

# Rechtsgeschichte Legal History

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Zitiervorschlag: Rechtsgeschichte – Legal History Rg 20 (2012)

Rg **20** 2012 470–475

## Abstracts

**Thomas Duve**

## Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive

For decades, European Legal History has been a strong field of scholarship on the history of law in a transnational perspective. It has been shaped especially by German-speaking scholars such as Emil Seckel, Paul Koschaker, Franz Wieacker, and Helmut Coing, and it was set up in the context of European post-war projects of political integration. To this day, we build upon this tradition. Like all historical scholarship, European Legal History was part of a broad communicative process of identity-building. It depicted European Legal Culture as something clearly distinct from other traditions.

In the last years though, postcolonial studies and scholars engaged in Transnational and Global History criticized harshly the very fundamentals of European historiography. Thus, European Legal History faces serious challenges regarding some of its fundamental assumptions: What was its underlying vision of Europe? What are its intellec-

tual and conceptual foundations? How does it address allegations of Eurocentrism and epistemic colonialism? How does it respond to the postulation of a necessity to provincialize European history? How do we define the relationship of European to Transnational and Global Legal History? – These and other related questions will be addressed by the following considerations. They will focus on a critical review of the academic tradition on European Legal History, its conceptual foundations and its historical context (1. Part, 1.–6.). As a result of this critical assessment, and taking into account findings of the debate on Global History, I present an outline of some starting points and possible assignments for a Legal History of Europe in Global Historical Perspective, which can build upon some results of the tradition, but has to be conceptualized necessarily in a different way (2. Part, 7.–11.).



**Michael Stolleis**

## Transfer normativer Ordnungen – Baumaterial für junge Nationalstaaten

Forschungsbericht über ein Südosteuropa-Projekt

Since the 17<sup>th</sup> century there have been historical reflections on the question as to how and why ancient Roman law in the form of the medieval common law was »received« north of the Alps. In a different tone the spreading of the »colonisation« of Eastern Europe through the city-laws of Lübeck and Magdeburg was discussed during the 19<sup>th</sup> century. Modern legal historiography seeks new models and terminologies to explain the transfer of codifications, principles of law, institutions, legal languages or the cultural habitus of »lawyers«

in a better and more accurate way. The following essay deals with a project concerning the state-building process in south-eastern Europe between around 1850 and 1933 after the decline of the Ottoman Empire. The focus lies on the transfer of normative orders (constitutional law, civil law and penal law) in the newly emerging national states of Greece, Romania, Bulgaria, Serbia, Montenegro and Albania.



**George Rodrigo Bandeira Galindo**

## Force Field: On History and Theory of International Law

»History« and »theory« have increasingly appeared together in the vocabulary of international law. Although international lawyers have traditionally looked to the past in their search for authority, a more critical approach has emerged in the last three decades, proposing not only a close relationship between history and theory, but embracing the aims and methods involved in the

tasks of historians and theorists. Three tensions that emerge from this critical approach are discussed in terms of their potentials and challenges: local/global, ideas/practice, and micro/macro. The article concludes that the engagement between history and theory must continue and deepen. ■

**Jakob Fortunat Stagl**

## The Rule of Law against the Rule of Greed: Edmund Burke against the East India Company

At the end of the 18<sup>th</sup> century Bengal suddenly came under the rule of the East India Company. The former trading company had become the sovereign, first, of a country the size of France, and eventually of the whole Indian subcontinent. The Company was not controlled by any positive law, be it Indian, British or international. As a consequence, the Company's individual and corporate greed reigned supreme, with the most dire consequences for the native Indian population. The Indian question aroused the interest of Edmund Burke. He saw in India a metaphor for his native Ireland and was suspicious of the corruption of British politics by the money and influence that the Company's men had gained in India. He therefore made it the aim of his life to fight the Company's unrestrained avarice by fostering an impeachment

trial against Warren Hastings, the first Governor General of Bengal. In order to get Hastings convicted it was necessary to show that he had infringed the law. But which law should Hastings' judges apply? He resorted to Natural Law and Roman Law. Thence he took the maxim »Eundem negotiatorem et dominum«, that is to say, commerce which aims at profit, and government which aims at the welfare of the population, are irreconcilable. Though after many years Hastings was acquitted, Burke contributed by this trial to civilising British rule in India. Burke's stance has recently been criticised by the post-colonial school: He should have pleaded for the British to quit India rather than improving their rule and thereby prolonging its existence. ■

**Michael Sievernich**

## Recht und Mission in der frühen Neuzeit

Normative Texte im kirchlichen Leben der Neuen Welt

The principle of the »translatibility« typical for Christianity is exemplified in translations of the Bible and other normative texts of a doctrinal, canonical, ritual or disciplinary nature. This applies also to the early modern Christianization of Hispano-America, when normative texts for the regula-

tion of religious life (such as doctrinas or sermonarios) emerged, which referred in different ways to the new context of the New World. This article provides a typology of confession manuals (confessionarios) in the 16<sup>th</sup> century. The first type is the casuistic »translation«, which occurs in the Latin

handbook of the French Franciscan missionary Juan de Foher (†1572). As a jurist he applied European legal institutions such as monogamy to the Indian world, in order to create a native American world ordered according to European standards. The second type is a Spanish Confesionario for the Europeans in the New World (1552) written by the Spanish Dominican and Bishop Bartolomé de Las Casas (1484–1566). He had particular professionals in mind, such as conquis-

tadors, colonists and arms dealers from whom he demanded a notarially authenticated restitution. Finally, the third type is represented by bilingual Confesionarios (1569) of the Franciscan friar Alonso de Molina (1512–1584), an excellent linguistic expert of Náhuatl. The comparison of the models shows the increasing importance of contextual syntheses in the canonical and pastoral design of sacramental penance. ■

### Christoph H. F. Meyer

#### *Probati auctores*

Ursprünge und Funktionen einer wenig beachteten Quelle kanonistischer Tradition und Argumentation

This article deals with the so-called *probati auctores*, i.e. those canonists and theologians who are commonly regarded as reliable and faithful interpreters of the doctrine of the Catholic Church in regard to canon law, belief and morals. The respective category originated both from a personalization of the doctrine of *communis opinio* which was developed in the late medieval *Ius Commune*, and from older theological notions such as the ideal of the holy Church Father and the Doctor of the Church. Starting with a decision made by Benedict XIV in 1744 (*Redditae Nobis*) the article looks into the question why the »approved authors« played such a significant role in canon law

until the 20<sup>th</sup> century, whereas the *communis opinio* lost its importance in civil jurisprudence in the course of the 18<sup>th</sup> century. Against the background of the history of science this brings to light a particular demand for and supply of canon law information. On the one hand there was an interest in a universal and »Roman« view of canon law, on the other hand the Roman Curia used the *probati auctores* as a means of influencing the process of opinion-formation in canon law. This working paper ends with a brief look at the knowledge potential and possible research perspectives in this particular field. ■

### José Daniel Cesano

#### Redes intelectuales y recepción en la cultura jurídico penal de Córdoba (1900–1950)

The purpose of this paper is to analyze the factors that contributed to the abandonment of the scientific doctrine of the Italian Positivist School of Criminology in the legal culture of Córdoba (Argentina) from 1926. For this purpose, and from the categories of intellectual history, it will discuss the creation of an intellectual elite, composed of European jurists (Luis Jimenez de Asúa, Marcello Finzi and Roberto Goldschmidt) and its relation to local jurists (Enrique Martínez Paz, Sebastian Soler and Ricardo Núñez). From

this contact, and in the area of the Institute of Comparative Law of the Faculty of Law at the University of Córdoba, began a process of reception of dogmatic methodology in the analysis of the legal theory of crime; model that displaced the positivist epistemological perspective. In this process I seek to analyze especially the translation of important works of German legal science and its dissemination through publishing companies. ■

**Rafael Mrowczynski**

## Self-Regulation of Legal Professions in State-Socialism

Poland and Russia Compared

The paper analyzes how the self-regulatory institutions of two legal professions – attorneys-at-law and in-house lawyers – developed in Poland and Russia from the second half of the 19<sup>th</sup> century until the collapse of state socialism at the beginning of the 1990s. These two countries constitute the most contrasting cases of socialist transformation in the region in terms of legal traditions and of the broader socio-political context. To adequately grasp the case differences it is necessary to include the formative period of the modern legal profession in the region. The comparative analysis uses the conceptual framework of the sociology of

professions. It shows that (1) attorneys-at-law were able to preserve a certain degree of collective autonomy and self-regulation during most of the time; (2) institutional path dependencies reaching back into the pre-socialist past determine the degree of autonomy and self-regulation; (3) the discrepancy between both countries is particularly pronounced in the case of the occupational group of in-house lawyers; (4) the state-socialist regimes were, therefore, not as unifying and homogenizing as it is sometimes assumed. ■

**Alessandro Somma**

## Tradizione giuridica occidentale e modernizzazione latinoamericana

Petrolio, democrazia e capitalismo nell'esperienza venezuelana

Latin America, where capitalist and democratic institutions advanced slowly, is usually considered as the periphery of the Western Legal Tradition. However, historical evidence will here be given that even in Europe and North America capitalism often established authoritarian or totalitarian political systems. Moreover, those who describe Latin American capitalism as less developed than the Western one, neglect the fact that underdevelopment was at least partially imposed; they also ignore the fact that, what is meant by underdevel-

opment, may also be seen as an alternative modernity program. The history and legal history of Venezuela in the first half of the past century shows that deficiencies in democracy were due to theories and practices which were widespread within the Western Legal Tradition; it also offers examples for considering some peculiarities in the development of capitalism as part of an original path to modernity, rather than a bad copy of it. ■

**Luis M. Lloredo Alix**

## Rafael Altamira y Adolfo Posada: Dos aportaciones a la socialización del derecho y su proyección en Latinoamérica

The aim of this paper is to outline the great transformation undergone by the law during the first half of the 20<sup>th</sup> century, which basically consisted of a double process of socialization and internationalization. Legal antiformalism, legal

sociological thought, private international law and comparative law played an important role in these transformations, especially if we consider the extensive phenomena of legal transplants and the transfer of legal ideas. Here we try to examine this

process through the contributions of two Spanish scholars, Adolfo Posada y Rafael Altamira, who were working on a social approach to law and travelled to Latin America on several occasions. They tried to establish an enduring relationship with the former Spanish colonies and to work on a

common cultural Hispano-American unity, so that a legal unification between the Hispanic peoples on both sides of the Atlantic Ocean might be achieved. ■

### **Enrique Brahm García**

## Algunos aspectos del proceso de socialización del derecho de propiedad en Chile durante el gobierno del general Carlos Ibañez del Campo (1927–1931)

The military intervention in 1924 ended, in the political sphere, the parliamentary regime, while in the economic and social field it attacked frontally the dominant liberal principles in Chile which had existed since the early decades of the nineteenth century, leading to greater state intervention. Among other things this led to questioning of the traditional concept of domain as regulated by the Constitution and the Civil Code. Thus, when the leader of the military movement, Carlos Ibañez, assumed the presidency of the republic in

1927, he promoted the enactment of a series of legal standards that were intended to realise the social function of property, for example in the context of the colonisation of the southern territories of the country, in the regulation of urban property and in expropriation. That policy, its doctrinal foundations, the European models that inspired them and the discussion that was generated in relation to them, are the subject of this work. ■

### **Thorsten Keiser**

## Social conceptions of Property and Labour – Private Law in the aftermath of the Mexican Revolution and European Legal Science

This article tries to outline possible research topics in the field of comparative 20<sup>th</sup> century legal history between Europe and Latin-America. It seeks to examine changes both in Labour and Property law as core areas where social conceptions began to influence »liberal« private law. Focussing on an example from Mexican law in the aftermath of the revolution which took place in the first decades of the 20<sup>th</sup> century, it is argued that new conceptions in both fields were discussed using similar conceptual patterns in Europe and Latin-America. In the reaction of the jurists from both continents to the challenges of the new century lies a possibility for fruitful comparison. Conducting

research in such a framework can also produce comparative results on the interplay between constitutional law and private law – especially when the focus lies on Germany and Mexico, where new constitutions at the beginning of the new century did evoke reactions in the discourses about private law. With regard to methodology it has to be observed that such research has to go far beyond the traditional pattern of »reception« of legal concepts from Europe in Latin-America, and to highlight more complex ways of transition of legal forms between the two continents. ■

**Mario G. Losano**

## Un modello italiano per l'economia nel Brasile di Getúlio Vargas: la «Carta del Lavoro» del 1927

Corporativism was one of the characteristic elements of the Italian fascist State, which through it intended to connect again with the Italian medieval tradition. Oscillating between history and «invented tradition», the corporativism of the fascist government proposed a solution to the economic crisis of the Thirties and an alternative to both the liberal and communist State, i. e. a «third way». The present text synthetically describes the origins, evolution, and structure of Italian corporatism, with special attention paid to the «Carta del Lavoro» of 1927, the document which prepared the way during the short adventure in Fiume of Gabriele d'Annunzio. As a model of economical gestion denying the struggle of class, in the age of dictatorships, corporatism spread both within and outside Europe. The analysis focuses on Brazil during its transition from the «República Velha» to the dictatorship of Getúlio Vargas, which started in 1930 and lasted until 1954, although with some

institutional changes. Within the political movement of this time, called «Integralismo», the philosopher Miguel Reale (1910–2006) advocated a democratic corporativism. The Italian corporatist model is reflected in some parts of the huge «Consolidação das Leis do Trabalho», enacted by Vargas in 1943. It is a clear example of the social legislation accompanying several dictatorships of the 20<sup>th</sup> century, whose consequences were felt in Brazil long after the fall of Vargas' regime. The «Consolidação», however, referred only to the urban workers, while Brazil was a prevalently agrarian society. It is therefore necessary to pass in review the measures in favour of the urban and agrarian workers taken by the governments of Juscelino Kubitschek (1902–1976) and of João Goulart (1919–1976), as well as, finally, the protection accorded in 1964 to the agrarian workers by the «Estatuto da terra».



**María Rosario Polotto**

## Argumentación jurídica y trasfondo ideológico

Análisis del debate legislativo sobre prórroga de alquileres en argentina a principios del siglo xx

This article pretends to deal with the parliamentary discussion of the laws 11.152 and 11.157 that intended to bring a legislative solution to the habitual problem that Argentina was going through at that moment. The hypothesis of our investigation is that, far from trying to find closed or rigid concepts in those debates, the reference to notions such as code, right, property, freedom to hire, foreign law, takes us to areas of discussion from which different opinions on the measures taken can be formed. We think that a privileged source from which it is possible to rescue the multiple meanings of our juridical institutions and their ideological backgrounds are the parliamentary debates. Therefore, parliaments are seen as an »assembly of the representatives of the main points of view which are found in society«, taking

their »deliberations and decisions to the frame of the conflict and the controversy on those views« and creating law »on the basis of convictions and votes explicitly partisan«. In this context, the law is no longer an abstract and neutral entity, logical in its consequences, but a topic, a juridical argumentation of a certain ideological position, dealing with the factual circumstances of a certain society. A particular aspect of this analysis is Foreign Law as a topic. Our point of view stresses that rather than seek to simplify, we should try to understand the complexity of the circulation processes of juridical ideas and the adoption of European juridical models that were in the mind of the Argentinian elites during the first half of the 20<sup>th</sup> century.

