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What is global legal history?

Thomas Duve*

Legal history, as developed in nineteenth-century continental Europe, has a national tradition, but also a transnational past. During the last two decades, however, a new field of global legal history has emerged, not least as a response to Eurocentrism, methodological nationalism and the current reality of transnational and global law. In this article, I map some historiographic traditions of transnational legal history and the emerging field of global legal history, pointing out some important methodological problems and suggesting a knowledge-historical approach. It ends with a definition of global legal history as a critical history of the production of multinormative knowledge, understood as a process of distributed knowledge production through cultural translation, comprising theory and practice, drawing on a wide range of sources, on a transnational scale, with special attention for the dialectics of glocalisation.

Keywords: global history; legal history; history of empire; global law; legal pluralism; globalisation

Legal scholarship, and with it, legal history, the historical jurisprudence as it has developed in continental Europe, are children of the nation-state. Their institutionalisation, their sources, concepts and academic practices are still influenced by this tradition today. However, the nineteenth century was, at the same time, an age of globalisation of law, and legal scholarship and historical jurisprudence were in no small way instrumental for this internationalisation. It provided concepts and narratives to create images of other world areas' legal cultures, just as these shaped Western self-perceptions and legal histories. Max Weber's

*Director at the Max Planck Institute for European Legal History, Frankfurt, and professor of Comparative Legal History at Goethe University, Frankfurt. Email: sekduve@rg.mpg.de.
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Occidentalism, built on his analysis of non-Western legal cultures and his paramount impact on Western legal historiography, might be the most striking example. Notably, due to ideas of civilisation, modernisation and rationalisation – the underpinnings and results of this engagement with other world areas' legal histories – Western modernity was seen to have originated a model of the organisation of social coexistence through law that seemed superior, and that would spread across the globe and prevail in the long term. European or Western legal culture had, it seemed, produced the originals. Other nations, which were as yet less civilised, would copy them.

However, this image proved wrong, and the time of such European self-assurance seems to be over. It is not only the rise of global regions such as Asia, where other forms of governance are self-confidently lived out, and the apparent crisis of the Western model of democracy that has caused the West's deep insecurity about its own identity, resulting, not least, in new nationalisms and retraditionalisations. Academia also contributed to this insecurity. For four decades, critical histories, postcolonial perspectives and global history have increasingly brought the darker sides of Western history into the general consciousness. Global studies have discredited diffusionist models of globalisation. In the last few years, many monuments were torn down, not only those recently removed in Brussels, Madrid or the US. As a result, the grand narrative of the slow triumph of Western law has also lost its glory.

While this happened, and as a part of the deconstruction of the grand and many smaller narratives, a new way of looking at the legal histories of larger, transnational spaces, but also at each nation's legal history, has emerged. According to some observers, a 'field of global legal history is now taking shape at record speed' and 'a world history of law that is more than a collection of national legal histories is now clearly in view'.[1] In fact, there is an increasing number of publications and activities using this label. What, however, is 'global legal history', forcefully put on the legal historian's agenda by some, and suspected to be simply a new fashion, outdated before it really started,[2] by others?

The aim of this article is obviously not to give a definite – and, due to the plural character of global legal history, perhaps also impossible – answer to this question. Rather, this essay is an attempt to map a still-emerging field, to highlight some of the major methodological problems and to suggest some possible solutions, all

[1]Lauren Benton, 'Law and World History' in Kenneth R Curtis and Jerry H Bentley (eds), *Architects of World History: Researching the Global Past* (John Wiley & Sons 2014) 134, 135.

[2]Jeremy Adelman, 'What is Global History Now?' [2017] *Aeon* <https://aeon.co/essays/is-global-history-still-possible-or-has-it-had-its-moment> accessed 15 September 2020 raised this question for global history, pointing out perspectives for the future; on the further discussion, not without misreadings, and the future of global history, see Richard Drayton and David Motadel, 'Discussion: the Futures of Global History' (2018) 13 *Journal of Global History* 1 as well as the answers by David Bell and Jeremy Adelman in the same issue.

from the perspective of a legal historian based in Europe and thus writing from his ineluctable positionality.[3]

As many of the methodological aims and problems of global legal history are a response precisely to the European or Western historiographical tradition, it starts with a glimpse into some aspects of this legacy (I). It then gives an overview of important neighbouring disciplines of global legal history, like the history of empires, global history and comparative law, as well as a brief survey about claims for and attempts to define global legal history (II). Moving beyond methodological postulates, it distinguishes two major dimensions of global legal history: a legal history from a global perspective (III) and the history of the globalisation of law (IV). Building on this, it analyses some major methodological problems (V) and suggests that a knowledge-historical approach to global legal history might provide a helpful perspective for overcoming some of them (VI). The article concludes with a suggestion for a working definition (VII).

I. European traditions of doing legal history

Not least because this article expresses a continental European perspective, it seems important to start with a critical review of some Western traditions of writing national, transnational and global legal history. This seems all the more necessary as the continental European perspective has dominated legal historical research for a long time and influenced methods and academic practices in many places around the world. It has left a certain national imprint, even on legal histories dedicated to transnational or indeed global legal history.

1. *Historical jurisprudence, legal history and the nation-state*

Legal history in the form in which it is practised today, at least in continental Europe and in some places in the world influenced by this tradition, arose in the

[3]In this article, I am building on previous writings on the history of legal historiography in Germany and continental Europe and on methods of (global) legal history, especially on Thomas Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive' (2012) 20 *Rechtsgeschichte – Legal History* 18; Thomas Duve, 'German Legal History: National Traditions and Transnational Perspectives' (2014) 22 *Rechtsgeschichte – Legal History* 16; Thomas Duve, 'Global Legal History: A Methodological Approach' [2017] *Oxford Handbooks Online* < www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-25> accessed 15 September 2020; Thomas Duve, 'Global Legal History: Setting Europe in Perspective' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018). As bibliographical references in this survey had to be kept to a minimum, highlighting not least some more recent publications, I remit to these writings for further references on many issues.

search for the nation's 'own' laws.[4] After its early beginnings – with Hotman, Coke, Conring – it was the historical school of the first half of the nineteenth century which, first in Germany and then later in many other countries, shaped questions, concepts, methods and practices to find the appropriate tools for legal nation-building. Jurists practiced what was called a 'historical jurisprudence'.[5] They looked back to Roman Law, Medieval Law, or wherever they felt their traditions were rooted, and from there they constructed a historical evolution that seemed to lead to their respective nation-states.

This national imprint on the discipline extended deep into the twentieth century. For, even if the connection between legal history, legal dogmatics and comparative law had loosened by 1900 at the latest,[6] legal scholarship remained committed to a comparative historical method for a long time and legal historians, at least in the West, ie in Europe and the Americas, continued to frame their research with the nation-state in mind. In continental Europe and in other areas like, for example, Latin America, the national codifications and constitutions, as well as legal scholarship, were seen not only as a consequence, but as the culmination of a long historical development. Even European legal history of the mid-twentieth century, an early attempt to write transnational legal history, was still characterised by this nation-state past and its historiographic practices.[7] Only slowly were the methodological nationalisms recognised. In addition to the criticism that had already been levelled in the 1950s at a 'very Germanic' view of European legal history,[8] there was a growing awareness of the many particularities of European legal histories. It is this insight into the complexity of the legal histories in Europe that even today make European legal history seem to be 'still a project'.[9]

[4]On the history of legal history in the age of nation-state, see Joachim Rückert, 'The Invention of National Legal History' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 22–83; on German national traditions and transnational perspectives Duve, 'German Legal History' (n 3).

[5]Mathias Reimann, 'Historical Jurisprudence' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 397–417.

[6]Stefan Vogenauer, 'Rechtsgeschichte und Rechtsvergleichung um 1900: Die Geschichte einer anderen "Emanzipation durch Auseinanderdenken"' (2012) 76 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1122.

[7]See on this Randall Lesaffer, 'The Birth of European Legal History' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) and Duve, 'Global Legal History' (n 3).

[8]Alvaro D'Ors, 'Jus Europaeum?' in Wolfgang Kunkel and others, *L'Europa e il diritto romano: studi in memoria di Paolo Koschaker* (Giuffrè 1954) vol 1, 475.

[9]Michael Stolleis, 'Europäische Rechtsgeschichte, immer noch ein Projekt' in Stefan Ruppert and Miloš Vec (eds), *Michael Stolleis: Ausgewählte Aufsätze und Beiträge* (Vittorio Klostermann 2011) vol 2, 1113–26.

2. *Nationalisation and internationalisation of law and legal (historical) scholarship*

The case of European legal history illustrates that as much as the history of law was moulded by the nation-state and its scholarly practices, national legal histories were inscribed in transnational spaces since their early days. Nationalisation and internationalisation of law and legal scholarship in the nineteenth and twentieth centuries were simultaneous processes.[10] The codification movement, for example, a central part of the attempts to create legal frameworks for nineteenth-century nation-states, was at the same time a transnational phenomenon.[11] Undoubtedly, jurists all over the world were mainly interested in improving their own national legal systems. But they did so by looking beyond their borders, taking what fitted their needs best. Due to the still strong historical method of legal scholarship, this also meant learning about the legal histories of other countries and even world areas, and relating one's own national legal history to these other legal cultures. The search for the particular 'national spirit' was only possible by creating images of and difference to the other.

At the same time, more than a few scholars in this age of juridical nationalism observed with fascination the formation of transnational normative orders. In the same months, for example, in which the French *Code Civil*, perhaps the most influential and transformative national codification in world history,[12] came into force, near the borders with French territories – in Göttingen – the German historian, Arnold Heeren, wrote in the preface to his *Handbook of the History of the*

[10]Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19–73; for the German public law, see, for example, Michael Stolleis, 'Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts' in Stefan Ruppert and Miloš Vec (eds), *Michael Stolleis: Ausgewählte Aufsätze und Beiträge* (Vittorio Klostermann 2011) vol 1, 379–401.

[11]See on the codification period from this perspective, for example, the surveys in Paolo Grossi, *De la codificación a la globalización del derecho* (Editorial Aranzadi 2010); Jean-Louis Halpérin, 'The Age of Codification and Legal Modernization in Private Law' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 907–27; on codes and their significance more generally see the critical remarks on research traditions by Heikki Pihlajamäki, 'Legal Codes as Cultural Products' in Simon Stern, Maksymilian Del Mar and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (Oxford University Press 2019) 703–18.

[12]On the worldwide impact of the French law, see the study of Sylvain Soleil, *Le modèle juridique français dans le monde: Une ambition, une expansion (XVI^e^-XIX^e^ siècle)* (IRJS Editions 2014); more specifically on the French Code Civil in Latin America Francisco J Andrés Santos, 'Napoleon in America? Reflections on the Concept of "Legal Reception" in the Light of the Civil Law Codification in Latin America' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 297–313.

European System of States and its Colonies, that 'through the spread of European culture over distant parts of the world and the flourishing plantations of Europeans beyond the ocean, the elements become visible to a freer and larger, already powerfully rising world state system', rightly recognising in this the 'material for the historian of coming centuries'.[13]

With this interest in other world areas, Heeren was building upon earlier traditions of universal histories that had been developed not only in Göttingen, but also elsewhere, notably with the universal jurisprudence and universal history of JPA Feuerbach.[14] Heeren was representative of an increasing search for a way of relating the national to the universal. Three decades later, for example, the Berlin law professor, Eduard Gans, combined the national and the universal in a completely different, namely Hegelian, way.[15] Last but not least, the historical school, with its concentration on the reconstruction of the process of reception of the *ius commune* in Europe, placed the analysis of the dissemination and localisation of law in space and time at the centre of its work. It was a profoundly national and at the same time transnational endeavour. Sources of medieval jurisprudence scattered throughout Europe were tapped and resulted in a hugely influential interpretation of the process of differentiation of national laws.[16] It was not only Rudolf von Jhering, whose writings were translated and read far beyond the borders of continental Europe, who then conceptualised Roman law as world law.[17] In short, and again from the perspective of a legal historian based in Europe and thus writing from his ineluctable positionality: in very different ways, national legal history was seen as a particular – and, usually, privileged – historical formation, shaped by the distinct national spirits, but expressing universal principles. It was written with a clear consciousness about the transnational past and the present vocation of the national law.

With increasing international communication and trade, not least with European colonialism and legal imperialism and the considerable growth of academia,

[13]Arnold HL Heeren, *Handbuch der Geschichte des europäischen Staatensystems und seiner Colonien von der Entdeckung beyder Indien bis zur Errichtung des französischen Kayserthrons* (Röwer 1809) XII.

[14]Heinz Mohnhaupt, 'Universalgeschichte, Universal-Jurisprudenz und rechtsvergleichende Methode im Werk P.J.A. Feuerbachs' in Heinz Mohnhaupt (ed), *Historische Vergleichung im Bereich von Staat und Recht: Gesammelte Aufsätze* (Vittorio Klostermann 2000) 437–70.

[15]Corrado Bertani, '*Das Erbrecht in weltgeschichtlicher Entwicklung* (1824–1835) von Eduard Gans: Das erste Zeugnis vom Einfluss Hegels auf die Privatrechtsgeschichtsschreibung' (2007) 11 *Rechtsgeschichte* 110.

[16]Cristina Vano, *Der Gaius der Historischen Rechtsschule: Eine Geschichte der Wissenschaft vom römischen Recht* (Vittorio Klostermann 2008); on the German Historical School see Hans-Peter Haferkamp, *Die Historische Rechtsschule* (Vittorio Klostermann 2018).

[17]Joachim Rückert, 'Das Methodenorakel Rudolf von Jhering (1818–1892)' (2019) 219 *Archiv für die civilistische Praxis* 457, 468.

attention to international law, foreign legal systems and the transnational dimension of law grew even more during the second half of the nineteenth and early twentieth centuries. As time went by, more and more draft constitutions, codifications and legal literature from all over the world piled up on the tables of legislators. In many places, large collections of foreign legal texts or translations of legal scholarship were edited.[18] In the field of constitutional law, for example, in China during the late imperial period in 1907, a 32-volume collection of constitutional texts of the West ('The Essence of European and American Politics', 列国政要) was published, as was Paul Posener's *The State Constitutions of the World* ('Die Staatsverfassungen des Erdballs') two years later in Germany. In both cases, the foreign constitutions were integrated into national intellectual reference systems, and thus respectively into a Confucian and a colonial one.[19]

In many places, politicians and jurists were in contact with their colleagues from other areas, and governments and universities sent students, professors and whole delegations around the world and concluded treaties which standardised the world. The dynamic growth of transnational normative orders was considered fascinating:

> The trade relations of peoples are developing ever more magnificently and enormously with the unexpected perfection of means of transport … It is now clear without doubt that trade will flourish all the more, the more the legislation of the countries it links is in harmony … For like trade itself, as indicated above, the character of the legal norms which regulate it is, at all times and in all zones, universal,

can be read, for example, in the introduction to the 1883 collection 'The Trade Laws of the World' ('*Die geltenden Handelsgesetze des Erdballs*').[20] The 'transformation of the world', as Jürgen Osterhammel has famously phrased it,[21] also inevitably affected the world of law. The internationalisation of law and legal scholarship, not least as a consequence of (legal) imperialism by Western powers, led to what has been called a 'Europeanization of the world', for good or for bad.[22]

[18]For a sample of case studies on the translation of Savigny as one of the most influential German jurists see Joachim Rückert and Thomas Duve (eds), *Savigny International?* (Vittorio Klostermann 2015) with contributions on translations of Savigny in France, the common-law world, Nordic legal culture, Russia, Japan, Spain, Italy, Brazil and China.

[19]See on this Fupeng Li, 'Translating Weimar: The Cultural Translation of the Weimar Constitution in China (1919–1949)' (Dr iur thesis, Goethe University Frankfurt 2020); on later translations in China see Fupeng Li, 'Becoming Policy: Cultural Translation of the Weimar Constitution in China (1919–1949)' (2019) 27 *Rechtsgeschichte – Legal History* 207.

[20]Oscar Borchardt, *Die geltenden Handelsgesetze des Erdballs* (Decker 1883) vol 1, VII, XI.

[21]Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (Patrick Camiller tr, Princeton University Press 2015).

[22]See on this 'Europeanization' James Q Whitman, 'The World Historical Significance of European Legal History: An Interim Report' in Heikki Pihlajamäki, Markus D Dubber and

Due to the still imperious historical paradigm for legal scholarship, the quest for universal regulations was carried out not least through legal historical studies. Commercial law was an early and important case, with Levin Goldschmidt's 'Universal History of Commercial Law' (*Universalgeschichte des Handelsrechts* in its 1891 edition) as a milestone.[23] In the same years, and accompanying the imperial and colonial expansion of European and American states, the basic concepts of international law were developed historically, according to national or confessional preferences, presenting either Francisco de Vitoria, Alberico Gentili or Hugo Grotius as the 'father' of international law.[24] There were even some histories of imperial law *avant la lettre*, like the so-called *Derecho indiano*, ie a legal history of the Spanish empire. However, also this imperial legal history was framed in nationalistic terms. Whereas the founder of this field, the Argentinean Ricardo Levene, saw the completion of *Hispanidad* in the Argentinean nation-state, which recently had celebrated its centenary of independence and envisioned a future of wealth and power, after World War II, Spanish legal historian, Alfonso García Gallo, and his school worked on the same history – as a legal history of imperial Catholic Spain which found its historical realisation in Franco's state.[25]

3. *Worldviews and legal historical methods*

These few snapshots of a broad and multifaceted discourse might illustrate to what extent legal history was and still is based on implicit or explicit historical and social theories, (legal) philosophical assumptions and, not least, life-historical contingencies. Anyone who, like the legal philosopher Gans, believed in the realisation of a world spirit in the history of his own nation had to place national history in a different relationship to the legal histories of other areas, compared to someone who, like the historian Heeren, traced the 'spread of European culture through distant parts of the world and the flourishing plantations of Europeans beyond the ocean'.[26] Those who, like Ricardo Levene or Alfonso García Gallo, discovered in their own nations the end of a long history of *Hispanidad* looked at legal history differently from the representatives of European legal

Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 3.

[23]See on his concept of universal history Karl Otto Scherner, 'Goldschmidts Universum' in Mario Ascheri and others (eds), '*Ins Wasser geworfen und Ozeane durchquert*': *Festschrift für Knut Wolfgang Nörr* (Böhlau Verlag 2003) 859–92.

[24]See on this Luigi Nuzzo and Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Vittorio Klostermann 2012); Ignacio de la Rasilla del Moral, *In the Shadow of Vitoria: A History of International Law in Spain (1770–1953)* (Brill-Nijhoff 2018).

[25]Luigi Nuzzo, 'Between America and Europe. The Strange Case of the *derecho indiano*' in Thomas Duve and Heikki Pihlajamäki (eds), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Max Planck Institute for European Legal History 2015) 161–91.

[26]Heeren (n 13).

history of the post-war period, as, for example, Helmut Coing, who adhered to natural law philosophy, assuming that certain supertemporal phenomena would appear at different times in different places – but initially, of course, in Europe.

What most Western visions of legal histories of the world had in common, however, was their European positionality, a certain occidental teleology and a silent consensus on what was considered the object of study: the law. A historical superiority of Christian Europe or, after 1900, the inevitable triumph of Western rational, secular and formal law seemed evident to most observers. Writing legal history as a history of the scientification of law (*Verwissenschaftlichung*), part of a process of rationalisation, was paradigmatic. The great Western legal historical narratives of the twentieth century, that is, those of Max Weber, Franz Wieacker, Francesco Calasso, Helmut Coing, Peter Stein, Harold Berman, Manlio Bellomo, or Paolo Grossi, to name a few, are based on this paradigm, despite all the differences in their assessment of this process.[27]

The methods used to reconstruct transnational legal formations corresponded to this consensus. Western law consisted of state laws, legal and political ideas and legal scholarship, and it seemed to spread from some centres to many regions in a star shape and to assert itself there slowly, at first in faint copies of the original. The course of history seemed to confirm this vision, remarkably untouched by the moral disasters of the twentieth century, two world wars and decolonisation.[28] Even in the post-war period and in the 1970s and 1980s, and despite all the setbacks through economic crises and the feeling that economic growth would come to an end, 'modernisation' was believed to be irreversible. Impressive advances in the European integration, the fall of the Berlin Wall with the subsequent new wave of codifications in Eastern Europe, and the idea of an almost involuntarily progressive constitutionalistion of the world made it possible to reflect on the 'end of history'.

As a consequence, diffusionist models, the study of the reception of European law in other regions starting from the original, a limited sensitivity to the phenomena of localisation, or their interpretation as implementation deficits, dominated the scene.[29] Books written from this perspective on the reception of European civil law, criminal law and constitutional law in Latin America or Asia have

[27]For a more in-depth analysis, see Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive' (n 3). For a different account of European legal history, see now Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press 2018).

[28]On the persistence of globalization even in the context of decolonisation, see Martin Thomas and Andrew Thompson, 'Empire and Globalisation: from "High Imperialism" to Decolonisation' (2014) 36 *The International History Review* 142.

[29]See on this general Eurocentrism and its expression the observations by Antoon de Baets, 'Eurocentrism' in Thomas Benjamin (ed), *Encyclopedia of Western Colonialism since 1450* (Thomson Gale 2007) vol 1, 456; on the historical context of comparative legal history in this period see more specifically Adolfo Giuliani, 'What is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in Olivier Moréteau,

brought a substantial amount of material to light and pointed to important communicative spheres like expert cultures, elite discourses and imperial networks, which have contributed to an almost global presence of a European and Western vocabulary of law. However, the historiographical practice of reducing legal history to a history of legal texts, black letter law and legal scholarship facilitated Eurocentric interpretations. It directed the gaze to the things one knew, to sources and epistemic communities that could be relatively easily reconstructed with national or European methods, and induced misunderstandings of the legal cultures which integrated these imports into their own cultural system. How cultural translation of the knowledge acquired abroad took place in ministerial, judicial or everyday practice, and what adaptations and transformations occurred in the process of translating this knowledge and, above all, what value the 'transplanted law' actually had, remained mostly in the dark.

4. *New horizons?*

Looking back, the scene of this intellectual heritage is somewhat ambivalent. At the end of the twentieth century, legal historians were able to draw on an important tradition not only of national legal history, but also of what would today be called the history of transnational law and legal histories of other countries and regions. Research on the reception of the *ius commune* in the Middle Ages and in modern times had produced a vast quantity of studies on the reproduction of law and legal scholarship in time and space. Legal historians had also traced the influence of Western law in other world areas. Due to the simultaneity of nationalisation and internationalisation, jurists working with a historical method, as well as legal historians, had a considerable amount of information about legal histories of other nations and even world areas at hand. Not least, comparative law had made an important contribution to this broad knowledge. However, from today's perspective, many of the studies were full of racist, biologicistic, colonialist and ethnocentric interpretations, and both legal history and comparative law remained in most cases trapped in the shell of the nation-state and its academic practices.

Moreover, neither of them succeeded in replacing the metaphysical or evolutionist interpretations of the nineteenth and early twentieth centuries with new convincing theories of the reproduction of law in time and space. Legal history rested on the rich harvest of research on the reception of *ius commune*. Most of the research was based on implicit philosophical assumptions or reductionist perspectives on law. In comparative law, the discussions about the (im)possibility of legal transplants and its impact on modernisation, which had started in the 1970s, are still going on today, although an observer like Lawrence Friedman, writing 20

Aniceto Masferrer and Kjell A Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 30–77.

years ago, could already notice that criticising Watson's ideas was like 'shooting a fish in a barrel'.[30] Systems theory and other evolutionary theories, like HP Glenn's cosmopolitan proposals, or historical institutionalism, have not really been put into practice in legal historical research.[31]

These deficits can be seen more clearly today because, at the turn of the millennium, with internationalisation and an increased preoccupation with transnational law and law in globalisation, the opening of legal scholarship to postcolonial perspectives, the so-called historical turn in international law, and a heightened interest in history and in legal theory, much has changed.[32] Not least, general history has begun to take an interest in law again. Due to these and some other developments, a lively field of legal history with transnational scope has emerged, especially in southern Europe (Italy, Spain, Portugal) and in Anglo-American academia, in some cases starting from an interest in their own colonial past and then moving to 'global legal history'.[33]

[30]Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 93. The debate about legal transplants goes on, see, for example, the special issue of the American Journal of Comparative Law: Franz Werro and Helge Dedek, 'What We Write About When We Write About Comparative Law: Pierre Legrand's Critique in Discussion. Preface' (2017) 65 *The American Journal of Comparative Law* VII. For a summary of the evolution since the 1970s see Michele Graziadei, 'Comparative Law, Transplants, and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd edn 2019) 443–73.

[31]On Glenn and the potential of his thinking, see Thomas Duve, 'Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History' (2018) 6 *Comparative Legal History* 15.

[32]For a recent assessment see, for example, António Manuel Hespanha, 'Is There Place for a Separated Legal History? A Broad Review of Recent Developments on Legal Historiography' (2019) 48 *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 7; for a survey of the state of the art in legal history in general see the contributions in Bernardo Sordi (ed), *Storia e diritto. Esperienze a confronto. Atti dell'incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini, Firenze, 18-19 ottobre 2012* (Giuffrè Editore 2013).

[33]The huge field of colonial legal history cannot be covered here, despite its close relation to imperial and global legal history. On the history of colonial law, see, for example, with regard to the big European colonial powers, the studies and historiographical surveys: Mary S Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Harvard University Press 2004); Luciano Martone, *Diritto d'oltremare: Legge e ordine per le Colonie del Regno d'Italia* (Giuffrè 2008); Bernard Durand, *Introduction historique au droit colonial* (Economica 2015); António Manuel Hespanha, 'O "direito de Índias" no contexto da historiografia das colonizações ibéricas' in Thomas Duve (ed), *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano, Berlín 2016* (Dickinson 2017) 43–83; Tamar Herzog, 'Colonial Law: Early Modern Normativity in Spanish America' in Jörg Tellkamp (ed), *A Companion to Early Modern Spanish Imperial Political and Social Thought* (Brill 2020) 105–27.

II. Global legal history between global history, imperial history, and legal studies

As a consequence, many smaller and larger histories of the huge process of transnationalisation and globalisation of law have been written in the last two decades. More and more legal historians and historians working on legal history are making the case for, or are at least considering critically, a global legal history that overcomes national perspectives and is different from assembling national histories in one volume. They stress the need for decentring and decolonising legal historiography and plead for overcoming the Eurocentrism embedded in academic concepts, practices and institutional frameworks of legal history.[34] Is there, one might then ask, already a 'global legal history'?

Despite the growing methodological debate and an increasing number of global historical studies, global legal history is still very much an emerging field. Just as in the case of 'general' global history, there is no generally accepted definition, and it would perhaps not even be desirable to have one for an

[34]See the bibliography mentioned in notes 1, 3, 91, 94 (Benton, Duve) as well as: Jean-Louis Halpérin, *Profils des mondialisations du droit* (Dalloz 2009); Pia Letto-Vanamo, 'Towards Global Legal History?' in Per Andersen and others (eds), *Liber Amicorum Ditlev Tamm: Law, History and Culture* (DJØF Publishing 2011); Frédéric Audren, 'Ouverture: Dénationaliser l'histoire du droit?' [2012] 5 *Clio@Themis* <www.cliothemis.com/Ouverture-Denationaliser-l> accessed 15 September 2020; Pietro Costa, 'Reading Postcolonial Studies: Some Tentative Suggestions for Legal Historians' (2013) 35 *Zeitschrift für Neuere Rechtsgeschichte* 272; António M Hespanha, 'Particularidades de método de uma história mundial do direito' in Bernardo Sordi (ed), *Storia e diritto. Esperienze a confronto. Atti dell'incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini, Firenze, 18-19 ottobre 2012* (Giuffrè Editore 2013) 483–91; Philip C McCarty, 'Globalizing Legal History' (2014) 22 *Rechtsgeschichte – Legal History* 283 as well as other contributions in *Rechtsgeschichte – Legal History* 22 (2014); Arne Jarrick and Maria Wallenberg Bondesson, 'What Can be Understood, Compared, and Counted as Context? Studying Lawmaking in World History' in Arne Jarrick, Janken Myrdal and Maria Wallenberg Bondesson (eds), *Methods in World History: A Critical Approach* (Nordic Academic Press 2016) 147–84; Jean-Louis Halpérin, 'Spatializing Law in a Comparative Perspective of Legal History' (2016) 40 *Extrême-Orient, Extrême-Occident* 207; Eliana Augusti, 'Quale storia del diritto? Vecchi e nuovi scenari narrativi tra comparazione e globalizzazione' in Massimo Brutti and Alessandro Somma (eds), *Diritto: storia e comparazione: Nuovi propositi per un binomio antico* (Max Planck Institute for European Legal History 2018) 31–47; Luigi Nuzzo, 'Rethinking Eurocentrism. European Legal Legacy and Western Colonialism' in Massimo Brutti and Alessandro Somma (eds), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Max Planck Institute for European Legal History 2018) 359–78; Carlos Garriga, '¿Cómo escribir una historia "descolonizada" del derecho en América Latina?' in Sebastián Martín and Jesús Vallejo (eds), *En Antidora: Homenaje a Bartolomé Clavero* (Thomson Reuters Aranzadi 2019) 325–76; Heikki Pihlajamäki (n 11); Maksymilian Del Mar, 'Global Historical Jurisprudence: Relating Law and Power in a Global Context' in Jorge L Fabra-Zamora (ed), *Jurisprudence in a Globalized World* (Edward Elgar Publishing 2020) 100–26. A good and recent survey on the field also in Frédéric Audren, Anne-Sophie Chambost and Jean-Louis Halpérin, *Histoires contemporaines du droit* (Dalloz 2020) esp 7–24.

intellectual project that, just like global history, has to be plural on its own terms.[35] However, while an emerging field might tolerate a certain level of confusion when it comes to terminology, at some point, it needs to develop a consensual minimum.[36] If not, some debates – and misunderstandings – will repeat over and over again.

1. *Global history, histories of empires and other neighbouring fields*

A minimum consensus on some issues might be feasible, not least because of the 'dramatic expansion of global history' in recent years[37] and the intense debates about aims and methods of global history and the 'new imperial history'.[38] Although global history and (new) imperial history hardly take law into account,[39] legal historians can learn a lot from these and related discussions in specific subfields. Global art history, for example, is reviewing the national

[35]Dominic Sachsenmaier, *Global Perspectives on Global History: Theories and Approaches in a Connected World* (Cambridge University Press 2011) 7.

[36]As Osterhammel has affirmed for global history, Jürgen Osterhammel, 'Global History (Commentator: Pierre-Yves Saunier)' in Marek Tamm and Peter Burke (eds), *Debating New Approaches to History* (Bloomsbury 2018) 21.

[37]*Ibid.*

[38]On the state of global history, see *ibid*, as well as the other excellent surveys of Sven Beckert and Dominic Sachsenmaier (eds), *Global History, Globally: Research and Practice around the World* (Bloomsbury 2018); Roland Wenzlhuemer, *Globalgeschichte schreiben: Eine Einführung in 6 Episoden* (UVK Verlagsgesellschaft 2017); Matthias Middell and Katja Naumann (eds), *Bibliography of Global History* (Leipziger Universitätsverlag 2017); Sebastian Conrad, *What is Global History?* (Princeton University Press 2016); Sachsenmaier (n 35). See also the contributions in recent special issues, for example in: Christian Büschges and Stephan Scheuzger (eds), *Global History and Area Histories* (Leipziger Universitätsverlag 2020); Neus Rotger, Diana Roig-Sanz and Marta Puxan-Oliva, 'Introduction: Towards a Cross-Disciplinary History of the Global in the Humanities and the Social Sciences' (2019) 14 *Journal of Global History* 325.

[39]See, for example, the recent surveys mentioned in Beckert and Sachsenmaier (n 38) which demonstrate the nearly complete absence of legal history from global history. In imperial history one can find more studies dedicated to law, see, for example, Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton University Press 2010); Lauren A Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press 2013); Jeroen Duindam and others (eds), *Law and Empire: Ideas, Practices, Actors* (Brill 2013); Kent F Schull, M Safa Saraçoğlu and Robert Zens (eds), *Law and Legality in the Ottoman Empire and Republic of Turkey* (Indiana University Press 2016); Tanja Bührer and others (eds), *Cooperation and Empire: Local Realities of Global Processes* (Berghahn 2017); Stefan B. Kirmse, *The Lawful Empire: Legal Change and Cultural Diversity in Late Tsarist Russia* (Cambridge University Press 2019) as well the review of the 'world history of law in empire-approach' in section IV.3 of this article. Important chapters on legal history can be found in some recent collections on Iberian imperial history: Fernando Bouza, Pedro Cardim and Antonio Feros (eds), *The Iberian World, 1450–1820* (Routledge 2020); Ângela B Xavier, Federico Palomo and Roberta Stumpf (eds), *Monarquias Ibéricas em Perspectiva*

framing of research topics and practices, the object ('Art'), the sources and the methods of the field in very inspiring ways.[40] In a similar vein, global intellectual history[41] and, as will be explained more extensively in section VI, the history of science are dealing with many methodological problems and topics closely related to legal history.

Global legal historians, however, can also mobilise expertise in some legal disciplines – especially legal theory, legal sociology and legal anthropology – that provide reflections about the specificities of the identified object of global legal history: the law. This is crucial because, while law undoubtedly was – just as scientific knowledge – a 'fellow traveller'[42] of ministers, merchants, missionaries, soldiers and slaves, it is nevertheless something quite different from objects like cotton, sugar and pottery, and also from aesthetic ideas, mechanics or philosophy, ie the topics that until now have shaped the methodological toolkit of global history. For this reason, global legal history will need to develop its own methodologies.

2. *Comparative law and comparative legal history*

One discipline that is of particular importance for global legal history is comparative law. In a certain parallel to what is happening in legal history, comparative law can build on decades of research on transplants and receptions of law, not least in historical perspective,[43] and is currently undergoing a process of methodological

Comparada (Sécs. XVI-XVIII): Dinâmicas Imperiais e Circulação de Modelos Administrativos (Imprensa de Ciências Sociais 2018).

[40]See, for example, James Elkins (ed), *Is Art History Global?* (Routledge 2007); Thomas DaCosta Kaufmann, Catherine Dossin and Béatrice Joyeux-Prunel (eds), *Circulations in the Global History of Art* (Routledge 2015); for a recent survey Béatrice Joyeux-Prunel, 'Art History and the Global: Deconstructing the Latest Canonical Narrative' (2019) 14 *Journal of Global History* 413.

[41]For an insight into current debates on methodological problems with extreme relevance for legal history see Martin Mulsow, 'A Reference Theory of Globalized Ideas' (2017) 2 *Global Intellectual History* 67; Knud Haakonssen and Richard Whatmore, 'Global Possibilities in Intellectual History: A Note on Practice' (2017) 2 *Global Intellectual History* 18; John GA Pocock, 'On the Unglobality of Contexts: Cambridge Methods and the History of Political Thought' (2019) 4 *Global Intellectual History* 1; also Dominic Sachsenmaier, 'Global Challenges to Intellectual History: Regional Focus of Intellectual History in the West' (2013) 6 *Fudan Journal of the Humanities and Social Sciences* 128; Samuel Moyn and Andrew Sartori (eds), *Global Intellectual History* (Columbia University Press 2013).

[42]Jürgen Renn and Malcolm H Hyman, 'The Globalization of Knowledge in History: An Introduction' in Jürgen Renn (ed), *The Globalization of Knowledge in History* (Edition Open Access 2012).

[43]See for an exhaustive introduction into comparative law with a survey of the debates on methods, aims and goals now Uwe Kischel, *Comparative Law* (Oxford University Press 2019). A succinct summary in Graziadei (n 30).

innovation, decolonisation and historical self-reflection.[44] At the same time, comparative legal history, as a special way of doing legal history, has turned out to be a lively field of debate and research, sharing some aims and goals of global legal history and comparative law, like abandoning the national framework, searching for new analytical concepts and tracing entanglements.[45] Due to these openings, the boundaries between comparative law, comparative legal history and global legal history have become, and will probably remain, fuzzy.[46]

The strong legacy of comparative law on attempts to write global legal history, or the use of the word 'global' for samples of studies that might also have been published under the title 'comparative legal history', is clearly visible in a recently published volume with studies on transnational legal histories, entitled *Global Legal History. A Comparative Law Perspective*. In the introduction, the editors provide a summary of their understanding of global legal history that shows the indebtedness to both traditions of comparative law and comparative legal history. According to them, global legal history:

> … takes law as a general normative practice, varying across time and space, drawing comparisons among experiences in different times and places, and searching for the existence of ideas, rules, and institutions common to different societies. Its interest lies in commonalities and particularities beyond the nation-state and beyond traditional legal families. … It puts the North Atlantic model of law and politics in brackets in order to avoid using it as a standard against which the long history of political and normative experiments of mankind could or should be measured. It considers that influences happen in a multidirectional way so that it is not just the 'central,' 'imperial,' or 'developed' system that imposes changes on 'the other.' Ideas that were born in a certain place are incorporated into a different cultural,

[44]See on this process the survey by Mathias Siems, 'New Directions in Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd edn 2019); on decolonisation Sherally Munshi, 'Comparative Law and Decolonizing Critique' (2017) 65 *The American Journal of Comparative Law* 207; Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015).

[45]On comparative legal history, see Kjell Å Modéer, 'Abandoning the Nationalist Framework: Comparative Legal History' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 100; Luigi Lacchè, 'Sulla Comparative Legal History e dintorni' in Massimo Brutti and Alessandro Somma (eds), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Max Planck Institute for European Legal History 2018) 245–65; Aniceto Masferrer, Kjell Å Modéer and Olivier Moréteau, 'The Emergence of Comparative Legal History' in Olivier Moréteau, Aniceto Masferrer and Kjell Å Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 1–28; Sean P Donlan, 'Comparative? Legal? History? Crossing Boundaries' in Olivier Moréteau, Aniceto Masferrer and Kjell A Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 78–95.

[46]See on this, for example, Heikki Pihlajamäki, 'Merging Comparative Law and Legal History: Towards an Integrated Discipline' (2018) 66 *The American Journal of Comparative Law* 733.

> institutional, social, political background, and work differently, resulting in a new idea, institution, or practice.[47]

While certainly a useful description, it nevertheless seems to be missing a few aspects that are important for global legal history, such as the critical self-reflection of the traditions of writing legal history and the problem of the localisation and translation of normative knowledge. One might also find problematic a certain essentialist and reifying tendency (as if ideas were something untouched by their 'incorporation') and an emphasis on the search for commonalities, an old legacy of the *praesumptio similitudinis* of comparative law. More importantly, however, one dimension of global legal history is averted in this definition: the reconstruction of the formation of global legal regimes, and the role of law in the history of globalisation.

Due to the need to integrate these aspects into the picture, it seems useful to distinguish two major dimensions of global legal history: a 'legal history in a global historical perspective' and a 'global legal history as a history of the globalisation of law'.[48] Both are interrelated and, in some cases, may even be two sides of the same coin. The 'deconstructive' – or, perhaps, destructive – approach of setting legal history in a global perspective is often the precondition for the 'reconstructive' or 'constructive' approach of writing a history of the globalisation of law and its role in the globalisation as such. This is why it seems reasonable to start with the former.

III. Legal history in a global-historical perspective

As a perspective, global legal history aims to situate national legal histories in a broader spatial and analytical framework, overcoming methodological nationalism, internalist explanations and diffusionist perspectives, and revising ethnocentric – and, due to the state of the discipline, this more often than not means Eurocentric, but could also, for example, mean Sinocentric – assumptions. It seeks to decentre and often de-Europeanise or de-Occidentalise legal historiography. It promises to fulfil an emancipatory function, show the darker sides of European legal histories and might result in a deconstruction of powerful grand narratives. It could even contribute to a radical rewriting of history that helps to

[47]Joshua C Tate, José Reinaldo de Lima Lopes and Andrés Botero-Bernal, 'Global Comparative Legal History. An Introduction' in Joshua C Tate, José Reinaldo de Lima Lopes and Andrés Botero-Bernal (eds), *Global Legal History: A Comparative Law Perspective* (Routledge 2019) 7–8. In a similar way, the contributions in Griet Vermeesch, Manon van der Heijden and Jaco Zuijderduijn (eds), *The Uses of Justice in Global Perspective, 1600–1900* (Routledge 2019) could also be seen as an exercise in comparative legal history.
[48]For a similar distinction regarding global history see, for example, Conrad (n 38); Wenzlhuemer (n 38).

put an end to the 'cognitive empire'[49] and to discover new forms of regulating conviviality.

Some examples of these 'deconstructive' goals of a legal history from a global perspective, achieved by widening the spatial and conceptual framework of European legal history, might illustrate what this means.

1. *Opening spatial and conceptual frameworks of European legal histories*

In some cases, placing European legal history in a global perspective has greatly contributed to the understanding that it was not only imperial and colonial experiences of all kinds (ie formal and informal empires) that made 'European' normative orders, institutions and practices what they are today. It shows that national and continental legal histories cannot be understood only in and of themselves. Europe was a global region, just like other areas, and these were interconnected with each other. Overcoming what is sometimes called a 'container approach' to history, and opening for new, wider and flexible spaces, as well as questioning established periodisations and concepts can lead to a reassessment of 'European' legal history, but also of legal histories in other areas of the world, deeply entangled with each other.

Take the School of Salamanca.[50] Since its so-called rediscovery in late nineteenth-century Spain, especially by legal historian Eduardo de Hinojosa, it was seen as a Spanish Catholic intellectual achievement that disseminated throughout the world. Constructing a continuity between the Spanish Golden Age and the present did not only have a legitimising effect for the emerging juridical discipline of international law at the end of the nineteenth century. It was also part of a national effort to emphasise the important role of Spain in the development of science, a major goal of Spanish intellectuals of that time. Ever since those days, Francisco de Vitoria has been called the 'father of international law', a vision still to be found in a notable commonality by both hagiographic praise and postcolonial critical historiography. The resulting concentration on one author, or a select group of authors, and, more importantly, the reduction of the School to its role as the precursor of legal scholarship – in international law, but later also in civil law and criminal law – has shaped the legal historical research on the School until today. When, for example, Italian legal historian, Manlio Bellomo, states in his masterly survey of European legal history that, with the emergence of the 'new jurisprudence' in sixteenth-century Spain, the picture of

[49]Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University Press 2018).

[50]See on the following Thomas Duve, 'The School of Salamanca. A Case of Global Knowledge Production' (2020) 12 *Max Planck Institute for European Legal History Research Paper Series* 1, a preprint of Chapter 1 of: Thomas Duve, Christiane Birr and José L Egío García (eds), *The School of Salamanca: A Case of Global Knowledge Production?* (Brill) (forthcoming).

European legal history changed radically because 'a totally new, and original legal culture formed and developed in Spain, which then expanded and took hold throughout Europe among the dominant currents of legal thought',[51] he shows to what extent the School of Salamanca has been integrated into the leading narrative of European legal history as a history of the scientification of law, built on contributions by different European nation-states.

Looking critically at the historical context surrounding the construction of this notion of the School of Salamanca, however, and emancipating it from some path dependencies resulting from the research tradition, what is known as the School of Salamanca might more adequately be considered a phenomenon of global knowledge production under colonial conditions of asymmetry. What is referred to as 'the School' was much more than a group of some outstanding Dominicans teaching in Salamanca. It was an epistemic community and a community of practices that was active in many places, far beyond what later became Spain. One just has to leave the reduction of legal history to a history of scientification of law and a history of the emergence of jurisprudence behind, integrate law and religion in a joint analysis, and take seriously that the sixteenth-century theologian's most important goal was the *cura animarum*. Then it becomes clear that the tremendous (and obviously highly ambivalent) significance of the School for the international language of law and politics resulted not only from the grand treatises that, since the later nineteenth century, have been the nearly exclusive object of study. It also, and perhaps to a major degree, was due to the practice of administering justice (in the *forum externum* and *internum*) in thousands and thousands of daily acts all over the world, performed by missionaries, bishops and counsellors far removed from university lecture halls. The media used were not the big treatises, but small books, the pragmatic literature, the never-printed manuscripts and excerpts that were written in many places and, in some cases, circulated with their authors, localising and specifying the normative knowledge for their specific situations.

This might already show that the emancipation from national research traditions goes hand in hand with changes in the relevant sources and, not least, the spatial dimension. As long as Salamanca is considered solely as a part of the history of the formation of legal scholarship, and as producers of important books and doctrines that shaped later systematic thinking and jurisprudence in Europe, one will find it (almost) exclusively in Europe. If, however, one sees Salamanca as an epistemic community and community of practices, and understands it on its own terms as practical and performative theology that produced normative statements and thus shaped the language of law, one can find its presence around the globe. One becomes aware of the contributions of actors in many sites of the world to this process of producing knowledge. The combination of an

[51]Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800* (The Catholic University of America Press 1995) 225.

emancipation from the analytical traditions with an opening of the spatial dimension leads to a new, quite different – and hopefully more adequate – non-diffusionist characterisation of the School as a case of distributed knowledge production on a global scale. And it raises the awareness that major developments in 'European' legal history were inextricably linked to the imperial past.

Similar argumentative structures, not least a focus on the role of practice in the production of legal regimes, can be found in other fields. In many cases, the inclusion of imperial or global experiences into the picture and a different understanding of processes of knowledge creation led to the deconstruction of previously unquestioned national or European narratives. Lauren Benton has argued, for example, that the emergence of the concept of sovereignty was a consequence of the experience of incomplete and contested jurisdictions and numerous anomalous zones of power in European overseas empires.[52] For her, looking beyond Europe provides a different picture of European legal history, where sovereignty was mainly seen as a fruit of theoretical reasoning, and this remains true, even if one might recognise some of the developments described by Benton, not least in the history of the Holy Roman Empire, characterised by its incomplete and multi-layered jurisdictions.

In a similar way, and for quite some time, international law has been presented as a creation by European authors and is now being set in a perspective that gives more space to non-European actors.[53] Recently, it has been suggested that international law was a fruit of a 'rage for order' in the British Empire, putting different actors at centre stage and calling for an imperial turn in the history of international law.[54] Again, opening up the spatial dimension and a different perspective (looking at international law as practice) leads to a different narrative.

Opening up the spatial dimension beyond Europe or the North-Atlantic has also helped to shed new light on seminal parts of European and Atlantic legal and intellectual history. For example, it has become clear that the independence movements of the late eighteenth and early nineteenth centuries need to be understood in their global context, not least by integrating experiences like the revolution in Haiti into the picture.[55] In a similar way, there is no doubt that the history of

[52]Lauren Benton, *A Search for Sovereignty. Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2010).

[53]For example Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press 2014); Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law* (Cambridge University Press 2017).

[54]Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press 2016); Lauren Benton, 'Made in Empire: Finding the History of International Law in Imperial Locations: Introduction' (2018) 31 *Leiden Journal of International Law* 473.

[55]See, for example, Wim Klooster, *Revolutions in the Atlantic World: A Comparative History* (New York University Press 2009). Still putting the US in the centre stage is

constitutionalism would have to be written differently had it not been purely the history of white men.[56] In recent years, the history of human rights, for a long time seen as a history of a European cultural achievement that spread out all over the world, has been rewritten as a history of European domination or, in a different manner, as a history that could not have taken place without the constitutive role of those suffering under colonialism and the very violation of human rights.[57]

In another classical field, the history of lawmaking and legal scholarship, one can find a certain consensus that the century of nation-building in Europe and the West was, at the same time, a period when globalisation of law and legal thought were on the march and extremely influential. As already mentioned at the beginning of this essay, the juridical monuments of this nation-building, ie constitutions and codifications, have been part of a complex process of communication that, in some respects, possessed a global dimension. Constitutions and Codes from different parts of the world circulated and were translated, literally and culturally, to a greater or lesser degree, into each nation's realities.[58] Jeremy Bentham, for

David Armitage, *The Declaration of Independence: A Global History* (Harvard University Press 2007); more globally David Armitage and Sanjay Subrahmanyam (eds), *The Age of Revolutions in Global Context, c.1760–1840* (Palgrave Macmillan 2010). See for further references and some critical observations on the field Linda Colley, 'Writing Constitutions and Writing World History' in James Belich and others (eds), *The Prospect of Global History* (Oxford University Press 2016) 160–77.

[56]Bartolomé Clavero, *Derecho global: Por una historia verosímil de los derechos humanos* (Editorial Trotta 2014); Bartolomé Clavero, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas* (The Robbins Collection 2005).

[57]See, for example, Samuel Moyn, *Human Rights and the Uses of History* (Verso Books 2014); Massimo Meccarelli, Paolo Palchetti and Carlo Sotis (eds), *Il lato oscuro dei Diritti umani: esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Dykinson 2014); José-Manuel Barreto, 'Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto' (2015) 3 *Transnational Legal Theory* 1; Martti Koskenniemi, 'Rights, History, Critique' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018) 41–60; for a survey see Philipp Kandler, 'Neue Trends in der "neuen Menschenrechtsgeschichte"' (2019) 45 *Geschichte und Gesellschaft* 297.

[58]On Constitutions see, for example, Eduardo Zimmermann, 'Translations of the "American Model" in Nineteenth Century Argentina: Constitutional Culture as a Global Legal Entanglement' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 385–425; Li, 'Becoming Policy' (n 19); Leticia Vita, 'Weimar in Argentina: a Transnational Analysis of the 1949 Constitutional Reform' (2019) 27 *Rechtsgeschichte – Legal History* 176. On the history of codification from a global perspective Inge Kroppenberg and Nikolaus Linder, 'Coding the Nation: Codification History from a (Post-)Global Perspective' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 67–99. On the need to integrate codification history in a transnational perspectives see, for example, Martijn van der Burg, 'Cultural and Legal Transfer in Napoleonic Europe: Codification of Dutch Civil Law as a Cross-National Process' (2015) 3 *Comparative Legal History* 85; Aniceto Masferrer, 'Codification as Nationalisation or

example, often considered to be the 'inventor' of the codification principle, is being 'globalised', not least due to his intense contacts with exiled politicians.[59] Integrating these aspects into the picture and looking at them as a product of multiple entanglements might change some national narratives. Moreover, looking from this global historical perspective, can one really depict the nineteenth and early twentieth century as a period of nationalisation and monopolisation of law through the state?

At this level, incidentally, lies the answer to the frequently asked question of what has 'come back' from Asia, Africa or Latin America to Europe. If one expects clear-cut innovations in civil law dogmatics or new legal theories, according to the logics of European or German legal scholarship, one will probably not find much until the second half of the twentieth century. There were, for instance, clearly more European codifications taken into account when making national codes in Latin America than the other way around. The same applies to the history of constitutional law. For those European legal historians who, in narrating a history of progress, are searching for direct imports from the global south, this may be proof enough that considering perspectives from there and across the oceans is ultimately unproductive.

Historical evolution, however, is more complex. What is decisive is that the legal histories of Europe would have been different had they not developed in imperial and colonial structures; if they had not known the field of experimentation of colonial areas; if they would not have needed to produce a legal framework for the world economy or norms for securing Western political hegemony through law. The School of Salamanca, to return to this example, would probably be forgotten today had it not developed in the context of imperial expansion and the technological and intellectual dynamics related to it. Global legal history raises awareness for these contexts and interconnections. It might, in some cases, even lead to a questioning of the grand narratives.

2. *Questioning the grand narratives*

The deconstruction of European legal historiographies may, in some cases, touch on foundational narratives that were made possible only due to what has been called 'legal orientalism'.[60] For continental European legal history, for example, the self-identification as a rational-formal legal culture, following Max Weber,

Denationalisation of Law: the Spanish Case in Comparative Perspective' (2016) 4 *Comparative Legal History* 100 as well as the contributions in Aniceto Masferrer (ed), *The Western Codification of Criminal Law: A Revision of the Myth of Its Predominant French Influence* (Springer 2018).

[59]David R Armitage, 'Globalizing Jeremy Bentham' (2011) 31 *History of Political Thought* 63.

[60]See on this concept and the political use recently Thomas Coendet, 'Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law' (2019) 67 *The American*

has been paradigmatic throughout the twentieth century. The grand narratives of European or Western legal history rely, to a large extent, on this assumption. Today, however, one can see that Max Weber – who entered academia as a legal historian and was deeply immersed in its contemporary debates – not only employed a very narrow and rigid concept of law, but he also based his vision of the course of Western legal history on many assumptions that today are outdated. Notwithstanding the fact that Weber's knowledge of Chinese legal history was undoubtedly impressive according to the standards of his time, it was nevertheless very limited compared to the current state of the art. Today, the picture he painted of Chinese legal history, foundational for drawing up the sharp contrast between the Occident and the rest, is considered highly problematic.[61] If – to put it bluntly – European legal history is less formal, rational and secular, and Chinese legal history more formal, rational and secular than Weber made them seem, is the clear contrast he established and then integrated into his teleological model of modernisation still a foundation upon which European legal history can build?

3. *Emancipating from hegemonic concepts*

Global legal history, however, is not only about deconstructing European or Western legal history and its grand narratives. It also fulfils an emancipatory function with regard to those regions where use was made of European categories to analyse their own legal histories. Again, this emancipation might have effects on periodisation, spaces, analytical concepts and interpretations.

With regard to periodisation, it is interesting to see that many former colonised countries have written their legal histories in terms of a pre-history to their inclusion into the colonial empire. There is, for example, no legal history of Latin America that includes a substantial portion of the legal past before European colonisation, and it would, perhaps, make no sense to integrate these pre-colonial histories into a spatial (and temporal and conceptual) framework shaped by colonial historiography. A global legal history, on the contrary, would try to see the European invaders as part of a larger history of complex interactions between different communities and their laws.[62] It might also want to look at indigenous legal histories not from the perspective of the space they were granted in the

Journal of Comparative Law 775; for the concept as such, see Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press 2013).

[61]See, for example, Robert M Marsh, 'Weber's Misunderstanding of Traditional Chinese Law' (2000) 106 *American Journal of Sociology* 281; Junnan Lai, '"Patrimonial Bureaucracy" and Chinese Law: Max Weber's Legacy and Its Limits' (2015) 41 *Modern China* 40.

[62]For this approach in general historiography see Matthew Restall, 'The Americas in the Age of Indigenous Empires' in Jerry Bentley, Sanjay Subrahmanyam and Merry Wiesner-Hanks (eds), *The Cambridge World History: The Construction of a Global World, 1400–1800 CE. Foundations* (Cambridge University Press 2015) vol 6 (1), 210–42.

colonial legal system, but precisely the other way around: a legal history of Latin America written from the perspective of how different indigenous peoples, Americans of African descent, or so-called *mestizos,* lived and organised their societies drawing on legal knowledge coming from different origins.

Similar observations could be made for the need for emancipation from the conceptual heritage of nineteenth- and twentieth-century European scholarship. Japanese legal historians, for example, in many cases, drew on German concepts to write Japanese history and are now developing their own analytical and comparative frameworks.[63] In a similar way, Chinese legal history is increasingly attentive to the need to understand its object of research on its own terms.[64] Chinese constitutional history, for example, has been written from a 'shock-and-response' perspective, as if the confrontation with Western powers would have been the sole trigger of innovation. As a result, the adaptation and translation of 'Western' imports into the traditional mental frameworks were often underestimated.[65] In a similar way, after many decades of Eurocentric colonial historiography, South African legal history has been given a different interpretation by leaving the colonial perspective and putting it into a wider framework.[66] Recently, it has been shown for the constitutional history of India that it can be written in a clear detachment from colonial assumptions about postcolonial dependency.[67]

Thus, there is a growing consciousness of the enduring intellectual impact or even imperialism of Western scholarship and its followers in other world areas. In light of this, and similar to what has been postulated for comparative law and is discussed in other arenas, untypical units of comparison are gaining space.[68]

[63]Yoichi Nishikawa, 'Public Administration between Western Model and Eastern Tradition: A Historical and Comparative Sketch' in Joachim J Hesse, Jan-Erik Lane and Yoichi Nishikawa (eds), *The Public Sector in Transition* (Nomos-Verlagsgesellschaft 2007) 39–56; Yoichi Nishikawa, '"Genius des Okzidents": Zur Bedeutung der deutschen Geschichtswissenschaft für das moderne Staatsdenken in Japan' (2008) 5 *Zeitschrift für Staats- und Europawissenschaften* 334; Taisu Zhang, 'Beyond Methodological Eurocentrism: Comparing the Chinese and European Legal Traditions' (2016) 56 *American Journal of Legal History* 195; Kentaro Matsubara, 'East, East, and West: Comparative Law and the Historical Processes of Legal Interaction in China and Japan' (2018) 66 *The American Journal of Comparative Law* 769.

[64]Jérôme Bourgon, 'Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing' (2002) 23 *Late Imperial China* 50; Ruskola, *Legal Orientalism* (n 60); William P Alford and Eric T Schluessel, 'Legal History' in Michael Szonyi (ed), *A Companion to Chinese History* (John Wiley & Sons 2017) 277–89.

[65]Li, 'Becoming Policy' (n 19).

[66]Martin Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge University Press 2001).

[67]Rohit De, *A People's Constitution. The Everyday Life of Law in the Indian Republic* (Princeton University Press 2018).

[68]See on this the inspiring remarks from Mathias Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare?' (2020) 67 *American Journal of Comparative Law* 861.

There is, for example, more and more evidence for the importance of the household as a central social structure in which normativity was developed, lived and executed, be that in Qing Dynasty China, in South-American urban areas during the colonial period or in early modern Germany – but no comparative work on a global scale as yet.[69] Also other agents of change like modern ideologies such as 'neo-liberalism' or 'global regimes of memory', including, for example, indigenous peoples' movements, and other examples of ideas and associated practices might be traced and analysed with regards to the legal responses they triggered in many places all over the globe, usually analysed exclusively from a national perspective.[70]

IV. History of the globalisation of law and of the role of law in globalisation

The second dimension of global legal history deals with the transnationalisation or globalisation of law. It studies the formation of legal regimes on a larger spatial scale, or under the conditions of a compression of time and space, from a historical perspective. Not least, it asks for the role of law in globalisation. Whereas situating legal history in a global perspective mainly aims to 'deconstruct' traditions, concepts, spatial constellations and narratives, the global legal history as a history of the globalisation of law and the role of law in globalisation can be considered a primarily 'reconstructive' approach. It reconstructs spaces of communication, often the result of formal or informal empires, or shaped by transnational epistemic communities. It might help to explain the present world order, with its globalisations and fragmentations of legal regimes, and the presence of a polysemic and seemingly universal language of law, deeply shaped by power asymmetries. It might, however, also raise awareness for 'law' as a tool and part of the historical process of globalisation in all its ambivalence. Again, some examples might help to illustrate what this means.

[69]Thomas Duve, 'Der blinde Fleck der "Oeconomia"? – Wirtschaft und Soziales in der frühen Neuzeit' in Jean-François Kervégan and Heinz Mohnhaupt (eds), *Wirtschaft und Wirtschaftstheorie in Rechtsgeschichte und Philosophie: Viertes deutsch-französisches Symposion vom 2.-4. Mai 2002 in Wetzlar* (Vittorio Klostermann 2004) 29–61; Taisu Zhang, *The Laws and Economics of Confucianism: Kinship and Property in Preindustrial China and England* (Cambridge University Press 2017); Romina Zamora, *Casa poblada y buen gobierno. 'Oeconomia' católica y servicio personal en San Miguel de Tucumán, siglo XVIII* (Prometeo Libros 2017).

[70]On neoliberalism see Alessandro Somma, 'Global Legal History, Legal Systemology, and the Genealogy of Law' (2018) 66 *The American Journal of Comparative Law* 751. On the indigenous rights see Thomas Duve, 'Indigenous Rights in Latin America: A Legal Historical Perspective' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 817–37.

1. *Global legal regimes*

As mentioned in the review of the research traditions of European legal history, legal historians have been studying the diffusion, transfers and transplants of law developed in the European tradition outside of Europe. This has led to a growing insight into the many processes of reception, translation, and adaptation, with – in some cases – even convergence of legal systems, as well as to the formation of global legal regimes.

Research on the presence and adaptation of *ius commune*, the circulation and translation of legal ideas from European countries and their impact on the formation of non-European legal systems provides global legal history with important elements for understanding how legal regimes all over the world have integrated, translated or repelled normative information coming from Europe.[71] More and more comparative studies on specific legal institutions, like, for example, ownership, are shedding light on the consequences of the processes of communication under conditions of Western legal imperialism.[72] Legal institutions, legal ideas and legal methods from the European tradition were important elements for political and economic expansion, integration and globalisation.[73] The already mentioned nineteenth- and twentieth-century European codifications[74] and

[71]For a brief overview of the research from the perspective of transplant and receptions see Graziadei (n 30). A landmark publication on the Roman foundations of the civilian tradition has been Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990). On the circulation of books see, for example, Laura Beck Varela, 'The Diffusion of Law Books in Early Modern Europe: A Methodological Approach' in Massimo Meccarelli and María J Solla Sastre (eds), *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries* (Max Planck Institute for European Legal History 2016) 195–239.

[72]See on ownership, for example, Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press 2014); Agustín Parise, *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th–20th Centuries)* (Brill-Nijhoff 2017); Manuel Bastias Saavedra, 'The Normativity of Possession. Rethinking Land Relations in Early-Modern Spanish America, ca. 1500–1800' (2020) 29 *Colonial Latin American Review* 223.

[73]There is a huge amount of literature tracing back the importance of, for example, natural law thinking for global (intellectual) history, with clear overlaps to legal history; see, for example, the writings of David Armitage, *Foundations of Modern International Thought* (Cambridge University Press 2013); Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford University Press 2016); on legal thought more specifically Edward Cavanagh, 'Legal Thought and Empires: Analogies, Principles, and Authorities from the Ancients to the Moderns' (2019) 10 *Jurisprudence* 1.

[74]On the transnational dimension of the 'national' codes, see, for example, Kroppenberg and Linder (n 58); Andrés Santos (n 12); Agustín Parise, 'Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 315–84. For the impact of scholarship see the in-depth study

constitutions[75] were translated and integrated into different legal systems and thus contributed to the mixing between different legal traditions and the emergence of a global discourse on certain modes of regulation.

It was, however, not only European secular law that channelled its vocabulary into this global language game (*Sprachspiel*). Scholars dedicated to Canon Law and Moral Theology have started to study the globalisation and localisation of religious normative knowledge – produced by central and local institutions and actors – circulating through transnational communicative structures, imperial networks and religious orders; travelling with merchants or soldiers; or migrating with slaves, indigenous peoples and refugees. Historiography on the Holy See as a global actor, for example, has shed light on the history of early modern global governance, questioning national narratives, making visible the importance of religious normative practices for state-building in many places of the world and pointing at the role of a language of normativity from the field of religion for the formation of global regimes.[76] In a similar way, historical scholarship on Canon Law started to set the normativity of the Catholic Church from a global perspective with, for example, comparative studies on Tridentine marriage.[77] Through these multiple processes of many local cultural translations and adaptations, a picture of a world is emerging whose legal systems were not at all uniform, nor necessarily converging, but to a major or lesser degree employing, at least in some spheres of normativity, similar vocabularies and sharing a similar grammar of law and politics.[78]

Besides legal and political imperialism, religious expansion and mission and especially economic integration and increasing (maritime, overseas, global) commerce and trade were the main drivers of entanglements and integration on a global

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of the impact of the nineteenth century historical school and their vision of Roman law in Russia given by Martin Avenarius, *Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des 'rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts* (Wallstein Verlag 2014).

[75]See, for example, Linda Colley, 'Writing Constitutions and Writing World History' in James Belich and others (eds), *The Prospect of Global History* (Oxford University Press 2016) 160–77; Luigi Lacchè, 'Rethinking Constitutionalism between History and Global world: Realities and Challenges' (2016) 32 *Journal of Constitutional History* 5; Zimmermann (n 58).

[76]See Benedetta Albani, 'The Apostolic See and the World: Challenges and Risks facing Global History' (2012) 22 *Rechtsgeschichte – Legal History* 330.

[77]See, for example, the contributions in Benedetta Albani, 'Global Perspectives on Tridentine Marriage. An Introduction' (2019) 27 *Rechtsgeschichte – Legal History* 66.

[78]As Cavanagh (n 73) 36 points out:

> The reward for scholars … is not necessarily the discovery that the substantive content of legal thinking was similar from colony to colony. The reward is rather the discovery that the same tools were available to all legal thinkers making certain claims to other legal thinkers whom they had every expectation would recognise their claims and respond to them.

scale. Existing and new commercial practices and different legal traditions transformed into national institutions and regulations, and contributed to the formation of a transnational law of commerce and trade through practice and exchange of knowledge. Standardisation and the need to regulate trade, or the prosecution of crimes on a transnational scale led to an ever more close-knit network of transnational or international law.[79] Taken together with other 'common laws' in the sense of HP Glenn,[80] one might find, at least since the eighteenth century, many indicators for the emergence of multiple and overlapping global legal regimes that gave rise to and shaped legal institutions.[81] These legal regimes, as well as those that came with the political and religious expansion, were undoubtedly the foundations for the emergence of a polysemic, highly heterogeneous, not all-encompassing and not at all innocent international language of law on a global scale.

In addition to this scholarship focusing on the classical topics of legal history, there is a growing concern to analyse the role of professional groups like lawyers from other than European countries and to write the history of international institutions and their role in the construction of transnational or global law.[82]

[79]Research on the history of transnational law merchant and commercial law, as well as maritime law, sometimes referred to under the problematic term of *lex mercatoria*, has shown the complexity of these often overlapping, hybrid and dynamic transnational normative spheres. See with further references on the medieval period Albrecht Cordes, 'Lex maritima? Local, regional and universal maritime law in the Middle Ages' in Wim Blockmans, Mikhail Krom and Justyna Wubs-Mrozewicz (eds), *The Routledge Handbook of Maritime Trade around Europe 1300–1600: Commercial Networks and Urban Autonomy* (Routledge 2017) 69–85; for a study from the Iberian perspective, leading up to modern commercial law see, for example, Carlos Petit, *Historia del derecho mercantil* (Marcial Pons 2016) and the contributions in Carlos Petit (ed), *Del ius mercatorum al derecho mercantil. III Seminario de Historia del Derecho Privado, Sitges, 28-30 de mayo de 1992* (Marcial Pons 1997). Increasing global trade and mobility also created the need for technical regulation, international law of trade, or prosecution of crimes. From the vast field of literature on these issues, see, for example, Miloš Vec, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (Vittorio Klostermann 2006); Rainer Klump and Miloš Vec (eds), *Völkerrecht und Weltwirtschaft im 19. Jahrhundert* (Nomos 2012); Karl Härter, Tina Hannappel and Conrad Tyrichter (eds), *The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century: Political Crime, Police Cooperation, Security Regimes and Normative Orders* (Vittorio Klostermann 2019).

[80]H Patrick Glenn, *On Common Laws* (Oxford University Press 2005).

[81]See on this now Ron Harris, *Going the Distance: Eurasian Trade and the Rise of the Business Corporation, 1400–1700* (Princeton University Press 2020).

[82]See, for example, Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (University of California Press 2002); Madeleine Herren, *Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung* (Wissenschaftliche Buchgesellschaft 2009); Madeleine Herren, 'Introduction: Towards a Global History of International Organization' in Madeleine Herren (ed), *Networking the International System: Global Histories of International Organizations* (Springer 2014) 1–12; Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

Studies on specific institutions like the International Labour Organization (ILO) or the League of Nations Health Organization are opening new perspectives on the emergence of global legal regimes and the role of law in these processes.[83]

2. *Histories of international law*

This leads to the booming field of research on the history of international law, sometimes considered to be part of global legal history.[84] After considerable research interested in, above all, the formation of international law as a scholarly discipline,[85] since the 1990s a growing number of legal scholars, especially those influenced by critical legal studies and postcolonial studies, started to denounce international law as an instrument of colonialism that was now to be historically delegitimised. The much-discussed historical turn in international law, which has been propelled by Martti Koskenniemi and Antony Anghie, [86] and the subsequent Third World Approaches to International Law (TWAIL) have since triggered an avalanche of studies on the formation of a discourse of international law, its institutions and practices.[87] Notwithstanding the many interesting results of this research, there is increasing criticism of the methods employed by authors coming from the legal field, advocating for anachronism, and those insisting on contextualisation.[88] Taking into account the rising number of publications

[83]See on this, for example, Jill M Jensen and Nelson Lichtenstein (eds), *The ILO from Geneva to the Pacific Rim: West Meets East* (International Labour Organization 2016); Guy Fiti Sinclair, 'A "Civilizing Task": The International Labour Organization, Social Reform, and the Genealogy of Development' (2017) 20 *Journal of the History of International Law* 1; Tomoko Akami, 'A Quest to be Global: The League of Nations Health Organization and Inter-Colonial Regional Governing Agendas of the Far Eastern Association of Tropical Medicine 1910–25' (2016) 38 *The International History Review* 1.

[84]For a recent survey, see Kate Purcell, 'On the Uses and Advantages of Genealogy for International Law' (2020) 33 *Leiden Journal of International Law* 13. On 'Global History of international Law' see Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1–24 as well as the subsequent 'Book Review Symposium' (2014) 25 *European Journal of International Law* 287.

[85]Luigi Nuzzo, *Origini di una Scienza: Diritto internazionale e colonialismo nel XIX secolo* (Vittorio Klostermann 2012); Nuzzo and Vec (eds) (n 24); Rasilla del Moral (n 24).

[86]Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2004); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

[87]On TWAIL see James T Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26; more recent BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2nd edn 2017) 1–37.

[88]Andrew Fitzmaurice, 'Context in the History of International Law' (2018) 20 *Journal of the History of International Law* 5; Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of*

on a global history of political ideas,[89] sometimes presented as a 'historical turn in international relations', and booming fields such as the debate on the history of human rights,[90] a lively field of study of the formation of normative orders, its institutions and discourses on a global level comes into view.

3. *World history of law in empire*

Perhaps the most prominent way of doing global legal history as a history of the globalisation of law has emerged from a 'world history of law in Empire' approach, that is, a global legal history that traces the emergence of a global legal regime by putting legal practices ('jurispractice') in empires at centre stage. This approach was developed mainly in the pioneering studies of Lauren Benton, who in 2000 started with the observation that patterns of jurisdictional complexity in European, African and American societies were broadly similar across polities in ways that created possibilities for the transregional movement of people and goods. Building on this, in her *Law and Colonial Cultures*,[91] Benton highlighted how actors managed to navigate systems composed of many parallel jurisdictions in different empires. After deepening the analysis of the dynamics of legal and jurisdictional pluralism, paying particular attention to a wide range of actors from all strata in her *A Search for Sovereignty*[92] and in other writings on legal pluralism and 'interpolity law',[93] she renewed her pledge for 'a new narrative of world history that places empires at its center'.[94] In 2016, Lauren Benton and Lisa Ford took a further step and questioned the usual narrative of the origins of international law as a product of European – and some semi-peripheral – jurists after 1850 and analysed how intra- and inter-imperial dynamics, with the British Empire at the centre, shaped what became later known as international law. For them, international law was

International Law 1; Jean D'Aspremont, *The Critical Attitude and the History of International Law* (Brill 2019).

[89]Halvard Leira and Benjamin de Carvalho (eds), *Historical International Relations* (SAGE Publications 2015) vols 1–4.

[90]See, for example, the literature mentioned in n 57.

[91]Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2002).

[92]Benton (n 52).

[93]Benton and Ross (n 39); Lauren Benton and Adam Clulow, 'Legal Encounters and the Origins of Global Law' in Jerry Bentley, Sanjay Subrahmanyam and Merry Wiesner-Hanks (eds), *The Cambridge World History: The Construction of a Global World, 1400–1800 CE. Patterns of Change* (Cambridge University Press 2015) vol 6(2), 80–100.

[94]Lauren A Benton and Richard J Ross, 'Empires and Legal Pluralism. Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World' in Lauren A Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press 2013) 2; see also Lauren Benton, 'AHR Forum. Law and Empire in Global Perspective. Introduction' (2012) 117 *The Hispanic American Historical Review* 1092.

'made in Empire',[95] with empires being 'the ghost in the machine of global governance'.[96]

Through these and other studies, a strand of global legal history has taken shape that could be described as a history of colonial laws of empires. These empires produced, through their interaction and the eventual participation of other polities, a global legal regime. Notably, this global legal history is conceived of as being a history of practice. For Benton, it was 'the practice of law and politics in empires and the contributions to political thought of the broader range of historical actors in places across the globe' that created international law.[97] As 'some of the most important conversations about global order were occurring far away from law schools and halls of diplomacy, in the course of mundane jurisdictional disputes arising in and on the boundaries of empires',[98] Benton and Ford see a generative tension between practice and the writings of jurists,[99] with a clear priority of practice. Ordinary people, middle powers, middling officials and agents of empire provided what became 'both model and anti-model for the punctilious law professors who sat down in Germany and France to draft international law after 1850'.[100] This preference for practice is in line with previous and later statements in which Benton urges the focus on practice, on the exercise of legal authority, on patterned strategic behaviour – and not on norms and rules as objects of study. This is because 'norms make spectacularly bad objects of analysis' and 'historians have dull tools with which to uncover supposedly determinative "normative structures" operating in deep background to legal behavior and utterances'.[101]

V. Problems

Looking back on this survey, at least five questions, closely related to each other, impose themselves. First, what is the 'global' in global legal history; second, what is the 'legal'; third, what is the object of study: 'theory' or 'practice'; fourth, what are the relevant sources of a global legal history; fifth, what is the adequate way to understand the mechanisms of cultural (re)production of normativity?

[95] Benton (n 54).
[96] Benton and Ford (n 54) 1.
[97] Benton (n 54) 473.
[98] Benton and Ford (n 54) 4–5.
[99] *Ibid*, 7.
[100] *Ibid*, 6.
[101] Lauren Benton, 'In Defense of Ignorance. Frameworks for Legal Politics in the Atlantic World' in Brian P Owensby and Richard J Ross (eds), *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York University Press 2018) 275, 280.

1. *The 'global'*

The first concern that needs to be addressed is whether every history of the emergence of a global legal regime, in the sense of a legal regime that extended over large spaces, is, at the same time, a 'global' legal history according to the standards of the field.

The examples presented here – the history of the School of Salamanca as a phenomenon of global knowledge production, or a global history of Canon Law, or the history of international law – could also be labelled as studies on the formation of transnational legal regimes. They can lead to interesting reflections about the globalisation and localisation of normative knowledge and its translation into larger spaces and different legal cultures, tracing the contributions that various actors, distributed all over the world, have been making to the formation of this regime. They can give important insights into wide-ranging questions like the formation of a common language of law that might enable communication between different legal cultures, or make up a universal code of legality, or provide (historical) legal sociology of world systems with material for the construction of their theories, to name but a few of the fields with which global legal history could be in dialogue. They definitely contribute to decentring legal history and questioning a historical narrative.

However, a 'global perspective' could require even more. It might also mean, for example, that the School of Salamanca should be integrated into a larger picture, looking, for instance, at the local translations of Christian Moral Theological thinking into other belief systems, as it occurred in Qing China.[102] It would, most of all, require placing this and other histories into a joint narrative of the formation of a discourse about good conduct and the consequences of misbehaviour, where the Christian Moral Theological tradition is just one amongst many others. Law and Moral Theology could thus be understood as specific ways of responding to the need of regulating conviviality, in some cases deeply entangled with other traditions, giving way to new constellations and hybrid normativities, not necessarily limited to one geographical or cultural space.

Along the same lines, a global perspective on the history of early modern colonial Hispanic American law would not only have to integrate the Americas into larger spatial contexts, including Europe, Asia and Africa, but it would also have to integrate the colonial period into a larger narrative of local and imperial legal histories of indigenous peoples or of other social groups. Such a perspective would begin long before the European invasion of the Americas and would be observable on all continents. Not only would the periodisation and spatial dimension be different but the concepts and sources as well.

[102]Dominic Sachsenmaier, *Global Entanglements of a Man Who Never Traveled: A Seventeenth-Century Chinese Christian and His Conflicted Worlds* (Columbia University Press 2018); Feng-chuan Pan, 'Moral Ideas and Practices' in Nicolas Standaert (ed), *Handbook of Christianity in China: 635–1800* (Brill 2000) vol 1, 653–67.

Finally, a global perspective on the history of international law as a global legal regime would not limit itself to reconstructing the formation of international law through the practice of and between large empires, including semi-peripheral jurists from these imperial spaces. It would also bring other visions of international law into the picture, for example, African or Chinese ideas of international law, even if these might not have been able to impose themselves on a global level.[103] By doing this, the history of the formation of international law as a global legal regime would also escape the danger of becoming a teleological enterprise that perpetuates epistemic structures from colonial times. In this case, and perhaps only in this, it could be truly disruptive.[104]

These examples might prompt the question of how realistic these endeavours are from a practical perspective and whether global legal history can actually achieve these goals. Would it not be more realistic to admit that global legal history is nothing but 'critical legal history on a transnational scale' – and should be labelled as such?

2. *The 'legal'*

The answer to the second question is no easier: What is the 'legal' in global legal history? The review of the research on global legal history has made clear that this aspect is decisive not only because of the need to overcome the Eurocentric perspective and its hegemony, but also because a major part of daily life in many parts of the world was not regulated by legal regimes stemming from state or secular authorities, the main object of European and Western legal history. It was regulated rather by norms, institutions and practices that European or Euro-American historiography consider to be 'social', or refer to as 'religion', or in the case of so-called indigenous peoples, as 'customs' or 'traditions'. To declare the European state-bound law as the main object of interest of global legal history and to distinguish between 'law' and different modes of 'non-law', as has been a long-standing practice, is precisely the opposite of what is needed for a global legal history.

[103]Urs M Zachmann, 'Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945' (2014) 22 *Rechtsgeschichte – Legal History* 228; Stefan B Kirmse, 'Sleepy Side Alleys, Dead Ends, and the Perpetuation of Eurocentrism' (2014) 25 *The European Journal of International Law* 307; Teemu Ruskola, 'China in the Age of the World Picture' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 138–55; Jakob Zollmann, 'African International Legal Histories – International Law in Africa: Perspectives and Possibilities' (2018) 31 *Leiden Journal of International Law* 897; Ayesha Shahid, 'An Exploration of the "Global" History of International Law: Some Perspectives from within the Islamic Legal Traditions' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill 2018) 64–89; Xin Fan, '"International Law in Ancient China": Eurocentrism and the Rethinking of Case Studies in Chinese Intellectual History' (2020) *Global Intellectual History* 1.

[104]D'Aspremont (n 88).

To reflect upon the meaning and use of 'law' is obviously not a new task; it is (or should be) the daily business for legal historians. In fact, there is a consolidated tradition of coping with the inapplicability of modern concepts, especially for periods that might be an object of 'deep' legal history, for example, the Sumerian-Accadian law, where the need to be attentive to the *Eigenbegrifflichkeit* has long been recognised.[105] There is an intense discussion about the need for a new approach to (antique) Islamic law.[106] Intense (and heated) discussions have been held about the question of whether there is a concept of law in the Middle Ages, and which concept legal historians have while reconstructing medieval legal history. China, to give but another example, was considered to be a lawless society.[107] For obvious reasons, legal theory, comparative legal history and comparative law have engaged in intense reflection about the concept of law, opening themselves to cultural perspectives and trying to overcome a purely legalist and reductionist concept of law.[108]

It is in this context of a growing awareness for the complexity of law and the need to overcome state-bound, legalistic notions of law, especially in colonial contexts, that the concept of 'legal pluralism' has garnered a lot of attention in global history and legal historical studies dedicated to premodern law and colonial contexts.[109] Building on the long-standing debate, intensified in the 1970s, in sociology of law and (legal) anthropology, some legal scholars – such as Werner Menski[110] or Brian Tamanaha[111] – have proposed conceptual frameworks that

[105]Benno Landsberger, 'Die Eigenbegrifflichkeit der babylonischen Welt' (1926) 2 *Islamica* 355.

[106]See with further references the critique of the historiography in Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions* (Cambridge University Press 2016).

[107]On the 'medieval concept of law' and the legal historians concepts see Martin Pilch, *Der Rahmen der Rechtsgewohnheiten: Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte* (Böhlau 2009) as well as the debate on this in *Rechtsgeschichte – Legal History* 17 (2010). On China as a 'lawless' country see the seminal article of William Alford, 'Law, Law, What Law? Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law' (1997) 23 *Modern China* 398.

[108]See, for example, the collection of essays on Concepts of Law: Lukas Heckendorn Urscheler and Seán P Donlan (eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Routledge 2014).

[109]There is an avalanche of literature on legal pluralism. For legal historians and historians writing on Empires, the writings of Lauren Benton have become standard references, see especially Benton (n 91); Benton and Ross (n 39). On the use and its problems, see Thomas Duve, 'Was ist "Multinormativität"? – Einführende Bemerkungen' (2017) 25 *Rechtsgeschichte – Legal History* 88.

[110]Werner Menski, 'Plural Worlds of Law and the Search for Living Law' in Werner Gephart (ed), *Rechtsanalyse als Kulturforschung* (Vittorio Klostermann 2012) 71–88.

[111]Brian Z Tamanaha, 'A Framework for Pluralistic Socio-Legal Arenas' in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison D Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant 2010) 381–401.

aim to encompass different modes of normativity. Undoubtedly, these distinctions can – just as the debate about 'legal', 'jurisdictional' and now 'normative pluralism' – be helpful and operate as sensitising tools.[112] However, many of these attempts have been developed for either taxonomic or normative projects, or both.[113] Most importantly, as abstract categories and distinctions, they cannot grasp the dynamic production of normativity and the often complex constellations of different normative spheres that are activated in concrete cases – nor do they help to identify the rules that operate in the selection, interpretation and adaptation of these normative resources for the resolution of specific cases. They might give an insight into the elements that lead to the results, sometimes described as 'hybrid' or 'mixed' legal systems or situations, but they do not provide a deeper understanding of the process as such.[114]

3. *Theory and practice*

The insecurity about the concept of 'law' is also underlying the question of what legal historians are really looking at when they are doing global legal history. Do (legal) historians simply reconstruct practices, as Benton argues, when she suggests that global legal regimes can be understood as a result of 'patterns of strategic behavior that is simultaneously cultural and, through its repetition, institutional in effect'?[115] Should legal historians really do so without asking about the normative structures operating in the background, because historians have 'dull tools' for that kind of analysis?[116]

The separation between a history of norms, a history of legal scholarship and a history of practice, but above all, the playing off of one against the other, is not at

[112]See on this function as 'sensitizing tools' and for a review of the development of the debate Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 255.
[113]For a criticism of the 'taxonomic project' see H Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd edn 2019) 423–40.
[114]This has been emphasised by one of the proponents of the concept, Franz von Benda-Beckmann, 'Gefangen im Rechtspluralismus: Zum Umgang mit Normkollisionen in rechtlich pluralen sozialen Räumen' in Matthias Kötter and Gunnar F Schuppert (eds), *Normative Pluralität ordnen: Rechtsbegriffe, Normenkollisionen und Rule of Law in Kontexten dies- und jenseits des Staates* (Nomos 2009) 169–89.
[115]Benton (n 101) 276.
[116]*Ibid*, 280. For a similar critique of the tradition of analysing only the big authors and treatises in international law, and advocating for the reconstruction of 'global legal practices' from the IR perspective see, for example, Tomas Wallenius, 'The Case for a History of Global Legal Practices' (2019) 25 *European Journal of International Relations* 108. For critical reflections on these approaches and their understanding of 'theory' and 'practice', see Cavanagh (n 73) and Fitzmaurice (n 88).

all a new problem in legal history.[117] It has been debated at least since the days when social history started to work with judicial documents, leaving 'law in books' to the legal historians who, in turn, left the 'law in action' to historians.[118] In a similar manner, since the late 1980s, culturalist interpretations of (medieval) society tended to focus on important aspects like symbolical performance, rituals and rules of the game, reducing, however, their observations to this, and leaving out the legal framework and legal knowledge of the actors almost completely.[119] The problem with these visions is not their – important – emphasis on the need to integrate other modes of normativity and 'practice' or 'reality' into the analysis, but the often anachronistic and legalistic misunderstandings of the complex practice of law. It seems as if, after a long period of jurists writing on legal history leaving aside practice, now historians writing on legal history are leaving aside the law.

It is important to overcome this misleading dichotomy. Not only has it been shown for a long time that a reconstruction of the contemporary political language gives access to the meaning of practice – and that this political language can be found in a concentrated manner, not least in so-called 'theory', in books, manuscripts, and writings of all kind. Moreover, from a legal theoretical perspective, the performative, interactional, contextual, post-positivist legal theories that understand law as social and cultural practice render this separation completely impossible, too.[120] Writing a book is as much a practice as writing a court judgement, an opinion, or performing a duel, and granting absolution in the confessionary. Exercising *iurisdictio* was practice, often based on 'law in the books', just as

[117]See on this Peter Oestmann, 'Normengeschichte, Wissenschaftsgeschichte und Praxisgeschichte: Drei Blickwinkel auf das Recht der Vergangenheit' (2014) 6 *Max Planck Institute for European Legal History Research Paper Series* 1 and the subsequent debate in *Rechtsgeschichte – Legal History* 23 (2015). Audren, Chambost and Halpérin (n 34) 61–144 distinguish norms, legal professionals, legal dogmatics, use and users and a political history of law.

[118]For an enlightening analysis of the misreadings of the famous formula coined by Roscoe Pound, who never meant it to be a separation between theory and reality, see Jean-Louis Halpérin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64 *Maine Law Review* 45.

[119]See, for example, Gerd Althoff, *Spielregeln der Politik im Mittelalter. Kommunikation in Frieden und Fehde* (Primus Verlag 1997); an English translation of some parts of this book and some later writings now in Gerd Althoff, *Rules and Rituals in Medieval Power Games: A German Perspective* (Brill 2019). For a legal historical critique that anticipated a lot what is being discussed currently see, for example, Jürgen Weitzel, 'Gerd Althoff, Spielregeln der Politik im Mittelalter. Kommunikation in Frieden und Fehde. Gerd Althoff, Hans-Werner Goetz, Ernst Schubert (Hgg.), Menschen im Schatten der Kathedrale. Neuigkeiten aus dem Mittelalter' (2000) 117 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 689.

[120]See on this, for example, the survey in Thomas Vesting, *Legal Theory* (Aaron Shoichet tr, CH Beck 2018) 36–38, 97–114; as well as Ko Hasegawa, 'Interactive Reason in Law' in MNS Sellers (ed), *Law, Reason, and Emotion* (Cambridge University Press 2017) 184–201.

legislation was not at all sterile, but another mode of practice. Creating categories of dependency, or labelling social practices as 'law' is nothing but a cultural translation and localisation of general knowledge about law to the specific circumstances.[121]

What legal historians have to provide, therefore, is an interpretation of these different modes of practice, performed by different epistemic communities (which are also communities of practice), all part of a great historical *Sprachspiel* that needs to be deciphered.[122] The distinction between 'law in the books' and 'law in action' and the reference to the former as mere theory definitely cannot grasp this complexity.[123] Legal historians do not only have 'dull tools', but also some quite refined ones. They just have to draw on and eventually modify those developed in the long-standing scholarly debate about methods of legal history.[124] Adding on the previous reformulation of how global legal history could be renamed to express this, viewing this and the former aspects, one

[121]On 'localisation' and 'globalisation' see for example Bartolomé Clavero, 'Gracia y derecho entre localización, recepción y globalización (lectura coral de Las Vísperas Constitucionales de António Hespanha)' (2012) 41 *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 675; Alejandro Agüero, 'Local Law and Localization of Law: Hispanic Legal Tradition and Colonial Culture (16th-18th Centuries)' in Massimo Meccarelli and María J Solla Sastre (eds), *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries* (Max Planck Institute for European Legal History 2016) 101–29.

[122]See Michael Stolleis, *Rechtsgeschichte schreiben: Rekonstruktion, Erzählung, Fiktion?* (Schwabe Verlag 2008).

[123]See on this Thomas Duve, 'Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (16th–17th Centuries)' in Thomas Duve and Otto Danwerth (eds), *Knowledge of the pragmatic: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Brill-Nijhoff 2020) 1–39 with further references.

[124]It is not possible to dig deeper into this complex problem here, also discussed recently between Lauren Benton and Tamar Herzog in their contributions to the volume on legal intelligibility in British, Iberian and Indigenous America, by Brian P Owensby and Richard J Ross (eds), *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York University Press 2018). A masterly example of how a concrete case can be analysed combining social, cultural and legal history, with attention to legal frameworks, extralegal practices, legal horizons and expectations, has been given recently by Hendrik Hartog, *The Trouble with Minna: A Case of Slavery and Emancipation in the Antebellum North* (The University of North Carolina Press 2018). Hartog describes his method in the introductory chapter, p. 8:

> My goal is to reconstruct some of the tacit norms and understandings that shaped what was known or knowable at the time – what it meant to be in that world – and to work to imagine what those who lived in that world saw around them … I remain focused on the legal situations that gradual emancipation generated and the legal landscape within which enslaved people and slaveholders lived and negotiated with one another … I work in a speculative vein to try to reconstruct their understandings of their world and its contingencies and possibilities.

might suggest naming it a 'critical history of the production of normativity, comprising theory and practice, on a transnational scale'.

4. *Sources*

The question of the concept of law underlying the research, and the impossibility to distinguish theory and practice, is also relevant for one major problem of global legal history: the definition of the relevant sources. If one places legislation and state law in the centre, as has been the case in the tradition of national legal historiographies, the focus will be on norm-setting by the sovereign. If colonial officials and practitioners are assigned a prominent role, the documentation of administrative bodies will come into focus. If one considers everyday household practice to be decisive, one might look for it in a wide array of sources of cultural history. If actors and institutions from the field labelled as 'religion' are included, one needs to look at sources produced by these communities, private associations and networks, for example. Completely different norms, namely those which, from a European point of view, were considered social, then become central objects of legal history. In addition to this, global legal history has to ask how to relate 'local' and 'global' sources: by tracing the circulation of persons, objects, ideas or by privileging the local setting and the transformative moment?

If global legal history thus requires a radical expansion of the materials considered to be relevant as historical sources, in the case of non-colonial actors, for example of the indigenous peoples in early modern colonial America or in large parts of Africa in the nineteenth and twentieth centuries, research proves to be particularly difficult.[125] The fragility of the cultural heritage of these regulatory and decision-making collectives, the, in some cases devastating, consequences of the organisation of the archives in nineteenth and twentieth centuries nation-states, and the perpetuation of epistemic asymmetries by the current scientific infrastructure set global perspectives in some cases insurmountable limits.[126]

5. *Mechanisms of cultural reproduction*

Looking at the research tradition, as well as at many writings on the formation of global legal regimes, one can observe that the processes of transnationalisation of law are often described with the image of a circulation of knowledge, of legal

[125]The so-called 'archival turn' has led to a rich production on the history of archives and the construction of sources in Latin America, see for example Kathryn Burns, *Into the Archive: Writing and Power in Colonial Peru* (Duke University Press 2010); Fabian Fechner, 'Knowledge Knots on the Spot: Colonial Archives through the Looking Glass of the Archival Turn – the Cases of Caracas and Buenos Aires' (2017) 54 *Jahrbuch für Geschichte Lateinamerikas – Anuario de Historia de America Latina* 258.

[126]See more generally Ricardo Roque and Kim A Wagner (eds), *Engaging Colonial Knowledge: Reading European Archives in World History* (Palgrave Macmillan 2012).

transplant or transfer. In many cases, these reifying or essentialising images – the circulation, transfer, transplant *of something* – and the lack in understanding of the pragmatic, performative character of law lead to an underestimation of the contextual reinterpretation and (cultural) translation of the knowledge with which local actors work. Often, this has resulted in a diffusionist perspective that has proved to be insufficient to grasp the complexity of processes of distributed knowledge production. Thus, global legal history needs an intellectual framework that can help to understand this performative, pragmatic character of the production of law and the role of institutions in it and that enables the understanding of the mechanisms of distributed cultural production on a global scale. Taking the latter two aspects into account, and again adding on the definition given above, global legal history could be described as a 'critical history of the production of normativity, understood as a process of distributed knowledge production, comprising theory and practice, drawing on a wide range of sources, on a transnational scale'.

VI. A knowledge-historical approach to global legal history

It is not least with regard to the need to find a method for a critical history of the production of normativity, understood as a process of distributed knowledge production, comprising theory and practice, drawing on a wide range of sources, on a transnational scale that a knowledge-historical approach to global legal history might be helpful. For obvious reasons, such an approach cannot be developed in detail here. Scholarship on the history of knowledge has exploded in recent years, not least with a focus on global knowledge creation, translations, localisations of knowledge, and science as a cultural practice.[127] However, even a short review of some of the problems outlined above might show the potential of a knowledge-historical approach for global legal history.[128]

First, and with regard to the central problem of what is the 'legal' in global legal history (addressed above, V.2), it might help to overcome some of the problems of defining the object of study by focusing on 'multinormative knowledge', not on 'law'. Second, it could entail studying legal history as a process of knowledge production, understood as 'translation' of normative knowledge on a global scale, paying particular attention to the problem of the integration of theoretical and practical knowledge and the corresponding sources for this way of doing

[127]See the surveys of Jürgen Renn, 'From the History of Science to the History of Knowledge – and Back' (2015) 57 *Centaurus* 37; Peter Burke, *What is the History of Knowledge?* (Polity 2015); Lorraine Daston, 'The History of Science and the History of Knowledge' (2017) 1 *Know* 131; Renn and Hyman (n 42); Suzanne Marchand, 'How Much Knowledge is Worth Knowing? An American Intellectual Historian's Thoughts on the "Geschichte des Wissens"' (2019) 42 *Berichte zur Wissenschaftsgeschichte* 126.

[128]See Jürgen Renn, 'The Globalization of Knowledge in History and its Normative Challenges' (2014) 22 *Rechtsgeschichte – Legal History* 52.

global legal history (addressed above, V.3, 4). Third, it would make it possible to get a better understanding of the particular mechanisms of cultural reproduction between the local and the global (addressed above V.1, 5), or, phrased differently: of the glocalisations of normative knowledge and the historical regimes behind it.

1. *Multinormative knowledge*

A knowledge-historical perspective would have a virtually liberating effect with regard to the question of the concept of law, ie, the object of global legal history. Because, formulated in terms of the history of knowledge, law and other modes of normativity are simply knowledge and thus part of the 'totality of propositions that the members of a culture consider to be true, or that a sufficient number of texts of culture sets as true'. This comprises not only 'secured facts, but the entire stock of culturally possible patterns of thought, orientation and action', related to a certain field of action.[129] This field of action could simply be denoted as 'normativity'. Speaking of 'normative' knowledge thus means knowledge that is relevant for being exposed to and producing 'positively marked possibilities', as it has been suggested (with similar liberating motives in mind) in legal theory.[130]

Similar to what has been written for the history of science, such a knowledge-historical approach would not only have 'the advantage of nipping in the bud sterile, inconclusive discussions' about whether some normative statement could be analysed as 'law' or not.[131] It would also help to avoid semantic hierarchies, or asymmetric constructions like 'law' and 'non-law', useful for the analysis of certain historical regimes of normativity, like, for example, the European early modernity, but inappropriate for the analysis of, for example, Chinese Qing dynasty, and even less for a comparative view on both.

Most of all, it would widen the scope of observation to very different kinds of normative knowledge. It would include not least implicit or tacit knowledge, conventions and aesthetic norms, but also be open for the wide range of relevant factors succinctly summarised for the history of science by Lorrain Daston as 'roughly, what scientists actually do as opposed to what they say they do'.[132] It would not least integrate the rules of practice and take seriously the claim that

[129]See on this Birigt Neumann, 'Kulturelles Wissen' in Ansgar Nünning (ed), *Metzler Lexikon Literatur- und Kulturtheorie: Ansätze-Personen-Grundbegriffe* (Springer, 5th edn 2013) 811; the first quote is taken by Neumann from Michael Titzmann, 'Kulturelles Wissen – Diskurs – Denksystem. Zu einigen Grundbegriffen der Literaturgeschichtsschreibung' (1989) 99 *Zeitschrift für französische Sprache und Literatur* 47, 48 – both translations into English are by Thomas Duve; see also Günter Abel, 'Systematic Knowledge Research: Rethinking Epistemology' in Hans J Sandkühler (ed), *Wissen: Wissenskulturen und die Kontextualität des Wissens* (Peter Lang 2014) 17–37.

[130]Christoph Möllers, *The Possibility of Norms: Social Practice Beyond Morals and Causes* (Alex Holznienkemper tr, Oxford University Press 2020) XII.

[131]Daston (n 127) 142.

[132]*Ibid*, 139.

legal knowledge is 'a species of cultural competence', an 'activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description'.[133] It would thus comprise all normativities summarised under the denomination of 'multinormativity'.[134]

The object of a global legal history as a history of knowledge is consequently all knowledge that has an influence on the production of normativity, as well as the results of this process itself – regardless of whether according to, for example, a Western understanding, the normative knowledge would be labelled as social norms, religious norms, legal norms, implicit or explicit knowledge of a theoretical or practical nature, or perhaps even of objects and artefacts or events to which normativity is ascribed. The combination of two 'usefully vague' terms like 'knowledge' and 'normativity' can provide scholarship with something like a terminological minimum, or the smallest possible unit, to address very different historical or cultural practices of producing normative knowledge.[135]

2. *Translation*

Understanding law as 'normative knowledge' would also bring in knowledge-historical expertise to study global legal history as a huge process of production of normative knowledge, understood as a process of cultural translation.[136] In this respect, it could join forces with legal theoretical scholarship that understands law as performative practice, exercised in a system of multiple, fluid, overlapping communicative spheres, made up of epistemic communities and communities of practice that are dynamically interacting.[137]

From such a knowledge-historical and legal-theoretical perspective, the sterile divide between 'theory' and 'practice' or 'law in books' and 'law in action' could be overcome. 'Practice' could be understood as an exercise that inevitably draws on a wide range of normative knowledge and that indeed itself is part of normative knowledge – and, at the same time, continuously produces new normative knowledge. This perspective could help to understand that practice is not simply 'action',

[133]James B White, 'Legal Knowledge' (2002) 115 *Harvard Law Review* 1396, 1399.
[134]Duve (n 109).
[135]Daston (n 127).
[136]For an introduction into this perspective and the distinction between two cultural translations – from normative information to normative knowledge and then into a pragmatic context – see Duve (n 123) with further references. Obviously, lingual translations do also play an important role in this process, see on this aspect Ko Hasegawa, 'Normative Translation in the Heterogeneity of Law' (2015) 6 *Transnational Legal Theory* 501.
[137]On law as a system of communicative spheres see, for example, António M Hespanha, 'Southern Europe (Italy, Iberian Peninsula, France)' in Heikki Pihlajamäki, Markus Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 332–57; see on the legal theoretical ideas underlying this some references in Vesting (n 118).

but a specific way of acting conditioned by technicity, materiality, logics, habits and forms, often summarised under the label of 'tradition'.[138] 'Normative knowledge' thus encompasses both theoretical and practical knowledge.

3. *Glocalisation*

Third, the concrete conditions under which this knowledge production in the field of normativity – conceived of as a cultural translation of normative knowledge – is taking place could be summarised as a historical regime of knowledge production, a more or less stabilised historical formation of specific practices, rules, principles and norms for producing normative knowledge.[139] As the production of normative knowledge happens with each act, on a local level, this would mean that what is being studied are the local conditions under which the process of translation and thus localisation of – potentially global – normative knowledge is being reproduced. What Jürgen Renn has pointed out with regard to the history of science is, as he himself hinted at, also true for legal history: 'Local knowledge constitutes the substratum of all other forms of knowledge, generating the global diversity also of scientific knowledge'.[140] Without assigning too much importance to the wording, the term 'glocalisation', coined in the 1990s with the clear ambition to counter the hence still quite teleological perspectives on globalisation as an irreversible process, might be useful to draw attention to the fact that even globally 'circulating' knowledge has to be localised.[141]

Understanding legal history as a process of translation of normative knowledge, integrating normative information stemming from other areas and converting them in the act of cultural translation into local knowledge, labelled as 'glocalisation', could also help to counter the still powerful diffusionist view on the globalisation of law. At the same time, it could help to integrate economic, political and cultural asymmetries as well as power structures into the analysis, because these form part of the conditions under which translations are happening.

VII. Some conclusions and a working definition

The title of this article poses a question, and, to be fair, more questions have been raised than answered. However, it might be possible to summarise some results of this analysis.

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[138]H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 5th edn 2014); Duve (n 31); Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237.

[139]Abel (n 129); Peter Wehling, 'Wissensregime' in Rainer Schützeichel (ed), *Handbuch Wissenssoziologie und Wissensforschung* (UVK 2007) 704–12.

[140]Renn (n 128) 53.

[141]For a survey with references to Robertson and others see Victor Roudometof, *Glocalization: A Critical Introduction* (Routledge 2016).

Starting from a brief review of the research traditions and recent debates, two major dimensions of global legal history have been distinguished: a legal history from a global perspective and the history of the globalisation of law and the role of law in globalisation. Comprising these two, global legal history might be considered more ambitious than most modes of writing 'transnational' history, because it does not focus exclusively on entanglements, mutual influences and transnational framings (and thus questionings) of national histories, but also asks for the mechanisms that have caused what is called the globalisation of law and legal scholarship, and the role of the latter in globalisation. It is, thus, also broader in scope than comparative legal history, traditionally concentrated on comparison and not so much on the emergence of global legal regimes. Neither can it be reduced to a history of international law, or polities, because it goes beyond the realm of international law as usually understood. However, with the dynamic transformation of the mentioned fields, these classifications should not be overstated: global and transnational histories have long been aware of the need to reflect on their implicit categories and comparative practices, whereas comparative law and comparative legal history have integrated the entanglements and mutual influences into their analysis.

An assessment of some fields of global legal history and an analysis of some problems have shown that a major challenge for global legal history consists in developing a method that overcomes Eurocentric notions of law (or other centrisms like, possibly, a Sinocentrism), takes the complexity of producing normativity seriously and helps to understand mechanisms of cultural reproduction of law on a global scale. This has led to the result that global legal history could be considered as a critical history of the production of normativity, understood as a process of distributed knowledge production, comprising theory and practice, drawing on a wide range of sources, on a transnational scale.

The need for a method for this enterprise has led to the suggestion of a knowledge-historical approach to global legal history. From this knowledge-historical perspective, law and other modes of normativity can be seen as forming part of the totality of propositions that the members of a culture consider to be true and that are relevant for producing positively marked options for behaviour. This comprises normative knowledge labelled in the Western tradition as social, religious, indigenous norms, state law, customs, etc. Practical knowledge, implicit understandings and all other norms and rules that have significance for the production of normative knowledge especially are an object of global legal history – just as, obviously, the results of this process. The object of global legal history is thus normative knowledge in this wide sense ('Multinormativity').

As the production of normative knowledge necessarily draws on pre-existing normative information and embeds this into a concrete context of action through a cognitive process of translation of normative information into normative knowledge relevant for the specific case, global legal history becomes the study of the history of the production of normative knowledge, understood as a process of cultural translation. As the conditions under which this process of translation

transpires are local (even if they would be the same in all places), global legal history gives priority to the local processes of production of normative knowledge, privileging local sources ('Translation').

When asking for the globalisation of normative knowledge, however, global legal history also has to consider the global entanglements and the normative information stemming from other places, close or remote, and its local effects. It has to be attentive to the undeniable expansions and reproductions of legal knowledge, overcoming diffusionist perspectives and setting the local and the global in a reflected relation with each other. It also has to be attentive to the formation of global regimes and the role of law in them. This means to overcome the simple observation of 'circulation' or 'transfer', 'transplant' etc of normative knowledge and leads to a more complex appreciation of the undeniable tendencies of a globalisation and localisation of a language of law developed in some world areas (and since modernity especially in the west). It could help to understand the simultaneity of sameness and difference, the ubiquitous hybridisations, perhaps even the emergence of a 'universal code of legality' and the formation of normative knowledge on larger spatial scales, without falling into the trap of teleological observations ('Glocalisations').

One might name this a 'critical history of the production of multinormative knowledge, understood as a process of distributed knowledge production through cultural translation, comprising theory and practice, drawing on a wide range of sources, on a transnational scale, with special attention for the dialectics of glocalisation'. Having this in mind, however, 'global legal history' and its equivalents in other languages might be an easier denomination for this intellectual adventure.

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