

Werner Gephart



# Law as Culture

For a study of law in the process  
of globalization from the  
perspective of the humanities

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VITTORIO KLOSTERMANN  
Frankfurt am Main



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## Welcome note

The subtitle of the research project is as unmistakable as it is programmatic in expressing the aim to which the Käte Hamburger Centre for Advanced Study “Law as Culture” has committed itself: “For a study of law in the process of globalization from the perspective of the humanities.” This stated aim seems to beg for an exclamation mark so as to ensure that the special emphasis of the project is not ignored. For that which is special about this endeavor is not readily apparent: that law is not only a part of culture, but has always had a central “cultural relevance”<sup>1</sup> (Max Weber). Just as much as it is necessary to conduct a comparative analysis of the legal cultures in which ‘the’ law finds its concrete expression, law must therefore necessarily also be the object of study within the humanities.

The classic scholars within the humanities were aware of this. They would have been prompted by that, which we refer to as the process of globalization, to orient their work on comparative culture and law towards this new societal situation manifesting itself globally and affecting all cultures. It is a situation in which the possibility of intercultural contact has led to a necessity of contact for all cultures. Delineations between cultures and nations have become delineations within cultures and nations, while transnational political, economic and media networks have sprung up.

The founding of the Centre for Advanced Study “Law as Culture” can be regarded as a reaction to both the incompleteness of a tradition of comparative cultural studies from the point of view of a claim to universality of the European (Western) enlightenment and the ‘project’ of modernity, and to a process of globalization in which non-simultaneities, territorial and local peculiarities, and ‘glocally’ different reaction patterns towards tendencies of globalization exist alongside each other. The singular “Law as Culture” is thus necessarily tied to the plural: the plurality of conceptions of law, of justice and of legal systems as an expression of different cultures and religions.

However, this plural also points towards a commonality connecting both the different expressions, as well as culture, religion and law as such. As symbolic forms they not only represent attempts to endow the haphazardness of history or human life with meaning, but also act as guarantors of social order. Culture and religion are reliant on symbols, rites and rituals. Religion, priesthood and church, systems of governance, the arts and everyday communal life are just as dependent on an order of rituals and symbols as legal systems, judges ('legal personnel') and jurisprudence. "Law as Culture" finds its expression in the symbolic-ritualistic forms, in which it is represented and perceived as a visual embodiment of cultural meaning.

In committing to such a comprehensive research project, the Center for Advanced Study lives up to what Bertolt Brecht requires of a good plan:

*"Carefully I examine  
My plan; it is  
Grand enough; it is  
Unachievable."*<sup>2</sup>

Yet for this very reason it is necessary.

**Hans-Georg Soeffner**

*Chairman of the German Sociological Association*

## Key points at a glance

The research project intends to contribute to an understanding of law at a time when the world's normative orders have become subject to rapidly progressing globalization. Whereas the *quid-juris-question* is the focus of jurisprudence in general and legal dogmatics in particular, we want to utilize the conceptual and methodological means of the Humanities in order to render the law comprehensible as an important dimension of a globalizing world. In this regard, and *vis-à-vis* earlier standards of discussion in the 19th century, law is to be rediscovered as a legitimate object of cultural analysis with important implications for contemporary concerns and problems. Just as knowledge of religious world views and its dynamics allows for an understanding of a conflictuous world, law holds a kind of indicative function for the paths and meanders of a global modernity. A center of this modernity can no longer be determined, neither empirically nor normatively. Only deeper comprehension of those religiously inflected and decentralized legal cultures – prototypically analyzed in the works of Max Weber – can illuminate the specifics of occidental legal cultures. The very intertwinement of the law with those cultures' basic presuppositions, for example, in the Arabic-Islamic world, is what demands and allows for harnessing the analytical potential of those disciplines engaged in cultural studies. This includes a historical-comparative analysis of the law, which, in emphasizing its symbolic-ritualistic and organizational dimensions, continues the traditions of the Humanities in Germany, in order to refine, to apply and to complement them in course of a dialogue with representatives of other legal cultures. Since this type of analysis is relieved from the *quid-juris-question* which usually circumscribes the limits of judicial decision-making, one can expect from it new insights into a fundamental fact of social life under the conditions of globalization. In contradistinction to Max Weber's emphasis of differences in his reconstruction of legal cultures, intertwinement, hybridization and partial fusion of legal cultures harbor potential for conflict as well as reconciliation. Literature, film, architecture, visual arts, and maybe even dance have their own story to tell about this state of the law. Its negation by regimes of unjustness highlights what precious achievement the law represents in the process of civilization. This becomes particularly clear when facing the law's latent culturalization, where the attainments of modern legal cultures are threatened to be negated "in the name of culture".

The following subject areas will form the respective yearly emphasis of the research project:

1. Law as Culture. Questions from the Viewpoint of the Humanities
2. Subject Area I: Law and Religion
3. Subject Area II: Law and Globalization
4. Subject Area III: Genesis, Hybridization and Conflicts of Legal Cultures
5. Subject Area IV: Cultural Forms of Law: Literature, Film, Architecture
6. Law as Culture, or: In the Name of Culture?

Systematic dimensions of law as cultural fact – such as symbolic cultures, ritualistic dynamics, normativity and normative pluralism, as well as questions of legal authority and organizational cultures – are to be reflected in the various subject areas they traverse. Hence, one may expect contributions to the analysis of law that are genuinely rooted in the Humanities. They take into account not only the fact of globalization in a way that is attentive to the differences between cultures but also the question whether ‘culture’ becomes a genuine ‘source’ of law.

## **Strange tendencies**

The field of cultural studies has a strange tendency of excluding law from its ambit. This was not so during its birth in the 19th century. From the historical school of law to the discussion of methods within legal studies – both in its cultural-sociological (Simmel, Ehrlich, Weber) and its ‘cultural/historical’ tint, influenced by the neo-Kantianism from Baden (Rickert, Lask, Radbruch) – law was perceived as a foundational element of culture, which called for a juridical ‘endowment with meaning of’ (*Sinnstiftung*) and a ‘positioning towards’ the normative presuppositions of the world (*Stellungnahme*), in a Weberian sense.

There are many signs of law receiving renewed attention in our contemporary quest for orientation. The European Union’s search for identity became more contentious with the onset of the argument about the necessity of a constitution, and the loosening of the prohibition on the use of force during the course of the war in Iraq not only troubles scholars of international public law. Furthermore, might not the cracks and tears in the apparently sound fundament of the post-war order lead towards a clash of legal cultures? Finally, what is the significance of the increased tensions within the legal-cultural order of most Asian societies that manifest them-

selves in the course of progressive ‘glocalization’? The old question of the validity of law, of what constitutes the normative and empirical source of law, is in no way obsolete. In their quest for the ‘source of law’ various observers of law encounter extra-legal preconditions. For instance, the deconstruction of law can be read as a rediscovery of ‘violence’ in its purest form, as an amalgamation with the holy, from which the creative power of the validity of law arises. Yet does this disenchantment of a self-referential concept of law not create a new myth, which needs to be ‘disenchanted’ in turn? A disenchantment, in which the multitude of law-creating power structures and forces guaranteeing validity might be differentiated. The research project thus embarks on a rediscovery of law as an object relevant to the central questions of contemporary cultural studies. This can only be achieved by bringing together the disciplines of law, cultural studies, and area studies.<sup>3</sup> A cultural turn of perceptions of law would simultaneously be able to link up with the traditions of the respective discipline, not least in Bonn.<sup>4</sup>

## **Law as Culture.**

### **A ‘judicial turn’ of the Humanities?**

The ‘cultural turn’ of legal analysis focuses on a dimension which is often forgotten in discussions about the control function of law, alternatives to law, or the difference between customary law and jurist law, even though it was once very familiar to the discipline of legal history. In a language now foreign to us, Jacob Grimm wrote: “The view that regards such symbols as mere empty inventions to aid judicial pomp and circumstance is unsatisfactory. To the contrary, each surely has its own dark, holy, and historical significance; if this were lacking, the general belief in it and the common ability to understand it would be lacking”.<sup>5</sup> Symbols and rituals take their place next to the imperative duty to abide by the law, which is forcibly maintained. This both oft-forgotten and oft-abused or perverted role of symbols and rituals of law needs to be recaptured in order to gain an understanding of law. Particularly where the sanction mechanisms fail, the belief in law is affected, and recourse to extra-judicial means of conflict resolution is taken.

It is an important and fundamental task of the Centre for Advanced Study to discuss these cultural dimensions of law in the light of various other disciplines. The lost tradition of a cultural sociology of law as seen in Durkheim and Weber needs to be mobilized.<sup>6</sup> The illusion of a “mere empty invention” needs to also be broken



in the law of the present. Hereby, one can not only discover the ritualistic and symbolic guarantees of continued applicability of the law, but also their dissociating potential, which might drive legal cultures apart. If it is true that we find ourselves in an unstoppable process of globalization, then law not only has an integrative function, but also a power to expand conflict.<sup>7</sup> The Centre for Advanced Study's first round of research will focus on this issue. Three areas of study will be centered on, which lend themselves well to a comparison of national and emerging global legal cultures, both synchronously and diachronously. They will constitute *cross-sectional dimensions* which will accompany the entire research project.

### *Legal symbolism and ritualistic dynamics*

Apart from a few contributions by individuals, the symbolic dimension of law remains under-researched. Insofar as not only a 'cultural turn', but also a 'semiotic' and 'visual turn' has occurred within the social sciences, the methodological and object-related innovations in legal analysis have hardly been implemented thus far.<sup>8</sup>

The same goes for the analysis of law as a ritual. Luhmann's dictum of 'legitimacy through procedure' went against the adoption of an ethnologically tinted theory of rituals. But can one forego the power of rituals in order to grasp the "*force du droit*" (Bourdieu)? That power which relieves, and simultaneously both reduces and increases the complexity of the effervescent status of social processes?<sup>9</sup>

At the same time, the self-image of the rationalization of law within the Occident portrays itself as a progressive liberation from sensual elements and symbolic reinforcements.<sup>10</sup> However, one may question whether this tendency towards de-symbolization really exists. The same applies to myths of law and justice.<sup>11</sup> Are there not also contrary tendencies, not least concerning symbolic usage of signs in states that do not follow the rule of law? Does not this very symbolic complex create the large and small differences between the legal cultures?<sup>12</sup> A Centre for Advanced Study rooted in the humanities could further pursue cultural semiotics of law as well as a perspective that grasps the functions of collective symbolism. This would deliver, on the one hand, a greater cognitive density and, on the other hand, a transfer of collective sentiments. Parallel thereto, the symbolic-aesthetic level of law could receive special attention, also with regard to its collective representations,

for instance in the visual arts. Next to the disciplines of cultural and legal studies who are confronted with this, the aesthetic forms of knowledge relevant to law would also receive due consideration. Together with the former director of the Bonn museum of art, Professor Dr. Dieter Ronte, as well as eminent correspondents from the arts, a yearly stipend will be given to an artist.

### *Juridical normativity and normative pluralism*

The Centre for Advanced Study remains convinced that an understanding of law cannot ignore its normative nature, which rests on its reality-defiant claim for validity of expectations and expectations of expectations. In other words, it rests on ‘agreements on validity’ (*Geltungseinverständnissen*), which require further power in order to be effective. This does not preclude concepts of ‘law’, of ‘sources’ of law and thus also ‘cultures of validity’ (*Geltungskulturen*) from diverging between different legal cultures. Neither does it prevent claims towards intercultural legal reasoning from being raised.<sup>13</sup> There is widespread consensus on the fact that legal analysis cannot be reduced to analysis and interpretation of norms. However, the normative dimension is supported in sociology, in order to create a realm of the normative, which permeates the social world through a kind of micro physics of normative power. This can be seen, for instance, in Durkheim’s analysis of social life.

Weber’s works also conceptualize law as a norm or normative order. He inquires into the *empiric validity* of existing norms and the *paradoxical development conditions* of normative orders, which perpetuate themselves through habit. Both the affinity and difference to Kelsen’s premise of the ‘pure legal doctrine’ (*Reine Rechtslehre*),<sup>14</sup> to which Weber’s legal analysis can be viewed as a sociological counterpart, is apparent. Here, the autonomy of the normative sphere – which is precisely not based on a freedom from contradictions, but rather is familiar with the existence of different normative orders along-side each other – is in no way denied. In this regard, Weber is not opposed to a normative pluralism. Just as Durkheim analyzes the nesting of particulate and universalist normative orders, Weber stresses the contradictions between law, custom, convention, and morals.<sup>15</sup> This discovery can not only be attributed to the discipline of ‘legal pluralism’;<sup>16</sup> the analytical strengths of its findings in the subject areas of law and religion, law and globalization, and in the genealogy of legal cultures are to be adopted, without necessarily having to share all of its normative consequences.



Werner Gephart, *In the Realm of the Normative (Michel Foucault)* (2001)

### *Force of law and organizational cultures*

According to Weber, manifold motives can contribute to the ‘validity’ of an order. Yet Weber only dares speak of ‘guaranteed’ law “where there is a chance that a compulsion, or ‘legal compulsion’ ‘for its own sake’ might emerge”.<sup>17</sup> The guarantee of a legal order thus becomes a necessary *legal obligation of the state*, which cannot be irritated by utilitarian motives or opportunism. In this regard the ‘element of compulsion within the law’<sup>18</sup> is ethically elevated (überhöht) from the outset, inasmuch as the motives for adherence only possess ethical dignity if they do not exist merely out of fear of negative consequences or in expectation of a reward.

One possible direction of the development, viz. what Weber coined the ‘*rationalization*’ of law, could result from the unfolding of this ‘compulsive apparatus’. This process is to be seen in close connection with the unfolding of the ‘state’. From this perspective, the development of law is closely linked to the process of monopolizing power within the *state*. The organizational constitution of law thus points to the

political sphere, which is more or less determined by the state, and which at times escapes the classical conception of statehood within a transnational space or in sub-national normative enclaves.<sup>19</sup>

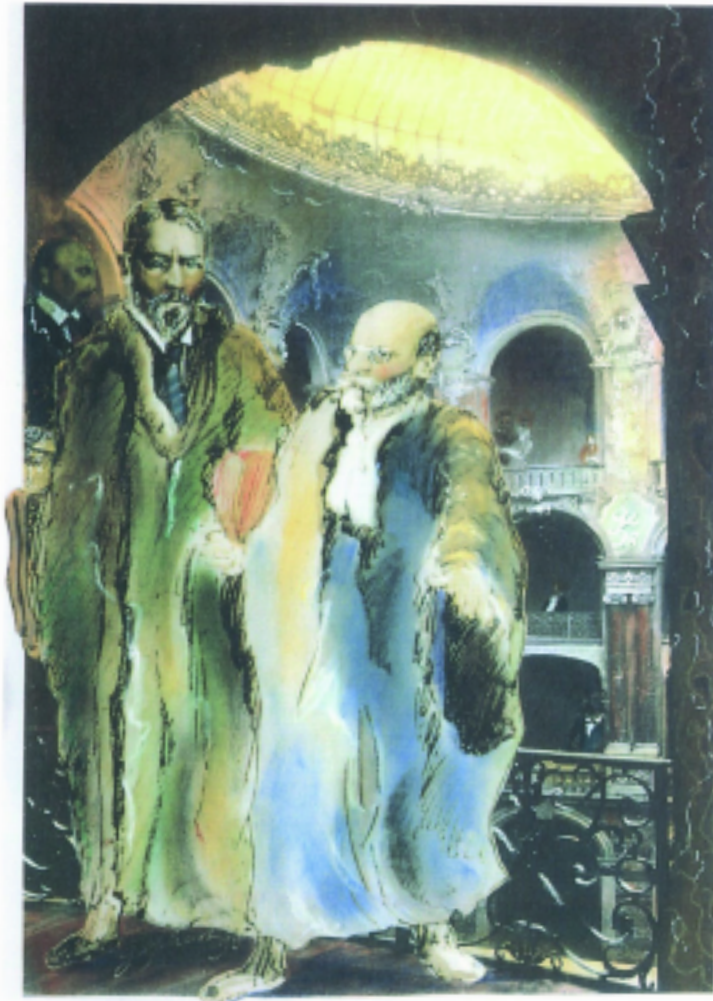
Yet just as the analysis seeks to reflect organizational cultures<sup>20</sup> and their differences, the organization of ‘justice’ – from its ‘nurturing’ to ‘court edifices’ within the occidental world as we know it – is enwoven and strengthened symbolically in ‘fossilized legal cultures’ which serve the *‘force du droit’*. A concept of law from the cultural sciences is thus targeted, which needs to be aware of the differences between legal cultures from the outset. A concept, which is oriented towards the dialogue with other legal cultures, which will be represented by eminent scholars within the framework of the Centre for Advanced Study.

With a view to the established dimensions of law, which point to extra-legal disciplines when it comes to an analysis from a cultural science perspective,<sup>21</sup> one cannot help but come to the sociologically founded suspicion that the differences in openness towards neighboring disciplines represent a reflex of differences between legal cultures. A relative insensitivity within the French scientific culture would reflect the myth of the *‘juge’* as *‘bouche de la loi’*, who does not need any extra-judicial influences. While the German continental law tradition at least offers a place of reflection within the universities, the Anglo-American legal culture features a stronger decoupling of the university viz. ‘law school’ from legal questions. To this extent, the latter may have offered the requisite space for the emergence of the ‘law and literature’ movement.

The opening phase of the Centre for Advanced Study therefore intends to develop a multi-dimensional perspective of law, where classical authors will at times be read against the direction in which they have been received – for instance Hans Kelsen as an analyst of myths of law – so as to invigorate the thematic focal points of the disciplines of law, religion, globalization, legal cultures and cultural forms of law both conceptually and theoretically.

## Law and Religion: An evergreen of social theory

Law and religion were the pillars of every social analysis for the classical scholars of social theory. This goes for Max Weber,<sup>22</sup> but also for Emile Durkheim. Whereas it was important to Weber to differentiate between these spheres, and whereas he saw a gain in rationality precisely in avoiding a fusion of law and religion, Durkheim's sociology upholds the general suspicion of sociology of religion (*"Dans le principe tout est religieux"*), by showing the religious roots of law in general. It is the students Paul Fauconnet, Paul Huvelin and Emmanuel Lévy, who can be said to have investigated the religious origin of criminal attribution<sup>23</sup> and of private law<sup>24</sup> in detail.



*Werner Gephart,  
Law as Culture  
(Fauconnet, Weber,  
Durkheim, Mauss,  
1998)*

The insights into the ‘risky’ character of human action already speak to the fundamental correlation between law and religion. This is so not only because we cannot gauge the consequences of our actions, but also because the unexpected or unheard of intrudes again and again. In other words: our expectations are constantly disappointed, and man must depend on uncertainties being absorbed by societal institutions. Civilizations could be differentiated in the abstract, according to how they distribute the burdens of processing disappointment to the institutions of law or of religion. Here, it is striking how the structural parallel of law and religion leads to different figuration types, which privilege *symbolic forms*, *normativity*, *organizational requirements* and *ritualistic dynamics* to different extents. The monotheistic religions are characterized by an idiosyncratically close-knit relation between law and religion. In Judaism, this can be seen by the legal conception of the *Berith-relationship*, in Islam as the entwinement of legal, moral and religious commands, and in the hidden traces of the holy within legal cultures with Christian roots. Can this close relation be explained by the monotheistic religions’ concept of God, and to which conditions is the reciprocal liberation of the spheres of law and religion linked? What does the semantic shift of ‘obligation’ from its original religious sphere to law, and finally to economics entail for the relation between law and religion in the legal cultures of modernity?<sup>25</sup>

Since legal and religious-dogmatic knowledge have distanced themselves from each other today – lawyers only educate themselves religiously for their own pleasure, while theologians only display legal competence in the field of church law – it is the task of the Centre for Advanced Study to win religious scholars and theologians interested in legal questions over for cultural scientific analysis of the law, in which they might bring in their competence in the area of historical-systematic religious studies. It needs to be simultaneously called to mind that legal cultures which do not split up law, religion and morals in the occidental sense – for instance traditional Islam – may have brought forth a class of legal scholars familiar with law and religion, yet has not resulted in reflective analysis of law on the one hand, and religion on the other as specialized disciplines.<sup>26</sup> Unity and differentiation of legal and religious spheres can thus only be understood from a cultural comparative perspective, which simultaneously demarcates how the course between the respective civilizations has been set: from a law-based religion in the Judaism of Antiquity to the theology of the modern state

based on the rule of law.<sup>27</sup> The second year of research will be centered on these topics, by concentrating cultural and legal studies, but also religion studies and theology – with their respective expertise – on the processes of demarcation and interdependency of law and religion.

## **Law and Globalization: New and old questions**

The process of multidimensional globalization<sup>28</sup> also brings normative cultures closer together. Economic exchange is unthinkable without binding rules on the applicability of contracts, and the search for a fairer and more peaceful world order remains of importance, particularly in view of the heightened worldwide potential for conflict. The idea of a global application of individual rights towards states and other powers is not obsolete, despite the ubiquitous violation of human rights, even if the competition of theories about the universal applicability of such rights has been further complicated by the post-development debate.<sup>29</sup>

At the same time, a retreat to local, traditional normative orders is also observable.<sup>30</sup> These orders are further reinforced in their particulate tendencies when placed on a religious foundation.<sup>31</sup> Law not only exists within the confines of legal scholars or the autonomous laws of legal systems, but in exchange with the cultural foundations of society. Both the inhibitions of a – oftentimes desired – universalization of legal norms and the access to the idiosyncrasies of individual conceptions of law remain obscure if they are only addressed from the legal perspective of the *‘quid juris question’*.

It would be an important task of the Centre for Advanced Study to find productive nexuses for a more complex understanding of the normative dimension of the process of globalization with the research tools offered by the humanities, as a substantial deficit is observable within the current debate.<sup>32</sup> The very well developed globalization discourse, as can be seen from Wallerstein<sup>33</sup> to Giddens,<sup>34</sup> from Albrow<sup>35</sup> to Luhmann<sup>36</sup> and Beck,<sup>37</sup> and from Homi Bhaba<sup>38</sup> to Dipesh Chakrabarty,<sup>39</sup> has only had few effects in the field of law, even though such venerable subjects as comparative law and disciplines of international law are well accustomed to conceptually frame local and translocal normative orders.<sup>40</sup> Even though globalization and law is a common subject of research,<sup>41</sup> the confrontation of advanced theories of global-

ization, or rather of global modernity,<sup>42</sup> with question of transnational and local normative orders promises to be fruitful for both academic cultures.

In this context one should differentiate between different ‘globalization streams’ of law – private law questions might be more closely connected to developments within the economic sphere,<sup>43</sup> while those of public law are inextricably bound to the political sphere, and criminal law problems reflect diverging ‘*consciences collectives*’ of international criminal law.<sup>44</sup> Particularly because law is traditionally conceived of from the perspective of a state, as a bearer of a legal order, norm-setting competencies which transcend the state point to the limits of the sphere of the state. It therefore appears fruitful to conceptualize law as a ‘sphere’<sup>45</sup> in the context of globalization,<sup>46</sup> as a kind of ‘judicio-scape’ in analogy to Appadurai’s perspective of globalization.<sup>47</sup> Only a multidimensional approach to the understanding of globalizational processes offers the chance to determine the variable place of law within this complex process.

## **Genesis, Entwinement and Encounter of Legal Cultures.**

### **On the path towards a transcivilizational legal scholarship.**

Contrary to the strong presence of ‘cultural science’ within 19th century legal analysis,<sup>48</sup> a new cultural scientific and cultural sociological access to the law is necessary, which not only conceives of law as a system of norms, but also as a symbolically and ritualistically transmitted normative order of the legal community (*Rechtsgemeinschaft*),<sup>49</sup> which is strongly determined by religiously informed worldviews and their practices. This fact will hereinafter be referred to as legal cultures.<sup>50</sup> Against the backdrop of the knowledge on the context and background of this comparative cultural sociology of law acquired while working on the edition of Max Weber’s so-called sociology of law (MWG I/22-3) in Bonn, not only Weber’s historical-comparative argumentation is to be elucidated. Rather, the typifying profiles found in the images of different legal cultures he created are to be extended to present-day interpretations. However, the goal should be to adopt a *transcivilizational* perspective, as opposed to Weber’s view, which tends to isolate cultures. Here, it is indispensable to cooperate with Islam studies, Indology, Japanology and Sinology, particularly with a view to the dramatic lacunae within the leading text books on comparative law for these legal cultures. Faced with the challenges to the Eurocentric view formulated by ‘postcolonial studies’, seeking exchange with scholars who understand how





Werner Gephart, *Spherical Journeys* (2004)

to reverse Weber's view of the 'other' is paramount. Such scholars would investigate and discuss Weber's respective legal cultural bias when analyzing Chinese, Islamic, and other legal cultures from the respective interior view.

Weber set himself the task of isolating the peculiarities of the development of law in the occident by comparing legal cultures. In doing so, he both investigated the inner motivation for the rationalization of law, especially of the places in which law is imparted, and specified the exogenous developmental conditions in the political, economic, and religious sphere. This task, however, was not targeted at the *conflict*, the *areas of contact*, *fault lines* and *hybrid mixtures* of idealized and fairly isolated legal cultures. To this extent Weber's analysis needs to be supplemented: instead of relying on a comparative approach<sup>51</sup> focusing on the idiosyncrasies of the occident, the *interdependencies* and *entwinements* between legal orders need to be addressed.

Yet does this mean that we forego Weber's insights when dealing with the clash of cultures, including their normative orders, particularly as ordinary comparative

law tends to disregard the legal cultures of Asia, India, Africa, and especially of Islam?<sup>52</sup>

Even though Weber disputes having delivered a “comprehensive cultural analysis – however concise” in his introductory comments to the ‘collected essays on sociology of religion’ (*Gesammelte Aufsätze zur Religionssoziologie*), the number of comments on law in the comparative studies on sociology of religion are considerable.<sup>53</sup> For instance, in the study on *China* the decisive question is related to the idiosyncrasy of *law*: “Why did the administration and law remain so irrational?”<sup>54</sup> – despite its bureaucratic underpinning, which might have been conducive to a rationalization. Weber’s response goes beyond the logic of pure legal rationalization processes. For it is the religious ethics of Confucianism coupled with the idiosyncrasies of the structure of Chinese society which prevented the formation of a professional legal profession as bearers of rationalization, on the one hand;<sup>55</sup> and kept practical social ethics rooted in a pattern of organic relationships of deference. The latter were not amenable to the development of impersonal ethics of business and law according to Weber, just as much as any “obligation towards ‘factual’ communities” is unthinkable.<sup>56</sup> How then, should a rule of impersonal, abstract law – as is required in the international exchange of economic actors and the relationship of states – emerge from such a tradition? Further, how can different legal cultures and legal languages be translated into one another at all, so as to not only make the comparative lawyer’s work easier, but to attain a mutual understanding or even a communicative agreement?

### *Legal pluralism in India*

This problem, which was not the object of Weber’s research, but can be better appreciated in the light of his analysis, becomes even more poignant when taking the example of the normative cosmos in *India*. Here, various levels of religious ethics, practical lifestyle, specific social agents (*Trägerschichten*) and a rigid social structure permeate each other, and prevent a rationalization of law in the sense of a development of intra-legal qualities.<sup>57</sup> Which path, however, led from the religiously inflected legal particularism to a universal legal order – as was created in the course of colonization of law and the development of the Indian nation state?<sup>58</sup> Which remnants of traditional legal thought are still to be found in the Indian legal system? One may think of the magical means of judicial enforcement (the star-



*Werner Gephart, Max Weber in India (2004)*

vation of the debtor at the creditor's doorstep, for instance), the sanctioned self justice which denies the state's monopoly on the legitimate use of force, or the drastic means of *caste justice*, in which the individual is shunned from society by means of social exclusion. Are these but mere historical reminiscences to the contemporary understanding of India and its international relations? Or do subcutaneous customs anchored in legal traditions remain,<sup>59</sup> which can only be explained by the idiosyncrasies of the social structure of India? Are such remnants perhaps even constituent components of the pluralist legal landscape of India?<sup>60</sup> Does this result in a conflict zone, which one would have to describe as a 'clash' of legal cultures?

The religious ethics of Islam as a combination of shaping and conquering the world could have been amenable to both legal rationalization and the existence of a separate legal profession with institutionalized law schools. In this regard, Weber's theory of the formative power of the bearers of legal rationalization is challenged by the fact that 'Islamic holy law' is entirely jurist's law<sup>61</sup>. However, religiously determined cultural elements, namely the limitation of the personal scope of application, stand in the way of a universalization of law. Furthermore, the radical prohibition of interpretations<sup>62</sup> runs counter to a "systematic creation of law for the purpose for the inner and outer harmonization of law".<sup>63</sup> Thus, legal motivations mesh with those of religious ethics, with all its consequences for the mixture with moral aspects and the lifestyle related thereto.<sup>64</sup> What about the Islamic '*Sonderweg*'<sup>65</sup> towards law? Does it necessarily result in irreconcilable conflict, as the claim of a 'clash of civilizations'<sup>66</sup> suggests?<sup>67</sup> Do we have to let Weber, of all people, tell us that this consequence is inevitable?

### *A „Clash of Legal Cultures“?*

Based on a cultural sociological perspective of law, it is possible to frame this question as one regarding the interaction of legal cultures, thereby addressing it more precisely. Even if Huntington<sup>68</sup> links the impulses of cultures that forge a common identity, but that are also prone to conflict, to religion, a sense of meaning and identity,<sup>69</sup> with all its inherent potential for conflict, can equally be generated by the sphere of law.<sup>70</sup> The danger of a 'clash of legal cultures' cannot be discounted wherever deep-seated cultural convictions of society regarding the normative order of the world collide. The legal cultures of the world not only offer ample evidence therefore, but also point to the urgent need of making both covert and apparent tensions in times of normative-legal globalization and simultaneous particularization 'understandable'.

The western world is marked by considerable legal pluralism, in which the strong Roman law tradition has created a *ius commune* which has found its continuation in EU legislation. Extra-occidental societies also possess a normative pluralism next to the multitude of religious bases of meaning, which is reflected in several development movements.<sup>71</sup> On the one hand, a reception of occidental law has

occurred in the course of the modernization process – Japan being a prime example. On the other hand, occidental legal traditions have also been imposed on indigenous legal cultures in the course of colonization.<sup>72</sup> The Islamic revival movements are simultaneously attempts of restoring the legal community of *umma*, which has been historically ‘contaminated’ repeatedly, but also of finding a solution for the prohibition on interest payments (*riba*) in its own banking system, when confronted with the conditions of modernity.

But can the very controversial thesis of a ‘Clash of Civilizations’, which is, however, highly powerful as a source of orientation, be transferred to law? Does the basis for a clash of civilizations perhaps reside more in the difference of legal cultures than in the power of religions to form identities; particularly if the legal cultures tend towards a *legal fundamentalism*? Yet in the end, what is the role of differences in religiously rooted world views, even if they are almost completely set aside by pragmatic interests of economic and international law? The value of making use of Weber’s perspective on differences to identify *incompatibilities* and *areas of friction* is self-evident. One can thus clarify why such sharp and hurtful gashes can result from the contact between legal cultures. Furthermore, harnessing this perspective allows one to investigate why the sphere of law may be aimed at certainty and the creation of order in its scope of application, yet creates extreme tensions at the margins of its respective area of normative validity, and can be a factor of its own in the clash of cultures. On the other hand, law is also able to create a framework which enables communication between cultures.<sup>73</sup>

The project of a ‘sociology of legal and cultural contents’ therefore possesses a strategic importance for an access to the law from the perspective of cultural studies. Sociology of law cannot be reduced to the research of legal facts, and Weber’s project of comparing legal cultures cannot be frozen as an incomplete story of the evolution of occidental law.<sup>74</sup> Rather, due to its rationalization of occidental law based on ideal types, but also particularly due to the central role taken by religion, his comparative study into the great legal cultures is immensely powerful in interpreting legal-cultural facts. However, it is also important to overcome the focus on the civilizational complexes inherent in Weber’s perspective.<sup>75</sup> We therefore intend to harness it as a means of typified profiling, but also wish to extend it to interactions, transactions and transcivilizational relations.

## **Cultural forms of law:**

### **Literature, film and architecture**

Not only religion has been neglected among the facts of culture that interact with law in the course of a materialistic concept of law focused on the relationship between law and economics. The literature within the realm of the normative has also been slighted. Anglo-Saxon literature makes use of a double perspective of researching ‘law *in* literature’ while simultaneously reading ‘law *as* literature’.

Which lawyer does not have his favorite poets, preferably one of the poet-lawyers, and which writer does not have at least a due amount of disdain for law which, according to Georg Simmel, is “passed on like an eternal disease”?<sup>76</sup> It should be considered that a number of important German-speaking poets have a legal background.<sup>77</sup> This applies to Goethe, Kleist, von Hardenberg, Kafka, Handke, etc. Is this a coincidence, due to the dominance of law in the canon of 18th and 19th century Cameralism and its offshoots? Or does the structure of narration about unheard-of events rather constitute a narratologically identifiable elective affinity between law and literature?<sup>78</sup>

For Islamic law, for instance, there have surprisingly been no attempts made at reconstructing the hadiths into different forms of narration distinguished into *sanad* and *matn*,<sup>79</sup> even though we all believe the Islamic-Arabic culture to be a civilization of narration. Should the obstacles to a systematic, rational analysis of the topic of law result from the logic of narration, then the question becomes one on the limitations or idiosyncrasies of legal rationalism in legal orders that maintain narrative moments in their legal rhetoric and dogmatics. This question should be approached comparatively. How, then, is it that the relationship of ‘law and literature’ receives so much attention in the Anglo-Saxon area,<sup>80</sup> where it has, in fact, brought forth an entire interdisciplinary discipline, with its own chairs, journals, etc., while no comparable movement has emerged in German-language legal research?<sup>81</sup> Might the reason be found in the idiosyncrasies of the respective legal systems, where, for instance, the Anglo-Saxon tradition of linking the facts of cases not only requires the use of fiction, but also requires narration forms, which the continental – in the Weberian sense systematically rationalized – law believes to have escaped?

The comparative, innovative approach, which, in our view, goes beyond the ‘law and literature’ research, would be two-fold: *Contrasting legal cultures on the one hand, while on the other hand isolating means of narration within literary communication, which do not differ by mere chance, but rather correspond to different narration cultures in law and literature.* Therefore, the ‘translation’<sup>82</sup> necessary for the reconciliation of conflicting normative orders of legal cultures needs to take account of the respective narrative traditions.<sup>83</sup> If William Hazlitt’s quip “poetry like law, is a fiction; only a more agreeable one”<sup>84</sup> is accurate, then one should harness the expertise in narrative poeology amassed at the Institute for Asian and Oriental Studies (*Institut für Asien- und Orientalwissenschaften*) at the University of Bonn in order to do the double perspective of narrated life in law and literature justice. What are the consequences of the “*logique du récit*” for the legal cultures in China, India, and the Islamic world? A comparative approach would go beyond the mere demonstrative intent of showing law to be an object of literature, of revealing that literature can be used as a historical source of law, or of demonstrating the reverse, that law can avail itself of literary-rhetorical forms. Rather, this approach would pursue the hypothesis that the idiosyncrasies of legal cultures are manifested in the form of narration of its (case) facts, as well as the condensation to narrative nodes. Further, it would investigate the claim that narration chains are created by reference to acts of speaking or writing (“it is written”, “the prophet said, and X said that the prophet said”, or: “Y said, that X had said, that the prophet had said”), which attain their own normativity by becoming ‘settled law’.<sup>85</sup>

Here, the discipline of German language and literature studies would also have something to say. For instance, Eva Geulen’s research on Agamben’s work already contributes to a strong reference to law in German language and literature studies<sup>86</sup> as well as Romance studies. Finally, the use of the methods of discourse analysis promises to be a useful tool. With these aids, it becomes possible to reveal and decipher legal-literary communication, convoluted discourses, and discursive knots. Hereby, it is possible to not only gain new insights into the different cultures of discourse, which lead to normative orders, but also to put the theories and methods of discourse analysis to work on a new area of application, which was heretofore grossly underresearched.<sup>87</sup> Moreover, in (and through) the medium of film collective representations of law<sup>88</sup> are crystallized and constituted, which appear particularly suited to dramatic effects, depending on its legal cultural ‘setting’.<sup>89</sup> The court room drama represents a film genre of its own, in which not only the



effects of ‘last minute witnesses’ can be studied.<sup>90</sup> That legal-cultural idiosyncrasies can be found in the ‘wrong place’ in the course of globalization of the media can be seen in court TV shows, which transplant the form of American court proceedings into foreign legal cultures. To the extent that legal systems grant movie and TV crews access to the court room, dedicated ‘court channels’ sometimes emerge (four in Brazil alone),<sup>91</sup> who concern themselves, *inter alia*, with the reappraisal of injustice done by the state in its search for historical ‘justice’. To this extent, ‘simulacra of justice’ (Baudrillard) would lend themselves to strategies of comparative analysis.

The ‘ceremonial form’ of law is already connected to its efficiency in Grimm, by claiming that it encourages a general faith in the law (cf. *supra*). As a reminder: symbols and rituals take their place next to the forcibly maintained, imperative duty to abide by the law in creating the ‘*force du droit*’, which needs to be gathered at a determinable place: in the village square or in the court room of modern law. This both oft-forgotten and oft-abused or perverted role of symbols and rituals of law needs to be recaptured in order to gain an understanding of the law. Particularly where the sanction mechanisms fail, the belief in the law is affected, and recourse to extra-judicial means of conflict resolution is taken. According to the underlying concept of legal culture, it is thus important to grasp the symbolic, ritualistic and organization cultural dimension of law, so as to gain a better understanding of the differences, commonalities, and dissonances of the various legal cultures. Here, the sub-disciplines of *legal symbolism studies*,<sup>92</sup> *legal ritualistic dynamics*,<sup>93</sup> and the search of *places of justice*<sup>94</sup> do not need to be reinvented. The innovative approach would rather be found in the combined use of the existing research expertise at the University of Bonn, in order to implement these cultural dimensions of law – that are tied in with the function of law as a guarantor of validity – in *comparative* research.

For example, the legal cultures of Islam, China and India not only differ with regard to the normative contents of their provisions and the sense of validity found in their (legal) order, but also with regard to their respective symbolic culture, ritualistic dynamics, and the organizational cultures of legal proceedings. Whereas the material on court buildings in Europe appears accessible,<sup>95</sup> and, for instance, the architecture of courts is already often regarded as legal culture set in stone and thus as symbolically charged, our knowledge on the relationship between legal symbol-



ism, ritualism and spatialization of law in places of justice outside the occident is completely inadequate. Whoever concerns himself with the history of architecture of justice will have encountered the buildings by Le Corbusier in Chandigarh, or the superior court of justice by Ungers in Berlin – but systematic observations<sup>96</sup> within the legal culture of Islam are basically non-existent, even if we can read about the spatial organization of Islamic proceedings in Mawerdi.<sup>97</sup> How does the plurality of conflicting, overlapping and segregated normative orders manifest itself in India? What story of symbolic-ritualistic tribunalization does China have to tell?

The point of this research segment at the Centre for Advanced Study is thus to reveal the differences between legal cultures in the Islamic-Arabic and Asian area at the meeting-point of symbolism studies, history of architecture and legal research from a cultural studies perspective. The goal is, further, to examine the inherent conflict potential and illuminate such integrative places of legal cultures, as were, for instance, created with the European Court of Human Rights by R. Rogers (1989-1995).

## **Law as culture, or: In the ‘name’ of culture?**

In a concluding phase, 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 (I), the placement of law and competing normative orders in a multidimensional process of globalization (II), the fanning-out of legal-cultural areas of tension (III), and the many faces of legal representation in literature, film, and architecture (IV) 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*’? 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. 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 ‘cultural-istic’ acceptance of other legal cultures misses insights into the value-bound character of supposedly purely ‘formal’ legal cultures.

It is now 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, of the return of the holy, and of battles for identity, which cannot be tackled with an additive model of law, but requires a multidimensional perspective. This unifying problem statement will be kept in focus during each phase of the Centre for Advanced Study’s research.

Without wishing to announce an atlas of global legal cultures, this international and interdisciplinary Centre for Advanced Study, working from the perspective of the Humanities, expects to trace paths on an imaginary map of legal spheres, culturally charged to varying degrees and in varying ways.

For this endeavor a special place has been found, a place of almost symbolic significance.

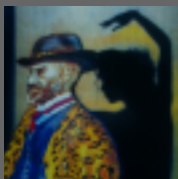
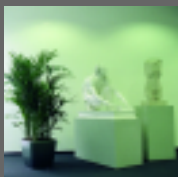


The Seat of the Centre  
for Advanced Study  
at the Bonner Bogen:

The future House  
of Legal Cultures



The Centre for Advanced Study is seated in the landmarked “*Direktoren-villa*” (Directors’ mansion) at the Bonner Bogen, the area of the former Portland cement plant in Bonn-Ramersdorf, newly developed in 2002. The proximity to the Rhine, the government district, and the Bonn international business district lends the location a ‘glocal’ dimension from the outset. Together with the view of the *Sieben-gebirge* hills and *Rheinauen* meadows, it provides ideal conditions for the research project. The tower houses a studio, in which alternating artists in residence will provide for the artistic dimension to the Centre for Advanced Study, by visualizing and dramatizing law as culture.







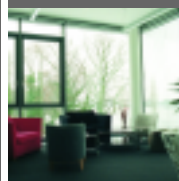
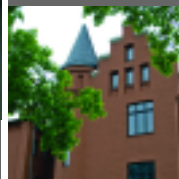


# recht als kultur

käte hamburger kolleg  
law as culture  
centre for advanced study



The architectural design of the *Direktorenvilla* emphasizes the dialogue between old and new. It combines 19th Century industrial architecture, the golden age of jurisprudence, with late modern transparent architecture. This tension between tradition and modernity, between nature, culture and science, allows the *Direktorenvilla* to blossom into an attractive place for the analysis of law within the process of globalization.



## Explanatory Notes

- <sup>1</sup> Kulturbedeutung.
- <sup>2</sup> “Sorgfältig prüf ich/Meinen Plan: er ist/Groß genug, er ist/Unverwirklichbar (our translation above)”.
- <sup>3</sup> Legal studies would not require a repositioning within the disciplinary landscape; however cf. the interesting interdisciplinary approaches in David T. Goldberg et. al. (Eds.), *Between Law and Culture: Relocating Legal Studies*, Minneapolis 2001.
- <sup>4</sup> Cf. Stephan Conerman / Wolfram Schaffar (Eds.), *Die schwere Geburt von Staaten. Verfassungen und Rechtskulturen in modernen asiatischen Gesellschaften* [Bonner Asienstudien, Bd. 1], Schenefeld 2007; cf. esp. The introduction by Stephan Conermann, in which the link to the tradition of legal analysis as a methodological instrument of cultural studies is renewed.
- <sup>5</sup> „Es ist eine unbefriedigende Ansicht, welche in solchen Symbolen bloße leere Erfindung zum Behuf der gerichtlichen Form und Feierlichkeit erblickt. Im Gegentheil hat jedes derselben gewiss seine dunkle, heilige und historische Bedeutung; mangelte diese, so würde der allgemeine Glaube daran und seine herkömmliche Verständlichkeit fehlen“ (our translation above). Jakob Grimm, *Von der Poesie im Recht*, in: *Zeitschrift für geschichtliche Rechtswissenschaft* 2, 1816, S. 25-99; reprint Darmstadt 1963, at p. 48. Wilhelm Wundt, however, attempts to posit the symbol as a constituent part of a legal act and a legal relationship (cf. Wilhelm Wundt, *Völkerpsychologie*, Bd. 9, *Das Recht*, Leipzig 1918, p. 387 et seq.).
- <sup>6</sup> Cf. Werner Gephart, *Recht als Kultur. Zur kultursoziologischen Analyse des Rechts* [Studien zur europäischen Rechtsgeschichte, Veröffentlichungen des Max-Planck-Institutes für europäische Rechtsgeschichte, Bd. 209], Frankfurt am Main 2006.
- <sup>7</sup> Cf. Klaus Günther / Shalini Randeria, *Recht, Kultur und Gesellschaft im Prozess der Globalisierung*, Bad Homburg 2001; Werner F. Menski, *Comparative law in a global context: the legal systems of Asia and Africa*, London 2000; Jerry D. Leonard (Ed.), *Legal Studies as Cultural Studies. A Reader in (Post-)Modern Critical Theory*, Albany 2001; David Nelken (Ed.), *Comparing Legal Cultures*, Aldershot 1997; Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History. 1400-1900*, Cambridge 2001; David Nelken / Johannes Feest (Eds.), *Adapting Legal Cultures*, Oxford 2001.
- <sup>8</sup> Cf. one of the few exceptions, the early studies of Antoine Garapon, e.g. *Forme symbolique et forme linguistique du droit*, in: *International Journal for the Semiotics of Law*, Vol. I, No. 2, May 1988, pp. 161-176.
- <sup>9</sup> Illuminating in this regard are the works of Lior Barshak, e.g.: *Between Ritual and Theatre: Judicial Performance as Paradox*, in: Oren Perez / Gunther Teubner (Eds.), *Paradoxes and Inconsistencies in the Law*, Oxford 2006, pp. 145-167; further esp. the excellent study by Antoine Garapon, *Bien juger. Essai sur le rituel judiciaire*, Paris 1997.
- <sup>10</sup> Cf. in this context the strong theory of Uriel Procaccia, according to which the problems with the reception of contract law in Russia’s legal culture are related to the dominance of the image (iconic religiousness) over the word (cf. Uriel Procaccia, *Russian Culture, Property Rights, and the Market Economy*, Cambridge 2007).
- <sup>11</sup> The as yet unpublished manuscript of Kelsen on the “Sociology of beliefs in the soul” (boxes 5-7 of the estate, ca. 2000 pages!) still awaits a mytho-critical analysis. On this and the project of the complete edition cf. Matthias Jestaedt (Ed.), *Hans Kelsen im Selbstzeugnis. Sonderpublikation anlässlich des 125. Geburtstags von Hans Kelsen am 11. Oktober 2006*, Tübingen, 2006.
- <sup>12</sup> One yet has to sound the experiment initiated by French ethnologists of having professionals (lawyers, judges, etc.) ‘play through’ a ‘simple’ theft in various legal cultures. This material is available on CD.



- <sup>13</sup> This is the approach of Zaczyk; cf. also Otfried Hoffe, *Koexistenz der Kulturen im Zeitalter der Globalisierung*, Münchner Kompetenz Zentrum Ethik, lecture held January 24, 2008.
- <sup>14</sup> Cf. Fritz Loos, *Zur Wert- und Rechtslehre Max Webers*, Tübingen 1970. Cf. Also: Norberto Bobbio, Max Weber und Hans Kelsen, in: Manfred Rehbinder und Klaus-Peter Tieck (Eds.), *Max Weber als Rechtssoziologe*, Berlin 1987, pp. 109-126. In the introduction to the volume 'law' (MWC I/22-3) we hope to further define this relationship.
- <sup>15</sup> Although Weber's relevant comments on the conflict of normative orders, such as custom and law, were conceived of within one culture. Cf. Max Weber, *Die Wirtschaft und die gesellschaftlichen Ordnungen*, in: *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 5., rev. Aufl., Studienausg., Tübingen 1972, pp. 181-198.
- <sup>16</sup> Out of the breadth of relevant literature cf. e.g. John Griffiths, *What is Legal Pluralism?*, in: *Journal of Legal Pluralism* 24, 1986, pp. 1-55; Keebet von Benda-Beckmann / Franz von Benda-Beckmann, *The case of legal pluralism*, in: *Journal of Peace Studies*, 9, 2002, pp. 38-82; on the relationship between 'legal pluralism' and globalization also Brian Z. TAMANAHA, *Understanding Legal Pluralism: Past to Present, Local to Global*, St. John's University School of Law, Legal Studies Research Paper Series, Paper #07-0080, May 2008.
- <sup>17</sup> „Wo die Chance besteht, es werde gegebenenfalls ‚um ihrer selbst willen‘ Zwang, ‚Rechtszwang‘, eintreten“ (our translation above) Max Weber, *Wirtschaft und Gesellschaft*, op. cit., p. 182.
- <sup>18</sup> On Durkheim's view cf. the review of E. Neukamp, *Das Zwangsmoment im Recht in entwicklungsgeschichtlicher Bedeutung* (Berlin 1898), in: *L'Année sociologique* 3, 1900, pp. 324-325.
- <sup>19</sup> Cf. in this sense, which seeks to transcend the state centrism of legal theory Emmanuel Melissaris, *Ubiquitous Law. Legal Theory and the Space for Legal Pluralism*, Farnham 2009.
- <sup>20</sup> Cf. from a social psychological perspective Walter Neubauer, *Organisationskultur*, Stuttgart 2003.
- <sup>21</sup> On their relationship cf. the still foundational collection of Dieter Grimm (Ed.), *Rechtswissenschaft und Nachbarwissenschaften*, 2. Bde., Frankfurt am Main 1973.
- <sup>22</sup> Cf. Werner Gephart, *Recht oder Religion? Konkurrierende Perspektiven im Werk Max Webers*, in: Gephart, *Handeln und Kultur. Vielfalt und Einheit der Kulturwissenschaften im Werk Max Webers*, Frankfurt am Main 1998, pp. 17-38.
- <sup>23</sup> Cf. Paul Fauconnet, *La responsabilité*, Paris 1992; cf. to this the only monographic disquisition: Werner Gephart, *Symbol und Sanktion. Zur Theorie der strafrechtlichen Zurechnung von Paul Fauconnet*, Opladen 1997.
- <sup>24</sup> On the religious origins of private law in the Durkheim school of thought cf. Werner Gephart, *Recht als Kultur. Zur kultursoziologischen Analyse des Rechts*, op. cit., pp. 137-161. Cf. also Realino Marra, *La religione dei diritti. Durkheim-Jellinek-Weber*, Turin 2006. On the relation of Weber and Jellinek further also Peter Ghosh, *Max Weber and Georg Jellinek: two divergent conceptions of law*, in: *Saeculum. Jahrbuch für Universalgeschichte*, 59. Jg., 2. Halbband, 2008, pp. 299-347.
- <sup>25</sup> Cf. Winnifred F. Sullivan's interesting remarks, *The Impossibility of Religious Freedom*, Princeton 2005; in the synopsis also Thomas G. Kirsch / Bertram Turner (Eds.), *Permutations of Order. Religion and Law as Contested Sovereignties*, Farnham und Burlington 2009; Wolfgang Fikentscher, *Modes of Thought: A study in the anthropology of law and religion*, 2nd ed., Tübingen 2004.
- <sup>26</sup> On the relation cf. for early modernity: Christoph Strohm and Heinrich de Wall (Eds.), *Konfessionalität und Jurisprudenz in der frühen Neuzeit*, Berlin 2009.
- <sup>27</sup> A worthwhile overview is provided by Winnifred Sullivan and Robert Yelle, *Law and Religion: An Overview*, in: *Encyclopedia of Religion*, Vol. 8, 2. ed., Detroit 2005, pp. 5325-5332. Further e.g.: Andrew HUXLEY (Ed.), *Religion, Law and Tradition: Comparative Studies in Religious Law*, London 2002.

- <sup>28</sup> For the political sphere cf. esp. Martin Albrow, *The Global Age: State and Society Beyond Modernity*, Cambridge 1996. Cf. also the excellent overview in David Held / Anthony MCGREW, *Global Transformations: Politics, Economics and Culture*, Stanford 1999. Regarding the cultural sphere: Elisabeth Mudimbe-Boyi (Ed.), *Beyond dichotomies: Histories, identities, cultures, and the challenge of globalization*, Albany 2002. As an ironic variant of the theory syndrome: George RITZER, *The Globalization of Nothing*, London 2004. For the sociological debate Robertson was of particular import; cf. Roland Robertson, *Globalization: Social Theory and Global Culture*, London 1994.
- <sup>29</sup> Cf. the overview in Aram Ziai, *Post-Development: Ideologiekritik in der Entwicklungstheorie*, in: *Politische Vierteljahresschrift*, 47. Jg. (2006), Heft 2, pp. 193-218.
- <sup>30</sup> This applies particularly to several romanticizing authors of the post-development movement.
- <sup>31</sup> The findings and projects of the “Commission on Legal Pluralism” ([www.commission-on-legal-pluralism.ch](http://www.commission-on-legal-pluralism.ch)) and the project group on this topic at the Max-Planck-Institute for Social Anthropology in Halle (<http://www.eth.mpg.de>) are particularly interesting. The *Journal of Legal Pluralism* contains extensive literature on this topic.
- <sup>32</sup> Very farsighted, however: Ruti. G. Teitel, *Transitional Justice*, Oxford 2000.
- <sup>33</sup> Esp. Immanuel Wallerstein, *The Modern World System*, 3 Vols., New York 1974 et seq.; Wallerstein, *World-Systems Analysis: An Introduction*, Durham 2004; recently also Wallerstein, *Die Barbarei der anderen. Europäischer Universalismus*, Berlin 2007.
- <sup>34</sup> Of seminal importance to this day: Anthony Giddens, *The Consequences of Modernity*, Stanford 1990.
- <sup>35</sup> Esp. Martin Albrow, *The Global Age*, op cit.
- <sup>36</sup> Esp. the early (pre-)works on the concept of ‘Weltgesellschaft’; cf. Niklas Luhmann, *Die Weltgesellschaft*, in: Luhmann, *Soziologische Aufklärung*, Bd. 2: Aufsätze zur Theorie der Gesellschaft, 4. Ed., Opladen 1991, pp. 51-71, and from his later works esp. Luhmann, *Die Gesellschaft der Gesellschaft*, 2 Vols, Frankfurt am Main 1997, there esp. Vol. 1, Chap. X; cf. also the conceptionally and theoretically pointed analysis of Rudolf Stichweh, *Das Konzept der Weltgesellschaft. Genese und Strukturbildung eines globalen Gesellschaftssystems*, in: Rudolf Stichweh and Martin Schulte (Eds.), *Weltrecht, Rechtstheorie Supplement 22*, Berlin 2008; as well as in this context Günther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: Teubner, *Global Law Without a State*, Dartmouth 1997, pp. 3-28.
- <sup>37</sup> Out of the numerous works cf. recently esp. Ulrich Beck, *Weltrisikogesellschaft. Auf der Suche nach der verlorenen Sicherheit*, Frankfurt am Main 2007.
- <sup>38</sup> Cf. e.g. Homi Bhaba, Edward Said. *Continuing the Conversation*, Chicago 2005.
- <sup>39</sup> Cf. esp. the provocative claim of Dipesh Chakrabarty, *Provincialising Europe: Post-colonial Thought and Historical Difference*, Princeton 2000.
- <sup>40</sup> This difference between traditional international law and normative globalization becomes clear in Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, Harvard Law School, Public Law and Legal Theory Working Paper Series, Paper No. 09-06; Frédéric Mègret, *Globalization and International Law*, in: Max Planck Encyclopedia of International Law, 2009; with a view to private law questions also Robert Wai, *The Interlegality of Transnational Private Law*, in: *Law and Contemporary Problems*, Vol. 71, 2008, pp. 107-127.
- <sup>41</sup> Cf. seminally Paul Schiff Berman, *From International Law to Law and Globalization*, in: *Columbia Journal of Transnational Law*, Vol. 43, 2005, pp. 485-556; exemplarily also: Werner Krawietz / Raul Narits (Eds.), *Multiple Modernität, Globalisierung der Rechtsordnung und Kommunikationsstruktur der Rechtssysteme, Rechtstheorie*, 38. Band (2007), Heft 2/3, pp. 197-394; Boaventura de Sousa Santos / César A. Rodríguez-Garavito (Eds.), *Law and Globalisation from Below: Towards*

a Cosmopolitan Legality, Cambridge 2005; Franz and Keebet von-Benda Beckmann, Transnationalisation of law, globalization and legal pluralism: A legal anthropological perspective, in: Christoph Andonts / Volkmar Gessner (Eds.), Globalisation and resistance: Law reform in Asia since the crisis, Oxford 2007, pp. 53-80; cf. further: Jürgen Schwarzw (Ed.), Globalisierung und Entstaatlichung des Rechts, Ergebnisse der 31. Tagung der Gesellschaft für Rechtsvergleichung vom 20. bis 22. September 2007 in Halle. Teilband 1: Beiträge zum Öffentlichen Recht, Europarecht, Arbeits- und Sozialrecht und Strafrecht, Tübingen 2008; Hermann Gröhe and Christoph Kannengießer (Eds.), Globalisierung und Recht. Beiträge der 2. Berliner Rechtspolitischen Konferenz, Konrad-Adenauer-Stiftung, Sankt Augustin / Berlin 2008; and finally the Indian-French conference at the Conseil Constitutionnel (Paris) on the topic of "Globalisation and Law" as well as the introductory contribution by Werner Gephart, März 2009.

<sup>42</sup> Cf. Youssef Dennaoui's excellent analysis, Sinn und Macht in der globalen Moderne [Gesellschaft und Kommunikation. Soziologische Studien, Bd. 9], Münster / Berlin 2010.

<sup>43</sup> Cf. e.g. Stefano Battini, The Globalization of Public Law, in: European Review of Public Law, Vol. 18, No. 1, Spring 2006, pp. 27-50.

<sup>44</sup> Cf. Werner Gephart, Strafe und Verbrechen. Die Theorie Emile Durkheims, Opladen 1990.

<sup>45</sup> Cf. seminally Udo di Fabio, Der Verfassungsstaat in der Weltgesellschaft, Tübingen 2001.

<sup>46</sup> On the consequences of the imagery of spheres for differentiation theory cf. Werner Gephart, "Sphären" als Orte okzidentaler Rationalisierung. Zu einer vergessenen Metapher in Max Webers Rationalisierungstheorie, in: Hans-Jürgen Aretz / Christian Lahusen (Eds.), Die Ordnung der Gesellschaft. Festschrift zum 60. Geburtstag von Richard Münch, Frankfurt am Main 2005, pp. 125-160.

<sup>47</sup> Cf. Arjun Appadurai, Modernity at large, Minneapolis 1996.

<sup>48</sup> This can be found under different names in the historically oriented 19th century legal studies, from the so-called historical school of law of the Savigny-Puchta school of thought, via early comparative law (Kohler), to Albert Hermann Post's ethnologic jurisprudence; cf. Werner Gephart, Recht als Kultur. Zur kultursoziologischen Analyse des Rechts, op cit., pp. 34-44.

<sup>49</sup> On this legal term taken from Durkheim's theory of social life cf. ibid. pp. 289-302.

<sup>50</sup> An overview of various attempts to further specify Friedman's concept of 'legal culture' can be found in Roger Cotterrell, The Concept of Legal Culture, in: David Nelken (Ed.), Comparing Legal Cultures, op. cit., pp. 13-31.

<sup>51</sup> Randeria describes this area of research in harsh terms: „[Sie] beginnen normalerweise mit der Idealisierung der westeuropäischen Erfahrung, abstrahieren diese, um anschließend außereuropäische Verlaufsformen, Transformationen und Institutionen im Vergleich als mangelhaft oder abweichend zu diagnostizieren“ (Shalini Randeria, Verwobene Moderne: Zivilgesellschaft, Kastenbindungen und nicht-staatliches Familienrecht im (post)kolonialen Indien, in: Randeria (et al.) (Eds.), Konfigurationen der Moderne, Baden-Baden 2004, pp. 155-178, p. 160).

<sup>52</sup> Cf. e.g. Günther Grassman / René David, Einführung in die großen Rechtssysteme der Gegenwart, 2. Aufl., Munich 1988.

<sup>53</sup> „sei es auch noch so gedrängte – umfassende Kulturanalyse“ (our translation above); Max Weber, Vorbemerkung, in: Weber, Gesammelte Aufsätze zur Religionssoziologie, Bd. 1, 6. Aufl., Tübingen 1972, pp. 1-16, p. 13.

<sup>54</sup> „Warum blieb diese Verwaltung und Justiz so irrational?“ (our translation above). Max Weber, Konfuzianismus und Taoismus, in: Weber, Gesammelte Aufsätze zur Religionssoziologie, Bd. 1, op. cit., pp. 276-536, p. 473. On Chinese legal culture cf. Robert Heuser, Einführung in die chinesische Rechtskultur, Hamburg 1999.

- <sup>55</sup> A legal prophecy was also unknown, however; on the lack of prophecy in China and on Chinese law, cf. the remarks in the study of Confucianism, Confucianism and Taoism, op. cit. MWC I/19, pp. 333, 362, 410, 420, 433, 460 et seq. on the lack of prophecy, and pp. 279-284, 341 et seq. on law in general.
- <sup>56</sup> „Verpflichtung gegenüber ‚sachlichen‘ Gemeinschaften“ (our translation above).
- <sup>57</sup> On the legal autonomy of castes and guilds cf. Max Weber, *Hinduismus und Buddhismus*, MWC I/20, pp. 54, 109, 113, 191. Weber primarily relies on the studies of Julius Jolly, *Recht und Sitte, einschließlich der einheimischen Literatur* (Grundriß der indo-arischen Philologie und Altertumskunde, hrsg. Von Georg Bühler, Band 2, Heft 8), Strasbourg 1896; as well as on Josef Kohler, *Das Recht der orientalischen Völker*, in: Kohler and Leopold Wenger, *Allgemeine Rechtsgeschichte*, 1. Hälfte: *Orientalisches Recht und Recht der Griechen und Römer* (Die Kultur der Gegenwart, Ihre Entwicklung und ihre Ziele, hrsg. Von Paul Hinneberg, Teil II, Abt. VII, 1) Leipzig/Berlin 1914, pp. 49-153.
- <sup>58</sup> On the tense relationship between law and colonialism comp. the excellent omnibus review by Sally Engle Merry in the *Law & Society Review* 24 (1991), pp. 889-922, as well as M.B. Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Laws*, Oxford 1975.
- <sup>59</sup> Cf. from a comparative perspective Leon Sheleff, *The future of tradition. Customary law, common law and legal pluralism*, London 1999; based on the French example also Bruno Latour, *La Fabrique du droit. Une ethnographie du Conseil d'Etat*, Paris 2002.
- <sup>60</sup> On legal pluralism in India, cf. Upendra Baxi, *People's law in India – the Hindu society*, in: Masaji Chiba (Ed.), *Asian indigenous law in interaction with received law*, London / New York 1986, pp. 216-266; and especially Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity*, New Delhi 2003. Inter alia on the Indian example also Franz and Keebet von Banda-Beckmann / Bertram Turner, *Die Revitalisierung von Tradition im Recht: Rückfall in die Vergangenheit oder zeitgemäße Entwicklung?*, in: *Juridicum. Zeitschrift im Rechtsstaat* 4, 2005, pp. 197-201. Finally, drawing from his extensive knowledge of ethnology, Olivier Herrenschmidt, *L'impossible Code civil des Indiens*, in: Raymond Jamous / Rahma Bourqia (Eds.), *Alterité et reconstruction de la société locale*, Paris 2008, pp. 159-202.
- <sup>61</sup> Cf. Max Weber, *Wirtschaft und Gesellschaft*, op. cit., p. 475.
- <sup>62</sup> On the other hand, someone who is incapable of independent reflection, innovation, or thinking in analogies is excluded from adjudicating the law according to Mawardi. The requisite personal qualifications for the office of judge is indicative of the core of Islamic legal scholarship. Cf. Mawardi (Aboul-Hasan Ali), *Les statuts gouvernementaux ou règles de droit public et administrative*, translated and annotated by Edmond Fagnan, Algier 1915 (reprint 1982), pp. 131-156, p. 136; cf. also the Latin translation of the Arabic text at Bonn University by Enger from 1853.
- <sup>63</sup> Max Weber, *Wirtschaft und Gesellschaft*, op. cit., p. 475.
- <sup>64</sup> Out of the newer literature on Islamic law cf. esp. Hervé Bleuchot, *Droit musulman: Essai d'approche anthropologique* (2 Bde.), Aix 2000 / 2002; Taha Jabir al Alwani, *Fondements du droit musulman (Usul al-fiqh al-islami)*, Paris 2005. On legal pluralism in the Muslim world one may find, inter alia: Boudouin Dupret / Maurits Berger / Laila Al-Zwain (Eds.), *Legal Pluralism in the Arab World*, Den Haag 1999; as well as Michael Kemper / Maurus Reinkowski (Eds.), *Rechtspluralismus in der Islamischen Welt. Gewohnheitsrecht zwischen Staat und Gesellschaft*, Berlin / New York 2005.
- <sup>65</sup> The finding of a cultural, ideological, military, theological, economic, social, and political special position of Islam, supported by Hamadi Redessi (*L'exception islamique*, Paris 2004) lacks an analysis of an 'exception juridique'.
- <sup>66</sup> Cf. the still worthwhile contribution on Huntington's thesis by Benedikt Giesing, *Kulturelle Identitäten als strategischer Kompaß? Soziologische Anmerkungen zu Samuel P. Huntingtons „clash of civilisations“*, in: Werner Gephart / Karl-Heinz Saurwein (Hrsg.), *Gebrochene Identitäten. Zur Kon-*

troverse um kollektive Identitäten in Deutschland, Israel, Südafrika, Europa und im Identitätskampf der Kulturen, Opladen 1999, pp. 117-141.

<sup>67</sup> Up to the dystopia of a (future) justice of culture; cf. e.g. Elisabeth Zechenter: In the name of culture: Cultural relativism and the abuse of the individual, in: *Journal of anthropological research*, Vol. 53, No. 3, 1997, pp. 319-347. Cf. in this context also the worthwhile contribution of Rainer Zaczyk, *Das Toleranzgebot als strafrechtsbegrenzendes Prinzip?*, in: Christoph Enders / Michael Kahlo (Eds.), *Toleranz als Ordnungsprinzip?*, Paderborn 2007, pp. 235-242. José Casanova warns of Europe's fear of religion, German translation by Rolf Schieder, Berlin 2009. Does this also concern the fear of 'different' law?

<sup>68</sup> Cf. on the one hand the original article by Huntington in *Foreign Affairs*, Summer 1993, pp. 22-49, and, on the other hand, the unexpected literary consequences of this publication, which yields over 1 million google search results.

<sup>69</sup> 'Sinnstiftung' is the central determination of culture in Weber's work; cf., with reference to the underlying entwinement with the religious sphere: Werner Gephart, *Handeln und Kultur. Vielfalt und Einheit der Kulturwissenschaften im Werk Max Webers*, op. cit., pp. 188-196.

<sup>70</sup> Stefan Ulrich Pieper rightly saw a limitation of Huntington's viewpoint herein, cf. "The Clash of Civilisations" und das Völkerrecht. Kulturelle Einflüsse im internationalen Recht, in: Werner Krawitz / Gert Riechers / Klaus Vedder (Eds.), *Konvergenz oder Konfrontation? Transformationen kultureller Identität in den Rechtssystemen an der Schwelle zum 21. Jahrhundert*, *Rechtstheorie*, 29. Bd., Heft 3/4, Huntington-Sonderheft, 1998, pp. 331-355.

<sup>71</sup> On the relation between development and legal pluralism from a legal-ethnological perspective, cf. esp. the works of Franz and Keebet von Benda-Beckmann, e.g. von Benda-Beckmann (Eds.), *Dynamics of plural legal orders*. Special double issue of *The Journal of Legal Pluralism and Unofficial Law*, No. 53-54, Berlin 2006; esp. the title contribution by the editors, pp. 1-44. On the multitude of ethnographic accesses to law cf. recently also Eve Darian-Smith (Ed.), *Ethnography and Law*, Farnham 2007.

<sup>72</sup> However, there have also been astonishing attempts at creating a hybrid legal culture of pluralism, which, for instance, seeks to combine French civil law and German legal traditions, from the perspective of their shared Roman law roots, with the perspective of Muslim law. David Santillana has exposed this wonder of charismatic creation of law in the Tunesian *Code des obligations et des contrats tunisien*. Cf. Raja Sakrani, *Au croisement des cultures de droit occidentale et musulmane. Le pluralisme juridique dans le code tunisien des obligations et des contrats*, *Bonner Islamstudien*, ed. by Stephan Conermann, Volume 15, Schenefeld 2009.

<sup>73</sup> In this regard, an identity or communication function should be added to the classic catalogue of functions of law.

<sup>74</sup> Cf. in this regard again Keebet and Franz von Benda-Beckmann, *Evolutionismus und Recht: Komplexe Fragen zu komplexen Gesellschaften*, in: Rüdiger Voigt (Ed.), *Evolution des Rechts*. *Schriften zur Rechtspolitologie* 7, Baden-Baden 1998, pp. 93-118.

<sup>75</sup> This point of critique also applies to the extension of the Weberian perspective in S.N. Eisenstadt; cf. Sebastian Conrad and Shalini Randeria, *Einleitung. Geteilte Geschichten – Europa in einer postkolonialen Welt*, in: Conrad and Randeria (Eds.) *Jenseits des Eurozentrismus. Postkoloniale Perspektiven in den Geschichts- und Kulturwissenschaften*, Frankfurt am Main 2002, pp. 9-49. Cf. also the portrayal of the critique formulated by Arnason in Hans JOAS and Wolfgang Knöbl, *Sozialtheorie. Zwanzig einführende Vorlesungen*, Frankfurt am Main 2004, p. 759, according to which the critique "Zivilisationskontakt als wichtige Variable berücksichtigt und insofern eine dezidiert trans-zivilisationelle und transnationale Stossrichtung erhält".

<sup>76</sup> Georg Simmel, *Philosophie des Geldes*, Berlin 1900, p. 525, in reference to Goethe.

- <sup>77</sup> The topic of law and literature enjoy increasing attention, also in Germany: cf., for instance, *Arbeitsgespräch in der Herzog August Bibliothek Wolfenbüttel über Recht und Literatur um 1800* (2005).
- <sup>78</sup> Cf. seminally: Claude Bremond, *Logique du récit*, Paris 1973.
- <sup>79</sup> Raja Sakrani (Bonn / Paris) is currently engaged in taking on this task (cf. Law as narration or how to make Law by telling stories, lecture, FU Berlin 2008). On the cultural differences and potential tensions mentioned here cf. also the revealing illustrations in Ludo Rocher, *Law Books in an Oral Culture: The Indian Dharmastras*, in: *Proceedings of the American Philosophical Society*, 137(2), 1993, pp. 254-267.
- <sup>80</sup> Cf. esp. Richard A. Posner, *Law and Literature*, Cambridge, MA / London 1998; Jan Ward, *Law and Literature. Possibilities and Perspectives*, Cambridge 1995; as well as the text book by Sanford Livinson and Steven Mailloux, *Interpreting Law and Literature. A Hermeneutic Reader*, Evanston 1988. More skeptical: Jane B. Baron, *The Rhetoric of Law and Literature: A Skeptical View*, in: *Cardozo Law Review*, 2005, pp. 2273-2281.
- <sup>81</sup> It is, however, interesting that the topic has found its way into educational literature (cf. the contribution by Edward Schramm, *Law and Literature*, in: *Juristische Arbeitsblätter* 2007, pp. 581-585); cf. also Klaus Kastner, *Literatur und Recht – eine unendliche Geschichte*, *NJW* 2003, pp. 609-615; as well as recently the special issue “Literatur, Kunst und Recht” (*NJW*, Heft 11/2009).
- <sup>82</sup> Cf. Joachim Renn: *Übersetzungsverhältnisse. Perspektiven einer pragmatistischen Gesellschaftstheorie*, Weilerswist 2006.
- <sup>83</sup> Here the work of James Boyd White, *Justice as translation. An essay in cultural and legal criticism*, Chicago 1990, would be processed.
- <sup>84</sup> Cited in Kieran Dolin, *A critical introduction to law and literature*, Cambridge 2007, p. vii.
- <sup>85</sup> On the narrative tendencies in law, one should also address the legal culture of Spain, and the legal cultures in South America based thereupon, which was influenced by Islamic law. Here, it would be fruitful to follow up on the already existent contacts with the research institute for philosophy and law at the Universidad Externado de Colombia.
- <sup>86</sup> Cf., next to a series of papers, esp. Eva Geulen, *Giorgio Agamben zur Einführung*, Hamburg 2005.
- <sup>87</sup> Cf. for some of the few exceptions, esp. the overview in Roger W. Shuy, *Discourse Analysis in the Legal Context*, in: Deborah Schiffrin / Deborah Tannen / Heide E. Hamilton (Eds.), *The Handbook of Discourse Analysis*, Oxford 2001, pp. 437-452; further Johanna Niemi-Kiesiläinen / Päivi Honkatukia / Minna Ruuskanen, *Legal Texts as Discourses*, in: Åsa Gunnarsson / Eva-Maria Svensson / Margaret Davies (Eds.), *Exploiting the Limits of Law. Swedish Feminism and the Challenge to Pessimism*, Aldershot / Burlington 2007, pp. 69-88; as well as Thomas Scheffer, *Statements, Cases, and Criminal Procedures. The Ethnographic Discourse Analysis of Legal Discourse Formations. Research Report*, in: Andrea Bührmann / Rainer Diaz-Bone (et al.) (Eds.), *Von Michel Foucaults Diskurstheorie zur empirischen Diskursforschung*, *Forum Qualitative Sozialforschung* [Online Journal], 8(2), 2007; recently and based on concrete material also Melissa Hamilton, *Expert Testimony on Domestic Violence. A Discourse Analysis*, El Paso, 2009, there generally esp. pp. 39 et seq.; finally, if less general, also the work by Christian Schauer: *Aufforderung zum Spiel. Foucault und das Recht*, Cologne, 2006.
- <sup>88</sup> However, the unrepresented, (in-)justice subjected to systematic cinematographic censorship also deserves attention; cf. the works by Ursula von Keitz, esp.: *Im Schatten des Gesetzes. Schwangerschaftskonflikt und Reproduktion im deutsch-sprachigen Film 1918-1933*, Marburg 2005; von Keitz / Jürgen Keiper (Eds.), *Die Zensur-Entscheidungen der Film-Oberprüfstelle Berlin 1920-1933*, Internet-Edition, Frankfurt am Main 1999-2001.
- <sup>89</sup> Cf., for instance, Steve Greenfield et al., *Film and the law*, London 2001; David Alan Black, *Law in Film: Resonance and Representation*, Urbana and Chicago 1999; John Denvir (Ed.), *Legal Reelism. Movies as Legal Texts*, Champaign, IL 1996.

- <sup>90</sup> Cf. e.g. Carol Clover, *Judging Audiences: The Case of the Trial Movie*, in: Christine Gledhill / Linda Williams (Eds.), *Reinventing Film Studies*, London 2000, pp. 244-254.
- <sup>91</sup> Here too, there are contacts with a research group dealing with ‘postmodern’ legal structures in Brazil.
- <sup>92</sup> Cf. the omnibus volume by Rainer Schulze (Ed.), *Rechtssymbolik und Wertevermittlung*, Berlin 2004.
- <sup>93</sup> Still incredibly stimulating as a starting point: Niklas Luhmann, *Legitimation durch Verfahren*, Darmstadt und Neuwied 1969, who, however, seeks – unsuccessfully in our opinion – to unlink procedural theory from analysis of rituals. On this epistemic problem cf. further: Werner Gephart, *Rituale der Ritualbeobachtung. Von Emile Durkheims “effervescence” über Marcel Mauss’ “fait total” zu Pierre Bourdeus “acte d’institution”*, Nr. 6 des *Forum Ritualdynamic*, März 2004 [Diskussionsbeiträge des SFB 619 “Ritualdynamik” der Universität Heidelberg], edited by Dietrich Harth and Axel Michaels.
- <sup>94</sup> Cf. Werner Gephart, *Versteinerte Rechtskultur. Zur kultursoziologischen Analyse von Gerichtsbauten*, in: Heinz Monhaupt / Dieter Simon (Eds.), *Vorträge zur Justizforschung*, Frankfurt am Main 1992, pp. 401-431, as well as the revised edition: *Orte der Gerechtigkeit. Gerichtsarchitektur zwischen Sakral- und Profanbau*, in: *Recht als Kultur. Zur kultursoziologischen Analyse des Rechts*, op. cit., pp. 237-254.
- <sup>95</sup> Cf., for instance, on late 19th Century France: Katherine Fischer Taylor, *In the Theatre of Criminal Justice. The Palais de Justice in Second Empire Paris*, Princeton 1993; also Antoine Garapon, *La symbolique du palais de justice de Grenoble*, in: Olivier Cogne (Ed.), *Rendre la justice en Dauphiné. Exposition présentée par les Archives départementales de l’Isère, au palais du parlement de Dauphiné du 31 octobre 2003 au 17 mai 2004*, Catalogue, Grenoble 2003, pp. 121-123.
- <sup>96</sup> Hamdi Abdel Monheim’s informative study, *Le Tribunal Musulman des abus ou (Diwâne Al-Mazalim)*, Thèse, Paris I 1973, forms an exception. According to this study, the composition of the court interestingly foresees that witnesses guarantee the adherence to religious rules. On the minutely regulated seating order in the form of a circle, with the presence of representatives of all schools of law (Medehb), in which the distances are differentiated according to rank, and are measured in ells, cf. Monheim, pp. 93 et seq.
- <sup>97</sup> Cf. Mawardi (Aboul-Hasan Ali). *Les statuts gouvernementaux ou règles de droit public et administrative*, op. cit.

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