KAILASHCHANDRA DHAR

MEANING AND POWER IN THE LANGUAGE OF LAW

HISTORICAL IDEAS (VOLUME 1)

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An Overview
Why a Global History of Ideas in the Language of Law?

A. The history of ideas as a history of languages

Studies on what is referred to as universal history, world story, or, more and more frequently, global history are enjoying a heyday.[1] This can also be said for the global history of ideas,[2] which can be considered a variety of global history.[3] Different methodological approaches can be adopted in a global history of ideas. Some authors, like David Armitage, concern themselves with the origins and spread of "big ideas."[4] This is not our chosen path; with Martin Mulsow, we consider such a narrow concept of "idea" not very useful.[5] A second and particularly popular approach is to treat the history of ideas as a history of interaction[6] looking at "intermediaries, translations, and networks."[7] This is a tempting perspective,[8] and we shall be considering it in some detail at a later stage. At present, however, we will be looking at a

1 See Bayly (2006); Budde et al. (eds.) (2006); Conrad et. al. (eds.) (2007a); Sachsenmaier (2011); Conrad (2013).

2 On the global history of ideas see, above all, Moyn / Sartori (eds.) (2013); Osterhammel (2015); Mulsow (2016); Mulsow (2015).

3 In the view of Conrad – which we share – global history is more a perspective than a subject. A vast range of subject matter can accordingly be examined from a global history perspective: "Basically, a global history perspective can be adopted by all historiographical approaches", Conrad (2013) 13.

4 See Armitage (2012).

5 Mulsow (2015) 19: "Ideas, theories, portions of theory, points of view in a broad sense are conveyed together with the concomitant informational elements, religious attitudes, physical carriers, and cultural practices. It cannot be helpful to subject the history of ideas to puristic reduction."

6 Mulsow (2015) 1–21.

7 Moyn / Sartori (eds.) (2013) 3–30.

8 See Schuppert, G. F. (2014); Schuppert, G. F. (2015).

"third way," at writing a history of ideas as a history of languages: the languages used in public discourses on the common good and on the good and just order of things – the languages, for instance, of theology, philosophy,[9] law, and, increasingly, economics.

Centre stage in the history of ideas as a history of languages is John G. A. Pocock, who, along with Quentin Skinner, founded the reputation of the "Cambridge School of Intellectual History."[10] As the name suggests, it is really a style or school of thought,[11] whose influence is difficult to overestimate.

What this "Cambridge School" is about is perhaps best explained by John G. A. Pocock in his now classic 1962 essay "History of Political Thought."[12] Pocock names his point of departure already in the second paragraph: discussions in the higher spheres of politics are conducted in one or more languages that can be described as *political language(s)*: "… a political scientist may … be interested in the relations between the political activities, institutions and traditions of a society and the terms in which that political complex is from time to time expressed and commented on, and in the uses to which those terms are put; in short, in the functions within a political society of what may be called its language (or languages) of politics."[13]

Quentin Skinner,[14] too, posits that political thought is embedded in the context of the political life and action of a social community[15] and that the language used by the people involved is also socially embedded: "*The political thinker is a social being and his thoughts are social actions or events*. The words and concepts he uses are part of a shared inheritance which severely constrain his liberty to conceptualize and theorize. It is shared inheritance, variously named traditions, universes of discourse, *languages of legitimation*,

9 Mulsow (2015) 9: "Decisive frameworks for ideas are often philosophical and philosophico-theological languages. They determine and influence the speech acts performed in them."

10 See the articles in: Mulsow/Mahler (eds.) (2010); the outstanding introduction in Rosa (1994).

11 See Fleck (1980).

12 Pocock (1962).

13 Pocock (1962) 183.

14 See, above all, his key article: Skinner (1988).

15 Rosa (1994) 199.

vocabularies, and paradigms, which must provide the context in which individual thinkers perform their social actions."[16]

On closer inspection, the public discourse in a society uses not only *one* political language but several such languages: "Any stable and articulate society possesses concepts with which to discuss its political affairs, and associates these to form groups of languages. There is no reason to suppose that a society will have only one such language; we may rather expect to find several, differing in the departments of social activity from which they originate, the uses to which they are put and the modifications which they undergo."[17]

Does the language of law have its place in this repertoire? Pocock believes so: "Some [of those political languages] originate in the technical vocabulary of one of society's institutionalized modes of regulating public affairs. *Western political thought has been conducted largely in the vocabulary of law*, Confucian Chinese in that of ritual. Others originate in the vocabulary of some social process which has become relevant to politics: theology in an ecclesiastical society, land tenure in a feudal society, technology in an industrial society."[18]

Quentin Skinner, too, not only testifies to the important role of the language of law in the political discourse but complains of the predominance of a "law-centric paradigm"[19] that needs to be balanced by a humanistic-republican paradigm as a sort of counter ideology.[20]

This brief review of the "Cambridge School" indicates that political languages are used in every society where policy design and political ideas are discussed: until the advent of modernity first and foremost the language of theology, in early modern times theological-philosophical language, and, in the present age, often the language of economics – reflecting the economization of almost all areas of life. Above all in early modernity, the language of law predominated among these political languages.

It is our impression that the language of law no longer plays a key, or even major role in the history of ideas. At an international conference "Towards a

16 Boucher (1985) 155; quoted from Rosa (1994) 199.
17 Pocock (1962) 195.
18 Pocock (1962) 195.
19 Skinner (1978).
20 Rosa (1994) 208.

Global History of Ideas" staged by the Max Weber College for Cultural and Social Science Studies at the University of Erfurt in July 2017, law was not mentioned. And in his paper on "elements of a globalized intellectual history of premodernity," Martin Mulsow[21] failed to mention the language of the philosophy of law when discussing the globalization of philosophical languages.

The marginalization of the language of law to be observed in discourses on the global history of ideas and knowledge does not do justice to the undeniably prominent role it played in early modernity and fails to recognize the *important potential of the language of law for a future history of ideas and knowledge*.

This is the concern of this book: to explain *the language of law as a language of politics* in discourses on the good and just order of society. As the following five points convincingly show, it is well worth examining the potential of the language of law for a global history of ideas and knowledge.

B. The language of law as a language of politics relevant to the history of ideas: five functions in five contexts

I. The language of law as a language of discourses on the legitimacy of political authority

As Hartmut Rosa has clearly demonstrated for the Cambridge School, discourses conducted in political language are above all *discourses about legitimacy*, a function that comes to the fore principally when old and outdated orders are to be overcome. The success of such ventures can be substantially furthered if a *new language* with new concepts is available that is able to convey the new content. With reference to John G. A. Pocock, Hartmut Rosa writes:

> "Revolutions and changes in paradigm occur … Where social or societal changes can no longer be adequately captured, legitimized, or explained in the prevailing vocabulary; where, to use Kuhn's terminology, societal anomalies occur. As in Kuhn's theory, anomalies in science impose adaptation of the prevailing paradigm, and, if this fails, produce 'scientific revolutions.' According to Pocock, a political community (in the shape of its political thinkers) seeks to adapt the existing lin-

21 Mulsow (2016).

> guistic system to new situations or to replace it by a different 'language.' … An example of such a process that Pocock cites are the upheavals in the English political system in the 1640s. In the first half of the seventeenth century, the political vocabulary in England was dominated by such ideas and concepts as tradition, convention, and custom. The key concepts were 'ancient constitution' and 'common law.' But this vocabulary could be applied only to situations characterized by continuity; it was completely unsuited for explaining, let alone justifying radical change."[22]

With Pocock's remarks in mind, we turn to two examples of how the legitimacy of political authority is handled discursively *in two sublanguages of the language of law*. The first is the language of global constitutionalism with its two legal sublanguages, the language of human rights[23] and the language of the rule of law.[24]

The language of global constitutionalism

In the debate about models of global order,[25] the concept of global constitutionalism[26] plays a prominent part, not in the sense of a utopian call for a world constitution, and not – as Anne Peters suggests[27] – in the sense of "compensatory constitutionalism" to make up for national constitutions' lack of reach, but as a "*global legal script*" in discourses on the justification of political authority wherever and in whatever guise. Mattias Kumm et al. have set out this claim to global validity in an editorial marking the third year of publication of the journal "Global Constitutionalism." They first address the "Trinitarian mantra of the constitutionalist faith," namely "human rights, democracy and the rule of law":

> "The publication record over the first couple of years also reflects the fact that constitutive and fundamental norms that implicate questions of legitimate authority generally include a commitment to human rights, democracy and the rule of law. The commitment to human rights, democracy and the rule of law – *the Trinitarian mantra of the constitutionalist faith* – is part of the deep grammar of the

22 Rosa (1994) 206.
23 On the concept of universal human rights as a "juridified revolution" see Schuppert, G. F. (2015) 247 f.
24 On the globalization of rule of law principles as an applied case of discursive lawmaking, Schuppert, G. F. (2015) 257.
25 See Zürn (2011b) 78.
26 Law/Versteeg (2011) 1163; Schwöbel (2011) 1.
27 Peters (2015) 1484.

> modern constitutionalist tradition. It provides an abstract template of principles in the light of which concrete arrangements are negotiated and policies are forged in contemporary constitutionalist settings. Within this constitutionalist framework, wherever political and legal authority is constituted or exercised, it can be criticized or justified with reference to these concepts."[28]

On closer inspection, the core of the "global constitutionalism" concept consists – secondly – in a *global language* to be employed in discourses on the justification or limitation of political authority. On this *claim to universality*, the authors comment:

> "The '*legitimatory trinity*' as a central feature of a modern constitutional discourse came into the world with the French and American Revolutions and was internally connected to ideas of individual and collective self-government at the time. It went through various challenges and permutations before it re-emerged after World War II to become a globally hegemonic discourse since the 1990s, both in and beyond the state. There is no liberal constitution enacted after 1990 that does not pledge allegiance to the trinity in some way. The European Union asserts that these are its foundational values, the Council of Europe has embraced it, the UN claims to be committed to it and various General Assembly Resolutions have endorsed it. In global public discourse *this is the language most likely to be used* and most likely to be effective when either contesting or resisting authority or using it to justify the imposition of restrictions on others."[29]

The language of legal pluralism

The critical and emancipatory potential of the language of law is demonstrated by one of the most prominent representatives of legal pluralism, Boaventura de Sousa Santos (* 1940). His 1977 essay on "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada"[30] reveals the political thrust of his work: he opposes the state monopoly on law and wants to give, or return, a degree of autonomy to the normative order, especially in socially disadvantaged communities. In contrast to other well-known theoreticians of legal pluralism such as John Griffith[31] and Marc Galanter,[32] "he does not look for legal pluralism in indigenous commun-

28 Kumm et al. (2014) 1.
29 Kumm et al. (2014) 4.
30 de Sousa Santos (1977).
31 Griffith (1986).
32 Galanter (1981).

ities. He looks for it in the precarious conditions on the fringes of urban centres of modernity: in the favelas of Rio de Janeiro. He has given the name Pasargada to this urban time-space he studies."[33]

He wants to liberate the various social spheres existing in differentiated societies from the hegemony of state law and have their intrinsic normative value recognized. Innate to the "*new legal common sense*"[34] he propagates is a clear *emancipatory tendency*, which Ralf Seinecke outlines as follows:

> "This demands not an instrumental but an emancipatory juridification of social affairs. His postmodern law gives back their intrinsic law to social spheres, frees them from the exclusive hegemony of state and formal law. This postmodern or plural law lends the various social spheres greater potential for reflection because it places their (autonomous) law, their (autonomous) power, and their (autonomous) knowledge in competition with the law, power, and knowledge of the state and of other structural spaces. This juridification of the social measures actual social structures by the normative standards of the law and puts it under greater *pressure for legitimation.* Law and rightness are more closely related than social authority, social power, and social justice."[35]

In the emancipation of non-state "normative spaces," Santos suggests that an important role could be played by the language of law, which imagines these social spaces and provides not only orientation like a map but can also generates its own reality.

> "My argument is that there are many unresolved problems in the sociological study of the law that may be solved by comparing law with other ways of imagining the real. Maps are one such way. There are, in fact, striking similarities between the laws and maps – both concerning their structural features and their use patterns. Obviously, laws are maps only in the metaphorical sense. But, as rhetoric also teaches us, the repeated use of a metaphor over a long period of time may gradually transform the metaphorical description into a literal description. Today laws are maps in a metaphorical sense. Tomorrow they may be maps in a literal sense."[36]

Closely related to the language of law as a language of discourses on the legitimacy of political authority is its application as a language of political change, which brings out its ability to convey new ideas particularly clearly.

33 Seinecke (2015) 209.
34 For more detail see de Sousa Santos (2002).
35 de Sousa Santos (2002) 229.
36 de Sousa Santos (1987) 286.

II. The language of law as a language of political change

As we have seen, using a language – whether that of theology, philosophy, or law – as a language of politics is not about the inconsequential instruction of the reader but about achieving something, about changing a social reality no longer considered acceptable. To quote John L. Austin, it is about "how to do things with words."[37] Heinrich Heine, one of the most acute and sharp-tongued observers of political affairs in both Germany and France, had this to say about the *incantations* circulating in the political debate on the French Revolution: "… they are incantations mightier than gold and guns, words with which the dead are called out of their graves and the living sent to their death. Words that make giants out of dwarves and shatter giants, words that sever all your power like the guillotine a king's neck."[38]

Some will find this too dramatic and will prefer to formulate the issue in linguistic terms, speaking of the *performative use*[39] of every language of politics. This also holds for the language of law in this capacity.

1. The language of law used in legal policy as "performative language"

In a recent article on "Law as the Subject of Jurisprudence and Law Production", Thilo Kuntz[40] complains of the self-imposed, narrow limitation of jurisprudence to the law "in force". He shows that not only classical law-making but also its realization and interpretation involve producing law in and through language. Kuntz calls this *performative law production*:[41]

> "Law is constituted linguistically whether it is written or unwritten law. The only medium available is the linguistic utterance. The type of legal source, law, or ruling, whether precedent or some other form is immaterial. There is a 'fundamental … dependence of legal rules and values (requirement, validity, normativity, and obligation) on a legal culture tied to language and its media.'[42] The dependence of law on language is apparent on (at least) two levels: law is not only linguistically *constituted*, it is also *produced* in and through language. The production of law is based on speech acts by the competent authorities. It is an example of the possibility of not

37 Austin (1962).
38 Heine (1971) 103. Transl. R. B.
39 On performativity see Wirth (ed.) (2002); Bachmann-Medick (2009) 104–143.
40 Kuntz (2016).
41 Kuntz (2016) 18.
42 Vesting (2011b) 42.

> only describing the world by means of speech act but also of *changing* it. In other words, the production of law is an example of a performative speech act:[43] if someone with the relevant authority makes a linguistic utterance to the effect that certain conduct is liable to prosecution or that a certain option is available, for instance a company limited by shares, performance of these speech acts bring about criminal liability and creates the company limited by shares as a legal form. These are examples of "performance of an act *in* saying something."[44]

If we apply these reflections of Thilo Kuntz on the performative production of law to the language of law concerned with political change – that is to say, as a language of politics – we can rightly speak of the language of law as performative language. This performative language of law can be used in two ways: first to defend the existing order – under such headings as tradition and acquired rights – and as a fanfare for revolution.[45] The latter almost inevitably invites brief consideration of the French Revolution and its revolutionary (legal) language.

2. Revolutions and their revolutionary (legal) language: the example of the French Revolution

When it comes to discussing the French Revolution, it is only right to give the floor to a Frenchman. Particularly eloquent is Pierre Rosanvallon, who has this to say about the language of the French Revolution:[46]

> "From the beginning of the Revolution it was clear that a new vocabulary was needed to describe the motives and principles of the new political order that was being established. One no longer spoke of subjects, for example, but of citizens; not of a kingdom but of a nation; and so on. It was a time of extraordinary inventiveness in this connection, and *a novel political language* did in fact emerge. But not only was it a language in flux, it was liable to be corrupted as well. Some of the most bitter recriminations expressed during the Terror concerned just this point. Thus Sieyès, the father of the first French Constitution, scathingly denounced "the infamous prostitution of the words most dear to French hearts, Liberty, Equality, People," considering "the abuse of what once was a common language" to be by no means

43 Monography: Müller-Mall (2012).

44 Müller-Mall (2012) 8.

45 On the role of the lawyer, see Schmitt (2008) 491: "Of every revolutionary movement it can be said that the lawyer, the 'theologian of the prevailing order' is seen as its special enemy, while, vice versa, it is precisely the lawyers in particular who are on the side of the revolution and who lend it the pathos of oppressed and insulted law."

46 Rosanvallon (2018) 228.

> the least source of the misfortunes of the age, words having now lost their natural meaning and been made to "conspire with the enemies of our country."[47]

In view of the susceptibility of probably all political language to abuse, it is no surprise that in turbulent revolutionary times attempts were made to discipline the use of language; Rosanvallon reports:

> "Condorcet's purpose in founding the *Journal d'instruction sociale*, in 1793, was more pedagogical than punitive. Its objective was to 'combat political charlatans'[48] by elucidating the key terms of an orthodox political lexicon and thereby limit variant and illegitimate interpretations. The journal's motto was simply stated: 'Reason is one, and has only one language.'[49] In the same spirit, Sieyès proposed that an attempt be made to 'fix the language,' giving it a stable and permanent form by means of conventions, and thus to provided politics with a 'proper language' uncontaminated by the imprecision of 'natual language.' Sieyès was seconded in this by Destutt de Tracy, author of five-volume *Éléments d'idéologie* (1801–1815), who sought to create an 'analytic language' that would help modify and improve the practice of democracy.[50] The utopian conception of linguistic purity as the condition of plain speaking came to nothing in either case, but there was no getting around the necessity of confronting fundamental questions arising from the indefinite character of political semantics. Democracy is, after all, a regime that unavoidably involves continual and perpetual debate over is basic concepts and terminology."[51]

The plausible conclusion is that democracy is a form of political sociation whose task it is to permanently reflect on the type and quality of the performative language practised within it.

Finally, we take a look at the particularly interesting language of institutional legal thought under the National Socialist regime.

3. The institutional legal thinking of the Carl Schmitt School: an example of the susceptibility of the language of law to abuse

This is not the place to go into the interesting history of institutional legal thought[52] or to examine, let alone question, whether we are witnessing a

47 Guilhaumou (2002) 31, as quoted by Rosanvallon (2018) 228.
48 Condorcet (1793), prospectus of this journal, 10.
49 Condorcet (1793), prospectus of this journal, 10–11.
50 See Schlieben-Lange (1996).
51 Schlieben-Lange (1996) 232–233.
52 See Rüthers (1970); also Meinel (2011).

renaissance of the institutional perspective[53] or its replacement by an individual basic rights perspective, such as Hans-Michael Heinig and Christian Walter propagate for public ecclesiastical law.[54] Instead, we shall examine the *concrete order thinking* of Carl Schmitt, because this example can teach us a great deal about the *susceptibility of the language of law to instrumentalization*.

a) The concept and function of concrete order thinking

The concept of *concrete order thinking* goes back to the treatise Carl Schmitt published in 1934 under the title "On the Three Types of Juristic Thought",[55] which introduces the notion of "concrete order and formation thinking" as follows: "every lawyer who consciously or unconsciously bases his work on the concept of '*law*' understands this law either as a *rule*, or a *decision*, or as a concrete *order and formation*. This determines the three types of juristic thinking that are distinguished here."[56]

* *Changes in the property regime*

In 1935, Franz Wieacker, then teaching law at the University of Freiburg i. Br., author of the later "History of Private Law in Europe"[57] and professor at the University of Göttingen (where the present author attended his lectures on Digest exegesis), published a brief work under this heading.[58] It reflects what a circle of professors of law, young in 1933, understood and propagated by "national legal renewal" ("*völkische Rechtserneuerung*").

The preface and foreword send a clear message: a new age requires a "new" jurisprudence[59] and thus *new figures of thought* – as the example of the property concept illustrates:

> "After the upheavals of 1933, the clear and precise *definition of the forms of thought* within which the property concept is still meaningful in the law of this state must be attempted. Even though the National Socialist state promises to care for and

53 See Vesting et al. (eds.) 2014.
54 See Heinig/Walter (eds.) (2007).
55 Schmitt (1993); English translation by J. W. Bendersky: Schmitt (2004).
56 Schmitt (2004) 7.
57 Wieacker (1996); Wieacker (1967).
58 Wieacker (1935).
59 See Grimm (1985).

> uphold property, there can be no doubt that this decision is grounded in *materially new values content*; all work on renewing property law surely needs to begin with an explanation of this content. For it is precisely the property commitments behind the legal provision of Article 903 that, in the merging economic regime, determine the *concrete validity content of the institution 'property'*. In seeking clarity about its structure, we should not once again posit a new generic concept in the sense of normativist positivism from which a new property regime is derived by rigid necessity; such a concept imposed on the *realities of life* would be taken to the point of absurdity by ongoing legislation. Considering new ways of thinking about property serves a different, essentially pedagogical purpose: to present acceptable and unequivocal ideas that obviate any return to obsolescent forms of civil law."[60]

The postulated redefinition of the property concept is explained in the following passage. What the new national order (*Volksordnung*), divided into defined "order circles" (*Ordnungskreise*), requires is a "bounded property regime":

> "This formal version of the task of legal policy will bear no fruit if we do not take the concrete structure of the new order into account. This structuring tendency, as the Farm Succession Act and the Labour Promotion Act show, leads to the replacement of *destructive dialectical group formation in the body of the nation*: workers – employers; tenants – landlords; city and country by … formations such as the Labour Front (*Arbeitsfront*) and works community (*Betriebsgemeinschaft*), food producers, and farmers. Lawmaking in pursuit of this structural principle is justified by the notion that fronts and occupations are subdivisions of the natural order of the nation, in which lawmaking through occupational group regulation presents itself as the optimal principle for the unconstrained and ordering growth of law. The closer these subdivisions are to the *given circles of the national order*, the more thoroughgoing, comprehensive, and stable regulation will be. Thus, family property law, which in the Civil Code still purports to represent a concrete basic order, is joined by agricultural property law, and in outline also property law pertaining to the industrial enterprise. This is the structure we mean when using the ambiguous term '*bounded property order*'."[61]

* *Changes in the work regime*

Without a doubt, "concrete order thinking" left its mark particularly on the work regime. Writing about "civil law theory and fascism", Ingeborg Maus remarks:[62]

60 Wieacker (1935) 9.
61 Wieacker (1935) 21.
62 Maus (1980).

> "Carl Schmitt's theory of concrete order thinking is most concrete where it refers to the 1934 'Act on the Order of National Labour': 'the collective wage agreement is replaced by a wage order; employers, employees, and workers are the leaders and followers of an enterprise who work together in pursuit of business objectives and for the common good of the nation and state; the two are members of a common order, a community under public law.'[63] This definition, especially under Section 1 of the Act, of a *community ideology of the undertaking*, in which group freedom of contract disappears and the limits to the justiciable legal obligation of the individual are abandoned in favour of a duty of loyalty, offers a classical example of perverted legislation typical of a constitution-making prerogative state and grounded in 'concrete-order thinking'."[64]

What two then standard commentaries on the "Act on the Order of National Labour" have to say about Article 1 is both informative and revelatory. Ingeborg Maus:

> "The first paragraph, a form of preamble, sums up the meaning, content, and ethic of the law, so that the following provisions can be understood largely as elaborations of these basic ideas … The Act treats this community of all working in the enterprise as *part of* a *national community* (*Volksgemeinschaft*). With every single provision, it calls upon this spirit of national community, demanding and expecting that all individuals fulfil their duties in this sense, but also exercise their rights in this sense. The Act deliberately waives all casuistic regulation, being satisfied to establish general guidelines and generally define duties and rights. Basically, it leaves detailed interpretation to the responsible and conscientious decision of the individuals called upon to decide. It places almost unlimited confidence in all those entrusted with interpretation."[65]

And in the commentary by Mansfeld / Pohl / Steinmann and Krause we find the following complementary remarks: "We are dealing not so much with legal norms inapt to interpretation by old methods … as with an Act whose main sections are less juristic than *ethical in import*. The aim of the lawmaker is rather to educate and form members of the German nation (*Volksgenossen*) than to establish an external legal order for social life, that will become less and less necessary as this education succeeds."[66]

63 Schmitt (1993) 64.
64 Maus (1980) 133–134.
65 Hueck et al. (1934) 20–21.
66 Mansfeld et al. (1934) 75.

These passages invite the following conclusion:

A regime like that of National Socialism shaped by political struggle and a specific political ideology had to rely on translating its political goals into the language of law, as well, and placing law at the service of regime policy. The ruling elite of the Nazi state were fully aware that it would be useful if they could point to theoretical grounding for such instrumentalization of law and present it as "amenable to theory". In this situation the formulation "concrete order thinking" was to prove invaluable. The conclusion of Schmitt's treatise on the three types of jurisprudential thought shows that, with concrete order thinking, he presented the Nazi regime with an *"apposite" mode of reasoning* on a silver platter. A somewhat lengthy perusal of this "customized" gift is therefore called for:

> "… to traditional positivist thinking, the indisputable advance of a new mode of juridical thought appears to be only a corrective to its old method, a limbering up as in earlier free law movements, as mere adjustment to a new situation for perpetuation and self-preservation of the prevailing type. But the change in jurisprudential thinking comes now in conjunction with a change in the entire structure of the state. As we have seen, all changes in a mode of legal thought are to be seen in a vast historical and systematic context, which places them in the given situation of the community's political life. … The state of today is no longer divided into two in terms of state and society, but into three series of orders in terms of state, movement, and people. The state as a special order level within the political entity no longer holds a monopoly of politics, but is only an organ of the leader of the movement. The old decisionist, normativistic or combined positivist legal thinking is no longer adequate for a political entity thus structured. What is now needed is a concrete order and formation thinking that can deal with the numerous new tasks imposed by the state, national, economic, and world-view situation and which can cope with the new forms of community. Intrinsic to this advance of a new jurisprudential thinking is therefore not mere correction of old positivist methods but a transition to a new type of legal thought able to cope with the coming communities, orders, and formations of a new century."[67]

b) Radical order thinking and the organization of totalitarian rule

Under this heading, the historian Lutz Raphael presents ground-breaking reflections[68] on how the totalitarian National Socialist regime managed

67 Schmitt (1993) 54–55. Translation R. B.
68 Raphael (2001).

– without any resistance to speak of – to organize a close relationship between the regime and academia,[69] gaining justification of its political goals. At the same time, Raphael shows the indispensable role played by jurists in *translating the language of ideology into the language of law*, in transforming political ideology into enforceable official language. With reference to National Socialist race theory, he explains that an irrational ideology like that of the Nazi state, if it was to be implemented in administrative practice, in a bureaucratic, i. e., *rule-bound administrative state*, had to be translated into manageable decisions, that is, into statutory law, regulations, or decrees that an administrative staff, generally with legal training, could execute.[70] It was the job of jurists to transpose ideological policy programmes into a language that could be comprehended and carried out by an administration operating in the functional mode of rational legal government. Lutz Raphael describes this "metamorphosis" of irrational ideology into the ostensible rationality of legal and administrative language:

> "As professors, judges, and administrative officials, jurists performed key functions in reshaping private and constitutional law to meet the political goals of the regime, continuously legitimating the wrongful practices of the regime through commentaries and decisions. Notably, the important role played by institutionalized racism shows the need to take the contribution of legal experts into account when examining the applied human sciences. Legal expertise was the indispensable prerequisite for transforming the defamatory propaganda of the regime or the discriminatory allegations of scientists and scholars into *the official language of legally relevant classifications and distinctions*. The contribution of jurisprudence must therefore be seen in this genuinely 'political work':[71] 'The legal facts strengthened the belief in the scientificity of race theory and eugenic practices. In turn, the latter were raised to the

69 Academia was not only unable to oppose the aggressive governmental policy of the National Socialists, but, as Raphael notes, experienced a "*wave of self-mobilization*" for the Nazi cause, abandoning prevailing standards of scholarly morality and professional ethics: "The willing participation of a broad majority in the academic professions and university circles in the 'national revolution' was a decisive precondition for the regime itself, after eliminating basic critique, to adapt to the existing relation of forces in the universities, permitting a limited measure of intellectual freedom of opinion, which established a pluralism of discipline-specific theories and schools for all who accepted *the official language of the new regime and, above all, its political claim to binding interpretation and designation of the social world*." Raphael (2001) 12.

70 See Bertrand (2012).

71 Pollak (1990) 25.

status of research areas at the universities. Vice versa, these disciplines contributed to the legitimation of conditions that had been created by the new legal framework.'"[72]

4. A brief interim appraisal

The language of law as a language of politics, being a performative language, is always at risk of political instrumentalization. This is demonstrated by the French Revolution and by the advent of the National Socialist regime as linguistic-conceptual seizure of power. The latter example is so interesting because it shows how, through the agency of jurists who saw themselves as representatives of a "new jurisprudence," could be translated into the language of law, thus legitimating the totalitarian regime and enabling its bureaucratic application. This particular example demonstrates how the language of law as a language of politics also operates as an institutional language at constant risk of political instrumentalization and even abuse. Not only the language of law is necessarily close to the exercise of power: so is the legal profession, as Bernd Rüthers has convincingly shown.[73]

III. The language of law as a language of rights

When the law comes under discussion in its function of creating and guaranteeing rights, whether in relations between individuals or between the individual and the governance collective to which he or she belongs,[74] we expect to hear about conceptual classics of the language of rights such as subjective public law,[75] basic rights,[76] and the constitutional guarantee of effective legal protection.[77] For the moment, however, our attention turns elsewhere: to two matters we consider particularly important from the point of view of the history of ideas.

72 Raphael (2001) 1–16.
73 Rüthers (1992).
74 Moore (1973).
75 Bühler (1914) 21, 224; Kraft (2008) 14.
76 Comprehensive treatment in: Pieroth/Schlink (2010) 23.
77 Wahl (1985) 222–223.

1. Hardening political ideas through translation into the language of constitutional law

Those who have successfully carried out a revolution or have emerged victorious from a political dispute tend to record the result as a perceptible turn of events – preferably in the language of law with its promise of permanence and stability. In legal and constitutional history, this is demonstrated by the fact that almost all legal acts marking revolutions and upheavals are formulated as documents of rights. Wolfgang Knies has this to say:

> "Not only the French Déclaration but also the *American declarations of rights* is the outcome of revolutionary history. In formulating individual rights, they could draw on the model and material of the seventeenth century English freedom documents, which blazed the trail in the dispute between Crown and Parliament, and which set out the civil liberties of Englishmen – partly as political demands, partly as concessions by the Crown. In the *Petition of Rights* (1628), the first *Agreement of the People* (1647), the *Habeas Corpus Act* (1679), and finally in the *Bill of Rights* (1689), we find not only such important, forward-looking principles and rights as equality before the law, freedom of religion, no taxation without representation, procedural guarantees for detainees, and due process of the law with respect to any encroachment on freedom and property; also the notion of certain natural, innate human rights (birth rights, native rights), which – systematically developed by English theoreticians of the state, notably John Locke (1632–1704) – already find expression in them."[78]

Clearly, the strategy of couching the victory of a political idea or other course-setting political decision in the form of a constitutional act lends palpable shape to the characteristics of a constitution that, following Peter Badura,[79] can be defined as follows:[80]

> *Constitution*
> - *a law set out in a constitutional document*, distinguished from the rest of the legal order by its legal effect and the import of its subject matter;
> - the most outstanding expression of the *legal culture of a society*, politically documenting and constantly renewing its unity and self-conception;

78 Knies (1971) 45.
79 Badura (1987) cl. 3757 ff.
80 Schuppert, G. F. (2003) 743.

- *legally effectuating*, through the exercise of state authority, *the political ideas promulgated in making the constitution,* and hence, above all establishing the unity of the legal order;
- imposing the exercise of power under a legal order, eliminating the arbitrary and inconsistent exercise of this power, lending it *predictability and stability* through "juristic baptism".

Every constitution is hence a historical snapshot that breaths and reflects the spirit of the times, but which also signals the dawning of a better world.[81] Presumably, a "good" constitution would therefore have something to say even if somewhat antiquated. Writing in the Süddeutsche Zeitung on the occasion of the seventieth anniversary of the Bavarian Constitution, Heribert Prantl confirmed this in an article entitled "State Love Letter":

> "Although this constitution is a love letter it is not mere waffle. When it addresses work, the economy, and social policy, it sounds as if Fidel Castro and Pope Francis helped draft it. 'Every man has the right to gain an adequate livelihood through work,' we read. And: 'Work enjoys the special protection of the state.' And: 'Every man has a right to security against the vicissitudes of life.' And 'Every worker has a right to recreation.'
>
> As we see, this is not taken from a brochure for the 125th jubilee of the German Metalworkers' Union, not from a papal social encyclical, let alone an old socialist constitution of an erstwhile Eastern Bloc country. It comes from the Bavarian Constitution of December 1946. This provision on co-determination above establishment level is also there, very clear and very forceful: 'Workers as equal members of the economy participate in formative economic activities together with all other persons engaged in the economy.'
>
> All these statements convey a vision and a lesson – the lesson from the mass unemployment in the twenties and thirties of the twentieth century, which helped bring the Nazis to power. Seventy years ago, this lesson was so clear to the CSU and the SPD that agreement on fundamental economic issues proved possible. Even if the language sounds a little antiquated and traditionalist here and there, one sometimes has the feeling that this constitution foresaw the difficulties of globalization and pointed in the right direction. 'All economic activity serves the common good' according to Article 151, and 'the economic freedom of the individual finds its limits in consideration of others.' If we hear this nowadays, the old Heiner Geißler comes to mind, or perhaps Sahra Wagenknecht."[82]

So much – with regard to the weight of political ideas – for the hardening of constitutional law in the mould of the constitution.

81 Preuss (1994).
82 Prantl (2016) 49.

2. The language of law as dynamic language: "extending the combat zone"

In a recent article we posited that – in contrast to the classical notion of a system upholding and developing a static order – law has to be understood as a thoroughly *dynamic system*,[83] because only in this sense can law perform its function as the central steerage system for the democratic constitutional state, the state under the rule of law.[84] If this is so, the language of law can also be described as a dynamic language. This is indeed the case.

a) The endogenous dynamics of basic rights

At an early date, basic rights, the focus of the language of rights, moved beyond the closed ranks of defensive rights to steadily extend their *rich functional potential*. The history of basic rights can in so far be written as a *history of expansion*.

In his seminal work on the system of subjective public rights,[85] Georg Jellinek had, in addressing the position of the individual vis-à-vis the state, already drawn a distinction between "status negativus", "status positivus", and "status activus". "Status negativus" concerns basic rights as defensive rights against the state; "status positivus" is determined and guaranteed by basic rights in their capacity as *entitlements, participatory rights, rights to performance*, and *procedural rights*. Finally, "status activus" refers to the situation "where the individual exercises his *freedom in and for the state*, helps to shape and participate in the state. It is fashioned and safeguarded by civil rights."[86]

Taking up and developing this approach, the *basic rights theories*[87] so dominant in the jurisprudence of the Bonn Republic took note of constant change in basic rights and fostered the process[88] in an effort to meet the constantly changing challenges of societal reality. The Federal Constitutional

83 Schuppert, G. F. (2016a); see also Zeh (2006) 123–138.
84 On the law see: Schuppert, G. F. (ed.) (1998).
85 Jellinek (1919) 87 ff.
86 Pieroth / Schlink (2010).
87 Still instructive: Böckenförde (1974).
88 See from the perspective of the transition from the Bonn to the Berlin Republic: Krüper (2015).

Court, in particular, has shown considerable initiative with avant-garde innovations in basic rights.[89] In terms of the problem addressed in this introduction, it could be said that, through its rulings on basic rights, the Federal Constitutional Court has not only safeguarded the expressive capacity of the language of law but has also made it sustainable.

b) The language of human rights as a language of intervention in political discourses

If what we have said at the beginning of this introduction about the language of law as a language of discourses on the legitimacy of political authority is correct, the language of law as a language of politics will always tend to be a language of intervention in political discourses and debates. The genuinely political dimension of the language of law is impressively demonstrated by the discourse on human rights:

- *Human rights as "enabling narrative"*

Writing about human rights as a translation problem, Doris Bachmann-Medick[90] addresses the translational potential of the idea of human rights, which unfolds above all when the human rights discourse in the sense of Dipesh Chakrabarty[91] links up with other, politico-social discourses, forming critical-strategic alliances. With reference to Joseph Slaughter, Doris Bachmann-Medick sees such a link in the coupling of human rights and an "emancipatory" literature such as the bildungsroman:[92]

> "Like Lynn Hunt,[93] Slaughter maintains that the programmatic development perspective of individual legal claims in the human rights discourse since the eight-

89 A good example is the "fundamental right of the confidentiality and integrity of information systems", BVerfGE 120, 274, 313 ff.; see Hoffmann-Riem (2016) § 35: Grundrechtsinnovationen im Spannungsfeld von Präventionsstaat und technologischer Entwicklung.

90 Bachmann-Medick (2012).

91 Chakrabarty (2013).

92 On the question of how "human rights function as narrative constructions" can be linked to "story-telling" as the facilitation of "self-representation" of the subjects, see Slaughter (2007), http: //docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1031&context=clcweb&seiredir=1#search=%22clc+web+jospeh+Slaughter+narration%22.

93 Hunt (2007).

> eenth century goes back to the humanistic idea of the spiritual development of the individual. Like literature, it operates as 'enabling fiction.'[94] It is thus certainly no accident, albeit astonishing, that, in drafting Article 29 of the UN declaration of 1948,[95] some delegates controversially invoked a prime literary example of personality development: Daniel Defoe's 'Robinson Crusoe'.[96] But 'enabling' has come to mean a great deal more. It also covers giving impetus to political activism through 'life narratives,' 'testimonios,' and other forms of self-testimony[97] such as those of well-known writers: Arundhati Roy writing against the construction of the […] Narmada Dam[98] and the Nobel Prize winner and human rights activist Rigoberta Menchú with her support for the rights of the Quiché-Mayas in Guatemala, which she develops in a testimonio.[99] Scandalous and moving is the case of the Nigerian writer and human rights activist Ken Saro-Wiwa, who for many years championed the rights of the Ogoni in Nigeria, a minority whose land has for decades been exploited and contaminated by the oil company Shell against the backdrop of their oppression and impoverishment. In this struggle for indigenous rights, Ken Saro-Wiwa was executed – despite all appeals to human rights and despite the constitution of a local human rights declaration,[100] the Ogoni Bill of Rights of 1990."[101]

But Bachmann-Medick points to another interesting connection, which we shall consider in brief in concluding this look at the language of law as a language of rights.

94 Slaughter (2006) 1406.

95 Article 29:

Everyone has duties to the community in which alone the free and full development of his personality is possible.

(1) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(2) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

96 Slaughter (2006) 1405 f.

97 Schaffer / Smith (2004) 1–34.

98 See Roy (1999).

99 Menchú (2010).

100 Under: http://www.waado.org/nigerdelta/RightsDeclaration/Ogoni.html.

101 Bachmann-Medick (2009) 354.

* *From a "needs-centred approach" to a "rights-centred one"*

The link between the human rights discourse and the development discourse has proved particularly fruitful, notable in the discussion of *resource rights*;[102] Doris Bachmann-Medick:

> "Further new translational links arise where, for example human rights issues are translated into the development discourse, particularly apparent in the *Declaration of Development Rights*.[103] Vice versa, the translation of development debates into human rights discourses proves fruitful for human rights praxis. In this fashion, subsistence rights such as food, water, and work – as we have seen – are reformulated as human rights.[104] At any rate, the translation perspective reveals how marginalized sections of the population can advance their self-empowerment and assert their interests; for instance by translating an orientation on needs into an orientation on rights: 'The *needs-centred approach* is being *replaced by a rights-centred approach*'[105] – in rural areas, for example, by reclaiming fishing, land, and forest rights; in urban areas through claims to housing and residential rights or rights to a power supply."[106]

If this perspective is extended to include the ever more urgent problem of climate change, the "rights-centred approach" and the threats to it posed by climate change can be described as follows, to quote Oxfam International:[107]

102 See further: Schuppert, F. (2012); Schuppert, F. (2014).

103 See Eckert (2009) 318: "Der Aufstieg von Entwicklungs- und Menschenrechtsdiskursen verläuft parallel, institutionell gibt es zahllose Überlappungen. Der Frage nach der gegenseitigen Prägung dieser Felder wurde bisher nur sehr unsystematisch nachgegangen."

104 Sachs (2003).

105 Sachs (2003) 30.

106 Bachmann-Medick (2009) 357.

107 Oxfam International (2008).

How climate change undermines human rights

Human-rights norms in international law	Current and projected impacts of climate change upon human rights
The Right to Life and Security "Everyone has the right to life, liberty and security of person." (UDHR, Article3)	* There will be more deaths, disease, and injury due to the increasing frequency and intensity of heat waves, floods, storms, fires, and droughts. * Rising sea levels will increase the risk of death and injury by drowning. Up to 20 percent of the world's population live in river basins that are likely to be affected by increased flood hazard by the 2080s. * Heat weaves are likely to increase deaths among elderly or chronically sick people, young children, and the socially isolated. Europe's 2003 heat wave – induced by climate change – resulted in 27.000 extra deaths.*
Right to Food "The State Parties to the present Covenant, recognize the fundamental right of everyone to be free of hunger …" (ICESCR, Article 11)	* Future climate change is expected to put close to 50 million more people at risk of hunger by 2020, and an additional 132 million people by 2050. * In Africa, Shrinking arable land, shorter growing seasons, and lower crop yields will exacerbate malnutrition. In some countries, yields form rain-fed agriculture could fall by up to 30 per cent in central and South Asia by 2050. * In parts of Asia, food security will be threatened due to water shortages and rising temperatures. Crop yields could fall by up to 30 per cent in Central and South Asia by 2050.
The Right to Subsistence "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing …" (UDHR, Article 25) "In no case may a people be deprived of its own means of subsistence." (ICCPR, Article 1.2 and ICESCR, Article 1.2)	* Water: By 2020, between 75 million and 250 million people in Africa are likely to face greater water stress due to climate change. Reduced water flow from mountain glaciers could affect up to one billion people in Asia by 2050s. * Natural resources: Approximately 20–30 per cent of plant and animal species assessed so far are likely to be at increased risk of extinction if average global temperatures rise more then 1.5–2.5 C. Coral bleaching and coastal erosion will affect fish stocks – currently the primary source of animal protein for one billion people. * Property and shelter: Millions more people risk facing annual floods due to sea-level rise by 2080s, mostly in the mega-deltas of Asia and Africa. On small islands, too, sea-level rise is expected to exacerbate inundation, storm surge, and erosion, threatening vital infrastructure, settlements, and facilities that support the livelihoods of island communities.
The Right to Health "The State Parties to the present Covenant, recognise the fundamental right of everyone to be free from hunger …" (ICESCR, Article 11)	* Child malnutrition will increase, damaging growth and development prospects for millions of children. * Increasing floods and drought will lead to more cases of diarrhea and cholera. Over 150.000 people are currently estimated to die each year from diarrhea, malaria, and malnutrition caused by climate change. * Changing temperatures will cause some infectious diseases to spread into new areas. It is estimated that 220–400 million more people will be at risk of malaria. The risk of dengue fever is estimated to reach 3.5 billion people by 2085 to climate change.

Sources: Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Right (ICESCR); the Intergovernmental Panel on Climate Change (IPCC) 2007, Working Group II; *World Health Organisation.

3. A second interim appraisal

The language of rights is clearly a classical *subdivision of the language of law*, since it conveys the promising message of individual freedom. But, as we know from our examination of "semantic shifts",[108] semantics change and must change if they do not only reflect societal change but also accompany or even induce it. If the language of rights as a language of politics is to claim such a critical-strategic thrust for itself, it assumes the function of equipping a vast range of "agents of justice"[109] with the vocabulary and conceptual repertoire needed for legal discourse as social critique. It is then only a short step to the language of law as a language of justice, as we shall see.

IV. The language of law as a language of justice

If, in concluding our tour d'horizon of the functions and contexts of the language of law, we now turn to the justice dimension, it is not with the intention of losing ourselves in the vast terrain of law as justice.[110] We are concerned with a specific perspective, namely the role of the language of law in the current intensive political discourse on justice; the language of law makes itself distinctly heard in these debates.

1. Justice discourses as social critique: the language of law as social-critical language

There is currently no escaping the call for "more justice". In 2016, the Social Democratic party staged a major "Values Conference: Justice",[111] and the Greens, too, give the highest priority to justice – witness their efforts to develop a consistent taxation concept. These justice discourses naturally address the everlasting topic of all social policy – associated above all with the name of John Rawls – *distributive justice*,[112] but especially with social

108 On the role and function of "semantic shifts" see Schuppert, G. F. (2010) 115 ff.
109 See O'Neill, O. (2001); Dryzek (2015).
110 For a good overview on law and justice see: Rüthers et al. (2010) § 9 (222–264).
111 On 9/5 2016 in Berlin; see the speech by party leader Sigmar Gabriel, https://sigmar-gabriel.de/wp-content/uploads/sites/3/2016/05/Rede_Sigmar_Gabriel_beim_Wertekongress.pdf.
112 Rawls (1999).

justice, represented in political philosophy primarily by "social egalitarians";[113] who focus not so much on the distribution of material goods but – as Fabian Schuppert has shown – on the demand to treat people as "being equal":

> "According to its proponents, social equality is valuable because it protects every person's status as a free and equal member of society. Social equality is concerned with the relationships people stand in and what people can do and be within these relationships. Phrased differently, social equality concerns more the harmful effects of certain social relationships and their associated inequalities, than the equal distribution of a particular set of goods or the provision of equal initial opportunity. This reading of equality distinguishes social egalitarians from classic distributive egalitarians, whose focus is determining the adequate currency for egalitarian distributions and the exact principles of such distribution. […] Social egalitarians thus primarily worry about the negative effects of certain inequalities."[114]

This "social egalitarian approach" is particularly convincing and promising because it connects three functionally related dimensions. First, it focuses on the *justifiability of existing inequalities*, a highly charged issue from the social critique point of view; second, it addresses concrete experiences of inequality, how social groups[115] are affected;[116] thirdly and finally, this social-egalitarian approach – and this where law comes in – also addresses the *remedial dimension*, exploring how, by what means and by whom unjustified inequalities can be eliminated or compensated.[117]

2. The demand for global justice as a paradigmatic shift in the history of ideas

Where justice is concerned, the question automatically arises of whether justice is to be conceived of as local, regional, national, or even global: "what is the scope of justice?" As Stefan Gosepath puts it:

> "Is justice global, universal, boundless? Or are there reasons of any sort, conceptual, normative, or pragmatic, to conceive of justice locally – to rather start at home, in a

113 See especially Anderson (1999); O'Neill, M. (2008); Schuppert, F. (2015a).
114 Schuppert, F. (2015b).
115 On the concept of group in a sociology of inequalities, see Schuppert, G. F. (forthcoming).
116 O'Neill, M. (2008); Schuppert, F. (2015a).
117 See Anderson (2012).

> community or state-society and therefore require less from foreigners than from our fellow citizens? In order to find an answer to such questions, I will start […] by outlining what I see as a relatively plausible, and not uncommon, egalitarian conception of justice. According to this conception, justice is – at least prima facie – immediately universal, and therefore global. It does not morally recognize any judicial boundaries or limits. […] My conclusion that there is such a [global] dimension will consequently lead to many normative-pragmatic questions […] especially how best to construct and establish global (or international) institutions securing global justice."[118]

According to Christoph Broszies and Henning Hahn, the widespread view that justice can be conceptualized only in global terms is nothing less than a paradigmatic shift:

> "The idea that the domain of justice extends beyond the limits of one's own polity or empire marks no less than a paradigmatic shift in the history of ideas. To a certain extent, cosmopolitanism follows on from antiquity, the Middle Ages, and modernity, but ultimately it responds to genuinely modern experiences and challenges. In brief: global justice is a prerequisite of globalization. The associated global mechanisms of exclusion, exploitation, and domination are a basic condition for global justice to come to the fore. It is therefore no surprise that the cosmopolitanism-particularism debate opens a new chapter in the history of ideas."[119]

Nevertheless, the notion of global justice has older historical roots:[120]

> "Leafing back through the history of ideas can … prove informative. After all, the Stoics introduced the cosmopolitan at an early date, the citizen of the world who understands himself as a member of the human race and part of the overall world order – and who is consequently not intimidated when threatened with exile because of his independent attitude. However, in the ethical cosmopolitanism of the stoics, there is little sign of any justice-theoretical cosmopolitanism explicitly concerned with the legitimacy of global rule. The same can be said of divine justice in the Christian Middle Ages. It was not until modern times that a sustainable change is to be observed in state-centric legal thinking and consequently in the state-centric understanding of justice. Although the aim of early modern international law was mainly to embed (religious) peace in an international legal order, the idea of cosmopolitan individual rights was already taking root in the soil of natural law. In this connection, Martha Nussbaum points out that Hugo Grotius (1583–1645) grounded international law in human dignity, and already in *De Jure Belli ac Pacis* (1625) argued in favour of universalizing legal relations between individuals."[121]

118 Gosepath (2001) 145.
119 Broszies / Hahn (eds.) (2013) 9–52, here 13.
120 Broszies / Hahn (eds.) (2013) 1–14.
121 Nussbaum (2006) 36–39; see also: Fraser (2005).

Be that as it may. In a globalized world one can think only in global terms, which – see Stefan Gosepath – leads directly to the problem that *international institutions* are needed in order to realize justice at the global level. To this extent, justice – as we have shown elsewhere[122] – is to be conceived of primarily as *institutional justice*, a conclusion that Christoph Broszies und Henning Hahn draw in their introduction to the cosmopolitanism-particularism debate:

> "'The world in which we live is not just.' With this remark, Thomas Nagel begins his already seminal article on 'The Problem of Global Justice.'"[123]… Nagel describes a world that as a whole *cannot* be just, at least as long as it is divided into separate spheres of dominance. This world quite simply lacks the necessary institutions for coordinating action and enforcing rules. Seen in this light, the world as it is can be neither just nor unjust, so that asking about global justice is pointless. Nevertheless, Nagel, too, asserts that the world is unjust. Not perhaps in the same sense as when a state apportions well-being unequally across society, denies people democratic participatory rights, or discriminates against certain groups. The familiar principles of social justice, according to Nagel, are adapted to the nation-state. In many ways, however, it makes sense to speak of global injustice phenomena, for instance the distribution of climate change costs, veto rights in the Security Council of the United Nations, global seed and medicine patents, the exploitation of people and nature in the global market, or malnutrition among some billion human beings."[124]

This brings us to our last, brief topic.

V. The language of law as the language of a new global order

1. The transformation of statehood as a problem of description and analysis

Statehood has of course always been subject to change,[125] inviting the amiable depiction of various stages in its development. One example of such scenario painting is offered by Udo di Fabio, who offers a five-stage model:

> "The first stage is the arrival of the new idea of the state, which to some extent presented itself in the revival context of the Renaissance as a return to antiquity's

122 Schuppert, G. F. (2017a).
123 Nagel, T. (2013).
124 Broszies / Hahn (eds.) (2013) 9.
125 See, for instance: Leibfried / Zürn (eds.) (2006); see also the article by Schuppert, G. F. (2008c) with the reply by Genschel / Leibfried (2008).

> notion of polity. The next stage is abstraction and detachment from the concrete ruling figure, which made the state into more than the ideational amplification of a monopoly of authority claimed by the prince and his house. A further stage is national magnification and merging with the community defined in national terms. The trend from the outset, and still predominant today, has been towards rationalization, demystification, and complete legal subjugation of state authority in the constitutional state. However, a new stage seems to be emerging: the functional dismemberment of the state, the loss of state unity and of its ideational significance in a marked shift towards an open and integrated state, which – apparently in rejection of the order concepts of modernity – is reverting to a complex web of authority."[126]

Whether we take this model or that of the shift described by Philipp Genschel and Bernhard Zangl "from authority monopolist to authority manager",[127] every far-reaching change in statehood is a challenge for all scholarly disciplines that address the state, obliging them to examine whether their methodological tools suffice to adequately describe and analyse these processes of change.

In the first volume of the Jahrbuchs für Staats- und Verwaltungswissenschaft, Claus Offe reflects on a "theory of the state in search of its subject",[128] and Juliane Kokott and Thomas Vesting from the board of the Association of German University Teachers of Constitutional Law were commissioned to examine public law theory and changes in the subject matter.[129] Other examples of similar efforts could be cited.[130]

However, if any scholarly approach is particularly suitable for investigating change in statehood, it is the governance approach. This is at any rated suggested by the more recent governance literature, as the following examples show.

First, writing about the connection between changes in statehood and the governance perspective, Julia von Blumenthal has this to say:

> "A link is often established between the increasing scholarly interest in governance and political changes. Apart from the processes of globalization already mentioned, the financial crisis in the public sector and an 'ideological shift towards the market' in politics and science are cited in explaining the popularity of the concept. The discussion on governance thus belongs in the context of analysing and describing changes in statehood. To some extent, governance research adopts a contrary stance to scenarios of crisis or even of an end of statehood, seeing in governance proof of the adaptability of states to external social and economic changes."[131]

126 di Fabio (2003) 20.
127 Genschel/Zangl (2008).
128 Ellwein et al. (eds.) (1987) 30–320.
129 Kokott/Vesting (2004) 7 ff., 41 ff.
130 See Ladeur (2000) 101 ff.; Neyer (2004).
131 Blumenthal (2005) 1150 ff.

The second example is from Hans-Heinrich Trute, Doris Kühlers, and Arne Pilniok, who conclude their article on the governance approach as an analytical approach in administrative jurisprudence with the following succinct remark: "One important achievement of the governance approach is that it provides a *framework for discussing changes in statehood* while ensuring mutual interdisciplinary connectivity."[132]

The suitability of the governance approach for analysing change in statehood is even more obvious if this approach is seen as specifically process-oriented. In my view, the special "competence" of the governance approach, indeed, its specific added value, is its processuality and dynamics.[133] It is, however, demanding in that, unlike many approaches, it addresses neither the sequence of governance levels (local governance, regional governance, metropolitan governance, European governance, global governance) nor the sequence of governance areas (Internet governance, environmental governance, governance of financial markets). Instead, it takes a processual perspective that seeks to analyse changes in governance structures and explain observable processes of change. This processual perspective can unfold in four dimensions,[134] namely:

- *Changing and new actor constellations*, drawing on the actor perspectives of control theory but "dynamizing" them processually;
- *Changing and new institutional arrangements and regulatory structures*, drawing on the institutionalist turn called for by Renate Mayntz,[135] enriching it primarily from an institutional culture point of view;
- *Dissolving or blurring boundaries*, such as those between national and international, public and private, internal and external, etc., on the assumption that observable changes in statehood are above all processes of dissolving and blurring boundaries;
- *Changing or new legitimation concepts* that overcome the security offered by national lines of legitimation, making legitimatory demands on new, notably transnational forms of governance.

This brings us to the next point.

132 Trute et al. (2008) 173–189.
133 See Botzem et al. (eds.) (2008).
134 Botzem et al. (eds.) (2008).
135 Mayntz (2005).

2. In what language is a new global order really described?

The answer is pretty obvious: above all in the language of law, when – informed by governance theory – it thinks in terms of regulatory structures. It suffices to cite Michael Zürn's "four models of a global order in cosmopolitan intent" in which, as the following overview shows, the language of law plays a key role.[136]

Four models of a global order in cosmopolitan intent

	Intergovernmental model of global order	*Cosmopolitan pluralism*	*Cosmopolitan federalism*	*Cosmopolitan democracy*
Representatives (examples)	Dahl, Maus, Moravcsik, Scharpf	Dryzek, Forst, Krisch, Kumm	Habermas, Höffe, Schmalz-Bruns	Archibugi, Caney, Held, Pogge, Marchetti
Basic norms	State sovereignty; prohibition of the use of force; principle of non-intervention; democratic organization of states	Human rights; rule of Law; due process; practical reasoning; discursive democracy	Human rights; democratic legitimation of the monopoly of force; discursive justification of regulation	Democratic legitimation of all regulation; justice; fundamental rights
Statehood	Territorial states concentrate all the functions of statehood	Statehood unravels in different legal orders; the monopoly of force remains on the nation-state level; sovereignty is bound by basic norms	Legitimate monopoly on preserving peace and protecting fundamental rights shifts to the global level; democratic states continue to exist and maintain their dominance in many fields	Emergence of a rudimentary world state; nation-states

This instructive overview concludes our tour d'horizon of the five functions of the language of law we consider the most important.

136 Zürn (2011b).

C. In conclusion

As we remarked at the outset, we are concerned with the *potential of the language of law* as a language of politics for making a meaningful contribution to a future global history of ideas and knowledge. To judge by what we have so far "dug up", this potential can be considered extremely high.

It begins with the observation that discourses on the legitimacy of political authority as social-critical discourses generally take the form of legal discourses. This brings us to the second observation that revolutionary seizures of power are always legalo-semantic seizures of power, in which the "new cause" always comes in the guise of a new language requiring new concepts or reinterpreting existing legal concepts.

Third, it is evident that the language of law can make a particularly important contribute to the *global dimension of a history of ideas*. Something in the way of a language of global constitutionalism has meanwhile developed, a particularly interesting phenomenon because it takes up the function of constitution-making, "hardening" political ideas with all the legal consequences for impact and durability. Fourth, this globalization "gene" of the language of law as a language of politics is also evident in the spread of justice discourses at the global level, where, as inevitable response to ongoing globalization, global justice is in increasing demand, thus broadening the very concept of justice (catchwords: environmental justice, climate justice).

Fifth, a future world order – however conceived – cannot, it would seem, be described without the language of law. Zürn's overview of the subject "speaks volumes".

In sum: the language of law as a language of politics is, in our view, an essential component of a global history of ideas and knowledge, a conclusion we shall be justifying in detail in the course of this book with abundant reference to the literature. To begin with, however, the first section considers what is to be understood by global history and a global history of ideas. The contribution of the language of law cannot be meaningfully discussed without first defining these concepts.

Part One
Understanding Global History of Ideas

Introduction

A. How ideas and knowledge travel: a little story to begin with

When people write about the history of ideas and knowledge, they mostly focus on how knowledge and ideas spread – not only within a narrow compass but also throughout the world or what the people of the time consider to be "their" world, for instance Christendom or Islam. Ideas and knowledge seem to find it difficult to stay put: they like to be "on the move."[1] This suggests it would be useful to look at how ideas and knowledge voyaged before the advent of telegraphy and the Internet. A novel, "The Thousand Autumns of Jacob de Zoet,"[2] gives us a pointer. The hero is a young clerk in the employ of the Dutch East India Company (Vereenigte Oost-Indische Compagnie or VOC). In 1799 he takes up his post at a trading factory at the gates of the Japanese port of Nagasaki. Since the Japanese government is determined to prevent Western, notably Christian ideas from entering the country unfiltered, the baggage of foreign arrivals is thoroughly searched. Including Jacob's sea chest. Its contents include a "scarred Psalter bound in deerskin," a family heirloom Jacob's father has entrusted to him for his journey to Asia with instructions to "protect it with your life". When Jacob learns that the bibliophile inspector Ogawa is to examine the chest, he fears all is lost:

> "Mr. de Zoet," says Ogawa, "I wish to speak about a book you bring. It is important matter …"

1 See, for instance, Smith, P. H. (2009); Secord (2004).

2 Mitchell (2011). The magazine *Spiegel* has described the work as "a literary travel dream and linguistic orgy."

> Jacob loses the next clause to a rush of nausea and dread. … My career is destroyed, thinks Jacob, my liberty is gone …
>
> "In Mr. de Zoet's chest I found book of Mr. … Adamu Sumissu." Jacob opens his eyes: … "Adam Smith?"
>
> "Adam Smith – please excuse. The Wealth of Nations … You know?"
>
> I know it, yes, thinks Jacob, but I don't yet dare hope. "The original English is a little difficult, so I bought the Dutch edition in Batavia."
>
> Ogawa looks surprised. "Adam Smith is Englishman?"
>
> "He'd not thank you, Mr. Ogawa!" Smith's a Scot, living in Edinburgh. But can it be The Wealth of Nations about which you speak?"
>
> "What other? I am rangakusha – scholar of Dutch science. Four years ago, I borrow Wealth of Nations from Chief Hemmij.[3] I began translation to bring" – Ogawa's lips ready themselves, 'Theory of Political Economy' to Japan. But lord of Satsuma offered Chief Hemmij much money, so I returned it. Book was sold before I finish."
>
> … "Then, this morning, in your book chest, Adam Smith I find. Very much surprise, and to speak with sincerity, Mr. de Zoet, I wish to buy or rent …"
>
> "Adam Smith is neither for sale nor rent," says the Dutchman, "But you are welcome, Mr. Ogawa – very welcome indeed – to borrow him for as long as ever you wish."[4]

The theory of political economy might well have come to Japan in this fashion – on a ship of one of the world's biggest trading companies in the sea chest of a company officer.

So far so good.

The brief episode from this novelistic "historical cabinet of curiosities"[5] has a certain déjà-vu effect, recalling Christopher L. Hill's assertion in "Conceptual Universalization in the Transnational Nineteenth Century,"[6] that it is immaterial whether the "circulation of ideas by circulation of books"[7] involves the original publication, a translation, or a popularized version:

3 The then director of the trading factory before the gates of Nagasaki.
4 Mitchell (2011) 28 f.
5 To quote a review in the *Tageszeitung*.
6 Hill (2013).
7 See Gamsa (2011).

> "The fact that many of the concepts arrived in mediated form – through the intellectual vulgate, through translation – means it was not necessary to go to the origin to get the concepts, which by this time may have been more recognizable in their popularized than in their original forms anyway. Such recognizability came from the reproduction of concepts, not their original production. And as much as geopolitics inflected the creation of equivalents – a key part of the circulation of ideas – the readiness with which equivalents were accepted shows that these concepts' lingering associations with particular parts of the globe did not leave them looking any less universal."[8]

With these considerations in mind, *three points* should be noted:

* *Ideas and knowledge: typical "fellow travellers"*

The history of ideas and knowledge repeatedly draws attention to the fact that ideas and knowledge[9] like to travel in company – riding piggyback, as it were, on trade, religion, and the military;[10] in our example on the shoulders of a group of merchants[11] – a species of globalization actor we have dealt with elsewhere and whom we shall be looking at more closely in the course of this book.

* *Transport media for knowledge and ideas*

Even though we are not told the titles of all the books Jacob de Zoet had in his sea chest – there were some fifty – we nevertheless learn that at least two "bodies of thought" were being transported: Dutch Protestantism and the economic theory of the Scot Adam Smith. Books were thus particularly suitable transport media; a global history of ideas and knowledge always has to be a "history of books,"[12] as well.

Now, books and printing are not only an important medium for philosophical and economic theories and knowledge but also a key *medium of law*, as two examples will show. The first is Hugo Grotius' famous work "De Jure Belli ac Pacis," which Thomas Nicklas in 2010 described (albeit with a question mark) as "*international law for the saddlebag*",[13] because King Gustav

8 Hill (2013) 145.
9 On "knowledge as fellow traveller" see Renn / Hyman (2012).
10 See Mulsow (2016) 6.
11 Mulsow (2016) 6.
12 See Rose, J. (1998).
13 Nicklas (2010).

Adolf of Sweden, "who landed with his army in West Pomerania in 1630, claimed to have it always at hand during his military campaigns."[14]

Our second example comes from Thomas Vesting, "Die Medien des Rechts: Buchdruck,"[15] ("The Media of Law: Printing"), in which he describes the Christianity of late antiquity as a sort of "*pocketbook religion*" because of the important role played by the parchment codex as a writing material:[16]

> "These changes in the materiality and format of communication are closely associated with the religious transformations of late antiquity, notably the rise of Christianity following Constantine's victory at the Battle of the Milvian Bridge (312), which also proved an institutionally stabilizing movement. While the importance of orality for (early) Christianity ought not to be underestimated, Christians were eager readers from the outset. They are repeatedly noted as owning books and often have to explain themselves, as did the Christians of Scilium arrested and brought before the proconsul Saturnius in Carthage; when asked what they had in their luggage, they responded: 'The books and letters of Paul, a just man'. As writers, however the apostles had always preferred the parchment codex, which towards the end of the second century was practically a Christian innovation, establishing Christianity in a certain sense as a 'pocketbook religion'[17]."[18]

* *Receptivity for the Other and New*

In our first example, it was the "third rank" interpreter Ogawa who was eager to translate the theories of Adam Smith in order to introduce them to Japan. Thus the spread of ideas and knowledge appears to depend very much on the openness of elites in the recipient country; in this connection, Martin Mulsow has pointed to receptiveness at the Chinese imperial court:

> "Also prominent is naturally the receptiveness of the Chinese imperial court, notable that of the Kangxi Emperor, the second of the Quing dynasty at the turn of the

14 Nicklas (2010) 61.

15 Vesting (2013); see also Vesting (2011b) and (2011a) as well as the fourth and final volume (2015).

16 On its qualities, see Vesting (2013) 10: "The parchment codex fundamentally changed the technical form of the book. It ended the monopoly of papyrus as writing material, which since the second millennium before Christ had been made from the papyrus plant harvested on the banks of the Nile and glued together into rolls. … [I]n the Mediterranean region of late antiquity, calf, goat, and sheepskin was laboriously washed, depilated, bated, dried, smoothed, and then folded once, twice or three times When all surfaces had been written on and or painted, they were bound together into a codex, which, with its layered rectangular pages came very close to the the compact format of the printed book."

17 Stroumsa (2011) 67 f.

18 Stroumsa (2011) 10–11.

> seventeenth to the eighteenth century, for European mathematics and astronomy brought to China by the Jesuits. Catherine Jami tells the story not, as usual, from the European perspective but from that of the Chinese.[19] Only then does the process as a genuine "entanglement" become apparent, for we see how the emperor adapted the ideas received and used them to consolidate the Manchu dynasty while the Jesuits proved open to adopt Chinese ideas in other areas."[20]

So much for our introductory example. What, however, are we to understand by global history and a global history of ideas and knowledge? In considering this question we must constantly keep in mind ("casting our eyes to and fro"[21]) what this means for the language of law as a "language of politics" relevant for the history of ideas.

B. What are global history and the global history of ideas?

As Jürgen Osterhammel has repeatedly and knowledgeably shown, there are old and new approaches to world history, and, above all, methodologically differing ones.[22] There is no need to go over them here. Since the concept of "global history" appears to be gaining ground and is also more apposite to our present project than the somewhat bombastic "world history",[23] we shall be drawing on Sebastian Conrad's[24] exemplary definition of global history, identifying three approaches.

19 Jami (2012).

20 Jami (2012) 16.

21 A process familiar to all lawyers. The formulation ("Prozess des Hin- und Herwandern des Blicks") goes back to English (1963), who discusses the process of applying the law and the need to cast one's eyes to and from between the facts of the case and the legal consequences.

22 Osterhammel (2005); Osterhammel (ed.) (2008) 9–32.

23 It seems to us that Martti Koskenniemi's scepticism about the term "global history" expressed in discussion with Alexandra Kemmerer applies to "world history": "For me the call for global history implied a ridiculously exaggerated ambition, perhaps even the old European endeavour to find the place where one's own statements can be stamped 'global', where one can say 'that is global' whereas that there is not." Kemmerer (2015) 38.

24 Conrad (2013); see also Conrad et al. (eds.) (2007b).

I. Fields and topics of global history

In his highly differentiated introduction to global history, Sebastian Conrad presents a tour d'horizon, identifying seven topic areas with a strong affinity for global issues:[25]

- *Global commodities*
- *Expansion*
  History of the oceans
- *Migration*
- *Empire*
- *Nation*
- *Environmental history*
- *Race*

There can be no doubt that taking a "*global view*" of these fields is particularly fruitful, and Conrad's exposition of the topics is extremely interesting, with abundant examples, from the global product history of sugar and tea[26] to oceans as interactional spaces – which we shall be looking at – and the global history of migration, a subject of almost depressing topicality: in some regards, the treatment of migrants recalls the times of the slave trade.[27]

Be that as it may, we will not be pursuing this *issue-specific approach* any further. The various levels of analysis – products, geographical determinants,[28] governmental structures, global processes – are too heterogeneous; this approach offers far too much temptation to include fields – such as the global history of communication,[29] not to mention the global history of ideas and knowledge – that an author might consider just as important.

25 Conrad (2013) 202 ff.
26 On sugar, see Mintz (2007); on tea, see Vries (2009).
27 Consider the growing practice of countries targeted by current migration flows of spending billions to induce governments in migrants' countries of origin to "keep" would-be refugees, or to persuade governments in transit countries to take back the people who have passed through them. To this extent, we can speak of the economization of the refugee problem.
28 Marshall (2015).
29 See Schuppert, G. F. (2015).

II. Key concepts and figures of thought

In a 2015 article on "globalification," Jürgen Osterhammel introduces six "figures of thought of the new world,"[30] using what we can describe as key concepts.[31] This arouses our interest: the key concept[32] has proved a particularly useful device for mapping out an extensive terrain – for instance, "changes in statehood."[33] Since by definition no other subject matter is likely to have a broader wingspan than global history, the three essential functions of key concepts outlined by Andreas Voßkuhle will be helpful:

> "The function of key concepts is to make overarching ideas of order fertile for given argumentational contexts by concentrating, structuring and rendering comprehensible a mass of information and thoughts in a repository term. While reducing complexity they also serve as an inspirational platform by stimulating association, lending first shape to ideas still in the making, bringing various perspectives together, and offering guidance for the future. In this sense they resemble 'theories' … – but the format is smaller and the proposition at first glance more simplistic. Key concepts are therefore particularly dependent on concretisation; they supply no answers but give direction to thought."[34]

With these three functions in mind, we turn briefly to Osterhammel's six figures of thought and, in much abbreviated form, to what he has to say about them:[35]

- *Expansion*
  "It is no wonder that more recent global history has developed essentially out of the history of imperial and economic expansion … Expansion remains the *founding figure of thought of global history*."
- *Circulation*
  "The cross-boundary dynamics of expansion processes are often contained and channelled in the figure of circulation …" What do we mean [however] by the 'circulation of ideas'? Older, somewhat patinated categories like 'transfer' and 'reception' were in many regards more differentiated.
- *Channelling systems*
  "Circulation necessarily presupposes a channelling system." In this context *network* is the concept often used: "Analytically, the network remains the most productive figure of thought for globality, because it allows stable system for-

30 Osterhammel (2015).
31 See Baer (2004).
32 Schuppert, G. F. (1999).
33 See Schuppert, G. F. (2008c).
34 Vosskuhle (2001b); Schuppert, G. F. (1999) 198.
35 Osterhammel (2015) 12 f.

mation through the institutional consolidation of such interconnected complexes. The transitive concept of networking includes intentional action: there is no network without *networkers*."

- *Densification*
  "Densification means, for example, multiplying elements and their interrelations in a finite world, reducing spacing, increasing the speed and frequency of contact, compressing cause-effect chains. … Densification is relatively easy to describe; where it occurs, even statistics will have a great deal to say – for instance, statistics on book production and the book trade in the modern history of ideas and knowledge."
- *Standardization and universalization*
  "Standardization and universalization have become fundamental figures of a global teleology …. Only rarely is simple convergence meant …. The focus is rather on two things: first, on the development of world-society legal norms, headed by the much-discussed human rights, and, second, the development of systems of technico-economic coordination, such as standard world time or the rules of international payments."
- *Spatial asymmetry of power*
  "If we take the originally critical impulse of global history seriously, it does not reduce itself to the genesis of the all-round integrated present. The uneventful, creeping filling and densification of the planet – more and more people having more and more to do with one another – would be a framing narrative of dubious triviality. For this reason, a figure of thought from the dependence and world-system theories of the 1970s has remained important, namely spatial *asymmetry* of power, the asymmetry of subjugation and resistance. The gap between rich and poor, between strong and weak corresponds at the international level to social inequality within national societies. … The discussion is only getting under way on how the history of ideas, especially for the age of European world dominance, reacts to such conflictual plurality. At any rate, widespread dichotomies such as Occident / Orient, export / import of ideas, and Westernization / local knowledge are no longer adequate."

These six figures of thought look promising and do justice to the basic functions of key concepts outlined by Andreas Voßkuhle. The productiveness of this approach encourages us to look for key concepts in the global history of ideas to allow comparison with the figures of thought discovered there with those of Osterhammel for global history.

III. Global history as perspective

Under this heading, we return to Sebastian Conrad's introduction to global history. He begins by asking whether global history is a subject or a perspective. His answer is clear: global history is primarily a perspective.

> "Is global history … a subject of study or a perspective? Primarily, it is the latter – and thus an approach that focuses on certain aspects and contexts. The Kulturkampf in Bavaria in the nineteenth century, to take an example, can be examined from the point of view of local history, as an issue of cultural or gender history, or as part of German history. But it can also be placed in the context of global history – as an element in the struggle between the liberal state and the churches that occurred in the nineteenth century in many parts of the world: throughout Europe, but also in Latin America and Japan. These conflicts were interconnected through various channels. *Global history is therefore primarily a perspective, and it brings other dimensions, other questions to the fore.*"[36]

I agree with this assessment, above all in the light of my far-reaching experience with "governance," my concern at the Berlin Social Science Center (WZB) as holder of the research professorship in "New Modes of Governance" established in 2003. Here, too, the question was whether governance was to be seen rather as a subject of study – as implied by such topic blocks as "local," "regional," and "global governance" to be found in every governance manual[37] – or as a perspective from which the governance structures of modern statehood are investigated in their diversity and specific "mix." After more than ten interesting years in the governance field, we are as convinced as Sebastian Conrad that governance is above all a perspective, and a non-statist one: a non-state-centric point of view operating with institutional categories, a standpoint from which the regulatory structures and governance regimes obtaining in any policy sector can be examined.[38]

If global history is primarily a perspective – a view repeatedly echoed in Jürgen Osterhammel's presentation of various "globalizations"[39] and which has recently been affirmed by Philip McCarty[40] – it can also be *a perspective* in a broad range of topic areas, as Sebastian Conrad concludes:

> "Global history is currently a broad trend in both research and teaching. In journals and publication series, at meetings and conferences concerned with global history, forums for scientific exchanges and discussion on research have developed. They do

36 Conrad (2013) 12.
37 Benz (ed.) (2004).
38 See Schuppert, G. F. (ed.) (2005) 371–469; Schuppert, G. F. (2007c); Schuppert, G. F. (2014).
39 Osterhammel (2011).
40 McCarty (2014) 290: "Whatever the object of study or field of inquiry, global perspectives shape the kinds of questions we ask, the analytical approaches we take, and the ways we engage the world."

> not operate alongside the rest of the discipline, they are not a luxury one must be able to afford. In the twentieth century things were different: then world history was an occupation for well-established and mostly older historians. Today, global history is even on occasion addressed by theses and dissertations. The approach has also found its place in theory, in individual seminars or entire courses of study. Also striking is that widely different fields are discussed. Environmental and economic historians no less than social and cultural historians lay claim to global history. *In principle, a global history perspective can be combined with all historiographical approaches.*"[41]

If this is the case, a global history perspective would not only be amenable to legal history but also necessary in the interests of connectivity. Anticipating this observation – which dates from August 2016 – the Max Planck Institute for European Legal History launched a series of publications on "Global Perspectives on Legal History," starting in 2014 with "Entanglements in Legal History,"[42] fully in agreement with the definition of a global history of ideas as "histoire croisée" or "entangled history."[43]

Thomas Duve, director of the Frankfurt Max Planck Institute, who has taken up the cause of this global perspective for legal history[44] and launched the publication series mentioned, (in which our book "The World of Rules" has also appeared[45]), notes in his introductory contribution to the entanglement volume that a global history dimension has always been immanent in legal historiography:

> "[…] Legal History may nearly always have harboured a 'transnational' dimension in the broad sense of the word, especially in consideration of history before and after the spread of nationalism in Europe. Our work has addressed a wide array of questions relating to the 'transfer', 'transplantation' or 'translation' of normativity. It has almost always had to confront the challenge of describing and analyzing processes of normative reproduction in rapidly changing historical settings, not similar, but neither that different from those we observe today. The globalization of law, and of legal thought, is not a new phenomenon.[46] Thus, legal history should be able to make a contribution to the growing reflection on how different normative orders emerge, interact, develop."[47]

41 Conrad (2013) 13.
42 Duve (ed.) (2014).
43 Mulsow (2015).
44 See also his programmatic treatise: Duve (2012).
45 Schuppert, G. F. (2016b).
46 Kennedy (2006).
47 Schuppert, G. F. (2016b) 6.

Before considering what is to be understood by a global history of ideas, it should be noted that where in the course of this book we use the now current term global history, we mean not a subject but a *perspective* on certain historical events or processes. We can then, like the Max Planck Institute for European Legal History, write of "global perspectives on legal history."

When working with such a global history perspective, it is useful to make use of various key concepts or figures of thought that have proved their worth in analysing global history interrelations. Jürgen Osterhammel has convincingly shown what key concepts come into question.[48]

IV. Global history of ideas – three searchlights

To get at what a "global history of ideas" might mean, it is not helpful to proceed "globally" like Marcus Llanque, who presents a history of political ideas from antiquity to the present day without omitting a single major political philosopher in the long trajectory.[49] Of necessity Plato and Aristotle take the lead with Thomas Hobbes, Montesquieu, and Rousseau in midfield, while the concluding chapter describes the present as the age of human rights without, for a change, assigning responsibility to any philosophical thinker. We prefer to sweep the broad terrain of a global history of ideas to map out a history of ideas in keeping with the times in the light of the following questions:

- What ideas?
- "Global intellectual fields" and "global legal spaces" – What constitutes an intellectual field and a legal space?
- The history of ideas as entangled history?

48 Osterhammel (2015); also McCarty (2014), has identified nine "Integrated Perspectives in Global Studies": "1. Global and Local – Issues at Scale, 2. Interconnecting and Interdependence, 3. Decentralized and Distributed Processes, 4. Synchronic Contextualization, 5. Historical Contextualization, 6. Critical and Constructive, 7. Breaking Down Binaries, 8. Hybridity and Flexibility, 9. Multiple Perspectives and Voices."

49 Llanque (2016).

Concept of Idea and Role of Discipline

A. A narrow or broad concept of idea?

We must first clarify what sort of ideas we are actually thinking of when tracing the contours of a global history of ideas: Are we concerned primarily with so-called "big ideas"[50] and major philosophical conceptions, or ought we to use a *wide-angle lens* so as not to leave out too much of interest?

As far as presenting "big ideas" is concerned, Martin Mulsow has identified a clear trend in this direction: "The big themes are once again being pursued across the centuries and now also across the continents. … The focus is once again be on thinking itself and its efficacy …". Can we therefore expect a – modified – return to Lovejoy's "unit-ideas"? By this he meant basal ideas[51] that have kept going for hundreds or thousands of years, assuming ever new forms of expression and entering into different relationships.[52]

With Martin Mulsow, we take a decidedly different view in the conviction that such mega-concepts as "idea" or "knowledge" ought not to be too closely tailored from the outset. "Knowledge" – as Wilfried Rudloff remarks with reference to the knowledge of local social welfare authorities in Germany[53] – "is a complex, flexible, but also, because of its universal application, fuzzy concept. It covers everything that individual or collective actors use to interpret situations or produce action: know-how and information, techniques, world views, experience, customs, values, etc."[54]

The same holds for the concept of idea; we therefore agree with Martin Mulsow that, in addressing the history of ideas as entangled history, a narrow concept of this history makes no sense: "What do transfers convey? … Ideas, theories, bits of theory, points of view in a broad sense are conveyed together with the concomitant informational elements, religious attitudes, physical carriers, and cultural practices. Puristically narrowing down intellectual history cannot be helpful."[55]

In what follows we therefore adopt a broad concept of idea.

50 See Armitage (2012).
51 Lovejoy (1936), Introduction; also Lovejoy (1940).
52 Mulsow (2015) 4–5.
53 Rudloff (2003).
54 Rudloff (2003) 33.
55 Mulsow (2015) 19.

B. Do disciplines matter?

A closer look at the literature on the history of ideas raises the question whether there has been a *lead discipline* "responsible" for the production of successful ideas on a global scale. Depending on what periods are under scrutiny and perhaps in varying order, the candidates are theology, political philosophy, legal philosophy, and – last but not least – the comparatively young discipline of political science. On closer examination, however, it seems doubtful whether thinking in terms of separate disciplines within the history of ideas makes any sense at all, and whether such an approach will not neglect the increasingly obvious need to *contextualize* the *production of ideas*.[56] The following observations also suggest that a discipline-oriented approach is inappropriate:

* *The difficulty of assignment to a discipline*

Turning once again to Marcus Llanque,[57] we find the following icons of the political history of ideas, to each of whom a specific substantive focus is attributed:

(1) Plato, Aristotle, and antique democracy
(2) Augustine of Hippo and Marsilius of Padua: faith, church, and politics in the Middle Ages
(3) Thomas More and Niccolo Macchiavelli: politics between Utopia and the preservation of power

56 Particularly clear in this sense: Koskenniemi (2014) 123: "No doubt the turn to context provides an important corrective to ways of doing international legal history. It situates past rules and practices in their institutional, economic and political environments, portraying the jurists and politicians as active agents in their milieus with distinct interests and purposes to advance. … It brings legal principles down from the conceptual heaven and into a real world where agents make claims and counter-claims, advancing some agendas, opposing others. Meaning cannot be detached from intention, and intention, again, appears in action – in the way words are used to attain effects in the world. Historians of political and legal thoughts should pay attention to the specific moments when a text was produced and ask the question of who produced it and for what purpose – making agency visible while simultaneously demonstrating the way ideas function within linguistic and social conventions agents must follow so as to attain the persuasive effects they look for."

57 Llanque (2016).

(4) Thomas Hobbes, John Locke and modern contractualism
(5) Montesquieu and Rousseau: politics and society in the Enlightenment
(6) "Federalist Papers" and Immanuel Kant: the constitutional state and the rule of law in the Age of Revolutions
(7) Hegel, Marx, and the modern contradictions in society and politics
(8) Alexis de Tocqueville and John Stuart Mill: the individual and democracy in the modern age
(9) Max Weber and John Dewey: the idea of democracy between realism and idealism
(10) Carl Schmitt and Max Horckheimer: political thought in the epoch of totalitarian regimes
(11) The present: the age of human rights

This list of names almost automatically invites enquiry of the various disciplines as to their choice of icons for their ancestral portrait galleries. Legal philosophy would go for Hegel and Kant, but, quite rightly, so would philosophy. Thomas Hobbes, Montesquieu, and Carl Schmitt would be claimed not only by the general theory of the state (*allgemeine Staatslehre*) but naturally also by political science.[58] Particularly interesting, of course, is the case of Max Weber, one of the greatest legal sociologists. He was also a sociologist of religion, a national economist, and, above all, a theoretician of power and bureaucracy. This disciplinary diversity in one person was the inspiration behind the founding of the "Max Weber Centre for Advanced Cultural and Social Studies" at the University of Erfurt,[59] whose fellows are drawn from the various disciplines covered by Weber's research programme. For some years now, the present author has been of their number, not least as standard-bearer for legal science.

But there is a further aspect. Many of the great names in the history of ideas were not only theorizing scholars but also to a greater or lesser degree actively involved in the political affairs of their country as what we would now call "political consultants." This was the case for Thomas More and Jean

58 Interestingly, the frontispiece of the Leviathan not only adorns the front page of the eponymous social science journal but – on my initiative when chairman of the organization – also featured on the official letterhead for the circular of board of the Association of German University Teachers of Constitutional Law until removed on a motion by several members on the grounds that Thomas Hobbes was no worthy forbear of the democratic / liberal theory of constitutional law; nonsense, of course.

59 https://www.uni-erfurt.de/max-weber-kolleg.

Bodin, and particularly for the putative founder of modern international law Hugo Grotius – whose world – as Martti Koskenniemi shows[60] – was a *multi-disciplinary* one:

> "It has become increasingly common to read and understand Hugo Grotius from the perspective of his advocacy work *De jure praedae* (1604–1606) for the Dutch East India Company (Vereenigde Oostindische Compagnie, VOC) and thus at the service of the colonial pursuits of his countrymen.[61] But surely this welcome corrective to the old image of the great humanist may also blind us to the significance of his ecumenical projects and writings that manifest his specific religious convictions that, again, cannot be dissociated from his belonging to a cosmopolitan social class that was viewed with suspicion by the country's strictly puritan majority. Theology, politics and economy – and law – all frame the world in which Grotius operated. How to conceive the relations between these contexts is of course subject to ongoing methodological debate. Each of the alternatives provide us with a different 'Grotius' and none with any *intrinsic* epistemological priority."[62]

So much for our first observation.

* *The emerging modern territorial state as a state in need of ideas and knowledge*

The developing modern territorial state, whose emergence – as Ernst-Wolfgang Böckenförde has notably shown[63] – can be seen as a process of emancipation from the all-embracing grasp of the lead discipline theology, required specific legitimation to consolidate its self-standing as a genuinely political entity as well as the "know-how" that we could now call "governance knowledge." Historically, they were supplied by what in German was referred to as '*Staatswissenschaft*,'[64] inseparably associated with the rise of the territorial state in modern times, a discipline that managed to satisfy both requirements of modern statehood: with a specific theory of the purpose of the state – to further the happiness of subjects[65] – firstly as theory of legitimation while also providing the necessary *governance and administrative*

60 Koskenniemi / Orford (2015) 119–135.
61 In the same vein, Van Ittersen (2006); Wilson, E. (2008).
62 Van Ittersen (2006) 125.
63 Böckenförde (2007).
64 See Schuppert, G. F. (2003).
65 See Stolleis (1988) 334 ff.

knowledge[66] with the combined efforts of the subdisciplines *Policeywissenschaft*, *Kameralwissenschaft*, and *Ökonomie*.

The princely foundation of universities in Göttingen and Halle are also to be seen in this context, flagships for the thought of the Enlightenment and natural law, which also had to be *useful state institutions*.[67] Chairs of natural law were established less in the pursuit of legal philosophy than because of the *practical value* of natural law "in education of administrators and officials, in law reform, in recasting the law of nations, in civic education and its association with civic religion".[68]

In this context, it is particularly worth noting that natural law, although regarded as a "Protestant discipline," was also taught in Catholic territories at the explicit wish of Catholic authorities. Katharina Beiergrösslein, Iris von Dorn und Diethelm Klippel in "Das Naturrecht an den Universitäten Würzburg und Bamberg im 18. Jahrhundert"[69] have this to say on the subject:

> "… the introduction of natural law as a branch of study also appears to have been considered some years prior to Schönborn's broad programme of reform: already in the 1720s, Johann Georg von Eckert, former Hanover councillor and historian, as well as professor of history in Helmstedt, who in 1723 had been appointed court and university librarian by Johann Philipp Franz von Schönborn in 1723, called for the establishment of a chair in natural law. Schönborn's predecessor Christoph Franz von Hutten (1724–1729), too, had already recognized the importance of jus publicum and jus naturae, and had demanded that the professors of the law faculty hold regular lectures on natural, international and constitutional law. … This trend was reflected in Schönborn's reform programme, which set the number of full professorships at four. The required syllabus included not only canon law and Roman law but also jus publicum, natural and international law, jus feudale, and legal praxis. Friedrich Karl von Schönborn saw natural law in relation to jus publicum, '*whose true and proper science is of the greatest importance for every ecclesiastical and secular principality*'. In fact, natural law provided the basis for the theory of jus publicum, particularly that part of natural law that dealt with public law, *jus publicum universale*.[70] … The instructions for the professor juris naturae et gentium also clearly show that, although natural law continued to be regarded as a basic subject, this was no longer only because of jure publico, and thus in relation to *Publizistik*

66 On state modernization policy during the Enlightenment see Stollberg-Rilinger (2016) 208 ff.
67 Stolleis (1988) 298 ff.
68 Haakonssen (2012) 50.
69 Beiergrösslein et al. (2013) 178–179.
70 See Klippel (2010); Klippel (2013).

(constitutional law). It was now a general basic subject, designed to acquaint law students with the structure of all legal scholarship and its methods."[71]

So much for our second observation.

* *The cross-disciplinary history of the reception of ideas*

Carl Schmitt once said that all important constitutional law concepts had once been theological concepts.[72] This teaches us that ideas tend to leave their original river bed and wend their own way. Developing Schmitt's dictum somewhat further, it could be said that originally legal concepts transmute into political concepts, indeed by preference into *tools of political discourse*: for – as Thomas Niklas has put it – "*The language of law can sometimes be very useful.*"[73] Niklas cites the example of the Grotian concept of "freedom of the seas" as a "means of compensating the power deficits of small states."[74] Another particularly impressive example is Bodin's concept of sovereignty, in itself a constitutional law concept,[75] whose triumphal progress was more or less predestined, since it satisfied the needs of the rising territorial state to perfection.[76]

C. The phenomenon of contact zones between disciplines

Turning to the concept of contact zones, we leave aside the spatial sense of the term current in the history of ideas,[77] which addresses *communicatively shaped interactional spaces* such as the Silk Road or the Mediterranean, applying it primarily to *institutionalized cross-disciplinary interfaces*. Taking the example of the *relationship between the cultural and legal sciences*, we shall then consider exchange relations between disciplines.

71 Beiergrösslein et al. (2013) 178–179.
72 Schmitt (2009) 43.
73 Vesting (2013) 65.
74 Vesting (2013) 65.
75 See Quaritsch (1970).
76 Schuppert, G. F. (2003) 157 ff.
77 The concept of "contact zones" was coined by Pratt (1992) – primarily with reference to contact between "imperial and indigenous subjects" within territories under imperial rule.

* *Institutionalized contact zones*

Two, perhaps even three examples can show what we mean by institutionalized contact zones. The first is *natural law*, a discipline always characterized by remarkable *internal plurality*.[78] But, as Knud Haakonssen has shown, natural law, despite its internal plurality, had a strong *institutional identity*, marked by a Europe-wide network of chairs in natural law, filled with the aid of transnational "headhunters":

> "While natural law as a philosophical and religious doctrine may be of uncertain age, address and origins, it is indisputable that the subject took on a distinct *institutional* identity at a particular time – at least, within a limited span of time – in relatively well defined places, namely as an academic discipline in the European university faculties from the latter half of the seventeenth century until the end of the eighteenth century and, in several places, until well into the nineteenth century. There had of course been teaching of natural law as part of philosophy and theology since the Middle Ages, but the renewal of the subject that was perceived to happen with Hugo Grotius' *De iure belli ac pacis* (1625) had a nearly immediate academic impact in the context of the new *politica*. For example, Grotius's natural law had begun to be taught by Henrik Ernst in Sorø Academy in Denmark already in 1634. And in 1655 the subject had a special chair devoted to it at the University of Uppsala, when Petrus Eliæ Gavelius was appointed to a post in the Law Faculty specifically devoted to teaching the law of nature and nations, and, it was understood, to do so on the basis of Grotius's *De iure belli*. From then on chairs in the subject began to be founded with great intensity. In Germany the first was in 1661 in Heidelberg, although not in name certainly in fact, for this was the start of Samuel Pufendorf's career. It was from this position that he was head-hunted to become foundation professor of the law of nature and nations at the new Swedish University of Lund in 1668. But before that, similar chairs had already been instituted in Kiel (1665) and in Greifswald (1666), which had recently become part of the new Swedish empire. The Swedish concern with the teaching of natural law was extended from Lund, Greifswald and, in particular, Uppsala to Dorpat (Tartu) and Åbo, although separate chairs were not provided in the Estonian and Finnish institutions. Similarly natural law was taught at the Ridderakademi in Copenhagen from 1692, though at the University a chair was not established until 1732."[79]

The second example for an institutionalized contact zone is the aforementioned *Staatswissenschaft*, not only a science of legitimation and and purveyor of governance and administrative knowledge but also a contact-zone disci-

78 See, for example, Seelmann (2010) 131 ff.
79 Haakonssen (2012) 47.

pline uniting various fields of study useful to the modern territorial state.[80] Attempts to carry on this tradition of communication under the umbrella of *Staatswissenschaft*, or even to proclaim a "new" discipline under this heading have, as far as we can judge, enjoyed no great success.[81]

A third example of a scholarly discipline or a research institution seeking to relate various perspectives could be governance research,[82] which has now been institutionalized[83] to a considerable degree and whose approach cannot be claimed exclusively by any established discipline. Under the friendly applause of colleagues,[84] we have therefore labelled governance a bridging concept,[85] which unites various scholarly perspectives, thus sharpening analytical acuity.

So much for institutionalized contact zones between disciplines.

* *The relationship between culture and law: dynamic exchanges*

Thomas Vesting has shown –notably under the heading *contact zones*[86] – that the relationship between culture and law, between the cultural sciences and legal science has to be understood as one of dynamic exchange.

Vesting takes it as given that people have to rely on symbolic forms of culture for *orientation*. "If, as does older ethnology, we describe culture as the 'quintessence of knowledge, faith, art, morality, law, custom, and all the other abilities and habits that a person acquires as a member of society'",[87] it is clear that the specific function culture provides is orientation: "If one argues thus, the concept of culture occupies the sphere of transcendence abandoned by God and transforms the metaphysical vacuum of modernity into an incessant inner-world search for 'legible' meaning. For this reason,

80 See Stichweh (1991).

81 This is also true of "new" theory of the state posited by Vosskuhle (2001a), and for the attempt by the present author to revive "Staatswissenschaft" (2003).

82 See Schuppert, G. F. (ed.) (2005) 371–469.

83 In addition to an international network of governance research and the journal *Governance*, of which I have long been a member of the board of trustees.

84 See Benz et al. (ed.) (2007) 16: "Governance is thus no more, but also no less that a scholarly 'bridging concept' (…), which enable problem-oriented communication between different subdisciplines of political science and between scholarly disciplines."

85 Again in: Schuppert, G. F. (2007c).

86 Vesting (2015) 131 ff.

87 Vesting (2015) 127, with reference to Tylor (1871), quoted there by Baecker (2013) 211.

too, one can now posit that the 'question about culture' is a form of the 'question about the world', and not only a question about the cultural and intellectual as opposed to the technical / economic / material."[88]

"This insight into the embedding of individual conduct in cultural contexts that go beyond his or her person, the ties of the human being to the 'traditions within us' have" – according to Vesting[89] – "been elaborated by Aleida and Jan Assmann into a theory of cultural memory: the memory has not only a neuronal and social dimension, it is not only corporeally embodied and linguistically networked memory: it is also shaped by a cultural dimension inscribed in landscapes, places, buildings, pictures, and texts. Cultural memory includes not only the '*functional memory*', the symbolically present world, but also a '*storage memory*', the stocks of tradition that are not directly available for communication and which include what has not only been forgotten but also repressed."[90]

We agree with Vesting that these orientational aids are closely *linked to institutions and rules*, which brings us directly to law and its storage function – which we will be considering later in greater detail – and thus to the relationship between law and culture. Since Vesting describes this relationship between law and culture, cultural studies, and legal science as *entangled history*, we quote the relevant passage in full:

> That for the law of the liberal state a polycentric network of different national cultures is constitutive and that this network, like the individual cultures themselves are initially cultivated by the printing press could, according to David Wellbery and Kart-Heinz Ladeur, be described as the 'semantic intermediate input' of culture for the legal structure of the liberal state.[91] From this point of view, the orientation that the culture of printing provides for the liberal state would consist – to put it somewhat differently – in the production of 'formative texts', in *jointly inhabited narratives*, on which law docks as 'normative text', as expression of enhanced binding

88 Vesting (2015).

89 Vesting (2015) 128.

90 See Assmann, A. (2011) 181 f., 188: "In the storage memory, sources, objects, and data are collected and preserved regardless of whether they are needed at the present moment; we can therefore speak of a passive memory of society. The functional memory, by contrast, is the active memory of a we-group. Just as the autobiographical memory supports the identity of an individual, the cultural functional memory supports the identity of a collectivity. It contains a small selection from the abundance of handed down stocks important for the identity of this group."

91 Ladeur (2012) 173 ff.

force.[92] Niklas Luhmann would perhaps have said that the symbolic forms of the culture of printing would then be responsible for a specific 'cognitive' infrastructure of liberal law over and beyond its normative closure.[93] These various conceptual strategies for the literary, cultural- science, and systems-theory context (semantic input, formative / normative, cognitive / normative) is likely to be particularly useful where the *relationship between culture and law* is seen as dynamic, as a discontinuous shift in the density of a contact zone, but not as a rigid boundary and insurmountable dividing line. In contrast to Luhmann's closed legal system that operates only within its own boundaries, we must now look for constructions that allow more possibilities: on the one hand, the figure of the boundary of the legal system cannot be abandoned, nor the structure and intrasystemic ordering competence intrinsic to law; on the other hand, the legal system must always be incomplete. It cannot process all and every 'environmental irritation' in accordance with its own rules. And the relationship of the liberal state with culture and the media must be thought of and theoretically conceptualized as a locus of transition, of exchange, as a contact point, a space of entanglement of cultural-formative and legal-normative phenomena."[94]

After this excursion into the relationship between culture and law, we turn to a particularly interesting question: what actually constitutes intellectual fields and legal spaces.

92 On this terminology see Assmann, J. (2000) 38 f., 146 f.
93 See Luhmann (1993) 77 ff.
94 Vesting (2015) 131–132.

A Comprehensive Study of Global Intellectual Fields

A. Global intellectual and knowledge fields and legal spaces as communication spaces

We take the view that global intellectual fields, fields of knowledge, and legal spaces are primarily spaces of communication, that it is communication that constitutes them. To underpin this thesis, we invite the reader to join us in exploring two paths towards understanding this assertion. First, we cast a brief glance at the nature of communication spaces.

I. The workings and forms of communication spaces

Communication scientists largely agree that what constitutes communication communities is the presence of a common *communication code* by which members make themselves understood and which performs functions typical of a community, namely internal identity consolidation and external demarcation. Hubert Knoblauch explains:

> "We can speak of *communication communities* only if the commonalties of communication and their objectivization are also realized in social structures. Whereas only very weak social structures develop, for instance, in relation to television – referred to as a 'public' (with the exception of fan groups for popular soaps, who actively form communities) – the interactive media enable social structures to form: actors that build networks in which common topics (job hunting, homosexuality, dental phobia) or forms (games, gambling, auctions) are treated communicatively, quite clearly form communication communities. As such they share not only *common codes* and forms but also the notion of a community to which one belongs. Still more important in the framework of decontextualized communication is the *communicative marking of an identity* corresponding to the community."[95]

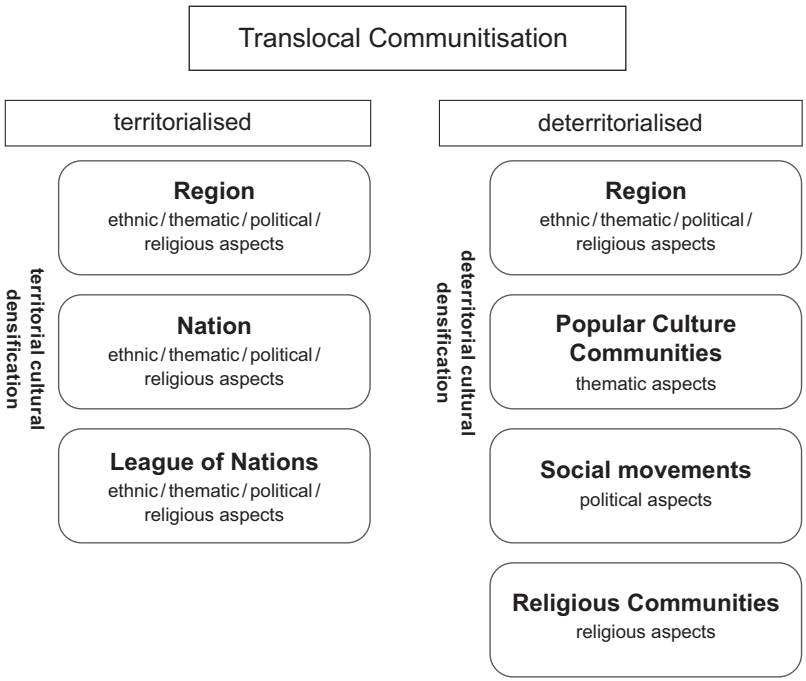
The religious community is a particularly apt example, which we will be looking at below. As Enzo Pace has convincingly shown, an experience of faith or an act of faith becomes "religion" only through the *development of a community-specific communication code*:

95 Knoblauch (2008) 85.

> "To sum up, religion as a means of communication therefore means at least three things: suggesting the idea of a God that speaks, always choosing privileged interpreters to whom He transmits a symbolic code, giving the latter the power to establish social links that can no longer be conceived in purely ethnic, territorial, tribal and parental terms – worlds that end to wrap individuals up in details (ethnic group, tribe, family, territory) – the links must be traced back to a higher code that separates individuals from these particulars and makes them feel and act as if they *belonged to a universal community.*
>
> The *symbolic boundaries* of this community are *defined by a communication code*, the key to which cannot be infinitely duplicated, because it is guarded by those who programmed the code and only made accessible (as a sign of their goodwill) to someone they trust. Religions basically ask human beings to place their trust in the person that a god has trusted with the opening and closing of the communication code. Seen from this point of view, faith thus means primarily trust in somebody (be it a prophet, a spiritual master, guide or shaman); *the community of faith* that is created *relies on a constant process of ritualized communication*, by means of which its members renew their pact of loyalty to the code transmitted to them, learning to discriminate true signs from false, confirming the socio-linguistic evidence that enables the community to consider itself as such. Its unity is essentially the product of a communicative investment, of a successful communication that publicly ensures a formal understanding of the evidence, of the fact that everything is continuing true to memory. The rites and liturgies of religions can be seen as great public communication systems that serve specifically to reiterate (so as to acknowledge and have acknowledged) the content and confines of the communicative pact that the community of 'faithful' has signed in order to come into being."[96]

It is only the existence of such a *communication* code not tied to a defined territory that ensures the functioning of deterritorial communication communities, which – as the overview below shows[97] – include both religious communities and social movements, which, like the anti-slavery movement, are held together by a common idea, in this case human dignity.

96 Pace (2009) 215.
97 Hepp (2008) 135.



But in speaking of communication spaces, we are concerned not only with the nature of communication codes and their decoding, but also with the actors communicating with one another, the members of the communication community and especially with the prominent social group that determines communication style and exercises interpretational sovereignty over the means of communication used.[98] This brings us to forms of community building in the professions, which generally operate as intensive communication communities and, as such, develop their own technical language as a communication code.

98 See Gebhardt (ed.) (1999).

II. Professions and their language

It is interesting to see what *type of professionalized actor* "calls the tune" from one period of history to the next. Back in the – hardly conceivable – "age without lawyers"[99] it was the clergy:

> "… the clergy were the leading personalities. The *institutional responsibility* they took on themselves made them the guardians and interpreters of the Ten Commandments, the Holy Scriptures, and the earthly standards of divine justice. Their daily contact with the faithful, particularly in the confessional, meant that they were constantly obliged to judge human conduct. Within the communities of the time it was quite normal to turn to the parish priest, the bishop, the monk, or the canon, not only in matters of spiritual welfare but also for advice in secular questions, or for help and moral support in the business of everyday life (the just price for buying or selling, or the right choice of an heir, etc.). It was, it seems, just as usual for the cleric who had been consulted to take up his pen and record on parchment the decisions and agreements of the parties to a legal transaction. The man of the Church was therefore a judge in matters both divine and secular; he was theologian and lawyer, rhetor and notary. He knew and judged evil deeds and forbidden thoughts as sin, and at the same time as unlawful conduct under civil or criminal law."[100]

But the clergyman soon found himself in company. Under the heading "Between old and new social estates," Manlio Bellomo has this to report:

> "In the cities a new circle of people took the stage. They included the specialized jurists trained in schools of law. These schools became increasingly important; they were the cradle of the modern university. They included physicians (now called *physici*), who took over many positions and logical procedures for analysing reality from the rediscovered Aristotelian texts, and tested and refined their professional qualifications through direct observation. They included scholars, who now attained social and political weight, which reached its zenith in the Humanism of the fifteenth and sixteenth centuries. They included artists, above all painters and sculptors. But the money changers – exchange brokers and the highly esteemed financial brokers (the modern banking system was coming into being) were also among them, contributing to the economic and cultural unity of the emerging Europe with major international transactions."[101]

We have opted for this actor-specific approach because professions tend to develop their own professional language as communication code, with the aid of which they can make themselves understood worldwide, wherever

99 This is the heading of chapter two in Bellomo (2005) 35.
100 Bellomo (2005) 48.
101 Bellomo (2005) 59.

they happen to be. John G. A. Pocock calls these professional languages "institutional languages," which are to be distinguished from the "languages of politics,"[102] which arise only in political discourse. In their informative article on the Cambridge School and its critics ("Die Cambridge School und ihre Kritiker" [2001]), Eckhart Hellmuth and Christoph von Ehrenstein remark that:

> "For Pocock there are basically two different types of 'political language'. First there are the so-called institutional languages. By this Pocock means idioms that have their origin in specific milieus. Pocock cites the example of the cultivation of *common law* and the idea of the *ancient constitution* by English jurists in the seventeenth century. Secondly, there are 'political languages', which develop in the discourse itself. They include, for instance *civic humanism*, whose genesis and transformation Pocock describes in his 1975 magnum opus 'The Machiavellian Moment'. In this monograph, which has remained influential to this day, he traces out the history of the participatory civic ideal from Machiavelli's Florentine city republic to the American constitutional debates in the late eighteenth century. With the discovery of the tradition of civic humanism, Pocock dramatically changes the way the intellectual household of early modernity is seen. In the Anglo-American culture of the seventeenth and eighteenth centuries, it now became clear that, alongside natural law, which had hitherto been regarded as the dominant idiom, there was a second key 'political language' in use – that of *civic humanism* – which contemporaries turned to in reasoning on the state, society, and law."[103]

Our interest focuses on "institutional languages"; Pocock names examples of such languages specific to a given profession: "Some will have originated in the institutional practices of the society concerned: as the professional vocabularies of jurists, theologians, philosophers, merchants, and so on that for some reason have become recognized as part of the practice of politics and have entered into political discourse."[104] Of these four, we are particularly interested in the language of jurists and theologians because their *institutional framing* is especially pronounced. In what follows – and this is the second path we wish to explore – we consider two "global intellectual fields": the world of law and the world of religion.

102 On the function of "languages of politics" in discourses on the good and just order of a polity see Pocock (1962).
103 Hellmuth/Ehrenstein (2001) 159 f.
104 Pocock (1973) 3–41.

B. Two examples of deterritorialized communication about law and life-determining ideas

I. The "jus commune" as communicatively generated and disseminated universalist legal thought

In considering the law of the Middle Ages, *various legal regimes* have to be distinguished, which have in turn to be *ranked*. Precedence is taken by enacted local law, such as local government statutes or the royal prerogative, be it that of the Regnum Sicilia or in Castile and Léon, then came customary law, and, finally – if the first two levels offered no solution – the jus commune, which in turn was based on the tenets and principles of the "corpus juris civilis" and the "corpus juris canonici."[105] What are we to understand by "jus commune"?

The particularity of the jus commune is best understood when it becomes clear how it was made and disseminated. It was made by a particular species of legal actor, who in legal history go by the names of "glossarist" and "commentator," who processed the rediscovered Roman law in the form of glosses and commentaries in such a way that the "corpus juris civilis" gradually came into being alongside the canon law of the Church in the shape of the "corpus juris canonici."[106] Together, the two legal regimes formed the "utrumque jus," whose two pillars had to be mastered by prospective "doctors of law." The jus commune was taught in the schools of law scattered across Europe, for example in Bologna, Padua, Perugia, Montpellier, Toulouse, Orleans, and Salamanca – to mention the most renowned. Entire generations of students from everywhere in Europe made their way to these places of learning, a process that Manlio Bellomo describes as follows:

> "On the road, they met other students from Sicily or the distant British Isles, and they made chance acquaintance with fellow travellers and experienced, prudent merchants. Their sense of community, of solidarity grew through such contacts, and in comparing habits and customs in conversation, they harmonized their various vulgar tongues through the lexical and grammatical medium of a living, sim-

105 On the overall complex of jus commune see Bellomo (2005) 155 ff.: "Das System des ius commune".

106 On the function and importance of glossarists and commentators, see Wesel (1997) 311 ff.

ple, and flexible language, Latin. Thus, they helped promote a cultural unity that was to play a prominent role in the cities."[107]

But what was really particular to the jus commune was that it taught jurists *how to argue legally*. Its chief function was thus less to establish a system of legal rules than to provide jurists everywhere with a *fund of argumentation* on which to draw when dealing with local law – "jus proprium" – or enacted law. Bellomo sums up:

> "Even if the binding point of reference was a rule of *jus proprium* (royal prerogative, municipal, etc,) or a term in a contract, the judge or lawyer could not ignore the generally accepted meaning of the technical terms that he found in the law or notarial document. In other words, he could not ignore the *jus commune*, which had determined the meaning of these terms and which designated what Gaius called the *variae causarum figurae* – the legal *figurae*, which were the heritage and wealth of every jurist. It was immaterial whether the content of the norms or contractual terms tallied with *jus commune* rules, and it was irrelevant whether the *jus commune* as the applicable positive law ranked first or last among the legal sources. What counted was only the *figurae* that embodied the *jus commune*, the principles and their underlying values.
>
> Associated with the conception and knowledge of the *figurae* was the conviction that they were eternal and non-modifiable, since they embodied a system of values and supreme, absolute principles. This provided a standard of value, a presentation model, and a means of reaching agreement that surpassed the arbitrariness and randomness of *jus proprium*. The *jus commune* in its objective and meta-historical nature thus also served to protect the interests of jurists and their profession. It was immaterial whether they were aware of this, or whether they acted out of conviction grounded in reason or out of naive, unthinking trust in the universality of *jus commune*."[108]

In his treatment of law in European history,[109] Paolo Grossi provides an excellent description of jus commune. He begins with the particularities of its emergence:

> "Legal experts developed this law, people at home in the law: judges, notaries, advocates, but especially scholars and professors teaching at universities throughout Europe. Deeply involved in the concrete practice of the law, they served rulers as legal advisers; appeared in court as barristers or counsel to the bench; successfully

107 Wesel (1997) 121.
108 Wesel (1997) 159.
109 Grossi (2010).

> exercised the professions of solicitor and notary. The law grew out of a complex dialogue with both the requirements of their age and the antique Roman texts."[110]

Also important was that the jus commune could operate as a uniform *voice of the legal community*:

> "It was law that presented itself as the uniform voice of the legal community, as the mouthpiece of a class of experts who were endeavouring to erect a great legal edifice, a law free of the state, which was to prevail throughout the later Middle Ages. The great Italian legal historian Francesco Calasso rightly spoke of 'common law as an intellectual fact'."[111]

Above all, however, the jus commune was essentially law without borders, law – we could say – with a *globalization gene*:

> "This law knew no borders, just like science, which addresses the universal and to which artificial political barriers are anathema. This is shown by the great *migrations of teachers and students*, moving from one university to the next as cultural pilgrims and citizens of a republic of letters in which no-one felt himself to be a foreigner. This law created the legal unity of Europe and had a *universal orientation*, which alone enjoyed scholarly legitimacy. One of many instructive examples is offered by the main representative of the commentator school, Bartolus de Saxoferrato, an Italian jurist in the first half of the fourteenth century. At one point in his *Commentarii*, for the most part notes on lectures that record lively dialogues with students, Bartolus supplemented his text with reference to a German scholar who on a particular morning had presented the views of a university professor from Orléans. The small lecture hall at the University of Perugia where Bartolus taught was not sealed off from the outside world by the walls of the central Italian city but was at the centre of an *intellectual network* that spanned Italy, Germany, and France and was located geographically at the centre of the entire civilized world."[112]

In sum, we note that the jus commune was a legal regime disseminated communicatively, which consisted essentially in a *legal idea* and a *methodological regime* rather than constituting a closed system of legal rules, and which was therefore suitable for application wherever legal experts were at work. However, the globalization gene of the jus commune – and this is the inevitable actor perspective – could develop a global effect only because there was a class of jurists able to exert their interpretive sway over this *jurists' law* to establish its position in politics and society.

Now to our second example.

110 Grossi (2010) 58.
111 Grossi (2010) 59.
112 Grossi (2010) 59.

II. Religious communities as important communication communities in the history of ideas

1. The history of religion as a history of ideas

To take the religious community as an example of a communication community important in intellectual history can be justified on the undeniable grounds that religious thinking plays a key role in the history of political thought. For this reason, such names as Augustine, Thomas Aquinas, and Marsilius of Padua have their place in every ancestral portrait gallery of the political history of ideas.[113] At this point, however, we are concerned not with these great thinkers but with political thought as theological thought and with the role of religious language as a language of politics.

In his recent history of political thought, Otfried Höffe[114] offers provides an admirable introduction to the topic. We begin with his assessment of the *role of Christianity* in the political history of ideas as a *revolutionary force*:

> "With Christianity, a new intellectual and social force entered political thought. … Whereas Plato had connected political thinking with just about all the fields of his philosophy, Aristotle and Cicero limited themselves to interlocking politics with ethics and a philosophically demanding rhetoric. … Although the outstanding thinker of the early period, St. Augustine, went along with this, the continuity was interrupted by a discontinuity with revolutionary implications. Political thought was profoundly, essentially charged with religion. Mere politics, coupled at best with ethics and rhetoric, had lost its rights. Permeated to the core by religion, genuinely political thinking transmuted into political theology and theological politics."[115]

As the introductory remarks in this book on the role of the language of law would lead us to expect, this "new intellectual and social force" employed a new language and new concepts, as Höffe explains:

> "Augustine's propositions are without a doubt both innovative and provocative, and both radically so. Innovative is the focal topic of the second part, *fundamentally new* vis-à-vis the philosophical tradition: a civitas dei, a city of God, with its just as *fundamentally new concepts and arguments*. No less provocative is the lack of interest

113 See, for example, Llanque (2016) 24 ff. on "Augustinus von Hippo und Marsilius von Padua: Glaube, Kirche und Politik im Mittelalter".

114 Höffe (2016).

115 Höffe (2016) 92.

> in usual political thought. Political philosophy is displaced by political theology. However, what was meant was not the Roman, 'heathen' theology of the state-controlled cult of the gods totally rejected by Augustine in Books VI to VII. Augustine's *city of God* is not political thinking *as* political theology but rather political theology *instead* of political philosophy."[116]

If, as we feel, there is something to Höffe's assessment of the innovative and radical nature of the *Christian gospel*, this brings two aspects into focus: first, the question of how and by whom this good news was told and how it was institutionally "managed."

2. Religious communities as narrative communities

One thing they the monotheistic religions Judaism, Christianity, and Islam have in common is that they clearly cannot manage without a founding story, a *foundational narrative*: religious communities can with good reason be described as *narrative communities* in which a particular narrative form – the so-called *revelation narrative* – plays a key role. What such revelation narratives are and what function they have can be illustrated by two particularly apt examples:

* *Revelation as inspiration or "sending down" – the case of the Koran*

According to the usual account, the word of God was revealed *only orally* by the Archangel Gabriel to the Prophet, and by the Prophet to the faithful. In his introduction to the Koran, Hartmut Bonzin gives us an excellent idea of how this revelation is to be imagined and what it means for understanding the Koran.

> "Sura 20; 114 brings us closer to the *process of revelation*:
>
> And do not be hasty with the Koran before its inspiration to you is concluded.
> From this we learn that first an inspiration or revelation is given Mohammed by God, which is then recited by the Prophet. This 'recitation' of the revealed text is called Koran (Quran, Qur'an). And to describe the process of revelation which precedes this recitation, two main concepts are used, namely '*inspiration*' (wahy) and '*sending or coming down*' (tanzíl)."[117]

116 Höffe (2016) 107.
117 Bobzin (2007) 19.

The revelation story of Islam thus describes a multi-stage process; the first recitation is ascribed to the Archangel Gabriel, the second, based on this first, is made by the Prophet Mohammed; in all, according to Bolzin, "Koran" thus means *four different things*:

- The recitation of a revelation text to Mohammed himself
- The public recitation of this text by Mohammed
- The text itself that is recited
- The totality of the texts to be recited, i. e., the Koran as book.[118]

* **God's revelation of the Ten Commandments as surely the most impressive legislative act in legal history**

How God revealed the Ten Commandments to Moses on Mount Sinai has been portrayed over and over again, and we all remember the pictures from bible class, if not from Cecile B. DeMille's "The Ten Commandments." "The revelation on Mount Sinai," comments Graf, "is a primal scene in the religious narratives of monotheism, a constellation of inexhaustible abundance of meaning. No Jew and no Christian would not immediately associate the Ten Commandments with the idea of biblical law." And then the act of legislation itself, a religious representation whose suggestive power could hardly be more intensive:

> "Yahwe's Sinai theophany is accompanied by fearsome natural signals of divine transcendence: thunder, lightening, dense clouds, mighty trumpeting, quakes, smoke, and fire. In ancient European emblematics, smoke and fire were symbols of transience, ephemerality, of the self-consumung, the unobtainable. By contrast, *the law of the eternal God written in stone had an aura of eternal validity, immutability, which should govern all dimensions of human conduct*."[119]

But it is not only a matter of being impressed; we want to understand what was special about this law revealed and made by God. As Matthias Köckert[120] has shown, this can best be achieved by comparing the revelation of the Ten Commandments with the conferring of legislative power on King Hammurapi by the sun god Shamash:

118 Bobzin (2007) 20.
119 Graf (2006) 44.
120 Köckert (2007).

> "Before Shamash to the left stands the king, recognizable from his bowl-like cap. It is doubtless Hammurapi. But Shamash presents him not with the collection of laws but with ring and sceptre, the insignia of power and dominion. In relation to the laws set out below, *the relief depicts the king as lawmaker under divine commission*. Contravention of the legal order enacted by the king was therefore also an offence against the commissioning divinity, even though *gods in the ancient Orient were merely the guardians of the law and not lawmakers* …
>
> *Lawmaking in the Ancient Orient was prerogative of the king.* For this reason, kingship and lawmaking were closely associated. However, through the mediation of the king, the law also had a religious foundation, for the monarchy was – if not of divine origin or nature – always kingship by the grace of God."[121]

It was quite a different matter with the revelation of the Ten Commandments; in this case, lawmaking power was not conferred: it was the *lawmaker God*[122] Himself who enacted the law. Köckert notes:

> "How very differently the Old Testament tells of the imparting of the Decalogue and the laws. Although it depicts Moses in kingly guise: he alone may approach God, he is representative of the people, intermediary for God's will, military leader, and many other things, but not a lawmaker. *Unlike King Hammurapi, Moses receives not insignia of power from the hands of God but the Tables of the Law*, which not Moses but God Himself has written on the tablets with his finger. Whatever laws Moses wrote after receiving the Decalogue, such as the Book of the Covenant etc., he had first received from God. Although the laws in themselves do not indicate the authorship of God, and even the Decalogue presents itself only at the beginning as the word of God, in the context of the framing narrative they are all styled as statements of God. In the Old Testament, God himself authorizes law and justice in lieu of the king."[123]

Before turning to *religious communities as institutionalized loci* of religious and of legal communication, it is well worth taking a look at the narrative foundations of another governance collective, the modern constitutional state. In considering this parallel world, what Otto Depenheuer and Christian Waldhoff have to say on the subject is helpful.

* The narrative foundations of the modern constitutional state

Otto Depenheuer set out recently in "search of the narrated state."[124] He has identified various "state narratives." As examples he cites the idea of the "Holy Roman Empire" and the associated notion of "translatio imperii" – and

121 Köckert (2007) 23 f.
122 See Graf (2006) 36.
123 Graf (2006) 24.
124 Depenheuer (ed.) (2011) 7–34.

competition between state narratives in which states take part as narrative communities; the relevant passage is worth quoting not least because it is tempting to replace the term "state" by that of "religion":

> "There is competition between state narratives. States that vouch for a dream and represent hope for people have much more attractive narratives than others that close themselves off from the outside world in a narrative. The state that can tell the better story is courted and self-confident. The unavoidable and disagreeable flip side of this narrative creation of particular identity is exclusion of the Other: whoever does not understand the stories, who cannot or does not wish to apply the narratives to himself does not belong to the *narrative community*. This can give rise to exaggerations, delusions and aversion vis à vis 'others',– the 'barbarians', 'foreigners', 'outcasts', 'enemies'–, as history shows over and over again. Such absolutization, however, is neither an historically necessary nor logically inevitable consequence of these narratives. One can love one's own narration while respecting others and gaining enrichment from them. This is also life-serving because everyone is caught in a network of stories: all narratives passing judgement on inclusion and exclusion are therefore always relative; each refers to only one of many narrated communities: that of a country, a region, a city, a religion, a party, a firm, etc. There is not only one, big story; the present reality is shaped by the reality of a *plurality of narratives*. The abuse of a narrative, which can never be excluded, therefore does not speak against it, and certainly not against the inevitability of narratives. 'Abusus non tollit usum', ['Abuse does not take away use'] say the Digest, and this should not be seriously disputed with regard to the narratives of the state, either."[125]

The quite remarkable parallels between religious revelation narratives and the foundational narratives of constitutional states is stressed by Christian Waldhoff, writing about "The Foundational Narrative of the Constitution as Idea of the State." Concluding our consideration of religious communities as narrative community, we cite him as follows:

> "As we shall see, the constituent power thrives on the notion that the new constitution as idea of the state to come is born in full facticity through the revolutionary act, the 'supreme accomplishment' of constitutional theory ….
>
> Literally spelling out this idea and transporting it into time is the real objective of constitution-making. *The constituent power thus becomes the foundational narrative of the later constitutional state*, the myth of the nation. This narrative – as Napoleon demonstrates with the confidence of a sleepwalker – is not a historical account but a novel. Making a constitution is, furthermore, one of those 'conditional beginnings' of which Thomas Mann writes, 'that constitute the primal origin of the special tradition of a given community, ethic entity, or religious family in a practical and actual sense (Mann 1969, p. 9) and thus bring the eternal search for ever more distant origins in infinite regression to an end. This could well explain the kinship

125 Depenheuer (ed.) (2011) 26.

> with aesthetic categories; it is more a matter of fathoming sensory perception than juridical rationality. The sets the theory of constituent power in stark contrast to the prosaic full positivity of constitutional law. Napoleon again: once the novel of revolution is over, the task is to govern, not to philosophize."[126]

3. The institution "Church" as an important communication space in the history of ideas

The sociology of space and communication science tell us three things about the nature of communication spaces: first, that a container-like understanding of communication spaces is inadequate; second, that communication itself has a space-generating function; and, third, that different social groups can be understood as different communication spaces.[127] The first point obviously requires no further discussion. The second – the space-generating function of communication – also seems perfectly plausible on condition that there is a certain density of communication. Thomas Wetzstein argues in this vein in writing about the contribution the papacy made to the development of new communication spaces:

> "A 'communication space' is to be understood as a space defined by longer-term *exchange relations*. The term 'communication space' has only recently been taken up by historiography … With reference, mostly in studies on the early modern period, to 'a dense network of informal relationship matrices and communications contacts' (Keller 2004). And the motto 'Communication and Space' for the 45th Biennial Meeting of German Historians in Kiel in 2004 indicated that the science of history had opened up a new field of research, albeit without devoting too much attention to the significance of this compound concept.
>
> That German medieval studies, in particular, are only now gradually coming to focus on large historical spaces again is perhaps due to the risk of political exploitation. In light of twentieth-century debates on the 'West' and a European Union still thirsting after historical identity, the temptation to use spatial categories for political purposes is by no means a phenomenon from the distant past. Be that as it may, there can be no doubt about the importance of historical communication spaces, especially in investigating transfer and homogenization processes. The eleventh and twelfth centuries, in particular, are seen by historians as a phase of intensive exchanges and concentration processes."[128]

126 Waldhoff (2011) 62.

127 As representative of the sociology of space, see Löw (2001); for communications science, Jarren (1987).

128 Wetzstein (2008).

The third point – social groups as communication spaces – invites an argumentation chain from religious communities as governance collectives to religious communities as institutionalized collectives and then to religious communities as loci of institutionalized communication. We end up with "Church" as locus and space of institutionalized communication.

This *connection between institution and communication* seems to have been wantonly neglected by media-centric communication science; in our view *institutions* are also *communication spaces*, and the institution "Church" is an excellent example of this. Our view is confirmed by Helmut Schelsky, who has gone into the question "Can permanent reflection be institutionalized?" Institutions, he claims, are not only loci of communication but, as the example of churches shows, also entities *needful of communication*:

> "The step to knowledge of developing institutional forms for religious faith based on the permanent reflection of interiority is now no longer all that difficult to take. It is clearly a matter of the production and communication, steered organizationally by the temporal outside world, of permanently reflected subjectivity in the religious field, which in consciousness is reduced to trivially banal commonplace. This seems to me to be the case for all social forms of present-day religious life, which is based on conversation and discussion, and thus on the conscious meeting of individual subjectivities, as form of organization and communication. The fundamental institutional requirement of this form of faith appears to be that 'people talk to one another'. This *conversation principle* underlies all modern attempts to achieve the socially effective animation of faith, reconversion, or safeguarding of religious existence. What is at issue are not only 'structurally pure' institutions of this sort like the Protestant academies, the churches and 'Katholikentage', church industrial work, youth work, etc.: 'discursive partnership' is increasingly becoming the normal form per se of religious church activity, both within the inner life of the community – the oratory becomes an assembly room – and in the overall societal presentation of the churches, apparently reducing the importance of older forms of religious communication – ritual, scripture readings, singing, even preaching."[129]

The history of the papal creation of communication spaces shows that it makes sense to regard the institution "Church" as an important such space in the history of ideas. As a rule, the rise of the papacy is recorded as institutional history, describing how this organizational model gained the upper hand over other institutional options such as conciliarism. As Thomas Wetzstein shows, the growing importance of the papacy can be described from

129 Schelsky (1957).

the perspective sociology of space and communication theory, yielding interesting insights.

The first is that the strengthen of the papal office was accompanied by a "*novel claim to space penetration*":

> "Although the horizon of the Roman bishops had briefly broadened under Nicolas I (858–867) and again in the tenth century with activities in Spain, Scandinavia, and Eastern Europe, it was a quite new development in the history of the papacy when the vicarius Petri in the person of Leo IX not only laid theoretical claim to the leadership of Christendom but also pursued the practical implementation of his reform demands by seeking to impose a completely new relationship with space. Also for the successors of the pope Emperor Henry III had placed on St. Peter's throne, this novel claim to space penetration was a prototypical innovation whose causes are to be found not only in a new conception of the papal office, but also in the 'de-Romanization' of the papacy itself through the appointment of non-Roman bishops and in the example of the episcopal visitation."[130]

Whereas ecclesiastical legal history often describes important pontiffs as "*judicial popes*" because they pursued the judicialization of the Church, from a communication science point of view it might also be appropriate to speak of popes who made their mark through their high *communication potential*. As Wetzstein points out:

> "Particularly under Gregory VII (1073–1085), the new relationship of the popes to space took on a new quality (1073–1085) Not only is his correspondence permeated, as it were, by a programmatic postulate of spatial domination: his address book listed rulers and prelates in Germany, Italy, France, England, and the three Spanish empires, along with the kings of Denmark, Norway, and Sweden, the Duke of Poland, the kings of Russia, Hungary, Serbia, Croatia, and Dalmatia, the Emperor in Constantinople, rulers in Ireland and even in Islamic Mauritania. Recent research on papal records shows that in document production, the papacy began as early as the pontificate of Leo IX to overtake the Holy Roman Emperor as competing, space-dominant authority. Over a period of five years (1154–1159), for instance, the chancellery of Frederic I issued 148 documents, whereas over the same period Pope Hadrian IV produced no fewer than 1000.
>
> Above all in critical situations – already during the Investiture dispute, but particularly in the context of schisms – the popes began to implement their newly won communicative potential in intensive public relations work, often with the support of wide personal networks. Alexander III, in particular, was well aware of the effectiveness of this tool when, after the controversial election of 1159, he sought systematically to inundate Western Christendom with electoral propaganda, finally

130 Wetzstein (2008) 60.

> – with the aid of two centralized orders with a communicative potential at least equal to that of the papacy – emerging as victor from the 'war of propaganda'…."[131]

We conclude this point with Thomas Wetzstein's summary of the history of the papacy as communication history:

> "To return to the initial question of the contribution the papacy made to expanding the communication spaces of Latin Christendom, there can be no doubt about the impressive achievement of the popes since Leo IX – even though the twelfth century offered institutions that in no way lagged behind the papacy in their spatial impact: universities with far-reaching personal networks often maintained by correspondence, and the new, centralized orders of the Cistercians and Premonstrensians with general chapters almost revolutionary in communication history.
>
> The communications techniques of the papacy demonstrated a striking development in keeping with a general trend in Latin European communication history: in propagating their reform programme, Leo IX and many of his successors quite clearly took the communicative habits of a face-to-face society into account when they placed great value on personal contact through travel, synodical activities, and the attachment of external functional elites to their persons. The twelfth century saw a gradually break with such communicative practices, as the written word gained increasing importance in organizing 'rule from afar'. The Fourth Lateran Council with its impressive list of participants can be seen as marking the end of this era, opening the door on a new epoch of papal communicative praxis. Although, until well into the fifteenth century, the papacy was unable to carry out its reforms or collect financial resources without sending out representatives, from the twelfth century onwards it displayed more and more decided characteristics of governance based on the written word."[132]

After these observations and findings on intellectual fields, fields of knowledge, and legal spaces as communication spaces, we turn to the popular subject of the history of ideas and knowledge as histoire croisée or entangled history.

131 Wetzstein (2008) 61 f.
132 Wetzstein (2008) 73–74.

An Early Intertwined History of Idea and Knowledge

As the founder of the history of ideas in America in the 1940s Arthur O. Lovejoy rightly stressed, "Ideas are the most migratory things in the world."[133] With this in mind, I presented some thoughts on the mobility of the rule of law principle under the heading "Can the Rule of Law Travel?" at a 2012 workshop at the Erfurt Max Weber Center.[134] Given the incontestable wanderlust of ideas, writing a history of ideas as entangled history is an increasingly popular approach – witness Martin Mulsow's "Ideengeschichte als Verflechtungsgeschichte. Impulse für eine Global Intellectual History"[135] and the introductory essay by the editors Samuel Moyn and Andrew Sartori in "Global Intellectual History".[136]

Certain reflections and examples of our own could prove helpful at this stage. Before presenting them, however, we shall attempt to place the "entangled history" approach to a global history of ideas and knowledge in a somewhat more general context as a contribution to understanding the history of ideas as entangled history.

A. Globalization history as entangled history: the need for systematic entanglement research

Two books I published in 2014 and 2015 discussed the history of globalization from two different, rather unusual perspectives. I first examined what *governance structures* and *governance actors* can be regarded as characteristic of the globalization process – globalization as a history of governance[137] – and, second, I sought to depict the history of globalization as essentially a history of communication,[138] since *globalizing communication* has been the chief factor leading to the shrinking of the world and the "death of distance."

133 Lovejoy (1940) 4.
134 Schuppert, G. F. (2012a).
135 Mulsow (2015).
136 Moyn / Sartori (eds.) (2013) 3–32.
137 Schuppert, G. F. (2014).
138 Schuppert, G. F. (2015).

From the standpoint of governance research[139] and of communication science, *entanglement structures* were in clear evidence almost everywhere.

The first book was therefore given the title "*Entangled Statehood*" ("*Verflochtene Staatlichkeit*") and focused on the following *five entanglement regimes*:[140]

- Statehood entrepreneurs, such as the East India Company as pioneers in globalization
- Empires and networks as entanglement structures typical of globalization
- The state in the entangled world of finance – between the Rothschilds and the International Monetary Fund
- The partnership practised between State and Church; and
- The history of globalization as missionary history – the triad of commerce, civilizational sense of mission, and Christian missionaryship

The second publication, which addresses the phenomenon of globalization from the point of view of communication history, deals not only with entanglement structures but focuses more strongly on specific *globalization actors*, as they can be called. Seven are particularly typical and interesting:

- The postal entrepreneurs Thurn and Taxis
- The operators of news and press agencies as communication entrepreneurs of the "Victorian Internet"
- Siemens as a communications and infrastructure company
- The Reformation as a communication event and Luther as media star
- The inhabitants of the "blogosphere"
- The members of the Republic of Letters, and
- Human rights activists

These rich pickings invite us to outline what we could call *entanglement research*, which would have to be pursued as a *multi-disciplinary project*. In what follows we make a start with a list of five fields that any entanglement research worthy of the name would have to address. The list shows which discipline could assume "responsibility" for the given field of study.

139 See the overview in Schuppert, G. F. (2015) 371–469.
140 Schuppert, G. F. (2014) 356 ff.

- To begin with, *entanglement structures* and *entanglement actors* need to be identified. Although they are difficult to keep apart – as governance studies show, actors operate within the structures that frame their action[141] – it is analytically useful to treat structures and actors separately while keeping their interrelatedness in mind. And this is how we shall proceed, looking first at some typical entanglement structures and then at particularly "conspicuous" entanglement actors.
- Our second concern is to examine the *causes of entanglement* and also whether we are dealing with institutional pathologies rather than institutional responses to certain processes and problems not or scarcely amenable to handling without entanglement. One interesting example is the so-called *European composite administration*,[142] an informational, decision-making, and monitoring network that is to be understood as an answer to the institutional structure of the European Union. From a still more general perspective, the investigation of governance structures in multi-level systems – so-called "multilevel governance"[143] – has to seen as entanglement research: "The focal subject matter of political-science analysis [of multilevel governance] is the causes, forms, and consequences of entanglement."
- Third and last, entanglement research would have to capture the diversity of existing entanglement forms and attempt to systematize them in some way; I have, very provisionally, identified *four types of entanglement structure typical of globalization*:
  - *Entanglement structures* between the state and commerce: from the privileged trading companies to the symbiotic relationship between state and multinational corporations
  - *Entanglement structures* between the state and religion: from alliance between throne and altar to military chaplaincies and the division of labour in meaning production.
  - *Entanglement structures beyond national statehood*: from transnational network cooperation to fraying statehood[144] as an applied case of entangling statehood.
  - *Imperial entanglement structures*: from "informal empire" to "indirect rule."[145]

141 Mayntz (2005).
142 See Schmidt-Assmann / Schöndorf-Haubold (eds.) (2005).
143 Greater detail in Benz (ed.) (2004) 125–146.
144 Genschel / Zangl (2007).
145 Greater detail in Osterhammel (2003).

- Fourthly, entanglement research would have to examine the intended and, above all, the *unintended consequences* of entangled political decision-making processes. In this connection, the reader is referred to the now classical study by Fritz W. Scharpf on the so-called *political interdependence trap*,[146] in which he convincingly traces the phenomenon of the European butter mountain back to the entanglement structures of European governance, which favour status-quo decisions, prevent dramatic surges of reform,[147] and generally enable a policy of blockade.
- Fifth – which brings us to the second part – entanglement research has to investigate whether there is a *dynamic between the entangled parts* and what this dynamic is. What actually happens there? What is transported and exchanged through the *entangled channels*?

The European Union is a highly instructive example. The EU governance system is characterized by, among other things, *performance competition* between member states. Arthur Benz describes the functional logic involved:

> "In the EU, governance by performance competition takes place under the heading '*open method of coordination*' above all in the fields of economic, employment, social, and environmental policy. At the European level the commission defines goals and standards to guide member states and leaves it to them to implement them by the means of their choice. *Benchmarking* by member-state experts and the commission provides the incentive for member states to meet these goals and standards. The publication of best practices aims to trigger *learning processes* and public critique of bad practices is intended to prompt the states involved to adapt their policy to meet European standards."[148]

"Benchmarking" and "open method of coordination" (OMC) involve not only confrontation with and exchanges between different political styles and administrative cultures but also a meeting of different notions of the public good and political ideas. These are extremely communication-intensive processes, which justifies speaking of "governance as communication."[149]

146 Scharpf (1985).
147 See Schuppert, G. F. (2008a).
148 Scharpf (1985) 107.
149 Schuppert, G. F. (2007a).

We now take a closer look at typical entanglement structures and entanglement actors.

B. Communication-intensive networks as a prime instance of entanglement structures: two historical examples

The network concept is a fine example of entanglement structure. Despite its ambivalence, this successful concept cannot be avoided.[150] Jürgen Osterhammel shows this: while expressing his scepticism about the concept ("the network is a both graphic and deceptive metaphor"), he stresses how useful it is: "The network metaphor is particularly useful because it permits the notion of a *multitude of contact points and nodes*."[151]

The metaphor is useful, and therefore so successful, because – as Andreas Wald and Dorothea Jansen rightly stress – networks are "application-neutral."[152] Its all-round usefulness explains why the network concept is to be found in so many contexts. It can be used as an analytical tool in micropolitical history; Wolfgang Reinhard does so in his study on "The Nose of Cleopatra" ("Die Nase der Kleopatra").[153] He has this to say about the ubiquity of the metaphor:

> "Networks are an omnipresent historico-anthropological phenomenon, just as convincingly demonstrated by the old Chinese variant Guanxi and its adaptation to the present as by a network-theoretical interpretation of St. Paul's first letter to the Coninthians.[154] But its importance was recognized only when it was promoted to a *form of societalization of the information world* of our age. The connection with the growing importance of the Internet is obvious. Since 1990, 'network' has become an absolute concept that no scientific or non-scientific publication can now do without.[155]
>
> However, closer examination of the 'nodes', 'edges', and overall form of networks shows how very much networks are modified by historical and cultural environmental influences. Once again, the given *political culture* as the quintessence of political praxis plays an important role. Basically, a role of societal power leads to a better position in networks, for power is the raw material of micropolitics. But

150 See Jansen / Schubert (eds.) (1995).
151 Osterhammel (2009) 1010.
152 Jansen / Wald (2007) 188.
153 Reinhard (2011).
154 Gold et al. (eds.) (2002); Chow (1992).
155 Schüttpelz (2007).

> because political power roles have changed historically, membership of parties or associations, of the Free Masons or the Rotary Club now play a far greater role than kinship or regional origins, which in premodernity were micropolitically more important. Accordingly, the importance of 'connections' arising from a common education, place of work, and membership has increased in the modern age.[156] It should also be remembered that the Internet opens up quite new possibilities for micropolitics owing to its network character."[157]

However, network can also be understood as a concept typical of globalization[158] that explains the spread of globalizing capitalism, as Sven Beckert shows in his study of the cotton trade empire under the heading "Information flow and trust":

> "Although the cotton empires did not manage to integrate the growers, the most important characteristic of this first modern processing industry was its globality. *This globalization needed globalizers*, people who recognized the opportunities offered by the new order and who persuaded others, not least their governments, to take collective action. The most important globalizers were not the often very local-minded planters or factory owners but … the merchants, who were specialized in *establishing networks* linking up producers, manufacturers, and consumers.
>
> Developing such global networks required courage and vision. When in 1854 Johannes Niederer applied for a position with the Swiss trading firm Gebrüder Volkart, he offered to sound out the market opportunities in Batavia, Australia, Macassar, Mindanao, Japan, China, Rangoon, Ceylon, and Cape Town. Such globe-trotter merchants 'ruled over industry'. Indeed, manufacturers and planters regularly complained about the power of these traders, and many merchants looked down on factory owners as provincials and gamblers. To become powerful actors in the cotton empire and to conduct this trade profitably, the Rathbones, Barings, Lecesnes, Wätjens, Rallis, and others established *close-knit networks in which information, finance, and merchandise could reliably flow*."[159]

And the network concept is extremely useful in analysing governance structures beyond the nation state, as I have done with respect to *transnational administrative networks*.[160]

Two other examples are particularly instructive from the history of ideas perspective, namely the closely related phenomena of the so-called Republic of Letters and the network of the Enlightenment.

156 Emrich et al. (1996); Döscher (2005); Karsten / Thiessen (eds.) (2006).
157 Reinhard (2011) 638–639.
158 As I have done in Schuppert, G. F. (2014), chapter 2: "Globalisierung als 'institution building' – Imperien und Netzwerke als globalisierungstypische Verflechtungsstrukturen".
159 Beckert (2014) 217–218.
160 Schuppert, G. F. (2013b).

I. The Gelehrtenrepublik / Republic of Letters / République des Lettres as communication network

The Republic of Letters should not be overlooked in this study, for it operated through and was fuelled by networked communication.

> "Republic of Letters has to be conceived of as part of the Scholarly Culture in the Early Modern Age, primarily under the aspects of its links to community, in general of communications, i. e. institutions, ideas and their diffusion, production / reception / distribution of texts, nature and history of text genres – but always in the analytical context of communication: of its participants, centres, channels, instruments, media. We should be aware of the fact that analyzing Scholarly Culture under the leading aspect of Republic of Letters means to accept an implicit bias of its analysis towards communication."[161]

The name of this virtual republic is essentially a self-description of a specific scholarly culture of the sixteenth and seventeenth centuries, held together by communication:

> "*Republic of Letters,* more than nobilitas litteraria, is a *metaphorical manner of speech,* a façon de parler used to characterize this kind of communication among scholars, i. e. the internal communication within the (status-bound or status-transcending?) community of scholars, under the aspect of its conditions and state as well as, and more so, of the claims and norms the scholarly community should conform to, that is under the aspect of *communication as it should be.* Thus, *Republic of Letters* thematizes scholarly communications with respect to *normative* expectations, to definitions of limits, e. g. of tolerance, of room for criticism etc. […] As a subject of historical research, *Republic of Letters* does not assume its proper, specific contour until it is conceived of as the *self-concept,* the *self-description* of (a representative part of) early modern scholarly communication, or to put it more precisely: of scholarly culture under the specific aspect of its communications."[162]

With Anthony Grafton we must ask, "If this state had no maps, no administrative officials, and no borders, how do we know it existed at all?"[163] Any answer to this question calls for a visit to the republic to gain better acquaintance with its characteristics.

In his *Sketch Map of a Lost Continent*, Grafton describes this imaginary country as follows:

161 Jaumann (2011) 12.
162 Jaumann (2011) 13 ff.
163 Grafton (2009) 8.

> "This essay offers a historical traveler's report on a strange imaginary land, one that had few of the distinctive marks by which we usually identify a state. It did have a distinctive name: *Respublica literarum,* the Republic of Letters. Its citizens agreed that they owed it loyalty, and almost all of them spoke its two languages – Latin, which remained the language of all scholars from 1500 to 1650 or so, and still played a prominent role thereafter, and French, which gradually replaced it in most periodicals and almost all salons. But it had no borders, no government, no capital. In a world of sharp and well-defined social hierarchies – a world in which men and women wore formal costumes that graphically revealed their rank and occupation – its citizens insisted that all of them were equal, and that any special fame that one of them might enjoy had been earned by his or her own efforts. As one observer put it in 1699, 'The Republic of Letters is of very ancient origin […] It embraces the whole world and is composed of all nationalities, all social classes, all ages and both sexes … All languages, ancient as well as modern, are spoken. The arts are joined to letters, and artisans also have their place in it … Praise and honor are awarded by popular acclaim' … The Republic of Letters imagined itself as Europe's first egalitarian society, even if it did not always enact these high ideals in the grubby reality of its intellectual and professional practices."[164]

Particularly interesting, of course, is the question of how citizenship of this virtual republic was to be gained. According to Anthony Grafton, it was quite simple: required were good language skills, a certain social behaviour, and a letter of recommendation from a senior scholar:

> "The citizens of the Republic carried no passports, but they could recognize one another by certain marks. Not wealth, of course; then as now, scholar did not rhyme with dollar. But they looked for learning, for humanity, for generosity, and they rewarded those who possessed these qualities. Any young man, and more than a few young women, could pay the price of admission. Just master Latin – and, ideally, Greek, Hebrew, and Arabic; become proficient at what now seem the unconnected skills of mathematics and astronomy, history and geography, physics and music; turn up at the door of any recognized scholar from John Locke in London to Giambattista Vico in Naples, bearing a letter from a senior scholar, and greet your host in acceptable Latin or French – and you were assured of everything a learned man or woman could want: a warm and civilized welcome, a cup of chocolate (or, later, coffee); and an hour or two of ceremonious conversation on the latest editions of the classics and the most recent sightings of the rings of Saturn."[165]

The architecture of this republic thus consisted of a network of mutual correspondence: "The strands of long-term correspondence formed a capillary system along which information could travel from papal Rome to Cal-

164 Grafton (2009) 1 f.
165 Grafton (2009) 8.

vinist strongholds in the north, and vice versa – so long as both had inhabitants, as they did, who wished to communicate."[166]

Interestingly, Anthony Grafton draws clear parallels between the Republic of Letters he describes and the present-day information and knowledge society. They are evident not only in the common problem of "information overload,"[167] but also in the *incessant transfer of information and ideas*, which calls to mind the bloggers of today:

> "Trade had become global again in the fifteenth century. Now information also joined the global flow, as Huguenots in exile in Berlin and Potsdam informed the European world about recent science and scholarship in French. Kircher, admired and envied in Rome, drew information from fellow Jesuits around the world as he charted the underground movements of rivers and lava flows and the ancient migrations of peoples. Vico, isolated but well-informed Catholic, southern Naples, used Dutch journals published in Latin as his primary sources for the new theories of Spinoza and Locke. Like the blogs that have accelerated the movement of facts and ideas in recent years, the new journals and publishing houses had a profoundly unsettling effect on political and social authorities. The Republic of Letters stood, in the first instance, for a kind of intellectual market – one in which values depended, in theory at least, not on a writer's rank but on the quality of his or her work."[168]

II. The Enlightenment as a process of transnational coproduction of knowledge

I have long been a friend of the notion that what we call statehood is not produced exclusively by the state but is also co-produced in collaboration between the state and other actors. This could explain why we find Sebastian Conrad's comment particularly interesting that the so-called Enlightenment – a second and somewhat later Republic of Letters – can be seen as a process of global co-production.[169] In the Enlightenment, inseparably associated with the name of Immanuel Kant, he sees above all an answer to the growing global processes of entanglement:

166 Grafton (2009) 9.
167 Rosenberg, D. (2003).
168 Grafton (2009).
169 Conrad (2012).

> "The production of knowledge in the late eighteenth century was structurally embedded in larger global contexts, and much of the debate about Enlightenment in Europe can be understood *as a response to the challenges of global integration*. The non-European world was always present in eighteenth-century intellectual discussions. No contemporary genre was more popular and more influential than the travelogue. Accounts of the Hurons in North America, of the Polynesian Omai who was taken to England by Captain Cook in 1774, and of the Mandarins at the Chinese court reached a broad readership and found their way into popular culture. Most direct was the impact of the idealization of the reign of the Qing emperors Kangxi (1661–1722) and Qianlong (1736–1795); China was posited as the incarnation of an enlightened and meritocratic society – and instrumentalized for criticisms of absolutist rule in Europe.
>
> But the appropriation of the world was not confined to its function as a mirror. In many ways, central elements of the cultural transformations that are customarily summarized as 'Enlightenment' *need to be understood as a reaction to the global entanglements of the times*. The expansion of Europe's horizons that had begun in the Age of Discovery and culminated in the voyages of James Cook and Louis de Bougainville resulted in the incorporation of the 'world' into European systems of knowledge. In particular, the emergence of the modern sciences can be seen as an attempt *to come to terms with global realities*. Further examples include the discussions about the character of humanity following the interventions of Bartolomé de las Casas; the idea of the law of nations and an international world order as proposed by Hugo Grotius; the ethnological and geographical explorations of the globe; the comparative study of language and religion; the theories of free trade and the civilizing effects of commerce; and the notions of race, on the one hand, and cosmopolitanism, on the other. The perception *of an increasingly interlinked globe posed a cognitive challenge* that was gradually met by reorganizing knowledge and the order of the disciplines."[170]

Conrad avoids a Eurocentric view of what we are accustomed to calling the Enlightenment, instead stressing the global perspective and the trend towards global thinking that entered the world of ideas and knowledge with the Enlightenment:

> "The Enlightenment of the eighteenth century, however, was not the intellectual monopoly of Europeans. It needs to be understood *as a result of the transnational co-production of knowledge by many contributors around the world*. This is not to deny that particular debates were also deeply embedded in European traditions, and were shaped by specific situations in places such as Edinburgh, Halle, and Naples. But the intellectual dynamic as well as the revolutionary impact of the transformation of the late eighteenth century was very much *energized by global conditions*.
>
> Moreover, the Enlightenment was not confined to its Atlantic moment in the eighteenth century; it had a much longer course. This was a history not so much of

170 Conrad (2012) 1009 f.

> its diffusion as of its permanent reinvention. Groups and social milieus that pressed for social and cultural change invoked the authority of the Enlightenment while fusing it with other traditions. In the process, what was seen as the core of the Enlightenment changed profoundly, both because of the creative merging of elements from a variety of cultural backgrounds, and because these ideas were proposed in geopolitical contexts that differed greatly from eighteenth-century Europe. Increasingly, Enlightenment was employed *as a concept that allowed historical actors to think globally and to position their communities on a world stage*."[171]

C. Two types of entanglement actor at work: "state nomads" or "empire agents" and "go-betweens in a brokered world"

When different cultures encounter one another, meeting spaces develop that Mary Louise Pratt calls "contact zones."[172] These zones[173] are home to specific entanglement actors that play an important role in the circulation of ideas and concepts. We conclude this first part with a look at this interesting species:

I. State nomads and empire agents

In her fascinating book "The Secret War," Eva Horn[174] addresses, among other things, the imperial thirst for knowledge. She comes across a type of actor Thomas Richards[175] has labelled "state nomad." Writing about the British Empire, Horn has this to say:[176]

> "The British Empire was a power structure rooted in the administration and control of an immense and extremely heterogeneous space. As Thomas Richards has argued, it took a specific regime of knowledge to guarantee its spatial coherence, an 'imperial archive' designed to collect, store, and classify information from all parts of the world. 'They surveyed and they mapped. They took censuses, produces statistics. … In fact they often could do little other than collect and collate information, for any exact civil control, of the kind possible in England, was out of question. The Empire was too far away …'.[177] Pursuing the ideal of a unified and complete representation

171 Conrad (2012) 1026.
172 Pratt (1992).
173 Greater detail in Smith, V. (2013).
174 Horn (2013).
175 Richards (1993).
176 Richards (1993) 164–165.
177 Richards (1993) 3.

> of the world, the *imperial thirst for knowledge* arose from its specific spatial structure: and empire spanning the globe with Britain as its undisputed political, economic, and military center that nonetheless had to nurture and facilitate a certain amount of 'local' self-organization to maintain control over such a vast domain. Local features in colonial territories had to be harmonized with imperial centralization – that is, remote control and self-control had to be coordinated. The *Victorian colonial will to knowledge is a will to power* grounded in control over space. Geography and hydrography, institutionalized in the *Royal Geogrphical Society* (founded in 1830), are the basis for the administration and military control of the colonial territory. As such they are not simply areas of knowledge among others but the royal disciplines of colonialism. 'State nomads', that is, world travelers, explorers, cartographers, and the empire's more or less amateurish secret agents, are the actual heroes of this kind of spatial power: 'nineteenth-century geography was the continuation of politics by other means'."[178]

But in addition to the state nomad, there is another type of actor, whom Eva Horn calls the "*empire agent*." She cites "Kim" from Rudyard Kipling's famous novel[179] as an example. About the function of the empire agent, which she also refers to as a cultural chameleon, she remarks:

> "… Kipling's novel depicts in singular clarity a transformation of imperialism from the reliance on ethnocide, enslavement, or unfettered exploitation, that is, from the direct use of violence, to the skilled management of information – and of intelligence, for that matter. … However, colonial intelligence as the accumulation of knowledge pertaining to the control of colonial territory is already encumbered by problems of communication and interpretation. Hence there is an urgent need for multilingual agents familiar with *the many cultural codes, laws, and taboos* of an extremely heterogeneous society such as India. In other words, the political and military reconnaissance of colonial space involves more than scouting and spying missions to explore the terrain and eavesdrop on the enemy; it also requires cultural fluency and social acumen. In short, it depends on '*local knowledge*'. As the British had been forced to learn during the Indian uprising of 1857, they could not secure their rule if they disregarded local codes and customs."[180]

II. Government by go-betweens in a brokered world

In "The Brokered World. Go-Betweens and Global Intelligence 1770–1820, "the editors Simon Schaffer / Lissa Roberts / Kapil Raj and James Delbourgo

178 Richards (1993) 17.
179 Kipling (1987).
180 Horn (2013) 182.

write expressis verbis of "government by go-betweens,"[181] making these mediators into key governance actors. In effect, this is a concept transfer from the world of literature to the world of "global intellectual history." In literature, the 'go-between' is the intermediary who "through swift and willing services as postillon d'amour joins lovers separated from one another by a plethora of moral and social barriers, but who remains in ignorance of the delicate substance and purposes of his actions."[182] This is the concept as we know it exemplified by the classic novel by L. P. Hartley.[183] Now – in global intellectual history – he no longer operates as postillion d'amour but as intermediary and interpreter between different cultures: "The go-between in this sense is thus not just a passer-by or a simple agent of cross-cultural diffusion, but someone who articulates relationships between disparate worlds of cultures by being able to translate between them."[184]

Kapi Raj takes us somewhat deeper in the world of "go-betweens" in this study on "Mapping Knowledge Go-Betweens in Calcutta, 1770–1820,"[185] where he shows that all merchants, whether 14th century Arabs or officers of the East India Company had to rely on the services of intermediaries if they were to trade successfully with the locals. "*Knowledge go-betweens*" of wide-ranging provenance were therefore indispensable.

> "In the circumstances, it is not difficult to perceive that go-betweens were indispensable to ensure passage between the varied languages, customs and accounting techniques of the merchants and those of local communities of producers and suppliers. They were designated by special appellations, such as *dallāl* in Arabic, but often looked upon with contempt and suspicion, referred to variously as 'arrogant, rebellious and audacious' or 'shameless, bold, cunning, debauched [and] liars.' Nonetheless, they constituted an obligatory passage point for all transactions and, already in the 14th century, Arab merchants were advised to use the services of such factotums, as the following extract from an Arabic trader's manual emphasizes: 'The merchant who arrives in a locality unknown to him must also carefully arrange in advance to secure a reliable representative, a safe lodging house, and whatever besides is necessary, so that he is not taken in by a slow payer or a cheat.' In addition to translators, interpreters, moneychangers, bankers and moneylenders, the regional trade network was predicated upon specific maritime knowledge and skills. Pilots,

181 Schaffer et al. (eds.) (2000) xi ff.
182 Breidecker (2008) 14.
183 Hartley (2000).
184 Schaffer et al. (eds.) (2000) xiv.
185 Raj (2000).

navigators and theorists of navigation helped guide ships around maritime Asia and East Africa, thus forming yet another *intermediary profession*."[186]

The colonial powers, in particular, starting with the Portuguese, learned by bitter experience that fruitful exchanges between themselves and "civil societies" could not be organized without the assistances of professionalized go-betweens:

> "At the turn of the sixteenth century, west Europeans thus entered a highly organized and complex economic network in the Indian Ocean with well-established trade conventions, of which they had some notion through various travel accounts and reports. But over which they lacked mastery. For a start, the Portuguese – the first west European power to enter the region – had to rely on the services of different local Muslim pilots to direct them up the Swahili coast and then to Calicut, their final destination. And when, after initially carrying out armed attacks on local powers, merchants and populations, they finally embarked on establishing an empire in the region, based on fortified littoral colonial settlements, private trade, and political and commercial treaties with regional polities, their interaction with the various communities and political authorities concerned was rendered possible only *through the mediation of professional go-betweens with specific literary, technical, juridical, administrative and financial* skills. The pattern set by the Portuguese in the 16th century was to continue into the following centuries and formed the basis of subsequent European interaction and maritime settlements in the Indian Ocean.
>
> In the context of the relationship between maritime Asia and western Europe, we can distinguish *at least five major functional types of intermediaries* – the interpreter-translator, the merchant-banker, the comprador or procurer, the legal representative or attorney, and the knowledge broker. In the South Asian context, each of these types could be composed of Asians, North Africans or Europeans, missionaries or footloose strangers, men or women."[187]

186 Raj (2000) 107.
187 Raj (2000) 108.

Part Two

Language of Law and its Functions

The first part of this book was about what Pocock has called the "languages of politics" in which the nature of the good and just order of a community is spoken and written about. The key questions were what legitimizes admitting the language of law to the concert of these languages, and whether its voice should be marginal or central.

In tackling these questions, we propose distinguishing between five functions of the language of law:

- The language of law as the language of discourses on the legitimacy of political authority
- The language of law as the language of political change
- The language of law as the language of rights
- The language of law as the language of justice, and
- The language of law as the language of a new global order

In the second part, we focus on two aspects of the capabilities of law and its specific language as a language of politics. First, we ask what the language of law does particularly well in comparison with other "languages of politics", and second why the language of law can consequently deal a particularly "good hand" in discourses on the order of the polity.

We present the indulgent reader with three key functions of law and its language in examining these questions.

Law and its Language: Functions of Abstraction and Transformation

A. Two examples of the abstraction functions of the language of law

I. The "invention" of the legal person

In "Sapiens: A Brief History of Humankind",[1] Yuval Noah Harari cites the French automotive firm Peugeot, founded in 1896, as an example of what this momentous invention is all about.

> "… Armand Peugeot, who had inherited from his parents a metalworking shop that produced springs, saws and bicycles, decided to go into the automobile business. To that end, he set up a limited liability company. He named the company after himself, but it was independent of him. If one of the cars broke down, the buyer could sue Peugeot, but not Armand Peugeot. If the company borrowed millions of francs and then went bust, Armand Peugeot did not owe its creditors a single franc. The loan, after all, had been given to Peugeot, the company, not to Armand Peugeot, the Homo sapiens. Armand Peugeot died in 1915. Peugeot, the company, is still alive and well."[2]

Harari seeks to explains that the firm Peugeot as an object of juridical attribution can be kept apart from the natural person Armand Peugeot by a 'legal conjuring trick' – which, in a certain sense, it is:

> "Peugeot is a figment of our collective imagination. It can't be pointed at; it is not a physical object. … But it *exists as a 'legal fiction'*. …
>
> In the case of Peugeot SA the crucial story was the French legal code, as written by the French parliament. According to the French legislators, if a certified lawyer followed all the proper liturgy and rituals, wrote all the required spells and oaths on a wonderfully decorated piece of paper, and affixed his ornate signature to the bottom of the document, then hocus pocus – a new company was incorporated. Once the lawyer had performed all the right rituals and pronounced all the necessary spells and oaths, millions of upright French citizens behaved as if the Peugeot company really existed."[3]

1 Harari (2015).
2 Harari (2015) 45.
3 Harari (2015) 43, 46.

If this account is a little to colourful and the role of the lawyer as shaman[4] somewhat overdrawn, Jürgen Kocka provides a more sober description.[5] He sees the invention of the limited liability company or corporation as playing a decisive role in the development of capitalism. The founding of the "Vereenigde Oostindische Compagnie" (VOC) in 1602 provides a good illustration of the innovative nature of this institution:

> "Trade enterprises had already existed, but through the sixteenth century primarily as partnerships that brought together a small number of merchants working and keeping accounts relatively independently. The *VOC*, however, *came into being as a public corporation*. Its impressive capital of 6.45 million guilders was raised by 219 shareholders, each with limited liability. They regularly received dividends (18 percent on average annually) but had little influence on the management of the company. The VOC stayed together until 1799, while *its shareholders changed*. They could do this because they could trade their shares on the newly emerging stock exchanges. The management of the company lay in the hands of directors. They ran the extensive, vertically integrated organization and its many branch offices (especially in Asia) out of Amsterdam with the aid of an ingenious system of committees, a systemic reporting system, and a central office that soon employed a staff of 350 salaried employees. The company operated the purchase, transport, and sale of a variety of goods. But it also expanded selectively to become a manufacturing company by incorporating, for example, saltpetre works and silk-spinning plants in India. In all these respects, the VOC seemed *unusually modern*."[6]

But the public corporation, which experienced a veritable boom during the industrial revolution in the form of the limited liability company, was not only modern: it was also – a *condition for the spread of ideas and knowledge* – adapted to the political needs of the time:

> "The huge capital requirements and complexity of services to be performed are not the only factors explaining the emergence of this *unique organization*. The Dutch East India Company also fit in with the political needs of government in this era, since business, politics, and military force were most intimately mixed, and intensive competition between states often brought to a standstill competition between enterprises within one and the same country. The VOC was formed as an alliance of merchants and trading companies from all the provinces of the Netherlands under pressure from the government, as a pooling of resources in international competition with an anti-Spanish, and then soon also an anti-English, thrust. Much the same can be said of other trading companies of the time, such as the much smaller

4 Harari (2015) 41, pos. 478: "The principle difference between them and tribal shamans is that modern lawyers tell far stranger tales."

5 Kocka (2016).

6 Kocka (2016) 50.

> English East India Company, which existed between 1600 and 1858, but also the Dutch West-India Company and comparable establishments, for example in Scandinavian countries."[7]

However, the consequences that the abstraction function of depersonalized economic actors in the form of limited liability companies and public limited companies had for the history of ideas were far outdone by the invention of the state as a legal person and thus as a form of depersonalized government. Ernst Forsthoff has described the juridification of the state and depersonalization of power this implies:

> "This theory goes back to a book review published by the Göttingen historian Albrecht in the 'Göttingische Gelehrte Anzeigen' in 1837. It has recently attracted much attention among constitutional lawyers. And rightly so: classifying the state as a legal person was the most momentous intellectual attack on the monarchical constitution. The monarch, in whose person the state had hitherto been embodied was converted into an *institution of the legal person 'state*,' with which he could no longer be equated. His *sovereign rights were transformed into integrated powers* defined by the constitution and thus also limited. … The rapid spread of this theory is to be explained by the intention prevailing in constitutional law on the threshold of rule-of-law constitutionalism, which triumphed in the Prussian constitution of 1850. This intention was juridification of the state, transformation of governing relations between the state and the individual into legal relations – that were as bilateral as possible. The service that the theory of the state as legal person rendered towards realizing this intention was outstanding. This theory underpinned a specific conception of the rule of law."[8]

The same direction – the depersonalization of power through the functionalization of the ruling person into an agent of the abstract entity "state" – had already been indicated by the *reason of state concept* in the political philosophy of early modern times; Herfried Münkler comments on this topos in relation to the *institution of the state*:

> "*Reason of state* has a *double function* for those who cite it – first, it allows decisions to be made and action taken in breach of legal norms and moral bounds, while rigorously subordinating such decisions and action to an *objectivizable interest of the state* not only as orientation but also as the later measure and touchstone of efficiency. As Reinhard Kreuz has shown,[9] the reason of state is born when the purposes of power, or to be more precise, of the state, begin to constrain the arbitrary personal rule of power holders and to *transform them successively into agents*:

7 Kocka (2016) 51.
8 Forsthoff (1971b) 13 f.
9 Kreuz (1978) 199.

> 'While the reason of state allows the prince to be "worse" than subjects ought to be, it also requires him to be "better" than the ruling individual, swayed by his passions and therefore needful of strict control, actually is." The prince, who at first glance appears to gain from the transformation, is etatized until he is finally no more than an executive institution of the reason of state, the first servant of the state, to quote Frederick the Great. The reason of state is thus – also – a milestone on the road to the *depersonalization of power*."[10]

II. The reception of Roman law as acquisition of a new language

The reception of Roman law has received a great deal of attention[11] – also from the present author.[12] This is not the place to revisit this subject. What we will do briefly at this point is to recall[13] *the special quality of Roman law* that made it especially suitable for reception. Experts appear to agree that this quality lies in what the particular "*conceptual strength*" of Roman law, which permits a high degree of abstraction. Uwe Wesels notes: "In civil law, the Romans created the global pattern of a law that is founded on private property and free will. In this form it spread throughout Europe in the Late Middle Ages after Justinian's codification had come to Northern Italy in the eleventh century. It has accordingly become the basis of our law, not only our civil law but, *with its abstract conceptuality* also of our criminal law and administrative law, and even of our constitutional law."[14]

Peter G. Stein takes a similar view in "Roman Law in European History":[15]

> "Within the borders of the Holy Roman Empire, reference to Roman sources could be explained on the grounds that it was imperial law, but it was justified not for its formal authority but for its *technical superiority over every possible rival*. Unlike the canon law, however, no court applied just Roman law. The Church courts applied canon law to such matters as marriage and personal status; the courts of feudal lords applied feudal law to questions of landholding; the traditional community courts

10 Münkler (1987) 168.
11 See Wieacker (1967).
12 Schuppert, G. F. (2003) 95 ff: "Frühneuzeitliche Staatsbildung und die Bedeutung der Rezeption des römischen Rechts."
13 See also my treatment of the "jus commune" as communicatively generated and diffused universalist legal thought, in this volume p. 59.
14 Wesel (1997) 156.
15 Stein (1999).

> applied the local customary law to claims for compensation for wrongdoing. What the civil law supplied was a conceptual framework, a set of principles of interpretation that constituted a kind of universal grammar of law, to which recourse could be made whenever it was needed."[16]

This description of Roman law as a universal grammar of law brings us without much of a detour to the legal historian Christoph H. F. Meyer, who, fully in line with our argument, describes the reception of Roman law as the *acquisition of a new language*:

> "In the history of scholarship, widely differing reasons for this success have been mooted, for instance the quality of Roman law as ratio scripta, its *claim to be imperial law*, or its scientific presentation. In what follows, no explanation of the 'miracle of Bologna' is offered, or any answer to the question what the acquisition of Roman legal knowledge brought substantively, that is, in innovation from an institutional or dogmatic historical point of view. The point of departure is rather the question of what was new, what use was made of it, and how it spread. The focus is first on the stations of a particular way of juridification, which in the twelfth century led from Northern Italy to far reaches of the Occident. Characteristic of this process was work on written law, the acquisition and recording of knowledge from ancient texts of Roman law, and effort to use the resulting knowledge for contemporary concerns.
>
> Looking, however, at the *spread of this juridification strategy*, things look different: quite new agreement was to be reached on what (secular) law ought to be. *The communicative side of the process* is thus also involved, *which in some respects recalls the imparting of a new language*. A *language of law* that possesses a vast vocabulary of norms and concepts together with a learned grammar that sets the rules for deontological statements. The metaphor helps perhaps to better understand not only the general phenomenon but also the remarkable diffusion processes. For *the success of the new language of law lay in the first place in successful communication* and only secondly in norm enforcement. Whoever accepted the new idiom, answered in it, placed himself on the same legal and deontological footing as his interlocutor. Even partial success was effective, for instance if someone had only an incomplete mastery of the new language or wished to make only selective use of it."[17]

With respect to this *analogy between law and language*, Meyer refers the reader to the famous work by Rudolf Jhering published in 1852, "Geist des römischen Rechts" (The Spirit of Roman Law"); we quote a brief passage on the *alphabet of law*:

> "Allow me to use another analogy, namely, to liken the systematic or logical structure of law to an alphabet. *The relationship between a case-centred legal code and law reduced to its logical form is the same as that between written Chinese and our written*

16 Stein (1999) 61.
17 Meyer, C. (2010) 312 f.

> *language*. For every concept the Chinese have a special sign; a lifetime hardly suffices to learn them all, and for each new concept its sign has to be determined. We, by contrast, have a small alphabet that allows us to reduce each word to its constituent parts and assemble it: easy to learn and dependable. The case-centred legal code thus contains a great many signs for particular, individual cases; a law reduced to its logical elements, however, offers us an alphabet of law that allows us to decipher and depict even the most unusual word formations of life."[18]

These two passages confirm our conviction that *learning the law* is really not about learning certain legal norms, the content of law (which is naturally also useful; such proficiency is required up to the usual final law examinations) but about *learning a certain method* of thinking, whose mastery allows the lawyer to *communicate with colleagues in the same language*.

B. Two examples of the transformation functions of law and its language

I. Transformation of power into authority: the "invention" of public office

In early modern state building, the institution of "office" plays a key role because it accomplishes two things. First – like the "reason of state" – it *depersonalizes power*: the person is replaced by a function, a job title, and it is this office concept that *abstracts from the person*. The abstraction function is accompanied by a *transformation function* – transformation in so far as public office transforms power into government, since *office vests the holder with power*.

* From a historical point of view the *Church played a leading role* in achieving abstraction from the person. After the fall of the Roman Empire, the Church was the "sole coherently organized institution"[19] left, and it continued to function well not least because it had adopted the organizational principles of the Empire:

> "The Church took over the administrative subdivisions of the late Roman Empire as its own, which involved the acceptance of a whole range of concepts, such as the

18 Jhering (1926).
19 Blockmans (1997) 115.

> *territorial nature of authority*, the *hierarchy of official competences* and functions and, more fundamental still, *the concept of office itself*. These were all *abstract ideas* which the Germanic and Slavic peoples had not yet reached by the tenth century. … The maintenance of hierarchically arranged and well-defined territorial offices was of such importance because in the period from the fifth to the eleventh century the mass migrations of peoples had blurred all ideas of frontiers. Among the Germans, and even more among the equestrian hordes who overran central Europe and the Balkans, power was linked to individuals and not to specific territories."[20]

Wim Blockmans describes the central role that the concept of office played in the organizational and functional model of the Church:

> "The Church also took over from the late empire the concept of exemptions, which the senatorial class of large landowners had deployed to protect their patrimonies from taxation by the state. Pleading its otherworldly mission, the Church claimed immunity for its property and sacrosanctity from worldly judges for its servants. By doing so it created for later ages its role as a special order, the First Estate. Apart from its separate legal status, this also rested on education and consecration. These two components added to the interpretation of the concept of office, which the Church took over from the Romans. As an abstract concept this consisted of a well-defined sum of qualifications which the holder needed to satisfy, and powers which he might or might not exercise. The role of an office-holder is strictly defined, and quite separate from the individual filling it. The criteria he has to satisfy, the procedure for appointment and, where necessary, for dismissal from his office if he exceeds his powers or neglects his duties all exist quite separately from the individuals who have to fill the roles. This kind of *abstract thought* was wholly alien to the Germans and Slavs; their vision was a direct one of individuals who by virtue of the trust placed in them were given extensive but vaguely defined opportunities for exercising power. Some were able to develop and expand their power. Dismissal was barely thinkable without a bloody conflict with those challenging them."[21]

* But public office is not only a successful model transferred from a traditional bureaucratic hierarchical institution – the Church – to a new type of bureaucratic hierarchical institution – the early modern territorial state. And the exercise of power through office is not only an institutional backbone of bureaucratic administration in the sense of Max Weber: *public office is more than a mere organisational-sociology category.* Public office transports the regime of power into the world of law, turns power into authority by institutionalizing it. Whether this justifies the claim that

20 Blockmans (1997) 115.
21 Blockmans (1997) 115 f.

public office "ennobles" rule[22] is another matter. The *decisive function of public office is its catalytic effect:* as a catalyst, office translates power into responsibility,[23] converts the power of command into the right to command, makes forced obedience into obligatory obedience.[24] Office conveys *entitlement to power*, a *transformation function* that, as Ralf Dreier has shown, means not only the limitation but also the *legitimation of social power*:

> "Fundamental is … the *notion of limitation*. The understanding of rule as office implies its interpretation as service; i. e., as *entrusted power to be exercised with responsibility*. For practical purposes, however, everything depends on whom this responsibility is owed to and what legal form it takes. If we draw a simple distinction between natural and conferred rule, the latter is typically defined in terms of accountability towards those subject to rule. By contrast, 'natural' rule characteristically sees limitation only as moral accountability to a higher authority, namely God, and does not consider itself subject to institutional control by the governed. This also shows the *importance of the notion of office as a legitimation category*. The same moral and (or) legal norms that constitute rule as service also justify its existence. No proof is needed that this legitimation function of the office concept, i. e., its interpretation as entitlement to power, has been more effective historically than the limitation principle. But the one should not be forgotten because of the other."[25]

II. Law as congealed politics: the transformation function of constitutional law

One of the key functions of constitutions identified by Rudolf Smend[26] is integration: "Among the essential achievements of the modern constitutional state is its considerable integrative force. It can provide divergent political forces common legal ground on which conflicts can be peacefully resolved in accordance with set rules of the game. The condition is consensus to place greater value on the constitutional order than on any substantive decision."[27]

This function of a constitution to codify the *consensus on certain fundamental values and political procedures* prevailing at the time of its enactment

22 See Gneist (1879) 15, cited with approval by Krüger (1964) 270.
23 See Isensee (1987), § 57, r. 10.
24 Schluchter (1985) 146.
25 Dreier, R. (1972) 130 f.
26 Smend (1994) 119–276.
27 Pauly / Sielinger (1999) 83.

significantly eases the burden on the political process, because the rules of the constitution are no longer an issue but a premise of politics:

> "The written form given to the consensus dissociates it from any subjective interpretation by the parties involved and lends it verifiable certainty. Enrichment with legal normative force divorces it from the historical will of the authors and lends it validity over time. In that it comprises rules, it is divorced from the purposes for which it was drawn up and can find application in later implementation.
>
> This involves substantial achievements. Binding written form reduces the possibility of later dissension about the content of the consensus. When opinions differ, rules laid down by the constitution make it easier to establish how the state is required to act in specific cases. The permanence consensus gains from legal validity relieves politics from the need to find it in each and every case. If decisions had constantly to be made on the basis of competing proposals, such a procedure would bring immeasurable costs. The political decision-making process depends on being spared incessant discussion on finding consensus. The constitution provides this relief because its rules are no longer a political issue but a premise for politics."[28]

On closer inspection, the high normative ranking of constitutional provisions *deprives politics of decision-making autonomy* that accrues inversely to the domain of law – and hence in effect to constitutional courts as the guardians of the constitution. Dieter Grimm explains this functional interplay of political and legal effects:

> "Legal norms are plurifunctional. The lawyer tends to absolutize the dispute settlement function. Systems theory, in contrast, stress the disburdening function of norms. *Through lawmaking, issues are withdrawn from decision and rendered binding.* Legal rules thus reduce the decisional load by setting a frame for decision-making authorities. They operate henceforth as meaning-constituting premises and no longer as topics of decision. Legal rules can perform this function on various levels: so that only a principle is taken out of dispute while its elaboration is left open politically; so that its elaboration is also settled while it remains to be applied in the individual case. The scope for action narrows from stage to stage. The reduction function is also performed by constitutional provisions that are not directly applicable. To this extent they are more than mere 'proposals', as Burdeau posits.[29] That they still require specification and development says nothing about their normative nature but does indicate the level of reduction: their addressee is primarily (not exclusively) the lawmaker."[30]

28 Grimm (1990) 22 f.
29 Burdeau (1962) 398.
30 Grimm (1972) 489 ff.

An Integrated Study of Language of Law, Order and Conflict Resolution

A. The language of law as a language of order

The guarantee of legal certainty as the "idée directrice" of law

Certainty and law have been closely related from the very outset: "Securitas" in the sense of a guarantee that obligations will be met is already to be found in Roman law …. In the personalized governance relations of the Middle Ages, too, securitas is the focus of the oath of fealty and urban defence leagues."[31] The term *legal certainty* has long been used to describe this close relationship between certainty and law, notably with respect to its most important aspects *certainty of expectation*, *certainty of meaning*, *and certainty of compliance*.

Certainty of expectation and of meaning constitute what amounts to an "*idée directrice of law*." "Together with justice and purposiveness", according to Andreas von Arnauld,[32] "legal certainty is a fundamental element in the idea of law. In all more or less developed legal systems, legal certainty is an idée directrice of law; every reasonably well-developed legal system will create institutions seeking to realize the demand for knowable, reliable, and predictable law."

If, as perhaps needful in the more general context of this discussion, we wish to operate not so much with the concept of legal certainty, of certainty as to the law, with its connotations of state law – which is, moreover perceived by most people solely as a legal concept – we can with Andreas Anter[33] opt for the broader concept of certainty of order (*Ordnungssicherheit*) to place greater emphasis on production of the public good "certainty as order". The two concepts, legal certainty and the certainty of order, although not identical, do largely overlap; and it is this functional perspective that is of interest for our purposes:

31 Arnauld (2006) 76.
32 Arnauld (2006) 691.
33 Anter (2004).

> "Under the conditions and prerequisites of legal-rational governance, however, law is an essential, if not decisive factor for the certainty of order. Law plays a decisive role because its function is ultimately to guarantee certainty. This notion culminates in the idea and practice of the modern rule of law, whose legitimacy is based primarily on the guarantee of 'legal certainty.' *The concept of legal certainty points to the elementary function of law to provide order.* Legal certainty can also be understood as certainty of order and vice versa. *In both cases one knows where one stands* and what one can expect. Although the two concepts are closely related, they are by no means synonymous, since certainty of order is the somewhat more comprehensive of the two."[34]

According to Anter, orders have at their disposition a special form of capital offering members or subjects a specific type of certainty, which can be called certainty of order, a concept that Heinrich Popitz describes as follows: "People enjoy certainty of order if they have certain knowledge about what they and others may and must do; if they can gain certainty that all parties involved will also, with some reliability, really behave as expected of them. … In short, people have to know where they stand."[35]

Thus, if the certainty of order is based on the justified expectation of certain consequences of action, we could with Hermann Heller[36] propose the following simple equation: "order is predictability", an equation that also implies that predictability does not necessarily have to be based on state law; it can be provided by private governance or by non-state regulatory regimes.

Turning to certainty of compliance, he points to the mandate of the constitutional state not only to provide a legal system that guarantees certainty of expectation but also to put it into effect if trust is not to be disappointed. This aspect of *law enforcement is therefore an essential element of the rule-of-law principle*; Markus Möstl:

> "The *mandate to enforce the law* is in many regards immanent in the principle of the rule of law. On the one hand, it follows from the fundamental rule-of-law mandate to preserve and safeguard the public peace and legal certainty. Both historically and dogmatically, *keeping the peace through legal order* is among the original and constitutive properties of the rule of law. However, the public peace and certainty as to the law (legal certainty in the broader sense of the term) presuppose that the legal order of the state, which is to provide this peace and certainty, not only exists but is actually efficacious, which in turn requires the legal order to be sufficiently efficient

34 Anter (2004) 105.
35 Popitz (1992) 35.
36 Heller (1927).

> and actually enforced. *The efficacy and enforcement of the law are therefore a permanent demand of a state governed by the rule of law.* But even if – second – the focus is less on peace than on freedom as a conceptual cornerstone of the rule of law, the result is no different: if the essential property of the rule of law is to ensure lawful freedom and self-determination through the law, this presupposes that lawfulness and the law are actually realized and enforced, not only in relation to the state as freedom from unlawful coercion but also in relation to third parties as security against unlawful encroachment; for only the all-round enforcement of the law produces the state of lawful freedom that the rule of law seeks to guarantee."[37]

However, since we are concerned not only with the legal point of view, we now cite an author – political scientist, governance scholar, and institutional theoretician in one – who stresses the key *importance of chiefly formal* but also informal *rules* for the *stability* of the political system and its institutional structure:

> "Institutions are permanent regulatory systems recognized in a society. Their purpose is to steer individual behaviour and to coordinate it with the behaviour of other institutions in order to enable collective action. In the constant flow of events, institutions also ensure order, orientation, coordination, and *stability*, thus easing the persistent pressure on actors to justify themselves and make decisions. …
>
> The *stability* of institutions depends above all on *formal rules*. However, the governance, orientation, and coordination effects of institutions also depend on how actors in the institution interpret and apply the rules. Furthermore, the reality of institutions also includes informal rules and social norms, so-called 'standard operation procedures,' the routines, decisional styles, and normative self-descriptions of organized reality that collaborating actors have agreed on."[38]

However, the extent to which the language of law is a language of order is particularly evident in the production and guarantee of order and stability through rule-boundedness. It is rule-boundedness and the consequent repeatability of courses of action that lead to their *institutionalized concentration*. This process of creating institutions from ritual also holds, in particularly strong measure, for law, as the numerous studies show on the *importance of legal rituals*, notably in early and medieval legal history.[39] Later in this book, we will be looking more closely at the importance of ritual knowledge as a particularly striking example of so-called 'rule knowledge'.

37 Mösti (2002) 65.

38 Benz (2004) 19–20.

39 See Kannowski (2002); Ebel (1975); Sellert (1997). In particular on the history of the oath, see Esders (ed.) (2007) 55–77; Esders (2009).

B. The language of law as a language of conflict resolution

I. Political culture as conflict culture

1. Conflicts as sources of social change

Obviously, conflict is ubiquitous in modern societies,[40] we have consequently to learn how to deal with it: "It is an axiom of the modern political and social sciences that conflict is inherent in all known societies. However, societies differ in how that handle it."[41] How conflicts are dealt with can be described (as I have done[42]) as the conflict culture of a polity and as part of its political culture.

It is also agreed that there is nothing pathological about conflict: if peacefully resolved,[43] it has, from a sociological point of view, a positive capacity to further the social change society needs.[44] Conflict is socially productive: within itself it develops the elements of its own limitation and regulation. It builds not only on an existing wealth of common interests but also creates new norms and rules and modifies old ones. From this point of view, conflict can be regarded as a source of social change."[45]

If the social function of conflict is thus positive rather than negative, it must obviously be tackled and *somehow regulated*. Ralf Dahrendorf comes to the following conclusion:

> "The attitude towards conflicts that, unlike repression and 'solution', promises success because it takes account of social realities, I shall call the *regulation of conflicts*. The regulation of social conflicts is the decisive tool for reducing the violence of almost all types of conflict. Conflicts do not disappear through regulation; they do not even necessarily become less intensive; but to the extent that they can be successfully regulated they become controllable and their creative force is put to the service of the gradual development of social structures."[46]

40 On the many types and fields of conflict see Meyer, B. (ed.) (1997).
41 Bürzer et al. (1996) 15.
42 Schuppert, G. F. (2008b) 465–598: "Drittes Kapitel: Politische Kultur als Konfliktkultur."
43 On the basic decision between "peaceful or unpeaceful" see, from the historical perspective, Wesel (1985).
44 Coser (1965).
45 Nollmann (1997) 20.
46 Dahrendorf (1961) 227.

However, conflicts can be successfully regulated only if conflicts are recognized by all those concerned to be justified and useful, if the aim is not their final elimination, and if conflicts manifest themselves in organized conflict parties. Only then does the next step make sense: that the parties agree on specific 'rules of the game' for settling their differences; but it must be seen in the context of the other preconditions. '*Rules of the game*', framework agreements, constitutions, statutes, and so forth can operate as such only if they do not advantage or disadvantage any party from the outset, if they limit themselves *to formal aspects of the dispute* and if they presuppose the binding channelling of all differences."[47]

It should, however, be added that, where *rules of the game, constitutions, or statutes* are involved, the legal system comes into play, whose task it is to *provide* such rules of conflict processing. This brings us to an old favourite of mine, the 'providing' function of law.

2. *The providing function of law*

We have long spoken of the providing function of law, initially in relation to the task of state and administrative law to provide all the forms of action and organization required for effective, citizen-friendly administrative action subject to discipline by the rule of law.[48] It is not only a matter of administration but also of conflict parties being provided with the rules and institutional arrangements required for propitious conflict processing. An important effect of the providing function of law is to make the individual, that is in principle everyone, *capable of conflict*:

> "Legal norms enhance the riskability of conflicts. They create better prospects for 'noes' by producing adversarial institutions. A farmer can face a dispute about the use of a service road with confidence if the relevant right of use is entered in the land register. Even an impecunious student can oblige his landlord to repair a washbasin if such repairs are covered by the tenancy agreement. For his part, the landlord as owner can serve notice on the student as tenant if he can plausibly demonstrate that he needs the premises for personal use. However one judges the justice of legally normativized relations – there can be no doubt that the law enhances conflict

47 Dahrendorf (1961) 228.
48 Schuppert, G. F. (1993).

> competence.[49] The initiation of conflicts through legal norms backed by physical force succeeds because force is withheld from society and reserved to the state but then made available for non-state purposes through legal mediatization. Force as a means of conflict resolution is barracked, legally re-specified and, finally, socially redistributed. Under no circumstances is a landlord permitted to evict tenants himself, even if notice has been correctly served and the period of notice observed. He has to apply for eviction to the competent authority – only then is, if need be, forceable eviction legalized."[50]

This second step – the withdrawal of force – presupposes that the legal order of the state is prepared to make conflicts communicable and resolvable:

> "More possibilities will not prevent many conflicts from occurring but can lend tolerable form to them. The typically modern combination of political monopolization, legal specification, and societal redistribution of force acts in this direction. The outdifferentiation of the rule of law follows on from here. *Law clears the path, so to speak, by which reproduced contradictions can work their way towards processing. Paths are provided* by which contradictions are easier to communicate. Contradictions become effectively operative because their immanent indeterminacy can be made determinable by the law always looming on the horizon."[51]

II. The need for a "modus vivendi" and "modus procedendi" for normative conflicts – formulated in the language of law

Growing cultural, especially religious plurality in modern societies raises the increasingly urgent problem of how to deal with often conflicting diversity – a problem we have addressed under the heading "governance of diversity."[52] More and more people apparently see the practical solution to such normative conflicts in *proceduralization and institutionalization* – in the search for a "modus vivendi" and "modus procedendi" to defuse conflict.[53] The language of law is not only available for formulating this arrangement, it is probably also indispensable for the purpose.

A particularly apt historical example is the so-called Religious Peace of Augsburg of 1555, which sought to deal adequately with the confessional

49 See Luhmann (1995) 397 ff.
50 Nollmann (1997) 176 f.
51 Nollmann (1997) 178 f.
52 Schuppert, G. F. (2017b).
53 See especially Willems (2012b); Willems (2012a).

schism that had led to dissolution of the universal ecclesiastical and secular unity in medieval *Christianitas* and the development of the confessional state.[54] A brief glance at how this peace accord worked is therefore à propos:

It should be noted that the Augsburg Peace did not bring religious peace; it was unable to do so because it did not resolve the religious crisis: "The crisis of faith was *not resolved*: the Religious Peace did not bring religious peace; it could not, and did not even seek to do so. Spiritual agreement and consensus in faith were not achieved, and the aim had been precisely to avoid any forced unity of faith and law in the Empire."[55]

Martin Heckel concludes, that "… the Religious Peace of 1555 established an *order of political peace and legally guaranteed coexistence* between the two confessional power blocs";[56] it was therefore an order of peaceful coexistence. Heckel:

> "This order of peaceful coexistence was thus both secular and political in nature: it henceforth gave both confessions the same imperial protection and legal recognition; it guaranteed their political existence, internal spiritual self-determination, and the external freedom of development for confession and church organization. It also guaranteed that each could lay absolute claim to identity with the true Church of Christ and hence to being the sole true confession and that the two could engage in *spiritual* combat. In the Tridentine ordinances and in both early and later Protestant confessionals, this spiritual repudiation and dissociation were then emphatically proclaimed. But the legal freedom of spiritual self-realization and dispute was hedged in and contained secularly by the manifold distributive, protective, and barrier norms of imperial church law, which were intended to prevent the spiritual blaze from enveloping and razing the secular structure of the empire."[57]

This order of coexistence was the outcome of arduous negotiations and took the legal form of a contract: "The Religious Peace laid the foundations for the further development of the Empire in peace and freedom amidst the raging European religious struggles. In both practice and theory, it had gained the status of a constitutional basic contract and – law. It had *two aspects*: first, it was an agreement between estates, between the head of the Empire and the estates of the Empire (like every imperial 'recess' or reso-

54 Important on this subject: Reinhard (1977); Reinhard (1995).
55 Heckel (2001) 45.
56 Heckel (2001).
57 Heckel (2001) 46.

lution) and a confessional agreement between the Catholic and Protestant parties. It effected the decisive merging of estate / federalist dualism and confessional dualism, which had a lasting impact on the development of religion and the spiritual life, on the conflict between monarchy and estates, unitary statehood and on federalism and particularism in Germany."[58]

Marin Heckels shows that we are dealing with a professionally managed *conflict culture*, with a mode of conflict resolution that, although it did not eliminate the substantive conflict, did consistently *juridify* and *proceduralize* it – in the language of law.

58 Heckel (2001) 49–50.

Law as Resonance: Types of State and "Their" Law

In pursuing and modifying our examination of law as a dynamic system,[59] we now turn to law as a sphere of resonance, which Hartmut Rosa has addressed in his inspiring book (in June 2018 the English translation was forthcoming) "Resonance – A Sociology of the Relationship to the World" (in press: Cambridge UK, Polity Press).[60]

A. What is resonance and what does the answer teach us about our topic?

Our point of departure is Rosa's thesis that resonance is not, for example, an emotional state, but a *relationship mode*.[61] For our topic of law and its language, this means that the focus is on the relationship between the dynamic societal and political reality and the legal system (and its language) and whether it can be considered a resonance relationship. Rosa suggests that this is indeed the case.

He explains that resonance occurs only if the *resonant (or natural) frequency* of a body is excited by the oscillation of another:

> "Even at this acoustic physical level it can thus be said that when two bodies are in a resonant relationship each speaks with a 'voice of its own'. The oscillation of two bodies in a resonant relationship can in turn lead to mutual amplification … Resonant relationships can also develop in a process of mutual adaptive movements, which can be understood as *responsive oscillation* … The essential idea is that the two entities in the relationship affect one another in an oscillatory medium (or resonant space) in such a way that they respond to one another while *each speaking with its own voice*, i. e. 'resounding.'"[62]

Having established that resonance consists in mutual reaction between two entities, the important complementary concept of *axes of resonance* needs to be introduced. Rosa identifies two types: *horizontal axes of resonance* such as family, friendship, and politics, and *vertical axes of resonance* such as religion, nature, art, and history. It is thus not only a matter of the relation of the

59 Schuppert, G. F. (2016a).
60 Rosa (2016).
61 Rosa (2016) 288.
62 Rosa (2016) 282.

individual subject to the world, but also of *collective spheres of resonance*, such as *democracy* as an – ideally – self-determined order of the social:

> "The great promise of democracy … is essentially that the structures and institutions of public life can be changed in and through the medium of democratic politics and its representatives, the *rulers*, placed in a responsive relation to the subjects. Because and to the extent that – taking up a basic constitutive idea of modernity – human beings can themselves determine the social, political, and economic order in which they live and act and can so (democratically) shape society, they can experience this order as a responsive and reactive sphere of resonance and make it their own."[63]

Thus Hartmut Rosa. All we have to do now is to translate this for the *field of law*, which presents no major difficulties.

If we substitute 'politics' or rather 'democratically self-made political order' by 'democratically self-made *legal order*,' we are dealing *in law with a collective sphere of resonance*, which can be experienced as and made one's own. If we also assume that there is a resonant relationship between dynamic societal and political developments and the legal system in which the two entities articulate themselves independently, we have to substitute Rosa's concept of 'voice' by that of 'language', bringing us to the *language of law* in which the collective sphere of resonance of law responds to the surrounding world.

However, this response in the language of law is, it is important to note, not to be understood as an echo in the natural-science sense of the word but as the language peculiar to the legal system, which still has to be articulated – in the institutionally formed political process by which "law" is produced. The successful novelist Juli Zeh, herself a doctor at law,[64] has described this process:

> "Legislative competence is part of state authority. In the democratic system, the authority of the state emanates from the people. Legal authority accordingly also emanates from the people and is delegated by them to representative institutions. In parliamentary legislative procedure, the concerns of interest groups are deliberated until a distribution of forces is attained that enables a majority decision to be reached. On the one hand, such a procedure is highly accommodating to societal developments and the interests they produce. On the other, it is phlegmatic and protracted. This is one of the key paradoxes of lawmaking in the modern democratic state. A complex society marked by ever faster change requires law that assimilates dynamic impulses and translates them into action at a pace amenable to develop-

63 Rosa (2016) 364–365.
64 Zeh (2012); see the favourable review by Kilian (2014) 285 f.

> ment while reflecting the democratic balance of interests. And it should avoid the unwieldy, wishy-washy outcomes that precipitate compromise brings. This is three wishes in one. The conservational nature of a system of rules resistant to change is therefore not the primary obstacle to dynamic law; It is the democratic idea itself, which requires the plural crystallization of opinions and their representation in the legislature."[65]

We now turn in more detail to the resonant relationship between the dynamic world and the legal system responding in its specific language. First, we look at selected types of state and "their" law. Second, we examine whether a "successful" legal system and its language not only reacts to the external world but helps shape it as a "language of politics." Third, we venture into the worlds of law to examine the autonomy of these nomoi and their order – the nomos of the nomoi.[66]

B. Types of state and "their" law

Taking up our own preliminary reflections on the subject,[67] we identify various types of state, as well as typical regulatory structures and regulatory regimes. The aim is to show how the legal system and – as an element thereof – jurisprudence reacts to societal and political change in the sense of a sphere of resonance; and not only – technically and instrumentally – by *providing the necessary forms of action and regulation* but also by *creating new concepts and new methods*, thus affecting its subject – government and administration. We consider two examples of this interactive relationship between societal reality and responding jurisprudence, the "manager" of the language of law.[68] The first state is that of industrial society.

65 Zeh (2006) 123–138, here 127–128.
66 See Seinecke (2015) 262, 273.
67 See above all: Schuppert, G. F. (2001).
68 On the relationship between law and language and in particular the "crisis of law as crisis of language," see Forsthoff (1971a).

I. The state of industrial society and the existential responsibility of the state as ordering idea of the modern administrative state

1. *The development of the interventionist state in response to societal and political modernization*

The history of German administration and administrative history in the late nineteenth century and the first third of the twentieth century shows this to have been a period of societal, legal, and administrative modernization,[69] which set in with the industrial revolution[70] and entered a *phase of acceleration* between 1880 and 1930: "In the history of society, these decades were marked by industrialization and urbanization, by the dissolution of traditional, estate-based milieus and by the political rise of the labour movement. These … factors were also important determinants of political development in Germany at the turn of the century. With the "great turn" in Bismarck's domestic, economic, and social policy after the end of his alliance with the liberals, a period of massive statization began in Germany. Many social fields *become subject to sovereign regulation and control by the state*.[71]

To describe the role of the state in the face of these modernization processes, the term *interventionist state* has often been used,[72] playing a role that, as Michael Stolleis stresses, the state could not avoid:

> "In a very broad sense, every modern state is interventionist because lawmaking and enforcement and the administrative regulation of individual cases incessantly constrains, induces, or inhibits societal processes, so that we can meaningfully speak of the 'interventionist state' only when legal influence reaches a certain level of density and systematization. The changes must therefore be 'structural and qualitative … And not merely a quantitative inflation of functions already in place'. For legal and constitutional history, it is decisive whether, from a certain point in time, industrial society urgently needed constant state intervention in the form of new legislation because it was no longer a self-supporting construction. As soon as this point was reached, the state had to intervene if it was to maintain its double role as guarantor of the rules of the game and as player; it intervened not from a position of strength but from one of weakness. Where intervention was to take place was increasingly determined in consultation between the politico-administrative system and societal groups. This had far-reaching consequences, not least in the style of legislation and

69 Greater detail in Schnabel (1949) 101 ff.
70 See Maetschke et al. (eds.) (2013).
71 Meinel (2011) 108.
72 On the concept and the problems it poses, see Gall (1978) 562 ff.; Stolleis (1989).

the administration of justice, political will-formation, and, ultimately in the attribution of sovereignty. The question, debated since the end of the nineteenth century, of whether the epoch of (internal) sovereignty was coming to an end, had its origins in this complex."[73]

We now turn from the interventionist state and its interventionist law[74] to the question of how jurisprudence reacted to this far-reaching modernization. In the role of '*resonant actor*', one of the major figures in the administrative law of the period, Ernst Forsthoff, formulated better than anyone the answer of administrative jurisprudence. As we shall see with regard to the Enlightenment and natural law, there are authoritative *resonant places* and *resonant persons* in a sphere of resonance like law.

2. *Ernst Forsthoff and the "discovery" of responsibility for providing services of general interest as an objective of the modern administrative state*

Unlike natural scientists, jurists are generally said to invent and discover nothing. This may well be so, but there are exceptions. One is Ernst Forsthoff, who in his seminal work on the administration as service provider[75] responded to the modernization processes of the late nineteenth and early twentieth centuries, a period Jürgen Osterhammel has knowledgeably described and analysed under the heading "The Transformation of the World."[76] Reading Forsthoff – preferably also through Florian Meinel's spectacles in his ground-breaking dissertation "The Jurist in Industrial Society"[77] – does indeed leave one with an impression of *resonant oscillations*, concentrating conceptually towards the provision of services of general interest as a notion of order in the modern administrative state. Methodologically, Forsthoff sets out from a sociological finding: that individuals are increasingly dependent on services provided by the state, since the life space

73 Stolleis (1989) 135 f.
74 According to Puhle (1973). Three structural and qualitative changes are characteristic of law in the interventionist state: 1. The sharp rise in the need for regulation in industrial society; 2. The 'seizure of power' by public law and administrative law as growth sector; 3. The gradual blurring of the boundaries between private law and public law.
75 Forsthoff (1938).
76 Osterhammel (2009).
77 Forsthoff (1971b).

they can manage autonomously is continuously shrinking: "Forsthoff's methodological programme goes far beyond the ultimately banal postulate that the juristic discourse has to take 'social realities' into account. He wanted to rethink the ordering structures of law from the perspective of social realities *in order to adapt juristic forms to a changed reality from within*, to conceptualize this changed reality in legal-dogmatic terms. For Forsthoff, all juristic endeavours to capture reality were solely in the interest of this *dialectical return* to legal concepts."[78]

Summing up Forsthoff's analysis, Florian Meinel explains how we are to understand this dependence of this individual on the state as service provider:[79]

> "Forsthoff illustrates his hypothesis with the graphic distinction between 'effective' and the 'controlled' life space.[80] In agrarian society and still in the bourgeois age, people from the classes that shaped political life lived in an environment they could 'regard as their own': 'The farm, the field belonging to them, the house they lived in;' that is to say, their life basis was assured by property rights: their 'controlled life space'. The goods of the controlled life space could ensure 'a comparatively secure living', because in their subjective sphere people could dispose freely over them.
>
> With the transition to a modern economy and a way of life rooted in the division of labour, people had to range far beyond the life space they controlled in order to provide themselves with the necessities of life. Forsthoff calls the sphere in which people move but which does not 'belong' to them personally their 'effective life space.' We could also speak of socialized or social life space. The necessities of life that people can avail themselves of in their effective life space differ from those available in their own life space in that they are typically not the product of people's own work but of a specialized production process based on the division of labour. … As Forsthoff puts it, citing Max Weber, people have to 'appropriate' them. … Where 'smooth appropriation' through the free circulation of goods no longer functions, the state itself takes over distribution. Individuals then depend essentially on the complex administrative system and its services. They use public transport and communication facilities, purchase gas and energy, use public health services and social security institutions. The state does not, of course, provide all such services itself. But it becomes the omnipresent guarantor of 'appropriation'. In Enst Jünger's *Der Arbeiter* we read that 'nine tenths of everything the modern human being has would immediately become worthless if they were to be abstracted from the existence of the state'."[81]

78 Meinel (2011) 133.
79 Meinel (2011) 154–155.
80 The following brief quotes are all from Forsthoff (1938).
81 Jünger (1981) 292.

Because of these processes, the administrative authorities gain enormous power potential, which, following Michel Foucault, is nowadays generally referred to as "organic power" or Giorgio Agamben as sovereign power over "naked life".[82]

> "Already under the sway of liberal ideas and constitutional orders, the state had experienced an extraordinary growth in power. It gained control over the essential prerequisites for the life of the individual to a degree surely quite alien to the absolute police state. This absolute police state could supervise professional life, rebuke Kant, censure Schiller, and prohibit the spread of deterministic theories; it could certainly determine the very details of how people ought to live. But it was far from exercising the same responsibility for ensuring that life was possible at all as does the state today."[83]

Meinel outlines just how comprehensively the administrative authorities as service providers affect the realities of life for every individual:

> "For Forsthoff, this power over the basics of life manifested itself not only in the form of direct or indirect public services with regard to which the a*dministrative authorities* acted chiefly as *providers of services of general interest*. … In a 1950 lecture, he stated: 'The provision of essential public services is thus no longer only a matter of satisfying community needs at the local level. It means rather the organization of large economic and social spaces.'[84] In the first place, this certainly includes public utility services, infrastructure management, and public health, hence soft power through benefits of all sorts ('the carer also rules!'[85]). But, for Forsthoff, services of general interest included developmental administration in the broadest sense – not concerned with individual intervention in subjective rights: economic planning; managing the labour market; spatial planning; influencing the population ideologically through propaganda and the mass media; 'harnessing and steering the emotional energies of the modern masses'.[86] And the whole field of psychological (and some day genetic) influence and prevention, which the state cannot forgo, not least *because, presiding over industrial society, it is obliged to generate growth* and must therefore ensure that the population can optimally serve the industrial employment regime."[87]

One last sociological observation important for the conception of administrative law and the functional logic of the modern administrative state: the

82 See Foucault (1978–79); Agamben (1995).
83 Forsthoff (1938) 8.
84 Forsthoff (1950) 6.
85 Forsthoff (1964) 65.
86 Forsthoff (1942) 69.
87 Meinel (2011) 164–165.

replacement of the ideal of equality held high by the liberal state governed by the rule of law by concentration on the differing needs of various social groups:

> "The ideal of civil liberty was at the same time an ideal of civil equality, and society based on equality before the law was the 'object' of administrative action. … This notion, too, was incompatible with the provision of services of general interest. If the separation of society and the state is eliminated and hence – from the point of view of the state – the nature of society as a unitary object, the formal basis for societal equality is also lost. In modern administration, eligibility is based … not on civil equality but on inequality among social groups. Social groups depend in various ways on the state machinery for service provision, distribution, and legalization and for this very reason have to act collectively in order to effectively assert their claims of access vis-à-vis the state. The provision of services of general interest thus cancels out the status of civil equality. The fundamental normative category is not the citizen but the 'beneficiary', whose existence is registered in terms of entitlement: as consumer or as entrepreneur, as country or city dweller, as traffic participant, as tenant, patient, worker, employee, and so on. The state as provider of services of general interest is no longer the state of a given society but a state of social groups."[88]

So much for the *resonant actor* Ernst Forsthoff's analysis and responses.[89]

II. The preventive state and "its" preventive security law

Rereading my 2001 essay on regulated self-regulation, which addresses the relationship between the preventive state and its security law in some depth,[90] I was struck by how, in concept formation and semantic shifts, the authors cited capture a development whose functional logic has become fully apparent only through the scourge of terrorism since 9/11. We cast only a brief glance at this development, not only flanked but also exacerbated by abandonment of the classical concept of 'warding off danger' in favour of suppressing it by 'ensuring security'.[91]

88 Meinel (2011) 169.
89 See Badura (1966); Badura (1967).
90 Schuppert, G. F. (2001) 210 ff.
91 On the failure of the proportionality principle to develop a disciplinary effect in crime prevention see Schuppert, G. F. (1996).

III. The concept and workings of the preventive state

The preventive state[92] undertakes to prevent dangers, not to ward them off. Dieter Grimm: "In contrast to a state that sees itself primarily as a repressive authority, and which can accordingly wait for socially detrimental events to occur before reacting, a prevention-oriented state has to detect potential crises at the very onset and try to nip them in the bud. The state comes into play not only when concrete danger threatens but already when abstract risks are identified."[93]

Particularly interesting is how the preventive state comes into action, what tools and procedures it uses. Grimm has this to say about the liberal repressive state governed by the rule of law: "State repression finds expression in intervention against manifest disturbance of a legally established normal state of affairs with the aim of restoring this state of affairs. It thus acts reactively and selectively. … Preventive action by the state, in contrast, takes the form of avoiding undesirable developments and events. It is therefore prospective and comprehensive."[94]

This is precisely the point. The prospective and comprehensive preventive state has been provided with an appropriate toolbox in the form of the Prevention of Trafficking in Illegal Drugs and Other Manifestations of Organized Crime Act (OrgKG) and the later Fight against Crime Act (VerbrBekG). These acts legalize precisely what the preventive state has to rely on: the preventive and comprehensive fight against crime.

* *The preventive state as a security state*

In analogy to 'welfare state', a term that stresses the provision of social security and the establishment of social justice as key functions of the state in industrial society, we can call the preventive state a 'security state' to stress the central function of the state in providing security through evolving security law and through administration adequate to the task. Indeed, *changing terminology* manifestly indicates shifts in the sense of a functional change in administration and administrative law in the field of "providing security and order."[95] This can be outlined under two headings:

92 Grimm (1986) 38–54; also published in Grimm (1991); see also Denninger (1988).
93 Grimm (1991) 198.
94 Grimm (1991) 199.
95 On the provision of security and order within the structure of state responsibilities see the typology of Rose, R. (1975); see also Schuppert, G. F. (1980).

* *The provision of security by the state as a basic right*

There has been broad consensus that the provision of security is a central function of the state and that the basic duty of the citizen to renounce force corresponds to the state monopoly of the use of force and the state's duty to enforce the law. Gusy rightly comments: "Today, security is recognized as a task of the state. It covers not only sanctioning breaches of the law that have already occurred but also putting a stop to ongoing attacks against the legal order and warding off future attacks. This makes the enforcement of the legal order a public good. In the risk society, security is a public good."[96]

Recent discussion has emphasized the constitutional rank of security as a task of the state. For Volkmar Götz, the constitutional-law quality of the "internal security" mandate of the state is an expression of the "*constitutional-law dimension of demands on the state*."[97] Josef Isensee writes of a "basic right to security".[98]

In brief, this terminology provides "flanking conceptual protection" for the natural logical tendency of the preventive state to go beyond the constraints on police action that the traditional concept of danger imposes and, in the name of countering risks, to progressively waive the domesticizing impact of the proportionality principle.

* *From police law to security law*

This title of Christoph Gusy's[99] Bielefeld inaugural lecture captures the functional change in law following the advent of the preventive state as security state. The substantive shift came on tiptoe in the guise of a terminological change with the inexorable career of the concept "internal security". Whereas Götz's entry in the "Manual of German Constitutional Law" (Drews / Wacke / Vogel / Martens: "Handbuch des Deutschen Staatsrechts") would once perhaps have appeared under the headword "Gefahrenabwehr" ("averting danger")[100] it is now to be found under "Innere Sicherheit" ("internal security"). This concept not only dedifferentiates branches of security, bringing them together under a general heading but, as Götz him-

96 Gusy (1994) 192.
97 Götz (1988) 1007 f.
98 Isensee (1983).
99 Gusy (1994).
100 Drews et al. (1986).

self puts it, it expresses a demand on the state lending argumentative weight to a policy for combating crime that presents itself as a security package. Under the heading "internal security – promise and real possibility; Alfred Dietel rightly remarks:

> "The concept 'internal security' has become a subject in its own right. As political promise, 'internal security' has more positive connotations than the more juristically neutral term 'public security'. A political capacity to act and determination are better signalled by measures to improve 'internal security' because this can always give the impression that major and important matters are at issue."[101]

"Security law", the matching concept to "internal security" as a task of the state therefore goes beyond classical police law. This development merely obeys the logic of the preventive state. It is therefore not a question of halting this logic but of not allowing the *logic of substantive demands on the state* to blur the distinction between police and justice, repression and prevention, police service and intelligence service, etc. In this field, jurisprudence faces a new challenge in finding a balance that both works and secures freedom.

> Security is a state that, under the modern conditions of the risk society increasingly reaches beyond the domain of police and traditional police law. If, in establishing and maintaining security, the state and the police are only two factors among many, the interests that have to be taken into legal account, too, become more numerous and more complex. This is where security law begins. It is, however, also evident that the real problems that present themselves are less and less accessible from the beaten paths of police-law dogmatics. Many questions arise off the beaten track, but, so far, few answers have been found. In this regard jurisprudence is almost everywhere in its infancy."[102]

Here too, as we shall see, the function of the legal system and legal science is clearly to react to changes in the actual state of affairs not only by echoing them but also by addressing them and by amplifying them through linguistic change – so-called semantic shifts[103] – and thus responsively impacting reality.

101 Dietel (1987) 57.
102 Gusy (1994) 207–208.
103 On changes in statehood reflected by "semantic shifts" see Schuppert, G. F. (2010) 116 ff.

C. From the private law of the constitution to the constitution of private law: the necessary correspondence between the conceptual models of jurisprudence and social and economic conditions

I. The necessary correspondence between law and social reality or why legal concepts can not only age but also lose their function

In 1960, one of the giants of German jurisprudence, Franz Wieacker,[104] addressed the German Association of Jurists on the occasion of its centenary,[105] an institution whose task it is to periodically check the 'reality adequacy' of the law in place and, where needful, to recommend reforms. We could thus speak of an institutionalized attempt to ensure the resonance capacity of the legal system and its jurisprudence through a sort of constant monitoring.

Wieacker paid tribute to the founding of association, which took place against the backdrop of a "fraternity of jurists" determined to reform the legal order through national codification:

> "Since the professors of law, the high judges, the leading attorneys, and the experts from the ministries of justice and legislation were of one mind, idea and reality, theory and practice, legal policy, and application of the law came ever closer in the manner characteristic of the heyday of a legal culture.
>
> This favourable constellation at the hour of birth of the German Association of Jurists was no accident. It was grounded in the intellectual, political, and economic actuality of civil jurisprudence at that time. Public prestige for scholarly jurisprudence is possible only if it is able to *express vital demands of the society of its time*; the *curious interaction between intellectual and social forces* then sets in that is one of the existential conditions of law. For this reason, determining the 'social model' of codification (attempted elsewhere[106]) is a precondition for understanding the functions, victories, and decline of the great legal codes."[107]

Because of this *necessary interdependence between the legal order and society*, it is not only likely but normal for a certain conceptualization of law to age when this correspondence between law and societal reality erodes: "If there

104 Wieacker's best-known work, which now enjoys canonical status, is "A History of Private Law in Europe" (1996).
105 Wieacker (1960).
106 Wieacker (1953).
107 Wieacker (1960).

really is interdependence between the spirit of a legal order and the structure of its society – what we call the 'social model' – there will also have to be structural shifts in modern economic society supplanting the classical dogmatic context of general private law by once marginal areas. In short, classical private law started to age because the free, pioneering society of the nineteenth century, whose social and economic conditions were reflected in its dogmatics, no longer exists."[108]

Writing on the constitutionalization of private law as a development process Felix Maultzsch[109] argues in similar vein. He comments on the drifting apart of the classical civil law model prior to the introduction of the Civil Code and the reality of the modern administrative state:

> "This system with its cornerstones of civil equality, and freedom of contract and property provided a formally oriented framework that was also binding on lawmakers and therefore constitutional to the extent that any legal-policy/purposive reshaping of private-law conditions did not lie within its competence. Against this backdrop, basic rights, too, could only offer defence against state interference. Extending their application to relations between private persons would have run counter to the fundamental parameters of the nineteenth century legal structures. However, there were already signs that this conception of civil law was on the wane, witness the growing discussion on the social function of private law. It was *Otto Gierke* who famously proposed that a 'drop of socialist oil' should be infused into the coming Civil Code.[110] In his view, civil law ought not to persist in a purely liberal basic attitude but embrace higher, social objectives if it wished to survive in the emerging modern administrative state and industrial society."[111]

A third author should be cited on the correspondence between legal and social orders: from a systems theoretical perspective legal, Dan Wielsch points to the need for *societal adequacy of law*, which requires at least that the order be *adequately complex*:

> "In minimalistic intent, we translate the concept as adequate complexity. In a broad sense, this means that the law has institutions at its disposal that are compatible with the levels of abstraction demanded by society. The necessary categorial reductions of law should not be allowed to hinder an increase in societal complexity but, on the contrary, enable it. What is necessary are selectors that, despite a high level of societal complexity, enable relatively simple decisions to be made without these

108 Wieacker (1960) 6.
109 Maultzsch (2012).
110 Gierke (1889) 3.
111 Maultzsch (2012) 1041–1042.

> decisions reducing societal complexity through their binding effect.[112] This is also likely to be true for the implementation of collectively defined control plans entrusted and credited to law, such as are generated in and through the political system. The focus in law – at least historically – has been on providing and securing the (systemic and societal) complexity provoked by the individual seeking to realize plans of his own. One example is the figure of subjective property law, with whose aid social relations can be unravelled, spheres of interest separated and rendered variable independently of one another."[113]

Just how a lack of correspondence between legal and social order can plunge a legal model – so-called *private law society*[114] – into crisis and force it to give way to a different understanding of law is shown by the shift from private law as constitution to the constitution of private law.

II. From private law as constitution to the constitution of private law

The development process is described by Dan Wielsh in an essay on "Basic Rights as Justificatory Rules in Private Law."[115] He begins by outlining the ambitious self-conception of a civil jurisprudence as a societal order:[116]

> "However, the self-awareness of this society that defines itself as civil cannot be fully explained in terms of the liberation of individuals from the estate-based, feudal order so that they now stand atomized vis-à-vis the state they themselves have authorized. It can be understood only if a further assumption is taken into account: that society has at its disposal 'institutions with the innate capability to coordinate and thus *directly steer and influence* the plans and actions of free, autonomous people[117] in such a way that society is able in itself to attain prosperity and justice. Only because civil society has at its disposal a non-hierarchical ordering mechanism in the shape of the free transaction economy and competition can it emancipate itself from substantive provisions pertaining to the public good in the state and limit itself to enabling free self-determination. The overall societal and constitutional policy status of this regulatory process arises only from the link between private law and this ordering process, from its relationship with an economic system that provides market access, that leaves the beneficial use of resources and participation in the work process to the free decision of economic operators, and which knows

112 Luhmann (1970) 175–202.
113 Wielsch (2001) 36.
114 See Riesenhuber (ed.) 2007.
115 Wielsch (2013).
116 Wielsch (2013) 721–722.
117 Böhm (1966) 88 (highlighting in original).

> only one legal basis for the resulting system of communication and cooperation: private law."[118]

In brief, this means: "Private law is raised to the status of a societal order and the – decentralized – 'steering' of a society is entrusted to free and autonomously planning individuals."[119]

According to Wielsch, however, private law cannot satisfy the macro-societal regulatory demands made of it, chiefly for *methodological reasons*:

> "Adoption of the constitutional-law promise of equal freedom through private law lends this law macro-societal status. This alone explains and justifies the nineteenth century notion of the priority of private law over constitutional law. Methodologically, however, private law is inadequately equipped for the task. The public-law perspective on subjective rights and private-law institutions adopted by ordoliberal legal theory remains marginal. The prevailing view is that of an 'unpolitical' private law whose task it is to establish a bilateral balance of interests. … Because the prevailing methodological understanding lacks any sense for a constitutional view of subjective rights and private autonomy, the societal function that private law has assumed is not adequately perceived. … On the other hand, … law fails to honour its own promise of equal freedom because it ignores the actual preconditions for claiming civil liberties. It is a hallmark of formal liberal law that it throws no light on its own functional conditions."[120]

With the enactment of the Basic Law and, in particular, with the rulings of the Federal Constitutional Court that define this basic order, the sceptre has passed to *constitutional law*. Wielsch notes:[121]

> "The promise of equal freedom passes from the private-law constitution and private law to the democratic constitution and the basic rights, albeit without competition losing its quality as an institution under constitutional law. Basic rights assume a socially constitutive function, but in so doing can build on the regulatory function of social institutions and private law.
>
> The precondition is that basic rights – as well as the political system – are also binding on society itself. For this purpose, their dogmatic interpretation as bans on interference, requiring the state to refrain from action, does not suffice. Basic rights must be able to *change* society. This is achieved if they are understood as precepts for shaping the law that are implemented by the branches of government (legislature, executive, and judicature) within the specific framework of their functions and responsibilities. What decisively sets the course is that constitutional jurisdiction also qualifies basic rights as objective fundamental norms that present decisions on

118 Mestmäcker (2007) 41.
119 Wielsch (2013) 722.
120 Wielsch (2013) 728 f.
121 Wielsch (2013) 731 f.

> values for all areas of simple law.[122] Over and beyond the interpretation of individual basic norms, the basic law catalogue as a whole is treated as an objective order and system of values."[123]

In brief, the establishment of the necessary correspondence between the legal and social orders is primarily a task for the – reflexive – legal order[124] itself. This can require law to develop suitable methods for adequately discharging its controlling function;[125] but, as we have seen, it can also prove necessary to change the relationship between entire fields of law, as has been done with probably irrevocable effect by the constitutionalization of the whole legal order.[126]

D. The multiple life worlds of the law: the helpful perspective of legal pluralism

I. The societies of law

In his seminal work on the law of legal pluralism,[127] Ralf Seinecke posits that all communities tend to give themselves regulatory regimes of their own: "Every society, community, or association finds (at least theoretically) the normative force to establish its own law. Communities themselves recognize their given order as law. This insight has been formulated under wide-ranging epistemological conditions; nevertheless, all legal theoreticians of 'societal law' in the modern age have faced the same difficulty: the 'Malinowski problem', i. e., the distinction between law and other social norms."[128]

This is exactly what we mean when, in the "language of governance", we say that every governance collective tends to organize itself as a regulatory

122 First: BVerfGE 6, 55 (72) – Income splitting: Article 6 I of the Basic Law is not only an institutional guarantee but a fundamental norm (Grundsatznorm), "that is to say, a binding decision on values for private and public law pertaining to the entire field of marriage and family."

123 A year later, BVerfGE 7, 198 (205) – Lüth.

124 See the reflections of the present author in: Schuppert, G. F. (2016a).

125 See Schuppert, G. F. (2017c).

126 See Schuppert, G. F. / Bumke (2000).

127 Seinecke (2015).

128 Seinecke (2015) 157.

collective in order to stabilize itself internally and differentiate itself from the environment;[129] it is another question whether – as a second step – we speak of law or reserve this honorific for state-made law. If, as we suggest,[130] we operate with a broad concept of law, we will doubtless end up with a *broad concept of legal pluralism*, which Seinecke "provisionally" defines as follows:

> "Legal pluralism covers all legal or social constellations, circumstances, and situations in which various types of legal rules, legal orders, or legal sources can be subscribed to from a normative, descriptive, or world-view perspective. This plurality of law can be described politically, sociologically, or juristically, as well as historically narrated. It concerns individual subjects, small communities, entire societies, social fields, and communicative social systems alike. To the extent that this normative diversity is understood to be juristic, legal pluralism is always a critical normative concept. In every legal pluralism, the word law constitutes an episteme or weltanschauung in its own right, thus structuring the normative, political, and social perception of the world.
>
> In brief, legal pluralism means all socio-legal constellations in which different sorts of legal rules, legal principles, legal orders, legal sources, legal history, and legal views interact or collide and which can be distinguished from one another in normative, descriptive, empirical, or world-view terms."[131]

We are thus dealing with different worlds of law, which – and this is the essential point – reflect different *views of the world* in the sense of Rosa's sphere of resonance, a phenomenon we shall be looking at in brief in concluding this second part.

II. Communities of law and their specific world-views

With the help of Ralf Seinecke, we can best understand what is meant by citing two legal pluralists. A number of general remarks will then conclude this section.

* The first author is Robert Cover from the world of Jewish law, where no clearly marked boundary is drawn between life-world and law. He employs the metaphor of a bridge:

129 In extenso in Schuppert, G. F. (2016b) 63 ff.
130 Schuppert, G. F. (2016b) 251–291.
131 Seinecke (2015) 8.

> "Law … is a bridge in normative space connecting … the 'world-that-is' … with our projections of alternative 'worlds-that-might-be' …. In this theory, law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives. It *is* the bridge – the committed social behavior which constitutes the way a group of people will attempt to get from here to there. Law connects 'reality' to alternity constituting a new reality with a bridge built out of committed social behavior. Thus, visions of the future are more or less strongly determinative of the bridge which is 'law' depending upon the commitment and social organization of the people who hold them."[132]

Seinecke notes that, for Cover, law is always "embedded law," embedded in the life-world of the given community:[133]

> "This conception of law runs contrary to classical concepts. It refers not to institutionalized coercion, not to a ruling state, not to good old justice, not to community recognition and not to a communicative code. Cover has a quite different law in mind. The question 'What is law?' takes on a quite different meaning for him. Cover embeds the law of a community in its life-world. Law constitutes the world in which we live, our nomos:
>
> 'We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. … No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.'"[134]

We add a further comment by Seinecke, in which he speaks of the *sounding board of law*:

> "Cover strongly attacks the project of legal positivism. He confronts the notion of functional or instrumental law with the eternal stories from the world of law and justice. They still resonate against the sounding board of law to disclose the deficient perspective of juristic positivism. Cover deliberately describes his law not in an analytic study: he presents it in a story of its own. In this narrative, law draws its strength not only from normative postulates but also from the history and myths of law. Cover understands the two elements law and narrative as "inseparable": every rule needs history and fate, beginning and end, explanation and goal. Similarly, every narrative relies on a normative standpoint. It needs the moral of the story."[135]

132 Cover (1993) 176–203, here 176.
133 Seinecke (2015) 263.
134 Cover (1983) 4.
135 Seinecke (2015) 265.

* The second author to be considered is the legal pluralist Boaventura de Sousa Santos, whom we have already mentioned in the first part of this book. Seinecke sums up his *world-view legal pluralism*:

> "This link between law and life world also shapes the political and postmodern legal pluralism of Boaventura de Sousa Santos.[136] As in Jewish law, he combines the topoi of law and life, knowledge and action, theory and practice; of emancipation and politics, of truth and activism. This political law is part of many worlds and is to be found in all "structural spaces" of the world. The law of the household, work, community, market, state, and world together form the interlegal space of law. But Santos does not limit his legal pluralism to legal orders in the modern sense of the term. He associates it closely with the world-view demands and perspectives of international leftwing politics. For law as a "map of misreading" always provides information about the truth of the world – who deserves law and who has no right to it."[137]

* We bring the second part of this book to an end with the apt concluding remarks of Ralf Seinecke:

> "Legal pluralism is characterized by the diversity of perspectives. It lacks an imperial nomos that establishes the sovereignty and dominance of a first legal order. Only thus can legal pluralism guarantee a space of their own to the alternative ways of life and life-worlds of law. For this reason, the nomos of legal pluralism is fundamentally controversial: interaction between legal orders brings together the various alternative legal orders with their bridges to other world-orders in a nomos of legal pluralism, and hence introduces chaos into the order of law – legal pluralism is pictured as a nomos of nomoi.
>
> In legal pluralism, different legal and world orders are superimposed. While interaction at the level of law can in one sense still be contained by a certain order of law, it gets out of control in the nomoi of legal orders. For legal pluralism lacks a prevailing and sovereign perspective. In the nomos of legal pluralism, no primary law dominates. The concept of legal pluralism encompasses first, second, third, many legal orders without bringing them under the control of any one order. In the nomos of legal pluralism, the disorder of orders prevails. For this reason, legal pluralism is the nomos of nomoi."[138]

136 See, above all, de Sousa Santos (1987).
137 Seinecke (2015) 299.
138 Seinecke (2015) 373.