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Entanglements in Legal History: Conceptual Approaches

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Entanglements in Legal History.
Introductory Remarks | 3–25



MAX PLANCK INSTITUTE
FOR EUROPEAN LEGAL HISTORY

ISBN 978-3-944773-00-1
eISBN 978-3-944773-10-0
ISSN 2196-9752

First published in 2014

Published by Max Planck Institute for European Legal History, Frankfurt am Main

Printed in Germany by epubli, Prinzessinnenstraße 20, 10969 Berlin
<http://www.epubli.de>

Max Planck Institute for European Legal History Open Access Publication
<http://global.rg.mpg.de>

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie;
detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

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Cover photo by Christiane Birr, Frankfurt am Main
Cover design by Elmar Lixenfeld, Frankfurt am Main

Recommended citation:

Duve, Thomas (ed.) (2014), *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History*, Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, <http://dx.doi.org/10.12946/gplh1>

Entanglements in Legal History. Introductory Remarks

For decades, jurists all over the world have been witnessing the dynamic growth of ‘Transnational Law’.¹ Seemingly new kinds of normative orders are emerging, independent from, or in the shadow of, state and international law. Topics such as ‘Global Constitutionalism’, ‘Global Legal Pluralism’, or ‘Regulatory Hybridization’ are being intensely discussed among growing numbers of scholars of Transnational Law, sometimes under the rubric of ‘General Jurisprudence’.² Global communication has enhanced a dynamic process of hybridization, translation, reproduction of normative options under very different local conditions.

Legal historians cannot ignore this development.³ Instead, their professional experience should lead them to engage in these debates. In large part, legal historical research is dedicated to times and spaces in which the notion of the ‘modern state’ did not exist, or to historical situations of limited statehood. In Europe, for instance, generations of research on the reception of Roman and Canon law in the Middle Ages offer valuable insights into the complex processes of appropriation and reproduction of normative options in the European Middle Ages and in the Early Modern period, and the role different authorities and actors played in this. Research on these periods transports us to worlds very different from the ‘Modern World’ that Christopher A. Bayly invokes and which has shaped our understanding of

1 On Transnational Law see ZUMBANSEN (2012); COTTERELL (2012); on the challenges for legal scholarship SIEBER (2010), AMSTUTZ (2013), for legal education MENKEL-MEADOW (2011).

2 For example on ‘global constitutionalism’ PETERS/ARMINGEON (2009); PAULUS (2009); COHEN (2012); TAMANAHA (2001); TWINING (2009); BERMAN (2012); KJAER (2013).

3 See from the perspective of legal history DUVE (2014). For recent manifestations of the necessity of a historical approach to these questions see for example BRUNKHORST (2012); GLENN (2013); FASSBENDER/PETERS (2012); KOSKENNIEMI (2014).

normative orders and generated a shared vocabulary to express our world-views⁴ – but which might be coming to an end. In a similar vein, legal history dedicated to the 19th and 20th centuries has paid considerable attention to the ‘reception’ of European law in non-European areas, in particular, to the transfer and dissemination of expert-knowledge and ‘European’ ideas outside of Europe. Thus, Legal History may nearly always have harboured a ‘transnational’ dimension in the broad sense of the word,⁵ especially in consideration of histories before and after the spread of nationalism in Europe. Our work has addressed a wide array of questions relating to the ‘transfer’, ‘transplantation’ or ‘translation’ of normativity. It has almost always had to confront the challenge of describing and analyzing processes of normative reproduction in rapidly changing historical settings, not similar, but neither that different from those we are observing today. The globalization of law, and of legal thought, is not a new phenomenon.⁶ Thus, Legal History should be able to make a contribution to the growing reflection on how different normative orders emerge, interact, develop.

The conceptual underpinnings of some traditions of Legal History, however, have not developed at the same pace as it is the case in other fields of study. The gaps and cracks are all the more glaring when this discipline is compared to Global Studies, to Global or Transnational History in particular, which is characterized by intense discussions on methods and concepts of research. It seems that European Legal History has not paid much attention to these discussions,⁷ neither did, for example, the scholarship on ‘*Derecho indiano*’, which studies legal history of the overseas territories of the Spanish monarchy in the Early Modern period. Important works in central and classical fields of legal historical research, like the History of Constitutionalism or Human Rights, and their insistence on the need to generate global perspectives and methods necessary for reconstructing interconnections and interdependencies, have not had a significant

4 BAYLY (2004).

5 See on this term and its use for histories even before the ‘age of nationalism’ SAUNIER (2009); YUN-CASALILLA (2007); for a critical perspective on ‘early globalization’ see EMMER (2003); in this volume, FERNÁNDEZ CASTRO dedicates some thoughts on this problem.

6 KENNEDY (2006).

7 See for example, CAIRNS (2012); IBBETSON (2013) as well as the contributions in SORDI (2013). For a recent critical survey and reflection on this see DUVE (2012); COSTA (2013).

impact on mainstream legal historical scholarship of continental Europe.⁸ The same applies, in part, to discourses generated within Legal Theory and Comparative Law.⁹

Due to this situation, it seemed important to engage in a survey of the concepts employed in transnational legal history today. What are the methods and theories legal historians are using to reconstruct historical processes of interaction of different normative orders? Why are they using these concepts and not others? What are the individual strengths and weaknesses of these methodological tools?

The aim of this volume is to present some specific responses to these questions as well as to offer some examples for methodologies which can serve for analyzing the dynamics of historical normative orders, especially those constituted as a result of intense cross-border communication processes. We requested legal historians to analytically apprehend the law as it ‘moved’, so to speak, in full awareness that the metaphor of ‘movement’ bore the risk of affirming the fallacy of essentialism and underestimating the conditioning and destabilizing factors within an entangled process of exchange, communication and reproduction. Still, our aim was not to focus so much on theory, or on prescribing specific methodologies for undertaking transnational legal history. Instead, in this volume, we turn our attention to how transnational legal histories are effectively being written in every-day-research. Similarly, our intention was also not to limit our discussion to one privileged concept. On the contrary, guided by the belief that there is not one key concept appropriate for all legal historical research, we asked for a critical assessment of our research traditions that would juxtapose the strengths and the weaknesses of new approaches to ‘entangled legal histories’.

Thus, the first section of this volume, ‘Traditions of Transnational Legal History’, revisits specific achievements and shortcomings of legal historical research against the backdrop of postcolonial and global studies. Reflections

8 See, for example, the important works of CLAVERO (2005), ARMITAGE (2007), MOYN (2010), THORNHILL (2011); obviously, there are fields like the History of International Law which has forcefully opened for postcolonial readings of history – see the survey in VEC (2011) – and there is a discourse on ‘Global Legal History’ emerging, see LETTO VANAMO (2011), DUVE (2012), or as an impressive example of how entangled legal histories can be written PETIT (2007).

9 See on this recently the excellent survey of SECKELMANN (2013).

on our own disciplinary traditions that reveal the path-dependencies include critical accounts of the tradition of ‘European Legal History’, ‘Codification history’, the emergence of ‘Hindu Law’, and methodological aspects of Comparative Law.

The four articles in the second section, ‘Empires and Law’, showcase how entangled legal histories forged in imperial spaces, for instance, through treaties concluded in the ancient Roman Empire’s spheres of influence, can be analyzed as a process of ‘narrative transculturation’. The manner in which transnational institutions adjudicated merchant-disputes within the Early Modern Spanish Empire and, after the decline of this empire, how normative frameworks were constructed in multilingual spaces are analyzed as processes of ‘diffusion and hybridization’. Finally, we highlight the so-called ‘craftsmen of transfer’ and the bureaucrats that took practical comparative law as the basis for designing German colonial law. Studies included in this volume only selectively shine a spotlight on a large field, but we were glad to be able to introduce at least one study on antiquity, one on the Early Modern period and two on the imperial world in the 19th and early 20th century.

In the third section, ‘Analyzing transnational law and legal scholarship in 19th and early 20th century’, we present seven case studies to reflect upon how entangled legal histories can most effectively be analyzed. The discussions range from civil law codifications in Latin America as ‘receptions’ or ‘normative transfers’ and entangled histories of constitutionalism as ‘translations’ and ‘legal transfers’ to the formation of transnational legal orders in 19th century International Law, the International Law on State Bankruptcies, and the impact of transnational legal scholarship on criminology. All articles engage in methodological reflections and discussions about their concrete application in legal historical research.

Entanglements

Discussions of the methods of transnational – or global – scholarship in some parts of humanities, cultural studies and social science, especially in the domain of historiography, have been on the rise in recent decades.¹⁰ The terrain is too vast and complex to summarize here, but suffice it so say that

10 See on this the surveys of HOPKINS (2002); DARWIN (2009); SACHSENMAIER (2011); DE JONG (2011); IRIYE (2013); MIDDELL (2013).

one of the main concerns of this debate is to engage in critical explorations fully conscious of the pitfalls of Eurocentric or Western approaches to historical realities. The question we are constantly at pains to ask is this: How do we stop projecting our own categories and concepts on to realities different from the ones these categories and concepts have emerged from?¹¹

Obviously, this is not a new issue. Some scholars, however, especially from the field of Transnational or Global History, felt that the methodological devices employed by traditional historiography, its comparative methods as well as the more recent histories of transfer, were not really adequately developed to escape this fallacy. In many cases, even so-called transnational histories had failed to effectually cross the border with a coherent transnational perspective, and instead sought national or regional (mostly 'European') paradigms, categories, and concepts as their valid point of departure. New approaches to transnational history were proposed, emphasizing the ineradicable interconnectedness of histories not only of neighboring countries and regions, but also of remote global areas. Drawing on postcolonial debates, scholars started to insist on the necessity of analyzing not only the mutual interconnectedness of colonial centers and their peripheries, but to supplement research with a constant critical assessment of the analytical categories being used, as much in Europe and the Western world as in non-western areas where these concepts had been adopted. The main claim is that categories, periodization, epistemic foundations of our scholarship would have to be reconsidered and a self-conscious, reflexive scholarship was the only way to overcome our epistemic positionality, at least partially, in a sort of a dialectic movement between the images of ourselves and the others. This debate also drew attention to some essentialist visions underlying transnational history scholarship. Without aspiring to a homogeneous terminology or a single 'school of thought', some global historians have been employing the image of 'entanglement' or 'entangled histories' (in German '*Verflechtung*') as the label that aptly described their claims. We thought that this is a useful terminology, namely to transform the matrix of inquiry. Because, just as the illustration of this book's cover shows: entangled situations do not offer the luxury of a single point of departure. But this is just what historical work on transnational

11 DIRLIK (2002); DE BAETS (2007); KOSKENNIEMI (2011b). See on this in this volume especially the contributions by Srikantan, Lindner/Kroppenberg, Heimbeck, Kemme.

legal histories is about: Complex intertwined networks, with no beginning and no end, and a difficulty to fix the own point of departure.¹²

Traditions

Transnational scholarship is contingent upon a high degree of self-reflexivity. In that spirit, the four contributions in the first section perform a critical review of scholarly traditions.¹³ They bring together perspectives and frames of reference from historiographical discourses inspired by global history, debates in Comparative Law and Postcolonial Studies in ways that are meaningful for our purposes.

The first article, ‘European Legal History’ (Duve), concentrates on perhaps the most established field of transnational legal historical scholarship. It offers a brief account of the historical circumstances under which this field of study was first formulated in order to analyze some of the underlying assumptions of the concept of ‘European Legal History’, as created after World War II by prominent European writers and thinkers, mostly of German origin. In fact, these foundations can be traced back to Max Weber or Arnold Toynbee. A ‘classical’ Eurocentric vision on legal history that was then propounded drove a conceptual wedge between Europe and the rest of the world. From this perspective, territories beyond Europe were perceived merely as recipients of legal diffusion, where legal systems that had already attained maturity in Europe still seemed to be in their infancy. The methods employed for generating a new transnational legal historiography basically derived from a very German concept of law that privileged learned law and its contribution to the formation of codified systems. At the same time, trapped within a world that shaped their notion of possibilities and constraints, legal historians of that generation starkly underestimated the wide range of transnational actors involved in the reproduction of these European models, so that legal historical scholarship did not get beyond what is sometimes called a diffusionist model of ‘recep-

12 See on this SUBRAHMANYAM (1997); GRUZINSKI (2001); WERNER/ZIMMERMANN (2006); GOULD (2007) as well as the surveys in HAUPT (2001); HAUPT/KOCKA (2009); WELSKOPP (2010); DAVIS (2011). See also Donlan in this volume.

13 See on these aspects also some of the contributions in Rg 22 (2014), especially SAKRANI (2014), KOSKENNIEMI (2014).

tion'.¹⁴ The emergent complex and fluid legal spaces produced by the 'craftsmen of transfer' that orchestrate the assimilation and transformation of models remained undocumented. This article proposes a 'decentered' analysis, which involves opening up the analytical categories in use as a way to counter this tradition.

The article by Inge Kroppenberg and Nikolaus Lindner is dedicated to what they call a 'core' issue of modern legal history, namely codification, which Franz Wieacker claims is a 'delightful possession of the peoples of modern Europe'. Kroppenberg and Lindner show the impact of the Weberian paradigm on the standard narrative of European legal history and the shortcomings that paradigm produced. They argue that the underlying structural functionalism of the concept of 'codification', as it was developed by Weber and adopted by Neo-Weberian legal historians, inevitably leads to a biased vision of legal history, which can only be overcome by adopting a 'culturalist' approach, in effect through a cultural analysis of law. Taking Switzerland as an example, they show how collective identities and the nation-building process were shaped and produced through codes and how that codification history had to be rewritten from a different perspective. They offer a list of theses that constitutes a tentative framework for engaging with modern legal history as well as codification history from a global perspective.

Another critical analysis on the influence of Weberian thought on the writing of transnational legal history is offered by Geetanjali Srikantan in her article on the construction of Hindu Law. The category of 'Hindu law' since the mid-19th century, when British colonial administration came to develop a body of law, has henceforth shaped the image of the Indian legal system. Subsequently, and based on occidentalist perspectives, the 'secular' and the 'religious' symbolized two structuring principles for what could be regarded as law and what did not make the cut. In the end, Europe's image of India mirrored its own categories more than it explained Hindu law. In the same, or even slightly more radical, way that Kroppenberg/Lindner criticized functionalism, Srikantan holds that functionalist approaches by themselves cannot evade the influence of our biased perceptions. Instead,

14 Obviously, this is precisely not what is being addressed when Sean Donlan uses the concept of 'diffusion' in this volume or in DONLAN (2015).

she suggests an analysis within the framework of Edward Said's 'Orientalism' to understand European experiences of non-Western cultures as a first step in reevaluating existing forms of knowledge.

George Rodrigo Bandeira Galindo initially situates his analysis in Post-colonial Studies, described as a 'geographical inquiry into historical experience' (E. Said) and also draws on Comparative Law's structural dependency on space as an organizing principle of research. Yet, the point Bandeira Galindo makes is not so much about the importance of space, but the need to be more aware of the temporal dimension of legal transplants. Drawing on Reinhard Koselleck's theory of history, he proposes viewing legal transplants as attempts to fill the gap between experience and expectation in the legal field. Yet, historical reconstructions of the underlying expectations that were guiding the actors become an essential way to understand legal transplants, at least in the Western world and in those areas where 'modernity' emerged. Ideas of 'progress' as well as the attempted 'prognoses' for legal transplants seem to be especially promising fields of research where Comparative Law needs a more thorough (legal) historical foundation. The ensuing sections provide some striking examples of the fruitfulness of this perspective.

Empires and Law

'Empire' has emerged as an important analytical framework for breaking up national historiographies and understanding the larger spaces of governance since the 1990s. Comparisons between the various empires abound: ancient, early modern and modern. Studies generally highlight the centrality of law in the construction of empires as well as the significance of both formal and informal empires as spaces of communication, fundamental for the evolution of law.¹⁵ Four studies in this section list different aspects of the relationship between law and empire, as well as the different ways of analyzing legal empires.

15 See on this from a general perspective ALLSEN (2011); ELLIOTT (2006); DUINDAM/HARRIES/HUMFRESS/HURVITS (2013); BURBANK/COOPER (2010), DUARA (2011); from the perspective of legal history see, for example, ROSS (2008); KOSKENNIEMI (2011a); BENTON (2010); BENTON (2012); BENTON/ROSS (2013); HESPANHA (2013); KIRKBY/COLEBORNE (2001).

Emiliano J. Buis' article on the influence of the Greek treaties on Roman 'International Law' is not just a case study on legal communication within the sphere of influence of an empire that for a long time has served as the paramount example of European Empires. He also proposes 'narrative transculturation' as the theoretical framework to understand the complex interaction within these imperial structures. In a series of small case studies, he shows how Romans adapted the Greek tradition of treaties, pursuing their own political goals even while employing the traditional political language of that time. 'Transculturation', as defined by the Cuban jurist and anthropologist Fernando Ortíz, allows him to analyze the process of hybridization of various identities in the creation of 'a single and complex society based on the adaptation of colliding (or complementary) perspectives'. Angel Ramas' modification of this idea of 'transculturation', leading to the concept of a 'narrative transculturation', developed in the 1970s within the context of an emergent post-colonial critique, helps him to depict the strategies of adaptation within asymmetrical political and cultural structures. Drawing on this concept, Buis sheds new light on how Roman practices of signing treaties in the Greek world, essentially by appropriating the vocabulary and the models of vanquished, allowed the Romans to establish higher authority within these political spaces. Thus, Buis demonstrates the fruitfulness of the application of 'Southern Theory' (Raewynn Connell) to established fields of research and historiographical discourses dominated by European paradigms.

As Buis has shown, two Latin American intellectuals, Fernando Ortíz and Angel Ramas, made significant contributions to the methodological toolbox for writing histories of entangled worlds emerging from asymmetrical encounters. This might be, in a way, a late intellectual consequence of the global dimensions of the Early Modern Spanish Empire. In her contribution to this volume, Ana Belem Fernández Castro offers an inside perspective into this Spanish Empire, as she puts it, an 'empire built on law'. Within the multi-layered constitution of this 'composite monarchy', she focuses on the beginnings of what she denominates as 'transnational' institution of governance and justice: the House of Trade (*Casa de Contratación de las Indias*), founded a few years after the expansion towards the Indies. Drawing on archival sources of the jurisdictional activity of this House of Trade, she shows that this institution was not only 'transnational' because of the multiplicity of nations that formed a part of the Spanish monarchy and

participated with their capital in the trade, but also because the House of Trade served, notwithstanding an explicit legislation to the contrary, even merchants that were not citizens of Castile. Thus, judicial practices embedded in a local culture affected merchants in different parts of the world. Emergent forms of world trade thus contributed to a diffusion of European juridical practices far beyond the borders of the continent.

The decline and the subsequent implosion of this same Spanish Empire not only paved the way to the independence movements of early 19th century's and the formation of new national legal orders; the third section depicts three case studies on the transnational framing of the national legal orders that emerged as a result (Andrés Santos; Parise; Zimmermann). The fragmentation of the Empire was also part of a long lasting process of political and territorial rearrangement between old and new European and new American powers, resulting in an interweaving of legal systems. Due to this, Spanish West Florida, an area Seán Patrick Donlan analyzes in his article, had been French, British, Spanish and American by the advent of the 19th century. While its population was largely Anglophone during that period, its laws were a variant of Spanish colonial law. In a similar vein, the neighboring American Territory of Orleans's population was largely Francophone, but subject to what he calls 'a gumbo of continental and Anglo-American ingredients'. In both territories, Donlan points out, "the diffusion – direct and indirect, formal and informal, ongoing and sporadic – of the various laws and norms of natives and newcomers created intricate legal and normative hybrids". It is this hybridity he works out in detail, illustrating vividly that hybridity is a product of "a perpetual blending process generated by the ongoing, multidirectional diffusion of laws and norms".

The profound transformations in early 19th century political history, including imperialist expansion on an unseen scale and the consolidation of European nation-states, were the prerequisites for the centralization and systematization of law we observe in 19th century Europe. Yet, 'juridical modernity' also brought about a proliferation of colonial laws in those empires that had not disappeared from the world map. Still, the process of centralization and systematization of national legal orders did not necessarily lead to a widening gap between national colonial legal regimes now completely detached from each other, as it has sometimes appeared. On the contrary, as Jakob Zollmann shows in his survey on German colonial law-making in late 19th and early 20th century, the formation of these

colonial regimes can only be understood as a product of a mutual process of learning and observation. They might even be exemplary for what ‘entangled histories’ mean. Zollmann shows the high degree of attentiveness German colonial bureaucrats displayed towards the methods of other more established and experienced colonial powers than the German later-colonizers. In a sort of ‘comparative law as a natural practice’, these bureaucrats, the ‘craftsmen of transfer’, contributed to the reproduction and adaptation of legislation and juridical practices developed by other colonial powers, leading to “a legal-argumentative and legally-practical entanglement of the colonial empires prior to First World War”. Zollmann points to the very beginnings of the creation of German colonial administration and law, designed with close attention to the experiences of Great Britain. For the crucial aspects of legislation, he shifts his focus to the status of the ‘natives’ and a separate criminal law for these peoples in the German colonies. Somewhat surprisingly, he states in conclusion: “Based on the source analysis presented here, it is shown that one cannot argue for significantly differing national colonial legal systems”.

Analyzing transnational law and legal scholarship in 19th and early 20th century

Processes of mutual observation, imitation, and translations as well as a remarkable activity in the sense of ‘comparative law as a natural practice’ can also be observed in the studies on the formation of national or international normative orders emerging in the 19th and early 20th century. As the German Global Historian Jürgen Osterhammel put it, it was the period of the ‘Transformation of the World’.¹⁶

From the legal historian’s point of view, this was also the period when national and transnational legal orders were both being simultaneously constituted through an intensification of international communication, which was the driver of global knowledge creation in the field of law.¹⁷ Within Europe, but not least in the Americas, we can observe an intensification of legislative activity, which had to take into account local,

16 OSTERHAMMEL (2009).

17 See on the mechanisms of ‘Global Knowledge Creation’ especially RENN (2014) as well as WENDT/RENN (2012).

indigenous and colonial heritages on the basis of which nation states were founded and normative frameworks were created for societies facing important changes in their economic, social and political systems. Lindner and Kroppenberg already offer an introduction to these processes in the first section, Donlan presents a case study on this world of law making in the second section, and Zollmann shows the need to design new colonial laws within the emergent German colonial setting in Africa. In many of the recently independent areas, like Latin America, jurists and politicians were confronted with significant responsibilities and little preparation. Relatively small groups had suddenly been raised to the status of a functional elite who had to demonstrate their versatility in politics, economy, and diplomacy. Thus, comparing oneself against, and learning from, other nation-states was sheer necessity. This ‘transformation of the world’ became possible due to widespread migrations among elite groups as a result of revolutions and political turmoil on the one hand and the rapidly changing possibilities in the face of technical innovations and brisk information flow on the other hand. The necessity of establishing national legal orders as well as opening the borders of areas previously closed to foreign influences for a long time, like Japan and China, intensified the transnational communication about law-making, through mutual observation, travel, diplomacy, exchange of objects, information or books.¹⁸

In this section, four articles are dedicated to legal histories that can be written within this context of the formation of national legal orders (Andrés Santos; Parise; Zimmermann; Delbecke). Two are case studies on the formation of early International Law (Kemme; Heimbeck) and one concentrates on the emergent transnational scholarly community at the beginning of the 20th century (Pifferi). All of them revisit specific case studies, in particular to show how these histories can be written.

In the first contribution, Francisco J. Andrés Santos focuses on the nearly classical topic of the ‘reception’ of the French *Code Civil* in Latin America and questions the heuristic value of this concept, which was established on

18 See on these processes also FIOCCHI/KELLER (2014); HALPERIN (2014); ZHANG (2014); LI (2014); ZACHMANN (2014); ZAFFARONI (2014). The processes of knowledge creation within transnational scholarly communities and between the ‘craftsmen of transfer’ is also increasingly debated under the label of ‘global intellectual history’, see on this now WENDT/RENN (2012); RENN (2014); RENN/HYMAN (2012).

the basis of a specific European historical situation. He does this as a way to reconstruct what happened in 19th century Latin America. Andrés Santos underlines the importance of understanding Latin American codification within the complex and heterogeneous political situation, from which the recently independent States had just emerged. French codes certainly offered greater benefits from the linguistic, technical, and juridical point of view. The admiration some Latin American leaders felt for Napoleon Bonaparte, a general cultural preference for France and the huge prestige of its early codifications made it nearly natural to consider the French codes as a ‘model’. Thus, there were some early projects, which seem to be mere translations, whereas the so-called ‘second wave’ of codifications in the second half of the 19th century brought more genuine efforts to create a normative framework that could function in the societies they were made for, in fact drawing consciously on pre-existing legal orders. This fusion of traditions rooted in the Spanish imperial past and the fact that even the French Civil Code was drawing on the same set of traditions, despite the revolutionary milieu, leads Andrés Santos to question the applicability of the traditional concept of ‘reception’ to what happened in 19th century Latin America.

In the next article, Agustín Parise takes a closer look at the acts of comparing, translating and adopting normative options for the codification of civil law in the Americas. He does so by concentrating on an important tool for 19th century’s American ‘craftsmen of transfer’: the so-called ‘libraries of the civil code’. These reference works gave access to texts that legislators had been citing in their codifications, which in turn provided the jurists with a better understanding of the motivation of the legislators in formulating their arguments. It was also easier to confirm the authority of the texts by citing their sources, or the reference points to which the legislators resorted and which provided them with historical legitimacy. Introducing and comparing two examples – Charles-Chamilly de Lorimier’s *Bibliothèque du Code Civil de la Province de Québec*, published in Montreal in 1873, and Luis V. Varela’s *Concordancias y Fundamentos del Código Civil Argentino*, published in Buenos Aires from 1873 on – Parise shows similarities and differences in the organization of juridical knowledge in the Northern and Southern extremes of the Americas. The comparative view reveals how the positivist attitude towards law, eclectic practices, and, not least, restricted access to media made these reference works a valuable tool

for jurists; they opened the door to a context-detached *bricolage* of European and Latin American pieces for building national codes, a process described by Parise using the concept of ‘legal transfer’.

Eduardo Zimmermann’s paper continues these reflections on the Latin American legal culture in times of independence, focusing on Argentine law making, its transnational context in the field of Constitutional law. He goes a step further to emphasize the importance of local conditions for reformulating laws that were allegedly ‘imported’. In his case study on the reception and adaptation of U.S. constitutional doctrine and jurisprudence, facilitated by Argentine jurists in the second half of the 19th century, he draws on an impressive and detailed panoramic view of translations and textbooks used and produced in this period, highlighting how the emerging “language of liberal constitutionalism [...] gradually produced a novel constitutional culture, a mixture of the original model and the many adaptations and interpretations produced by its local translators”. Guided by the conviction that exchange is not a linear, but a complex, process of knowledge creation brought into being by international networks, communication processes as well as local conditions, Zimmermann recreates the world in which these U.S. models were being read, interpreted and transformed. He does so by analyzing how U.S. institutions came to be perceived by the Argentine political elite in the nineteenth century, the role of translations and translators, printers and booksellers, and the local articulation of a new constitutional vocabulary. In his concluding remarks, he emphasizes the importance of these local conditions for the establishment of political semantics: “The ‘spirit’ within the interpretations presented in all the translations and textbooks produced by Argentine jurists was eminently local and gave birth to a constitutional culture nourished by a ‘global legal entanglement’, in which the new texts reflected a unique mixture of original, foreign texts and local interpretations.” One of the most important conditioning moments for this emerging constitutional culture was politics, and the filters it established. Yet, at the same time, the political language of liberal republicanism, which the translators had created, determined the scope of what was politically possible in these turbulent times. In conclusion, Zimmermann declares that studying Latin American constitutionalism as a part of global knowledge creation in the field of constitutional law not only helps to denationalize the perspective on the history of each country, but it also means reconsidering some fundamentals of the history of constitutionalism, which

projects the image of the Latin American elite as ‘failed importers’ of European and US constitutionalism.

The way that global perspectives can change our vision on constitutional history is also the question that Bram Delbecke raises at the beginning of his article on the Belgian constitution of 1831 and its connected history with French constitutional development. He rightly advocates that global perspectives should not leave out the ‘old continental history’. Moreover, he proposes that the study of constitutions must not be limited exclusively to what is common to most constitutions, but must also emphasize differences. The distinct treatment of ‘political offence’ developed in France and incorporated into the Belgian constitution is one such case. Delbecke’s detailed reconstruction of the local context of the transfer of this institution enables him to show the concrete motivations of those actors who were responsible for including the special treatment of political offences into the constitution. But it also helps him to underscore the fact that this cannot be attributed only to personal experiences and contingent circumstances. A more fundamental development was at play, which becomes visible in this transfer: the articulation of a clear distinction between civil society and political institutions. This idea was introduced into the Belgian constitution by a young group of the bourgeois elite in Belgium who – as Delbecke insists – were acting within the asymmetrical setting of a relatively small country, in the periphery of the French cultural and legal empire.

Whereas the first four papers in this section were dedicated to more classical fields – the history of civil and constitutional law – Lea Heimbeck looks at a normative order that emerged in the late 19th century: international insolvency law. Heimbeck shows that for a long time, international lawyers and governments “dealt with a debtor state’s bankruptcy on a case-by-case basis using legal, military or political tools to solve the situation in the easiest way”, an even easier task considering that generally the debtor states were non-European nations and the creditors were European actors. Three case studies (on Egypt, Ottoman Empire, and Venezuela) illustrate the considerable increase in the number of actors involved in these bankruptcy cases during the late 19th century, resulting in the growing complexity of normative spheres: “national legal systems [...], self regulatory regimes [...] and public international law” were intertwined. This flexible system privileged powerful nations, which for a long time were not interested in establishing a more coherent legal framework. From the

purposes of this volume, it is important to note that the ‘legal silence’ was mirrored in a blind spot in legal history. Thus, Heimbeck shows to what extent our ideas about international law still continue to shape our historical research and it is not surprising that neither national legal historians nor the History of International Law is dedicated to this field. Hence, in a way, historiography continues to perpetuate unjust situations of the past. As Heimbeck concludes, we need a – global – legal history not restricted to a state-centered perspective on (international) law and open to the experiences of non-Europe, in order to overcome these blind spots in International Law.

Overcoming state-centered traditions of the History of International law is also the starting point for Clara Kemme’s detailed and extensive contribution, titled ‘Entanglements in eighteenth and nineteenth century India’. In her reconstruction of the interaction between the British East India Company and Indian rulers, Kemme not only opens a rich field which traditional narratives of the History of International Law usually do not consider. She also shows the change in the political logics from the period when East India Company amassed regional power in India to the point when the subcontinent was eventually brought under the direct administrative rule of the British Crown in the mid 19th century. This saw a slow but steady marginalization of the Indian states from international law. The central tool for this exemplary process for the universalization of European juridical practices, and thus the ‘Europeanization of International Law’, were the treaties with Indian rulers. Due to some pre-existing commonalities and the increasing readiness of Indian rulers to adopt European international law, step-by-step these rulers not only gave up the fight for their political independence, but soon also ceded so much of what the European international law deemed constitutive for sovereignty that they finally lost their legal status. For Kemme, this process cannot be understood without focusing on the entangled history of the Indian state system with early imperial intervention through the East India Company, acting in a state-like manner. It was this long interaction that made possible the subsequent strengthening of British control over India. Thus, Kemme concludes that not “so much a comparison of normative orders will help us to put the history of European international law in global historical perspective, rather the tracing of entanglements will provide more adequate tools to do so”. Just as with other case studies presented in this volume, as in Eduardo Zimmermann’s

contribution, we can see that writing legal history in a global perspective needs a thorough dedication to local practices.

This tension between globalizing models and local translations is also the backdrop for Michele Pifferi's study on 'Global Criminology and National Tradition' in the field of Criminal law at the beginning of the 20th century, which concludes this section. Pifferi takes his starting point from one of the most forceful international movements in legal scholarship at the end of the 19th and early 20th century: the wave that sought to establish criminology as a scientific method. Pifferi proposes that "the fundamental tenets of criminological science shared a global dimension (at least in the Western World) because they were grounded on the idea of a universal scientific and progressive knowledge but were differently applied in the concrete legal systems". Notwithstanding the important question of whether we really can assume the existence of a 'global dimension (at least in the Western World)' – as I would suggest not to do – and what 'applied' means, Pifferi convincingly shows how the different mindsets, but also the constitutional law and traditions of legal thought, contributed to a process of differentiation and the formation of national peculiarities in this field, especially during the first decades of the 20th century. Concentrating on one significant example, namely the discussion about the principle of indeterminateness, he reconstructs how the claims resulting from this debate impacted on the fundamental ideas about the division of powers, the weight of the principle of *nulla poena sine lege*, as well as on the role of the judiciary and the administration. Once again, a case study of the transnational dimension of law ends with a plea for local perspectives on global histories, and for the need to be aware of the translations these transnationally circulating ideas and models underwent, once they began to be put into action. There is a general need to generate increased awareness of these processes. But the urgency just might be greater in a world of globalizing normative orders in which 'Transnational Law' is increasingly significant.

Acknowledgements

The contributions selected for the publication in this volume were presented at the '*Entanglements in Legal History. Conceptual Approaches to Global Legal History*' conference held at the *Max Planck Institute for European Legal History*, Frankfurt/Main, in August 2012, and on a subsequent panel at the bi-annual

Convention of German Legal Historians (39. *Deutscher Rechtshistorikertag*) held in Lucerne, Switzerland, in September 2012. They responded to our invitation in a call for papers published in 2011¹⁹ and were collected and prepared for publication during the course of 2013. I am very grateful to the organizers of the *Deutscher Rechtshistorikertag*, especially to Michele Luminati, for offering a space for these deliberations in the context of this important event for European legal historical communities.

I am very happy that this set of articles, centered on the question of how to write transnational legal histories, can be published as the first volume of the new book series, 'Global Perspectives on Legal History', edited at the *Max Planck Institute for European Legal History* in Frankfurt. This new series, available in electronic format in open-access (<http://global.rg.mpg.de>) as well as in printed form (in print-on-demand via the usual channels of distribution), pursues the same goal that underlay the concept of the two conferences in Frankfurt and Lucerne: to stimulate researchers to introduce global perspectives in their research on legal history.

The collection of these articles might show that this endeavor, seemingly utopian, already has a lot of scholarship to build upon. Significant research and a forceful discourse on methodology does exist, providing the foundation for developing the analytical tools we need. What is necessary is, not least, an institutional framework that helps us to exchange and connect this knowledge, created by historians and legal scholars all over the world, within the national institutional settings. The book series, which this volume begins, might be a humble contribution to this goal.

Nicole Pasakarnis and Karl-Heinz Lingens have, as always, vitally contributed to the organization of these events and to the publication of the articles collected. My gratitude goes to both of them and also to the entire publication department at the *Max Planck Institute for European Legal History*.

19 http://www.rg.mpg.de/de/aktuelles/mitteilungen/i18318_1.cfm.

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