Towards a New Cultural History of Law

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Until recently, the law and its practices did not receive much attention from social and political historians working on the history of the modern world.[1] Although few contest that law has had a tremendous impact on modern societies in the 19th and especially 20th century,[2] to this day it remains rather unclear how historians can analyze legal practices in order to integrate them into a general, comparative or transnational history of modern societies. The fundamental question seems to be whether legal history, a well-established historical sub-discipline in its own right, offers an answer to this problem, or whether alternative modes of analysis are necessary that aim at an integrative, general historiography sensitive for legal issues. Even if specialists in legal history still dominate the current preoccupation with questions of law in historical perspective (Lewis et al. 2004; Sugarman 1996; Kelley 1984), a slow, but lasting change can be observed: law—as a theoretical and analytical category as well as an object of empirical research—has also increasingly turned also into a field of interest within political and cultural history.[3]

This article stresses the importance of this shift by first providing a cursory research overview of the last decades, focusing mostly, but not exclusively, on debates among historians and jurists in Germany. Second, some general issues of the problematic relationship between law and

1 This holds true with the exception of constitutional history. See Grothe 2005 for further references.

2 On the debate on the impact of »juridification« in the industrialized world, defined by Steinmetz as »the pretension to engineer and control social change through law,« see Steinmetz 2000: 22–24.

3 For a short presentation of this problem, see also the introduction to this issue.

historiography will be discussed in regard to recent research. To conclude, current attempts at as well as theoretical problems of the »new« cultural history of law will be sketched out, ending with a plea for comparative historical studies on law and its practices.

Is legal history the exclusive domain of legal historians?

In 2005, the historians Wolfgang Burgdorf and Cornel A. Zwierlein published an article on recent problems in legal history in one of the leading legal history journals, the *Zeitschrift für Neuere Rechtsgeschichte*. They included a paragraph that serves as a good starting point for our discussion on the prevailing relationship between legal history and general historiography:

> Once again, nowadays the generally accepted pressure for ›reform‹ leads to a situation where complex societal functions of historic-scientific reflection are judged by naïve expectations that former business lawyers, jurists working for insurance companies, and criminal judges gain some knowledge of legal history *as such*. The further pauperization of legal education might be the consequence. The current dogma of enhancing efficiency is increasingly defined only as shortening the duration of study, as schoolification, the simplification of reasoning, and the eradication of academic disciplines that are considered irrelevant. One of the most important fields of human coexistence, the law, is about to lose the dimensions of reflection and retrospective dependence. (Burgdorf et al. 2005: 296)[4]

Reading such and other laments, mostly from legal historians, one gets the impression that legal history is slowly and inevitably dying—or that it has been in a coma for the last 30 years, at least. Some scholars, like historian Christof Dipper, look down at such claims with a form of mild irony. According to him, the rhetoric of *crisis* in legal history is at least

4 Translation here and in the following by Daniel Siemens if not noted otherwise. For a similar, yet more optimistic conclusion see Stolleis 2007: 405–408.

one hundred years old and must be explained as a logical consequence of the decline of the historical justification of present legal norms (Dipper 2005: 279–280). Nevertheless, there are also good reasons to take the current anxieties seriously. On the one hand, statements like the one cited above reflect a fear of the decreasing importance of legal history in respect to the education of jurists in Germany today.[5] On the other hand, such pessimism also comes as a surprise, given the fact that there is an ongoing controversy about the contributions legal history is able to make to general historiography.[6]

To be sure, the debate about the complicated relationship between legal and general history is quite old, dating back to the 19th century when the foundations of modern historical research where established.[7] Indeed, there are good reasons to assume that the collaboration between legal and general history was more intense in the 19th than in the early 21st century, as the professionalization of academic history went hand in hand with a significant emphasis on topics related to the law such as the history of institutions, constitutions, and public law (Rose 2010: 109). In Germany, contemporaries seemed to regard this as a natural symbiosis, also contributed to by the flourishing of the Historical School of Law and the focus on »classic« languages in higher education. To put the latter more bluntly: if you were taught Latin by analyzing Cicero, you became easily convinced that law is a fundamental category in history. Some scholars even argue that »several links between history and legal history« originate from the humanist's rediscovery and reception of the *Corpus Iuris Civilis* beginning in the 15th and 16th century (Rose 2010:

5 If one considers this problem the other way round, the situation does not look any better, as general historians' limited knowledge of legal processes are often not even regarded as a problem.

6 See Burgdorf et al. 2005; Dipper 2005; Oexle 1987; Koselleck 1987.

7 For an overview, see Stolleis 2008: 11–13; Stolleis 2007. On the origins of modern academic historiography more generally, see Lingelbach 2003; Fulda 1996; Jaeger et al. 1992.

106). A similar claim could be made for Christian Thomasius' attempts to historicize natural law at the turn of the 17th century.[8]

However this is not the place to review the long history of the relationship of law and historiography. I will instead focus on some selected arguments that played a central role in the debate of the last decades, and that might be significant in ongoing historiographical discussions. As some constraints are needed for practical reasons, I focus mostly on debates in the German-speaking academic world, but I integrate research from Britain and the United States where possible.[9] I do not claim to be able to give any kind of advice—in particular not to legal historians. In this respect, I agree with Hans-Ulrich Wehler, who in the 1980s pointed out that problems which are of interest to legal historians as well as to social historians are so complex that only cooperation, based on goodwill from both sides, will help to elaborate them (Wehler 1989: 193). In an even more optimistic way, Reinhart Koselleck assumed a »*gemeinsame Signatur des Problemhorizonts*«—that is a »shared horizon« between legal and general historians. An »osmosis between the two academic disciplines is inevitable,« he added (Koselleck 1987: 130). However, Koselleck also pointed out some singularities of legal sources that might distinguish them from other sources. As a consequence, legal historians would share a specific point of view that emphasized the repeated application of law. In the main, they would look for structural particularities rather than singular incidents (Koselleck 1987: 144–145).

It is difficult not to wonder at the optimism of the 1980s. From a present-day perspective, the osmosis predicted did not come to pass, and sometimes quite the opposite seems to be true. Collaborative research projects including legal scholars and (social) historians remained the exception, and even books such as the promisingly entitled *Rechtsgeschichte auf kulturgeschichtlicher Grundlage* (Legal history grounded on cultural his-

8 Wieacker 1995: 251–253.

9 For an overview see Sugarman 1996; Rose 2010: 108–123, including further references.

tory), a recent manual for law students, are disappointing as regards methodological reflection on legal history:

> The educational goal [of legal history, D.S.] in relation to culture resides in an ambitious learning process about how to deal with the inspiring and demanding diversity of legal history. […] Legal history as an academic subject therefore serves progressive purposes. Legal history obtains practical relevance in so far as it does not see the law as a singular phenomenon, but in relation to many other aspects of life. (Senn et al. 2006: X)

Even if it is fair to say that such a paragraph is not characteristic of the status quo in the methodology of legal history, it nevertheless illustrates the prevailing tendency of having a limited understanding of the possible range of legal history.[10] The authors of the book mentioned above apparently consider their academic field to be a kind of intellectual playground, which might help future jurists to think in more substantial ways about their academic subject. But it remains fundamentally unclear how the so-called »relation to many other aspects of life« can be determined, not to mention the relation between legal history, general historiography, and the process of history itself.

This latter point is exactly what I am interested in. As a number of scholars have already published on this matter, I am in the comfortable position of being able to begin with a recapitulation of some of their basic arguments. Initially, I will concentrate on the debate between the legal scholar Dieter Grimm and the historian Hans-Ulrich Wehler on the status of law in modern historiography, which has been ongoing since the late 1980s. Grimm, now Professor Emeritus of Public Law at the University of Bielefeld, had no doubts about how modern legal history

10 It must be emphasized that this tendency should not obscure that fact that some legal historians like, for example, Michael Stolleis are strong proponents of an ambitious writing of legal history in accordance with the ongoing methodological discussions in general historiography. See Stolleis 2008: 45–48.

should be pursued. More than 20 years ago, in his book *Recht und Staat der bürgerlichen Gesellschaft*, he wrote unhesitatingly:

> Research in legal history has to get used to attributing the same relevance to starvation, religious schisms, and the invention of the steam engine as it normally does to the legal system of Savigny, the Magna Carta, and the trial against the miller Arnold.[11] (Grimm 1987: 418)

A bit further on, Grimm maintained that »legal history, which is relevant to present times, is a form of social history.«[12] It is obvious that such a claim was at least in part inspired by the tremendous influence of some colleagues from the history department in Bielefeld, in the 1980s most notably Hans-Ulrich Wehler and Jürgen Kocka (Hitzer and Welskopp 2010). Grimm criticized the majority of legal historians for failing to understand that law and social transformation were fundamentally interconnected. According to him, traditional legal historians would often produce a kind of »history of legal ideas« (*juristische Geistesgeschichte*) to the detriment of real legal history (*juristische Realgeschichte)* (Grimm 1987: 413). He accused his jurist colleagues of producing legal fiction, forgetting that law is not only made by a small group of intellectuals, but is a complicated mixture of political action, legal reasoning, and social needs.[13]

But one would be mistaken to take Grimm simply for an uncritical follower of social history, trying to spread the gospel to the poor and burdened legal jurists. A decade after his fierce critique of the manner in

11 On the famous trial of the miller Arnold in Prussia, see Luebke 1999.

12 On this, see also Klippel 1987 (who is more cautious on this subject).

13 In contrast to Grimm, the historian Otto Gerhard Oexle argues that legal history would serve interdisciplinary dialogue with »general« history best by insisting on its specifics. Additionally, he points out that, already in the 19th century, legal history contributed richly to what is nowadays labelled »social history.« Regarding the modern concept of »social science history,« Oexle emphasizes that this concept is an equally ephemeral phenomenon and should therefore not be treated as the summit of historiography (See Oexle 1987: 77–107).

which legal history was traditionally pursued, Grimm also raised some critical questions about social history. He reproached Wehler for underestimating law and justice in his *Gesellschaftsgeschichte*. In particular he regretted that his colleague from the history department did not define the place of law in his programmatic introduction to the first volume (Grimm 2000). Grimm furthermore deplored that Wehler did not consider law to be one of the »fundamental dimensions« or »axes« that—according to his introduction—would determine the structure of every modern society: political rule, economy, and culture (Wehler 2008 [1987]: 6–31). If one agrees with Wehler that *Gesellschaftsgeschichte* is foremost about writing the history of social inequality, Grimm argued, then one should also acknowledge that the law and legal procedures determine social inequality to a great extent. Grimm maintained that in modern times, particularly in »bourgeois societies,« it could no longer be disputed that no status quo is unaffected by legal arrangements. And, pushing his argument even further, he postulated that the legal system could be regarded as a kind of societal self-definition, a definition that would both reflect and help define a society's moral values and the distribution of power and influence. Therefore, Grimm concluded, it appears as if the law or the legal order should be considered a »forgotten fundamental dimension« in Wehler's *Gesellschaftsgeschichte* (Grimm 2000: 48–50, 56).

Wehler answered Grimm in the introduction of vol. 4 of his *Gesellschaftsgeschichte,* published in 2003, which deals with the history of Germany between 1914 and 1945. Calling it a brilliant argument, he acknowledged that Grimm's postulation to understand law as another structural axis had »persuasive power.« Nevertheless, Wehler did not alter his methodological and theoretical framework, excusing himself by pointing to examples where law and legal practices were analyzed in his book, but also freely admitting: »Ultimately, I did not feel up to the task of mas-

tering the legal problematic, which is furthermore treated in a complicated technical language« (Wehler 2003: XVII f.).[14]

This is not the place to take a partisan standpoint in this debate, nor should it be our task to have a closer look at the theoretical premises of *Gesellschaftsgeschichte*. Nevertheless, the debate between Grimm and Wehler reveals at least one central aspect of our topic: it emphasizes that it is of fundamental importance whether law is merely regarded as an »object« or whether it is understood as an analytical category in its own right. In the first case, we might apply all historiographical methods—if we deem them appropriate, of course—to deal with questions of law and justice. In the second case, we are forced to reflect how law and justice—as analytical categories—can be integrated into the theoretical and methodological framework of broader historiographical analyses.

As far as I can see, although there is an increasing number of publications and conferences on conceptual approaches to dealing with law and legal matters in history,[15] a prototype of such a theoretically elaborated historiography does yet not exist. What we can rely on instead are a few innovative pioneer studies, some of which will be discussed below. My proposition here is that cultural history, extending beyond the theoretical premises of traditional social history by emphasizing agency and *Eigensinn*, symbolic meaning, rituals, and communication, should not only bring forward such predominantly empirical studies, but that it is im-

14 The debate about the status of law in Wehler's *Gesellschaftsgeschichte* was revived to a certain extent on the occasion of the publication of the fifth volume in 2008. See Bahners and Camman 2009: 384.

15 See most recently the interdisciplinary approach by Vismann 2011. See also the contributions to the conference *»Law as …«: Theory and Method in Legal History* (University of California, Irvine, 16th–17th April 2010, 6th November 2011, http://www.law.uci.edu/legalhistory/index.html) and the program for the conference on *Entanglements in Legal History. Conceptual Approaches to Global Legal History* (University of Luzern, Switzerland, 2nd–6th September 2012, 6th November 2011, http://hsozkult.geschichte.hu-berlin.de/termine/id=17754).

perative to develop approaches which allow law and legal matters to be integrated into the theoretical framework of general historical work.

Current research on the cultural history of law

According to Susanne Lepsius, professor of law at the Ludwig Maximilian University of Munich, it is more than one-sided to blame legal historians for the assumed theoretical shortcomings of their discipline, without also taking a critical look at the status of law in general historiography. This holds true in particular for historians working under the paradigm of cultural history, she writes, replying to the attack by Burgdorf and Zwierlein, quoted above. Of particular importance to our topic is Lepsius' question whether these alleged cultural historians would classify law as a domain of culture, following Gustav Radbruch (Radbruch 2003), or whether they assume a prior understanding of law that regards it as the Other, something »categorically opposed to social and societal customs.« In her eyes, the latter point of view would be misleading, at least if historians think in mutually exclusive categories (Lepsius 2005: 306).

Even if Lepsius concedes that there is always communication regarding law that varies historically, she insists that law is not exclusively produced in the process of legal communication. Instead, she believes in an essence of law that remains untouched even in different historical circumstances. Most cultural historians, however, would deny her assumption, stressing in contrast that such a view simply obscures how deeply even traditional legal ideas and practices are grounded in spheres other then the law itself. It is once again Reinhart Koselleck who provides an instructive explanation of the basis of these different perceptions. Although he insists that all historical sources refer to a »reality that is other than textual,« he underlines that it is the »temporal depth« (*zeitliche Tiefendimension)* that aims at a relative continuity of law and provides legal sources with a specific status, »a status that is not to be confused with the status of political, economic or literary [= historical, D.S.] sources« (Koselleck 1987: 145). But this observation should not bring us to the conclusion that there is such a thing as an »essence of law,« as Lepsius

would have it.[16] Instead, as Koselleck rightly argues, it means instead that there are some minimal conditions of general history that can only be understood and explained using the methodological approach of legal history. As a consequence, he called for an »integrative legal history«—always reminding his readers that such a history is an essential, but not sufficient, condition for a general, total history (Koselleck 1987: 148).[17]

One area of historical research where such an »integrative legal history« is already being created is the history of crime and criminal justice, a booming field of historical research for at least 25 years, with its own journals and working groups (Habermas 2009; Blauert et al. 2000). Since 1997, the bilingual journal *Crime, Histoire & Sociétés / Crime, History and Societies* has been published continuously, the official journal of the *International Association for the History of Crime and Criminal Justice* (founded as early as 1978).[18] Additionally, in Central Europe there were—at least until very recently—two well-established historical working groups in criminal history. Firstly, the *Kolloquium zur Polizeigeschichte*, an annual meeting of historians, sociologists, and criminologists; and secondly, the *Arbeitskreis historische Kriminalitätsforschung*, both launched about twenty years ago. The *Arbeitskreis* started as a working group for historical research on the early modern period, but later evolved to include modern and contemporary historians as well. However the annual conference, the major forum for interaction, was suspended until further notice in 2010, and the continued work of the *Arbeitskreis* appears to be at risk.[19] A third institution relevant in this context is the *Institut für Juristische Zeitgeschichte* based at the University of Hagen under the direction of Thomas

16 The important question of whether law always comprises an anthropological dimension (in human rights, but also in rules like *pacta sunt servanda*) cannot be elaborated here.

17 On the concept of *histoire totale*, see Furet 1987.

18 *International Association for the History of Crime and Criminal Justice, Crime, Histoire & Sociétés / Crime, History and Societies*, 6th November 2011, http://chs.revues.org/index.html.

19 *Arbeitskreis historische Kriminalitätsforschung*, 6th November 2011, http://www.akhk.org/2.html.

Vormbaum, which publishes a yearbook partially reaching out to general historians since the years 1999/2000.

Certainly, since the 1990s dialogue between legal and general historians, so urgently called for in the late 1980s—and still of course most welcome—has been ongoing and working effectively. To some researchers, like legal historian Miloš Vec or Lutz Raphael, Professor of Modern History at the University of Trier, crossing the borders between the disciplines already comes naturally (Vec 2006; Vec 2002; Raphael 2000). The fact that the second to last *Rechtshistorikertag* (15th–18th September 2010), the biannual meeting of legal historians, included at least two panels with clear appeal to and participation of »general« historians,[20] is another indicator that the recurrent laments on the deficit of legal history may no longer reflect the status quo, which is often characterised by a much more open and diverse approach to questions of law and justice (Lepsius 2005). In fact, there are fields of research where the interests of general and legal historians meet. For example, the records of court proceedings are increasingly discovered as valuable primary source material not only for legal history, but also for historians interested in political history, the history of urban culture, the history of mentalities and—of course—the history of criminality (Jahr 2011; Siemens 2007; Hett 2004; Grunwald 2002; Hommen 1999; Hunt 1999). Another example is the field of constitutional history. What used to be an exclusive topic for legal historians is now also of interest to cultural historians, working for example on European integration or the history of the United States in the 19th and 20th century (VanBurkleo 2002; Willoweit 2003; Schulze 1992; Schulze 1991). A third area where law plays a distinct role is the history of colonialism. An increasing number of studies no longer concentrate on diplomatic or political history, but also take into consideration the extent to which law was a crucial factor for colonial rule (Tomlins 2010; Kirkby 2010; Schaper 2009; Birla 2009; Benton 2002).

20 See the program of the *Rechtshistorikertag* in Münster in 2011, 6th November 2011, http://www.uni-muenster.de/imperia/md/content/rechtshistorikertag/programm.pdf; Kaube 2010.

To discuss these points more precisely, it is useful to look at some recently published historical studies that deal with law and justice in an integrative way. I have chosen four examples that operate in different analytic modes, but share (at least in the first two cases) one basic assumption of cultural history in that they concentrate on the »performativity of law.«[21] I use this term in a wider sense here, to characterize a wide range of enactments of law—taking into account different actors, forms of knowledge, and legal regulations as well as their enforcement.[22] The sample comprises the following books: *Begegnungen vor Gericht* by Willibald Steinmetz, an advocate of conceptual history and historical semantics (Steinmetz 2002), *Death in the Tiergarten* by Benjamin Carter Hett, a former lawyer and Harvard-trained historian (Hett 2004), and two recent books dealing with the 19th century in global perspective: Christopher Bayly's *The birth of the modern world, 1780–1914* and Jürgen Osterhammel's *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts* (Osterhammel 2009; Bayly 2004).

1. The book by Steinmetz, a slightly modified version of his habilitation dissertation, published by *Oldenbourg* in Munich in 2002, analyses the transformation of English labor law between 1850 and 1925 by focusing on the way in which it was perceived and interpreted by the parties involved. Of course, Steinmetz also pursues the question of whether legal norms change over time and if so, how, but he always does so in regard to the ways in which ordinary people, in this case employers and employees, reacted to or even stimulated this change. Steinmetz's epistemological position towards law is revealed in a formulation by the American legal historian Christopher Tomlins, quoted in a footnote of Steinmetz's book:

21 It is for this reason only that I did not integrate some other masterful studies into my sample, although they connect legal and general history admiringly; see Vec 2006; Fisch 1984.

22 Compare the contributions in Paula Diehl et. al. 2006. On the significance of performativity as a historical concept, see Martschukat et al. 2003, as well as the article by Henning Grunwald in this volume.

> Thus conceived, law may be regarded as a knowledge that records the play of social relations, but which also dynamically reproduces them in the institutions and ideologies to which it gives effect. Exploration of its history is hence an exploration of how law reproduces the details of people's lives by furnishing those lives with their »facts.« (Tomlins 1995: 64)

Referring to Koselleck and Luhmann, Steinmetz points out that every legal system has to produce sentences that must be—*grosso modo*—predictable. Yet at the same time it has to be flexible enough to react to altering situations. In other words, a relative redundancy in the application of legal norms must necessarily be combined with a certain degree of variety (Steinmetz 2002: 536). As Steinmetz shows in detail, in the second half of the 19th century, English labor law became »at the same time too complex and not complex enough to provide, and be perceived as, an adequate solution to the disputes in question« (Steinmetz 2002: 704).

The result was a growing gap between the expectations of laymen and -women on the one hand and jurists, bound to the increasingly refined, but at the same time unrealistic principles of common law, on the other hand. Herewith, Steinmetz diverges from the explanation most legal historians before him gave for the undisputed fact that British workers increasingly turned away from the courts and tried to settle conflicts collectively by negotiation or strikes. According to Steinmetz, it was not political transformations or class-biased judges, but the law itself, its rhetoric and structure, that caused this change in behaviour (Steinmetz 2002: 535–634). His book, therefore, is a fine example of how the methods of historical semantics can challenge conventional legal history. It also demonstrates the kind of important contribution legal history can make to political and social history when the »interaction between law and society« (Steinmetz 2002: 27) is placed in the center—in other words, when the challenges of cultural history are not only faced, but also accepted.

2. The Canadian-American historian Benjamin Carter Hett, the author of the book *Death in the Tiergarten*, published in 2004 by Harvard University

Press, chooses a very different approach to law and the legal system. In his pioneering study, he uses files of court cases as well as newspaper reports on criminal trials to sketch central aspects of everyday life in a modern metropolis at the turn of the 20th century. Influenced by the linguistic turn, micro-histories designed by scholars such as Carlo Ginzburg, and some aspects of the history of everyday life, with a strong understanding of the legal system and its figures/players, Hett explains how the law was put into practice day by day as well as the extent to which this practice was dependent on expectations, most notably expressed by a growing market for sensationalist journalism (Hett 2004: 5–7, 222). Relying on a broad range of sources, Hett's analyses can be called a legal history from the actor's perspective—his readers »get to know the law and the justice system through individuals who have agency, can follow their fates, and are privy to behind-the-scenes manoeuvrings that influenced their trials« (Bruggemann 2006).

Hett starts from the premise that Berlin's criminal justice system in the decades before World War One reflected larger social, cultural, and political trends and was becoming more flexible which meant that

> the result was a situation in which professional culture, the impact of public opinion, the state of scientific and other scholarly advances, and (from time to time) high politics could mold the clay of the formal legal structures into a myriad of possible shapes. (Hett 2004: 221)

This multidimensionality opened the door for »the very question of what law was and how the stability of its meanings could be assured […] in a way it had not been for a century« (Hett 2004: 223). In comparison to the book by Steinmetz, Hett's theoretical approach seems even further distanced from the perspective of traditional legal history. But—as Hett outlines—this »distance« might be only another example resulting from the almost unchallenged dominance of legal formalism in European legal thought throughout the 20th century. Instead, Hett wants to build on another intellectual tradition, the American legal realism of Roscoe Pound and Karl Llewellyn—a tradition, which, ironically, was of German origin before it became influential in the United States.

To sum up: Hett's book is more than an excellent and well narrated case study. It not only tells the story of criminal justice in Berlin at the turn of the century, but also more generally portrays in lively terms the »culture of the criminal courtroom« (Hett 2004: 5). It indicates that micro-histories dealing with the performance of law are not only able to reveal the atmosphere of a certain historical phenomenon and time, but can even elucidate longer processes of historical transformation when many are looked at together.

3. My final examples are two books that both tell a global history of the 19th century: Christopher Bayly's *The birth of the modern world, 1780–1914* (first published in 2004) and Jürgen Osterhammel's *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts* (published in 2009). Despite being firmly rooted in the premises of social history, both authors' openness towards recent trends in cultural history and their transnational perspective is reason enough to include them here. Putting aside some minor controversies about these books, both are without any doubt admiringly well-informed masterpieces of both historical knowledge and historiographical narration.

Unsurprisingly, I will only look at one aspect of these books that is of central interest to this article: the role of law and legal practices in these new, globally-orientated narratives of the 19th century. Remarkably, for both authors law is neither a field of particular empirical interest nor an analytic category deemed appropriate for structuring the master narratives. Let us begin with Osterhammel. After some innovative reflections on *time* and *space* as overall historiographical categories, followed by systematic chapters on larger cohered fields and subject matters such as the »standard of living,« »empires,« »cities,« »states,« and »revolution,« he analyses some topics that have cross-thematic appeal (and are in this way similar to Wehler's understanding of »axes«): »energy and industry,« »work,« »networks,« »hierarchies,« »knowledge,« »›civilizing‹ and exclusion,« and »religion.« In contrast, law, either as a theoretical construct for ordering societies (internally as well as externally) or as an applied social technology, is almost completely missing, with two exceptions:

First, law is important with regard to the implementation of capitalism. According to Osterhammel, lawmaking by nation states was the most relevant parameter in creating the general conditions that allowed capitalism to grow across the globe during the 19th century.

> By generating elaborated and detailed ›bourgeois‹ legal orders […] governments and their bureaucracies all over the world made capitalist economies possible and secured them, beginning with proving the legal ground of every capitalism: the public guarantee of private property. (Osterhammel 2010: 955)

Second, Osterhammel regards law as important with respect to international relations, policies, and wars: »All empires are based on the perpetual latent threat of violence apart from implementation of a set legal order« (Osterhammel 2010: 610). Although he considers »European international law« to be a major achievement in terms of civilization, he criticizes that Europeans did not take the initiative for a global legal order. As a result, the only way to come to a »globalisation of law« consisted of a gradual enforcement of European legal ideas, which in practice were regularly interpreted in favor of European interests (Osterhammel 2010: 680). In both cases, law is exclusively interpreted as a technology of power, but in an abstract manner. The character of the historical forces responsible for its implementation and administration, be they monarchs, politicians, or the legal profession, remain indistinct in this book. Furthermore, the pertinacity (*Eigensinn)* of legal traditions, norms and structures—which prevents a powerful ruler from using the legal system exclusively at his discretion—is overlooked. Even totalitarian rulers cannot entirely dispose of a given legal system, as it depends on people, traditions, and cultures and is therefore a far too complex institution to be controlled dictatorially.

Bayly's point of view with respect to the status of law in his global history of the 19th century is similar. In general, it is his aim to demonstrate how »historical trends and sequences of events, which have been treated separately in regional or national histories, can be brought together« (Bayly 2004: 1). Law is of interest to him either in as much as it is relevant for the grounding of the (Imperial) nation state or as a tool for dis-

ciplining the people.[23] During the 19th century, he writes in a chapter entitled »Claims to Justice and Symbols of Power,« public authorities all over the world »claimed to be able to create and enforce statuses which were regarded as embodied or innate under the old regime.« According to Bayly, even the *Declaration of the Rights of Man* has to be seen in many cases as »a declaration of the rights of the state, which then attempted to regulate and control [the population, D.S.] in new ways« (Bayly 2004: 262). In other words, the success story of the slow, but irresistible implementation of the rule of law is only one side of the coin. The other side, too often hidden in the shadow of historiography, is a story of repression and force. Bayly here sounds like a follower of Michel Foucault, to whom he makes reference more than once:

> In fact, control of justice and punishment had everywhere become an issue through which the state sought to define its own rights. Local and community forms of arbitration and vengeance were increasingly denounced as illegitimate and outside the pale of civil society by theorists of the state. So the feud, the duel, and the moral vengeance of the crowd, which had been normal features of the workings of most societies even as late as the previous century, were stigmatized and criminalized. (Bayly 2004: 262)[24]

However, Bayly adds, even if it is possible to tell the story of the implementation of law during the 19th century as a success story or a story of deprivation, either way it would be wrong to overemphasize the effects of this transformation, as »enactment and aspiration were not the same as enforcement.« Bayly maintains that

> in many societies, the state simply did not have the strength or the single-mindedness to enforce its newly trumpeted claims to the

23 With these thematic priorities, Bayly follows an established trend in modern social history to understand the law as »something imposed on people ›from above‹« (Steinmetz 2000: 25).

24 Bayly's criticism seems less convincing when taking into account that feuds and duels had already been stigmatized in many societies for centuries, sometimes as early as the 11th century; see Wadle 2002: 25–30.

> monopoly over violence. Equally, local communities, magnates, and religious authorities continued to deny the legitimacy of the state to intervene. (Bayly 2004: 264)

This is an important reservation. It hints at a possible bridge between micro-historical studies of law and its application on the one hand and global macro-histories, concentrating on anonymous processes and the policies of big powers, on the other. Bayly, to clarify his position, concentrates almost exclusively on historical phenomena on a global scale in order to put further the main argument of his book, which ultimately might be called a defense of the theory of modernization, now exercised on a global level (see Hall 2004).

Although I can only be very sketchy here, we might come to the preliminary conclusion that the impact of a »new« cultural history of law in recent syntheses of global history is rather limited. One reason for this is that individual behavior and scope, which is of central interest to most studies in cultural history, is consistently disregarded by authors like Bayly and Osterhammel. This is a more or less logical consequence of their focus on macro-level historical analysis (see Schlumbohm 1998). But notwithstanding that writing global history requires a high level of abstraction, I would argue in support of the integration of recent trends in cultural legal history by partially incorporating some examples of the performance of law. The distance between micro- and macro-history might be great, however, historiography at both ends should at least not produce contradictory findings.

Comparative and transnational research on law and history: Which way to go?

Up to this point, the complicated relationship between law and history has been considered from two sides. Firstly, I analyzed this relation from a more historiographical and theoretical perspective, focusing on the debate between legal and general historians for the last thirty years. Secondly, I asked whether studies of the history of law and its practices reflect recent trends in cultural history. The exemplary historical works I examined more closely indicate that a considerable number of micro-

historical studies on law and crime by general historians do exist. In contrast, macro-historically orientated writing, at least in the field of global history, still takes a rather distanced stance toward a historiography that includes the performance of law, of »doing *Recht*« as Rebekka Habermas puts it (Habermas 2008).

My cursory summary identifies open questions more than it is able to provide satisfying answers. Some problems that still need to be discussed more extensively than is possible within the scope of this article include:

1. Can a transnational or even global history of law and legal practices be written if the law itself, at least in the 19th and 20th century, was largely bound to national historical developments and is diverse and highly complex? (Kirmse 2012). This is arguably a lesser problem for scholars establishing their arguments on the ground of common natural law or—to phrase it more fashionable—on the grounds of an »occidental community of values,« although they often walk into the trap of a normative, Westernized understanding of progress. Ultimately, they are at risk of succumbing to the same intellectual shortcomings as their enlightened predecessors in the 18th century. However, this is by no means inescapable, as the eminent study by Harold Berman as well as the legal writings of Max Weber demonstrate, to name just two prominent examples (Berman 1983; Weber 2010). Against this backdrop, one is tempted to assume that there is in fact no alternative to a perspectival view. By all means, it is certainly easier for general historians to take a comparative look at the »performativity« of different legal systems than it is for legal historians to cross the established boundaries of the legal framework in which they were brought up. A »comparative history of legal cultures« (Steinmetz 2000: 3), a concept that is still only infrequently applied to empirical research, might be one possible solution, although its capacity to integrate transnational aspects remains to be demonstrated in practice.

2. What is an appropriate language for the historiographical description of larger historical processes with regard to law? Is it a more or less hermetic language, which tries to do justice to the legal profession and the logic of judicial arguments? Or is a more ambitious language preferable, a descriptive language that follows the categories and trends of modern

historiography, but might have problems »translating« judicial terms and proceedings into more general expressions? And there is another related problem: How should the scholar be trained? Is it preferable that she or he is both a historian and a jurist, or will this just double the confusion?[25]

3. Ultimately, the question of what the categories and reference points might be for a new history of law still has to be addressed. Is a cultural history of law really more than another form of writing legal history—a form that is especially sensitive to performative aspects, but otherwise does not add much? In other words, what is the target of a historian writing a comparative study on the history of law and legal practices? Although many different answers are possible, depending on the subject and the ideological stance of the author, it seems rather unlikely that the answer is to be found within the boundaries of the legal world (as this would ultimately cause a kind of circular reasoning). Put another way, this observation emphasizes that writing a cultural history of law (like historiography in general) is always based on a sometimes articulated and elaborated, sometimes implicit need for theory. Once again, this might sound trivial, but it is still not a generally accepted rule when it comes to empirical research.

Having taken these questions into account, it becomes clear that there is certainly no »law for all,« as a recent workshop at Berlin's Humboldt University in fall 2009 provocatively suggested.[26] At least, such a question is easily misleading as long as one does not intend to write a normative history based on the assumptions of natural law that would compare a certain historical period or development to a progressive ideal of his-

25 What might seem a trivial question at first glance is indeed a complicated discussion, dating back as early as the turn of the 20th century. For the ongoing debate about this issue, see the references in Rose 2010: 112–117.

26 Humboldt University Berlin, *Collaborative Research Centre 640: One Law for All? Law and »Modernization« in Comparative Global Perspective. Universal Claims, Local Implementations* (Workshop), Berlin, 29th-30th October 2009. A selection of papers presented at this workshop is published in Kirmse 2012.

torical progress (Boyle et al. 2005: 179–182). I therefore prefer to reformulate this question and ask whether there is *one* analytical concept and *one* language of historiography that can describe different processes of law and legal actions within the context of larger narratives of the history of the modern world.

I would like to conclude by presenting one example of how a new cultural history of law might be practically achieved, even on a macro-level. In 2009, a new research project based at the University of Helsinki commenced under the supervision of Bo Strath and Martti Koskenniemi. Entitled *Between Restoration and Revolution, National Constitutions and Global Law: an Alternative View on the European Century 1815–1914*, the aim of this project is to analyze European history using an »alternative approach« that focuses on the »relationship between politics and law, nationally as well as internationally« (Strath et al. 2008: 1). In terms of methodology, it is an interdisciplinary research project that looks at the »dynamic and contentious conceptualization of law and politics,« thus taking particular interest in the role of languages and the transformation of semantic fields (Strath et al. 2008: 2). The project intends to integrate cultural aspects of law into a larger synthesis of long-term European political history:

> The research in social sciences, legal history and history on 19th century Europe and the world has so far followed rather strict disciplinary methodologies of investigation with a focus on either imperialism, colonialism and geopolitics on the one side, or international law on the other. This project is going to bring them together in a perspective of entangled inter-dynamics. A target of analysis in this field is the variety of perspectives and practices along the axis from geopolitics to global law contingent on the variety of national viewpoints. Another analytical target is the complex legal and political dependencies between Europe and the colonies, which we will explore and map out in detail. (Strath et al. 2008: 6)

Although—judging from the concept paper—one might critically argue that it is not yet clear how the »entangled inter-dynamics« can be fully

explored when »legal and political dependencies between Europe and the colonies« are taken as a presupposition (thus implying an implicit top-down approach?), it is my hope that further comparative historical studies on law and judicial procedures will set off to explore similar paths, not only by demonstrating the richness of historical developments, but also by contributing to the question of how the law and its practices can be integrated into general historical analyses. It is worth emphasizing that the current state of affairs, a diversity of approaches and concepts, is not a problem in itself as long as there is communication and exchange between them. My assumption is that the more stories are told about legal matters, based on the premises of cultural history, the more it will become clear that law is a fundamental dimension of historical analysis. It is not only a field of research for legal historians but also a challenge for historians of the modern world in general.

References

Bahners, Patrick and Alexander Cammann, eds. 2009: *Bundesrepublik und DDR. Die Debatte um Hans Ulrich Wehlers »Deutsche Gesellschaftsgeschichte.«* Munich.

Bayly, Christopher A. 2004: *The birth of the modern world, 1780–1914. Global connections and comparisons*. Malden.

Benton, Lauren A. 2002: *Law and Colonial Cultures. Legal Regimes in World History, 1400–1900*. Cambridge.

Berman, Harold J. 1983: *Law and Revolution. The Formation of the Western Legal Tradition*. Cambridge.

Birla, Ritu 2009: *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Durham.

Blauert, Andreas and Gerd Schwerhoff, eds. 2000: *Kriminalitätsgeschichte. Beiträge zur Sozial- und Kulturgeschichte der Vormoderne. Konflikte und Kultur. Historische Perspektiven*. Bd. 1, Konstanz.

Boyle, Elizabeth Heger and John W. Meyer 2005: Das moderne Recht als säkulares globales Modell: Konsequenzen für die Rechtssoziologie. *Weltkultur. Wie die westlichen Prinzipien die Welt durchdringen*, edited by John W. Meyer and Georg Krücken, Frankfurt/M.: 179–211.

Bruggemann, Julia 2006: Review of Death in the Tiergarten. *h-net*, 20th August 2010, http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-review&month=0608&week=b&msg=sl8GIyF1Ql9bfSUpRFl0/w&user=&pw=.

Burgdorf, Wolfgang and Cornel A. Zwierlein 2005: Zwischen den Stühlen. Die Rechtsgeschichte aus der Sicht der allgemeinen Geschichtswissenschaft. *Zeitschrift für Neuere Rechtsgeschichte* (27/3–4): 296–310.

Diehl, Paula et al., eds. 2006: Performanz des Rechts. Inszenierung und Diskurs. *Paragrana. Internationale Zeitschrift für Historische Anthropologie* (15/1). Berlin.

Dipper, Christof 2005: Geschichtswissenschaft und Rechtsgeschichte. *Zeitschrift für Neuere Rechtsgeschichte* (27/3–4): 272–286.

Fisch, Jörg 1984: *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*. Stuttgart.

Fulda, Daniel 1996: *Wissenschaft aus Kunst. Die Entstehung der modernen deutschen Geschichtsschreibung 1760–1860*. Berlin.

Furet, François 1987: Die Methoden der Sozialwissenschaften in der Geschichtsforschung und die »histoire totale.« *Theorie der modernen Geschichtsschreibung*, edited by Pietro Rossi, Frankfurt/M.: 147–172.

Grimm, Dieter 1987: *Recht und Staat der bürgerlichen Gesellschaft*. Frankfurt/M.

— 2000: Die Bedeutung des Rechts in der Gesellschaftsgeschichte. Eine Anfrage. *Perspektiven der Gesellschaftsgeschichte*, edited by Paul Nolte et al., München: 47–57.

Grothe, Ewald 2005: *Zwischen Geschichte und Recht. Deutsche Verfassungsgeschichtsschreibung 1900–1970. Ordnungssyteme: Studien zur Ideengeschichte der Neuzeit*. Vol. 16, Munich.

Grunwald, Henning 2002: *Party Lawyers, Political Trials and Judicial Culture in the Weimar Republic*. PhD Thesis, University of Cambridge.

Habermas, Rebekka 2008: *Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert*. Frankfurt/M.

— 2009: Rechts- und Kriminalitätsgeschichte revisited – ein Plädoyer. *Verbrechen im Blick. Perspektiven der neuzeitlichen Kriminalitätsgeschichte*, edited by Rebekka Habermas and Gerd Schwerhoff, Frankfurt/M.: 19–41.

Hall, Catherine 2004: *Review of »The Birth of the Modern World 1780–1914. Global Connections and Comparisons.«* Review no. 420, 2nd November 2011, http://www.history.ac.uk/reviews/review/420.

Hett, Benjamin Carter 2004: *Death in the Tiergarten. Murder and Criminal Justice in the Kaiser's Berlin*. Cambridge.

Hitzer, Bettina and Thomas Welskopp, eds. 2010: *Die Bielefelder Sozialgeschichte: Klassische Texte zu einem geschichtswissenschaftlichen Programm und seinen Kontroversen*. Bielefeld.

Hommen, Tanja 1999: *Sittlichkeitsverbrechen. Sexuelle Gewalt im Kaiserreich*. Frankfurt/M.

Hunt, Alan 1999: *Governing Morals. A Social History of Moral Regulation*. Cambrige.

Jaeger, Friedrich and Jörn Rüsen 1992: *Geschichte des Historismus. Eine Einführung*. Munich.

Jahr, Christoph 2011: *Antisemitismus vor Gericht. Debatten über die juristische Ahndung judenfeindlicher Agitation in Deutschland (1879–1960)*. Frankfurt/M.

Kaube, Jürgen 2010: Die Exhumierung vergangener Konflikte. *Frankfurter Allgemeine Zeitung* (22nd September).

Kelley, Donald R. 1984: *The Writing of History and the Study of Law*. Aldershot.

Kirkby, Diane and Catherine Coleborne, eds. 2010: *Law, History, Colonialism. The Reach of Empire*. Manchester.

Kirmse, Stefan, ed. 2012: *One Law for All? Western models and local practices in (post-) imperial contexts*. Frankfurt/M.

Klippel, Diethelm 1987: Sozialgeschichte und Rechtsgeschichte. Recht und Rechtsgeschichte in der historischen Familienforschung. *Zur Geschichte des Familien- und Erbrechts. Politische Implikationen und Perspektiven*, edited by Heinz Mohnhaupt, Frankfurt/M.: 267–280.

Koselleck, Reinhart 1987: Geschichte, Recht und Gerechtigkeit. *Akten des 26. Deutschen Rechtshistorikertages (Frankfurt/M., 22.–26. September 1986)*, edited by Dieter Simon, Frankfurt/M.: 129–149.

Lepsius, Susanne 2005: Rechtsgeschichte und allgemeine Geschichtswissenschaft. Zur Wahrnehmung einer Differenz bei den Historikern Burgdorf und Zwierlein. *Zeitschrift für Neuere Rechtsgeschichte* (27/3–4): 304–310.

Lewis, Andrew and Michael Lobban, eds. 2004: Law and History. *Current Legal Issues* (6), Oxford.

Lingelbach, Gabriele 2003: *Klio macht Karriere. Die Institutionalisierung der Geschichtswissenschaft in Frankreich und in den USA in der zweiten Hälfte des 19. Jahrhunderts*. Göttingen.

Luebke, David M. 1999: Frederick the Great and the Celebrated Case of the Millers Arnold (1770–1779). A Reappraisal. *Central European History* (32/4): 379–408.

Martschukat, Jürgen and Steffen Patzold 2003: Geschichtswissenschaft und »performative turn«: Eine Einführung in Fragestellungen, Konzepte und

Literatur. *Geschichtswissenschaft und »performative turn.« Ritual, Inszenierung und Performanz vom Mittelalter bis zur Neuzeit*, edited by Jürgen Martschukat and Steffen Patzold, Köln: 1–31.

Oexle, Otto Gerhard 1987: *Rechtsgeschichte und Geschichtswissenschaft. Akten des 26. Deutschen Rechtshistorikertages (Frankfurt/M., 22.–26. September 1986).* Edited by Dieter Simon, Frankfurt/M.: 77–107.

Osterhammel, Jürgen 2009: *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts.* Munich.

Radbruch, Gustav 2003: *Rechtsphilosophie.* Edited by Ralf Dreier and Stanley L. Paulson, 2nd edition, Heidelberg.

Raphael, Lutz 2000: *Recht und Ordnung. Herrschaft durch Verwaltung im 19. Jahrhundert.* Frankfurt/M.

Rose, Jonathan 2010: Studying the Past: The Nature and Development of Legal History as an Academic Discipline. *The Journal of Legal History* (31/2): 101–128.

Schaper, Ulrike 2009: Law and Colonial Order: Legal Policy in German Cameroon between Civilising and Public Peace. *comparativ* (19/1): 17–33.

Schlumbohm, Jürgen, ed. 1998: *Mikrogeschichte – Makrogeschichte: komplementär oder inkommensurabel?* Göttingen.

Schulze, Reiner 1991: *Europäische Rechts- und Verfassungsgeschichte. Ergebnisse und Perspektiven der Forschung.* Berlin.

— 1992: European Legal History. A new Field of Research in Germany. *Journal of Legal History* (13): 270–295.

Senn, Marcel et al., eds. 2006: *Rechtsgeschichte auf kulturgeschichtlicher Grundlage.* Zürich.

Siemens, Daniel 2007: Metropole und Verbrechen. Die Gerichtsreportage in Berlin, Paris und Chicago, 1919–1933, *Transatlantische Historische Studien* (32), Stuttgart.

Steinmetz, Willibald 2000: Towards a comparative history of legal cultures, 1750–1950. *Private law and social inequality in the industrial age. Comparing legal cultures in Britain, France, Germany, and the United States*, edited by Willibald Steinmetz, Oxford: 1–41.

— 2002: *Begegnungen vor Gericht. Eine Sozial- und Kulturgeschichte des englischen Arbeitsrechts (1850–1925)*. Munich.

Stolleis, Michael 2007: Rechtsgeschichte, Verfassungsgeschichte. *Geschichte. Ein Grundkurs*, edited by Hans-Jürgen Goertz, Reinbek bei Hamburg: 391–412.

— 2008: Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion? *Jacob-Burckhardt-Gespräche auf Castelen*, Basel.

Strath, Bo and Martti Koskenniemi 2008: *Between Restoration and Revolution, National Constitutions and Global Law: an Alternative View on the European Century 1815–1914*. Concept paper: 1. 6th November 2011, http://blogs.helsinki.fi/erere-project/files/2008/11/erere_project.pdf.

Sugarman, David 1996: Introduction: Histories of Law and Society. *Law in History: Histories of Law and Society*. Vol. 2, edited by David Sugarman, Aldershot: xi–xxx.

Tomlins, Christopher 1995: Subordination, Authority, Law: Subjects in Labor History. *International Labor and Working-Class History* (47): 56–90.

— 2010: *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865*. Cambridge.

VanBurkleo, Sandra F., ed. 2002: *Constitutionalism and American culture. Writing the new constitutional history*. Lawrence (Canada).

Vec, Miloš 2002: Die Spur des Täters. Methoden der Identifikation in der Kriminalistik (1879–1933). *Schriftenreihe der Juristischen Zeitgeschichte – Abteilung 1: Allgemeine Reihe*. Vol. 12, Baden-Baden.

— 2006: Recht und Normierung in der Industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung. *Studien zur europäischen Rechtsgeschichte 200, Recht in der Industriellen Revolution 1*. Frankfurt/M.

Vismann, Cornelia 2011: *Medien der Rechtsprechung*. Frankfurt/M.

Wadle, Elmar 2002: Zur Delegitimierung der Fehde. *Herrschaftliches Strafen seit dem Hochmittelalter*, edited by Hans Schlosser et al., Köln: 9–30.

Weber, Max 2010: *Gesamtausgabe. Abteilung I: Schriften und Reden*. Band 22/3. *Wirtschaft und Gesellschaft. Die Wirtschaft und die gesellschaftlichen Ordnungen*

und Mächte. Nachlass. Teilband 3: *Recht*. Edited by Werner Gephart and Siegfried Hermes, Tübingen.

Wehler, Hans-Ulrich 1989: Gesellschaftsgeschichte und Rechtsgeschichte. *Rechtshistorisches Journal* (8), edited by Dieter Simon, Frankfurt/M.: 181–194.

— 2003: *Deutsche Gesellschaftsgeschichte. Vierter Band: Vom Beginn des Ersten Weltkriegs bis zur Gründung der beiden deutschen Staaten 1914–1949*. Munich.

— 2008 (1987): *Deutsche Gesellschaftsgeschichte. Erster Band: Vom Feudalismus des Alten Reichs bis zur Defensiven Modernisierung der Reformära 1700–1815*. Munich.

Wieacker, Franz 1995: *A history of the private law in Europe: with particular reference to Germany*. Foreword by Reinhard Zimmermann, Oxford.

Willoweit, Dietmar, ed. 2003: *Europäische Verfassungsgeschichte*. Munich.

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