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Abstracts

Andreas Thier

Time, Law, and Legal History – Some Observations and Considerations

This essay addresses perceptions of time and temporality in legal rules and in legal knowledge under changing historical conditions. The first section treats the ongoing »temporal turn« in current debates (I). The second section discusses the notions of time in the 19th, 20th, and 21st centuries (II): Since the late 19th century, the perception of time has undergone a fundamental change. Contrary to the Newtonian tradition, time is no longer perceived as a universal and objective entity. Instead, a process of subjectivization of time has emerged. As a consequence, concepts like the idea of »social time« or »multiple times« have been discussed in the humanities and social sciences. The following section deals with the relationship between law, legal knowledge, and temporality in general (III): Legal rules and legal knowledge can only be understood with reference to temporal modes as the distinction between past / present / future. In this regard, time constitutes a sense-giving dimension of law. As a consequence, legal rules and legal knowledge serve as media of contemporary cultural practices of time and temporality. In this regard, the relationship between law and time is subject to historical change. Particular elements of temporality in the European legal tradition are dealt with in the next section (IV). While continuity and discontinuity as well as notions of eternity all appear as historical constants, how history and its relation to law are grasped is subject to change. This seems all the more true when it comes to our understanding of future, whereas acceleration and its impact on legal normativity show elements of stronger historical continuity. [p. 20–44]

Keywords: time, future, temporality, risk, (dis-) continuity

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Jan Thiessen

Appetitus Socialis Berolinensis

Unternehmensrecht in der Berliner Republik

Business law is highly influenced by its political, social and, of course, economic surroundings. This is in particular true with respect to the so-called »Berlin Republic«, the socio-political context that emerged post-German-reunification. After 1990, German business law, which originated from the comprehensive codifications carried out in the late 19th century, was exposed to the forces of globalization and Europeanization and the dawn of the digital age. This article examines how jurists of different professions, that is, legislators, judges, lawyers and scholars, gradually re-shaped the traditional landscape of national statutory law and case law in times of global commerce, competition and communication. [p. 46–84]

Keywords: Berlin Republic, business law, globalization, corporate governance, Europeanization

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Wim Decock

Collaborative Legal Pluralism

Confessors as Law Enforcers in Mercado's Advice on Economic Governance (1571)

Legal pluralism calls into question the monopoly of the modern state when it comes to the production and the enforcement of norms. It rests on the assumption that juridical normativity and state organization can be dissociated. From an early modern historian's perspective, such an assump-

tion makes perfect sense, the plural nature of the legal order being the natural state of affairs in imperial spaces across the globe in the sixteenth and seventeenth centuries. This article will provide a case study of the collaborative nature of the interaction between spiritual and temporal legal orders in Spain and its overseas territories as conceived by Tomás de Mercado (ca. 1520–1575), a major theologian from the School of Salamanca. His treatise on trade and contracts (1571) contained an extended discussion of the government's attempt to regulate the grain market by imposing a maximum price. It will be argued that Mercado's view on the bindingness of economic regulations in conscience allowed for the internalization of the regulatory power of the nascent state. He called upon confessors to be strict enforcers of state law, considering them as fathers of the republic as much as fathers of faith. This is illustrative of the »collaborative form of legal pluralism« typical of the osmotic relationship between Church and State in the early modern Spanish empire. It contributed to the moral justification of state jurisdictions, while at the same time, guaranteeing a privileged role for theologians and religious leaders in running the affairs of the state. [p. 103–114]

Keywords: legal pluralism, School of Salamanca, economic governance, market interventionism, conscience

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Heinz Mohnhaupt

Formen und Konkurrenzen juristischer Normativitäten im »Ius Commune« und in der Differentienliteratur (17./18. Jh.)

Today's growing multinormativity arises out of global developments in the world of states and their societies. As a result, there has been a corresponding increase in the legal and non-legal rules governing their actions and behaviour. The present paper focuses on the phenomenon of historical »multinormativity« that determined the legal and normative systems of the 17th–18th centuries, since »mononormativity« has not, in fact, ever existed. A large number and variety of laws, stemming from social elites or the ruler on specific legal questions, constitutes a veritable cosmos of norms of quite different genres in this period. Thus, pressure necessarily emerged to regulate competition and conflicts between these different norms as well as a search for solutions through comparative study. [p. 115–126]

Keywords: juridical and non-juridical normative concepts, grounds for decision, legal pluralism, collisions, comparison

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Marian Füssel

Multinormativität in der Gelehrtenkultur? Versuche der Normierung »guter gelehrter Praxis« im 17. und 18. Jahrhundert

During the 17th and 18th centuries, the practices of learning were regulated by an informal »moral economy of knowledge«. Practices like fraud, plagiarism and symbolic claims to a superior social status were difficult to control and could not be handled by the law alone. Setting the norms for scholarly practices can thus serve as a case study for the workings of multinormativity in early modern societies. The deviant practices of scholars were addressed by religious norms, the ideals of courtly society and the emerging bourgeois society, and they were articulated in different media like satires, academic dissertations and moralizing pamphlets. The multinormativity of the discourse of scholarly vices was not compensatory but operated on different layers of normativity concerning both the sources of articulation and the origins of different norms. The paper traces in three steps how the norms of conduct of the learned were implemented. First, it discusses norms beyond the law, then it focuses on the jurist as an object of that normative order, and third it takes a look at the challenges of

regulating practices of social distinction in juridical terms. Practices of self-fashioning beyond the limits of what was deemed acceptable were counted as misdemeanours but nevertheless were hard to sanctify. Grappling with that challenge became a multinormative project that offers new insights into the historicity of normative orders as well as orders of knowledge. [p. 127–136]

Keywords: moral economy of knowledge, jurist, republic of letters, practices of knowledge

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Peter Collin

Ehrengerichtliche Rechtsprechung im Kaiserreich und der Weimarer Republik

Multinormativität in einer mononormativen Rechtsordnung?

The concept of »multinormativity« refers to the existence of various norms, not restricted to legal norms, and simultaneously to the relationship between these different norms. This relationship is dynamic; often norms arise from normative resources because other norms create the necessary prerequisites. The concept of »multinormativity« underlines that normativity takes validity to be a process, not static. In this dynamic understanding, validity is relative, and the balance between normative powers shifts. However, it is questionable whether this understanding of »multinormativity« is applicable to a »mononormative« legal order; that is, a legal order in which the monopoly of state law prevails and that does not tolerate any norms beyond its own in its regulatory area. In principle, such was the legal order of Germany in the late 19th and the early 20th centuries. This article examines how occupational courts of honor were integrated into this legal order, how the jurisdiction of these courts transformed the normative resource of honor into law and what relationships between this law and state law emerged. [p. 138–150]

Keywords: multinormativity, normative resources, courts of honor, non-state justice, professional interests

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Oliver Lepsius

Normpluralismus als Ausdruck der Funktionsrationalität des Rechts

Normative pluralism is not only the effect of social change, globalization or the diversification of legal institutions. These are, of course, relevant factors that contribute to the phenomenon of legal pluralism. However, one should not forget or underestimate that the legal system itself produces pluralism because it is just working how it should. The article emphasizes the endogenous dynamic within the legal system in order to explain legal pluralism. The modern legislative process, the increasing relevance of judge-made law and the diversification of a norm into different »states of aggregation« provide examples to prove this. [p. 152–161]

Keywords: legal pluralism, legal system, legislative process, judge-made law, states of aggregation

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Daniel Damler

Synästhetische Normativität

Values regulate and determine normative orders. According to a widespread assumption, values arise for their parts solely within the borders of the specific normative order (aesthetics, science, ethics, law etc.) they are intended for. The article challenges this view, arguing that aesthetic, epistemic and moral (legal, political) values are correlated because of a common underlying mechanism. The »synaesthesia of values« facilitates a constant exchange of principles and concepts between apparently distinct normative spheres. [p. 162–182]

Keywords: kalokagathia, category mistake, metaphor, values, attractiveness stereotype

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Matías Dewey, Daniel Pedro Míguez

Translating Institutional Templates: A Historical Account of the Consequences of Importing Policing Models into Argentina

This article focuses on the translation of the French and English law enforcement models into Argentina and analyzes its consequences in terms of social order. Whereas in the former two models the judiciary and police institutions originated in large-scale processes of historical consolidation, in the latter these institutions were implanted without the antecedents present in their countries of origin. The empirical references are Argentine police institutions, particularly the police of the Buenos Aires Province, observed at two moments in which the institutional import was particularly intense: towards the end of the nineteenth and beginning of the twentieth centuries, and at the end of the twentieth century. By way of tracing these processes of police constitution and reform, we show how new models of law enforcement and policing interacted with indigenous political structures and cultural frames, as well as how this constellation produced a social order in which legality and illegality are closely interwoven. The article is an attempt to go beyond the common observations regarding how an imported model failed; instead, it dissects the effects the translation actually produced and how the translated models transform into resources that reshape the new social order. A crucial element, the article shows, is that these resources can be instrumentalized according to »idiosyncrasies«, interests, and quotas of power. [p. 183–193]

Keywords: institutional import, police, politics, social order, Argentina

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Sander van 't Foort

The History of National Contact Points and the OECD Guidelines for Multinational Enterprises

This article analyses the legal development of the OECD Guidelines for Multinational Enterprises (MNE Guidelines) and their implementation mechanism – National Contact Points (NCPs). Both the MNE Guidelines and NCPs have matured over the past 40 years. While the MNE Guidelines have broadened their scope of application by covering more themes, NCPs have evolved to become legally binding, resulting in the unique combination of soft-law guidelines with a legally binding implementation mechanism. The legal evolution of the MNE Guidelines and NCPs is analysed by extensively consulting their ›legislative‹ history and by referring to various cases that have been submitted to NCPs and courts. More complex questions are also addressed, for instance, regarding the relation between the MNE Guidelines and customary law and the MNE Guidelines'

legal status since their increased (partial) integration into hard law. This article aims to offer the first comprehensive overview of these often overlooked guidelines from a legal-historical perspective and discusses their multinormativity. [p. 195–214]

Keywords: national contact points, OECD, Guidelines for Multinational Enterprises, responsible business conduct, multinormativity

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Ralf Seinecke

Rechtspluralismus in der Rechtsgeschichte

Legal pluralism is not a conventional topic in legal history. Vice versa, legal history usually does not figure prominently in scholarship on legal pluralism. This article aims to show how both disciplines and topics can benefit from each other. To this end, the article conceives legal pluralism as nomos of nomoi. This concept of legal pluralism neither exhausts legal pluralism in conflicts of material law or jurisdiction, nor in the competition between law and non-law, nor in the pluralistic genesis of law. Instead, it focuses on the relationships between the legal system and its legal lifeworld, between legal texts and legal culture, and between law and its nomos.

Legal history not only provides examples for this concept of legal pluralism, it specifies the theoretical ideas and fills the concept with substance. In this manner, legal history irritates the routines of legal pluralism and uncovers the diversity of past relationships between law and the legal lifeworld. By drawing on the case of the debate on legal customs in the early Middle Ages, this article reveals the theoretical insights that can be gained by synthesizing legal history and scholarship on legal pluralism. In particular, it offers subtle illustrations of how law and normativity, law and violence, and law and its media have interacted in distinct ways. In addition, the article argues that the turn to the nomos of nomoi, the alternative conception of law, and the pluralistic focus on interlegality open up new perspectives for historical legal research. [p. 215–228]

Keywords: legal pluralism, legal history, customary law, medieval law, methodology in legal history

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Gunnar Folke Schuppert

The Languages of Multinormativity

When speaking of multinormativity, a range of different regulatory regimes and, beyond this, diverse worlds of rules are envisaged. One can only get a hold of these complex phenomena if one looks at them from the perspective of different disciplines and is open to devote oneself to the different languages and vocabularies of these disciplines. Therefore, it is quite plausible to speak of multiple »languages of normativity« when describing and analysing multinormativity. The article attempts this. [p. 229–239]

Keywords: fragmentation of the legal system, decoupling the state and law, law as group privileges, parallel orders, governance of diversity

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Stephen Cummins

Negotiating Justice and Passion in European Legal Cultures, ca. 1500–1800

This article explores two interrelated facets of early modern law and emotions. It first examines the emotional dynamics of negotiated justice in early modern Europe, tackling one of the clearest characteristics of European legal culture in this period. In so doing, it underscores how the complex emotional worlds connected with justice practices that were transactional, negotiable and often explicitly based on the reproduction of society's hierarchies and relationships through settlements and arbitration. Secondly, it moves to consider such changes in legal thought that occurred as critiques of practices of Old Regime justice. Reconsideration of the relations between emotion and law in the Enlightenment occurred as part of a twinned project of the critique of existing practices of law and speculative imaginings of the potential of legislation to influence behaviour and feelings. Innovative accounts of the relation between passions and law were the product of this reconsideration of the status quo. Laws were reconsidered as tools to channel human passions in certain directions. This article explores the place of emotions in legal change in the seventeenth and eighteenth centuries by looking both at the defining practices of early modern justice and how they were the spur for new conceptions of the relationship between legislation and the passions. [p. 252–262]

Keywords: justice, emotions, reconciliation, passions, enlightenment

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Daphne Rozenblatt

Legal Insanity: Towards an Understanding of Free Will Through Feeling in Modern Europe

The degree to which insanity or mental infirmity can be instrumentalized in legal debate is shaped by understandings of what insanity is, the currency of a specific diagnosis, as well as official and unofficial symptomatologies, all of which render the law, as a system of knowledge and social practices, porous and permeable in regards to what might be abstractly called »the human mind and heart«. This article explores the changing role of emotions in explaining, demonstrating, and adjudicating insanity during the nineteenth and early twentieth centuries. Over the course of the nineteenth century, the insanity plea became a matter of heated debate in relation to specific trials of capital offenses, which not only brought crime but also the subject of criminal insanity into the public eye. At the same time, the rise of expert scientific testimony and the modern medical sciences – specifically medical psychology and the advent of psychiatry – created different definitions and understandings of mental illness that challenged legal definitions of insanity. This led to interdisciplinary discussion and debate, as physicians sought to provide a serviceable system to the lawyers, and lawyers sought new ways to discover and prove cases. The medicalization and pathologization of emotions not only led to the introduction and interpretation of new kinds of emotional evidence in the courtroom, it also gave emotions a range of different potential meanings, challenging the psychological premises and assumptions of the law as well as the principles and purposes of criminal justice. [p. 263–275]

Keywords: medical jurisprudence / legal medicine, moral insanity, free will, mania, melancholy

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Pavel Vasilyev

Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe

The conventional image of a judge as a dispassionate person continues to prevail in both popular culture and academic scholarship, despite influential recent research that has clearly demonstrated the inevitable impact of emotions on judicial decision-making. This article provides a historical perspective on what Terry Maroney has called »the persistent cultural script of judicial dispassion« and extends the discussion to modern continental legal systems. By looking at the legal debates that took place on the pages of professional periodicals and academic monographs across Europe, I show that the role of emotions was in fact an important topic in these discussions, with many participants advancing a very positive view of emotions as something that can help the judge arrive at correct decisions.

I further argue that there was a specific historical period around the turn of the 20th century when the discussions about the importance of emotions for legal judgment intensified greatly. I associate this trend with the emergence of the German free law movement and examine the influence of their radical ideas on legal scholars across Europe. In particular, I consider the experimental legal model of »revolutionary justice« that was introduced in Soviet Russia following the Russian Revolution of 1917 as an attempt to put the ideas of the free law movement into practice by placing a particularly strong emphasis on emotions in legal judgment. By bringing in the wider social and cultural context, the article provides new explanations for the rise and demise of the »emotional judge« between ca. 1880 and 1930 and the persistence of the »dispassionate« stereotype in the modern era.
[p. 277–285]

Keywords: law and emotions, legal judgment, judicial dispassion, Freirechtsbewegung, revolutionary justice

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Gian Marco Vidor

Rhetorical Engineering of Emotions in the Courtroom: the Case of Lawyers in Modern France

As a way of »performing the law«, courtroom speeches have been a fundamental component of the legal ritual and a basic component of lawyers' identities in many countries with civil law traditions: lawyers have presented themselves and have been culturally perceived as legal experts who make use of emotional strategies in order to achieve their aims in court. Within the courtroom, emotions have been both rhetorical tools and goals, especially in criminal trials where forensic eloquence aimed to create an emotional environment that was favourable to the client. In France, a rich literature on the art of forensic rhetoric was both the result and the basis of a (re-)construction of a tradition that was extremely self-conscious, self-reflective and fundamentally emotional. The present work analyses the role of emotions in lawyers' courtroom performances in the French legal culture from the beginning of the nineteenth century to the present. Its purpose is to identify the main themes related to the use of emotions in the pleading that legal professionals themselves have considered important – albeit with differing opinions – in the past three centuries. More broadly, this study explores reason / dispassion and emotion in legal practice beyond their longstanding dichotomy. Investigating the courtroom speech as a prototypical forensic performance through the perspective of the legal professionals themselves shows how reason and emotion have been continually intertwined and how legal professionals have consciously strategized approaches to the complex interplay between them in the judicial processes.
[p. 286–295]

Keywords: lawyers, courtroom, emotions, rhetoric, eloquence

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