What's the problem with law in history? An introduction

Daniel Hedinger & Daniel Siemens

In one of his seminal articles on the problem of narrativity, the historian and literary theorist Hayden White advocates that questions of law, legality, and legitimacy affect all the ways in which history can be written. Taking up Hegel's idea from his *Lectures on the Philosophy of History*, White identifies an »intimate relationship« between historicality, narrativity, and law. Narrativity, regardless of whether it is factual or fictional, »presupposes,« in White's words, a certain social order defined by legal arrangements. As a consequence, he expects historians to be very attentive to legal affairs: »The more historically self-conscious the writer of any form of historiography, the more the question of the social system and the law which sustains it, the authority of this law and its justification, and threats to the law occupy his attention« (White 1980: 17).

Since White wrote these words, over 30 years have passed. Have historians of modern times in the interim been attentive to legal affairs? Did they integrate law, its authority and justification, in their narratives of changing social orders? By and large, the answer is: not really, and surely not enough. The separation of law from history, deplored by prominent American legal scholar Harold Berman as early as three decades ago, has still not been overcome (Berman 1983: VI). This is particularly obvious with regard to social history. Although social history is defined slightly differently in the English-speaking world, in France and Germany, to name just some of the strongholds of this mode of historical writing (Welskopp 2003), it is commonly understood as the history of social orders, structures, and inequalities. Therefore it becomes—with regard to White's considerations—immediately apparent why one should ask about the legal aspects of these orders when writing social history. How-

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ever, as legal scholar Dieter Grimm has effectively pointed out with respect to Hans-Ulrich Wehler's *Gesellschaftsgeschichte* of modern Germany, the function and role of law has never been clearly defined in social history (Grimm 2000: 48).

The separation is partly due to the historians' reception of two of the most influential thinkers in social history. First, Karl Marx seemed to regularly downplay the law's comprehensive importance. For him it is obviously the economy that constitutes basic reality, not legal order. »Law, morality, religion, are to him [the proletarian, DH/DS] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests,« as the well-known formulation in the *Manifesto of the Communist Party* reads (Marx and Engels 1848). Marx and his followers regard the law as a part of (individual) consciousness and thereby as a component of ideology. Thus they assume that it has »no fundamental historical importance« (Berman 1983: 543). Max Weber, second, rejected this view as one-sided, or at least qualified it. He argued that »[e]conomic factors can […] be said to have an indirect influence only« on law, which »depended largely upon factors of legal technique and of political organization« (Weber 1978: 654–655).

However, in historians' reception of Weber—who was an even more highly qualified specialist in legal studies than the former law student Marx—law is nearly always subordinated to politics. It is paradoxical: While Weber was one of the founding fathers of social sciences who wrote extensively on the sociology of law and whose main texts in this respect were published in 1960 for the first time (as part of *Wirtschaft und Gesellschaft*), he has only recently been recognized by historians as an eminent scholar at the intersection of law and history. For Werner Gephart and Siegfried Hermes, the latest editors of Weber's manuscripts on law, he can even be regarded as a pioneer in ideas of legal pluralism. They emphasize that Weber, although holding (Western) legal rationalism in high esteem, reflected in groundbreaking ways about how legal cultures came into existence, operated, and interacted (Weber 2010: 66–71, 125–130; more critically Kaesler 2011; Berman 1983: 550–552).

That historians usually paid scarce attention to the importance of legal processes in the writings of Marx and Weber affected not only their theoretical framework, but also the empirical basis of their works: Even if a large number of historical studies on very different aspects of law and legal procedures exist—as well as historical sub-disciplines like legal history or constitutional history—general historical writings and especially broader social histories are by no means preoccupied with questions of law. A »judicial turn« (Gephart 2010: 10) did not occur, at least not in university history departments. To the contrary, efforts undertaken by social and legal historians to come closer together in the 1980s have passed by without lasting effect. Law and legal procedures are often regarded as a kind of speciality, a peculiar field of interest where, polemically speaking, the general historian, confronted with the intimate knowledge of jurists, is lost *ab initio*.

Although this practical problem might to a certain extent explain the frequent shyness of historians as regards integrating legal aspects into their own writings, we believe that such restraint is both harmful and unnecessary. In our view, most historical studies would benefit if historians finally took the importance of legal arrangements in modern societies seriously. Of course, not all (social) history is first and foremost legal history. But without the inclusion of law, history lacks reflection about one of the fundamental dimensions of every society.

Nowadays, social history is no longer in the position to dominate the field of historiography. The tableau has become much more diverse, but is also increasingly fragmented. From today's perspective it seems as if the tendency to divide the field of historical writing into several sub-disciplines did not improve the position of law in historiography. On the contrary, the growing diversity has, generally speaking, only further marginalized the role of law in most studies of history. We nevertheless believe that this diversification also provides historians with new and thrilling opportunities to integrate law in their historical narratives. This becomes evident if we take the case of cultural history, a relatively new and booming field of historiography that initially defined culture—following the school of the anthropologist Clifford Geertz—as an unsteady

and changeable system of meanings, expressed in symbolic forms by means of which people communicate (Geertz 1973). Such and similar impulses—mainly from cultural anthropology—proved to be fruitful for historiography: A considerable number of recent attempts conceive the law above all as flexible and defined more by cultural practices and less by a codified set of rules. These new attempts are particularly interested in negotiation processes. They pay attention not only to the presumed will of the lawmaker, but also to the appropriation of the law by those who are subjected to it; or they examine indigenous peoples where order was thought to be established without any codified legal norms. A good example of this school of thought is microhistory. In some of the most influential works of this field, the daily life of supposedly common people is reconstructed using legal sources (Levi 1988; Ginzburg 1980). A new cultural history of law, in other words, systematically explores the diversity of legal cultures and links the perspectives from above and below. The original idea of Geertz's »thick description« has lately shifted the focus of legal studies onto courtroom practices and performance; in short, to law in action (with regard to different aspects of German history, see for example Jahr 2011; Habermas 2008; Siemens 2007; Hett 2004). While these studies base their claims on detailed analyses of particular cases, the relevant studies in the Anglophone world, often influenced by the sociology of law and legal anthropology as well as by unorthodox Marxism, provide a more complete picture of societies and their legal frameworks in historical perspective, in particular with regard to critical studies in political history (Tomlins 2010; Friedman 2002; Hamm 1995).

In cultural history, this new interest in legal aspects has already advanced quite far, producing some remarkable results. However this does not seem to be the case for other historical sub-disciplines, which have gained in popularity and format particularly in the last decade. This is especially true for world or global history. On the one hand, the abovementioned new cultural histories of legal affairs deal generally with Western societies, mainly the Anglo-Saxon world or Western Europe. On the other hand, in the most discussed recent works on global history,

law is more or less absent. In popular narratives describing macro-processes of globalisation, which are said to have taken place since the 19th century, law simply does not play a central role—in sharp contrast to, for example, economic developments, cultural transfers, or migration. But, one may ask, how can the »birth of the modern world« (Bayly 2004) be told without taking legal aspects into account?

We strongly believe that global perspectives on legal affairs have promise (see also the programmatic statements by Gephart 2010 and Rosen 2006). Apart from simply adding another level of analysis, our understanding of globalization processes may be advanced by transnational perspectives on the globalization of legal cultures since the 19th century. The potential of such studies is already evident in recent discussions of the law of nations, the origins of human rights, legal internationalism, international sea law, and colonial law in a global perspective (Kirmse 2012; Hoffmann 2011; Fisch 2010; Kirkby 2010; Sharafi 2007; Benton 2002). At the same time, a challenge not yet convincingly met is the question of how to find a narrative that combines global processes with local adoptions as well as non-Western perspectives.

The inclusion of legal questions also seems to be promising for other historical sub-disciplines. One might ask whether economic history as well as the history of science do not also contain strong legal aspects that should be made more explicit than is usually the case. What impact did the alleged increasing juridification of societies have on economics and sciences? Property rights in firms and patent laws in pharmaceutical research, as explored in this volume, are only two subjects that open an innovative field to include legal questions into mainstream economic and scientific history.

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Based on these reflections and assumptions, this volume contains seven papers, reflecting the wide variety of topics and theoretical premises comprised within »law and historiography.« The contributions all pick up at least one of the theoretical and methodological problems mentioned above. Three focal points are evident: A first group, consisting foremost

of the articles by Grunwald, Vec, and Siemens, reflect on theoretical and historiographical approaches to the importance of law in the historiography of modern times. The second group, characterised in particular by the contributions of Kirmse and Hedinger, deals with the relevance of law for the writing of global and imperial history. A third group, made up of the essays by Schulz and Hüntelmann, offers case studies that point to the importance of legal questions in the fields of economic history and the history of science, respectively.

Of course most of the contributions belong to at least two of these groups, as they all share a theoretical interest in the questions raised here combined with a particular field of enquiry. This becomes clear when we take a closer look at the contributions that follow. In the first essay of this volume, Daniel Siemens reviews some of the latest tendencies with regard to the importance of law and legal practices in general history and asks for the extent to which the contours of a »new cultural history of law« already manifest themselves. Analysing this question by taking a closer look both at relevant micro-historical studies as well as at recent attempts in the field of global history, he identifies some of the reasons that make transgressing the boundaries of social as well as legal history a persistent difficulty. Not only do legal systems in many cases still operate within national structures and follow a specific logic, making them hard to separate from a distinct set of rules and values, they also use a special language that needs »translation« by the historian before she or he is able to integrate them into a particular historical narrative.

In the second essay, Henning Grunwald explores the performative character of legal procedures. He distinguishes three ways of dealing with the performativity of justice which dominate recent studies: Scholars either focus on sequential arrangements of legal affairs and their ritual aspects; on the authority of the state, questioning the alleged »neutral« character of the justice system; or on »counter-performances,« that is attempts to use the judicial system for means opposed to the state's intention. Probing his theoretical considerations on an empirical level, he then analyses political trials that took place in Weimar Germany. Grunwald not only explains how political parties of the far right and left exploited the judi-

cial system for their own purposes, but also proves that a modern cultural historian's »doing law« approach can be beneficial for questions linked foremost with political and social history.

In the third article of this volume, Miloš Vec analyses the universalization of international law since the late 18th century, when it expanded from a European to a global normative order in doctrine and practise. Vec concludes that the international law doctrine of the 19th century represented a distinct social order with ambivalences. It contained references to social customs and morality that a cultural history of law can help to reconstruct and to understand. Their political, social, and religious suppositions and ethical frameworks were entangled with juridical norms. For Vec, legal pluralism does not explain this sufficiently. Instead, he suggests the concept of multinormativity, by which one can introduce a cultural history of law that makes the interweavement, transfer, and hybridization of non-legal rules with legal regulations visible, and which allows for an understanding of normative orders in their entire complexity.

Whereas all of these three essays focus predominantly on historiographical and theoretical aspects, the two contributions that follow link reflections about a new cultural history of law to current research, undertaken in the booming field of non-European, imperial, and global history. Stefan Kirmse discusses new developments in the field of imperial law by exploring the study of legal practice in the Russian Empire. His article sets off with a detailed review of the literature, carving out some of the existing and missing links between the wider analysis of law and society and the study of legal practice in imperial Russia. He shows that historians of the Russian Empire have now entered the cross-cultural and multi-disciplinary field of law and society research. He argues, however, that the potential of socio-legal research has yet to be fully exploited in the context of late imperial Russia. Kirmse therefore identifies five promising areas for future research on the Russian legal system: legal pluralism, persisting inequalities, legal intermediaries, »forum-shopping,« and out-of-court dispute resolutions. To illustrate the ways in which the combination of these areas would help to improve our understanding of

everyday legal experience, he then offers two short case studies of litigation from nineteenth-century Crimea.

Daniel Hedinger, by giving a »thick description« of a criminal case in late 19th century Japan, sets an example of how a global history of law can be written on a micro-historical level. His article focuses on the courtroom as a place of encounter between the authorities and the public. This allows Hedinger to draw more general conclusions reaching beyond the courtroom walls. With respect to the social history of modern Japan, he is able to show that the open trials of the 1880s are best understood as rituals seeking to address and finally to resolve social crises triggered by the Meiji Revolution. He thereby shows that the beginnings of a notion of public space can be traced back to the mid-Meiji years. By discussing the emergence of public space in late 19th century East Asia he finally also adds to the problem of the globalization in the 19th century.

The articles by Kirmse and Hedinger are both historiographical reflections as well as empirical case studies. It is the latter point that dominates the two last contributions of this volume, which explore the potential of including law in economic history and in the history of science, respectively. They can both be read in at least two ways: On the one hand, they are up-to-date contributions to specialist debates. On the other hand, they are also intended to point to the potential of a lively dialogue between their respective historical disciplines and a more general historiography of law.

Ulrike Schulz's paper enquires as to how the property rights theory, a cornerstone in modern business history, can also be analysed with respect to legal history. Her findings indicate that it not only makes sense for economic historians to reach out to legal historians when debating the legal framework of the economic order, but also for legal scholars to take conclusions from property rights theory seriously. Schulz demonstrates that the social sphere of recognition is not limited to written laws and their application. Legal norms are, in practice, only one aspect of the social order, which written law is supposed to represent in its complexity—a challenge it necessarily fails to meet. Its scripted interpretation and enforcement of legal norms can only be fully understood as the re-

sult of a complicated process of interacting agents that negotiate property rights according to their particular interests.

Finally, Axel Hüntelmann analyses the mechanism of pharmaceutical research in the German Empire before World War I. He reveals that scientific research, intended to cure mankind from serious illnesses, was not so much an altruistic endeavour but one that was marked by bitter rivalry and conflicts. Top researchers intended to use patent law for their own ends, by asking for far-reaching protection of their »inventions,« not least with the intention of securing benefits. His is a telling example of how diverse legal norms and practices can be analysed. A unilateral perspective, focussing exclusively on the state as the inventor and warden of patent law, would easily overlook how closely legal norms, social practice, and scientific progress were intermingled in the German Empire.

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It's our hope that the distinct and multifaceted findings of these contributions help clarify the contours of a »new cultural history of law.« Ours is not intended as another programmatic statement, but meant as an impulse for current methodological debates as well as an invitation to further research. New cultural histories of law may be written in different historiographical modes, but they are always an integral part of general history.

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Towards a New Cultural History of Law

Daniel Siemens

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.

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Justice as ›performance‹? The historiography of legal procedure and political criminal justice in Weimar Germany

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In his *Arbeitsjournal* (6 December 1940), Brecht mused that »following on from the explorations conducted in the *Street Scene*,« one should »seek out all those moments where theatre is part of everyday life, in the world of erotica, business, politics, law [*Rechtspflege*], religion, and so on« (Brecht 1973: 204; all translations H.G. unless noted otherwise). Not by coincidence, Brecht's exhortation to explore the rituals and performativity of everyday life on stage explicitly names the administration of justice. As Yasco Horsman has shown, the idea of mirroring the forms, props and psychological mechanisms of judicial inquiry on stage played an important role in Brecht's earliest conceptualizations of epic theatre, especially in the so-called *Lehrstücke* or instructional plays (Horsman 2011: 92–8). The most controversial and celebrated of these, *The Measures Taken* (also translated as *The Decision*) is not only a performance of a trial, but also features a trial-within-a-trial.

Of course, one need not recur to Brecht to make a point about the theatricality of law. Metaphors of forensic theatre and courtroom drama abound, even in Germany, where the prevalence of inquisitorial elements in penal procedure deemphasizes courtroom confrontation and spectacle. And yet, despite—or perhaps partly because of—manifest structural similarities between theatre and courtroom, between stage and tribunal, scholars of politics, law and culture have been slow to take seriously the performativity of law (Korobkin 2003: 2127). Why?

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In this essay, I want to give an overview of recent attempts to apply concepts developed in performance studies to law and legal procedure. Among the methodological conundrums and challenges a cultural history of the legal process as performance poses, jargon and an overemphasis on theory largely unsullied by empirical grounding loom large. In the second half of my essay, I therefore attempt to link some of the theoretical insights surveyed at the outset to the politicization and aestheticization of trials in the Weimar Republic. Thanks to the polarization of the public sphere, the appetite of the general public and the media for trials, and the efforts of extremist parties to turn judicial persecution from a legal liability into a propagandistic asset, the period lends itself especially well to such an interpretation of the interconnection of justice and political culture. In particular, I argue that viewing trials as performances of ideology unlocks two crucial but routinely overlooked aspects of Weimar political justice: the constitution and affirmation of community and the assertion of fundamental opposition authenticated by the defendants' sacrifice in court.

This essay has three parts. The first surveys concepts of performance and performativity and their historiographical reception. It also lays out my own synthesis which, while laying no claim to originality, informs the rest of the piece. Part two develops a tripartite matrix for categorizing interpretations of the nexus between performance and the legal process: surface/structural similarities; the performance of impartiality (and by extension the state's legitimacy); and, brushing these against the grain, counter-performances of fundamental dissent. It then illustrates each category with examples from Weimar trials. Part three focuses on two features of performance—audience interaction and the creation/affirmation of community through sacrifice—to argue that taking seriously the performativity of justice in the substantive sense can help us better understand how the administration of justice impacts political culture.

I.

While the facility with which the theatre metaphor is at times applied to trials smacks of the »all the world's a stage« wisdom of undergraduate writing there can be little doubt that there is something particularly *performative* about trials—but what? And how should this performativity of law impact historical scholarship drawing on legal procedure?

Taking their cue from Judith Butler, philosophers, cultural theorists and lawyers (mostly of a law and literature or law and society persuasion) have recently turned their attention to performance as a cultural template and matrix for the analysis of legal procedure.[27] Martha Merrill Umphrey gives an overview in her essay *Law in drag: Trials and Legal Performativity*, and argues that »trials are law-making (not just law-applying or law-interpreting) events because of their performativity.« Most schools of legal philosophy, she points out, place very little weight on the performativity of law, or none at all. »[C]hampions of the common law come closest« to a performative view of the administration of justice as »essentially trial-based.« Yet even here, »classic theorists downplay that aspect, rather emphasizing the ways in which (common law) is tethered to the past« (Umphrey 2012: 522–3). However,

> conceiving of law as ›performative‹ suggests that we can forward an expansive understanding of law not just as the application of formal legal rules or past precedent, but as a set of contingent enunciations made across a number of legal locations: the street corner, the interrogation room, the district attorney's office, a lynching scene and, of course, the trial.

Further, such an understanding foregrounds that not just the content of the law is in play and in contention, but the way in which the legal subject is constituted: »How is law discursively constituted such that it pro-

27 Apart from the authors discussed in the text see also Shklar 1986: 142–46 on the ostentatious qualities of legal procedure, and her argument that liberal Western justice systems are not intended to deal with fundamental political dissent, ibid: 216–17; further Burns 1999: 124–219; Allo 2010: 46–51; De Ycaza 2010.

duces particular renderings of both law itself and legal subjectivity?« (Umphrey 2012: 524).

In probing this *how*, scholars disagree, even about the very definitions of basic concepts like *performance* and *performative*, and the relationship between them. Thus Julie Peters points out that *performance* in Performance Studies is »reiterative, deriving its meaning from its repetition of the same; the linguistic performative is by definition nonreiterative, deriving its meaning from its creation of the new« (Peters 2008: 184). Most performance scholars would invert this relation, and stress the reiterative, referential nature of *performativity* vis-à-vis the event character and immediacy of *performance*. This conceptual cloudiness has important implications for understanding trials as performative: are we to read them primarily as one-of-a-kind performances, or as tradition-steeped rituals? Both, says Umphrey: »paradoxically, though they are discrete and singular events,« trials also function »reiteratively, drawing upon and repeating particular discursive formations and invoking conceptions of cultural and legal subjectivity whose sedimented meanings have no final, noncontingent ground or origin« (Umphrey 2012: 522). Andrew Munro traces the ambivalence back to Judith Butler, who, combating »overly voluntaristic readings of performativity in relation to gender and sex identities« argues that »performance ›presumes a subject,‹ whereas performativity ›contests the very notion‹« of this last. »[T]here is no power, construed as a subject, that acts,« Munro quotes Butler, »but only a reiterated acting that is power in its persistence and instability.« Performativity is thus best understood as »a renewable action without origin or end« (Munro 2012: 84).

These theoretical findings have made their way into historiography, in more or less faithful adaptations. Thus Jürgen Martschukat stresses that »a history inspired by performance theory does not search for individual human intentions behind historical events or processes.« Though he equivocates to an extent—»the influence of human agency on history are not denied at all«—the »different« quality of such historiography stems from eschewing the »search for individual intentions behind the actions of supposedly autonomous human subjects.«

Instead, it

> strives to describe historically specific cultural configurations that make certain thoughts, intentions, and actions possible and appear logical, positive, self-evident—and others illogical and false. To put it differently, these configurations form the conditions of possibility for human actions and intentions. (Martschukat 2005: 50f.)

Ariela Gross has demonstrated how fruitful this approach can be in her account of the way in which race-determination litigation modulated ascriptions of racial identity (Gross 1998). According to Donald Korobkin, Gross's approach to performativity exemplifies

> the broader category of cultural criticism of law that, in the words of Binder & Weisberg, ›[v]iews law as an arena for the performance and contestation of representations of self and as an influence on the roles and identities available to groups and individuals in portraying themselves.‹ (Korobkin 2003: 2128; Binder/Weisberg 2000)

Although Martschukat's position is persuasive, he takes the insights derived from Butler et al. quite far. Arguably he is being more Catholic than the Pope in appropriating concepts contested even within performance studies. Andrew Munro, for example, argues that Butler's somewhat ambiguous notion of performance and performativity implicitly presupposes a »Peircean,« i.e. strongly contextualized, situational and genre-savvy reading: »to attend to interpretants in relation to interpreters, and to situate these last in respect of rhetorical situations and genres« (Munro 2012: 84). In other words, to pay careful attention to context, intentions and sources—hallmarks of empirical historical practice. Stripped of the jargon, a historian as unsuspicious of faddishness as E.P. Thompson could have endorsed this statement, at least according to Suzanne Desan's reading (Desan 1989: 53–4).

While the nexus of law and performance has thus come into greater focus in recent years, the field is clearly still in its infancy. »Despite the persistence of the trope likening law to theatre,« Julie Peters notes, and despite the »vast body« of writing on ›law and literature‹ and the »general

proliferation of the term ›performance‹ in critical studies« there is »no sustained theoretical articulation of the nature of legal performance or the meaning of legal theatricality in the critical literature« (Peters 2008: 181). Naturally, remedying this state of affairs goes well beyond the scope of this essay. Nevertheless, drawing on my empirical work on the dramatization and politicization of legal procedure in Weimar Germany, I want to contribute to a better understanding of the possibilities scholar have in studying the performativity of justice. Hopefully, doing so will further the case for taking seriously the concept's usefulness in the historical analysis of law and legal procedure. First, however, allow me to present a short exposé of the notion of *performance* with which this essay operates.

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What is performance? The term's currency in the humanities followed in the wake of J.L. Austin's work on speech acts and John Searle's subsequent philosophy of language (for an accessible introduction to the »performative turn« see Fischer-Lichte 2010). Ever since, a growing number of scholars have asked whether it is not imperative in the study of social orders and social action to scrutinize the acts and modalities of representation itself. In different ways, the work of Erving Goffmann, Victor Turner, Richard Schechner and Erika Fischer-Lichte has made the notion of *performance* operational as a heuristic tool and a framework for analysis (Goffman 1959: 18–27; Turner 1969: 94–101; Geertz 1983: 25–31; Fischer-Lichte 1992: 1–17, 129–31, 139–41). Phenomena as varied as *flaneurs* in Parisian streets and North Korean mass choreographies, medieval carnivals and modern sports, gender identity and early modern practical jokes in Parisian printing houses have been studied as »performances« (Butler 1999: 177–9; Gumbrecht 2007; Darnton 1984: 75–106; Fitzpatrick 1993).

The basic formula describing performance is »S observing A embodying X,« wherein A is the actor, S the spectator and X the object of representation—an emotion, a relationship, an ideology, a specific person, an attitude. Performance involves the bodily co-presence of a spectator and a performer (which can be one and the same, as in our daily routines in

front of the mirror, or in moments when we become, often acutely, aware of our appearance to others, see Butler 1999: 179; Gumbrecht 2007: 271).

By definition, a performance is transitory, unique, and immediate: the performance of Hofmannsthal's *Elektra* on Friday 30 October 1903 as opposed to that on the following day, Communist renegade Max Hölz's closing speech in the Moabit courtroom on 22 June 1921 rather than a newspaper's evocation of the same. This is not to say that the effect of performances is limited to those physically present. As large as sports arenas, theatres, and houses of worship are, media can serve to significantly extend the reach of performances. Some impact is lost in translation, but witnessing a performance second hand is still different from merely being informed of actions and outcomes, as anyone will testify who has watched a football game with the volume switched off and the roar of the crowd subdued. For the same reason, newscasts feature live dispatches from on-site correspondents, and court reporters report from the courtroom, incorporating dialogues, atmospheric descriptions of the locality, portraits of the principal actors and so forth (Siemens 2007: 43–9).

Performativity refers to the inherent and ongoing potential of specific cultural, discursive or political configurations to generate social, aesthetic or transcendental realities. Unlike performance, performativity is not unique and transient. In fact, its force derives partly from repetition and custom. To a higher degree even than performance, performativity depends on framing and presupposes the existence of a symbolic order in which the social and political context is represented. Anyone can utter the words »I pronounce thee man and wife« or »in the name of the people.« For these words to make something happen, however—to constitute or alter reality—the setting, the participants, and a host of other conditions must accord. As Jacques Derrida puts it, for performative speech-acts to succeed they must »repeat a ›coded‹ or iterable utterance« (Derrida 1988: 18). Performativity therefore draws on and reaffirms, but—potentially and over time—also challenges and modifies shared perceptions and orders of representation.

It is a misconception (entertained mostly by its critics and detractors) that the broad movement of this performative turn has led to a consensus. Scholars disagree on subjects and periods to study, but also on methodology, i.e. precisely how social phenomena should be studied as performances. My own notion of performativity, for example, is obviously indebted to Judith Butler, who occasionally describes the performativity of gender in legal metaphors. For example she describes the incommensurability of bodies and the discourses governing their emergence as »instabilities« marking »one domain in which the force of the regulatory law can be turned against itself to spawn rearticulations that call into question the hegemonic force of that very regulatory law.« As Andrew Munro puts it,

> both Butler's earlier work and *Excitable Speech* locate contestatory possibilities for nonsovereign subjects in the very structures of normative citation by means of which these subjects are partially formed.

Nevertheless, Butler's philosophical take on performativity deals with language and subjectivization, whereas mine is concerned with collective identity and political representation. Butler even explicitly distinguishes performativity (as iterative and citational) from theatricality (Butler 1993: x, 2–3, 13–15; Munro 2012: 85). It is thus safe to say that we disagree on the performativity of the legal process, even though we (hopefully) agree on the legitimacy of analyzing performance and performativity in the humanities.

II.

In this section, I explore the practical applications a perspective on trials as performances might have. Under this general heading, I will distinguish between three levels of the performativity of justice—surface/structural similarities; the performance of impartiality (and the state's legitimacy); and, brushing these against the grain, counter-performances of fundamental dissent—bearing in mind that all three are in most practical instances inextricably connected.

To characterize judicial procedure as ›theatrical‹ is a staple of historical writing, routinely rolled out to describe trials that either aroused exceptional contemporary interest or are perceived as politically influenced, or both. Bernd Steger opens his classic account of the 1924 Hitler-Ludendorff trial, for example, by likening the proceedings to a play: »Outwardly, the action in front of and inside the School of Infantry (where the trial was held) resembled a sensational theatrical production.« »Long queues,« entry »by ticket only,« »people bearing bouquets of flowers,« the ornate uniforms of some defendants, and the »tumultuous scenes« during the reading of the verdict are the tokens that vouch for the occasion's theatricality. They underpin a reading of the trial as thoroughly irregular, politically determined, and rigged. In short, by dint of its theatricality the trial reveals itself as the very opposite of »normal,« regular legal process. »Thus ended proceedings« Steger caps his opening vignette, »which had only the name in common with a trial in a court of law, and in which law (*das Recht*) had been squashed by political speechmaking« (Steger 1977: 442).

In contrasting the theatricality of the sham trial with the implied open-endedness and adherence to legal guarantees of evidence, due process, fair hearing and equitable judgment of a ›real‹ or ›authentic‹ trial, Steger's argument fits into a long continuum of what John Barish has called the »antitheatrical prejudice« (Barish 1981; Kos 1996). According to Julie Peters, this continuum stretches across time and disciplines from Plato's scorn for actors to modern-day art criticism. Michael Fried, for example, chose »theatricality« as the antithesis of the »absorption« he extolled in modern art. Against the foil of the self-awareness and ostentation of *theatricality*, the inwardness and self-contained quality of *successful* art stands out all the more clearly.

As we have seen, since the early 1980s scholarship in a number of disciplines has gone beyond the observation of structural similarities between stage and tribunal. In the wake of Judith Butler's appropriation and reinvention of Austin's theory of performative speech acts in the constitution of gender and—more generally—of the modern subject, broader and more substantive claims about the kinship and resonance of justice

and theatre have been posited. Scholars disagree fundamentally over the implications—are, for example, the spectators truly merged into a community (Fischer-Lichte), or does each spectator remain isolated (Rancière)—but would likely agree on a conception of the performativity of judicial procedure that goes beyond the observation that trials and theatre share certain surface traits. True, both involve something like a script (procedural law plus the legal argument of the case). Officers of the courts, judges, defendants lawyers etc. can be likened to »actors« taking on certain »roles.« There are »props,« a »stage,« an audience and—notionally at least—a dramatic conflict and a suspenseful narrative arc towards a nail-biting, cathartic finale.

However, the resonances between performance and the judicial process go beyond such surface similarities in two substantive ways. Firstly, trials embody and perform claims about the authority of the state and its role in upholding justice. Secondly, trials constitute community. They do so either through the identification and excision of scapegoat-like Others, or, in more particular circumstances, through the affirmation of a counter-community that challenges the hegemonic order. In the latter case, the sacrifice of the defendants/convicts constitutes and affirms the counter-community. In the following, this essay treats each of the three levels—firstly, the superficial or surface likeness of stage and tribunal, secondly, the performance of the trial's (and by extension the state's) impartiality, authority and legitimacy, and thirdly, the possibilities for subverting that performance of impartiality. I examine these levels consecutively, though in practice each is intimately connected to the others.

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I have already given an illustration, in Steger's characterization of the Hitler-Ludendorff trial, of the theatre metaphor used as a brush to tar trials viewed as »un-legal.« This was, as the work of Julie Peters and Martha Umphrey suggests, very much the norm until the advent of performance studies. Scholarly, ex-post commentators are neither the only nor the first people to home in on the theatricality of justice. Contemporary observers of the justice system also pointed out »histrionics,« usually pejoratively. Barristers are often subject to particular criticism. The law-

yer and journalist Rudolf Olden, for example, remarked on the prevalence of »a type of defender who attempted to compensate for deficiencies of his case, and sometimes of his person, through agitation as well as by exerting his voice« (Olden 1985: 6).

The rejection of (overt) theatricality was mediated through the apolitical and traditionalist mien of the German legal profession, broadly conceived. Below we will turn to the question of the extent to which this staid and legalistic, deliberately dry demeanour can in itself be understood as a performance, for now it should be pointed out that not all Olden's contemporaries rejected theatrics in the courtroom. In *Die Kunst der Verteidigung* (The Art of Defense, 1915), Barrister Fritz Friedmann explains the mounting acridity of judicial proceedings after the turn of the 20th century as a conflict between judges and barristers. An enormously successful (and boisterous) Berlin lawyer, he had been disbarred in 1895 due to his gambling and his relationship to a 17 year old girl and was forced to flee from his creditors (and the state prosecutor). The bitterness which sometimes informs his account is more than balanced by the insouciant frankness which his fall from grace made possible and which makes this such a valuable source.

To Friedmann, the culpability was clear: judges were to blame »for the secret bitterness, the ›electrically charged air‹ in the courtroom which is so often talked about.« He diagnosed a multi-layered resentment towards lawyers. Judges envied the lawyers' superior income and greater social freedom. More importantly, they resented the procedural rights of the defense, the lawyer's privileged access to the accused and his ability to name witnesses independently of the court's approval (§219 StPO). Deep down, judges thought the defense lawyer superfluous, if not positively counterproductive, a quasi-accomplice (Friedmann 1927: 41). The judges' own »objectivity« was all the protection defendants required. Friedmann was sharply critical of this view. He promoted a view of trials as the modulation of openly acknowledged conflicting interests. Friedmann believed that this conception was embodied in the British justice system, while German judges regarded free advocacy only as an

annoying concession to the British and French revolutions (Friedmann 1927: 48, 51; see also Knapp 1974: 31–6).

Metaphors of struggle and theatre colour Friedmann's description of courtroom action (in the following paragraphs, quotations from Friedmann 1927: 39–62 unless otherwise specified). Locked in a »guerrilla war,« the »true battle zone« between judge and lawyer was the presentation of evidence, including cross-examinations:

> The struggle in the courtroom, between the accused and the witnesses and among the witnesses themselves is similar to play-acting on stage, whether one likes it or not. Thrust for thrust, word against word, thus the image is created; where the interruptions begin, dramatic life comes to an end. (Friedmann 1927: 58)

But even while suppressing the defence's theatrical flourishes, the judges used similar techniques themselves. During the barrister's final plea, for example, they fidgeted in all conceivable manners »by which equanimity, disregard, dissent, impatience and the emphasis on a pointless waste of time may be expressed.« Working themselves into a huff about the lawyers' »playing to the crowds,« the judges were not just philistines, but hypocritical. They themselves were engaged in a performance, albeit one more aligned with the dominant paradigm of the courts' role in bolstering the state's authority as the protector of law and order in a particular cultural key, for which the rhetoric of the »organ of the administration of justice« is emblematic.

Subtleties aside, judges even resorted to the overtly theatrical means they purportedly spurned. Unlike a judge, a lawyer »cannot thunder, he cannot interrupt, he cannot declare an episode closed, he cannot issue an on-the-spot fine.« All in all, it was »the most unequal combat imaginable,« in which the lawyer almost inevitably lost out. Friedmann recognized that political and cultural enmity informed this antagonism. As barristers began to explore the possibilities offered by public proceedings, the »public at large, represented by the court press« preferred the figure of the defense lawyer over the judge and listened to him »with a

merrier heart.« If the barrister »hit upon adroit figures of speech, if he was courageous, cutting, witty« he earned the audience's applause, much to the judges' chagrin:

> [F]requently the ›Bravo‹ which the presiding judge hates with such venom will cross the listeners' lips, who are, as a matter of principle (although it virtually never comes to pass in fact), threatened with an ousting from the temple of the blind goddess. Who among us humans, however, rejoices at praise lavished upon the *opponent*? (Friedmann 1927: 44; emphasis in the original)

»Political and race questions« exacerbated the enmity engendered by the public's preferences:

> Very often, the barrister is Jewish, almost always a liberal, these days often even a Social Democrat; an ambitious judge is mostly conservative, never a Jew—sometimes perhaps a baptized one, in that case of course an ultra-anti-Semite, in order to blot out his origins. (Friedmann 1927: 45)

In contrast to practicing the theatricality of justice, recognizing it—to say nothing of endorsing it à la Friedmann—was beyond most conservative lawyers. But not beyond all; for example the nationalist Rüdiger von der Goltz, Joseph Goebbels' favorite barrister in the Weimar years, applauded colleagues who endeavored to »create a ›splash‹« in »the great Moabit trials which were plastered all over the papers under the bold headline ›defense clashes with court‹.« Goltz thought that it was perfectly admissible for a lawyer, »noticing a faulty attitude, or even a certain one-sidedness of the judge« to »alert the assessors, especially those without legal training, to this state of affairs by means of such histrionics (*Auftritte)*«[28].

While the condescension and the choice of words may smack of what Barish has termed »antitheatrical prejudice,« there can be little doubt that Goltz himself took great pride in his own theatrical flourishes.[29] During

28 Bundesarchiv Koblenz (BA(K)) KLE 653 von der Goltz Band 2, [35].

29 BA(K) KLE 653 von der Goltz Band 1, [103].

the anti-Young Plan agitation, Goebbels strove against not only the Social Democrat Otto Braun—whose good name the courts protected with lukewarm enthusiasm—but also against President Hindenburg, whose honor they guarded with greater zeal. Goebbels and his lawyer travelled to Hannover in August 1930 for the appeal proceedings in one such case. A »gigantic crowd« greeted them, and, anticipating triumph, their motorcade made its way to the nearby courthouse. Here is Goebbels' account of what transpired:

> Yesterday: Hannover with Goltz. Thousands in front of the courthouse […] the state prosecutor demands nine months. I yell at him, it's true theatre. Goltz leaves the building in protest. For a moment a fistfight threatens to break out.

Goebbels was cleared of all charges: »Outside the masses heave. Flowers, chants of *Hail*. The SA carries me down the street. *Up the banners*! Goltz has pleaded brilliantly.« That Goebbels' appreciation of his lawyer and of the effect of trials-as-propaganda did not depend on a favourable verdict is demonstrated by his account of a similar case he and Goltz lost in Berlin two months previously:

> At nine in the morning the fun begins. We demand that two Jewish judges be ruled unfit. After half an hour, the motion is rejected. Then I speak. ½ hour. I am on absolutely fabulous form. The whole court is deeply impressed. […] Goltz speaks. Very effective. A short, juicy final word from me […] flowers and great ovations.

While not sentenced as harshly as the prosecutor demanded, Goebbels was found guilty and fined a considerable amount of money, an outcome that had him seething. Nonetheless, his evaluation of the case is unambiguously positive:

> for Hindenburg this was a first class burial. Outside, ovations as never before. People are absolutely crazy. The press is bursting with news of the trial. Pictures and caricatures en masse. Well

> done. Wonderful propaganda for us. Unending jubilation […] an all-out victory.[30]

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Goebbels' trials form a useful bridge between the first and the second and third levels of the performativity of justice as discussed here. While the commotion, the raised voices, and von der Goltz's demonstrative renunciation of his mandate (in protest of the court's »bias«) are all ›theatrical,‹ these actions resonate politically because they brush against the grain of a more subtle and implicit performance that characterizes all trials: the legal process's performance of its own impartiality and open-endedness. Putting the fairness and objectivity of the judicial process and the state authority that underpins it on display in trials is a universal feature of justice systems. The judge's robes and hats, the British barrister's wig, or the more modest white tie German advocates wear all serve to de-emphasize the individuality of the participant in the legal process and instead underline the person's function. Images symbolizing impartiality (e.g. the scale or the blindfolded Justitia) and the emphasis on formality and protocol likewise signal neutrality and incorruptibility. At the same time, the presence of the state's power in the courtroom and invocations such as »in the name of the people« link the administration of justice to the state. Certainly, in Weimar not all judges identified with the new democratic state, as the wave of Berlin verdicts »mistakenly« pronounced »in the name of the king« in 1919/1920 illustrate.[31] However, this only serves to underline the general point—otherwise Berlin judges' passive-aggressive show of defiance would have made no sense. Put another way, to the extent that *this* performativity of justice is intrinsic to the process, it is also open to challenges. Precisely because of the state's role in the judicial process, and precisely because of its ostensible impartiality and fairness, subversive performances of defiance can cut it to the quick.

30 BA(K) KLE 653 von der Goltz Band 2, [157f.]; Goebbels 1987: 588–90.

31 I am obliged to one of the anonymous reviewers of this article for pointing this out.

In Weimar, contesting the legitimacy of the process and ridiculing the very foundations upon which »fairness« was offered made trials rousing vehicles of dissent. Their attraction resulted partly from brushing this crucial, yet scarcely acknowledged aspect of creating acceptance for legal decision-making against the grain. Underscored by the willingness of their protagonists to sacrifice themselves in the unmasking of the »charade,« trials as performances of ideology laid a powerful charge against the legitimacy not just of Weimar justice, but of the hated »system« as a whole.

Not least because career paths in the administration and the judiciary were de-facto barred to them, many Jewish law graduates practiced as barristers. In the late Empire, this gave anti-Semites a pretext to blame Jews for the increasingly confrontational and publicity-conscious manner, so deplored by conservatives, in which trials were conducted (Hett 2004). In his famous 1912 pamphlet *Wenn ich der Kaiser wär'*, nationalist barrister and president of the *Alldeutscher Verband* Heinrich Claß set the tone: »The Jew,« he wrote,

> remains a Jew in all that he undertakes [...] If he becomes a barrister, he has a corrosive effect, because his inborn conception of law stand in opposition to those inherent in the written German law, and the result are those Talmudic practices which twist lawfulness into lawlessness and vice versa. (Krach 1991: 28–9)

In the Weimar Republic, Nazi propaganda took up this cue and attacked »Jewish judicial comedies« or complained of Jewish barristers turning the courtroom into a »fairground of playacting and class struggle« (Krohn 1991: 242, 266, 284).

Levelling this charge was ironic given the highly excitable and legally vapid style of leading Nazi barristers. The Magdeburg *Volksstimme* memorably lampooned Hans Frank's pleading, for example, as »pamphlet gymnastics following the system Frank II.« Frank, whose habit of attaching the Roman numeral to his surname drew ridicule within as well as outside the Nazi movement (»Dr.II«), later became governor of occupied Poland. As head of the Association of NS German Lawyers, he liked to

style himself »Adolf Hitler's lawyer« and placed the »correct« representation of National Socialist ideology high above the acquittal of his client. In spring 1930, for example, Hans Frank defended stormtroopers accused of grievous bodily harm in Schweidnitz, Upper Silesia. Breslau *SPD* barrister Foerder represented the victims, who had joined the criminal action as joint plaintiffs. Frank heckled Foerder in open court and encouraged his charges to do the same, despite the risk of ensuing fines and alienating the judges.[32] Frank even contemplated provoking Munich barrister Nußbaum into a libel suit (the ›*Judeneid*‹ trial, as he referred to it) solely in order to create a platform for his anti-Semitic legal claptrap. »Expert witnesses« would offer an exegesis of »the famous Talmudic passage about the Jew's oath towards an *acum*.«[33] Nußbaum was one of Frank's favorite targets (on one occasion he even managed to get the Jewish lawyer arrested), but his death in early 1929 cut Frank's *Judeneid* trial plan short.[34] In view of such trial strategies and courtroom tactics, however, it should be clear that the charge of »turning the courtroom into a theatre« was a self-serving rationalization.

The politicization and escalation of courtroom rhetoric in Weimar was driven above all by the kind of lawyers Rudolf Olden labelled *Krawallanwälte* (riot lawyers), as I have argued in greater detail elsewhere (Grunwald 2012). Using the courtroom to attack opponents, denigrate the Republic and exalt their own ideological community was predicated on a willingness on the part of lawyers to »turn the courtroom into a revolutionary stage« (as one prominent Communist lawyer put it).[35] This

32 Barrister Foerder to Vorstand der Anwaltskammer München, Breslau, 5 Jul. 1930; Philipp Loewenfeld to Vorstand der Anwaltskammer München, Munich, 24 Apr. 1930, BA(K) NL 1110 Frank Band 36I.

33 Frank to Hermann Esser, Munich, 18 Jan. 1929, BA(K) NL 1110 Hans Frank Band 40–14.

34 Frank to Hitler, Munich, 21 Jun. 1928, BA(K) NL 1110 Frank Band 28–1.

35 Barrister Ernst Hegewisch to *KPD* central office, Celle, 8 May 1922, Bundesarchiv Berlin (BA(B)) RY1/I2/711 Juristische Zentralstelle (JZ), Band 8, [110]–[165], [141].

willingness transcended ideological boundaries and united party lawyers from the left and the right. Despite this fact, and despite the highly disproportionate incidence of the legal profession's own disciplinary measures against party lawyers, the courts were slow to move against them. Indeed, exclusions of political lawyers from proceedings were so rare that each occasion was a well-known and much debated cause célèbre. It is striking, though, that both times a left-wing (and in Hans Litten's case also Jewish) lawyer was the target.

The 1932 Felseneck trial takes its moniker from a Berlin *Laubenkolonie* (allotment gardens), the site of a pitched battle between the SA and the predominantly proletarian residents that left two dead. Journalist Jochen von Lang likened the trial to a »catch as catch can« wrestling match:

> Time and again, judges and lawyers, lawyers and prosecutors scrapped noisily; time and again, the defendants cried in protest and the police hauled obstinate men from the room on the presiding judge's say-so; time and again, the accused, the lawyers and the spectators saluted with a loud ›Red Front!‹ fists raised; and from time to time, the Internationale was intoned as well. (Brauns 2003: 271)

It is not difficult to read these stylized affirmations of identity as performances of ideological community. As such, they mirror the original violent confrontation, but infuse it with additional symbolic meaning. On the one hand, the brawl—arguably fuelled by personal animosities and drunken aggression just as much as political passions—was reduced to its political dimension and exalted as an idealistic struggle. At the same time, the clash of the radical enemies of the status quo with the state authority (judges, police) highlighted the fact that Nazis and Communists not only fought one another, but rejected efforts at arbitration as both inappropriate and biased, as vestiges of the old.

Controversially, barrister Litten was excluded from proceedings for influencing witnesses and »fomenting unrestrained party-political propaganda in court.« The lawyer, the judges ruled, had »made the courtroom a fairground (*Tummelplatz*) of political passions.« A storm of protest

greeted the decision, widely held to be unlawful. Initially, even one of the Nazi lawyers opposing Litten, a certain Plettenberg, attacked the court's ruling to exclude him, though he was swiftly whistled back by the NS leadership. In any case the Court of Appeal rescinded the decision, whereupon the Felseneck judges recused themselves (as one of my anonymous reviewers put it, in an act of passive aggressive protest against the superior court's ruling). The trial had to start over, and this time Litten was barred from the trial for influencing an important witness suspect of aiding and abetting several defendants. Litten's appeal was rejected by the Berlin *Kammergericht* in November 1932, shortly before the December 1932 amnesty, which closed the case (König 1987: 18–21; Brauns 2003: 271).

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As these examples have shown, not one but two performances were in play, and in contest, in Weimar courtrooms. On the one hand, the performance of the reliability, impartiality and authority of the judicial process (and by extension of the political order) was ingrained in every trial—spectacular or mundane, big or small, political or not. On the other hand, in the trials of self-consciously political defendants bent on using the courtroom as a platform (or a »revolutionary stage,« as Communist Party barrister Ernst Hegewisch put it emphatically), an aggressive counter-performance asserted the very opposite.

We can trace this counter-performance in Rudiger von der Goltz's exit from the Hannover courtroom and in myriad other occasions, subtle and overt. Perhaps the most succinct statement of the principle, however, was made by Max Hölz. The self-styled »Communist Robin Hood,« arrested in the wake of the March insurrections in the Vogtland, was tried in Berlin between 13 and 22 June, 1921.

> I do not see myself as a defendant but as the prosecutor of bourgeois society represented by you, the judges. And if you have been able to drag me here, then for a single reason: you have the power, and thereby also the law on your side,

Hölz declared in his opening statement (Gebhardt 1989: 164).

Assisted by no fewer than three Communist lawyers—Ernst Hegewisch and Victor Fränkl from the Communist Party of Germany and James Broh from the Communist Workers' Party—Hölz tried to turn the trial on its head. As the journalist Max Hermann Neiße put it:

> Not since Liebknecht has anyone in all of Germany faced the class court with such inner victoriousness as Max Hölz. From the very first, he has refused to cede the merest inch of ground, and be it in the most insignificant of formalities, towards recognizing its authority. On the attack from the get-go, turning the tables, transformed from the accused into the most relentless prosecutor. (Gebhardt 1989: 166)

On the second day of the trial, the transcript recorded merriment amongst the spectators. Hölz had just described the rule of his »Red Army« militia as one of peace and quiet, »it was only when Hörsing showed up […] that the commotion and the bloodletting began.« Derision greeted this claim, prompting Barrister Hegewisch to

> enter on the record that the entire audience opposes Hölz. That is the proof that only members of the propertied classes are allowed to enter here. If it were workers filling those benches, Hölz's words would have been met with the liveliest acclaim.

»Do you as a lawyer count on the acclamation of the audience?,« the judge asked, to which Hölz replied that the judges only dared sit in his presence under the protection of arms, and feared nothing more than the revolution (Gebhardt 1989: 165–6).

On 22 June, Hölz was sentenced to life for high treason, but crucially also for killing the landowner Hess. Hölz denied manslaughter, but was more than happy to accept the court's verdict of high treason. As he pointed out in his closing speech, the higher the sentence, the better his »grades« as a revolutionary:

> When you pass judgement on me today, I will look upon it as an exam in school. If you sentence me to ten years in prison, that will be a ›D‹ life would be a grade ›A,‹ and the death penalty, a starred

> ›A.‹ For me, the bourgeois honour you wish to strip me of does not exist. Were you to award it to me I would be ashamed. The only honour I know is proletarian honour. That is the honour of unconditional solidarity with the proletariat, and that honour you cannot take away from me.

After disregarding (for the umpteenth time) the presiding judge's exhortation to silence, Hölz was dragged from the courtroom, crying »long live the world revolution« (Halle 1921, cited in Hannover and Hannover-Drück 1966: 217).

Hölz was the most celebrated and notorious of Communist defendants, but perhaps even more salient are the prescriptions of Felix Halle's best-selling legal advice manual, *How does the Proletarian Defend Himself from Police, State Prosecutor and the Courts.* Published in 1924, in it the head of the Communist Party's central legal office reminds defendants that

> a proletarian who has joined a revolutionary movement […] must under certain circumstances fight out the struggle with the bourgeois courts with all acridity, without paying heed to the consequences for his personal fate.

Regardless

> whether it is a trial of great or small importance, his trial represents a part of the great revolutionary struggle in its entirety [...] and as a fighter he owes an obligation to the great community of his class with each of his words and acts.

Above all, Halle admonished his comrades, implicating others was absolutely off-limits, as was showing any kind of remorse:

> [T]he accused revolutionary ought to say as little as possible about his personal actions and nothing at all about the actions of other comrades. He ought to say as much as possible about the distress of his class and of its will to put an end to capitalist exploitation.

To »beg for the court's benevolence through lamentations of remorse or similar miserable weaknesses« was »unworthy« of revolutionary fighters. On the contrary it was required »in all proceedings of import« to »issue

in the main court session a *pledge of allegiance to the revolutionary Communist movement*« (Halle 1924: 32, 35, emphasis F.H.).[36] This is a relatively blunt demand for self-sacrifice, given the likely consequences of such a statement for the court's determination of subjective consciousness of wrong-doing.

At the same time as »the system« and »its« courts were rejected—as in Goebbels' motion against »Jewish« judges or his lawyers' exit from the courtroom—the ideological community of the future was performed and validated in court. Roland Freisler, for example, while defending a group of stormtroopers, literally rallied his troupes and led the defendants outside the court to partake in a fistfight on the courthouse steps. While putting himself and his charges beyond the pale of legal norms and at risk of harsher punishment—we know of the case thanks in part to Freisler's disciplinary proceedings, in which he was found guilty, fined and reprimanded—the courtroom amplified the message of uncompromising defiance and implacable enmity (Grunwald 2012: 71–2).

Recognizing this, the Communist Felix Halle demanded that »even more than hitherto, the attention of the fighting proletariat must turn to matters of justice.« In the coming years

> a significant part of the class struggle will take place in the courtrooms. [...] At a time where the military authorities suppress political gatherings, every political trial offers proletarians […] the opportunity to enhance their knowledge on the field of class struggle.

Desirable as attending trials in person was (which Halle recommended for »our unemployed,« but also for »women and youths«), this placed a special onus on the press. »Above all,« Halle admonished, it was »necessary that, insofar as a class-conscious proletarian press exists, it reports on arrests, political trials and convictions in greater detail and length than hitherto« (Halle 1924: xii).

36 The title of Halle's book recalls August Bebel's series of articles *Wie verhalten wir uns vor Polizei und Gericht?* in *Der Sozialdemokrat*, Zürich, Nos. 45–7, 2, 9 and 16 Nov. 1882.

III.

Using the examples provided thus far, I would now like to ask in what sense the concepts developed within performance studies can help clarify the historical significance of legal procedure. In particular, I will focus on interactivity and audience participation as well as the creation or affirmation of community through sacrifice. Both constitute the performativity of the legal process independently of more localized, context-specific factors. In Weimar, such factors further embellished the theatricality of justice. The dramatic innovations of Brecht and Piscator, e.g., or the enthusiastic reception of Soviet agitprop in Germany helped erode the boundaries between art and life—and between aesthetics and politics. While the dramatization and politicization of the administration of justice was particularly visible in the case of Weimar, many of the following observations, *mutatis mutandis*, stem from other times and places. That is why *performance*, *performative*, *mis-en-scène* and so forth deserve our attention; they unlock particularly salient ways in which judicial and political culture interact. That these concepts are far more complex and contested than I have allowed for in my initial sketch of what performance *is*, or than I will be able to elucidate in the following, goes without saying. In the conclusion, I will return to the relationship between historical inquiry and performance studies.

Let us first turn to the interaction between audience and performers. Performance theorists have many bones of contention, but they agree that the performance is a transient phenomenon that happens *between* performers and audience. Those doing and those observing (and the two may overlap in any number of real life instances) are connected through a network of subtle bodily and imagined signs. If that sounds esoteric, consider a football match played in an empty stadium, or recall that cringe-inducing feeling of watching a play flop. A feedback loop connects audience and performers, who bring forth the performance together. Their bodily co-presence also accounts for the particular transformative and community-generating potential of performance (Fischer-Lichte 2010: 33, 37–39). When Nazi barrister Hans Frank celebrates his stormtrooper clients' refusal to answer the questions of the »Jewish ca-

det« on the opposing lawyer's bench; when defendants, lawyers, and audience members at the Felseneck trial jointly intone the Internationale; when fifty peasants accused of breach of the peace for resisting the requisition of cattle to be sold in debt auctions stomp their feet in time to the Prussian military march of the local regiment's band (whose passage the defence lawyer has carefully arranged to coincide with the final pleas), meaning is generated and transmitted in a manner that goes far beyond the sermonizing of the party press. Whereas the umpteenth exhortation to revolutionary action fell on increasingly deaf ears (even party officers hardly read the op-eds in the party press, editors complained), the comrades in the dock actually seemed to live it. Hence Felix Halle's insistence that party members attend (and the party press cover) courtroom confrontations. Trials were not just an exhortation to class struggle or nationalist liberation, in a sense they *were* that struggle, if only for the time being in the grit-your-teeth, clench-your-fist mode of the theatrical as if.

In the wake of Marcel Mauss and René Girard, scholars have assigned sacrifice a key role in the constitution of political community. In Sir James Frazer's memorable phrase, in sacrifice divinities »take themselves apart to put a world together« (Frazer 1890: 69). It is a universal human ritual »whose social and institutional form can be displaced but which can be eliminated only at the risk of dissolving the social« (Borneman 2002: 5). And in fact, the German word *Opfer* means both *sacrifice* and *victim*. As Marcus Funck, Greg Eghigian and Matthew Berg have pointed out, this linguistic conflation indicates the notion's special potency in German political discourse. Moreover, defeat lent the rhetoric of sacrifice a special poignancy after the First World War. Its impact can be traced on a number of levels, from the »stab-in-the-back« myth of an army supposedly »undefeated in the field« that falls to betrayal by revolution on the home front to the iconization of »fallen heroes« such as Leo Schlageter and Horst Wessel. *Ex ossibus ultor*—from the bones, an avenger—was a popular motto encapsulating militarist aspirations to reverse defeat in the First World War (Reichardt 2002: 555–8). It found lively expression in popular culture, for example in Richard Euringer's

Deutsche Passion 1933 (1932). The radio play, adapted into hugely popular mass pageant under National Socialism, features a fallen soldier rising up from the grave to heal Germany's bitter internal divisions and ensure that the wartime sacrifices were not in vain (Fischer-Lichte 2005: 8, 122–7).

»The social« which sacrifice in Weimar political trials constituted so defiantly was the idealized community of the future. It was imagined as a fighting élite and germ cell for society's regeneration and renewal. Nothing illustrates this better than the exaltation of *the* political prisoners of left and right, Max Hölz and Paul Schulz. Under the heading »Stop the chicanery! Stop judicial crime! Free Max Hölz!,« deputy *KPD* leader Ernst Schneller wrote that »the proletarian political prisoners are tormented and tortured with all chicanes [...] the conviction of comrade Hölz is an object lesson.« Police exhibitions pandered to the »arrogant sated curiosity« of the bourgeoisie:

> they all pass by these images [of the imprisoned Hölz], exhibited to mock the proletariat: the bankers, speculators, lords of the business conglomerates, the class judges, the high and mighty of the army and the police, the royalty and the *Feme* murderers. (*Rote Fahne,* 2 Oct. 1926)

Ex negativo, Schneller thus evokes the proletarian community by juxtaposing the gawking bourgeois mob with the martyred Hölz. Under the heading »Dedicated to Max Hölz, the first Soldier,« Wilhelm Stolzenburg rhymed:

> O body amidst bodies, hand amongst hands / O shimmer in these nightly lands / O wave, of light born / O breath, to life sworn / Lift us up into a day / Which dark clouds cannot sway / Call awake, o voice, the hearts/ So that long night take flight at last.

Given the religious overtones of such eulogies, it is small wonder that an enthused admirer wrote:

> Hölz, o you our brother, our blood, I kiss your hands, your wounds, which they inflict upon you for all our sakes [...]. Poets

> and bards will rise up for you, brother, because you are life and the future. (Gebhardt 1989: 60)

In practice as well as theory, sacrifice was at the heart of performing the ideological community on trial. Ernst von Salomon, having served five years for his part in the Rathenau assassination, voiced the expectation that in political trials »the verdict could not be a source of fear for anyone, as it should really be a pleasure to become a martyr for the good cause« (Von Salomon 1961: 279). It is only logical that defendants willing (or even eager) to sacrifice themselves accepted that the party determined every aspect of their defence. From July 1924 onwards, the Communist Party encouraged fugitive party members to give themselves up to the state authorities: »Better go to prison for a year or two then live illegally for years on end, and in this way become completely demoralized, be lost to the party and in the end still get caught and made to do time« (Brauns 2003: 206). Many followed the party's call. In 1928, for example, a group of fugitive *KPD* members, accused of high treason *in absentia* since 1924, declared their willingness to surrender themselves. Their self-sacrifice, they wrote, would give party propaganda »a revolutionary note« with »repercussions far beyond the [1928] elections.« »Naturally,« they added, »we are prepared to conduct the trial according to the directives of the Communist International and the KPD.«[37]

Andreas Wirsching, Emilio Gentile and other scholars have recently placed renewed emphasis on the study of the early stages of totalitarian movements (Wirsching 1999; Gentile 2006). In these quasi-embryonic phases, they argue, attitudes and practices of community are rehearsed which subsequently shape and inform the movement's regime in power. As Daniel Schönpflug summarizes:

> The movement offers its members a collective way of life, a place in society, an experiential space and an aesthetic. The promise of the future characteristic of totalitarianism is translated into language, visual images, and symbols. On a small scale, the ideologi-

37 Anon, typed manuscript, place unknown, 9 May 1928, BA(B) RY1/ I2/ 711, Juristische Zentralstelle, Band 3, [124].

> cally constructed group prefigures what is in store for the state, society and economy once the totalitarian movement, with its claims to fundamental renewal and a complete domination of all aspects of life, takes power [...]. (Schönpflug 2007: 267)

Conceptualizing legal procedure as performative reveals the judicial as a particularly salient and powerful context in which gestures, language, images and symbols can create and affirm such a community of ideologues. To speak of performance is not to suggest that the trials were in some sense *just* theatre, or that the values and ideas informing them were insincere or merely pretended. Much less is it to distract from the fate of the many thousands of victims of judicial bias, overwhelmingly from the left, or to render harmless the suffering of prisoners, regardless of culpability and political stripe. Instead, labelling trials as performances of ideology is to suggest that they offered extremist parties a means of creating meaning and identity that was intuitive, emotive, interactive and powerful.

The heroic community of defendants, lawyers, and the party forged in political trials offered just the kind of aesthetic and experiential place Schönpflug evokes. It was a vital component in sustaining the—often highly unrealistic—pathos and self-view of extremist parties as genuinely revolutionary forces. For the extremist parties during the stability phase, judicial procedure therefore provided a crucial counterpoint to the relatively conciliatory practice of parliamentarism (Mergel 2002: 135–6). Political trials as spectacles of ideological conviction and defiance helped keep alive the aura of revolutionary potency even while the Communist and far-right parties immersed themselves in the practice of Weimar politics, economic life and at times even government.

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In this essay, I have argued that we can distinguish three levels through scholarly engagement with the performativity of justice: firstly, surface similarities in physical arrangement, sequence of events, props, costumes, ritualization etc; secondly, the performance of the neutrality and impartiality of legal procedure, and, implicitly, the authority and legitimacy of

the state as its guarantor; thirdly, the possibility of brushing this second level against the grain though the production of counter-performances. Another important level that I have largely bracketed from this account involves more complex epistemological and ontological claims about the constitution of subjects and subjectivity. Jürgen Martschukat hints and Andrew Munro, Judith Butler and others argue in more detail that this process finds a (some seem to suggest *the*) privileged arena in legal procedure. Subjects are constituted and performed in and through legal interpellations.

The three levels discussed here are of course linked. The first, »surface« level we may term the *theatricality* of justice, it posits that courtroom action resembles a play. It is usually, though not always, invoked to discredit particular trials or sets of trials as somehow fake, inauthentic and improper—not *real* law. We should note that in so doing it assumes both that there is such a thing as real, and presumably largely or totally unperformative law, and, more generally, that authenticity and performance are opposites.[38] Both, I would suggest, are deeply flawed notions. The first ignores that all legal procedure is, and always has been, performative. Quintilian's *Institutes of Oratory*, which one could qualify, tongue in cheek, as the first law school textbook, counsels defendants to arrange for their infant children to attend court unfed so that they will wail with hunger (or, in the ears of the jury, in anguish at their father's plight). Quintilian was anything but frivolous about the ethics of advocacy, and representing a just cause was the *sine qua non* of his forensic schooling—but he saw no contradiction between the wailing child and the purity of the law.

38 See e.g. the strong distinction Awol Allo makes between what he terms the first (»legalistic«) and second (»normative and performative«) level »orderings« of trials; legal success can only be achieved by foregoing objectives regarding the social and political impact of proceedings, and vice versa (Allo 2010: 46–51).

The second notion, that performance and authenticity are opposites, is even more problematic. It ignores that *authenticity* is in itself a construction that relies on much the same methods of dissemination and reception as *deceit* (Peters 2008: 184). Puzzlingly, even well-informed commentators fall back into an essentialist notion of authenticity. A recent (and in its imaginative empirical scope brilliant) attempt to apply the insights of the performative turn to the cross-legitimization of National Socialist and Communist self-stylization is Tim Brown's *Weimar Radicals. Nazis and Communists between Authenticity and Performance*. Taking his cue from Conan Fisher, Brown argues that locating Communists and National Socialists on opposite ends of a political »spectrum« is misleading. The dynamic between the two unfolded in an in-between zone, he claims, and *performance* is a key to unlocking it. This approach has much to commend it, but—as juxtaposition of *performance* and *authenticity* in the subtitle of the book signals—risks misapprehending the basic relationship between these two concepts. Performance in its substantive sense (i.e. apart from the »all the world's a stage« generalities) has little to do with make-believe, and nothing at all with »fakeness« (Brown 2009: 1–13, esp. 11–2).. Authenticity *is* a performance. In the case of Weimar, it was precisely the fusion of stylized, deliberate, calculated behaviour and the supreme authenticity of (real) sacrifice that made political trials so compelling as performances of ideology.

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Universalization, Particularization, and Discrimination. European Perspectives on a Cultural History of 19th century International Law

Miloš Vec

Among the various areas of positive law, international law claims to be the most universal regulatory regime: one law for all sovereign nations of the world. Its universalization, so it is usually said (Verdross 1960: 678), took place beginning in the late 18th century, when it expanded from *jus publicum europaeum* (Steiger 2007: 1148–1154) to *jus publicum universale*, from a »droit des gens Européen« (Steiger 1992: 125) to a law of nations—or international law without any geographical restrictions.

But was it really ›one law for all,‹ the enlightened dream of equality? Equality has always been a delicate topic (Dann 1975: 997–1046), not only in domestic law, but also with regard to the international order. Hegemons and minor powers existed both before and after the 18th century (Simpson 2004; Wolfke 1961). Diplomacy and its theoretical masterminds notoriously struggled with issues of rank and precedency (Vec 1998). Pre-modern European history is filled with conflicts about equality vs. hierarchy and the symbolic ordering of sovereigns and nations. This was not only a challenge for politics, the academic world as well elaborated extensively on these issues. In academic tracts and dissertations, the normative fundaments of political and legal claims were discussed, approved, and dismissed all over Europe. The underlying principle and shared assumption was one of widespread inequality; only the categories and ranks were up for discussion. Diplomacy and international law were, on the one hand, founded on these conflicts and seemed at least to some observers to be barely more than an expression of such symbolic orderings. On the other hand, diplomacy and international law

offered tools for the management and resolution of these conflicts, which partly hindered pre-modern political communication and partly constituted it.

According to contemporaries, many of these problems seemed to have been overcome in the first decades of the 19th century. The principle of sovereign equality was now firmly established and widely recognized: »No principle of public law is more generally acknowledged than the perfect equality of nations« (Wildman 1850: 15). Furthermore, ranks of diplomatic agents were disconnected from the ranking of nation-states and their honors (Vec 2001: 559–590). My aim in this paper is to discuss some issues linked to this process of the universalization of international law in the 19th century. Which were the achievements of ›one law for all‹ in international law, what were its methodological premises, and what were its alternatives? In what ways was 19th century international law exclusionary? Which particularizations and discriminations did its doctrine incorporate, and to what extent can a cultural history of law contribute to its analysis? And finally, why should we go beyond legal pluralism?

When telling histories of international law, there is a need for a wider definition of normativity, for a proper understanding that goes beyond the investigation of international order as a juridically constructed system based on laws and other juridical rules (the traditional approach of classical legal history). More than in other areas of law, the long-lasting focus of legal historiography on the state as the principal entity, courts as the regular (or even the one and only) institutions that solve conflicts, and statutory law as the main normative instrument has to be overcome. Legal history should widen its focus to also incorporate the entanglements of law with other normative orders, not for the sake of making legal history less juridical, but for a better understanding of what essentially constitutes the juridical order and of how law really works.

Writing history of international legal practices and legal doctrines thus brings not only particular challenges to the historiography of law, but is also a means of enriching our understanding of complex normative orders. Given the post-modern processes of pluralization and globaliza-

tion, these normative foundations become even more important for our understanding of the current world order. The instruments for the analysis of normative orders beyond the state will emerge from our re-telling of historical experiences, thus re-modeling our analytical frame. The history of international law is thus a tool for a critical and conscious moving of frontiers, not only between the national and the international, or the public and the private, but also as regards, on a global level, the contents of basic concepts such as authority, power, order, law, and the state. Such a history of international law would display the entanglements between different normative orders of law, morality, and social rules.

Universalization: From Europe to the whole world

Jus Gentium universale or the extension of natural law

In the 18th century, international law was mainly inspired and founded on natural law. The rules of natural law, grounded in pre-modern European moral philosophy and designed by authors like Hugo Grotius and Samuel von Pufendorf in the 17th century, were transferred from the individual level to the level of nations (Wolff 1769: 780, § 1088). The Leipzig based German lawyer Georg Stephan Wiesand wrote in 1759: »Natural law has come to be applied to peoples. For what is lawful among private individuals is also lawful among entire peoples.« (Wiesand 1759: 84).[39] This was a commonplace that could be found in pre-modern natural law textbooks throughout Europe, and became later known as the »domestic analogy.« Through this parallelization of states and individuals, international law received a distinct place in the legal system. Rights and duties were derived from and dependent on those of the individual in the national legal order. In this respect, the doctrinal developments of natural law seemed to be very similar or even identical all over Europe—as one would expect as they were connected in manifold ways.

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39 »Das Naturrecht wird nun auf die Völker angewendet. Denn was unter einzelnen Privatpersonen Rechtens, das ist auch unter ganzen Völkern Rechtens.«

The definition of the law of nations was abstract and the method of its creation was, in some but not all cases, deductive (Schröder 2001: 175). Rules were therefore very general and at the same time very theoretical, particularly as expressed by authors like Christian Wolff who, even though he was no specialist in international law, treated it as an extension of his system of natural law. However, there was little use for his doctrine of international relations in state practice. Several critics even argued that some of Wolff's statements were absurd or lacked practical importance.[40] This critique could also be applied to most of the premodern juridical, philosophical, or theological tracts that were written across Europe and contained similar elaborations on the various aspects of the law of nations. However, Wolff's style of writing carried the natural law doctrine to extremes that few other authors reached.

On the other hand, these rules were beyond doubt very general. Although written by authors who were often employed by local universities or minor princes in small territories that had neither the desire nor the money to rule Europe or the world, they drafted a normative order with universal claim. Their law of nations, designed in the provinces, was insofar lacking practical relevance for inter-state relations on a large scale, but it was truly universal—just as natural law generally was a universal system of norms.

Equality and its limitations

Formally, no geographical limitation[41] was placed upon this normative order and not even civilizational distinctions were made on the level of abstract definitions. As the bibliographer of international law, Dietrich Heinrich Ludwig von Ompteda (Wijffels 2003), noted in 1785: »The purely natural law of nations extends its rule over every and all peoples

40 For critical characterizations see Nussbaum 1961: 155. His scientific method »led him to frequent pretentious trivialities and tautologies«; Schröder 2001: 171; Schröder 2000: 55.

41 On limitations (inequality) see Weeber 2010: 305, 307.

of this earth, be they civilized or uncivilized.« (Ompteda 1785: 18).[42] This system was named the »Law of nature and of nations«—to quote the English translation of a work by Pufendorf (Pufendorf 1710). This terminology indicated not only the general perspective, but also implied that the authors did not necessarily treat inter-state relations. »Law among nations« was also a synonym for all habits and customs that were globally in use among all peoples. The tardiness of the changes of semantics in »*jus Gentium,*« »*droit des gens,*« and »law of nations« should not be underestimated.

Yet, as the adjective »European« was usually included neither in the title nor in the text,[43] the origin of the doctrine and its addresses and aims were not clarified. *Jus gentium naturale* and *jus gentium universale* were synonyms (Abicht 1795: 143). In this system, all nations were theoretically equal (Vattel 1797: lxiii, B.II, C.III, 149; Wolff 1769: 781) and deserved equal respect. As such, one law for all was the enlightened claim of the masterminds of social theory—as long as these nations were legal subjects. Doctrines such as the »fundamental rights and duties,« originally designed for humans and for the domestic order, were thus transferred by analogy to the level of states and to the international order. Here, they managed to survive up until the 21st century (Vec 2011b). Sovereignty was proof and requirement of legal actorhood, but it also was a very flexible doctrinal instrument. At the same time, it was clear that distinctions had to be made in terms of rank and precedency, and this affected exactly those sovereign rulers and nations that were claimed to be legally equal. Thus, the construction of juridical equality incorporated similar paradoxes and inherent hierarchies on the level of states as it exhibited on the level of individuals. The following paragraphs show more precisely how ideas of cultural or biological supremacy shaped normative standards within the universal law of nature and of nations.

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42 »Das bloß natürliche Völkerrecht nehmlich verbreitet seine Herrschaft über alle und jede Völker dieser Erde, selbige mögen oder ungesittet seyn.«

43 See Abicht 1795: 143–151 and Wolff 1769: 780–902, neither of whom discuss any limitations of scope.

Particularization

Positivistic turn and explicit Europeanization

At the end of the 18th century, a change of paradigms took place. It was Georg Friedrich von Martens, a professor from Göttingen, who finally brought a so-called positivistic turn to the discipline.[44] His law of nations was founded, as expressed in the title of the first American edition in 1795, *Upon the Treaties and Customs of Modern Nations in Europe*. This modification had enormous consequences. It did not change the claim of being a general system of norms, to the contrary, Martens emphasized that the law of nations had a general character that was binding for all nations (Martens 1795: 2). Yet its impact was intricate. Martens criticized natural law as insufficient to regulate the frequent encounters and conflicts among peoples (Martens 1795: 2). Instead, he focused on the customs (and their history) that were observed by many peoples (Martens 1795: 5). The historic dimension of law traditionally emphasized by the Göttingen school (Hammerstein 1972; Stolleis 1988: 309 ff.; Loughlin 2010) became stronger than ever before in international law.

Subsequently, Martens and his followers scrutinized the customs of former centuries: Which principles and manners could be observed, which general rules of international law could be drawn by comparison? The historical focus contained a geographical and cultural dimension. The European states delivered the material. Christian times, rulers, and manners were now identified as vital elements of the development of the law of nations (Ward 1795; Martens 1795: 6). Neither a world state nor a European republic of states existed, but in this view Europe constituted a community of nations since its legal subjects contributed to the emergence of the rules regulating their relations (Römer 1789: 3; Klüber 1821:

44 One should also mention his predecessor Johann Jacob Moser, see Stolleis 1988: 264 (with further references). The program was elaborated in Martens, *Versuch über die Existenz eines positiven Europäischen Völkerrechts und den Nutzen dieser Wissenschaft. Nebst einer Anzeige seiner in dem nächsten Winter halben Jahre zu haltenden Vorlesungen*, Göttingen 1787. On Martens see Koskenniemi's contribution in Calliess et al. 2006: 13–29.

16). Non-European customs, manners and rules were rarely mentioned by contemporary lawyers (Martens 1795: 27) and if they were, then only to enhance Europe's special character/nature by comparison with other parts of the world. This positivistic turn was at the time regarded as a fruitful innovation. Martens' books were reprinted and translated several times, particularly in the Anglo-American world (Macalister-Smith and Schwietzke 2001: 100–101). Other authors, all of them jurists, followed his method. Many textbooks now carried titles that were notably different than previous books on the topic: They shifted from the *jus gentium* universalism to a regional focus. The »European law of nations« was their subject, and they began promoting it in the titles of their textbooks.[45] The result was a practical and positive doctrine (Lingens 2010:

45 See the following selection of classical titels of the discipline, all containing »European«: Moser 1750, *Grund-Sätze des jetzt-üblichen Europäischen Völcker-Rechts in Fridens-Zeiten, auch anderer unter denen Europäischen Souverainen und Nationen zu solcher Zeit fürkommender willkührlicher Handlungen*; Neyron 1783, *Principes Du Droit Des Gens Européen Conventionnel. Ou bien Précis historique politique & juridique des droits & obligations que les Etats de l'Europe se sont acquis & imposés par des conventions & des usages reçus, que l'interêt commun à rendu necessaries*; Anonymous 1790, *Erste Grundlinien des europäischen Gesandschaftsrechtes*; Alt 1870, *Handbuch des Europäischen Gesandschafts-Rechtes, nebst einem Abriss von dem Consulatswesen, insbesondere mit Berücksichtigung der Gesetzgebung des Norddeutschen Bundes, und einem Anhange, enthaltend erläuternde Beilagen*; Günther 1777, *Grundriß eines europäischen Völkerrechts nach Vernunft, Verträgen, Herkommen und Analogie, mit Anwendung auf die teutschen Reichsstände*; idem first part 1787, second part 1792, *Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen und Herkommen mit Anwendung auf die teutschen Reichsstände*; Köhler 1790, *Einleitung in das praktische europäische Völkerrecht zum Gebrauch seiner Vorlesung*; Saalfeld 1809, *Grundriß eines Systems des europäischen Völkerrechts. Zum Gebrauche akademischer Vorlesungen*; Schmalz 1817, *Das europäische Völker-Recht; in acht Büchern; Schmelzing, Systematischer Grundriß des praktischen Europäischen Völker=Rechtes. Für akademische Vorlesungen und zum Selbst=Unterricht entworfen*, 3 volumes 1818-1820; Heffter 1844, *Das Europäische Völkerrecht der Gegenwart*, 1st edition; Klüber 1821, *Europäisches Völkerrecht*; Miruss 1847, *Das Europäische Gesandschaftsrecht. Nebst einem Anhange von dem Gesandschaftsrechte des Deutschen Bundes, einer Bücherkunde des Gesandschaftsrechts und erläuternden Beilagen, 2 Abtheilungen*; Pözl 1852, *Grundriss zu Vorlesungen über europäisches Völkerrecht*; Freiherr von Neumann, 1st edition 1856, 2nd edition 1877, 3rd

174) that tried to distance itself from the metaphysical speculations and a non-positive philosophy of law.

For most of these authors the claim of Europeanism was so explicit and self-evident that they did not bother with many words of justification (Klüber 1821). Only occasionally can one find explicit lines justifying Europe's predominance in the system of the law of nations. For nearly a century, writing a »European law of nations« had been considered the state of the art in contemporary international law textbooks. As this example shows, modernization and scientific progress did not necessarily go together with universalization and equality, but rather with elaborate, learned eurocentrism. This positivistic turn substituted the European tradition of natural law which claimed to be universalist (while having its blind spots) through a positivist perception that was explicitly European, but in a different way.

Historicism and sources of international law: the Europeanization of Europe

The 19th century doctrine of international law was in a certain sense less universal and more particular than that of the 18th century natural lawyers. Europe now became the center of legal scholars' accounts. For them, the course of history clearly demonstrated that it was in Europe that the genesis of rules took place. Not only Johann Ludwig Klüber included a »cultural history of international law« in his textbook that was first published in French in 1819 (Klüber 1821: 29–43).

The history of Europe was now exploited as a contribution to the sources of international law; it became a legitimate part of a historical and positivist doctrine. For the European writers of the positive doctrine

edition 1885, *Grundriss des heutigen europäischen Völkerrechtes*; Holtzendorff, ed., *Handbuch des Völkerrechts. Auf Grundlage Europäischer Staatspraxis*, Band 1 1885: *Einleitung in das Völkerrecht*, Band 2 1887: *Die völkerrechtliche Verfassung und Grundordnung der auswärtigen Staatsbeziehungen*, Band 3 1887: *Die Staatsverträge und die internationalen Magistraturen*; Meister 1886, *Repetitorium des Europäischen Völkerrechts für Studierende und Prüfungskandidaten*; Resch 1890, *Das Völkerrecht der heutigen Staatenwelt europäischer Gesittung. Für Studierende und Gebildete aller Stände systematisch dargestellt*, second edition.

of international law, it became a matter of course to deal more or less exclusively with Europe.

However, if one looks more closely, it is obvious that »Europe« did not encompass the entire European continent. Not all countries contributed equally to the development of international law. Rather, as Klüber wrote, »the majority simply accepted these rules« (Klüber 1821: 7). Moreover, Martens had already indicated in the title of his book that it was the »modern« nations that promoted international law.[46] These and similar distinctions were made in nearly all cases; discriminatory intent was a common heritage. At the same time, the concrete achievements made and benefits held within the European borders remained somewhat vague. Whereas it was easy for the authors to invoke remote external examples, they hesitated to make internal characterizations of the individual European countries and to judge their contributions to international law. It seemed politically appropriate to embrace a rather vague »us« that was regularly contrasted with the »other«—basically denoting everything non-European.

With this methodological empiricism and Eurocentric focus, the perspective on non-European legal entities became most critical. The recognition of international law by non-Europeans soon ended outside of Europe, as most writers did not fail to notice. At the beginning of the 19th century, it was only recognized in North America and also, a late addition, in Brazil, whereas the situation in the Ottoman Empire was already doubtful (Klüber 1821: 17). In no legal field were universal rules to be found: »As there are no universal principles of the civil jurisprudence which belongs to each community, so there are no universal principles of international law which are common to all communities« (Cornewall Lewis 1852: 35). The historiography of international law clearly made Europe's international law more European than ever.

46 Martens 1795, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern [!] Nations of Europe; with a list of the Principle treaties, concluded since the year 1748 down to the present times indicating the works in which they are to be found.*

Welcome to the club, sovereigns!

The impact of the doctrine of international law and its methodology comprised a focus on concepts in jurisprudence that had developed over time. This focus had intricate implications for some key concepts.

One of the undisputed dogmas of international law was that only sovereigns and independent states were the subjects of international law (Klüber 1851: 24; Wildman 1850: 7, 29): »The law of nations is the law of sovereigns« (Vattel 1797: xviii). Thus a universalistic claim of applicability was part and parcel of Emer de Vattel's theory on sovereignty. Yet it had a cultural bias as it operated with contingent categories that had emerged during the early modern process of European nation-building.

This all-encompassing law in the above-mentioned sense excluded entities that did not fit into the scheme of European sovereignty (Anghie 1999: 25; Idem 2009: 49–63). As an example, although the doctrine spoke about »nations« and »peoples,« the concept of these terms was rather narrow. The jurists of the classical doctrine simply identified peoples, nations, and states (Vattel 1797: 1, § 1; Vec 2011a: 1–4). These terms, they claimed, were interchangeable. Nations were always states, but only in Europe. Thus not all peoples of the globe were welcome to the club. American Indians like the Iroquois, to give an example that was critically discussed at the time (Eschbach 1856: 54), were simply categorically barred from access to international law.

The criteria of sovereign equality did, on the formal level of doctrine, bring some equality of legal subjects. However, the practical implementation and doctrinal transfer to other parts of the world occurred on a highly selective level, a level that adopted juridical doctrine to European moral standards and self-understanding and excluded others. The universalistic claim was in fact a European myth.

Christendom

The science of international law flourished in the second half of the 19th century. More textbooks than ever were published and the first journals on international law were introduced (Hueck 1999: 379–420). In 1873, the *Institut de Droit International* was founded, and around the same time

chairs of international law were established at universities (Hueck 2001: 194–217). In short, international law received more attention than ever. One of the reasons for this was probably the internationalization of communication, trade, and economies (Klump and Vec 2012; Vec 2006: 21–164), as well as the ongoing colonization of many parts of the world. This process was particularly important for the evolvement of international law textbooks in countries like the United States, England, and France which had had, in contrast to Germany, hardly any textbook tradition in this subject until the second half of the 19th century. For most countries, it can be claimed that international law as an academic discipline was born in these decades (Nuzzo and Vec 2012), inspired by multiple factors in international relations and diplomacy, jurisprudence, political sciences, and related academic subjects. The different political and academic backgrounds and experiences also shaped different styles of conceptualizing international law and its doctrine in different countries.[47]

These changes challenged Europe as a whole. The search for an identity that fit the new situation also left traces in the doctrine of international law. Concepts of European history were now stronger than ever affiliated with values and connected to a very special understanding of interstate morality. Carl Baron Kaltenborn von Stachau, author of »Kritik des Völkerrechts,« strongly emphasized the idea of an international community founded particularly on Christendom (Kaltenborn von Stachau 1847). Very similar ideas can be found in Friedrich Carl von Savigny's works (Savigny 1840: 33). In the latter, both the excluding components of the legal doctrine as well as its requirements and extra-legal assumptions had the strongest influence on the construction of the discipline seen to date. The struggle for an international order was carried out in juridical terms that were often heavily moralized. The American author and diplomat Henry Wheaton, influenced by European ideas, put it bluntly: »Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with

47 For Germany see Carty 2007; for Italy, Nuzzo 2012: 87–168; for England, Sylvest 2004.

slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin« (Wheaton 1866: 17 [also in former editions]).

Civilization

»Christendom,« in that sense, seemed to be just a code, a symbol for the self-understanding of European states, and it usually went along with affirmative remarks on the »standard of civilization« (Gong 1984; Osterhammel 2005: 363–425; Bowden 2009; Pauka 2012) that should govern international relations and limit access to the international legal community (Snow 1895: 17). »Civilization« became a key term in late 19th century doctrine (Kroll 2012a). Only the civilized states of the world were part of this community, the others were deemed »barbarous« or »semi-barbarous,« and simply excluded (Snow 1895: 22). Some authors frequently referred to what they called the »moral law of nations« (Gardner 1844: IX; Atkinson 1851). Civilization, culture (Fisch 1992: 679–774), and religion easily went together when they were used to justify the exclusion of some subjects from international relations. Against this background, the factual scope of international law was much narrower than the semantics of the times would make us believe. In 1883, the Russian-Baltic lawyer F.F. von Martens stated with regard to the scope of international law:

> Accordingly, the scope of international law is restricted to such peoples who accept the basic principles of European culture and thus deserve to be called civilized nations. The peculiar social and public circumstances under which the Mohammedan people, as well as the heathen and primitive tribes, live make it absolutely impossible to make international law applicable in any dealings with these uncultured or semi-cultured nations.[48] (Martens 1883: 181)

[48] »Demnach beschränkt sich das Geltungsgebiet des Völkerrechts auch nur auf diejenigen Völker, welche die elementaren Grundsätze der europäischen Cultur anerkennen und also des Namens gesitteter Nationen würdig sind. Die eigenthümlichen socialen und staatlichen Zustände, in denen sowohl die muhamedanischen Völkerschaften als auch die heid-

For these peoples and particularly for their individual members, the normative fundament of their treatment was often not international law, based on the principal equality of the legal subjects, but colonial law—a juridical discipline born in the late 19th century that represented many of the »dark sides« of the new legal world order (Nuzzo 2011; Nuzzo 2012: 187–286).

A structural discrimination

It is usually agreed upon that those who discriminate are often not conscious of their discriminatory behavior. The highly estimated jurists of the late 19th century were not driven by what they would have regarded as questionable intentions. However, their universalistic systems were underpinned with contemporary ideas of civilizational progress and a mission for global implementation—and often even for conquest and exploitation. Modeling international order in this way meant giving the most vivid effect to its legal frameworks. Therefore, they combined legal ideas with their cultural and religious convictions of superiority and their belief in civilizational progress. Their optimism was founded not least on technological and economic advancements that seemed to be dramatically accelerated. Jurisprudence, so it was commonly believed, should and could at least support this development. An all-encompassing law had to follow the European model, which had allegedly proven its superiority many times. Structural discrimination through concepts was the consequence. Even if the term »European« did not necessarily refer to its geographical range (Ompteda 1785: 19),[49] but only to the historical source of the doctrine (Lingens 2010: 185), the effects were incisive. Unequal treaties (with China, Japan, and Siam) were justified, and colonial warfare and imperialism were legally regarded as politically legitimate strategies.

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nischen und wilden Stämme leben, gewähren absolute keine Möglichkeit, beim Verkehr mit diesen uncultivirten oder halbcultivirten Nationalitäten das Völkerrecht in Anwendung zu bringen.«

49 For this reason, Ompteda finds the term »European« too restrictive.

This argumentation, however, did not remain undisputed. Some critics argued that the idea of genuine European legal principles was doubtful, stating that they were simply too vague (Bergbohm 1901: 9). This criticism did not address the relation between Europe and the rest of the world, it merely focused on the method of identifying principles and on cases of doubt.

At the same time, a globalization of juridical doctrine took place. Lawyers, translators, and politicians at the political and geographical periphery of the Eurocentric, imperial world order adopted this ideology (in Russia, Japan, China, and Latin America). They thereby transformed and re-interpreted the juridical systems for their own needs (Becker Lorca 2010). This internalization enabled them to be part of a world society that communicated via the global code of international law (Kroll 2012b).

Conclusion

The doctrine of international law and its practical application in the 19th century represented a distinct social order with ambivalences. The problems of universalization, equality, and structural discrimination were only three among many. Law and culture has become a popular topic in the last years, and it is evident that such matters effect the question of culture as a resource for identity, which is linked in many ways to jurisprudence (Kirste 2010: 1–32; Hofmann 2009: 1–10; Senn and Puskás 2008).

A cultural history of law as I understand it should draw attention not only to the written statutory law and its doctrinal history (*Dogmengeschichte*), but also to the social, philosophical, and political contexts of legal thinking and legal practice. Such a cultural history of law would soon realize that concepts such as legal pluralism could help our understanding of the coexistence and conflicts of juridical orders, both local and global. Legal theory and the sociology of law traditionally work on these and related topics; thus, their combination with legal history looks very promising. This article has shown in some detail, although many more examples are available, how social, philosophical, and political contexts shaped legal thinking in the area of international law, thus pro-

viding an example of how a cultural history of law might be conceptualized.

But the concept of legal pluralism does not go far enough. Legal pluralism is commonly understood as the coexistence of different legal norms or different legal orders. However with regard to the 19th century doctrine of international law, a much broader focus is needed to understand the legal constructions. These sometimes included and sometimes excluded the notion of morality (Lovrić-Pernak 2013). Very often, social customs play a crucial role in the development of legal norms. Particularly in the field of pre-modern European international law, even the distinction between social custom and customary law is difficult to establish, as ceremonies such as receptions of ambassadors and the related issues of rank and precedence were already considered intricate phenomena by the contemporary lawyers who had to clarify the normative fundaments between law, customs, and pure factuality. In other areas, very technical norms became part of 19th century international law, a process still largely unknown in detail (Vec 2006: 21–164).

Therefore, my final call is to be more ambitious and to aim for concepts beyond legal pluralism. Not only law's plurality, but also the problem of normative orders demands our attention; the interweavement, transfer, and hybridization of norms from different spheres. This might include morals, theology, social norms, customs, and technical rules (Bora 2006: 31–50). My suggestion, which I can only briefly hint at here, is to introduce a concept of »multinormativity« (Vec 2009: 155–166). This term indicates a focal interest in plural types of normativity that go beyond the plural worlds within legal regimes (e.g. different legal orders colliding, merging etc.). It could be included in more traditional approaches to a »cultural history of law« and would presumably enrich them. Multinormativity expresses an extensive interest in the various entanglements between norms of the law and norms deriving from morals, religions, social customs, and technical standards. The concept of multinormativity can help to establish a cultural history of law that makes the interweavement, the transfer, and the hybridization of rules with legal regulations

visible, and which allows us to understand normative orders in their astonishing complexity.

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»Law and society« in imperial Russia

Stefan B. Kirmse

Introduction

At first sight, combining the study of imperial Russia and the interdisciplinary field of law and society research, established in the mid-1960s to explore the social context of legal practice in the United States, may seem unusual. Indeed, there are considerable differences between some of the assumptions that informed the development of the two fields. For many years, students of law in Western society assumed that, somehow, law mattered. A wide range of academics shared this conviction, including legal scholars who focused on the integrative power of formal legal institutions, and critical sociologists, who paid more attention to these institutions' discrimination against women, the poor, and minorities. Historians of Russia, in contrast, tended to assume the opposite: namely, that the law mattered very little. Richard Pipes's classic study, for example, pointed out that many key laws had never been officially promulgated, that those in power did not need courts and laws to have their way, and that ordinary people »avoided legal proceedings like the Plague« (1974: 288–289). Whatever laws existed in the Empire could be manipulated by rulers, local administrators, and police to suit their personal interests. Such arbitrary rule seemed far removed from the ideal of a *Rechtsstaat*.

Since the mid-1990s, new critical scholarship has emerged in both law and society research (also known as socio-legal studies) and in the field of Russian history. As this scholarship has begun to question the underlying assumptions mentioned above, the gap between the two fields has narrowed. Scholars of law and legal practice in Europe and North America have turned towards cultural studies, inserting law into cultural analysis (for example, Sarat and Kearns 1998; Nelken and Feest 2001;

Sarat and Simon 2003). Some of them now acknowledge that the law does not matter in the ordering of our world any more than other cultural and institutional influences (Munger 1998: 55). At the same time, historians of Russia are paying more and more attention to the wider study of law and legal practice. They have begun to deconstruct the cliché of a »lawless« Russia, documenting that the Empire was, in fact, full of legal forums and interactions. Yet, they have not fully exploited the potential that law and society research offers to imperial histories.

The aim of this article is threefold. First, by discussing the entangled historiographies of socio-legal research and Russian imperial history from the mid-1960s to the present, the article highlights both the shortcomings of previous research and the advantages of the increasing cross-fertilization between these and related academic fields. It first analyzes the emergence of a cross-cultural and multi-disciplinary field for the study of law and legal practice over the past few decades, before turning its attention to the field of Russian imperial history and explaining why historians of Russia have been slower at entering this field than scholars working on other imperial contexts. The article then explores the ways in which more recent studies on Russian history have started to address earlier flaws. Second, arguing that these achievements are only a modest beginning, the article demarcates a number of directions in which the analysis of legal interaction in the Russian Empire should be taken in the near future. Finally, it offers a short case study to illustrate the ways in which the interdisciplinary approach would help to improve our understanding of Russian imperial rule and society.

Studying law and legal practice: Towards interdisciplinarity

For a long time the study of law was divided into rather autonomous subfields that tended to not pay much attention to one another. At least until the mid-twentieth century, many legal scholars based in Western law departments focused on the effects of legislation and formal legal institutions, usually without analyzing their social and cultural context. Influenced by functionalism, they treated the law as an autonomous force that somehow served as the glue of society and guarantor of social

equilibrium. The historians among them mainly explored the effects of changing laws and institutions, or discussed the ramifications of individual cases over time.

In the mid-1960s, a new form of interdisciplinary legal enquiry, which became known as law and society research, began to establish itself as an independent field in the United States (Levine 1990). While initially no more than a private initiative by a few like-minded legal scholars and social scientists, this approach soon became institutionalized as an association that produced regular conferences and publications (most importantly, the *Law and Society Review*). Calling for a new emphasis on the ways in which law and legal practice were socially and culturally embedded and produced, it exposed numerous liberal legal myths: it showed that the law was anything but cost-free, that people avoided and manipulated it, and that its influence on society was often indirect and ambiguous (Munger 1998: 39–52). Rejecting structuralist understandings of society, socio-legal scholars stressed agency and meaning. For them (as for many social scientists in the late 1960s and early 1970s), it was not fixed structures, but individual agency, interpreted differently by different people, that constituted the complex webs of social life. More political than traditional legal inquiry, socio-legal research also advocated a more critical stance on the role of law and lawyers in contemporary society (and the latter's role in maintaining the socio-economic *status quo*).

While much law and society scholarship followed the lead of mainstream legal studies insofar as it focused on disputes, formal institutions, and the role of officials, some of its proponents began to look at legal interactions from the perspective of ordinary people (for example, Galanter 1974; 1975; Sarat 1976; Law and Society Review 1976; Felstiner et al. 1980–81). This bottom-up approach, which has intensified since the early days of law and society research, was partly rooted in the desire to identify the inequality and asymmetry of power inherent in the legal system (Felstiner et al. 1980–81: 637). Other key developments have included a turn towards social constructivism, rooted in a growing skepticism about whether the law can be understood and examined as a formal set of rules.

Be that as it may, the growth and institutionalization of law and society research was largely a North American phenomenon. In Germany, an interdisciplinary field for the study of law is still in its infancy. The Berlin-based study group »legal reality« (*Rechtswirklichkeit*), which draws on the law and society tradition, was created only in 2005; the associated research program »legal cultures« launched in 2010. Prior to this, the analysis of law in society had largely been limited to *Rechtssoziologie* (»sociology of law«), which had its heyday in the early 1970s (Wrase 2006). As a critique of power structures, law-making, and the (conservative) legal profession, however, it was soon dismissed by legal scholars as an academic sanctuary for »Leftists.« By the 1990s, it had disappeared from many university curriculums; where it remained, it was no more than an auxiliary subject (ibid: 295–296). Unlike socio-legal studies in the United States, *Rechtssoziologie* failed to become an interdisciplinary forum widely respected and used by sociologists, historians, social anthropologists, and scholars of law.

As divergent as disciplinary developments in Germany and the United States were, legal scholars on either side of the Atlantic tended to focus on contemporary Western society, showing little interest in the study of law under conditions of empire. Yet, law and society research was influenced by some of the insights and research methods of legal anthropology, history, literary and cultural studies, and psychology. Two examples of interdisciplinary exchange are the aforementioned turn towards the perspective of ordinary litigants and the social-constructivist understanding of law, both of which legal scholars borrowed from sociology and cultural anthropology.

With their emphasis on the everyday operation of law in both Western and non-Western states, legal anthropologists in particular have left a mark on law and society research from the beginning. Moving away from descriptions of laws and rules, they focused on dispute processes and the interests of litigants (for example, Gibbs 1963; Nader 1969; Collier 1973; Starr 1978). By the 1980s, these scholars had extended their discussions into the context of colonial and post-colonial rule, thus building a bridge between legal research and the study of empire and

colonialism (Chanock 1985; Gordon and Meggitt 1985, among many others). Some of their findings found an audience far beyond their field. To give but two examples: the conclusion that »customary law« is not a relic of the past but a colonial construct—an »invented tradition« promoted by great powers to uphold colonial rule (Snyder 1981; Ranger 1983)—is now accepted by historians working on various parts of the world (for example, Mommsen and DeMoor 1992; Benton 2002; Jersild 2002). Second, following the anthropological realization that different forms of normative ordering coexist in virtually every society (Merry 1988: 869, 871), the study of »legal pluralism« has entered numerous academic fields. In particular, scholars of law now routinely invoke the concept of »forum shopping« (Benda-Beckmann 1981) to capture the ability of litigants to choose and move between different legal forums.

While continuing to concentrate on legal institutions such as trials, lawyers, juries, and courts, legal scholars also became interested in interpretive theory as formulated by cultural anthropologist Clifford Geertz. Geertz's approach stressed the importance of culture, meaning, and agency. He famously argued:

> The »law« side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real. (Geertz 1983: 173)

From the perspective of interpretive theory, then, the law is a series of interactions and the meanings attached to these by culturally situated actors. Litigants, lawyers, and lawmakers continually produce the law as they give meaning to it in everyday interaction. At the same time, legal action also produces culture. Cultural and legal norms and assumptions »interpenetrate,« as Barbara Yngvesson put it (1988: 410).

In the course of the 1980s, the findings of legal anthropology were also appropriated by sociologists and historians. A cross-disciplinary turn towards culture facilitated the realization that law and culture were mutually constitutive, inherently dynamic, and not deducible from structural factors. Historians started to explore the culturally productive role of

legal systems, as well as anthropological research methods in general (for a useful account, see Hunt 1989: 12–13). This was new insofar as earlier anthropological analyses of law and culture across Asia, Africa, and the Americas—for example, Laura Nader's work (1969)—had not been read widely among historians.

Historians of imperialism and colonialism, in fact, have been slow at turning to the interplay of law and culture. For decades, their analysis of legal interactions offered Eurocentric analyses of encounters between natives and European administrators, placing law in a developmental narrative in which imported Western law first coexisted with, but then gradually superseded ancient »customary law« (for critiques, see Mommsen 1992; Benton 2002). Using notions of subalternity or national culture, older works also discussed the legal administration of disenfranchised subject populations. Social history, on its part, did not fill the gaps: across Asia, Africa, and the Americas, it tended to focus on poverty and rebellions, neglecting the study of legal practice. Since the early 1990s, however, the analysis of imperial and colonial law has grown and diversified. Among the key reasons for this were the general expansion of the study of both empire and (post)colonialism and the »cultural turn« that formed part of this expansion. Historians and legal scholars have produced elaborate analyses of legal culture under colonial rule (for example, Chanock 2001; Elliott 2006: 117–183). A »new« imperial history, in fact, has helped to question the Eurocentric perspective of older scholarship on high politics, the economy, or military expansion and replace it with an examination of the ways in which cultural interaction, hegemony, race, and gender informed everyday interactions (Gerasimov et al. 2005; Wilson 2006; Howe 2010).

With some delay, imperial and colonial historians have thus joined other disciplines in treating law as a malleable and multi-dimensional concept. Along with law and society scholars, they now commonly explore the legal sphere as an arena of struggle or contestation in which law-makers and ordinary litigants tried to shape and use legal forums to their advantage (Starr and Collier 1989; Merry 1991: 891; Lazarus-Black and Hirsch 1994; Aguirre and Salvatore 2001: 13; Benton 2002). This focus not only

builds on earlier works in legal anthropology (see above) but also on British social history (Thompson 1975, 1978; Hay et al. 1976) and subaltern studies which, in the 1970s and 1980s, introduced a focus on the voices and tactics of the powerless.[50] Yet, while various academic fields have joined forces to restore agency to the masses, scholars across disciplines concede that the legal contest is nevertheless unequal. Indeed, the law can facilitate the resistance of the poor, but all too often sustains the hegemony of the powerful. That said, several recent studies have also pointed out that the most common form of interaction between the haves and have-nots, the dominant and the subordinate, has usually been accommodation, rather than collaboration or resistance (Benton 2002: 27; Burbank and Cooper 2010: 14).

The expanded study of empire and colonial rule has opened up new opportunities for legal analysis. It has shed light on the ambiguous and complex ways in which European powers understood and institutionalized their interpretation of the »rule of law,« both at home and abroad. In the course of the nineteenth century, these powers increasingly yielded to demands for greater equality in their (traditionally hierarchical) home societies, while continuing to rely on inequality as a guarantee for domination over non-Europeans. They simultaneously pursued policies of legal integration and discrimination, even segregation (Kirmse 2012), justifying this contradiction with the alleged civilizational differences between culturally superior Europeans and inferior Others (Fisch 1992: 29–30). While at first sight the principles of the French Revolution may seem like the natural enemy of hierarchical imperial orders, liberalism was actually complicit in the maintenance of legal inequalities (Fitzpatrick 2012; Fitzmaurice 2012: 122).

In sum, over the past few decades a truly interdisciplinary forum for the study of legal practice in historical perspective has emerged. In what follows, I turn to the specific case of the Russian Empire, discussing the degree to which the study of law and legal practice under the tsars has

50 See for example the series of volumes edited by Ranajit Guha between 1982 and 1989 under the title *Subaltern Studies*.

been influenced by the developments in history, legal anthropology, and law and society research outlined above. I argue that for a long time, the analysis of the Russian case was oddly cut off from mainstream academic debates, and has only joined these in the last fifteen years. Challenges, however, remain.

Studying law in the Russian Empire: Omissions and achievements

As I noted at the outset of this article, the Russian Empire and its legal institutions have often been associated with arbitrariness, corruption, and the lack of a »rule of law« (however defined). For a long time, the growing interest in everyday legal interaction described in the previous section found little resonance in Russian Studies. Research on the Empire was conducted almost exclusively by historians, most of whom did not take developments in socio-legal studies or legal anthropology into account. Few discussed the imperial legal system, and those who did tended to focus on institutions, institutional reform, and their effects on autocratic rule (Kucherov 1953; Kaiser 1972; Wortman 1976; Baberowski 1996). As they mainly relied on the memoirs and publications of legal professionals as sources, these studies reflected the views of elites based in the Empire's urban centers, especially St. Petersburg and Moscow. They were also russocentric insofar as they granted little attention to non-Russian subjects of the Empire.[51]

There are various reasons why everyday legal interaction did not feature prominently in analyses of imperial Russia, at least until recently. First, imperial society came to be seen in terms of a binary model, a society divided into masses of traditionally-minded peasants and educated urban elites, each with their own norms and agendas (Raeff 1983: 219, 230; Daly 1998: 9–10; Mironov 2000a: 514–515; Baberowski 2006: 368; Pipes 2010: 5). Many members of the upper strata viewed the countryside, home to 80–90 percent of the population, as violent and lawless. This

51 Baberowski admittedly includes a discussion of state law among non-Russian populations (1996: 339–427), yet he limits this discussion to borderland regions such as the South Caucasus, the Steppe region, and Central Asia.

cliché, which reflected elite fears more than lived reality, drew strength and legitimacy from the writings of Russian imperial elites who repeated it endlessly, not least to defend their own privileges. After the Great Reforms of the 1860s, liberals used the cliché to justify their struggle for further reform, whereas conservatives stressed it in their calls for more police and administrative control (Frank 1999: 27). Village communes, moreover, were not only seen as a world apart, but also as a relatively homogenous world. As Boris Mironov contended, »The socialization process and the strong social control exercised by the commune did not allow a distinction between the individual and the group: the peasant's ›I‹ merged with the communal ›we‹« (1985: 450).

Second, it was assumed that »pre-modern« village worlds had no use for state institutions, including legal ones. By this rationale, peasants tried to avoid the state as much as possible (Pipes 1974: 288; Worobec 1987: 285–286; Baberowski 2008: 21). Where they needed support in local disputes, peasants mobilized their networks and patrons rather than state officials. Defenders of the autocratic system also insisted that neither the peasantry nor the authorities had any need for greater legal order. In 1883, the bishop of the province Ufa, for example, dismissed the »English-American juridical truth« of the new courts introduced in the 1860s. In a letter to the Holy Synod in St. Petersburg, he insisted that only rule with an iron fist would be able to address the general lawlessness (*obshchee bezsudie*) in the countryside (Russkii Arkhiv 1915: 88, 94).

The growth and spread of scientific expeditions and societies, which produced a wealth of ethnographic studies of village life, helped to foster the image of exotic peasant communes full of their own legal traditions. As part of this process, numerous studies offered collections of what they saw as customary or popular law in the countryside (among many others: Orshanskii 1875; Iakushkin 1875–1910; Pakhman 1877–1879; Zapiski 1878, 1900; Dril' 1883; Leont'ev 1908). Both Soviet and Western scholars then adopted the assumption that villages were governed by their own legal norms and consciousness (Mironov 1985; Lewin 1985; Worobec 1987: 285–286; Frierson 1987: 58; Baberowski 2006: 348). The image of a dual legal order in the Russian Empire did not contain much

room for interaction between villages and the central state. Nor did it allow for much interaction between state institutions and the Empire's ethnic and religious minorities, who had allegedly also retained separate legal orders. If the Russian village was a world apart from civilized Russia, the non-Russian village was a different universe.

Soviet authors had vested interests in recognizing as little state-society interaction as possible in tsarist Russia. They argued that, as a socially isolated class, the peasantry tried to minimize interaction with feudal lords and state representatives as much as possible. By this rationale, only »bourgeois elements« in the village would challenge the unwritten laws of communal life (Mironov 1985: 459). While some Soviet scholars acknowledged changes in »customary law« over time (partly to reconcile the idea of ancient customs with the Marxist belief in a set succession of economic stages of development), they construed this law as the organically grown rules governing all legal interactions among the peasantry (Minenko 1980; Aleksandrov 1984; Mironov 1985). Some identified these rules on the basis of the collections of customary practices by nineteenth-century scientific societies (for example: Gromyko 1977: 83–91). The »bourgeois« Judicial Reform of 1864, by this rationale, yielded little benefit: »The new courts, like the court of the pre-Reform period, were tools of domination used by the exploitative classes« (Vorob'ev 1955: 311). In addition, from the perspective of the USSR's numerous nationally defined republics or autonomous regions, the courts formed »part of the apparatus of national oppression« (ibid.; see also Chernychev 1927: 182).

For much of the Cold War period, then, the study of law and legal practice in imperial Russia did not move beyond structuralist and functionalist accounts in which separate legal norms served to maintain the cohesiveness of different social strata. Individual agency was granted, at best, to elites; in the case of the rural masses, what mattered was not what peasants did, but what was done to them. Only since the mid-1980s have Russia's rural inhabitants been treated as individuals and rational historical actors (Bradley 1985; Brooks 1985; Eklof 1986; Worobec 1995). Yet, this new generation of studies usually focused on the subversive charac-

ter of local communities which sought to protect their own little worlds from outside influence. While these works thus began to consider the voices and tactics of the powerless and exploited to which subaltern studies and social history had alerted the academic community, they nevertheless continued to draw romantic and essentialist pictures of what they viewed as a »traditional society of an earlier day« (Worobec 1995: 14–15), a society that acted collectively and bravely resisted the authorities. The new stress on peasant agency, in other words, did little to undermine the idea of the two Russias. The ways in which ordinary people used and helped to shape state legal institutions continued to be neglected. For a long time, the methods and findings of legal anthropology and law and society research thus failed to make inroads into Russian imperial history.

Since the 1990s, the idea of the isolated peasant commune operating by its own unwritten laws has come under sustained attack. There is a growing awareness among historians that disputes and conflicts were more characteristic of village life than feelings of community and solidarity (Wagner 1994; Frank 1999; Burbank 2004; Gaudin 2007; Engel 2009). Drawing on local archives rather than elite publications, these newer studies have been able to show that peasants in the Russian Empire routinely interacted with state institutions to manage their daily affairs; cooperation and accommodation—rather than resistance—were also common in the state's interaction with ethnic and religious minorities (Sunderland 1998; Crews 2006; Burbank 2012; Kirmse 2012).

Historians, admittedly, have a harder time than anthropologists at examining legal behavior at the village level, especially if they adopt the Geertzian perspective, trying to see and understand each step through the eyes of the litigant. Archival sources were written by local elites (jurists, administrators, and other representatives of the state) who necessarily gave their own versions of reality. As David Sabean put it in a different context: »Whatever sources there are for studying peasant culture implicate in one way or another those people who to some extent exercised domination over the peasant« (1984: 2). And yet, these sources paint a more nuanced picture than press articles and memoirs written at

the imperial center. They suggest that townspeople and peasants alike often acted pragmatically and by no means avoided representatives of the state *per se*. Moreover, there is a considerable variety of documentary sources. In addition to exploring court records, for example, scholars have begun to analyze petitions sent by ordinary people to state institutions (Crews 2006; Farkhshatov 2008).

In any case, historians of Russia have begun to examine the meanings attached to legal action by individual agents. Some have joined their colleagues working on other imperial contexts in deconstructing the notion of »customary law,« especially those scholars specializing in the Caucasus and Central Asia (for example, Bobrovnikov 1999; Martin 2001; Jersild 2002: 89–109; Kemper 2005; but also see Frank 1999). These studies have documented that in Russia, as in other empires, nineteenth-century governments, aided by scientists, imperial officials, and local intermediaries, attempted to codify a set of dynamic local legal norms, thus freezing them into existence. Only in some regions were these codifications abandoned before they were complete (Martin 2001: 45–46). Locals admittedly claimed to follow »communal norms« in many forms of legal interaction, but more often than not, they used these claims as rhetorical devices to gain an advantage or justify their behavior.

For some, the idea of two different legal universes—one for Russian elites, and one for the masses (which could vary by region, ethnicity, or religion)—still has some leverage. Mironov's *Social History of Imperial Russia* repeatedly notes that the peasantry held on to »traditional« and »archaic« forms of law and justice, and thus remained untouched by the legal transformations affecting the rest of society (2000b: 223–365). Baberowski (2006; 2008) similarly asserts that the Empire never managed to bridge the gap between its educated, urban and traditional, rural (and partly non-Russian) worlds. He concludes:

> The system of laws of the late tsarist empire met the demands of the elites and the urban public [...]. It did not know how to communicate with the »other Russia,« the lower classes of the centre and the periphery. (Baberowski 2006: 368)

Along with their new interest in »customary law,« historians of law and culture in imperial Russia have followed the lead of legal anthropology and wider law and society research in focusing on the practice of going to court. As the most numerous courts in the Empire, late nineteenth-century township courts have received particular academic attention (Frierson 1997; Popkins 1999, 2000; Zemtsov 2002; Burbank 2004; Gaudin 2007: 85–131). This field of enquiry has documented that far from avoiding formal institutions, peasants routinely used courts to settle their disputes and combat crime. However, it has yet to widen its geographical and cultural focus and look beyond predominantly Russian communities in order to trace the effects of legal pluralism on legal interactions among a highly diverse population.

In borderland regions, the legal practices of non-Russians have become a focal area of research (the works on Central Asia and the Caucasus cited above, along with Kemper and Reinkowski 2005, are only the beginning of a much longer list of publications). These studies have contributed to our understanding of legal pluralisms in the Empire, not least by showing how these pluralisms differed from region to region, and were experienced and used in different forms. Peripheral regions, however, represent rather specific cases of legal orders. They were only annexed in the course of the nineteenth century and not fully integrated into the civil-administrative structure of the Empire. Non-Russians had few of the legal rights and opportunities in these areas that they enjoyed in most of European Russia. The full extent and implications of the use of state courts by non-Russians must therefore be examined in more central, culturally heterogeneous regions. Useful case studies would include the Empire's »interior peripheries,« as Leonid Gorizontov (2007: 79–80) called them: former frontier zones with histories of independent social, economic and political organization that, by the early to mid-nineteenth century, were increasingly treated as part of the imperial core. Kazan and other provinces in the Volga-Kama region count among them, as do the steppes of southern Russia and Crimea. In these regions, everyday court usage and links between different legal forums remain largely unexplored.

The recent surge in studies on legal practice—even if these are still confined to borderlands, on the one hand, and township courts in central regions, on the other—has documented the quotidian nature of legal experience in the Russian Empire. On a day-to-day basis, Russian rulers put enormous resources, financial and social, into the administration of their polity and the maintenance of law and order. While undoubtedly short on skilled personnel (as most empires were), late imperial Russia was full of legal forums and legal activity. In which directions, then, should existing research be taken to investigate the interactions between these forums?

Some reflections on promising avenues of research

Historians of Russia have entered the interdisciplinary forum of legal studies. Drawing on anthropological research findings and methods, they have begun to fill the gaps left by earlier works on Russian legal history. However, challenges remain (and many of these can also be found in research on legal culture in other parts of the globe).

First, law has widely been examined from »above« as a set of individual laws or legal systems designed and debated by lawmakers, and from »below« as an array of manners in which the system was implemented, used, and experienced at the local level; yet, there is still much work to be done on the links between the two perspectives. Scholars concentrating on different imperial and post-imperial contexts have called for a greater focus on cultural and legal intermediaries who facilitated and ultimately shaped state-society interaction (Macauley 1998; Aguirre and Salvatore 2001; Benton 2002; Sharafi 2007; Aguirre 2012). The study of petitions, for example, is hardly imaginable without an analysis of the people who wrote these petitions for the mostly illiterate peasants. In order to understand the ways in which legal practitioners, and others capable of writing complaints (*zhaloby*) and petitions (*prosheniia*), affected the masses' access to justice and thus helped to shape legal culture in the towns and villages of the Russian Empire, we need to know more about the origins and motivations of these legal intermediaries, and about their relationships with their clients and state institutions. The absence of

these crucial figures from existing literature is partly due to the previous focus on township and borderland courts, which did not insist on receiving complaints in writing and operated without lawyers.

Second, the study of legal culture in imperial Russia still pays too little attention to law as an »arena of struggle.« The challenge in this discussion is to recognize the agency of people across all social, regional, and gender divides, while not falling into the trap of suggesting equality (which often remained an illusion). Women, underprivileged estates, and ethnic and religious minorities experienced—and did not always accommodate—multiple inequalities. These asymmetries, which are central in the study of law and colonialism thanks to the influence of subaltern studies and legal anthropology, continue to be neglected in the analysis of legal culture in the Russian Empire. In order to offer a more accurate picture of everyday legal experiences, we would need a closer analysis of the mechanisms and consequences of legal inclusion and exclusion.

The study of everyday legal practice must also include the multiplicity of links between different legal institutions and normative orders since these did not exist in isolation from each other. Jane Burbank stressed that rural township courts were linked with higher judicial instances in different ways, and thus part of a plural legal system (1997: 90–92; 2006: 414; see also Kriukova 2008). She also explained that Russian state law consciously legalized, and thus appropriated, local courts, establishing a legal system for the Empire that deliberately included different procedural and normative orders (Burbank 2006). However, Burbank discussed the integration of non-Russians in the imperial court system mainly in the context of borderland regions (ibid.: 412–416), where separate local courts were the rule. She thus highlighted the judicial distinctiveness of ethnic and religious minorities, neglecting the fact that minorities were much more closely integrated in the state court system in more central parts of the Empire. The fledgling study of legal practice in Russia's plural legal order must therefore be extended to other regions, periods, and multiethnic contexts.

It is time to identify the array and nature of legal pluralisms across the Empire. It is a commonplace in legal anthropology that any society is

home to a multiplicity of normative orders. In the context of empire, this multiplicity becomes particularly pronounced since all empires faced a similar dilemma when dealing with legal pluralism: the desire to improve administrative efficiency and reinforce unity, paired with the continued need to promote hierarchy, difference, and domination over disenfranchised subject populations. Thus, we need to explore how this dilemma was solved for each region, period, and social group. Which forms of pluralism emerged, for example, in the South Caucasus, the Volga region, or along the Baltic Sea shore? How did they differ by estate, nationality, religion, or gender? Were legal orders parallel, inclusive, or did they take the form of aggressive competition? How did pluralism evolve in the course of the imperial period, and how did its constituent elements shape one another? Franz von Benda-Beckmann's analysis of the relationship between the triangular constellation of Islamic law, *adat* law, and state law in Indonesia (2008) has highlighted the importance of studying the links between legal orders over time, since the relative weight of these elements, and their hybrid forms, are subject to ongoing change. Cursory remarks by scholars have pointed to similarly dynamic relationships between legal orders in Russia: Babich (2005: 261), for example, observed that *adat* law in the North Caucasus was first Islamicized by local elites fighting against the Empire, and later Russified by imperial administrators. These observations underline the necessity of carrying out longitudinal studies of the Empire's interacting legal cultures while also reminding us that the law is best analyzed as part of local power struggles.

Another important question concerns the freedom of litigants to move and choose between legal forums. In the end, the legal institutions created for different parts of the population were deeply entangled and developed multiple forms of cooperation. Formal segregation of different groups in society did little to stop these groups from developing legal relations with each other. Normative designs were thus rather different from the legal reality, which could not be fully scripted. These questions, which have been explored extensively by legal anthropologists working

on Africa and South East Asia in particular, have yet to make a real impact on the study of the Russian Empire.

Finally, while it is important to point out that law was an everyday experience from St. Petersburg to the plains of central Eurasia, socio-legal research has also reminded us that court cases, in particular, are unusual situations. Scholars working on areas as diverse as American civil law and African »customary« law agree that most injurious experiences are not taken to court (Holleman 1973: 592; Felstiner et al. 1980–81: 651). A more rounded picture would require us to focus, for example, on the antecedents of disputes and the question of how and when solutions were reached out-of-court. While such cases are more difficult to investigate since there are fewer sources, they form essential pieces in the mosaic of »legal cultures.«

In the final section, I offer a brief example of what a combined analysis of some of the five areas summarized above might look like.

Property claims in late imperial circuit courts: Some evidence from Crimea

On 2 May 1878, the Tatar woman Aishe Sherife, married to a peasant by the name of Seit Memet Mulla Osman oglu, filed a lawsuit against the civil servant Ivan Dimitrievich Godzi with the Simferopol Circuit Court on the Crimean peninsula.[52] Circuit courts had been introduced by the Judicial Reform of 1864 to address major crimes and civil disputes. They were based on a mixture of French, Prussian, and Anglo-Saxon models and designed to promote the »rule of law« in the Russian Empire, that is, to enhance legal transparency, accountability, and efficiency (Kirmse 2013). Over the following years, these new courts spread across the European part of Russia and, eventually, into Siberia and Central Asia. Some of these regions had a culturally very diverse population. The establishment of a circuit court in Simferopol, the Crimean capital, in 1869 brought large numbers of non-Russians under the jurisdiction of the new

52 GAARK (State Archive of the Autonomous Republic of Crimea, Simferopol), file 376-5-2808 (1878): 18.

court system. Muslim Tatars, in particular, formed over 40 percent of the population on the peninsula.[53]

Aishe Sherife's case was as follows: The previous year, the civil servant Godzi had taken her husband to court because the peasant had failed to pay off debt amounting to 4,000 rubles. In order to allow Godzi to recover the debt, the court had identified a plot of land near Alushta on the South Crimean shore for seizure and sale. On 26 March 1878, the Court announced the public auction of the plot, which prompted Aishe Sherife to act. In her lawsuit, she claimed through her lawyer that the land was hers rather than her husband's and could therefore not be seized.

The court responded quickly. On 12 May, it put the sale on hold until the issue of ownership was resolved. In July, Godzi submitted his version of the story to the court, arguing that Seit Memet had always been in command of the land and gained profit from it.[54] The case was delayed for financial and logistical reasons. Alushta was an arduous trip from Simferopol across the coastal mountains. The questioning of witnesses was therefore expensive, and it was only on 24 November 1879 that the court received the money from the two parties for the travel expenses of a member of the court and a land surveyor.[55]

Five days later, the enquiry in Alushta began. Nearly all of the witnesses were Muslim peasants, who gave testimony in Tatar.[56] Linguistic diversity was part of imperial court practice. Thus, in addition to the land surveyor and various lawyers, the court representative was accompanied

53 Statistics gathered by the Crimean administration in the 1880s suggest a Muslim share of 42.7% (Werner 1889: section II, 32–33). These formed no more than 18% of the urban population, but they were still a clear majority in rural areas (64%) (ibid.).

54 To speed things up and receive at least part the money owed to him, Godzi also filed an ultimately unsuccessful complaint against a court clerk. See GAARK, 376-1-43 (1878).

55 GAARK, 376-5-2808 (1878): 7–7v.

56 For the testimony, see ibid.: 10–17v.

by a mullah and the Muslim nobleman Mustafa Davidevich who acted as a Russian-Tatar interpreter.[57] All witnesses confirmed that Aishe Sherife received the revenues, but had authorized her husband to manage the land. Six of them explained that under Muslim law, a woman could have no private property; therefore, she had to authorize her husband to be in control of the land. The court accepted these explanations, concluding that Seit Memet used the revenues »to operate the business in his wife's name, upon her authorization and on the basis of Muhammadan law according to which the wife has no right to be in charge of her property.«[58]

Among other things, the case highlights the penetration of imperial legal principles and practices in Muslim communities. While Tatars publicly stressed the importance of Islamic norms, they seemed aware of the fact that some of them had adapted to Russian property arrangements which allowed wives to own land: in this court case nearly all neighbors knew that the disputed land was the wife's rather than the husband's. In fact, the woman had been active on the property market for some time. As one witness explained, Aishe Sherife had bought the land near Alushta from the revenues of another land sale several years earlier.[59] It is hardly surprising that she filed a lawsuit that guaranteed her ownership and future revenues.

The Tatar woman could not have engaged in »forum shopping.« The Circuit Court presented the only legal option for her. She could not have turned to the Islamic judges of the Spiritual Muslim Administration of Crimea—a state institution founded in 1794 to oversee matters of religion, and some areas of civil law—because in land disputes, this administration only had jurisdiction over Muslim land endowments known as *waqf*. Thus, the case also illustrates that legal pluralism was clearly demarcated in the Russian Empire.

57 Ibid.: 12.

58 Ibid.: 19v–20.

59 Ibid.: 12v.

That said, another case, taken from the records of the Simferopol-based lawyer M.A. Freshkop, highlights that »forum shopping« was possible in some areas of civil law. In October 1894, Freshkop filed a lawsuit with the Simferopol Circuit Court on behalf of the peasant woman Zeynep.[60] The woman had recently been divorced by her husband, the mullah Umer Chelebi oglu. According to the lawsuit, she had brought goods amounting to 400 rubles into the marriage, which her husband refused to return to her upon divorce. Referring to the Russian Civil Code, her lawyer explained that the act of marriage did not establish joint ownership of property. Thus, he asked the court to oblige Umer Chelebi oglu to return the goods.

Zeynep's choice of a Russian court is striking. Article 1399 of the *Statutes of Spiritual Matters of Foreign Faiths*[61] allowed Muslims in Crimea to turn to Islamic judges in cases of property claims resulting from divorce. This was only possible, however, if both parties agreed. In Zeynep's case, it is understandable that she preferred to take her claim to a circuit court. Islamic judges were entitled to rule in accordance with »customs,« which tended to enforce patriarchy. Circuit courts, by contrast, relied on the Civil Code which contained a confusing array of rules with respect to family law and could therefore be interpreted in different ways. Umer Chelebi oglu's lawyer insisted on the religious peculiarity of the case, asking the court »to summon one person of Muhammadan faith as an expert who can offer a correct interpretation of [marriage] law.«[62] The Circuit Court, however, ignored this request, accepted Freshkop's line of argument, and had goods worth 400 rubles taken away from Zeynep's ex-husband.[63]

60 GAARK, file 849-1-17 (1894).

61 This is vol. XI, part 1 of the *Collection of Laws of the Russian Empire*, 1900 edition.

62 GAARK, file 849-1-17 (1894): 28.

63 Ibid., 34–34v.

The two cases taken together illustrate a number of points made in the previous section. First, they underline the usefulness of approaching legal practice in the Russian Empire in terms of interpenetrating, rather than simply coexisting, legal orders. In everyday legal business, such as property claims, the state legal sphere (represented here by the circuit courts) interacted with multiple local laws and judges. In Zeynep's case, these were religiously-based; in many cases involving Russian peasants, they were local justices of the peace or peasant courts. Yet while this multiplicity of legal forums provided litigants with an element of choice, the choice was limited to certain areas, such as family and inheritance law. This limitation was a common feature of expanding imperial and colonial powers: whereas the unification of family and inheritance law was rarely a priority, the homogenization of criminal law, followed by commercial and contract law, tended to be high on their agenda (Mommsen 1992: 10; Fisch 1992: 32). In areas of law where litigants could choose between forums, they acted pragmatically. As rational historical actors, they rarely sought solutions only within the local community, but turned to state courts whenever it was in their interests to do so.

In addition to raising questions about legal pluralism and »forum-shopping,« the cases discussed above also point to two other fields of enquiry mentioned earlier: legal inequalities and intermediaries. As regards the first of these, the case Aishe Sherife vs. Ivan Godzi, in particular, shows that filing a lawsuit entailed substantial costs—for lawyers, surveyors, translators, travel expenses, and litigation fees. These costs limited the access of the poor to circuit courts. As a landowner who had been active on the property market for years, Aishe Sherife could pay these fees; others were less fortunate. Yet inequality was not just a question of financial resources. Social status based on land ownership and the development of local patronage networks also made a difference: all of Aishe Sherife's witnesses, for example, confirmed her ownership of the land, which ensured her victory in this legal battle. Godzi had no such con-

nections in Alushta—in fact, four of the five witnesses he had named could not confirm his version of the case with certainty.[64]

Ethnicity or religion could also be a source of legal inequality, though not necessarily with negative consequences. Being a member of a minority group opened additional legal avenues in some areas of law. Yet, Muslims and others also faced more detrimental forms of discrimination: they were underrepresented, for example, as judges, lawyers, and jurors in the late imperial legal order (Kirmse 2013).

Finally, legal intermediaries were crucial in the cases outlined above. The court records suggest that Aishe Sherife, Godzi, Zeynep, and Umer Chelebi oglu never appeared in court in person; they were represented at all times by lawyers whose skills proved decisive. The lawyer Freshkop's line of argument that relied on an article in the Civil Code convinced the judges of the circuit court whereas his opponent's strategy of consulting an Islamic scholar turned out to be fruitless. Moreover, the choice and, ultimately, the power and influence of intermediaries reflected the social and economic resources of the litigants. In Aishe Sherife's case, even the translator was a nobleman (which provides a contrast to many other cases involving Tatars at the Simferopol Circuit Court in which Tatar peasants worked as interpreters).

Conclusion

In this largely historiographical article I have attempted to show the existing and missing links between the study of late imperial Russia and the wider analysis of law and legal practice. The discussion has underlined that over the last fifteen years, historians of the Russian Empire have turned to the examination of law and culture in substantial numbers. Long-established approaches and methods from law and society research—the »bottom-up« perspective, the emphasis on agency and meaning, the deconstruction of »customary law,« and the analysis of litigant behavior in plural legal orders—have, albeit slowly, entered the field of Russian history.

64 GAARK, 376-5-2808 (1878): 20.

Given the spatial, temporal, and cultural diversity of the Russian Empire, these recent gains are only a beginning. Emerging fields such as the self-designated »new imperial history« of Russia (Gerasimov et al. 2005) have yet to perform a »legal turn« and demonstrate the multitude of legal links between the center and the regions, as well as between and within intermediate and peripheral territories of the Empire. The five areas of promising research I have identified in this article—pluralism, persisting inequalities, intermediaries, »forum-shopping,« and out-of-court dispute resolutions—would help historians of imperial Russia gain a better understanding of the daily experience of law. The study of legal practice in borderlands and the analysis of central township courts have become cottage industries, yet these fields are very specific. Whereas the former covers rather unusual legal regimes (partly still under military command) with limited access to courts, the latter is often russocentric, neglecting the Empire's cultural heterogeneity.

As I have tried to show in the case studies at the end, a closer discussion of legal activity that takes most (if not all) of the five areas into consideration, reveals the participation of all social groups and strata in the legal system as well as the interpenetration of legal orders. At the same time, it highlights the persistence of hierarchies and privileges, be they social, religious, or linguistic. Legal anthropologists have argued that the law is never neutral and impartial, but always constructed by human agency in a way that is advantageous to some at the expense of others (Starr and Collier 1989: 3, 7). In the case of the Russian Empire, the study of legal inclusion and exclusion—their forms, differences, and mechanisms—is still in its infancy.

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Globalization of legal cultures in the 19th century. Criminal trials, gender, and the public in Meiji Japan

Daniel Hedinger

Introduction[65]

In history, the rule of law is often seen as a Western product as well as a source of comparative advantage over non-European societies.[66] In these narratives, the globalization of legal cultures—usually understood to have begun in the 19th century—is therefore equated with the enforcement of European legal concepts the world over, and thus with westernization more generally.[67] Japan serves as a prime example of the translation and enforcement of European legal concepts in non-Western contexts.[68] The reasons for this are twofold. First, through its rapid adoption of French and German legal principles following the Meiji Revolution of 1868, Japan appears to be a prime example of thorough westernization. The Meiji constitution of 1889 is seen as marking the culmination of this

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66 On global history, see Bayly 2004: 81–82; on legal history see Costa 2007 or Berman 1983.

67 Osterhammel 2009: 680. For more context on globalization and Western legal concepts see Goldman 2007. On law in the process of European expansion see also Fisch 1992.

68 Haley 2010; Ginsburg 2010: 18–19; Osterhammel 2009: 853; Goodman 2003: 20–23; Tanaka 1976: 194–195; Stevens 1971: 669.

trend.[69] Second, Meiji Japan (1868–1912) has allowed historians not only to document the extent of the westernization of non-European legal systems in the late 19th century, but also to present the process of the globalization of legal cultures as a success story: »Japan is the only case of genuine judicial autonomy being manufactured, without colonialism, in such a short time« (Ginsburg 2010: 18). In such readings, the new legal order safeguarded the empire's independence and its subsequent evolution into a great power in the period after 1900.

However, the focus on westernization is problematic. While the overall trend is scarcely open to question, the legal reforms are seldom reviewed in detail or considered in context. This is one of the pitfalls of global history, which tends to consider the globalization of legal cultures at a macro level while neglecting the complexity of local cases.[70] Accordingly, the globalization of law is generally treated as a mere symptom rather than as a factor in what Christopher Bayly has termed »the Great Acceleration« in the decade before the First World War (Bayly 2004: 451).

On the other hand, in the historiography of Japanese law, the extent of westernization was always contested. Some authors spoke of the »the Japanization of Western law« (Coing 1990), or tried to find »the Japanese in Japanese law« (Menkhaus 1994). Others have juxtaposed »European law« and »Japanese tradition« (Seizelet 1992). But such readings often tend to essentialize Japanese legal culture by claiming that it is culturally particular as well as historically unchanging.

One problem is that the historiography of Japanese law has in the main approached legal affairs via legal texts and has mostly neglected the question of the westernization of legal cultures or legal practices.[71] In the

69 Jansen 2000: 414; Osterhammel 2000: 269. On the history of the Meiji constitution see Ōishi 1992.

70 For a more detailed critique of law in world and global history see Benton 2002: 3.

71 Goodman 2003; Röhl 2005; Fukushima 1993; Tanaka 1976. Some of these studies highlight the perceived success of modernization or westernization (for the state of research see Ginsburg 2010: 17 and Dean

case of Meiji Japan, we therefore know a great deal about the translation of codes and the influence of various Western legal traditions. But our knowledge of the actual processes of appropriation and social response is still limited. Two problems follow from this: a focus on the history of legal ideas while neglecting the details of their specific implementation may encourage an exaggerated sense of Western influence. Additionally, legal reforms have often appeared disconnected from social change and realities—a point which concerns the broader historiography of Meiji-Japan itself:

> While Japanese law borrowed extensively from European Codes, the population was unconcerned with this new legal order and the new rulers of Japan appear to have been unconcerned about the popular view of the law. It can be argued that there existed a fundamental disconnect between the new legal regime created by the Meiji oligarchs and interpreted by the Meiji courts and the realities of Japanese life in the cities and villages of Japan. (Goodman 2003: 28)

A new cultural history of law that genuinely accounts for popular responses to the legal reforms would give us a much more comprehensive picture. It is thus necessary, above all, to shift our focus from the law of books to the process of law in action. This article focuses on the courtroom as a place of encounter between the law and the general public, the site where law was implemented and thus »made.« The public trials of the mid-Meiji period appear to be a good starting point for a discussion of the implementation of Western law in Japan. For this purpose, I have chosen one of the most notorious criminal trials of Meiji Japan, that of the geisha Hanai Oume[72] who was accused of having murdered her lover

2002: 60), while others emphasize the particularities of the Japanese system (Haley 1998; Tanaka 1976: 191–192; Stevens 1971: 667).

72 This article follows the Japanese practice of writing a person's last name followed by their first name. In the case of Hanai Oume, the first name is her surname and the second is her stage name. However, due to her fame as geisha she was generally referred to in newspaper reports by her stage name. Thus this article also refers to her as Oume.

Yasugi Minekichi in 1887 in Tokyo. Why a criminal case? First, the seriousness of this crime and its lurid character guaranteed a great deal of public attention.[73] Second, in the early Meiji era criminal trials were held in public for the first time in Japan, thus the case enables a discussion of social participation in the new legal system. This article aims at thereby showing that legal reforms were not just a symptom of, but rather a factor for, the changing social and gender order in Meiji Japan.

The following is divided into five sections. The first attempts to reconstruct the case on the basis of the findings of the police investigation. The second section examines the historical background, particularly the far-reaching judicial reforms enacted in this period. The third section addresses the trial itself. Crucial questions include the following: What role did trials play in connecting the state and society? Did they help to satisfy the public's desire for justice? What was the relationship between the emergence of mass media, public trials, and the widespread craving for sensation? The article subsequently describes the trial's aftermath and, lastly, discusses the possibility of a new cultural history of law, asking how the inclusion of legal affairs might contribute to our understanding of the history of Meiji Japan.

The case

On the night of 9 June 1887 a murder took place in one of Tokyo's entertainment districts. According to the preliminary investigation of the crime, a geisha known as Hanai Oume stabbed her *hakoya* to death.[74] Geishas usually hire *hakoyas* or »box-men« to carry their *shamisen* and other items when they are working outside of their teahouses. The victim was Yasugi Minekichi, also known as Mineyoshi or Minesaburō. Mineki-

73 Recent scholarship has recognized the significance of court trials for a new cultural history of European law: Hett 2004; Siemens 2007; and Steinmetz 2002.

74 On the course of events see *Tōkyō nichinichi*, 11 June 1887 (cited in Meiji Nyūsu Jiten Hensan Iinkai 1984: 652). On Oume's life-story see Jiken Hanzai Kenkyūkai 2002: 790–791; Yamashita 1988: 211–214; Kata 1980: 22–30; Asai 1903; as well as Satō 1887.

chi was not only Oume's *hakoya,* but also her lover. Their relationship had apparently been quite complicated and unsettled. On a dark, rainy night, Oume waited for Minekichi in front of her teahouse. They began to quarrel soon after Minekichi arrived. As the preliminary investigation report stated, Oume finally attacked Minekichi with a kitchen knife and slashed his neck. Minekichi escaped but died shortly afterward from blood loss. Oume briefly fled to her father's house before turning herself in to the local police.

Figure 1: »Kinsei jinbutsushi. Hanai Oume,« Coloured newspaper page by Tsukioka Yoshitoshi, 1877. Source: *Yamamoto Shinbun*, Nr. 263, 20 Aug. 1887.

Over the next few days the case made headlines all over Japan. In the early Meiji era, newspapers were a new medium and crime and trial reporting drove the fledgling industry from the beginning. The news cov-

erage was thus not unusual, as cases of female violence attracted wide public attention. Many newspapers provided details of Oume's disreputable life as a geisha. The daily *Jiji shinpō* stated in its edition of June 11:

> Hanai Oume opened a stylish teahouse called ›Suigetsu‹ [literarily: drunken moon] and earned her living by singing, dancing and playing *shamisen*. In the Shinbashi district of Tokyo she was also known as Hidekichi […] and there were rumors that she was always drunk.[75]

Not only was Oume described as a drunkard but her stage name was mentioned as a telling detail: Because Hidekichi is written with the same characters as Hideyoshi, she bore the same name as the famous 16th-century warlord Toyotomi Hideyoshi, one of the unifiers of Japan. Accordingly, in many of these articles she was described as being »mannish, proud, and overbearing« in character, despite her looks which were invariably found to be »elegant and beautiful.«[76]

Oume's career was determined early in life. She was born into a poor samurai family in 1864, in the vicinity of present-day Tokyo. At the age of six she was given up for adoption and sold to a geisha house. There she seems to have acquired some of the skills required of a geisha, such as playing the *shamisen*. At 15 she started to work as a geisha. Six years later she went into business for herself in Shinbashi and began to use the name Hidekichi. At this time, she seems to have become involved in a form of prostitution which took place on ships. Sometimes geishas provided this form of entertainment, but it was seen as a rather low-level occupation for these well-trained entertainers. Oume became known for her good looks. She was soon able to escape from the seedy environment of the harbor and found work at a more prestigious venue. There she became involved with Yodaime Sawamura Gennosuke, the president of one of Japan's first private banks. He even sought to become her pa-

75 *Jiji shinpō* of June 11, 1887 (quoted in Meiji Nyūsu Jiten Hensan Iinkai 1984: 652).

76 Nyūsu Jiten Hensan Iinkai 1984: 652–653.

tron, but Oume preferred to remain independent. She was able to save money and opened her own teahouse, hiring Minekichi as her *hakoya*.

Her teahouse was a success, but this in turn led to new difficulties. According to the police investigation, within the space of a few weeks, Minekichi had attempted to gain control of the teahouse. One problem was that the business was officially registered in the name of Oume's father, with whom Minekichi had allied himself. The two men attempted to take over her business, which Oume resisted. On the evening of the murder she took Minekichi to task and the situation escalated. At the time of the court case, Oume was 23 years old. From the beginning, the killing's lurid setting and the gender issues involved—mainly the fact that the violence was committed by a woman—ensured that the case received a great deal of public attention. An indicator for this are the many different *nishikie shinbun* that were sold all over Japan immediately after the murder. *Nishikie shinbun* combined written news reports with often lurid and bloody color prints. They were a very popular medium of the early Meiji years, and violence committed by women was one of their favorite topics (Kinoshita 1999). In these newspaper prints, Oume was shown as a cold-blooded, strong, and dominant woman who was at the same time a beautiful and artful geisha. She acted, whereas her male victim seemed helpless and feeble, and was often faceless (see figure 1).

The legal background

Oume's trial coincided with a period of fast-paced legal reforms. In the wake of the Meiji Revolution of 1868, a small new elite began an ambitious program of reforms. These reforms were all enacted in the first few years of the new era, but only after several decades would their effects become fully visible. Yet by the eve of the First World War, Japan had become an industrialized nation-state, a colonial empire, and one of the world's great powers.

Laws were central to the Meiji Revolution at various levels. First and foremost, the reforms were legally binding acts.[77] Among the most important were an act abolishing the feudal domains (1871), a conscription ordinance (1872), and land and tax laws (1873).[78] Their overall effect was to bring about the end of the feudal order. The Japanese people were confronted with a set of new rights and obligations, starting with the Five Charter Oath of 1868—the pillar of the Meiji Revolution—according to which »all classes, high and low, shall be united« (Sasayama 1994: 240). At the level of the legal system, the changes were truly revolutionary in nature: property rights were strengthened, and freedom to choose a profession and freedom of movement were granted. In consequence, the sale of human beings—the fate of the young Oume in the final years of the Edo period (1603–1868)—was banned, although in practice it at first continued. The great reforms ultimately entailed the juridification and codification of society in general. This process lasted for several decades. One reason for the ongoing necessity of new laws and reforms during the Meiji years is that the epoch-making changes enacted in the first few years after the revolution enabled entirely new forms of social relationships, behavior, and mobility. In the eyes of the authorities, these all required regulation.

But the urgent need for new legislation and penal reforms were never matters of domestic concern alone (Botsman 2005: 140). The Western powers had condemned the legal order of Edo Japan as barbaric and, exploiting the absence (as they saw it) of the rule of law in Japan, forced the so-called unequal treaties on the country during the 1850s and 1860s.[79] Application of the principle of extraterritoriality to the Western nations was an important element of the unequal treaties. It meant that Westerners were not bound by Japanese law. Since the treaties called

77 For the history of legal reforms in Meiji Japan see Kasumi 2007; Fukushima 1993; Röhl 2005.

78 The acts may be found in Fujita 2007: 18, 24, 27.

79 On the unequal treaties see Auslin 2006.

Japanese sovereignty into question and raised fears of colonization, the old legal practices appeared to jeopardize the state's existence.

To understand the Westerners attitude as well as the range of Meiji reforms, we must take a look at the legal order of Edo Japan. Pre-Meiji legal concepts were heavily influenced by Chinese law and thus by neo-Confucian ideas of social order and justice.[80] Generally speaking, law was seen as synonymous with morality. Edo Japan lacked both written laws and a constitution accessible to everyone. The central government, the *shogunat*, did issue legal guidelines for its officials from time to time. But these officials had only a certain degree of control over legal proceedings, and only in areas under their direct rule. This excluded most of Japan, where the local feudal lords, the *daimyōs*, acted as the supreme legal authority. Edo jurisdiction thus lacked the separation of powers and was characterized by fragmentation. Moreover, criminal trials, verdicts, and punishments all depended on the social class of the accused. Punishments were severe and capital punishment was applied frequently. When the Western powers forced the country to open, crucifixion and burning were both means of capital punishment.[81]

All of these facts taken together made it easy for the Western powers to argue that Japan lacked the rule of law when they forced their way into Japan in the mid-19th century. Torture and corporal punishment in particular were used as a pretext for establishing extraterritoriality. Westerners naturally tended to exaggerate these points to their own advantage and their claims were not entirely legitimate. In reality, Edo Japan was by no means lawless and did know written collections of rules and laws. In practice, these laws were not as secret as has been supposed (Botsman 2005: 34). In the mid-18th century, the *Kujikata-Osadamegaki* code was issued. These »Rules for Public Officials« concerned administrative, penal, and civil law. Overall, not every aspect of the legal system of Edo

80 For jurisprudence in pre-1868 Japan see Dean 2002: 58–60 and Steenstrup 1991.

81 Between 1862 and 1865 fifteen crucifixions took place in Edo (Botsman 2005: 17–18).

Japan was unable to withstand comparison with its European counterparts—in some cases it was even »a more ›modern‹ system, than say, prevailed in France about 1750« (Steenstrup 1991: 116). In addition, the system was not as static as Westerners maintained. To be sure, the fragmentation of legal systems was real, but over the course of the Edo years legal practices increasingly converged, guided by the shogunal jurisdiction. Lately the literature has rightfully pointed out the country's long history of legislation and legal practices as well as the tendencies toward systematization, humanization, and centralization during the Edo period that was not due to Western pressure or influence (Botsman 2005; Steenstrup 1991). But even if the legal history of Edo Japan is much more dynamic and complex than has hitherto been believed, the fact remains that the Western powers simply did not care. In their eyes, the legal order of Japan was backward and brutal. Moreover—and this is the central point in this context—after the Meiji Revolution Japan's new elite began to share this belief.

The wish to revise the unequal treaties—and thus to restore Japanese sovereignty and to secure the country's independence—was the main drive behind the great reforms (Perez 1997). Shortly after the revolution, a wide range of codes were enacted to satisfy Western demands. French and German legislation provided the chief sources of inspiration. At the same time, jurisprudence underwent institutionalization. In 1872, Japan established a ministry of justice. The changes were evident not only in Tokyo, all over Japan impressive stone courts were erected.[82] The newly founded universities—above all the Imperial University of Tokyo—also played an important role in the process of institutionalization and standardization.[83] After two decades of change, the process of legal reform culminated around the time of Oume's trial in the Meiji constitution of 1889. This was the first constitution in an Asian country to be based on

82 On the new court buildings see Shihōkyōkai 1995: 16–19. For the history of courts see Hayashiya 2003.

83 For the law faculty of the Tokyo University see Tōkyō Daigaku Hyakunenshi Henshū Iinkai 1984a: 97–103 and Tōkyō Daigaku Hyakunenshi Henshū Iinkai, 1984b: 451–514.

Western standards. The constitution marked the peak of the great reforms and was supposed to make rule of law in Japan visible to the rest of the world.

Oume's case requires a closer examination of the reforms to penal law, for which initial changes were announced only months after the revolution. In February 1868, the *Karikeiritsu* was enacted. This »Provisional Criminal Code« applied to feudal domains across Japan, and banned some punishments seen as especially cruel such as crucifixion or burning. Although it did not regulate criminal trials, the *Karikeiritsu* nonetheless proves that the new government sought from the outset to centralize legislation throughout Japan.

However this was only a first step. Over the following six years, the government drafted several new penal codes. In 1871, the government enacted the *Shinritsu kōryō* (Outline of the New Criminal Code) and two years later the *Kaitei ritsurei* (Reformed Criminal Code). While the first was largely based on Chinese legal principles of the Ming and Qing periods, the latter was Japan's first penal code which borrowed extensively from Western legislation. Both of these laws reduced the frequency of severe corporal punishment and replaced it with imprisonment in some cases—mainly to meet Western expectations.[84] But the real bone of contention was the public nature of the punishments. Therefore, during the 1870s punishment in public was banned altogether. Foucault's assessment of late 18th and early 19th-century France might thus also be said to apply to early-Meiji Japan (Foucault 1975). Again, this development does not solely reflect Western influence, since even in the Edo period Japanese penal practices were evolving toward »somewhat more humanitarian methods.«[85]

However, the reforms of the early Meiji years were unable to halt Western criticism. The famous Iwakura Mission, which traveled in the United States and Europe in the period from 1871 to 1873, failed to persuade

84 On punishment in Japan around 1870 see Oda 2009.

85 Steenstrup 1991: 154.

any of the Western powers to cancel the unequal treaties. The Japanese authorities realized that the country's penal laws remained a key obstacle. The new penal laws enacted in the early 1870s contained several problems. On the one hand, the various new codes were all used at the same time, leading to confusion. On the other hand, the new codes still maintained social discrimination.[86] By the middle of the first decade of the Meiji era, it had become clear that the system required more fundamental changes. In 1875, a committee began to plan for a new criminal law which was to be based on Western—mainly French—law. Strongly influenced by the French legal scholar Gustave Emile Boissonade, who was serving as a law professor at the ministry of justice in Tokyo at this time, the commission finished its work five years later and published the *Keihō* (Criminal Code) and the *Chizaihō* (Criminal Procedure Law). Beheading and torture were abolished once and for all. The Criminal Procedure Law also brought fundamental changes; for example, it introduced federal prosecutors and lawyers.[87] These two codes met with strong public interest and, even before they came into force in January 1882, publishing houses all over Japan published dozens of editions of the codes.[88]

The reasons for this interest are clear, since all courts were now open to the public. As the closed tribunals of the Edo period disappeared, a new courts system emerged. In this process, after the Meiji Revolution, trials were gradually made public. Access was initially restricted to journalists. The general public was permitted to attend civil trials in 1875, but had to wait seven more years until they were admitted to criminal trials (Matsunaga 2006: 24). However not everyone was immediately welcome. It was necessary to apply for access, which was quite often refused. The authorities wished to maintain some degree of control. For them, open-

86 For more detailed information on criminal law in the first decade of Meiji Japan see Röhl 2005: 607–609 and Chen 1981.

87 For the history of lawyers in Meiji Japan see Tani 2009 and in late-Edo Japan Tani 2008.

88 Anon 1880; Dajōkan Insatsukyoku 1880 and Hashizume 1880.

ing the courts proved problematic, as is reflected by the number of laws enacted in this period regulating the public's behavior in the courthouse. The public's behavior was also an issue in Oume's trial—as we will see in the following.

The Trial

Oume's trial took place in the Tokyo »court for serious crimes« over the course of three days in November 1887. It was only »the fourth occasion that the courtroom of the Tokyo ›court for serious crimes‹ was open to the public,« as the *Jiji shinpō* reported.[89] The courthouse was a new building in the Western style. It held public trials and could accommodate hundreds of visitors, a necessity due to the widespread interest attracted by criminal trials. But, as the *Yomiuri* newspaper reported, the court proved too small for Oume's trial:

> Yesterday, in the early morning while it was still dark, crowds waited at the entrance to the Tokyo ›court for serious crimes.‹ There was a crowd of around 1,000 and therefore the crush was terrible. Then more police arrived to restrict entry to the court and for about an hour it was impossible to enter or leave the court. Finally, after much discussion and begging, the first two hundred people in front of the court building were permitted to enter the court and received their tickets for admission.[90]

Three things are important: First, the open trials of the late 1880s attracted crowds. Second, tickets for admission were now distributed on a first come first serve basis; the authorities obviously no longer sought to control or select the audience. Third, for the gathering crowd, attending a trial had become almost an everyday occurrence. They expected to enter without delay, and those who were denied admission saw the police's behavior as a provocation. When the doors were closed many protested and tried to interrupt the trial. They threw stones and destroyed

89 *Jiji shinpō,* 14 July 1887 (quoted in: Meiji Nyūsu Jiten Hensan Iinkai 1984: 652).

90 *Yomiuri shinbun* 19 November 1887: 3.

five courthouse windows. A 32-year-old traveling salesman was held responsible for this incident and received a prison sentence (Yamashita 1988: 215).

But what happened inside the building and who was able to enter? The *Chōya* newspaper gives us an impression:

> There were calligraphy students, merchants, and *rakugo* players wishing to see the trial of Oume. [...] The 200 people who were permitted to enter the court included storytellers and around 23 housewives and their children.[91]

Many newspaper reports included descriptions of the spectators. The presence of storytellers at the trial is readily explicable since Oume's crime was soon reflected in various forms of entertainment, including *kabuki* plays. But the presence of so many »common women«—sometimes together with their children—seems to have puzzled the journalists. Overall, these reports suggest that in the 1880s huge audiences—from a broad range of social strata—gathered to follow the trials.

For those who were unable to gain admission to the court or who lacked the time to attend, illustrations of the trial in the form of black-and-white woodblock prints were on sale within a period of days.[92] Together with the newspaper reports, these prints provide a detailed description of the Meiji-period courtroom. The existence of such pictures is in itself remarkable: It was one thing to open up the courts, but quite another to permit commercial publishers to print images of the protagonists at the trial.

91 *Chōya shinbun* of 19 November 1887.

92 *Tōkyō eiri shinbun* of November 19, 1887: 2 or Satō 1887: 4–5. For an example of another trial see Meiji Nyūsu Jiten Hensan Iinkai 1984: 6.

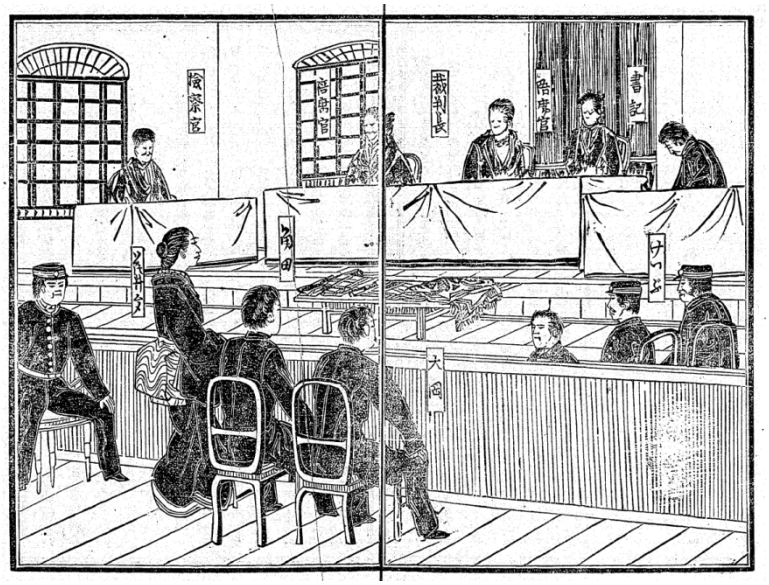

Figure 2: »Notes from the public trial of Hanai Ume,« Black-and-white print, double page. Artist unknown. Source: Satō 1887: 26–27.

The woodblock prints all essentially show the same setting (see figure 2): the key protagonists at the trial and their positions within the courtroom. In the mid-Meiji period of the late 19th-century, this setting was always identical due to the strictness of the Criminal Procedure Law. The presiding judge sat in the center, flanked by two assistant judges. The public prosecutor sat to their right at a separate table, and a clerk sat to their left. These persons were all seated on a raised platform. In front of them was a small table for the deposition of evidence. A fence separated the accused and her lawyer from the judges and the public prosecutor, with police officers standing in between. The overall effect of the seating arrangements was to heighten the sense of the authorities' superiority. The accused was the sole person who was required to stand. As other sources confirm, the woodblock prints produced during Oume's trial depict a standard courtroom scene in Meiji Japan (Shihōkyōkai 1995: 5). Another aspect of these prints is also eye-catching: The above-mentioned figures are always labeled in courtroom illustrations. In other words, the court-

room scene was so new and unfamiliar that ordinary newspaper readers could hardly be expected to recognize the protagonists.

Most visitors will have readily identified the judges through their position at the center of the courtroom. In line with continental European practice, the presiding judge played a very active role in trials. He certainly did so at Oume's trial, which was documented in its entirety in a report entitled *Notes from the public trial of Hanai Ume* (Satō 1887). This court report—in all likelihood the first of its kind in Japan—consisted of a small book of around fifty pages and was published quite promptly. It was on sale just a few days after the trial ended in early December 1887. The *Notes from the public trial of Hanai Ume* claimed to give a realistic account of the proceedings (Satō 1887: 1).

The judge's questioning opened the trial. According to the narrative of the *Notes*, the judge played the key role in the prosecution.[93] Judge Kosugi Naokichi first established Oume's personal details and read out the charges before embarking on a long series of questions concerning her life in the period leading up to the crime. The dialog between the judge and Oume fill over a third of the entire *Notes*. Evidently, Kosugi wanted to know everything about Oume's life in order to understand her crime. Oume was granted a great deal of time to describe her family background, her career as a geisha, and all of the hardships she had faced in her young life.

The protracted nature of this initial questioning of the accused is all the more remarkable because Oume had already confessed to the crime. The preliminary investigation had commenced in June 1887. This investigation had a central role within the trial system. In it, the key facts were established, the witnesses were heard, the evidence was presented, and the medical examination of the corpse was discussed.[94] Together with the open trial practice of only submitting evidence in the form of long dialogues between the judge and the accused, the preliminary investiga-

93 Procedures for the start of a trial are stipulated in Anon 1880: 133.

94 On the preliminary investigation see Satō 1887: 3.

tion lent the Japanese system an inquisitorial touch. Lawyers were not allowed to take part in the preliminary investigation. This was controversial since lawyers saw a danger that »after elaborate investigations by *juges d'instruction,* the accused was presumed in the public mind to be guilty« (Dean 2002: 99). At first glance, this secretiveness might be interpreted as a remnant of old, inquisitorial methods. Yet it would be mistaken to interpret the preliminary investigations and the inquisitorial character of the trial as proof of the continuing backwardness of penal law in mid-Meiji Japan and its incomplete westernization. The proceedings described here followed exactly the French model initially established during the age of Enlightenment during the second half of the 18th century, transformed by the French Revolution, and finally systematized in the Napoleonic Code of 1810. The procedure for French criminal trials was traditionally inquisitorial in nature, especially during the preliminary investigation.

However, as in the French system, Oume's public trial combined elements of the inquisitorial and the adversarial system (Elliott 2011: 210–214). The power of the judge, and thus of the state, was balanced by three important factors. First, by the prosecutor—who was also present at the trial. While it was easy for Japanese spectators to identify the judge, the prosecutor was less conspicuous. The public may have struggled to understand his role in the courtroom. This was partly because the prosecutor remained silent and passive for much of the proceedings. In Oume's case, he only intervened in the final third of the trial and his role was limited to summing up his view that Oume was guilty of murder and not simply of manslaughter (Satō 1887: 28). While a clear distinction now existed between the judge and the prosecutor for the first time in Japanese history, the former tended to dominate the trial and to diminish the latter's profile. Despite this, however, the prosecutor played an essential role in the overall system. Ever since the introduction of public trials and the office of the prosecutor during the French Revolution, the two had been inseparable (Hett 2004: 32). In Meiji Japan, the prosecutor thus revealed France's influence in the Japanese Criminal Code as well as

a departure from the even more inquisitorial system that had been characteristic of the Edo period.

Lawyers were more important as a counterbalance to the judge's power.[95] In their case too, many spectators will have no doubt struggled to understand their role. The general public appears to have found them of considerably more interest than the silent prosecutor. Apart from Oume, the lawyers are the only other courtroom protagonists who are indicated by name on the woodblock prints (the judges and other court officials are merely indicated in terms of their functions). Oume had two lawyers, Tsunota Shinpei and Ōoka Ikuzō, both of whom were obviously eager to defend her since public interest in the trial represented an opportunity for them to establish reputations for themselves. Ōoka was to become one of the most famous criminal defense lawyers of Meiji Japan. Born in 1856, the young Ōoka was admitted to practice as a lawyer in 1882. He began his career at the age of 26 defending the accused in the Chichibu Incident, a peasant revolt which took place near Tokyo in 1884. By the time he took up Oume's case, he was already well-known for defending »hopeless« cases, and the newspapers provided detailed reports of his defense of Oume.[96] The lawyer's profession is a good example of the opportunities that the new political order of Meiji Japan created for the self-made man of the era. Open trials provided lawyers with a platform for fame, and their careers were founded on the reputations they gained from their courtroom performances; they became courtroom celebrities. Ōoka appears to have become even more popular by acting against the state in political cases. He later became a successful politician—a clear illustration of the wide range of new career opportunities that emerged in the Meiji years and how they were connected to legal affairs.

Ōoka surprised the spectators and the judges at Oume's trial by stating that Oume was mentally confused and had been temporarily insane at

95 On Western lawyers see Duff 2007: 40–41.

96 *Jiji Shinpō,* 14 July 1887 (cited in Meiji Nyūsu Jiten Hensan Iinkai 1984: 652).

the time of the crime. In Japan, this form of plea was rather new. By way of evidence, Ōoka contended that Oume's mother had also been mad. Oume had attacked Minekichi in a state of confusion, he insisted, and her crime was thus manslaughter rather than deliberate murder (Satō 1887: 26–28). He thereby wanted to save her from the death penalty.

The media and the general public were the third and final counterbalance to the power of the judge. Newspaper coverage of trials was a new phenomenon, as daily newspapers only began to appear in the early 1870s (Okitsu 1997). Journalists started to cover trials in the 1880s, and crime stories were soon an important part of the news. This is clear in any perusal of *Yomiuri* and *Asahi*—two of the most popular Meiji period newspapers, both still published today: The phrase »public trial« [*kōhan*] was first used around 1880. In the five years after 1883—the era of Oume's trial—*Yomiuri* printed over 1,000 articles on public trials. *Asahi*'s figures are even more impressive. In the same period it published over 2,200 articles referring to »public trials,« a frequency of more than one article per day. However, it was only later that the phenomenon peaked. In the five-year period from 1888 to 1892 *Asahi* published over 4,000 articles in this area. These articles subsequently appeared less frequently, a trend which is all the more remarkable in view of newspapers' growing size. While in the 1870s one page was the standard, around the time of Oume's crime three pages were average, and by the end of the Meiji period ten or more pages were not unusual. One might therefore expect the growing size of newspapers to have entailed a wider coverage of trials. Since this was not the case, it is reasonable to conclude that interest in this new form of justice peaked in the first decade following the introduction of public trials.

All over Japan, readers could learn of developments in the trial on the following day. It was through this media that Oume became a well-known figure. Her crime was omnipresent, not only in the newspapers but also in book form. Courtroom narratives and criminal biographies both surged in popularity at this time. The *Notes from the public trial of Hanai Ume* were clearly written for a wide readership. Their Chinese characters were accompanied by a Japanese syllable script to make them eas-

ier for unskilled readers to read. The popularity of court reports published in book form peaked in Japan in the final years of the 19th century. To be sure, courtroom narratives already existed in the Edo period—based on a Chinese tradition—but »these stories were written in a climate of authoritarian legal thought, and they generally glorified the state's authority as it was embodied in the wise judges at these stories' center«; the heroes of these narratives were the judges who were portrayed as »unfailingly clear-sighted men« (Silver, 2008: 16). Something had changed in the courtroom reports of the early Meiji period: While the judges still played a prominent role, they were no longer the sole source of law, justice, and morals they had been in the Edo period. The courtroom reports, which claimed to be as realistic as possible, documented a new fascination with establishing the truth through a time-consuming act of gathering evidence. They included official documents, records of criminal testimony, the wording of the proceedings, and/or medical reports. The general public thus obtained a »scientific« view of the trials of the mid-Meiji years, an entirely new development. And many contemporaries saw a symbol of the new era in the scientification of legal practice.

Moreover, the accused was now granted much more attention than in the courtroom narratives of the Edo period. This leads us to the question of how Oume was portrayed in the press. Usually, she was described as an elegant lady. The newspaper *Chōya*, writing about her appearance at the hearing following the preliminary investigation on 12 November 1887, stated:

> Oume is today wearing two decorative pairs of medium-size kimono undergarments of raw silk twill fabric in a fine diamond pattern, above this three black kimonos decorated with a family crest, an *obi* of fine woven Chinese satin damask, a long undershirt of crimson crepe and a white silk crepe *obi*. Her hair is untied. (Meiji Nyūsu Jiten Hensan Iinkai 1984: 653)

It was not unusual for Geishas to dress for work in such a way that their crimson under-kimono became visible, but it seems noteworthy that a woman presented herself like this before a court. On the one hand,

Oume was apparently not afraid to use her charms. On the other hand, the authorities obviously did not disapprove of such behavior, as she was able to obtain the elegant and expensive clothing she needed during her stay in jail. The newspaper in turn contributed to the voyeurism by giving detailed and sexualized description of Oume. Concerning her appearance before court, woodblock prints backed the newspaper article (Satō 1887). In the *Tōkyō eiri* newspaper, for example, Oume is presented as an elegant geisha. In this print she has center-stage rather than the judges, the prosecutor or the new legal system as represented by the court building. Through her beauty, she seems to challenge the dull, technocratic appearance of the other protagonists at the trial. This effect is heightened by Oume's outsized and framed image. Set against the courtroom background, her beauty appears untouched by the legal proceedings; she seems to be standing outside or above the legal order.[97] The newspapers enhanced these effects by focusing on every aspect of the trial and even inquiring into her everyday life, which was discussed in detail in the media as well as in the courtroom. The public thirsted for biographies of criminals in the mid-Meiji period. Supposedly they hoped to find some explanation for the violent acts in the lives of delinquents. This, together with the long interrogation of the accused by the judge, may be interpreted as an attempt to establish something along the lines of a social context or a social reality within which the crime was committed. In other words, an attempt to understand crime as a product of social circumstances. Summing up, her performance seemed to have helped Oume gain public attention and fame. Occupying center-stage in the media in turn proved useful as regards her sentence—as we will see in the following.

The Aftermath

The judges refused to follow the arguments of Oume's lawyers and found her guilty of deliberate murder after a three-day trial. Under Article 292 of the Criminal Code, this crime was punishable by death pen-

97 *Tōkyō eiri shinbun,* 19 November 1887.

alty. However, due to her life story and her confession, the judges acknowledged extenuating circumstances, possible under Articles 89 and 90. They sentenced her to life imprisonment rather than imposing a death sentence (Satō 1887: 41–42). Her escape from capital punishment came rather unexpectedly and—if we are to believe the comments—Oume seems to have been pleased with the outcome. Overall, it seems as Oume benefited from her performance before the judges as well as from her popularity due to the media coverage of the crime. But the verdict also fits with the overall trend in jurisprudence, as the administration of capital punishment—especially for women—saw a general decrease in those years (Schmidt 2002: 25–26).

The verdict also implied the possibility that the criminal was amenable to reform. The mid-Meiji court differed fundamentally from its Edo-period predecessor in this respect. Before 1868, a crime jeopardized public order, which was restored by determining guilt and inflicting severe punishment. In the fast-changing world of Meiji Japan, this was no longer possible. The social order was now re-established by comprehending the crime and its context, of which the court, the criminal, and the public at large (at least ideally) were to reach a common understanding. The point was not only to understand Oume's motives for the murder, but to comprehend her state of mind in committing the deed.

The interest on the part of the authorities and the general public in Oume's character, life-story, and motives continued even after the court's ruling. Oume spent only 15 years in prison, in 1903 she was pardoned and released, at which time she was 40 years old. A well-timed biography appeared at her release from prison, and the newspapers once again began to cover every aspect of her life. Exploiting her widespread fame, she opened a restaurant close to the scene of the crime. Two years later she even played herself in a drama about the crime and toured all over Japan. She later resumed work as a geisha before dying of pneumonia in 1916 at the age of 53. Several songs, novels, and even *kabuki* plays still told of her crime even then, and more was to come: Between 1922 and 1935 four films about her life appeared, the last of which bore the name *A woman of the Meiji era* (*Meiji ichidai onna)*. The novelist Kawaguchi

Matsutarō used this same title for his book on Oume, with a preface by the famous author Tanizaki Jun'ichirō. In the second decade of the *Shōwa* period (1926–1989*) A woman of the Meiji era* also became a famous song. With the passing of the old world of Meiji Japan, Oume increasingly came to symbolize the women of her generation; a fallen but bold figure who—through the various contradictory aspects of her character—represented the rapidly changing social and gender relationships of her era.

What are the reasons for her ongoing popularity and her post-prison career and »success« as a symbol of her age? The presentation of her life-story as a narrative of repentance and rehabilitation is surely an important element. During her imprisonment, the media's discussion of whether Oume was in fact mentally ill was by no means flattering to her (Marran 2007: 82). While this discussion did ensure continuing public interest, she was often found to be a crazy woman who was beyond rehabilitation and of no use to society. Influenced by the new scientific discourse on mental illness, the general public was fascinated by questions of repentance, rehabilitation, and criminals' usefulness to society. It is thus hardly surprising that, with the help of a journalist, Oume produced a book about her life in which she promised to tell her whole story all over again, including her years in prison, and thus sought to improve her public image. She presented herself as someone who had gone through the prison system and thereby once more become a useful part of society (Asai 1903: 1–2). In retrospect, it is the multifaceted and contradictory story of the difficulties which she faced, the narrative of mental and social reform, and her success as a businesswoman which make her life appear typical of the fast-changing society of Meiji Japan.

Conclusion

An opening question for this article was the extent to which the legal system of late 19th-century Japan underwent westernization—in theory and in practice. By the early 1880s, the Japanese criminal code was a faithful copy of French legislation. Given the fact that there weren't many alternatives to reform of the legal order, this is hardly surprising.

But Oume's trial proves that even Japanese legal practice was westernized *in extenso*. In the mid-Meiji years, the courtroom scene and proceedings so closely resembled the French model that a European visitor versed in French legal culture who attended Oume's trial might have readily identified the key protagonists. If this visitor had also been capable of understanding Japanese, even the proceeding and the argumentation of the verdict would have been familiar to him. It has been claimed that the »code of criminal procedure [...] could not be adjusted to Japanese circumstances and thus quickly became a paper tiger« (Schmidt 2002: 25). As far as Oume's trial is concerned, this can not be confirmed. Japan's case illustrates, first and foremost, the scope of the globalization of legal culture in the 19th century within a specific context. These findings complement existing research focusing on law in text and it contradicts research claiming the ongoing cultural particularity of Japanese law.

In fact, Japanese idiosyncrasies only become apparent through an examination of public reaction and the debate surrounding the crime. Courtroom culture changed dramatically in the mid-Meiji period, when public interest in open trials peaked. Oume's public trial thus shows that around 1890, a specifically Japanese legal culture emerged through a combination of legal reforms and public participation. But the key point is that these idiosyncrasies cannot be explained in terms of a »traditional,« »unchanging« Japanese legal culture and in no way represented a wish to return to legal practices of the Edo period or to traditional ethical norms. They were instead a product of their era and thus historically contingent. In summary, this convergence of fast-changing practices and omnipresent public interest in trials marks a short and specific moment in modern Japanese history.

In any case, it is misleading to examine the affair exclusively through the prism of »westernization.« First of all, there were huge differences between Western legal systems in the 19th century (for instance, between the French inquisitorial system and the American adversarial system) that persist right up to the present day. The term »westernization« is therefore overly general and elides the broad variation in Western legal practice around 1900. Secondly, a focus on westernization obscures our view of

the dynamics of change and the particularity of Meiji Japan, because it describes an endpoint. In this sense, the use of the term »westernization« is ahistorical. The revolution of 1868 entailed new forms of social opportunity, mobility, and behavior. The abolition of the feudal order also gave rise to fear and uncertainty. Some of this is evident in the judge's repeated questioning of Oume as regards her origins and her social status—noble, samurai or commoner—and in the difficulties she experienced in providing correct answers to these questions (Satō 1887). Other ambiguities also played a role in the trial, particularly moral issues linked to the gender question. Oume worked as a geisha and killed to regain control of her business. She thus acted out a gender role far removed from the officially sanctioned model of a good wife and a wise mother—a new ideology of the early Meiji period, which picked up older Confucian gender ideals. It is surely no coincidence that a series of killings featuring female perpetrators, and geishas in particular, attracted public interest in the mid-Meiji period. The phenomenon became so popular that the contemporary press even coined an expression: *dokufu*—femme fatale, or literally an evil woman or »poison woman.«[98]

The open trials of the 1880s are best understood as rituals seeking to address and finally to resolve social crises triggered by the Meiji Revolution. They were social dramas which unfolded in the new public sphere of the courtroom.[99] Yet this space was never under the state's absolute control, and trials were not engines of repression. In fact, in many ways the courtroom represented an arena in which the state and society were able to negotiate with one another. Oume's case demonstrates above all the way in which police, judges, prosecutors, and lawyers interacted with experts, the media, and spectators in an open trial. Surprisingly, the latter (who might be termed the urban masses) were not passive and in fact played an active and participatory role, sometimes even criticizing proceedings. It is interesting to note that some similar development have been described for Western societies during the interwar years—espe-

98 For a broader discussion of the *dokufu* see Silver 2008: 17.

99 On social drama see Turner 1995: 108–127.

cially for Germany (Hett 2004; Siemens 2007). In the future it could fruitful to compare these findings in global perspective, to ask about the degree of mediatization of court trials in different societies, and the starting point of such developments.

In Japan many benefited from the legal reforms and from open trials. The media, the crowd, the lawyers and the prosecutors as a new class of legal professionals, and even the accused exploited the trial in their own, very different ways. It would be overly simple to see Oume as a mere victim of the proceedings. Instead, she used public interest in the trial for her own purposes. By telling her story and explaining her motives, she often met with something akin to public sympathy for her fate. To be sure, this public curiosity also had negative consequences, as illustrated by the continuing discussions about her mental stability. Ultimately, her trial provides us with a picture of the complex and contradictory nature of urban society in the mid-Meiji years.

Through Oume's case we glimpse the beginnings of a notion of public space in Meiji Japan. The Meiji courtroom may scarcely fit with concepts of a public sphere or civil society as defined by Jürgen Habermas.[100] In reference to such classical notions of a public sphere, many scholars have noted the absence of this (Eurocentric) idea in Meiji Japan. Certainly, following the high-point of the »Freedom and People's Right Movement« in the mid-1880s, it may be hard to find a liberal, rational, bourgeois public sphere along the lines of the 18th-century Western European salon in late 19th-century imperial Japan. But the courtroom does reveal a different kind of public sphere, resulting from public interest in criminals and sometimes even sympathy for them. This was a public sphere created also by the mass consumption of new media such as newspapers or *nishikie shinbun*. Therefore, in connection with public trials, the emergence of a new mass consumer culture—usually dated to the Taishō years (1912–1926) in Japanese historiography—can be traced back to the last decades of the 19th century.

100 On the notion of the public sphere, see Habermas: 1989.

This public sphere emerged amid official attempts to strengthen state authority and to establish a nation-state in the period leading up to the promulgation of the constitution. The emergence of this form of public sphere in late 19th-century Asia has not attracted much scholarly attention. But the case of Oume shows that it is worth thinking about changing legal cultures and practices during the Meiji era. On the one hand, a cultural history of law can make an important contribution to research on the social history of Meiji Japan—as the question of a public sphere shows. In this context, it provides us with a more complex insight into the multifariousness of Japanese society in the decades around 1900. And it contradicts the thesis that in Japan »legal modernization preceded social change (Seizelet 1992: 72)«; rather both went hand in hand and had a reciprocal influence upon each other. Also, the idea that »in the Meiji period, criminal law developed as a bulwark against liberal movements« (Seizelet 1992: 77) seems too crude. On the other hand, the trial of Oume also provides a concrete historical setting for an examination of the globalization of legal culture in the 19th century. When one looks at Oume's case, the legal system of Meiji Japan appears neither exotic nor alien. Her trial instead historicizes Japan's experience of legal reform processes within global contexts around 1900. This deepens our understanding of processes of legal globalization in the late 19th century, but also complicates our notions of »westernization.«

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Economic perspectives on the history of law: Property rights in business history[101]

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Introduction

The insight that law plays a significant and enforcing role in the economy is widely undisputed. However, when it comes to the question of the ways in which law intervenes in and influences economic processes, and how law prefigures the organizational structures of economic institutions, we still do not know that much. We might know, for instance, the legal framework within a business firm, but know little about how agents within the firm use it to gain profit or to solve business problems. Behind this gap, one can see that law has a quality that generates the duality of structure and agency as Anthony Giddens delineated in his structuration theory almost thirty years ago (Giddens 1984). Property is

101 This article is a shortened version of one chapter of my PhD dissertation in which I discuss methodological questions. In my dissertation, I analyzed the business history of the *Simson* company in Suhl/Thuringia between 1856 and 1993. The study focuses on the change of property rights arrangements under different political systems. It asks which political, socio-economic, and cultural circumstances bring actors to recognize property rights, and what the consequences are for the business performance of the company. The dissertation was part of the research project *Structural Change of Recognition in the 21st Century* at the Institute of Social Research in Frankfurt/M. http://www.ifs.uni-frankfurt.de/forschung/anerkennung/index.htm. I want to thank my advisors, Thomas Welskopp, University of Bielefeld, and Adam Tooze, Yale University, New Haven, for their constant support and their willingness to share their expertise with me.

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one of the most concise examples of this characteristic of law. On the one hand property receives rights, legal instruments or structures. On the other hand property is radically dependent on the contexts agents are able or powerful enough to enforce, secure, and institutionalize within property rights. Whereas economists tend to disregard the general problem—namely the fact that law always reflects specific contexts—and assume that the quality of property is neutral, historians and sociologists find it crucial to study the different structural settings and social contexts in which property finds its forms. From a historical or sociological perspective, law can be seen as one of the core topics that might be able to bridge the gap between economists and (economic) historians as well as social scientists.

In the following, I propose a methodological framework for the analysis of economic property rights in businesses. I want to show what the legal framework of »property« within firms is like, and how one might analyze several processes of juridification of property rights between interacting agents. I refer only to the business level within companies. In contrast to microeconomics, I do not refer to the systemic level and also not to the macro-level concerning the influence of constitutional law on market economies. In a first step I describe the basic aspects of property rights theory (PRT) in order to demonstrate the abstract core of property. PRT offers a controversial, but also fruitful approach to studying social practices, processes of juridification, and institutional changes in different property regimes within firms. At the same time, I will point out the problems resulting from economists' belief that it is possible to leave out social dimensions. My wish is to combine the theoretical and methodological implications of PRT, using the concept of »recognition« as a link between the social and structural dimensions of property. In conclusion, I propose a model for economic and business historians which reflects governance structures within firms.

The abstract core of property: Assigning agents specific scopes of action and decision-making capacities

Ever since the conceptualization of property rights theory (PRT) in the late 1960s, it has persisted as one of the most controversial, but nonetheless constitutional, elements of the research curriculum of new institutional economics (NIE). Since that time, the approach has been transferred into the specific research agendas of both economics and social sciences. The economists Harold Demsetz and Armen A. Alchian wrote the founding texts of this approach. These texts are today considered »classical« PRT, having influenced the works of later economists, namely Svetozar Pejovich, Eirik Furubotn, and Rudolf Richter in the 1970s, as well as Douglass C. North and Oliver Williamson in the 1980s and 1990s (Coase 1937: 386–405; Coase 1960: 1–44; Demsetz 1964: 347–359; Furubotn and Pejovich 1972: 1137–116; Furubotn and Pejovich 1973: 273–302; North 1988; Williamson 1990; Richter and Furubotn 2003: 87–132). In the field of (economic) sociology, the works of Michel Callon, Neil Fligstein, Neil Smelser, Richard Swedberg, Peter A. Hall, and David Soskice should be mentioned. Their highly influential books all experimented with analytical problems of property in different organizations (Callon 1994; Fligstein 2001; Smelser and Swedberg 1994; Hall and Soskice 2001).

Today's scientific debates stem from these author's canonical texts, which continue to be influential (Eggertsson 1990; Colombatto 2004; Jongwook and Mahoney 2005: 223–242). Their relevance for other academic branches and fields has since been proven. PRT was also influential for the German scientific discussion. The debates in Germany began in the 1970s, flourished in the 1980s, and ended relatively abruptly in the early 1990s (Schenk 1978; Buhbe 1980; Schüller 1983; Riekhof 1984; Budäus 1988; Elsner 1986; Kaulmann 1987). Given PRT`s wide adoption and applicability in many fields, many economists' harsh objection to the theory is astonishing (Neumann 1984; Erlei et al. 2007). The approach has been called naïve, ideological, and a useless interpolation of neoclassical theorems (Voigt 2002). Some even went as far as to declare that the only value of PRT was its object of research: property and prop-

erty rights as determinants for economies as well as for political systems. One reason why economists kept such distance to the approach was the internal dispute about the objective of economic theory in general. Neoclassical economists rejected PRT because they were (and still are) more familiar with explorations of formalized mathematical solutions. They were essentially uninterested in any attempt to bolster their theoretical frameworks with empirical details (Furubotn and Richter 2003: 161–200). This criticism was indeed justified regarding some aspects of PRT. For instance, PRT's scope of application was never conceptualized satisfactorily. It also remained unclear whether the approach was applicable to microeconomic or macroeconomic frameworks. Despite such deficits, PRT helped to promote its subject: property as an analytical variable appeared again in academic curricula. Some even spoke of a »new foundation of an economic theory of property« (Feldmann 2005: 80).

Regarding the field of economic and business history, it appears that neither discipline was very much interested in the approach. Especially in Germany, economic historians seem to have mostly adapted the negative dictum of neoclassic economics (Borchardt 1977: 139–160; Hutter 1979). Since then, only Alfred Reckendrees and Clemens Wischermann have added substantial contributions with regard to theoretical and methodological questions concerning property rights (Wischermann 1993: 239–258; Reckendrees 2004: 272–290). Especially Reckendrees valued the PRT approach especially as a methodological contribution to economic history, studying both its theoretical and methodological implications into historical settings.

Property is one of the core problems of economics. To this day, many economists and social scientists are trying to integrate the category of »property« into their theoretical framings and methodological tests (Eckl and Ludwig 2005). However, no one has yet found a satisfactory general solution for the integration of property into their models. The reason why property is such an analytical challenge lies in its direct dependence on context (Siegrist 2006: 10). This is the fundamental explanation of why it will remain impossible to reduce property to its pure economic functions (Plumpe 2009: 27). When it comes to the question of

property, economists as well as social scientists must take into account social, cultural, political, and institutional implications. Therefore, there is a great amount of literature that provides insights concerning the formation, characteristic traits, handling, protecting, and adaptation of highly specific property rights in different institutional contexts, while a universal formula cannot exist.

Consequently, most definitions define property rigorously as a legal, all-embracing, and absolute right *in rem* (Richter and Furubotn 2003: 95). This notion draws solely on the legal definition of property; one example is the system of rules for a constitutionally protected system of (private) ownership in society. The overarching legal system is without a doubt of great importance. Nevertheless, this understanding of property misses the abstract core of the matter. The Anglo-Saxon understanding of property provides a more complete and comprehensive approach. It understands property as a system of rules concerning social relations. This means that it does not necessarily and always have a physical counterpart in movable or immovable objects. First and foremost, property is a person-to-person relationship between at least two agents (Stephanians 2005: 133). As a result, property is viewed as a bundle of rights that precedes the scope of action as well as the scope of decision-making. These in turn determine the consumptive and productive uses of resources and fix the social hierarchies between agents. The bundle of rights is furthermore partitioned into rights of disposition and rights of use. Such a differentiation is useful, because it distinguishes between rights of enforcement and selling rights on the one side and rights of use on the other side (Heinsohn and Steiger: 43). Rights of disposition include rights of use, but not the other way around. If one speaks of property rights, one is always speaking of both rights of disposition and rights of use.

At the center of such an understanding of property stands the social negotiation process between at least two different (though not necessarily individual) agents. The social negotiation process is the decisive criterion in a complexly structured arrangement of legal rights, social practices, and cultural norms. Property rights, for example, can come into

existence without any legal expression, resting only on the strength of social and cultural norms and conventions. If this notion of property rights is taken seriously, one will not find a constitutive, durable, and compulsory ownership structure in business companies. But what will we find instead?

The link: »Recognition« as a key concept in property rights theory

As stated above, the abstract core of property lies in its assignation of a specific scope of action and a specific scope of decision-making capabilities to agents. In PRT, this assignation is set as both a restriction to and an exclusion of third parties/agents. This means that property rights limit the specific scope of action of other agents. The character and extent of these limited and specific property rights determines both incentives and the economic value of resources. In economic theory, ideally every property right in the entire bundle is assigned to exactly one agent, which will most commonly be an individual person. However, in the real world such a clear-cut relation does not exist; property rights are mostly unspecific (Richter and Furubotn 2003: 88). There are two main reasons for this. Firstly, negotiation processes and the allocation and control of property rights generate so-called transaction costs (Coase 1960: 1–44). Secondly, in most arrangements there are preexisting limitations of agents' access to property rights. Allow me to give one example to illustrate this problem. Let us imagine an individual who owns a parcel of land. Although this person is allowed to do a lot of things with his or her property, some activities are not allowed. For example, she does not have the right to install a commercial waste incineration plant. She must also accept that she might have neighbors who own the pathway to a nearby lake that crosses her land. Taking a broader look at his or her rights, he or she cannot ban airplanes flying overhead. And if the community plans to build a retirement home 500 feet away that will likely increase traffic and noise near her property, there is again nothing she can do about it. All of these factors, to greater and lesser degrees, influence the economic value of his or her property in both the near and long term. Furthermore, there are always other agents who, depending on the circumstances and societal constellations given, will oppose or

support the economic initiatives of others. This means that a specific and real arrangement of sanctions and gratifications for the exchange of property rights comes into existence (Eschenburg 1978: 13). Property rights never exist by themselves; the economic resources secured by property rights always have a relational value. As a result, the system of ownership—constituted by the bundle of rights of disposition over and use of property—is steadily evolving; rights are constantly negotiated and re-evaluated.

Until this point, the general assumptions concerning property and property rights are undisputed among economists. However, when it comes to bolstering them with empirical data, the theory's proponents mostly step back and thrust empirical findings aside. Questions of substance—such as those that concern agents, the social negotiation process, or processes of juridification—are excluded. Consequentially, the answers to the above-mentioned problems have been highly reductionist and have convinced neither neoclassicist economists nor social scientists. There is no need to go into further detail here as it is well-known that the majority of questions concerning the social dimension are hidden behind a rational, autonomous, self-interested, wealth-maximizing individual actor, the classical homo economicus (Plumpe 2004: 31–57). These homines economici are able to combine and redistribute their property rights as long as they want and without any interference from others until they achieve maximum benefits for themselves. This model does not account for (historical) change, power-relations, or negotiation-processes because the causal mechanism of the theory is reductionist and self-directed. As Harold Demsetz puts it: »Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization« (Demsetz 1964: 347).

The problem can be exemplified using the classic example of the fishermen (Callon 1998). A chemical plant is polluting a river and destroys its fish stock. The pollution therefore has consequences for the local fishermen's rights of use. The fishermen sue the plant for damages and demand compensation. According to the PRT and Coase theorem respectively, the manager of the firm will now weigh two options. Is it more

economical for the business to install a filter or to properly compensate the fishermen? Depending on this cost-benefit analysis, one of the two options will be chosen. On the one hand, such an explanation is substantial and can be observed in reality. On the other hand, the implicit and generalized presumptions are highly problematic. The direction of the negotiation process has been set by an a priori and normative criterion of efficiency. The behavioral assumption of self-interest is restricted to an extremely limited concept of homo oeconomicus. Firstly, all the individuals taking part in the bargaining processes aspire—quasi automatically—towards the most economically efficient solution and towards ensuring the exclusiveness of their property rights. Secondly, the individuals are adapting themselves—again quasi automatically—to the continuously changing economic and environmental conditions with which they are confronted (Elsner 1986: 330). In sum, the actions of agents are explained by methodological individualism, and the targets of the agents' action are explained by the utility function in a given system of property rights (Tietzel 1981: 224). Within such a model, negotiation and enforcement processes between agents are mostly not questioned (Libecap 1989: 4–5). Conflicts of interests, coalition- and group-building, and power-relations are excluded. There is, for instance, no differentiation between agents with formally codified property rights and agents with real power (Schüller 1983: 33).

But from an economic historian's point of view, one cannot exclude the systematic investigation of the forms through and conditions in which agents have tried to enforce their property rights. The same is true for the general context, i.e. the investigation of specific historical institutional environments. Only if one combines both dimensions can one observe the dynamics and the institutional changes of property rights, their direct dependence on contexts. The exchange of property rights can only be differentiated when the researcher analyzes the changing constellations between agents, including when and how they are trying to gain access, control, and benefit from property rights (Siegrist 2006: 32). If we now apply this to the fishermen example, we find that it is anything but clear that the fishermen would be willing to accept

compensation and in return agree to abandon their profession. Even if compensation were more cost-saving for the chemical plant than filters, it most likely would not be a long-term solution to the problem. First, one must determine the holder of property rights to the river. Most likely, these are not fully specified because rivers are public property. If so, the fishermen would have to win the interest of the community, competitors on the market, or the environmental protection office. Most likely, the fishermen would try to take their grievance to other—more powerful—agents since the opposing agents in this bargaining process over property rights are not of equal strength. Even if the fishermen were successful, their case would likely be appealed and negotiated, perhaps at higher governmental levels. In any case, every new negotiation would produce new transaction costs, most probably incalculable and in excess of the original damages. In the course of the process, interest will generally shift, relocate, and rescheduled (Richter and Furubotn 2003: 132).

If we take these insights seriously, it becomes obvious that the prerequisites contained in the classical property rights theory model are too normative and insufficient for the interrelated questions and complex methodological demands of business and economic historians. Historical work must be interested in the reconstruction and analytical description of concrete institutional arrangements. The latter are constituted by agents with specific, context-dependent rationalities and confronted with several constraints that affect their scope of action. This leads us to the question of how the underlying concepts of PRT can be operationalized in historical studies. Applying the property rights approach to business history allows us to analyze processes of negotiating the allocation and enforcement of property rights between external and internal agents, and to see the effects of these processes on the legal structure, production processes, organization, and economic success of companies.

To judge the performance and economic activities of a firm, the reconstruction of the specific and contingent scope of action for agents enforcing their property rights plays a prominent role. The question is how and under which political, social, and economic circumstances they were

able to enforce, secure, and institutionalize their property rights. The assignment of property rights to agents is enforced by agents through negotiation processes, secured by (incomplete) contracts, and institutionalized *ex post* by legal institutions. This differentiation makes it necessary to grasp the assignation of property rights as agents' scope of action (Reckendrees 2004: 288). The analysis of specific and real assignations of property rights to specific agents differentiates, firstly, between various agents (such as managers or employees) holding specific property rights and, secondly, specifies the power relations between them. This is why the pure assignation of property rights in a formal and legal sense is not an indicator for the true scope of action of the bundle of property rights. Negotiation processes and codification of property rights have a reciprocal relationship. Additionally, there are more variables in this negotiation process that can change the tide of negotiation. The allocation of property rights also depends on the expected gain for agents, the number and heterogeneity of the negotiating parties, the legal system of the nation-state, and the mechanisms of allocation in a given economy.

If one takes these variables into account, the enforcement of property rights turns out to be the key question. Property holdings are measured according to specific economic, political, and societal conditions that frame the *recognition of agents*. Economic risks rise for agents if their property rights are not recognized. The importance of the question can be observed in the remarkably distinct semantics of *recognition* in the texts of both its proponents and critics. Interestingly enough, there has never been an impulse to theorize and operationalize the concept of recognition within the question of property. With Werner Plumpe, I understand recognition as a function of distinction. From a historical perspective, one must reconstruct social practices of recognition/non-recognition in historical change (Plumpe 2008). Following Werner Plumpe, one has to take three »constitutional moments« into consideration: Firstly, the *semantic moment*: According to historical semantics, one must analyze communication practices to detect the various meanings of distinction and decision-making preferences. Secondly, the *moment of institutional change*.

This means the *ex post* institutionalization of the decision-making practices of agents. It is also means focusing on the question of when decisions are followed by a real change in the practice of agents. From this perspective, the organizational rebuilding of existing institutions or establishment of new institutions can be seen as an indication of historical change. Thirdly, *the moment of practical distinction* in the action of (historical) agents, i.e., what they really did. Plumpe here describes the historical practices of agents doing business in everyday life according to their specific rules (Plumpe 2009: 30–35).

Having taken these three *moments of recognition* into consideration it is possible to analyze rights of disposition and rights of use as interdependent interactions between legal rights and institutional settings on the one hand, and as a product of legal interpretation, conflicting interests, and agents' exercise of their scope of action on the other hand. As a result, recognition can be seen as the decisive link between the two fundamental levels of property: property in its structural dimension, i.e. property as a legal institution, and property in its action-theory dimension, i.e. property as a negotiation process. This insight has consequences for any methodological framing of PRT. In the following I will use an abstract experimental design to model the insights provided by PRT and analyze property rights structures within a firm.

Property rights structures in firms

Taking the insights discussed above into account, three interdependent variables must be included in any experimental design if it is to be methodologically as well as theoretically sufficient for analyzing the property rights structure of a firm: the (individual) agent, the social negotiation process, and the (*ex post*) process of juridification. Finally, one must determine the consequences of the definition, organization, and structure of property rights within the firm.

The (individual) agent

The nationality, ethnicity, and social belonging of agents can be relevant in terms of their rights of attribution and their chances of being recognized by a state, a community or a society. Societal status and social

capital greatly enhance the ability of agents to acquire valid property rights. When defining »agent,« one must also take into account that agents who are involved in negotiation processes over property rights are often not autonomous. They speak in most cases on behalf of a group or on behalf of the aims of institutions such as a state, a professional body or a business firm. Moreover, these agents—or the groups they represent—may vary by cultural norms and social conventions in the process of negotiation. Multiple agents exist both within and outside of each firm. As Thomas Welskopp has suggested, firms are not only material-based, stationary combinations of factors of production, but also social arenas of severe conflicts between changing (and unequal) players, strategies, rules, and frontlines (Welskopp 1996). In this social arena, a vast variety of internal as well as external agents are negotiating for their interests, possible gains, control, and positions of power as regards the company's economic resources. As a result, the state and its organizations, economic pressure groups, and even competitors can wield much influence concerning the structure, organization, and economic performance of a business firm.

The negotiation process

In most cases, agents are not equal when they face each other and begin to negotiate. The achievements of a negotiation process are most often not in accordance with the overarching normative legal framework—such as the market or business—in which they occur. Though every agent aims to apply legally fixed rules and standards—or at least pretends to—in reality every agent simply tries to expand her own scope of action and to delimit the action of others using any means possible. Depending on the number of agents involved, the level of information and expertise, the expected gain, the power relations, and other factors, agents are able to exclude others or to install a new constellation of participants in the negotiation process (Libecap 1989: 26–31; Libecap 2004). *Ex post* juridification may, but does not necessarily, follow.

Not only are the agents unequal in a negotiation, but they need the recognition of a third party—often the state—to reach their aims. The negotiation process contains a systematic and specific group-building pro-

cess with regard to recognition. If two agents negotiate property rights, forming the basic social constellation called the dyad, a third agent or party is needed to recognize and settle the negotiation process. Only if a third agent recognizes the property rights in question can those rights be economically valued and the process of the codification of rights effected. In most cases, the state is the authority for fixing and legalizing the negotiation process, but public agents do not necessarily need to act as the legislative body, they only need to be able to exercise the state monopoly on the use of force (North et al. 2009; Sened 1997; De Soto 2000). Nevertheless, in the majority of cases, the state legitimizes the property rights negotiated *ex post* by exercising jurisdiction. The generation of group building processes via a third party is a well-recognized postulate devised by the German sociologist Georg Simmel (1908). It is the *triad* and not the *dyad* that constitutes the basal constellation of sociality. The triad legitimizes reciprocal action between an *I* and a *you*. Sociologists therefore see the triad as a necessary condition of societal processes and the formation of institutions. The crucial point here is that *recognition* stands at the very center of such a social constellation. As Gesa Lindemann puts it:

> The third [agent] is the condition for a compulsion for recognition. […] This compulsion for recognition sets limits for each agent, which can be seen as socially mediated limits: Not B alone, but B and C decide, whether or not A is a legitimate agent. (Lindemann 2006: 82)

The third agent modifies the societal process by entering the negotiation process, but does not constitute the negotiation process and conflict. This insight correlates exactly to the definition of property as explained above, and prefigures the process of juridification (see fig. 1).

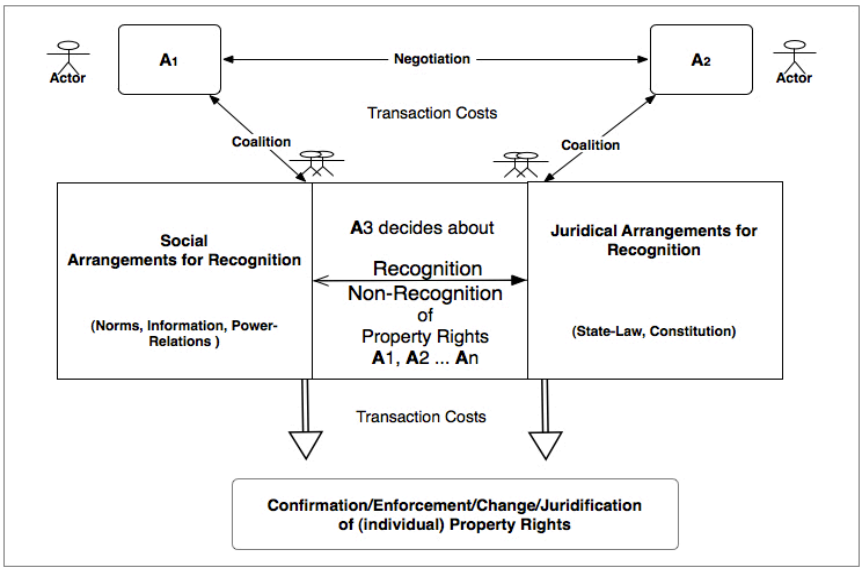

Fig. 1: The negotiation process over property rights

To summarize, agent 1 and agent 2 want to change their property rights. Agent 1 wants to secure her established property rights and agent 2 wishes to change those rights in her favor. Agents 1 and 2 can both act as individuals or they can speak in favor of a group, organization, or public body. Before they enter into the negotiation process, they both have a specific status and an empirically measurable capacity to fight for their interests. Parallel to the partition of property rights into rights of disposition and rights of use there are, I propose, two spheres of recognition: (1) a sphere of social recognition, e.g. power or cultural norms, and (2) a sphere of legal recognition, e.g. a constitutionally secured individual property right such as a title. It is important to note that the allocation of property rights for agents 1 and 2 is dependent on these two spheres as regards the agents' chances of enforcing their property rights and the associated scope of action of these rights. It is also essential to keep in mind that in the moment the agents both enter the negotiation process, transaction costs incurred. That means that the initiation of the negotiation itself and the invocation of the third party are costly. This may interfere with the negotiation process or interrupt it entirely. Another contingent factor is the time it takes for all parties to negotiate

over the property rights in question. That is why the negotiation process is sometimes inefficient in an economic sense. Finally, as discussed above, the way in which the negotiation process proceeds and the determination of which agents' rights will be recognized lays not in the hands of agents 1 and 2, but in the hands of agent 3. Agent 3 is the agent with the decisive authority to sanction or confirm the property rights in question. This third agent, through very specific social and legal arrangements of recognition, leads the negotiation process into a qualitatively new direction. The third agent arbitrates conflicts, strengthens coalitions, and in the end decides which rights will be allocated to which agent.

The process of juridification

It is important to note that the legal sphere does not trump the social sphere of recognition. But it is worth mentioning that the law as such can be seen as an *ex ante* recognition procedure, whereas legal enforcement after the negotiation process can be seen as *ex post* recognition of the agents. The negotiation may modify former principles of law. Legal titles are not superior to power relations. They are not, in the philosophical sense, normative, but are set *ex ante*. That is why laws, contracts, and legal norms are also a subject to interpretation and therefore generously contingent (Siegrist 2006: 19). For instance, laws can be dispensed to enact justice as well as tort. It is not necessary to call on the state as an overall authority; there are countless ways for businesses to undercut legal norms as well as laws. A prominent example is the handling of intellectual property rights in firms. We won't ever detect all the innovators in firms who have never profited from their inventions, regardless of the legal protection provided by patent laws. After the property rights in question in the example above have been modified, rejected, or confirmed, the process of juridification—institutionalizing the new/former property rights—begins. The new or established property rights must be secured and controlled by another authority. This process is another *ex post* procedure and again incurs transaction costs. In other words, the process of juridification is a process of institutionalizing reciprocal recognition.

The question now arises as to how these insights can be integrated in a research agenda for business historians? The proponents of classical PRT were always interested in the firm as one of the crucial organizational forms of market economies. In the definition of the firm suggested by PRT, the firm not only combines material factors, but also generates products via a network of contracts. In virtue of these contracts, firms are able to arrange and control the production of a plant more effectively and cost-efficiently than markets. Firms replace the competition on markets while they transform external agents into internal agents (Alchian 2006: 151–178; Hart and Moore 1990: 1119–1158; Kaulmann 1984; Williamson 2002: 117–195; Richter and Furubotn 2003: 339–406). PRT therefore pays attention to the legal, social, and structural aspects of the firm. To reiterate, these insights are very helpful for methodological input, but is still only an ideal model and the proponents of PRT never went beyond it. This model refers only to the classical privately (family-)owned firm in market economies. In reality this is only one, almost marginal, model. Nonetheless, it can offer a vantage point to explain why firms continuously experiment with their organizational form, production factors, capital accumulation, and human resources (Picot 1981: 174). But if historians try to adapt this model to historical frameworks, they quickly realize that this contract theory model leads to the same blockades as the neoclassical models. What Werner Plumpe has said about the modeling procedures of new institutional economics is also true for PRT. PRT does not overcome the static structure of its precedents, but rather enlarges it, simply adding organizational costs to the price of production in the neoclassical model (Plumpe 2005: 18).

Returning to the discussion of *homo oeconomicus* above, for almost the same reasons PRT offers historians an idealized, structured guideline. PRT neglects the social impact of structure and in consequence the dynamics of change. There are almost no answers to those questions that interest historians most: Why do firms survive? What are the decision-making processes in companies? What impact does external political decision-making have? How are these decision-making processes implemented and enforced in the corporate body of firms? (Plumpe 2003). In

my opinion, sociology as well as economic and business history could provide an impetus for integrating the social perspective in order to combine the dimensions of structure and agency (Maurer 2008). In the following I propose a method of solving the problem of structure and agency in firms. In this, I rely on a definition of the firm oriented toward behavioral science proposed by Richard Cyert and James March (Cyert and March 1995). Their so-called coalition theory sets the focus on agents operating inside and outside companies. At the very center of this framework is an analysis of decision-making processes in firms. Cyert and March define the firm loosely as a collective of agents who are forced to operate in an arena of diverse and conflicting goals. My focus on business history is informed by the action-theory oriented approaches of Werner Plumpe and Thomas Welskopp (Plumpe 1992; Welskopp 1994; Welskopp 2004; Welskopp 2004a).

As a first step, we must give up some standard ideas about the firm. I propose that the firm is not an entity with a solid location and strictly defined borders delineating inside and outside space. Rather, I proceed from the assumption that a firm is a combination of two operational sides. On one side is (1) the corporation or capital strain side and on the other is (2) the plant or production side. These two sides are interconnected by various contracts and mutual control and together constitute the firm. While the capital strain side is immaterial, flexible, and versatile, the production side is characterized foremost by its materiality and by spatial restrictions. The capital strain side is composed of all agents that participate in financing the firm. These agents are not necessarily on-site or working together. In contrast, the production side is constituted of fixed capital and has in the main a specific location. This refers to the real estate, plant buildings, equipment, staff, etc. Tied-up capital configures the material and logistical conditions of the production side; it has the character of fixed capital. In addition, tied-up capital begins to assume a more and more independent existence and reality in time and space. It increasingly acts on the conditions of the location itself, on the accumulated technical and commercial knowledge of the management and staff, on the commercial environment of the branch the firm be-

longs to, and therefore on the specific conditions of the market and marketing structure.

The analytical distinction between the capital strain side and the production side is highly influenced by the works of Thomas Welskopp. Welskopp designated the tension between capital and material as the *corporate disposition* of a firm. He sees the decision by capital lenders to invest in a plant as a highly decisive and delicate act, because after the investment, their capital is very bound to materiality (Welskopp 2004). Immediately investors begin to lose power, the power to decide over capital employment and production targets. From this moment on, investors can no longer exercise their unilateral control over their capital. In fact, their measure of controlling or taking part in decision-making processes in the plant is quite limited. This fact is anything but banal, because the material side now becomes more and more autonomous from the capital investors who preserve the organization (Welskopp 2004: 197). This model of the firm represents an important step forward. It takes seriously both the structure and agency of a firm, and—moreover—combines them in a systematic manner. We can prove this by returning to the insights gained from the discussion of property rights structure and property regimes above.

The central characteristics of the corporate disposition of firms, e.g., the differentiation between the capital strain side and the production side, match exactly with the potential assignment of property rights to agents, namely, the rights of disposition and the rights of use. The agents financing the firm are located on the capital strain side and have rights of disposition. They may also hold and exercise rights of use on the material side of the firm, for instance as managers in a company with limited liability. Agents with the rights of disposition over property in the context of a firm have above all the right to sell, bequest, and liquidate the firm. In other words, they hold the rights to release their capital out of the firm. Agents with rights of disposition over property can also put their capital into a firm and only share the value. In cases where agents with rights of disposition are engaged in the management of the firm, they can also employ their leverage to decide over capital employment

and production targets. But only in this case do they have the real power of disposition assigned to them quasi automatically, as a seemingly self-evident fact. From a historical perspective, this case is anything but common, because activities on the capital strain side are highly constrained by the agents on the production side. On the latter side are situated agents with property rights of use. Analogously, they hold the rights of organization (*ius abusus*), the rights of usage (*ius usus*), and the right of gains from the plant (*ius fructus*). Holding these rights, they do not have the power to decide over capital employment and production targets. But they control the production side of the firm and therefore, in practice, have significant power and control. And if the agents of rights of disposition over property fail to regularly exercise their rights, agents with the rights of use ensure that the company's tied-up capital is preserved as long as possible. One of the main and most exciting results of my studies is the realization of how long a firm can perform successfully in the complete absence of agents with rights of disposition over property (Schulz 2011).

Fig. 2 illustrates the structure of the firm, differentiating between the capital strain side (corporation) and the production side, as well as between agents with specific property rights (plant). Following the model in fig. 2, one can precisely assign every agent to property rights within the firm. This is the main achievement of this model. It lays a basis for understanding the negotiation process and, finally, the outcome of legally enforcing the positions secured by the agents.

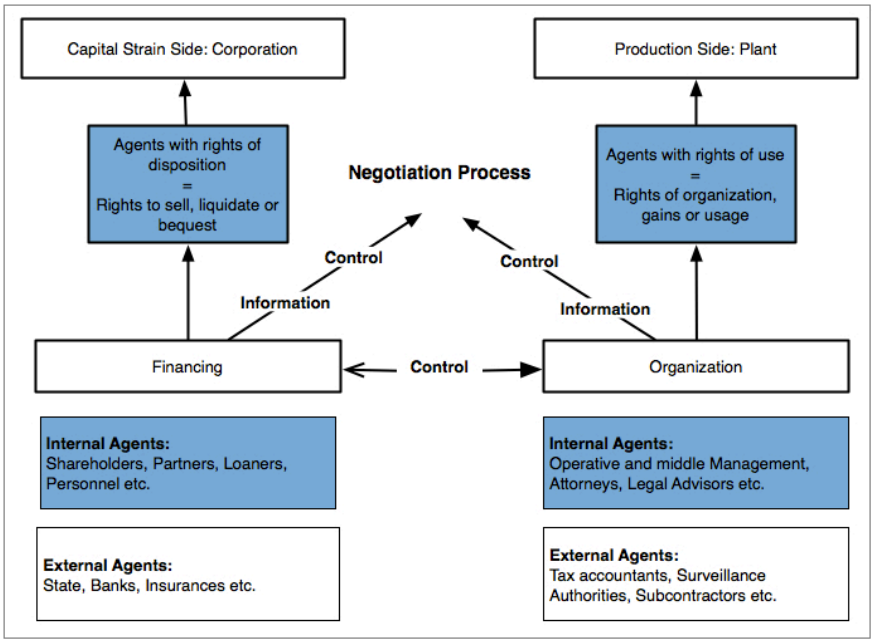

Fig. 2: The organization of the firm: The interrelation between the capital strain side and the production side

Agents with rights of disposition over property are situated on the capital strain side. They acquire disposition and control over the capital investments in the plant. Please note that there is an additional differentiation into internal and external agents to indicate the specific position of each. Internal agents with rights of disposition mostly exercise rights of use in the sense of entrepreneurship (Casson 2010). They are responsible and directly liable for decisions about the strategic direction, goals, and market position of the plant and the company. In most cases, agents with rights of disposition over property are part of a family of entrepreneurs or managers with capital investments in the firm, such as partners or members in joint partnerships or, to a far lesser extent, stockholders. Agents with rights of disposition invest directly in the plant and represent their own interests by controlling their capital. Normally, their structural position in the corporation is dependent on the legal form of organization (property rights as legal form). The measure of control and power they can acquire is also dependent on the negotiation process between all agents with interests in the firm, regardless of their specific

rights. Not only do agents with rights of use limit those with rights of disposition, but also external investors such as banks, insurance companies or even the state. The negotiation process between internal and external agents with rights of disposition over property is key to the survival of the company, because this is how the cash flow is secured.

Parallel to this, agents with property rights of use need to be differentiated as regards their specific rights of use, organization, and gains. Ideally there is no hierarchy between these various rights. Hierarchies come into play depending on the control and therefore, power the specific rights of use provide each agent. This defines the scope of action agents have on the production side. This differentiation can be especially important when it come to the analysis of firms in economic systems such as central planning systems. Only if one can differentiate between agents can one track decision-making processes in the planning system as well as in the plant. In general, middle or operative management, assistant managers, legal advisors, and attorneys hold the strongest property rights of use on the production side of the firm. They are the direct representatives of agents with rights of disposition over property and therefore can make decisions about the organization. Because of their advantage as regards information, they usually obtain a lot more control over the activities of the plant than their principals. As Alfred Reckendrees and others have argued, the principal agent approach can now be fully integrated in the analysis of property rights in companies (Reckendrees 2004: 218; Jongwok and Mahoney 2005: 241). In this sense, managers, skilled laborers, and foremen are among those agents with property rights of use, because they have expertise and knowledge in their departments. Likewise, similar to the capital strain side, there are also external agents with property rights of use, among them tax accountants or surveillance authorities. Although uncommon, the decisions of these agents can decisively affect the economic performance of both sides of the firm. The same is true for subcontractors. Again, this effect can be observed most often in central planning systems.

In sum, agents with property rights of both disposition and use participate in the economic activities of the firm. They affect the financing,

controlling, and organization of the firm. They all have a specific and empirically assignable scope of action that is interconnected with their specific property rights. The negotiation process concerning property rights is most continuously observable between agents on the capital strain side and those on the production side of the firm. The structural position and power relations between these agents are empirically assignable. The outcome of this negotiation process is control over the assets of the firm. Agents who occupy decisive control positions can normally act as the legitimating and sanctioning power between agents with property rights of disposition and those with rights of use. Such controlling positions dictate the operating range of the property rights. Only nominally the owners, agents with property rights of disposition hold these central control positions. In the social arena of the firm, agents with property rights of use can acquire and hold also very strong rights that work almost like rights of disposition.

Conclusion

In analyzing the corporate disposition of companies, I have relied on a combination of several theoretical and methodological approaches: the economic and legal conceptualization of property; insights of PRT as discussed above; the problem of recognition; coalition theory; and the methodological frameworks of economic historians Thomas Welskopp and Werner Plumpe. In my study, I have demonstrated that the overarching importance of property is constituted by its ability to assign a specific scope of action and decision-making capacity to agents. Hence, property should not be reduced to an autonomous, self-referential analytic category. Rather, property needs to be understood as dependent upon the respective social contexts in which it is appears, for instance in a firm. In such an environment, property is shaped according to the specific circumstances evolving from various social constellations and structural arrangements. Correspondingly, the juridification and institutionalization of property rights takes place at the very end of a longer or shorter process of negotiation between agents, as this article has shown. In firms, these negotiation processes are highly institutionalized and routinized. That is one reason for their stability. At the same time I argue

that the legal constitution of property rights in firms needs to be understood as the temporary result of a continuing and contingent social process.

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Priority, Property, and Trust

Patent law and pharmaceuticals in the German Empire[102]

Axel C. Hüntelmann

In February 1913 an article in the *Vossische Zeitung* reported on a new remedy that was supposed to cure tuberculosis. An effective cure for tuberculosis would have meant a breakthrough in the control of a widespread disease. Apart from the promising announcement, little was known about the remedy that was allegedly based on a substance of biological origin. It had been developed by the physician Friedrich Franz Friedmann and was presented to the public for the first time in November 1912. Since then it had triggered a controversial debate (Werner 2002; Hüntelmann 2008) that is outlined exemplarily in the newspaper article mentioned above. After reporting about facts of the remedy, the journalist complained that no further information about its composition was available. He suspected that Friedmann »wishes to secure the money he is entitled to as the inventor,« and for this reason Friedmann »has applied for a patent for a method of producing protective substances against tuberculosis.« An expert on tuberculosis, cited in the article, identified attenuated tuberculosis bacteria originating from turtles as the

102 I would like to thank the editors for inviting me to participate in this volume and for their helpful comments on this paper. Moreover I want to thank two anonymous reviewers for their stimulating suggestions. The *Paul Ehrlich Institute* and the *Rockefeller Archive Center* supported me in my archival research. Finally, I want to thank the *European Science Foundation* and the *Steering Committee of the ESF Network Group Drug History* for supporting my research in this field and allowing me to finish this article. Special thanks also go to Christoph Gradmann, Volker Hess, Carsten Timmermann, and Michael Worboys.

active ingredient. However, the expert doubted that the remedy was »patent-ready,« as it was unclear what kind of a patent Friedmann had applied for. Turtles generally fall ill from tuberculosis and any bacteriologically trained person would be able to breed these bacterial cultures. »Claiming a patent on a living bacterial culture is something new, and we may look forward with interest to the way in which it will be dealt with« (Lennhoff 1913).

Several times the newspaper article referred to patents and the patenting of drugs, discussed the application's prospects of success and the economic motives that led to the patent application. However, the medical community and the public condemned claiming profits for therapeutic agents and considered it unethical.

Beyond economic interest, patent law is related to claims of priority. There is no doubt that the development of a new remedy to cure tuberculosis would have significantly increased the scientific reputation and social prestige of the inventing researcher. In a certain sense, the patent became an institutionalized procedure to ensure property rights on the invention as well as to secure legal priority status. Furthermore, the newspaper article invokes the aspect of trust when asking for further information about the composition of the remedy. If neither the ingredients nor the composition were known, the remedy might cause unintended effects and entail a severe public health risk, bringing up the regulatory role of the state.

In the following article I explain in more detail how these aspects—property, priority, and trust—and the actors mentioned—scientists, the industry, and the state—were linked together and how this affected the patenting of pharmaceuticals. Moreover, I analyze the interaction between different actors and possible conflicts resulting from this interaction. Finally, I investigate the role of patents within, and their influence on, the research process. I thus emphasize in particular the importance of law and legal aspects in the history of science and pharmaceuticals. After a more general introduction and review of the literature on law and legal aspects in the history of pharmaceuticals, I sketch the state regulation of pharmaceuticals and the impact of patent law on pharmaceuticals

in historical perspective. Furthermore, I explore the nexus of priority, prestige, and originality to explain why applications for patents became attractive to scientists. I then demonstrate the influence of patents on and the entanglement between legal, economic, and scientific aspects within the research process, using the example of the *Institute for Experimental Therapy* (*IET*) and the *Georg Speyer House* (*GSH*) in Frankfurt in the first decade in the 20th century. I emphasize the aspect of scientific research, patent law, economic interest, and public trust by returning to Friedrich Franz Friedmann's patent application for his tuberculosis remedy. Finally, I summarize the relation between patents, priority, property, and trust as well as the entanglement of law and science in the history of pharmaceuticals.

Law in the history of science. Legal aspects and patent law in the history of pharmaceuticals

Only a few decades ago, the history of medicine and of pharmaceuticals was written as a story of great discoveries, focusing on altruistic experts searching for ›magic bullets‹ to save mankind from suffering. More recent publications on the history of pharmaceuticals trace the epistemological process of drug development, which is linked to knowledge production. They locate the experiment and the experimental setting in the specific space of the laboratory and emphasize the importance of social factors in science. Outside the laboratory, historical studies delineate the socio-cultural and biopolitical background against which the development of new therapeutics took place. Furthermore, they analyze the negotiation processes between different actors such as politicians, patients, scientists, clinicians, the pharmaceutical industry, and other pressure groups who are all involved in the development of new pharmaceuticals.[103]

103 This describes only a tendency in the historiography of pharmaceuticals and is not intended as a comprehensive historical account. For the newer approach see Gaudillière and Löwy 1998; Gijswijt-Hostra et al. 2002; the volume on Drug Trajectories edited by Jean Paul Gaudillière in *Studies in the History and Philosophie of Biological and Biomedical Sciences* (4/36, 2005);

Recent publications on the history of pharmaceuticals emphasize the close entanglement between science, industry, and politics. There is now little doubt that science is driven by economic interests. Pharmaceuticals are developed and produced less for the benefit of mankind than for the benefit of pharmaceutical companies. This is not a modern or post-modern phenomenon of a genetic or biotechnological era, but a historic process that started at least at the end of the 19th century (Gaudillière 2005: 609). The pharmaceutical industry and the sciences formed an interdependent interest community for two reasons. First, the increasing complexity of the production of chemical compounds or preparations of biological origin required technological know-how. Natural scientists became involved in the production process and formed the core staff of the new research and development departments. Some scientists, like Emil Behring or Emil Fischer, became entrepreneurs themselves. Second, the chemical and pharmaceutical industry sponsored scientists in (university) laboratories either directly by providing funding or indirectly by contributing working facilities, material, or manpower. Although the basis of economic activities in a free market system is legal certainty and protection of property (rights), only few studies have as yet analyzed legal aspects and the importance of law as an issue in the history of pharmaceuticals. In what ways did law and legal issues influence the pharmaceutical industry—the research, production and distribution of therapeutics—and vice versa?

One junction where history and law, science and industry intersect is the historical relation of patent law and pharmaceuticals (Fleischer 1984; Wimmer 1994; Seckelmann 2006). Most publications focus on the socio-

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the articles on the history, production and regulation of diphtheria serotherapy in *Dynamis. Acta Hispanica ad Medicinae Scientarumque Historiam Illustrandam* (27) in 2007; and, in the same journal, on the circulation of antibiotics (ed. by Christoph Gradmann and María Jesús Santesmases, 2011, 2/31); the volume on locating therapeutic vaccines in the 19th and early 20th century in *Science in Context* (21, 2008); Prüll et al. 2008; Bonah et al. 2009; Eschenbruch et al. 2009; and Gaudillière and Hess 2013; studies such as those by Bud 2007; Greene 2007; Quirke 2008; Bächi 2009; or Ratmoko 2010.

economic and legal aspects of patent law. They see companies as black boxes and do not touch on the consequences of the production of knowledge for the companies. In contrary, Jean-Paul Gaudillière has recently edited a special issue on the patenting of pharmaceuticals (2008a) and of living organisms (2009). The articles in this issue address the question of how therapeutic agents—not considered commodities until the end of the 19th century—were transformed into large-scale manufactured commercial products during the early 20th century. The patenting of pharmaceuticals played an important role during this transition process and the articles investigate the local practices concerning scientific, industrial and legal aspects that altered the meaning of drug patents (Gaudillière 2008b). In this article I attempt a similar analysis of the entanglement between patent law and the development of new drugs in the history of science.

The state regulation of pharmaceuticals

Until the end of the 1880s, remedies and pharmaceuticals were made and distributed almost exclusively by pharmacists. The production of pharmaceuticals was mostly restricted to the local or regional level. Pharmacies were provided with a fixed catalogue of organic and inorganic substances which were said to have a healing effect. The pharmacist guaranteed and was personally responsible for the purity and harmlessness of the pharmaceuticals he produced and distributed. Thus, pharmaceutical law aimed at pharmacists and regulated their education and the distribution of pharmaceuticals (Schmitz 2005: 1015–1019).

Similar to other European states and to North America, in the German Empire, the *Pharmacopoea Germanica* prescribed the degree of purity of the raw materials used as of 1872.[104] Erika Hickel (1973 and 1977) and

104 A published ›book,‹ the *pharmacopoeia* contains detailed definitions of pharmaceutical compounds; their composition, the degree of purity of individual substances, and instructions for their preparation. The *pharmacopoeia* is a reference work on drug specifications and is legally binding for all drug producers on the city, district, and national level. Today, on the supranational level, there is also a European *pharmacopoeia* and an international *pharmacopoeia*.

Jürgen Holsten (1977) have elaborated on the design of the *Pharmacopoea Germanica*. Its revision was coordinated by a permanent pharmaceutical commission comprised of public health officials, pharmacologists, and life scientists as well as representatives of the chemical-pharmaceutical industry. The 1910 revision of the pharmacopoiea has been described as a negotiation process, influenced by economic and political interests and driven by professional and industrial pressure groups (Holsten 1977).

At the end of the 1880s, the organizational principle—which was based on professionalism and trust—began to totter. With the industrial production of pharmaceuticals by the chemical industry, distributed to pharmacists as packaged sales units in the form of powders and pills, the latter were no longer able to guarantee purity and harmlessness. Thus standardized norms, such as the Ordinance on Pharmaceutical Trafficking (*Verordnung betreffend den Verkehr mit Arzneimittel*, later the *Medical Products Act AMG*) enacted in 1890, were supposed to regulate the composition of freely available remedies. A further regulation was passed in 1891, stipulating that highly effective medications could be only sold to the consumer after he or she had presented a medical prescription.

A second difficulty for pharmacists resulted from the development of remedies of biological origin, such as sera and vaccines. Their harmlessness and effectiveness could only be proven by complex procedures which required extensive bacteriological and serological knowledge, something pharmacists did not have. With the establishment of an institute for serum control that tested, evaluated, and approved the quality and potency of the serum produced, state control of sera shifted from distribution to production as it was easier to test a few producers than thousands of pharmacies (Wimmer 1994: 85–101; Hüntelmann 2007; Gradmann 2010).

(Pre-)history of patent law and pharmaceuticals

In the 1880s, the chemical industry started to establish research departments or to cooperate with chemists, pharmacologists, and physicians. This resulted in the launch of new, mass-produced, and ready-made pharmaceuticals. The German patent law of 1877 ruled out any protec-

tion for pharmaceuticals. Likewise, chemical substances could not be registered, only chemical procedures. This regulation suited the German chemical industry, whose main source of revenue at the time stemmed from imitating new products developed in Great Britain. In the course of the 1880s however, the chemical industry in Germany changed its strategy and supported an extension of patent law in order to protect their own innovations. But in the 1891 revision of the patent law, pharmaceuticals remained excluded from patent protection. This was defended by pointing to the significance of pharmaceuticals for public health. On the one hand, inventors promised that their new remedies would be able to prevent or cure threatening diseases, but on the other hand, the new remedies might involve the risk of unintended side effects, and in so far the composition should become known to the public. Furthermore, it was doubted that medical activity could be considered trade (Fleischer 1984; Wimmer 1994; Seckelmann 2006, Gaudillière 2008a and 2009). Beyond this, concern was raised that consumers might mistakenly see patents as a form of state approval for drugs (Gaudillière 2008a: 101). The chemical industry responded with varying attempts to circumvent this exception. First, companies defined the process to be patented as broadly as possible, also including potential alterations of the process, so that competitors could not vary the process and market and patent it as a their own (Schmitz 2005: 1017). A second way of bypassing the exception for product patents was to protect newly developed remedies as registered trademarks.[105] After the revision of German patent law in 1891, a third possibility was to obtain patent protection for chemical components or sub-components that provided the basis for a remedy. Finally, if the chemical companies marketed their therapeutics abroad,

105 In reference to the contemporary discussion on patents in the United States at the end of the 19th century, Joseph Gabriel (2009: 155–156) clearly distinguishes between patents and trademarks. The latter do not include the aspect of information exchange and registered trademarks do not expire.

they could apply for patents for these products in the respective foreign countries.[106]

Patent protection was supposed to secure the commercial exploitation of an invention for a certain period of time. The patent should legally guarantee the amortization of research and development expenses (Fleischer 1984: 9). In return, the patent holder disclosed his method. The guaranteed right to exploitation of an invention via patent protection and the rule of transparency was supposed to ensure further research and thereby support technological development. According to Margit Seckelmann, the introduction of patent law was nothing less than a catalyst for the Second Industrial Revolution (Seckelmann 2006: 11). Openness and accountability regarding the composition of remedies also served to counter the image of so-called secret remedies and nostrums. As the latter term indicates, the formula of remedies had previously been kept as a trade secret by the inventor, who exploited the nostrum commercially (Ramsey 1987: 79). This secrecy was understood as a form of temporary monopoly that restricted the circulation of information about the drug. Because nothing was known about their composition and active principles, secret remedies were considered a public health hazard and the owners of the property rights were vilified as unethical and unscrupulous quacks (Gabriel 2009: 142; see also the contributions in Bynum 1987). The legal protection of inventions was meant to create an atmosphere of trust and create advantages for the inventor as well as for the public. The inventor could present (and market) himself as an ethical manufacturer who circulated all information about his invention which in turn might generate further research and thereby promote progress (Wimmer 1994; Ripperger 1998; Seckelmann 2006: 14). The public benefited from the free circulation of information about the new remedy, because it was now possible to evaluate positive effects and balance them against possible health risks. »Patents,« as Joseph M. Gabriel summarized the American discussion on patents for remedies in the 1880s,

106 Joseph Gabriel (2009: 157) remarks that German remedies were often protected by patents and trademarks.

should »simultaneously protect a firm's financial investment in the development of a new remedy and provide the openness necessary to promote the advancement of science and the public welfare« (Gabriel 2009: 154). In accordance with Theodore M. Porter, one could interpret the institutionalized protection of inventions and the rise of patent law as a technology to generate trust in a social environment.[107] Juridification by way of patent law, the bureaucratization of registering processes and institutionalization in the form of the patent office worked as elements of constituting trust by way of protection for inventors (Seckelmann 2006: 27).

In contrast to Seckelmann,[108] who points out that patent law reduces the variety and complexity of contractual relationships, Martin Hartmann (2011: 9–15) emphasizes that trust does not reduce the complexity of relationships between contract partners, but that the establishment and practice of trust itself is a complex communicative and social set of regulations. In the following sections I will describe this complex interplay between the different actors involved in patent applications for remedies with an eye toward the various levels of trust in this process.

Before there were patents: Quarrels about priority and originality

Before there were patents, medical science was understood as the accumulation of empirical data and knowledge about therapeutic cures and methods. The free circulation of this knowledge among a community of honorable practitioners was assumed. These men saw themselves as conducting medical research as part of a larger collaborative project to improve the common good. Research results were reviewed by the medical community, discussed in medical journals, and either rejected or,

107 Porter describes how trust in numbers, considered an objective value, is generated in a bureaucratic and legally formalized setting (Porter 1995). The implementation of a system of serum regulation and evaluation, or in general of remedies of biological origin, can also be understood as a technology to generate public trust; see Hüntelmann 2006; Gradmann 2010.

108 See Seckelmann 2006: 16, in accordance with Luhmann 2000.

when verified, accepted as part of a larger body of knowledge that was accessible to all. This ethical concept of medicine was divorced from any commercial interest or private gain (Gabriel 2009: 138–140). As Joseph M. Gabriel illustrates, this ideal changed in the United States in the second half of the 19th century. But between the ideal of interest-free, ethical medicine and mercantile quackery corrupted by the selfish pursuit of profit, lies a broad field of interpretation and negotiation of the moral economy[109] of medical science. In this field of discussion about medical ethics and drug innovation prior to and in the early years of patent law, two aspects are directly related to the idea of patents: priority and resources.

In the last third of the 19th century there were countless quarrels between life scientists on the issue of priority. When in 1890 Emil von Behring postulated the principle that immunity against a certain disease could be transferred by blood serum, scientific colleagues raised objections and claimed that they themselves had discovered this principle, known as passive immunization (Zeiss and Bieling 1941; Linton 2005; Throm 1995: 45–46).

Behring was involved in many debates about the priority of his invention of serum therapy. A publication entitled *The History of Diphtheria* (Behring 1893), or a similar publication by Paul Ehrlich on the *History of Granula*

109 Nicolas Rasmussen (2004) uses this term to describe the ambivalent cooperation between scientists and the pharmaceutical industry. Originally, the term »moral economy« was characterized by E. P. Thompson (1971) as the ethical foundation of economy; and modified by Lorraine Daston (1995) as a set of values—an organized system of balanced emotional forces. In a certain socio-cultural context, these values elucidate why the scientific community considered some arguments for and methods of explaining scientific facts to be more convincing and plausible than others. The ethical arguments of 19th century physicians against secret remedies refer in a similar way to the moral economy as »thinking about the values and practices grounding the system of reciprocal gifts that dominates the world of open knowledge« as elaborated in Daston (Gaudillière 2008: 100). This becomes important in the further discussion on priority and originality.

(Ehrlich 1891), dealt less with the history of a topic and more with the history of an epistemic process. Behring presented his view on the development of the diphtheria serum, while Ehrlich claimed that he had been the first who had colored and identified cell nuclei.[110]

The claim to having been first with a development, a discovery or an invention[111] can be seen as the institutional anchoring of originality. Great significance was attributed to this value,[112] which was considered a contribution to the further development of science and linked to progress and modernity. The claim to priority is connected with the prospect of public recognition. In terms of reciprocal give and take, the scientist making the claim expects that his own (life-time) achievements will in return be rewarded by society.[113] With his claim to priority the

110 The system of literary references and the exchange of information and knowledge was (and is) linked to the idea of science as a collaborative project as mentioned above. Beyond this idealized imagination, the production of knowledge is a collaborative process involving many people, as illustrated by theories such Ludwik Fleck's thought collectives and by current social science studies. But after a certain point, usually when the success of a project becomes obvious, the scientists involved claim their intellectual property rights on the development. This tracing of the individual part of collaborative work provide the background for the histories of certain epistemic processes cited above, which often ended in claims to priority of invention or discovery. The history of the diphtheria serum could serve as an example for this shift from a collaborative we/our to an individual me/my.

111 In her discussion of the discourse on and legal disputes over the patenting of adrenaline, Mercedes Bunz distinguishes between »discovery« and »invention.« If a substance—such as plant extracts or other organic substances like adrenaline—already existed and only its therapeutic use was developed, this process was seen as a »discovery.« The development of a new substance was considered an invention and only the latter was supposed to be patentable (Gaudilliere 2009; Bud 2009; Bunz 2009).

112 The *German Patent Office* for instance tested the patent application only on its originality; see Fleischer 1984; Seckelmann 2006: 19.

113 From a sociological perspective Merton 1985: *Prioritätsstreitigkeiten in der Wissenschaft* (priority conflicts in scicence): 258–300.

inventor also indirectly called for the right to benefit from his invention. In this way the claim to priority was a substitute for patent protection unless it was not possible to patent remedies. One could not have expected any material reward as »compensation« for the originality of an achievement, but—as an alternative—social recognition, which is expressed by status symbols such as decorations or by promotion. The significance of priority in the context of exploitation rights can be illustrated by the example of the diphtheria serum. After the development of a remedy for diphtheria, celebrated by the scientific community as a milestone in medicine, Emil von Behring became Professor of Hygienics (Zeiss and Bieling 1941: 198–210; Linton 2005). The claim to priority of invention was less about economic compensation for research and development expenses, but about prestige and recognition. With the onset of patent law, patent applications became the institutionalized process for claiming priority. However, patent law and the claims derived from it reduced the aspect of recognition solely to material rewards. This was however necessary; the inclusion of scientific actors in industrial processes (and vice versa) meant that actors from outside the scientific community were also becoming involved and the industry was rooted in a value system which was different from that of the sciences.

The example of the diphtheria serum combines a number of aspects that appear within patent protection: priority, prestige, trust, and economic interests. In their publication on a promising serum to combat diphtheria, Emil Behring and his co-worker Erich Wernicke concluded that they had to terminate their research because they ran out of money (Behring and Wernicke 1892). After the director of *Farbwerke Höchst* read the article, he contacted Behring and offered his cooperation. They made a contractual agreement that *Farbwerke Höchst* would fund future experiments and would in return, should a successful therapeutic be developed, be entitled to market and exploit the prospective remedy.[114] The funding

114 August Laubenheimer: *Zur Geschichte der Serumdarstellung in den Farbwerken* (The History of the Serum Therapy at Farbwerke Hoechst). June 1904. *Behring Archive*, University of Marburg, 8-01, Correspondence with

of Behring's research by *Farbwerke Höchst* makes clear that they trusted in his capabilities to develop an diphtheria serum. For his part, Behring trusted that the investor would finance his research.[115] In contrast, the community of orthodox physicians and practitioners, as characterized in Joseph Gabriel's work (2009), mistrusted the industry. The cooperation of a scientist with the industry could compromise his scientific reputation.

For life scientists, the exchange relationship with the chemical industry offered the advantage that they need not appear as commercial actors, as the remedy was distributed under the label of the producer. In each case, cooperation was stipulated by contracts governed by private law. Indeed these contracts, when the contractual periods were over, caused conflicts; for instance between Behring and *Farbwerke Höchst* about the contract modalities to be negotiated (Throm 1995).

The mix of scientific work and economic interests also led to conflicts between colleagues, especially when personal and scientific relationships were tightly interwoven and no or only insufficient contractual agreements had been made. In the aftermath of the successful development of the diphtheria serum, Behring had several conflicts with his scientific collaborators and friends about the commercial exploitation of the remedy. The quarrels were about the question of how much each respective scientist had contributed to the joint work, and in which way this contribution was compensated or appreciated. All these different relations of trust between the scientist and his industrial partner, the medical community, the general public, and his co-workers had to be balanced out. The example of the development and exploitation of the diphtheria serum illustrates the connectedness and fragility of trust, and demonstrates the importance of trust as a category for the analysis of legal matters in the history of science.

Farbwerke Hoechst, doc. 678. Draft and contract 20 Dec. 1892, *Behring Archive*, University of Marburg, 8-01; Throm 1995: 44, 49.

115 Niklas Luhmann emphasizes that trust is also a risky »advance payment« and only this risk makes trust possible (Luhmann 2000).

Beside the debates on priority before the advent of patent law, the question of resources is an important, but less discussed issue. As described above, until the 1880s medical science was understood by orthodox physicians as an accumulation of data and knowledge about therapeutic cures. With the rise of the chemical industry, the implementation of bacteriology, and experimental laboratory medicine, growth of knowledge was no longer obtained by the exchange of data collected in the medical practice or at the bedside—rather knowledge was produced.

With the emergence of bacteriology and biochemistry in the last third of the 19th century, the acquisition of expensive technical devices and the creation of laboratory facilities became a precondition for research. Furthermore, the extensive consumption of animals for in vivo experiments and the need for chemical compounds in bacteriology or chemotherapy caused high expenses. The funding of larger series of experiments became a great challenge for institutions focused on research. For this reason, these institutions tried to find money to fund experiments in addition to their regular budget. The chemical industry funded experiments directly as well as indirectly through the provision of chemicals, as I will show in the next section. However, the chemical industry did not support research for altruistic reasons, but expected to benefit from the investment. A problem in this relationship was the short-term costs for institutions in contrast to prospective long-term and uncertain profits, again an issue of trust and future expectations. It seems that patenting balanced and institutionalized these different expectations and needs in the most satisfactory way for all parties. In the following section, I will illustrate how science and industry were related to each other, and describe the role of patents within, and their influence on, the research process.

Patents and science in action. The importance of patents at the *Institute for Experimental Therapy* and the *Georg Speyer House*

In November 1898, Paul Ehrlich, director of the *IET*, thanked the *Badische Anilin- und Soda-Fabrik* (*BASF*) for sending him dyestuffs. He told them that he was intending »to turn again more intensively to my

old favorite field of histological and biological staining,« and he asked for future support.[116] As a consequence, the dyestuff producers sent Ehrlich newly developed products, asking if he would test their therapeutic impact or histological staining properties. Ehrlich also, after having consulted catalogues or patent announcements,[117] ordered new dyestuffs.[118] At the *IET*, the director and his co-workers tested the therapeutic or toxic effects of the dyestuffs and the arsenic compounds on several parasitic pathogens in vitro or in vivo. If the experiments showed promising results, Ehrlich organized clinical trials by contacting familiar or friendly clinicians.

If the clinical trials were unsuccessful or only partly successful because the preparations caused side-effects, Ehrlich sometimes suggested a change in their composition. Since the turn of the century, the director of the *IET* had been cooperating with a number of dyestuff producers and chemists, mainly *Farbwerke Höchst* and the dye-works *Leopold Casella & Co.* After the foundation of the *GSH*, a private chemotherapeutical research institute affiliated with the *IET*, chemists from the *GSH* cooperated extensively with their colleagues at *Farbwerke Höchst* and *Casella & Co.* Some *GSH* chemists were even partly paid by the industry, or chemists from the *Speyer House* worked temporarily at the industrial plants. The companies also provided chemical compounds. Arthur Weinberg, together with his brother owner of *Casella & Co.,* was a member of the

116 Paul Ehrlich to *BASF*, 15 Nov. 1898, RAC PEC Box 4.

117 See the request for the patent specification 30 A 189110, Paul Ehrlich to the *Imperial Patent Office*, 29 Nov. 1907, Copybook XXIII, RAC PEC, Box 25; the request for patent publications about a procedure for an arsenic-acid preparation of Wilhelm Adler; and about a procedure for the production of a secondary Diazo dyestuff of the *Anilinfabrication AG* in Berlin, Paul Ehrlich to the *Imperial Patent Office*, 9 July 1909, RAC PEC, Copybook XXVI, Box 25.

118 See his letter to the *Gesellschaft Chemische Industrie in Basel* (*CiBa*) in February 1903 asking for batches with reference to the *Färberzeitung* (Dyer journal) and the patents mentioned therein.

board of trustees of the *Speyer Funding Society*. Weinberg also became a personal friend of Ehrlich, and helped to close financial gaps in the institute's budget. In return, the *GSH* tested the therapeutic impact and staining capabilities of chemical compounds and made new research results available to *Casella & Co*. and *Farbwerke Höchst*.

Particularly around 1900, when no chemist was yet working at the institute Ehrlich directed, he cooperated with chemists he was close with, as well as with his nephews, the chemists Georg Pinkus and Franz Sachs, both of whom were working as assistants at Emil Fischer's laboratory. Ehrlich regularly sent written instructions to his nephew Franz Sachs urging him to read patent specifications or to assess and modify experiments.[119] In some cases these experiments produced successful results. In such cases Ehrlich urged Sachs to finish the patent specifications.[120]

Mentions of patents are regularly found among Ehrlich's notes and instructions to his staff members. On the one hand, Ehrlich told them about certain patents they were supposed to read and assess.[121] For example, between September 1912 and the beginning of 1913 we find instructions on the completion of patents (Block No. 5037) and on applications for patents (Block Nos. 5143, 5169), a reminder that *Farbwerke Höchst* was supposed to extend the patents on arsphenamine with metal compounds (Block No. 5376), and a reminder that the Maynerack patent

119 For example he asked whether Franz Sachs could pass by the *Imperial Patent Office* to inspect the patent application for water-soluble and unstained fuchsin preparations: Paul Ehrlich to Franz Sachs, 12 May 1905, RAC PEC Copybook XVII, Box 24; request, to inspect the patent for *Farbwerke Höchst's* akridiniume dyestuff, October 1902, RAC PEC, Box 20.

120 For the correspondence between Franz Sachs und Paul Ehrlich from the late 1890s to 1903/1904, see the archive of *Leo Baeck Institute*, New York.

121 In April 1909 he requested copies of patents mentioned in the *Chemikerzeitung* held by the companies *Soc. Commerciale du Carbure de Calcium*, *Farbwerke Höchst*, *Kalle Biebrich*, and *Ludwig Wilhelm Gans* as well as a patent on medical yeast for injections held by the Italian life scientist Maurizio Ascoli, RAC PEC Box 25, Copybook XXVI.

should be discussed with Alfred Bertheim and Paul Karrer, two of Ehrlich's co-workers,[122] as well as a note saying that *Farbwerke Höchst* was supposed to deliver arsenic sulfide, to »mate [it with the] mixed compounds,« so that they would be able to check the possibility of having it patented.[123]

If the experiments at the *GSH* produced promising results, he urged his staff members to write a patent specification. For example, Ludwig Benda, a staff member of the *GSH* who was working on the premises of the *Casella* company,[124] informed Paul Ehrlich in May 1910 regarding Trypaflavin and Diaminokridin that the application for a patent had passed the preliminary tests and would be handed in soon.[125] Benda continued that Arthur von Weinberg had not yet applied for trademark protection because he was of the opinion that this would be done by *Farbwerke Höchst*. On another occasion, Paul Ehrlich sent a patent specification to Ludwig Benda, requesting him to »produce small samples of the two described azo dyes of naphtion acid and H acid« to test their capabilities[126] of staining tissue and sterilizing pathogens. Similarly, Alfred Bertheim was instructed to finish the recipe for the production of urea, so that it could be sent to the *Vereinigte Chemische Werke* in Charlottenburg as soon as possible.[127]

122 See the note for a meeting with Robert Kahn and Alfred Bertheim concerning the application of some reduction preparations to be saved as soon as possible, March 1907, RAC PEC, Box 28.

123 All notes and instructions (so-called blocs/pads) between mid-September 1912 and end of February 1913, RAC PEC Box 20.

124 Benda's salary was paid partly by the *GSH* and partly by *Casella & Co*.

125 Ludwig Benda (letterhead *Casella & Co.*) to Paul Ehrlich, 26 May 1910, RAC PEC Box 1 Folder 4.

126 Another example: Ehrlich informed Benda (2 April 1909) that the dyestuff Tryparosan had been tested in Heidelberg successfully, RAC PEC Box 1 Folder 4.

127 Likewise Bertheim should prepare the patent for urea, see Paul Ehrlich to Richard Kahn (Head of Chemical Department), 12 Nov. 1906, RAC PEC Box 27.

Instructions on patents indicate the close cooperation between science and industry. The *Vereinigte Chemische Werke*, for example, agreed to extend experiments on atoxyl. They also advised being wary of imitators and recommended securing patents.[128] The mention of patents in the instructions shows the significance of patents at and for the *GSH*. As soon as there were any prospects of successful commercial exploitation, an application was made for a patent on the newly developed substance. This is not very surprising if one looks at the legal constitution of the *GSH*.

Initial capital for the *GSH* had been donated by banker's widow, Franziska Speyer, in memory of her husband's death. The founding contract from 1906 provided that the board of trustees of her foundation, the *Georg und Franziska Speyer'sche Studien Stiftung* would have the right to depose of all inventions made at the *GSH*. The director transferred the rights to all arsenic compounds suitable to fighting parasitic diseases first to the *Vereinigte Chemische Werke* and later to *Farbwerke Höchst* and *Casella & Co.* The industrial partner was responsible for production and distribution. The agreement stipulated that the industrial cooperation partner officially apply for patents on any new developments and methods. The research was to be funded in the main by the foundation's endowment capital and, in addition, indirectly by the cooperation partner who was to provide manpower, material, and laboratory space. The industrial partner would then take over commercial exploitation and the *GSH* as well as its staff members were to receive a contractually fixed share of the net profits.[129] Thus, the *Speyer House* and its director were interested in applying for as many patents as possible.

128 *Vereinigte Chemische Werke Charlottenburg* to Paul Ehrlich, 5 Sep. 1906, RAC 650.3 Eh 89 Martha Marquardt Collection, Box 2.

129 The *GSH* was supposed to receive thirty percent. After the expiration of the 15-year contract, both contracting parties were free to commercialize the products or preparations. The patents were the property of both parties, but the trademark was owned by the *Vereinigte Chemische Werke*. RAC PEC Box 1 Folder 45.

The organization of the application process was based on the division of labor. The technical details of the application were outlined by *GSH* scientists and the application was then handed over to the industrial cooperation partner. The company's legal department and research and development department completed the application by adapting it to the formalized structure defined by the *Imperial Patent Office*. Unclear issues of content were clarified in letters between the legal department or the research and development department and members of the *GSH*; otherwise, the *GSH* made no official appearance. The correspondence was solely between the company and the *Patent Office*. Civil servants of the *Imperial Patent Office* checked the patent application as to originality. If nobody entered an objection within a certain period of time, the patent became valid.[130]

Already shortly after synthesizing it, Ehrlich applied for a patent on arsphenamine in June 1909 (Ehrlich and Bertheim 1910). In the course of the following year, the preparation proved to be efficient in the treatment of syphilis, and in December 1910 it was marketed by *Farbwerke Höchst* under the label »Salvarsan.« Profits from *Salvarsan* sales were enormous and totaled in the millions, because *Farbwerke Höchst* also patented the preparation in other countries and secured a worldwide monopoly. The *GSH*, Paul Ehrlich, and those staff members who had contributed to developing the preparation also benefitted financially, as they were entitled to a percentage of the net profits. The importance of patents for the *GSH* became obvious when the income from *Salvarsan* decreased rapidly during the First World War. When at the beginning of the war the export of *Salvarsan* was banned, the chemical-pharmaceutical industry in North America, Britain, France, and Japan ignored the patent and started their own production of the drug. Consequently, the director

130 See Fleischer 1984; Seckelmann 2006. The practical process is described in Gaudillière 2008b using the example of *Schering*.

of the *GSH* lamented to a member of the board of trustees that no money was coming in from foreign patents.[131]

For *Farbwerke Höchst*, the contractual cooperation with scientists like Paul Ehrlich became a model for the organization of research and development.[132] Whereas *Farbwerke Bayer* established their own research and development department, *Farbwerke Höchst* supported independent scientists whose developments they marketed.[133]

Although the application for a patent provides more clarity regarding the legal and commercial exploitation of an invention, there was still a potential for conflicts. Ehrlich started to argue with the *Vereinigte Chemische Werke* after their business relationship came to an end.

> Now I intend to have some patent fun with my opponents, those from Charlottenburg, who gave me the run-around and tried to fool us by prematurely launching our acetylate oxyl. They have had two compounds patented whose absolutely easy production I suggested to them two years ago. As my experts tell me, legally the case is absolutely clear, and I think we will be able to have the patents transferred to ourselves.[134]

Alongside questions about the exploitation of inventions were many more open questions. The next section will explore the broad potential

131 Paul Ehrlich to Ludwig Darmstädter, 27 Oct. 1914, RAC PEC Box 1 Folder 8.

132 Christina Ratmoko (2010) describes a similar example of this form of cooperation in the 1920s and 1930s between Leopold Ruzicka and the Swiss company *Chemische Industrie Basel* (*CiBa*) that led to the successful development and marketing of sex hormones. For the cooperation between scientific/clinical experts and the pharmaceutical industry in the North American context, see Rasmussen 2005.

133 See Wimmer 1994. Until the early 1920s, the research and development department at *Farbwerke Höchst* acted more like a mediator between the legal department and the scientists.

134 Paul Ehrlich to Lord Moulton, end of November/early December 1908, RAC PEC Copybook XXV, Box 25.

of conflicts by again taking up the discussion of Friedmann's remedy for tuberculosis.

Economic capital and public trust. The patenting of Friedmann's tuberculosis remedy

In March 1913, the President of the *Imperial Health Office* gave a detailed report to the State Secretary of the Interior on Friedmann's tuberculosis remedy. He stated that Max Piorkowski, on Friedmann's behalf, had bred a strain of so-called turtle tuberculosis bacteria already in 1903 from the lungs of a turtle that had died of tuberculosis. The bacterial culture seemed to be similar to bovine or human tuberculosis pathogens. Guinea pigs that had been injected with this culture showed symptoms of tuberculosis, but did not die of it. Since resuming the experiments, Friedmann had been very secretive and had not left the culture he had bred with anybody else. However the attempt to have the remedy produced by *Farbwerke Höchst* failed in 1905. Staff members from the company's biological department had come to the conclusion that the remedy had no therapeutic effect whatsoever. In the following years, Friedmann continued work on the remedy, until in 1912 he believed he had achieved a breakthrough.[135]

This remedy was not at all a curiosity. Since Edward Jenner had propagated vaccination with cowpox lymph as a preventive measure against smallpox at the end of the 18th century, there had been repeated attempts to fight other diseases in this way. In the 1880s, Louis Pasteur and members of his staff had succeeded in developing vaccines against chicken pox, cholera, anthrax, and rabies from attenuated bacteria cultures, and in 1890 Robert Koch had made an attempt to develop a rem-

135 See President of the *Imperial Health Office* to the State Secretary of the Interior, 22 March 1913. Report concerning Friedmann's remedy against tuberculosis. Report and evaluation of the therapeutic results and their historical development (hereafter report concerning Friedmann's remedy), Geheimes Staatsarchiv Preußischer Kulturbesitz (Prussian Secret State Archives), 1. Hauptabteilung, Rep. 76 VIII B, Nr. 4176 (hereafter GStA PK 4176); Werner 2002; Hüntelmann 2008.

edy for tuberculosis, called tuberculin, which was based on the same principle (Porter 1997; Bynum et al. 2006). Since the mid-1890s, a number of sera and vaccines against human or animal diseases had been developed and marketed.

Friedmann's tuberculosis remedy was similar as regards production and composition to these organic pharmaceuticals, such as vaccines against typhus and cholera, which were based on modified bacteria cultures. What made Friedmann's tuberculosis remedy special was that attenuated living cultures (that were supposed to be avirulent) were injected, and critics worried that possibly the bacteria culture might regain its original virulence, thus becoming a danger for the patient.[136]

In July 1911, Friedmann applied for a patent for his remedy, or rather for his method. According to the *Imperial Health Office*, his application was very general and vague. Friedmann had not restricted his patent to »turtle bacteria« but had formulated his claims as broadly as possible, speaking generally of »tuberculosis bacteria and other acid-resistant bacteria.« The virulence of the bacteria cultures was supposed to be attenuated by means of continued inoculation in an artificial culture medium.[137]

> Somewhat vaguely he stated that bacteria, which after longer periods (about 8-12 months) in the bodies of animal species related to humans […] and extracted again, will have a considerably increased protective and healing value.[138]

After further processing, the tuberculosis cultures would then be used in the form of an emulsion or a suspension that had to be injected. The

136 See the President of the *Imperial Health Office* to the State Secretary of the Interior, 22 March 1913. Report concerning Friedmann's remedy. GStA PK 4176.

137 Ibid.; Patent application of 19 July 1911, displayed in public on 14 Nov. 1912, objection to be entered by 13 Jan. 1913, Patent No. F 32742; Piorkowski 1913.

138 See the President of the *Imperial Health Office* to the State Secretary of the Interior, 22 March 1913. Report concerning Friedmann's remedy. GStA PK 4176.

patent was supposed to include not only living, but also dead bacteria. Friedmann's patent should cover the cultures and their further uses which, as the President of the *Imperial Health Office* remarked, would also concern pharmaceuticals such as tuberculin.[139]

The *Health Office* was particularly critical towards a method that was supposed to use living avirulent tuberculosis pathogens. This method, the office argued, bore the danger that a transfer of virulent bacteria could not be avoided, especially because no preservative, such as carbolic acid which would kill adverse bacteria, was added. This danger appeared serious as Friedmann had not documented any test series with animals and clinical trials had only been conducted regarding one certain method which was complicated and difficult to comprehend and evaluate.[140]

The application for a patent and the comments by the President of the *Imperial Health Office* illustrate the difficulties regarding applications for patents on remedies, especially those of biological origin. The patent was not meant for an individual end product, but for methods of using tuberculosis bacteria as a basis for the production of remedies. Friedmann had extended the description of his method so far that his claim covered methods using attenuated, dead, or living tuberculosis pathogens. Furthermore, his application included the modification of pathogens by passaging them through animals and the use of intermediate products such as the cultures themselves. Finally, it included methods such as processing tuberculosis pathogens into emulsions or suspensions to be injected, or creams for external use (inunction). In short, his patent application included every possible known method of developing a tuberculosis remedy on the basis of biological and organic substances. This would have secured Friedmann a legal monopoly on the production of

139 Ibid.; Patent of 19 July 1911, Patent No. F 32742.

140 See the President of the *Imperial Health Office* to the State Secretary of the Interior, 22 March 1913. Report concerning Friedmann's remedy. GStA PK 4176. Concerning the difficult and complex application process and the controversial human experiments see Hüntelmann 2008.

these biologicals. Thus it is no surprise that objections were raised to his application.

Max Piorkowski, who had cultivated the turtle tuberculosis bacteria on Friedmann's behalf a decade earlier, also raised objections to the latter's patent application. His justification mixed personal reasons with those of public interest. Piorkowski referred to patent laws that excluded pharmaceuticals from patent protection. However, the status of tuberculosis pathogens as a remedy was unclear. On the one hand, he said, living bacteria were of immunizing nature even if they were unprocessed; on the other hand they were not a priori a protective and healing substance. The preliminary examiner on behalf of the patent office had objected that Friedman's claim to a method of producing protective and healing substances to fight tuberculosis was not new, but was already in general use. Piorkowski criticized the application for being so complex and extensive »that a monopoly for the breeding of tuberculosis bacilluses would be granted and that in the future it would be impossible for any researcher to further fructify this branch of bacteriology« (Piorkowski 1913).[141] The only new thing was the tubercle lesions within the turtle, and these had developed naturally and had only coincidentally got into Friedmann's hands. If anybody, it was Piorkowski who was entitled to a patent, as it had been he who had bred the turtle tuberculosis pathogen (Piorkowski 1913).

With his extensive patent application Friedmann had gone beyond the pale in several respects. His contemporaries and colleagues gained the impression that he wanted to monopolize organic preparations based on bacteria for tuberculosis treatment (Möller 1913). This impression was exacerbated by what the scientific community saw as Friedmann's promotion efforts. The presentation of his remedy to the medical community was accompanied by a press campaign which, in the opinion of his

141 Likewise, A. Möller (1913) criticized Friedmann for obviously wanting to monopolize the treatment of tuberculosis with bacterial preparations.

contemporaries, had been initiated by Friedmann.[142] His expert colleagues objected to his offensive manner of marketing the remedy, which corresponded to the extensive patent and the assumed monopolization of bacteria preparations. If advertising a remedy was a taboo among physicians, a press campaign was considered a violation of physicians' morals.[143] In contrast to his extensive patent application he had been very secretive about the production method and the composition of his remedy so that his colleagues accused him of quackery and of merchandising a secret remedy. The suspicion that this press campaign only served considerations of private profit made an even more disastrous impact, as Friedmann publicly proclaimed himself an altruist and claimed that he had no intention of making profits from the remedy. At the same time, he severely criticized his critics' economic interests. Friedmann assumed that they opposed his remedy simply because they were only interested in making money with useless therapeutics and sanatoriums (Werner 2002; Hüntelmann 2008). Whatever reasons were in the end decisive, the patent application was rejected.

Wrapping up—the relation between patent law, priority, property, and trust in a broader context

Friedmann's tuberculosis remedy illustrates the ambivalence of patenting pharmaceuticals in the German Empire. And the examples of the *IET* and the *GSH* demonstrate the role and the importance of patents and patent law within the research process in the first decade after 1900. In both case studies, economic interests were closely connected to notions such as trust, intellectual property rights, and scientific priority.

142 Confidential report by Otto Kiliani to the Imperial German Consul General, Horst Falcke, 5 Oct. 1913. GStA PK, Nr. 4176.

143 Regarding the official ostracism of advertisements in the medical field and the manifold attempts to undermine professional ethical norms see Binder 2000.

Patents were supposed to reward the inventor for his work and to protect his inventions and developments from imitators; to protect intellectual property. Although patent law was supposed to provide more clarity in respect to the legal and commercial exploitation of an invention, this does not mean that the question of priority as concerns inventions had been clarified. The objection by Max Piorkowski and others show that the development of a pharmaceutical was also connected to questions of originality, the rights of first invention, and related quarrels about priority.

Securing exploitation rights by way of patent protection is based on a different strategy than claiming priority. For example, whereas Behring published the results of his work as early as possible to claim priority for a development, in applying for a patent there was no necessity for publication. On the contrary, this would have been an obstacle. If earlier we found hints among Ehrlich's instructions and correspondence that results should be published as soon as possible to preempt competing teams, their number declines to the same degree as the number of demands for patent applications increases. In the latter case, publication was less advisable than keeping confidentiality until the patent application was submitted. Accordingly, Ehrlich published the results on the synthesis of arsphenamine only one year after the patent application was submitted. The criticism of Friedmann's tuberculosis remedy was based primarily on the fact that he would not tell about the method and the composition of the remedy as long as the application procedure was ongoing.

Whereas priority quarrels took place in journals and in front of the expert public, it was lawyers, producers and inventors who were involved in patents quarrels. After all, the priority quarrel happened ex post, i. e. the two inventors derived their claims from earlier publications to justify their claim to priority, whereas the patent quarrel happened before patent protection was decided.

Pharmaceuticals were admittedly excluded from patent protection in the German Empire, but both examples nevertheless deal with the patenting of pharmaceuticals. The patenting applications for chemical intermediate

products necessary to produce pharmaceutical end products illustrate how this exemption was circumvented. Friedmann tried to avoid patent law by patenting all different means of processing bacteria cultures to protect his prospective tuberculosis remedy.

But this practice raised questions about the status of biological materials and chemical preparations. Were, for instance, organic preparations and bacteria cultures, minerals and vegetable raw materials »normal« commodities or pharmaceuticals? Bacteria were supposed to become both a remedy and a public good, making it difficult to patent (Gabriel 2009; Cassier 2009; Bud 2009).

The state was another actor in the patenting of pharmaceuticals. The *Imperial Patent Office* and the public health administration were key figures. While the patent office was generally the executive body that examined applications and granted or denied patents, public health authorities were involved especially (and exclusively) in the patenting of pharmaceuticals. The state had to balance several bio-political aims. In the case of Friedmann's tuberculosis remedy, bacteria cultures were considered to be a public health risk *and* at the same time a prospective remedy for a widespread infectious disease. For this reason, information about the remedy was a sine qua non and the *Imperial Health Office* discussed and evaluated any related public health risk that might result from its use. The development of an effective and harmless remedy could only be guaranteed by its critical examination and confirmation by the scientific community.

In order to combat probable public health risk, the state had a bio-political interest in the development of new remedies. Patent protection provided producers with an opportunity to inform the public about the drugs they invented while at the same time protecting them. But the simultaneity of give and take was precarious and a matter of trust. The development of a remedy that would have been well received by the medical community required the publication of information about the invention in advance, but this made the reproduction of the invention possible. For this reason, Friedmann hesitated to publish information about his remedy until he had applied for a patent. However, due to a lack of information, the public and the medical community were skepti-

cal about the remedy. The discussion of Friedmann's tuberculosis remedy was linked to the tensions between public trust and secret remedies, between tradition and progress. Friedmann's failed patenting process illustrates the significance of public trust and transparency, as well as the necessary reciprocity of trust.

Trust also played an important role in the relationship between scientists doing experimental research, as in the example of Ehrlich and the industry. The cooperation between the chemical industry and science had changed by the end of the 19th century. The chemical industry became enormously dynamic in this period and the realm of industrial research had been established through patent law. Beyond this, chemical companies provided scientists with material and in return, the latter transferred the rights to useful results to the industry. In this way, both parties benefited from the cooperation and the exchange of knowledge. The industry paid in advance for the scientists' ever more costly experiments; in return, new developments were patented and exploited commercially by the industry. Patents, to compensate for unreliable returns at an indeterminate future date, provided a possibility for enterprises to legitimate short-term expenses and investments. According to how the relationship is organized, the inventor receives a contractually fixed share of the profits; the industry appears to the public as the beneficiary, and the life-scientist is spared a conflict with medical ethos. However, for this contractual relationship too, trust plays an important role for a fruitful cooperation. Providing financial and other support for the scientists is a credit of trust, connected to the expectation and the promise that at some time in the future the scientist will develop a market-ready product. Against this background, as shown by the example of the *IET* laboratories, patents became an important driving force for inventions.

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