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The Ivory Tower Meets Everyday Life

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Frank L. Schäfer

The Ivory Tower Meets Everyday Life*

We live in the age of commentaries. When I was a law student at Heidelberg University and wrote a take-home exam on private law in the mid-1990s, I had to survey eight commentaries on the German Civil Code. Today, students have to check twice as many commentaries, among them whoppers like the Historical-Critical Commentary and the Beck »Grand« Online-Commentary, the latter still in progress with more than 400 individual contributors – not paragraphs. Publishers and editors must use all kinds of incentives to lure new authors onto their juridical treadmills. Nobody needs an oracle to predict that most of the commentaries without a digital interface will soon vanish – sometimes to the relief of their authors, who are deeply frustrated by the lack of citations in textbooks and court cases. There is no need for the Club of Rome to issue a paper on the limits of legal commentaries. Despite all this intertextual Darwinism, the commentaries call to mind a kind of legal oasis with plenty of resources. The desert beyond buries

the few remaining »grand« textbooks that traditionally developed legal principles and legal system. The commentaries can provide no guidance on these points. Their focus lies on practical details, not overarching structures. It is no wonder that mainstream contemporary German legal writing on private law is unable to master the overwhelming number of changes in the German Civil Code introduced over the last two decades.

Since I write comments for various sections of the German Civil Code in the Munich Commentary and the Historical-Critical Commentary, my own role is unusual, perhaps even cynical: here I'm commenting on a monograph on commentaries in which I also contribute commentaries. Dr David Kästle-Lamparter, a junior researcher at the University of Münster, has composed a book on legal commentaries. His dissertation has received many awards: the Johannes-Zilkens-Doctoral Award of the renowned German Scholarship Foundation, the Ernst-Rabel-Prize of the Society

* DAVID KÄSTLE-LAMPARTER, *Welt der Kommentare: Struktur, Funktion und Stellenwert juristischer Kommentare in Geschichte und Gegenwart* (Grundlagen der Rechtswissenschaft, Bd. 30), Tübingen: Mohr Siebeck 2016, 416 p., ISBN 978-3-16-154142-1

for Comparative Law and the Prize of the University of Münster. After the Faculty of Law in Münster painstakingly had to investigate plagiarism in other award-winning dissertations – to the embarrassment of the national jurist community – such prizes no longer automatically indicate academic merit. However, there is no reason for hyperventilation in Münster. A thorough inspection of the book reveals that Dr Kästle-Lamparter has indeed delivered an innovative and independent masterpiece.

Dr Kästle-Lamparter tells the tales of legal commentaries through the lenses of history and theory. He divides his thesis into four parts, the first three reflecting legal history and the last legal theory: first, a brief history of commentaries in Europe from ancient Rome to the world wide web; second, the ancient commentaries of the Bologna Law School, canon law, and domestic German law; third, the rise of commentaries in Germany during the 19th and 20th centuries; and fourth, an analytical part called »Phenomenology Attempted«. Needless to say, the thesis does not cover all legal subjects, but rather focuses on the most important and most advanced: private law and its history. Thus, Dr Kästle-Lamparter not only delivers a history of legal commentaries, but also a profound overview of the history of private law.

Some minor details demand discussion. Dr Kästle-Lamparter blames several legal historians for wrongly citing or wrongly spelling David Mevius's commentary on the law of Lübeck. He claims the only and true title of the commentary was *Commentarius in Ius Lubecense*. This might be true from the 2nd edition (1664) on. However, the beginning of the first edition (1642/43) bears only the main title, *Commentarii in Jus Lubecense*, without reference to any *libri quinque*. Mevius added those latter words from the second edition on. Far more dubious is Dr Kästle-Lamparter's comparison of the Nazi commentaries to the »Alternative Commentaries«, edited by the renowned court president Rudolf Wassermann and written by social-liberal and progressive scholars from Bremen Law School and other reform universities. Dr Kästle-Lamparter identifies in a footnote on page 88 »certain structural parallels« between Nazi commentaries and the »Alternative Commentaries«. Such a strong accusation using the so-called »Nazi truncheon« requires more than a simple footnote; indeed, it requires a very elaborate explanation! Readers must figure out on their own

whether Wassermann's contribution to a nationalist essay collection called *Die selbstbewusste Nation* informs Dr Kästle-Lamparter's accusation. As always in German dissertations, the academic sniping is well hidden in the footnotes, whereas American and British scholars prefer an open debate in the main text, with the footnotes merely providing references. Clearly, we should learn to follow the American and British example. What else is there to highlight in the other two following historical parts? The next chapter on the glossators and their successors tries to decipher the literary sources of Accursius's *Glossa Ordinaria*. Dr Kästle-Lamparter has done some independent research here, but the result is no match for Horst Heinrich Jakobs's excellent monograph, *Hugolinusglossen im accursischen Apparat zum Digestum vetus* (2017).

The last historical section, concerning the specific history of the commentaries in Germany during the 19th and 20th centuries, is a major contribution to the general history of private law and maybe the best part of the thesis. Despite all merits, a very important question remains unsolved. Dr Kästle-Lamparter underestimates the depths, intensity and range of the interaction between a commentator and his readers (legal practitioners plus legal scholars, including other commentators) during the course of several consecutive editions of a commentary. Things get even more complicated if one considers federal judges participating in commentaries. Dr Kästle-Lamparter introduces several examples in tort law (section 823 civil code) to analyse how the commentaries interpreted the German Civil Code during the first decades of its existence. He refers to the two major, predominant commentaries, namely Planck and Staudinger. He skims through several editions of each commentary and is able to trace some formal development in the commentaries. However, by far the most important task is what he does not examine in full detail, but only peripherally: the question of how one commentator should react to a competing commentary, other literature and the latest court cases. Should a commentator change his comments after the latest edition of a competing commentary or a contradictory case? And how can he influence other commentaries and case law? This interaction is most important for the development of law because professional commentators try to reflect and influence ongoing legal discourse. Since Dr Kästle-Lamparter – like so many other legal historians – has not yet joined the ranks of the

commentators on current law, his omissions are understandable.

What remains is a marvellous book on the most important genre of legal literature. Unlike progressive scholars (e.g. Peter Derleder), Dr Kästle-Lamparter does not condemn the daily business of the commentators. Rather, he reveals the practical and theoretical boundaries of commentaries as a me-

dium of communicating about law and within the realm of law. The thesis covers an impressive range of literature, eras and theories without losing its sense of direction. The author of this review learned quite a lot about his own business. Other readers might profit from Dr Kästle-Lamparter's contribution as well. ■

Gerd Bender

Living with the Past*

»Sozialwissenschaftlich aufschlussreich sind für mich nicht Zustände, sondern Verläufe – oder Zustände nur im Zusammenhang von Verläufen. Theorien, die Strukturen oder Ereignisse als freistehende Unikate in einem feststehenden Ereignis- und Möglichkeitsraum behandeln, können fundamental in die Irre führen. Alles Soziale spielt sich in der Zeit ab, entfaltet sich mit der Zeit und wird in und mit ihr sich selber ähnlicher. Was wir heute sehen, können wir nur verstehen, wenn wir wissen, wie es gestern ausgesehen hat und auf welchem Weg es sich befindet. Alles, was vorfindlich ist, ist immer auf einem Entwicklungspfad unterwegs. Auf diesen kommt es entscheidend an.«

Dieses Plädoyer für historische Vertiefung, für ein entschiedenes ›history matters‹ findet sich in Wolfgang Streecks »Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus«, einem der einflussreichen Werke der zeitgenössischen Politikwissenschaft (Berlin 2013, 11 f.). Es markiert den Aufstieg des »Historischen Institutionalismus«, einer Blickveränderung, die dazu beitragen soll, die Sozialwissenschaften von präsentistischen Selbstfesselungen zu befreien. Natürlich geht es dabei um bessere Analysen, nicht zuletzt aber auch um eine erhöhte Prognosefähigkeit als Anschlussstelle für irgendwie gelingende Steuerung.

Der krisenwissenschaftliche Dreischritt Auguste Comtes wird gleichsam aufgeladen mit historischer Sensibilität, zum Wohle einer politischen Wissenschaft, die den Herausforderungen einer immer turbulenteren Welt entspricht.

The Oxford Handbook of Historical Institutionalism führt den Leser in dieses Konzept, das die Politikwissenschaft der Globalisierungszeit bewegt, in fast schon akribischer Weise ein. Es knüpft an das einige Jahre zuvor erschienene *The Oxford Handbook of Comparative Institutional Analysis*¹ an, das in Teil I fundamentale Beiträge zum Thema im Angebot hatte, vor allem aber den wiederum von Streeck verfassten Epilog »Institutions in History. Bringing Capitalism Back In«. Im aktuellen Handbook bieten die Herausgeber in Teil I (3 ff.) eine informative Einführung in den Aufstieg des Konzepts mit einer Reminiszenz (7) an den wichtigen, 1992 erschienenen Titel *Structuring Politics: Historical Institutionalism in Comparative Analysis*,² der die Debatte darüber angestoßen hatte, »how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations« (3).

Die Teile III, IV und V enthalten eine wahrlich große Anzahl von Einzelstudien zu »American Politics«, »European Politics« und unter »Compar-

* ORFEO FIORETOS, TULIA G. FALLETTI, ADAM SHEINGATE (eds.), *The Oxford Handbook of Historical Institutionalism*, Oxford: Oxford University Press 2016, XV, 676 p., ISBN 978-0-19-966281-4

1 GLENN MORGAN, JOHN L. CAMPBELL, COLIN CROUCH, OVE KAJ PEDERSEN, RICHARD WHITLEY (ed.), Oxford 2010.

2 SVEN STEINMO, KATHLEEN THELEN, FRANK LONGSTRETH (ed.), Cambridge 1992.