

Traditions and Changes and the Role of Legal History

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I.

From a scientific-historical perspective, legal history has its beginnings in the process of national movement of the late 18th and early 19th century. But even before, one has been generally aware of the historicity of law, especially in the European humanism of the 15th and 16th century. Particularly the French humanist-jurists emphasized in “*mos gallicus*” the text-levels of Roman Law. That was a relief from the dogmatic rule and it was also an opening-up for the legislation by the state, or more precisely: by the monarch who had by now become the sovereign.

In this process of historicization of law, Germany has followed a little later. But even in there the following held true: The Roman Law wouldn't be effective as a result of imperial authority or due to reason, it would be rather a product of history and could and needed to be re-ordered by a legislator, a new Justinian. This was written by

Hermann Conring in 1643, in his book “*De Origine Iuris Germanici Commentarius Historicus*”¹. Since then, the law has generally been recognized as historically dynamic, although the jurists who were doing practical work, acted, as if it was an expression of immutable reason, just *ratio scripta*. From that time on new law emerged from the will of the sovereign. New law pushed aside the old law. The field of History of Law has described these dynamic processes, while the legal doctrine tried to stabilize these processes by de-historicization. This probably inescapable antagonism still exists today.

II.

In the 19th century, for all nations who joined the program of the constitutional “nation-state”, law and legal history were the central means of nation building. The

state was supposed to be a nation-state, a constitutional state subject to the rule of law. As a nation-state, it was supposed to create a codification to bind all citizens to a new national legal system. As a constitutional state subject to the rule of law, it was supposed to push back absolutism and to commit itself to be bound by the law. Everywhere new national constitutions and codifications of civil, criminal and procedural law emerged. For instance, such was the case with regard to the states emerging from the breakup of the Ottoman Empire (Greece, Bulgaria, Romania, the Balkans, Egypt, Maghreb), the states that arose from the emancipation of the South American countries from Spanish-Portuguese colonial empires², the States on the edge of the Tsarist Empire (Poland, Finland, Estonia, Latvia, Lithuania), the former Habsburg lands (Bohemia and Moravia, Transylvania, Galicia – Ukraine). In the 20th century, the process of building an identity, the search for the “right” constitution and for a legal system, arising “from its own roots”, continued, first in Europe itself³, but then also in the new post-colonial states of Africa and Asia, for example in the Francophone countries of Africa, in Indochina or in *France-outré-mer*, in Anglophone countries (South Africa, Namibia, India, Pakistan, Sri Lanka), in the Dutch possessions in Southeast Asia, in the Belgian possession in the Congo, in the remainder of the Italian colonies in Somalia and Ethiopia, in the English and French mandated territories after the First World War as Iraq and Syria.

Throughout places and time, legal elements of the former ruling power were used (for example the *Code Civil*, the Common-Law-System, the Austrian ABGB, the Spanish-Portuguese law of the Crown, the Dutch *ius commune* etc.). At the same time,

one was looking for still usable residuals of the “indigenous law” and tried to embrace all of this by a new constitution. The difficulty of this undertaking – then and today – can be seen by the fact that during the 19th and 20th century more than 200 constitutions have been enacted and abolished in South America alone⁴. There has always been an intermingling of the own and the alien. And there have been translations, interactions and alienations. Today, we have to bid farewell to simple applications within the meaning of popular ideas of “reception”.

III.

Now, let us look at Europe. After the era of nationalism had ended irrevocably with the era of the two World Wars, in 1945 one returned to the old idea of Europe in the need for help. Such idea was a strange *mixtum compositum* of political, ideological and economic elements.

From the Nazi-propagandist “struggle against Bolshevism” that was proclaimed by National Socialism, and from the front line during the “Cold War”, the wish for a close union within Europe emerged (as Churchill said, possibly even the “United States of Europe”, albeit without the United Kingdom). The NATO and the European Defence Community (which failed due to French resistance) pointed in this direction.

Especially according to the ideal of catholic forces, Europe was supposed to be a humanist-Christian “Occident” having its center in Rome. To some extent, this was a European Continuation of the German “Reichstheology” from 1920/1930⁵. But



The College of German students in Bologna, 1497 miniature

since the 1970s at latest, this idea has apparently lost its appeal.

Focal point certainly was the economy. It pushed towards an integration of the European Economic Area (EEA) and achieved this goal through intermediate stages in 1957⁶ with the Treaty of Rome (A. de Gasperi, R. Schuman, J. Monnet, P.H. Spaak, K. Adenauer, W. Hallstein etc.). Simultaneously, lawyers and legal historians drew the vision of a European judicial area that was supposed to find its roots in Roman Law (*Ius Commune*) and that was supposed to find its realization through the academic field of Comparative law and the practi-

cal coordination of law. The monographs from Calasso, Koschaker, Wieacker etc. are just as typical for this as the project of a depiction of the *Ius Romanum Medii Aevi* (IRMAE), the handbook of the sources and literature of recent European Private Law (Coing) and the establishment of the Max Planck Institute for European Legal History (understood as the history of private law). Europe was supposed to be a "legal community" – according to the formula of Walter Hallstein, which was later taken up by Jacques Delors⁷.

IV.

Today all of Europe is discussing whether the foundations of an "European idea", the common legal foundations and the vision of a "European constitution" are still realistic. We are amidst a phase of uncertainty.

The reconstruction after the war and the enthusiasm about building a new post-nationalist Europe are indeed a historical fact, but also a mood that is only difficult to understand two generations later. Meanwhile, the political union Europe has transcended its western-European nucleus towards the East. The incorporation of post-soviet states (Baltic states, Poland, Hungary, Bulgaria, Romania) is not only causing economic and social problems, but also such of pertaining to legal culture. Authoritarian regimes with significant deficits regarding human rights and democracy standards have emerged in various post-soviet states (Russia, Belarus, Ukraine, but also Hungary). In these countries, there was no "western legal tradition" or it existed in only superficial adaptations. These countries are members of the European Council and the number of human rights claims involving them that are brought before the European Court of Human Rights in Strasbourg is getting higher⁸.

The European harmonization of law is moving forward but not in the historical pattern of the "*Ius commune*" (which has been a phantom beyond the law of obligations), but according to economic necessities, as for instance with regard to corporate law, road traffic law, social law, media law, energy- or technology law.

Although the Treaties of Maastricht and Lisbon as well as the European Charter of Fundamental Rights factually are a Euro-

pean Constitution that stands in line with the model constitutions of the 19th century nation states, such factual constitution has fundamental gaps with regard to its democratic legitimacy and faces at the same time a strong predominance of an administrative machinery in Brussels. The latter is generating tendencies towards a regulatory overkill and an "educational administration". Such tendencies are playing into the cards of populist forces that are gaining ground in particular in times of financial crises and high rates of unemployment among young people.

Even those who are skeptical with regard to the process of European integration or those who merely criticize its slow progress must admit that quite significant components of formerly "sovereign" nation states have transferred to Europe. Every single day, Europe is creating new law that is binding on all of us. The old-fashioned nation state, having the exclusive legislative power with regard to its internal and external relations, is entangled within a network of international treaties. Today, "sovereignty" is no longer a suitable defining characteristic for European states.

V.

This picture of the European judicial area with its historical "multi-normativity" during the past 1000 years, which might already not be satisfying to some, is even further disarranged with regard to global changes:

Everybody knows that we are amidst a revolution of electronic communication and its economic as well as political-mili-

tary use. What we have developed so far for the purpose of “data protection” based on the idea of “privacy” has turned out to be insufficient. It seems that conventional means do not suffice anymore to stop the use of the bulks of data that have been collected globally through the great powers’ security agencies. The utmost efforts would be required to redress them. But which political authority would be able or mandated to bring up the needed energy, while the political-military complex itself is the beneficiary of the total(itarian) control?

The global exchange of information and goods is (together with the potentials of the internet) leading to new forms of soft law, to networks of legal norms, that do no longer emanate from states, that are not subject to democratic control and against which no legal remedies can be taken. Neither the “western legal tradition” nor the standards of the European constitutional state with its rule of law offer help⁹. It seems as if we were returning, on a global scale, to the pre-modern forms of “multi-normativity”¹⁰. Also this would be a captivating chapter of science with the topic “tradition and change”.

Finally, new forms of international conflicts and conflict resolution have come into being. Also in this realm, the times of traditional “international law” and of the traditional courts of arbitration seem to be over. Relevant keywords in this regard are 9/11, terror networks, modern warfare with the use of drones, cyber-war and the potentials of nanotechnology that are not yet predictable today. Wars are no longer officially declared nor ended. They disguise themselves as civil wars, as concealed “humanitarian interventions” or openly present themselves as sheer acts of terrorism. All around

the world we may witness the search for a new order of international law.

VI.

I conclude with several remarks on the potential consequences this might have for the field of Legal History. If we want to understand the foreshadowed developments and interactions of the globally differing and diffusing legal systems, then we need to fundamentally historicize and relativize our own standpoints. We need to bid farewell to the traditional Eurocentric perspective, but we can also take note of the fact that the yardsticks for human rights, the rule of law, the separation of powers and democracy, which are being accepted by the majority of the world’s population, have significant European origins. We are living on this tradition, but at the same time we observe that this tradition is also changing and gaining new features with each and every transfer into different cultures. It is obvious that the acceptance of “the western legal tradition” is only limited in Islamic states that are applying the rules of the Sharia¹¹. Only a comparative-historical approach allows us to grasp and (maybe!) mitigate the extent of tensions attached to this.

Put differently: On the ground of an ocean of differences we are searching for universalities to which large majorities may consent. In this regard, comparative Legal History may carry out invaluable groundwork. In countries that have been destroyed by civil war – I only name some examples: Afghanistan, Syria, Congo, Mali and Sudan – the universalities (for instance: *nulla poena sine lege*, elimination of only vague el-

ements of a crime, the ban on torture, the renouncement of death penalty, fair trial, separation of powers, the fight against corruption and ethics of office) still and first need to be implanted and practiced again. This process is burdensome and always threatened by the possibility of failure, but it surely is as important as humanitarian relief, and in the long run maybe even more

important. By highlighting these universalities as constituting “minimalia of civilized legal orders”, we, as Legal Historians, make our humble contribution.

¹ H. Conring, *De origine iuris germanici Commentarius Historicus*, Helmstedt, H. Müller, 1643 (in German, M. Stolleis (hrsg.), *Der Ursprung des deutschen Rechts*, Frankfurt, Insel Verlag, 1994).

² Th. Duve, *Rechtswesen*, in S. Hensel, B. Potthast (hrsg.), *Das Lateinamerika Lexikon*, Wuppertal, Hummer, 2013, pp. 279-282.

³ Chr. Gusy (hrsg. von), *Demokratie in der Krise: Europa in der Zwischenkriegszeit*, Baden-Baden, Nomos Verlagsgesellschaft, 2008, pp. 15-51.

⁴ Duve, *Rechtswesen* cit.

⁵ A. Koenen, *Der Fall Carl Schmitt. Sein Aufstieg zum „Kronjuristen des Dritten Reiches“*, Darmstadt, Wissenschaftliche Buchgesellschaft, 1995, especially pp. 269 ff.; F. Blindow, *Carl Schmitts Reichsordnung. Strategie für einen europäischen Großraum*, Berlin, Akademie Verlag, 1999.

⁶ *The Treaty establishing the European Economic Community* from 25th March 1957; *The Treaty of Maastricht establishing the European Union* from 7th February 1992; *The Treaty of Amsterdam* from 2nd October 1997 / 1st May 1999; BVerfGE 89, the so-called Maastricht judgement, the Treaty of Lisbon (2009) and BVerfGE 123, 267.

⁷ M. Stolleis, *Europa als Rechtsgemeinschaft*, in S. Kadelbach (hrsg. von), *Europa als kulturelle Idee.*

Symposion für Claudio Magris, Baden-Baden, Nomos, 2010, pp. 71-81.

⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms* dated 4th November 1950.

⁹ M. Stolleis, *La idea europea de Estado de derecho*, in *La Metamorfosis del Estado del Derecho*, Oviedo, Junta General del Principado de Asturias, 2014.

¹⁰ M. Stolleis, *Vormodernes und postmodernes Recht*, in «Quaderini Fiorentini», n. 37, 2008, pp. 54³-55¹.

¹¹ *Banjul Charter on Human and Peoples' Rights* dated 27th June 1982; *Cairo Declaration of Human Rights in Islam* (CDHRI) dated 5th August 1990.