EUROPEAN TRADITIONS: INTEGRATION OR DISINTEGRATION?

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ABSTRACT BOOKLET

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DEAR PARTICIPANTS,

I am looking forward to welcoming you at the XVIIth Annual Forum of Young Legal Historians under the theme *European Traditions: Integration or Disintegration?*

Europe's past, including its legal history, can be and frequently has been used to justify contemporary opinions and decisions on its future. Answers to the question whether European traditions are primarily characterised by integration or disintegration may easily be used to either promote or reject the current European integration.

Coming April we will gather to present and discuss our research related to European traditions. Even if we would like to limit ourselves in describing and explaining the past, we can not escape a normative element, as we can not escape ourselves: our worldview, background and education – and those of the people surrounding us – may already be represented in the choice of our research topics. We want the present to know what has been important in the past. We can not change the past, but we choose to tell a particular story about that past. Easily we can get carried away by our own view of the world, unaware and uncorrected by the opinions and knowledge of others, with a completely different background, education and world view than ours. Why should people listen to our story, why is it more reliable than the previous story, or the next story to be told?

Listening to each other's ideas and discussing them, can make us aware of our own preconceptions. In this way our Forum helps us to make our historical research and our story of the past more worthwhile. Sharing knowledge and ideas is priceless, and in that respect integration is good. At least, in my opinion.

Two persons in particular made this Forum happen: Hester van der Kaaij, but foremost Mariken Lenaerts. Many thanks for your tremendous effort and relentless enthusiasm. Furthermore, I would like to express my gratitude to the Faculty of Law Science Committee, the Department of Foundations and Methods of Law, the Limburg University Fund/SWOL and especially Professor Remco van Rhee and Professor Louis Berkvens for their generous financial contributions. On behalf of the entire team I wish you a wonderful Forum in Maastricht.

Janwillem Oosterhuis

Maastricht, 1 March 2011

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TITLE

TRIUMPH DER TERRITORIEN? DAS FRÜHNEUZEITLICHE, KAISERLICHE NOTARIAT IM SPANNUNGSVERHÄLTNIS ZWISCHEN KAISER UND STADTHERRSCHAFT

Das Heilige Römische Reich des ausgehenden Mittelalters glich vielmehr einem Flickenteppich territorialer Herrschaften als einem homogenen Staatsgebilde. Die imperiale Macht des Kaisers hatte sich zu Gunsten der Territorialherrschaften verschoben. Diese Reichsstände orientierten sich am Herrschaftsmodell des modernen Staates, traten nach außen als Obrigkeit und damit als souveräner Partner auf der politischen Bühne auf. Spätestens seit die Freien und Reichsstädte im 16.Jh. auf den Reichstagen als eigene Kurie vertreten waren, rückten sie staatsrechtlich in eine Ebene mit den reichsständischen Territorialstaaten. Auch die um 1500 eingeläuteten Reichsreformen, die unter anderem den Zweck hatten, diesen Wildwuchs in geordnete zentralisierte Bahnen zu lenken, blieben weitgehend wirkungslos. Und so schreiben die Geschichtsbücher eine Epoche des Triumphes der Territorien, die zugleich eine Verlustgeschichte der imperialen Macht des Reiches ist. Mit der Konsolidierung der Territorien und Reichsstädte erfuhren auch ihre Institutionen einen nicht unbeachtlichen Bedeutungsgewinn. Diese Einschätzung ist bislang für die Geschichte des Notariats kaum in Frage gestellt worden. Die Assimilierungstendenzen der Territorialherrschaften sprächen jedoch für eine landesherrliche Umformung des kaiserlichen Notariats. In der Forschung wird dieses Problem durch das Ausblenden der imperialen Dimension regelmäßig umgangen. Gerade im Hinblick auf die institutionelle Entwicklung des kaiserlichen Notariats in Reichsstädten kann das Spannungsverhältnis zwischen der kaiserlichen Macht und der städtischen Souveränität nicht unbeachtete bleiben. Die reichsstädtischen Gemeinden, die dem Kaiser direkt untergeordnet waren – insofern also eine deutlichere Bindung zum Reich aufwiesen – entwickelten daher vielfach eine Sonderform des Notariats, das einerseits in den städtischen Begebenheiten verankert war, zugleich aber eine imperiale Einbindung in sich trug.

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TITLE

THE PRINCIPLE OF SUBSIDIARITY. BACK TO THE ROOTS

When trying to find the roots of the principle of subsidiarity we shall not search those in the documents of the European Communities, as this principle may be hundreds of years old depending on the accepted origin.

Among the theories of origin the most widespread is that the subsidiarity appeared together with the spread of Christian-socialism in the 19th century. The document was the encyclical *Rerum Novarum* issued by Pope Leo XIII in 1891. Subsidiarity as an organic part of the Christian society model appeared in the encyclicals *Quadragesimo Anno* and *Non Abbiamo Bisogno* of Pope Pius XI issued in 1930. Pope Pius XI tried to find means of self protection in the principle of subsidiarity against the monopolized power concentration of the appearance of the totalitarian threats of Mussolini, Hitler or Franco. The principle provides responsible freedom and certain autonomy to the persons, smaller or bigger communities. The pope supported a social order that could have avoided the annulation of the function of the local organizations. As Pope Pius XI said: '…the most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community; so it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser or subordinate organizations can do.' This principle is also affirmed by his successor, Pope Pius XII in the encyclical *Summi Pontificatus*. Pope John XXIII revived the principle of subsidiarity in the early 1960's by his encyclical, *Pacem in Terris* (issued in 1963). He declared that the base theory of the organization of the state is subsidiarity itself.

Another source of the subsidiarity principle may be the German *Grundgesetz* (Ground law), in which the principle occurs in the rules dividing the competences among the federal (Bund) and the territorial (Land) levels. The development of the subsidiarity principle appears in the German development during the years following the Second World War. Subsidiarity before the war was only a category in social philosophy, after the war it evolved to a legal idea. The principle, that earlier concerned the individual, group and society, was extended to the authorities and political institutions. By the appearance of the federalist systems, the legalization of the subsidiarity principle occurs, especially in the German system. According to the first summary on subsidiarity of Isensee, centralization shall be decreased to the smallest possible. As the German definition subsidiarity means, that a higher-level governmental organization may only acquire competence if the lower-level organization cannot or cannot adequately fulfil that. This idea appears in the German federal constitution.

The above were those circumstances among which the subsidiarity showed its face first in the Communities, in an embryonic form, in 1951, in the 5th Article of the Treaty establishing the European Coal and Steel Community.

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TITLE

THE ARGUMENT OF 'CUSTOM' BEFORE ENGLISH AND FRENCH JUDGES. CLAIMING LOCAL RIGHTS ON ANOTHER'S LAND

In the field of private law, European harmonization's prospects raise many controversial issues and amongst them, the fundamental difference between common law and civil law systems. Their distinctive approaches on most of private law notions go way back to specific historical developments. Our research addresses the question of local quasi-property rights on another's piece of land. This concerns mainly right of access, practice of sports and pastimes, estover and pasture. When litigations arise, those rights are generally claimed on behalf of a local group, as a community. The paper will compare contemporary judicial decisions in France and in England, from the beginning of the 19th century until more recent cases. We will focus on the intervention of 'custom' as an argument, either by a party as a ground for the right claimed or in the discourse of the judge himself.

In England, common law seems to have superseded local customs centuries ago and in France, the Napoleonian civil code has replaced all previous laws, including at first, custom. However, both systems still allow custom – or similar notions such as tradition, local practice, immemorial usage, etc. – to play a role in the establishment of a right. In the case of local land rights, custom can intervene as a fully developed doctrine used by the judiciary – the local customary law 'test', elaborated at the beginning of the 17th century in the Tanistry Case – or as a punctual justification, allowed by the legislative – such as the indications given by the French civil code as to the possibility for local usage to move away from common provisions.

The first key question of the paper will be the tension between local practices and national legal systems. This will be the starting point for a comparison of English and French ways to handle customary local variations and ensure their compatibility with the pre-eminent law and its unity achieved through time, embodied by the common law and the civil code. The paper will also underline the difference between French and English law regarding private and public ownership. While that distinction is not relevant in England, in France, many local rights are exercised on lands that are local authority's property and as a result, subject to their regulation. Finally, national responses to local rights will highlight the persistent legacy of a traditional concept – custom – in contemporary law.

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TITLE

THE ENIGMA OF CIVIL JUSTICE IN IMPERIAL CHINA: MEDIATORY JUSTICE OR PROCEDURAL FORMALISM? A LEGAL HISTORICAL ENQUIRY AND A COMPARATIVE PERSPECTIVE WITH EUROPE

China historically relied heavily on community-based mediation and an adjudicatory system coloured by strong mediatory traits to handle disputes relating to civil matters. The tradition to resolve disputes through mediation survived the destruction of the empire and remained an important attribute of the civil justice system in contemporary China. The established academic view explained the prominence of mediation as an inevitable consequence of cultural preference. Mediation was seen as the least confrontational form of dispute resolution. It promoted the Confucian ideal of social harmony. Magistracy adjudication frequently took the form of a mediatory process at the expense of procedural formalism. Recent literature questioned this view. Professor Philip Huang argued that the reliance on mediation was overemphasized and that some form of adjudicatory formalism existed.

Existing literature lacked a comprehensive jurisprudential explanation of the historical tension between the mediatory inclination and procedural formalism in dispute resolution. This paper seeks to fill this gap by arguing that civil justice in imperial China was neither a pure form of mediatory justice nor an elaborate form of civil justice based on Weberian formalism and procedural sophistication.

China failed to achieve the kind of procedural formalism seen in Europe because of the absence of an autonomous regime of civil procedure. The relative efficiency in the disposal of disputes by judicial mediation and community-based mediation further entrenched the reliance on mediation. One of the key deficits resulting from the absence of an autonomous system of civil procedure was the lack of efficient judicial case management. Without sophisticated procedures on case management, the magistrate would sometimes be forced to resort to mediatory tools in adjudicating disputes or simply refer the case to a third party for mediation outside the court. Without the safeguard of procedural formalism, disputants were more inclined to have the case settled within the community by mediation rather than incurring the cost and time to go to court.

However, it would be erroneous to conclude that Chinese civil justice was completely informal and unsystematic. While China only experimented with a modern civil code with European origin during the late Qing period, the 'decriminalization' of the law relating to civil matters occurred hundreds of years before. Real efforts were made to establish procedures for handling non-criminal complaints. A 'thin version' of procedural formalism did develop over time. Courts were influenced by social norms but legal rules had been applied with some consistency.

China and Europe have in the past taken very different paths in searching for the suitable institutions and procedures for resolving civil disputes. The European experience had been constructed on the sophistication of the civil law tradition and the entrenchment of individual property rights. It was on this basis that an independent regime of procedural laws emerged in Europe. China for most part of her imperial history lacked an autonomous civil procedural infrastructure to administer civil justice. A comparative perspective with Europe would enhance understanding of China's historical deficit in this area and provide insight on reforming China's civil procedure today.

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TITLE

REANIMATING *SCHULDHAFTUNG* WITH *CESSIO BONORUM* IN ANTWERP AND MECHELEN (EARLY SIXTEENTH CENTURY)

Historical examples often make it clear that law is culture rather than a product of circumstances and contexts. In some instances, legislators got completely absorbed with doctrinal ideas without considering what was actually needed in practice. The example of abandonment of estate ('cession of goods') in some cities of the Netherlands of the early 1500's provides an example thereof. Even though the reception of civil law, which in the areas west of the river Scheldt took place from the later 1400's onwards, was all in all advantageous to citizens and merchants, in some respects it was a process of trial and error. Starting from the historical developments surrounding abandonment of estate, a point can be made for a first enthusiastic reception having some cumbersome effects, but which was soon followed by more realistic policies.

In the first years of the 1500's, in the important commercial centres of Antwerp and Mechelen, an older practice of imprisonment for debts (*Schuldhaftung*) was struggling to survive. The latter became increasingly redundant in light of the growing acceptance of civil-law ideas with respect to the relation between debts and estates. In the 1400's, it had been the common rule that properties could be addressed for the payment of debts only if they had explicitly been linked to the debt. The contract of the creditor was thus to state that a movable or immovable could be attached in case the debtor did not honour his obligations. In the first years of the sixteenth century, this view was replaced with a new idea stemming from Roman law, which was to give the creditors the right to attach all belongings of the debtor, even if the latter had not been secured in the contract. This shift of thought had major consequences, of which only one will be analyzed in the paper.

During the fifteenth century, incarceration of debtors had been a means to obtain abandonment of an estate. If creditors lacked securities, they could lock up their debtor in order to make him yield his assets, after which a public sale was organized for their benefit. Such a transfer of assets was required so as to be freed from prison, if the debt remained unpaid. However, when in the early sixteenth century creditors could attach any belonging of their debtor, the practice of imprisonment lost most of its relevance. Imprisonment could still serve to put pressure on friends and relatives of the unfortunate, but this was only rarely practiced. Third-party attachments became common, since they proved more efficient and less costly than imprisonment.

However, in spite of all this, the Antwerp and Mechelen legislators clung onto their traditions and they filled in the older practice of *Schuldhaftung* with civil-law doctrine regarding *cessio bonorum*. This institution of Roman law allowed a debtor to prevent incarceration and other executive measures, or – according to the late-medieval interpretation – provided him with the possibility to be liberated from imprisonment, on the condition that he abandoned his estate. Even this latter medieval conception of 'cession of goods' was useless, but that did not prevent the Antwerp and Mechelen authorities to hang onto it. The obsoleteness of 'cession of goods' was ultimately acknowledged with a 1536 royal law, which – following a French example – transformed cession of goods into a collective procedure of liquidation, to be started on the initiative of the debtor.

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TITLE

INTERNATIONAL LEGAL DISCOURSE BETWEEN DISINTEGRATION AND INTEGRATION. THE CASE OF THE PEACEFUL SUCCESSION STRUGGLES, 1713-1739

Early modern European international relations (1450-1815) appear in contemporary manuals as a ceaseless succession of bloodshed and competing sovereign claims. Likewise, the development of international law is assumed to have known a qualitative boost at the end of the nineteenth century, when law turns into a 'gentle civilizer of nations' (Koskenniemi). Law disciplines the sovereign state by imposing order through universal principles, applicable to other entities (individuals/international organizations) as well.

However, both narratives are inconsistent with international law's prime objective: *international order*, which can also be achieved through legal arguments in a non-institutionalized and tempered anarchical environment. This is the case during '*les trente heureuses*'(Le Roy Ladurie), the period running from the War of the Spanish Succession (1702-1714) to the War of the Austrian Succession (1740-1748).

With the break-up of medieval conceptual European unity at the Westphalia Treaties (1648), a new discourse accommodating all partners had to be found. It took the '*Société des Princes*' (Bély) until the 1713 Peace of Utrecht to develop a horizontal, instead of a vertical consensus. The political impracticability of the latter structure had been proven, since it supposed a sufficiently strong and buttressing hegemony, which neither the Emperor, nor the Spanish or French King could incarnate. Consequently, Imperial (leaning on Roman and Imperial feudal law), Spanish (based on Castilian public Law) and French (rooted in unwritten domestic fundamental laws) discourse was unacceptable as a *common vector*.

Within the practical community of early eighteenth-century diplomats, horizontal discourse, or the conceptual language of treaty law, became predominant (Lesaffer). An eminent example of this were the *successions of extinguished sovereign houses* (Steiger). As one of the most fundamental political issues, the designation of the prince's successor was determined by internal constitutionalized norms.

However, this proved to be a political fiction, because of the combination of the European state system's interdependence and power inequalities. Succession laws and even domestic private law were used by big powers as a pretext to invade whenever they felt pleased to (War of Devolution/Nine Years War). Internationally unregulated successions stimulated instinctive instability and were thus a liability to European order.

Through the process of negotiation of the so-called *partition treaties* on the Spanish Succession (1668-1700 – Bérenger/Rule), an early consensus on this last point materialized amongst the big powers France, Britain-Holland and the Empire. The War of the Spanish Succession sealed the fate of pan-European war, the alternative to regulation (Dhondt).

In this conference paper, I propose to present how the 'peace system' (Chaussinand-Nogaret) of abbot Dubois (1656-1723) and Earl Stanhope (1673-1721) dealt with succession questions in the *post-Utrecht period*, and how this practice evolved during the 1720's and 1730's, under Prime Ministers Cardinal Fleury (1653-1743) and Robert Walpole (1676-1745) (Vaucher/Black). Generally speaking,

a Franco-British tandem acted as the motor of European affairs, mounting multilateral interventions against transgressors such as Spanish King Philip V in his 1717-1718 invasion of Italy, pushing bilateral issues up to a higher level of resolution, the political agora of European-wide congresses.

These congresses, held at Cambrai (1722/1724-1725) and Soissons (1728-1729) have left ample dispatches by the plenipotentiaries, in which the above cited rhetorical and conceptual oppositions come into light. It is my aim to *reinterpret the latter primary sources* (State Papers, Kew – Archives Diplomatiques, Paris), which I currently examine in my doctoral dissertation, through the rich explicatory grid of international law.

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TITLE

ACCIDENTAL HOMICIDE IN CANON LAW. THE ROLE OF THE INJURED PARTY

The medieval *ius commune* of Roman and canon law was an important European legal tradition which had great influence on later development of the law of delicts. Liability in medieval canon law, just as in medieval Roman law, was based on *culpa*. However, the notion of *culpa* in canon law slightly differed from the one in medieval Roman law, because it was also determined by the theological notion of sin. At the end of the twelfth and the beginning of the thirteenth century, the canonists developed a notion of *culpa* that was not exactly the same as 'acting without due care' in Roman law. According to the canonists, *culpa* can either exist in acting in contravention of legal provisions or in doing something permissible, but without observing the diligence due.

In medieval Roman scholarship, contributory negligence of the injured seemed to be regarded as a reproachable misconduct that could be sanctioned by a refusal of the claim for compensation. If two parties acted negligently to some extent, sometimes a compensation for their negligence was granted. The idea emerged that *culpa* of the wrongdoer could be compensated by *culpa* of the injured party. This idea was adopted by the author of the *Summa* '*Animal est substantia*', ad D.50 c.50, at least for the case of the barber in D. 9.2.11pr. However, the way in which canonists seem to have dealt with the problem of 'contributory negligence' seems to be different than in medieval Roman scholarship. In cases where a cleric had accidentally killed another and where the question was whether the former could still be promoted and/or exercise his function, this principle of compensation did not apply. In these cases, if the wrongdoer and the injured party both acted culpably, the negligence of the wrongdoer was not compensated, even if the culpability of the first was less serious. This presentation contains a discussion of this case as well as of two other interesting cases (X 5.12.8 & X 5.12.9).

Despite the fact that these cases from a modern perspective could be considered as cases of contributory negligence, the canonists did not consider them that way and therefore did not apply the *culpae compensatio* doctrine. They only and directly aimed at the question of negligence of the wrongdoer (the cleric). Evidently, the question of negligence of the cleric was the only relevant issue in the trial before the Pope; more specifically the question whether the cleric could still be promoted and/or can exercise his function, all the relevant circumstances taken into account.

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TITLE

THE JACOBEAN 'UNION OF THE LAWS', 1603-1610

My research centres on King James VI and I's (1566-1625) attempt to promote a 'union of the laws' between his two kingdoms of England and Scotland after his 1603 accession to the English throne. The importance of debates over union, especially in King James VI and I's first English parliament (1604-1610), has been neglected by previous historians. My work attempts to rectify this gap within the historiography by building upon a growing literature on nation identity and the creation of 'Britishness' within the early modern period. Further attention is given to the complex interaction between history and law in the debate over legal union, and my research addresses the uses of British, Roman, and European history on both sides of this debate by English and Scottish historical actors.

I argue that King James VI and I, Sir Francis Bacon (1561-1626), English civil lawyers, Scottish advocates, and other proponents of legal union borrowed from continental legal structures in proposing ways to reconcile and bring into conformity the very different legal traditions of these two realms. As such, my research suggests that contrary to most scholarly interpretations of this complex issue, most proponents of legal union (1) hoped to preserve local or 'municipal' customs of both England and Scotland and (2) did not desire either the extension of the English common law over Scotland or the creation of a new unified body of law to be used by both nations.

In addition, my work discusses how this proposed Jacobean union of the laws failed between the years of 1603 and 1608, in the face of resistance of the English and Scottish political nations to legal change. In particular, I offer a new interpretation of the puzzling events of James VI and I's first English parliament (1604-1610), in which Sir Edwin Sandys (1561-1629), who had been one of the most vociferous opponents of legal union between England and Scotland, put forward a radical proposal for 'perfect' legal union between both nations.

The debate surrounding the proposed Jacobean 'union of the laws' represented one of the most important discussions of legal union within early modern Europe, and it offers a number of important lessons for analyzing ongoing efforts at European legal integration. The complex issues surrounding harmonization of the Scottish 'civil law' tradition with the English 'common law' tradition provide insights into contemporary debates about the United Kingdom's legal place within the European community.

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THE EX-YUGOSLAV COUNTRIES IN THEIR WAYS TO THE EU. FROM INTEGRATION TO DISINTEGRATION AND BACKWARDS

The history of European international relations is determined by processes of integrations, disintegrations, divisions, armed conflicts, etc., caused by various ideological, religious and other reasons. The experience from the ex-Yugoslav territory during 1990's definitely shows a very significant example of disintegration of one very complex state. The authors indicate basic disintegration movements in the process of ex-Yugoslav dissolution, noted up the international law point of view. Furthermore, they emphasize the perspective of legal science, which recognizes the state as a dominant subject of international law (but not the only one), looking up the aspect of its constituting and the recognition in the international community.

Inevitable fact considering ex-Yugoslavia was the following armed conflict during its reintegration process in the early 1990's. Moreover, in that time the world was shocked by the atrocities at the European territory. Further, those atrocities were the trigger for the very significant and repressive legal action of the international community – the establishment of the International Tribunal for the former Yugoslavia (ICTY), as a specific measure of the Security Council according to Chapter VII of the UN Charter.

The question of (re)integration and/or disintegration issues considering ex-Yugoslav countries, in relation to the newest political aspirations, is very much understandable. But, authors are asking, is that particular reunion the greater irony for the war victims and their loved ones, as well?

According to the main aims of the ex-Yugoslav republics (now all recognized states) after their independence proclamations, the future of this part of South-east Europe will be reaffirmed by their possible and probable reintegration. Their efforts to some sort of new reintegration are closely connected with their endeavours to enter the EU or NATO.

Although it could seem ironic (or even tragic from the war victims point of view), authors perceive that such reintegration is radically different in its fundament (with respect to the totalitarian regime of ex-Yugoslavia – characterized by the elements of planned economy, significant substantial suppression of human rights and democratic standards). The ex-Yugoslav countries have a different perspective of the state determination in the new integration frame to which they all gravitate. Nevertheless, unlike the state, comprehend in formal-legal sense of sovereignty, without many factual settings of sovereignty in ex-Yugoslavia, and despite the liberalistic concept of state, the new perceptions are very affirmative to the concept of state, in its role of being the main subject of international law.

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TITLE

BESEITIGUNG DER DOPPELBESTEUERUNG IN WIRTSCHAFTSINTEGRATIONEN IM 19. JAHRHUNDERT UND HEUTE

Obwohl direkte Steuern weiterhin in Kompetenzbereich der Mitgliedstaaten der EU fallen, beschäftigt sich das EuGH oft mit steuerrechtlichen Fragestellungen, von denen viele Rechtssachen die Doppelbesteuerung als Streitgegenstand haben: Arbeitnehmer deren Wohnsitz und Arbeitgeber sich nicht im gleichen Land sind, grenzüberschreitend agierende Unternehmen, Besteuerung von Zinsen und Dividenden.

Ziel der Präsentation soll sein, die Anfänge des Doppelbesteuerungsproblems zu untersuchen und zwar am Beispiel von einheitlichen Wirtschaftsräumen, in denen mehrere Steuerhoheiten existierten. Nicht nur die Probleme, sondern auch die Lösungsansätze des Problems sollen untersucht werden: welche Mittel stehen zu Verfügung diskriminierende Steuer abzuwenden und die Finanzhoheiten zu koordinieren. Obwohl meine Forschungen ins 19. Jahrhundert zurückführen – da erst dann begann der moderne Steuerstaat und das moderne Steuersystem sich auszubilden – sind die Probleme genau gleich die oben genannten Herausforderungen in der europäischen Integration: freizügige Arbeitnehmer, Dividendenbesteuerung, grenzüberschreitende Unternehmen – mit Betriebsstätten in mehreren Staaten.

Meine Beispiele für einheitliche Wirtschaftsräume – oder wirtschaftliche Integrationen – die aber mehrere Souveräne als Steuerschuldner hatten, sind die Monarchie Österreich-Ungarn, der Norddeutsche Bund, später Deutsches Reich und die Schweiz. Obwohl die Staatsformen unterschiedlich waren, sind die Probleme der Doppelbesteuerung ähnlich: alle Staaten hatten mehrere Finanzhoheiten. Österreich-Ungarn hatte nur zwei, das Deutsche Reich und die Schweiz weit mehr, bildeten aber jeweils einen einheitlichen Wirtschaftsraum: Zollunion, freizügige Arbeitnehmer, viele in mehreren Gliedstaaten tätige Firmen und Unternehmen.

Die Doppelbesteuerung wurde als Problem erkannt – lange Zeit war nicht einmal unstrittig, dass es überhaupt ein Problem sei. Durch die verstärkte Mobilität von Kapital und Arbeitnehmer wurde das Phänomen sichtbar und betraf immer mehr natürliche und juristische Personen. Es wurde sowohl in der Wissenschaft, als auch in der Politik über mögliche Lösungen nachgedacht.

In meinem Referat soll gezeigt werden, wie die oben genannten drei Staaten auf diese Herausforderung reagierten und welche Wege der Lösung sich ergaben bzw. erarbeitet wurden:
1. Die Österreichisch-Ungarische Monarchie bestand nur aus zwei Gliedstaaten, von denen Ungarn ökonomisch viel weniger entwickelt war. So waren von der möglichen Doppelbesteuerung nur Firmen bedroht, die in beiden Landesteilen agierten. Als Lösung wurden Abkommen der zwei Finanzminister angewandt – die können als Vorgänger der heutigen Doppelbesteuerungsabkommen betrachtet werden.
2. Das Deutsche Reich bestand aus vielen unterschiedlich großen Gliedstaaten, die die Gesetzgebungshoheit für die direkten Steuern hatten. Um die steuerlichen Maßnahmen zu koordinieren, wurde jedoch ein Doppelbesteuerungsgesetz erarbeitet, noch als Rechtsakt des Deutschen Bundes. Es war also ein einheitliches Regelwerk, die sich nicht auf Bilaterität beruht.
3. Das dritte und für den heutigen Forscher am interessantesten Weg wählte die Schweiz, wo wegen fehlender politischer Einstimmigkeit keine gesetzliche Regelung zustande kam – stattdessen wurden in der Wissenschaft viele Lösungsansätze erarbeitet und ein umfangreiches Rechtsprechung der Höchstgerichte schuf ein Praxis, was tragfähige Regeln brachte, langfristig aber ungenügend war.

In der Präsentation sollten die drei oben genannten Wegen untersucht werden, auch in Hinblick der heutigen Anwendbarkeit in der größten wirtschaftlichen Integration unserer Zeit, die Europäische Union.

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TITLE

THE REVIVAL OF ROMANISTIC SCHOLARSHIP BETWEEN THE XIX AND XX CENTURY AS 'CENTRALIZING FORCE' IN EUROPEAN LEGAL HISTORY: THE MASTERPIECES OF GERMAN PANDECTIST LITERATURE REVIZED BY ITALIAN TRANSLATORS

The success of the German Pandectist School, as a rejuvenating approach to Roman Law in order to construct a system of contemporary Private Law suitable for the particular needs of the nineteenth-century society, and especially its large influence far beyond the boundaries of Germany, can be considered as one of the 'centralizing forces' known by European legal history.

This particular connotation becomes even more significant when considering the contemporary development of the national codifications as opposite 'decentralizing force', which led to an increasing gap between the different legislations issued by European countries, therefore breaking the centuries-old tradition of continuity represented by the Roman-Canon *ius commune*.

The unexpected and remarkable revival of Romanistic scholarship, during and in spite of the development of the codifications, is interpreted by the contemporary historians in terms of 'Third Reinassance of Roman Law', after the *usus antiquus* and the *usus modernus pandectarum*.

Within Europe the influence of the German Pandectist School was particularly strong on the Italian legal science, especially after the promulgation of the first Italian Civil Code in 1865, mostly influenced by the French model of *Code Napoléon*. The founding fathers of Italian Private Law, who were at the same time the most influential Romanistic scholars and had been trained in Germany by the Pandectist School, celebrated the value of Pandect-science as one of the best sources of principles to interpret the new Civil Code.

The development of Italian translations, increasingly turning to original works especially due to plenty of notes provided by the translators, was particularly encouraged by Italian Romanistic scholars after the national unification as emblematic part of a general project for the diffusion of German legal culture.

With my presentation I intend to examine the connections between German and Italian scholarships, as leading authorities of Roman law between the XIX and XX century, especially through the analysis of Italian translations of German Pandectist literature, therefore supporting the study of legal history with a comparative approach, in order to appreciate similarities and differences among these models.

I will focus above all on the translation of *Lehrbuch des Pandektenrechts* by Bernhard Windscheid achieved by Carlo Fadda and Paolo Emilio Bensa, who widely contributed to the development of a 'General Part' of Italian Private Law, and I will also compare their working procedure to the one chosen by Filippo Serafini to translate *Lehrbuch der Pandekten* by Carl Ludwig Arndts. Thereby it will be possible to examine which influence German Pandectist literature had on the way of conceiving the role of Italian jurist for then, especially analyzing the notes in the margin of the translation provided by Fadda and Bensa on the matter of interpretation of Italian law and the relative tasks of the interpreter.

AUTHOR
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TITLE

BAD PRECEDENCE FOR THE FUTURE: ABOLISHING LEGAL RESPONSE TO HISTORICAL WAR CRIMES BY SUPRANATIONAL LAW

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union. Its purpose is clearly stated in the Preamble, which states that 'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values,' which is to create supranational law for criminal proceedings. It also proclaims that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.' This might sound just if read in any Criminal Code, where double jeopardy rules protect the individual from abuse use of legal proceedings for the same crime, but in context with the complex judicial construct we have in the European Union, its effects of absolution for war criminals leaves a troubling doubt about the feasibility of claims made in the EU law. I argue that it not only created a new legal loophole for Nazi War Criminals who, for lack of then existing international law, must still be tried by national tribunals. But more importantly for the value we assign to human rights, war crimes proceedings and participation in judicial procedures, it also trivializes historical attempts to recognize victimization by the Nazi regime, and the current attempts of the International Criminal Court in The Hague to strengthen victim's rights and their participation in war crimes proceedings as an alternative restorative approach for the crimes committed onto them.

AUTHOR
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TITLE

UNJUSTIFIED ENRICHMENT: TRANSFORMATIONS OF A CONCEPT IN EUROPEAN LEGAL TRADITIONS

The prohibition of unjustified enrichment, a stoic philosophical principle, has found its expression in Roman law in a system of diverse *condictiones sine causa*. Regarding their number and form, these legal remedies assumed their final shape in the classical period of Roman law, in the first two centuries AD. They were considered to be the procedural law remedies, in a sense that every particular *condictio* was a procedural application to the circumstances at hand. Later on, in the post-classical period, Justinian accepted them in his codification. However, as all the most important practical situations were covered by the classical system of *condictiones*, in the *Corpus Iuris Civilis* individual *condictiones* were considered to be the descriptions of a definite number of situations in which restitution on the grounds of enrichment without cause was granted. Therefore, they came to be regarded not as a part of the procedural law, but as a part of the substantive law instead.

This distinction bears significance when we consider the reception of the Roman law of unjustified enrichment in the Middle Ages and later, in the first civil codes in Europe. In some legal systems a general prohibition of unjustified enrichment was accepted, with few examples as to the most common instances in which an unjustified enrichment occurs, reflecting Justinian's system of *condictiones* (for example in German law). In others, only parts of the Roman system were accepted (for example in French law). On the contrary, in English law legal remedies for unjustified enrichment did not stem from the Roman law at all, although in their final shape they did resemble their continental law counterparts. Interesting development in this legal area is that the Roman law principle of prohibition of unjustified enrichment serves as a possible basis for a future general prohibition of unjust enrichment in England.

Condictiones sine causa achieved technical legal perfection in the Roman law, and then served as a basis for a number of European legal systems. The principle behind them, prohibition of unjustified enrichment, found its way from the Roman stoic philosophy through the reception of the Roman law in the Middle Ages to the contemporary law, all the way influencing their development. Finally, that principle not only serves as a means of establishing national general prohibition of unjustified enrichment, but it also represents the least common denominator of the European legal traditions of fundamentally different origins.

It is purpose of this paper to address these crucial points in the historical development of the unjustified enrichment law; substantive and procedural character of the remedy, approach to the problem with a general principle or with particular solutions for the most common instances, and finally the extent to which Roman law sources can be of importance in the process of converging of the European law systems.

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TITLE

'*OMNIA ESSE DEBENT EADEM, QUAE FUERUNT, CUM PROMITTERE, UT PROMITTENTIS FIDEM TENEAS.*' (SEN., DE BENEF. IV, 35) – THE ROLE OF CHANGED CIRCUMSTANCES IN HISTORICAL PERSPECTIVE

The situation where the change of circumstances after the conclusion of contract has affected the obligation of one contracting party so significantly that it makes it unjust to enforce its execution and presents a reason for modification or rescission of a contract has been generally covered in continental legal literature by the concept of *clausula rebus sic stantibus*. Although it was not known in Roman law, it has been created during the Middle Ages with reliance on Roman philosophical and legal sources. According to these, two, although not strictly separated, general lines of development can be observed, one in Canon law and one in Civil law. Canon law built on the philosophical and theological works, in first place the writings of Seneca and St. Augustine, while the Civil law doctrine developed on the basis of glosses on D. 12,4,8 (Neratius 2 membr.) and D. 46,3,38 (Africanus 7 quaest.).

The focus in this paper is on Seneca's text *De Beneficiis*, *lib*. IV, 34-40, where the idea that promises are to be kept, unless there is a grave change of circumstances, was most profoundly elaborated. The analysis deals with the elements defining the intervening event and the difference between supervening impossibility and difficulty to fulfil promises. Also, the connections of Seneca's work with similar ideas of Cicero and St. Augustine are more closely examined, while the additional effort is put into investigation of its possible relation to legal fragments. Finally, Roman texts are put into the context of Medieval legal and philosophical literature on the topic where Seneca's explanation, '*Subest, inquam, tacita exceptio, si potero, si debebo, si haec ita erunt.*' (IV, 39), played a prominent role, through the commentary of St. Thomas Aquinas, in the construction of *clausula* as implied condition.

The development of the doctrine of *clausula rebus sic stantibus* during the Middle Ages represents an example of integrational processes pertinent to *ius commune*. However, it differentiates from the others as it emerged despite the lack of substantial basis in the *Corpus Iuris Civilis*. The absence of a clearly established rule in Roman law, which created a challenge for Medieval authors in its justification and elaboration, was overcome with the help of surviving non-legal texts. Thus, philosophical, especially Seneca's *De Beneficiis*, and theological works significantly aided to the affirmation of the struggling legal idea that is today an important part of both private and public law.

AUTHOR
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TITLE

MEDICAL TREATMENT EXPENSES IN ROMAN LAW

This paper explores the borders of the two torts of Roman law: *iniuria* and *damnum iniuria datum* through linguistic, systemic and historical interpretation of the fragments D.9.2.5.3, D.9.2.7.pr, D.19.2.13.4, D.9.2.27.17 and Coll. 2.4.1 and is also supported by interpolationistic researches.

The author tries to answer the three principle questions:

1. Were the medical expenses included in the term *damnum iniuria datum* before the Justinian's law reform? On one hand, comparison of the texts D.9.2.27.17 and Coll. 2.4.1, supported by the interpolationistic findings, suggests that original Ulpian's opinion was that this type of loss could not be *damnum* in the sense of the *Lex Aquilia*. However, further analysis of D.9.2.5.3, on the other hand, offers a negative answer.

2. What was the *actio* that could be used in case of such damages? According to Ulpian's quotations of Julian in D.9.2.5.3, Julian at one point denies the use of *actio iniuriarum* due to lack of *animus iniuriandi*. However, Julian remains silent on *actio legis Aquiliae*. The Aquilian action is mentioned in the interpolated Ulpian's sentence. Therefore, it can be concluded that the sought action is *actio iniuriarum*.

3. What lead the compilers to make such a reform? First reason could be the systematization of two types of damages in two different torts. Julians explanation in D.9.2.5.3 offers the second reason. Namely, it was an attempt to extend the responsibility to all cases of damage caused by negligence, since the condition of application of *actio iniuriarum* was the *animus*.

AUTHOR
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TITLE

INTEGRATION AND INTERNATIONAL LAW: THE EFFECT OF BLUNTSCHLI'S 'MODERNES VÖLKERRECHT' ON FORMING THE DAE HAN EMPIRE

The question of integration or disintegration of European legal traditions is not limited to the European continent. From a more global perspective on legal history, one can find that European legal traditions had also integrative and disintegrative effects in a non-European context. In the 19th century, East Asian countries, such as Qing China, Meiji Japan and Choson Korea, encountered the international law of the Christian West – since the Peace of Westphalia and developed from the law of nations also a European legal tradition. These not yet 'civilized' nations studied international law not only by signing 'unequal' treaties with the Great powers, but also through translations of a great many law books on international law by inter alia Henry Wheaton, Karl Martens and Johann Caspar Bluntschli. By doing so, the European/Western legal tradition of international law had a significant impact on the changes of political, social, intellectual and legal thoughts in those respective countries.

Bearing that in mind and with respect to the core questions of this Forum, I will delineate two aspects of integrative forces in my paper:

1. Autochthonic strategy of inclusion and exclusion:
The newly introduced international law conflicted with the traditional sino-centristic system of 'Serving the Greatism' (事大主義) and subsequently let to its disintegration. Through a comparative approach, I will contrast this integrative political system of suzerainty (宗主權) and tributary states (屬國) with the Western legal tradition of international law as a concept of sovereign states acting as equals. In this context, I will also answer the questions to the difficulties of implementing new terms, ideas and concepts of international law in a totally different political, social and historical environment.

2. Imported strategy of integration:
Once the old tributary system was abolished, how did international law affect the struggle of 'freed' nations for independence, sovereignty and the entry to the family of nations? To answer this question, I will analyze how the Korean Court implemented European constitutional concepts, which were transmitted in the Chinese translation of Bluntschli's 'Völkerrecht', and established on that ground the Dae Han Empire and its constitution. It is questionable if the Korean ministers fully comprehended the new intellectual category of international law or if they intentionally utilized a distorted, own notion of international law.

AUTHOR
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TITLE

THE IDEA OF POPULAR SOVEREIGNTY AND THE DIFFERENT EUROPEAN TRADITIONS OF DIRECT DEMOCRACY

Popular sovereignty – a political idea of the enlightenment which came to its first real breakthrough in Europe in times of the French Bourgeois Revolution and – after a temporary period of the restoration – has been continuing its victorious career in the practice of modern constitution-making. Almost every democratic political system considers it a fundamental principle. In its classical, radical constitutional formulation – as in the French Montagnard Constitution of 1793 – it meant a direct participation of the people in constitution- and law-making processes. Accordingly, in modern times, not only the idea of popular sovereignty itself, but the institutions of direct democracy were also widely adapted in different European countries – although the former did spread at a slower pace.

Thus, the idea of popular sovereignty has played an integrating role in European constitutional history. However, when we look behind the common principle and examine the forms and methods of the direct exercise of the people's power, the picture becomes multi-coloured. Institutions of direct democracy – first of all: referendums and popular initiatives – are traceable to the common idea, but they function very differently in various European political systems.

In *France*, the original democratic institutions of the revolution paved the way for the subsequent Napoleonic era: the referendum was used to legitimize the authoritarian regime of Bonaparte and – some decades later – the regime of Louis Napoleon. This practice discredited the institution of referendum for more than seventy years. After the Second World War however a specific kind of direct democracy – in fact: plebiscitary democracy – saw its coming of age. Its main characteristic is the direct communication between the head of state and the people. The president defines the subject and orders the referendum; the ballot serves for confirming the president and his policies and for legitimizing a decision already taken.

In *Switzerland*, the idea of popular sovereignty led to an essentially different tradition of direct democracy. After two revolutionary periods in the 1830ies and 1860ies, both cantons and the federation adopted 'bottom up' institutions: the initiative in this case derives from a part of the electorate and not from a state organ. 100 000 electors have the right to launch an initiative to amend the constitution, 50 000 electors can propose a referendum on a bill or international treaty passed by the parliament; revisions of the constitution, specific international treaties and laws are subject to obligatory referendums. This set of instruments resulted in a 'negotiated democracy', where not only parliamentary opposing forces but also extra-parliamentary interest groups are drawn into the legislation process in order to avoid a possible defeat of decisions made by the majority by means of a subsequent referendum.

In *Denmark*, since the constitutional amendment of 1953, one third of the parliamentary deputies can demand that a bill passed by the parliament be submitted to referendum for either approval or rejection. Therefore, this so-called 'rejective referendum' is a means of protection of the parliamentary minority against the majority. Voters do not have the right to initiate referendums. In consequence the principle of popular sovereignty is considered to have only a limited manifestation in this fundamentally representative system.

In *Italy*, the most typical institution of the direct exercise of the popular sovereignty is the so-called 'abrogative referendum'. Since 1970, 500 000 voters (or five regional councils) can request the total or partial annulment of a law already in force. This instrument however not only has a veto function, but can – indirectly – intervene in the political agenda setting and promote amendments of laws as well.

The historical development of these main types of European direct democracies show that the same fundamental principle can lead to substantially divergent modes of operation in different political cultures. The paper shall further deal with the question to what extent recommendations and regulations of international organizations – Venice Commission: Code of Good Practice of Referendums; European Union: European popular initiative – can have an integrating effect on different constitutional and political traditions.

AUTHOR
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TITLE

SECOND-RATE CITIZENS. FREEDMAN STATUS AND THE *CONSTITUTIO ANTONINIANA*

Few events in legal history have had as many consequences as an imperial edict issued on July 11th of the year 212 A.D., commonly known as the *constitutio Antoniniana*. All free inhabitants of the Roman empire (except the so-called *dediticii*) acquired citizenship overnight. With such citizenship came the rule of Roman law, so that at least in theory a single law prevailed throughout the empire. Considering the number of people affected, not to mention the replacement of a multitude of indigenous legal orders by a single system of Roman law, the edict must have caused momentous change. Nominally, it integrated all the peoples of the empire into a centralized legal system, culminating in the institution of appeal to the emperor. But whether this process of integration led to a corresponding disintegration of indigenous legal institutions remains a topic of much debate.

This paper deals with the effects of the extension of the Roman law of slavery through the *constitutio Antoniniana*. Many parts of this area of law were particular to the Romans, as a people, and were not shared by their neighbours. Slave law belonged more to the *ius proprium* than to the *ius gentium*. But since slaves had great value throughout the Mediterranean, the – sometimes abstruse – inner workings of Roman law must have been of importance to the masters of these slaves, who suddenly found themselves Roman citizens. As a preliminary, two developments are examined here: 1) The possibility of extending a *peculium*, an earmarked fund, to slaves and its effect on manumissions; 2) The effects of the 5% tax on Roman manumissions, which Caracalla raised to 10% and which may have been one of the motives for the *constitutio Antoniniana* (or so Cassius Dio claims).

The greater part of the paper, however, deals with the status of slaves who were freed without adhering to the strict Roman rules on manumission. According to legislation from the Augustine era, such freedmen (Junian Latins) remained second-rate citizens at best, incapable, for instance, of making a will. This institution was unknown in the Hellenistic world. The question, then, is how a typically Roman institution such as the Junian Latinate was accommodated in other parts of the empire; and this question of integration becomes all the more pressing with the realization that the *constitutio Antoniniana* raised all existing – that is to say: Roman – Junian Latins to the status of full citizenship, thereby effectively abolishing the distinction for all freedmen manumitted *before* the edict.

AUTHOR
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TITLE

STRICT LIABILITY. AN INTEGRATIVE CONCEPT AND ITS DISINTEGRATIVE APPLICATIONS

Strict liability is a very important concept in the European legal tradition. Its simple and clear definition can be found in the economic theory of law: strict liability is a legal rule which forces the injurer to compensate the total losses of the victim irrespective of the behaviour of the injurer. In my presentation I would like to focus on the non fault liability cases in Roman law and their relation to modern strict liability, demonstrating their significance to the main theme of the XVIIth European Forum of Young Legal Historians.

It seems that on a dogmatic theory level strict liability is a strong factor integrating different legal systems in Europe. On the other hand an overview of regulations introducing strict liability shows very significant divergences in European national legislations.

Roman law applied strict liability rules in many situations. The most common justification was the need to protect members of the community against specific dangers inherent to determined commercial activities. For example entrepreneurs making business out of land or overseas transport where strictly liable for the goods entrusted to them by their clients. Private tax collectors where held liable for all actions of their personnel, especially for common cases of fraud or theft committed in course of their regular duties. Roman jurists where also sensible to the difficulties of proving fault in some circumstances and therefore stressed the necessity of strict liability rules in those cases.

The Roman model of non fault liability has many common characteristics with the modern concept of strict liability. Contemporary legal systems respond with strict liability rules when an object or activity is the source of an objective danger. The actual range of strict liability regulations (which is significantly increasing) and the main doctrinal justifications of it are equivalent in various European countries.

Nonetheless important differences arise in details, such as the possibility of applying strict liability laws analogously, the amount of compensation available or possible extend of defences (i.e. *Act of God* or *force majeure*). We may conclude that the idea of strict liability integrates European legal science while disintegrating European legal systems.

AUTHOR
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TITLE

REGULATING THE GAME: GAMBLING AND PLAYING IN SWEDEN FROM A EUROPEAN PERSPECTIVE 1250-1800

In Sweden – as in other European regions – board and card games, dicing, betting and gambling were popular pastimes. Nevertheless, gaming was no innocent distraction. Indeed, there were many reasons to monitor and control various games of fortune. They could be addictive, causing people to neglect their civic duties and to waste both valuable time and money on them. This was a moral and an economic problem for the community. Gambling and disputes arising from it caused disciplinary problems, and the ensuing fights threatened peace and public order. Moreover, gambling could cause people to run into heavy debt potentially ruining families and resulting in bankruptcy. In addition, many things presently pertaining to normal economic activities, such as lotteries, insurance, aleatory contracts and speculative investment, were then in learned jurisprudence regarded as 'gambling'.

Hitherto, the Swedish legal history of gaming has not been studied. Yet, the restrictions and bans on games of fortune, dicing and so on form an interesting case study of policing and disciplining the people. Our research will be based on manorial law (*gårdsrätt*), court records, guild regulations, secular law, jurisprudence, statutes, police regulations and theological sources. Namely, there were two main fields of discussing, controlling and restricting gaming: moral theology and the law. These two disciplines were closely interconnected and cannot be understood separately.

In our presentation, we aim at investigating the Swedish legal history of gaming from a European perspective. The possible influence of moral theology, Roman law and early modern *ius commune* jurisprudence on Swedish norms regulating gambling will be analyzed. In various regions in Europe, the number of norms regarding gambling and the regulatory principles varied depending on the moral climate as well as the focus and aims of control. Norms on gambling concentrated especially on various aspects: where and when gaming was forbidden, what games were forbidden, restrictions on bets (amount of money, types of property, etc.), who were forbidden to play, etc. We intend to put Sweden on the comparative European map of gambling policy.

In our PowerPoint-assisted presentation, we will sketch the Swedish social environment and moral climate which formed the breeding ground for concerns about gambling resulting in its regulation, prohibitions and penalizing of gaming excesses in its European context. We will also investigate the role of the *ius proprium* and the *ius commune* as well as foreign legislative trends and fashionable games on Swedish gaming regulations.

AUTHOR
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TITLE

REGENERATING REVOLUTIONARY FRANCE AND ITS SISTER REPUBLICS: TOWARDS A REPUBLICAN TRADITION IN CONSTITUTIONAL LAW?

During the Revolutionary Wars (1792-1802), two systems both with their own ideas on the legitimacy of power were deemed to oppose each other: the republican Europe of popular sovereignty and the Counter-revolutionary Europe of the *droit divin* and aristocracy. The French Revolutionaries attributed a universal character to their political principles and set out to spread them by military means.

From early 1795 onwards, the advance of the French Revolutionary armies caused the creation of allied republics in the Netherlands, Italy, and Switzerland; the so-called 'sister republics.' The notion of sister republics came to the fore against the background of the cosmopolitan spirit of the society of mankind that had to be organized along federalist lines. The constitutional design of the sister republics was essential both to abide by Revolutionary views on legitimate governance and to safeguard their regimes' loyalty to France. The latter was a crucial element of the Revolutionary's redefinition of French foreign and security policies. The sister republics were to form a buffer along France's borders. Because of this mixture of political ideology and military necessity, the sister republics had to be linked to the French Republic by akin political and social institutions. Because of this strategy, France had an interest in the domestic constitutional order of the sister republics. The strategy called in fact for ongoing intervention in the formation, operation, and revision of the sister republics' constitutions embodying complex bonds of mutual dependence between Paris and local Patriots.

Constitutional law in the sister republics came to oscillate between emulating the French constitutional model and holding on to local (republican) traditions in a process of regenerating and reforming existing polities or creating new ones inspired by a common background of Enlightenment thought.

By comparing the sister republics' constitutions, this paper sets out to examine whether the creation of these sister republics and French involvement in the processes of constitution-making resulted in a distinct and cohesive 'republican tradition' of constitutional law within Europe and, if so, what the unique and core features of this tradition were. Thereto, the paper will elaborate on what role the tradition played in international relations at the time.

AUTHOR
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TITLE

LEGAL INTEGRATION OF EUROPE BEFORE 1989? REMARKS ON 'THE SOCIALIST RULE OF LAW' IN THE LAST YEARS OF THE PEOPLE'S REPUBLIC OF POLAND

The unification of Europe started to some extent even before the Round Table Talks in Poland and the fall of the Berlin Wall. During the period of the Cold War it seemed that there were two opposite sides of the conflict not only of the ideological, but also of legal nature. There were two conflicting legal systems – a capitalist and a socialist one. The socialist legal system, despite having its roots in the communist utopia, in the 1980's has started to be more and more similar to its opponent. Curiously enough, these changes were proposed and completed with the use of the prior, socialist terminology. An excellent example is the concept of *the socialist rule of law*, which analysis would be the subject of my speech.

The most important changes in the perception of *the socialist rule of law* can be observed during the, so-called, *period of 16 months of 'Solidarity'* (from the signing of the agreements in August 1980 to the introduction of martial law in December 1981). The concept itself was the subject of controversy – not as much as to the need for the implementation of *the socialist rule of law* (that was out of the question) – but to its 'true' meaning. This sense was searched not only in the legal tradition of the country, but also in legal institutions and notions established in the Western countries.

'Legal solutions adopted in developed western countries – were prepared in different circumstances and for a different political system – therefore they can not constitute a simple pattern. However they could be helpful in shaping our own solutions' – the aforementioned statement of an official in the Communist Ministry for the official press release in 1980 can serve as a good illustration. Although the rule of law was supposed to be still socialist – the ground for radical changes that took place later was being created.

Without the discussions during the period of 1980-1981 and the evolution of the meaning of the notion *socialist rule of law*, it would have been difficult to set up such – for democratic European countries – important institutions as the Constitutional Tribunal (1982), the State Tribunal (1982), Polish Ombudsman (1988) so early.

Today one tends to put too much emphasis on the turning point of 1989. However, according to the results of my research, at least on the legal level this approach significantly simplifies the image of the European integration. This unification – that started long before the Autumn of Nations – was more complex and multifaceted.

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TITLE

PRACTICES OF CITATION AND THE MEDIEVAL LAY JURIST: ROMAN LAW AND OTHER SOURCES IN THE *COUTUMIERS*

The movement of legal ideas in the Middle Ages is usually associated with the rediscovery of Roman law and the birth of a *ius commune*. This *ius commune* was spread throughout the discrete kingdoms of the European West by the wanderings of graduates from the schools of canon and civil law, as well as by the impressive circulation of the books of Justinian's *Corpus Iuris Civilis*. Fairly quickly, it became a common pool of legal knowledge based on specific foundational texts, textual practices and particular methods of thinking shared by a community of initiates.

We know that, eventually, these ideas from Roman and canon law moved beyond this community of initiates and infiltrated the practical world of the secular courts. How is it that these legal ideas moved from one a group of fluent Latinist often associated with universities to a milieu defined by customary law and vernacular language, and in what form did they do so? This is the question that I propose to examine in a paper at the conference in April. Specifically, I will examine the use of Roman and canon law in the first Northern French *coutumiers*, composed around the second half of the thirteenth century. The *coutumiers* are commonly defined as works that set the customs and usages of a specified region in writing, and are almost all written in the vernacular.

Since J.P. Lévy's 1957 article on the 'penetration' of Roman law into the *coutumiers*, analysis of these texts has largely focused on the extent to which the authors of the texts understood and incorporated Roman law. While this focus has yielded some interesting results, the underlying assumption has been that lay jurists were anti-intellectuals who 'resisted' Roman law in a simplistic quest to preserve 'tradition', who were unable to understand its complexities, and who competed with it despite their consciousness of the inferiority of customary law. The major flaw in this type of analysis is that it has looked at Roman law in a vacuum, only occasionally branching out to include canon law. In my talk, I would like to put the use of Roman law in the *coutumiers* in context by treating Roman law as one type of a number of sources cited in these texts, which include normative authorities such as cases, other customary texts and proverbs. Comparing citations of Roman law to the use of other authorities can help us understand the general culture of erudition of the lay jurists who composed texts of customary law, it can help us see the place of Roman law amongst other sources of normativity in the context of secular law and can, lastly, help us refine our understanding of the nature of the dialogical relationship between the *ius commune* and *iura propria*.

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TITLE

INTEGRATION OF THE FRENCH MUTUAL DONATION INTO THE ITALIAN *IUS COMMUNE*. CYNUS PISTORIENSIS, EXPONENT OF ORLEANAISE THOUGHT IN ITALY

Cynus Pistoriensis (d. 1336) – or Cino da Pistoia – is known as much in the Arts world as the first author of the *Dolce stil novo*, as in the world of Law. A pupil of Dinus de Mugello in Pistoia, Italian historians have discovered that he made several visits to Orleans, including one in 1292 during which he met Jacobus de Ravanis (d. 1296). The Jubilee Year meant that Petrus de Bellapertica (d. 1308) was obliged to travel to Rome; on the way, he stopped in Bologna where he met Cynus. It was following this meeting that Cynus returned to France. He wrote a *Lectura* on the Justinian Code with exemplary speed between 1312 and 1314. French authors are widely quoted: Jacobus de Ravanis, Petrus de Bellapertica, Jean de Monchy (d. after 1265), Jean Le Moine (d. 1313) and Guillelmus de Cuneo (d. 1325) being the principal ones.

In his commentary on the *Si pater puellae* law (C., 3, 28, 12), Cynus, quoting Petrus de Bellapertica, cites the mutual donation as an exception to the prohibitive Roman principle of gifts between spouses. The mutual donation is customary in origin and is referred to in the *Summa de libellis possessoriis* by Eudes de Sens (d. prior to 1344) as well as in the *Grand Coutumier de France* by Jacques d'Ableiges (d. 1402). The two blended this statute of private law with the custom of Paris; but it is also found in the customs of central and eastern France, as in Reims and in Burgundy. The provisions of these customs, known to Petrus de Bellepertica, were included in one of the latter's commentaries on the Code (C., 3, 28, 12) and in a *Repetitio* and were subsequently taken up by Cynus Pistoriensis.

Thus integrated into the Italian *ius commune*, the writers who came after Cynus also took up this element of French customary law, both in the commentaries on the Justinian Code and in the *Consilia*. Nevertheless, it appears that common practice resisted: the major Italian notarial formulae of the XIVth and XVth centuries remain faithful to the separatist spirit of the Roman matrimonial system and perfectly impermeable to the new provisions from France.

The study of Cynus' juridical thinking proves what a key role he played in the promotion and diffusion of Orleanaise thinking in Italy, and in the construction of a *ius commune* and European judicial culture.

AUTHOR
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TITLE

NEW IMPERIALISM AND THE EUROPEAN LEGAL TRADITIONS (1870-1920): AN INTEGRATIVE AND DISINTEGRATIVE EPISODE

New Imperialism, also called the second European colonization wave, started in the second half of the nineteenth century, and which had Africa as one of its main battlefields. In the 'Scramble for Africa' (1870-1920), several European powers collided in their ambitions to seize territory. The main actors in this competition were Great Britain, France and Germany, but also Belgium, Portugal, Italy and to a far lesser extent Spain were involved. The motives behind this colonization were multiple; they involved economic exploitation, protection of European national interests and imposing 'superior' Western values. During the Age of New Imperialism, European powers added almost 9,000,000 square miles of African land, approximately 20 percent of the whole landmass of the world, to their overseas colonial empires. Consequently, the territorial ambitions of several European powers clashed. The factual and practical events and consequences, which the partition of Africa implied, were enormous, in the sense of drawing border lines, dividing territory and disturbing, splitting up and assimilating communities of peoples to European civilization. What distinguishes New Imperialism from the former period of European colonization is that during the 'Scramble for Africa', the whole continent was brought under the rule of the European colonizing powers. From an international legal perspective, this raises the question of the mode(s) of acquisition of territory. In the light of the acquisition of territory or land, the focus will be on the relation between private property of land, *dominium*, and territorial sovereignty, *imperium*.

However, the underlying paper will not focus on the legal dimensions of sovereignty and property in Africa. Instead, it will take into account the European legal traditions and their laws on *imperium* and *dominium* during the Age of New Imperialism. In this respect, the central question is whether the European legal traditions, especially their laws on territorial sovereignty and the right to property of land, were affected by the occurrences of New Imperialism in Africa. Hereupon, in case of a confirmative answer, the question is in which way did this influence manifest itself? The disruptive or continuant effect of New Imperialism on the European legal traditions will be discussed by analyzing the European, in particular British, French and German legal doctrine, legislation and case law regarding New Imperialism in the framework of international law between 1870 and 1920. Further, an analysis of the influence of New Imperialism in Africa on the legal rules and attitudes, especially in regard to *dominium* and *imperium*, of European States will be given. Finally, a theory on the disruptive or continuant effect of New Imperialism on the European legal tradition will be constructed.

The paper consists of six parts. After the introduction (1), New Imperialism and its legal dimensions will be discussed (2). The third part will address the concepts of *imperium* and *dominium*, followed by an exploration of the relation between New Imperialism and the European legal traditions (4). Then, part five will address the disruptive or continuant effect of New Imperialism on the European legal traditions. Finally, the whole will be summarized and concluded in the sixth part.

AUTHOR
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TITLE

ROMAN LAW AND MEDIEVAL RUSSIAN LAW: FOR A STATEMENT OF THE PROBLEM

In a very interesting volume just edited about the history of the Medieval Russian law – Ferdinand Feldbrugge, *Law in Medieval Russia* (= Law in Eastern Europe 59), Martinus Nijhoff Publishers, Leiden-Boston 2009, 334 pp. – the third chapter is totally devoted to the hard problem of the influences of the Roman law and his sources on the development of the legal system in the Rus'. The subject, which was often analyzed by the western scholars in a quite shallow way, except only some rare cases, of course is strictly connected with the consideration of the diffusion of the Byzantine law on the slavian world; the orthodox sense of law, they have thought, was so far far away from the Roman as similar to the Byzantine one. But this presumes that Roman law and Byzantine law are completely two different things. Also our author writes something of similar, when he says that 'if Roman law comes to Russia in this period, it could only have been through the vehicle of Byzantine law'. From this point of view, which comes from the tradition, we have to start to realize if is it possible to include the Russian ancient law into the big family of the Roman law, or not: in fact, we have to investigate in which measure Roman law and Byzantine law are near. Thinking about the Russian academic doctrine, tsarist and sovietic, we found few indications, because of the great charge of ideology: Roman law and even Byzantine law was always considered something from the West, and so a danger to eliminate. The most important monument of the Russian ancient law, the *Russkaja Pravda*, is a collection of customary prescriptions, probably taken from the old Germanic culture. Instead there is the presence of several articles which derive from the middle Byzantine sources, like the Isaurian *Ekloge* and the Macedonic *Prochiron*; they are preserved into the ecclesiastical collection, especially into the *Kormčaja Kniga*, and concern the rule of marriage and criminal law. To investigate all these passages is essential to understand how the Russian legal world, during the past and after, and more the whole slavian, was part of the European history of law.

AUTHOR
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TITLE

AN IMPERIAL LEGISLATURE. THE PARLIAMENT AT WESTMINSTER AND THE LAW OF THE BRITISH EMPIRE

Two years ago I gave a paper to the XVth European Forum of Young Legal Historians on the subject of 'An Imperial Court – The Judicial Committee of the Privy Council'. This paper examined the supreme appellate court of the British Empire in the nineteenth and twentieth centuries. I would like to offer a companion to this paper in 2011 by examining the supreme legislature of the British Empire during the same period of time.

The parliament at Westminster was often referred to as the 'Imperial Parliament' in the late nineteenth and early twentieth centuries. This title was not accurate in terms of representation. The lower house of parliament, the House of Commons, only contained representatives elected from constituencies in the United Kingdom. Yet the parliament at Westminster was an Imperial parliament in terms of its legislative powers. Statutes whose effect extended beyond the frontiers of the United Kingdom were often called 'Imperial statutes'.

The 'Imperial Parliament' faced considerable challenges in legislating for a global entity in addition to the United Kingdom itself. The Empire consisted of a myriad of different political entities. These included protectorates, protected states, mandated territories and trust territories. These differing political entities had different legislative needs. The Imperial parliament was also joined by a number of local legislatures within the British Empire. These included the parliaments of the self-governing 'Dominions' of Canada, Australia, New Zealand, South Africa, Newfoundland and the Irish Free State. By the early twentieth century these 'daughter' legislatures had began to demand more autonomy from the 'mother of parliaments'.

This paper will examine the challenges facing the parliament at Westminster as an Imperial parliament. It will also outline the range of subject matter covered by Imperial legislation. The paper will analyze the means by which the Imperial parliament maintained its supremacy over the colonial legislatures in the late nineteenth and early twentieth centuries. It will examine why the Imperial parliament became the primary focus of a movement that advocated the union of the United Kingdom and the Dominions into a single federal state. It will also analyze the process of decolonization and examine the contrasting fate of British Imperial legislation in differing parts of the former Empire.

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TITLE

DOMESTICATION DU DROIT ET DES IDÉES OCCIDENTAUX DANS L'EMPIRE OTTOMAN: UN ENJEU DE SOUVERAINETÉ. L'EXEMPLE DES TRIBUNAUX DE COMMERCE MIXTES AU XIXÈME SIÈCLE

Partagé au XIXème siècle entre une volonté d'ouverture de son droit aux influences européennes et la préservation de sa souveraineté et de son territoire déliquescents, l'Empire ottoman amorce un profond processus de réformes, les Tanzimat ('la réorganisation'), réalisé entre 1839 et 1876. Cette réorganisation fut aussi l'occasion de codifier certains usages, comme celui du règlement de conflits mixtes, par la création de tribunaux mixtes (*karma mahkemeleri*) par un Règlement promulgué le 10 avril 1847 pour connaître des litiges entre Ottomans et étrangers.

La mésentente et l'incompréhension entre deux mondes (la Chrétienté et l'Islam) pour certains, l'intensification de leurs relations pour d'autres entre Ottomans et étrangers, qui se contentaient jusque là de négociations par voie diplomatique et extrajudiciaire, ces deux positions opposées ont paradoxalement justifié la création de cette juridiction spécialisée. Celle-ci s'étendit progressivement dans toute la Province ottomane avant de subir deux nouvelles restructurations importantes en 1860 et 1879. Ainsi avec ce vaste mouvement de modernisation de l'Empire, la Sublime Porte incorporait-elle dans son droit interne les Capitulations déjà conclues avec nombre d'Etats occidentaux, qui régissaient essentiellement la procédure devant ces nouvelles juridictions, pour un type de conflits, qui devait désormais aussi relever de la compétence ottomane.

Il serait toutefois réducteur de considérer ce processus d'intégration normative comme une curiosité orientale ou comme le sceau d'une gabegie générale dans l'Empire. En effet, la perpétuation des Capitulations est aussi celle de la vision juridique ottomane, dominée par le principe de personnalité des lois. Cependant le nombre et l'étendue des Capitulations, consenties déjà lors de l'apogée de l'Empire, n'ont eu de cesse de croître au XIXème siècle sous l'effet des défaites ottomanes successives et d'un expansionnisme européen, si bien qu'elles ont graduellement contribué à la construction d'une situation d''hypo-colonie'.

Toutefois, les notions de souveraineté et d'une loi strictement sans partage territoriales, qui régnaient désormais au XIXème siècle sur l'Occident obtint difficilement droit de cité dans le Levant, où la compétence territoriale ne s'est emparée des esprits que beaucoup plus lentement. Il en va de même pour les notions irrépressibles de 'nationalité' et de 'souveraineté', encore très flous et mal assimilés dans l'Empire, dont le fonctionnement même de ses nouvelles juridictions mixtes nécessite une qualification d'ottoman ou d'étranger. C'est précisément en ce que ces Tribunaux mixtes semblent cristalliser en quelque sorte le *Zeitgeist* d'un Empire en déclin dans un contexte 'crypto-colonialisme' européen, que réside tout l'intérêt heuristique de mon travail.

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TITLE

DER EINFLUSS DER *LEX BAIUVARIORUM* AUF DIE MITTELALTERLICHE UNGARISCHE GESETZGEBUNG

Im vorliegenden Beitrag sollen die Einflüsse der frühmittelalterlichen westlichen Rechtsquellen, in erster Linie die der *Lex Baiuvariorum* auf die frühsten Gesetzbücher des ungarischen Mittelalters, d.h. die Gesetze des ersten ungarischen Königs Stefans I. untersucht werden. Nach einem kurzen Überblick des Standes der Forschung gilt es Entstehungszeit und Entstehungsgrund der *Lex Baiuvariorum* und der zwei Gesetzbücher des hl. Stefans I. festzustellen. Hiernach sollen einerseits die wörtlichen und sinngemäßen Übereinstimmungen der Gesetzeswerke, andererseits die Unterschiede der gesetzgeberischen Tendenzen analysiert werden. Besondere Aufmerksamkeit gilt es jenen Stellen zu widmen, die römischrechtliche Reminiszenzen aufweisen, vor allem aus jener Hinsicht ob diese Zitate ausschließlich auf eine Übernahme aus dem bayerischen Gesetz zurückzuführen sind, oder ob es hierbei auch andere Quellen in Betracht gezogen werden sollten.

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TITLE

LEGAL PRACTICE AS AN INTEGRATIVE OR DISINTEGRATIVE FORCE: TESTAMENTARY DEEDS IN LATE ROMAN LAW

The purpose of the proposed paper is to present a study on the interaction between stated law and the legal practice in late Antiquity. The focus of the paper is on the external form of late Roman wills known thanks to both legal papyri and sources of stated law, especially Theodosian and Justinian Codes.

Through the investigation of testamentary deeds I intend to illustrate, how law evolved in Late Antiquity and also whether Justinian projects of the legal integration and unification succeeded at the level of everyday life of common people. The comparison between the testaments preserved on papyrus and parchment and sources of stated law shall illustrate both the level of legal knowledge and its application in provinces.

The paper also aims at presenting the origins of the solutions concerning the external form of wills applied in the codes of Late Antiquity. By confronting the documents elaborated by legal practice and the juridical sources, one may attempt to reconstruct relations between the development of the form of wills at the level of legal practice and the content of law. As any synchronical concordance between the law and the practice may be a misleading coincidence, in order to determine their relationship one must follow whether changes in law correspond with changes in practice.

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TITLE

BEYOND EUROPE: THE ROLE OF EUROPEAN LEGAL EXPERIENCE IN THE BRAZILIAN *ESTADO NOVO* REGIME (1937-1945)

The development of *penale* ('criminal' as substantive without 'law' – Mario Sbriccoli's concept) during the nineteenth century brought great enrichment to the European legal culture, even after the encoding process which aimed at reducing the sources of law to the law and the lawyer to an exegete. This was due to the fact that the legislative and doctrinal discussions of this period (which addressed issues such as the limits of the right to punish the state, the death penalty, the characteristics of the criminal, as well the penitentiary issue) were aimed to scientific deepening.

This deepening had as its scope not only the worship of knowledge, but also served as an instrument that cleared the central role of criminal law in the material constitution of the States. This situation can be, for example, verified by the debate between the Italian criminal law 'schools'. However, at the beginning of the twentieth century the *penale* undergoes a twist that will incline it to cultural impoverishment already felt by the Private Law in the early nineteenth century. The Criminal Law would be reduced to a mere legal technique, becoming 'apolitical'. This ideological vacuum provided better protection for authoritarian regimes such as Germany and Italy. Under the shield of technicists jurists, those regimes supported the existence of an authoritarian criminal law, whether in legislative, doctrinal or juridical fields.

This process was widely followed and received across the Atlantic, especially in Brazil that was involved with an authoritarian regime, contemporary to fascism and Nazism. The European criminal and legal experience substantiated a major process of reform of penal codification in Latin America in the early twentieth century, reproducing the dichotomy Classical School-Positive School observed in Italy. The jurists who gave the technical character to the penal reforms produced by the *Estado Novo* regime of Getúlio Vargas also used that European product, in their own way: in the doctrine, the main Brazilian criminal jurist, Nélson Hungria, gave a distorted reading of the *Programma* of Francesco Carrara for the maintenance of political crimes outside the new Brazilian Penal Code, 1940; in the field of legislation, the Minister of Justice of Brazil of that time, Vicente Ráo, editor of the project that would become the first National Security Law of Vargas government, utilized the procedure of translation of some types of criminal Italian Penal Code of 1930, like subversive association and; finally, in the field of judicial structure, Getúlio Vargas used the model of Nazi Germany and fascist Italy and created an exception to the trial political crimes. Under the Brazilian 'Estado Novo' (1937-1945) these influences overcame the *penale* and reached the heart of the legal system. This authoritarian regime was established with the granting of a new constitution, nicknamed the 'Polish Constitution', given the great influence of the reforms introduced by Polish dictator Jozef Pilsudski and by Polish Constitution of 1935.

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TITLE

LIVING WILLS AND THE INSOLVENCY OF FINANCIAL INSTITUTIONS IN THE EU

The EU's member-states differing insolvency laws, which are based on separate long-standing legal cultures and traditions, have become an increasingly problematic unavoidability. Bankruptcy cases such as Eurofood and Lehman-Brothers – resulting in multiple separate simultaneous proceedings – demonstrate that the once widely held notion that corporations live globally but die nationally no longer holds true. Multinational corporations may be entitled to file for insolvency in any jurisdiction in which they have establishments, which frequently leads to forum shopping. The disintegration of the EU's member-states' insolvency laws is problematic because it: (1) operates to sabotage the evolution of a more independent, equal and integrated EU regulatory system; (2) destabilizes the veracity of the EU law; and (3) provides little in the way of safeguards against unfair resolutions of judicially fragmented the European Union's insolvency proceedings. Accordingly, an integration of the insolvency laws is needed.

Principles of national sovereignty prevent bankruptcy courts from forcefully applying their laws in other jurisdictions. Therefore courts rely on international comity to give effect to their decisions outside their jurisdiction. In an attempt to encourage reliance on international comity, in 1997 the UNCITRAL adopted its Model Law on cross-border insolvency. The Model Law was adopted by key-trading nations such as the US and the UK. The EU, however, declined to adopt it as its, although a few EU members did. Nevertheless, even if approved by the EU, the Model Law would not have necessarily integrated the EU member-states' laws, because it contains a public policy exception from cooperation, as well as other provisions that grant courts considerable discretion. Overuse of such discretion to protect local creditors can undermine the purpose of the Model Law.

In an effort to integrate the EU member-states' insolvency laws, the EU issued Insolvency Regulations. Nevertheless, the laws across Europe remain widely varied, despite the fact that many of these laws adopt a modified 'universality' international insolvency law approach. While protocols can offer guidelines for communication and collaboration among courts, they also do not integrate the differing legal traditions, because protocols do not predetermine substantive legal conflicts. Moreover, courts are reluctant to authorize protocols that do not reserve discretionary authority, and many countries often prefer to maintain the disintegration of legal traditions, because it enables them to preserve the dominance of their local interests. Thus, countries can opportunistically break the rules without seriously jeopardizing the system they have created.

While certain specific bankruptcy administrations may have the capacity to handle the proceedings of a large consortium on a domestic level, the international issues arising from the global return-maximizing structure present greater difficulty, because they require dealing with the international patchwork of legal, regulatory, and tax provisions that comes hand-in-hand with such consortium's global structure. Even the recently enacted US Dodd-Frank Act, which does encourage cooperation with foreign regulators, fails to address the complete absence of a feasible integration of the cross-border insolvency laws. The EU, however, should do a better job than the Dodd-Frank does in promoting such integration, at least when dealing with its own member-states.

Since it is unlikely that the EU will succeed in integrating its member-states' insolvency laws in the near future, an 'in-the-meantime' harmonizing solution should be encouraged by the EU; that solution would increase business certainty and resemble the 'living wills' model adopted in the UK.

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TITLE

CODIFICATION OF THE LAW IN LOUISIANA: EARLY NINETEENTH-CENTURY ATTEMPTS TO PRESERVE A CONTINENTAL EUROPEAN LEGAL SYSTEM IN AMERICA

The state of Louisiana (United States of America) has a rich legal history, most of which remains unexplored, and which may be traced back to Europe. The legal system in Louisiana is currently seen as a mixed jurisdiction, the only one in North America where the Continental European system and the Common Law coexist. The presentation will focus on the Continental European heritage of Louisiana, by exploring the main events that relate to the codification of the law in that region during the early nineteenth century (1800's-1830's). The presentation will address the somehow familiar codification of the civil law, but will also explore the not-so-familiar codification endeavours of the criminal, procedural (civil and criminal), and commercial laws. The presentation will mainly aim at reflecting the degrees of inclination that Louisianans had towards the codification of their law, trying in most occasions to protect the Continental European system and their legal heritage from the influences of the Common Law.

To reflect the degrees of inclination towards codification, the presentation will provide an overview of each codification endeavour. Each codification endeavour will be approached individually, while common grounds will be sought for. The presentation will examine the replacement of the *old* order by the newly created codes; the activities of the drafters, their original ideas, and the influences they received from Europe (v.gr. the debate on the sources of the civil code, determining if they are French or Spanish); and the results of their work. The presentation will also provide selected examples of codified institutions that differed significantly in the Continental European system and the Common Law, trying to explain why Louisianans were more inclined or not towards the familiarity and usefulness of their heritage.

The presentation will also provide a brief but needed socio-historical context. That context will reflect that Louisiana was among the first to seek codification and that the efforts in Louisiana led the way in other regions (i.e. New York, Spain, and most countries of Latin America). In those same lines, the presentation will comment on aspects of the main European and Latin American codification movements and compare them with the ones in Louisiana. Such comparative approaches will bridge the divide between regions and help reflect the effects that European nineteenth-century codification movements had in Louisiana.

AUTHOR
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TITLE

EUROPEAN BICENTENARY: THE INTEGRATION OF INTERNATIONAL EXPERIENCES IN THE AUSTRIAN GENERAL CIVIL CODE OF 1811

Austria is going to celebrate the bicentenary of its Civil Code in 2011. The *Allgemeines Bürgerliches Gesetzbuch* (ABGB) is one of the 'natural law' codes and as such related to the Prussian *Allgemeines Landrecht* (ALR) of 1794 and the French *Code Civil* of 1803. In my presentation I want to discuss two separate levels of a European influence on the development of the ABGB. First I will evaluate if and how the two older codes as well as other existing legal sources influenced the compilation process that resulted in the ABGB text. The main sources which I will use for this purpose are the minutes of the legislative commission and the published works of Franz von Zeiller, who is considered the most important of the ABGB's authors. We know from Zeiller's influential commentary and his other academic texts that he was well acquainted with the older law codes and used them as benchmarks for his work on the new Austrian Civil Code. Preparatory research has shown that the Prussian *Landrecht*, for example, was mentioned in the discussions surrounding the wording of seventy-three ABGB articles. In almost half of these cases, the relevant articles were eventually rewritten in line with the ALR model. In other cases the commission quoted ALR rules as negative examples against which they developed what they considered more modern legal norms.

In a second step I will discuss the contributions of law schools and courts from the periphery of the Habsburg Empire to the wording of the ABGB. Such institutions had been provided with copies of an early draft of the code and invited to comment on its individual articles. These comments were then discussed in the meetings of the legislative commission. Often they were based on local experiences and particular legal circumstances.

Thus I will argue that the history of the Austrian Civil Code has a greater European dimension than most lawyers today realize.

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TITLE

PACTA SUNT SERVANDA: PILLAR OR CRUTCH OF EUROPEAN LEGAL TRADITION?

1. Legal principles as important part of European legal tradition
An important role of legal principles is widely accepted by academics and by legislators. The belief in general principles common to the laws of Member States of the EU survives up to the present days (see e.g. the Treaty of Rome, art. 215(2)).

2. Legal definition of principle is missing
The important role of legal principles is presumed, although a legal definition thereof is missing. In academic writings legal principles are usually described as models for projecting and applying more specific rules (i.e. rules *stricto sensu*), or as a high standard other rules should comply with, or means to correct and support the ruling in a particular case (Jacoby, Avila, etc.).

3. *Pacta sunt servanda* as legal principle of civil law
'*Pacta sunt servanda*' is one of the best-known legal principles in civil law since the Middle Ages. It matches all the criteria of a legal principle and it can be discovered in all major codifications on the European continent.

4. Different meaning behind common wording?
A closer look at *pacta sunt servanda* reveals vagueness of this phrase presumably due to the following:
a) no legal fixation of its meaning;
b) contradictory sayings (*adages*) in Europe: e.g. '*Si prende il bue per le corna e l'uomo con la parola*' but '*Nessuno è schiavo della sua parola*' or '*Promettre et tenir sont deux*'.
c) different requirements for the contract from jurisdiction to jurisdiction (meaning of *consensus*, formation procedure, requirements and meaning of *cause* etc.), all these followed by variations of national court practices;
d) growing number of exemptions (e.g. the right to withdraw).

5. Does Civil Law still need this principle?
Yes, as long as unity of contract law of *ius commune* (*novum*) is the goal. This principle may be regarded as a *symbol* of modern contract law as opposed to the Roman rule (*ex nuda pacta actio non nascitur*), as a *standard* of fair dealing, and more important for legal historians, as means to transfer us back to pre-codification times (good old days of *ius commune*).

6. Legal history and precization of *pacta sunt servanda*
Academic community makes efforts to renovate the principles to meet the needs of the united Europe. Draft CFR, *Principes directeurs* and other projects insert the old principle into the new frame called *contractual security*. However, one should not discard its long tradition. This is where legal historians should step in and reveal the rich background of '*pacta sunt servanda*':
- its ideological force which goes back to ethics and Christian morality rather than Roman law
- its symbolic value within common European legal culture, emphasized by Spanish late scholastics (Suarez, Molina, Lessius) and German proponents of natural law (Pufendorf, Thomasius, Wolff).
- its didactical value as part of *principia iuris*.

Legal history contains many proofs of legal principles as essential means to arrive from *multitudo legum* to *ius unum*.

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TITLE

INTERNATIONAL LAW, SCIENTIFICITY AND EUROCENTRISM. A DIALOG BETWEEN PAULUS VLADIMIRI AND FRANCISCO DE VITORIA

The zone of conceptual fracture between the *medioevo* and Modernity is fraught with theoretical specificities, especially when addressing the historic building of international law. The development of Aquinian concepts of natural law, mainly when related with the second scholasticism, enables the creation of more 'scientific' theories, breaking the previous theoretical paradigms. Francisco de Vitoria, with his relevant *Relectiones*, rather than support the development of new natural rights, adopts a new argumentative systematization, still greatly fact based, but much aimed at a deductive approach of his object of analysis. Influenced by the impact of the discovery of the New World, the Spanish theorist begins his reasoning, which calls into question the dependence of the 'emerging autonomy policies' with respect to the maximum powers of the Church and the Emperor, demonstrating the relevance of the change of theoretical and methodological approach in relation to rules of relational coexistence; the *ius gentium*.

However, most of the central elements of the theory of Vitoria can be observed one century early. Inserted in the context of the *communitas christiana* from the beginning of the fifteenth century, Paulus Vladimiri, professor at the University of Krakow, theoretically faces political conflicts involving the Polish kingdom, developing the internationalists concepts within a theoretical deductive construction. Like Vitoria, he relativizes the power exercise of the Pope and the Emperor on the infidels, seeking to support the prohibition to the 'nascent' Christian European republics, to attack pagan regions that peacefully coexisted with other kingdoms. Vladimiri also seems to oppose the medieval paradigm allowing a step forward in building of an international law as a juridical system with scientificity.

This change in theoretical approach is of vital importance in the definition of scientific structures of international law stemming from modernity. Similarly, searching to legally legitimate changes in political positions in their respective times, they came across the boundary zone of the previous methodological paradigm. However, despite both theorists reach to similar conclusions, the differences between these critical moments are crucial to verify the resulting theoretical implications. While Vladimiri elaborates a theory based on an intra-European conflict, that seeks to justify the right of defense against the unlawful Teutonic-Christian invasion, Vitoria faces the unprecedented extra-continental and transoceanic conflict, trying to develop, not so much a defense of indigenous rights, but new legitimizing elements to the conquer.

While they agree in many aspects – like de definition of universal natural rights against illegal aggression or against forced religious conversion, rights of property, etc., the structural similarity observed in their theories doesn't appear with the level of *praxis*. In this sense, an important divergent aspect can indicate some relevant theoretical indicatives. While Vladimiri develops an argumentation based in the real intention behind political acts (*animus*) rather than formal justification, Vitoria rests in silence about this discussion, 'authorizing' a legitimizing and Eurocentric implementation of his natural rights by the European conqueror.

AUTHOR
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TITLE

LATIN TERMS IN THE DECISIONS OF THE EUROPEAN COURT OF JUSTICE: EUROPEAN LEGAL TRADITION OR NEW HISTORY IN EUROPEAN LAW?

The development of law in continental Europe has relied heavily on the Latin language and the system of concepts based on Roman Law. Historically, Latin has been extremely closely connected with the development of European law. In the past centuries, Latin used to play the role of a common legal language, which was applied across the boundaries of local law. In a way, Latin can be called the common mother tongue of European legal culture: the bulk of legal literature as well as legislation was compiled in Latin. On the basis of Latin, jurisprudence has developed over the centuries, even at the time when national languages became more dominating in science. Although Latin ceased to be the language of law and legal science in the 21st century, its significance as a technical means of communication between lawyers in Europe remains.

My presentation will focus on the Latin terms used in the decisions of the European Court of Justice and aims at exploring the vocabulary employed by European legal practitioners when formulating their decisions. The special attention will be paid to the Latin terms which judges have adopted in their active vocabulary in recent years. I will observe the connection between the usage of these new terms and the terms which carry the historical tradition of European law.

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TITLE

THE 'LONDON BOOKE OF ORDERS': A 16TH CENTURY CIVIL LAW CODE. ENGLISH INSURANCE AND THE CONTINENT

It is a common and easy temptation for the English legal historian to assume a relative lack of influence of the Continent over England. With regard to the *Lex mercatoria* such an assumption becomes less self-evident, given the differences in procedure between Merchant law and Common law. Yet, the usual answer still bends in favour of British' 'splendid isolation'. The present paper aims at offering a different view on the matter, with particular emphasis on maritime insurance, whose importance in the subject is magnified thanks to an unpublished Insurance Code of the late 16th century, pretty much 'Civilian' in its content, whose use in the Aldermen's Court of London is attested beyond any reasonable doubt.

The aim of the paper is to examine some of the most important features of maritime insurance with regard both to legislation, merchant practice and – as far as it is possible, given the paucity of the English extant documents – court decisions. A similar examination leads to a remarkable closeness between Continental and London views on insurance, at times even verging on a corresponding departure, on the same subject, of London customs from the Common law itself.

In matters of insurance, indeed, England – or at least London – dealt with obligations in a pronounced 'Civilian' fashion, often departing from the principles and solutions envisaged by the Common law. Moreover, and even more significantly, such a 'Civilian' fashion was not the product of a single model predominant in London on any given moment, so as to justify – and provide a paternal 'absolution' to – those limbs of the *Lex mercatoria* departing from the Common law legal sphere. On the contrary, during the second half of the sixteenth century the rules applied by London Courts, the practice of merchants and the legislation itself all changed according to the 'model' predominant at any given time in Western Europe.

In the second half of the sixteenth century, in fact, maritime insurance was undergoing a substantial and fast-evolving change, moving from what might be described as a 'Mediterranean' model to a 'Northern' one. Very interestingly, such an evolution is perfectly mirrored in the two extant drafts of the provisions of the London Insurance Court, which could be approximately dated on 1575 and 1582 respectively. While the first draft is heavily dependent on the Mediterranean 'style', notably on the Genoese model, the second attests the incumbent Dutch supremacy, above all that of Antwerp.

The deep dependence of the London provisions – and so, perhaps, of a good part of the *Lex mercatoria* itself – on sources not only external to the Common law but, crucially, common to Western Europe would suggest reconsidering some of the conclusions so far predominant on English merchant law. Far from being a 'branch' of the Common law, historically stemming from it and substantially relying on it in all but form, the English *Lex mercatoria* was substantially – and not just procedurally – different from the Common law, and it stemmed from what would ultimately appear to be a pan-European model.

AUTHOR
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TITLE

THE SEPARATION OF POWERS IN AUSTRIA FROM 1867 TO 1925

The separation of powers in a federal state is perhaps the most important factor to determine the grade of centralization or decentralization in such a state. Nevertheless the separations of powers in the Austrian part of the Austro-Hungarian Monarchy has not been sufficiently investigated.

This paper aims at tracing the development from 1867 to the end of the Austro-Hungarian monarchy (and even longer). In this period the separation of powers was laid down in §11 and §12 of the *Gesetz vom 21. Dezember 1867 wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird*. §11 enumerated the powers of the central *Reichsrat*. All matters not assigned to the *Reichsrat* remained with the legislation of the individual *Landtage*. Federal laws were implemented by federal authorities (*Staatliche Behörden in den Ländern*) whereas state laws were implemented by autonomous authorities (*autonome Landesbehörden*). This resulted in the infamous parallel administration in Austria.

Before the dismemberment of the Habsburg Empire the separation of powers was modified just once in 1907. Nevertheless the legislation of the individual states became more and more important after 1867. It is interesting that this happened without formal modifications of the constitution (with the one exception mentioned above).

Disputes whether a certain matter fell into the legislation of the *Reichsrat* or the *Landtage* were decided by the *Reichsgericht*. The decisions of the *Reichsgericht* show how §11 and §12 of the *Gesetz vom 21. Dezember 1867* were understood and how this understanding changed over the years.

The separation of powers remained effective longer than most other regulations of the Austrian constitution of 1867. It was not immediately changed when Austria became a republic in 1918. Not before 1925 new regulations for the separation of powers were enacted. Finally the paper will discuss differences and similarities in the separation of powers between the Austro-Hungarian Monarchy and the Republic of Austria.

AUTHOR
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TITLE

LEGAL 'INTEGRATION' IN PRIVATE LAW IN EARLY 20TH CENTURY AUSTRIA? A STUDY ON THE AMENDMENTS TO THE AUSTRIAN ABGB

The Austrian civil law codification, ABGB, is one of the earlier great private law codifications in Europe. It was enacted in 1811 and is still – after 200 years – in force. Besides in Austria it came into effect in the 19th century in Hungary lasting only 9 years and in Liechtenstein, where it is still valid. After the breakdown of Austria-Hungary it was as well enacted in the successor states (in Poland until 1965, in Czechoslovakia until 1951 and in Romania until 1938). Besides having a wide range of application the codification (after the amendments) shows many influences by different European codifications. The preliminary work to these amendments shows the different considerations of other codifications or drafts among others the German BGB, the Swiss ZGB, the French Code Civil and the Hungarian codification draft. These surveys to the amendments took place between 1907 and 1912 in the House of Lords. Due to the outbreak of World War I the legislative process never came to an end and the so-called '*Teilnovellen*', the amendments to the ABGB, were passed by the monarch in 1914, 1915 and 1916.

The aim of the paper is to present the different influences on the *Teilnovellen* – many different ways were taken into consideration. The second aspect that seems important is the motivation of these changes: As the law was passed not by the assembly but by the monarch the question arises whether the monarch followed the House of Lords. Moreover that leaves a general aspect to consider: can we speak of a kind of integration due to the fact that only some aspects were transferred into the codification?

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TITLE

'THE LAST BORN OF JURIDICAL NOTIONS'. SOME REMARKS ON THE CREATION AND DEVELOPMENT OF AVIATION LAW IN THE FIRST HALF OF THE 20TH CENTURY

Aviation and modern ways of air travel were progressing at an astounding pace at the beginning of the 20th century. Not only did they become a strategic part of the armaments industry, but also a key element of the large scale changes ongoing in the international transportation.

The establishment of civil aviation called for the introduction of law regulations controlling air navigation. Various issues were investigated and discussed by the academics within the European doctrine of law. It was quickly concluded that traditional legal mechanisms are not enough and new legal notions needed to be developed. The World War I proved aviation to be one of the most dangerous types of warfare, whereas the time of peace, drawing on the bloody experience of the war, contributed to the development of the doctrine. A new branch of law was born: aviation law. Its character, features and scope were determined. Important and interesting debates took place regarding the autonomy of the legal branch. Some denied aviation law special character and autonomy, while others stressed them extensively. Analogies to marine and transportation law in legal assessment were sought.

The development of aviation law was unique. The tendency to central legislation and international unification became strongly apparent. It resulted in attempts to regulate air navigation, passenger transport and freight, as well as legal assessment of the occurrences resulting from air communication. The development of aviation law rules by international bodies and national aviation authorities created one and uniform academic discipline of aviation law and related spheres.

The aim of the paper is to present selected issues connected with the development of aviation law being a new branch of law in the first half of the 20th century. Early legislation is analyzed, as well as the most interesting themes of the debate within the contemporary doctrine, which resulted in the autonomous character of aviation law and specific solutions adopted within.

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TITLE

COMMUNIS OPINIO DOCTORUM AS *IUS COMMUNE UNIVERSALE*? REMARKS ON THE LEGAL DOGMA OF 'INTELLECTUAL INTEGRATION' OF MEDIEVAL AND MODERN EUROPE BASED ON THE (ANTI)EXAMPLES OF THE LEGAL LITERATURE

The aim of the presentation is to present and critically revise one of the very well known concepts – a particular 'legal dogma' used to explain the march of Roman law through the history, starting from the Justinian's Compilation, i.e. the idea of common legal culture or – in other words – the idea of 'intellectual integration', named by some as 'second life of Roman Law' (P. Vinogradoff), and by the others as 'resurrection of Roman Law' (J.A.C. Thomas).

Of course, it must be emphasized that such a critical, or better – sceptical, attitude does not necessarily mean the negation of the concept of continuity of human history as a whole, stressed, inter alia, by Franz Wieacker, in particular – as a continuity in legal development of Europe. It is only an attempt to show some aspects of legal history of Europe, as a space and community, shaped by many legal traditions, as well as the common one which is 'traditionally' bound up with successive interpretation and reinterpretation of one of the most important legal monuments, *Corpus Iuris Civilis* – the interpretation done in order to adopt this 'source-book' to the new circumstances, to match local needs, to form new blend of law. There is no denying the fact that this tradition exists, although one should understand it properly that can be achieved only on the way of critical revision of some old schemas, patterns of thought, even legal *clichés*, such as the common reception of the 'homogenous body of law' called *ius commune*, the common world of thinking and teaching, the common literature etc. It seems that in the times of Legal Humanism and Natural Law, one can observe a particular weakness of the *ius commune* being in fact a doctrinal phenomenon – *communis opinio doctorum*, but understood as a legal system (sic!) and supposed to grant a certainty of law, was exposed and questioned as being unsuitable for demands of national countries and societies. In other words, one can observe a disintegration of the so-called, 'common legal tradition', regarded – traditionally – as universal and homogeneous.

So than, it seems that a broad examination from different perspectives, not only a legal, but also a political, social and intellectual one, that is a research taking into account different aspects of human culture, can show a partial inadequacy of the paraphrase of a well known *dictum*: *Europa Medioevalis et Moderna vivit lege Romana*, because this Europe saw meetings, adoption but also rejection of particular elements fashioned by different social groups.

AUTHOR
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TITLE

JOINT APPLICATION: JURISPRUDENCE AT A CROSS ROADS?

The history of the European Union is also a history of conflicting interests between Member States and the Union. Disputes are mainly governed by the principle of conferral of powers and the subsidiarity principle. The arbitrator of arising disputes is the Court of Justice of the EU (the Court). The Court as the arbitrator in such disputes has been both capable and willing to bring the integration process of the European Union further, even at times when the volunty of Member States appeared to be lacking.

Also in the area of Competition law the Court extended the scope of EU Law. Based on the joint application of the Articles 10(2) (duty of loyalty), 3(g) (undistorted competition), 81 (cartelization) and 82 (abuse) EC Treaty (now Articles 4(3) EU Treaty, Protocol (No 27) on the internal market and competition, Articles 101 and 102 TFEU), the Court developed in 1977 jurisprudence establishing that Member States are obliged to abstain from taking measures which could deprive core Competition law provisions of their effectiveness (*effet utile*). Through this the Court established jurisprudence that was intended to contain undue State interference with the objectives of the EC Treaty. This jurisprudence was applied in a myriad of contexts including price regulations, social security provisions and maximum credit rates where Member States sought to hide e.g. illegal cartels under the umbrella of national legislation. The joint application jurisprudence thus fulfils a gap filling function bringing State measures inducing cartelization and abuse that are beyond reach of the four freedoms or Competition law provisions into the realm of EU Law.

The Lisbon Treaty saw, however, the deletion of Article 3(g) from the Treaties. It is now contained in a special Protocol (No 27) on the internal market and competition annexed to the TFEU. Concern has been voiced that the deletion of the objective of maintaining undistorted competition from the interpretive provisions of the Treaties would weaken the Competition law *acquis* and thereby facilitate the taking of industrial policy measures. Such policy measures could take the form of orchestrating domestic cartelization so as to allow certain undertakings to earn higher profits and thereby to make them stronger and more capable to withstand international competition. The French President Sarkozy has – at least in rhetoric – been indulging the long tradition of State-led development and has strongly criticized *laissez-faire* capitalism and been a proponent for a more developmentalist European economic policies as well.

This paper examines the historic development of the joint application jurisprudence and seeks to assess if the Court is likely to be impressed by the change in the Treaties or if it is likely to uphold its current approach.

AUTHOR
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TITLE

FROM *DOLUS MALUS* TO 'SIMONIACAL HERESY'. A CASE FOR DARK-AGE LEGAL INTEGRATION?

Historians in general, and legal historians especially, are inclined to regard the early Middle Ages in Western Europe as a period of legal and social 'disintegration.' Where the fundamental components of the later-medieval *ius commune* are concerned, both the civil law of Justinian failed to make any impression at all on the early medieval West, and the canon law of the Church failed to be systematized until Gratian. Meanwhile, as Agobard of Lyons, a ninth-century Carolingian ecclesiast, infamously complained, five otherwise-faithful subjects of the emperor could travel and eat and drink together, and yet not be able to swear oaths or to testify in each other's behalf, due to the complexities of the *ius proprium*. Nevertheless, despite this image of admittedly very real disintegration, I wish to regard the early-medieval period simultaneously as a time of decisive 'integration,' also. Specifically I will plot the reception of Roman legal concepts concerning fraud and deceit by Rome's Germanic and ecclesiastical successors. Why were Roman precedents on *dolus malus* (fraud) and the *crimen falsi* (falsification), repeated, amended, and even occasionally strengthened, in the legislation of the Visigoths, Burgundians, and Lombards – even as the money economy and effective administration receded? And how did the early canonical condemnation of simony – the fraudulent acquisition of ecclesiastical office – innovate beyond the Roman inheritance? Particular attention will be given to the legislation of the Spanish church councils and to the letters of Pope Gregory the Great, as well as to the Germanic legal codes.

AUTHOR
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TITLE

100 YEARS AFTER THE SCOTTISH REFORMATION: RE-EVALUATING THE USE OF CANON LAW IN SCOTLAND'S FIRST INSTITUTIONAL TREATISE

Canon law was one of the great centralizing forces in medieval Europe. The Reformation in the C16th precipitated the decline in the perceived importance of this source and in its use in juristic treatises in Reformed nations. However, the extent to which Protestant nations departed from the Canon law can be exaggerated, and the continued use of Canon law is not always appreciated. This is seen in Scotland's first institutional treatise, Viscount Stair's *Institutions of the Law of Scotland* (1681), written exactly 100 years after the Scottish Reformation (1559-1560). It is believed that his comments regarding Canon law were 'of a casual or passing nature', that they had 'an anti-papal sting in the tail', and that Stair referred to Canon law rules almost only when Scots law had diverged from them. It has also been suggested that he gave only one 'direct and full reference to canon law'. This, it is claimed, is unsurprising for a Scottish Presbyterian of that period. Yet, these views cannot be sustained when Stair's *Institutions* is re-examined.

This paper will show, first, that Stair acknowledged the influence of Canon law in Scots law (as part of the great European intellectual tradition). Instead of constantly criticizing Canon law, he did praise the nature and sense of these rules. Further, although Stair was sometimes critical of Canon law, it was not uncommon for him to criticize a rule which he thought should not be received (or have been received) into Scots law, whatever its origin.

Secondly, it will show that, far from citing only one text of Canon law, Stair cited several such texts. The perception of Stair's citing Canon law only once is the result of two methodological problems: his citations of Canon law wrongly being classified as being of Justinian's *Codex*; and scholars being misled by amendments in later editions of the *Institutions*, in which Stair's citations of Canon law were removed, replaced or reduced in number without explanation. Once the C17th editions are examined, it becomes clear that the number of citations of and references to Canon law in the *Institutions* was not inconsequential.

Thirdly, Stair included most of his references to Canon law when first writing the *Institutions* in 1659-1662. Yet, this paper will show that he added new citations of Canon law when preparing the first printed edition in 1681, indicating that he continued to regard it as authoritative when revising the *Institutions*.

Finally, this paper will examine Stair's source for his references of Canon law. It seems that he did not consult texts of or works on Canon law directly. Rather, Stair borrowed his references to Canon law from other seventeenth-century juristic sources, principally the *Digesta per aphorismos* (1642) by Arnold Corvinus (Dutch jurist; died circa 1680). This makes sense given the political and social context of the C17th: Stair consulted the increasingly-controversial Canon law as distilled through the appropriately-Protestant medium of Roman-Dutch jurisprudence.

POSTER ABSTRACTS

AUTHOR
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TITLE

STANDGERICHT ALS ANTWORT? RÄUBERBANDEN UND UNGARISCHE REGIERUNG AN DER WENDE DER 18. UND 19. JAHRHUNDERTE

In dem Beitrag wird ein solches eigenartiges Phänomen vorführen, welche in Westeuropa unbemerkbar ist. In einem typischen europäischen Staat (z.B. Frankreich, Bayern, Preußen) gab es kodifiziertes Strafrecht und ein modernes Verwaltungssystem, als die 'neuere' Kriminalität erschien. In Ungarn herrschte stattdessen noch ein typisches spätständisches Rechtssystem, und es gab keine Gewaltentrennung, deshalb, als die 'neue' Kriminalität auftauchte, die Reaktionen der Regierung waren von anderer Natur als die in den europäischen Staaten.

Die Mangel an der strafrechtlichen Kodifikation hatte in Ungarn viele Auswirkungen, unter denen vor allem die spezielle Rolle der Zentralverwaltung in der Strafgerichtsbarkeit: die Regierung gestaltete die ungarische Strafrechtspraxis nämlich durch Verordnungen vor der Revolution von 1848.

An der Wende der 18. und 19. Jahrhunderte lässt es sich zwei Eigenartigkeiten des ungarischen Strafrechts bemerken: die Humanisierung des Strafsystems (Zurückdrängung der Todesstrafe) und die Modernisierung der Kriminalität.

In dem letzten Drittel des 18. Jahrhunderts hat sich die Struktur der Kriminalität verändert, die Bedeutung der schwersten Vermögenskriminalität (Pferd- und Viehdiebstahl) und der gewaltigen Vermögenskriminalität (Raub, Raubmord, Straßenraub) ist in Südostungarn gewachsen. Die aufgeklärte absolutistische Regierung hatte zwei Antworten auf dieses Phänomen: sie hat einerseits bürokratische Verordnungen des Viehgeschäfts und des Verkehrs erlassen, anderseits die Standgerichtsbarkeit geregelt (1785). Nach dem Zusammenbruch des aufgeklärten Absolutismus (1790) war die Regierung vorsichtiger, aber neue Mittel gegen diese Kriminalität hatte sie nicht. Wegen der speziellen Struktur der ungarischen Verwaltung hatte das Komitat als die mittlere Verwaltungseinheit eine relative Selbständigkeit, deshalb war der Vollzug der Zentralverordnungen kompliziert.

In diesem Vortrag wird dargestellt, wie diese Verordnungen und Standgerichtsbarkeit in der Praxis funktionierten, ob sie die Zielsetzungen der Regierung erfüllt hatten.

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TITLE

UNWORTHY TO SERVE THE NATION. THE PROFESSIONAL PURGE OF THE GOVERNMENT ADMINISTRATION AFTER WORLD WAR II IN BELGIUM

As in many other European countries, the post-war purge in Belgium has not been the final chapter in the national history of the Second World War. For more than 40 years after the war, it has been a politically loaded subject on which developed diametrically opposed views on the punishment of collaborators. The camp that identified with the victims of the collaboration took the view that collaboration called for very severe punishment. The opponents, who were against what they called the 'repression', saw the people involved as victims of a cruel and unjust social purge.

Unsurprisingly, historians kept well away from this politically charged subject for a long time. Since the 1980's, therefore, quite a few studies have appeared that look both at aspects of the collaboration and at the post-war purge. These studies focus on the 'official' purge by the courts-martial who punished military, political and economic collaboration and denunciation. Recently, also the 'street repression' has been the subject of research. However, the history of the purge of the apparatus of the Belgian government after World War II has remained unexplored territory so far. Nevertheless, a large number of civil servants were laid off or punished in other ways for their collaborationist behaviour. It is estimated that at least 11,000 civil servants were sanctioned for 'incivism' in one way or another.

The history of the post-war purge is particularly suitable for analysis from a gender perspective. International research has shown that the persecution of collaboration was gendered and was based on constructions of masculinity and femininity.

Using the individual 'epuration'-files of the State Telegraph and Telephone Company (RTT), we will explain how the professional purge has been put into practice on the work floor. One of the objectives are to reconstruct and analyze 'profiles' of suspects of collaboration and to analyze the (gendered) discourse about collaboration. Between the culprits of 'crimes' who could legally seen not be considered for persecution by the military courts, such as the 'horizontal collaborators' or 'opinion offenders', we find a high number of women who were punished for crossing the borders of 'descent female behaviour' and who had violated the collective conventions of 'good citizenship'.

One of our conclusions reveals that the professional purge has enlarged significantly the number of people who got involved in the post-war purge process in general. Because the RTT applied criteria of its own, the state-company involved a considerable group of persons in the purge who would otherwise have been unaffected or only lightly affected by the repression, if this 'administrative purge' had not taken place. This was due to the fact that a person who was dismissed from the civil service for 'unpatriotic behaviour' lost his or her political and civil rights and this was at a serious disadvantage in many other social areas. Because of the gender-determined nature of these criteria, women represented a substantial part of these RTT employees who were accused of and punished for incivism, but whom the courts-martial left alone.

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TITLE

CENTRALIZING AND DECENTRALIZING FORCES IN THE STATE OF THE TEUTONIC ORDER IN THE XIVTH CENTURY

In the middle of the XIVth century, the State founded and developed by the Teutonic Brothers was one of the most important countries in Central-Eastern Europe, reaching from Danzig in the West to the coast of Estland in the East.

In the conquered territories the Teutonic Brothers ruled with wisdom and strong hand, showing great organizational skills. Their position was very strong, so they managed to centralize all their territories widely. Taxes were providing the best example for it. In the Middle Ages one part of taxes was usually collected by the emperor, another one by the ground owner and the last part by the church. In the conquered territories the Teutonic Brothers were the ruler and the ground owner, so they prevailed by both parts in the taxation system. As the Brothers promised to live in celibacy and were bound by the monastic vows, they could claim the last part as well. In fact, all the taxes flew to the Brotherhood. Each of the relevant instances was controlled by the Teutonic Brothers, their territories are therefore being called the first 'state' in Europe.

Since the beginning of the XIVth century, in the strongly centralized Teutonic State the first contrasting tendencies became visible. The Brothers promised to live without property, in chastity and in obedience. Successful wars and flourishing economy made the country wealthy. For that reason some of the Brothers did not hold to their vows strictly any longer. Werner von Orseln (1324-1330) was the first Grand Master who saw the problem and requested the members of the Order to observe the internal rules exactly. His successors set up more explicit prohibitions and banned luxury within the Order by different laws. Every new Grand Master of the Teutonic Order repeated such legislative measures during his regency, which leads to the conclusion that all those efforts did not show the desired results. Winrich von Kniprode (1352-1382) intensified the internal control and made the visitation one of the most significant means to maintain the discipline. This should provide that in every commandery of the Order the same standards are applied. Nevertheless, from different contemporary sources it is known that some of the Teutonic Brothers were wearing expensive clothing or keeping money for themselves – which was clearly not allowed by their rules. The leadership of the Order, unable to get such cases under control, faced soon economical problems. The Teutonic commanderies provided earlier the Order with goods and financial benefits. As some Brothers spent a part of the money for themselves, the income of the Order became smaller. Recently, first members even started forming unofficial alliances to achieve influential positions within the cooperation. Elections became accompanied by a network of protections. These tendencies grew by every decade and should pose a great problem to the Brotherhood in the following century. On the other hand, it would be wrong to argue that the Teutonic State marched towards decentralization. The Brothers strengthened their harmonization efforts and extended greatly the control tools. The Teutonic Order, plagued by internal crisis, remained successful outward. All the cities located under Lübeck law were brought under control and forced to accept Kulm law. Since the middle of the XIVth century the Brotherhood discovered a new branch – trade and commerce – merchandizing with good results. No force inside the state could challenge them.

Especially their successful commercial activities were crucial. On the one side the Order was provided with more wealth and became even more powerful. On the other side the prosperity loosened up the internal discipline which was the source of all victories of the Order. The trade led thus to two contrary appearances – it strengthened and weakened the Order at the same time. It may not surprise that every new Grand Master repeated the statement of his predecessors requesting an exact observation of the internal rules, prohibiting many behaviours and banning luxury. In the widely centralized Teutonic State worked some barely controllable decentralizing forces.

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TITLE

'*IUS COMMUNE*' AND 'GENERAL CUSTOM' VS. 'SPECIAL CUSTOM' IN EUROPEAN 'LEARNED LAW' (XII-XIV CENTURIES)

1. From the birth of European legal science learned lawyers favoured systematization of law. They viewed negatively the particular and personal laws, which dominated Europe in XI – XII century. Certain theoretical and practical actions were taken to make existing rules compatible with '*ius commune*'.

2. Certain role in this process was played by the doctrine of custom. Could a local custom be valid, if it contradicted '*ius commune*'? To solve this problem several fragments of '*Corpus Iuris*' and various theoretical 'distinctions' were used.

3. Of the most popular among the latter was the 'distinction' between 'general' and 'special' customs. Analysis of Glossators' texts demonstrates that 'general' customs were attributed with such properties as certainty, intentional reception, 'general' validity in the 'whole' territory. On the other hand, 'special' customs were attributed with properties of strict individuality, restrictive interpretation and application, additional requirements for validity. Some of the additional requirements by the times of Accursius had been extended to both kinds of custom, but the distinction persevered.

4. It seems that this distinction caused several seeming contradictions in the works of civilians on the role and function of custom. On the one hand, custom was to 'interpret and correct' written law and could be applied by analogy – just like custom in ancient Roman law. On the other hand, 'special' custom could completely 'derogate' a '*ius commune*' rule in its locality.

5. Gratian's '*Decretum*' and the 'Decretists' favoured application of 'general' customs as against 'special' customs. But still, 'special' custom could actually have valid and even 'supreme' legal force. In the decretals of the XII-XIII centuries 'special' custom was almost identical to 'prescription' and was often opposed to '*ius commune*' and 'general customs'.

6. Perhaps, one should assume that by 'special custom' learned lawyers meant real customs of contemporary Europe. These customs in large part existed not as certain sets of rules, but as the systems of adopted local procedures; they were 'customs-privileges', not general rules. Learned lawyers tended to fix these customs in time, restrict their application and make them compatible with '*ius commune*'. 'General customs', on the other hand, were customs 'as they ought to be' – certain articulated rules. '*Ius commune*' and 'general customs' were '*ius novum*', in contrast to '*ius antiquum*' of 'special customs'.

7. Some of the aforesaid problems seem to have been solved by the Commentators, who divided the institution of custom into elements and created a more practical model of it. However, the traces of old ambiguities could still be found in Bartolus's works.

8. The distinction between 'general' and 'special' custom, connected with the opposition of '*ius novum*' and '*ius antiquum*', left traces in the texts of European '*ius proprium*', such as '*Coutumes de Beauvaisis*' and '*Siete Partidas*'.

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TITLE

ROMAN LAW AND ETHICS IN 19TH CENTURY EUROPE: AN ITALIAN PERSPECTIVE IN ANTONIO ROSMINI

In his monumental *Philosophy of Right* Antonio Rosmini draws his concept of right and of State constitution which should be an answer to the challenge of modern society after the French Revolution. With regard to constitutions and civil rights of the French tradition he criticized their failing *juridical* stability and dignity. It's particularly worthy of notice that right for these dimensions he recurred to Roman law which – even if it is lacking in the complexity of the relation between individual and State and therefore in the modern requirement of constitution – determined in a fundamental way the items *societas*, *ius*, *iustitia*, *libertas*, *ratio* and *natura*.[1]

His own contribution he realized and concreted in some experiments of constitutions which are incorporated in a paradigmatic constitution entitled significantly 'of the social justice' (1848).[2] In 19th century Europe there was a great need of 'good rights', as Rosmini emphasizes, expressions of a universal legislation, founded in a constitution and manifesting therefore certainty and uniqueness.[3] To this goal, Rosmini outlines in his *Philosophy of Right* (1841-1844) the 'original and noble idea of justice',[4] connecting it to the Roman right. He strongly criticized all the ones who negated to Roman law any importance for modern law, emphasizing at the same time the need of completeness and perfectness which characterizes modern legal systems. That's why Rosmini on the one hand valorizes the position of Savigny according to whom the right is rather the expression of the national spirit (*Volksgeist*) than a result of the act of legislation,[5] criticizing him, on the other hand, with Hegel for his general hostility to constitutions and for modern systematicity. Pointing out the importance of rationality and justice of the constitution, Rosmini revaluated Roman law and inquired the importance of its specific rationality for Europe 'also after the formation of modern Codifications'.[6]

According to Rosmini, the rationality of Roman law is essential to avoid the positivistic risk inherent in modern legislation which should be brought to its perfection by Kelsen. It's interesting that in the Rosminian point of view also the Pandects of Savigny (and then of Puchta) in the end can not avoid this consequence. The particular way Rosmini studied Roman law is the intention to find a juridical rationality and systematicity that European modernity had forgotten, connecting it to the modern necessity of constitution.

The goal of the paper is to delineate Rosmini's interpretation and evaluation of the rationality and systematic of Roman Right, according to the modern challenge of constitution. Rosmini doesn't give a systematic treatise of Roman Right; despite that, its comprehension is the *condition sine qua non* for the comprehension of his *Philosophy of Right*[7] which

1 M. Balestri Fumagalli, *Rosmini e il diritto romano*, Milano 2003, 29.
2 Cf. A. Rosmini, *Progetti di costituzione. Saggi editi ed inediti sullo Stato*, ed. by C. Gray, Milano 1952.
3 Cf. A. Rosmini, *Filosofia del diritto*, 6 vols., ed. by R. Orecchia, Padova 1967-69, I, 1. This work is traduced in English: *The Philosophy of right*, 6 vols., translated by D. Cleary and T. Watson, Durham 1993-96.
4 Rosmini, *Filosofia del diritto*, I, 4.
5 Cf. Rosmini, *Filosofia del diritto*, I, 11.
6 Rosmini, *Filosofia del diritto*, I, 8s.
7 Cf. Balestri Fumagalli, *Rosmini*, 15s.

inspired some of the most important Italian constitutionalists and juridical philosophers of the 20th century, such as Ferrini,[8] Capograssi,[9] Cotta[10] and others. Lastly, since Rosmini wrote the *Philosophy of Right* in an explicit European vision, he can be considered as an important voice of the Italian perspective on 'Roman law and ethics in 19th century Europe'.

8 Cf. M. Balestri, *Rosmini Ferrini La Pira*, in: Index. Quaderni camerti di studi romanistici 34 (2006) 253-274.
9 Cf. G. Capograssi, *Attualità e inattualità di Rosmini*, a c. di V. Lattanzi, Roma-Stresa 2001.
10 Cf. S. Cotta, *I limiti della politica*, Bologna 2002.

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TITLE

MEDIATIVE POWERS OF ARBITRATORS AND *AMICABILES COMPOSITORES* IN ROMAN LEGAL TRADITION

An arbitrator of Roman law was primarily an expert. He was selected when specific skills, knowledge, experience or understanding of the subject matter was required for dispute resolution. In non-state proceedings of Roman time arbitrators were empowered not only to adjudicate on contradictory claims of the parties, but could act as mediators. Mediative function was as a derivation of the arbitrator's expert role in arbitral proceeding. Cicero defines arbitration of his time as a mild and moderate mechanism of dispute resolution and determines the mediative role of the arbitrator: (1) to level legal interests of the parties; (2) to strike a deal, i.e. to reach negotiated agreement between the parties; (3) to conciliate rather than to rigidly decide on who is right and who is not (CIC., Pro Rosc. 4, 10-11). In case of the arbitrator Chrysippus, Cicero even put an imperative before him to decide the case following *the ratio of the middle* (*medium ferire*). This ratio would prevent the party in dispute from losing the case due to unintentional overclaims. The ratio would encounter arbitral awards that would contain proclamation excessively favouring interests of a single party in dispute (CIC., De fat. 17, 39). On such basis pre-classic and classic legal practice of Roman law developed the idea of the arbitrator good man (*arbiter bonus vir*). His arbitral efforts were mediation in its full sense whose result had to be just and friendly. From the etymological point of view (which coincides with legal determinations) an arbitrator good man is defined as an intermediator of parties' legal interests in dispute. The sources often refer to him as to *moderator* indicating his mediative function.

In the Middle Ages French canonists and scholars created the term *amicabilis compositor* modelled on the Roman *arbiter bonus vir*. In Durantis' '*Speculum iudiciale*', the most important medieval work on Roman-canon proceedings (1271), *amicabilis compositor* was defined as a person who conciliates and distributes what is uncontested. Baldus de Ubaldis highlighted his goal to build harmony between the parties by appealing to their mutual understanding for the purpose of conciliation. From that time treatises on law of procedure regularly contain a title *De arbitro and arbitratore* defining the *amicabilis compositor* in later sense, which is firmly grounded on Roman law. Dutch theorists Johannes Voet and Joost van Damhouder defined *amicabilis compositor* as an arbitrator who follows righteousness and resolves the dispute by his counsel and honour.

This paper will examine mediative powers of arbitrators from Roman law to *ius commune* and will follow its development line. Pre-classic and classic legal practice of Roman jurists' represented a basis upon which medieval legal scholars and practice, as well as theorists in New ages, accepted in Europe a uniform type of private judges called *arbitratores – amicabiles compositores* whose main function was mediation. On the example of this institute the paper will discuss how legal tradition based on Roman law affected cohesion and uniformity of principles regarding private procedures in Europe.

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TITLE

THE IMPLEMENTATION OF JUSTICE IN SOVIET LITHUANIA 1944-1990: THE CONFLICT OF LEGAL VALUES

The research about the implementation of justice in Soviet Lithuania in 1944-1990 is based on the proposition that the implementation of justice is the fundamental obligation of a government. This proposition is related to the doctrine of separation of powers which was developed by Ch. Montesquieu and discussed in Lithuania by the great academic Mykolas Romeris before World War II. According to this doctrine the judiciary is an independent, discrete body from the executive and the legislature and the functions of these bodies are exercised by separate institutions. But the Lithuanian legal system was not always based on this doctrine. The Constitution of Soviet Lithuania (1940) established the independence of the judiciary and the guarantees for judges, but at present there is a preconception that these principals were only declarative postulates. For this reason at first glance it could seem that the research of implementation of justice in Soviet Lithuania is not relevant or important. However, it is obvious that only objective and retrospective research could reveal the historical and legal importance of the implementation of justice in Soviet Lithuania.

The presentation is followed by the introduction of scientific problem which is question, was the implementation of justice in Soviet Lithuania determined by the soviet ideology? Next, the definition of justice and differences between *socialistic justice* and *socialistic legality* definitions are revealed. The institutional framework of implementation of justice in Soviet Lithuania and the definition of the *implementation of justice* will be discussed as well. Furthermore, the concept of the *implementation of justice* will be compared with the present Lithuanian constitutional definition of implementation of justice and main differences between present implementation of justice and socialistic implementation of justice will be revealed. Also the Soviet Lithuania judiciary system will be represented. Then the elements of the process of implementation of justice in Soviet Lithuania and the operation of the Soviet legal system in Lithuania will be revealed, specifically, the independence of judges and judiciary and its guarantees.

In addition, the relevance of the research will be introduced and the basic ambitions of the research will be presented. The basic goals of this research are to reveal the institutional framework, to discover the implementation of justice in Soviet Lithuania and to investigate how the implementation of justice in Soviet Lithuania was determined by the Soviet ideology. Conclusively, the methodology of the research will be introduced.

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TITLE

PATRIMONIALISM AND PATRIARCHALISM: THE DISCONTINUITIES AND CONTINUITIES OF THE RELATIONSHIP PORTUGAL-BRAZIL

The present article intends to discuss how the patrimonial and patriarchal relationships that are perceived in Portugal at the beginning of the XVI century relating them with the formation of its juridical culture. Afterwards, we intend to verify how that relation between culture and juridical culture could also influence the formation of the juridical culture in Brazil. For this, the present article, necessarily interdisciplinary because of its research focus and the adopted methodology, needed not only a dialogue with the law scholars, but also with historians, sociologists and anthropologists. Here we start from the ascertainment that it is not possible to make law history only using the positive law or only the official sources as the positivist historiography would recommend, but it is possible to make law history by using different elements of sociology, of history, of the social customs. At this point it was also necessary to dive into the theories of history to discuss continuity and discontinuity concepts, analyzing, sometimes the repetitions, of long or short duration, sometimes the sudden or slow alterations. The attempt is to bring those elements of the theory of history to the history of law, the attempt is to question the history of law and not to create a simple repetition, because that way it can be possible to deconstruct or reconstruct facts, narratives and historical events.

After these discussions, it was possible to notice that it is not possible to construct a perfect straight line, progressist in the patrimonialism and in the patriarchalism, in the Portuguese juridical culture as well as in the Brazilian one. The process of formation and construction of these cultures, that takes into account not only the culture, but also the analysis that are made about them, show that both live in processes loaded with mishaps, successes, ups and downs. The history of law, in these two countries (also in others) cannot be analyzed as a stride towards progress, as a way to something better. These arguments are used to legitimate a juridical culture that is seen in the present and that may not be compatible to their past.

To use concepts such as progress and linearity in the analysis of these histories of law is to use these histories to justify the current positivations and to want to look at the past with the eyes of the present, without criticism, or grounds, in its context, which is peculiar and diverse from the current one. Namely, to draw these lines in the history of law is to ignore what the historical research shows us and it is to make yesterday's history with today's facts.

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TITLE

CORPUS IURIS CIVILIS AND RECEPTION OF LAW IN TURKEY

Roman law was in force, within the boundaries of Roman Empire, from the foundation of the Empire (BC 753) till the death of the East Roman Emperor Justinian (AD 565). The *Corpus Iuris Civilis* is the name given to a four-part compilation of Roman law prepared between 528 and 534 AD by a commission appointed by Emperor Justinian and headed by the jurist Tribonian. The Corpus includes the Code (a compilation of Roman imperial decrees issued prior to Justinian's time and still in force, arranged systematically according to subject-matter); the Digest (or Pandects) (fragments of classical texts of Roman law by well-known Roman authors such as Ulpian and Paul, composed from the 1st to the 4th centuries AD, arranged in 50 books subdivided into titles); the Institutes (a coherent, explanatory text serving as an introduction to the Digest, based on a similar and earlier work by the jurist Gaius); and the Novellae (Novels) (a compilation of new imperial decrees issued by Justinian himself). After this period it gained great effectiveness on European countries until the codification movements in the nineteenth century. During the enlightenment and the period of the new codifications, law had risen to prominence in a form closely tied to the nation state. Although the new codes were national codes, they were largely based on Roman law. In nineteenth-century Europe, the *Corpus Iuris Civilis* provided inspiration for several codifications of law, notably the French Code Napoléon of 1804, the Austrian code of 1811, the German code of 1889, and the Swiss codes of 1889 and 1907. Through these codes, elements of Roman law spread beyond Europe. German law influenced Hungarian, Brazilian, Japanese and Greek law. The Turkish Civil Code, which is based on the Swiss Civil Code, also finds its roots in Roman law.

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