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Communities and the(ir) law

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Introductory Notes to »Communities and the(ir) Law«

Over the course of its second funding phase, the Käte Hamburger Center for Advanced Study in the Humanities »Law as Culture«, which was guided by the basic assumption that law should be understood as part of a society's culture, set out to both systematically and historically-comparatively relate law to the spheres of economy, politics, and the community. Relations to the *economic* sphere are quite evident: Recently brought back to general awareness in an impressive way by Katharina Pistor,[1] and previously, for instance, by Richard Swedberg,[2] the idea of a close referential relationship between law and economics was downright constitutive for classics such as Marx[3] or Weber, who treated historical economic developments as »conditions for the development of law« in his so-called *Rechtssoziologie*.[4] The relationship between law and the *political* field seems even more obvious, whether law is conceived as a means or an obstacle to the exercise of political power. Among other areas, particularly public law and constitutional law as well as its manifestations in legal and constitutional cultures provide rich material in which these relations are presented.[5] With the underlying analytical separation of relatively autonomous segments such as law, economics and politics, functional systems, social fields or spheres of meaning are designated and placed in relation to each other that undoubtedly mark out a broad terrain of sociological analysis. At the same time, this perspective exhibits its own limitations, and by drawing on such classic differentiation-theoretical distinctions, a plethora of social phenomena run the risk of being overlooked: Circles of friendship, family associations, neighborhoods, sports clubs, voluntary associations, social movements, or also coercive forms, such as the »prison community«.[6] It is typically not scarce goods or politi-

1 Pistor: The Code of Capital.

2 Swedberg: The Case for an Economic Sociology of Law.

3 Marx: Debates on the Law on Thefts of Wood.

4 Cp. Weber: Wirtschaft und Gesellschaft. Recht [MWG I/22-3].

5 Cp., from the »Law as Culture« perspective, for example: Gephart & Suntrup (eds): Dynamics of Constitutional Cultures; Witte & Bucholc: Verfassungssoziologie als Rechtskulturvergleich.

6 Cp., classically, Clemmer: The Prison Community; Hayner & Ash: The Prison as a Community.

cal decisions that are produced in these specific figurations, but social relations, shared meaning, identities and (often particularistic) solidarities; not least, they can be understood as sites of origin of mechanical or organic solidarity, of a »solidarité par similitude« or a »solidarité par différence«, as Durkheim phrased it in the *Division du travail social*.[7]

Sociologically speaking, the rather opaque concept of »community« is of course closely linked to the name of Ferdinand Tönnies. But even a sober theorist such as Weber, who was rather reticent about emphatic evocations of solidarity, experimented with the concept of a »community of consent« *(Einverständnisgemeinschaft)* in a quite central context[8] and dealt with processes of »communalization« (*Vergemeinschaftung*) in order to counter an essentialist interpretation of the juxtaposition of »community« and »society«, as he thought was present in Tönnies' approach. Beyond classical conceptual work, however, it is difficult also on the social level to overlook a permanent conjuncture, perhaps even a certain desire for »community«. Rather, we encounter the dream of community again and again in different context: be it in flat-sharing or »gated« residential communities, be it in an urban exodus and the retreat into small towns, or even just *ex negativo* in the nightmare of »bowling alone« as a metaphor for a society whose community has »collapsed«;[9] it is revealed to us in the differentiation of highly specialized online communities,[10] in the context of the pandemic experience,[11] or in attempts to overcome the hard divide between society and a subjugated nature in order to strive for new forms of communitization between humans and non-human living beings.[12]

The strongest circulating images of community, however, admittedly refer to times of crisis or to conditions of hardship or misery – to »communities of need« or even »communities of fate«, such as can arise in times of war or can weld together people in extremely marginalized positions. Admittedly, in all these contexts, we cannot even be quite sure whether we are not rather taking a pipe dream at face value in view of the invocation of »communities«, or whether we are not perhaps rather overwhelmed by fictions of community and succumbing to communitarian deceptions. At the same time, it is not surprising that the »communal« dimension of social life is often viewed with suspicion: For does it not lead us from the dust-dry path of analyzing social structures and dynamics into a backwoods realm of romantic longings – and perhaps even into the claustrophobic atmosphere of a cult of community, into the logic of particularisms and the strict distinction between inside and outside, members and strangers – and thus, ultimately, into the darkest

7 Durkheim: De la division du travail social.
8 Weber: Ueber einige Kategorien der verstehenden Soziologie, p. 463.
9 Putnam: Bowling Alone.
10 See the contribution by Daniel Zimmer in this volume.
11 See the final chapter by Werner Gephart.
12 See the chapter by Pierre Brunet.

chapters of human history? In fact, there is a line of reception of the concept of community that associates the term primarily with social confinement and control, with a primacy of the collective over the individual, with the restriction of autonomy and a perhaps romantic but antiquated form in which social relations can be organized largely based on personal acquaintance and close ties – in short, with much of what »modernity« (and modern »society«) promised to liberate us from. Empirical observations, however, tend to cast doubt on such an understanding of »modernity« rather than on the relevance of communal figurations even for the present. In this sense, and much like the concept of »culture«, one should be aware from the outset of the multiplicity of meanings encapsulated in the term »community«, the ambivalence of the underlying idea and its corresponding practices, especially if one decides to use the term for analytical purposes. However, dealing with such ambiguities of »meaning« constitutes precisely an essential characteristic and a central challenge of the scientific study of culture, which should also always subject its own basic concepts to its specific methodological procedures: contextualization, historical embedding, systematic distancing and alienation, etc.

But how can the connection between community and law be thought of in a next step? Of course, we speak of »legal communities« in a similar way as we speak of »religious communities«, but we are also familiar with political community forms ranging from parties and factions to imagined national communities, or even the idea of a politically constituted world community as it is based on the UN Charter. But how do we determine in each individual case whether we are dealing with a political, a religious or, for example, a scientific community? Can we rely solely on the »subjectively intended meaning« of the actors involved? And how does law relate to other normative systems that create order in communities, as legal pluralism has always emphasized following the classical reflections of Eugen Ehrlich? As Ehrlich put it in his *Fundamental Principles of the Sociology of Law* from 1913: »The inner order of the associations of human beings is not only the original, but also, down to the present time, the basic form of law. […] And in fact all these associations – whether they are organized or unorganized, and whether they are called country, home, residence, religious communion, family, circle of friends, social life, political party, industrial association, or good will of a business – make certain demands in exchange for that which they give; and the social norms which prevail in these communities are nothing more than the universally valid precipitate of the claims which the latter make upon the individual.«[13] This perspective, of course, not only directly paved the way for the study of legal pluralism, but also inevitably leads to the question of whether »law« should not be distinguished from other normative orders and by what means this would

13 Ehrlich: Fundamental Principles of the Sociology of Law, pp. 37, 63.

still be possible.[14] Apart from this long-running (largely conceptual) debate, the substantial question naturally arises as to how we can better understand these legal or even multinormative orders of communities, including their internal dynamics and tensions as well as their relations to their respective environments. What does it mean, both in terms of sociology of law and norm theory as well as for legal practice, that we never live in just one community, but typically belong to several of them at the same time, apart from the further question of whether these are arranged hierarchically, concentrically, in juxtaposition or in other constellations? What does this in turn imply for the character of their normative orders and the conflicts between multiple memberships? Lastly, to what extent is community even dependent on legal regulation, and – perhaps even more importantly – is all law ultimately based on a »belief in commonality« (*Gemeinsamkeitsglaube*), as also Weber might imply when he determines »law« primarily through a coercive apparatus, but underlies this with the idea of a shared, albeit possibly fictional, »consent«? Are communities eventually the birthplace of law, and is law ultimately something like the DNA of communities?

I. Law and Community: Some Remarks on a Complex Relationship

Our starting hypothesis is thus that the relationship between law and community is central to an adequate understanding of both spheres. Without a legal community as a basis for obligations and sanctions, the normative projections of professional guardians of justice all too often come to nothing; conversely, without legal penetration and consolidation, »imagined communities«[15] remain relevant as such: as social constructions, but they nevertheless cannot avoid also organizing their inner structure normatively and codifying relations of expectation vis-à-vis their environment. Ideally, this interplay should contribute to the »integration« of highly complex societies and possibly endow them with the resource of »solidarity«[16] – without setting the limits of all solidarity with the »limits of community«.

At this point it may be helpful to return to classical sociological considerations on the concept of community. Ferdinand Tönnies opens his famous work *Gemein-*

14 As classic positions, see, e. g., Griffiths: What is Legal Pluralism?, p. 39, on the one hand, and de Sousa Santos: Toward a New Common Sense, p. 429, as well as Merry: Legal Pluralism, pp. 878 et seq., on the other.

15 See Anderson: Imagined Communities.

16 Supiot (ed.): La Solidarité.

schaft und Gesellschaft[17] with examples on which he explores the semantic sensorium of linguistic communities. He does this in order to then contrast the *Aktiengesellschaft* (joint stock company, literally: »stock society«) with the *Forschungsgemeinschaft* (scientific or »research community«) in clearly legalistic terms. As much as it is claimed that Tönnies objectifies his central pair of concepts, this often overlooks the distinction between *Wesenwille* (»essential« or »natural will«) and *Kürwille* (»arbitrary« or »rational will«), which are precisely both volitional and conceived as based on subjective conceptions.[18] Even if this oppositional pair may seem linguistically old-fashioned to us today, its reference to the subjectivizing effect gains significance when the opaque formula of *Gemeinschaft* is dissolved with Weber into a »Gemeinsamkeits*glauben*« (»belief in commonality«).[19] It is precisely when *Einverständnisgemeinschaften* (roughly: »communities of consent«) establish the factual validity of normative orders by referring to a fictitious consensus in order to circumvent a substantive understanding of the social world – here in the sense of Weber's theory of action, which in turn distinguishes between *Gemeinschaftshandeln* (»communal action«) and *Gesellschaftshandeln* (»societal action«) – that the connection to the realm of the normative is established: Legal communities are then to be understood as *Einverständnisgemeinschaften* that are constituted in the first place by a *Gemeinsamkeitsglauben*, namely the shared belief in the existence of precisely this legal community.

This, of course, immediately leads to the problem of creating a common collective identity and almost as immediately renders the category of community highly ambivalent. Not least from a German perspective, it does not seem too surprising that René König, the head of the so-called »Cologne School« of post-war German sociology, wanted to banish the term from sociological usage altogether because of its history of abuse during the Nazi era.[20] While this reservation should be taken seriously, there is also reason to hold on to the concept of »community« for sociological or legal thinking, if only because it persists as an important practical operator in the subject matter of our disciplines even in less problematic contexts. It should not be seen as a semantic triviality, for instance, that the European community was conceived from the outset by Walter Hallstein and others as a »legal community« (which in turn has been described as »common knowledge of Euro-

17 Tönnies: Gemeinschaft und Gesellschaft.

18 We are proud that Niall Bond, Tönnies' great-grandson, has used his fellowship at our Centre to deepen our understanding of the relationship between law and community historically and systematically. On the pitfalls of translating the fundamental concepts of Tönnies' *opus magnum*, see, e.g., Bond: Gemeinschaft und Gesellschaft, as well as his contribution to the present volume.

19 This reading is emphasized in Gephart: L'identità sociale tra i concetti di *Gemeinsamkeitsglaube* e *solidarité sociale*.

20 See König: Die Begriffe Gemeinschaft und Gesellschaft bei Ferdinand Tönnies; on the label »Cologne School« see Moebius & Griesbacher: Gab es eine »Kölner Schule« der bundesrepublikanischen Soziologie?

pean studies«,[21] but what is perhaps less well known is that the use of the term »community« by the German negotiator Carl Friedrich Ophüls explicitly drew on Tönnies' famous distinction here[22]). Be they, as in this case, highly artificial and high-aggregated or small-scale and »organically« grown: the problem of the constitution and limitation of collectives, the production of their internal orders and the determination of their relations to their respective »others« in any case represents a fundamental sociological question of the first order. Thus the classical sociologists, each in their own way, have circled the problem of »community« and its limits, which Helmuth Plessner set out so clearly in his pivotal *Grenzen der Gemeinschaft*.[23] One of the main problems Plessner wrestled with in this influential work was the question (or rather: the impossibility) of the universalization of community; not least in view of the obvious legal implications of this basic idea, it might be useful to reflect below on some of the possible limits of universalistic community-building.

Some limits of universalistic communities

Paradigmatically formulated in Plessner's critique of »social radicalism«, the very idea of universal communitarisation comes up against structural limits that quickly lead the sociologist to ask whether the rhetoric of unity and community is in many cases nothing more than an illusion.[24] A crucial question for any realistic theory of »community« is therefore whether communitarian structures can be extended at all beyond small groups and primordial or particular ties:

1. The first problem could be called the problem of universalizing something that is essentially particular. This expression refers to the specific qualities and effects of physical co-presence and direct mutual perception, emotional closeness, harmonious interaction, etc., which are highly dependent on face-to-face relationships. To put it in the words of the phenomenological paradigm: the symbolic, affective, spatial and ultimately social structures of the »lifeworld« in Alfred Schütz's sense resist generalization and expansion beyond the boundaries of the bodily experienceable social world to a large extent.

21 Mayer: Europa als Rechtsgemeinschaft, p. 430 (»Allgemeingut der Europawissenschaften«); further also Stolleis: Europa als Rechtsgemeinschaft.

22 See Ophüls: Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung, p. 392, regarding his vision of Europe as a legal community. This sociological origin of the invention and naming of Europe has often been overlooked; it would probably be worth a study of its own. However, the problematic historical continuities must also be mentioned – Ophüls, for example, was a committed Nazi and a member of the NSDAP from 1933 to 1945 – which certainly cannot be disregarded in this context.

23 See Plessner: Grenzen der Gemeinschaft.

24 Ibid.

2. Secondly, there are equally inherent limits to what Benjamin Nelson has called »tribal brotherhood«.[25] One of the most radical forms of communitarian thinking in this sense is a consistent »ethics of fraternity« or »brotherliness« (*Brüderlichkeitsethik*) – as Max Weber calls it in the spirit of the Sermon on the Mount[26] – a universalist attitude that extends the ethics of emergency aid among relatives or spatial neighbours to the respective »neighbor« in a figurative sense. According to Weber's famous interpretation, however, this ethic stands in irreconcilable opposition to the inherent laws of the rationalized spheres of social life:[27] to the operational logics of politics and economics in particular, but also to those of the cultural spheres as represented by science and art. An ethics of boundless brother- or sisterhood therefore seems impossible in modern societies, if only because it is structurally opposed by the manifold obligations in other differentiated spheres in which the modern subject is involved. From this perspective, even the core of a particularist ethics of communalism proves to be not arbitrarily generalizable.

3. Thirdly, the generalization of »communality« is accompanied by limitations related to the inescapable tension (or even dialectic) of inclusion and exclusion. The principle of community and its social form cannot be entirely decoupled from the exclusion of those who are not part of that community; in extreme cases, this logic culminates in the distinction between »friend« and »enemy« as defined by Carl Schmitt.[28] Thus, the more a community is based on providing its own members with essential resources and life chances, which are typically scarce goods, the greater will be the tendency, from this perspective, to exclude others from its consumption. One does not even have to follow the so-called anthropological theory according to which the exclusion of the stranger is a condition for the survival of the group. For the communal form of association, however, the distinction between the »member« of the group and the »Other« seems to be constitutive, so that the idea of a universalistic community already encounters the logical problem here of having to determine its boundary and environment, whereas the world community of mankind as such does not know any »Other« but »nature«.[29]

4. In addition to these structural limits to universalization, which point to the necessity of overcoming hostilities through association and yet always lead back to the principle of discrimination against the »stranger«, it is also necessary to mention some »material« limits to the universalization of community, which

25 See Nelson: The Idea of Usury.

26 See Weber: Zwischenbetrachtung.

27 The metaphor of »sphere« and its use in Weber is discussed in detail by Gephart: »Sphären« als Orte der okzidentalen Rationalisierung.

28 Schmitt: Der Begriff des Politischen.

29 As Simmel shows in his brilliant essay on the »stranger«, it is a very specific, dynamic and interactive position that defines a member of a group as a »stranger«: This places him or her in a distinctive social relation with dominant factions, which in turn enables him or her to play the role of mediator between different, perhaps opposing, groups. See Simmel: Exkurs über den Fremden.

were often considered overcome in a partly naïve debate on globalization.[30] These limits consist not only in the difficulty of transcending local and spatial ties, but also in overcoming those intersectional tensions in which geographical and class positions correlate closely with the distribution of life chances in global society: Universalist ideas of community thus ultimately refer to the pipe dream of a global classless society, whereby the idea of egalitarian communalism is also countered by the finding of a pluralisation of lifestyles that is always also materially based. Integration by way of »multiple differentiation«, as one can already read Durkheim's study of the division of labour and Simmel's work on the »intersection of social circles«[31] and as it is also increasingly represented as a strong position in social theoretical discourse in recent times,[32] is then however neither at the national nor even at the supranational level compatible with the idea of a powerful »societal community«, to take up Parsons' term here.[33] Ultimately, then, what is at stake at this point is the inherent conflict structures that still exist even within so-called »communities«, which are further potentiated at a higher aggregate level and cannot simply be dissolved into thin air by the invocation of universalism.

In face of this provisional deconstruction of a transcendence of the particular by the universal, towards a global paradise of harmonious-peaceful community relations, the question nevertheless remains whether and in what sense one can speak of a renaissance of »community« in times of collective fears and concerns, as can be diagnosed in view of, among other things, the Covid-19 crisis, the climate catastrophe, old and new wars as well as a return of authoritarianism in many parts of the world. Following Weber, the degree to which community can be universalized – for example, into a global community of law – would depend on the extent to which a belief in communality (»Gemeinsamkeitsglaube«) can be created that transcends the local – and at least the pandemic and global warming could leave room for some hope at this point. Sociologically, however, a realistic position that corresponds to the character of sociology as a *Wirklichkeitswissenschaft* would be that only an increasingly complex nesting of universalistic and particularistic affiliations, orientations and community forms seems conceivable.[34]

In other words: The utopia of a universalistic community, as it was conceived by Parsons, obviously needs a correction to the effect that »communities« that

30 See, e. g., Schneickert, Schmitz & Witte: Das Feld der Macht (esp. ch. 5, pp. 103–152), for an overview.

31 Durkheim: De la division du travail social; Simmel: Über sociale Differenzierung.

32 See, e. g., Renn: Übersetzungsverhältnisse; from a field-theoretical perspective Witte: Zur Verknüpfung von sachlicher Differenzierung und sozialer Ungleichheit; Schneickert, Schmitz & Witte: Das Feld der Macht, ch. 4, pp. 61–102.

33 The central text for this is Parsons' posthumously published *American Society*, which also offers a reconstruction of the development of communal thought from *The Structure of Social Action* to *The System of Modern Societies*.

34 As argued in Gephart: Gesellschaftstheorie und Recht, pp. 208 et seqq.

still deserve this term and would be able to escape the tension between emotional closeness and bureaucratic efficiency, between rural idyll and urbanity or between local ties and global interdependencies, are at best still conceivable as loose »communication communities«. This construction then also reflects the secret community theory behind Jürgen Habermas' theory of communicative action in a version adjusted with Luhmann;[35] and especially with regard to the topic of law, impulses for a sociological theory of »community« can be gained from this, the subject of which is pre-loaded in many respects and yet nevertheless appears indispensable. The price for this, however, and this remains the downside, is not small, because this terminological manoeuvre is itself only possible if the »community« concept is largely robbed of its original content and applied to large-scale, usually largely anonymous figurations.

Finally, the tension that appears in theories of legal pluralism as a contradiction between normative orders only becomes truly explosive because behind the various religious and legal, indigenous and colonial, local, regional and national normative orders there are concrete social communities that seek to assert their claims; and of course, these communities in turn often form conflictual relations with each other, which renders overarching legal bonds principally unstable and also causes the often invoked, legally positive universal »culture of human rights« to appear highly fragile from the outset.

Of families, neighbourhoods, and neo-communities: Particularistic communities, normative pluralism, and the law

The social and affective boundaries of a universalistic community thus simultaneously reflect, to a certain extent, the boundaries of the community of law that shapes the lives of those subject to it. The decreasing relevance of primordial ties, however, suggests that for the present contexts, we should once again take a closer look at what Tönnies called »communities of blood«: Even in global modernity and in the face of a pluralization of community forms, the *family* can still be considered a central social place where normative patterns and resources of society are produced.[36] Moreover, the family continues to be a central addressee in orders of the distribution of goods and mutual obligations,[37] which are therefore sometimes

35 See, e. g., Luhmann's critique of Habermas' discourse theory of law and democracy: Quod omnes tangit.

36 On which cf. Beck-Gernsheim: Im Kreuzfeuer. On the legal handling of the multitude of new family forms cp., e. g., Dethloff: Changing Family Forms. See also, among others, Marschelke's contribution in this volume, who uses the example of the normative orders of the family to illustrate his predominantly theoretical considerations.

37 On the European level, this issue was intensively discussed during our conference on »Family

seen as a real or even imagined starting point for the transfer of norms from the family unit to society as a whole. In this sense, *family law* then also comes into view as a mirror of changing family forms and family ideals, of life in a community characterized by social proximity and emotional entanglements.[38] The pluralization of family structures thereby can be seen as a concomitant of other processes of social change and of transformations of the normative foundations of societies in general.[39] Accordingly, changing family structures, and the study of family law as a methodological approach, may in turn serve as the starting point for *cultural comparison*: Nowhere does the construction of the collective »self« and the »Other«[40] seem to be so deeply anchored in the intuitions and convictions of collective memory, which shapes both the past and the future, as in the case of the family. The communal form of the »family« and debates about what constitutes its normative character hence possess a kind of universal cultural significance (»*Kulturbedeutung*«); however, these very debates can therefore also ignite *cultural validity conflicts*, which can then in turn manifest themselves in legal conflicts.[41] The fact that international family law sometimes enables and demands the application of the law of the »Other« is sufficiently well known in the discussion about the realities of »legal pluralism«, but has not yet penetrated general awareness. In the European legal space, the principle of party autonomy links the traditionally competing ties of nationality and residence in the areas of family and inheritance law, each of which struggles to satisfy legal-cultural ties and integration interests.[42] At the same time, European legal history has a normative model of the coexistence of Jews, Christians and Muslims that could be put to the test again under the guiding idea of *convivencia* as myth and social reality.[43]

Law and Culture in Europe: New Developments, Challenges, and Opportunities« (August 29–31, 2013). Cf. also the conference volume by Boele-Woelki, Dethloff & Gephart (eds.): Family Law and Culture in Europe, particularly the final contribution by Gephart: Family Law as Culture.

38 In his *Introduction to the Sociology of Family*, Durkheim wrote: »In summary, it is the inner structure of family that we need to attempt to reconstruct because it alone is of scientific interest.« Durkheim sees only one way to carry out such an analysis of internal structures, namely the observation of the »ways of acting as have become established through use, known as customs, law and manners« (both quotes translated by the authors from Durkheim: Einführung in die Soziologie der Familie, p. 62). According to Durkheim, the secret of family structure thus reveals itself where the normative aspects of family life condense into a normative order. In this respect, then, family law is at the cradle of the birth of sociology from the spirit of law (cf. Gephart: Gesellschaftstheorie und Recht).

39 See Knecht: Die Politik der Verwandtschaft neu denken.

40 On the latter's historical role in the construction of European identity, cp. Sakrani: The Law of the Other.

41 From the context of the Center's work, see the contribution by Gephart & Sakrani: ›Recht‹ und ›Geltungskultur‹; further Büchler: Islamic Law in Europe?

42 Dethloff: Zusammenspiel der Rechtsquellen aus privatrechtlicher Sicht, at pp. 60 seqq; cf. also Mansel: Personalstatut, Staatsangehörigkeit und Effektivität, Mn 570; Mansel: Das Staatsangehörigkeitsprinzip im deutschen und gemeinschaftsrechtlichen Internationalen Privatrecht, p. 138.

43 This was discussed by Raja Sakrani in her lecture on »The Three Cultures. Living together in Al-Andalus« at the »Forum Law as Culture« on 24 November 2015.

The terrain thus explored, not least in methodological terms, also opens up the view for further levels of comparison when other forms of community are considered in addition to the family and its relationship to applicable law: for example, traditional local neighbourhood communities with their diverse orally transmitted legal claims, contemporary »post-traditional communities«,[44] as they were long subsumed under the term »subcultures«, and finally also neo-communities that explicitly form around an exclamated counter-law and corresponding claims to validity. In all of these community forms, their own normative orders emerge, which can come into conflict with state law. Some of the Kolleg's central guiding questions once again become virulent here: What is the possibly conflictual relationship between particular and universal claims to validity in these and many other cases? How far does the acceptance of valid law extend in each of these communities, and to what extent does this acceptance lead either to pragmatic attempts to »harmonize« state law pragmatically with one's own normative ideas or also to enforce the latter beyond the boundaries of one's own community?

Neighbourhood communities have historically always been a challenge to state claims to power – i. e. to an expanded codified law – because in many cases a network of social norms is woven here and handed down in an informal way, stabilized by a tight system of social control and, culturally, by the formation of local identities, which may well come into conflict with applicable law. Although they usually do not claim universal validity, these local normative orders nevertheless form a potential for resistance – a resistance that can sometimes even turn into local »counter-rights« (»it is written, but we have always done it this way«). *Post-traditional communities* of various kinds also typically develop their own normative internal orders, whereby the degree of conflict with applicable state law can be very different: from loose community forms with their own rituals and conventions, which at best behave indifferently towards other normative orders, to conspiratorial subcultures whose norms regularly come into open conflict with state law. A special case of the latter form, so to speak, is represented by those (neo-)communities that are more or less first constituted through their explicitly *anti-legal orientations* or even the reference to a *counter-law*, for which criticism, questioning or even resistance to existing law is part of the constitutive core of identity and is often also complemented by principally diverging conceptions of law: One might think here of the »Souvereign Citizen« or the German »Reichsbürger« movements, whose questioning of existing law extends to denying the existence of the state itself (and beyond), but similar tendencies can also be identified, for instance, in the far-right milieu of the protests against the Corona meas-

44 Hitzler, Honer & Pfadenhauer (eds.): Posttraditionale Gemeinschaften.

ures, or in the anti-legal normative order of the Mafia.[45] In any case, all these exemplary figurations show that »proper law« can enter into relationships of both intertwining and conflict with the social norms of certain groups that are neither organizations nor »societies« in the Tönniesian sense, but rather specific types of »communities« – a thematic field that can only be sketched here and certainly requires further, more in-depth research.

From this sketch, some outlines of the two-year thematic field of the Käte Hamburger Center »Law as Culture«, from which this conference volume results, emerge: This terrain includes the question of different community structures and their respective normative orders – from friendship and family structures to local and regional units such as *Gebietskörperschaften* to national communities, insofar as one wants to think of »nations« as held together by a belief in commonality. In addition, there are new forms of community that develop in the course of social transformation processes: digital communities, for example, which are based on the shared use of specific communication media and can be structured by their own »digital cultures«. Their basis is admittedly different from that of many other forms of communalization: fundamental common values and norms such as universal human rights, global institutions, but especially events such as wars or global threats to the »world risk society«[46] are capable of constituting communities of mourning and fate that are not held together on a voluntary basis, but by what one might call »cognitive coercion«. The Covid-19 crisis provides the most recent example – an example, however, in which we are still living. It thus also provides a laboratory of normative space, as Angela Condello rightly called it in her analysis of the pandemic in the light of the »Law as Culture« paradigm.[47] Other examples, of course, have to be explored by other means – the contributions in this volume represent samples of such an exploration of a terrain that has not been fully measured.

II. About the Contributions

The breadth of the topics gathered in this volume is ambitious: In the first part, we hope to shed some light on the relations between law and community from a theoretical perspective. At the beginning of this attempt to make sociological theory fruitful all the way back to the classics may be the legacy of Romanticism, as Niall Bond shows in his knowledgeable contribution on Ferdinand Tönnies and his seminal work *Gemeinschaft und Gesellschaft*, even if, according to Bond, this legacy

45 See the most inspiring, systematically and empirically convincing study by Villegas: L'ordre juridique mafieux.

46 Beck: World Risk Society.

47 Condello: Immersed in a Normative Laboratory.

is tempered in Tönnies by his »commitment to the mastery of the world through science«. Although the closeness of the semantics of »community« to the culture of traditional Japanese society is arguably more than a mere proto-sociological cliché, Masahiro Noguchi's contribution on the enormous complexity of translating this term opens our eyes to the diverse receptions of German sociological thought, especially Tönnies, in Japan, and thus at the same time a door for a comparative cultural sociology of community itself. The legacy of Émile Durkheim comes alive in the contribution by Roger Cotterrell, who, in linking the theory of community with the normative frameworks of multicultural societies, at the same time brilliantly sums up his longstanding engagement with these fundamental questions. While Lior Barshack, following Hannah Arendt, opens up a surprising arena of thinking about communities via her political theory of private and public »bodies« – and thus at the same time provides wonderful insights into the symbolic and ritual dimension of differentiated spheres of social life – Jan-Christoph Marschelke's chapter takes another theoretical step by introducing theories of practice into the debate: »Community« (as well as »law«) emerges from this perspective as a concept that appears much less opaque when the everyday practical production of collectivity and normativity is analysed as a »doing«.

As already mentioned, a comparative perspective is inevitable in the debate on »communities and the(ir) law«. Admittedly, we would have liked to see an even broader panorama of community types pass before our eyes in this volume: From ancient Judaism to modern Far Eastern societies; from Greek antiquity to the indigenous collectives of South America; the European types of community formation in all their varieties from feudal court society to the »delayed« process of nation-building in Germany;[48] the community cult of the USA, repeatedly challenged by racial segregation and civil rights movements up to #BlackLivesMatter, as well as community practices in the Japanese Togkugawa religion or contemporary China. Such a claim to catalogical »completeness« would, however, be presumptuous and would hopelessly overload this volume.[49] Nevertheless, we temporarily travel to Indonesia with Rosy Antons-Sutanto and Christoph Antons, delve into the pre-colonial normative order of the Nigerian Ogba people with Chioma Daisy Onyige, and get to know new, also systematically stimulating aspects of the interactions between Islamic legal cultures and their »Others« with Raja Sakrani and Payam Ahmadi-Rouzbahani; we take another look at the construction of Europe as a »legal community« with the expert support of Matthias Herdegen and have to learn more about Nazi Germany's abysmal dream of com-

48 Plessner: Die verspätete Nation.

49 In his evolutionary phase, Talcott Parsons narrates the history of societies as a transformation of the communal sphere in a comparative way. For this reading, see Gephart: Gesellschaftstheorie und Recht, pp. 208 et seqq.

munity as well as its racist normative order from one of the greatest specialists in this field, Olivier Jouanjan.

Finally, in the last part, we turn to old and also new forms of communalization with their corresponding normativities: Matthias Weller raises the question of whether the restitution of the works of art looted by the Nazis can create a new kind of community between the victims and the successor generation of the perpetrators: Are »just and fair solutions« also possible against this background, what might they look like and can or must they go beyond purely formal-rational law? With Pierre Brunet, we then explore the questions of whether we are moving towards a kind of animistic legal ontology in the face of the climate catastrophe, of how »the West« can be irritated by and learn from other collectives in this context, and of how the confrontation with other political-ecological ontologies could be translated into new legal forms without again falling into new essentialisms. Yousra Abourabi also deals with anthropogenic climate change and the recognition of nature and the environment as legal subjects when she looks at a changed ecological consciousness around which new communities with their own normativities are forming. The extent to which the emergence of new forms of community in the digital sphere is also accompanied by the emergence of new norms and rules is the subject of Daniel Zimmer's contribution, whereby the focus here is rather on the regulation *of* practice by and in communities: on the one hand, through algorithmically implemented or otherwise enforced rules of conduct by platforms themselves, but on the other hand also through attempts by the state to set legal limits to certain developments – includeng the crucial question of the relationship between private regulation and state-legislated law. Werner Gephart concludes the volume with a look at the transformation of normative orders in the course of the Covid-19 pandemic, in which a specific »pandemic culture of validity« may have emerged, which has nevertheless differentiated into different factions over time.

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In this respect, this volume attempts to cover a wide range: from theoretical reflections on the principal ambivalences of community formation and its particular normative ordering effects, to an approach of placing the diversity of social and legal communities in a comparative horizon, and finally to an attempt to trace the virulence of the intertwining of communities and law in the course of entirely new community experiences – in order to come a little closer to an understanding of the role of communities and their own normativity in multicultural, post-traditional societies.

On this journey, further questions emerge that are probably too big to be answered within the framework of individual contributions or even an entire volume. What are the specific features of communities' normative orders that might distin-

guish them from the normative structures of other social units? What is the significance here of the respective formal or substantial character of the community in question on the one hand, and its specific histories, path dependencies and cultural embeddings on the other? How do the normative orders of different communities relate to each other and to other normative systems? Do the law of communities and community-creating effects legitimize each other mutually – and could we speak of special »community cultures of validity« in this respect? How can the paradoxes of community formation be overcome if their claim to validity can be derived from binding forces that are at the same time always accompanied by social control and social exclusion? And is it perhaps ultimately the character of the respective normative order that makes the difference at all between, for example, religious and political communities, pandemic and ecological risk communities, circles of friends, and internet communities? If such broader questions are at least raised by the contributions now available here and a reflection on them is encouraged, if hopefully further questions are also stimulated and if perhaps answers are also given to one or the other intermediate question, this would, in our view, already be a success of this attempt to add another aspect to the analysis of law understood as »cultural research«.

Werner Gephart and Daniel Witte Bonn, October 2022

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