

Conference report: History and Law - A German-French approximation of Historians' and Lawyers' Writing on the History of Law - Centre Marc Bloch, Berlin, 24 June 2003

By Heike Litzinger

A. Au départ

Originally, a number of French and German historians and legal scholars merely planned to meet in Berlin at the *Centre Marc Bloch* to speak - both in French and in German - about the interdisciplinary challenges that have been emerging with regard to historians working on the history of law or, legal history. Eventually, the dimensions of the envisioned meeting widened as PhD-students and fellows working at the Centre and at other institutions expressed their interest in the topic. Step by step, the initial scope was extended to grow into a full day's workshop on June 24th, 2003, attracting some twenty-five scholars of history, law and the history of art to Berlin's Schiffbauerdamm, where the *Centre Marc Bloch* is situated. The workshop, organized by Anne-Sophie Beau, Isabelle Deflers, Thomas Horstmann, Guillaume Mouralis and Petra Overath, convened under the title: „History and Law: a mutual approach. Assessing the Dialogue between the History of Law and the Historical Sciences“.

B. Le regard au-délà

The French lawyer and legal historian, Isabelle Deflers, highlighted in her introduction to the workshop what has by now developed into a wide-spread interest among historians in juridical, legal-philosophical and legal-sociological questions. She made particular reference to the fact that historians working on legal history still found themselves confronted with lawyers' doubts as to their, i.e. the historians', supposedly insufficient understanding of the essentials of legal thinking and the correct use of legal terminology. Certainly, she pointed out, much of the same prejudice could be found in the opposite direction, too, as historians regularly criticize lawyers working in history for their alleged lack of any appropriate methodical training. Against this background, Deflers asked how the methodical possibilities of each discipline might best be exploited for mutually fruitful benefit.

In the following presentation, the Director of the French-German *Centre Marc Bloch*, Catherine Colliot-Thélène, explored different possible approaches to the workshop's topic. Colliot-Thélène, as philosopher a quasi neutral arbitrator over the different disciplines' approaches, pointed to Max Weber as both a Jurist and a legal historian, stressing that Weber extended his scholarship to law, history as well as to sociology. Weber differentiated between a sociological-historical and a legal way of perceiving and interpreting the law: while the sociologist was interested in the actual *existence* of law, the legal scholar explored the conditions of *how* the law *should be*. Colliot-Thélène invited the workshop's participants to reflect upon whether in fact such a different interest of research existed, or whether rather legally trained historians of law differed from their historically trained homologues only because with regard to their specialist knowledge of the law.

C. Discours de la Méthode

In the three sections of the workshop, jurists and historians provided insights into their respective research work and into the methodology they had applied in the research process to assess their findings. An overriding objective in these sessions was clearly to identify the particular traits of the different approaches in order to better outline the commonalities as well as the overlapping features among the disciplines. In the first section, economic history as well as labor history were set alongside of the study of history of economic and labor law. The lawyer and legal historian, Friso Ross (Frankfurt/Main), who had studied the economic and labor law during the dictatorship of Primo de Riveira in Spain in the 1920s, focused in his lecture mostly on methodological aspects. He argued that historians of law - jurists as well historians - often displayed a particular interest in power and sovereignty, on the one hand, and in socially conflictuous fields of law, e.g. criminal law or labor law, on the other. Unfortunately, the historians' view would often be lead astray in this undertaking. Many times, historians of law - whether they be historians or lawyers - risked adopting a lopsided perspective on their fields of research: an exclusive focus on the ideology of power with respect to a specific field would often overshadow any alternative view of the field on which ideology might not even have had a mentionable effect. Riso further criticized that too much attention was paid to written (positive) law, while considerably less emphasis was placed on legal practice. In addition, Ross suggested that jurists, often being part of the ruling oligarchy, might also transfer other, possibly liberal traditions, over to authoritarian systems.

The French historian Anne-Sophie Beau (*Centre Marc Bloch*, Berlin) used her ensuing lecture to directly apply Ross' methodological proposals in her insightful overview of the „professional classifications“ in France between 1939 and 1950. While the choice of this time period for the sake of argument might seem problematic

with regard to the fact that during this historical time period in fact three different political regime changes place, Beau succeeded in showing that the identification of different professional qualifications with their respective differences in the wage scale served all three governments a certain, even if different purpose. While, therefore, the legitimacy basis for the professional qualification differed under each political regime, this had no influence on the regulation itself.

Beau went on to describe the difficulties that she confronted with the use of legal terms in the context of her historical work on labor legislation. These problems, however, she eventually found to be surmountable. She characterized labor legislation as being more accessible to the historical researcher than other fields of law, it being a relatively young branch, more political and, at the same time, less burdened with old and tradition-loaden notions.

D. L'une où l'autre ?

In the following section, the historian Petra Overath (*Centre Marc Bloch*) and the lawyer Peter Collin (University of Greifswald) sketched their research results about jury trials in 19th Century criminal law. Both researchers had chosen the same starting points and research agendas for their respective inquiry: and finding that they had more or less arrived at the same results, they asked the inevitable question, asked by Collin, whether in fact one were to conclude that „one of the two of us was superfluent“. Especially lawyers, he said, were asked to lay down whether or not „history of law“ as a discipline truly based itself on particular and distinct ways of analysis or presentation. A possible answer, however, to this question, he went on, could not be to limit oneself to a Luhmannian „*communication about law*“. This would reduce the discipline of history of law to the exclusive attempt to establish whether, in retrospect, someone „had been right or wrong“. The historian of law would be nothing else than a judge, and as a judge he would assume a too restrictive position that would no longer be adequate to his object of research. Collin concluded that the lawyer as a historian of law was in charge of providing an explanation of the legal contexts in order to better understand historical phenomena.

Collins' co-presenter, Petra Overath argued for a particular *historical* perspective in analyzing criminal law, all the while underlining that historical sciences were everything but a monolithic bloc of method and findings. From her historical research on the history of criminal law she concluded that history as a discipline distinctly differed from legal history insofar that it considered also socio-historical, psychological and medico-historical approaches to its topic.

Had the discussion following the first presentations remained in a certain state of hesitation, this clearly changed with the papers of Overath and Collin and with the

participants' greater ease at this time to engage in and to follow a bilingual discussion. In the discussion following the presentation by Overath and Collin one participant claimed that in spite of the fact that both the target of research and the reached result had been more or less similar, Overath's and Collin's papers had in fact differed greatly. While Collin had, according to the commentator, argued „field-immanently“, Overath had assumed law as just an(other) instrument to be employed in the context of her research. Another commentator, the Historian Sabine Rudischhauser, raised an interesting and helpful point in the discussion at that point when she said that the differences between the two research projects had expectedly remained rather small as indeed both disciplinary approaches had originated in the German historical school of the 19th century. From her point of view, the comparison between a German and a French perspective would have been more productive than the exclusive focus on methodological differences between the approaches of a historian of law and a legal historian.

The lawyer Olivier Beaud (*Centre Marc Bloch*) then raised the question why Collin had not shed more light on the political dimension of the historical debate concerning jury trials. Collin found this to be an inadequate reduction in perspective on this topic. Answering Beaud, Collin defended his approach by embracing the idea of the „autonomy of the juridical discourse“. Even if the proponents of the jury trials had mainly been liberals, who had pursued the introduction of a greater participatory element in the judiciary system of their time by promoting jury trials, Collin said that these lawyers eventually remained more concerned about „law“ than about politics.

E. Responsabilités

In the third section, the historians Thomas Horstmann (University of Cologne) and Guillaume Mouralis (*Centre Marc Bloch*) highlighted the difficulties in legal scholarship and legal practice when dealing with state criminality. Horstmann explained that criminal law, when applied to Nazi crimes, regularly was meeting its own limits, causing it indeed to fall into a crisis, because the crimes committed by the bureaucratically organized state could not to be subsumed under the principle of individual responsibility in German criminal law. Admittedly, German criminal law did experience a redefinition of the notion of the perpetrator (*Täter*). The law now recognizes, next to the *personal* authority for the committed crime (*Tatherrschaft*), a form of authority for the organized apparatus of might (*Tatherrschaft durch einen organisierten Machtapparat*). Up to this day, however, we were missing a general concept for crime committed by a „system“ (*Systemunrecht*). Then, Horstmann raised the question whether jurists eventually might discover new ways out of this dilemma when learning about the results of historical research on the legal practice under the Nazi regime. He went on to present the work by a Swiss legal scholar

and an US-American historian¹ of law who both had relied in their work on the well-known book of Raul Hilberg „The destruction of the European Jews“, especially Hilberg’s detailed description of administration in the „*Third Reich*“, in order to elaborate a new concept of „bureaucratic responsibility“ in criminal law.

The Historian Guillaume Mouralis (Paris/Berlin), focusing on criminal proceedings against officials of the GDR in the 1990s, criticized that the concepts of historians or political scientists, such as „*Vergangenheitspolitik*“ (policy of the past) or „transitional justice“ were based on a too restricted time perspective. When the system change occurred in the GDR to the Federal Republic of Germany, many scholars were only considering the short period of time around the event of the political reversal. But, Mouralis argued, the juridical world remained „relatively autonomous“ in relation to the political world. Therefore, he suggested, to examine the transition on three different levels of time: the time of the „*longue durée*“ of the legislation, the time of middle length of the jurisprudence needing to adapt to new legal problems and to the critique of the legal scholars, and the rather short time of the legal proceeding itself. Hinting at the capacity of juridical traditions and schools to persist, Mouralis here came back to the idea that Friso Ross had presented in the first paper of the workshop.

The discussion on these two last contributions demonstrated the difficulty confronting those that try to reach mutual understandings, possibly due to the respective cases of a „*deformation professionnelle*“. While all lawyers at the workshop, regardless of whether they were French or German, found the idea of possibly giving up the idea of individual responsibility merely unacceptable, this seemed to be at least a tempting and interesting perspective for the development of law in the eyes of the historians Horstmann and Mouralis. What became clear at this point, was that both disciplines, history legal history, were both informed by a normative search for „how law should be“ (the „*Sollen*“ instead of the „*Sein*“) in contemporary history. Thus, the answer to the introductory question presented by Catherine Colliot-Thélène might be: historians, after all, might, too, be seduced to regard law in a normative way.

The conclusion to the interdisciplinary workshop in Berlin was left to the French legal scholar Olivier Beaud, who remarked that throughout the workshop the particular situation of the discipline „history of law“ had hardly been a topic, although the discipline has long been experiencing the same marginalization in Germany as in France. To Beaud it seemed a good result of the workshop that it had provoked

¹ Hans Vest, Genozid durch organisierte Machtapparate. An der Grenze von individueller und kollektiver Verantwortlichkeit, Baden-Baden 2002; Cohen, David: Bureaucracy, Justice, and Collective Responsibility in the World War II War Crimes Trials. In: Rechtshistorisches Journal 18 (1999), 313-42.

more awareness of the necessity to study the practice of law with much greater emphasis. Already now, theoreticians of law assumed that law was both the legal *text and its application*, not *only* the text. Especially historians of law should start from this assumption and generally integrate more legal theory into their research. While for a long time historians of law who had displayed a socio-historical approach to their own discipline had not been taken seriously by their colleagues, there might now be some signs of change.

At any rate, it was a common view among all of the participants that the dialogue between the two disciplines ought to continue. While Thomas Horstmann, at different instances during the workshop, had complained about too much harmony and consensus among the participants and had therefore asked for more dissenting voices, Isabelle Deflers underlined the importance of this workshop. As many of the lawyers working on legal theory continued to struggle for their separate and distinct identity, and as only few if any legal historians interested in the exploration of the doctrinal history of Roman law would want to merge efforts with legal historians that pursue socio-historical approaches to their field, this workshop could well be seen as merely showing a small part of all the topics offering themselves for future discussions between historians and lawyers. A beginning, at least.

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