JURISDICTIONAL COMPLEXITY IN WESTERN LEGAL HISTORY, C1600-1900

GHENT , 6-7 JULY 2012

Western legal histories are frequently told as very simplistic and whiggish tales. They highlight common laws at the expense of both myriad, layered local laws and other, less formal, normative orders. But the creation of genuinely general national laws, a legal 'system' centred on the state, and the elimination of competing jurisdictions and marginalisation of non-legal norms was a very long historical process. Indeed, the ideas and institutions of many of the competitors of national law have survived into the present. Because the historical and contemporary importance of these jurisdictions is not reflected in current historiography, the proposed volume in comparative legal history will examine Western jural complexity from the sixteenth through the nineteenth century. Only the study of these marginalised normative orders—each worthy of study in their own right—will provide us with the appropriate context necessary to understand the laws that have continued into the present period. Their failures will tell us much about the successes of our contemporary common laws.

Legal and normative complexity or hybridity was, in fact, the norm across the West before the nineteenth century. There were multiple contemporaneous legal orders co-existing in the same geographical space and at the same time. Legal traditions were—and are—each unique hybrids of diverse folk-laws, summary and discretionary jurisdictions, local and particular iura propria, the romano-canonical 'learned laws' or ius commune, and other trans-territorial iura communia (including feudal law and the lex mercatoria). Law was also polycentric, with multiple, competing centres. Over time, these various bodies of law were linked to public institutions and increasingly meaningful and centralised powers of enforcement. They only slowly came under the control of early modern states and legal 'systems'. This fragmented plurality of laws contributed much to the substance and subsequent success of common laws.

The law also blurred seamlessly into the less formally institutionalised, but meaningful, normative pluralism from which more formal legal rules often emerged and with which they would continue to compete. Especially in the pre-modern period, such normative traditions may appropriately be included within the public adjudicative or juridical—though not necessarily 'official' or state—sphere. Before the nineteenth century, the boundaries between such official and unofficial 'legalities' were especially porous. Legal traditions are, in fact, a sub-set of normative traditions generally, distinguished by the formality and professionalism of its institutions. As a result, histories of hybridity ought to include both formal and informal, or institutionalised and non-institutionalised, 'legalities'. The failure of legal historians to tell this more complex history is a loss for legal study as well, not least for legal theory. (Cf, eg, Martin Pilch's Der Rahmen der Rechtsgewohnheiten: Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte (2009))

If the project will highlight legal diversity, it may also reveal legal unities in unexpected places. In its open nature and use of transnational, pan-European bodies of law and legal doctrine, England and Ireland were little different from jurisdictions across the Channel. This fact has often been obscured by the English law's comparative autonomy from Europe's iura communia and a belief in exceptionalism. But English law was always part of a wider European jurisprudential-juridical legal culture. Until the nineteenth century, English law also contained much more than the so-called 'common law'. The 'common law' of England, properly understood, was a law geographically common across the English kingdom in contrast to both (i) pan-European common laws and (ii) local, particular jurisdictions. The courts of common law competed for centuries with those dispensing English 'Equity' and the numerous courts of the Anglo- and Hiberno-canonists and civilians. Many of these ensured that Anglophone lawyers were in constant communication with continental laws.

There were also England's numerous iura propria, its commercial, urban, and manorial courts, the sessions of the justices of the peace or sheriffs, small-claim 'courts of requests', and other local jurisdictions. In addition, there were numerous lesser sites of 'low justice' where formal law meant little and much was left to the discretion of lay judges. Here especially, competing normative traditions could easily trespass on the ephemeral decisions and equitable motivations of the courts. All of these jurisdictions were essential to the formation of modern Anglo-American legal traditions and systems. The common law of England only achieved its hegemony over the course of centuries by borrowing from and absorbing its rival jurisdictions, both foreign and domestic.

Continental legal history sometimes suffers from some of the same problems. The histories generated by those prescribing a novum ius commune Europaeum are frequently fuelled by the politics of the present. This isn't to suggest that such histories are necessarily poor. It is very useful, for example, to be reminded that the law of the 'old' ius commune, especially in the form of juristic doctrine, preceded the state and modern jurisprudence and legislation; its authoritativeness did not rest on state authority. But such histories are often highly selective in their presentation of the iura communia. Roman elements are celebrated as providing central principles. The canon law, so important to Europe's legal inheritance, is discussed less often and viewed as more problematic for modern purposes. Feudal law, a common or universal law throughout much of European legal history, is similarly marginalised as having less apparent contemporary utility. The lex mercatoria, like the new ius commune, is paraded as mere preparation for a European or globalised economy. Indeed, legal historians do not always take into account that the expression 'ius commune' sometimes referred to (i) that part of the learned laws acceptable in the local, limited jurisdiction or (ii) to a national common law (eg, droit commun in France; gemeines recht in Germany), itself a hybrid of learned and local laws. Most problematically, little is said of the iura propria, the particular laws of Europe that were, over time, borrowed from and absorbed into the national iura communia. Perhaps it is more accurate to say that the piecemeal presentation of these histories obscures their participation in the larger, plural whole. These 'lesser' jurisdictions affected more people more of the time than did Europe's common laws. They contributed much to the more dominant common laws.

Like modern comparative law, the knowledge of our past can reveal important similarities to and differences from our present domestic laws. Histories of hybridity serve an especially useful critical function. They undermine, for example, the anachronistic application of modern legal nationalism and positivism, legal centralism and unity, into the past. They remind us that the 'state' has been historically, and in much of the world remains, only the most obvious and formalised creator of norms. They challenge ideas of deep correspondence between laws and societies and the division of multifarious traditions into reasonably discrete, closed legal systems or 'families'. The plural Western past can also tell us much about the global present. In doing so, histories of hybridity may prepare us for the future and new—or are they old?—possibilities. Things have, after all, been different; they will be again.

PROGRAM

Friday 6 July 2012

15:00-15:15

Welcome by the Dean of the Ghent Law Faculty and Introductions

15:15-15:30

General introduction
by Prof. Dr. Dirk Heirbaut and Prof. Dr. Seán Patrick Donlan

15:30-16:30

Session One:

- Hybridity and historiography': Prof. Dr. Seán Patrick Donlan
- Acadia, 1660-1710: Prof. Dr. Jacques Vanderlinden (read by Drs. Sebastiaan Vandenbogaerde)

16:30-16:45

Coffee Break

16:45-18:15

Session Two:

- Spain: Prof. Dr. Aniceto Masferrer
- Italy: Dr. Adolfo Giuliani
- Italy: Dr. Annamaria Monti

18:15-18:30

Miscellaneous

Saturday 7 July 2012

09:00-10:00

Breakfast/Coffee

10:00-11:00

Session Three:

- Low Countries (II: Southern) Drs. Bram Van Hofstraeten

11:00-11:15

Coffee Break

11:15-12:45

Session Four:

- Nordic countries: Prof. Dr. Heikki Pihlajamäki
- Scotland: Prof. Dr. John Finlay
- England: Prof. Dr. Anthony Musson

12:45-13:45

Lunch

13:45-14:45

Session Five:

- Ius commune: Prof. Dr. Alain Wijffels
- Lex mercatoria: Dr. Dave de Ruysscher

14:45-15:00

Coffee Break

15:00-16:30

Session Six:

- Methodology of legal history: Dr. Bruno Debaenst
- The legal histories of European Jews c1600-1900: Dr. Nir Kedar

16:30-17:00

Session Seven:

- Codification: Prof. Dr. Dirk Heirbaut

17:00-17:30

Instructions for the Draft and Limerick Meeting:
Prof. Dr. Dirk Heirbaut and Prof. Dr. Seán Patrick Donlan

17:30-18:00 General Discussion