

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

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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 historicity, 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-

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 above-mentioned 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.

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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