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Abstracts

Thomas Duve

German Legal History: National Traditions and Transnational Perspectives

In this article, I review select institutional and analytical traditions of Legal History in 20th century Germany, in order to put forth some recommendations for the future development of our discipline. A careful examination of the evolution of Legal History in Germany in the last twenty-five years, in particular, reveals radical transformations in the research framework: Within the study of law, there has been a shift in the internal reference points for Legal History. While the discipline is opening up to new understandings of law and to its neighboring disciplines, its institutional position at the law departments has become precarious. Research funding is being allocated in new ways and the German academic system is witnessing ever more internal differentiation. Internationally, German contributions and analytic traditions are receiving less attention and are being marginalized as new regions enter into a global dialogue on law and its history. The German tradition of research in Legal History had for long been setting benchmarks internationally; now it has to reflect upon and react to new global knowledge systems that have emerged in light of the digital revolution and the transnationalization of legal and academic systems. If legal historians in Germany accept the challenge these changing conditions pose, thrilling new intellectual and also institutional opportunities emerge. Especially the transnationalization of law and the need for a transnational legal scholarship offers fascinating perspectives for Legal History.

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Jürgen Renn

The Globalization of Knowledge in History and its Normative Challenges

The paper discusses the relationship between history of law and history of science. It argues that just as the history of science has recently been widened to include a more encompassing history of knowledge, the history of law may also be conceived of as part of a larger history of normativity. Science and law, when viewed as cultural abstractions deriving from reflections on concrete practices and experiences along historical trajectories, must be understood from a global perspective. Aspects of a global history of knowledge that shaped the emergence of modern science inform this approach.

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Hartmut Leppin

Christianity and the Discovery of Religious Freedom

With its broad spectrum of cults and coexisting religions Graeco-Roman antiquity seems, at first glance, to be the embodiment of religious freedom. Yet, a closer analysis shows that a concept of tolerance or the idea of religious freedom did not exist. Political institutions could easily suppress religious practices that were regarded as offensive. Fighting against the oppression of Christians appears to have increased under the influence of oecumenical paganism during the reign of the Severans. In this time, the Christian thinker Tertullian discovered and articulated the concept of religious freedom. However, he did not do so emphatically and the concept was not very successful in antiquity. With the Christianization of the Roman Empire it disappeared soon, although its rediscovery in later epochs contributed heavily to the formation of the European norm of religious freedom.

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Heiner Lück

Aspects of the transfer of the Saxon-Magdeburg Law to Central and Eastern Europe

An important impetus for the development and dissemination of the *Saxon Mirror*, the most famous and influential German law book of Central Germany between 1220 and 1235 by one *Eike von Repgow*, was the municipal law of the town of Magdeburg, the so called *Magdeburg Law*. It is one of the most important German town laws of the Middle Ages. In conjunction with the *Saxon Mirror* with which it was closely interconnected, the *Magdeburg Law* reached the territories of Silesia, Poland, the lands belonging to the Teutonic Order, the Baltic countries (especially Lithuania), Ukraine, Bohemia, Moravia, Slovakia and Hungary. The peculiar symbiosis between *Saxon Mirror* and *Magdeburg Law* on the way to Eastern Europe has been expressed in the source texts (*ius Teutonicum*, *ius Maideburgense* and *ius Saxonum* in the early originally carried the same content). *Ius Maideburgense* (Magdeburg Law) has reached the foremost position as a broad term, which encompassed the Saxon territorial law as well as the Magdeburg town law, and, quite frequently, also the German Law (*ius Teutonicum*) in general. Modern scholarship recognizes this terminological overlapping and interrelatedness through the notion of *Saxon-Magdeburg Law*. In a very complex process of legal transfer, the *Saxon-Magdeburg Law* became a fundamental source of the legal systems in several Eastern European states during the late Middle Ages and the early modern period. In this sense the *Saxon-Magdeburg Law* contributed to the groundwork of the development of law in Europe. Milestones achieved in the process included the formal concession of Magdeburg Law to the capitals Krakow (Poland), Kiev (Ukraine), Minsk (Belarus), Vilnius (Lithuania) and other towns by kings and princes between the 13th and 15th centuries.

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Raja Sakrani

The Law of the Other

An unknown Islamic chapter in the legal history of Europe

As the Other is indispensable for the construction of self-identity and collective identity, the question of the Other is viscerally linked not only to the question of identity but also to law. Starting from some reflections in philosophy about Otherness and the sociological inquiries of building collective identities a fundamental problem remains: Who is the Other? Or: What does Europe have to gain from rediscovering the History of the Muslim Other and his normative space in order to understand his collective identity and to resituate his Otherness in an inclusive plural albeit value oriented Europe?

There is no doubt that historians recognize the decisive role played by translations and Arab thought for the reception of the heritage of Antiquity and Greek philosophy. But don't they remain blind about the role of the evolution of the realm of normativity in Europe?

In order to tackle this complex question some Islamic pasts will be remembered in a first step (I). Then a further look is thrown upon Islamic Law in the History of European Law (II), whereas the case of Spain is analysed as a problem of interacting and overlapping legal cultures on the basis of a critical analysis of research traditions (III). New challenges arise for a more complex understanding of a selective collective memory on the one side and the necessity to improve our knowledge of this entangled normative history beyond the case of Al-Andalus on the other side in: Sicily, France, England and East Southern Europe.

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Martti Koskenniemi

Vitoria and Us

Thoughts on Critical Histories of International Law

How to write (international) legal histories that would be true to their protagonists while simultaneously relevant to present audiences? Most of us would also want to write »critically« – that is to say, at least by aiming to avoid Eurocentrism, hagiography and commitment to an altogether old-fashioned view of international law as an instrument of progress. Hence we write today our histories »in context«. But this cannot be all. Framing the relevant »context« is only possible by drawing upon more or less conscious jurisprudential and political preferences. Should attention be focused on academic debates, military power, class structures or assumptions about the longue durée? Such choices determine for us what we think of as relevant »contexts«, and engage us as participants in large conversations about law and power that are not only about what once »was« but also what there will be in the future. ■

Tamar Herzog

The Appropriation of Native Status: Forming and Reforming Insiders and Outsiders in the Spanish Colonial World

This article examines the different meanings of native status in Spanish America. It argues that the classification of Indigenous peoples as »natives« was not meant to reflect a reality of indigeneity as many have assumed, but instead was geared towards attributing them with a particular legal status, which in Peninsular Spain was reserved to members of the political community (naturales). It operated to de-ethnicized the Indians by implying, on the one hand, that they would lose their previous condition as members of various distinct human groups transforming them instead into participants in a common patria (the Americas) and, on the other, that rather than being classified by the traditional ties that united them to one another and to their previous lords, they would become civic members of a community that no longer depended on descent. While in the sixteenth, seventeenth, and eighteenth centuries Indians were de- and re-classified, American Spaniards – who initially were the quintessential foreigners – were gradually transformed into natives and Peninsular Spaniards were presented as aliens. By the end of this process, rather than creating two republics that clearly separated colonized from colonizers, what colonialism did was to turn the world upside down. It de-naturalized natives while making some Europeans (but not all) the true legal possessors of a world, which they invaded but which they now claimed as rightfully their own. ■

Jean-Louis Halpérin

Transplants of European Normativity in India and in Japan: a Historical Comparison

What can we learn from a comparison between legal transplants in modern India and Japan? Are they so strong differences between a colonized territory and an always independent country? The process of reception of Western law appears to be very similar in India and in Japan, as a global importation of legal institutions and schemes. The limits for the reception of Western models have their origins in sociological and political factors rather than in cultural ones. The question of legal education is crucial until today and also involves the American model. One has to study, as an important element of differentiation, the evolution of legal writing in the two countries.

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Li Xiuqing

The Chinese Repository and Chinese Criminal Law in the Minds of Westerners of the 19th Century

The *Chinese Repository* was the first well-established comprehensive English language journal in China. Based on the exploration of The *Chinese Repository*, the article provides a general view and an analysis of the contents concerning the Chinese criminal law and other relevant information published thereon, summarizing the views of Chinese criminal law held by the Westerners of the 19th century and elaborating on the accountability and causes of the final consequence. Typical Westerners' views of Chinese criminal law were as follows: There are too many provisions on violent crimes, especially on homicides, and as for homicides, whether murders or manslaughters, a life for a life was always a principle to be followed and the perpetrator had to be executed, with only few exceptions to that rule. Since the purpose of criminal punishment was to penalize rather than correct or educate criminals, the punishments were severe and among them, capital punishment was widely employed to cruel effect. The abuse of extortion was widespread and unlawful extortion or torture was common though prohibited. Laws in China, including criminal laws, lacked certainty, which was not only due to the arbitrariness in law-making and law-amending, but also to the excessive degree of discretion conferred on local government officers and given to the practice of implication (Zhu Lian), which reveals a certain backwardness and cruelty. These nearly »backward and barbarian« or »bloody and cruel« views of Chinese criminal law, though somewhat correct, are partial and imaginary to certain extent. These views rooted in the minds of Westerners at that time partly owe to the language obstacles, partly to the influences of West-centrism, the ideology of racial superiority, and conflicts or different ideas between the Chinese and Western traditional or historical legal systems. The *Chinese Repository* was the main, though not the only, widespread media between China and the West, through which the Westerners' views of Chinese criminal law undoubtedly spread far and wide.

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Zhang Zhongqiu

China's Selection of Foreign Laws for Succession in the Late Qing Dynasty

This article studies the selection of a target country for succession of foreign laws by China of the late Qing Dynasty as well as the channels and approaches based on documentation in the Chinese language. According to this article, the selection was mostly limited by information, the national situation and political system, objectives, international environment, legal tradition as well as human and material resources, of which the national situation, political system and objectives serve as key factors. In this case, historically, China of the late Qing Dynasty looked at the United States, Britain, France and Germany before settling on Japan as the target country for the succession of foreign laws; and with respect to the channels and approaches for the succession, several relatively effective channels and approaches, such as studying aboard, translating foreign texts, making survey trips and hiring foreign experts, were employed. Such selection by China of the late Qing Dynasty for the purpose of succession of foreign laws provide us with useful references for thinking about law succession and the current exchange of laws and cultures between China and foreign countries.

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Eugenio R. Zaffaroni,
Guido L. Croxatto

El pensamiento alemán en el derecho penal argentino

The purpose of this essay is to address, from a historical perspective, the influence of German thinking (German philosophy, German dogmas) on the Argentine criminal law, by recalling the way in which different German theorists have been read and received in Argentina. It attempts to think the Argentine criminal coding as a dialogue – many times as a mere uncritical acceptance – among Latin American jurists and codifiers and German thinkers, in their different expressions and historical stages. Different debates are analysed –such as the polemic between causalism and finalism– both for the manner in which they have occurred in Germany and for the way in which they have taken place in Argentina (the causalism-finalism debate took place in the difficult 1970s in Argentina), especially considering the political context in which said polemics have occurred, the meaning of such debates – and what taking certain positions meant – according to the political context in which they took place. Thus, the aim is to devise an outlook of the current discussion in the Argentine criminal law, highlighting the historical analysis of the problems still faced by Criminal Law, attempting to create, in turn, a critical, conscious criminal thinking – but not a hostage – of the European influences, that is to say, a critical criminal thinking which takes into account the particular social and historical context of the region where the law is applied.

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Elisabetta Fiocchi Malaspina,
Nina Keller-Kemmerer

International Law and Translation in the 19th century

The article aims to investigate, under the aspect of translation, the process of legal appropriation and reproduction of international law during the course of the 19th century. An occidental understanding of translation played an important role in the so-called process of universalization in the 19th century, as it made the complexity of global circulation of ideas invisible. Approaches proposed by scholars of Postcolonial, Cultural and Translation Studies are useful for re-reading histories of the circulation of European ideas, particularly the international law doctrines, from a different perspective. The great strides made in Translation and Cultural Studies in the last decades, as well as the discernment practiced in the scholarship of Postcolonial Studies, are important for a broader and more differentiated understanding of the processes of appropriation and reproduction of the doctrines of international law during the 19th century. The present article begins by tracing the connection between translation and universalization of concepts in 19th century international law; after a short *excursus* on the Western idea of translation, the attention is focused on the translation of international law textbooks. The conclusive section is dedicated to a comparison between Emer de Vattel's *Droit des gens* and Andrés Bello's *Principios de Derecho de Jentes*.

■

Urs Matthias Zachmann

Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945

European normativity has been an epistemological problem for Japan throughout modernity (1868–1945). This essay discusses this problem in the case of international law by tracing its reception and application from the beginning, the opening-up of Japan in 1854, until the final demise of its imperialist project in 1945. During this period, Japan was the only non-Western great power in the hitherto all-European concert of powers. International law and the critique of European normativity played a central role in Japan's ascent to power and confrontation with the West. In the first phase of reception between 1954 and 1905, Japanese attitudes towards international law were marked by an exceptional commitment to and acquiescence with the European standard, in line with Japan's ambition to »leave Asia«. However, due to its strategic purposes, European normativity was more a means of political expediency than a matter of intrinsic conviction. Moreover, after the initial phase of receiving and practicing the principles of international law with considerable success, many Japanese began to feel a certain estrangement and inner reservation to European standards. Not until 1905, was Japan in a position to gradually challenge Europe. Thus, Japan's interwar period (1905–1931) was an uneasy combination of outward compliance and inner reservation, a tension that Japan eventually resolved by withdrawing from Europe and trying to build its own autonomous sphere in East Asia after 1931. However, the example of Japanese international lawyers shows that in order to save international law from its ultranationalist critics and enemies, European normativity still remained the central cultural reference, albeit now in its revisionist variant (especially Soviet and Nazi German political thought) and subject to a strategic re-interpretation. Thus, from the perspective of Japanese international lawyers, despite the Pan-Asianist pretenses of Japan's official rhetoric during the war, Japan never actually left Europe.

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Ute Frevert

Honour and / or / as Passion: Historical trajectories of legal defenses

This article provides a historical perspective in a European context on the phenomenon that has become known as honour killings. A cause of outrage and disdain in today's (Western) societies, the notion of restoring honour through a violent act is, in fact, deeply rooted in European legal and cultural history. By examining French, Anglo-Saxon, German and Italian examples, it is revealed that to varying degrees emotions, and, in some cases honour in particular, were accommodated in legislation as granting the perpetrator extenuating circumstances. Adultery in particular was thought to compromise the honour of husbands, thus entrenching an inherently gendered conception of honour. However, leniency of the law was mostly dependent on ›heat of the moment‹ arguments, attempts to avenge the violation of one's honour, rather than premeditated, cold-blooded revenge killings restoring the collective honour of the family. By discriminating between notions of individual and collective (family) honour, examples from European history exhibit a qualitative difference compared to modern day honour killings. The full extent of hypocrisy in judging modern day (Muslim) honour killings, however, becomes apparent when considering that gendered concepts of emotions and honour only disappeared from European legal thought after the 1970s, partly following feminist criticism.

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Paolo Grossi

Die Botschaft des europäischen Rechts und ihre Vitalität: gestern, heute, morgen

The author wishes to identify the legal message given by Europe in the Middle Ages and in contemporary times, when a legal entity was achieved therein. This message has ancient roots, but has the following common elements: achievement of a legal unit, while also respecting internal diversity; enhancement of the value of jurists in legal production (because law is the field of jurists, and not of politicians); and especially enhancement of the value of legal science, for its capacity to establish harmonising and generally boundless principles.

It is singular that this enhancement of the value of jurists and legal science may also be found in the great movement often called legal globalisation, a movement borne of the needs of the global economic market, and in which jurists and legal science play a decisive part.

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