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Abstracts

Gerhard Dilcher

The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization

The essay, originally written in German as an introduction to a volume of collected papers, shows the influence of the Historical School of Law on legal, historical and social sciences in Germany throughout the 19th and even 20th centuries – a time span running contrary to the dominate view that sees the end of the School in the middle of the 19th century. In my view the School constitutes not only a method for developing norms of private law out of the historical materials of Roman and German-Germanic laws, but is based on a wider conception of culture, law and history that is also connected to the political positions of that time. In Savigny's founding pamphlet, »The vocation of our time ...«, two major theoretical topics for this long-lasting influence can be found: The Romantic one, which views law as a part of culture and parallel to language and custom, based on the »spirit of the people«, and, on the other side, the rationality of the European tradition of Roman law, which was developed and administered by jurists. These two basic points,

in part standing in contradiction to one another, form a fertile tension that provides an impulse to the intellectual discussions and new movements in jurisprudence and history analysed in the text. Realism, founded in the connection of both sciences to political and social life, builds a kind of »basso continuo« and acts as a counterbalance to the former two. And it is in this context that the works of Jacob Grimm, Puchta and Beseler, Heinrich Brunner, Georg von Below and others are analysed, in particular the works of Otto von Gierke and Max Weber. Finally, evidence is furnished that a new image of the medieval period, and its impact on law, as a centre of Western identity was outlined in the 20th century by authors like Ernst Kantorowicz, Fritz Kern, Otto Brunner and, last but not least, by Harold J. Berman (walking in the footsteps of Eugen Rosenstock-Huussy), all of whom were situated in different ways within the tradition of the broader, cultural-based Romantic view. ■

Jakob Zollmann

Austrägalgerichtsbarkeit – Interstate Dispute Settlement in a Confederate Arrangement, 1815 to 1866

This article analyses the interstate dispute settlement mechanisms between member states of the German Confederation (*Deutscher Bund*). The question as to how disputes between German sovereigns should be decided already had a long (pre-)history dating back to the Middle Ages. Article 11 IV of the German Federal Act (1815) (*Bundesakte*) was the basic norm of the so-called *Austrägal* jurisdiction enacted to resolve disputes between states of the German Confederation and stipulated the manner in which the dispute was to

be brought to ›court‹ (*Austrägalinstanz*). During the period of the German Confederation, 10 out of 25 German courts of third instance handled altogether 54 *Austrägal* cases. Whereas *Austrägal* jurisdiction was no longer present in the German *Kaiserreich*, Emperor William II and the professor of public law Paul Laband attempted to resurrect the idea, but failed due to the resistance of the other German princes. ■

Pedro Cardim

Political Status and Identity: Debating the Status of American Territories across the Sixteenth and Seventeenth Century Iberian World

This article focuses on the debates that took place across the Iberian world on the political status of the American territories throughout the 16th and 17th centuries. I begin by tracing the *constitutional* place allotted to the American territories in each of the two Iberian polities. Subsequently, I demonstrate that the political status initially ascribed to the so-called Indies soon became a matter of discussion. At the center of the analysis are the exchanges between institutions in Madrid and Lisbon, on the one hand, and Creole

groups in Spanish and Portuguese America, on the other. I focus on the debates generated by the two following topics: first, the rank of the representative assemblies formed in the Asian and American territories under the rule of the two Iberian polities, and second, the participation of American and Asian representatives in the parliaments of Castile and Portugal. This article explores the constitutional implications of these debates. ■

José Luis Egío

From Castilian to Nahuatl, or from Nahuatl to Castilian? Reflections and Doubts about Legal Translation in the Writings of Judge Alonso de Zorita (1512–1585?)

This article examines the reflections on legal translation set out in two *Relaciones* written by the 16th century Spanish jurist Alonso de Zorita. These serve as excellent illustrations for the creative dimension motivating several of the proposals for the adaptation of Castilian law to native legal custom in the Americas. My analysis focuses on

some of the linguistic issues implied by Zorita's proposal for the restoration of an idealized pre-Hispanic polity: the use of the native pictorial legal sources, and it considers some of the issues and dilemmas related to their proper interpretation and translation. ■

Oswaldo Rodolfo Moutin

More than Copy and Paste. The Drafting of the Judicial Order in the Decrees of the Third Mexican Council

This article compares the legislation promulgated by the Synod of Granada (1572) and the Third Mexican Provincial Council (1585) regarding procedural canonical law. Diego Romano, bishop of Puebla, served as a vehicle between the Spanish and Mexican Assemblies, and he was clearly inspired by the former when drafting the

latter. The article pays attention to the level of appropriation and via a comparison of the texts addresses the question whether it is possible to say that Iberian procedural law was copied by the prelate. ■

Laura Beck Varela

Translating Law for Women?

The *Institutes du droit civil pour les dames* in Eighteenth-Century Helmstedt

Institutes du droit civil pour les dames is the title of a unique piece of work printed in 1751 in the small town of Helmstedt. Its author, a little known jurist, Johann Heinrich Kratzenstein (1726–1805), close to the Pietistic circles, composed an abridged French translation in 48 pages of Justinian's *Institutes*, one of the most widespread texts in European legal history. It was written as a birthday gift for a noblewoman, Regina Charlotte Topp, wife of an influential law professor of the University of Helmstedt. This short essay examines this rare attempt to translate and adapt Latin juridical texts for a female audience. What legal topics did Kratzenstein choose? What kind of legal knowledge did he consider »suitable« for the »other«, the female readership? What kind of reader did he »construct«, and what motivated him to engage in such

a singular project? How was his work received? Could jurisprudence find a place among the new »popular« scientific and philosophical genres, promoted in certain enlightened circles, especially on the bookshelves of the so-called *Frauenzimmer-Bibliotheken* (the specially designated ladies' libraries)?

To answer these questions about Kratzenstein's translation, I discuss a topic that has so far been neglected by mainstream legal history, which is traditionally centered on legal scholarship: the vivid early modern debate on women's education (the so-called *querelle des femmes*) and its impact on the field of jurisprudence in the eighteenth century.

■

Mahmood Kooria

Two ›Cultural Translators‹ of Islamic Law and German East Africa

In the existing Islamic legal historiography on the 19th century, the focus has mostly been on the state-sponsored codification projects and the legal reformist attempts of Muslim modernists. In this article, I take a different approach by exploring the trajectory of one Islamic law-book (*Ghāyat al-ikhtiyār*) written in the 12th century and its journey to the 19th century via multiple commentaries and super-commentaries across the terrains of the Shāfi'ite school of Islamic law. I examine two "cultural translators" of this law book, who hailed from completely distant socio-cultural, political, and geographical contexts: Ibrāhīm al-Bājūrī (1784–1860), the rector of al-Azhar University Cairo from 1847 till his death, and Eduard Sachau (1845–1930), a professor at the University of Berlin

starting in 1876. Juxtaposing al-Bājūrī with Sachau, as two cultural translators of one law, I investigate the nuances of mediators who stand between different *legal* times, traditions, languages, and meanings associate or disassociate with the realities of their particular socio-cultural contexts. Their experiments involving what is familiar and what is foreign explicate that the ambivalences in legal transfers cannot be reduced into any particular moments or intentions of the mediators, and the larger context is emphatically embedded within legalistic projects. Accordingly, the very concept of cultural translation should be reexamined in terms of law in order to accommodate various complexities.

■

Karla Escobar

What is the »Cultural Baggage« of Legal Transfers?

Methodological Reflections on the Case of La Quintiada, Tierradentro-Cauca, 1914–1917

This article analyzes how cultural translation was carried out in Manuel Quintín Lame's interpretation of Law 89 of 1980 during the indigenous revolt that took place in Tierradentro – Cauca (Colombia) between 1914 and 1916: riots that were popularly referred to as *La Quintiada*. The main focus here is on Lame and his contemporaries' visions of justice regarding the possession of

the land as a way to account for the richness and complexity of the »cultural baggage« behind legal transfer processes. The purpose of this exercise is to detail the extrajudicial elements involved in legal transfers and the opportunities that a cultural translation of law approach can bring in order to understand this process. ■

Tzung-Mou Wu

Western Legal Traditions for »Laying Down Taiwan's Indigenous Customs in Writing«

The question of what the law is may preoccupy some legal theorists. Answering it is definitely the legal professionals' nightmare. Constitutional and statutory requirements now require Taiwan's officials and lawyers to confront the problem of ascertaining and applying indigenous customs in the exercise of all state powers. Yet, the most widely accepted juridical concept of custom results in a choice between two evils, to wit, breaching either the general duty to uphold law or the concrete obligation to respect indigenous values. So far, efforts have only been made to document the customs, but the documentation thus produced is too ethnographic to be legally useful. The challenge, therefore, is one of translation. Values are to be carried from an indigenous world into the modern one, and the little-known form of custom is to be expressed in the language of the science of law.

This paper argues for the translation of indigenous customs with conceptions available in an

array of examples from European legal history. This paper explains that, in cases like Taiwan, the solutions known to the English-speaking literature all end in the dilemma I call »modern state centralism« (MSC). The solutions are divided into two types: legal pluralism and Francisco Suárez's conception of custom. The former defeats itself in that its criticism against the state's monopoly of law amounts to suggesting that the state tolerate all kinds of non-state normativity. The latter reduces to MSC because recent literature ignores Suárez's legal historical references and important studies written in German. The rest of the section shows how »non-modern« legal techniques may help. This paper concludes by suggesting that the concept pair of law and custom be dissociated from four others, to wit, written and unwritten law, state and society, law in books and law in action, and, finally, alien and native law. ■

Emanuele Conte

Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction

Various views of the historical phenomenon of custom coexist in the world's legal historical scholarship. Some scholars hold that customs are the primary feature of a people's autonomy and self-determination in the permanent struggle against the »imperialist« attitudes of major powers. Others try to stay closer to historical sources, where the concept of custom has apparently served as a tool of argumentation that has proven very useful in defending the jurisdictional rights of collective subjects, such as cities, religious communities or regional powers.

The key to correctly understanding medieval theories of custom is the relationship between custom and the *ius commune*. The latter is the complex of normative authorities and doctrinal interpretations produced by jurists from the 12th to the 15th century. This relationship was not as conflictual as some of the legal historical literature depicts. Some examples regarding serfdom, private peace and customary procedures of evidence show how complicated the intertwining of the *ius commune*, customary laws and municipal statutes in the late Middle Ages can be. ■

Soazick Kerneis

Consuetudo Legis: Writing Down Customs in the Roman Empire (2nd–5th Century CE)

The terms used to refer to the sources of law are still marked by the influence of Rome: *lex* and *consuetudo*. Despite this semantic legacy, it is difficult to know what those terms referred to in the Roman period. Of course, it would be presumptuous to transpose our modern categories and to consider laws as impersonal and general rules issued from sovereign powers, and customs as spontaneously generated uses that have been accepted by the social groups concerned.

Though Roman *jurisconsultes* did not deal with the theoretical question of custom, the problem of the relationship between laws and customs did occur in the practice of law. Everywhere in the provinces, local rules persisted alongside Roman law, and judges had to reconcile the discrepancies. Obviously, it is impossible to grasp the realities of native laws. When texts mentioned the *consuetudines* of some cities, those customs were only con-

sidered in light of their interactions with Roman law. Legal anthropology has emphasised that the very existence of custom does not simply reflect popular will. Rather, it is linked to a legal order anxious to choose from among local traditions those to be deemed customs. In the Late Empire, customs are mainly visible in administrative matters, and those administrative customs could be part of the very legacy of Rome. Indeed, they helped to shape particular identities.

My paper will promote the view of legal anthropology to understand the role of the custom in Late Antiquity. I focus on the fact that custom can be understood as a privilege (*privata lex*), especially in the case of the first national laws given to barbarian tribes established in the Late Roman Empire. ■

Bernd Kannowski

On Legal Pluralism and Ghosts in the *Sachsenspiegel* and in *Gaya*

This paper reflects on legal pluralism. How did medieval societies incorporate both unwritten customs and written law at the same time? How did they constitute the process of finding justice? What is the essence of legal pluralism, and will it help us understand the situation of Taiwan's indigenous population?

We aim to solve these problems by taking a closer look at medieval Saxony: for around 400 years, both laws given by the authorities and traditional customs in Saxony worked fine in parallel. The latter were put into writing by the legal practitioner Eike von Repgow around 1230 for reasons unknown. We refer to his collection of laws and customs of the Saxons as the *Sachsenspiegel* (»Mirror of Saxons«).

While Saxons certainly differed from Taiwan's indigenous population for many reasons, such as

the supposedly weaker egalitarianism among the Saxons than among at least some indigenous groups, the two show some remarkable similarities nonetheless. Just like the Taiwanese *Gaya*, the *Sachsenspiegel's* spiritual origin raises the claim to validity. Furthermore, comparing the handling of a person's sale of inherited property, the legal situations in the *Sachsenspiegel* and Taiwan's unwritten customs resemble each other. The heir can transfer only property he acquired personally. Furthermore, the author discusses the different character of courts and procedure under oral law in contrast to written modern law.

Finally, the paper concludes with some remarks about a learned commentary on the *Sachsenspiegel* written around 1325, combined with an outlook on the possible future of Taiwanese customs. ■

Claudia Storti

Ascertainment of Customs and Personal Laws in Medieval Italy from the Lombard Kingdom to the Communes

The medieval systems of law in Italy and Europe have been proposed as a sort of virtual laboratory to deal with the issue of ensuring that the principle of equality in the rule of law be compatible with the recognition of indigenous peoples' customs.

The legal framework of the medieval communes sought to strike a balance between the general interest in having legal certainty and uniformity with the citizens' interest in ruling their family life and economic assets according to their cultural and social values.

Up until the 14th century, in Lombardy an individual's legal status, family and inheritance continued to be ruled according to the customs of the individual's *natio*, be they Lombard or Roman.

The ascertainment of customs is an arduous task, as oral customs are fluid and vary from place

to place and from family to family. For this reason, in the Middle Ages ascertainment was always entrusted to judges and legal experts (*sapientes*).

Until a few decades ago, recognising and enforcing customs was mostly unthinkable due to legal positivism and the principle of equality. Now, however, the limits of the principle of legal equality are well known: »Legal positivism was not able to abolish *status*« (G. Alpa).

The recognition of »legal Indigenous status« provides continuity between the past (the Middle Ages) and present (Indigenous Peoples Basic Law). Just as in the past, when living according to a given *natio's* laws and customs did not mean self-government, so today the enforcement of an indigenous peoples' basic law should not undermine the sovereignty of the State. ■

Charles de Miramon

Customary Law, Legal Consciousness and Local Agency. From Sumatra to Beauvais circa 1100 and back

In this paper I compare two field studies of customary law in action. Minangkabau in Western Sumatra is home to the largest population with matrilineal property transmission rights in the world. I show how customary law, the so-called »adat«, has been an essential part of the identity of this population, next to Islamic law, since the 17th century. Adat was also shaped by the efforts of the Dutch colonisers to write it down. My second case is set in the French medieval town of

Beauvais at the turn of the 12th century, when the town was thriving. I focus on one judicial conflict surrounding a water-mill. The document pertaining to this case is the oldest to provide information about customs in Beauvais. This document illuminates the evolving legal consciousness of competing groups in the city and the process by which a medieval judge wrote custom down. ■

Beatrice Pasciuta

From Ethnic Law to Town Law: The Customs of the Kingdom of Sicily from the Twelfth to the Fifteenth Century

The history of Sicily, the largest island of the Mediterranean, is notably distinct from the history of the rest of Italy. It is because of this distinctiveness that Sicily can serve as a paradigmatic example of a pluralist legal system, one with a mix of both personal-law and territorial-law rules. In the time period that I examine in this essay, customary law

took several different forms. What legislation, private records, and judicial decisions all call »custom« plays three different roles: law of specific ethnic groups, rights and customary practices concerning real property, and the law of towns. ■

Bram Van Hofstraeten

Recording Customs in Early Modern Antwerp, a Commercial Metropolis

This article questions whether early modern compilations of customary law retained their customary nature after being recorded in the Low Countries by learned jurists and within the framework of a procedure designed and controlled by a central authority. By means of a quantitative analysis of the seventeenth-century recorded customs of the commercial metropolis of Antwerp, as well as their legal origins, it will become apparent that such collections of recorded customs can no longer

be typified as unadulterated customary law. Despite a considerable proportion of authentic customary elements, these »customary« compilations contained numerous articles that sprouted from non-customary legal sources like Roman law, local as well as foreign legislation, foreign compilations of customary law and the achievements of European jurisprudence. ■

Rodrigo Míguez Núñez

Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case

Based on anthropological and historical considerations, this paper analyses the evolution of the relationship between Western law and aboriginal custom in Latin America by focusing on the most tangible and problematic issue in customary law: land tenure. My aim is to provide a critical review of the impact of the rule of law in the arrangement of the alternative cosmologies that flows from the material and spiritual relationship of indigenous groups with their lands. Historical and political issues will be emphasised to illustrate the current

problems concerning the interaction between custom and formal law in the case of the Mapuche people from Chile. By looking at some recent developments in the arena of public law, indigenous legislation and legal doctrine, the paper finally suggests how private law discourse, which traditionally has paid almost no attention to the discussion of indigenous law, might be integrated into the legal systems that widely recognise indigenous customs. ■

Barbara Truffin

Codification and Its Discontents: the Emergence of »Customary Rights« of Amazonian Kichwa in Ecuador

Over the last decades, most Latin American States have been engaged in processes of legal recognition of indigenous rights at the international and constitutional levels. Consequently, the extent to which »indigenous customary norms« should be taken into account by public policies and in the judicial system, and in what form, have become major political issues in contemporary Latin America. Alongside the political dimension of the struggles for their voices to be heard and heeded by policy makers and economic agents, Latin American indigenous peoples also face the difficulty of communicating and codifying their norms, that is, to produce written forms of their

»own« norms and principles. The present contribution reflects on these difficulties from an ethnographic perspective. After briefly reviewing the historical background of Latin America's indigenous peoples' mobilisation to claim recognition of specific indigenous rights, it discusses how »customary norms« are made at the local level of indigenous assemblies with the aid of an ethnographical vignette taken from fieldwork conducted with an indigenous organisation of the Amazonian region of Ecuador defending the rights of Amazonian Kichwa of the Pastaza region. ■