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## Abstracts

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**Joachim Rückert**

## Die Erfindung nationaler Rechtsgeschichten in Europa

The »Invention of National Legal History« in Europe deals with a multiplicity of almost unknown histories. Three main steps need to be undertaken in order to better grasp the phenomena. The contribution begins with reflections about the object of something as legal history, the various methods of both defining and presenting it, what »national« means within this research context, as well as mentioning several factors that are probably highly relevant. Since no one author nor the preparatory research is capable of providing a complete picture, even for the larger European nations, the second step offers an analysis of three promising cases studies. Fortunately, these individual case studies generate fruitful insights into the various evolutions and conditions of legal history. With Hermann Conring, Matthew Hale, and Claude Fleury in Germany, England, and France, respectively, we encounter three non-coincidental, parallel initiatives, as will be shown, that all take place in

the 17<sup>th</sup> century. Yet as rich as the three analyzes are, current research can still contribute significantly to these cases. The third step brings nearly all of Europe into focus, namely the »European variations and conditions« of legal histories. Seven special factors of particular relevance are determined and serve as leading questions. Thus, it is possible to show something significant about the varying national »solutions according to their factors« in France, England, the Holy Roman Empire as well as in Germany, Spain, Portugal, Italy, the Netherlands, and the Nordic countries. The contribution closes with a contemplative section entitled »Results, Prognosis and Retrospective«. [p. 22–68]

Keywords: legal historiography, European nations, nationalism, legal history, Europe



**Tay-sheng Wang**

## Die Rezeption des kontinentaleuropäischen Zivilrechts in Taiwan und die Eigenständigkeit des taiwanischen Zivilrechts

Taiwan became a colony of Japan in 1895, and thus followed Japan in transplanting Continental European civil law. Early in the period of Japanese rule, Taiwanese civil matters were largely decided according to customs, which were informed by concepts and terminology of Continental European civil law. However, the ownership, pledge and mortgage of Continental European law had been partly introduced to Taiwan. Later in the period of Japanese rule, property law in the Japanese Civil Code, receiving Continental European law, took effect in Taiwan. In contrast, the status law relating to the Taiwanese was still applied to customary law and was shaped by terminology of Continental European civil law.

Taiwan became a province of China during the period of four years after World War II, and it began to implement the civil law of China in the republican era. As a result, the Taiwanese status law was also modeled on Continental European law.

Taiwan has been a de facto state since 1949, the year China began to be ruled by the communist party. Taiwan continues to enforce the civil law, which originated in Republican China, with its roots in Continental European law, and adds many elements from American law in the special civil law due to close political and economic ties with the United States. However, the theory and practice of civil law in Taiwan has been dominated by the jurisprudence and laws of Continental Europe, especially Germany. In post-war Taiwan, the majority of the first-generation legal scholars came from Republican China and were deeply influenced by Continental European law; the minority had been trained in pre-war Japanese law, which received Continental European law as well. Many Taiwanese legal scholars, from the second generation to today, directly borrowed from Germany or learned from Japan to introduce the civil law and its theories in post-war Europe to Taiwan.

After the democratization of Taiwan in the 1990s, people in Taiwan have reformed their legal system for their own needs. With legal knowledge incorporating the ideas of Continental European civil law, a localized civil law has been shaped by the decisions of Taiwanese courts, the struggle of social movements in Taiwan and the reaction of Taiwan's legislature. This law is unique among

countries in East Asia because it is based on the social needs of Taiwan. [p. 70–89]

Keywords: Taiwanese law, Continental European law, civil law, customary law, democratization

### Raja Sakrani

## The *Dhimmi* as the Other of Multiple *Convivencias* in al-Andalus

Protection, Tolerance and Domination in Islamic Law

The figure of *dhimmi* is certainly the most emblematic juristic figure in the history of Islamic law. Strangely, it also has the juristic status of being the most ambiguous and complex, as it lacks a coherent, genuine legal shape and doctrine. Quranic references to *dhimma* or *abl al-kitāb* (People of the Book) complicate the landscape. However, the *dhimmi*'s juristic corpus has played a major role in organising the cohabitation, domination or exclusion of non-Muslims in conquered territories for centuries.

*Convivencia* in al-Andalus represents a unique experience in the history of Islamic law and Europe, the results of which are still felt today. But what is to be learned from the former inclusion/exclusion of *dhimmi*? This issue, linked to understanding ›otherness‹, is fundamental to studying *Convivencia* and grasping its mechanisms. Monotheistic Others in Islam (Jews and Christians) can thus teach us about Islam and guide us as we do.

Iberian *Convivencia*, seen as a narcissistic injury and repressed memory to this day, is a historical and cultural chance to reflect upon and research the Self and the Other. If Muslims in Europe today consider themselves, often unconsciously, as being a kind of *dhimmi*, it is because Islamic discourse on the Self and the Other is profoundly inscribed into this juristic and historical heritage. Understanding facets of *Convivencia* / (de-) *Convivencia* from an Arab-Islamic view requires examining *dhimmi* in all states: protected, tolerated, dominated or persecuted. Focusing on *dhimmi*'s legal status is methodologically fruitful, as pitfalls in research based solely on Islamic legal texts are avoided. It further does justice to the often obscured human dimension of Muslims and *dhimmi* living together. [p. 95–138]

Keywords: *Dhimmi*, *Convivencias*, al-Andalus, Islamic law, the Other

### Christoph H. F. Meyer

## Nichtchristen in der Geschichte des kanonischen Rechts

Beobachtungen zu Entwicklung und Problemen der Forschung

The article deals with the question of how non-Christians were represented in premodern Canon law, under which aspects historical research (especially as regards the history of Canon law) has dealt with them so far and how or on under what conditions did it arrive at its conclusions. First,

the current state of research as regards the history of Canon law, in general, and the status of non-Christians, in particular, are considered. Then, the focus turns to the semantics and the concept of the infidel in the legal as well as theological tradition of the Catholic Church. As a third step, the project

of a bibliography on the status of non-Christians in the normative culture of the Catholic Church between Antiquity and modern times as well as some insights into the history of research gained in the course of the respective bibliographical studies will be presented. The last part of the article takes a closer look at two methodological aspects of research, namely the problem of anachronistic

terms and contemporary aspects of valuation. [p. 139–160]

Keywords: history of Canon law, non-Christians, history of research, baptism, anachronism

### Max Deardorff

## Republics, their Customs, and the Law of the King: *Convivencia* and Self-Determination in the Crown of Castile and its American Territories, 1400–1700

This article examines a conflict over indigenous inheritance law in one small corner of the 16<sup>th</sup>-century Spanish Empire – the northern Andes – in order to open a window onto legal traditions in the wider Hispanic world. A specific emphasis is devoted to the mechanisms that placed custom (unwritten norms) at the center of early modern Spanish legal theory, making the Spanish monarchy one especially adapted to incorporating diverse social elements. By focusing on the late-medieval/early modern conception of »republics« – cultural com-

munities oriented toward cohesive action preserving their common good – as the basic unit of study, and on custom as the basic guarantor of their continuing self-determination, I suggest ways to think about the legacy of Iberian *convivencia* both within and outside of its traditional medieval frame. [p. 162–199]

Keywords: *convivencia*, hidden jurisdictions, interlegality, Spain, Latin America

### Alfons Aragoneses

## Uses of *Convivencia* and *Filosefardismo* in Spanish Legal Discourses

References to *convivencia* displayed, and still perform, different functions in historical, political, and social discourses in Spain. The use of the concept popularized by Américo Castro, and others before him, was a reaction to a political and cultural context and had a political meaning as well. Therefore, these intellectual creations need to be contextualized and analyzed critically. My aim in this text is to analyze the uses of *convivencia* in legal and political discourses in 19<sup>th</sup> and 20<sup>th</sup> centuries as well as today.

In the following pages, I describe the historical trajectory of *convivencia* in Spain and its reflection within the legal and political culture as well as the nation-building process. I mostly focus on the

representations of Sephardic Jews in contemporary Spain and the Middle Ages by the Spanish intellectual and political elites. Following suggestions made by David Nirenberg, I consider how the references to Jews and to Judaism affected Spanish society, how the Spanish »Jewish question« influenced legal and political thought, and shaped national identity in Spain. I analyze parliamentary discourses, legal texts, and other intellectual productions by the Spanish elites from the mid-19<sup>th</sup> century until today. [p. 200–219]

Keywords: *filosefardismo*, *convivencia*, Sephardic Jews, nation building

**Elena Paulino Montero, Vera-Simone Schulz**

## Encounters, Interactions, and Connectivities from an Art Historical Perspective

Transcultural encounters, interactions, and connectivities have been among the core interests of the discipline of art history in recent years. Focusing on the premodern period, this image series addresses these issues through a number of case studies ranging from the Caucasus to the Mediterranean, the Indian Ocean world, Sub-Saharan Africa, Latin America and the Pacific. By no means exhaustive, the following case studies are analyzed paying equal attention to diverse materials, media, and their intersections from architecture and objects of material culture to maps and paintings. Approached from an empirico-historical perspec-

tive and addressing some methodological problems, this image series thus aims to introduce readers to and sharpen our understanding of the current reflections within the field of research. [p. 222–232]

Keywords: transcultural art history, premodern artistic dynamics, short- and long-distance connectivities, artistic creations and negotiations of space, intersections between visual and material culture

**José Luis Egío García**

## Matías De Paz and the Introduction of Thomism in the *Asuntos De Indias*: A Conceptual Revolution

Most of the writings dedicated to assessing the contribution of the Spanish Second Scholasticism to the controversial issue of infidels' dominion began their analyses with the well-known Francisco de Vitoria's *Relectiones* (1532). This article offers a reconstruction of the history of the theological and juridical debates on this key issue on the Iberian Peninsula since the late 13<sup>th</sup> century. Special attention is paid to friar Matías de Paz, who was asked to offer his advice on the early patterns of rule and domination imposed on the Native Americans at the *Junta de Burgos* (1512), introduced to the discussions about *asuntos de Indias* the Thomist conceptual framework later employed

by Vitoria, Soto, Suárez and many other prominent members of the so-called School of Salamanca. The article shows that it was, in fact, De Paz who first considered the Amerindians infidels affected by an »invincible ignorance«, and he tried to curb some of the many abuses committed against them by applying the distinctions between different types of *dominium* and *principatus*. [p. 236–262]

Keywords: School of Salamanca, Thomism, infidels, dominion, rule, just war, conceptual history

**Christiane Birr**

## *Dominium* in the Indies. Juan López de Palacios Rubios' *Libellus de insulis oceanis quas vulgus indias appellat* (1512–1516)

The *conquista* of the Americas confronted Spanish jurists educated in the legal concepts of the European medieval tradition with a different reality, pushing them to develop modern legal con-

cepts on the basis of the European *ius commune* tradition. Traditionally, the School of Salamanca, theologians and jurists centred around the Dominican Francisco de Vitoria are credited with this

intellectual renovation of moral and legal thought. However, the role earlier authors played in the process is still insufficiently researched. The Castilian crown jurist Juan López de Palacios Rubios is one of the most interesting authors of the early phase in the conquest of the Americas. His treatise about the Spanish dominion in the Americas is a central text that shows how at the beginning of the 16<sup>th</sup> century the knowledge and the experien-

ces of the European past were applied to the American present and, in the process, were shaped into modern ideas. [p. 264–283]

Keywords: School of Salamanca, conquest, dominium, Bartolomé de Las Casas, Juan de Palacios Rubios



### Marco Toste

## Invincible Ignorance and the Americas: Why and How the Salamancan Theologians Made Use of a Medieval Notion

Invincible ignorance is defined as the state in which one cannot overcome his ignorance, despite one's utmost diligence, and hence cannot be blamed for the acts resulting from that circumstance. It is particularly relevant with regard to law and principles that one is bound to know. The main problem with the admission that such a state may occur results from the difficulty of assessing the subjective element present in such a state: How can we know that one applied his diligence to the utmost extent?

This notion emerged in the 12<sup>th</sup> century. But while medieval theologians elaborated such a notion, they nonetheless stressed that in reality no one could be guiltlessly ignorant of natural and divine law. The arrival of the Spaniards to the Americas triggered the awareness that entire nations could, in fact, be invincibly ignorant of

Christianity. The Spanish theologians then started to use this notion, admitting the existence of invincible ignorance of some principles of divine and natural law. Their argumentative strategy rested on emphasising the subjective element of invincible ignorance.

In this article, I examine Vitoria's *Relectio de Indis* against the medieval doctrinal background. I also analyse Vitoria's, Domingo de Soto's and Juan Gil de Nava's unedited lectures on Aquinas's *Summa theologiae* as well as the works by Matías de Paz, Juan López de Palacios Rubios, Juan de Celaya and Bartolomé de Las Casas. [p. 284–297]

Keywords: invincible ignorance, natural law, diligence, Vitoria, Salamanca



### Arno Wehling

## An Old Empire Gives Birth to a New One

Social Practices and Transformations of the Luso-Brazilian Legal Order

This paper analyzes the institutional and legal organization of the Brazilian Empire during the transition from the Old Regime to a liberal world, in a country still deeply affected by its colonial status.

The paper tries to answer the following questions: With the country moving towards independence, how was the new liberal order put in place in a continental, agro-exporting, slave-owning and predominantly illiterate country like Brazil, whose source of power came mainly from large rural

estates? And how was the new normativity established during this huge and long period of transition?

It is determined that the liberal framework involved new constitutional and infra-constitutional laws, while also accepting the survival of old legal and judicial rules and doctrines. [p. 302–311]

Keywords: constitutionalism, patrimonialism, liberalism, Brazilian Empire, codification



**José María Portillo**

*Corpus mysticum* and *cuerpo de nación*.  
Modernity and the End of a Catholic Empire

Traditionally, historiography on the dissolution of the Spanish Empire focused on the transition from monarchy to nations and from empire to independent states. I propose here to consider another aspect of this process that has to do with the transition from a Catholic imperial monarchy to Catholic nations and republics. This essay explores the relevance of the *corpus mysticum* in the

public space, and how it to a great extent determined the understanding of the reach of the constituent power of the *cuerpo de nación*. [p. 313–324]

Keywords: *corpus mysticum*, Catholic liberalism, early constitutionalism, nation, emancipation



**Manuel Bastias Saavedra**

Jurisdictional Autonomy and the Autonomy of Law:  
End of Empire and the Functional Differentiation of Law  
in 19<sup>th</sup>-century Latin America

This contribution discusses the collapse of the Iberian Empire and the transformation of legal regimes in 19<sup>th</sup>-century Latin America. While most of the literature on this period centers on the process of state-building and the reform of legal institutions, my discussion will focus on the important changes produced in the form of law according to Luhmann's theory of functional differentiation. The main argument is that systems theory can provide a re-evaluation of the history of law in the 19<sup>th</sup> and 20<sup>th</sup> centuries if one focuses on the idea of the autonomy of law. I argue that this way

of reading the functioning of law is analogous to the legal historical re-evaluation of early-modern Iberian legal regimes through the idea of jurisdictional autonomy. Taken together both ways of understanding autonomy in legal observation direct our attention to shifts in law that go beyond the question of empire and nation-state building. [p. 325–337]

Keywords: empire, Latin America, legal history, indigenous peoples, frontiers



**Eliana Augusti**

What Kind of End for the Ottoman Empire?

A Critical Reading

In 19<sup>th</sup>-century Europe, the juridical texture of space changed entirely. The state came to dominate the new normative and ontological landscape, inducing homogeneity. This phenomenon was more massive, critical, and contradictory in Central and Eastern Europe, as the states there were pursuing a territorialization plan to balance the Mediterranean area. Europe's strategy moved in step with the Westernization/modernization process of the Ottoman Empire and its attempt to survive the crisis and keep up with the first »global«

competition. This article investigates the effects of the ambiguous European inclusion/exclusion policies towards the empire, highlighting the interplay of the Christian paradigm and international law. In so doing, it lays bare the functioning of Western ideas, patterns, and devices to support both the survival of the empire and the territorialization plan within its borders through the claims of nascent, unaware, and fictional nation-states. The aim is to reveal the responsibilities and wrongs of international law as premature and undefined

law and to apply the appealing concept of »entanglement« to a new, more global historiography on the fall of the Ottoman Empire. [p. 339–352]

Keywords: Ottoman Empire, international law, 19<sup>th</sup>-century Europe



### **Holger Knudsen**

## Die englische Kolonialgesetzgebung für Helgoland – »Ordinances of Heligoland«

Zugleich eine kurze Besprechung des Buches »Helgoland« von Jan Rüger

The contribution deals with a widely unknown and formerly inaccessible part of English colonial law-making: the small body of legal rules for the colony of Heligoland (1807–1890). Even though Heligoland was a very small and rather insignificant colony, the ordinances are interesting for three reasons: the indulgent treatment of the local population (given that Heligoland was one of the very few European colonies of the empire), the geographical vicinity of German-speaking territories, and in particular, the emerging German Empire after 1871. All of these are reflected in the application of foreign (German) laws (strand laws, monetary laws, metric rules) to the colony. This made

Heligoland a unique case compared to other colonies.

The contribution provides an overview of the pre-history of the introduction of the ordinances (1807–1863), and it explains the why, whence and whither of the 76 ordinances that were passed between 1864 and 1889. It is completed by a chronological list of the ordinances. [p. 498–507]

Keywords: English colonial law-making, Governor Maxse, ordinances, Heligoland, Anglo-German treaty

