laden manner. The subversive consequences of this exceptional state could be observed in the sovereign undermining of legal procedures, as well as in the repressive proclamation of new prescriptions on morals, art and fashion that were watched over by censors and commissaries and subjected the population to a special form of the disciplinary regime.

As a further ideal type, Gephart suggested the conception of a secular validity culture – in contrast to a religious one. Whereas the former attained its normative power by reference to profane texts and inner-worldly actors based on the contingency of normativity, the latter featured a coalescence of religious and legal communities through its reference to sacral texts and "charismatic creators of norms". Further, religious validity culture expressed a tendency to regulate vast swaths within the realm of the normative on the basis of religious norms, thereby counteracting differentiation. Irene Schneider (Göttingen/Bonn) made use of this suggested typification in order to investigate whether Islamic legal culture represented such a religious validity culture. For good reason, she avoided determining a singular Islamic legal culture, as the manifold political and legal forms within regions of the Islamic world could hardly be considered unitary. Instead, Schneider used the example of Iran to illustrate which obstacles the diffusion of international norms encounters when implemented into national law. Iran was one of only few countries that did not ratify the 1979 international CEDAW convention on the elimination of discrimination against women of any kind. Schneider reasoned that it would be too simple to trace this rejection back to an Islamic basis of law. Instead, she analyzed arguments brought forth concerning the convention in order to show that interpretations of Islam were quite diverse in this context and the object of vehement interpretative battles. Whereas one side, espoused for instance by Professor Farība ʿAlāsvand, rejected the Western notion of equality as incompatible with Islamic norms, the other side – as expressed in the position of lawyer Shahīndokht Mawlāverdī – argued that the latter were compatible with provisions of human and civil rights. This dispute centered on what represented an adequate understanding of equality, something that could be understood legally, but also biologically. Schneider concluded that

the investigated example could, in fact, be described as a religious validity culture, but added that the basic norm of religion did not pre-form a specific political position and that many profane, namely biologistical and technical arguments could be found within this frame of validity culture and were relied upon by both sides. Which side ultimately politically and legally prevailed, Werner Gephart remarked, depended on institutional and interpretational power.

Daniel Witte (Bonn) continued this discussion in his contribution, in which he demonstrated with the help of Pierre Bourdieu's field theory how social battles determined the layout of specific validity cultures, that is to say the hierarchization, differentiation, but also de-differentiation of normative orders. Contrary to certain classical differentiation theories, the concept of social fields did not presuppose a certain number of functional systems as a mere given, but considered these contingent and dynamic. The structure and relation of fields took place within the field of power and particularly in the ideal-typically conceived religious validity culture of the Islamic world, the boundaries of law and religion often were the object of intense disputes, as Witte illustrated based on the example of the most recent Egyptian draft constitution, in which the fundamental role of law and the creation of authoritative interpretative instances was at stake.

On the genesis and explication of normative validity: The power of narratives and institutions

Other contributions to the conference paid particular attention to the issue raised concerning the concrete validity of norms, particularly the validity of law. Both Andreas Thier (Zurich) and Hans Vorländer (Dresden) examined the normative power of narratives. As Thier pointed out, many elements of narratives could already be found within legal proceedings, as

differing *courtroom narratives* brought forth by the parties to the dispute and by the judge evidenced. From a cultural science perspective, it is particularly the "*Geltungsgeschichten*" ("validity stories/histories") – a term coined by Vorländer – that are of interest. While law is already valid due to its ordered legislation and the institutional backing through an apparatus of force in the background, Thier maintained that "this validity must be explicated through practices of cultural mediation". Validity can be secured through this process, but can also be called into question. Vorländer and Their thus highlighted a whole series of justification narratives, reaching from myths of origin, via transcendental attempts at validation through reference to God, history and reason up to more localized narratives. Vorländer placed special emphasis on different constitutional cultures and different options available to constitutional interpreters (especially courts) to validate law through strategies of historization that emphasizes contemporary constitutional change and dehistorization that appeals to a transhistorical or original meaning. To what extent the mediality of narratives – so for instance its delivery through material, holy scripture – contributes to its validity power could merely be raised as a question by Thier – an aspect that requires further reflection beyond the conference.

Petar Bojanić (Belgrade/Rijeka) left ample space for institutions in his philosophical thoughts on the "deontic power" of institutions and mediality by following the concept of

"documentality" – i.e. media authentication – elaborated by Maurizio Ferraris (Turin, currently Fellow at the Käte Hamburger Center for Advanced Study in the Humanities "Law as Culture") and considering it an important factor for the existence of the former. Yet what makes norms valid within an institution? Here, Bojanić pointed to the work of Finnish philosopher Raimo Tuomela who tied social validity of norms to the reciprocal belief of people that the other also feels bound to the norm. This is a version of collective intentionality that possesses apparent parallels to sociological theories of the formation of expectations, such as Max Weber's concept of *Geltungsglaube*. He heavily criticized John Searle's theory of social institutions (John Searle coined the concept of *deontic power*), pointing out Searle's concept of rationality, his underestimation of the coercive potential of institutions, the role of the state and many further details.

The fact of pluralism and its normative order: shared normativity, self-constitution and protest

Marta Bucholc emphasized how the normative complex not only consists of legal or religious norms, but for example also of customs and manners. Inspired by the reflections of Norbert Elias, she illustrated several environmental cases of social constructions of normativity. Analytically observing the precise differentiation and hierarchies of "multi-normativity" has always been difficult for empirical social science and legal theory. As Klaus Günther (Frankfurt) pointed out, the legal pluralism debate has attempted to distinguish law from other norms for decades: Are the systems of norms of sub-statal groups to be considered law? Are forms of self-regulations emerging in the transnational space such as the *lex mercatoria* mere conventions, classical law or a yet further to-be-determined form of *soft law*? In any case, a dense network of competing normativities can be identified not only on the national plane. As individuals, as Günther noted following Paul Schiff, feel attached not only to a certain national community, but to many further ethnic, religious, epistemic and territorial communities, the question of order imposes itself with great urgency from an empirical and normative standpoint. "Is there a new space of validity under global conditions?" was the question posed by Otto Kallscheuer (Sassari/New York), who directed attention to colliding attempts at ordering through processes of deliberation, the dynamics of market regulation and different attempts to missionize. Klaus Günther, meanwhile, attempted to further determine whether, despite the deep-seated normative pluralism that could be identified, a vision of a *shared normativity* that bridged these lines of conflict could be upheld. He thereby embarked on a search for a solution beyond

"objectivistic" attempts to order with reference to God, sovereignty or moral universalism, but also beyond an "occasional world" (Carl Schmitt) devoid of structure and ties. Günther identified this path in a fairly Habermasian manner, namely as one focused on the normative implications of a communicative community.

He thereby also went against the radical fragmentization diagnosis made by his Frankfurt colleague Gunther Teubner, which cannot consider even such a limited form of universalism as a realistic option. Teubner subversively questioned several constitutional tenets when presenting his interpretation of societal constitutionalism in times of globalization. It would be a mistake, he admonished, to focus one's gaze solely on political constitutions, just as it would be a mistake to reduce constitutions to their function of providing a fundament and order. Instead, processes of constitutionalization were to be observed not only in politics, but also in other social systems. Teubner described this process not only as lending order, but as representing "paradox management". From a systems theoretical viewpoint, these functional systems were rooted in a self-referential manner. Through processes of constitutionalization, i.e. by reference to law, these normatively important self-referential paradoxes could be externalized. Nowadays, a new form of "natural law" was emerging in the respective social systems (e.g. economics and science), that is a multitude of social norms and procedures that were recognized through law (by necessity through its inherent rationality in a misconceiving manner). This, in turn, had an effect on the development of the systems' identity: "The social systems' 'self' is then heteronomously defined via legal norms and the systems can subsequently autonomously define themselves according to these". The consequences of this conception are serious, as it questions both the often presumed theoretical constitutional primacy of the political and the idea of a central generation of law through the constitutional state. The latter is replaced by a production of normativity within the social systems recognized as law *ex post*, whereby Teubner took into account the increasing power of protest movements, whose *colère publique* is not only directed against political, but increasingly also against economic actors.

The relevancy of protest was also at issue in Youssef Dennaoui's (Bonn) lecture, who addressed the cultural fundaments of the production of legal norms. He stressed the importance of the "cultural idea of the nation" in the 19th Century which had developed great power through law both within, in order to politically integrate the collective, as well as without in the course of "civilizing" colonization. As Dennaoui argued following Saskia Sassen and Gunther Teubner, globalization of law could be traced back to organizational logic of nation states and the ways in which their systems function. However, he also warned against focusing solely on the internal processes of the formation of legal systems, as global legal norms could also be appropriated locally in specific cultural contexts and become politicized i.e. through protest movements. These, in turn, could produce new normative expectations.

Paul Schiff Berman (Washington DC) latched on to reflections on pluralism of normative

orders by promoting a normative model of legal pluralism, thereby embarking on a search for pluralist solutions to clashes of norms. Neither unilateral power to decide on the bases of "sovereign territorialism" nor a universalization of law offered a convincing perspective to coping with the hybridity of law. Rather, pragmatically dealing with other legal practices represented the only means of accomplishing this task. Berman considered hybrid courts of law at the international level a good approach, as well as the establishment of heterogeneously composed juries in the USA or the jurisprudence of the European Court of Human Rights, which left national jurisdictions interpretative leeway when concretizing fundamental rights. Berman likewise stressed, however, that pluralism should not go so far as to blindly tolerate any and all foreign practices. At times, there were good normative reasons for courts to come to "jurispathic" (Robert Cover) decisions that do not recognize foreign law.

Marie-Claire Foblets' (Halle/Leuven) thoughts on European legal pluralism went in a similar direction. The risk of cultural collisions brought about by migration and other factors could no longer be countered with a model of republican universalism that is blind to differences: "Don't go the French way!" she admonished. In order to prevent a parallel justice "in the shadow of the state", state law should grant some space for alternative practices and means of conflict

resolution without violating fundamental rights or applying a double standard – a task she admitted to be extraordinarily difficult. At the end of varied and multi-facetted lectures and stimulating discussions, the virulent legal-political problems of contemporary society induced a sense of urgency that called upon the participants to not content themselves with collective advances in learning through a substantive exchange of ideas, but to continue researching *in vivo* in order to meet the challenges of the normative complex.

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