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Intellectual Property Rights and Globalization

Herausgegeben von
Isabella Löhr und Hannes Siegrist

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Intellectual Property Rights between Nationalization and Globalization. Introduction

Hannes Siegrist / Isabella Löhr

The present volume deals with the role and function of intellectual property rights in the nationalization and globalization of cultural, scientific and economic relations from the 19th century to the present with regard to the following key questions: Why are modern societies increasingly regulating their relations in culture, science and the economy in terms of property? How have institutions and standards of intellectual property spread in the course of history? What are the actors behind the international harmonization of intellectual property rights and their dissemination as a global social and cultural system of reference, and what acting options do they have? Why has their role been controversial until the present day? The articles on the internationalization of cultural works and markets (Isabella Löhr), the international harmonization of patent law (Margrit Seckelmann), the marketing of technical and medical knowledge in India (Sabil Francis) and on scientific property (Gabriel Galvez-Béhar) explore central tendencies, problems and conflicts in the history of the property-related institutionalization of cultural, scientific and economic relations.

The volume examines the way in which intellectual property rights were implemented on a global level by asking how programmes, strategies and processes of propertization, nationalization and globalization interlock.[1] The term propertization refers to the tendency

1 The idea for this volume originally goes back to the section "The Propertization of Culture. The International Governance of Intellectual Property Rights" at the "Second European Congress on World and Global History" in Dresden (3rd – 5th July 2008). We would like to thank all authors, as well as Lionel Bently (Cambridge) for their

to increasingly understand social relations as *property-related relations* and to govern them on a property-related basis.[2] Nationalization means that social, cultural, scientific, legal and political relations are predominantly governed from the perspective of national sovereignty, integration and delimitation. Globalization refers to transborder economic, social, cultural and political interlinking processes and attendant regulation strategies in which state, private and international actors and organizations are equally involved and which consequently go beyond any of the strictly inter-state forms of action in the sense of bilateral or multilateral policies as suggested by conventional historiographical approaches to analyzing international relations.[3]

The volume examines the way in which social, cultural, scientific, economic and political structures and processes determine the dynamics of propertization, nationalization and globalization; how these processes mutually enhance or impede each other; how the actors perceive them in the relevant social and cultural context and set against the background of the institutional tradition, and agree on rules for dealing with cultural and knowledge-based goods. Insofar as the articles historicize and contextualize the development and dissemination of intellectual property rights, they are able to show why concepts and norms of intellectual property often reinforce hierarchies, differences and

assistance in further developing the themes with us in a discussion. We thank the Centre for History and Culture of East-Central Europe, Leipzig, and the German Federal Ministry of Education and Research for financial support of the translation.

2 In the present volume, "propertization" is used as a heuristic concept for the historical and comparative analysis of social, cultural and legal strategies and processes which amount to governing social relations with material and immaterial objects from a property perspective. Propertization is a process concept which serves as an aid in comprehending a number of concrete and abstract forms of the property-related institutionalization of cultural, scientific and economic relations: H. Siegrist, Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne, in: ibid. (ed.), Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen, Leipzig 2007 (= Comparativ 16 (2006), no. 5/6), pp. 9-52; H. Siegrist, Strategien der Propertisierung kultureller Beziehungen. Die Rolle von Urheber- und geistigen Eigentumsrechten in der Institutionalisierung moderner europäischer Kulturen (18.-20. Jh.), in: S. Leible / A. Ohly / H. Zech (eds.), Wissen – Märkte – Geistiges Eigentum, Tübingen 2010, pp. 3-36. In everyday and political discussions on the extension and delimitation of individual intellectual property rights and the privatization and commercialization of culture and knowledge, "propertization" has also been used as a concept of dispute since the 1990s by critics of certain propertization phenomena. With the help of the following legal and legal-political studies, it can be seen how "propertization" has been transformed for a decade from a concept of dispute to a systematic concept for a critical scientific analysis of legal and institutional processes: L. Lessig, Reclaiming a Commons. Keynote Address, in: The Berkman Center's Building a Digital Commons, May 20, 1999, Cambridge/MA, Draft 1.01, URL: http://cyber.law.harvard.edu/events/lessigkeynote.pdf (accessed June 25, 2011); R. A. Posner, Do we Have too Many Intellectual Property Rights?, in: Marquette Intellectual Property Law Review 9 (2005), no. 2, pp. 173-185; P. Drahos/J. Braitwaite, Information Feudalism. Who Owns the Knowledge Economy?, London 2002 (1st eds.)/New York 2007 (paperback); M. J. Radin, A Comment on Information Propertization and its Legal Milieu, in: Cleveland State Law Review 23 (2006), pp. 1- 16; T. Dreier, Verdichtungen und unscharfe Ränder. Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums, in: H. Siegrist (ed.), Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen, Leipzig 2007 (= Comparativ 16 (2006), no. 5/6), pp. 172-192.

3 J. Osterhammel / N. P. Petersson, Globalization: A Short History, Princeton / New Jersey 2003; A. G. Hopkins (ed.), Global History. Interactions Between the Universal and the Local, New York 2006; P. Manning, Navigating World History. Historians Create a Global Past, New York 2003; P. Vries (ed.), Global History, Innsbruck 2009 (= Österreichische Zeitschrift für Geschichtswissenschaft 20 (2009), no. 2); M. Hughes-Warrington (ed.), Palgrave Advances in World Histories, Basingstoke 2005; F. Hadler / M. Middell (eds.), Verflochtene Geschichten: Ostmitteleuropa, Leipzig 2010 (= Comparativ 20 (2010), no. 1/2).

dependencies on a global scale. On the other hand, they also indicate that this motivates processes of adjustment and opens up chances of participation. Intellectual property rights have become more ambiguous and multifunctional over the course of history and their worldwide dissemination.

The requirements, forms and consequences of the property-related institutionalization of cultural, scientific and economic processes are mainly of interest from a socio-historical perspective in the present volume. The articles analyze relations in cooperation, competition and governance between individuals, interest groups, associations, companies, states and international organizations. They bring back the problem of intellectual property more closely to general historiography, where it has hitherto only been of marginal interest. Research on intellectual property claims and the meaning of intellectual property law has remained a special area of legal history and legal science until recently. Intellectual property rights are occasionally interesting from the perspective of special disciplines, such as business history, the history of economic growth, labour and professions and of social inequality, the history of technology and science and of media, literature and culture. Until recently historians have generally been interested in non-property-related forms of dealing with culture, science and information; national and universal history in many cases assume unquestioningly that culture and knowledge is about commons.

In the following, we will outline the conceptual basis of this research programme (Chapter 1). Then we will sum up the history of the nationalization and globalization of intellectual property rights from the 19th century to the present from selected viewpoints (Chapter 2). Finally, in ten theses we will link the history of the dissemination of intellectual property to central developments and conflicts of the modern age (Chapter 3).

1. Key terms in socio-historical research on intellectual property: institutional change and propertization

Legally speaking, intellectual property rights are understood in the broadest sense as a "bundle of individual and exclusive *rights*." Intellectual property is thus an umbrella term whose scope includes copyright, patent law, trademark law and related power protection rights. Whereas patent law sets down how to deal with technical inventions, copyright law governs how to deal with cultural goods and the relationship between authors, agents, users and the public. Research on the practices, norms and effects of intellectual property in modern cultures and societies is generally geared towards questions posed by individual scientific disciplines and mainly concentrates on special areas of knowledge. The concern of the present volume, however, is to show, systematically and by means of examples, how disparate findings from research in the historical, legal, cultural and social sciences can be integrated with the aid of interdisciplinary heuristic concepts. In the following we will structure the research on the meaning of intellectual property into social, cultural, economic and political relations using the concepts of institutionalization and propertization.

From a socio-historical and sociological perspective, intellectual property rights are of interest as "institutions", i.e. as rules which societies use to structure relations in governance, cooperation and competition. Institutions are collective rules and rules of play which standardize, normalize and sanction social and cultural action. As consolidated cultural patterns, they ensure a security of expectation in social relations. By internalizing the rules in the context of socialization and acculturation processes, the actors acquire a specific social habitus or a group-specific mentality, which also have a retroactive effect on the persistence and change of the institutions.

The social history of intellectual property asks why rights and obligations, functions and relations in culture, science, media science and industry are grasped in terms of property. It understands propertization in modern culture and science as a specific form of an "institutionalization" of social relations. The term institutionalization refers to processes of constructing, implementing and embedding institutions.[4] In modern and globally networked societies, institutional change is characterized by acceleration, transfers, interlinking and delimitation. Institutional knowledge – i.e. the knowledge of actors regarding *possible forms* of regulating social, cultural and economic relations – is expanded and differentiated. Institutions such as intellectual property become more ambiguous and multifunctional as a result of their being used in different social constellations and cultural contexts. At the same time, conflicts regarding their meaning and function increase. The tension between traditional and innovative, as well as between indigenous and foreign institutions, becomes permanent and intensifies periodically. It is a structure characteristic of modern societies.

One of the distinctive features of modern societies then is that proprietary institutions and propertization processes are becoming increasingly more important. "Propertization" generally means that exclusive claims to the disposal, monitoring and exploitation of material and immaterial goods are regulated and justified by means of theories, concepts and norms of *property*.[5] In the special case of cultural goods and knowledge,

4 Processes of institutionalization are examined on a social, cultural and legal level. Institutionalistic research approaches are widespread both in the historical, social and cultural sciences, and in the legal and economic sciences. The institutions approach is the cornerstone of interdisciplinary research specifically on intellectual property, and more generally on the institutionalization of cultural, scientific, economic and political relations. On the institution concept and on the analysis of institutions in the social, cultural, economic and historical sciences: W. R. Scott, Institutions and Organizations, Thousand Oaks 2001 (2nd ext. ed.); K.-S. Rehberg, Institutionen, Kognitionen und Symbole. Institutionen als symbolische Verkörperungen, in: A. Maurer/M. Schmid (eds.), Neuer Institutionalismus. Zur soziologischen Erklärung von Organisation, Moral und Vertrauen, Frankfurt am Main 2002, pp. 39-56; K.-S. Rehberg, Weltrepräsentanz und Verkörperung. Institutionelle Analyse und Symboltheorien. Eine Einführung in systematischer Absicht, in: G. Melville (ed.), Institutionalität und Symbolisierung. Verstetigungen kultureller Ordnungsmuster in Vergangenheit und Gegenwart, Köln 2001, pp. 3-49; D. C. North, Theorie des institutionellen Wandels. Eine neue Sicht der Wirtschaftsgeschichte, Tübingen 1988; D. C. North, Institutions, Institutional Change and Economic Performance, Cambridge 1990; R. K. Merton, The Matthew Effect in Science II: Cumulative Advantage and the Symbolism of Intellectual Property, in: Isis 79 (1988) no. 4, pp. 606-623.

5 H. Siegrist, Die Propertisierung (annotation 2). On the problems of propertization in agriculture and rural societies, cf. the ethnological studies by C. Hann, Propertization und ihre Gegentendenzen. Beispiele aus ländlichen Gebieten Europas, in: H. Siegrist (ed.), Entgrenzung des Eigentums (annotation 2), pp. 84-98; F. v. Benda-Beck-

"propertization" refers to programmes, strategies and processes which amount to regulating social dealings with commercially exploitable forms of expression and know-how with reference to the conception of intellectual property and with the aid of intellectual property law.[6] This means that relations in culture, science and the economy are increasingly standardized with regard to property, the validity of proprietary rights and rules is extended in terms of both space and time, alternatives are relativized, superimposed or displaced. Specific groups of professions, interest associations, national states and international organizations tend to extend the scope of the function and validity of institutions and norms of intellectual property in a national and international context.

The articles in this volume deal with the causes, motives, forms, consequences and limits of various propertization and de-propertization processes in their respective historical and cultural context, using objects and problems as examples. They do not proceed from the assumption that propertization processes are uniform or that they proceed in a unilinear manner. Rather, they seek to understand the dialectics and forms of propertization and de-propertization processes. They therefore take the competition of actors, interests, ideas and institutions as their starting-point and examine how and why property-related rules spread and become established in the "battle of institutions" and "institutional fashions";[7] and how intellectual property rights – nationally and internationally – are embedded in the relevant institutional, legal and social structure.[8]

The volume examines the exclusion and inclusion effects of intellectual property rights within and beyond the national state and thus on a national, international and global level. It begins with traditional nation-centred research on intellectual property and the institutionalization of modern culture and science, but then concentrates on the interfaces of state, inter-state and transnational action. It shows how the actors – states, interest groups, non-governmental organizations and international organizations – negotiate and implement the legal and institutional foundations of a *global governance* of culture, media science and knowledge industries;[9] how far the influence of national states and as-

mann, Propertization in Indonesien. Parallele und gegenläufige Entwicklungen, in: H. Siegrist (ed.), Entgrenzung des Eigentums (annotation 2), pp. 99-111.

6 H. Siegrist, Strategien der Propertisierung (annotation 2); exemplary: S. Klotz, Zwischen musikalischer sprezzatura und labeur. Komponieren in der frühen Neuzeit als Investition, in: H. Siegrist (ed.), Entgrenzung des Eigentums (annotation 2), pp. 193-201; A. Götz von Olenhusen, Balzac und das Urheber- und Verlagsrecht, in: UFITA. Archiv für Urheber- und Medienrecht (2008), pp. 441-463.

7 W. Schluchter, Interessen, Ideen und Institutionen. Key Terms of a Sociology Orientated Towards that of Max Weber, in: S. Steffen et al. (eds.), Soziale Konstellation und historische Perspektive. Festschrift für M. Rainer Lepsius, Wiesbaden 2008, pp. 57-80, here p. 57 f.

8 Cf. the article by G. Galvez-Behar in this volume. Classic: D.C. North, North, Institutions, Institutional Change and Economic Performance (annotation 4). P. Drahos / J. Braitwaite, Information Feudalism, (annotation 2), p. 2 indicate the problems of an "institutional mismatch", whereby imported institutions lose the capacity for achievement and acknowledgement which they expected.

9 Cf. on this, exemplary for the history of copyright law, I. Löhr, Die Globalisierung geistiger Eigentumsrechte. Neue Strukturen internationaler Zusammenarbeit, 1886–1952, Göttingen 2010. A comprehensive introduction to current theory approaches and challenges of governance research are provided by: A. Benz (ed.), Handbuch Governance. Theoretische Grundlagen und empirische Anwendungsfelder, Wiesbaden 2007; S. Quack, Zum Werden und Vergehen von Institutionen Vorschläge für eine dynamische Governanceanalyse, in: G. F. Schup-

sociations reaches; and why international contracts and organizations have been gaining importance in regulating and controlling cross-border cultural, scientific and economic processes since the late 19th century. From the following historical overview of the construction and implementation of intellectual property rights, it is clear to see that claims for monitoring and controlling the transfer of cultural goods and knowledge increased in the long-term; and that agreement on rules regarding the cross-border exchange of cultural goods and knowledge was dramatically complicated as a result of extending the scope of the actors, objects, interests and institutional preferences.

2. The construction and implementation of intellectual property rights between nationalization and globalization

From a historical viewpoint, modern copyright and invention rights are actually institutional innovations of late 18th and early 19th centuries. The dissemination of intellectual property rights occurred for the first time in Western and Central Europe, and in America, in the context of the great institutional revolutions and reforms between 1770 and 1870. In the context of the freedom of trade and commerce and a middle-class public, copyright and patent laws served to protect specific claims for use and exploitation. In this way, societies wished to regulate dealings with knowledge and forms of expression in a liberal order.[10]

pert (ed.), Governance-Forschung – Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2005, pp. 346-370; for a discussion of global governance in the state and administration sciences: M. Seckelmann, Keine Alternative zur Staatlichkeit – Das Konzept der "Global Governance", in: Verwaltungsarchiv. Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik 98 (2007), pp. 30-53; T. Risse-Kappen, Structures of Governance and Transnational Relations: What Have we Learned?, in: ibid. (ed.), Bringing Transnational Relations Back In. Non-State Actors, Domestic Structures and International Institutions, Cambridge 1995, pp. 280-313; M. Zürn, Global Governance, in: G. F. Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2005, pp. 121-146.

10 Cf. for this and the following research on copyright law or copyright in individual national and regional states: M. Rose, Authors and Owners. The Invention of Copyright, Cambridge 1993; B. Sherman / L. Bently, The Making of Modern Intellectual Property Law. The British Experience 1760–1911, Cambridge 1999; R. Deazley, On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth Century Britain, 1695–1775, Oxford 2004; E. Wadle, Geistiges Eigentum. Bausteine zur Rechtsgeschichte, vol. 1, Weinheim 1996, vol. 2, München 2003; M. Vogel, Die Entwicklung des Urheberrechts, in: G. Jäger et al. (eds.), Geschichte des deutschen Buchhandels im 19. und 20. Jahrhundert, vol. 1: Das Kaiserreich 1870–1918, Frankfurt am Main 2001, pp. 122-169; H. Bosse, Autorschaft ist Werkherrschaft. Über die Entstehung des Urheberrechts aus dem Geist der Goethezeit, Paderborn, München 1981; F. Kawohl, Urheberrecht der Musik in Preußen (1820- 1840), Tutzing 2002; C. Hesse, Publishing and Cultural Politics in Revolutionary Paris 1789–1810, Berkeley 1991; M. Woodmansee, Intellectual Property and the Construction of Authorship, New York 1992; M. Borghi, La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia 1801-1865, Milano 2003; M. T. Buinicki, Negotiating Copyright. Authorship and the Discourse of Literary Property Rights in Nineteenth-Century America, New York 2006; P. E. Geller, Copyright History and the Future. What's Culture Got to do With it?, in: Journal of the Copyright Society of the USA 47 (2000), pp. 209-264. Cf. also the commentated and digitalized collection of sources on England, France, Germany and the USA: L. Bently / M. Kretschmer (eds.), Primary Sources on Copyright (1450–1900), URL: www.copyrighthistory.org. – b) International comparisons of copyright: E. Wadle, Entwicklungsschritte des Geistigen Eigentums in Frankreich und Deutschland. Eine vergleichende Studie, in: H. Siegrist/D. Sugarman (eds.), Eigentum im internationalen Vergleich (18.-20. Jahrhundert), Göttingen 1999, pp. 243-261; S. Strömholm, Le

The property-related institutionalization of cultural and scientific relations gained its importance at that time in the context of the modernization of the territorial state and the "nationalization" of society and culture, the economy and the law. ("Nationalization" refers here in an abbreviated form to processes of integration and homogenization taking place at that time not only in national states such as France and England, but also in the numerous pre-national German and Italian regional states and in the Empires.) Intellectual property rights were meant to ensure security of expectation in the relations of cooperation and competition between professional groups and interest groups in the territory of the national state. Propertization and nationalization were in many cases complementary institutionalization strategies. States and social elites coordinated their particular professional, social, cultural and economic interests and objectives with the aid of the concept and norms of intellectual property with the overall aim of establishing a productive national culture, science and economy.[11] The modern legal and cultural state assigned authors and publishers, inventors and industrialists exclusive individual rights for intellectual works and inventions which it considered socially, culturally and economically relevant, but did not manufacture and convey under its own management. Gradually, what began as a pragmatically grounded claim by authors and inventors to their achievements became defined as a natural right or fundamental right, which was then specified by special laws, court decisions, legal commentaries and legal doctrines.
Between the late 18th and late 19th centuries more and more states began to hope that legally anchoring and codifying intellectual property law would provide an efficient means of regulating problems which traditional legal instruments and institutions such as pub-

droit moral de l'auteur en droit allemand, français et scandinave. Avec un aperçu de l'évolution internationale, Stockholm 1966; A. Strowel, Droit d'auteur et copyright. Divergences et convergences. Etude de droit comparé, Brüssel / Paris 1993; F. Rideau, La formation du droit de la propriété littéraire en France et en Grande Bretagne. Une convergence oubliée, Aix-en-Provence 2004; B. Dölemeyer, Urheber- und Verlagsrecht, in: H. Coing (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, vol. III. 3, Munich 1986, pp. 3955-4066; D. Halbert, Intellectual Property in the Information Age. The Politics of Expanding Ownership Rights, Westport 1999; G. Davies, Copyright and the Public Interest, Weinheim 1994. – c) On the history of patents: W. R. Cornish, Intellectual Property. Patents, Copyright, Trade Marks and Allied Rights, London 1981; H. I. Dutton, The Patent System and Inventive Activity During the Industrial Revolution 1750–1852, Manchester 1984; A. Beltran / S. Chauveau / G. Galvez-Behar, Des brevets et des marques. Une histoire de la propriété industrielle, Paris, 2001; F.-K. Beier, Gewerbefreiheit und Patentschutz. Zur Entwicklung des Patentrechts im 19. Jahrhundert, in: H. Coing / W. Wilhelm (eds.), Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert, vol. 4, Frankfurt am Main 1979, pp. 183-205; M. Seckelmann, Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914, Frankfurt am Main 2006; R. E. Evenson / J. D. Putnam, Institutional Changes in Intellectual Property Rights, in: American Journal of Agricultural Economics 69 (1987), no. 2, pp. 403-409; A. Aer, Patents in Imperial Russia. A History of the Russian Institution of Invention Privileges under Old Regime, Helsinki 1995.

11 In the 19th century and until well into the 20th century, property-holding and educated middle-class circles were interested above all in protecting intellectual property, i.e. industrial, media and cultural entrepreneurs, authors of all kinds, freelance artists, inventors, engineers and architects, small groups of copyright, patent law and trademark law specialists among lawyers, as well as educated audience groups. Exemplary for this: M. Woodmansee, The Cultural Work of Copyright. Legislating Authorship in Britain 1837–1842, in: A. Sarat / T. R. Kearns (eds.), Law in the Domains of Culture, Ann Arbour 1998, pp. 65-96; D. P. Miller, "Puffing Jamie". The Commercial and Ideological Importance of Being a "Philosopher" in the Case of the Reputation of James Watt (1736–1819), in: History of Science 38 (2000), no. 1, pp. 1-24.

lishers' privileges, trade monopolies and corporate rights – real or alleged – had failed to solve. In contrast to material property rights, however, which were becoming established at the same time, intellectual property was from the outset only temporary. The legal status and legally dogmatic justification of the new cultural and technical-scientific exclusive rights remained controversial for a long time. Depending on the place, time, field of knowledge and legal culture, the latter were understood and standardized as property, duplication, competition, investment protection or monopoly rights; in some areas of Central and Eastern Europe even still as privileges until the late 19th century.[12] In any case, proprietary protection always stood in the foreground at that time, i.e. the exclusive individual right to duplication and commercial exploitation. Not until the 20th century was the proprietary dimension of intellectual property law in Europe complemented more strongly by the moral rights of the author and the employed inventor.[13]

For a long time, intellectual property law only regulated a few selected functions and forms of exploitation, such as the commercial dissemination of mechanically duplicated cultural goods and the commercial application of new technical knowledge. Literary and artistic property law standardized functions and relations in the literary economy and elite culture. In the USA and Great Britain, such exclusive rights were understood and designated as *copyrights*, on the European continent as literary and artistic property rights, then later increasingly as personal rights of the author or rights to immaterial goods. Patent law gained importance in technically innovative and especially economically dynamic areas of industry and science.[14] Legislators limited individual intellectual property rights in the public and state's interest, by relativizing them, firstly with the term of their duration, secondly by so-called threshold rules in copyright and patent law[15] and

12 L. Gieseke, Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845, Göttingen 1995; T. Gergen, Die Nachdruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund, Berlin 2007.

13 Cf. on the dispute constantly blazing up above all in Continental Europe since the 19th century on the property-related or personality-related legal justification of intellectual property law: L. Pahlow, Geistiges Eigentum, in: Enzyklopädie der Neuzeit, vol. 4, Stuttgart 2006, pp. 291-296; L. Pahlow, Intellectual Property, Propriété Intellectuelle und kein geistiges Eigentum? Historisch-kritische Anmerkungen zu einem umstrittenen Rechtsbegriff, in: UFITA 115 (2006), pp. 705-726; H. Mohnhaupt, Zur Entstehung der Rechtsdisziplin "Urheberrecht" im 19. Jahrhundert, in: L. Pahlow/J. Eisfeld (eds.), Grundlagen und Grundfragen des Geistigen Eigentums. Diethelm Klippel zum 65. Geburtstag, Tübingen 2008, pp. 131-154; V. M. Jänich, Geistiges Eigentum – eine Komplementärerscheinung zum Sacheigentum?, Tübingen 2002; M. Goldhammer, Die Begründung des geistigen Eigentums in der US-amerikanischen Rechtswissenschaft und ihre Bedeutung für die deutsche Diskussion, in: Zeitschrift für geistiges Eigentum 1 (2009), pp. 139-166. From the late 19th century until the present day, prominent representatives of German jurisprudence have encountered the view widespread in the Anglo-Saxon world and in Western Europe, that authorial rights are to be understood primarily as intellectual property rights, critically and dismissively: M. Rehbinder, Urheberrecht, Munich 2006; H. Schack, Urheber- und Urhebervertragsrecht, Tübingen 2007; K.-N. Peifer, Individualität im Zivilrecht. Der Schutz persönlicher, gegenständlicher und wettbewerblicher Individualität im Persönlichkeitsrecht, Immaterialgüterrecht und Recht der Unternehmen, Tübingen 2001; T. Hoeren, Medienumbrüche und das Urheberrecht. Eine einführende Betrachtung, in: R. Schnell (ed.), Medienrevolutionen. Beiträge zur Mediengeschichte der Wahrnehmung, Bielefeld 2006, pp. 167-183.

14 Cf. on this in the present volume the articles by Gabriel Galvez-Behar and Margrit Seckelmann.

15 They determine, for example, that works protected by copyright in the public or state's interest could be freely used, for instance, for state celebrations, in schools or by the military. One of the limitation rules was also the right of quotation. Similar limits apply to patents relevant on a national, military or political security level. Cf. for

thirdly, by embedding them in cultural, educational, economic and social policy. That is to say, on a national scale the history of intellectual property was defined from the outset by the search for an acceptable balance between particular and general interests.

When international exchange relations in the cultural, media and knowledge industries were intensifying in the 19th century,[16] the question of how to balance interests in cross-border relations became more acute. Cultural goods protected in the country of origin were reprinted, edited, translated and commercially exploited beyond the national territory, patent-protected manufacturing processes were used freely abroad. Even in countries which already had a modern form of patent law, the "first registered" was also able to receive a patent for a foreign invention they had not created. That is to say, as long as intellectual property rights were not secured expressly by a *private contract* between the indigenous author, first publisher or patent owner on the one hand and a foreign user or agent on the other, they evaporated beyond the state border. Those parties affected by imitation and reproduction referred to this as piracy, yet were unable to do much against, since the sovereign state's power of regulation and sanctioning ended at its border. Propertization strategies of a national extent were inadequate. Thus the view sworn by the emerging liberal owner society, that material and immaterial property rights were about universal natural, liberty-related or human rights – justified by individual work, achievement and investments – threatened to become an illusion.

Right into the early 20th century, the role of intellectual property was not consolidated either in the regulation of cultural exchange processes or in a cross-border flow of goods and money, even in Western and Central Europe and the USA. States which declared intellectual property rights to be sacrosanct in their own area, behaved ambivalently towards the exclusive legal demands of foreign citizens and businesses. In the competition for political power, cultural influence, economic affluence and military strength, they repeatedly placed their own advantage above the exclusivity demands justified by foreign law.

The regional and national states, however, were also searching for solutions to the problem that texts, pictures, notes and new commercial knowledge could be used in duplicated form and at the same time in many places. As the cross-border exchange of cultural goods and knowledge increased and trade and customs borders were dismantled over the course of the 19th century, they focused increasingly on the institutions of intellectual property. Copyright, patent, trademark and ultimately a whole host of exclusive rights derived from these were intended to moralize, regulate and sanction the competition and cooperation relations between individuals, organizations and states even on an international level. Intellectual property rights became an instrument of external trade and external culture politics. Some Western and Central European industrial states, countries

the 20th century the article by M. Seckelmann and F. Mächtel, Das Patentrecht im Krieg, Tübingen 2009.

16 Cf. exemplary for this, on the internationalization of the book market: E. Fischer, Buchmarkt, in: European History Online (EGO), published by the Institute of European History (IEG) Mainz, March 12, 2010, URL: http://www.ieg-ego.eu/fischere-2010-de, URN: urn:nbn:de:0159-20100921215 [accessed May 21, 2011]; F. Barbier, (ed.), Est-Ouest. Transferts et réceptions dans le monde du livre en Europe (XVIIe-XXe siècles), Leipzig 2005.

of cultural export and the USA determined the standards which were subsequently to be assumed voluntarily or by force by other states.

Entrepreneurs, authors, inventors and lawyers were increasingly demanding that legislators should formulate internationally binding regulations for dealing with cultural goods and technical inventions. Private and national interests were to be protected by means of international contracts which would reinforce legal and expectation-related security in cross-border cultural and economic relations. In Europe, inter-state negiotiations on legal standards related to property and trade intensified in the course of the liberalization and free trade policies around 1840 and from the 1860s onwards. Large and medium-sized cultural and industrial states protected the intellectual property rights of their entrepreneurs, inventors and authors at first by means of a network of bilateral trade contracts.

When plans to create uniform international protection standards failed, industrial and cultural export states such as France, Germany and Great Britain agreed to protect both literary and artistic works and technical inventions by means of multilateral contracts, as was customary at the time in other fields.[17] The legal, institutional and organizational foundations for the international protection of intellectual property rights were laid in the 1880s: the Paris Convention for the Protection of Industrial Property, founded in 1883, regulated international patent protection,[18] the Berne Union, founded in 1886, regulated the international protection of literary and artistic property.[19] The international intellectual property regime from then on was based on principles of mutual recognition of national copyright titles (reciprocity), the equality of foreigners and natives in the respective national patent and copyright law (treatment of natives) and an alignment of the law. In the case of technical inventions, although the criteria which states used to award their patents became more universal, a special patent still had to be acquired for each country.[20] The aforementioned international conventions safeguarded the globalization of cultural, media and science industries in the 20th century, and ensured Western standards in cultural, scientific and economic relations were spread worldwide.

17 For general information on the question of international conventions and organizations: M. Herren, Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century, in: M. H. Geyer / J. Paulmann (eds.), The Mechanics of Internationalism. Culture, Society, and Politics From the 1840s to the First World War, Oxford 2001, pp. 121-144. Specially on intellectual property: M. Vec, Weltverträge für Weltliteratur. Das Geistige Eigentum im System der rechtsetzenden Konventionen des 19. Jahrhunderts, in: L. Pahlow / J. Eisfeld (eds.), Grundlagen und Grundfragen des Geistigen Eigentums, Tübingen 2008, pp. 107-130; B. Dölemeyer, „Geistiges Eigentum" zwischen „Commerzien" und „Informationsgesellschaft". Einzelstaatliche Gesetzgebung und internationaler Standard, in: L. Pahlow / J. Eisfeld (eds.), Grundlagen und Grundfragen des Geistigen Eigentums, Tübingen 2008, pp. 107-130; H. Siegrist, Geistiges Eigentum im Spannungsfeld von Individualisierung, Nationalisierung und Internationalisierung. Der Weg zur Berner Übereinkunft von 1886, in: R. Hohls / I. Schröder/H. Siegrist (eds.), Europa und die Europäer. Quellen und Essays zur modernen europäischen Geschichte, Wiesbaden 2005, pp. 52-61.

18 Cf. on this the article by Margrit Seckelmann in this volume (with further literature).

19 Cf. on this the article by Isabella Löhr in this volume (with further literature).

20 Cf. the articles by G. Galvez-Béhar and M. Seckelmann in this volume, as well as C. Mersch, Die Welt der Patente. Eine soziologische Analyse des Weltpatentsystems, in: B. Heintz / R. Münch / H. Tyrell (eds.), Zeitschrift für Soziologie. Sonderheft „Weltgesellschaft", Stuttgart 2006, pp. 239-259.

However, acceptance of the international standards was neither free of problems nor seamless, neither in Europe nor on a global scale. European Empires such as England and France implemented the legal order of the mother country and international conventions even in their colonies, but persisted in treating authors, inventors and businesses from the mother country with a certain amount of preference.[21] On the European continent as well, the convergence and alignment of intellectual property rights was repeatedly, dramatically slowed down as a result of diverging interests and different legal traditions and institutional preferences, right up to the First World War. Industrial countries such as Germany, Switzerland and the Netherlands hesitated to completely recognize the international patent convention until around 1900.[22] Multi-ethnic empires such as Austro-Hungary and the Russian Czarist Empire distanced themselves from the Berne Convention for the protection of literary and artistic property, as publishers warned that the translation and remunerative costs for foreign authors, in view of the limited market in the minor languages, was disproportionate with regard to what profit could be expected from them.[23] Only hesitantly did they conclude bilateral agreements with the major culture-exporting states. The states of North and South America also did not enter the Berne Union, but instead reached a series of multilateral agreements under the umbrella of the Pan-American Union, and refused entry to non-American states.

A renewed propertization effort occurred after the First World War, with the entry of the East Central European national states emerging from the Habsburg Empire in the Berne Union, in the context of the peace treaties. A new actor entered into the game in the 1920s with the League of Nations, which systematically linked and vehemently promoted propertization and globalization strategies in culture, science and the economy.[24] In 1945, after a period of stagnation and dramatic setbacks during the world economic crisis, and above all the Second World War, the Berne Union, UNESCO, the Paris Convention for the Protection of Industrial Property and leading Western industrial countries resumed the propertization projects of the interwar period and implemented large sections of them up until 1960/70. From the 1960s onwards, more and more countries from the Socialist world and the so-called Third World started to participate in the in-

21 E. Röthlisberger, Der interne und internationale Schutz des Urheberrechts in den Ländern des Erdballs, Leipzig 1901 (1st edition), 1904 (2nd edition), 1914 (3rd edition), 1931 (4th edition).

22 Cf. on this the article by Margrit Seckelmann in this volume.

23 W. Dillenz, Warum Österreich-Ungarn nie der Berner Übereinkunft beitrat, in: E. Wadle (ed.), Historische Studien zum Urheberrecht in Europa. Entwicklungslinien und Grundfragen, Berlin 1993, pp. 167-189; N. Bachleitner, Produktion, Tausch und Übersetzung im österreichischen Buchhandel im 19. Jahrhundert, in: F. Barbier (ed.), Est-Ouest. Transferts et réceptions dans le monde du livre en Europe (XVIIe-XXe siècles), Leipzig 2005.pp. 109-123; F. Majoros, Hundertzehn Jahre staatsvertraglich geregelten Urheberrechts des Zarenreiches und der Sowjetunion (1861–1971), in: Osteuropa-Recht 18 (1972), no. 1-3, pp. 61-97. For more on the problems of translation: L. Bently, Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries, in: Symposium. Intellectual Property, Trade and Development. Accommodating and Reconciling Different National Levels of Protection, in: Chicago-Kent Law Review 82 (2007), no. 3, pp. 1181-1240; M. Vogel, Die Entfaltung des Übersetzungsrechts im deutschen Urheberrecht des 19. Jahrhunderts, in: R. Dittrich (ed.), Die Notwendigkeit des Urheberrechtsschutzes im Lichte seiner Geschichte, Vienna 1991, pp. 202-221.

24 Cf. on this the articles by Isabella Löhr and Gabriel Galvez-Behar in this volume.

ternational agreements to protect intellectual property, such as the Universal Copyright Convention founded in 1952 with its moderate (in comparison to the Berne Union's) protection standards. In 1967, a new umbrella organization known as the World Intellectual Property Organization (WIPO) assumed the claim to leadership in developing a regime of intellectual property rights with a global scope.

From 1970 / 1980 onwards, expectations have risen dramatically once again with regard to intellectual property rights. Reasons for this include an increasing liberalization of economic, scientific and economic relations, digitalization and the expansion of cultural, media and information goods industries. In the context of the liberalization of international trade relations, patent, copyright, trademark and related protection rights are deemed the central legal and moral institutions of the world economy. They are disseminated and aligned worldwide, in order to guarantee an expectation-related security in international relations. Since 1994, the World Trade Organization's (WTO) TRIPS agreement on trade-related aspects of intellectual property has raised pressure on state and non-state actors wishing to reject or limit the international standards with reference to associated equality deficits or economic and cultural disadavantages.[25]

184 states belong to the WIPO today, over 150 states to the WTO, i.e. officially, the legal standards represented by the international umbrella organizations are recognized worldwide. Nonetheless, they remain contentious for a variety of theoretical and practical reasons. Critics from the "peripheries" complain that patent law protects the special interests of rich states and multinational businesses in the knowledge industry, instead of the human right to culture, knowledge, health and prosperity. Critics in the "centres" of a multicentric, post-colonial world warn that copyright law does not so much serve those producing culture, the general public or the national culture as globally acting media companies. Discussions on adapting national copyright, patent and trade mark protection laws to the directives of the WTO and the European Union indicate that even in the larger European states, in which intellectual property rights have traditionally been firmly anchored, objections are being raised repeatedly against a uniform international

25 Cf. on this and on the following the articles in this volume, as well as exemplary: P. Drahos / J. Braitwaite, Information Feudalism (annotation 2); C. May, A Global Political Economy of Intellectual Property Rights. The New Enclosures? London 2002; M. P. Ryan, Knowledge Diplomacy. Global Competition and the Politics of Intellectual Property 1998; J. L. Bikoff / D. I. Wilson, Intellectual Property Protection under NAFTA and TRIPS and the Future of Bilateral Intellectual Property Initiatives. Part I, in: Copyright World (1994), no. 44, pp. 27-33; Part II, in: Copyright World (1994), no. 45, pp. 32-37; J. Drexl, Entwicklungsmöglichkeiten des Urheberrechts im Rahmen des GATT. Inländerbehandlung, Meistbegünstigung, Maximalschutz, eine prinzipienorientierte Betrachtung im Lichte bestehender Konventionen, Munich 1990; S. Kreibich, Das TRIPs-Abkommen in der Gemeinschaftsordnung. Aspekte der Kompetenzverteilung zwischen WTO, Europäischer Gemeinschaft und ihren Mitgliedstaaten, Frankfurt am Main 2004; C: Heineke, Adventure Trips. Die Globalisierung geistiger Eigentumsrechte im Nord-Süd-Konflikt, in: J. Hofmann (ed.), Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter, Bonn 2006, pp. 141-163; P. Buck, Geistiges Eigentum und Völkerrecht. Beiträge des Völkerrechts zur Fortentwicklung des Schutzes von geistigem Eigentum, Berlin 1994; N. Thumm, Intellectual Property Rights. National Systems and Harmonisation in Europe, Heidelberg 2000; J. Marly, Urheberrechtsschutz für Computersoftware in der Europäischen Union. Abschied vom überkommenen Urheberrechtsverständnis, Munich 1995.

law. Conflicts over this and a search for new forms of agreement and mediation have thus moved into the centreground of public discussion.

3. Propertization, nationalization and globalization – theses

In the following, the role and significance of intellectual property rights in institutionalizing cultural, scientific and economic relations will be discussed on the basis of 10 theses.

1. Intellectual property law regulates not only exclusion but also inclusion processes.

"Intellectual property" refers to the claims and rights of a subject, and at the same time to an objective legal system, namely intellectual property law, which regulates certain aspects of cultural, scientific and economic relations. The relevant intellectual property law supports and consolidates social, cultural and economic inequalities and the imbalance of power in intercultural relations, but can also redynamize them. Intellectual property rights are above all exclusive rights. In the context of intellectual property law, rights of disposal on intellectual works and knowledge are allocated asymmetrically; the owner of the rights can exclude a third party from disposal and utilization. Intellectual property rights serve to safeguard expectation-related security in market- or competition-regulated relations of exchange and cooperation.

The history of the property-related institutionalization of cultural, scientific and economic relations indicates that intellectual property law regulates both processes of exclusion and inclusion. In modern societies and legal systems based on a formal legal equality, everyone who has created their own intellectual work can *in principle* become a holder of exclusive rights to it. Anyone who provides the special services or produces the artefacts required to recognize or acquire intellectual property rights can – in accordance with the country and time, with no or very few formalities in the case of copyright law, as a result of prescribed registration or evaluation procedures in the case of patents – become an intellectual property owner. This enables social, cultural and scientific processes of inclusion and advancement.

The use of the individual intellectual property rights is corrected by maxims relativizing individual utilization in consideration of fair use. Cultural, scientific and economic relations are not exclusively regulated by means of intellectual property law. Property rights are relativized by alternative and complementary claims and rights. The history of the institutionalization of cultural and scientific relations shows that non-proprietary institutions assert themselves tenaciously – even in countries which view themselves as historical pioneers of propertization. Cultural and scientific relations are also regulated from professional, academic, disciplinary, national, ethnic and denominational viewpoints, or along the lines of endowment, relations, friendship etc.[26] Corresponding institutionali-

26 Cf. exemplary on this, P. Bourdieu, Les règles de l'art. Genèse et structure du champ littéraire, Paris 1992; R. K. Merton, The Matthew Effect (anotation 4); H. Siegrist, Professionalization, Professions in History, in: N. J. Smelser/P. B.

zation strategies have been understood, both in the past and present, on the one hand as radical alternatives to the liberal-individualistic form of propertization, on the other hand as complementing it. The antagonism between private goods and goods in the public domain is thereby relativized again.[27]
Set against the background of the tradition of a multi-institutional organization of culture, science and the economy, many of the current conflicts between rich industrial nations and the so-called developing and emerging nations appear in a different light. The latter participate actively in the debate on the globalization of institutional pluralism by negotiating the acknowledgement and embedding of their institutions.[28]

2. Concepts of intellectual property are historically shaped by the linking of propertization processes to processes of liberalization, social stratification, legal codification and state building in a national context.

Property-related institutionalization first gained strength and shape during the period in which modern culture, science and the economy were formed, in the 18th and 19th centuries. In Europe and America, intellectual property rights became embedded in the complex institutional structure of the emerging modern nation state and combined with processes of liberalization, social stratification, legal codification and nationalization of social, cultural, scientific and economic relations. The concept of intellectual property was originally used to protect the individual and entrepreneurial achievements of certain groups of the property-owning and educated middle classes and to justify their special claims during the transition from the feudal to the modern class society. However, states of that time did not only regulate dealings with cultural and scientific goods with regard to property, but also from a bureaucratic, professional, market liberal etc. perspective. That is to say, the nation state controlled the effects of its propertization policies by attuning the extent and the scope of individual intellectual property rights to its cultural, educational, legal, economic and socio-political aims.

Baltes (eds.), International Encyclopedia of the Social and Behavioral Sciences (IESBS), Oxford 2001, pp. 12154-12160; D. P. Miller, Intellectual Property and Narratives of Discovery / Invention. The League of Nations' Draft Convention in 'Scientific Property' and its Fate, in: History of Science (2008), pp. 299-342; C. E. McClelland, Prophets, Paupers, or Professionals? A Social History of Everyday Visual Artists in Modern Germany 1850 – present, Oxford 2003; P. J. DiMaggio, Constructing an Organizational Field as a Professional Project. U.S. Art Museums, 1920–1940, in: W. W. Powell / P. J. DiMaggio (eds.), The New Institutionalism in Organizational Analysis, Chicago 1991, pp. 267-292; T. Adam / S. Lässig / G. Lingelbach (eds.), Stifter, Spender und Mäzene. USA und Deutschland im historischen Vergleich, Stuttgart 2008; R. Stichweh (ed.), Wissenschaft, Universität, Professionen. Soziologische Analysen, Frankfurt am Main 1994, pp. 278-336; J. Fohrmann/W. Voßkamp (eds.), Wissenschaft und Nation. Zur Entstehungsgeschichte der deutschen Literaturwissenschaft, Munich 1991, pp. 99-112; R. Jessen/J. Vogel (eds.), Wissenschaft und Nation in der europäischen Geschichte, Frankfurt am Main 2002.

27 A. Ohly / D. Klippel (eds.), Geistiges Eigentum und Gemeinfreiheit, Tübingen 2007; L. Pfister, La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d'auteur au 19ème siècle, in: Revue internationale du droit d'auteur 205 (2005), pp. 117-209; F. Leinemann, Die Sozialbindung des "Geistigen Eigentums". Zu den Grundlagen der Schranken des Urheberrechts zugunsten der Allgemeinheit, Baden-Baden 1998; D. Bollier, Public Assets, Private Profits. Reclaiming the American Commons in an Age of Market Enclosure, Washington 2001; J. Boyle, The Public Domain. Enclosing the Commons of the Mind, New Haven, London 2008.

28 Cf. the article by Sabil Francis in this volume.

Intellectual property law also served the interests of the nation state, which used limiting rules to ensure that protected works could be used by it and the public free of charge in certain cases. By temporally limiting the term of intellectual property rights, it defined a dynamic boundary (moving wall) between cultural and knowledge assets which were *protected* and in the *public domain*. The latter were considered as national or world culture and were allowed to freely be used by anyone.

3. The ambivalences of intellectual property in global relations are based on the fact that it justifies not only national exclusion strategies but also international inclusion strategies.

States and national interest groups use the instruments of intellectual property to protect – really or allegedly – forms of expression and knowledge originating from their area, in cross-border processes of exchange and exploitation. In this way, the state protects national interests against third-party countries and foreign users. Industrial and culture-exporting countries with a higher level of protection for intellectual works and inventions press states with a lower level of protection to adapt to their rules. The stronger countries insist on universalizing their rules and laws, but see themselves repeatedly obliged, when the usual means of pressure no longer help, to back down from their maximum demands.[29] Authors and inventors, businesses in the culture and knowledge industries, and dynamic industrial and cultural nations wishing to expand due to cultural, economic or political motives and necessities, have to try to convince potential cooperation partners and countries not (yet) systematically involved in proprietary relations of the moral, economic and legal advantages of their intellectual property law. They point to their own history of advancement to do so and present intellectual property law as a generally applicable recipe for an enduring modernization and efficient regulation of cross-border relations.

The chances of convincing economically weaker or culturally dependent states and user groups of the general advantage of proprietary rules tend to increase when they perceive that participating in property-related, regulated processes of cooperation improve their own acting options and rights in the medium term; i.e. when they can expect to be able to become providers and rightholders themselves. When positive effects are absent and the chances of participation with equal rights incline towards zero, the acceptance of intellectual property rights among weaker actors generally remains low. Research in social and cultural history shows that intellectual property rights are often judged in these countries not only from the perspective of economic benefit, but also from the perspective of social, cultural, moral and political recognition.

29 Cf. on this, in the present volume, the work on compulsory licences in the articles by Isabella Löhr and Margrit Seckelmann and on benefit-sharing between stakeholders in the article by Sabil Francis.

4. Due to the persistence of social, economic and cultural inequality, the global convergence of intellectual property law does not lead to equivalent real chances. The balancing of interests is not merely a legal problem.

For vast swathes of history, the international conventions of intellectual property have represented the interests, conceptions and institutional preferences of culturally, scientifically and economically dominant societies. Due to inequality and an imbalance of power in international relations, weaker actors have often been unable to effectively realize the formal rights granted them by international conventions. The basic problem encountered in settling rights and interests, ever since the establishment of international organizations aimed to protect intellectual property, has been the fact that stronger countries have seen themselves as members of a cartel agreeing on the rules of settlement and deciding on how members should be disciplined. The economic and cultural effects of these rules cannot be controlled by the weaker actors. International relations lacked a seriously higher level of authority which could comprehensively ensure interests in a way deemed fair by all parties. Since international conventions aiming to protect intellectual property concentrate on solving special problems and disseminating special rules, they very often produce neither the expectation-related security which was desired nor the settlement which was promised. They safeguard the continuity and dissemination of proprietary regulations and standards, but are unable to or do not wish to correct negative or undesirable effects. Although they see themselves in a broad sense as custodians and guarantors of the cultural and scientific order, they actually concentrate on selected aspects, special interests and specific regulation strategies. By unilaterally pursuing proprietary institutionalization strategies, they tend to devalue non-proprietary forms of institutionalization. Individual states therefore repeatedly call for the role, significance and effects of proprietary institutions to be taken into greater consideration in the relevant context.

5. On a global level, propertization strategies are often viewed as strategies of supremacy.

Discourses, institutions and norms of intellectual property are used to regulate, moralize and sanction hierarchical relations. One special variant of the supremacy thesis is that propertization strategies were and are elements of a comprehensive global control strategy of the West. From the early 19th century onwards, European states and the USA have been implementing concepts and standards of intellectual property originally developed for their own culture, science and economy worldwide, even against considerable resistance and concerns, and declaring them to be universal standards, in order to promote the interests of their cultural and knowledge-based industries, to strengthen their economic power and cultural influence and to permanently secure their political hegemony. In this way, they boosted the dissemination of their values, merchandise, creativity and innovation concepts, cultural canons, scientific standards and technical goods. The behaviour of a wide variety of actors was homogenized and disciplined by means of a dominant West-

ern idea and social conventions and legal standards derived from this. This was aided by the international conventions and organizations.

The supremacy thesis is supported, among other things, by the West's way of dealing with forms of expression, symbols and cultural artefacts from non-western cultures in which conceptions of subjective creativity and individual intellectual property have traditionally been quite unpronounced. [30] Many affiliated with Western property cultures treat the knowledge, practices and forms of expression of non-western or indigenous cultures as goods in the public domain. According to a traditional and widespread line of reasoning, they are not based on any individual creative achievement and therefore cannot be protected by any form of Western intellectual property law. Should options of utilizing them arise, intellectual property rights will be claimed for them by foreign companies and protected with the means of Western intellectual property law. That is to say, the question of whether symbolic goods and forms of knowledge can be owned or protected is traditionally decided on the basis of relations of power and control.

At present such dealings with so-called indigenous forms of expression, traditional knowledge, natural resources and genes are increasingly being regulated on a property-related basis in the outlying areas of India, America, Russia and Africa; manifest in these dealings, moreover, is a generalization of commercial and proprietary standards in cultural relations. In the meantime, however, it is no longer only globally acting Western companies and states who are actively involved in the propertization processes, but also companies, governments, elites, interest groups and local communities from emerging and developing countries, with the result that for some decades now concepts, standards and mentalities of intellectual property have been diffusing from top to bottom and from the centre to the periphery. More and more actors are articulating their disposal and design claims in the language of intellectual property. Occasionally, this helps in the formulation of emancipation claims and in protecting collective exclusive rights by tribes, ethnic groups, village communities and regions which would find it difficult to justify themselves with reference to local traditions in global contexts. However, this also globalizes the conflicts over exclusive rights of disposal and utilization once again in a new way.

6. The history of the 20th century was characterized by global conflicts over the homogenization and differentiation of discourses, institutions and standards of intellectual property.

In the 20th century, ideas and concepts, institutions and standards of intellectual property spread worldwide and in a variety of different forms.[31] In vast areas of the world,

30 Cf. on this and for the following: S. Francis in this volume and R. J. Coombe, The Cultural Life of Intellectual Properties. Authorship, Appropriation and the Law, Durham 1998; M. Brown, Can Culture be Copyrighted?, in: Current Anthropology 39 (1998), no. 2, pp. 193-223; M. F. Brown, Who Owns Native Culture? Cambridge 2003; C. B. Graber, Wanjina and Wunggurr. The Propertisation of Aboriginal Rock Art under Australian Law, in: G.-P. Calliess et al. (eds.), Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag, Berlin 2009, pp. 275-297.

31 International comparative legal research concentrates on proving and accounting for differences, similarities

they decisively helped determine how social and cultural action was perceived and what it meant. The globalization of intellectual property rights, meanwhile, led not only to homogenization, but also to new forms of differentiation and local hybrids. International hegemonial standards were adapted, on account of national and local traditions, mentalities and interests, and ones specific to the legal culture, to the special relations and requirements. Intellectual property law thus became more ambiguous and multifunctional.

The Anglo-Saxon concepts of *copyright* and *intellectual property rights*, and the Continental European concepts of *literary and artistic property* and moral rights functioned as the leading legal models of worldwide propertization. The development of patent law in many cases followed French, English, German or US-American standards. Together with the international conventions, these basic models decisively shaped the history of the global expansion of intellectual property rights. In the 20th century, as a result of intensive transfer relations and interweaving, conceptions, standards and forms of practice largely became aligned for the long term, especially in the transatlantic area, and comparative research on the form and function of copyright and patent rights indicates that they fulfilled similar social, cultural, economic and political functions – whatever the differences on a legal level.

Again and again, the pioneer states of intellectual property tended to underestimate the problems of how to transfer their customs into new contexts, and to overestimate the global benefit of their own standards and institutions. These often appeared to be less robust in the fringe areas of globalization than in the areas they originated from.[32] The hegemonial states and the international organizations recurrently lost part of the control of the propertization process as it expanded further and further worldwide. Hybrid models and forms of a legal pluralism developed, in which traditional and new, native and foreign standards coexisted. Both in the centres and in the periphery, criticism of intellectual property became connected in ever new forms with criticism of the governing authorities, culture, society and globalization.

While advocates of propertizing cultural and scientific relations as extensively as possible today point to the successful history and robustness of intellectual property, and consider its regulatory potential to be far from exhausted, critics warn of a delimiting and overstraining of intellectual property law. The propertization of culture, information and life would weaken non-proprietary rights and regulations, reduce the extent of the commons and increase obstacles to accessing cultural goods and knowledge. Over the last decades,

and functional equivalents in the law (M. Stolleis, Nationalität und Internationalität. Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts, Stuttgart 1998). It researches regional, national, civilization-specific and legal culture-specific peculiarities of intellectual property law, but also shows that individual exclusive rights to cultural goods and knowledge are enjoyed in different legal forms and accounted for differently, from a legal dogmatic perspective. Cf. on this the works on legal history quoted in annotations 12, 16, 26 and 28.

32 In the colonial areas, the imported standards for a long time only applied to goods and citizens from the motherland, while the majority oft he native population was geared towards traditional, often non-proprietary rules when using forms of expression and knowledge.

the boundaries between copyright law, patent law, trademark protection law and associated protection laws have become blurred by manufacturers of sound storage media and media companies, since they are employed alternatively and cumulatively.[33] Jurisprudential critics warn of a "fraying" of intellectual property rights and an "over-propertization" of the law.[34] An excessive and occasionally arbitrary use of intellectual property rights to protect ever newer particular interests and special objects would lead, according to critics, to a straining and overburdening of proprietary institutions. Once used to protect private commercial interests, they would forfeit their functional effectiveness and social acceptance sooner or later. One of the core traditional functions of intellectual property law, namely guaranteeing a balance between individual and general interests, would consequently be disregarded.

7. The robustness of intellectual property is decisively determined by the general quality of the institutionalization and organization of international relations. A legal settlement needs to be underpinned by social, cultural, scientific and political compromises.

Processes of propertization help to solve specific problems, but also create and intensify further tensions and conflicts. Constructing and implementing rules which can be effective and recognized in using symbolic forms thus becomes a permanent process. For over two hundred years, those involved have pointed firstly to the right of the creative individual to intellectual property, secondly to the general human right or right of citizens to culture, knowledge and prosperity, and thirdly to the principle, recognized early on in the case of intellectual property, of settling interests or balancing rights. The articles in this volume explore how the different actors argued and agreed, under their particular conditions, regarding the contents, forms, procedures and conditions of settlement. They show, firstly, that in the modern age legal settlement is not only secured by means of intellectual property law, but is also dependent on complementary principles and procedures which have been standardized in civil law, constitutional law, competition law, labour law and public international law etc. Secondly, a socio-historical analysis highlights the fact that a normative legal settlement will remain unstable unless it is underpinned by social, cultural, economic and political compromises. Thirdly, a political analysis makes it clear that the effectiveness and acceptance of intellectual property law in cross-border relations is decisively determined by the general quality of the institutionalization and organization of international relations. Fourthly, a willingness to regulate cross-border processes by means of universal property norms increases when these standards are compatible with "national" institutional paths, interests, experiences and expectations; and when there is a prospect of international conventions mitigating previous cultural, social, economic, legal and political asymmetries. A central role is played in these processes

33 H.-P. Götting, Die Komplexität von Schutzrechten am Beispiel des geistigen Eigentums, in: H. Siegrist (ed.), Entgrenzung des Eigentums (annotation 2), pp. 146-156.

34 Cf. on this the further literature tips in annotation 2.

– both positively and negatively – by international organizations. Their work is complicated, however, by the fact that the diversity of cultural goods and knowledge in the long term is growing to immeasurable proportions, and the number of actors interested is increasing considerably.

8. International organizations for intellectual property are gaining in significance and in their own importance in the regulation and control of complex cultural, scientific and economic processes. They are competing with other international organizations for competence and authority.

In the context of the liberalization of cultural, scientific and economic relations, intellectual property law is being given more and more monitoring and control functions, and demands and expectations regarding intellectual property law are increasing considerably. Debates on rules related to manufacturing, disseminating, using and utilizing cultural goods and knowledge are turning into a permanent structural conflict, breaking out on more and more fronts and in ever newer forms in the centres and peripheries of the world. Processes of negotiating and implementing international rules for a cross-border commerce of cultural goods and knowledge are thus becoming more demanding on an organizational level. Intellectual property law, which was originally conceived to regulate relations between *individuals*, is increasingly regulating relations between national, international and transnational *organizations* – states, confederations of states, cartels, businesses, interest groups and social movements. Intellectual property rights have thus become a central regulation mechanism in *inter-organizational* relations.

The articles show that the negotiating of abstract guidelines and concrete standards in the 20th century has shifted more and more towards international organizations to protect copyright, patent, performance protection and trademark laws. Although the international conventions need to be ratified by sovereign states, the international organizations are gaining in competence, influence and power. By initiating, moderating and monitoring the negotiation, standardization and worldwide transfer of concepts and institutions of intellectual property, they are assuming a central role in the emergence of a regime of intellectual property rights with a global scope. The articles in this volume show that it is becoming increasingly important for nation states and interest groups of producers, agents and users to be involved in the decisions of the international organizations.

It has remained debated, from the 20th century to the present, as to which of the ever more numerous international organizations can claim the highest authority and guideline competence for the global institutionalization of cultural, scientific and economic relations. Up until today, several international organizations have been competing – above all the WIPO and the WTO – for the top responsibility for developing and implementing globally valid legal standards, without consistently adapting their aims and strategies to those of other international organizations.

The international organizations for intellectual property have expanded their authority and regulation claims considerably for the long term. During the interwar period, they benefitted from the much more widely established institutionalization efforts of

the League of Nations. Its plans and work amounted to a multi-institutional regulation of international relations in culture, science and the economy, in which intellectual property rights were to play a central, but not exclusive role. In principle, this policy was continued after the Second World War by the UN. However, since the UN's committees were unable to agree on standards to satisfy all parties, its regulation competence shifted more strongly to its sub-organizations for culture and science, especially to the special organizations for intellectual property (such as the WIPO) and free trade (WTO), which were and are strengthening their own area of competence.[35]

9. The conceptions and standards of intellectual property have been spreading continuously and cyclically to ever more regions of the world for around two hundred years. Development has not been unilinear, but characterized rather by disruption, a lack of synchronism and setbacks.

Intellectual property rights have constantly been gaining in importance since the late 18th century on a national and international scale. The development and global dissemination of intellectual property law would generally intensify during periods of economic expansion and in times of fundamental cultural, technical-scientific and political change. On a global scale, propertization tendencies and the conflicts associated with them grew stronger around 1870/80, 1900, 1920/30, 1950/60 and from 1980/90 to the present. The institutions of intellectual property respectively became more robust, ambiguous and polyvalent in the process. During the economic and political crises of the 20th century, they often proved to be comparatively stable and resistant. However, their effects varied quite considerably, as a result of the external conditions in the respective countries and regions of the world.
Strategies of propertization and depropertization stand in a dialectic relationship to each other. In the context or wake of a push towards propertization, a search for alternative, non-proprietary institutionalization strategies also intensifies. At the centre of current debates on propertization is the question of the extent to which cultural, scientific and economic processes ought to be and can be regulated on a proprietary basis. Belonging to the discussion is a leading institution which owes its rise originally to the promise that intellectual property owners would be granted strong, but not unlimited rights of disposal, irrespective of their social, cultural or political backgrounds and in a socially balanced way.

10. Expectations regarding institutions of intellectual property have been increasing worldwide from the 18th century to the present day. Due to the growth of cultural, media, knowledge and service industries, intellectual property has become a leading institution in the globalized world over the last decades.

The reference to institutions of intellectual property is practically and functionally motivated on the one hand, and on the other hand by their historic tradition. Throughout

35 Cf. the literature detailed in annotation 28 and A. K. Menescal, Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective, in: The Journal of World Intellectual Property 8 (2005), no. 6, pp. 761-796.

its long, conflict-laden and differentiated development, the cultural and legal pattern of intellectual property has been consolidated in a variety of different forms. It shapes everyday social, cultural, political and economic conventions, forms of practice and mentalities, legislation and jurisprudence and the international conventions, and becomes manifest in historical master narratives, myths and experiences. The figure of intellectual property has thus developed its own dynamic, leading repeatedly to tensions between established legal standards on the one hand and new cultural, technical, scientific and social demands on the other hand.

Conflicts over intellectual property on a global level are essentially based on its ambiguity and multifunctionality. Intellectual property law structures relations of governance, competition and cooperation and justifies claims for exclusion and inclusion. The fact that intellectual property rights have been defining more and more areas and dimensions of culture, science and the economy for two hundred years argues for their being one of the most robust institutions of the modern period. Since, in the context of the present acceleration and delimitation of social and cultural change, more and more functions are being conferred on and expected of them with regard to regulating and controlling processes of exclusion *and* inclusion, of governance *and* settlement, there is an increasing risk that they will be overstrained and overburdened. In answer to the question of whether gradual or fundamental processes of upheaval are at play in the current change in cultural, scientific and economic relations and intellectual property law, neither special legal, microeconomic, technical and philosophical knowledge nor references to moral principles indifferent to time or space will suffice. In order to understand the present propertization processes, more interdisciplinary and historical-critical analysis of institutional paths of development, handed-down forms of practice, historical concepts and standards, experiences and mentalities is required.

Translated by Nick Emm

The Propertisation and Internationalisation of Culture in the 20th century

Isabella Löhr

RESÜMEE

Der Aufsatz problematisiert die Rolle internationaler Organisationen bei der Propertisierung kultureller Güter seit dem späten 19. Jahrhundert. Die Autorin argumentiert, dass die internationalen Organisationen die Einführung eines weltweiten Autorenschutzes maßgeblich beförderten, indem sie den grundsätzlichen Konflikt zwischen Kultur exportierenden und Kultur importierenden Staaten, der die Internationalisierung geistiger Eigentumsrechte von Beginn an begleitete, zu Gunsten der Rechteinhaber lösten. Die Funktion der internationalen Organisationen bestand vor allem darin, Befürwortern und Gegnern einen institutionellen Ort für den Streit über die kultur- und wirtschaftspolitischen Vor- und Nachteile eines eigentumsförmigen Managements kultureller Güter bereitzustellen, ohne dabei jedoch den Umgang mit Kultur und Wissen in Eigentumskategorien grundsätzlich infrage zu stellen. Obwohl diese politischen Kontroversen die Ausdehnung eines internationalen Autorenschutzes bisweilen verkomplizierten, trieb diese Praxis die Einführung weltweit gültiger Autorenrechte langfristig voran, indem sie die Verknüpfung von Kultur und Eigentum stärkte und die Ausarbeitung alternativer Strategien zur Regelung von Kultur und Wissen marginalisierte.

In 1994, the foundation of the *World Trade Organisation* (WTO) encouraged contemporaries to discuss controversially whether the WTO signified a watershed in the international regulation of trade. The consequences of the so called TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights), which established rules for trade with knowledge-based and cultural goods in the broadest sense, were and still are in the spotlight. While proponents strongly welcomed the TRIPS Agreement as a badly needed instrument to fill in loopholes in international law, critics found fault with the predominantly economic foundation of intellectual property rights (IPR) which TRIPS intro-

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duced into the handling of knowledge and cultural goods on a global scale. Advocates, mostly from the knowledge-based and cultural industries of Western states, especially favoured the new international agreement insofar as it remains the most comprehensive international agreement on intellectual property to date. On the other side, critics, overwhelmingly from developing countries, academics and Non-Governmental Organisations, complain that TRIPS is biased towards copyright and patent holders.[1] They claim trade liberalisation and increased market access are not the paramount goal of international regulation of access rules to knowledge and cultural goods and, consequently, they emphasise the need to critically reflect on the relationship between property-based handling rights and other policy fields orientated more towards public interests such as cultural and educational policy.

When it comes to providing reasons for this inexorable rise of private property as the key category for the handling of culture and knowledge across national borders, most commentators concentrate on the last thirty years, thereby igniting a politicised debate on the shortcomings and the Western origins of the present IPR regime that holds neoliberalism and proponents of private property in wealthy countries to be responsible. However, these debates do not take into account the fact that TRIPS only marks the temporary end of a long series of multilateral agreements on international copyright law beginning at the end of the 19th century, which initiated a continuous and long-term process of extending the Western concept of private property: firstly, to a growing variety of goods based on knowledge and culture, and secondly, to a particular regime of international law, which nowadays comprises nearly all countries and regions worldwide. Additionally, the unrelenting conflicts between developed and less developed countries over the calibre of IPR are rich in tradition, as they can also be traced back to the 1880s. Therefore, the question arises of whether the adoption of the TRIPS agreement can truly be interpreted as a watershed marking the fundamental step of knowledge-based societies towards the propertisation of immaterial goods.

The present chapter assumes that this particular master narrative does not go far enough, as it concentrates primarily on the subject-matter of trade liberalisation. Critics and proponents thus neglect historical patterns of propertisation processes and in this way conceal the complex institutional and social dynamics which have led to this long-term implementation of privatised and individualised property in culture and knowledge. Instead, the chapter indicates that the underlying causes of the continuous rise of private property as the main category to regulate culture and knowledge are to be found in the organisational structure of this particular field of international politics, set up for the first time at the end of the 19th century. Following recent research on the role international organisations played in setting international norms and standards from the middle of

1 See, for example, R. Wade, Welche Strategien bleiben den Entwicklungsländern heute? Die Welthandelsorganisation und der schrumpfende „Entwicklungsraum", in: S. Randeria / A. Eckert (eds), Vom Imperialismus zum Empire, Frankfurt am Main 2009, pp. 237-269; T. Voon, Cultural Products and the World Trade Organization, Cambridge 2007; a detailed introduction to the knowledge regime of the WTO gives: C. Arup, The World Trade Organization Knowledge Agreements, Cambridge 2008.

the 19th century onwards, it will be argued that the establishment of literary and artistic property in international law was closely connected to the foundation of specialised international organisations – the *Berne Union for the Protection of Literary and Artistic Property* founded in 1886, the League of Nations' *Intellectual Co-Operation Organisation* in the interwar years, UNESCO in 1945, the *World Intellectual Property Organisation* (WIPO) in 1967 and finally the WTO. Their main purpose was to link national propertisation strategies with the cross-border trade of cultural goods by several means. Firstly, they made IPR an integral part of international law; secondly, they decisively developed this particular field of international politics institutionally; thirdly, they have the task of harmonising the international agenda with the social elites of the countries involved; and finally, they have the task of settling conflicts by providing a general normative framework that provides information about the needs and overall advantages of integrating culture and knowledge in a property-related set of rules and handling rights.
The first step will be to briefly examine the relationship between the processes of propertisation and internationalisation of cultural goods from the 19th century onwards. Then, we will analyse the construction of international copyright law with a main focus on how the Berne Union and the League of Nations contributed to establishing the concept of private property in the realm of cultural goods, and how they were prepared to resolve the controversies over an extensive IPR regime on a global scale. The final section will provide an answer to the question of what role international organisations played in the continuous rise of intellectual property rights and how we are to critically reflect on the determining effects which their social and institutional framework imposes on the propertisation of culture and knowledge.[2]

1 The propertisation and internationalisation of culture in the 19th century

Modern intellectual property law is a bundle of individual rights developed in a secular market economy and liberally organised societies. This law was intended to guarantee and standardise the rights of authors, publishers, performing artists, the public and the state to engage in scientific, cultural and social competition and provide a secure contractual foundation for cooperation in the production, dissemination and reception of culture and knowledge.[3] Crucial to the codification of intellectual property rights was a rapidly intensifying consumption of and trade in books, works of art and music which occurred during the 19th century: a development due to growing literacy within broad sections of the population, the emancipation of the middle classes, and new technical opportunities to produce and reproduce cultural works. As a consequence, modern liberal

2 The paper will focus on literary and artistic property leaving aside the history of both patents and trademarks. For a detailed analysis of patents see the contribution of M. Seckelmann to this volume.

3 L. Bently/B. Sherman, Intellectual Property Law, Oxford 2008; H. Siegrist, Geschichte des geistigen Eigentums und der Urheberrechte: Kulturelle Handlungsrechte in der Moderne, in: J. Hofmann (ed.), Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter, Bonn 2006, pp. 64-80.

societies increasingly had to deal with questions involving ownership of goods that were at once cultural, political and mercantile.[4]

The concept of propertisation of culture and society interprets property rights, and particularly IPR, as a fundamental vehicle for artists, distributors and those using their art to extend their initial rights to copy and publish literary works.[5] Due to authors' and publishers' desire to protect their interests and market access as much as possible, intellectual property became the main legal category for handling and regularising culture and knowledge in the course of the late 18th and 19th centuries. But the presence of such a process does not necessarily indicate the prevalence of a liberal and individualistic approach to property and property rights regimes. Rather, the concept of propertisation acknowledges the immaterial character of cultural goods, which means the presence of a heterogeneous set of actors (creative artists, users of artworks, the public and the state) and a fundamentally different legal framework for intellectual property rights as compared to material property (for example in the temporal limitations at work in the former category). For this reason, the concept underscores how embedded IPR is in a wider institutional and socio-cultural framework. Once established as a legal, social, economic and also aesthetically reflected category, such rights provided an ordering principle in the construction of knowledge regimes; they would also determine how societies established their cultural institutions, rules and norms, in a process involving the restriction of access rights and assignment of a range of roles and functions to relevant actors in culture and society.

Thus, what was crucial to the management of culture and knowledge was not only a certain property rights regime but also a link to alternative institutions which sometimes weakened the individual and exclusive rights of authors or publishers in favour of the public or state: the state's interest in maintaining its educational and cultural policies; the interest of professional organisations in restricting access to the reproduction of cultural goods; that of people with education, wealth, appropriate social background or cultural capital (for example in the case of authorship) in maintaining exclusive property rights or access to professional positions.[6] Propertisation thus conceptualises IPR as a fundamental category contributing decisively to the shaping of modern society by integrating a complex ensemble of social, cultural, political, economic and legal institutions, relationships and values.

But to explain the predominance of intellectual property rights during the 20th century despite harsh criticism regarding its international imbalance, we also need to examine

4 F. Barbier, Histoire du livre, Paris 2000; J. Feather, Publishing, Piracy and Politics. A Historical Study of Copyright in Britain, London 1994; D. Finkelstein / A. McCleery (eds), The Book History Reader, London 2002; D. Vincent, The Rise of Mass Literacy. Reading and Writing in Modern Europe, Cambridge 2000.

5 For the following, see H. Siegrist, Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne, in: ibid. (ed.), Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen (= Comparativ (2007), no. 5/6), Leipzig 2007, pp. 1-52.

6 For the concept of intellectual property as public policy, see C. May / S. K. Sell, Intellectual Property Rights. A Critical History, Boulder 2006, pp. 108-111.

international politics more closely and ask how propertisation strategies were connected to strategies for internationalising IPR. It turned out that legislators in various European states needed not only to draw up laws to protect these rights but also to set up international regulations for distributing and handling cultural goods (at the time this meant books and other printed works), once these began to be exchanged between different states and different legal and linguistic areas in significant quantities.[7] An early attempt to solve this problem involved bilateral trade agreements, which, from the mid-nineteenth century onwards, prevented reprinting from occurring in different European states. However, the implementation of such bilateral and multilateral agreements was uneven, and some were also restricted to the short term. It thus became increasingly necessary to introduce long-term, universal legal standards in Europe covering the largest possible area.[8]

From the 1860s, the main European book trading countries such as Great Britain, France, Germany, Switzerland and Belgium pushed for a multilateral agreement acknowledging the rights of publishers and authors on the European continent. In 1886, these efforts resulted in the Berne Convention, the first multilateral treaty for the legal protection of literary and artistic works.[9] Although European initially, the convention marked the starting-point of a global implementation of the originally Western idea to standardise the use of cultural works in terms of a property rights regime describing social relations between owners and third persons by means of exclusive rights of disposal.[10] The Convention was embedded in a union of states known as the Berne Union, one of several such organisations established in the second half of the 19th century to oversee the technical, legal, social and economic tasks resulting from the increasing cross-border movement of people, goods and ideas.[11] The general intention of these organisations was to provide a framework for rules not only to govern transnational trade but also to minimise transaction costs and spur commercial-industrial, cultural, and social activities

7 M. Vec, Weltverträge für Weltliteratur: Das Geistige Eigentum im System der rechtssetzenden Konventionen des 19. Jahrhunderts, in: L. Pahlow / J. Eisfeld (eds), Grundlagen und Grundfragen des Geistigen Eigentums, Tübingen 2008, pp. 107-130.

8 S. P. Ladas, The International Copyright Protection of Literary and Artistic Property in Two Volumes, New York 1938, pp. 44-68; S. von Lewinski, International Copyright Law and Policy, Oxford 2008, pp. 15-23; C. Seville, The Internationalisation of Copyright Law. Books, Buccaneers and the Black Flag in the Nineteenth Century, Cambridge 2007, pp. 41-77.

9 J. Cavalli, La genèse de la Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886, Lausanne 1986; S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986, London 1987; J. Secretan, L'évolution structurelle des unions internationales pour la protection de la propriété intellectuelle, in: Bureaux internationaux réunis pour la protection de la propriété intellectuelle (ed.), Les unions internationales pour la protection de la propriété industrielle, littéraire et artistique, 1883–1963, Genève 1962, pp. 15f.

10 In 1886, founding states were Belgium, Germany, France, Great Britain, Spain (the last three mentioned including the territories of their colonies), Switzerland, Tunisia, Haiti and Liberia. By 1914, eight new member states had joined the union, amongst them Denmark, Japan, Luxembourg, Monaco, the Netherlands including the colonies, Norway, Portugal and colonies and Sweden.

11 R. Wolfrum, International Administrative Unions, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Amsterdam 1995, pp. 1041-1047.

between states and world regions.[12] Well-known international public unions, some of which are still in existence, were the International Telegraph Union (founded 1865), the Universal Postal Union (1874), the Paris Convention for the Protection of Industrial Property (1883), the International Union for the Publication of Customs Tariffs (1890) and the Central Office of International Railway Transport (1890).[13]

Recent research has stressed the significantly new elements these unions introduced into national and international politics from the 1860s onwards.[14] The most important innovation in our context was the implementation, with the Berne Union, of an institutional and organisational infrastructure allowing both state and non-state actors to cooperate in a field that not only took in private groups such as publishers, intellectuals and lawyers but also the states' cultural and educational policies.[15] Moreover, in providing these groups with the means to influence the handling and propertisation of cultural goods beyond their own national territory, the Union made it possible for state delegates, the cultural industries and intellectuals to introduce the regulation of culture and knowledge, in terms of property, into international politics.[16]

The participation of interest groups and professional associations was one of the essential features of the international public unions, with states considering these transnational actors to be fulfilling an important function,[17] contributing to a fundamental reform of both national and international politics. Simultaneously, this new organisational structure to implement international norms on literary and artistic property allowed authors and the cultural industries to extend their initial rights to copy and distribute cultural goods. That is to say, with the Berne Union new means emerged to anchor the idea of individual ownership in culture and knowledge as the ordering principle for cross-border trade with these goods. At the same time, the national legislative monopoly was

12 W. Fischer, Die Ordnung der Weltwirtschaft vor dem Ersten Weltkrieg: Die Funktion von europäischem Recht, zwischenstaatlichen Verträgen und Goldstandard beim Ausbau des internationalen Wirtschaftsverkehrs, in: Zeitschrift für Wirtschafts- und Sozialwissenschaften 1 (1975), pp. 289-304; C. Strikwerda, Reinterpreting the History of European Integration. Business, Labor, and Social Citizenship in Twentieth Century Europe, in: J. Klausen / L. A. Tilly (eds), European Integration in Social and Historical Perspective: 1850 to Present, Lanham 1997, p. 55.

13 C. N. Murphy, International Organization and Industrial Change: Global Governance Since 1850, Cambridge 1994, pp. 46-49.

14 M. Herren, Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung, Darmstadt 2009; A. Iriye, Global Community. The Role of International Organizations in the Making of the Contemporary World, Berkeley 2004; B. Reinalda, The Routledge History of International Organizations, London 2009.

15 For the institutional and political innovations of the public unions see G. Ambrosius, Regulativer Wettbewerb und koordinative Standardisierung zwischen Staaten: Theoretische Annahmen und historische Beispiele, Stuttgart 2005; M. Vec, Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung im Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung, Frankfurt am Main 2006.

16 S. Ricketson / J. C. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond, Oxford 2006, pp. 41-83; M. Vec, Weltverträge (annotation 7), pp. 107-130.

17 G. Ambrosius, Regulativer (annotation 15), p. 48; T. J. Röder, Rechtsbildung im wirtschaftlichen "Weltverkehr": Das Erdbeben von San Francisco und die internationale Standardisierung von Vertragsbedingungen, 1871–1914, Frankfurt am Main 2006, pp. 42 f.

subsumed in this context into a system of global governance linking national policy, intergovernmental agreements and transnational business activities.[18]

2 The Berne Union: unresolved conflicts over intellectual property rights

Bearing in mind the continuous rise of IPR during the last century despite serious critics, especially from countries depending on the import of cultural and educational goods, the Berne Union is of clear importance in two respects in explaining the formation of international IPR and its anchoring in national culture and society in the course of the 20th century. Firstly, it is important to analyse the organisational structures the Berne Union provided and the main acting group it addressed in order to develop this new field of international law and politics. Secondly, we will briefly examine the underlying conflicts over the distribution of culture and knowledge and how the Union handled them.

The foundation of the Berne Union owed much to the commitment of the interest groups of authors and publishers it primarily concerned, who were strongly interested in obtaining a sound contractual basis for the transnational reception of and trade with their works. From the 1850s onwards authors and publishers, mainly from the European book trading countries France, Great Britain, Germany, Switzerland and Belgium, pushed their national legislators to introduce long-term legal standards.[19] They sought multilateral agreements that would overcome the existing bilateral trade agreements in favour of international legal doctrines that would introduce their property right claims on knowledge and culture on a European level.[20] For these reasons, the Union pursued its goal of establishing private property rights to immaterial goods as the principal category in the global governance of culture and knowledge right from the outset. The strong pressure the professional associations applied led to an international convention in favour of the property rights holders: The Berne Union represented the cultural and economic interests of the culture producing groups manifest in societal pressure groups, comprising authors, publishers and lawyers, and in the book producing and selling countries of Western Europe.[21]

This socio-cultural focus on the interests of the cultural industries was translated into legal practice by applying the principle of national treatment – the crucial part of the convention. This principal stipulated that each citizen of any of the convention's member states who published his works in another member state had equal legal standing with that state's authors. By harmonising national and international law offering both authors

18 M. Zürn, Global Governance, in: G. F. Schuppert (ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2005, p. 127.

19 F. Ruffini, De la protection internationale des droits sur les œuvres littéraires et artistiques, in: Recueil des cours de l'Académie de Droit International de La Haye, Paris 1926, pp. 444-456; C. Seville, The Internationalisation (annotation 8), pp. 52-54.

20 H. Püschel, 100 Jahre Berner Union. Gedanken, Dokumente, Erinnerungen, Leipzig 1986, p. 18.

21 C. May / S. K. Sell, Intellectual (annotation 6), pp. 115-122.

and publishers binding rights covering distribution and reception in the entire territory of the Berne Convention, cross-border trade was meant to become easier to calculate.[22] In this way, while the states expanded the scope of their citizens' legal rights, they also handed over part of their function in institutionalising culture to a specialised international organisation. At the same time, they applied the concept of private property in cultural goods to international law and charged the Berne Union with supervising and pushing ahead with the propertisation of culture in international trade, law and politics.

From the outset, however, the Berne Union had to struggle with asymmetries regarding the quantity of printed works that were produced in the member states. From the 1840s onwards, the cultural industries of the main founding states Belgium, France, Germany, Great Britain and Switzerland exhibited two basic trends: A permanent increase in the book production rates per year, and a reduction in price per book in order to respond to growing literacy across broad sections of the population.[23] The Berne Union provided these states with valuable tools to support this growth market by means of international legal standards ensuring legal protection at home and abroad – a strategy that brought the cultural industries the reproach of protectionist behaviour at least in the early 19th century.[24] Consequently, the idea of institutionalising the concept of exclusive property rights in cultural goods in an international organisation was not generally welcomed. The concept of protecting authors and publishers from societies whose educational systems and cultural scenes were already flourishing implied severe disadvantages for societies depending on the import of cultural and educational works, since they had to renounce their right to reprint or translate these works without permission or the need to pay royalties to the copyright holders.[25] This proved to be the main weakness of the Berne Union and resulted in the absence of important countries such as the USA, the Latin American states and the multicultural and multilingual Russian, Austro-Hungarian and Ottoman Empires.[26]

From the outset, therefore, international copyright law had to struggle with opposing views regarding the benefits of a property-related handling of cultural goods, and thus suffered from severe conflicts between those countries with extensive and those with less developed cultural industries already in existence since the 1880s. The Berne member states tried to resolve the problem by introducing special provisions into the convention.[27] Having a dual interest in establishing a high-level protection of author's rights and in including as many countries as possible in the Berne Union, they tried to convince

22 B. Mentha, Berne Convention, in: H. L. Pinner (ed.), World Copyright. An Encyclopedia, Leyden 1953, pp. 1029-1070.

23 G. Menz, Der europäische Buchhandel seit dem Wiener Kongreß, Würzburg 1941, p. 114.

24 D. Klippel, Historische Wurzeln und Funktionen von Immaterialgüter- und Persönlichkeitsrechten im 19. Jahrhundert, in: Zeitschrift für Neuere Rechtsgeschichte 4 (1982), pp. 139f.

25 W. Dillenz, Warum Österreich-Ungarn nie der Berner Übereinkunft beitrat, in: E. Wadle (ed.), Historische Studien zum Urheberrecht in Europa. Entwicklungslinien und Grundfragen, Berlin 1993, pp. 167-189.

26 Pays membres de l'Union, in: Le Droit d'Auteur 25 (1914), p. 1.

27 S. Ricketson / J. C. Ginsburg, International Copyright (annotation 16), pp. 100f.

the non-members to accede to the union by allowing certain rights to be reserved. From 1908, states could gain membership on the compromise that they generally accepted the copyright rules, with the reservation that they did not have to apply the translation rights.[28] The desired effect did not materialise, however, as the said states remained absent: They continued to emphasise the severe social and economic differences between their cultural industries and those of the Berne member states.

3 Political resistance to and economic demands for a global copyright standard

The inter-war period represented a significant step towards the transformation of the Berne Union into a forum for the continuous settlement of conflicts over the concept of private property. While the historiography on IPR normally focuses on the development of the legal doctrines and thus interprets the inter-war years as coming to a standstill regarding the internationalisation of individual intellectual property rights,[29] a closer look in fact reveals significant changes in the way international norms were negotiated and set up, a subcutaneous development that from a long-term perspective led to the irreversible anchoring of the concept of private property in cultural goods in international law and politics. With the League of Nations a new actor emerged during the 1920s which had institutional, personal and financial resources at its disposal to remedy the shortcomings of the Berne Convention – the missing balance of interest between states with well- and lesser developed cultural industries and its euro-centrism. The League of Nations assisted the Berne Union in two respects: Firstly, the League provided an organisational infrastructure which linked the professional groups and their propertisation strategies even more closely to the process of setting up international legal standards. Secondly, the League managed to reconcile the gap between the Berne Convention and its counterpart, the copyright agreements of the Pan-American Union, and thus transformed international copyright law into a global affair integrating all world regions.

Though the Berne Union covered most of the territory of the European, African and Asian continents, except for Turkey, the Soviet Union and China, the majority of the 37 member states, including the union in 1928, were European, so that its geographical reach stemmed back to European colonial rule: the British, French, Spanish, Portuguese and Dutch colonies were an integral part of the Berne Union due to colonial law and

28 B. Mentha, Berne (annotation 22), p. 1039

29 Except for the works published up to the 1950s: A. Bogsch, La convention universelle sur le droit d'auteur. Exégèse, Paris 1953; E. Heymann, Das panamerikanische Urheberrecht und die Versuche seiner Einbeziehung in die Berner Übereinkunft, in: Zeitschrift für ausländisches und internationales Privatrecht 14 (1942), pp. 18-60; S. P. Ladas, The international (annotation 8); C. Royer, La protection internationale du droit d'auteur en Amérique et les tentatives de rapprochement des conventions panaméricaines et de la Convention de Berne, Toulouse 1942; M. Saporta, La conférence intergouvernementale de Genève (18 août - 6 septembre 1952) et la convention universelle du droit d'auteur de l'UNESCO (6 septembre 1952), Paris 1952; an exception in recent literature makes: S. Ricketson / J. C. Ginsburg, International (annotation 16).

its legal as well as political dependence on the mother country.[30] Major non-European member states such as Japan (entry in 1899), Brazil (1922) and Australia, New Zealand and Canada, who joined the union as independent signatory states in 1928, were the exception to this, whereas the majority of states with extensive cultural industries and who thus profited from the acknowledgement of the creative artist's individual rights abroad were European.[31]

In order to mitigate the convention's European focus, the signatory states proposed unifying the convention with the multilateral copyright agreements of the Pan-American Union at their revision conference in 1928.[32] Following a conference of the American states in Montevideo in 1889, the Pan-American Union had placed the multilateral copyright protection on its agenda, subsequently passing a whole series of multilateral conventions: the Convention of Montevideo in 1889, Mexico in 1902, Rio de Janeiro in 1906, Buenos Aires in 1910 and, finally, the Convention of Havana in 1928.[33] For the European states committed to the Berne Union, it was important that nearly all of these conventions were restricted to the American continent, so that non-American states were rigorously excluded from joining.[34] Alternatively, authors and publishers in Europe would have to push their governments for bilateral agreements on their own if they wished their works to be protected against unauthorised reprints or translations in America. However, this was also not a satisfactory solution, as both bilateral and multilateral negotiations with American states proved to be difficult and tended to fail. In 1913, for example, the Chilean government refused to conclude a bilateral agreement for the mutual acknowledgement of intellectual property rights with France. The reasons the Chilean government gave for their negative response resembled those already advanced by critics of the Berne Union: Such a bilateral agreement would be advantageous to the French publishing houses, as they could sue for royalties, whereas Chilean society could only suffer from the decreasing sale of cultural goods coming from France.[35]

Even though these political and administrative difficulties worked more to deter European states than to advance any dialogue between the European and American property rights regimes, the Latin American book markets were clearly important to the predominantly culture-exporting states such as Great Britain, France, Spain and Germany,

30 Tableau des pays de l'union au 1er novembre 1928, in: Union internationale pour la protection des œuvres littéraires et artistiques, Actes de la conférence réuni à Rome du 7 mai au 2 juin 1928, Neuchâtel 1929, pp. 9f ; L. Bently, Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries, in: Chicago-Kent Law Review 82 (2007), pp. 1181-1240.

31 Union pour la protection des droits d'auteurs sur leurs œuvres littéraires et artistiques. État au 1er janvier 1929, in: Le Droit d'Auteur 42 (1929), pp. 1 ff.

32 Union internationale pour la protection des œuvres littéraires et artistiques, Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928, Neuchâtel 1929, p. 350.

33 M. Canyes / P. A. Colborn / L. Guillermo Piazza, Copyright Protection in the Americas. Under National Legislation and Inter-American Treaties, Washington D.C. 1950; E. Röthlisberger, Der interne und internationale Schutz des Urheberrechts in den Ländern des Erdballs, Leipzig 1931.

34 C. Royer, La protection (annotation 29), p. 120.

35 Letter of the French ambassador in Chile to the French Foreign Minister H. Poincaré, November 18, 1912, in: Archives nationales (F/17/13491/6).

as Latin American states did not have an extensive level of cultural production at that time, thus making them dependent on imports from European and, on a smaller scale, US American publishers.[36] Due to the widespread dissemination and reception of their cultural goods, the members of the Berne Convention had a special interest in ensuring their cultural industries were remunerated in the territories of the Latin American states by means of legal protection. Therefore, in 1928 the member states formulated their efforts to harmonise European and American copyright law by means of a global copyright convention closing the legal gap between the two continents.[37]

The League of Nations entered the stage due to the restricted room the Berne Union had to extend its copyright regime to the entire globe. Although World War II did not threaten the legitimacy of the Berne Convention,[38] it became apparent that the Union had not achieved its initial goal of assembling all states world-wide. Even though the joint efforts of the Berne Union and the League of Nations failed to create a universal legal standard for the international protection of authors' rights, the League did leave its mark in a much more far-reaching way: It succeeded in integrating the American states in the European dominated discourse on the modalities and limits of the propertisation of culture and knowledge, even though they explicitly rejected the European concept of strong exclusive rights as the dominant framework for the handling of cultural goods. Thus, the League fundamentally contributed to institutionalising and globalising the links between culture and property.

4 The League of Nations: institutionalising conflicts over intellectual property rights

What was decisive in establishing private property as the key concept to statutorily regulating the trade of culture and knowledge on a global scale was the institutional framework the signatories of the Berne Convention took into account especially in order to convince the aloof Latin American states to join in a global copyright convention. The member states decided to entrust the League of Nations. The League seemed fit to assume responsibility for the project, since it maintained a thematically specialised suborganisation, the Intellectual Cooperation Organization (ICO), which was necessary to engage the American and European governments and interest groups in negotiations.[39] It was composed of the International Committee on Intellectual Cooperation, created in 1922, and the International Institute of Intellectual Cooperation seated in Paris. The

36 Entry for Central and South America, in J. Kirchner (ed.), Lexikon des Buchwesens, Stuttgart 1952, pp. 23-26; H. Calvo, Latin America, in: S. Eliot / J. Rose (eds), A Companion to the History of the Book, Malden 2007, pp. 138-151.

37 Union internationale pour la protection des œuvres littéraires et artistiques, Actes (annotation 30), p. 350.

38 I. Löhr, Transnational Cooperation in Wartime: The International Protection of Intellectual Property Rights During World War I, in: N. P. Petersson / C. Dejung (eds), Power, Institutions and Global Markets (forthcoming); for patents see F. Mächtel, Das Patentrecht im Krieg, Tübingen 2009.

39 For the role the ICO played in the propertisation of scientific authorship, see the contribution of G. Galvez-Behar to this volume.

Committee consisted of outstanding intellectuals – for example Henri Bergson, Marie Curie and Albert Einstein – who had the task of supplementing the League's disarmament policy by establishing close cooperation between the member states in the field of culture.[40] The Institute in Paris in turn executed the Committee's projects: a group of permanent civil servants and a budget for research, congress organisation and travel costs should enable it to build up thematically based networks inside and outside of the League's member states, including experts, professionals and representatives of civil society.[41] These networks would help to disseminate the Committee's ideas on how to peacefully reconcile the League's member states. Therefore, the ICO aimed at broadening cooperation between the League and its members beyond any purely intergovernmental discussion. In the tradition of the international public unions, the League placed emphasis both on intergovernmental cooperation between states, in order to pass international resolutions, and on the incorporation of professionals and experts, who it was hoped would make substantial contributions to the drafting of international conventions, their practical implementation and, above all, to the canvassing of acceptance and recognition for these norms in their home countries.[42]

This conception paid off for the introduction of property in literary and artistic works to all countries in the world. The ICO put the plan of a global copyright convention into action by operating independently on all the aforementioned levels:[43] The ICO consulted the states involved, assembled in the Berne and Pan-American Unions, both being independent of the League of Nations. At the same time, the Institute searched for cooperation beyond the intergovernmental level. Besides attempting to consult expert opinions so as to secure the legal construction of the new convention, this particular kind of cooperation aimed at obtaining approval of politically influential persons outside official diplomatic networks. Thus, the League followed a twofold strategy: firstly, to officially push the project on by engaging the Pan-American states in diplomatic negotiations, and secondly, to influence the Pan-American discussion by finding prominent proponents of the idea to regulate culture and knowledge primarily in terms of property who would campaign for the project independently of the League's efforts.

These ties beyond conventional diplomatic channels proved to be of major importance during the 1930s. As the idea of a global copyright convention was elaborated by the member states of the Berne Union, due to unfavourable experiences with their copyright claims in the Americas, the ICO was expected to convince the members of the Pan-American Union to consent to a global copyright convention that would further

40 For the foundation and the structure, see Secrétariat de la Société des Nations, La Société des Nations et la coopération intellectuelle, Genève 1926; C. André, L'Organisation de la Coopération Intellectuelle, Rennes 1938.

41 For a concise overview, see Institut international de coopération intellectuelle, L'Institut international de coopération intellectuelle 1925-1946, Paris 1946.

42 J. Kolasa, International Intellectual Cooperation. The League Experiences and the Beginnings of UNESCO, Wroclaw 1962, p. 41; Pham-Thi-Tu, La cooperation intellectuelle sous la Société des Nations, Genève 1962, p. 62.

43 For the authority, the ICO diposed on, see H. Bonnet, L'Œuvre de l'Institut international de coopération intellectuelle, Paris 1938, pp. 27f; J. Kolasa, International (annotation 42), p. 164.

the acknowledgement of a property-related regime for the handling of cultural goods. From the point of view especially of the Latin American states, the Berne Convention was not suited to being universalised. Rather, on their first deliberation of the project at a conference of the Pan-American Union in 1933 in Montevideo, the member states reacted with a fair amount of reserve.[44] This ranged from unreserved consent from the Brazilian government to serious doubts articulated by the Chilean and U.S.-American governments – which finally gained the upper hand – and thus the conference revealed fundamental asymmetries regarding the cultural and economic interests of the parties involved.[45] While the American states emphasised the legal differences caused by the Anglo-Saxon legal copyright tradition they followed in contrast to the continental European model of the *droit d'auteur*, the civil servants of the ICO identified much more substantial reasons for their remaining aloof from harmonising the European and American copyright law standards.[46] With the exception of the USA, the ICO argued, most of the American states did not have any extensive production of literary, artistic and scientific works, and therefore had to fall back upon cultural goods coming from Europe and North America to promote their educational systems and their cultural scenes. Had they agreed to a global copyright convention, however, following the European conception with the author as a strong and exclusive property rights holder, the usage and reception of these works in Latin America would no longer have been free but instead charged with royalties and fees they would have to pay the European property right holders.[47] In the face of these serious disadvantages which lesser developed countries had to expect, the ICO had to proceed strategically and was well-advised to provide good reasons for the global implementation of the concept of private property as the dominant framework to treat culture and knowledge.

Even though the Pan-American Union did not abandon its serious objections to a globalised IPR regime in the course of the 1930s, a majority of its members nevertheless appeared willing to participate in an international conference which the ICO and the Berne Union planned for 1938 or 1939 in order to inaugurate the new global copyright convention.[48] How can we explain their consent, however, even when the propertisation of culture and knowledge on a global scale did not promote their own interests? The explanation has to consider the organisational structures the League provided, which

44 Institut international de coopération intellectuelle, Rapport général du directeur à la commission internationale de coopération intellectuelle et au conseil d'administration de l'institut 1935, C.A.47.1935, pp. 173-176.

45 For a summary of the discussion of the League's suggestion, see Telegram of the French ambassador in Uruguay to the French foreign ministry, December 9, 1933, in: Archives diplomatiques de France à Paris (Société des Nations/IN – Coopération intellectuelle/1879).

46 R. Weiss, Les premières étapes d'une charte mondiale des droits intellectuels, Paris 1947, pp. 52f.

47 R. Weiss, Le mouvement américain en faveur d'un statut universel du droit d'auteur, in: Nouvelle Revue du Droit International Privé 3 (1936), p. 232; P. Azevedo, L'Amérique et la Convention de Berne, in: Geistiges Eigentum. Copyright. La Propriété Intellectuelle. Internationale Zeitschrift für Theorie und Praxis des Urheberrechts und seiner Nebengebiete 4 (1938), p. 6.

48 Les résolutions de la conférence de Lima, décembre 1938. Universalisation de la propriété intellectuelle, in: Geistiges Eigentum. Copyright. La Propriété Intellectuelle. Internationale Zeitschrift für Theorie und Praxis des Urheberrechts und seiner Nebengebiete 4 (1938), pp. 239f.

aimed to engage the American states and to convince critics. In order to find supporters for their project in the ranks of the American states, the ICO relied on its non-governmental networks. In particular, the ICO activated the North American National Committee on Intellectual Cooperation, which was composed of proponents of a strong international copyright regime. Hoping that the League's project would help to change attitudes within the U.S. American government, which continuously refused to accede to the Berne Union, the members of the national committee lobbied strongly for the League's suggestions.[49] Thanks to its secretary J. David Thompson, who was at the same time appointed to the advisory council of the department of intellectual cooperation of the Pan-American Union, in 1932 the national committee finally succeeded in inscribing the global copyright convention on the agenda of the next conference of the Pan-American Union in 1933.[50] Although the members of the Pan-American Union discussed the project controversially and kept their reserve for the aforementioned reasons, they agreed to consider advantages and disadvantages and thus consented to establish a committee of experts to study appropriate strategies with which to achieve a global copyright convention.[51]

This minimum concession by the Pan-American Union was sufficient for the League's ICO to use as a back door in order to influence deliberations within the Pan-American Union in favour of an extensive IPR regime. Once again, the ICO profited from its organisational structure. It persuaded some Latin American delegates who were assigned to the Institute for Intellectual Co-operation of the benefits of a global copyright convention comprising the Berne and the Pan-American regulations, so that they finally agreed to organise a meeting with the president of the American committee of experts and the representatives of the League of Nations. Regarding the question of how we can explain the establishment of an international regime to re-contextualise culture in terms of property, this meeting is of special significance. Although the first meeting in 1935 in Rio de Janeiro took place due to the initiative of the Brazilian government, and without the agreement of the Pan-American Union,[52] it nevertheless marked the beginning of diplomatic negotiations which from a long-term perspective led to the conclusion of the Universal Copyright Convention in 1952. For José Antuña, the president of the Pan-American committee of experts, declared his support for the project despite fundamental

49 Huitième réunion du comité des institutions s'occupant des droits intellectuels (Paris, 22 juin 1938), Memorandum sur l'état de la protection internationale du droit d'auteur présenté au comité du droit d'auteur de la commission nationale américaine de coopération intelllectuelle, par le Professeur Francis Deak, de la Faculté de Droit de l'Université Columbia, pp. 5 f, in: League of Nations Archive Geneva (R 4032: 5B/23171/8174).

50 Two letters of J. D. Thompson to R. Weiss, head of the legal section of the International Institute of Intellectual Cooperation, Februray 15 and April 18, 1932, in: UNESCO Archives (E.IV.28_1).

51 Résolution de la VIIe conférence internationale des Etats américains (Montevideo, 16 décembre 1933), in: Administration belge / Institut international de coopération intellectuelle, Conférence diplomatique pour la préparation d'une convention universelle sur le droit d'auteur. Fascicule 1: Documents préliminaires, Bruxelles 1938, pp. 9 f.

52 Telegram of the Brasilian delegate, assigned to the Institute of Intellectual Co-operation, E. F. de Montarroyos to the head of the department of intellectual co-operation of the League of Nations, Massimo Pilotti, August 2nd, 1935, in: Unesco Archives (E.IV.28_2).

scepticism from the Pan-American members. He justified his deviating position as the result of his personal conviction that unauthorised reprinting should not be interpreted as a minor offence but as synonymous with piracy.[53] Due to his prominent position within the Pan-American Union, he was able to give the project his whole support so that it remained on the agenda of the Pan-American Union. In April 1936, Antuña was officially invited to Paris. Under the auspices of the League of Nations, Antuña, the legal experts of the ICO, the director of the international office of the Berne Union and representatives of the international associations of authors and publishers worked out a draft for a global copyright convention that was in a sufficiently advanced state to be submitted for intergovernmental debate.[54] The draft was officially announced to the members of the two unions involved in the summer of 1936, along with an invitation to an international conference to pass the new convention, scheduled for 1938 or 1939 in Brussels[55] – a plan that was prevented by World War II.

5 International organisations and the setting of IPR as a field of global policy

Contemporary discussions concerning the imbalances of IPR normally view TRIPS as ushering in a new era of expanding private property rights to the realm of culture and knowledge. The assumption that we are witnessing the rise of something historically new is mainly based on a critical analysis of IPR contents, and in this respect the combination of intellectual property rights and international trade liberalisation does indeed mark a substantial strategic shift in policy goals. When searching for the reasons that made this shift possible, however, observers mostly refer to the pressure powerful lobby groups applied especially in the USA so as to extend their exclusive property and handlings rights to the whole globe. While it is not our intention to downplay the constitutive role of interest groups in drawing up the TRIPS-Agreement, the critique is one-sided as it mainly relies on the category of political and economic power, but ignores broader historical patterns that made the acceptance of private property possible as a core category for the handling of culture and knowledge over recent decades.

As we have seen, a closer look at the embeddedness of IPR in its institutional and sociocultural contexts reveals the mechanism that made conceptualising serious alternatives impossible and promoted the acceptance of an IPR regime that became more and more exclusive. The international organisations not only attributed culture and knowledge to

53 J. Antuña, Comité d'experts pour l'étude d'un statut universel du droit d'auteur, organisé en commun par les Instituts de Rome et de Paris, 1ère réunion, Paris 1er et 2 avril 1936, in: Nouvelle Revue de Droit International Privé 3 (1936), p. 430.

54 Avant-projet de convention universelle pour la protection du droit d'auteur, élaboré par le comité d'experts pour l'étude d'un statut universel du droit d'auteur, réuni à Paris les 1er, 2 et 25 avril 1936, in: Administration belge / Institut international de coopération intellectuelle, Conférence (annotation 51), p. 48-52.

55 Administration belge / Institut international de coopération intellectuelle, Conférence (annotation 51).

a property-related set of handling rights, but gradually assumed political leadership without losing sight of state sovereignty. The ICO allowed private and state actors to increase their individual claims for better international protection of literary and artistic property and thus contributed decisively to the shaping of this new field of international policy. The difference the Berne Union and the ICO of the League of Nations made was that they assembled the property right holders, coordinated the internationalisation strategies with their interests and took these particular interests as a starting point for setting up international norms and laws. Although it was not until 1952 that a Universal Copyright Convention saw the light of day, it was the League which anchored the idea of individual ownership of knowledge and cultural goods irrevocably in international politics. Firstly, the League reformulated the international agenda on IPR by presenting the legal gap between the Pan-American and the Berne Unions as a problem that had to be resolved. In this way, the League launched a moralised discussion that proposed a certain sense of fairness as the main argument for its claim to acknowledge the author's individual rights world-wide. Secondly, by integrating only the professional associations, legal experts and explicit proponents of property in literary and artistic works concerned, the League primarily echoed the positions of the property right holders. As a consequence, their arguments could not principally be sidelined by the severe objections which the Latin American states in particular articulated regarding the inclusiveness or exclusiveness IPR should have in order to balance the conflicting interests of culture exporting and culture importing states. Thirdly, the League institutionalised this discourse with a far-reaching consequence: The appropriateness of individual property in culture became an integral part of an, albeit disputed, international agenda.

This becomes particularly apparent if we take a brief look at developments after 1945. UNESCO, the institutional successor to the League's ICO, restarted the project in 1946. Although UNESCO succeeded in passing the Universal Copyright Convention in 1952, it inherited the severe conflicts the League had to deal with. Stronger than before, the developing countries announced resistance towards an only marginally modified version of the Berne Union as a global standard for IPR. As previously, UNESCO had to mediate between an author-centred copyright law and a legal conception focused more on public interests.[56] For these reasons, UNESCO insisted on applying a different ideological framework in comparison to the ICO: At first, UNESCO understood intellectual property rights as a barrier for the free flow of culture and knowledge and pleaded for the integration of IPR in multi-faceted policy measures regarding the promotion of culture, education and science.[57] The idea of social responsibility found expression in the

56 F. Hepp, Les perspectives actuelles de l'universalisatiion du droit d'auteur, Paris 1952 pp. 6-8; M. Saporta, La conférence intergouvernementale de Genève (18 août – 6 septembre 1952) et la convention universelle du droit d'auteur de l'UNESCO (6 septembre 1952), Paris 1952, pp. 25 f.

57 F. Hepp (Expert-Conseil), Rapport introductif aux travaux de la Commission Provisoire d'Experts en Droit d'Auteur convoquée à Paris du 15 au 20 septembre 1947 au siège de l'UNESCO, in: UNESCO, Documents de travail concernant le droit d'auteur dans le monde et la préparation de la Convention universelle du droit d'auteur, 1947-1951, Paris 1947-1951, p. 7.

regulation of a compulsory licence lesser developed countries were allowed to issue in case they did not obtain the permission to translate or publish a protected work that was considered to be important for education.[58]

The subsequent developments were faced with severe controversies over the justification and nature of IPR. Although the League had successfully reached its aim and included lesser developed countries in the elaboration of one global copyright standard, this also meant a shift from a majority of industrialised to an increasing number of developing countries, whose number grew during decolonialisation. Since then, global copyright law has had to struggle with tensions between parties pushing for the enforcement and protection of IPR and parties emphasising their dependence on the transfer of knowledge, culture and technology and thus claiming a less exclusive and economically focused IPR regime.[59] The aforementioned international organisations play a central, though dialectic, role in these controversies. Founded on behalf of the 'propertied countries', they have the task of introducing and enlarging IPR on a global scale with the aid of two means: Firstly, their task is to irreversibly link up international legal standards to the social and economic dynamics of national and cross-border trade with cultural goods; and secondly, they promote exclusive IPR by acknowledging criticism from lesser developed countries and searching for an appropriate political balance. Thus, it is the interplay of a strong European tradition of IPR, its early establishment as an international legal standard, its linking up with the professional interests of the property right holders, and the setting up of an institutional framework to promote IPR excluding serious alternatives that have made IPR a highly controversial part of a global agenda. Consequently, a reorganisation of this field of international law and politics in favour of a more inclusive IPR regime has to critically tackle the UNESCO, WIPO and WTO agencies, their generative power and their impact on the setting of IPR norms and future agendas.

58 S. Ricketson / J. C. Ginsburg, International Copyright (annotation 16), pp. 1187; A. Bogsch, The Law of Copyright Under the Universal Convention, Leyden 1968.

59 C. May, The World Intellectual Property Organization. Resurgence and the Development Agenda, London 2007.

From the Paris Convention (1883) to the TRIPS Agreement (1994): The History of the International Patent Agreements as a History of Propertisation?

Margrit Seckelmann

RESÜMEE

Anhand des Patentschutzes zeigt der Aufsatz, dass die *global governance* dieser Rechte seit der Einführung eines internationalen Patentschutzes 1883 von einer kritischen Diskussion begleitet wurde über die handelshemmende und die handelsfördernde Wirkung von Patenten sowie über den Verlust staatlicher Entscheidungshoheit. Dabei stellt die Autorin drei Entwicklungslinien heraus, die die Vertiefung des internationalen Patentschutzes im 20. Jahrhundert prägten: Ein zyklisches Aufflammen dieser Diskussion, sobald die Rechte der Patentinhaber substantiell gestärkt wurden; die Verschiebung der Konfliktlinie von einer europäischen Auseinandersetzung zu einem Streit zwischen Industrie- und Entwicklungsländern im Gefolge der stärkeren Regulierung der Weltwirtschaft nach dem Zweiten Weltkrieg; und schließlich die Neuausrichtung des Patentschutzes im Rahmen der WTO, die sich die im geistigen Eigentum angelegte Tendenz zur Ausdehnung der Schutzgegenstände in Zeit und Raum für die Integration neuer Gegenstandsbereiche und für die Formulierung strikter Teilnahmebedingungen an internationalen Handelsnetzwerken zunutze macht.

I. Introduction

The mutual acknowledgement of intellectual property agreed upon by various states between 1880 and 1890 inspired the imaginations of contemporaries. In 1889, the Swiss Law Professor Friedrich Meili characterised his fellow humans as "mobile global citizens", who could choose their state in accordance with their needs – thanks to the existence of international administrative unions.[1] In his time, these unions included the Interna-

1 F. Meili, Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums.

tional Telegraph Union of 1865/1868, the Universal Postal Union of 1874, the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886.[2] All of them formed nuclei of an international economic system, today mostly incorporated in the legal framework of the World Trade Organisation (WTO).[3]

This paper examines the process leading to the Paris Convention for the Protection of Industrial Property of 1883,[4] and the accompanying formation of the governance structure of the international patent regime and its development from 1883 to 1994.

The 110 years between the Paris Convention of 1883 and the TRIPS Agreement of 1994 can be seen as a time when the industrial society of the late 19th century was developing its rules applicable to technical knowledge and transforming them to meet the requirements of today's transnational 'information society'.[5] This process does not only apply to national but also to international rules concerning the usage of technical information. The focus of the latter issue implies a mutual acknowledgement of national patents by transnational rules monitored by international organisations (as long as no 'world patent' can be applied).

In this sense, one could argue, the history of the formation of the international governance system protecting intellectual property rights can be seen as a history of propertisation. As *Hannes Siegrist* pointed out in 2006, "interdisciplinary property research poses the question of what the optimum mixture of institutions could be for a transition from an industrial society to a knowledge and information society, and from a nation state order to a European and global order. In order to answer this question, it must extend property analysis to include an analysis of the governance of modern societies, international systems and transnational networks".[6]

Today, the World Trade Organisation is the heart of a multinational trade system that strongly regulates the trade laws of 140 states. Intellectual and industrial property rights form a part of the WTO's legal framework. This is evidenced by the fact that the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods* (TRIPS Agreement) of 1994[7] constitutes Annex 1 C of the legal framework

Ein Vortrag, gehalten in der Juristischen Gesellschaft zu Berlin am 05. Januar 1889, Leipzig 1889, p. 5; biographical information about Meili can be found in the post-mortem written by E. Huber, Friedrich Meili †, Deutsche Juristen-Zeitung 19 (1914), pp. 212-213.

2 M. Vec, Recht und Normierung in der Industriellen Revolution, Frankfurt am Main 2006.

3 A. Krueger, The WTO as an International Organisation, Chicago 1998.

4 The Berne Convention for the Protection of Literary and Artistic Works of 1886, for further details see E. Roethlisberger, Die Berner Uebereinkunft zum Schutze der Werke der Literatur und Kunst und die Zusatzabkommen. Geschichtlich und rechtlich beleuchtet und kommentiert, Bern 1906; P. Wauwermans, La convention de Berne (revisée à Paris) pour la protection des œuvres littéraires et artistiques, Bruxelles 1910; I. Löhr, Geistiges Eigentum in Kriegszeiten. Der Schutz von Urheberrechten und die Berner Übereinkunft im Ersten und Zweiten Weltkrieg, in: Comparativ 16 (2006), no. 5/6, p. 236 and Löhr's contribution to this volume.

5 H. Spinner, Die Architektur der Informationsgesellschaft, Hamburg 1998.

6 H. Siegrist, Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne, in: Comparativ 16 (2006), no. 5/6, p. 52.

7 Agreement on Trade-Related Aspects of Intellectual Property Rights as of April 15th, 1994.

of the WTO.[8] The *General Agreement on Tariffs and Trade* (GATT) also underwent significant change as a result of this agreement. This was due to the fact that, during the Punta del Este Conference in September 1986, the GATT contracting parties had agreed on adding trade related aspects of the protection of intellectual property to the subjects for negotiations within the GATT:[9] Reasons for the inclusions were a halt in negotiations over a revision of the Paris Convention, and the perceived need to end the 'balkanisation' of international trade regulations by harmonising existing treaties and making them more effective by means of a further linkage.[10] The negotiations of this so-called "Uruguay Round" gained momentum when the Iron Curtain fell in 1989 and Eastern European countries were considering joining the GATT.

As in 1889, the ratification of the TRIPS Agreement and the revision of the GATT in 1994 gave rise to visions of a peaceful new world (trade) order. Having experienced the recent fall of the Berlin wall, many contemporaries hoped for a peaceful self-regulation of autonomous subjects on an international level.[11]

The development of the international regulation concerning the mutual acknowledgement of patent protection can be seen as a process in which today's property structure, that underlies international trade law and international organisations, has been formed. This structure has been discussed a great deal – due mostly to the fact that it displays a specific concept of ownership of technical information, formed along the lines of the model of private property. Therefore, the TRIPS Agreement, the WTO and the GATT are all still issues of a lively discussion.[12]

The granting of patent rights[13] can be understood as a definition of property rights with regard to new technical knowledge for a limited time span.[14] During the life of the patent, the owner of the patent has the right to exclusively exploit the protected specific

8 Ch. Herrmann / W. Weiß / Ch. Ohler, Welthandelsrecht, Munich 2007, p. 45 and 51.

9 H.-D. Assmann / P. Buck, Trade Related Aspects of Intellectual Property Rights: Limitation of the Mandate or Point of Reference for the Further Development of the GATT?; in: Th. Oppermann / J. Molsberger (eds.), The New GATT for the Nineties and Europe '92, Baden-Baden 1991, p. 261.

10 For further details see e. g. H.-D. Assmann / P. Buck, Trade Related Aspects (annotation 9), p. 261; R. Dhanjee / L. Boissonde de Chazournes, Trade-Related Aspects of International Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions, in: Journal of World Trade 24 (1990), pp. 5-18; U. Joos / R. Moufang, Neue Tendenzen im internationalen Schutz des geistigen Eigentums, in: GUR Int. (1988), p. 902; R. Faupel, GATT und Geistiges Eigentum, in: GRUR Int. (1990), p. 256.

11 See for instance the foreword by Th. Oppermann and J. Molsberger, in: Th. Oppermann / J. Molsberger (eds.), The New GATT (annotation 9), p. 5; for a later assessment of the peace-keeping role of the WTO see the contributions in G. P. Sampson (ed.), The Role of the World Trade Organization in Global Governance, Tokyo 2001.

12 See for instance C. M. Correa, Intellectual Property Rights, the WTO and Developing Countries. The TRIPS Agreement and Policy Options, London / New York 2000, p. 149. As for the Declaration of Doha and its consequence, see part II of this paper and F.M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lightning a Dark Corner at the WTO, in: Journal of International Economic Law (2002), pp. 469-505; ibid., WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in: E.-U. Petersmann (ed.), International Trade Law and the GATT / WTO Dispute Settlement System, Den Haag 1997, pp. 413-437. H. P. Hestermeyer, Flexible Entscheidungsfindung in der WTO. Die Rechtsnatur der neuen WTO Beschlüsse über TRIPS und Zugang zu Medikamenten, in: GRUR Int. (2004), pp. 194-200.

13 In the course of this paper, only patents shall be analysed. As for the international treaties regarding the copyright, see the contribution of I. Löhr.

14 According to the TRIPS Agreement, this span is 20 years.

knowledge economically. Other market participants can only gain access to the protected 'informational good'[15] (i.e. the technical knowledge) on the condition of approval by the owner. The latter is usually linked to licences which are granted in exchange for money or another type of compensation (e.g. access to other technical knowledge). This makes new technical knowledge tradable. With regard to the theory of propertisation, this process can be interpreted as a process of commodification of knowledge.

Patents will not protect mere discoveries but are limited in their scope to technical inventions with proven applicability to either products or processes (details may, however, differ significantly from country to country[16]). Unlike the author's right regarding literature, paintings and films,[17] patent rights require a governmental registration or approval procedure (again, details vary from country to country).

In most Western countries, legislation does not limit the granting of patents to new products or processes but also makes patents available for new technical applications of existing sets of knowledge. Over the last 100 years,[18] this possibility has been applied to new biochemical and medical applications of existing natural substances (namely after the Budapest Treaty of 1977[19]). Some critics view this extension of property rights as a means of securing the predominance of the Western property model in the world economy.

To give an example, the American law professor *Marci A. Hamilton* accused the TRIPS Agreement of securing a "Western, Protestant-based capitalist copyright".[20] She argues that the agreement rests on a bundle of axioms about the rights to information organised in a property-like manner which can be characterised according to the following criteria: 1. the individuality of the owner (the Western concepts disagree on the question of whether it has to be a natural person[21]), 2. the limitation of time, 3. the possibility of a technical application (instead of knowledge "as such") and 4. the exploitability of the invention instead of the sustainability of knowledge.

As a system can be as controversial as that, it is worth digging further into its construction and its history (II.). After this, the question will be posed of whether and to what extent the history of international patent protection between 1883 and 1994 can be viewed

15 K. Goldhammer, Wissensgesellschaft und Informationsgüter aus ökonomischer Sicht, in: J. Hofmann (ed.), Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter, Bonn 2006, pp. 81-106.

16 For historical examples see M. Seckelmann, Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914, Frankfurt am Main 2006.

17 For further details see Isabella Löhr's contribution to this volume.

18 The German Patent Law of 1877 for instance did not initially allow the patenting of medical products: M. Seckelmann, Sittenwidrig oder nicht? Die Beurteilung der Patentfähigkeit von Verhütungsmitteln in der Praxis des Kaiserlichen Patentamts, in: C. Kleinschmidt (ed.), Kuriosa der Wirtschafts-, Unternehmens- und Technikgeschichte, Essen 2008, p. 33.

19 Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure of April 28, 1977.

20 M. A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, in: Vanderbilt Journal of International Law 29 (1996), pp. 613-634; see also S. Oddi, TRIPS – Natural Rights and a "Polite Form of Economic Imperialism", in: Vanderbilt Journal of Transnational Law 29 (1996), pp. 415-470.

21 For further details, Seckelmann (annotation 16), pp. 57-85.

as a history of propertisation, and what conclusions can be drawn from the answer to this question (III.). However, before exploring the historical dimensions of the international patent system we will briefly analyse the paradoxes underlying the problematic relationship between propertisation and international patent protection.

Propertisation and internationalisation of patent rights

The term 'propertisation' can be interpreted in a twofold way: as a process of ongoing commodification, a narrative of industrial society and – moreover – of the 'information society', where technical information becomes tradable, subjected to property rights and traded by licences.[22] However, 'propertisation' can also be seen as a heuristic category with which to analyse the governance structure regarding rights to information in a society. Is it organised in a more 'liberally exclusive' or 'liberally inclusive'[23] way: does it – for instance – allow the state to interfere with compulsory licences for the benefit of the community? The specific answer to this question invites conclusions about a society – as the social responsibility clause concerning the property right in Art. 14 of the German constitution can be seen as a constitutional indicator for the German state as being a social market economy.

The internationalisation of patent protection, therefore, reveals a serious problem, because it prevents states from setting up rules concerning technical information completely autonomously. As will be discussed at the end of this paper, this can be a serious problem for less developed countries[24] when it comes to the patent protection of medication. The most prominent example of this is the protection of patent rights of AIDS medicine in these countries, imposed by mutual acknowledgements ruled by the WTO and the TRIPS Agreement. Although the Declaration of Doha in 2001[25] made some gains for the less developed countries, concerning for instance the possibility of granting compulsory licences, the ambiguous nature of these agreements has been revealed: After the fall of the 'Iron Curtain' and the end of competition between different economic systems, it is unlikely that states will be able to develop from an "imitation industry" to an "innovation" industry[26] without being a member of the WTO. On the other hand, such agreements limit their sovereignty in specific regards that can be crucial to their social health care. The Paris Convention had its roots in the heterogeneous structure of the patent protection of more developed states versus less developed ones which wanted to take

22 W. W. Fisher III, Geistiges Eigentum – ein ausufernder Rechtsbereich. Die Geschichte des Ideenschutzes in den Vereinigten Staaten, in; H. Siegrist/ D. Sugarman (eds.), Eigentum im internationalen Vergleich (18.-20. Jahrhundert), Göttingen 1999, p. 286.

23 H. Siegrist, Die Propertisierung (annotation 6); H. Siegrist/ D. Sugarman, Geschichte als historisch-vergleichende Eigentumswisenschaft. Rechts-, kultur- und gesellschaftsgeschichtliche Perspektiven, in: H. Siegrist/ D. Sugarman, Eigentum (annotation 22), pp. 9-30.

24 In the course of this paper "less developed countries" include developing countries, lesser and least developed countries, if not specifically mentioned otherwise.

25 As for that subject, see chapter II of this paper.

26 M. Seckelmann, Industrialisierung (annotation 16), p. 8 and p. 91.

part in the developing of international commerce in the course of the industrial revolution. While in 1883 these countries were Germany, Austria and Switzerland, the TRIPS Agreement affects African and Asian states that want to be part of the world economy. The difference is that in 1883, the less developed countries had more opportunities with which to influence the regulations (although the example of the German Empire, which did not join the Paris Convention until 1903, already demonstrates the problems involved with harmonising patent systems in the late 19th and early 20th centuries[27]).
Seen from a propertisation perspective, the interrelationship of patent rights to free trade is a theoretical problem. When propertisation is seen as a heuristic category with which to analyse the underlying property structure of a community or state, the existence of patents is completely connected to a state that can grant a patent (or to the international treaties integrating these national patent systems). Therefore, visions of a globalised community are often combined with a critical view of patent protection.[28] Patent rights are first of all *national* rights. As patent protection ends on the respective border line, on the other hand, export and import are hindered. This can be explained by the free-rider model of institutional economics. Inventions resemble public goods as they are hard to protect and will not diminish when they are used.[29] What will decrease, however, is their commercial exploitability. Thus, inventors in further developed states will not export their goods to less developed states until they are able to guarantee them their inventions will be protected against imitation.[30] This fact can be termed the *paradox of patent protection*: Patents can function as a non-tariff impediment to commerce on the one hand, because they can be used against the import of goods violating the patent right of the owner. On the other hand, the non-existence of patent rights or a similar protection of foreign inventions will also act as a non-tariff impediment to commerce, because no one will export highly advanced technology or for instance medicine into that country. This is the very dilemma which developing states are confronted with nowadays. The historical answers to this paradox shall consequently be further analysed.

II. The development of an international patent regime

The harmonisation of patent protection was a highly controversial topic that was completely connected to the formation of the industrial society, displayed at global exhibitions.[31] Since the Great Exhibition of 1851 promised to unify the industrial products of all civilised peoples on earth in a comparative display, visitors were meant to gain a

27 For more information refer to M. Seckelmann, Industrialisierung (annotation 16).
28 See for instance L. Lessig, Free Culture. The Nature and Future of Creativity, New York 2004, p. 19.
29 M. Olson, The Logic of Collective Action. Public Goods and the Theory of Groups, Cambridge 1965; D. C. North, Structure and Change in Economic History, New York 1981.
30 As for historical examples see B. Dölemeyer, Einführungsprivilegien und Einführungspatente. Mittel des Technologietransfers, in: ius commune 12 (1984), p. 207.
31 M. Seckelmann, "The Indebtedness to the Inventive Genius". Global Expositions and the Development of an International Patent Protection, in: V. Barth (ed.), Identity and Universality. A Commemoration of 150 Years of

glimpse of a "new world"[32] of progress, peace and harmony. However, the promised land which the admirers of the exhibitions seemed to enter did not retain its innocence for a long time. The "fetish commodity" (as the philosopher Walter Benjamin put it)[33] did not only demand adoration, it also produced manifest greed. The promised "peaceful competition of nations"[34] exposed a certain nationalistic subtext.[35]

The newly invented substances of the dyestuff industry, for instance, amazed visitors to the Global Exposition of Paris in 1867. They admired the "mighty, metallic glimmering block of the 'Violet de Paris' and, beside it, the new intermediate products of the dyestuff industry, the methylated and ethylated anilines".[36] The new inventions nonetheless proved to be extremely vulnerable. This was as a result of the simplicity of imitation of knowledge[37] and the difficulties involved in finding out about such a deed. Furthermore, the vulnerability of intellectual property rights was accompanied by a still insufficient and heterogeneous form of protection of literary and industrial authorship by the countries displaying their products. The possibilities of protection proved to be even weaker with regard to inventions by citizens from foreign countries. In the age of mercantilism, many countries granted patents to the first importer of foreign inventions. These so-called "import patents" could subsequently even prevent the first inventor from selling his goods in the related country.[38]

Patent rights are granted by the country. The country allows a patentee to exploit his invention for a limited time and prevents anybody on his territory from using the same invention for commercial purposes or from importing goods that are produced violating these rights. Therefore, patents function as non-tariff impediments to imports of certain goods, as has previously been outlined.

Consequently, and due to the fact that patents were derived from monopolies, both possibilities have been discussed: both the internationalisation of patents and their abolition in general. A debate on the economic benefits and justifiability of intellectual property

Universal Exhibitions, Paris 2002, pp. 131-144; G. Wegner, Die Welt – an einem Ort erfahrbar. Weltausstellungen als Weltereignisse, in: T. Werron / R. Unkelbach / S. Nacke (eds.), Weltereignisse, Wiesbaden 2008, p. 77.

32 H. Caro, Ueber die Entwickelung der Theerfarben-Industrie, Berlin 1893, p. 80.

33 W. Benjamin, Paris, Hauptstadt des XIX. Jahrhunderts, in: W. Benjamin, Illuminationen, Frankfurt am Main 1977, p. 176.

34 C. Pieper (ed.), Der Erfinderschutz und die Reform der Patentgesetze. Amtlicher Bericht über den Internationalen Patent-Congress zur Erörterung der Frage des Patentschutzes, Dresden 1873, p. 2.

35 J. A. Auerbach, The Great Exhibition of 1851: A Nation on Display, New Haven/ London 1999. See also P. Greenhalgh, Ephemeral Vistas. The Expositions Universelles, Great Exhibitions and World's Fairs, 1851–1939, Manchester 1988; U. Haltern, Die „Welt als Schaustellung". Zur Funktion und Bedeutung der internationalen Industrieausstellung im 19. und 20. Jahrhundert, in: Vierteljahresschrift für Sozial- und Wirtschaftsgeschichte 60 (1973), p. 140; A. Andersen, Chemie als Zukunftstechnologie. Teerfarbeninsutrie vor dem Zweiten Weltkrieg, in: P. Hernter/ D. Schott (eds.), Zukunftstechnologien der letzten Jahrhundertwende: Intentionen – Visionen – Wirklichkeiten, Berlin 1999, pp. 85-101; J. P. Murmann, Knowledge and Competitive Advantage. The Coevolution of Firms, Technology and National Institutions, Cambridge 2003; A. Engel, Farben der Globalisierung. Die Entstehung moderner Märkte für Farbstoffe 1500–1900, Frankfurt am Main / New York 2009.

36 H. Caro, Ueber (annotation 32), p. 45.

37 For this topic refer to D. C. North, Structure (annotation 29); M. Seckelmann, Industrialisierung (annotation 16), p. 35.

38 B. Dölemeyer, Einführungsprivilegien (annotation 30), p. 207; A. Heggen, Erfindungsschutz und Industrialisierung in Preußen, 1793–1877, Göttingen 1975.

rights took place in Great Britain, France, the Netherlands, Germany and Switzerland during the time of the Industrial Revolution. In the "liberal era" of the 19th century, monopolies were worked against in all of these countries. While in Great Britain the *Statute of Monopolies* of 1624[39] was initially adapted by *jurisdiction* to the needs of industrialisation, the French and American model opted for a foundation of the inventor's right in their *constitutions* and their *patent legislation*. All three models, however, went back to the philosophy of *John Locke,* who declared everything one could form with one's hands or mind to be the property of the one who formed it.[40] *Immanuel Kant* and *Johann Gottlieb Fichte* construed an individual right to one's ideas and inventions not unlike this justification.[41]

In Germany, nonetheless, the "crisis of patent protection" went deeper.[42] This applied even more to Switzerland and the Netherlands, where patent legislation was altogether abandoned for a certain period. Other models of constructing rights to new technical information (which patents are) can be conceived: unhindered access, collective ownership of knowledge, sustainability instead of exploitability, unlimited access to knowledge instead of ownership for a limited time.[43] Nonetheless, simplifications and mystifications have to be avoided. The limited time span of patents in the Western model is, for instance, already a compromise between societal and individual interests. Technical knowledge is held in common after the protected time span, not lost.

The anti-patent tendency was motivated by the idea of infinite scientific progress. According to the view of leading free-trade economists, technological progress was self-inductive, and the role of inventors and engineers consisted merely in picking the fruits of new techniques as soon as they were ripe.[44] Patents, by contrast, appeared to be the rotten fruits which only reduced the yield of a wholesome harvest. Thus a member of the German free-trade movement predicted in 1863: "Patents are ripe to fall and be recognised more and more as a foul fruit hanging from the tree of human culture."[45] To their opponents, therefore, patents, which excluded others from the commercial utilisation of an idea, merely appeared to be a reminder of the old-fashioned viewpoint that the government should direct the economy.

Following a lengthy discussion on the pros and cons of patent rights, which developed in the middle of the 19th century, it was finally concluded that the advantages (in most

39 The common reference to the year 1623 for the enactment of this statute is due to the fact that, until the enthronement of George III, statutes were dated from the first day of the parliamentary session onwards. See F. Damme / R. Lutter, Das Deutsche Patentrecht. Ein Handbuch für Praxis und Studium, Berlin 1925, p. 3.

40 J. Locke, The Second Treatise of Government. An Essay concerning the True Original, Extent, and End of Civil Government, in: ibid., Two Treatises of Government, Cambridge [1689] 1988.

41 For further References see C. P. Rigamonti, Geistiges Eigentum als Begriff und Theorie des Urheberrechts, Baden-Baden 2001, p. 22; M. Seckelmann, Indusrialisierung (annotation 16), p. 129.

42 M. Seckelmann, Industrialisierung (annotation 16), p. 127.

43 Many of these criteria applied to knowledge can be found with indigenous people. Regarding this issue see the contribution of S. Francis.

44 K.-H. Manegold, Der Wiener Patentschutzkongreß von 1873. Seine Stellung und Bedeutung in der Geschichte des deutschen Patentwesens im 19. Jahrhundert, in: Technikgeschichte 38 (1971), p. 162.

45 V. Boehmert, Die Erfindungspatente, Berlin 1869, p. 80.

countries: temporary and conditional) of bestowing industrial property rights outweighed their drawbacks.[46]

1. The Paris Convention of 1883

The urge to reach an international agreement on the treatment of exhibits was primarily felt when American firms threatened to boycott the Global Exposition of Vienna, which was to be held in 1873. In September 1871, the programme of the planned Global Exposition had been published, translated into all languages and distributed to all the nations existing in 1871.[47] However, the American inventors and enterprises only wanted to display their inventions in a country where the exhibits were protected in accordance with American standards.[48]

Thus, the Austrian government enacted a regulation that allowed the displayed inventions to be protected for the whole of 1873, when the exposition was to be held. In addition, an international patent congress was held with the aim of setting up an international and general code for the protection of exhibits during global expositions. It took place in Vienna between 4 and 8 August 1873, in the conference programme of the exhibition.[49] 158 participants attended the conference.[50]

The congress agreed on setting minimum requirements for 'reasonable' patent law, which all 'civilised nations' had to enact. Secondly, they agreed to advise all these nations to form an international union which would guarantee any citizen of its member states equal treatment to the inhabitants of any other member state.

To enforce its resolutions, the congress installed an executive committee. It consisted of the Vienna conference's preparatory committee and several international experts. It was instructed to hold a new congress on the matter whenever it seemed to be favourable. Moreover, the participants were invited to form national sections.

In the course of the preparations for the 1878 Global Exposition in Paris, a conference on the protection of the exhibits became part of the conference programme again. The second *International Congress on the Protection of Industrial Property* convened in Paris from 5 to 17 September, 1878. It unified 500 participants from countries, professional associations, chambers of commerce and other organisations coming from even more countries than those that had attended the Vienna conference.[51] The conference

46 F. Machlup / E. Penrose, The Patent Controversy in the 19th Century, in: The Journal of Economic History 10 (1950), p. 5; M. Seckelmann, Industrialisierung (annotation 16).

47 C. Pieper, Der Erfinderschutz (annotation 34), pp. 2-3.

48 Ibid.

49 Invited were "delegates of governments, members of exhibition committees, delegates of trade or technical associations or of chambers of commerce from all nations, industrialists, traders, technicians, economists and everybody who feels, either as an inventor or exhibitor, a vocation to give substantial support to the interest of the envisaged issue", in: C. Pieper, Der Erfinderschutz (annotation 34), p. 11.

50 Coming e.g. from Denmark, France, the German Empire, Great Britain, Greece, Italy, the Netherlands, Romania, Russia, Sweden, Switzerland and the United States, or they even reported to Japan.

51 Comité Central des Congrès et Conferences / Ch. Thirion (eds.), Congrès International de la Propriété Industrielle, tenu à Paris du 5 au 17 Septembre 1878, comptes redus stenographiques, Paris 1879, p. 12.

members agreed on an envisaged protection of three sections of industrial property (for the protection of designs and models and the section for trademarks and commercial names). It was modelled on the Universal Postal Union (*Union postale universelle*, UPU) which had first been founded under the name General Postal Union in Berne in 1874 by 22 signatory states.[52]

The congress installed a permanent commission which was vested with full power to induce negotiations with the national governments and to hold new conferences. As soon as the managing French section had drafted a proposal for an international section, it was discussed within the national sections. After the alterations had been worked on by the French section, the modified draft was submitted to all interested foreign governments in 1880 and the French government invited the interested foreign governments to a diplomatic conference. At this conference, which convened in Paris in March 1883, the modified draft was discussed. It again underwent several alterations. Most importantly, a common patent law for all countries finally proved to be impossible. However, a union was created which had to guarantee any citizen of its member states equal treatment to the inhabitants of any other member state. It appeared problematic that at least two countries which were willing to join the union did not have their own patent law: the Netherlands and Switzerland. The convention only stated a merely "moral" obligation[53] to enact a patent law. Although this obligation was later combined with considerable economic pressure from the other member states, it took Switzerland several years before it finally enacted a patent law in 1888 and the Netherlands even longer, until 1910. On March 20 1883, Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia and the Swiss Federation finally signed a treaty which came into force after the ratification documents had been exchanged on July 7 1884.

The most important article of the convention dealt with mutual acknowledgement of industrial property rights (Article 2 of the convention).[54] Another important point concerned the priority right. In order to facilitate the application procedure, the inventor had to be granted a certain period during which he could decide whether he wished to apply for a patent for the same invention in any of the other member states. During this period, a valid patent could not be awarded to any other applicant (Article 4 section 1 of the convention). Since the prime motivation for harmonizing patent legislation was

52 Austria, Belgium, Denmark, Egypt, France, Germany, Greece, Great Britain, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Rumania, Russia, Sweden, Switzerland, Serbia, Spain, Turkey and the United States, see H. Bühler, Der Weltpostverein. Eine völkerrechtliche und wirtschaftspolitische Untersuchung, Berlin 1930, p. 22; K.-H. Schramm, Der Weltpostverein, Berlin 1983, p. 20; also M. Vec, Recht und Normierung in der Industriellen Revolution (annotation 2).

53 B. Dölemeyer, Die internationale Rechtsvereinheitlichung auf dem Gebiet des Gewerblichen Rechtsschutzes, in: H. Coing, Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, vol. 3, Munich 1986, p. 4210.

54 Convention pour la Protection de la Propriété Industrielle. Signée a Paris le 20 mars 1883, in: Recueil général de la législation et des traités concernant la propriété industrielle, tome VI, Berne 1901, pp. 586-602.

related to the treatment of exhibits at global exhibitions, this issue was settled in Article 11 of the convention.[55]

2. Further development up to the Second World War

The union additionally installed its own law enforcement agency. An *International Bureau for the Protection of Industrial Property* was founded, according to Section 13 Subsection 1 of the Paris Convention. This bureau was set up in Berne, financed by the member states of the union and managed by the Swiss Department for Commerce and Agriculture. The bureau collected data from the member states. In its periodical *La Propriété Industrielle* it informed readers about the latest developments concerning the protection of industrial property (e.g. new national patent regulations) from 1885 onwards. After the *Agreement concerning the International Registration of Marks* was signed in Madrid in 1891,[56] the bureau was also mandated to register trademarks on an international basis. In 1892, it began to publish the newly registered trademarks in its journal *Les Marques Internationales*. In 1893, the bureau merged with the agency of another convention. The *Berne Convention for the Protection of Intellectual Property Rights* of 1886[57] ensured literary authorship would be respected. As the Berne Convention had also set up an International Bureau in Berne to carry out administrative tasks, these bureaus were united in 1893 under the title of *United International Bureaux for the Protection of Intellectual Property* (BIRPI).

The Paris Convention provided an option for other countries to join (article 16). Up until the First World War, this invitation was accepted by many of them. The British government, which had to struggle with some opposition to the ratification act, declared it would join the union in 1884, as did Ecuador and Tunisia. Although Ecuador and Salvador then left the union in 1886, and Guatemala likewise in 1894, the convention was soon ratified by Norway and Sweden (1885), the United States of America (1887), the Dutch part of India (1888), Surinam and Curaçao (1890), New Zealand and Queensland (1891), Denmark (1894) and Japan (1899). The Dominican Republic, however, joined the union in 1884, left it in 1889 and re-joined in 1890. However, the German and Austro-Hungarian Empires did not initially join the union. Although this was seemingly contradictory, considering that German engineers had been among the strongest promoters of an international agreement around 1873, the German trade associations were ambiguous with regard to joining the union. This was due to the fact that the inner structure of the union was modelled along the lines of the French patent system. Throughout the Paris conference, the German and Austrian sections of the asso-

55 A. Osterrieth / A. Axster, Die internationale Uebereinkunft zum Schutze des gewerblichen Eigentums vom 20. März 1883 (Pariser Konvention) nebst den uebrigen Vertraegen des Deutschen Reichs über den gewerblichen Rechtsschutz, Berlin 1903, p. 226.

56 Arrangement concernant l'Enregistèrement International des Marques de Fabrique ou de Commerce. Conclu a Madrid le 14 avril 1891, in: Recueil général (annotation 54), pp. 606-610.

57 Regarding this issue see the contribution of I. Löhr in this volume.

ciation for harmonizing intellectual property legislation which had initiated the Vienna conference on patent protection could be seen to have lost their influence. Therefore, the German Federal Government opted – following the advice of leading industrialists – for the 'classical' style of having mutual trade agreements with specific countries. Soon, however, the policy of bilateral agreements proved to be inadequate. Serious differences between German and Swiss dyestuff producers, which mostly ended up in court, caused the representatives of the modern German industries, namely the chemical industry, to change their view. After the United States had joined the International Union in 1887, the statutes of the latter were discussed once more. They were then changed, in two distinctive aspects, in favour of the German patent system. Germany finally joined the union in 1903, and Austria and Hungary in 1909.

Since the Paris Convention only provided for mutual recognition of national patents but no common patent of its own, several initiatives were carried out for further harmonisation of patent legislation ("*loi uniforme*"). This vision of a universal 'global patent'[58] or 'global trademark' came to a preliminary end during the First World War. Nonetheless, attempts were resumed after the war. The Paris Convention was formally reinstalled in accordance with Article 286 of the Versailles Treaty.[59]

During the interwar years, the international patent system was further developed. The convention of The Hague in 1925, for instance, was concerned with harmonising the time span of patent protection (15 years). Transnational debates affected the *'droit moral'* of employed inventors.[60]

3. Setting up the GATT and the negotiations of the TRIPS Agreement in 1994

The Second World War introduced new actors onto the stage of international patent harmonisation. New regimes concerned with international trade policy were installed, initially competing with the WIPO until the latter system was integrated into the former. Starting with the Atlantic Charta of 1941, international relations, following an US-American initiative, underwent formalisation and institutionalisation. This applied to the establishment of the United Nations in 1945 and the World Bank in 1944 and, finally, the ratification of the GATT Agreement in 1947.[61] Another US project was the

58 A. Jost, Eine Anregung zur Internationalisierung des Patenwesens, Antwerpen 1910.

59 A. Osterrieth, Gewerblicher Rechtsschutz und Urheberrecht im Friedensvertrag von Versailles, Berlin 1920; as for this topic also refer to F. Mächtel, Das Patentrecht im Krieg, Tübingen 2009.

60 Regarding the 'droit moral', refer to K. Gispen, New Profession, Old Order, Engineers and German Society, 1816–1914, Cambridge 1989; ibid., Poems in Steel, National Socialism and the Politics for Inventing from Weimar to Bonn, New York / Oxford 2002; ibid., Die Patentgesetzgebung in der Zeit des Nationalsozialismus und in den Anfangsjahren der Bundesrepublik Deutschland, in: R. Boch (ed.), Patentschutz und Innovation in Geschichte und Gegenwart, Frankfurt am Main 1999, pp. 85-99; A. K. Schmidt, Erfinderprinzip und Erfinderpersönlichkeitsrecht im deutschen Patentrecht von 1877 bis 1936, Tübingen 2009; M. Seckelmann, Der „Dienst am schöpferischen Ingenium der Nation" – Die Entwicklung des Patentrechts im Nationalsozialismus, in: J. Bähr / R. Banken (eds.), Wirtschaftssteuerung durch Recht im Nationalsozialismus, Frankfurt am Main 2006, pp. 237- 279; M. Seckelmann, Industrialisierung (annotation 16), p. 325.

61 Ch. Herrmann / W. Weiß / Ch. Ohler, Welthandelsrecht (annotation 8), p. 51.

establishment of an *International Trade Union* (ITU), but this project was abandoned in 1950. The *General Agreement on Tariffs and Trade* (GATT) that had been drafted as a preliminary settlement in order to prepare the International Trade Union was then taking the part of a quasi-constitution of the international trade policy. With the foundation of the World Trade Organization, the international trade policy was finally given a formal constitution in 1995. The Treaty of 1994 that enacted that settlement contained some new agreements as appendices. One of them was the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods* (the aforementioned TRIPS Agreement) of 1994.

In 1994, the WIPO entered into an agreement with the *World Trade Organization* (WTO) which was derived from the international organisation formed by the *Agreement on General Tariffs and Trades* (GATT). The reasons for this development have already been touched on at the outset of this article: During the Conference in Punta del Este, the leaders of the member states of the WTO were looking for ways in which to make the WTO more effective. One of the possible measures was by integrating regulations concerning intellectual property rights into the WTO framework which had been left out previously. The reasons for the integration of the Paris Convention have been mentioned above: The establishment of the WTO resulted from a movement of bundling the different pluri- and multilateral trade agreements under one umbrella organization: the WTO. This situation caused problems due to the fact that most trade conflicts are affected by questions of (technical) information in one way or another in an 'information society'. Nonetheless, it has to be stated that the Uruguay round left the initial mandate given to it at the conference in Punta del Este: Initially, this was only seeking to combat imitations of products, but the members of the Uruguay round extended their negotiations to setting up rules for trade related aspects of intellectual property rights.[62] This procedure evokes memories of the setting up procedure of the Paris Convention at the international patent congresses of Vienna (1873) and Paris (1878).

According to the WTO Agreement (Section II Subsection I), this organisation will now supply the organisational framework for the trade relationships of its member states. Furthermore, the organisation, with its seat in Geneva, has the competence to administer related trade agreements (Section III Subsection 1 of the WTO Agreement) and provide a panel for negotiations (Section III Subsections 2 and 3) and a Trade Policy Review Mechanism (Section III Subsection 4). The broad competences of the WTO lead to a linkage of the different subsections of the WTO and their organs.[63]

The so-called TRIPS Agreement (*Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods*) in 1994 enhanced the obligations concerning the patent protection of its member states. In Article 2.1, the TRIPS Agree-

62 R. Senti, WTO. System und Funktionsweise der Welthandelsordnung, Zürich 2000, p. 655.

63 S. Mauderer, Der Wandel von GATT zur WTO und die Auswirkungen auf die Europäische Gemeinschaft unter besonderer Berücksichtigung der unmittelbaren Anwendbarkeit des primären WTO-Rechts, Osnabrück 2001, p. 23; W. Meng, WTO-Recht als Steuerungsmechanismus der Neuen Welthandelsordnung, in: M. Klein et al. (eds.), Die Neue Welthandelsordnung der WTO, Amsterdam 1998, p. 20.

ment of April 15 1994, which came into force on January 1 1995,[64] obliged its member states to comply with the most important articles (Art. 1-12 and 19) of the Paris Convention. Furthermore, it stated stronger minimum requirements for patent protection systems (duration of 20 years counted from the filing date (Art. 33 TRIPS Agreement)). The TRIPS Agreement forms annex 1 C of the legal framework of the World Trade Organisation.[65] It requires its member states to keep minimum standards regarding patent protection, including protection of pharmaceutical products.[66] The last requirement is related to the fear of industrialised nations regarding re-imports of medical products from less developed countries that could (ordered via internet etc.) easily find their way back into the industrialised nations when imported by less developed countries without taking their patent protection into consideration. As outlined previously, the TRIPS Agreement thus concerned a point that is crucial to any state and even more so to African countries, whose populations are strongly affected by the AIDS disease: the national health system.[67] Respecting the requirements of the TRIPS agreement, which those states need to catch up with the international trade networks, necessary for export and import, imposes restrictions on those countries in solving one of their most crucial domestic problems, namely by making cheap imports of medicine available – while at the same time endangering a sustainable import (and as a result of the strong reciprocity principle:[68] export) policy. Here, the disadvantages of joining international treaties expose a loss of sovereignty, which can – as demonstrated by this extreme example – not only strongly impact the trade policy but by means of reflection also other policies in the signatory states.

In order to at least deal with some of the relevant problems, the *Declaration of Doha* of 2001[69] was negotiated. In this Declaration, the member states of the WTO declared their concern regarding the implications of patent protection on the prices of medicine. Furthermore, they agreed on some official interpretations of the TRIPS concerning the right of the member states to grant compulsory licences. States can grant such licences to enterprises under certain circumstances when the patent owner does not voluntarily give a licence. These licences have to be financially compensated by the recipient, whereas the fee is fixed by the state. The problem in African countries, however, consists in the fact that sometimes no possible recipient enterprise is available due to the state of the

64 The TRIPS Agreement obliged industrialised countries to fulfil its requirements by 1996, developing and transitional countries by 2000 and the least developed countries by 2006.

65 Ch. Herrmann / W. Weiß / Ch. Ohler (annotation 8), p. 45 and p. 51.

66 Regarding the protection of pharmaceutical products, see the contribution of S. Francis to this volume.

67 Ch. Herrmann, TRIPS, Patentschutz für Medikamente und staatliche Gesundheitspolitik: Hinreichende Flexibilität?, in: Europäische Zeitschrift für Wirtschaftsrecht (2002), p. 37-43; P. Rott, TRIPS-Abkommen, Menschenrechte, Sozialpolitik und Entwicklungsländer, in: GRUR Int. (2003), pp. 103-118; F.M. Abbott, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, in: Vanderbilt Journal of Transnational Law 22 (1989), pp. 689-745.

68 On this issue, see the next paragraph.

69 Regarding the Declaration of Doha, see the quotations in annotation 12 and S. Mildner, Welthandel und Entwicklungsländer. Chancen der Doha-Runde für die Dritte Welt?, in: Internationale Politik (2002), pp. 29-36.

industry – and then the import question is raised again. In this case, the Declaration of Doha provides a panel in which the related problems between the states affected can be discussed: the "TRIPS Council".

Although the Declaration of Doha cleared some points and provided a new conflict regulation, many points were still unsettled: The TRIPS Agreement opted not for a uniform patent law but for a guarantee of minimum requirements (Art. 1.1 TRIPS). However, those requirements were construed according to the needs of the industrialised countries. By extending the TRIPS negotiations from an anti-piracy policy to a more integrative settlement, the Western standards were taken as a measure for "minimum requirements".[70] Art. 4(b) of the TRIPS Agreement distributed the advantages of the agreement in favour of the industrialised countries. The overall principles of the TRIPS agreement, the "most-favoured nation treatment" "inhabitant-similar"[71] patent protection, could be limited when it came to intellectual property rights safeguarded by the Rome Convention. The result was that not all member states' citizens but only those of member states guaranteeing a similar patent protection could profit from a specific intellectual property protection in another member state (exemption from the "most-favoured nation treatment" of Art. 4).[72]

This regulation is perhaps the crucial point that distinguishes the TRIPS Agreement from the Paris Convention: The Paris Convention set out a mere moral obligation to set up a patent legislation in accordance with its principles (and even set up its international bureau in Switzerland that did not have a patent legislation at that time). The TRIPS Agreement departed from this principle and set out a basic reciprocity. This principle derives from the revised Berne Convention[73] but is, when it comes to patent conventions, a fallback to the period of mercantilism.

III. A History of propertisation?

The international system regarding trade-related intellectual property rights developed between 1883 and 1994. The first step in this development was an acknowledgement of the economic benefits (not necessity) of patent protection after the discussion during the liberal era regarding other possibilities such as an unimpeded common use of new technical knowledge. The German "patent controversy" between patent supporters from

70 H. Ullrich, Technologieschutz nach TRIPS: Prinzipien und Probleme, in: GRUR Int. (1995), p. 630.

71 Ch. Herrmann / W. Weiß / Ch. Ohler, (annotation 8), p. 433.

72 Art. 4 states: "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: […] b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country." As to Art. 4 of the TRIPS Agreement see B. Lorenzen, Designschutz im europäischen und internationalen Recht. Zur Anwendung und Auslegung internationalen und europäischen Designschutzrechts, Münster 2002, pp. 30-31.

73 R. Senti, WTO (annotation 52), p. 656.

the new profession of engineers and Prussian economists, who mostly favoured other forms of distributing technical knowledge, can illustrate this debate.[74] The next step was the option of mutual acknowledgement of patent protection between states, not only by mutual trade negotiations or treaties but also by an international convention, the Paris Convention. This decision helped the international trade system to develop and helped economic growth during industrialisation[75] by safeguarding certain prerequisites for import and export and thus for industrial research. This development can be seen as a process of propertisation.

However, did this development necessarily lead to an individual, time-limited property right or – in *Hamilton's* words – a "Western, Protestant-based capitalist copyright"?[76] Yes and no. On the one hand, as demonstrated above, the TRIPS Agreement declared many elements of the patent law of an industrialised society to be "minimum requirements", which poses enormous problems for less developed countries. The central problem is how to safeguard these requirements with a strong reciprocity principle. In this regard, Hamilton is certainly right. On the other hand, certain doubts arise regarding the aspect of Protestantism. Rather than Protestantism, the governance set regarding technical information is based on the individual rights of the Enlightenment and the French Revolution, which declared the ideas of the author and inventor to be his "property". This concept goes back to the philosophy of *John Locke* who declared everything one could form with one's hands or mind to be the property of the one who formed it.[77] The discussion during the Enlightenment, namely by *Immanuel Kant* and *Johann Gottlieb Fichte*, stressed the individual right as being the foundation of the right to one's ideas and inventions. Thus, the foundation of the Western model of intellectual property law is influenced not so much by Protestantism as by the Enlightenment which in certain regards opposed the traditional property structure of the Catholic Church. According to *Max Horkheimer* and *Theodor Adorno*, the Enlightenment had a dialectic structure.[78] While it enabled the individual against despotism on the one hand, it established a property structure which *Crawford B. Macpherson,* in his famous critique of *John Locke,* called "possessive individualism".[79] Thus the new, Enlightenment-based property structure – including intellectual property rights – is inclusive and exclusive at the same time. Inclusive, when it involves the rights of the citizen (and one could go further into the question of which citizens are meant, male, female etc.) and exclusive, when it involves property and possession. After all, the system is not specifically Protestant but "individual", or perhaps, along the lines of *Macpherson,* "possessively individual".

When regarded as based on a *human right*, as the Enlightenment argued, an intellectual property right tends to be universal and expanding. When it comes to this, the aspect

74 F. Machlup / E. Penrose, The Patent Controversy (annotation 46).
75 D. C. North, Structure (annotation 29).
76 M. A. Hamilton, The TRIPS-Agreement (annotation 20).
77 J. Locke, The Second Treatise (annotation 40).
78 M. Horkheimer/ Th. W. Adorno, Dialektik der Aufklärung, Frankfurt am Main 1971, p. 42.
79 C. B. Macpherson, Die politische Theorie des Besitzindividualismus: Von Hobbes bis Locke, Frankfurt am Main 1989.

of *space* is related to that of *time*. Intellectual property rights in an internationally interlinked economy have an inherent tendency to be expanding. And this expansion is twofold. On the one hand, it wishes to acquire more and more topics under its command. On the other hand, it wishes to leap over the limits of states and territories. With regard to the first point, more and more material is assumed under its regime. As can be seen, patent protection – although widely discussed – increasingly tends to dominate "white landmarks" that nobody previously considered to be "white", for instance the genetic information of creatures, the knowledge of healing processes or the source code of a computer program.

This tendency is the subject of fierce debate. However, in our opinion a distinction has to be made again between two points. With the German law professor *Thomas Dreier*, a first group of cases, which are made the object of intellectual property rights, has to be identified: namely, those arising when new technologies allow new possibilities of imitation and new possibilities of protection are called for by at least some of the providers of information that have invested their time or money in the development.[80] And here, it can be seen that new information and new possibilities pose the question of their property structure – however this will be solved for the specific case.

Another case has to be distinguished from this one, concerning knowledge or material that has previously existed but not been regarded as a possible object of intellectual property rights until a certain point of technology or foreign intervention occurred. Examples of this are the methods of healing that are conserved by indigenous people and also, even though the methods of deciphering are new, the genetic information of plants used during this healing process.[81] In this case, the question of ascribing common knowledge to a specific person, even when he or she develops a new technical or medical application for it, is a different one and should be treated with the utmost sensitivity.

The Declaration of Doha was not far-reaching enough because it did not chance a strict reciprocity principle. However, from a propertisation perspective it can provide hints as to what a prospective international governance structure regarding intellectual property rights could look like. When it comes to rights to technical information, the governance structure does not necessarily have to be either "common" or "individual". Both governance structures mark two poles of a continuum in which different variants can be imagined. The granting of compulsory licences, for instance, opens up a possibility of designing a more 'liberally inclusive'[82] governance structure of property rights, which is in some respects analogous to the social responsibility clause concerning the property right in Art. 14 of the German constitution.

80 Th. Dreier, Verdichtungen und unscharfe Ränder – Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums, in: Comparativ 16 (2006), no. 5/6, p. 187.

81 As to this issue refer to the contribution of S. Francis in this volume. See also A. v. Hahn, Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der public domain, Berlin 2004.

82 H. Siegrist, Die Propertisierung (annotation 6).

And now, the propertisation perspective shall give way to more than an analysis of the existing structure of the international property rights system. If understood not only as a heuristic category but also as a political programme,[83] it demands the formulation of a separate vision for the future of international patent protection.

Thus, taking all precautions into consideration, a separate vision for this future shall be formulated: The idea of a social responsibility of intellectual property rights can be, in our opinion, also be applied to international trade relations. Nowadays (even given the background of the historical development) there is hardly any alternative for lesser and the least developed countries to try to take part in the international trade system. On the other hand, ways have to be sought (and the Declaration of Doha was too inadequate) in order to enable the developing and lesser and least developed countries to take an active part in the international system. Measures have to be conceived that either affect the patent system, for instance more freedom for specific national solutions in countries that are specifically suffering from AIDS and/or other measures to help those countries to become partners in international trade relations, e.g. more favourable import regulations concerning their (e.g. textile) products, maybe additionally financial aids in order to help enterprises from those countries to develop (maybe by meso-credits analogous to micro-credits). Then, there will be a chance that Meili's visionary words of "global citizens" in the sense of enabled "citoyens" can at least begin to come true.

83 Ibid.

The Propertisation of Knowledge: Leaving the Owner out

Sabil Francis

RESÜMEE[1]

Der Aufsatz untersucht am Beispiel der Propertisierung traditionellen Wissens die sozialen und politischen Konsequenzen der Erweiterung des geistigen Eigentums auf Gegenstände, die bis dahin primär einer kulturellen Logik unterstanden. Der Autor analysiert die Komplexität und Kontingenz einer *global governance* geistiger Eigentumsrechte, sobald diese mit den Anforderungen einer globalen Informationsgesellschaft und der Privatisierung und Ökonomisierung weiter Teile der angewandten Forschung konfrontiert wird. Dabei skizziert er ein mehrdimensionales Spannungsfeld, das geprägt ist vom wirtschaftlichen und politischen Ungleichgewicht zwischen den Industrie- und Entwicklungsländern, von Interessenskonflikten zwischen den lokalen, nationalen, multinationalen und zwischenstaatlichen Akteuren, von nicht hinreichend aufeinander abgestimmten Problemlösungsstrategien und von unterschiedlichen kulturellen Bewertungen des Verhältnisses von Gemeinschaft und Individuum. Der Beitrag führt zu zwei Erkenntnissen: Das Beispiel Indien zeigt, dass staatliche und private Akteure sich nicht notwendigerweise als Interessengemeinschaft im Kampf gegen die Propertisierungswut westlicher Unternehmen begreifen. Zweitens zeigt er, wie die Institutionalisierung des westlichen Modells einer exklusiven Eigentümerschaft an Erfindungen und technischen Innovationen in internationalen Konventionen und handelspolitischen Abkommen eine Situation geschaffen hat, in der nur noch die Rahmenbedingungen, aber nicht mehr die Propertisierung traditionellen Wissens verhandelt werden kann.

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The ownership of knowledge has expanded dramatically – moving even into nature.[2] At the same time, knowledge held in the commons, including the traditional knowledge of indigenous people has been rapidly moved into the realm of private property, or the "propertisation" of knowledge.[3] Currently, the benefit sharing model – where indigenous people are given a share in the commercial benefits that emanate from products created using their knowledge – is seen as an ideal way to compensate the holders of traditional knowledge for products created using their know-how. However, this paper contends that this model, though hailed widely, fails to redress issues of equitable distribution and instead creates new paradigms of property. It argues that current intellectual property rights (IPR) models are deeply rooted in a western cultural conception of IPR, that puts property at the centre of the debate and fails to address the protection of rights and claims over intangible assets such as traditional knowledge and that even well meaning activists who labour for indigenous people are confined by this cultural paradigm.

The extant literature is quite unbalanced with too much attention paid to conflicts over international rules and legal provisions and very little empirically grounded analysis of the actual social, political and cultural conflicts that the propertisation of knowledge along western standards causes in non-western societies. Moreover, knowledge is treated just like any other form of property, even though knowledge is inexhaustible and property is not.[4] How do historically marginalised communities react to the propertisation of their knowledge? This paper looks at one such agreement – the deal between the Tropical Botanic Garden and Research Institute (TBGRI),[5] in Kerala, India, with the Kani tribe who live in the Agastya forests of Kerala state, whose traditional knowledge of the invigorating properties of the "arogyapacha" (*Trichopus zeylanicus*, eng.trans. evergreen strength) was used to create an invigorating drug, "Jeevani". The resulting commercial benefits were shared with the tribe, and fulfilled recommendations of the World Intellectual Property Organization (WIPO) for a just and equitable benefit sharing agreement.

Benefit sharing agreements were first conceptualised by well meaning activists who rallied against bio piracy as a form of neo-colonial exploitation.[6] In the 1990s, and especially following the success of the benefit sharing agreement between the San tribe of South

2 Nearly 20 per cent of human genes are explicitly claimed as U.S. IP. The largest single patent owner of some 2000 human genes was Incyte Genomics, a US corporation. L. Palombi, (ed.) Gene Cartels Biotech Patents in the Age of Free Trade, Cheltenham 2009, p. 250.

3 C. Hann, Die Bauern und das Land. Eigentumsrechte in sozialistischen und postsozialistischen Staatssytemen im Vergleich, in: H. Siegrist/ D. Sugarman, (eds.) Eigentum im internationalen Vergleich (18.-20. Jahrhundert), Göttingen 1999, pp. 161-184; H. Siegrist, Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne, in: ibid. (ed.), Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen, Leipzig 2007 (Comparativ 5-6/2007), pp. 9-52.

4 S. Haunss, K. C. Shadlen (eds.) Politics of Intellectual Property: Contestation Over the Ownership, Use, and Control of Knowledge and Information, Cheltenham, U.K./ Northampton, Mass. 2009.

5 TBGRI is an autonomous research center established by the Government of Kerala in 1979. It has been accorded the status of a Center of Excellence in Conservation and Sustainable Utilisation of tropical plant diversity by the Ministry of Environment and Forests, Government of India. The key aim of the Institute is the conservation and sustainable utilisation of plant diversity in tropical India and the "arogyapacha" case has made it famous. For more see at URL: http://www.tbgri.in.

6 V. Shiva, Biopiracy: The Plunder of Nature and Knowledge, Cambridge, Mass. 1997.

Africa and the Pfizer pharmaceutical company[7] (the Hoodia case), in which, for the first time, an indigenous community shared the profits emanating from a product based on their traditional knowledge,[8] benefit sharing agreements were seen as an equitable way of sharing the benefits of commercial exploitation of indigenous knowledge. However, such agreements were usually made by non indigenous people, took an idealised conception of indigenous people that did not correspond to reality, and ignored the voice of the tribes themselves who were "spoken for". Indigenous people, denied agency, became mere subjects to be acted upon.

I analyse the benefit sharing agreement as a process that shapes the governance of intellectual property examining how such agreements influence the self perception of tribes, their behaviour, and the dynamic nature of cultural practices regarding traditional knowledge. The paper argues that, rather than allay the inequities that the propertisation of knowledge and the exclusivity that this entails means for traditional communities, benefit sharing agreements themselves are complex instruments that come with their own baggage. After briefly sketching the theoretical perspectives on traditional knowledge and intellectual property rights, I look at the lacunae in international agreements that address the issue, and then present the empirical evidence regarding the arogyapacha case.

Terms: local people, traditional knowledge and benefit sharers

In this paper, "local people" are defined as people who live in tropical forest habitats, whether indigenous or of mixed descent; the key question concerning them is how they can be provided reciprocal benefits for their traditional knowledge.[9] According to the International Intellectual Property Institute, traditional knowledge (TK) includes "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields".[10] I use the definition of benefit sharers as "the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and

7 For an extensive analysis see G. Dutfield, Intellectual Property, Biogenetic Resources and Traditional Knowledge, London 2004, pp. 52-55; R. Chennels, Ethics and Practice in Ethnobiology: The Experience of the San Peoples in South Africa, London 2007, pp. 413-427; G. Moon/ A. Aneesh, Intellectual Property Protection for Traditional Knowledge: The Case of the Hoodia Gordonia, Stanford 2005.

8 K.H. Mohai, Copyright in the Digital Era and Some Implications for Indigenous Knowledge, in: T. Pradip/ I. Ncube Mazonde (eds.), Indigenous Knowledge Systems and Intellectual Property in the Twenty-First Century: Perspectives from Southern Africa, Dakar 2007, pp. 66-77.

9 S. R. King et al., Biological Diversity, Indigenous Knowledge, Drug Discovery and Intellectual Property Rights: Creating Reciprocity and Maintaining Relationships, in: Journal of Ethnopharmacology 51 (1996), p. 46.

10 G.-W. and E. Garduno, Treading and Independent Course for Protecting Traditional Knowledge, in: International Intellectual Property Institute, URL: http://www.iipi.org (accessed February 2, 2008).

practices associated with such use and application".[11] However, as the "arogyapacha" case will show, this is hardly a simple matter. Trying to identify the benefit sharer, often when it comes to financial recompense, is something that challenges the definition and image of the tribe. Moreover, addressing concerns that stem from the propertisation of traditional knowledge is a process with its own set of contradictions.

Traditional knowledge and modernity

Globalisation has meant that traditional knowledge, which was of limited relevance, has suddenly become extremely important. This includes the key role of biotechnology[12] in an emerging knowledge economy,[13] the powerful position that the private sector has in the emerging "nan-cog-bio-info"[14] knowledge society,[15] and a denationalisation of science, a phenomenon evident in academic and policy-making circles after 1960, when the term "multinational" was first coined.[16] The consolidation and integration of pharmaceutical, chemical, industrial and other sectors, symbolised by a wave of mergers and acquisitions driven by competitive pressures, prohibitively expensive biotechnology research and development (R&D),[17] the potential for knowledge conglomerates and the super research university,[18] all underline this process. IPR practices also privilege broad patents that have the effect of driving competitors out of the market and, by deterring entry, increase consolidation.

What makes traditional knowledge significant is that pharmaceutical research is increasingly based on indigenous knowledge, especially in identifying beneficial plants. All plant based drugs in use are derived from fewer than 90 plant species. With more than 250,000 species of plant on Earth the commercial potential is enormous.[19] However, modern science is based on the "propertisation"[20] of knowledge, which breaks easily

11 S. R. King et al., Biological Diversity (annotation 9), p. 46.

12 C. Hamilton, Biodiversity, Biopiracy and Benefits: What Allegations of Biopiracy tell us about Intellectual Property, in: Developing World Bioethics 6 (2006), no. 3, p. 158.

13 See for example, E. K. Drexler, Engines of Creation: Challenges and Choices of the Last Technological Revolution, Garden City, NY 1986.

14 The convergence of information technology, bio technology, nano-technology, and cognitive sciences (Nano-Bio-Info-Cogno or NBIC).

15 J. D. Gaisford et al., The Economics of Biotechnology, Cheltenham 2003; K. E. Maskus, Intellectual Property Rights in the Global Economy, Washington DC 2000, p. 5; P. Pringle, Food Inc: Mendel to Monsanto – The Promises and Perils of the Biotech, Harvest, NY 2005.

16 S. M. Horrocks, The Internationalisation of Science in a Commercial Context: Research and Development by Overseas Multinationals in Britain before the Mid-1970s, in: British Journal for the History of Science 40 (2007), no. 2, pp. 227-250.

17 P. Newell, Globalisation and the Governance of Biotechnology, in: Gobal Environmental Politics 3 (2003), no. 2, pp. 56-71.

18 D. P. Baker, Privatisation, Mass Higher Education, and the Super Research University: Symbiotic or Zero Sum Trends?, in: Die Hochschule 2 (2008), pp. 36-53.

19 N. R. Farnsworth, Screening Plants for New Medicines, in: E. O. Wilson/ F. M. Peters (eds.), Biodiversity, New York 1988, pp. 61-73.

20 H. Siegrist, Die Propertisierung (annotation 3).

accessible knowledge held in the commons into IPR law protected fragments. Simultaneously, the juxtaposition of culture, property and rights, (cultural property, cultural rights, property rights) and the "indigenous" or "traditional" character of knowledge has given rise to a wave of well meaning efforts aimed at "protecting" indigenous people from capitalist exploitation, a trend that one author calls "a phenomenon little short of a global civil movement".[21] All this means that the policy response to a global tendency to propertise traditional knowledge and competing claims and protests will be crucial.

Traditional knowledge and the IPR regime: approaches

At its core, intellectual property is a system of permission-based restrictions. Those who "own" property set the default limits for those who wish to use it, subject to certain public policy constraints such as fair use.[22] Current debates around the propertisation of knowledge revolve around how knowledge should be dealt with – whether to make it exclusive and propertised, or to have an idealistic "knowledge is free" paradigm. Yet, while traditional wisdom remains unpatented and is open to access, most pharmaceutical firms have patented knowledge, arguing that they are not responsible for the poverty of their countries that have indigenous knowledge at their disposal but cannot exploit them commercially.[23]

In effect, this means building walls around knowledge that was previously in the public domain, in effect a modern enclosure movement.[24] Consequently, activists in the Third World have generally opposed the Western paradigms of intellectual property rights, coining the term "biopiracy"[25] to describe the activities of pharmaceutical companies who create expensive products based on traditional knowledge held in common with no single identifiable owner, and then patent them so as to create an exclusivity of knowledge – a new form of exploitation, akin to the conquest of the "New World" by colonialists.[26] For instance, in 1998, a coalition of two hundred non-governmental organisations challenged a series of U.S. and European patents involving local plant species. In each case, the charges were based on some form of "bio-piracy".[27] On the other hand, given

21 E. Hirsch / M. Strathern, Transactions and Creations: Property Debates and the Stimulus of Melanesia, New York, 2004, p. 4.

22 E. C. Kansa / J. Schultz / A. N. Bissell, Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas Via a "Some Rights Reserved" Model, in: International Journal of Cultural Property 12 (2005), pp. 287-289.

23 I. Mgbeoji, Global Biopiracy: Patents, Plants and Indigenous Knowledge, Ithaca, NY 2006.

24 See for example, A. Mushita / C. B. Thompson, Biopiracy of Biodiversity: Global Exchange as Enclosure, Trenton, NJ 2007. Shiva argues that instead of seeing nature as self-balancing and as having integrity of its own, corporations and many scientists view it as a source of raw materials leading to the „ownership" of nature, as well as of knowledge: V. Shiva, Biopiracy (annotation 6).

25 The term, with its connotations of plunder and illegality, is quite common in activist literature. See for example, V. Shiva, Biopiracy (annotation 6); A. Mushita / C. B. Thompson, Biopiracy (annotation 24); I. Mgbeoji, Global Biopiracy (annotation 23).

26 V. Shiva, Biopiracy (annotation 6).

27 S. Prakash, WTO Rules: Do They Conserve or Threaten Biodiversity?, in: The Journal of World Intellectual Property 3 (2000), no. 1, p. 160.

the intricate pattern of traditional knowledge, if such knowledge has to be paid for, this will lead to extremely expensive and complicated agreements with regard to the use of traditional knowledge. The debate in its essence revolves around what may rightfully be the subject of private ownership and both activists and bio prospectors follow practices that have deep roots in colonial modes of cultural perception. Thus, activists see indigenous communities as helpless and in need of protection, romanticising indigenous people, while bio prospectors see the rich resources of tribes as ripe for commercial exploitation. Both reflect a Western discourse about the "Other"[28] – reducing the tribe to mere bystanders who cannot actively engage with the current intellectual property paradigm. In both, the indigenous community is merely acted upon. What this shows is that property can culturally be conceived differently – the Western cultural mode of propertisation of knowledge, and the other in a community oriented perspective that gives importance to the commons.

Benefit sharing agreements were initially regarded as one way in which this gap could be bridged. If only indigenous tribes were trained to recognise the commercial value of their knowledge,[29] the argument ran, they could benefit enormously. Opponents saw such commercialisation of knowledge as destroying the tribe by eroding notions of communal property that are closely tied to tribal identity. Complicating the picture are systemic factors that disadvantage indigenous people: registering and defending a patent is complicated, prohibitively expensive, and rooted in an alien culture. Finally, the commons approach of indigenous communities is in direct opposition to the western paradigm that puts the individual, profit, and initiative at the centre of human activity. This in itself is not a reflection of an objective legal regime, but rather a cultural construct, with roots in European, and more specifically US, innovation culture – the American belief in individualism engendered by a pioneering spirit. Unsurprisingly, the first dedicated patent office in the world was in the United States. Thus, going beyond legalism, it is essential to see the cultural roots of IPR conflicts.

There have been other attempts to reconcile traditional knowledge and the rights of communities within the current paradigm. One example is the adoption of a "sui generis" mode that puts the nation state as the custodian of intellectual property rights in traditional knowledge, emphasising issues such as biodiversity protection, community rights, and sustainable uses.[30] Another approach has been the "some rights reserved" notion that falls between these two paradigms, making traditional knowledge accessible, but with some restrictions.[31] This approach tries to protect community owned knowledge paradigms from unfair commercial exploitation. Knowledge that is essential to scientific

28 The classic work on Western constructions of the "Other" remains E.W. Said, Orientalism, New York 1979. See also M. Sarup / T. Raja, Identity, Culture and the Postmodern World, Edinburgh 1996.

29 World Intellectual Property Organisation, Intellectual Property Needs and Expectations of Traditional Knowledge, Geneva 2001.

30 S. Ragavan / J. Mayer / O. Shields, Has India Addressed Its Environmental Woes? A Story of Plant Protection Issues, in: Georgetown International Environmental Law Review 20 (2007), no. 1, pp. 97-127.

31 E. C. Kansa et al., Protecting (annotation 22).

progress, such as patents in biotechnology, can be designated as "club goods"[32] permitting shared access to the information and its utilisation under conditions that emulate those of the public domain, but which may be enforced by invoking the rights of the original intellectual property owners – a contractually constructed, IPR-based "information commons".[33] Some authors have called for scientifically advanced nations to take explicit steps to take into account the pre-existing knowledge on which the patentable innovation might be based, before granting patents.[34]

Another way is to empower communities,[35] by vesting local communities with "custodianship rights of innovation" either through local community leaders who are nominated or appointed to act as trustees of traditional knowledge for the community, or through government custody of relevant intellectual property rights in trust for the local community.[36] The Indian government has toyed with the idea of Community Biodiversity Registers[37] that document the knowledge of conservation, as well as economic uses of biodiversity resources that rest with India's local communities. Local communities collaborate with high school and college students, and local NGOs, to collect information in a register. The information can be used or shared only with the knowledge and consent of the local community who, when consenting to the access, can charge fees. Decisions on how to disburse the funds are to be made through village community meetings. However, such a register means that hitherto secret knowledge moves into the public domain where corporate and research interests can freely access them.[38] However, the mechanisms of such empowerment, especially in countries such as India, where great gulfs exist in education and wealth, and tribal populations are among the most disadvantaged, have not been clearly thought out.

The state and IPR: the 1998 Convention on Biological Diversity (CBD) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The modern state also lays claim to property that was in the communal sphere, such as forests and traditional knowledge. This practice has roots in colonial times, when the

32 R. Cornes / T. Sandler, The Theory of Externalities, Public Goods, and Club Goods. Cambridge / New York 1996, pp. 33-35.

33 P. A. David, Using IPR to Expand the Research Commons for Science: New Moves in 'Legal Jujitsu', in: Conference Intellectual Property Rights for Business and Society, London 2006.

34 I. Muzu, Intellectual Property Rights and Biotechnology: How to Improve the Present Patent System, Venice 2006, p. 1.

35 J. D. Gaisford et al., The Economics of Biotechnology, Cheltenham 2003; V. Shiva, Biopiracy (annotation 6).

36 M. Blakeney, Communal Intellectual Property Rights of Indigenous People in Cultural Expressions, in: The Journal of World Intellectual Property 1 (1998), no. 6, pp. 985-1002.

37 Sustainable Use of Biodiversity Program Initiative International Development Research Centre, Canada, "Community Biodiversity Registers as a Mechanism the Protection of Indigenous and Local Knowledge", URL: http://idrinfo.idrc.ca/Archive/Corpdocs/114621/community.doc (accessed March 18, 2008).

38 A. V. Anuradha et al., Experiences with Biodiversity Policy-Making and Community Registers in India, London 2001.

state took over land or resources that were held in common.[39] International agreements recognise countries that seek increased access to genetic resources as the "user" countries and those holding the genetic resources and associated traditional knowledge as the "provider" countries.[40]

The Convention on Biological Diversity (CBD),[41] signed by 192 nations, has three main objectives: (a) The conservation of biological diversity (b) The sustainable use of the components of biological diversity and (c) The fair and equitable sharing of the benefits arising from the utilisation of genetic resources. However, a closer examination of the protocol reveals that it allows *nations* and *not* communities that own traditional knowledge to benefit from biotechnological innovation. The state often – either as the government or as a research organisation such as the TBGRI – is the intermediary in the interaction between traditional knowledge and its commercialisation. Thus, though developing countries have been vociferous in their opposition to the propertisation of traditional knowledge, usually the state claims ownership over traditional knowledge, while indigenous communities are reduced to mere bystanders.

Moreover, with near universal approval of the sanctity of private property, commercial entities have found it easy to propertise knowledge, giving rise to a powerful movement to draw the lines of the IPR debate, the battle ground of which is culture – whether music, movies, or traditional knowledge. Pharmaceutical companies have effectively lobbied for worldwide adaption of IPR paradigms based on the exclusivity of knowledge and an emphasis on the product rather than the process. India, which, after independence, followed a process-based patent system ensuring cheap drugs by manipulating the manufacturing process, had to switch to a product-based patent system that hiked the prices of essential drugs, although this did increase the profit of Indian pharmaceutical companies. In line with the TRIPS agreement, the Indian Patent Act of 1970 has been amended twice. The 1970 Act provided a process patent for five to seven years, while in the US and Europe product patents of 15-20 years were the norm. The first amendment in 1999 changed this to a product patent, and in December 2004 India changed its patent law again to meet a January 2005 deadline to allow patents on the chemical molecules used in drugs.[42]

As western IP law is based on individual property ownership, its aims are often incompatible with, if not detrimental to, those of traditional communities. What makes traditional knowledge resistant to propertisation is that it is too deeply rooted in the communities. Whether as part of the tribe's folklore, its medicinal knowledge, or its symbols, traditional knowledge was always part of the community. Until recently what

39 Ken-ichi Abe / Tuck-Po Lye / Wil de Jong, The Political Ecology of Tropical Forests in Southeast Asia, Kyoto 2003; M. Gadgil / R. Guha. This Fissured Land: An Ecological History of India, Berkeley 1993.

40 M. Chouchena-Rojas / M. Ruiz Muller / D. Vivas/ S. Winkler (eds.), Disclosure Requirements: Ensuring Mutual Supportiveness Between the WTO Trips Agreement and the CBD, Gland, Switzerland 2005.

41 For more details see URL: http://www.cbd.int/convention/ (accessed January 15, 2010).

42 E. S. Smith, Opening up to the World: India's Pharmaceutical Companies Prepare for 2005, Stanford, CA 2000, pp. 17-19.

protected it was its inaccessibility.[43] By contrast, the propertisation of knowledge is key to western science. Over the past century, "organised innovation"[44] and patent processes have become the hallmark of industrial Western science.[45] Despite claims to objectivity and value neutrality, the current legal regime is a cultural product of modernity and the West. Such a paradigm that favours the propertisation of knowledge is inherently hostile to traditional knowledge. For instance, take the definition of innovation – what is traditional is not new; there is no identifiable author or inventor; there is no documentation; and finally, traditional knowledge is already in the public domain.[46] Such requirements make it difficult for traditional knowledge – generally handed down from generation to generation – to obtain IP protection.

For many traditional communities, intellectual property is a means of developing and maintaining group identity and survival, rather than promoting individual economic gain. Moreover, memories of colonial exploitation have given rise to resentment over a Western paradigm of knowledge creation that stresses exclusivity and profit garnering as opposed to the open infrastructure of traditional communities.[47] Nevertheless, the rapid expansion of pharmaceutical research makes tribal communities "stakeholders" in the process of knowledge acquisition.[48] And in such a milieu, romanticising traditional knowledge and keeping it open and accessible would only mean that the most organised and the best qualified, which usually are private or organised government interests, can successfully exploit such knowledge. Thus the question is not one of access, but of how some domains of culture attain a proprietary cast, especially when they are protected by patent and inaccessible to the original owners of the knowledge.

The issue is as much cultural as legal. Attempts to address the issue from the perspective of the current IPR regime have, as an inherent weakness, the cultural and legal emphasis that is given to the propertisation of knowledge and organised innovation in the Western system. Thus the emotionally charged term "bio-piracy," by imposing a victimisation/exploitation paradigm, does not capture the complexity of the issue, especially the nuances of differing property paradigms, and the changes that are produced when one cultural paradigm is incorporated into another.

43 E. C. Kansa et al., Protecting (annotation 22), p. 289.

44 R. Landau / N. Rosenberg, The Positive Sum Strategy: Harnessing Technology for Economic Growth, Washington DC 1986, p. 302.

45 S. M. Horrocks, The Internationalisation of Science in a Commercial Context: Research and Development by Overseas Multinationals in Britain before the Mid-1970s, in: British Journal for the History of Science 40 (2007), no. 2, p. 228.

46 T. Greaves, The Intellectual Property of Sovereign Tribes, in: Science Communication 17 (1995), no. 2, pp. 201-213.

47 V. Shiva, Biopiracy (annotation 6).

48 E. C. Kansa et al., Protecting (annotation 22), p. 296.

The "arogya pacha" case[49]

"Arogya Pacha" is a plant (*Trichopus zeylanicus ssp. Travancoricus*)[50] which the TBGRI[51] used, in combination with three more ingredients, to synthesise and patent the Ayurvedic invigorating drug "Jeevani".[52] Significantly, the discovery of the plant was accidental rather than the result of an institutionalised process of benefit sharing. In 1987, an ethno-botanical expedition led by Pushpangadan, then a senior scientist of the Regional Research Laboratory (RRL), Jammu, under the aegis of the All India Coordinated Project on Ethno-biology (AICRPE),[53] was cataloguing the culture and bio-resource utilisation of the Kani. Trekking in the Western Ghat mountains, Pushpangandan noticed that his Kani tribal guides never seemed to grow tired. After being given the promise that they too would benefit if the "arogyapacha" could be commercially exploited, they revealed the closely guarded tribal secret that munching the unripe fruits of the "Arogyapacha" invigorated them.

As Pushpangadan already had access to high class laboratories under the AICRPE program, primary studies were carried out at the Ethno-pharmacology Division of Regional Research Laboratory (RRL), Jammu, leading to the isolation of active compounds from the leaves of the plant.[54] However, as the gestation period for a modern drug from a single compound was up to 15 years, Ayurvedic pharmaceutical methods, for which clinical trials are not legally required, were used to create and patent a multi-herbal formulation

49 For the technical details of the agreement I heavily draw upon A. V. Anuradha et al., Experiences (annotation 38); S. Chaturvedi, Kani Case: A Study for Genbenefit (2007), URL: http://www.ris.org.in/Kani_Case.pdf (accessed August 9, 2010); D.P. Agrawal, The Jeevani Elixir of the Kani Tribes of Kerala and Their Intellectual Property (IP) Rights, URL: http://www.infinityfoundation.com/mandala/t_es/t_es_agraw_jeevani_frameset.htm; N. D. Bijoy, Access and Benefit Sharing from the Indigenous Peoples' Perspective: The Tbgri 'Model, in: Law, Environment and Development Model 3 (2007), no. 1, pp. 1-23; and the official form submitted to the ***Equator*** Initiative ***Prize*** 2002 at the Earth Summit held in Johannesburg that nominated this benefit sharing agreement for the prize.

50 Belonging to the family Trichopodaceae, the plant was a herbaceous, perennial, rhoizomatous plant and was also known as "varahi" – one of the 18 divine herbs mentioned in the ancient Ayurvedic treatises, Charaka Samhita and Susruta Samhita.

51 Tropical Botanic Garden & Research Institute. For more details see annotation 5.

52 Jeevani is claimed to have anti-fatigue, anti-tumour, antioxidant, antiallergic, aphrodisiac, immunomodulatory and hepatoprotective actions. Details of the product can be seen at URL: http://www.jeevani.com/.

53 The AICRPE, a multidisciplinary and multi institutional project initiated in 1982 under the Man and Biosphere Program (MAB) was initially under the Department of Science & Technology, but later transferred to the Ministry of Environment & Forests (MoEF), of the Indian government. Dr. Pushpangadan was the Chief Coordinator of this ambitious programme which operated at 27 centres in India and lasted for 16 years (1982–1988). The AICRPE project documented the use of over 10,000 wild plants used by tribals on a day to day basis. The MoEF played a pivotal role in the TBGRI Benefit Sharing Experiment by providing administrative and financial support through the AICRPE.

54 In total, 12 active compounds were isolated from arogyapacha, and five process patent applications were filed after 1994, the most important being the process of preparing an immune system enhancing anti-fatigue, anti-stress and hepato-protective herbal drug, "Jeevanii" (P. Pushpangadan/ S. Rajasekharan/ V. George, Patent application number 959/MAS/96, 4 June 1996); a process for the Isolation of a Glycolipid Fraction from Trichopus Zelyanicus Possessing Adpatogenic Activity (K. K. Butani / D. K. Gupta / B. S. Taggi / K. K. Anand / R. S. Kapil / P. Pushpangadan / S. Rajasekharan, Patent application number 8/Del/94 (1994)); a patent application for a diabetes medicine (957/MAS/96, June 4, 1996), the second a sport medicine, Vaji (958/MAS/96, 4 June 1996) and third, a process to prepare a herbal preparation for cancer (MAS/650/2001).

"Jeevani" with the Arogyapacha leaf as one of the key ingredients. "Jeevani" was patented as an anti-fatigue, immune-enhancing and liver-protective drug. In November 1995, after a competitive process, exclusive rights for the manufacture and sale of the drug was given to one of India`s largest ayurvedic firms, the Coimbatore-based Arya Vaidya Pharmacy (AVP), for an initial period of seven years at a cost of US$ 50,000 (36,000 euros) for the licence plus two per cent royalty.[55] Several drugs were patented using the leaf.
The TBGRI received Rs 10 lakh (around 16,000 euros) as licence fee and two per cent royalty on ex-factory sales. The TBGRI decided that the Kani tribes would receive 50 per cent of the licence fee, as well as 50 per cent of the royalty obtained by TBGRI on sale of the drug. A seven year tech-license agreement was signed between TGBRI, the Kani trust that was subsequently set up, and the AVP.
A benefit sharing agreement, perfectly in line with the benefit sharing initiatives of Article 8(j) of the UN Convention of Biological Diversity, was signed with the Kani tribe.[56] It respected, preserved and maintained the traditional lifestyle of the Kani. It took their knowledge with their permission and shared the proceeds of the agreement with them. The tribe was financially rewarded, its contribution to the creation of the drugs was acknowledged, and it was marked by an "informed consent" of tribals, sustainable harvesting, bio-diversity conservation and benefit sharing. Hailed widely, the director of the TBGRI in Kerala, P. Pushpangadan, and the Kani tribal leader Kuttimathen Kani, were short listed for the United Nations Equator Initiative Prize 2002 at the Earth Summit held in Johannesburg, for their role in the agreement.

The impact of the benefit sharing agreement

In accordance with the agreement, two of the tribal guides on the 1987 expedition, Kuttimathan and Mallan Kani, were employed as consultants to the project. A trust, The Kerala Kani Samudaya Khshema Trust (Kerala Kani Community Welfare Trust), was set up and registered in November 1997. The trust was comprised of a General Body with adult tribals elected from the 30 Kani settlements, which were brought under a single organisational framework, an Executive Committee, and a 14-member Governing Council. The trust received half the licence fee (Rs 5 lakh 7 or 500 euros) and a share of the royalty which was used to build schools and hospitals, insure the tribes, pay for education and marriage, and also to buy coveted TV sets! Commercialising the drug impacted the Kani community. Traditionally poor and marginalised, they suddenly had

55 Response of Smt. Panabaka Lakshmi, Minister of State for Health & Family Welfare in a written reply to a question by Shri Raghuveer Singh Koshal in the Lok Sabha (Indian Parliament), Press Information Bureau, Government of India, Patenting of Traditional Medicine by USA, March 8, 2006.

56 The Kani tribals belong to a traditionally nomadic community, who now lead a primarily settled life in the forests of the Agast-Hymalai hills of the Western Ghats, a mountain range along south-western India, in the Thiruvananthapuram district of Kerala, India. The Kanis, numbering around 16,000, live in several tribal hamlets, each consisting of 10 to 20 families dispersed in and around the forest areas of the Thiruvanathapuram district. The Kanis are traditional collectors of non-timber forest products from the forest.

access to a nominal amount of money. At 1996 rates, one kilogram of the berries cost Rs. 150 (about three euros), and with an annual yield of 200 kg this meant about Rs 60,000 (about 1,000 euros). This did not convert into wealth but enabled the tribe to have access to a marginally better form of life with better schools, a water supply and a few television sets. Moreover, to meet the demand for a regular supply of the plant to the manufacturing unit, the "arogyapacha" which had traditionally been grown wild, was commercially cultivated. The TBGRI suggested that as only leaves of the plant were needed, several harvests could be made from the perennial plant without actually destroying it. Therefore, in October 1997, a proposal to the Forest Department and Tribal Welfare Department stated that it was willing to pay Kanis seed money for cultivation of the plant, and would subsequently buy leaves harvested from these plants. This was not only a sustainable use of the natural resource, but the sale of leaves would also give the Kanis an extra source of income. The TBGRI also assured the state department that no private parties would be involved in cultivating the plant. Thus, in 1995, the government's Integrated Tribal Development Project (ITDP) in Nedumangad initiated a scheme in collaboration with TBGRI to help the Kanis grow medicinal plants in their settlements. Under the project, 50 select families received Rs 2,000 each (about 30 euros), with 20.25 hectares coming under cultivation. The TBGRI bought five tonnes of the leaves every month from the Kanis, paying Rs 30 (0.50 euro) per kg for the chemical trial and for pilot production. The model eventually benefitted over 16,000 Kani people, comprising over seven hundred families, or roughly half the tribe.[57] Finally, in consultation with TBGRI, the Executive Committee of the Trust rewarded the three Kani tribesmen who provided the information about Arogyapacha. Rs. 20,000 each (about 330 euros) were given to Sri. Mallan Kani and Sri. Kuttimathan Kani, and Rs. 10,000 to Eachan Kani – the three guides on the original expedition.

The creation of new paradigms

The aftermath of the agreement shows that even well meaning attempts at equitable distribution of resources can lead to unanticipated problems concerning questions of ownership. This was evident in rival concepts for the institutionalisation of ownership that affected the actual implementation of the agreement.

Even though the agreement had been hailed internationally, it came into conflict with how the *state defined ownership of indigenous resources*. Under the 1927 Indian Forests Act, forests and anything that belonged to it were state property, and only minor produce could be taken out. Kani tribals taking leaves out were stopped at forest checkpoints under the pretext that "arogyapacha" was not classified as "micro-produce". Prices shot up, and smuggling and illegal cultivation of the plant became rife. The state's response was a blanket ban on taking the plant out of the forest. This made it difficult to distinguish

57 Official reports from the Forest Department of Kerala State, available at URL: http://www.forest.kerala.gov.in/.

between illegally and legally sourced fruits and plants from the licensed cultivations. The AVP claimed that they used only legally sourced produce in Jeevani. However, unscrupulous middlemen had used the loopholes in the agreement to smuggle out the herb and, given its popularity, it is possible that both legally and illegally sourced leaves were used. This indicates a key gap in the current intellectual property paradigms, that tries to address the basic issue of inequity in property relations by measures such as benefit sharing – unless colonial era laws that restrict property rights are annulled or changed, traditional communities will not be able to benefit commercially from their knowledge, since any physical manifestation of that knowledge – in this case the actual arogyapacha plant belongs to the state.

Moreover, state organs dealing with tribal welfare themselves disagreed on the best way in which to help the tribes. Though the TBGRI, and especially Director Pushpangandan, who had tried to ensure that the tribes were considered stake holders in the system, the official body for tribal welfare – the Kerala Institute for Research, Training and Development of Scheduled Castes and Scheduled Tribes (KIRTADS) – clashed with the TBGRI, which it saw as an interloper. Supported by NGOs, KIRTADS argued that the TBGRI was devaluing traditional knowledge. In September 1995, claiming that "purity of the practitioner" was central to tribal culture, a group of nine Kani healers wrote a letter to the chief minister of Kerala opposing the sale of their knowledge. Non-tribal activists tried to dissuade the Kanis from entering into the deal with TBGRI and selling "arogyapacha". The Kani case thus demonstrates a clash between differing paradigms on how best to look after indigenous people – a contradiction that was prominent in the disagreement inherent in the official paternalistic approach to tribal welfare as well as the efforts of activists to discourage what *they* saw as an undermining of the cultural ethos and sacred nature of tribal knowledge.

The propertisation of its traditional knowledge divided the Kani. Community knowledge often relies on a shared cultural perception of belonging, something that monetary incentives, rooted in western intellectual property law with its emphasis on the individual owner, can destroy. As Hirsch and Strathern point out, "ownership claims emerge in a world of owners".[58] The tribal knowledge that the "Jeevani" was based on was fairly widespread, but the TBGRI made agreements with only one section of the tribe – the section that the tribal guides who had accompanied the 1987 expedition, and who were personally known to the director, belonged to. Since the other Kani groups protested their perceived exclusion, the trust funds could not be distributed for a few years.

Finally, the agreement itself fell foul of changing paradigms in intellectual property law. According to the pre-1999 process patent system, the TBGRI applied for the patent in 1996, patenting only the process but not the actual product. However, after India signed the WTO the product patent paradigm was accepted as the cornerstone of Indian intellectual property law. This hit the Kani tribe. Since the original process patent on Jeevani's

58 E. Hirsch / M. Strathern, Transactions (annotation 21), p. 4.

formulation has now expired, the AVP and other companies do not have to pay royalties anymore. On the other hand, the mounting popularity of the drug that is now sold at Rs 160 (about 3 euros) for a 75gm container, has meant that the AVP has profited. The trust has become dysfunctional and the tribals have been left high and dry. Newspapers carried the poignant story of how the tribal guides who had revealed the sacred knowledge have now fallen into poverty.[59] The "arogyapacha" case illustrates how, although in theory traditionally marginalised communities can profit from the interaction of their communities with a global knowledge society, the tribes themselves are unable to profit from the demands of a modern knowledge economy – instead, they need someone to help them navigate. Thus, the indigenous community does not have the role of agency – this is given to an external actor, such as a well meaning coalition of NGOs in the case of the San tribe and the Hoodia cactus, and a research agency such as the TBGRI in the case of the "arogyapacha".

The agreement also marked a key shift in the cultural ethos of the tribe – while earlier notions of exclusivity were defined by ritual status in the tribe or membership in it, now the knowledge could be bought. It became a "resource" and gave rise to new perceptions of assets and ownership over them. Thus for indigenous people who are marginalised and poor, it seems access to immediate tangible wealth is more important than the debate over cultural commoditisation or the exploitation of indigenous resources that dominates much of the literature. Such ownership conflicts, that emerged only after a monetary value had been put on traditional knowledge, challenge conceptions of indigenous tribes, and their perceived helplessness that has dominated activist literature and the literature of such organisations such as the North America-based Rural Advancement Foundation International (RAFI), the Europe-based Genetic Resources Action International (GRAIN) and the Asian activist group, the Third World Network. It is significant that the impetus behind the impulse to share the knowledge was not altruistic but essentially a way of making money. It is significant that the petition to the chief minister, written by the tribal leaders, revolved around the sacredness of tribal knowledge. Thus, unlike the activist narrative that sees indigenous people as undifferentiated victims, it is significant that one part of the tribe was more commercially inclined, and it was the tribal elders who were more Puritanical and more traditional resented this.

Patent law is closely tied to the monetisation of traditional knowledge. Thus the Kani tribals benefitted only when India was a signatory to the process paradigm of intellectual property law rights and they were the first victims when India switched to a product paradigm. The benefit sharing agreement was not updated when it lapsed, even though the tribes had given up their sacred knowledge, and the royalties came to a halt once the initial agreement had lapsed.

The Kani case also underscores how tribes in the developing world are individual citizens of the nation state and have no special privileges as indigenous people. The Kani where

59 K. A. Shaji, Herbal Wars, in: Tehelka Magazine, September 27, 2008.

persecuted by the Indian state for having taken out restricted forest produce, it was only mediation by external actors such as activists and state organs that enabled them to profit from their knowledge, and when the intellectual property rights paradigms changed as a result of action by the Indian state, they were among the first victims.

At the core of all these issues is how previously communal knowledge can be reconciled with the propertisation of knowledge that is integral to the globalised knowledge economy.

Who defines the tribe? Who should benefit from the commercialisation of traditional knowledge? How would tribes mediate their role both as indigenous people who have been kept outside the mainstream of modernity and yet who profit from the demands that modernity and globalisation give rise to? Can knowledge that has not been properly propertised benefit from its commercialisation? Answers to these questions are rarely simple, and are complicated by the propertisation of knowledge. For example, where does one draw the line when it comes to profit that comes from traditional knowledge? The Kani case demonstrated that benefit sharing agreements themselves mean a process of selection and exclusivity. Rather than being a straightforward agreement between the tribe and those who benefit from knowledge, the agreement itself is subject to changing property paradigms. Finally, there is the question of when indigenous people should commercialise their knowledge – must the benefits accrue only after the commercial potential of the drug has been utilised, or must agreements be drawn up even before the research begins? Or, going further, must the research potential of traditional knowledge be accessed before bio prospecting even begins?

The "arogyapacha" case shows that benefit sharing agreements are not simple tools, but are fundamentally complex, and much of this has to do with the different conceptions of property rights and the propertisation of knowledge that this entails. Benefit sharing agreements may be seen as a pioneering attempt to alleviate the inequities inherent in the commercialisation of traditional knowledge. In reality, as the arogyapacha case shows, intentions often fall short of actual empirical reality. Thus, ownership patterns remain a process and an arena of negotiation and contention in the global knowledge economy.

It marks an arena of arbitration between two very different concepts – an individualised, property oriented intellectual property paradigm, and an alternative commons paradigm, both with their own cultural roots. This goes against the perception of activist literature that revolves around a victim/ exploiter paradigm. Rather than idealise one and exercise the other, it is important to understand that negotiated settlements to ownership questions themselves throw up new paradigms of propertisation.

Current definitions of tribes and indigenous people are essentially constructions of the modern state rather than reflections of empirical reality underscoring the need to understand these categories analytically rather than legally. Issues such as who defines the tribe, the legacy of colonial attitudes to indigenous people as illustrated in the Indian Forest Act of 1927, and the paternalistic attitude of the TBGRI and other agencies such as KIRTAD, affect the operationalisation of benefit sharing agreements. The "arogyapacha" case also shows the sudden influx of financial wealth into a traditional community can

have a potentially destabilising effect that challenges accepted notions of culture, society, and the economy of these marginalised tribes.

Controversies that swirl around the propertisation of traditional wisdom bring to the fore the role of the nation state in the intellectual property rights debate, the impact of changing paradigms in the knowledge economy and intellectual property rights on historically marginalised indigenous people, and the crucial link between innovation and pre-knowledge, especially in emerging fields such as biotechnology and medical research. At the heart of the issue is the close relation between innovation and research, and the larger question of whether innovation is tied to the power of exclusion in knowledge. It remains to be seen whether challenges that are inherent in the propertisation of traditional knowledge can be addressed within the current paradigms of intellectual property rights.

The Propertisation of Science: Suggestions for an Historical Investigation

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RESÜMEE

Der Aufsatz widmet sich der bis heute kontrovers geführte Diskussion um das wissenschaftliche Eigentum, das die individuellen Rechte im Übergangsbereich zwischen Urheber- und Patentrecht stärken soll, indem es die Rechte der angestellten Wissenschaftler an Universitäten, in Forschungslaboratorien und in der Industrie regelt. Anhand der bereits früh aufkeimenden Frage nach den Legitimationsgründen wissenschaftlicher Erkenntnisse untersucht der Beitrag, wie die Einführung dieser neuen Kategorie im 19. Jahrhundert am Vorrang scheiterte, den die wissenschaftlichen Akteure der Professionalisierung ihrer jeweiligen Disziplinen einräumten, indem sie die Ausbildung eines gemeinsamen Wissenskanons und einheitlicher Begrifflichkeiten höher bewerteten als die rechtliche und moralische Anerkennung von Einzelleistungen in Form exklusiver Eigentumsansprüche auf Forschungsergebnisse. Für das 20. Jahrhundert zeigt der Autor, wie die lauter werdende Forderung nach einem wissenschaftlichen Eigentum an den Inhabern von Patentrechten scheiterten, die mit der Unterscheidung zwischen *public domain* und Industrie verhinderten, dass wissenschaftliche Forschung unter proprietären Gesichtspunkten reflektiert wurde.

For thirty years scientific institutions have been engaged in a process of propertisation, whose symbolic beginning may be considered to be the US Bayh-Dole Act of 1980. This legislation, which enables universities to benefit from intellectual property rights for their inventions when they are developed within them and supported by federal funds, is associated with the emergence of an "entrepreneurial science",[1] particularly in the field

1 H. Etzkowitz, Entrepreneurial Science in the Academy: A Case of the Transformation of Norms, in: Social Problems 42 (1989), no. 1, pp. 14-29; H. Etzkowitz, Entrepreneurial Scientists and Entrepreneurial Universities in American Academic Science, in: Minerva 21 (1983), no. 2, pp. 198-233.

of health and medical research.[2] This issue has been the subject of lawyers' and economists' attention, focused on biologists' relationship to intellectual property rights (IPR), whose development is sometimes seen either as a challenge to the normal functioning of these disciplines or as a way to strengthen them.[3] Nevertheless, this strengthening of intellectual property in science is considered "a major change in institutional functioning and cognitive science".[4]

This rupture, testified by the intrusion of intellectual property in scientific institutions, has inspired questionable dichotomies such as the now famous distinction between a traditional mode of "pure science" and a new mode of "science in context".[5] However, assuming that science would have been characterised in the past by selflessness and the withdrawal of scholarly communities tends to ignore the complexity of relationships that scientists have always had with the economic and political sphere.[6] This relationship is, in fact, neither stable nor continuous. Others have therefore been conducted to distinguish different systems of organising science, such as the "Protoindustrial Regime", the "Cold War Regime" and "Globalised Privatisation",[7] but they actually insist on the last two regimes and neglect the first. However, if the current privatised form of science may be opposed to the public funded one existing during the Cold War, how ought we to consider modern scientific life prior to WWII? Should an analysis of the pre- "Big Science" regime not put the privatisation of science in perspective? After all, did not Max Weber diagnose a bid of science in capitalist process before the end of the First World War?[8]

An historical inquiry is therefore necessary and the concept of propertisation appears all the more appropriate as it enables long term analysis, which requires the *longue durée* characterising intellectual property and scientific institutions. Using propertisation frameworks may allow tools to be forged for comparative work, which is often lacking. When it is not overlooking the long term dimension, the analysis of "privatised science" is often too focused on the American model of science and intellectual property, and overvalues its particularities. Both science and intellectual property rights have to be taken into account in a global framework. Moreover, using a propertisation concept prevents analysis from being confined to a single disciplinary approach: the evolution of

2 B. Coriat / F. Orsi, Establishing a New Intellectual Property Rights Regime in the United States: Origins, Content and Problems, in: Research Policy 31 (2002), no. 8-9, pp. 1491-1507.

3 R. S. Eisenberg, Proprietary Rights and the Norms of Science in Biotechnology Research, in: The Yale Law Journal 97 (1987), no. 2, pp. 177-231; F. S. Kieff, Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science – A Response to Rai and Eisenberg, in: Northwestern University Law Review 95 (2000), p. 69.

4 R. K. Merton, The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property, in: Isis 79 (1988), no. 4, pp. 606-623.

5 M. Gibbons et al., The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies, London 1994.

6 S. Shapin, The Scientific Life: A Moral History of a Late Modern Vocation, Chicago 2008.

7 P. Mirowski / E.-M. Sent, Introduction, in: ibid. (eds.), Science Bought and Sold. Essays in the Economics of Science, Chicago / London 2002, pp. 1-68.

8 I. Kalinowski, Leçons wébériennes sur la science et la propagande, Marseille 2005, pp. 257-268.

intellectual property in science is not only matter of law and economics; it also refers to social and cultural dimensions.
This article presents some observations in order to promote such an historical inquiry on this topic; it represents the first stage of a wider project, which aims to establish the meaning and practice of scientific property between the middle of the 19th century and World War II. Here, three fields are explored: the relationship between scientific authorship and property; the place of science in the French patent system and the international controversy regarding scientific property during the interwar period.

1. Science, authorship and property

The history of propertisation in science cannot be separated from the issue of scientific authorship, which has been the subject of increasing attention in the last decade.[9] Mario Biagioli has drawn a precise distinction between scientific authorship and intellectual property. While the latter bestows property rights which are economically recoverable, the former allows a symbolic recognition of scientific work based on credit and reputation. Unlike copyrights, scientific authorship is not based on creativity or originality but on the truth of assertions made. Unlike patent law, it does not emphasise utility. Scientific authorship engages the author's responsibility but not on a legal level. The scientific author is in fact subject to trial by his peers, so it is both "the producer and the product of the produces he or she produces".[10] However, the boundaries of scientific authorship are not static and depend both on compromises negotiated between disciplines and on changes due to the development of science, which is becoming increasingly collective.
One question about scientific authorship is to know how this notion is taken into consideration by the actors and which name it may assume. At the beginning of the 19th century, scientists were aware of this problem of scientific authorship, whose definition obviously varied from discipline to discipline. Some, such as botany, zoology and medicine, were particularly involved in promoting scientific authorship. Ever since Linnaeus' *Philosophia botanica* (1751), the manner of applying names to plants and animals has been codified.[11] Progressively, during the first half of the 19th century, the "law of priority" became increasingly important. One of its instigators, the botanist Augustin de Candolle, suggested in 1813:

> *All this scaffolding of botanical nomenclature would fail from the base and would inevitably collapse if the universality of Naturalists did not recognize the principle I men-*

9 M. Biagioli / P. Galison (eds.), Scientific Authorship: Credit and Intellectual Property in Science, New York 2003; D. Pontille, La signature scientifique. Une sociologie pragmatique de l'attribution, Paris 2004.

10 M. Biagioli, Rights or Rewards? Changing Frameworks of Scientific Authorship, in: M. Biagioli / P. Galison (eds.), Scientific Authorship: Credit and Intellectual Property in Science, New York 2003, pp. 253-279.

11 S. Tillier, Terminologie et nomenclatures scientifiques: L'exemple de la taxonomie zoologique, in: Langages 39 (2005) no. 157, pp. 103-116.

> *tioned, namely the need to accept the name given by the inventor of a plant, whenever this name is consistent with the rules. A name must not be changed because it is insignificant; then the second may be removed if we find a third best, and so may the third if there is a fourth etc., therefore there is no more fixity in the nomenclature or rather there is no more scientific nomenclature. Even the author who first coined the name has no more right than any other to change it for a simple question of impropriety. […] The priority is in effect a fixed term that admits nothing positive nor arbitrary nor biased.*[12]

Scientific authorship was not only a question of truth and responsibility. In this case, botanical authorship, based on the law of priority, appears to be a condition for establishing a fixed nomenclature and, in fact, a basis of scientific botany.
Furthermore, the question of nomenclature concerned the issue of property. In his famous work *Règne animal*, published in 1817, Georges Cuvier drew a clear connection between these two notions by asserting that

> *it is in [his] eyes no more sacred than property of conceptions of the mind and the use, which has become too common among naturalists to hide plagiarism by changes of names, has always seemed to [him] a real crime.*[13]

This notion of "the property of the conception of the mind" evoked a Lockean point of view regarding the emergence of intellectual property. Just as every man owns the results of his labour, every scientist – like every author – owns those of his mind. Therefore the "law of priority" had a different aim to that of fixing zoological and botanical nomenclatures. It was intimately linked to intellectual property. In 1835, Alphonse de Candolle, the son of Augustin, suggested this justification:

> *This priority rule is fair to the authors who have provided outstanding services to science and, since each book is dated, it is extremely accurate. It avoids the friction of self-esteem that can result from not adopting the words of one author. It sets a limit to the invasion of unnecessary technical terms and draws a line between real scientists and charlatans in science.*[14]

The rule of priority was not only a way of avoiding confusion in botanical nomenclature, but also of recognizing the achievements of real botanists.
This idea became more and more prevalent in the middle of the 19th century. In 1842, during the annual meeting of the British Association for the Advancement of Science, a committee was appointed "to consider the rules by which the Nomenclature of Zoology

12 A. de Candolle, Théorie élémentaire de la botanique ou Exposition des principes de la classification naturelle et de l'art de décrire et d'étudier les végétaux, Paris 1813, p. 250.
13 G. Cuvier, Le Règne animal distribué d'après son organisation, pour servir de base à l'histoire naturelle des animaux et d'introduction à l'anatomie comparée, tome 1, Paris 1817, p. XXIX.
14 A. de Candolle, Introduction à l'étude la botanique ou traité élémentaire de cette science, Bruxelles, Méline 1837, p. 242.

may be established on a uniform and permanent basis". It stressed the importance of "priority" for zoological nomenclature:

> *Now in zoology no one person can subsequently claim an authority equal to that possessed by the person who is the first to define a new genus or describe a new species; and hence it is that the name originally given, even though it may be inferior in point of elegance or expressiveness to those subsequently proposed, ought as a general principle to be permanently retained. To this consideration we ought to add the injustice of erasing the name originally selected by the person to whose labours we owe our first knowledge of the object; and we should reflect how much the permission of such a practice opens a door to obscure pretenders for dragging themselves into notice at the expense of original observers.*[15]

The law of priority appears as a way of improving the professionalization of disciplines by avoiding the instability of nomenclature and arbitrary denominations. A good scientist was someone who renounced any superficial originality, agreeing to recognise the genuine originality of his predecessors. Thanks to his own labour and self-sacrifice, he was able to attain scientific fame by in his turn giving his name to a real discovery. As has been suggested by R. K. Merton, the law of priority, whose moral dimension is obvious since its violation is considered an "injustice", was one of the conditions required in promoting a scientific ethos.

Furthermore, this development of the priority may be interpreted as a significant moment in the propertisation of science. Not only was the "property of the conceptions of the mind", since Cuvier at least, one of the bases of the priority law, but also the notion of "scientific property" was based on the law of priority. The expression of "propriété scientifique" appeared progressively in many French journals of medicine at the beginning of the 19th century. Later, the link between priority and scientific property became clearer from fierce controversies shaking disciplines such as zoology. In 1857, the French editor of the *Revue et magasin de zoologie pure et appliqué*, Félix-Édouard Guérin-Méneville, accused the American entomologist James Thomson of having plagiarised his own work and having allowed himself to appear as a plagiarist. He denounced an attack on his "scientific property" and asserted that "the property of a scientific work is as sacred as a literary one".[16]

In 1863, American zoologists were disquieted by a strong dispute between Louis Agassiz, professor of zoology at Harvard University, and his former student, Henry James Clark, who was employed by the Museum of Comparative Zoology (MCZ), created and managed by Agassiz.[17] Clark considered the *Contributions to the Natural History of the United States of America*, which were edited only under Agassiz' name, contained several

15 Report of the XIIth Meeting of the British Association for the Advancement of Science, London 1843, p. 109.

16 F.-É. Guérin-Méneville, Matériaux pour une monographie des coléoptères du groupe des Eumorphides, et plus spécialement du genre Eumorphus, in: Revue et magasin de zoologie pure et appliquée (1857), p. 569.

17 For all this passage, see M. P. Winsor, Reading the Shape of Nature: Comparative Zoology at the Agassiz Museum, Chicago 1991, pp. 47-65.

important passages which were actually based on his own research on embryology. Clark demanded Agassiz recognise his debt but he refused categorically, claiming that Clark had worked under him and thanks to his own resources. As a result, Clark decided to publish a *Claim for Scientific Property*, which he sent to many learned societies around the world. As a result, Clark was fired from the MCZ on March 1863. Some months later, Agassiz decided to impose a strict control on his collaborators' research. A statement, adopted on 5 November 1863, stated:

> *No one connected with the Museum is authorized to work for himself in the Museum during the working hours fixed for Museum work. Whatever is done by any one connected with the Museum, during that time, is to be considered the property of the Museum, but due credit is to be given him by the Curator in his Annual Report. […] No one is authorised to publish, or present to learned societies, anything concerning his work at the Museum, without the previous consent of the Curator. All such contributions are to be submitted to the Curator for examination.*[18]

In fact, Agassiz distinguished authorship from scientific property. The former was merely a link between a discovery and a discoverer (or, more precisely in this case, between a description and its author). This relationship could be recognised without any problem. However, authorship did not necessarily mean scientific property, which was in fact controlling publications. Agassiz' collaborators had the right to be recognised as authors of discoveries but they were not authorised to publish anywhere. According to Agassiz, the Museum, which employed them and funded their research, was the legitimate owner of their publications. Agassiz could claim to control his collaborators' results because he owned the "scientific capital", whereas his collaborators were only his employees. In fact, scientific property was at the same time the basis and the result of a form of scientific capitalism, which would be based on the cumulative control of scientific work through a hierarchical organisation and a command of material resources.

This interpretation has to be precisely understood. These two examples refer to economic considerations. In the first case, the conflict is not only the one which concerns two specialists of Eumorphids; it opposes two competitors in scientific zoological publishing.[19] Concerning the second case, the litigation can be explained by Agassiz' willingness to control the work of his collaborators but also, according to Mary P. Winsor's analysis, by his attempt to promote the development of his Museum and of its publications, which both necessitated important funds and could not be exposed to competition. Agassiz' relationship to scientific property may be analysed as an attempt to impose his own monopoly on American zoology. In fact, however, such analysis has to refer to a specific conception of economics.

18 Annual Report [of the Museum of Comparative Zoology] for 1865, p. 48, quoted in: M. P. Winsor, Reading (annotation 17), p. 59.

19 It is not the place in this programmatic paper to underline the place of economic arguments in the controversy between Guérin-Méneville and Thomson. For details, see F.-É. Guérin-Méneville, Matériaux (annotation 16); J. Thomson, De Monsieur Guérin-Méneville et de trois Eumorphides, Paris 1858.

Economics of science has long been neglected by many approaches, which on the one hand postulate an asymmetry between factors considered as essential for science, and, on the other hand, social and economic factors seen as contingent. Even if he had already weighted their importance, Max Weber saw these factors as exogenous characters of the scientific profession.[20] Similarly, Robert K. Merton's work is primarily limited to the symbolic aspects of scientific institutions as evidenced by his particular conception of intellectual property which is defined as the right to peer recognition and not as an economic right.[21] Finally, this asymmetry is also evident in Pierre Bourdieu's approach, for whom scientific capital, which is necessary to scientists in their fight against their competitors, is split between a truly "scientific capital" and a "mundane" one, which is not directly related to intellectual skills.[22] At the same time, neoclassical economics of science, which reduce knowledge to information and scientists to maximising agents, forget the symbolic dimension the actors bestow on their activity and consider the scientific life as a market.[23]

Discussing the economic aspects of propertisation in science allows us to insist on the material dimension of science – and the scarcity of its resources – without eclipsing its social and cultural dimensions. Scientific propertisation bridges these two aspects in other disciplines such as medicine and archaeology. In the medical field, scientific property appeared necessary in order to distinguish those who contributed to the advancement of the science. At the same time, it promoted a diffusion of medical knowledge, since recognising scientific priority necessitated scientific publishing.[24] Scientific property in archaeology had another meaning, since scientific property had come to mean the ownership of archaeological discoveries. In fact, a historical analysis of scientific property also has to take two dimensions into account: the symbolic recognition of intellectual work and the material economic dimension of scientific activity. A relevant interpretation of scientific propertisation cannot overlook the fact that science is embedded in both social and economic contexts. If scientific authorship and scientific property are related, their significance cannot be examined while ignoring the material or symbolic economics of science.[25]

2. Science and intellectual property law

Analysing scientific propertisation necessitates studying the relationship between the scientific property and intellectual property rights which developed in the course of the 19th century. Being at the first stage of our project, we will insist on the French case here, but

20 M. Weber. La science, profession et vocation, Marseille 2005, p. 9.
21 R. K. Merton, Priorities in Scientific Discovery: A Chapter in the Sociology of Science, in: American Sociological Review 22 (1957), no. 6, pp. 635-659.
22 P. Bourdieu, Science de la science et réflexivité, Paris 2001.
23 For criticism, see P. Mirowski, The Effortless Economy of Science?, Durham/ London 2004.
24 For an example, see La Presse médicale belge, 25 December 1859, p. 1.
25 P. Mirowski / E.-M. Sent, Science Bought (annotation 7).

it is obvious that a history of this kind has to be undertaken in a global and connected framework: both the evolution of intellectual property and of scientific institutions depend essentially on international regulations.

Three kinds of intellectual property rights are traditionally distinguished. Whereas scientific property is not a legal set of rights assigned to scientists, copyright and literary and artistic property laws protect the original work of an author or of a creator.[26] Patents recognise rights for an industrial invention. In fact, the definition of intellectual properties depends on a continuous process, which has always been subject to strong challenges. From the 18th century onwards, there have been two main, opposing views regarding the ownership of "things of the mind". In 1763, publishing his *Letter on the book trade*, Diderot suggested:

> *Indeed, what property may belong to a man, if a work of mind, the only fruit of his upbringing, his education, his vigils, his time, his research, observations, his finest hour, the finest moments of his life, his own thoughts, feelings of his heart, the most valuable part of himself, that which is eternal, immortalised, does not belong to him? What comparison between man, the essence of man, his soul, field, meadow, tree or vine that nature offered at the beginning equally to all, and that the individual appropriated through culture, the first legitimate means of possession? Who is more entitled than the author to have his thing by gift or by sale?*[27]

Diderot's conception clearly reflects a Lockean perspective, since, for John Locke, things are earned by working for them, thus their property is an extension of the property of himself. Things of the mind are all the more justified as the subject of a property insofar as they result from what a man possesses more intimately.

This conception of intellectual property, which, although not thus designated is still considered to be a natural right, found its opponent in the person of Condorcet, the mathematician and philosopher, who said in 1776:

> *There can be no relationship between ownership of a work and that of a field which can be cultivated by one man; a piece of furniture that can serve only one man, and whose property, therefore, is based on the nature of the thing. So here it is not a property derived from the natural order, and defended by a social force. It is a property founded by society itself. This is not a real right but a privilege, like the exclusive enjoyment of all that can be removed from the sole possessor without violence.*[28]

From this perspective, intellectual property concerns immaterial objects whose use is essentially collective. Thus the appropriation of such things by a single individual is only a social concession which is justified by their contribution to the common good. Through-

26 J. Boncompain, La Révolution des auteurs. Naissance de la propriété intellectuelle, 1773–1815, Paris 2001.

27 D. Diderot, Lettre historique et politique sur le commerce de la librairie, in: ibid., Œuvres complètes, Paris 1876, p. 30.

28 Condorcet, Fragments sur la liberté de la presse, in: Œuvres de Condorcet, tome 11, Paris 1847, pp. 308-309.

out the 19th century – and beyond –, the debates and controversies relating to intellectual property were dependent on national legal traditions and on the relationship between socio-professional groups which contributed to building the frameworks of intellectual property at both national and international levels. However, they were still structured by these two models – IPR as natural rights *versus* social privilege.

In addition, many of these debates concerned the differential definition of intellectual properties. During the 19th century, the author and the inventor appeared as the two main Romantic figures of creativity. Like the author, the inventor was regarded as someone struggling against the hostility of the common people, who were not able to understand his genius.[29] In France, however, although the defence of intellectual property was based on a common ideological basis, i.e. Diderot's conception, different arguments were advanced in the 19th century to distinguish not only the rights, but also the status, of these two social figures of creativity.[30] Balzac, as an important actor in the defence of copyright, suggested the ambiguity of this relationship. In his novel *Illusions perdues*, he insisted on the fraternity of the inventor and the poet, but was in fact reluctant to claim the two intellectual properties could be aligned. According to him, there was no "lower parity" between a technical invention and a creative work.[31] For Balzac, the former created a need, was useful and, therefore, indispensable to society. However, artistic works quickly lost any utility. Therefore, unlike that of inventions, their property would not infringe any interest. Thanks to their uselessness, the author could be accorded the broadest rights, while the inventor, locked in the cage of ophelimity, had to sacrifice his interests to society.

In the second half of the 19th century, while the controversy over industrial property was still in full swing, the French economist and senator Michel Chevalier, an opponent of the patent, did not hesitate to rush to the aid of literary property. For him:

> *Literary and artistic works have a character of individuality perfectly sliced. For even they are a separate property that the law can recognise. Conversely, there is a lack of individual character in real or supposed discoveries that are the subject of patents, because what one has done today another hundred others will do tomorrow. That is why the monopoly conferred by patents shall in principle be accused of being unfair and can be completely abolished by the legislature without any result against the recognition of literary property.*[32]

Considering the fact that technical inventions were collective and therefore impersonal, Michel Chevalier denied any property rights for the inventor's creations. Little imagin-

29 On the heroic conception of inventors, see C. MacLeod, Heroes of Invention: Technology, Liberalism and British Identity, 1750–1914, New York 2007; on the French case: G. Galvez-Behar, Si loin, si proches. Inventeurs et artistes au regard de la propriété intellectuelle dans la France du XIXe siècle, URL: http://halshs.archives-ouvertes.fr/halshs-00008326/fr (accessed August 1, 2010).

30 For the history of literary property in 19th century France, see L. Pfister, L'auteur, propriétaire de son œuvre. La formation du droit d'auteur du XVIe siècle à la loi de 1957, Thèse, Strasbourg 1999.

31 F. Pollaud-Dulian, Balzac et la propriété littéraire, in: L'Année balzacienne (2003), no. 1, pp. 197-223.

32 M. Chevalier, L'exposition industrielle de 1862, Paris 1862, p. 168.

ing the reverse argument – after all, what Balzac did, could not another also do it? –, it thereby contributed to making the industry an anonymous world. As a consequence of this difference in design, literary property and the right of the inventor underwent separate paths: the former was never really criticised and was recognised for a longer time than the duration of the contested patent (15 years maximum in France).
Intellectual property can therefore not be viewed as a monolithic object and the question thus arises as to whether scientific work had a special place in the intellectual property laws defined in the 19th century around the world. To answer such a question, the extremely dense chronology of legislative reforms in this area should be borne in mind, as well as the debates they provoked on an international level.[33] Furthermore, scholarly publications grew in the 19th century with the process of scientific professionalisation, to such an extent that scientific publishing was becoming an economic sector necessitating regulation through intellectual property.

2.1 Scientific property and copyright

It is therefore not surprising that the question of scientific property was referred to on several occasions. This was particularly true in France, where the draft law on literary and artistic property was discussed between 1862 and 1866. The lawyer Frédéric Mourlon, in his legislative considerations on the topic, rejected the distinction between this form of property and the ownership of scientific insight resulting from the scientist's work as being as personal as the work of a writer.[34] According to Mourlon, making the scientist change his condition or leave to others the economic results of his discovery was tantamount to "denying him the result of his work". He added, on a prophetic note:

> *After scientific property we will have medical property. Once a doctor discovers an effective remedy against tuberculosis, he and his own will be alone, perhaps for a century, to be authorised to sell life to the consumptive. […] Once medical property has been accepted, similar forms of property will soon occur. If a skilled surgeon discovers a new binding, except him and his family, none of his colleagues will, for a time, use it medically. […] We will have, therefore, in addition to medical property, surgical property. Once this has been dedicated, others will follow. If you want to constitute one, two, at the most three properties, you will have a swarm.*[35]

However, the French law of 1866 on literary and artistic property did not recognise any special status for scientific property, although courses, lectures and communications were considered as works which might be protected.

33 For a survey, see C. MacLeod/ A. Nuvolari, Inventive Activities, Patents and Early Industrialization. A Synthesis of Research Issues, in: Druid Working Paper, no. 06-28, URL: http://www3.druid.dk/wp/20060028.pdf (accessed August 1, 2010).

34 F. Mourlon, Etude critique sur le projet de loi sur la propriété littéraire et artistique, Paris 1864.

35 Ibid., p. 68.

Nevertheless, the debate was not closed. In 1883 the issue was raised again at the Berne conference, which had been organised by the *International Literary Association* in order to create a General Union of literary and artistic property. During the inaugural session, a debate opposed advocates of an inscription of the word "scientific" in the title of the draft convention and all others. For the former, it not only had to take into account Spanish and German legislation (the latter offering particular rights to universities and learned societies) but also to provide protection for "certain designs that are not inventions and can not be patented, and that are nonetheless not literary works, such as maps, visual art for teaching, topography, etc."[36] For others, such as the lawyer Eugène Pouillet, the term "science" was not relevant, and some even feared being forced to "defend geometric figures and to protect cubes, because we had written the word "science" in the title of the draft convention".[37] This approach was imposed, which may explain why the question of scientific property was then treated in the context of discussions on industrial property.
This analysis should not be limited to the constitution of the legal framework but must be extended to uses of intellectual property. In a context of increasing internationalisation of science, translation rights, and how they are managed by scientific publishers, for example, are an important indication of this process of propertisation. A history of scientific propertisation has to pay special attention to the role of scientific property in defining literary and artistic property, both in terms of discourse and practice. This prerequisite also applies to industrial property, which developed during the 19th century.[38]

2.2 Scientific property and patents

Analysing the relationship between scientific property and patents helps determine to what extent science is patentable or not and to describe the practice of industrial property by scientists. Patentability, the definition of which is never immediately provided but results from a complex legislative and common law process, has a number of characters that must be put into perspective.
During the 19th century, scientific discoveries and principles were very often regarded as unpatentable because invention had to be distinguished from discovery. This distinction was proposed by the Scottish philosopher Dugald Stewart, who wrote, in his *Elements of the Philosophy of the Human Mind*:

> *Before we proceed it may be proper to take notice of the distinction between Invention and Discovery. The object of the former, as has been frequently remarked, is to produce something which had no existence before; that of the latter, to bring to light something which did exist, but which was concealed from common observation. Thus we say, Otto Guerricke invented the airpump; Sanctorius invented the thermometer; Newton and*

36 Bulletin de l'Association littéraire internationale (1883), no. 18, p. 5.
37 Ibid.
38 J. Lerner, 150 Years of Patent Protection (August 1999), URL: http://ssrn.com/abstract=179188 (accessed August 1, 2010.

> *Gregory invented the reflecting telescope; Galileo discovered the solar spots; and Harvey discovered the circulation of the blood. It appears, therefore, that improvements in the Arts are properly called inventions; and that facts brought to light by means of observation, are properly called discoveries.*[39]

Such a distinction, however, which influenced European lawyers such as the French Augustin-Charles Renouard, was not as obvious as suggested by the debates on the French patent law reform of 1843–1844.

In the 1840s, the French patent laws were renewed after years of complaint regarding the patent system inherited from the Revolution.[40] The governmental project foresaw that the patents covering the principles, methods, systems, designs and theoretical or purely scientific discoveries, would be null and void. The physicist, astronomer and deputy François Arago was opposed to this proposition, even though he did not try to totally remove it, since he agreed that an idea without any indication of industrial application should not be patented:

> *If anyone should today discover the square of the hypotenuse," he declared, "I do not wish it to be patented so that he might have the right to request a salary from astronomers using this proposition in order to measure the height of mountains on the Moon.*[41]

However, Arago did want a scientific idea to be patentable from the moment its author indicated precisely one industrial application. Arago's proposition was a way of promoting a kind of scientific property, i.e. – even though he did not use these terms – a legal possibility whereby a scientist could claim a part of the benefits enabled by his discovery. It can also be interpreted as a way of preventing scientists' work from being eliminated from patentability.

The result of Arago's intervention was the adoption of an amendment. Patents on scientific principles would be null and void unless any industrial application had been indicated. Thus the disposition in the 1844 French patent law provided a basis for the "patent of principle", which could protect both an industrial application and its theoretical principle. Lawyers such as Étienne Blanc considered that:

> *An idea or a system can not be validly patented in so far as the patent contains a statement of means with which we can apply the idea or the system to the industry. But if the idea or the system are new, the patent taken as mentioned above is what is in practice known as a "patent of principle", whose effect is to effectively protect the idea or the system so that nobody can apply it any longer, even with different means.*[42]

39 D. Stewart, The Works of Dugald Stewart, vol. 1, Cambridge 1829, p. 232. However this distinction in Dugald Steward's work was more complex than what thought autors like French lawyer Augustin-Charles Renouard.

40 G. Galvez-Behar, La République des inventeurs. Propriété et organisation de l'innovation en France (1781–1922), Rennes 2008.

41 Quoted in: A. Huard, Répertoire de législation et de jurisprudence en matière de brevets d'invention, Paris 1863, p. 354.

42 É. Blanc, Traité de la contrefaçon en tous genres et de sa poursuite en justice, Paris 1855, pp. 459-460.

Some courts shared this opinion, but it seems that during the second half of the 19th century the "patent of principle" was strongly attacked by other lawyers such as Dalloz and Eugène Pouillet.[43] For Pouillet, a patent dealing with a theoretical idea could not be granted if it indicated an industrial application, but it could only be valid for the application which had been mentioned. In fact, this discussion of the "patent of principle" revealed the contradictions regarding the statute of scientific discoveries to be part of the public domain. Even Arago's position appeared contradictory, since he claimed that scientific work could be recognised but refused to pay royalties to anyone discovering a new theory. This French example suggests how complex the early question of the (un)patentability of science was and demonstrates that scientists, even if there were only a few, could be interested in such a topic.

The patentability of drugs was another problem considered by some scientists. The law of 1791 did not prevent patents from being granted for drugs. However, throughout the first half of the 19th century, the policy of medicine and pharmacy took precedence over the right of the inventor. In 1829, the French Royal Academy of Medicine, founded nine years earlier, was against the patenting invention for drugs. The exclusion of drugs from the scope of patentability did not occur until 1843 and 1844 with the reform of the patent law.[44] Proponents of the patenting of drugs were led by the famous chemist, senator and trustee of Saint-Gobain Compagny Gay-Lussac, who defended three arguments: 1) it had to distinguish the conception of drugs from how they were run, 2) the patents would encourage the drug market and 3) the right of the inventor had to be defended, even for drugs. For others, an exclusion of drugs was essential in order to moralise the drug market. Not only must it protect the public from quackery, health could not be the subject of exclusive appropriation, even temporarily. This latter argument prevailed. The law of 1844 excluded drugs from the scope of patentability. These debates highlight the different attitudes of scientists towards the propertisation of science. While chemists such as Gay-Lussac were able to support the patentability of drugs, practitioners refused it in the name of moral considerations but perhaps more in order to avoid any control over their profession.

Scientists' relationship to the patent cannot, however, be reduced to the problem of patenting theories and drugs. It is also related to the question of scientific precedences, i.e. scientific discoveries on which patents are based, but which may also lead to the cancellation of the latter for lack of novelty. The famous case of the "Fuchsine" clearly illustrates this point. In 1859, a chemical company in Lyons, *Renard frères et Franc*, took out a patent on a dyestuff which had been invented by its French chemist Verguin, largely

43 Dalloz et alii, Jurisprudence générale: recueil périodique et critique de jurisprudence, de législation et de doctrine en matière civile, commerciale, criminelle, administrative et de droit public, deuxième partie. Arrêts des cours impériales, Paris 1859, p. 161-162, [Imperial Court of Lyon – 25 May, 1859]; E. Pouillet, Traité théorique et pratique des brevets d'invention et de la contrefaçon, Paris 1879, pp. 377-380.

44 M. Cassier, Brevets pharmaceutiques et santé publique en France: Opposition et dispositifs spécifiques, in: Entreprises et histoire 36 (2004), no. 2, pp. 29-47.

inspired himself by the German chemist August Wilhelm von Hofmann.[45] Thanks to this patent, *Renard frères et Franc* were able to bring lawsuits against competitors, who responded to the courts that the considered patent was null due to prior chemists' publications on this dyestuff, including Hofmann's works. On March 31, 1863, the Parisian Court of Appeal ruled that the patent held by the company *Renard frères et Franc* was not invalidated. In its ruling, it said:

> *In vain is it claimed that such an interpretation would tend to strip science for the benefit of industry; […] this distinction is in the nature of things […] science tends to develop useful knowledge, to advance the arts and industry; […] in chemistry above all, it often makes observations and watches without considering the industrial results it could produce, by not stopping there, by not formulating them, by not supplementing them but by opening the door for all, and by finding glory in the benefits that others derive; […] the industry, however, is merely limited to produce, by taking advantage of the ways opened by science and by providing society with the results that the patent law only intended to protect.*[46]

This decision suggested a strong distinction between science, which was regarded as a free domain, and industry. In a sense, Arago's fear came true: because scientists were supposed to work for free, their discoveries could be privatised by industrialists. This sort of judgement created a stir in both legal and scientific circles. Over fifteen years later, Eugène Pouillet regretted the confusion caused by such decisions which led to the belief that science could not possibly call into question the validity of a later patent.[47]
This paradoxical propertisation of the scientific public domain was also unacceptable to scientists. In this regard, the protection of Louis Pasteur's work on wine is quite interesting. In April 1865, Pasteur took out a patent on a warming process of wine. Not only did he consider taking out a patent as a good way in which to publish his scientific work, he also thought that, by abandoning his patent later, he could ensure that his scientific discovery would not be privatised by industrialists.[48] This question of priority and scientific publication did not arise, however, except for scholars. In the 19th century, the boundary between scholarly activity and industrial activity was not very clear – and it probably still is the case. In order to claim their inventions, inventors did not hesitate to communicate to learned societies, but they thereby underwent the risk that early publication of their inventions might cancel their patents, as evidenced by Henry Bessemer, inventor of a

45 H. van den Belt, Why Monopoly Failed: The Rise and Fall of Société *La Fuchsine*, in: The British Journal for the History of Science 25 (1992), no. 1, pp. 42-63.

46 Annales de la propriété industrielle, artistique et littéraire 9 (1863), art. 965.

47 E. Pouillet, Traité théorique (annotation 43), pp. 346-354.

48 Pasteur wrote that the patent "in my opinion is the best method of advertising that a scientist who wants to follow his work patiently can adopt, without resorting to the solemnity of a scientific publication". In: L. Pasteur, Œuvres de Pasteur, tome 3, Études sur le vinaigre et sur le vin, Paris 1924, p. 352. However, Pasteur's attitude towards patenting seems to be more complex and has to be analysed more precisely. For more details see G.G. Geison, The Private Science of Louis Pasteur, Princeton 1995.

steel producing method in the 1850s, who lost his French patents due to of a conference pronounced in a British learned society.
The history of intellectual property quite clearly suggests that this right is controversial always and everywhere. The specification of different intellectual property rights results from a long process of definition in which the attributes of originality or utility are not immediately and definitively given. Therefore, the opposition between scientific authorship and intellectual property law is no longer very clear. Finally, we cannot forget that scientists themselves have used intellectual property rights from early on. Such practices do not necessarily respond to a desire for personal enrichment, but they do reveal scientists' willingness to control the fruits of their discovery.

3. Intellectual work and scientific property in the first half of the 20th century

If further investigations are necessary to analyse these practices, an evolution may however be suggested. At the beginning of the 19th century, scientific property referred to scientists' claims for the recognition of their own work and was a means of promoting their professionalisation. By the end of the century, the propertisation of science no longer had the same significance. The development of scientific professions, which had grown stronger during the second half of the 19th century, the intensification of the relationship between science and industry, and the organisation of capitalism, which undermined the individualistic conception of property rights, together provided a new context. Due to a reappraisal by Romanticism, scientists were new figures of intellectual creativity and technical progress. At the beginning of the 20th century, scientific property was progressively being understood as the attempt of scientific professions to have their economic contribution recognised.
The development of a more collective form of innovation and the integration of skilled graduates in science and technology in a wage relationship led to stronger claims by so-called "intellectual workers" seeking to obtain fairer industrial property rights. In particular, the German controversies of the early 20th century regarding employee inventors' rights highlight this point.[49] The *Bund der technisch-industriellen Beamten*, created in 1906, demanded in 1907 that "technical employees should be guaranteed intellectual property rights on their inventions and that a fair share of the profits from their practical usage should clearly be assigned to them".[50] By 1905, the Reichstag had been seized with applications to amend the patent law and in July 1913 the imperial government presented a project confirming its intention to abandon the first-to-file principle, which was supposed to disadvantage the true inventors, and to establish fair compensation for the inventor employee. Examination of this reform, which was strongly criticised by

49 K. Gispen, New Profession, Old Order: Engineers and German Society, 1815–1914, Cambridge 1990.
50 M. Seckelmann, Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914, Frankfurt am Main 2006, p. 382.

representatives from industry, was interrupted by the war. In fact, the professionalisation of intellectual workers in industry was progressing and the propertisation of intellectual work becoming a stake of the relationship between employers' and employees' new organisations, which began to structure the intellectual professions.[51]

A new regime of propertisation in science was thus emerging. It was characterised by a new form of involvement by scientists in economic matters, especially concerning intellectual property, and by the development of organisations representing scientists. In France, for example, some scientists defended the role of science in industry and did not refuse to take part in the debates on industrial property. For many French chemists, the national patent law explained the inferiority of the French chemical industry in comparison to that of Germany. The First World War accentuated this evolution. In all the belligerent countries, scholars were engaged in the service of the army and allowed to develop new weapons.

Aware of their role during the conflict, scientists did not intend to return to the status quo ex ante after the war. In any case, the difficult post-war economic context promoted new organisations such as the French Confederation of Intellectual Workers (*Confédération des travailleurs intellectuels*, CTI) created in 1920.[52] The representation of intellectual workers also increased on an international level. In September 1921, the League of Nations accepted the French suggestion to create an international organisation of intellectual work. In January 1922, the International Committee for Intellectual Cooperation (*Commission internationale de coopération intellectuelle*, CICI) was created by the Council of the League as an advisory and provisional entity.[53] The CICI failed to work very well, however, thus, in order to promote both intellectual cooperation and its influence, France decided in 1926 to create the International Institute of Intellectual Cooperation (*Institut international de coopération intellectuelle*, IICI), which became the permanent secretariat of the CICI. In 1931, the International Committee for Intellectual Cooperation, the International Institute of Intellectual Cooperation and other national committees for intellectual cooperation, which had been founded in the 1920s, were gathered into the *Intellectual Cooperation Organisation* of the League of Nations.

These organisations played an important role in the development of an international IPR and, more particularly, in the discussion of the scientific property issue.[54] In 1921, the CTI and the *French Union of Inventors* proposed an amendment to the French patent law. Inventors, lawyers and scholars, brought together under mathematician Paul Appell's chairmanship, aspired to measures promoting scientific institutions which had been shaken by the war, but also attempted to find new financial resources. The CTI then submitted its draft to the CICI and convinced its president, Henri Bergson, to put scientific ownership on the agenda. In August 1922, the CICI gave a subcommit-

51 G. Sapiro (ed.), L'organisation des professions intellectuelles, Paris 2006 (Le Mouvement social 214/ 2006).

52 A. Chatriot, La lutte contre le ‚chômage intellectuel': L'action de la Confédération des Travailleurs Intellectuels (CTI) face à la crise des années 1930, in: G. Sapiro (ed.), L'organisation (annotation 51), pp. 77-91.

53 J.-J. Renoliet, L'Unesco oubliée. La Société des nations et la coopération intellectuelle (1919–1946), Paris 1999.

54 See I. Löhr in this volume.

tee devoted to intellectual property the task of preparing a report. This was published in 1923 by Italian Senator Francesco Ruffini, who called for the recognition of specific intellectual property for scientific discovery, in addition to industrial property – which protected the technical invention – and the copyright. This scientific property had to initiate the process of rewarding scientists' contribution to economic progress, which was already enjoyed by industrialists.

Presented to the General Assembly of the League of Nations, the report was referred to member countries for advice. Only thirty states responded – including ten which spoke favourably. While the government in France seemed keen about Ruffini's recommendations, the consultations launched by the Minister of Education in 1923 gave rise to more lukewarm responses. Work also continued within the CICI in 1924 and 1925, when it was decided to convene a meeting of experts and to obtain feedback from industry. Three years of consultations were still necessary before a new report was produced, written by the French senator and lawyer Marcel Plaisant. Although less ambitious than Ruffini's draft, Plaisant's report was still criticised. Referred to the League's members, it received unfavourable opinions from more than two thirds of the forty countries that had responded. The early 1930s saw the issue of scientific ownership decline and then disappear with the global crisis. In 1946, however, the newly established UNESCO seized on the matter, demonstrating the topic's importance beyond the 1920s and 1930s, and thus highlighting the relationship between scientific property and the ends of war.

Despite the event and the issue's importance, few works have as yet been devoted to their history. Only one conference by Soraya Boudia and an article by David Miller have attempted to analyse this controversy and drawn up a chronology.[55] The interest of Soraya Boudia's text is that it mentions the impact of this debate in France and highlights the unsuccessful property law project proposed in 1927. However, these studies have not been really developed. Even though it is very interesting, David Miller's article mainly focuses on Senator Ruffini's project and the reactions it caused in Britain and the United States. Paradoxically, French reactions are not discussed in detail even though the debate on scientific property began in France and found strong echoes there subsequently.

This ten-year international controversy, however, suggests a simple problem: How were scientists led to claim a proper right on their findings, even to distance themselves from the ethics of disinterestedness? Such a study would rely primarily on the archives of the ICIC (located at UNESCO), but would also be based on a large quantity of printed documentation generated by the question. In order to establish a solid comparative basis, the French case, which has been neglected, should be particularly studied by focusing on the 1927 law project. The attempted reform of literary property initiated by Jean Zay in 1936, which was strongly influenced by the issue of intellectual workers, should also

55 S. Boudia, La propriété intellectuelle en science et la communauté scientifique française (1900–1930), Franco-American Conference on the Law, Economics and History of Intellectual Property, Berkeley, October 5-6, 2001, URL: http://emlab.berkeley.edu/users/bhhall/ipconf/boudia_abs.doc (accessed August 1, 2010); D. Miller, Intellectual Property and Narratives of Discovery Invention: The League of Nations' Draft Convention on 'Scientific Property' and its Fate, in: History of Science 46 (2008), no. 3, pp. 299-342.

be considered. Foreign records could be used to understand the return of the scientific property issue in 1946. It could highlight the international circulation of the concept of scientific property and its adaptation to different national contexts.
Diachronic cross-analysis of the symbolic and material economics of science and of the practice of intellectual property in science should shed new light on the interwar debates. Moreover, it would be necessary to consider the reasons for the failure of such a claim, both on the international and national levels. In short, the assumption that should be considered is that this failure, far from resulting from an already independent scientific field, contributed to making science more autonomous.

Conclusion

These propositions are not conclusions but the first steps in an emerging project. They indicate, however, that the propertisation of science did not begin in the 1980s, since science and scientists have always dealt with property in the modern period. The history of the propertisation of science should not attempt to determine the origin of property in science; it should rather distinguish the different patterns of such a process, as the result of a comparative study in time and space.
In the 19th century, scientific disciplines developed their own conception of property which was necessary for their work. Propertisation in science was profoundly linked to the professionalisation of science. However, this quasi-Mertonian – but not functionalist – assumption is not sufficient. Science does not ignore mundane intellectual property rights, since scientific property shares with IPR a common ideology which enables scientific work to be recognised. Moreover, IPR also allow the relationship between science and industry to be managed. More precisely, it is the place where the distinction between science and industry is established. Therefore scientists use nearly the whole spectrum of intellectual and scientific property tools: publications, copyright, patents, *plis cachetés*, etc. An historical inquiry into scientific propertisation has to take into account this diversity of discourses and practices.
Finally, our project is part of a wider discussion. The theoretical objective relates to a dual analysis of science. Can we reduce science to its "worldly" aspects? Should we emphasise "strictly scientific" factors? Can we, alternatively, place these two types of approaches on the same level? The history of scientific propertisation offers a new and conducive basis for reflection. It refers to both mechanisms of reputation and to intellectual property rights. And it concerns both symbolic and material economics. It does not require favouring one over the other and justifies interest in the historical economics of science. It makes us understand this current issue without being prisoners of the short term.

BERICHT

Kuba und Frankreich in den 1960er Jahren: Kooperationen und Konflikte

Thomas Neuner

ABSTRACT

The triangle between Cuba, the French government und the intellectual left in France went far beyond the usual transcultural relationships between Latin America und Europe in the twentieth century. Both cooperations as well as tensions and contradictions were characteristic for this relationship. Following new research approaches of global history this article analyzes the relative importance of France for the social emancipatorical project in Cuba and vice versa the relative importance of the Cuban Revolution for the French government and the political programmatic of the left in France in the 1960s. The article figures out why the French-Cuban cooperation had to fail in the end. Moreover this study can make a better understanding for relations of other transformation societies in the so-called Third World striving for "autocentred" development and an end of asymmetric power relations with political movements in Europe in the 20th century.

Das Dreiecksverhältnis zwischen Kuba, der französischen Regierung und der dieser antagonistisch gegenüberstehenden intellektuellen Linken Frankreichs ging weit über die üblichen transkulturellen Beziehungen zwischen Lateinamerika und Europa im 20. Jahrhundert hinaus und war von Kooperationen aber auch von Spannungen und Widersprüchen geprägt. Gegenstand dieses Aufsatzes sind daher die Fragen, welche Bedeutung Frankreich für das sozial-emanzipatorische Projekt in Kuba sowie umgekehrt die kubanische Revolution für die Regierung und die politische Programmatik der Linken in Frankreich hatten und warum die kubanisch-französische Zusammenarbeit letztlich

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scheitern musste.[1] Obgleich Kuba und Frankreich jeweils eine Sonderstellung in Lateinamerika beziehungsweise Europa innehatten, kann die vorliegende Untersuchung aufgrund anderer Transformationsgesellschaften, die in kleinerem Maßstab gleichfalls in Verbindung mit Unterstützern in Europa nach „autozentrierter" Entwicklung und einer Überwindung der asymmetrischen globalen Machtverhältnisse strebten, als ein Musterbeispiel betrachtet werden.

Der theoretische Ansatz dieser Studie basiert auf der neueren Globalgeschichtsforschung, die die Bedeutung transkultureller Interaktionen für die Konstitution und Fortentwicklung der modernen Welt betont und stärker als bislang Zusammenhänge jenseits des nationalen Handlungsrahmens fokussiert. Ohne historische Verflechtungen zu essentialisieren und den Nationalstaat als eine Orientierungseinheit von Politik und Gesellschaft aufzugeben, gilt es, ein Bewusstsein für die globalen Horizonte disparat erscheinender Geschichten zu schaffen und die Erfahrungen verschiedener Kulturräume, etwa Europas und Lateinamerikas, zusammenzuführen. Gerade ein Forschungsansatz, der transkulturelle Interaktionen vor dem Hintergrund von Makrokontexten analysiert, ist geeignet, die Transferprozesse und Wechselwirkungen sowie die verschiedenen Etappen jenes Dreiecksverhältnisses zwischen antikolonialen Bewegungen in Außereuropa, ihren zivilgesellschaftlichen Unterstützern in den Industriestaaten sowie deren Regierungen herauszuarbeiten. Im Fall der vorliegenden Fragestellung gab es mehrere makrostrukturelle Grundtendenzen, die die wachsenden Verflechtungen sowie die Brüche mitbestimmt haben: zum einen die antikoloniale Emanzipationswelle und daraus folgend die Debatte um Überwindung der ökonomischen und sozialen Ungleichheiten in der Welt durch entwicklungspolitische Strategien; zum anderen die Krise der kommunistischen Bewegung und der damit verbundene gesellschaftliche Bedeutungszuwachs für die intellektuelle Linke sowie schließlich die Protestbewegung von 1968. Durch eine solche Kontextualisierung der Beziehungen zwischen Westeuropa und Kuba in den 1960er Jahren soll die Historisierung dieser Interaktionen vorangetrieben werden. Quellengrundlage sind unausgewertete Bestände insbesondere französischer Archive (u.a. Archiv des Außenministeriums, Archiv der französischen KP, Nationalarchiv sowie diverse Nachlässe bzw. Privatarchive) und kubanischer Bibliotheken. Zunächst werde ich in wenigen Zügen die Kriterien skizzieren, die in den 1960er Jahren zu einer Annäherung Kubas und Frankreichs führten. Im Anschluss werden die Bedeutung Frankreichs für das sozial-emanzipatorische Projekt in Kuba beziehungsweise die Bedeutung Kubas für Regierung und Gesellschaft in Frankreich erläutert. Abschließend werde ich auf die unterschiedlichen Interessen und Konflikte, die die kubanisch-französischen Beziehungen zu einem Spannungsverhältnis machten, eingehen.

Der weltweite Dekolonisierungsprozess, der seinen Höhepunkt um 1960 erreichte, forcierte in der zweiten Hälfte des 20. Jahrhunderts das politische Interesse breiter zivilgesellschaftlicher Kräfte in den Industriestaaten an sozial-emanzipatorischen Projekten

1 Der vorliegende Aufsatz basiert auf der Dissertation des Autors unter dem Titel „Paris, Havanna und die intellektuelle Linke: Kooperationen und Konflikte in den 1960er Jahren" (2011, im Erscheinen).

in den postkolonialen Transformationsgesellschaften: Algerien, Kuba, Vietnam, Chile, Nicaragua sollten bis 1980 die wichtigsten Stationen dieser Debatte bilden. Stärker als jede andere antikoloniale Bewegung verlieh zu Beginn der 1960er Jahre die Revolution in Kuba der Auffassung Ausdruck, dass die Herausforderung der Dekolonisierung mit der Unabhängigkeitserklärung und der Annahme einer Verfassung nicht bewältigt sei: Trotz staatlicher Autonomie würden die asymmetrischen Beziehungsmuster und alten wirtschaftlichen Abhängigkeiten in Form informeller imperialer Einflussnahme und Kontrolle fortbestehen. Die neue Regierung in Havanna bemühte sich Mitte der 1960er Jahre nachdrücklich um einen Ausbau ihrer kulturellen, diplomatischen und wirtschaftlichen Beziehungen zu den nichtsozialistischen europäischen Staaten. Am stärksten entwickelten sich die Verbindungen mit Frankreich: Das Land war mit der bipolaren Ordnung nach dem Zweiten Weltkrieg unzufrieden und verteidigte seinen Großmachtanspruch, indem es eine eigene Nuklearstreitmacht aufbaute, aus den Militärstrukturen der NATO austrat und auf der internationalen Bühne die Unterordnung unter die USA verweigerte. Zudem verkörperte die französische Gesellschaft wie kaum eine andere eine revolutionäre Freiheitstradition, die nicht zuletzt über die Figur des Intellektuellen international ausstrahlte. Viele sowjetkritische Linke hatten aus dem Kolonialkrieg in Algerien und der großen nationalen Krise, die die algerische Unabhängigkeitsbewegung im Mutterland auszulösen vermochte, die Schlussfolgerung gezogen, dass sich der Ausgangspunkt und das Subjekt revolutionärer Prozesse in die kolonial beherrschten oder lediglich nominell souveränen Gesellschaften verlagert habe.[2] Sie betrachteten moderne Industriestaaten und die Länder des Südens nicht länger als voneinander getrennt funktionierende Welten, sondern begriffen die strukturelle Abhängigkeit der Länder Lateinamerikas, Afrikas und Asiens gegenüber den westlichen Staaten als interagierendes System. Vor dem Hintergrund der zunehmenden Infragestellung der Marxschen Pauperisierungstheorie durch die Steigerung des allgemeinen Wohlstandsniveaus in den Industrieländern interessierten sich viele Intellektuelle zu Beginn der 1960er Jahre weniger für das traditionelle revolutionäre Subjekt im eigenen Land, die französische Arbeiterschicht, als für die im Umbruch befindliche Welt außerhalb Europas; sie richteten ihre Aufmerksamkeit insbesondere auf die langen antikolonialen Kriege in Algerien und Vietnam sowie auf den antikolonialen Widerstand Kubas und dessen neuen Ansatz zur Überwindung der Unterentwicklung. Neben der sowjetkritischen Haltung avancierte die Überzeugung, dass die großen „revolutionären" Veränderungen der Gegenwart ihren Ausgang von den Ländern der „Dritten Welt" (Tiers Monde) nehmen würden, zur Grundlage des später als „Tiersmondisme" bezeichneten politischen Denkens der intellektuellen Linken.

2 J. Daniel / A. Burguière, Le tiers monde et la gauche (1979).

I. Die Bedeutung Frankreichs für das soziale Projekt in Kuba

Die Bedeutung Frankreichs für Kuba in den 1960er Jahren lässt sich an drei Spezifika nachweisen. Als erstes ist Frankreichs Stellenwert für Kubas Bild in der Weltöffentlichkeit und für eine europäische Solidaritätsbewegung zu nennen. Die neue Staatsführung in Havanna erkannte von Beginn an sowohl die Notwendigkeit einer positiven Außenwirkung und einer internationalen Unterstützerbewegung als auch die Bedeutung Frankreichs als medialer Resonanzkörper Westeuropas. Ihre wichtigsten Instrumente im Rahmen der auswärtigen Kulturpolitik waren die Förderung französischer Solidaritätsorganisationen als zivilgesellschaftliche Mittlerorganisationen, die Förderung kubaspezifischer Kulturveranstaltungen, die Herausgabe beziehungsweise Förderung französischsprachiger Publikationen über Kuba in Frankreich sowie nicht zuletzt eine systematische Einladungspolitik, die zahlreiche französische Intellektuelle nach Kuba führte. Viele berichteten nach ihrer Rückkehr in den Medien oder in Vorträgen über positive Veränderungen für die Bevölkerungsmehrheit gegenüber der Zeit vor 1959. Zielgruppe der kulturpolitischen Strategie Havannas war zunächst nicht nur die sowjetkritische intellektuelle Linke, sondern – entsprechend der heterogenen Zusammensetzung der kubanischen Führung – auch die Kommunistische Partei Frankreichs (PCF). Die Schlüsselrolle kam jedoch der intellektuellen Linken zu, die grundsätzlich mit der Position der sowjetkritischen Hauptströmung in Havanna übereinstimmte: Sie übte innerhalb der französischen Öffentlichkeit großen Einfluss aus und verschaffte der Revolution die mehrheitliche Sympathie der französischen Zivilgesellschaft. Beste Beispiele sind der *Le Monde*-Redakteur Claude Julien, der ab 1958 über Kuba berichtete, sowie der Philosoph Jean-Paul Sartre, der 1960 seine 16-teilige Reportage in der zu jenem Zeitpunkt auflagenstärksten Tageszeitung *France Soir* publizierte.[3] Beide betonten sowohl die Unabhängigkeit des kubanischen Projektes vom sowjetischen Marxismus als auch – angesichts der Konfrontation mit den USA – seinen antikolonialen Grundzug, der dem Prozess in Kuba einen möglichen Modellcharakter für die anderen, in einer vergleichbaren Situation befindlichen Länder Lateinamerikas verlieh. Beistand für die eigenen politischen Positionen konnte Havanna in der zweiten Hälfte der 1960er Jahre in Frankreich insbesondere durch die Einladung gesellschaftlicher Multiplikatoren zu der Trikontinentalkonferenz, der OLAS-Konferenz und dem Kulturkongress gewinnen. Auf den erstgenannten Veranstaltungen stand die Propagierung einer globalen Strategie gegen den U.S. Imperialismus beziehungsweise des Modells des Guerillakampfes für Lateinamerika im Vordergrund. Mit dem Kulturkongress zielte die kubanische Seite überdies auf die moralische Verpflichtung der Wissenschaftler der industrialisierten Welt, den

3 J.-P. Sartre, „Ouragan sur le sucre" (Teile 1-16), in: France Soir, 28./29./30. Juni, 1./2./3.-4./5./6./7./8./9./10.-11./12./13./14./15. Juli 1960. Zu C. Julien vgl. u.a. „Cuba entre la colère et la peur" (Teile 1-6), in: Le Monde, 13./14./15./16./17./18.-19. Mai 1958; „Cuba ou la ferveur contagieuse" (Teile 1-6), in: Le Monde, 17./18./19./20.-21./22./23. März 1960; „Le communisme de M. Fidel Castro", in: Le Monde, 3. Januar 1962; „Sept heures avec M. Fidel Castro" (Teile 1-2), in: Le Monde, 22./23. März 1963; „M. Fidel Castro et le socialisme" (Teile 1-5), in: Le Monde, 3./4./5./6./7.-8. März 1965; sowie Juliens Monographie La Révolution Cubaine (1961).

Aufbau der Wissenschafts- und Technologiesektoren in Lateinamerika, Afrika und Asien zu unterstützen.

Um die Präsenz Kubas in Frankreich sowie die Bindungen zwischen den beiden Ländern zu fördern, griffen kubanische Entscheidungsträger zudem auf das Instrument zivilgesellschaftlicher Mittlerorganisation zurück. Marinello, der Vorsitzende der Kommunistischen Partei in Kuba (PSP), stieß Mitte 1960 die Gründung der Solidaritätsorganisation *Association France-Cuba* an, indem er in Paris gegenüber der französischen Bruderpartei den zunehmend sozialistischen Charakter des kubanischen Transformationsprozesses erläuterte und politische Unterstützung der französischen Zivilgesellschaft einforderte.[4] Die daraufhin in enger Kooperation mit der kubanischen Botschaft gebildete Organisation trug dazu bei, die Veränderungen auf Kuba sowie die Geschichte und Kultur des Landes einem gesellschaftlich breiten Publikum bekanntzumachen.[5] Ihre Strategie, sowohl die innerkubanischen sowjetkritischen Debatten als auch die Zurückdrängung der prosowjetischen Kräfte auszublenden, zeitigte insofern Erfolg, als die Vereinigung bis Mitte der 1960er Jahre zu einem anerkannten Forum avancierte, dessen Präsidium neben Mitgliedern des PCF auch Vertreter des Gaullismus und einzelne Unternehmer angehörten. In der zweiten Hälfte der Dekade jedoch, als die kubanische Regierung ihr politisches Profil schärfte, stieß die systematische Ausblendung der sowjetkritischen Dimension auf zunehmende Ablehnung in Havanna.[6] Die kubanische Seite stellte die Zusammenarbeit mit *France-Cuba* weitgehend ein und regte Anfang 1968 mit der Gründung der *Association Internationale des Amis de la Révolution Cubaine* eine neue Organisation an, die eine Repräsentation und politische Unterstützung des spezifischen revolutionären Anspruchs im Sinne der kubanischen Staatsführung leisten sollte.[7]

Das zweite Spezifikum, das in dem Untersuchungszeitraum die Bedeutung Frankreichs für Kuba ausmachte, war die wirtschaftliche und wissenschaftliche Kooperation auf nichtstaatlicher und staatlicher Ebene. Die kubanische Regierung betrachtete die Durchbrechung der von den Vereinigten Staaten forcierten internationalen Blockadepolitik und die Aufrechterhaltung von Handelsverbindungen jenseits der sozialistischen Staatenwelt als Voraussetzung für die Wahrung der Autonomie des Landes und die Modernisierung der Volkswirtschaft. Ein zentrales Handlungsfeld sah die kubanische Staatsführung in dem Wissenschafts- und Technologiesektor und trieb in den 1960er Jahren

4 J. Marinello, „Signification et portée de la révolution cubaine", in: Démocratie Nouvelle, Juni 1960, S. 63-69.

5 Auch wenn die ***Association France-Cuba*** nach außen hin nicht als Unterorganisation der Partei in Erscheinung trat, fand die Gründung nicht ohne vorhergehende Beratung des Sekretariats des PCF statt. Vgl. das Beschlussprotokoll der Sekretariatssitzung vom 3. Januar 1961, Tagesordnungspunkt 5, in: ASSD, Archives du Parti Communiste Français (2 NUM 4/12).

6 Aufgrund der politischen Diskrepanzen verzichtete Havanna in den Jahren 1966 bis 1971 auf den Austausch von Delegationen mit dem PCF und der *Association France-Cuba*. Zu der Ausblendung der sowjetkritischen Dimension der kubanischen Politik vgl. die Beiträge in *Cuba Si*, dem Organ der Vereinigung, in: Privatarchiv Paul Estrade, Paris (Dossier Association France-Cuba).

7 Vgl. das Gründungsdokument unter dem Titel „Crean comité permanente franco-cubano intelectuales de Cuba y Francia", in: Granma, 11. Januar 1968; sowie die Einladung zu der Gründungsversammlung vom 29. März 1968 mit dem Titel „Association Internationale des Amis de la Révolution Cubaine", in: Bibliothèque de Documentation Internationale Contemporaine (BDIC), Nachlass Daniel Guérin (Fol Δ 721/101/2).

wie keine andere Regierung Lateinamerikas dessen Aufbau voran.[8] Um Unterstützung von Seiten der französischen Regierung und eine Verbesserung der zwischenstaatlichen Beziehungen bemühte sie sich erst ab 1963: Ausschlaggebend waren für Havanna die allein zwischen Washington und Moskau ausgehandelte Lösung der Raketenkrise vom Herbst 1962 sowie eine Veränderung der französischen Außenpolitik. Die Raketenkrise hatte falsche Vorstellungen von einer uneigennützigen Schutzmacht, welche die nationalen Interessen kleinerer Länder respektieren würde, zerstört und einen tiefgreifenden Vertrauensbruch in dem kubanischen Verhältnis zu Moskau zur Folge. Die Unzufriedenheit mit den technisch veralteten Industrieanlagen jenseits des gewohnten U.S. Qualitätsstandards, die die kubanische Regierung in der ersten Hälfte der 1960er Jahre in der Sowjetunion und anderen osteuropäischen Ländern einkaufte, förderte das Interesse an Technik und Industrie aus Westeuropa.[9] Ebenso entscheidend für die Neubewertung und das wachsende Ansehen der französischen Staatsführung in Kuba waren die Beendigung des französischen Kolonialkrieges in Algerien und der neue außenpolitische Kurs de Gaulles. Die diplomatischen und wirtschaftlichen Beziehungen zwischen Havanna und Paris wurden nicht länger von jenen Spannungen belastet, die im Zusammenhang mit der proalgerischen Position der kubanischen Regierung entstanden waren.[10] Der Handel erlebte nicht zuletzt dank der ab 1964 gewährten Exportkreditgarantien der französischen Regierung einen solchen Aufschwung, dass Kuba in der zweiten Hälfte der Dekade zum wichtigsten Abnehmer französischer Maschinenbauerzeugnisse in Lateinamerika und Frankreich vorübergehend zu Kubas wichtigstem Nickelabsatzmarkt nach der Sowjetunion avancierte.[11] Die Bedeutung dieser wirtschaftlichen Verbindungen lag weniger in ihrem prozentualen Anteil an dem in den 1960er Jahren stets von der Sowjet-

8 Zu dem Aufbau eines modernen Wissenschafts- und Forschungssektors in Kuba, für den in der zweiten Hälfte der 1960er Jahre der Grundstein gelegt wurde, vgl. M. Roche, „Notes on Science in Cuba", in: Science 3943 (24. Juli 1970), S. 344-349.

9 Das Interesse erwuchs zudem aus der Tatsache, dass Frankreich aufgrund seiner Überseeterritorien im Gegensatz zu den Ländern Osteuropas über Kompetenzen auf dem Gebiet der tropischen Agronomie verfügte. Vgl. das Schreiben des kubanischen Botschafters in Paris an den Leiter der Direction de la Coopération technique im französischen Außenministerium vom 5. Mai 1970, in: Archives du Ministère des Affaires étrangères (MAE), Bestand Kuba, Art. 80.

10 Gegenüber dem französischen Botschafter in Havanna würdigte 1964 Kubas Außenminister Raúl Roa die Außenpolitik de Gaulles als „Wunder der französisch-algerischen Aussöhnung". Zu dem Gespräch vgl. den Bericht von Botschafter Pierre Négrier vom 20. August 1964, in: MAE, Bestand Kuba, Art. 54. In einem Anfang 1964 erschienenen Artikel über das Ansehen de Gaulles in der dekolonisierten Welt verwies der Publizist Jean Daniel auf sein Gespräch vom November 1963 mit dem kubanischen Premierminister Fidel Castro, der Frankreichs neue Algerienpolitik als positive Alternative zu Washingtons Lateinamerikapolitik hervorgehoben habe. Vgl. J. Daniel, „Le mythe gaulliste dans le ‚tiers monde'", in: Le Monde, 5. Februar 1964, S. 1-2. Zu Castros Bewunderung für Frankreichs Staatspräsidenten de Gaulle und dessen Algerienpolitik vgl. auch das Telegramm des französischen Botschafters an das Außenministerium vom 22. November 1963, in: MAE, Bestand Kuba, Art. 22.

11 Die ersten Kreditbürgschaften wurden für den Verkauf französischer Lastkraftwagen, Traktoren, Raupenfahrzeuge und Lokomotiven gewährt. Vgl. den Länderbericht des französischen Außenministeriums unter dem Titel „Note sur Cuba et les relations franco-cubaines" vom 2. November 1966, in: MAE, Bestand Kuba, Art. 54. Zu den kubanischen Nickelexporten nach Frankreich vgl. Statistiques du commerce extérieur de la France: importations-exportations en NDB, Bd. 1967, S. 915, Bd. 1968, S. 956, Bd. 1970, S. 1009; sowie die Übersicht des französischen Handelsattachés in Havanna François Mouton, „Analyse sommaire des échanges commerciaux franco-cubaines en 1969" (5. Mai 1970), in: MAE, Bestand Kuba, Art. 71.

union dominierten Außenhandelsumsatz Kubas, sondern vielmehr in der Tatsache, dass Havanna die Importe aus Frankreich gerade in den Jahren 1967/1968 steigern konnte, als Moskau die kubanische Regierung durch wirtschaftlichen Druck zum Einschwenken auf den sowjetischen Kurs zu zwingen versuchte. Erfolg zeitigten auch die kubanischen Bemühungen um einen Ausbau der Wissenschaftskooperation mit Frankreich und das zweigleisige Vorgehen: Da die Zusammenarbeit auf gouvernementaler Ebene ebenso wie der Abschluss von Kooperationsabkommen nur langsam vorangingen, setzte die Regierung in Havanna zugleich auf die direkte Kontaktaufnahme zu Experten und versuchte 1968 mit dem Kulturkongress, Wissenschaftler der industrialisierten Welt zur praktischen Unterstützung ihrer wissenschaftspolitischen Ziele zu verpflichten. Der als Ergebnis dieses Kongresses in Paris gegründete *Comité de liaison scientifique et universitaire franco-cubain* zielte mittels der Organisation von Sommeruniversitäten in Zusammenarbeit mit der Universität Havanna sowie der Vermittlung französischer Experten nach Kuba beziehungsweise kubanischer Nachwuchswissenschaftler an Einrichtungen in Frankreich auf die Hebung des Ausbildungsniveaus in Kuba.[12] Zudem engagierte sich der *Comité de liaison* erfolgreich für den Abschluss dreier Abkommen zwischen den Wissenschaftsinstitutionen der beiden Länder, die ab Herbst 1969 beziehungsweise 1971 den institutionellen und finanziellen Rahmen der Zusammenarbeit bildeten.[13] Von der Kooperation, zu deren Ergebnissen auch Forschungserfolge im Bereich der Labherstellung und der induzierten Zwillingsgeburt von Rindern gehörten, profitierten neben den Agrarwissenschaften insbesondere die Bereiche Mathematik, Informatik, Molekularbiologie und Medizin. Havanna war es somit jenseits der Hilfe der delegierten Experten aus Osteuropa gelungen, mit Unterstützung französischer Experten und deren Regierung sowie einzelner Wissenschaftler aus anderen westeuropäischen Ländern den Grundstein für den Aufbau eines modernen Wissenschafts- und Forschungssektors zu legen.

Das dritte Spezifikum hängt eng mit den beiden erstgenannten Punkten zusammen. So bestand die Bedeutung Frankreichs für Kuba beziehungsweise der kubanischen Zusammenarbeit mit der intellektuellen Linken und der Regierung in Frankreich letztlich in der Stärkung des politisch-ideologischen Autonomieanspruchs Havannas sowie in dem

12 Zur Arbeit des Comité de liaison und zu dem Programm der Sommeruniversitäten vgl. dessen Organ Bulletin du Comité de liaison scientifique franco-cubain 1 (1968), Bulletin du Comité de liaison scientifique et universitaire franco-cubain 3 (Februar 1970)-10 (Oktober 1972), sowie das Programm der Universität Havanna mit dem Titel Universidad de la Habana. Cursos de superación post-graduada: Escuela de verano 1969; in: Privatarchiv Didier Dacunha-Castelle, Palaiseau; sowie D. Dacunha-Castelle, „L'enseignement universitaire veut lier la production et la formation", in: Le Monde, 29.-30. März 1970, S. 4.

13 Vgl. das Abkommen zwischen der Academia de Ciencias de Cuba und dem CNRS vom 17. November 1969 einschließlich der Arbeitsprogramme für die Jahre 1970 und 1971; sowie das Abkommen zwischen dem Instituto Nacional de la Reforma Agraria und dem Institut National de la Recherche Agronomique vom 25. Oktober 1971, in: MAE, Bestand Kuba, Art. 80; sowie ANF (CAC), Bestand „Centre National de la Recherche Scientifique" (19860367/Art. 2 und 8). Zu dem gemeinsamen Forschungsprojekt des CENIC und des Institut National de la Recherche Agronomique vgl. „Note pour la Direction des Affaires politiques—Amérique" vom 14. Oktober 1969, in: MAE, Bestand Kuba, Art. 80; sowie C. L., „Les échanges culturels et techniques franco-cubains se développent rapidement", in: Le Monde, 29.-30. März 1970, S. 4; sowie F. Cisneros / E. Vallès / G. Mocquot / R. Tomassone, „Obtention de la présure à partir de veaux fistulés", in: Le Lait 517 (1972), S. 395-406.

Einflussgewinn westeuropäischer Intellektueller innerhalb Kubas. Grundlegend war der Stellenwert Frankreichs als kultureller Bezugspunkt sowie das Prestige der Französischen Revolution. Chruschtschows Position zur Moderne in Kunst und Kultur stieß in Kuba nur bei der kleinen prosowjetischen Fraktion, die sich erst in den 1970er Jahren durchsetzen konnte, auf Unterstützung. Umso größer war das Interesse kubanischer Kulturschaffender an jenen Ländern, wo die Moderne in Literatur, Film, Musik und Malerei eine zentrale Rolle spielte. Kubanische Verlage und Zeitschriften publizierten Schriften so unterschiedlicher Denker wie Sartre, de Gaulles Kulturminister André Malraux, des Marxspezialisten Louis Althusser, des Literaturwissenschaftlers Roland Barthes, des Philosophen Paul Ricœur und vieler anderer. Auch Französisch als Fremdsprache erlebte an kubanischen Sekundarschulen und dem französischen Kulturinstitut *Alliance Française* einen Aufschwung.[14] Für Kubas Regierung und Kulturschaffende stellte Frankreich Mitte der 1960er Jahre ein wichtiges Tor zu Westeuropa dar.

Die kulturellen, wirtschaftlichen und zwischenstaatlichen Verbindungen zu einem Land des nordatlantischen Bündnisses begünstigten in Kuba einen Kurs, der verstärkt auf sowjetunabhängige Ideen setzte. Nicht zufällig ging die Hinwendung zu Frankreichs Zivilgesellschaft und dem französischen Staat mit der 1962 einsetzenden Zurückdrängung der prosowjetischen Kräfte innerhalb der Revolution und einer bis 1968 zunehmenden Abgrenzung gegenüber der sowjetischen Politik einher: Erwähnt seien die Gewährung größerer künstlerischer Freiheit und der Aufbau eines sozialistischen Wirtschaftsmodells, das einen stärkeren Akzent auf Demonetarisierung und moralische Anreize setzte, sowie die Strategie des bewaffneten Kampfes und die Solidarisierung mit Befreiungsbewegungen in Lateinamerika. Im Gegensatz zur Imperialismustheorie Moskaus, wonach die Systemkonkurrenz zwischen Kapitalismus und Sozialismus den Hauptwiderspruch der Epoche darstellte, bildete die These von der Ausbeutung der Nichtindustrieländer durch die Vereinigten Staaten als dem gewichtigsten Antagonismus den Kern der kubanischen U.S. Superimperialismustheorie. Je deutlicher 1967 / 1968 die kubanische Staatsführung die sowjetische Politik kritisierte, umso wichtiger wurde die Unterstützung einer aus Frankreich angereisten intellektuellen Linken, die in der Welt die revolutionäre Avantgarderolle Kubas bezeugen sollte – nicht zuletzt angesichts der Konkurrenz in Peking. So füllten auf den Revolutionsfeiern dieser Jahre insbesondere Gäste aus Frankreich die Ränge der Ehrentribünen und auf dem Kulturkongress im Januar 1968 dominierten die Teilnehmer aus Frankreich.[15]

14 So verdoppelte sich beispielsweise von 1964 bis 1966 die Zahl der Sprachkursteilnehmer an der Alliance Française von 1.200 auf 2.500. Vgl. die beiden Berichte des französischen Außenministeriums unter dem Titel „Note sur Cuba et les relations franco-cubaines" vom 25. Februar 1964 sowie 2. November 1966, in: MAE, Bestand Kuba, Art. 54. Zur Beliebtheit der französischen Sprache bei kubanischen Sekundarschülern vgl. C. Julien, „M. Fidel Castro et le socialisme", Teil 5 „Le guérillero et le professeur", in: Le Monde, 7.-8. März 1965, S. 4; sowie das Gespräch des Verfassers mit dem Historiker und ehemaligen Sekundarschüler in Havanna José Vega Suñol (*1952) am 4. November 2009 in Köln.

15 Vgl. u. a. die offizielle Teilnehmerliste des Kulturkongresses mit den alphabetisch nach 65 Herkunftsländern geordneten Namen der Delegierten, in: Privatarchiv Dacunha-Castelle.

Diese wiederum suchten in Kuba nach Zeichen für politische Freiheit, die für viele in der künstlerischen Freiheit und dem Pluralismus auf dem Kulturkongress zum Ausdruck kam. Zum Teil intervenierten sie sogar, um repressiven Tendenzen entgegenzuwirken. Voraussetzung für den Bestand der Allianz mit der intellektuellen Linken Westeuropas war daher, dass die kubanische Führung auf deren spezifische Interessen Rücksicht nahm. So trat der italienische Verleger Feltrinelli 1965 im persönlichen Gespräch mit Premierminister Castro erfolgreich gegen die Inhaftierung Homosexueller ein.[16] Im Rahmen der Wissenschaftskooperation setzten sich Ende der 1960er Jahre französische Mathematiker für kubanische Kollegen ein, die aus politischen Gründen degradiert worden waren.[17] Wohl am stärksten war die kubanische Seite 1967/1968 interessiert, keinen Konflikt mit der intellektuellen Linken Westeuropas entstehen zu lassen: Der Dichter Padilla hatte 1967 mit einem Kommentar über die Unvereinbarkeit der Rolle des Intellektuellen mit der Funktion des Parteifunktionärs die offizielle Linie angegriffen. Die Regierung jedoch unterdrückte im Vorfeld des Kulturkongresses eine Debatte über das Thema. Erst später wurde bekannt gegeben, dass auch die Redaktion der Zeitschrift, die Padillas Stellungnahme abgedruckt hatte, ausgetauscht worden war.[18] Zudem musste sich auf dem Kulturkongress Minister und Schirmherr Llanusa – um den eigenen pluralistischen Anspruch zu wahren – für einen Manipulationsversuch der Fraktion um Jorge Serguera entschuldigen: Diese hatte den auf dem Kongress beratenen *Appell von Havanna* vor der Verabschiedung ohne Rücksprache mit den westeuropäischen Verfassern hinsichtlich der politischen Anforderungen an den „revolutionären Intellektuellen" verschärft.[19]
Insgesamt stärkte somit die Zusammenarbeit mit der intellektuellen Linken Frankreichs bis 1968 nach innen und außen den Autonomieanspruch Havannas; doch für die Aufrechterhaltung dieses Bündnisses musste die kubanische Führung „innerhalb der Revolution" ein Mindestmaß an individuellen Freiheitsrechten gewähren. Als im Herbst 1968 in Havanna aufgrund unterschiedlicher globaler und innenpolitischer Faktoren

16 C. Feltrinelli, Senior Service. Das Leben meines Vaters (2001), S. 319-321.

17 Vgl. den Brief des Generalsekretärs des Comité de liaison scientifique et universitaire franco-cubain vom 20. März 1969, adressiert an den Rektor der Universität von Havanna mit der Bitte um Weiterleitung an die zuständige Behörde (9 Blätter); sowie den Brief von Laurent Schwartz an Premierminister Castro, ohne Datum, vermutlich 1969 (12 Blätter), beide in: Privatarchiv Dacunha-Castelle.

18 Vgl. die im Herbst 1967 verfasste und erst im März 1968 abgedruckte Stellungnahme Heberto Padillas unter dem Titel „Sobre una ‚Pasión' pendiente nuevas opiniones: el poeta Padilla polemiza con la redacción saliente de ‚El Caimán Barbudo'" einschließlich der Vorbemerkung von Jaime Crombet, in: El Caimán Barbudo 19 (März 1968), S. 2-5; sowie die auf den 26. Oktober 1967 datierte und im Juni 1968 abgedruckte Erwiderung der entlassenen Redakteure Jesús Díaz, Luis Rogelio Nogueras, Guillermo Rodríguez Rivera, Víctor Casaus, „¿El yogui y el comisario?", in der sie Padillas Dualismus zurückwiesen, und die Stellungnahme von Lisandro Otero, „Del otro lado del Atlántico: una actitud", beide in: El Caimán Barbudo 21 (Juni 1968), S. 2-8. Zu der kubanischen Furcht vor einer negativen Außenwirkung einer Kontroverse im Vorfeld des Kulturkongresses vgl. L. Otero, Llover sobre mojado (1999), S. 109.

19 Vgl. die Schilderung des französischen Delegierten K. S. Karol, Les guérilleros au pouvoir (1970), S. 399, sowie J.-P. Gorin, „Le congrès culturel de La Havane a dénoncé la ‚pénétration culturelle' des États-Unis", in: Le Monde, 26. Januar 1968, S. 5. Zu dem Appell selbst vgl. R. Miliband, Appel de La Havane: Appel présenté à la commission No. 1 par Ralph Miliband, discuté et accepté comme accord en principe par toute la commission à l'unanimité sowie den auf diesem Dokument basierenden und von allen Delegierten angenommenen Appel de La Havane, beide in: Privatarchiv Dacunha-Castelle.

der Anspruch einer sozialistischen Alternative zum sowjetischen Modell zugunsten der politischen Absicherung des Entwicklungsprojektes in den Hintergrund trat, verlor auch Frankreichs intellektuelle Linke ihren Einfluss. Erfolglos intervenierten renommierte lateinamerikanische Schriftsteller mit Wohnsitz in Paris beziehungsweise Barcelona ebenso wie französische Intellektuelle, als die Vergabe des UNEAC-Literaturpreises an die beiden regimekritischen Schriftsteller Padilla und Arrufat zum Anlass für eine politische Kampagne gegen diejenigen Intellektuellen genommen wurde, die dem sowjetischen Marxismus und dem neuen Kurs kritisch gegenüberstanden.

II. Die Bedeutung Kubas für Gesellschaft und Regierung in Frankreich

Die Bedeutung Kubas für die Regierung und die politische Programmatik der Linken in Frankreich lässt sich wiederum an drei Spezifika aufzeigen. Erstens konnte Staatspräsident de Gaulle der weltpolitischen Sonderstellung Frankreichs und der französischen Ablehnung der U.S. Hegemonie mit Hilfe seiner Kubapolitik insofern Ausdruck verleihen, als Abgeordnete der Regierungspartei Washingtons Blockadepolitik gegenüber Havanna öffentlich kritisierten und die französische Regierung das Land durch Gewährung staatlicher Kreditgarantien für Exporte nach Kuba sowie durch Kooperation im Bereich Wissenschaft und Technik direkt unterstützte. Die Regierung sah in einer solchen Politik eine Möglichkeit, die Dominanz der USA in Lateinamerika zu schwächen und den eigenen Einfluss in der Region zu stärken. De Gaulles Kubapolitik war folglich Teil eines außenpolitischen Konzeptes, das in den Jahren 1964 bis 1968 durch die Abgrenzung gegenüber den USA, den Ausbau der französischen Präsenz in Lateinamerika sowie durch die Entspannungspolitik gegenüber China und der Sowjetunion auf die diplomatische Aufwertung Frankreichs im westlichen Bündnis zielte.[20] Im Vergleich zur Wichtigkeit Frankreichs für die kubanische Regierung war die Bedeutung Kubas für die französische Regierung allerdings gering.

Bedeutsamer hingegen war der Stellenwert der kubanischen Revolution für das Welterklärungsmodell des Marxismus in Frankreich: sowohl für diejenigen Linken, die sich am Kommunismus der Sowjetunion orientierten, als auch für jene, die dem sowjetischen Marxismus kritisch gegenüberstanden und zugleich an der Idee der Revolution festhielten. Trotz aller Abweichung der politischen Entwicklung in Kuba von der Ideologie des Marxismus-Leninismus unterstützte der PCF Anfang 1961 – wie viele andere Kommunistische Parteien in der Welt – die Gründung einer nationalen Solidaritätsorganisation. In den 1960er Jahren versuchte der PCF, das kubanische Projekt als Beispiel für den Vormarsch der von der Sowjetunion angeführten „internationalen kommunistischen Bewegung" zu instrumentalisieren. Die vom PCF dominierte *Association France-Cuba* zwängte das kubanische Projekt gewissermaßen in das Bett des Procrustes ein und blen-

20 F. Bozo, Two strategies for Europe: de Gaulle, the United States and the Atlantic Alliance (2001); B. Krouck, De Gaulle et la Chine (2005); R. Lukic, Conflit et coopération dans les relations franco-américaines (2009).

dete ideologische Abweichungen und die kubanische Kritik am sowjetischen Marxismus ebenso wie die politischen Spannungen zwischen Havanna und Moskau weitgehend aus. Die Solidarisierung mit Kuba war für den PCF daher kein Selbstzweck, sondern sollte gleichzeitig die teleologische Dimension der Identität der Partei stärken.[21]

Viele intellektuelle Linke hingegen, die von dem sowjetischen Modell enttäuscht waren, erkannten in dem kubanischen Projekt die Möglichkeit einer Alternative und einer Erneuerung der sozialistischen Idee. Diese von Kuba ausgehende Botschaft „Das Unmögliche ist möglich!" bestärkte jene, die das emanzipatorische Projekt gerade wegen des sowjetunabhängigen Kurses der kubanischen Führer unterstützten, in ihrem politischen Engagement. Für sie verkörperte der Transformationsprozess auf Kuba einerseits einen Prototyp für die Vollendung der Dekolonisierung und die Lösung der Entwicklungsfrage sowie andererseits eine Delegitimierung des sowjetischen Modells und die Möglichkeit einer sozialistischen Alternative. Es handelte sich bei diesen von kubanischer Seite übernommenen Deutungsmustern um Konzepte, die sich entsprechend den eigenen Interessen sowohl gegen die Hegemonie der USA als auch gegen den sowjetischen Marxismus und dessen Einverständnis mit der bipolaren Ordnung richteten. Sie bestärkten jene in Frankreich im Zuge des Dekolonisierungsprozesses und insbesondere des algerischen Unabhängigkeitskrieges entstandene Idee, dass eine grundlegende Veränderung der bestehenden Herrschaftsverhältnisse in der Welt nur durch Revolutionen in der „Dritten Welt" und nicht mehr durch die „kommunistische Weltbewegung", das heißt die Sowjetunion einschließlich der mit ihr verbundenen nationalen Kommunistischen Parteien, vorangetrieben würde. Die Kuba-Berichte des *Le Monde*-Journalisten Claude Julien sowie des bekanntesten französischen Philosophen dieser Jahre Jean-Paul Sartre, der 1960 vom Erfolg des kubanischen Projektes die Zukunft der Revolutionsidee an sich abhängig machte, spiegeln dieses Denken wider. Ein zentrales Argument Juliens beruhte ab 1958 auf dem mangelnden Beitrag der Kommunistischen Partei zum Zusammenbruch der Diktatur Batistas sowie auf der Originalität des darauf folgenden Transformationsprozesses. Indem Julien das Versagen der Kommunistischen Partei betonte und Kuba positiv vom sowjetischen Modell abhob, stellte er zugleich die Legitimation sowie den Avantgardeanspruch der Kommunistischen Parteien in Frankreich und anderen Ländern infrage. Die globale Dimension der Revolution sah Julien darin, dass in Kuba erstmals die auf ökonomischer Kontrolle und externer Einflussnahme basierende Herrschaftsform des „ökonomischen Imperialismus" erschüttert und eine Neuordnung des quasi-kolonialen Verhältnisses zu der Imperialmacht USA gefordert wurde. Sartre wiederum erklärte 1960 in seiner in Millionenauflage verbreiteten Reportage am Bei-

21 Das Konzept einer dualistischen Identität der Kommunistischen Parteien in Westeuropa, bestehend aus einer „teleologischen Dimension" und einer „gesellschaftlichen Dimension", haben französische Historiker begründet. Während die „teleologische Dimension" auf der Vorstellung einer historisch notwendigen Entwicklung hin zu einem weltweiten Sieg des Sozialismus im Rahmen einer von der Sowjetunion angeführten Weltbewegung basierte, umfasste die „gesellschaftliche Dimension" der Identität jene Elemente, die die Kommunistischen Parteien zu einem Teil der jeweiligen nationalen Kultur machten. Vgl. S. Courtois / M. Lazar, Histoire du Parti communiste français (2000), Introduction.

spiel der kolonialen Grundzüge der kubanischen Wirtschaft und Gesellschaft Neokolonialismus und Unterentwicklung als zwei Seiten einer Medaille. Latifundienwirtschaft und Monokultur begriff er als ökonomische Grundstruktur von Unterentwicklung und Abhängigkeit und stellte denn auch die Agrarreform als Schlüssel für die Überwindung der kolonialen Wirtschafts- und Gesellschaftsstrukturen sowie als das zentrale Motiv der Revolution dar. Zugleich stützte Sartre mit der Fokussierung seiner Reportage auf den Themenkomplex Agrarreform, Landbevölkerung und Rebellenheer in der Kontroverse um die Fraktion und Gesellschaftsschicht, welche den wichtigsten Beitrag zum Zusammenbruch der Diktatur Batistas geleistet habe, die These der Bauernrevolution, die die neue Staatsführung um Castro und Guevara verfocht. Die kubanische Revolution lieferte somit einerseits wichtige Argumente, die den sowjetischen Marxismus delegitimierten, und förderte andererseits, indem es die Möglichkeit einer Alternative zeigte, die wachsende Autonomie der intellektuellen Linken gegenüber der mächtigen Kommunistischen Bewegung.

Viele, die mit dem an Moskau orientierten Kurs der PCF-Führung unzufrieden waren, lehnten sich in den Machtkämpfen innerhalb der französischen Linken an die politische Linie der kubanischen Führung an. Diese Wirkungszusammenhänge spiegeln die Geschichte des PCF-Studentenverbandes UEC (*Union des Etudiants Communistes*), der Vietnamsolidaritätsbewegung CVN (*Comité Viêt-nam national*) sowie der *Association France-Cuba* wider. Das verbindende Moment zwischen der UEC und Kuba war 1963 bis 1965 die Kritik am sowjetischen Marxismus: Oppositionelle Strömungen, die in Konflikt mit der moskautreuen Mutterpartei standen, nutzten die Auseinandersetzungen innerhalb der kubanischen Revolution, um ihre Forderungen gegenüber der PCF-Führung nach mehr Basisdemokratie und einer „Entstalinisierung" des Sozialismus zu stärken. Sie griffen Debatten wie die Diskussion um die künstlerische Freiheit auf, welche Mitte der 1960er Jahre in Kuba zur Zurückdrängung derjenigen Strömung führten, die das sowjetische Modell durchsetzen wollte.[22] So instrumentalisierte etwa das UEC-Mitglied Janette Habel das kubanische Vorgehen gegen den Einfluss der an der Macht beteiligten prosowjetischen Kräfte – im Rahmen des Prozesses gegen Marcos Rodríguez – für eine generelle Kritik am PCF.[23] Daher galt auch Ernesto Guevara, der in seinen Texten den sowjetischen Marxismus am deutlichsten kritisierte, besonderes Interesse. Eine weitere programmatische Abweichung, mit dem sich innerhalb der UEC vor allem Régis Debray sowie die trotzkistische Fraktion gegenüber dem PCF positionierten, war ab 1965 ihre Unterstützung des von Havanna als Strategie für einen Systemwechsel in Lateinamerika propagierten Guerillamodells, das den Kommunistischen Parteien die Führungsrolle absprach. Der PCF und Moskau hingegen befürworteten die Teilnahme der Kommunistischen Parteien Lateinamerikas an der institutionellen Politik. Die UEC förderte die

22 Vgl. u.a. A. Guevara, „Cuba", in: Clarté 54 (Februar 1964), S. 28-30; erstmals unter dem Titel „El Cine Cubano 1963", in: Cine Cubano 14-15 (Oktober-November 1963), S. 1-9.

23 J. Habel, „Le procès de Marcos Rodríguez et les problèmes de l'unité du mouvement révolutionnaire cubain", in: Les Temps Modernes 219-220 (August-September 1964), S. 491-531.

Beschäftigung mit der Revolution in Kuba nicht nur auf der theoretischen Ebene, sondern auch durch die Organisation von Exkursionen. Die persönlichen Begegnungen und Erfahrungen spielten für viele Teilnehmer eine bestärkende Rolle in ihrer Suche nach gesellschaftlichen Gestaltungsmöglichkeiten, die letztlich dem Autonomiestreben gegenüber dem PCF zugrunde lag. Die kubanischen Führer unterstützten indirekt den Kampf des intellektuellen Nachwuchses der französischen KP gegen die moskautreue Mutterpartei, indem sie denjenigen, die sich für den politischen Prozess in Kuba interessierten, große Aufmerksamkeit widmeten und auf diese Weise deren symbolisches Kapital in Frankreich stärkten. Insgesamt wirkte der sowjetunabhängige Anspruch Havannas als Katalysator in dem Konflikt zwischen den oppositionellen UEC-Strömungen und dem PCF und forcierte auf diese Weise die 1965 / 1966 erfolgte Aufsplitterung in dem linken studentischen Spektrum.

In den Jahren 1967 / 1968 wiederum lehnte sich der *Comité Viêt-nam national* (CVN), eine Hauptströmung der Vietnamsolidaritätsbewegung in Frankreich,[24] an den Kurs der kubanischen Regierung an. Indem der CVN deren Strategie des bewaffneten Kampfes in Vietnam und Lateinamerika unterstützte, untergrub er die politische Autorität des PCF, der wie im Algerienkrieg ausschließlich für den Frieden, nicht aber für den Sieg der Befreiungsbewegungen eintrat. Der kubanische Aufruf für eine weltweite Allianz gegen die Hegemonie der USA und die öffentliche Kritik am sowjetischen Marxismus suggerierten nicht nur einen „Dritten Weg", sondern zugleich eine Einheit zwischen den bewaffneten Kämpfen in Lateinamerika und Vietnam sowie den studentischen Protestbewegungen in den Industrieländern. Auf diese Weise entwickelte der CVN ein eigenes Profil im linken Spektrum der gesellschaftlichen Kräfte und gewann an kognitiver Radikalisierung, die sich nicht zuletzt auch gegen die Regierung de Gaulles richtete. Es gelang dem CVN, zahlreiche politische Neulinge aus den ersten Jahrgängen der Nachkriegsgeneration im Vorfeld der französischen Proteste politisch zu mobilisieren, und einige Führer des CVN – etwa Jean-Pierre Vigier und Alain Krivine – engagierten sich im Mai 1968 an vorderster Stelle.

Selbst innerhalb der vom PCF dominierten *Association France-Cuba* löste die Beschäftigung mit dem kubanischen Projekt Konflikte aus: Diejenigen, die den sowjetunabhängigen Kurs der kubanischen Führung unterstützen wollten, kritisierten nach Guevaras Tod die Ausblendung politisch unliebsamer Positionen sowie die an den Interessen des PCF ausgerichtete Linie der Vereinigung. Die prosowjetische Linke geriet mangels einer überzeugenden Revolutionsstrategie sowohl für die Gesellschaft in Lateinamerika als auch für jene in Frankreich bis zum Frühjahr 1968 weiter in die Defensive. Diese innere Krise der Vereinigung konnte nur durch die Entmachtung der sowjetkritischen Kräfte Ende 1968 überwunden werden.[25]

24 N. Pas, „Six Heures pour le Vietnam": Histoire des Comités Vietnam français 1965–1968, in: Revue historique 613 (Januar-März 2000), S. 157-184.

25 Vgl. u. a. das Protestdossier Vive le Peuple Cubain. Vive le Xème anniversaire de la Révolution Cubaine (Januar 1969), hrsg. von R. Merle, G. Halimi, C. Faux, M. Mestre, C. Meyrignac, P. Orfois, H. Pézerat, J.-J. Aisenman, in: Privatarchiv Dacunha-Castelle.

Das dritte Spezifikum, das in dem Untersuchungszeitraum die Bedeutung Kubas für Frankreich ausmachte, bestand in dem verstärkten entwicklungspolitischen Engagement, das die kubanische Kulturpolitik unter französischen Wissenschaftlern förderte. Linke Intellektuelle erkannten in der Wissenschaftskooperation eine Möglichkeit, das Problem des Fachkräftemangels in den Entwicklungsländern anzugehen und ihrer selbst auferlegten Verpflichtung gegenüber der postkolonialen Welt nachzukommen.[26] Von Beginn an maß die kubanische Staatsführung Kultur, Wissenschaft und Technik eine besondere Bedeutung bei und überzeugte mit dieser Transformationsstrategie französische Wissenschaftler zu persönlichem Engagement. Auf kubanische Initiative und im Rahmen des *Kulturkongresses von Havanna* debattierten Anfang 1968 Schriftsteller und Naturwissenschaftler aus Lateinamerika, Westeuropa und anderen Regionen über die Rolle des Intellektuellen angesichts der Probleme der Entwicklungsländer. Der Kongress appellierte unter anderem an die moralische Verantwortung der Intellektuellen der industrialisierten Welt, den Emanzipationsprozess in Lateinamerika, Afrika und Asien mit ihrem spezifischen Wissen zu unterstützen.[27] Ein unmittelbares Ergebnis war mit der Gründung des *Comité de liaison scientifique et universitaire franco-cubain* in Paris die Entstehung einer der ersten Nichtregierungsorganisationen, die sich der Entwicklungszusammenarbeit widmeten.[28] Die Interaktionen mit Kuba hatten also französische Wissenschaftler in ihrer Verantwortung gegenüber den Problemen der Entwicklungsländer bestärkt. Für viele, die sich ab den 1970er Jahren auch in anderen Ländern engagierten, hatte sich neben ihren spezifischen Tätigkeiten in den Universitäten und Forschungsinstituten ein neues gesellschaftliches Aufgabenfeld aufgetan. Damit veränderte sich zugleich das Grundmuster eingreifenden Handelns: Weg von dem bis 1968 dominierenden Rollenmodell des von Sartre repräsentierten „allgemeinen Intellektuellen", der seine Macht des Wortes einsetzte, um allgemeine Werte oder Interessen und Bedürfnisse anderer sozialer Gruppen Ausdruck zu verleihen, hin zu dem in den 1970er Jahren von Michel Foucault beschriebenen Typus des „spezifischen Intellektuellen". Die Rolle dieser neuen Figur bestand nach Foucault darin, „dort gegen Formen einer Macht zu kämpfen, wo er [der Intellektuelle, T. N.] zugleich Gegenstand und Instrument dieser Macht ist:

26 Die Idee der Wissenschaftskooperation als eine Form antikolonialer Solidarität entstand unter französischen Wissenschaftlern insbesondere angesichts des U.S. Krieges gegen das 1954 aus Französisch-Indochina hervorgegangene sozialistische Nord-Vietnam. So lancierte 1967 in Paris der Collectif intersyndical d'action pour la paix au Vietnam erstmals eine Spendenkampagne für den Kauf von Büchern für die Universitätsbibliothek von Hanoi. Einer der Verantwortlichen für dieses Projekt war der Mathematiker Didier Dacunha-Castelle, der 1968 ebenfalls zu den Mitgründern des französischen Wissenschaftskomitees für Kuba gehörte. Vgl. N. Simon-Cortés, „Des livres pour le Viet Nam", in: Simon-Cortés / A. Teissonnière (Hg.), Viet Nam, une coopération exemplaire (2004), S. 46-53. Zum Collectif intersyndical universitaire d'action Vietnam Laos Cambodge vgl. den Bestand in den ANF (CAC), 20000529.

27 General Resolution of the Congress, in: Princeton University Library, Firestone Library (Cultural Congress of Havana: General Documents).

28 Zu dem Kulturkongress und der Debatte, die zur Gründung des Comité de liaison führte, vgl. das Kapitel „Der Kulturkongress von Havanna und die kollektive Verantwortlichkeit der Intellektuellen", in: Neuner, Paris, Havanna und die intellektuelle Linke (2011).

in der Ordnung des ‚Wissens', des ‚Bewusstseins' und des ‚Diskurses'."[29] Der „spezifische Intellektuelle" setzte demnach in den politischen Kämpfen auf seine besondere Stellung in der Ordnung des Wissens, um den vom „Machtsystem" Ausgegrenzten eine Chance zu verleihen, sich selbst zu artikulieren und Zugang zu den Wissenskulturen des 20. Jahrhunderts zu erhalten. Die Unterstützer der Wissenschaftskooperation mit Kuba griffen auf die eigene Fachkompetenz zurück und handelten nicht mehr als Träger allgemeiner Werte oder als Vermittler von Bewusstsein im Emanzipationskampf, sondern reihten sich ein in die Tradition des Wissenschaftlers als Experten. Da der Adressat und das zentrale Instrument ihres Engagements nicht die Öffentlichkeit beziehungsweise das Manifest waren, hatte keiner dieser spezifischen Intellektuellen einen der beiden Protestbriefe unterzeichnet, mit denen die allgemeinen Intellektuellen im Frühjahr 1971 bei der kubanischen Staatsführung intervenierten. Als Vermittler von Wissen waren kubanische Fachkollegen und Nachwuchswissenschaftler der Adressat ihres Handelns. Zwar wandte sich der *Comité de liaison scientifique et universitaire franco-cubain* auch mit Empfehlungen und Kritik, die auf die Förderung des Niveaus der Wissenschaftler in Kuba zielten, an die politische Führungsspitze, doch war diese Kommunikation nicht für die Öffentlichkeit bestimmt.
Auf der Basis der hier im Hinblick auf die Bedeutung Kubas für Frankreich beziehungsweise Frankreichs für Kuba aufgezeigten Wirkungszusammenhänge sollen nun die unterschiedlichen Interessen und Konflikte, die die kubanisch-französischen Beziehungen belasteten, nachgewiesen werden.

III. Widersprüche der kubanisch-französischen Beziehungen

Die Verbindung zwischen Kuba und Frankreich war stets von divergierenden Interessen und Brüchen geprägt. Dies kann am besten anhand der drei Phasen, in die sich die Interaktionsprozesse der 1960er Jahren grob unterteilen lassen, aufgezeigt werden.
In der ersten Phase von 1959 bis 1962 suchte die kubanische Staatsführung mittels kulturpolitischer Instrumente die Anerkennung der französischen Linken, um die Unterstützung der französischen Öffentlichkeit zu gewinnen und die internationale Isolation zu durchbrechen. Auf Zustimmung stieß die Revolution zunächst bei jenen Vertretern der französischen Zivilgesellschaft, die den Kolonialkrieg der französischen Regierung in Algerien kritisierten, sowie ab 1961 auch bei der Führung des PCF. Die intellektuelle Linke verstand das kubanische Projekt nicht nur als Revolution gegen den „ökonomischen Imperialismus" der Vereinigten Staaten, sondern auch als Bestätigung für die eigenen Hoffnungen auf eine Überwindung der beiden polarisierenden Ordnungsmodelle in der Welt durch ein freiheitliches, sozialistisches Gesellschaftsmodell ohne staatliche Repression. Trotz Castros Ende 1961 verkündeter Absage an die Möglichkeit einer neu-

29 M. Foucault, „Die Intellektuellen und die Macht. Gespräch mit Gilles Deleuze" (1972), in: ders., Schriften: Dits et écrits (2001–2005), Bd. 2, S. 380-393, hier S. 384. Vgl. auch Foucault, „Die politische Funktion des Intellektuellen" (1977), in: ebenda, Bd. 3, S. 145-152.

tralen Position gegenüber den USA und der Sowjetunion sowie seiner Verurteilung der Hoffnung auf einen „Mittelweg zwischen Kapitalismus und Sozialismus" als utopisch hielt die intellektuelle Linke an der Unterstützung der kubanischen Revolution fest. Sie machte die Zuspitzung des Konflikts mit den USA für Kubas Anlehnung an die Sowjetunion verantwortlich und war überzeugt, dass Castro nicht, wie von seinen Gegnern behauptet, von Beginn an Anhänger des sowjetischen Sozialismus war: Die intellektuelle Linke verabschiedete sich 1961 daher nur von der Vorstellung einer idealen Revolution. Für viele blieb Kuba Symbol einer Revolution, die unabhängig von den beiden Supermächten und ihren Ideologien entstanden war.

Ganz anders gestalteten sich in den ersten Jahren die Verbindungen auf der Regierungsebene, als der französische Kolonialkrieg in Algerien und Havannas antikoloniale Politik eine politische Annäherung unmöglich machten. Ein Jahr vor der Entlassung Algeriens in die Unabhängigkeit erkannte Kuba im Juni 1961 als eines der ersten Länder die algerische Regierung an und unterstützte diese Ende 1961 durch die Lieferung von Waffen. Wie stark die Spannungen zwischen Havanna und Paris waren, unterstrich 1961 / 62 die französische Ausweisung zweier Vertreter der neuen kubanischen Elite aufgrund proalgerischer Äußerungen.[30] Generell betrachtete die französische Regierung vor dem Hintergrund des Kalten Krieges Kuba als Teil des sowjetischen Lagers und unterstützte im Fall der Raketenkrise 1962 zunächst die Regierung in Washington.[31]

Die Phase 1959–1962 bildet einen Grundstein für das Verständnis der späteren Konflikte. Strukturelle Voraussetzungen waren erstens die politische Zugehörigkeit zu unterschiedlichen Blöcken innerhalb der bipolaren Ordnung sowie das Grundmisstrauen der französischen Regierung gegenüber dem revolutionären Antikolonialismus, der das kubanische Projekt antrieb. Zudem sollte die in der ersten Phase begonnene Zusammenarbeit mit zivilgesellschaftlichen Gruppen in Frankreich, die der Präsidentschaft de Gaulles ablehnend gegenüberstanden, 1968 zu diplomatischen Spannungen führen. Entscheidend für divergierende Interessen und Brüche war überdies, dass die kubanische Regierung sich 1961/1962 – wie auch ab 1970 – zwecks der militärischen Verteidigung der Revolution beziehungsweise der politisch-wirtschaftlichen Sicherung ihrer Macht dem sowjetischen Marxismus zuwandte und im Zweifelsfall nach den Regeln der Staatsraison handelte. Die intellektuelle Linke hingegen interessierte sich vor allem für die Idee

30 Es handelte sich im Oktober 1961 um Lisandro Otero, Publizist und Sekretär des 1961 gegründeten Schriftsteller- und Künstlerverbandes (UNEAC), sowie 1962 um den Dichter und UNEAC-Präsidenten Nicolás Guillén, der bereits 1958 aufgrund seiner antikolonialen Haltung nach dreijährigem Exil in Paris ausgewiesen worden war. Zu Otero vgl. „Pourquoi a-t-on expulsé Lisandro Otero?", in: Cuba Sí 2 (4. Quartal 1961), S. 5; „L'expulsion de Lisandro Otero", in: Partisans 2 (November-Dezember 1961), S. 221. Zu dem bis 1965 bestehenden Einreiseverbot für Guillén und dessen Ausweisung aus Frankreich 1962 vgl. das Schreiben von Botschafter Négrier in Havanna an das Außenministerium in Paris vom 3. März 1965, in dem der Botschafter die Aufhebung des Einreiseverbotes empfahl, in: MAE, Bestand Kuba, Art. 54. Guillén, der 1965 eine Einladung französischer Universitäten zu einer Vortragsreise annahm, musste an der spanischen Grenze mehrere Tage auf eine Einreisegenehmigung warten. Vgl. dazu die Kurznotiz in: Le Monde, 5. März 1965, S. 5; sowie P. Estrade, „A grands pas vers les beaux jours", in: Cuba Sí 12 (1. Quartal 1965), S. 1-2.

31 Vgl. M. Vaïsse, „La France et la crise de Cuba", in: Histoire, économie et societé 13,1 (1994), S. 185-195.

eines neuen Gesellschaftsprojektes jenseits der beiden Blöcke sowie den Übergang zu einer globalen Ordnung, in der die Entwicklungsländer einen größeren Einfluss hätten.
In der zweiten Phase 1963–1968 ermöglichten die Entlassung Algeriens in die Unabhängigkeit und der neue außenpolitische Kurs de Gaulles den Beginn einer Zusammenarbeit auf zwischenstaatlicher Ebene, so dass Havanna eine zweigleisige Frankreichpolitik verfolgen konnte: einerseits kulturpolitische Bemühungen, um die Unterstützung der französischen Öffentlichkeit zu erhalten; andererseits diplomatische Annäherung und Kooperation in den Bereichen Wirtschaft, Technik und Wissenschaft. Den entscheidenden Anstoß für diesen Prozess stellte die Raketenkrise dar, in deren Folge das kubanische Vertrauen in die Sowjetunion ebenso wie das der französischen Regierung in die Vereinigten Staaten nachhaltig erschüttert wurden. Die zunehmenden Abgrenzungsbemühungen Kubas gegenüber dem sowjetischen Marxismus beziehungsweise Frankreichs gegenüber den USA förderten die Zusammenarbeit zwischen Havanna und der französischen Regierung und Zivilgesellschaft. Einen wichtigen Konnex bildete auch die gemeinsame Verurteilung des Vietnamkrieges. Die Tatsache, dass französische Intellektuelle und die französische Regierung bis 1967 zum wichtigsten Kooperationspartner Kubas außerhalb des sozialistischen Lagers avancierten, zeigt die Bedeutung, die die kubanische Staatsführung dieser Zusammenarbeit beimaß. Doch obgleich sich eine auf Zivilgesellschaft und Regierung basierende Allianz anzubahnen schien, bestanden jenseits aller globalpolitischen Übereinstimmungen Interessendifferenzen und Misstrauen fort.
De Gaulles Regierung wahrte stets eine gewisse Distanz und lehnte die von kubanischer Seite vorgeschlagenen Zusammentreffen auf Regierungsebene ab. Im Falle höherer Interessen – sei es aufgrund der globalen Systemkonkurrenz oder aus Furcht vor Verbreitung subversiver Ideen innerhalb der französischen Kolonien – blockierte die französische Regierung eine Zusammenarbeit.[32] Die kubanischen Erwartungen an Paris blieben in dieser Phase daher immer größer als das politische und ökonomische Kapital, das die französische Regierung zu investieren bereit war. Die kubanische Öffnung gegenüber der

32 Zur Ablehnung des Linienflugverkehrs und der Abschirmung der französischen Kolonien vgl. das Telegramm des französischen Botschafters in Havanna vom 20. November 1963 (Art. 22); die Stellungnahme von J.-D. Jurgensen, Leiter des Referats Amerika der Politischen Abteilung im französischen Außenministerium, unter dem Titel „Note sur le memorandum de M. de Chambrun", Juli 1967 (Art. 71); das Schreiben von Botschafter Bayle vom 30. November 1967 bezüglich drei kubanischer Wissenschaftler, die Plantagen in Guadeloupe und Martinique besuchen wollten (Art. 56); den Bericht René de Saint-Légiers, außenpolitischer Berater des französischen Staatspräsidenten, über ein Gespräch mit dem kubanischen Botschafter Baudilio Castellanos García: „Entretien entre l'Ambassadeur de Cuba et M. de Saint-Légier, le 2 de décembre 1968 à 11 heures" (Art. 54); den Bericht von Hervé Alphand, Generalsekretär der Politischen Abteilung im französischen Außenministerium, über dessen Gespräch mit dem kubanischen Botschafter vom 20. Mai 1969 (Art. 54); den Bericht vom 5. September 1970 der Politischen Abteilung über das innerministerielle Arbeitstreffen vom 10. August 1970 zum Stand der französischen Beziehungen zu Kuba, Blatt 6 (Art. 54); J.-D. Jurgensen, „Note pour le Directeur des Affaires Politiques" vom 12. Oktober 1970 (Art. 71); das Schreiben des Referats Amerika der Direction des Affaires politiques vom 20. Oktober 1970 an die Botschaft in Havanna über eine geplante Reise des kubanischen Botschafters in Paris nach Guadeloupe, Martinique und Guayana zwecks der Sondierung von Handelsmöglichkeiten (Art. 71), alle in: MAE, Bestand Kuba; sowie das Schreiben der Direction générale des relations culturelles, scientifiques et techniques des französischen Außenministeriums an den Generaldirektor des CNRS vom 2. April 1971, in: ANF (CAC), Bestand „Centre National de la Recherche Scientifique" (19860367/Art. 2).

französischen Regierung war ebenfalls nicht vorbehaltlos. Während Havanna in Paris vor allem Maschinenbauerzeugnisse sowie Handelskredite nachfragte und im Bereich der kulturellen Zusammenarbeit an wissenschaftlicher Kooperation interessiert war, legte sie keinen Wert auf einen kulturellen Austausch, der wie das Theater auch die herrschenden politischen Ideen hätte unterminieren können.[33] Politisch Andersdenkende hingegen schätzten die individuellen Freiheitsrechte der französischen Republik, welche in Kuba vorenthalten wurden.[34] So avancierte beispielsweise die *Alliance Française*, die in Havanna als einziges westliches Kulturinstitut ihre Pforten öffnen durfte, mit ihren Sprachkursen zu einem beliebten Versammlungsort kubanischer Oppositioneller.[35]

Unterschiedliche Interessen und Misstrauen bestanden Mitte der 1960er Jahre zugleich zwischen der kubanischen Regierung und den zivilgesellschaftlichen Akteuren in Frankreich. Die wohl stärksten Spannungen verursachten in der zweiten Phase die Divergenzen zwischen Kuba und der *Association France-Cuba* beziehungsweise dem PCF. Präsent waren aber auch andere Gegensätze, die erst später zum Konflikt führten: Als etwa 1964 die PCF-kritischen Vertreter des kommunistischen Studierendenverbandes in Kuba nach neuen politischen Ansätzen suchten und Premierminister Castro nach dessen Meinung über de Gaulle und dessen Politik fragten, wollte dieser keine Kritik äußern und lobte sogar die französische Außenpolitik.[36] Auf die große Frage nach einer zukunftsträchtigen Revolutionsstrategie für Frankreich erklärte der Regierungschef in dem Interview diplomatisch, dass er als Kubaner die Probleme in den Industriegesellschaften zu wenig kenne und daher ausschließlich über die Entwicklungsländer sprechen könne. Castro machte hiermit deutlich, dass Kuba kein Interesse an einer politischen Destabilisierung der Herrschaft de Gaulles hätte.

Vor dem Hintergrund der zunehmenden sozialen und ökonomischen Disparitäten zwischen Lateinamerika und Westeuropa offenbarten auch die Interaktionen mit der intellektuellen Linken Frankreichs die Fragilität dieses transkulturellen Einverständnisses. Grundsätzliche Diskrepanzen zeichneten sich Anfang 1968 auf dem Kulturkongress etwa hinsichtlich eines gemeinsamen Intellektuellenkonzepts ab. Vertreter aus Westeuropa verteidigten mit der spezifischen Rolle des Intellektuellen als kritisches Gewissen der

33 Vgl. den Bericht des französischen Botschafters Bayle, „Note pour le Directeur des Affaires Politiques" (12. August 1970), in: MAE, Art. 54.

34 So beantragten einige Kubaner, die aus beruflichen Gründen ins Ausland reisen konnten, in Paris politisches Asyl: etwa 1966 Mitglieder des kubanischen Nationalballetts. Vgl. den Bericht des französischen Botschafters in Havanna vom 26. Dezember 1966, in: MAE, Bestand Kuba, Art. 54.

35 Wie Carlos Franqui nach der Intervention kubanischer Sicherheitskräfte im Mai 1968 erklärte, gab es an dem Kulturinstitut „zu viele Oppositionelle, die zu sehr ihre Ansichten zeigten". Da die Teilnehmer der Kurse fortan von kubanischer Seite ausgewählt wurden, sank die Schülerzahl in den folgenden Jahren von 2.500 (1968) auf knapp 1.600 (1970). Vgl. den Bericht von Botschafter Bayle vom 2. Juni 1968 über das Gespräch des französischen Kulturattachés mit C. Franqui, der zu jenem Zeitpunkt noch als Berater des kubanischen Premierministers für die Kulturbeziehungen zu Frankreich fungierte, in: MAE, Bestand Kuba, Art. 80; sowie den Bericht des französischen Außenministeriums vom 5. September 1970 zum Stand der französischen Beziehungen zu Kuba; sowie den Bericht unter dem Titel „Note sur Cuba et les relations franco-cubaines" vom 25. Februar 1968, in: MAE, Bestand Kuba, Art. 54.

36 Vgl. Fidel Castro im Interview mit Bernard Kouchner und Michel Remacle, „Comment on devient socialiste", in: Clarté 58 (Dezember 1964), S. 10-13.

Gesellschaft nicht nur das bürgerliche Autonomiekonzept der Intellektuellen, sondern zugleich das eigene, auf Misstrauen basierende Verhältnis zur politischen Macht. Die kubanischen Intellektuellen hingegen hatten 1967 auf dem Vorbereitungsseminar für den Kulturkongress den Lebensweg des Ex-Industrieministers und Guerillaführers Guevara zum Idealtypus eines „revolutionären Intellektuellen", der gegebenenfalls unter Einsatz des eigenen Lebens einen militärischen Beitrag leistete, erhoben.[37] Überdies machten sich einflussreiche Kräfte für eine umfassende Einbindung der Kulturschaffenden in die sozialen Kämpfe sowie ihre Unterordnung unter die politische Führung stark. Angesichts der Verschiedenartigkeit der gesellschaftlichen Probleme in Lateinamerika und Westeuropa erkannten in Kuba neben den Verfechtern des sowjetischen Sozialismus auch sowjetkritische Intellektuelle, dass das kulturelle Referenzsystem ihrer französischen Kollegen für das eigene Projekt unbrauchbar war. Als Beispiel wurde unter anderem der *Nouveau Roman* angeführt, der in jenen Jahren in Frankreich Erfolg hatte und in Ablehnung von Sartres Gebot der engagierten Literatur den Menschen als Subjekt und individuell Handelnden verwarf.[38] Im Gegensatz dazu engagierten sich Intellektuelle in Kuba für ein Projekt, in dessen Mittelpunkt der „neue Mensch" und die Konstruktion einer eigenen gesellschaftlichen Identität standen. Neben der Europazentriertheit stieß der teilweise als belehrend empfundene Habitus französischer und anderer westeuropäischer Intellektueller, die sich am Beispiel des Feldes der Kunst und Kultur ein Bild über die politische Freiheit im Land verschaffen wollten, auf zunehmendes Missfallen.[39] Im Zuge der Diskussion um „kulturelle Dekolonisierung", die 1967 / 1968 in Kuba an Bedeutung gewann, war schließlich das generelle asymmetrische Beziehungsmuster zwischen der Intelligenzija der Industrienationen und jener der Entwicklungsländer ins Visier geraten: Als Voraussetzung für einen neuen, gleichberechtigten Dialog sollten die Europäer ihre Verantwortung für einen globalen Prozess übernehmen, in dem der Fortschritt in den Industrieländern durch die Unterentwicklung der übrigen Welt erkauft worden wäre.

Ab Mai 1968 eskalierten die kulturellen und politischen Widersprüche, welche sich in den ersten beiden Phasen aufgebaut hatten. Die dritte Phase ist durch die Auflösung und Neuordnung der politischen Bindungen zwischen der kubanischen Führung und den prokubanischen Kräften der französischen Zivilgesellschaft gekennzeichnet. Konkret traten die Grenzen des außenpolitischen Spagates Havannas hervor, als französische Studierende unter maßgeblicher Beteiligung der *Jeunesse Communiste Révolutionnaire*, Jean-Pierre Vigiers und anderer zivilgesellschaftlicher Unterstützer Kubas zusammen mit Millionen französischer Arbeiter zum Sturz der bestehenden Ordnung unter Präsident de Gaulle ansetzten. Vor diesem Hintergrund gerieten die kubanisch-französischen Beziehungen nicht nur in eine diplomatische Krise, sondern die kubanische Regierung verwickelte sich in politische Widersprüche: Einerseits hatte sie Frankreichs intellektuelle

37 Vgl. Declaration of the Seminar for the Cultural Congress of Havana, in: Privatarchiv Dacunha-Castelle.

38 Vgl. Mario Benedetti, „Situación del escritor en América Latina", in: Casa de las Américas 45 (November-Dezember 1967), S. 31-36.

39 Vgl. Ambrosio Fornet, L'intellectuel dans la révolution, in der dritten Kommission des Kulturkongresses von Havanna präsentiertes Thesenpapier, in: Privatarchiv Dacunha-Castelle.

Linke noch auf dem Kulturkongress zu einer Verstärkung des politischen Engagements in Europa gegen den „nordamerikanischen Imperialismus" aufgerufen; andererseits bemühte sie sich im Mai 1968 um einen Ausbau der wirtschaftlichen und technischen Kooperation mit der französischen Regierung. Kuba war zur Stellungnahme gezwungen. Entscheidend verschärft wurde der Konflikt durch die kubanische Veranstaltung des vorab geplanten internationalen Sommerlagers „Campamento 5 de Mayo". Die Regierung in Paris warf der kubanischen Seite nicht nur vor, die französischen Teilnehmer mit subversiven Ideen zu indoktrinieren und sich auf diese Weise in die inneren Angelegenheiten Frankreichs einzumischen. Der Innenminister betrachtete sogar die seiner Einschätzung nach von Havanna aus koordinierte internationale Vietnamsolidaritätsbewegung als Ausgangspunkt der französischen Proteste. In dieser Krise setzte die französische Regierung innerhalb der NATO den Abbruch der Flugverbindungen von Westeuropa nach Kuba durch.[40]

Das Sommerlager stiftete entgegen der Befürchtungen von Innenminister Marcellin nicht zur politischen Subversion in Frankreich an, noch konnte es – wie von den Veranstaltern erhofft – unter den Teilnehmern den Ansatz einer globalen Einheit der sozialen Kämpfe gegen „Unterentwicklung" und „Neokapitalismus" stärken. Vielmehr wurden die Träger der Maibewegung, die die französischen Unruhen als erfolgreiche Generalprobe betrachteten und zu weiterem politischen Kampf entschlossen waren, mit der kubanischen Wirklichkeit und den politischen Prioritäten der kubanischen Regierung konfrontiert. Das kubanische Projekt, das mit wirtschaftlicher Unterstützung der Sowjetunion aber auch Frankreichs auf die Lösung der Entwicklungsfrage als Voraussetzung für eine neue globale Ordnung zielte, hatte mit den Forderungen der Maibewegung nach Selbstbestimmung, einer antihierarchischen und antiautoritären Politik sowie ihrer Kritik der Konsumkultur in den Industriegesellschaften nichts gemein. Die politische Programmatik des Mai 1968 war ausschlaggebend für die kritische Neubewertung des kubanischen Projektes. Spätestens Castros politische Billigung der sowjetischen Intervention in der Tschechoslowakei im August 1968, die noch während des Sommerlagers erfolgte, bedeutete für viele den Beginn eines Ernüchterungsprozesses.[41] Französische Studierende und Intellektuelle, deren politische Verbundenheit allein auf dem Interesse an einem „Dritten Weg" und einer Alternative zum sowjetischen Marxismus basierte, wollten der Stellungnahme des kubanischen Premierministers nicht folgen.[42]

40 Vgl. u. a. den Bericht von Frankreichs Ständigem Vertreter beim Rat der NATO, R. Seydoux, vom 24. Juli 1968; sowie die Schreiben vom französischen Außenministerium an die NATO-Vertretung in Brüssel vom 26. Juli 1968 und 30. Juli 1968; sowie die Berichte des französischen NATO-Gesandten J. Schricke vom 25. Juli 1968/26. Juli 1968/6. August 1968; sowie die „Note pour le Ministre" (Thema: Liaisons aériennes avec Cuba en relation avec l'ouverture des „camps de jeunes" dans l'île), alle in: MAE, Bestand Kuba, Art. 55.

41 Vgl. u. a. den Brief von Michel Remacle an den Verfasser vom 4. Oktober 2005; sowie die Briefe von Georges Waysand an den Verfasser vom 16. Oktober 2005/19. Oktober 2005; sowie den Bericht des Geschäftsträgers der französischen Botschaft in Havanna, A. Tronc, über den Campamento vom 24. September 1968; und das Schreiben von Botschafter Bayle vom 9. November 1968, in: MAE, Bestand Kuba, Art. 55.

42 So brachen etwa Alain Geismar, ein Führer der Maibewegung, und Serge July, die im August 1968 in Havanna Vertreter der kubanischen Führung von der Bedeutung der Ereignisse in Frankreich überzeugen wollten, ihre

Die kubanische Regierung wiederum äußerte nicht nur gegenüber dem französischen Außenminister ihr Desinteresse an einer politischen Schwächung de Gaulles, sondern Castro distanzierte sich im Rahmen seiner Stellungnahme zur Tschechoslowakei auch öffentlich von den sozialen Bewegungen Europas.[43] Er hielt ihnen vor, sich in erster Linie für die Probleme in den Industriegesellschaften zu interessieren und nicht für die seiner Einschätzung nach entscheidende Frage der Unterentwicklung. Die Abkehr von den antiautoritären Protestbewegungen Europas hing gleichermaßen damit zusammen, dass die kubanische Regierung ein Übergreifen auf die eigene Gesellschaft und ein „Wiederaufleben von Prag" befürchtete.[44]

Die Aufgabe des politischen Anspruchs einer Alternative zum sowjetischen Modell zugunsten der Absicherung der eigenen Macht und des sozialen Projektes bedeutete zugleich die Ausgrenzung derjenigen kubanischen Wissenschaftler und Schriftsteller, die dem sowjetischen Marxismus und dem neuen Kurs kritisch gegenüberstanden, sowie den Bruch mit den sowjetkritischen linken Intellektuellen in Westeuropa. Die offizielle Kritik an der mangelnden politischen Loyalität vieler kubanischer Kulturschaffender, die im Herbst 1968 mit der Aberkennung der an Heberto Padilla und Antón Arrufat verliehenen UNEAC-Literaturpreise einherging, knüpfte an die auf dem Kulturkongress deutlich gewordenen Differenzen hinsichtlich der Rolle des Intellektuellen an. Westeuropäische Schriftsteller sowie einige lateinamerikanische Exilschriftsteller, die in dem kubanischen Projekt die Vereinbarkeit des Marxismus mit der Meinungsfreiheit erkennen wollten, sahen durch die repressiven politischen Maßnahmen auf Kuba den spezifischen Charakter der Revolution bedroht.

Auf Unverständnis musste ebenso die mangelnde kubanische Unterstützung für die Protestbewegung in Mexiko stoßen, deren Demonstration zu Ehren der kubanischen Revolution am 26. Juli 1968 von staatlichen Sicherheitskräften mit Todesschüssen beantwortet wurde.[45] Viele Intellektuelle hatten die 1967 in Havanna auf der OLAS-Konferenz propagierte Solidarität mit emanzipatorischen Bewegungen in Lateinamerika noch in guter Erinnerung und bedauerten ebenso die Einstellung der kubanischen Unterstüt-

Gespräche ab. Vgl. H. Hamon / P. Rotman, Génération (1987), Bd. 1, S. 583-585. Vgl. ebenso die erste und einzige Nummer der Zeitschrift Comité, die im Oktober 1968 von dem zur Maibewegung gehörigen Comité d'action étudiants-écrivains herausgegeben wurde, wiederabgedruckt in: Lignes 33 (März 1998), S. 133-174. Unter den Titeln „Pour le camarade Castro" sowie „Réserves sur certaines remontrances à Fidel Castro" erschienen darin zwei anonyme Kommentare über Castros Billigung der sowjetischen Intervention. Während der Verfasser des ersten Textes – es handelte sich um Maurice Blanchot – Castros Stellungnahme als großen Fehler kritisierte, distanzierte sich der unbekannt gebliebene Autor des anderen Textes von diesen „Vorhaltungen" und warb um Verständnis für die kubanische Argumentation.

43 F. Castro, Allocution par le Commandant Fidel Castro pour analyser les événements de Tchécoslovaquie (1968).

44 F. Castro, „Discurso pronunciado [...] en el acto conmemorativo del VIII aniversario de los Comités de Defensa de la Revolución", in: Granma, 29. September 1968, S. 2-4. Auf der Jahrestagung der kubanischen Jungschriftsteller im Oktober 1968 warnte auch der Vizepräsident des Nationalen Rates für Kultur, Lisandro Otero, vor „konterrevolutionären" Kräften, die in Kuba „tschechoslowakische Probleme" und ein antagonistisches Verhältnis zwischen der Regierung und den Schriftstellern erzeugen wollten. Vgl. Lisandro Otero, „En Ustedes vemos una generación literaria que servirá de base al intelectual a que aspira la revolución", in: La Gaceta de Cuba 68 (November-Dezember 1968), S. 2-3.

45 K. S. Karol, Les guérilleros au pouvoir (1970), S. 499-501.

zung für die Guerillabewegungen in Venezuela und anderen lateinamerikanischen Ländern.[46] Angesichts einer solchen auf Idealen basierenden und an politische Bedingungen gebundenen Position muss jene These revidiert werden, welche von einer allgemeinen Funktionalisierung der prokubanischen Intellektuellen Westeuropas durch die Regierung in Havanna spricht.[47] Diese agierten mehrheitlich nicht nur im Einvernehmen mit Havanna, sondern achteten darauf, ihre eigenen politischen Zielvorstellungen nicht zu verraten beziehungsweise unabhängig von Havanna weiter zu verfolgen.

Der Protest westeuropäischer Schriftsteller gegen Padillas Verhaftung und Selbstkritik im Frühjahr 1971 war daher nicht mehr als der öffentliche Vollzug einer Trennung, die seit längerem politische Wirklichkeit war: Bereits ab 1968 hatten linke Intellektuelle in Frankreich begonnen, sich durch inneren Rückzug beziehungsweise öffentliche Kritik zu distanzieren. Der Fall Padilla war für viele das herausragende Beispiel für einen Kurswechsel sowie der überwältigende Beweis, dass es sich bei dem sozialen Projekt nicht länger um eine freiheitliche Alternative zum sowjetischen Sozialismus handelte.[48] Castro seinerseits hatte die Verbindung zur intellektuellen Linken Westeuropas aufgekündigt, indem er dieser in seiner Rede anlässlich von Lenins 100. Geburtstag im April 1970 Antisowjetismus vorwarf und pauschal von „theoretischen Superrevolutionären" sprach.[49] Ihren Abschluss sollte die Neudefinition des Verhältnisses zu den französischen Kulturschaffenden Ende April 1971 auf dem *Primer Congreso Nacional de Educación y Cultura* finden, als rund 1.700 Delegierte das Autonomiekonzept der Intellektuellen Westeuropas ebenso wie deren politische Ideen, kulturelle Vorstellungen und ästhetische Formen verwarfen.

Im Gegensatz zu dem von Sartre verkörperten Typus des „allgemeinen Intellektuellen", der seine politische Unterstützung an einen freiheitlichen, sowjetunabhängigen Charakter des kubanischen Sozialismus gekoppelt hatte, stand für die „spezifischen Intellektuellen", die sich ab 1968 dem *Comité de liaison scientifique et universitaire franco-cubain* angeschlossen hatten, die Entwicklungsfrage im Vordergrund. Mit dem Ziel die kubanisch-französische Wissenschaftskooperation zu fördern, hielten sie trotz des

46 Zu der Enttäuschung französischer Intellektueller über die Einstellung der kubanischen Unterstützung für die Guerillabewegungen in Lateinamerika vgl. die Behandlung des Themas in Les Temps Modernes und Le Monde: E. Rodríguez, „La crise du mouvement révolutionnaire latino-américain et l'expérience du Venezuela" und D. Bravo, „Rectification tactique ou stratégique?", beide in: Les Temps Modernes 288 (Juli 1970); sowie D. Bravo im Interview mit G. Mattéi unter dem Titel „Les principes de l'internationalisme prolétarien sont sacrifiés par les dirigeants cubains declare le Vénézuélien Douglas Bravo", in: Le Monde, 17. Juli 1970, S. 4.

47 U. a. J. Verdès-Leroux, La lune et le caudillo (1989); F. Hourmant, Au pays de l'avenir radieux (2000); P. Rigoulot, Coucher de soleil sur La Havane (2007); sowie M. N., „Castros nützliche Idioten", in: Die Welt, 15.-16. Mai 1971.

48 Zu Beginn der 1970er Jahre war dem interessierten Publikum in Frankreich wohl bekannt, dass diejenigen in Kuba, die offen mit politischen Reformen sympathisierten, entweder für einige Jahre in einem Arbeitslager verschwanden oder zu langen Haftstrafen verurteilt wurden. Eine Kopie des 20-seitigen Briefes, in dem der Moncadaveteran und langjährige Botschafter Kubas in Belgien und Luxemburg den politischen Prozess, der gegen ihn geführt wurde, sowie seine Haftjahre 1966 bis 1969 beschrieb, war etwa auch an Jean Pronteau weitergegeben worden. Vgl. den Brief von Gustavo Arcos Bergnes an den belgischen Rechtsanwalt Roger Lallemand vom 5. Januar 1969, in: IHTP, Nachlass Jean Pronteau (JP 37B).

49 F. Castro, „Discurso pronunciado […] en la velada solemne en conmemoración del centenario del natalicio de Vladimir Ilich Lenin, efectuada en el Teatro ‚Chaplin', el día 22 de abril de 1970", in: Bohemia, 24. April 1970, S. X-62 [sic].

kubanischen Politikwechsels größtenteils an ihrem Engagement fest. Die Kooperation wurde letztlich von der kubanischen Regierung abgebrochen: Vor dem Hintergrund ihres prosowjetischen Kurses verfolgte sie in den 1970er Jahren verstärkt den Ausbau der Wissenschaftsbeziehungen zu den osteuropäischen Ländern und stellte bis 1973 die Zusammenarbeit mit zivilgesellschaftlichen Akteuren Frankreichs außerhalb des PCF ein.[50]
Die Verbindung mit der intellektuellen Linken Frankreichs hatte also für das kubanische Projekt in den 1970er Jahren keine Bedeutung mehr. Lediglich die mit dem PCF verbundene *Association France-Cuba* avancierte im Rahmen der internationalen Unterstützerbewegung, auf welche die kubanische Führung nicht verzichten wollte, erneut zum zentralen Ansprechpartner in Frankreich. Auf zwischenstaatlicher Ebene konnten zwar nach Beilegung der diplomatischen Krise zwei größere, technisch-wissenschaftliche Kooperationsankommen 1969 und 1971 abgeschlossen werden, doch spätestens mit dem offiziellen Beitritt Kubas in den *Rat für gegenseitige Wirtschaftshilfe* 1972 hatte die wirtschaftliche Zusammenarbeit mit Frankreich ihre politische Tragweite für Havanna verloren.[51]
Vor dem Hintergrund eines globalgeschichtlichen Forschungsansatzes, der auf die Bedeutung transkultureller Interaktionen abzielt, stellt sich abschließend die Frage, ob der Bruch zwischen den französischen Intellektuellen und der kubanischen Regierung aufgrund der konkurrierenden Geschichtsbetrachtung der beiden Seiten nicht unvermeidbar war. Die bürgerliche Gesellschaft, in der letztlich auch die intellektuelle Linke verwurzelt war, begriff den geschichtlichen Prozess als eine fortschreitende Verwirklichung des Individualismus und der Freiheit und erkannte denn auch die großen Katastrophen der Vergangenheit in der systematischen Repression der Menschenrechte. In Kuba hingegen betrachtete die Regierung Kolonialismus und Imperialismus als die großen Verbrechen der Menschheit. Entsprechend wurde die jüngere Geschichte als fortschreitende Erlangung der Souveränität und wirtschaftspolitischer Handlungsfreiheit verstanden.

50 Vgl. die Briefe von Didier Dacunha-Castelle an den Verfasser vom 8. September 2006/31. Oktober 2006/29. November 2006; sowie den Brief von Richard Tomassone an den Verfasser vom 26. November 2006. Dacunha-Castelle und Tomassone fungierten von 1969–1971 bzw. 1971–1973 als Generalsekretäre des Comité de liaison scientifique et universitaire franco-cubain.

51 Weitaus umfassender waren daher die Verbindungen zwischen Kuba und den sozialistischen Staaten Osteuropas, mit denen sich ab Beginn der 1960er Jahre bis 1990 eine enge wirtschaftliche, wissenschaftlich-kulturelle und politisch-militärische Zusammenarbeit entwickelte. Die Bedeutung des PCF für das soziale Projekt in Kuba sowie die spezifische Bedeutung, welche Kuba für den PCF bzw. sowjetkritische Kräfte hatte, gilt mehr noch für die kommunistischen Staatsparteien in Osteuropa. So bildete die zweite Hälfte der 1960er Jahre, als die Zusammenarbeit zwischen Kuba und dem PCF beziehungsweise der Association France-Cuba fast zum Erliegen gekommen war, ebenfalls den Tiefpunkt der Beziehungen Kubas zur sozialistischen Staatenwelt. Die herausgearbeiteten Verflechtungen und Konflikte können daher auch als Grundmuster für das Verständnis der Interaktionen zwischen Kuba und vielen sozialistischen Staaten Europas dienen. Mit Beunruhigung verfolgte z. B. die ostdeutsche Regierung die Abweichung des kubanischen Projektes vom sowjetischen Marxismus und die Hinwendung der kubanischen Regierung und Intellektuellen zur sowjetkritischen Linken in Westeuropa. Besonders kritisch wurden die Veranstaltung des Salon de Mai 1967 und der Kulturkongress 1968 beurteilt. Vgl. u. a. den Bericht des Kulturattachés der Botschaft der DDR in Havanna, Werner Ruff, „Zu einigen Erscheinungen der Entwicklung der Literatur und Kunst in Kuba" (Dezember 1968), in: SAPMO-BArch, DY 30/IV A2/20/286.

Die Unumkehrbarkeit dieses Prozesses sollte ein autoritärer Staat gewährleisten, der nach außen als Mitglied der Blockfreienbewegung auf die Auflösung des asymmetrischen Beziehungsmusters zwischen der nördlichen und südlichen Hemisphäre durch Herausbildung einer multilateral ausgerichteten Weltordnung zielte sowie nach innen für Ordnung sorgte und die Verwirklichung sozialer Rechte versprach. Die Verwirklichung individueller Freiheitsrechte hätte im Innern die Machtfrage berührt und stieß daher bei der kubanischen Regierung – wie auch in vielen anderen Entwicklungs- und Schwellenländern – auf Widerspruch. Die intellektuelle Linke Westeuropas hatte sich somit in einem Dilemma befunden: Einerseits teilte sie die Ablehnung der U.S. Hegemonie in der Welt und erwartete von den neuen sozialistischen Ländern die Schaffung eines neuartigen Systems der politischen und gesellschaftlichen Beziehungen, das zugleich Menschenrechte, Demokratie und individuelle Entfaltung garantierte; anderseits wollte sie auf die Freiheiten sowie die Leistungskraft des kapitalistischen Modells nicht verzichten und vermochte nicht, sich ein alternatives Entwicklungsmodell konkret vorzustellen. Der Konflikt um die Hegemonie zweier konkurrierender Moderne-Konzepte war also unvermeidbar.

Ausblick

Auch wenn die Interaktionsprozesse zwischen Kuba und Frankreich besonders günstige Voraussetzungen boten und eine einmalige Dynamik entfalteten, können die dargestellten Ergebnisse als Ausgangspunkt für das Verständnis der wesentlich schwächer ausgeprägten Verbindungen zwischen Kuba und anderen Ländern Westeuropas fungieren. Nach dem französischem Vorbild des *Comité de liaison scientifique et universitaire franco-cubain* bildeten sich zu Beginn der 1970er Jahren etwa Wissenschaftskooperationen mit Italien (im Rahmen des französischen Komitees), Westdeutschland (*KoWiZuKu*, Komitee für wissenschaftliche Zusammenarbeit mit Kuba) und Großbritannien (*The Britain-Cuba scientific liaison committee*).

Die kubanisch-westeuropäischen Interaktionen hatten in den Industriestaaten eine breite Öffentlichkeit auf die Notwendigkeit gesellschaftlicher Veränderungen in Lateinamerika aufmerksam gemacht. Darüber hinaus hatten sie unter den Intellektuellen die Verantwortlichkeit für die Überwindung der strukturellen sozialen Ungleichheiten in der Welt gefördert. Dieses neue Bewusstsein für ein persönliches Engagement zugunsten der benachteiligten Bevölkerungen in Lateinamerika, Afrika und Asien spielte eine erhebliche Rolle für die starke Zunahme nichtstaatlicher und nichtkirchlicher Entwicklungsprojekte ab den 1970er Jahren. In diesem Zusammenhang können die Ergebnisse als Grundlage für die Analyse solcher Interaktionsprozesse betrachtet werden, die gleichfalls mit alternativen Gesellschaftsentwürfen verbunden waren und zu Dreiecksbeziehungen zwischen emanzipatorischen Bewegungen in Transformationsländern, zivilgesellschaftlichen Kräften in den Industriestaaten sowie deren Regierungen geführt hatten: etwa im Fall Vietnam, Chile und Nicaragua.

BUCHBESPRECHUNGEN

Karen Barkey: Empire of Difference. The Ottomans in Comparative Perspective, Cambridge: Cambridge University Press, 2008, 342 p.

Reviewed by Nora Lafi, Berlin

Karen Barkey, the author of Bandits and Bureaucrats: The Ottoman Route to State Centralization (Ithaca, 1994) – a book that is notable for influencing the present trend in Ottoman studies through its aims at reconsidering the roots of the Ottoman state-building process – exhibits a new step in her research on the very nature of the Ottoman Empire with her book Empire of Difference: The Ottomans in Comparative Perspective. Within her preface, she recalls touching memories about her family history and its connection with Istanbul: from her grandfather, an Ottoman citizen who took her to eat at the restaurant Borsa and an "Oriental version of the Orient" (p. IX) to her father, an Atatürkist modernist, an "Occidental version of the Orient" (p. X). After having illustrated in her previous book the importance of negotiation and mediation in the building process of the imperial apparel, she wishes with this book to confront the theme of the longevity of the Ottoman Empire. Suitably, Karen Barkey's main interests are the "mechanisms and machinery of empire" (p. X).

The first part of the book consists of an explication of the main features of the Ottoman imperial model, which originates from a very efficient definition of the Ottoman Empire: "[A] 'negotiated' enterprise where the basic configuration of relationships between imperial authorities and peripheries is constructed piece meal in a different fashion for each periphery, creating a patchwork pattern of relations with structural holes between peripheries. In that construction we see the architecture of empire emerge: a hub-and-spoke structure of state-periphery relations, where the direct and indirect vertical relations of imperial integration coexist with horizontal relations of segmentation" (p. 1). In this introductory chapter, K. Barkey also presents the "analytic framework" (p. 9) she intends to apply to her subject and imperial comparativist perspective.

On this basis, the second chapter is devoted to the early Ottoman period and the roots of Ottoman imperial governance.1 Karen Barkey's main point in this chapter is to refute the myth of the building of an empire by unorganized Turkish raiders: "The construction of this formidable political apparatus of authority was not just the result of fire, plunder, rape, death and

destruction. It was also the result of brokerage among different religious, social, and economic groups that formed new social relations, combining diverse ideas and practices and forging new identities" (p. 28). Indeed, brokerage is the key word of this chapter, with which the author illustrates the various modalities of the invention of a new governance based on different heritages from the comparison between the emergence of the Ottomans and the Russians as presented in the work of A. Kappeler. She starts from a description of the frontier between Byzantium and the Seljuks, trying to understand why, among various beylik, the one progressively organized by Osman (1290–1326) and his son Orhan (1326–1359) emerged and managed in a little more than a century to overwhelm the existing power map. Karen Barkey proposes an understanding of these phases that opposes the one inherited from Paul Wittek's analysis, which is based upon the concept of Holy War and in general the religious gâzî ideology, as well as the one promoted by Fuad Köprölü, which refers to a mythical Turkic ethnic identity. Discussing the historiographical decline of the interpretative trends of Cemal Kafadar, Linda Darling and Colin Imber, she also introduces important nuances into the now classical interpretation, as based upon organizational innovation, proposed by Halil Inalcık. Though agreeing with H. Lowry on the complexification effort made by the interpretative model, K. Barkey explains why she cannot be satisfied with the existing literature. With reference to Pierre Bourdieu, for her the key feature was the ability of the early Ottomans to "transform existing horizontal ties into vertical relations of power" (p. 33) and provide for the "brokerage across networks, recombination through alliances and key moves from one network to another" (p. 34). Everything but a mechanical march towards imperiality and territorial sovereignty. She applies this frame of mind to all the early periods of Ottoman development, and, with reference to the work of Klaus-Peter Matschke, underlines how the relationship with Byzantium was far more complex than a mere confrontation.

Particularly interesting in this chapter is also the analysis of the networks built by the early Ottomans. Karen Barkey presents two very telling graphic reconstructions of the personal networks of Osman and Orhan (pp. 49 and 54). On the questions of religious cohabitation within the new structure, the author underlines both the deep interpenetration - as part of the accommodation process, for example, early Ottoman often marrying Christian princesses, and the progressive building of a culture of differentiation. In this regard, "The boundaries that were established, however, never functioned as rigid and impermeable markers of difference" (p. 62). For Barkey, however, the reign of Murad II (1421–1444) marks a shift, with the Ottomans becoming "more confident in their own local networks, their own localities and identities, and their ability to dominate" (p. 63).

The third chapter, "Becoming an Empire," examines the construction of the state apparel between the 15th and 17th centuries. It starts with the conquest of Constantinople in 1453 and a definition of the new process that began then: "The empire that was built after 1453 became a robust, flexible and adaptative political entity where a patrimonial center, a strong army, and a

dependent and assimilated state elite interconnected with many diverse and multilingual populations ensconced in their ecological and territorial niches. The Ottoman imperial order was to be found in the three components of the empire – legitimacy, control over elites and resources, and the maintenance of diversity – each forged through the relations between state forces and social forces, center and periphery, state and regional elites, and central officials and local populations" (p. 67-68). This is all the strength of K. Barkey's work to put the governance of diversity at the very centre of the definition of Ottoman imperiality. After a short digression on the way institutions evolve – with reference to authors like Kathleen Thelen and Paul Pierson, but with a limited perspective on the question of the Byzantine heritage – in this chapter the author successively explores the different aspects of the Ottoman imperial dimension, such as the constitution of the Imperial Domains and the establishment of the army as a strong social element. The main focus is, however, the question of the management of frontiers and the establishment of provincial rule. Similar to before, diversity is a key word in K. Barkey's analysis. She also discusses the traditional dichotomy between core provinces (tımarlı) and outer provinces (salyanelı), insisting on how the Ottomans generally adapted their governance model according to the results of the negotiation processes with local social forces, with the possible exception of Crete. For Karen Barkey, the key paradigm is "the vertical integration of elites and corporate groups into the political system" (p. 93).

This leads her first to an interpretation of the rhetorical unifying concept of such a diverse system, the nizam-i âlem social balance and order, and then to a discussion of the role of Islam, which she stresses the decisive influence of Islamic religious scholars within Istanbul after the conquest of the Arab provinces in the evolution of the Ottoman concepts of governance. This evolution is, however, less documented in K. Barkey's narration, and therefore perhaps less convincing. To remedy this problem she could have focused on the concrete modalities of accommodation and negotiation, – such as petitions (şikayet) and their administrative and political treatment in Istanbul by a specific bureau, which was at the core of both the decision-making process and the growth of the bureaucratic apparel, instead of general ideas. Nonetheless, the chapter remains very useful in its attempt to propose a new model, less static and more dynamic, for an analysis of the construction of Ottoman imperial ideology and practice.

Conceived as the core of the book, the fourth chapter, with tolerance and difference as key paradigms, proposes a broad overview of what is the very nature of Ottoman imperial governance. It begins with a reference to John Locke's appreciation of toleration in an Ottoman context, and a quote of Voltaire that praises Ottoman religious toleration. Opposed to what R.I. Moore called a "persecuting society" (the West), K. Barkey underlines how the Ottoman Empire "pursued policies of accommodation (istimalet)" (p. 110). Instead of developing culturalist theories about Islam and toleration, she analyses Ottoman toleration as a highly imperial feature: "Toleration is neither a quality nor a modern form of 'multiculturalism' in the imperial setting. Rather, it is a means of rule, of ex-

tending, consolidating, and enforcing state power… Toleration added to the empire" (p. 110). This perspective, though, does not prevent the author from taking into consideration the episodes of religious persecution the empire experienced. However, she regards them, at least for the first three centuries of the empire, more as moments of crisis and adaptation of the system than expressions of an ontological animosity, with toleration remaining "the negotiated outcome of intergroup relations" (p. 114). The chapter then develops an understanding of the mechanisms of management of differences.

In the fifth chapter about dissent and the sixth about the "eventful" 18th century, Karen Barkey manages to avoid any risk of Ottoman angelism. Using the example of Şeyh Bedreddîn, the kızılbaş and the Celalis, as well as the imperial response to Islamic ultra-orthodoxy or Jewish messianism in the 17th century, she underlines how alternative forms of religiosity were a challenge to the negotiated imperial order. This leads her to view the 18th century as the turning point in Ottoman history, almost the end of a golden age.

In point of fact, Part II examines the transformations of the 18th century. It begins with a chronological chapter, the main milestones of which are the Edirne events of 1703, the Patrona Halil revolt of 1730 and the Sened-i Ittifak of 1808. These events are presented as elements of the major changes in what made the Ottoman balance, which she described in the first part of the book. Chapter seven is then logically on the construction of new, or newly interpreted, imperial governance features: tax farming and the refashioning of the relationship between the empire and local elite. This chapter ends with considerations about what the author calls "the transitional modernity of notables" (p. 256).

The last chapter of the book is devoted to the struggle of the Ottoman Empire with the concept of the nation-state, when "complexity, that had been a basis of legitimacy, became a source of dispersed loyalty" (p. 295), with a focus on what K. Barkey describes as "three options of identity" (p. 290): the Tanzimat, Abdülhamid II and the Young Turks, as well as on the process of state centralization. This final narrative, to which much less attention is given than to the previous periods, somewhat recounts the narrative system the author built to what she had been struggling with for almost 300 pages: the inertia of topoi. The 19th century is indeed seen as a long period of decline, whose roots lie in the very nature of an empire unable to fight with its new organization against localisms and nationalisms. However, the reforms of the Tanzimat and of the Constitutional Period – the content of which was negotiated along communication lines between centre and periphery, an element typical of the old regime (a negotiation again, the Istanbul BOA archives show, and not the mere importation of a ready-to-use modernity) – were maybe also an illustration of the specific nature of the Ottoman Empire. They created, where the Ottomans were able to fight European imperialism, after phases of clash and tension, a new negotiated balance, which in many cases lasted for decades. In the end, it took an event of unprecedented force in the history of mankind, World War I, to destroy the renewed system. Its decline was not yet sealed in 1800.

Apart from this final interpretative point and from the fact that K. Barkey's narration could have made use of more archival resources, the very nature of which is an illustration of her main thesis and could have consolidated the rhetorical construction, Empire of Difference: The Ottomans in Comparative Perspective will certainly affirm itself as a milestone in the current renewal of interpretations of Ottoman history.

Note:

1 An issue also addressed by Heath W. Lowry, The Nature of the Early Ottoman State, Albany, 2003.

Joachim Baur: Die Musealisierung der Migration. Einwanderungsmuseen und die Inszenierung der multikulturellen Nation, Bielefeld: transcipt Verlag, 2009, 408 S.

Rezensiert von
Kristin Weber, Berlin

„Die Musealisierung der Migration hat Konjunktur," so beginnt Baurs Monographie, die sich in Form von Fallstudien aus den USA, Kanada und Australien mit dem neuartigen Museumstyp des Einwanderungsmuseums auseinandersetzt – einer Institution, deren Auftauchen in der globalen Museumslandschaft wohl kaum länger als zwanzig Jahre zurückreicht und einen regelrechten Aufschwung erlebt. Diesen sieht Baur zum einen getragen von sozial-reformistisch aufgeladenen Erwartungen und Deutungen, die sich von diesem Museumstyp Lösungsansätze für gesellschaftliche „Probleme" erhoffen, etwa dem ebenfalls Konjunktur habenden Thema der Integration, zum anderen von der Hoffnung auf eine „Transnationalisierung der Erinnerungskulturen" und damit einem Aufbrechen allzu einengender nationaler Perspektiven musealer Repräsentation(en) sowie deren Dekonstruktion. Dennoch, trotz der zahlreichen Gründungen von Einwanderungsmuseen und den damit verknüpften Erwartungen, Hoffnungen und Deutungen, ist die wissenschaftliche Auseinandersetzung mit Einwanderung und deren musealer Institutionalisierung bisher eher schmal ausgefallen. Baurs Studie möchte diesem Mangel Abhilfe leisten und das Phänomen des Einwanderungsmuseums erstmals, wie er sagt, „empirisch vermessen" um zu zeigen, dass die museale Repräsentation der Migration nicht automatisch eine Dekonstruktion der Nation bedeutet. Im Gegenteil. Das Verhältnis zwischen der Inszenierung der Migration und der Nation begreift er als ein weitaus Komplexeres. Die Nation steht, so Baurs zentrale These, im Zentrum der Einwanderungsmuseen – sie wird mitnichten „dezentriert" sondern vielmehr „re-zentriert". Die Musealisierung der Migration fungiert als „reformierte Version der Inszenierung des Nationalen im Museum" und wird so zu einer Bühne für eine „Re-Vision" der Nation, die schlussendlich eine Stabilisierung der Nation im Zeichen des Multikulturalismus zum Ziel hat. Zur Überprüfung seines Ausgangsarguments unterzieht Baur das *Ellis Island Immigration Museum* in New York, Canada's *Immigration Museum Pier 21* in Halifax und das *Immigration Museum Melbourne* in drei Kapiteln jeweils einer kritischen und detaillierten Analyse,

die er in die Entstehungsgeschichte des Museums und dessen Präsentation unterteilt um abschließend die gewonnenen Erkenntnisse in Gemeinsamkeiten und Unterschiede zusammenzufassen.

Zunächst aber legt er in einem einführenden Kapitel die grundlegenden Perspektiven seiner Studie dar. Das Museum und seine Ausstellungen begreift er als Arenen und Orte, in welche Bedeutungen / Deutungen produziert und Identität aus- bzw. verhandelt werden. Die museale Repräsentation von Geschichte sieht er als Konstruktion bzw. Inszenierung der Vergangenheit in der Gegenwart und damit geprägt von politischen, sozialen, historischen und kulturellen Zusammenhängen. Die aus dem Gegenwartsbezug resultierende Dynamik des Wandels der musealen Formen und Inhalte führt Baur – bezugnehmend auf Tony Bennett (1995)[1] – auch auf zwei der Institution innewohnende Widersprüche zurück. Zum einen steht die demokratischen Rhetorik des Museums dem Museum als Instrument der Differenzierung, Elitenbildung und Regulierung seiner Besucher gegenüber, zum anderen wird der Anspruch, eine repräsentative, weil allgemeingültige Ordnung zur Darstellung zu bringen, mit der Einseitigkeit und Selektivität jeder musealen Repräsentation konfrontiert. Innerhalb dieser Spannungsverhältnisse sind daher auch die Impulse zu verorten, die zu der Musealisierung der Migration beigetragen haben. Einen dieser Impulse subsumiert Baur unter den Stichworten „ethnic revival" und Multikulturalismus. Er gibt einen Überblick über den damit einhergehenden Paradigmenwechsel in der Wahrnehmung der gesellschaftlichen Realität im Sinne der Koexistenz einer Vielzahl von „Kulturen" innerhalb eines Nationalstaats und illustriert diesen anhand der drei klassischen Einwanderungsländer USA, Australien und Kanada. Auch die in den 1960er und 1970er Jahren aufkommende „New Social History" mit ihrer Fokussierung auf bis dahin marginalisierte Aspekte der Geschichte wie Rasse, Klasse, Geschlecht, Kolonialismus, aber auch Alltag und Lebenswelt zählt Baur zu den Impulsgebern. Dies gilt auch für den in den 1980er Jahren einsetzenden Wandel in der wissenschaftlichen Auseinandersetzung mit dem Museum, den Baur als „reflexive Wende" bezeichnet. Die Institution des Museums wurde infolgedessen vom Elfenbeinturm vermeintlich objektiver Distanziertheit in die Gesellschaft zurückholt, was unter anderem auch in dem Anspruch mündete, das Museum neuen Gruppen von Besuchern zu öffnen und diese in die museale Praxis einzubinden. Dazu gehören auch Migranten. Deren Historisierung entwirft Baur parallel zu der Herausforderung und Krise nationaler Meistererzählungen vor dem Hintergrund gesellschaftlicher Pluralisierung, Transnationalisierung und Globalisierung.

Es folgt die detaillierte Wiedergabe der Entstehungsgeschichte der Museen eingebettet in soziale, politische und ideologische Debatten, wobei auch die Akteure mit oft in Widerspruch zueinander stehenden geschichtspolitischen Agenden als solche sichtbar gemacht werden. Das 1990 eröffnete *Ellis Island Immigration Museum* bewegte sich als Projekt einer *Public Private Partnership* zwischen einem patriotisch-verklärenden, von der Regierung Reagan angeregten öffentlichen Diskurs und Positionen einer kritischen Sozialgeschichte, die sich in den Reihen der zur Entwick-

lung der Ausstellungskonzeption eingesetzten Historikerkommission finden. Lokales bürgerschaftliches Engagement führte 1999 zur Eröffnung des *Pier 21* in Halifax, das zunächst als Denkmal für die in dieser Kontrollstation tätigen Grenzbeamten gedacht war und später auch mit dem Ansinnen, ein touristisches Ziel zu bilden, als explizit nationales Immigrationsmuseum teils vom Staat finanziert wurde. Das *Immigration Museum Melbourne* wurde auf Initiative des Bundestaates Victoria mit einer regionalen Ausrichtung ins Leben gerufen um eine multikulturalistisch geprägte Identitätspolitik in einem nationalen Rahmen zu stützen sowie Melbourne als Kulturmetropole zu etablieren. Nach einem „close reading" der jeweiligen Präsentationen bestätigt sich für Baur die Annahme, diesen neuen Typ von Museum als ein Instrument der Bewältigung dieser Krise des Nationalen anzusehen.

So zeigen seine drei Fallstudien sehr anschaulich, dass diese neue übergeordnete und identitätsstiftende Erzählung die der Migration ist und in allen drei Museen, eine in Anlehnung an Benedict Anderson[2] „imaginierte" Gemeinschaft der Migranten in Szene gesetzt und eben auch national harmonisiert wird. Ziel ist es allerdings nicht mehr, wie in traditionellen Inszenierungen des Nationalen „kulturelle" Vielfalt zu homogenisieren, sondern diese Heterogenität museal darzustellen um sie wiederum national anzueignen und einrahmen zu können. Als sehr schönes Beispiel führt Baur die Figur des Containers an, die als visuelle Metapher in allen drei Museen eine Rolle spielt. Im Falle von *Ellis Island* und *Pier 21* wirken die Gebäudekomplexe selbst – beide sind ehemalige Grenz- und Kontrollstationen – als verbindende und vereinheitlichende Räume höchst diverser Migrationserfahrungen. Dabei wird deren Rolle als Einrichtung eines Grenzregimes weitestgehend ausgespart und nicht hinterfragt (Stichwort: Internierung, Abweisung, Abschiebung) Als visuellen Container lokalisiert Baur in Melbourne nicht so sehr das Museumsgebäude an sich, das in seiner Funktion als ehemaliges Zollgebäude eher indirekt mit der Einwanderung in Verbindung steht, sondern die zentrale Installation eines Schiffes, das als Ort einer konstruierten kollektiven Erfahrung aller Einwanderer eine gemeinschaftsstiftende Erzählung einführt. Überhaupt sensibilisiert Baur immer wieder dafür, dass der Anspruch, alle Einwandergruppen in einem Museum repräsentiert zu sehen und ein Höchstmaß an Inklusion und Anschlussfähigkeit für die Besucher zu erreichen, gerade im Kontext einer neuen nationalen Erzählung zur Exklusion oder zumindest Vernachlässigung nicht weniger Aspekte führt. Darunter fallen so wichtige Themenfelder wie etwa die Spannungen zwischen oder innerhalb der verschiedenen Gruppen von Migranten, die Einteilung in willkommene und weniger willkommene Einwanderer, das Scheitern in der neuen Gesellschaft, aber auch die Frage nach dem Umgang mit den indigenen Bevölkerungen und welchen Platz dieselben in dieser neuen Meistererzählung der Migration einnehmen sollten. Lediglich in Melbourne wird dieser letzte Gesichtspunkt nicht ausgespart, wenn auch nicht erschöpfend behandelt. Überhaupt setzt sich das dortige Museum, aller Harmonisierungen und „Container" zum Trotz, von den beiden anderen ab, indem etwa Veränderungen in der nationalen Einwanderungspolitik und bei der Defini-

tion von nationaler Identität thematisiert werden – ein Versuch der Dekonstruktion des nationalen Narrativs.

Baur setzt in seiner umfangreichen empirischen Studie zwei in den letzten Jahren expandierende Forschungsfelder zueinander in Bezug, nämlich das Museum und die Migration. Dabei knüpft er an aktuelle Debatten über Repräsentation, Performanz, Erinnerungskultur(en) und Erinnerungsorte, Transnationalisierung bzw. Globalisierung an. Dass das eigentlich transnationale Phänomen der Migration nicht zu einer Überwindung nationaler Erzählstrukturen in den musealen Repräsentationen der drei vorgestellten Museen geführt hat, sondern vielmehr zu einer Nationalisierung der Migration, steht berechtigterweise im Zentrum von Baurs Kritik. Der nächste Schritt dieses neuen Museumstyps sollte es sein, sich von seinem weitestgehend nationalen Korsett und dem Paradigma des Multikulturalismus zu lösen. So schwingt implizit in weiten Teilen der Arbeit die Frage mit, inwieweit gerade die Musealisierung der Migration in einer Revolutionierung des Museums als solchen resultieren könnte – nämlich dem Aufbrechen der engen Verknüpfung der Institution des Museums mit der Idee der Nation, oder zumindest deren Problematisierung in der musealen Praxis. Es geht Baur darum, die zu Beginn erwähnte „selbstreflexive Wende" des Museums weiter voranzutreiben und das unter anderem auch im Sinne einer Politisierung. Die Tendenz, sozioökonomische Ungleichheiten und Konfliktlinien in eine vermeintlich kulturelle Heterogenität umzudeuten, und auf diese Weise dieselben und die damit verknüpften Machtverhältnisse weiter zu festigen, gilt es aufzuzeigen und aufzubrechen. Sein Anliegen, das Museum gewissermaßen zu einem Impulsgeber gesellschaftlicher Entwicklungen zu machen, ist begrüßens- und wünschenswert. So entwirft er das Einwanderungsmuseum als potentielle Arena transnationaler und transkultureller Perspektiven, die gar als ein „Leitmuseum einer (…) postnationalen Weltgesellschaft" fungieren könnte. Hier ist allerdings Vorsicht geboten – ein neuer harmonisierender „Container" mit einer diesmal transnationalen und globalen Meistererzählung könnte entstehen. Dies liegt aber durchaus nicht im Sinne von Baurs wichtigen und wohltuend dekonstruierenden Beitrag zum Thema Einwanderung und Musealisierung.

Anmerkungen:

1 T. Bennett, The Birth of the Museum. History, Politics, Theory. London 1995.

2 Benedict Anderson, Imagined Communities. Reflections on the Origin and Spread of Nationalism, London 1983.

Katja Roeckner: Ausgestellte Arbeit. Industriemuseen und ihr Umgang mit dem wirtschaftlichen Strukturwandel (= Beiträge zur Kommunikationsgeschichte, Bd. 21, Stuttgart: Franz Steiner Verlag 2009, 183 S.

Rezensiert von
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In Folge der De-Industrialisierung ist in der zweiten Hälfte des 20. Jahrhunderts international ein neuer Museumstyp entstanden: Das Industriemuseum. Seitdem

wurden und werden meist in leer stehenden Fabrikgebäuden ent-industrialisierter Regionen Museen dieses Typs gegründet. Eine umfassende wissenschaftliche Auseinandersetzung ist jedoch national wie auch international bislang ausgeblieben. Diesem Desiderat kommt die Historikerin und Ausstellungsmacherin Katja Roeckner mit ihrer 2009 publizierten Dissertation nach, die eine erste Analyse der deutschen Industriemuseen im Kontext westlicher Industrieländer und zugleich eine umfassende und auch theoretische Annäherung an diese heterogene Einrichtung darstellt.

Industriemuseen konnten sich bislang meist nicht von der Leuchtkraft traditioneller Museumstypen (insbesondere der Kunstmuseen) emanzipieren, obwohl sie in den 1960/70er Jahren – mit Beginn der ersten Industriemuseumsgründungen – innovative Einrichtungen darstellten. Heute überwiegt indessen die Kritik, dass diese Museen nostalgisch seien. Sie würden der von ihnen selbst gestellten Aufgabe nicht nachkommen, in der Zeit von De-Industrialisierung und einer massiven Umgestaltung industriell geprägter Landschaften „Orientierung im Strukturwandel" (S. 17) zu geben. Roeckner greift diese Kritik auf und fragt, wie die deutschen Industriemuseen überhaupt mit dem wirtschaftlichen Strukturwandel – sprich der Transformation von der Industrie- zur Dienstleistungs- und Wissensgesellschaft seit den 1960er Jahren – umgegangen sind und welche Folgen dies für die Art und Weise ihrer Ausgestaltung hatte.

Laut Roeckner stecken Industriemuseen dabei in einem Dilemma: Die Entstehung des Industriedenkmalschutzes und die daraus hervorgegangene Industriemuseumsbewegung müssen in einem engen zeitlichen und ursächlichen Zusammenhang mit dem Strukturwandel gesehen werden. Die wissenschaftliche Erforschung der Ursachen und Folgen dieses Wandels – die die Grundlage der musealen Arbeit sei – hätte jedoch bis heute keinen Konsens finden können. Die bestehenden unterschiedlichen Ansätze zur Beschreibung dieses Phänomens (u. a. Sektoraler Wandel, De-Industrialisierung, Globalisierung), die Roeckner detailliert beschreibt (2. Kapitel), seien verantwortlich für die oft beklagte unbefriedigende inhaltliche Ausrichtung der Industriemuseen. Denn diese seien ihrerseits gezwungen (gewesen), ohne „gesichertes Handbuchwissen" eigene Diskussionsbeiträge – in Form von Ausstellungen, Katalogen oder auch wissenschaftlichen Aufsätzen und Sammelbänden – zu entwickeln (vgl. S. 17). Was Roeckner hier mit einem etwas bedauernden Unterton stehen lässt, sollte hingegen als museumsimmanente Aufgabe verstanden und selbstbewusst von den Museen umgesetzt werden.

Da sich auch aufgrund dieser Schieflage ein in sich sehr differenzierter Museumstyp ausgebildet hat, führt Roeckner eine ausführliche Analyse des Industriemuseumstyps durch (3. Kapitel). Sie skizziert Begriff, Genese und Charakteristika und steckt dabei Schritt für Schritt den Rahmen ihrer daran anschließenden empirischen Untersuchung ab. Dabei betont Roeckner, dass parallel zum Strukturwandel international ein kultureller Wandel eingetreten sei, in dem Industrie als Teil des kulturellen Erbes anerkannt wurde und auf dessen Grundlage sich Industriemuseen ausbilden konnten. Zudem entwickelte sich Mitte der 1950er Jahre in Großbritannien mit der „Industriearchäologie" eine ent-

sprechende Forschungsdisziplin, die sich ganzheitlich mit der Kulturgeschichte des industriellen Zeitalters auseinandersetzt. Obwohl sich diese in den 1970ern international verbreitete und weiter professionalisierte (v. a. in westlichen Industrieländern und unter Einbeziehung osteuropäischer Forscher), konnte sie sich in Deutschland nur in abgewandelter Form als „Industriekultur" bzw. „Industriedenkmalschutz" etablieren. Besonderheiten in Deutschland waren – im Unterschied zu den meisten anderen Ländern – einerseits die geringen Bestrebungen, „Industriearchäologie" als akademisches Fach zu etablieren[1], andererseits sollten neben den Zeugnissen der Hochindustrialisierung auch Industriedenkmale des 20. Jahrhunderts berücksichtigt werden.

Dadurch ist in Deutschland – im internationalen Vergleich etwas verspätet – eine spezifische und sehr heterogene Industriemuseumslandschaft entstanden, die schwer zu charakterisieren ist. So werden Industriemuseen hierzulande statistisch in der Kategorie „Naturwissenschaftliche und technische Museen" aufgeführt und sind zahlenmäßig nicht eindeutig zu erfassen (2008: 753 Museen).[2] Außerdem befinden sich darunter auch Museen, die sich zwar als Industriemuseen verstehen, jedoch aufgrund ihres Museumsnamens nicht direkt als diese erkennbar sind – so beispielsweise das Museum der Arbeit in Hamburg. Erschwerend kommt hinzu, dass es in Deutschland zahlreiche Regional- und Stadtmuseen gibt, die einen industriegeschichtlichen Schwerpunkt aufweisen, aber in Statistiken einer anderen Kategorie zugerechnet werden wie das Museum Rüsselsheim. Und schaut man dann noch über den nationalen Tellerrand hinaus, scheint eine quantitative Auflistung dieses Museumsgenres unmöglich. Dennoch gelingt es Roeckner durch den deutschen (und zu Teilen auch durch den westeuropäischen und nordatlantischen) Museumsdschungel eine Schneise zu schlagen: Mit einem Überblick über Gründungsgeschichte und Etablierung von mehr als 15 bedeutenden deutschen Museen der Industriegesellschaft (darunter Technik-, Sozial-, Firmen- und Regionalmuseen) und in Abgrenzung zu britischen, französischen und nordamerikanischen Museen, die Vorbilder für die deutschen Industriemuseen waren, schärft Roeckner zwei Hauptspezifika des Industriemuseumstyps und widerlegt ein drittes: Es bestätigt sich, dass Industriemuseen (1) auf die Sozialgeschichte fokussieren und somit als Geschichtsmuseen (2) eindeutig von Technikmuseen abzugrenzen sind, wenngleich es in der Realität auch Überschneidungen mit ähnlichen Museen gibt. Doch lässt sich nicht bestätigen, dass Industriemuseen (3) stets in still gelegten Fabrikgebäuden, sprich an authentischen Orten der Industriekultur, entstanden seien.

Die daran anschließende exemplarische Analyse von drei großen deutschen Industriemuseen (4. Kapitel) basiert auf dem Geschichtskulturkonzept Jörn Rüsens und folgt den drei Dimensionen dieses Modells (Politik, Wissenschaft und Ästhetik). Nacheinander werden das Westfälische Industriemuseum / Zeche Zollern II/IV in Dortmund – Prototyp der deutschen Industriemuseen (1979) –, das Landesmuseum für Technik und Arbeit in Mannheim (heutiges Technoseum) – eine Mischform zwischen Technik- und Industriemuseum – und das Sächsische Industriemuseum Chemnitz – Hauptort eines der jüngsten

Industriemuseen (1990er Jahre) – unter die Lupe genommen. Während Dortmunds Prioritäten auf den Erhalt der Zeche als Industriedenkmal und die Präsentation der Sozialgeschichte der Arbeiterschaft abzielen, ist das Mannheimer Museum in einem Neubau untergebracht und widmet sich mehrheitlich der Technik- und Naturgeschichte. Roeckners Vorstellungen von einem Industriemuseum, das den Eigenschaften dieses Museumstyps entspricht und zudem ihrer Forderung nach der Auseinandersetzung mit dem Strukturwandel nachgeht, ist schließlich das Chemnitzer Museum. Hier wird die wirtschaftshistorische Perspektive – mit Fokus auf alle Akteursgruppen der Industriegeschichte (und nicht nur auf die Arbeiterschaft wie in Dortmund, sondern auch auf Unternehmer, Kreative, Familien etc.) – deutlich weiterentwickelt. Es werden stets der Gegenwartsbezug hergestellt, Stärken und Schwächen der sächsischen Industriegeschichte und aktuellen Wirtschaft reflektiert. Roeckner stellt dabei heraus, dass das Chemnitzer Museum trotz einer desolaten Haushaltssituation zeigt, dass Museen eigene Antworten auf die Musealisierung und Vermittlung des Strukturwandels finden können – hier v. a. durch einen überraschenderweise sehr kunsthistorisch orientierten Einsatz von Exponaten.

Einerseits auf den Ergebnissen ihrer Detailstudien basierend, andererseits aus der geschichtswissenschaftlichen und -didaktischen Forschung abgeleitet, formuliert Roeckner abschließend drei Überlegungen für die allgemeine konzeptionelle Weiterentwicklung von Industriemuseen (5. Kapitel): Erstens fordert sie eine stärkere Hervorhebung des Gegenwartsbezugs der Ausstellungsinhalte. Zweitens soll Industriegeschichte stärker den Wandel der Arbeitsbedingungen und -anforderungen durch zunehmende intersektorale Verschränkungen betonen – und nicht das Ende der Industrie beschwören bzw. konservieren, was aus diesem Zeitalter geblieben ist. Drittens plädiert Roeckner für eine Thematisierung von Kontroversen und offenen Fragen, wie sie nicht nur Industriemuseen, sondern Geschichtsmuseen im Allgemeinen anzuraten ist.

Roeckner kann ihr eingangs formuliertes Ziel, durch eine gründliche empirische Untersuchung sowie Begriffsgeschichte ein besseres Verständnis von Industriemuseen zu generieren, vollends erfüllen. Ihre Überlegungen zu und Einblicke in die deutsche Industriemuseumslandschaft sind nicht nur eingängig, sondern sollten Ansporn für weitere Forschungen zu diesem Museumstyp sein. Lohnenswert wäre vermutlich die Analyse eines vierten Museums gewesen, das zu den industriegeschichtlichen Stadt- und Regionalmuseen einreihen zählt. Roeckners mehrfach geäußerte Anregung, Industriemuseen sollten aktiver Identität(en) stiften und Orientierungshilfen im wirtschaftlichen Strukturwandel geben, ist jedoch nicht ohne Weiteres zuzustimmen. Es bleibt eher zu hoffen, dass dieser Museumstyp, der ja schon einmal in den 1970er Jahren so innovativ auf die Museumswelt eingewirkt hat, die Idee vom Museum als „Identitätsfabrik" lieber hinter sich lässt und sich – wie es ja Roeckner selbst auch fordert – als diskursiver, kontroverser Ort auf dem Museumsmarkt positioniert, an dem Meinungen verhandelt, aber nicht vorgegeben werden.

Anmerkungen:

1 Es konnte sich hierzulande ein gleichnamiger Diplom-/heute Bachelor- bzw. Masterstudien-

gang an der TU Bergakademie Freiberg/Sa. etablieren, den Roeckner jedoch nicht erwähnt.

2 Vgl. Institut für Museumsforschung, Statistische Gesamterhebung an den Museen der Bundesrepublik Deutschland für das Jahr 2008, Berlin 2009, S. 28.

Florian Mächtel: Das Patentrecht im Krieg (= Geistiges Eigentum und Wettbewerbsrecht, Bd. 25), Tübingen: Mohr Siebeck 2009, 413 S.

Rezensiert von
Isabella Löhr, Heidelberg

Viel ist bisher über den Ersten Weltkrieg geschrieben worden und die thematische Breite dieser Studien erweckt den Eindruck, dass Forschungsperspektiven und Fragestellungen zwar im Fluss sind, es aber nur noch wenige Themen gibt, die die Forschung bisher vollständig außen vor gelassen hat. Das Verdienst, ein solches Desiderat aufgefunden und zugänglich gemacht zu haben, kommt Florian Mächtel zu, der in seiner Bayreuther Dissertation der Frage nachgegangen ist, welche Rolle Patentrechte im Ersten Weltkrieg spielten. Wie der Autor eingangs darlegt, kommt Patentrechten in Kriegszeiten eine besondere Bedeutung zu: Je mehr Krieg industrialisiert wird und militärischer Erfolg sich in eine Kategorie verwandelt, die von technischem Vorsprung und von Innovationsfähigkeit abhängt, wird der Wettbewerb der Kriegsgegner um Erfindungen und Patente zu einem militärischen und politischen Imperativ. Mächtel problematisiert das Thema Patente und Krieg aus einer rechtswissenschaftlichen Perspektive, die sich vor allem dem deutschen Umgang mit Patenten im Ersten Weltkrieg widmet, an passenden Stellen allerdings immer wieder die Situation im europäischen Ausland, den USA und Japan überblicksartig einbezieht.

Die Studie gliedert sich in fünf große Kapitel, in denen der Autor das Thema systematisch aufrollt. Im erste Kapitel führt Mächtel in die grundlegende Problematik ein, dass alle modernen Patentrechtsgesetze das exklusive Vorrecht einer zeitlich befristeten Verwertung einer Erfindung immer an die Bedingung knüpfen, dass der Erfinder den ‚Bauplan' seiner Erfindung öffentlich macht mit dem Ziel, so den technischen Fortschritt zu gewährleisten. Auch das deutsche Patentgesetz von 1877 sah diese „Offenbarung des Erfindergedankens" (S. 13) vor, beinhaltete zugleich aber die Institution eines „Geheimpatentes": Geheimpatente gewährleisteten den Erfinderschutz, enthoben den Erfinder aber von der Pflicht, seine Erfindung außerhalb der öffentlichen Bekanntmachung im Detail zu offenbaren. Während diese Regelung bis 1914 keine Anwendung fand, änderte sich dies im Verlauf des Ersten Weltkriegs. Mächtel zeigt in diesem Kapitel, dass das Patentrecht erst ab Mitte des Jahres 1915 als kriegswichtiges Instrument in die Aufmerksamkeit der deutschen Behörden rückte. Allerdings kam es erst im Februar 1917 zur Einführung eines sogenannten „Kriegspatentes". Dieses legte fest, dass alle Erfindungen, die von den Militärbehörden als relevant für die Kriegsführung oder die Kriegswirtschaft eingeschätzt wurden, einer Geheimhaltung unterlagen, die Erfinder trotzdem ihre gewerblichen Eigentumsrechte voll zugesichert beka-

men. Auf diese Weise sollte verhindert werden, dass kriegswichtige Erfindungen vor den Behörden aus Angst vor Enteignung verheimlicht wurden, wie es bis 1917 mehrfach geschehen war. Interessant ist hier die abschließende Einschätzung des Autors, dass die Kriegspatente für die Patentinhaber wirtschaftlich gar nicht sehr ertragreich waren, sondern dass die Bedeutung der Kriegspatente vielmehr „psychologisch" zu erklären ist, „nämlich die Wiederherstellung der Anreizwirkung des Patentsystems auch bei geheim zu haltenden Innovationen im Krieg" (S. 84).

Das zweite Kapitel widmet sich anhand von „Patenteignungen" dem Verhältnis von Staat und Patentinhaber unter Kriegsbedingungen, indem der Werdegang der 1877 im deutschen Patentgesetz eingeführten Möglichkeit der Enteignung von Patentinhabern durch den Staat analysiert wird. Generell interpretiert Mächtel diese Enteignungsklausel erst einmal als eine Begrenzung staatlicher Macht, weil sie dem Staat willkürliche Enteignungen verbietet und ihn zur Zahlung einer Entschädigung verpflichtet. Erstaunlich ist das Ergebnis von Mächtels Analyse für die Zeit von 1914 bis 1918: Die Institution eines staatlich garantierten und geschützten gewerblichen Eigentums erwies sich in der Rechtspraxis als derart gefestigt, dass die zivilen Behörden dieses gegenüber allen militärischen Begehrlichkeiten verteidigten, so dass im Ersten Weltkrieg von der Möglichkeit einer Patententeignung faktisch kein Gebrauch gemacht wurde. Konflikte um kriegswichtige Patente wurden entweder im Einzelfall gelöst oder aber mithilfe der Geheimhaltung. Eine Ausnahme bildeten nur die sogenannten „Angestelltenerfindungen". Diese bezeichneten alle Erfindungen von staatlichen Angestellten. Nachdem die Militärbehörden anfänglich durchgesetzt hatten, dass Patentanmeldungen erst nach vorheriger Prüfung zum Patentschutz angemeldet werden durften, wurden die Rechte der angestellten Erfinder gegenüber Staat und Militär schließlich im September 1918 aufgewertet, nachdem sich gezeigt hatte, dass eine rigide Praxis der Aberkennung von Patentrechten die Innovationsfreudigkeit der angestellten Erfinder eher gebremst als gefördert hatte.

Das dritte Kapitel thematisiert die Weitergeltung des internationalen Patentschutzes im Krieg, der 1873 in Form der „Pariser Verbandsübereinkunft zum Schutz des gewerblichen Eigentums" (PVÜ) in einer internationalen Organisation institutionalisiert wurde. Mit der Entscheidung des Reichsgerichts im Oktober 1914, dass die Pariser Verbandsübereinkunft auch im Krieg unbedingt weiter gelte, bestätigte sich erst einmal die bis dahin vorherrschende Meinung, dass multilaterale Verträge bei Kriegsausbruch nicht zwangsläufig erlöschen, zumal die Pariser Verbandsübereinkunft auch keine entsprechende Klausel kannte. Diese Haltung hielt sich allerdings nicht lange, nachdem verschiedene Oberlandesgerichte sich gegen die Fortgeltung der PVÜ nach Kriegsausbruch ausgesprochen hatten und auch innerhalb der Rechtswissenschaft kein einheitlicher Standpunkt zu finden war. Im weiteren Verlauf der Argumentation zeigt Mächtel, dass diese Uneinigkeit zwischen den Rechtswissenschaftlern den politisch uneindeutigen Rahmenbedingungen geschuldet war: Während die Pariser Verbandsübereinkunft offiziell während des Krieges bestehen blieb, entwickelte sich das Patentrecht zu einem zentralen Schau-

platz der wirtschaftlichen Kriegführung, weswegen Mächtel auch von einem „Patentkrieg“ (S. 271) spricht. Insbesondere anhand der britischen Maßnahmen zeigt der Autor, wie die Patente deutscher Industrieller zur Zielscheibe für viele Maßnahmen wurden, die auf eine nachhaltige Schwächung der deutschen Wirtschaft zielten. So wurde in Großbritannien bereits drei Tage nach Kriegsausbruch ein Gesetz erlassen, das es zugunsten des britischen öffentlichen Interesses erlaubte, Patentrechte der Kriegsgegner nach einem genau definierten Verfahren entweder für nichtig zu erklären, auszusetzen oder aber zu lizenzieren. Obwohl das Vorgehen gegen deutsche Patente in Großbritannien 1918 noch einmal verschärft wurde und auch das Deutsche Reich im Juli 1915 verfügte, dass keine Patente an gegnerische Staatsangehörige vergeben werden durften und zugleich Zwangslizenzen auf bereits existierende Patente erteilt werden konnten, gesteht Mächtel dem „Patentkrieg“ keine große Bedeutung zu. Denn, so das Argument, die Kriegsgegner machten von den Enteignungsmaßnahmen nur wenig Gebrauch, was Mächtel auf den hohen Grad internationaler wirtschaftlicher Verflechtung und Abhängigkeit von vor 1914 zurückführt. Alle Beteiligten mussten damit rechnen, dass eine flächenmäßige Enteignung deutscher Patentrechte zu reziproken Vergeltungsmaßnahmen im Deutschen Reich führten, womit nicht mehr nur einseitig der deutschen Wirtschaft geschadet worden wäre, sondern zugleich auch der heimischen Wirtschaft in Frankreich, Großbritannien und den USA, die um ihre in Deutschland geltenden Patente fürchten mussten. Aus diesem Grund lassen sich auf einer zweiten Ebene Maßnahmen beobachten, mit denen die Kriegsparteien die Fortführung des internationalen Patentschutzes mit Blick auf die eigenen wirtschaftlichen Interessen erleichterten, so dass „an die Stelle einer institutionalisierten Zusammenarbeit im Rahmen der PVÜ […] eine Art ‚praktische Internationalität’ [trat], die durch Reziprozitätsklauseln auch Feinden Rechtsvorteile gewährte“ (S. 379 f.).

Die Kapitel vier und fünf behandeln den Übergang in die Nachkriegszeit und den Umgang mit Patenten im Zweiten Weltkrieg. Hier kommt Mächtel zu ähnlichen Ergebnissen wie bereits für die Zeit des Ersten Weltkriegs. Die Bekundungen der Siegermächte vor und während der Friedensverhandlungen, die Einschränkung deutscher Patente im In- und Ausland als Bestandteil des wirtschaftlichen Bestrafungskatalogs Deutschlands fortzusetzen, fanden zwar ihren Niederschlag im Versailler Vertrag und in nationalen Ausführungsgesetzen, wurden aber von keinem der Beteiligten mit Ausnahme der USA ernsthaft umgesetzt. Vielmehr zeigt Mächtel, dass sich die Beziehungen im Bereich des internationalen Patentschutzes relativ schnell normalisierten und es im Juli 1920 sogar zu einem internationalen Abkommen im Rahmen der Pariser Verbandsübereinkunft kam, das unter anderem erloschene Rechte und Verfahren wieder in Kraft setzte und damit direkt an die Vorkriegsstand des internationalen Patentschutzes anknüpfte. Beim Vergleich des Umgangs mit Patenten im Ersten und Zweiten Weltkrieg fördert die Studie schließlich eine erstaunliche Kontinuität zu Tage. Durch die direkte Wiedereinführung aller 1914–1918 erprobter patentrechtlichen Maßnahmen verlief der Zweite Weltkrieg auf nationaler

und internationaler Ebene zumindest bis 1943 parallel zum Ersten Weltkrieg, bis das Patentwesen in Deutschland kriegsbedingt zusammenbrach und endgültig erst 1949 mit der Eröffnung des Deutschen Patentamtes in München seinen Betrieb wieder aufnahm.

Diese gut geschriebene, mit vielen spannenden Details ausgestattete Studie gibt einen profunden Einblick in die Bedeutung des Patentwesens für das Funktionieren einer hochgradig verflochtenen internationalen Wirtschaft. Dabei zeigt Mächtel die Stabilität einer internationalen Eigentumsordnung auf, die Ende des 19. Jahrhunderts erstmals multilateral institutionalisiert wurde und sich in dem relativ kurzen Zeitraum von 1883 bis zum Ausbruch des Ersten Weltkriegs als ein so wichtiges wirtschaftspolitisches Instrument bewährte, dass sie nach 1914 verbalpolitisch und gesetzgeberisch zwar angegriffen und eingeschränkt wurde, praktisch von den Kriegsgegnern aber weitestgehend eingehalten und nach Kriegsbeginn wieder in Kraft gesetzt wurde. Damit leistet die Studie einen wichtigen Beitrag zur Frage, inwieweit der Erste Weltkrieg als eine Zäsur in der Wirtschaftsgeschichte interpretiert werden kann, die eine Phase der De-Globalisierung einleitet. Schade ist, dass Mächel diese Fragestellungen in seiner Studie nicht berücksichtigt, da er ausschließlich rechtshistorische und rechtswissenschaftliche Forschungsdiskussionen aufgreift und es versäumt, seine Ergebnisse mit Diskussionen in anderen historischen Teilgebieten zu verknüpfen. Das sollte den interessierten Leser aber nicht davon abhalten, zu diesem Buch zu greifen.

Duncan Kelly (ed.): Lineages of Empire. The Historical Roots of British Imperial Thought, London: Oxford University Press, 2009, 247 p.

Reviewed by
Ian Hall, Brisbane

This book is the product of a British Academy symposium held in 2006, but it is representative of a much larger body of recent work on British imperial thought from its origins in the sixteenth century to its nadir in the mid-twentieth century. In part, this scholarly effort is a response to demand for British history to be set in wider contexts – a demand that runs back to J. R. Seeley, and reiterated by many historians since, from Herbert Butterfield to his now more famous student, J. G. A. Pocock. In part too, as Duncan Kelly notes, the surge in interest in imperial thought is a response to events in contemporary international relations. The 'desire to trace the genealogy of our current predicament', as Kelly puts it (p. xiii), runs through all the essays in this book.

James Tully's opening chapter, 'Lineages of Contemporary Imperialism', addresses the question most directly. Seven particular lineages are identified: informal, free trade, colonial and indirect, nineteenth century civilisational [sic], cooperative mandate, US, and contemporary imperialism. These are analysed in no particular chronological order, emphasizing the areas of overlap between them, and leaving the impression that imperialism is not just common, but

ubiquitous in contemporary world politics. Reiterating this point from a different perspective, Uday Singh Mehta's essay on the making of the Indian constitution highlights the difficulties post-colonial elites faced when trying to construct a polity and reconstruct a society in the aftermath of empire.

The remaining chapters consist of more conventional pieces of intellectual history. Richard Whatmore traces the development of Western European views of small states and their future prospects in an eighteenth century world of emerging commercial empires. His concern is the 'origin of the perception of Britain as a defender of small states' – a perception not just confined to British thinkers, but shared by some Swiss and Genevan practitioners, who saw in Britain a putative saviour.

Phiroze Vasunia, for his part, examines changing readings of Virgil – the 'poet of empire' (p. 83) – in late eighteenth and nineteenth century Britain. He shows that Virgil was a touchstone for both critics and supporters of British imperialism, a point of contact between a Roman past and British future, his poem serving as confirmation of providential roles for empire. Iain Hampsher-Monk and Robert Travers' two chapters turn instead on matters Indian: the first explores Edmund Burke's understanding of empire and the second the analysis of the East India Company's economic management provided by James Steuart and Adam Smith, which Travers thinks helped structure their broader views of political economy.

The final three essays consider British anxieties about aspects of their empire. Karen O'Brien looks at Tory views of the social consequences of emigration for both Britain and the colonies, while Douglas Lorimer deals with the various ideologies and languages of race that emerged in the late nineteenth- and early twentieth-centuries. Tories, O'Brien demonstrates, viewed colonial settlement through a romantic lens, rather than an universalist one, lingering on the recreation of rural idylls of upstanding and God-fearing yeomen. In his chapter, Lorimer argues that scientific racism was more a rationalization of existing and evolving cultural prejudices than an ideology generated de novo.

The last essay, by Jeanne Morefield, addresses Harold Laski's identification of the 'habits' of imperialism, those patterns of behaviour apparently encouraged by the administration of empire which Laski thought crypto-authoritarian. Morefield aims to liberate Laski from those that have argued that his thinking on empire is mostly derivative, especially of Lenin. Instead, she thinks it is better seen in terms of Laski's analysis of the nature of sovereignty, with imperialism seen as a corrupted extension of sovereign power rather than merely of capitalism.

This is a high quality collection by a group of accomplished scholars. This reader wished for a concluding chapter that teased out more fully the 'genealogy' of our 'predicament', since the arguments presented by the various authors seem to contain some intriguing contradictions. Hampsher-Monk's essay is especially interesting in this regard. He notes that the words 'empire' and 'imperialism' derive from the Roman conception of imperium, the rule of the highest magistrates who were answerable – at least in times of crisis – to no others. In 'any entity larger than a city, and in the absence of the unified,

functionally integrated state of modernity', he observes, 'imperium was almost always exercised over internally differentiated political communities' (p. 118). To a thinker steeped in Roman thought like Burke, therefore, 'empire' merely implied the rule of a monarch or 'presiding republick' over a collection of polities (p. 119). In itself, 'empire' was thus morally neutral – what mattered, at least to Burke, was the quality of rule, not the fact of it.

This is a very different view to Tully's. Here, empire and imperialism are simply bad in whatever form they are found and the link between these concepts and sovereignty is broken. What Tully calls 'alternate forms of political, legal, and economic associations based in self-reliance, fair trade, nonviolence, deep ecology, and cooperative networks' are preferred (p. 29).

Between Burke and Tully, in other words, there has been conceptual broadening and narrowing. For Tully, empires and imperialism are anything powerful and wide-reaching; sovereignty – or at least the self-determination of political communities, which Tully favours – has been emancipated from the idea of imperium. Historiographically, these processes have been unhelpful, allowing for the separation of histories of states from histories of empires that occurred – despite Seeley's best efforts – in the late nineteenth century and persisted into the late twentieth. Better, one might argue, to see states and empires as points on one continuum, as different forms of imperia. But to do this requires some change in the moral views of historians, not least a movement away from Tully's insistence that empire is a form of political organization in a category of its own, uniquely worthy of our opprobrium.

Dieter Grimm: Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs, Berlin: Berlin University Press 2009, 135 S.

Rezensiert von
Helmut Goerlich, Leipzig

Im Gegensatz zu größeren, durch akademische Qualifikationsverfahren motivierten Schriften (zuletzt vor C. Seiler, den Grimm zitiert, etwa U. Schliesky, Souveränität und Legitimität von Herrschaftsgewalt, 2004, liegt mit dem hier anzuzeigenden Band eine kleine Streitschrift zum Thema vor. Sie kompensiert ihre Kürze, die keine umfassende Gelehrsamkeit schon durch ihren Umfang ausbreitet, durch die Aura elitärer Kompetenz. Der Autor ist dazu nicht nur dank seiner mehrschichtigen Karriere, sondern auch aufgrund seiner transatlantischen Existenz berufen. Sie stützt diese Aura durch die ausgewertete Literatur; so werden zahlreiche Arbeiten aus der angelsächsischen und der frankophonen Welt einbezogen, die ein biederer Habilitand in der deutschen Provinz sich nicht so leicht wird zugänglich machen können wie ein Gelehrter in New Haven oder Cambridge, Massachusetts, und am hiesigen Wissenschaftskolleg in Berlin. Daher erstaunt es auch nicht, wenn der deutsche Horizont eher zurücktritt, obwohl die Rechtsprechung des Bundesverfassungsgerichts durchaus gespiegelt wird, das Lissabon-Urteil allerdings nicht mehr wirklich, dafür kam es am 30. Juni 2009 zu spät. Aber es wird sicher Eingang fin-

den in weitere Variationen zum Thema, die Grimm gewiss unternehmen wird, zumal ihn seine außerordentliche rhetorische Begabung befähigt, leichten Fußes den Weg solcher Variationen zu gehen, ohne zu langweilen oder gar den Eindruck zu erwecken, er reite auf diesem Weg ein Steckenpferd, das sich alsbald erschöpft.

So ist denn auch die Thematik so angelegt, dass dies möglich ist. Einen ähnlichen Zyklus hatte der Autor schon durchschritten, als er – von dem Plan einer Verfassung der Europäischen Union motiviert – immer wieder den Nationalstaat und seine Verfasstheit dank einer nur ihm angemessenerweise zuzuordnenden Verfassung als Instrument der Vergewisserung nationaler Identität und Rechtskultur verhandelte. Im Verhältnis dazu ist die Souveränität erst eine jüngere Modalität; sie schließt sich aber nahtlos an und gehört in diesen Erfahrungszusammenhang. Dabei spiegelt sie als Thematik zugleich die an der Staatlichkeit des Verfassungsstaates orientierte Rechtsprechung des Bundesverfassungsgerichts besser wieder und erlaubt, auf sie aus der Sicht eines älteren, ausgeschiedenen Richters des anderen Senats zu sprechen, der an diesen Unternehmungen kaum beteiligt war und ist.

Sachlich geht die Schrift so vor, dass sie nach einer Einleitung mit der Überschrift „Souveränität im Wandel der Staatlichkeit" in einem ersten Teil, der mit „Entwicklung und Funktion des Souveränitätsbegriffs" überschrieben ist, zunächst den historischen Begriff von Souveränität unter der Kapitelüberschrift „Die Bedeutung Bodins für den Souveränitätsbegriff" verhandelt, aufgeteilt in Abschnitte „vor", „bei" und „nach" J. Bodin. Darauf wendet sie sich der „Souveränität im Verfassungsstaat" zu, und zwar unter den Abschnitten „Volkssouveränität", „Nationalsouveränität", „Staatssouveränität", „Souveränität im Bundesstaat" und „Latente Souveränität". Anschließend folgt ein Kapitel zur „äußeren Souveränität" mit den Unterabschnitten „Souveränität in der westfälischen Ära", „Die Entwicklung im 20. Jahrhundert" und „Rückwirkung auf die innere Souveränität", um dann mit einem letzten Teil zur „Souveränität heute" zu schließen. Dabei erscheint die Untersuchung aus ihrem Gang heraus ein begriffshistorisches und begriffsjuristisches Unterfangen, das andere Begriffe mit seinem engeren Gegenstand verbindet. Das heutige Ziel der Erörterung erscheint am Ende mit der Orientierung an der demokratischen Selbstbestimmung, für die Souveränität offenbar der notwendige Schlüsselbegriff sein soll, erreicht.

Zum Ausdruck kommt aber zunächst die tiefe Überzeugung, dass auf nationale Souveränität nicht verzichtet werden kann, die den westlichen Verfassungsstaat immer noch zu prägen scheint. Das berühmte Diktum von Sir E. Coke – nicht als Richter, sondern als Parlamentarier im Unterhaus –, wonach „Magna Charta is such a fellow that he will have no ‚Sovereign'" gilt, hat da keinen rechten Platz, weil für Grimm, wie in der vorausgegangenen europarechtlich motivierten Verfassungsdebatte, auch in einem Traktat über Souveränität ein Ort dieser Souveränität erforderlich ist, der auf dem europäischen Kontinent im Volk gefunden wurde. Fehlt aber nicht in der soliden angelsächsischen Tradition eben dieser Ort? Anders gewendet: „We the People…" mag eine gebotene, Legitimität schaffende Anrufung einer Identität im Vorspruch der amerikanischen Bundesverfassung sein; sie hat aber auch in

der amerikanischen Tradition der Verfassung nicht ihre sie selbst tragende Qualität gewonnen, denn diese Verfassung bewirkt eben Stabilität im Wandel (B. Ackerman), ohne diese Anrufung zu sehr zu betonen, wie es das Konzept der „rule of law and not of men" (J. Harrington) ergibt, dessen sich die Väter der amerikanischen Verfassung bedient haben. Und im sich heute und spät zur Demokratie hin wandelnden britischen Modell ist zwar die Souveränität des Parlaments als „King in Parliament" etabliert; diese enigmatische Formel verrät aber schon, dass es eben einen Souverän im kontinentalen Sinne in ihm nicht gibt – ebenso wenig wie übrigens einen abstrakten Staat, ganz wie in den USA, wo an dieser Stelle die Republik steht.

Das vorliegende Traktat ist denn auch die Langfassung eines Beitrags für ein französisches Handbuch von hohem Anspruch, dem traité international de droit constitutionel. In der Tradition der französischen Doktrin ist der Ansatz der Schrift überzeugend. Danach ist „Souveränität" Schlüsselbegriff, um „Staat" und „Verfassung" zu verstehen. Auch ist sie Signalwort für die Bewältigung von Zuordnungsproblemen auf nationaler, zwischenstaatlicher und europäischer Ebene. Das gilt jedenfalls dann, wenn man sich dem Feld von einem Theorieansatz nähert, der nicht Fallstudien über die Reichweite der Regelungsmächtigkeit in diesem Sinne souveräner Staaten in unserer Zeit zum Ausgangspunkt macht, sondern die Tradition der immer noch gültigen Theorie der Staatlichkeit des Westens. Geht man hingegen anders vor, also etwa induktiv aus der Perspektive der Erfahrung des Schwundes der Leistungskraft dieser Staatlichkeit, dann mag sich ein ganz anderes Bild ergeben. Nichts anderes gilt übrigens, wenn man sich dem Thema vom geringen Alter jener Staatlichkeit her nähert; denn auch dann zeigt sich alsbald, dass Souveränität zwar ein Produkt vor allem der westfälischen Ordnung im Völkerrecht ist, dass aber diese Ordnung stets stabilisiert wurde durch eine Fülle von Rechtsbindungen, welche die Souveränität in ihrer Universalität nur als einen dünnen Schleier über dem Leib des Lebens dieser Staatlichkeit erscheinen lassen. Die Fürstensouveränität währte kurz, die Staatensouveränität trat an ihre Stelle und die Volkssouveränität sollte sie verewigen. Heute haben wir ein Völkerrecht, bis in dessen Dach die Permeabilität des Rechts wirkt; es gibt Haftbefehle gegen amtierende, durch Wahlen legitimierte Oberhäupter von Staaten; die „responsibility to protect" schickt die Souveränität in die Mottenkiste der Geschichte und internationale Verträge als Instrument souveräner Staaten können sie von diesen Mechanismen nicht mehr freistellen. Staaten sind eingebettet in Netzwerke der unterschiedlichsten Art, nicht nur durch kündbare Bündnisse, sondern auch durch Regelwerke, aus denen sie de facto – und oft auch de iure – nicht mehr ausbrechen können. Umso mehr aber kommt es darauf an, Rechte und Befugnisse zwischen den Staaten, in ihrem Verhältnis zu ihnen heute vorgeordneten Rechtsebenen und zugunsten der Einzelnen, Gruppen und Nationalitäten zu präzisieren, zu pflegen und zu gewährleisten.

Darum geht es der anzuzeigenden Schrift indes nicht. Sie will vielmehr die demokratische Selbstbestimmung retten und dies ist in der Tat ein teures Anliegen. Mit dem Bundesverfassungsgericht sucht Grimm diese Selbstbestimmung nicht um

des Nationalstaates willen, sondern um ihrer Eigenschaft als Herrschaftslegitimation willen gegen die Bindungen des internationalen Rechts zu retten. Heute, nach dem vorläufigen Sieg des Minarettverbots in unserer Nachbarschaft, kann man diesem Ansatz – vielleicht gerade aus der Sicht einer der ältesten Demokratien, nämlich der Schweiz –, entgegenhalten, dass dieses Verbot nicht nur zwingendem internationalen Recht widerspricht, sondern dass die Weisheit der geltenden eidgenössischen Bundesverfassung von 1999 zeigt, dass heute demokratische Selbstbestimmung eingebettet sein muss in einen Gewährleistungsrahmen jenseits staatlicher Souveränität und damit auch jenseits der Staatlichkeit. Wie der konkrete Fall abgearbeitet werden wird, das steht auf einem anderen Blatt (dazu R. Zimmermann, ZaöRV 69 [2009], S. 829 ff.). Aber der Fall zeigt, dass der Rekurs auf die Souveränität im Interesse der demokratischen Selbstbestimmung ebenso wenig die heutige Einbettung demokratischen Verfassungsrechts in den Rechtszusammenhang jenseits deren Grenzen erfasst wie die Legitimation demokratischer Selbstbestimmung aus diesem Rechtszusammenhang heraus jenseits der Souveränität und jenseits des Nationalstaates. Man mag dem entgegenhalten, die Leistungsfähigkeit dieser Gewährleistung demokratischer Selbstbestimmung sei zu gering, oder auch, die Realität transnationaler Regelungsmacht sei weithin keineswegs demokratisch. Auch dies ist richtig: Aber ein hohes Lied von der Souveränität hilft darüber nicht hinweg. Es kann zwar etwas festhalten und erinnern, was als konstitutionelle Errungenschaft unverändert gelten darf. Es kann aber nicht darüber hinweg täuschen, dass die Deutungshoheit, wie weit diese Selbstbestimmung reicht, schon seit geraumer Zeit abwandert auf Ebenen jenseits des vormals aus sich selbst heraus souveränen Staates, seiner Legitimation aus und für Verfassung und Nation sowie der demokratischen Rechte des Volkes. So räumt am Ende denn auch diese Schrift ein, dass die Bestimmung der Grenzen der Reichweite der Rechtsmacht jenseits des Staates nicht mehr diesem, sondern den zuständigen Organen jener höheren Ebenen der rechtlichen Steuerung obliegt, also etwa dem Gerichtshof der Europäischen Union oder letztlich in jenem eidgenössischen Fall gegebenenfalls dem Europäischen Gerichtshof für Menschenrechte in Straßburg. Dies zeigt, dass der Rekurs auf die Souveränität im Sinne von Grimm zwar ermöglicht, das Ziel der demokratischen Selbstbestimmung zu erinnern, dass er aber nicht das leistet, was er erhofft, will man den zunehmenden demokratischen Kahlschlag verhindern, den er befürchtet. Will man das tun, so muss man sich auf die heute jenseits des Staates etablierten Ebenen der Rechtsentwicklung einlassen. Das Rad ist nicht zurückzudrehen.

Demgegenüber ist die Studie allerdings ausgezeichnet gelungen. Sie entfaltet das Thema in seiner Tradition. Sie arbeitet das Material auf und bezieht die ausländische Debatte mit ein. Sie zeigt historisches Können und rechtspolitisches Gespür. Sie ist leicht, aber nicht oberflächlich geschrieben und liest sich daher ebenso elegant, wie sie auftritt. Als Vorspiel für eine weiterführende Erörterung der ernsten Sorge des Autors um die demokratische Selbstbestimmung als alleinigem Instrument der Herrschaftslegitimation leistet sie gewiss ebenso viel wie voluminöse Erstlingswerke, wenn

nicht viel mehr, weil sie konzise und luzide ausführt und damit erhellt, was die Kernfragen dieser Debatte sind. Deshalb kann man diese kleine Schrift nur nachhaltig empfehlen. Sie sollte gelesen werden und zwar gerade auch von denen, die sich vor allem mit dem Alltag der europäischen Integration oder der rechtlichen Durchdringung des Lebens durch das Welthandelsrecht, sei es im Recht der Landwirtschaft oder auch – ebenso bedeutsam – demjenigen der Wasserversorgung, befassen. Unter all diesen Aspekten wäre dennoch nicht nur eine französische, sondern auch eine englische Fassung der kleinen, hiermit angezeigten Schrift wünschenswert.

Die internationale Finanzkrise: Was an ihr ist neu, was alt? Worauf muss in Zukunft geachtet werden? 31. Symposium des Instituts für bankhistorische Forschung e.V. am 10. Juni 2009 in der Hauptverwaltung Frankfurt am Main der Deutschen Bundesbank (=Bankhistorisches Archiv, Beiheft 47), Stuttgart: Franz Steiner Verlag, 2009, 137 S.

Rezensiert von
Jörg Roesler, Berlin

Mit den Worten „Vieles von dem, was wir als modern und neu ansehen, hat eine lange Geschichte", begrüßte Prof. Hans-Helmut Kotz, Mitglied des Vorstandes der Deutschen Bundesbank, Wirtschaftshistoriker und Ökonomen, Theoretiker und Praktiker, die sich im Sommer vorigen Jahres in Frankfurt am Main zusammengefunden hatten, um sich über die historische Dimension der gegenwärtigen Finanzkrise auszutauschen. Kotz bezog sich dabei auf die Eigenarten der Finanzmärkte. Vieles, was seit 2007 auf dem Bank- und Versicherungssektor geschehen sei, erinnere an frühere Finanzkrisen. Selbst die Finanzinnovationen der vergangenen beiden Jahrzehnte, denen für das Entstehen der aktuellen Krise so viel Bedeutung beigemessen werde, seien so brandneu nicht. „Einiges von dem, was als Innovation angesehen wird, ist neu nur insofern, als ein anderer Name draufsteht. Schaut man durch die Akronyme hindurch auf die zugrunde liegenden Zahlungsversprechen, dann erinnert dies an einiges, das man in älteren Büchern findet, zum Beispiel die ganze Vielfalt von Derivaten" (S. 10). Natürlich bedeute dies nicht, dass die gegenwärtige Finanzkrise keine Besonderheiten aufweise. Diese können aber erst nach Kenntnisnahme der Gemeinsamkeiten mit früheren Krisen in Inhalt und Umfang exakt ermittelt werden.

Kotz' Aussagen sind bedeutsam, denn erst die wesentlichen Ähnlichkeiten erlauben es, den vielfach als einmalig und als noch nie dagewesen empfundenen Ablauf der aktuellen Krise mit früheren Finanzkrisen zu vergleichen und Erkenntnisse von damals mit Aussicht auf Erfolg auf die heutige Situation anzuwenden. Der zweite gewichtige Grund, warum die Geschichte der Finanzkrisen für die Gegenwart interessant bleibt, wird von Ines Schnabel, die Financial Economics an der Universität Mainz lehrt, in ihrem Vortrag aufgedeckt: Die Erläuterungen über die Ursachen von Finanzkrise, die die ökonomische Theorie zu liefern vermag, seien spärlich und – ob

nun, wie die älteren mikroökonomisch oder die neueren eher makroökonomisch ausgerichtet – nur beschränkt geeignet, die historischen Krisenverläufe zu erklären, geschweige denn halbwegs sichere Voraussagen für den weiteren Verlauf der gegenwärtigen Finanzkrise zu liefern.

So verwundert es nicht, wenn Kotz „historische Forschung, historische Arbeit als sehr sinnvoll" ansieht, „um praktische Lehren zu ziehen. Wir sind davon überzeugt, dass analytisches Arbeiten von historischer Inspiration profitieren kann." (S. 10).

Ganz in diesem Sinne beschäftigte sich die Tagung mit den Finanzkrisen in den USA, Großbritannien, Deutschland und Japan während des 19. und 20. Jahrhunderts. Die Referenten bezweckten mit der Darstellung der früheren Krisen vor allem eines: die Einordnung und Charakterisierung der gegenwärtigen Krise. So gelangen die Wirtschaftsprofessoren Richard Kaufmann von der New York University und Leonard Stern von der New Yorker School of Business, nachdem sie eine Charakteristik von fünf US-amerikanischen Finanzkrisen zwischen 1792 und 1930-1933 gegeben haben, zu der Feststellung, dass es zwar noch nicht möglich ist, den Umgang von Regierung und Wirtschaftselite mit der 2007 begonnenen Krise umfassend werten, dass es aber bereits möglich sei, festzustellen, dass das Krisenmanagement der US-amerikanischen Regierung und des Big Business mehr dem in den Krisen von 1837–1842 bzw. 1930–1933 erinnert, als an das der Finanzkrisen von 1792, 1873 und 1907. Die damals gezogenen Schlussfolgerungen zwecks zukünftiger Krisenvermeidung und der Erfolg bzw. Misserfolg der darauf basierenden Finanzpolitik sind bekannt und sollten nach Auffassung der Vortragenden für die Krisenbekämpfung in der Gegenwart gebührende Beachtung finden. Kaufman und Stern bedauern, dass die Erforschung der früheren Finanzkrisen der USA bisher noch ungenügend fortgeschritten ist, was die Möglichkeit, Schlussfolgerungen aus der Historie zu ziehen, beeinträchtigt.

Ein generelles Problem der bisherigen Analysen benennt Richard Werner von der University von Southampton, wenn er feststellt, dass das traditionelle Herangehen der Bankhistoriker den wechselseitigen Beziehungen zwischen Banken und Realökonomie zu wenig Aufmerksamkeit schenkt. Eine wesentliche Schlussfolgerung, die er aus der japanischen Bankgeschichte für das Verhältnis von Banken und Politik zieht, lautet: Die relevanten staatlichen Aufsichtsbehörden, vor allem die Zentralbank, müssen die richtige Anreizstruktur und den passenden Regulierungsrahmen schaffen damit die Banken ihre Kredite hauptsächlich für produktive Zwecke einsetzen. Wenn dies gelingt, so ist Werner überzeugt, dann sind nachhaltige Bankgeschäfte zu erwarten und können überhitzte Konjunkturen wie jähe Abstürze im Finanzsektor vermieden werden.

Detaillierter erläutert der Münchener Ökonomieprofessor Bernd Rudolph die Vorschläge zur Neuregulierung des Finanzsektors, wie sie sich aus der Analyse früherer Finanzkrisen und der jetzigen Krise für die Zukunft ergeben. Dies war auch das Thema der Podiumsdiskussion, die auf 20 Seiten wiedergegeben ist und an der sich neben den Vortragenden auch der Präsident der Bundesbank, Axel A. Weber, beteiligte.

Die Referate sind im Original, d. h. in Englisch abgedruckt, die Einführungen

und die Podiumsdiskussion in Deutsch. Wenn auch die Grenzen der bisherigen historischen Forschungen über Finanzkrisen in den Referaten immer wieder erkennbar werden: Allen, die sich für die tieferen Ursachen der gegenwärtigen Finanzkrise interessieren, ist dieser Band zu empfehlen.

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