The Crises of European Legal Traditions inside and outside Europe 17.–18.2.2018

Organized by

Reinventing the Foundations of European Legal Culture 1934–1964 (University of Helsinki) and Prof. Jacques du Plessis (Universiteit Stellenbosch University).

Jacques du Plessis (Universiteit Stellenbosch University): *Receptions of civil law and good faith: a South African perspective*

After providing a brief overview of the historical role of the civilian tradition in the formation of South African law, the paper considers two questions. The first question is whether experiences with applying the laws of Europe outside its boundaries are relevant for developments within the region. Thereafter, and this will be the main focus of the paper, it is enquired to what extent developments in Europe are relevant in the regions to which its laws has been transplanted. Specific attention will be paid to the potential significance of modern European civil law for one of the most important problems in South African law, namely the role of good faith in the law of contract. In conclusion some general observations are made on the notion that good faith is a constitutional value, and how it relates to indigenous values. These observations in turn reflect on local narratives on the interaction between different legal traditions.

Philip Thomas (University of Pretoria): *The European legacy in South African law*

The paper addresses the survival of Roman or rather Roman-Dutch law in South Africa during the 19th century; the role of the English constitutional model in laying the foundation for Apartheid and the bizarre frozen turkey interpretation of Roman-Dutch law during that era, with as interlude a case showing that discrimination without Diktat from the state or support of Roman law has always been possible. The emergence of two new distinct paradigms during the 1950's contradict the assertion that the distinction between public and private law and the abstract, objective nature of legal science kept politics outside private law. The bar and side-bar, by and large remained true to their legal tradition and maintained a core of legal conscience. It may be argued that the judges should not be blamed for enforcing apartheid legislation, since legal positivism and the Westminster system had allowed politicisation of the law which led to injustice. New law curricula, a new political dispensation and the demand for Africanisation have eroded the classical humaniora in legal training and the Roman law legacy is gradually being marginalised.

Thomas Bennett (University of Cape Town): *Ubuntu: A Challenge to South Africa's European Legal Heritage*

Ubuntu [literally translated as 'humanity' or 'humaneness'] is a concept derived from traditional African systems of ethics, which place prime value on social harmony and the need to respect the interests of others. Over the past thirty years, South African courts have been referring to ubuntu as a new criterion for solving cases in which the application of strict rules of law would yield ethically inappropriate results – a remarkable phenomenon, for this is the first time in the history of South African law that a distinctively African precept has been accepted into the common law. Ubuntu first appeared in public legal discourse in an epilogue to the 1993 interim Constitution, but soon thereafter the courts began to apply it in a wide variety of cases, with the result that it is now an established feature of the legal system. Given the fact that Roman-Dutch law is already armed with a battery of similar equitable

principles derived from Roman law, the appearance of ubuntu could well be considered redundant to the requirements of the system. Ubuntu, however, provides a means whereby the courts have been able to introduce a typically relational (as opposed to rule-oriented) discourse to South African law, so that courts can pay closer attention to the factual and normative contexts of particular cases, and thereby require litigants to exercise their rights and powers with regard to their responsibilities towards a broader community. In consequence, ubuntu has brought a much needed sense of cultural legitimacy to a legal regime that has, until now, made few (if any) allowances for the fact that the great majority of South Africa's population live according to African norms and customs.

Jacob Giltaij (University of Helsinki): *The theory and practice of natural law after 1945*

The notion of natural law is a multifaceted concept, with many iterations throughout history from the ancient Greek dikaion fusikon onwards. This paper will argue that after 1945 due to the atrocities of the Second World War the concept was both reinvented and rediscovered primarily as an unwritten check on unfettered state power. The rediscovered historical narrative presupposed a strong link to an international legal system that was valid universally, which in the 1940s for the first time in history actually meant 'world-wide' and 'applicable to everyone and every state equally', at least in theory. Thus, in the course of the 1960s and 1970s the practice of decolonization became intertwined with a theoretical response stemming from curbing state power in Western Europe, specifically in the context of the then recently formed United Nations, the Universal Declaration of Human Rights, and the European project. However, since the theory had originally been developed as a response to abuses of power by Western European states alone, the proliferation of human rights and self-determination of former colonies presented a problem for those that had been involved in the initial development of the theory. This struggle between the theory and practice of a concept of natural law, and the dichotomy between the

validity of the concept inside and outside of Western Europe, after 1945 is the main subject of this paper.

Tommaso Beggio (University of Trento): *Beyond Germany: Paul Koschaker's legacy after WWII*

In his masterpiece *Europa und das römische Recht*, first published in 1947, Paul Koschaker (1879–1951) made a proposal for the study of Roman law and legal history, which is epitomised by the concept of "relative natural law". He argued that this "relative natural law" should not be speculative, but based on a comparative legal history method. The aim of Koschaker's proposal was twofold: on the one hand, he desired to go beyond the conflict between the historical and dogmatic approaches to Roman law studies, while rediscovering the universal legal principles underpinning traditional European private law systems in an attempt to rebuild a European jurisprudence, on the other. Yet many scholars, including Álvaro d'Ors and Francesco Calasso, have correctly drawn attention to the "Germanic" character of Koschaker's idea of Roman law and European legal tradition, which was evident in many of his works. This presentation will therefore attempt to investigate if, and to what extent, Koschaker's concept of "relative natural law" can actually be considered a means for a broader approach to Legal History studies, beyond the confines of a Western European legal tradition; moreover, it will analyse whether a more universalistic idea of Roman law, as conceived through the concept of "relative natural law", indeed influenced Koschaker's teaching experience in Turkey, after WWII.

Kaius Tuori (University of Helsinki): *Roman law,* ius commune *and the lost futures of European law*

The legal history of Europe and the European legal tradition may sound as synonyms, but this could not be farther from the truth. Both do have similar underpinnings:

Certain ideas and practices, a number of methodological and dogmatic similarities were to be found in many European countries and were central to the development of the legal cultures of Europe. This is probably where the similarities end, as the legal history of Europe has remained a neutral descriptive term, while the European legal tradition has taken a political significance and a crucial role in the aspirations regarding the future of European law. In this presentation, my aim is not to argue whether one should speak of a European legal tradition or envision a historical *ius commune* as its precedent, but rather the emergence of this idea in the discussions following the Second World War. In the post-war Europe, the whole concept of shared values, history and institutions gained a new market seeking to place law and human rights to the centre of the nascent European project. The European narrative in law became not only an interpretation of the past but equally a vision for the future. Beginning from the still relevant visions of historical scholars like Coing, I will trace the developments and their fundamental presuppositions through some of the major contributors such as Zimmermann.

Matthew C. Mirow (F.I.U. College of Law, Miami): *Léon Duguit and Property in Latin America, 1925–1960*

Throughout the twentieth century, many countries of Latin America redefined property by incorporating ideas of its social function into their constitutions. Because the Mexican Constitution of 1917 contains novel social restructurings of property, natural resources, land, and labor, historians have often assumed that this constitution was the source of these ideas that inevitably spread south from this powerful, northern, regional model. Recent studies of the adoption of the social function of property in individual countries require historians to abandon this earlier explanation of the doctrine's success in the region. If fact, in drafting and debating the incorporation of the social function of property, jurists and legislators rarely mentioned the Mexican Constitution. Instead, the path to incorporating the doctrine was informed by national legal culture and broader European sources. Most important amongst these sources were the subsequently published lectures of French jurist Léon Duguit (1859–1928) who presented the fullest and most influential

description of the social function in Buenos Aires, Argentina, in 1911. Duguit's modern and sociological influence was not exclusive; the new social teaching of the Roman Catholic Church and its related statements on work and property, such as Rerum Novarum (1891), were an equally important, yet philosophically distinct, source and influence. With recent studies of Argentina, Chile, and Colombia in view, this talk takes a few steps towards a new understanding of the development of the social function of property in the region.

Francisco Andrés Santos (Catedrático de Derecho Romano, Universidad de Valladolid, Spain): *The role of Roman Law in codificatory and post-codificatory era in Spanish America*

Roman law was a substantial element of the law really applied by the Spanish authorities in America during the colonial time (*Derecho indiano*) and the main subject of the legal education in the universities all over the Spanish America, despite the efforts of the royal officers to replace it by the state law (*Derecho real*), especially in the 18th century. In 19th century, actually, after the independence of the different states emerged from the process of *emancipación* from the Spanish empire, Roman law continued to be law in force before the courts and the spinal column of the educational programs of the law faculties in the new independent states. In fact, Roman law (eventually in the form adopted by the medieval code of *Las Siete Partidas* of the king Alphonse X) had a much deeper impact in the legal practice and the legal training in the American territories than in the very peninsular metropolis or generally in Europe. The main commentators and code writers of private law in the Spanish American states (e. g. the Venezuelan/Chilean *Andrés Bello* and the Argentinean *Dalmacio Vélez Sársfield*) were both of them excellent Romanists as well as they took seriously into account the rules and institutions of Roman law in their influential codifications of civil law (*Código civil de la República de Chile*, 1855, and *Código civil de la Nación Argentina*, 1869). This facts partly explains the essential continuity of the studies of Roman law in the Latin American universities after the codificatory period, and also gives some explanation to the intense

Romanism of the legal science and the case law doctrine in those territories, significantly larger than in Europe, even in the 20th century, to the point that, according to proposals of several scholars, Roman law should maybe constitute the best basis for a future harmonization, or even unification and codification, of civil law for the whole Latin America (namely Spanish America and Brazil). However, it seems also questionable that this traditional interpretation can be admitted as the only possible and acceptable hypothesis to explain historically the presence of Roman law in the legal life of these territories, and maybe there could be explored other options, such as the deep continuity of social and institutional structures derived from the *Ancien Régime* even in the modern Latin American republics –as it can be observed rather clearly during the authoritarian regimes in most of the Latin American states all along the 19th and 20th century- and the wide political role that Roman law can have developed the design of the ideal image of the jurist suitable to that kind of structures. This alternative (or complementary) explanation is what this paper is aimed to describe briefly.

Franz-Stefan Meissel (Universität Wien): *Between Nationalist Xenophobia, Racism and Cosmopolitanism – the Roman Law Experience in Vienna during and after the Nazi Period*

The history of Roman Law at the University of Vienna from the 1920s to the 1960s reflects the deep political crises of Austria as a mere "torso state" after World War I and the end of the multi-ethnic Habsbourg Empire. Within the context of bitter battles between highly militarized opposing political parties (marxist Social Democrats, christian Conservatives and the germano-nationalist/national socialist "Third Camp") even before the outbreak of open civil war, Roman law scholars such as Stephan Brassloff find themselves in the center of anti-semitic and xenophobic attacks. The attacks against Brassloff in 1925 combine suspicions against Roman Law as a "foreign legal system under semitic influences" with personal persecution for political and racist motives. Brassloff was forced to temporarily resign from teaching as a consequence of a campaign instituted by national socialist students. Others such

as Ernst Schönbauer tried to present Roman Law as highly compatible with national socialist ideas of law and even engaged in high public functions. Schönbauer was appointed Dean of the Law Faculty in the Nazi period (1938–1943) and actively contributed to the deliberations for a "Volksgesetzbuch" under the auspices of the Academy for German Law. The self perception after the defeat of national socialism is best captured by Leopold Wengers vision of Roman Law as a "Global Legal System" which has risen "from the ashes like a Phenix". Wengers optimistic characterization can be seen as the expresion of scholarly selfconfidence and autonomy in the context of a state still occupied by the four allies and opting for an Interpretation of Roman Law as a stronghold for individual freedom.

Ville Erkkilä: *Law, Conscience and scholarship. Reconstructing a European future*

In contemporary European jurisprudence, "conscience" usually refers to a human moral capability, shared by all men, which is the ultimate means to tackle undemocratic development in administration and legislation. The conceptual meaning of the word is a result of historically layered meanings. First, in the European legal history "conscience" has been used to mark the differences between protestant and catholic views on jurisprudence. Second, the concept generates its power from connotations to the totalitarian past of Europe. Finally, in the legal science of the late 20th century, "conscience" represented solid juridical skill and ethical legal thinking, in distinction to corrupted and twisted legal reasoning. It was a way to achieve a brighter, morally sustainable future for the stigmatized continent. I concentrate on studying the development of the concept in the framework of *Kieler Schule*; comprised of German scholars in the Third Reich. The *Kieler Schule* formulated a route to social justice – in line with National Socialist world view – grounded on *experience* of law. This experience, they argued, was to be found and further studied in legal history. The historical cases of national, Protestant legal scholars reflected this "conscientious" legal thinking. After the war, the scholars of *Kieler Schule* incorporated their secular and national Protestantism with catholic and religious approaches on jurisprudence. Their task of moralizing legal language, loading the

positive norms of national legislation with values, was completed in Federal Republic. In 1960s, members of the *Schule* (e.g. Franz Wieacker and Ernst Rudolf Huber) argued that European legal history was in reality a history of a morally unflinching legal skill – legal conscience – from the Roman Empire to post-war Europe. On this skill, they argued, Europeans would ground their hope for a social justice.