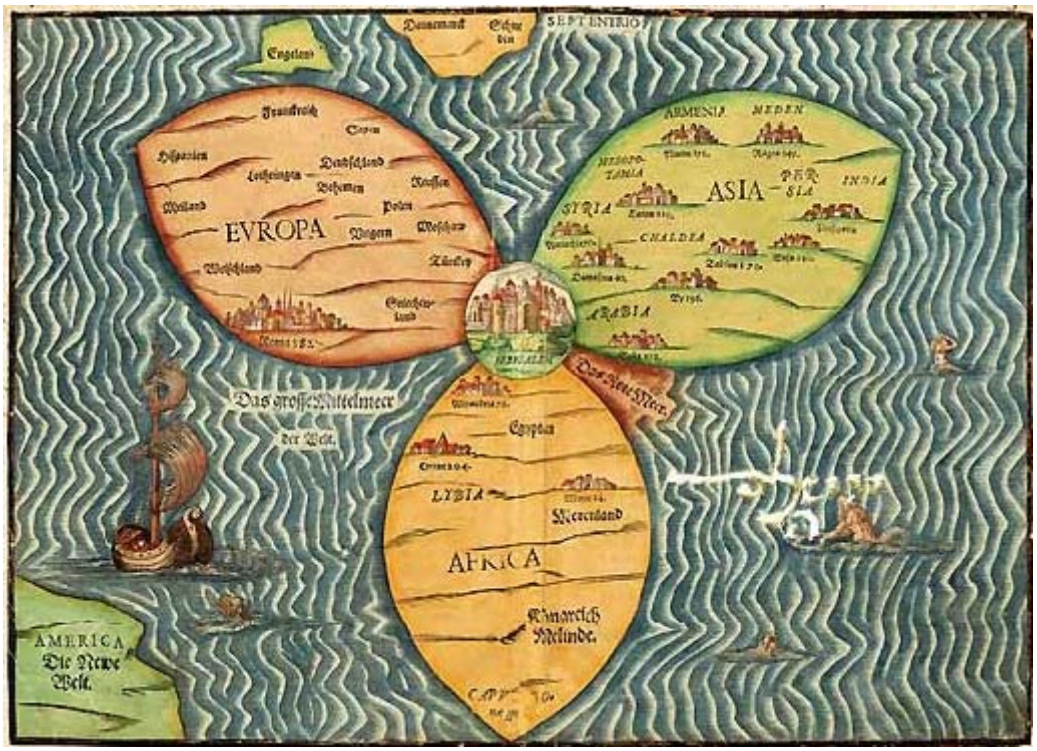
MAX-PLANCK-INSTITUT FÜR EUROPÄISCHE RECHTSGESCHICHTE
MAX PLANCK INSTITUTE FOR EUROPEAN LEGAL HISTORY

European Normativity – Global Historical Perspective

Colloquium
on the Occasion of the Inauguration of the New Building of the Max-Planck-Institute for European Legal History

2 – 4 September 2013



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please contact: sekduve@rg.mpg.de

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European Normativity: Global-Historical Perspectives

For hundreds of years it appeared as if standards of normative thinking valid across the whole world were set in Europe. Since the European expansion of the early modern era, it is possible to observe a global presence of normative orders developed from within the European horizon. These normative orders are the foundations of our verdicts regarding that which we consider to be right or wrong, to be good or bad or to be beautiful or ugly.

Traditionally, scholars have viewed this presence of Europe as, indeed, natural or necessary; later, in the light of modernization theories, at least as desirable. Even today it appears to many people that what is described as 'Europeanisation of the world' is a great cultural achievement. But the challenging questions are no less salient: the transfer of normative ideas and practices which arose from within a European horizon to regions outside of Europe appears, indeed, to exemplify an imperialism which began with colonisation and is perpetuated today largely in the economic and cultural realms. Moreover, we have to ask ourselves as to whether we can even really speak of a 'European Normativity' - and whether it has, in fact, 'spread' across the world. Today, we are more keenly aware of the differences within Europe and more sensitive to the processes of appropriation and translation - and, as such, of transformation - of normative ideas and practices in their respective cultural environment. Did something like 'European' normative ideas and practices ever exist? Which are they, where does 'Europe' end? When did the ascriptions to Europe as a cultural realm begin? Which role, in relation hereto, did the demarcation vis-a-vis Non-Europe play? What remained of these ideas, which were developed from within a European context, after their appropriation in local contexts, after their translative and transformational processes?

The inauguration of the new building of the Max-Planck-Institute for European Legal History on 2 September 2013 provides us with a festive occasion to discuss these questions regarding the historical role of Europe in the world. In the center of our interest is, naturally, the history of law. But we are, specifically for this reason, also curious about other forms of normativity and their histories of appropriation and interrelating. Indeed, the Institute, whose foundation occurred at a time of a search for an identity based on demarcation between 'Europe' and 'Non-Europe', is today ever more intensively dedicated to the legal history of Europe in its interrelationships with other global regions - and it conceives law as a kind of normativity which can only be understood with reference to other normative *modi*. We therefore wish to open our building in an intense dialogue with colleagues from diverse disciplines and regions of the world; colleagues who concern themselves, from varying observational positions, with the history of normative ideas and practices in the widest sense, which originated somewhere in Europe and then underwent global processes of translation – in the field of law, art, the natural sciences, religion or philosophy.

For an introduction to the colloquium see the working paper "*European Legal History - Global Perspectives: Working Paper for the Colloquium ‚European Normativity - Global Historical Perspectives"* by Thomas Duve on SSRN:
http://www.ssrn.com/link/Max-Planck-Legal-History-RES.html

2 September 2013

15.00 – 17.00 Inauguration Ceremony

Venue: New Building of the Max Planck Institute, Hansaallee 41

Followed by Refreshments

Colloquium: European Normativity – Global-Historical Perspectives

18.00 – 20.00 Evening lecture (Lecture Hall HZ 5 – University Campus)
Paolo Grossi (Florence/Rome)
Die Botschaft des europäischen Rechts und ihre Vitalität: Gestern, heute, morgen

3 September 2013

9.00 – 9.30 **Thomas Duve** (Frankfurt am Main)
Welcome

Theory and Method

9.30 – 10.15 **Jürgen Renn** (Berlin)
The Globalization of Knowledge in History and its Normative Challenges

10.15 – 11.00 **Marie-Claire Foblets** (Leuven/Halle)
European Normativity and Legal Anthropology. The History of a Troublesome Relationship

11.00 – 11.30 Coffee

11.30 – 12.15 **Werner Gephart** (Bonn)
European Legal Analysis as Cultural Research: A Global Cultural-Sociological Perspective

Integration and Encounter in the Ancient World and the Middle Ages

12.15 – 13.00 **Hartmut Leppin** (Frankfurt am Main)
Religious Liberty and the Challenge of Monotheism

13.00 – 14.30 Lunch

14.30 – 15.15 **Heiner Lück** (Halle)
Aspects of the Reception of Saxon-Magdeburg Law in Middle and Eastern Europe

15.15 – 15.30 Coffee

Law during the Age of the European Expansion

15.30 – 16.15 **Martti Koskenniemi** (Helsinki)
In Praise of Anachronism: Thoughts on Critical History of International Law

16.15 – 17.00 **Tamar Herzog** (Cambridge, MA)
Legal de-Naturalization: Forming and Reforming Insiders and Outsiders in Spanish Colonial Imagination

4 September 2013

9.15 – 9.30 **Thomas Duve** (Frankfurt am Main)
Introduction

European and other Normativities in the Age of the Transformation of the World

9.30 – 10.15 **Eugenio Raúl Zaffaroni** (Buenos Aires)
Der Einfluss des deutschen Strafrechts im argentinischen und lateinamerikanischen Recht

10.15 – 10.30 Coffee

10.30 – 11.15 **Yoichi Nishikawa** (Tokyo)
Menschenbild und Ordnungsvorstellung im japanischen Liberalismus zwischen Westen und Osten

11.15 – 12.00 **Jean-Louis Halpérin** (Paris)
Transplants of European Normativity in India and in Japan: an Historical Comparison

12.00 – 12.45 **Raja Sakrani** (Bonn)
The Law of the Other in Europe. On the Historical Presence of Islamic Law

12.45 – 14.00 Lunch

14.00 – 14.45 **Ute Frevert** (Berlin)
Honour and/or/as Passion

The Globalization of Aesthetic Norms

14.45 – 15.30 **Gerhard Wolf** (Florence/Berlin)
Normative Aesthetics and Transcultural Dialogue. Global Dynamics in the Premodern Period

15.30 – 16.00 Coffee

Final Discussion

16.00 – 16.45 *Initial Statements*

Mario Ascheri (Rome)
Klaus Günther (Frankfurt)
Kjell A. Modéer (Lund)
Andreas Thier (Zurich)

16.45 – 17.30 Final Discussion

Jürgen Renn (Berlin)

The Globalization of Knowledge in History and its Normative Challenges

Reviewing major steps in the historical evolution of knowledge, the role of transmission processes and their underlying dynamics is analyzed. It is shown, in particular, how ever more abstract concepts but also normative standards emerge from the reflexive quality of knowledge and its dependency on external representations and institutionalized forms of transmission. On this background, it is argued that normativity cannot be separated from the body of knowledge shared within a community and that it may help to reconsider the clash of global and local norms from the perspective of different trajectories of knowledge.

Marie-Claire Foblets (Leuven/Halle)

European Normativity and Legal Anthropology. The History of a Troublesome Relationship

The paper will take three different angles to shed light on the relationship between European normativity and legal anthropology. The least one can say is that, throughout history, this relationship has been troubled, not to say problematic.

The first angle is disciplinary: from a legal anthropological perspective, the European approach to the history of law has necessarily always suffered from Eurocentrism. In the first section of the paper, I look in more detail at how anthropologists have tried to express their reservations in this regard.

A second angle relates to the way in which legal anthropology raises questions as to how human rights enter into dialogue in a globalised society and as to the interaction between legal cultures and the normative exchange processes they set in motion and on which Thomas Duve has written so brilliantly.

The last and third angle is of a different nature, and focuses on illustrations from the recent case law of different European countries that illustrates how difficult it is do justice to legal practices from other traditions without relying upon criteria that are European in origin. The solutions are not necessarily unfair, but it depends of course on the point of view taken. From the literature, it seems that in recent years authors - both anthropologists but also some legal scholars - have become increasingly critical of a subtle Eurocentrism that emerges through legal judgments. The third section of the paper will propose a few concrete examples of this.

Werner Gephart (Bonn)

European Legal Analysis as Cultural Research: A global cultural-sociological perspective

Hartmut Leppin (Frankfurt)

Freedom of religion and the challenge of monotheism

The juncture “freedom of religion”, *libertas religionis*, was for the first time articulated by the Christian orator Tertullianus about 200 CE, although in the centuries before a wide variety of religious practices had been possible. At first glance, freedom of religion seemed to be a reality in the pagan world, though without it ever actually being described as such. On the other hand, restrictions and the persecution of deviant religious practices were by no means a rare occurrence, either in ancient Rome or elsewhere. This paper asks what a concept such as “freedom of religion” might have meant to pagans under those circumstances and what the contribution of monotheistic Christian religion to this concept was – in the time of persecution, as well as in the time of Christian dominance during late antiquity.

Heiner Lück (Halle-Wittenberg)

Aspects of the reception of Saxon-Magdeburg Law in Middle and Eastern Europe

Magdeburg Law is one of the most important German town laws in the Middle Ages. This law, spreading together with the *Saxon Mirror* with which it was closely interconnected, reached the territories of Silesia, Poland, the lands belonging to the Teutonic Order, the Baltic countries, Ukraine, Bohemia, Moravia, Slovakia and Hungary. The peculiar symbiosis into which the *Saxon Mirror* entered with Magdeburg Law on the way to Eastern Europe has been expressed in the source texts (note that in the early texts, the terms *ius Teutonicum*, *ius Maideburgense* and *ius Saxonum* originally carried the same content). Among these, the term *ius Maideburgense* (Magdeburg Law) has reached the foremost position as a broad term, which encompassed the Saxon territorial law as well as the Magdeburg town law, and, quite frequently, also the German Law (*ius Teutonicum*) in general. Hence, modern science recognizes this terminological overlapping and interrelatedness of terms by introducing the notion of "Saxon-Magdeburg Law".

Martti Koskenniemi (Helsinki)

In Praise of Anachronism: Thoughts on Critical History of International Law

Traditional histories of international law were blatantly anachronistic. They were obsessed with the need to search the “origin” of our laws and judged past laws and legal writings by the degree to which they could be read as precursors or present rules or humanitarian ideas. History was relevant above all to the extent it could be used to demonstrate either the brilliance or the corruption of the present. Today, anachronism is most clearly visible in the burgeoning literature on the history of human rights. When did “our” human rights first emerge – in canon law or during 16th century scholasticism, in the French revolutionary process or only with the “Victorian” sensibilities of 19th century English political theory? Or perhaps this took place only very recently – during the drafting of the 1948 Universal Declaration on Human Rights or as part of the 1970s cold war strategies?

There are many good objections to anachronism. It fails to reach the “internal aspect” of past legal systems, providing no understanding of the role past legal texts or ideas played in the context of past societies. It silences past jurists by interpreting them from the perspective of present concerns and agendas. It violates the basic rules of contextual history: that past texts and acts ought to be read in the context where they were first produced.

Although there is much to be said in favour of contextual legal history, it is also not without its problems. It has little to say about what the right "context" is and it ignores the necessary implication of the historian's prejudices and *Vorerkenntnis* in the process of interpreting the past – they way the "context" is always to some degree a construction of the present. Above all, however, it tends towards a rather unthinking relativism, suggesting that judging the past by reference to present standards is methodologically illegitimate. It might , for example, reject critiquing past international laws as instruments of European domination as an unwarranted extrapolation from today's postcolonial sensibilities. However, making these kind of judgments is an essential aspect of critical legal histories. There is much to be said in favour of viewing past texts and actors in their context of production. In this paper I will argue, however, that this does not mean that historical studies would – or could – be free from anachronism. On the contrary, the past, to follow Croce, always a past *of the present.* Judgments of the past based on present concerns are an unavoidable and critically necessary aspects of international legal history.

Tamar Herzog (Cambridge, MA)

Legal de-Naturalization: Forming and Reforming Insiders and Outsiders in Spanish Colonial Imagination.

Post-colonial literature questions the traditional divide between colonialists and colonized by arguing that colonialism was so hegemonic that it transformed colonized peoples into hybrid creatures that thereafter could not be assessed without reference their experience with imperialism. In the process, colonized and colonizers became, to a degree, but only to a degree, one and the same. The aim of this paper is to ask whether the same observations could be made regarding the early modern Spanish world. Did the competing groups form before or as a result of the colonial enterprise? How were the Indigenous defined? How were they distinguished from Europeans? I will look particularly at the ways Europeans imagined their relationships to natives and how they sought to de-naturalize them, while also making themselves the true and legal possessors of a world, which they invaded.

Eugenio Raúl Zaffaroni (Buenos Aires)

Der Einfluss des deutschen Strafrechts im argentinischen und lateinamerikanischen Recht

Die deutsche Strafrechtswissenschaft ist auf zwei Wegen in Argentinien eingedrungen:
Der erste Weg war die Legislative mit dem Bayerischen Strafgesetzbuch von 1813, das vom ersten argentinischen Strafgesetzbuch durch die französische Übersetzung von Vatel zum Vorbild genommen wurde.
Der zweite Weg war die Doktrin. Mit dem Untergang des italienischen kriminologischen Positivismus kam in Argentinien das Lehrbuch von Franz von Liszt und kurz danach der strafrechtliche Neukantianismus. Etwa 1940 begann die deutsche Dogmatik großen Einfluss auf die argentinische Strafrechtswissenschaft zu haben, nämlich mit lokalen Übersetzungen von Beling und dem normativen Schuldbegriff von Goldschmidt. Die drei großen Abkommen der darauffolgenden Jahrzehnten entsprachen der theoretischen neokantianischen Struktur.
Es wurde wenig zum Thema der Strafe geforscht, wobei sich die Theorie des Delikts sehr stark entwickelte. In den 60er Jahren trat der Finalismus von Hans Welzel in Bezug auf die Theorie des Delikts auf, wenn auch mit Beschränkungen hinsichtlich des Vorsatzes, wobei eine Debatte zwischen dem „Finalismus" und dem „Kausalismus" mit merkwürdigen politischen Unterschieden erfolgte, die durch die Diktatur im nachfolgenden Jahrzehnt verschärft wurden, die mehrere Theoretiker ins Exil schickte. Ab den 80er Jahren begann die aktuelle Periode, mit einem direkten Austausch von Forschern mit der Bundesrepublik.

Yoichi Nishikawa (Tokyo)

Menschenbild und Ordnungsvorstellung im japanischen Liberalismus zwischen Westen und Osten

The end of the self-imposed Isolation of Japan was caused by the advance of the Western powers into East Asia and accelerated on its part the globalization in this part of the world. Political elites of Japan who felt their own country threatened by the Western imperialism made great efforts to westernize not only the technologies and sciences but also the legal and political institutions in great haste. Several far-sighted intellectuals were, however, fully aware that a successful transplantation of the Western institutions is not possible without a radical departure from the traditional idea of man in Japan. Yukichi FUKUZAWA (1835-1901) and Masao MARUYAMA (1914-1996), the two most prominent liberal intellectuals in modern Japan, were confronted with the task of conceiving a new political and legal order in times of the deepest upheavals (the early Meiji period and the post-Second World War era respectively). Starting from a critical view of the tradition and influenced by Western thoughts, they advocated rebuilding the Japanese society on the foundation of the idea of the free and active citizen. A historical analysis of their efforts shows us the continuity of this, still unresolved, problem for the liberalism in Japan. (The paper will be read in German)

Jean-Louis Halpérin (Paris)

Transplants of European Normativity in India and in Japan: an Historical Comparison

The history of legal transplants from Western origin in British India (since the 18th century) and in Japan (since the Meiji era beginning in 1868) has been studied separately because of important differences between these two situations: on one hand a territory colonized by a common law system with the recognition of different personal status, on the other hand an independent country choosing to take inspiration in civil law systems (namely the French and the German ones). It is proposed here to focus on the similarities (the importance given to statutory laws and to codes, the development of a published case law, the limited role of the non-Western regulations) in the two processes (especially in the second half of the 19th century), then to develop some analysis about the obstacles to a complete acculturation of European normativity in India and in Japan (are these obstacles legal, cultural or social?) and finally to consider the more recent evolutions (in the second half of the 20th century) linked with the US influence (are the importance of “constitutionalism” and the reforms of legal education likely to transform European-oriented systems in American-oriented ones?).

Raja Sakrani (Bonn)

The Law of the Other in Europe. On the historical presence of Islamic law

Some years ago, the mere question of whether Islamic legal traditions might have had some influence on European legal history might have been seen as a provocation.
However, historical and sociological theory informs us that the usages, rites and the law of the other are important for the coding of collective identity. If this is so, why should they be without importance for the case of Europe? The master narrative of occidental rationalization, including the formation of Europeanness, stresses the role of Roman Law, with only a few heretic voices, such as that of Marie-Theres Fögen, rejecting this notion as Roman legal storytelling. But why should we recognize the impact of Arabic thought on the reception and renaissance of Aristotle and ancient thought in general only to exclude Islam from the traffic of legal transplants in medieval times and early modern history?

Al Andalus might have been a place where the emergence of a hybrid Islamic legal culture as a written law and a law in practice took place. Investigating the traces imparted on Spanish legal traditions reveals that these go so far that the Islamic model for treating the other as *dhimmi* has been transferred to the Hispanic world in South America. What kind of hypotheses, indicators (linguistic ones esp.) do we dispose of in order to back up such claims with historical evidence?

The notion of thinking of Common Law in terms of Islamic influences seems more revolting still. Yet it has been suggested that Islamic judicial capital coming from Sicily under Norman rule brought the model of the *waqf* over the Channel and developed into that distinctive and cherished institution of Common Law that is the "trust".

A thesis going even further is one claiming that we have to rethink Bologna and the Justinian Codification in order to grasp the Islamic influence on that founding myth of European legal thought and identity.

While this paper cannot presume to give any answers, it hopes to demonstrate the importance of this line of questioning, its implications for an understanding of European legal history and its foundation in complex processes of conflict and entanglement of legal cultures, including Islam as the Other and the “Eigen”.

Ute Frevert (Berlin)

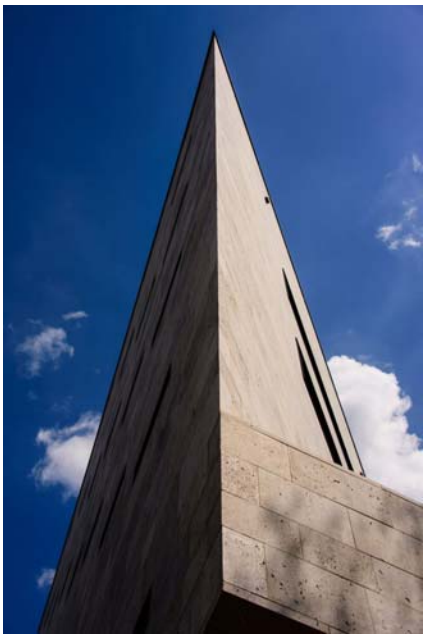
Ehre und/oder/als Passion

Die öffentlichen und juristischen Debatten um sogenannte Ehrenmorde ziehen gern einen klaren Strich zwischen Fremdem und Eigenem. Als fremd und kulturfern erscheinen Verhaltensformen, die durch das normative Konzept „Ehre“ integriert werden. Als vertraut und kulturnah dagegen gilt Handeln aus Affekt, Passion, Leidenschaft. Der Vortrag argumentiert, dass diese reinliche Scheidung aus historischer Perspektive auf tönernen Füßen steht. Auch in West-, Mittel- und Südeuropa akzeptierte man Ehre bis weit ins 20. Jahrhundert hinein als normatives Leitmotiv, das bestimmten, vom Recht negativ sanktionierten Handlungsweisen unterlag und ihnen eine besondere Dignität verlieh. Diese Tradition wird dort vergessen und unterschlagen, wo es darum geht, mittels der Unterscheidung von *crimes of honour* und *crimes of passion* wertende Aussagen über Fortschrittlichkeit und Zurückgebliebensein, über Zivilität und Barbarei, über Säkularität und religiösen Wahn zu treffen.

Gerhard Wolf (Florence/Berlin)

*Normative Aesthetics and Transcultural Dialogue. Global Dynamics in the Premodern Perio*d

Normativity is a fundamental concern of aesthetic discourses across cultures. Often bound to notions of identity or identity politics, and naturalized in universal concepts of beauty or cosmic order, aesthetic normativity is at the same time questioned by various forms of transgression and norms themselves have a great transformative potential. Aesthetic norms can artistically or iconoclastically be overcome or broken; they can be historized, quoted from shifting points of view etc. The presentation questions the role and place of aesthetic normativity in transcultural dialogues or encounters, especially in the early modern period. It argues along a series of case studies, looking at the interaction of European, Mexican, Ottoman and Mughal-Indian protagonists and visual culture. What are shared values in the aethetics of these cultures, what are the languages of dialogue, what are the objects in the interzones, what are exclusive tokens of proclaimed cultural authenticity and superiority, where can we find attempts of the installation of aesthetic norms over others, what are the counteracts to those attempts, where can we observe new aesthetic norms as a result of dialogue and encounter? From which time on and in which context can we speak of a globalization of visual or aesthetic norms and how does this relate to other global dynamics?



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