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in Continental and Anglo-American Legal History

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Band 32

The Laws' Many Bodies

Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900

Edited by

Seán Patrick Donlan and Dirk Heirbaut

Duncker & Humblot · Berlin

SEÁN PATRICK DONLAN/DIRK HEIRBAUT (Eds.)

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Herausgegeben von

Richard Helmholz, Knut Wolfgang Nörr
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Foreword

Like all such projects, this collection is the work of many hands. The original idea goes back many years, but our specific project took shape almost simultaneously with the establishment of the *European Society for Comparative Legal History* (ESCLH) in 2009. With Jan Hallebeek, Aniceto Masferrer, and Remco van Rhee, we assisted in its birth and our collective conversations, both formal and informal, were essential to our work here. Of course, comparative legal history predates the ESCLH. Duncker & Humblot's excellent, and now extensive, *Comparative Studies in Continental and Anglo-American Legal History* Series has set the standard for comparative-historical legal analysis for decades. We are honoured to be included in the series.

With many hands come many debts. Among these, we wish first to thank our contributors; our respect for their talents is matched only by our enjoyment of their company.

We are very grateful, too, for the generous funding of the *Gerda Henkel Stiftung*. That support, always ably managed by Irene Hofeditz, was essential to our work. It enabled us to meet twice, in Gent and in Limerick, with our contributors and other talented scholars. The lectures and discussions at these meetings imposed critical reflection on each of us. They also served to turn this collection into a meaningfully joint effort, rather than a mere hodge-podge of monologues.

We owe much, too, to the very able staff at our publisher, Duncker & Humblot. Knut-Wolfgang Nörr was particularly kind and helpful in early stages of the project. Jon Lloyd also served, professionally and patiently, as an independent copy editor of most of the text. He made numerous improvements.

There are many others who played important roles of different sorts in our project: Bruno Debaenst, Nir Kedar, Annamaria Monti, Sebastiaan Roes, Teresa Sartore, Jørn Oyrehagen Sunde, Jacques Vanderlinden, and Marc van Hoecke.

Finally, we are grateful for the support of our respective universities and departments. Most particularly, we are thankful for the assistance provided by Karin Pensaert.

Limerick/Gent, May 2015 *Seán Patrick Donlan and Dirk Heirbaut*

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‘A Patchwork of Accommodations’: European Legal Hybridity and Jurisdictional Complexity – An Introduction

By *Seán Patrick Donlan* and *Dirk Heirbaut*

The interaction between *ius commune* and *ius proprium* revealed by these *consilia* does not appear to have been systematic … In cases where law was experienced in action by jurists and litigants, where the events of social life were brought under legal categories and scrutinized in legal terms, the meaning of the rules of *ius commune* and of *ius proprium* had to be worked out anew each time. In place of a system of *ius commune* and *ius proprium*, then, there is a patchwork of accommodations … The law as it worked was not a functioning machine but the product of a carefully conducted craft.[1]

I. Introduction

Western legal histories are frequently presented as simple tales. The stories told have, from the perspective of the present, a sense of Whiggish inevitability as they move across time towards us and our more familiar forms. To avoid complication, such accounts highlight and often exaggerate the importance of the laws that have become dominant over time. They neglect both a wide variety of other laws and normative orders. The creation of genuinely general national laws, a legal ‘system’ centred on the state, and the elimination of competing jurisdictions and marginalization of non-legal norms was a very long historical process.[2] With contributors from many legal traditions – Anglo-American, continental, Nordic and mixed – this volume examines Europe’s historical polyjuralism from a variety of perspectives. Our focus is on the sixteenth through to the nineteenth centuries, a period of great confrontation and contestation between local and ‘common laws’.[3] This period saw the plurality of the medieval era slowly replaced across the West by greater levels of legal unity, i. e. common institutions and laws, built around the state.

[1] *T. Kuehn*, A late medieval conflict of laws: inheritance by illegitimates in ius commune and ius proprium in Law and History Review, 15, 1997, p. 243 – 73, p. 271 – 72.

[2] As used in this introduction, an ‘order’ is merely an interrelated assemblage of norms. This should not be confused with the concept of ‘system’, which implies some organization and rationalization. Even this may exaggerate past and present coherence and unity.

[3] *P. Glenn*, On common laws, Oxford 2005.

By its very nature, this jural intricacy – both the 'hybridity' of legal ideas and institutions and a criss-crossing 'jurisdictional complexity' – is not easy to grasp.[4] It is easy to agree with Bernard Durand, who wrote in his chapter of this collection, that: 'It would be useless to try and outline this phenomenon in all its many aspects.' This Herculean task would be still more difficult if legal historians were to try to capture both legal and normative complexity, past and present, across the globe. European legal history is obviously entangled with other laws and norms around the world, both through colonialism and borrowing. But a comprehensive examination of such phenomena is too much to ask in any single text. Our book is a slightly more modest project, presenting selected European case studies of legal hybridity and jurisdictional complexity. We do so aware, however, that we pursue what Thomas Duve has recently called a '(European) Legal History in a Global Perspective'.[5] This collection represents a first step towards such a global analysis. Here, we introduce the text, our understanding of 'legal hybridity' and 'jurisdictional complexity', as well as the common ground – insofar as it exists – between our investigations.

Like modern comparative law, the knowledge of our past can reveal important similarities to and differences from our present domestic laws. Histories of jural complexity serve an especially useful critical function.[6] They undermine, for example, the anachronistic application of modern legal nationalism and positivism, legal centralism and unity, into the past. They remind us that the 'state' has been historically, and in much of the world remains, only the most obvious and formalized creator of norms. They challenge ideas of deep correspondence between laws and societies and the division of multifarious traditions into reasonably discrete, closed legal systems or 'families'. The plural Western past can also suggest much about the global present. And only the study of all of our legal traditions, our major and marginalized normative orders, will provide us with the appropriate social and intellectual context necessary to understand the laws that have continued into the present. The extinction of some orders, the incorporation of others, will tell us much about our contemporary laws.

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[4] On 'jurisdictional complexity', see *L. Benton* and *R. Ross* (eds), Legal pluralism and empires, 1500–1850, New York 2013, p. 3–4.

[5] *T. Duve*, European legal history: global perspectives (Max Planck Institute for European Legal History Research Paper Series No. 2013-06), http://ssrn.com/abstract=2292666; *T. Duve*, Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive (From a European legal history towards a legal history of Europe in a global historical perspective), Max Planck Institute for European Legal History Research Paper Series no. 2012-01, 2012, http://ssrn.com/abstract=2139312, 21 August 2012.

[6] *S.P. Donlan*, Remembering: legal hybridity and legal history, in Comparative Law Review, 2, 2011, p. 1–35. Cf e. g. *M. Pilch*, Der Rahmen der Rechtsgewohnheiten: Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte,Vienna 2009.

II. Uncommon Laws

No modern legal tradition is a purely native growth. Each is a unique hybrid created in significant part by the complex and dynamic diffusion of laws, legal thought and legal institutions. At least until the nineteenth century, Europe was a landscape of multiple – often transnational, or pre-national and trans-territorial – legal traditions coexisting in the same geographical space and at the same time, though often affecting different individuals. Law was multi- or polycentric, with disparate and nested competing centres of power and persuasion. Jurisdictional complexity was the norm, a complex mix of local and larger laws; the former contributed much to the substance and subsequent success of the latter common laws. Legal orders of the pre-modern past only rarely expected to govern their rivals without a contest. The ability to legislate or adjudicate authoritatively was disputed for centuries. Local power and practical considerations saw different institutions dominate different times and places. Especially before the nineteenth century, 'law' and 'non-law' are not easily distinguished.[7] The boundaries between official and unofficial (informal and non-institutionalized) norms were especially porous. These 'legalities' 'are not produced in formal legal settings alone';[8] instead: 'They are social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest.'[9]

Legal traditions are a sub-set of normative traditions generally, distinguished by the formality and professionalism of its institutions.[10] But laws preceded both lawgivers and the state.[11] These laws competed both with rival legal regimes as well as with other forms of normativity; they only slowly came under the dominance and control of the late medieval and early modern states,[12] public institutions coupled with increasingly meaningful and centralized powers of enforcement. State law as a concept is, in fact, a relatively novel and recent normative form even in the

[7] On 'non-law', see *D. Ibbettson*, Comparative legal history: a methodology in A. Musson and C. Stebbings (eds), Making legal history: approaches and methodologies, Cambridge 2012, p. 142.

[8] *C. Tomlins*, The many legalities of colonialization: a manifesto of destiny for early American legal history in C. Tomlins and B.H. Mann (eds), The many legalities of early America, Chapel Hill 2001, p. 2. Cf. *M. Brown* and *S.P. Donlan* (eds), The law and other legalities of Ireland, 1689–1850, Farnham 2011. Given the history of 'ius' and 'lex', perhaps 'juralities' would be more appropriate?

[9] *Tomlins*, The many legalities of colonialization, p. 2–3.

[10] See e. g. *J. Bell*, The importance of institutions in M. Adams and D. Heirbaut (eds), The method and culture of comparative law: essays in honour of Mark van Hoecke, Oxford 2014, p. 207–19.

[11] Indeed, 'the "Lawgiver" is a recent entry into the domain of Law and … law may live, and lived, even without a lawgiver'. *R. Sacco*, Mute law in American Journal of Comparative Law, 43, 1995, p. 455–67, p. 456.

[12] See in this context, *inter alia*, *H. Spruyt*, The sovereign state and its competitors: an analysis of systems change, Princeton 1994.