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Editorial

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Editorial

In June of 1713, Friedrich Wilhelm I. decreed in the *General Order for the Improvement of the Justice System*: »In the provinces where more than one law – part Roman, part Saxon, part a *Jus consuetudinarium* – are applied, We want to work on real constitutions, so that all of the mistakes and ailments arising from an uncertain law will be abolished […]«. The *abusui praejudiciorum* must be countered, the *arbitrium Judicis* should not be extended too far and over the »inherent barriers« (*behörige Schrancken*). With this order, and shortly after his coronation, he took up the general criticism of the justice system. Already seventy years earlier, in his *De origine iuris germanici* (1643) – for some *the* »foundational text« when it comes to legal historical scholarship – Hermann Conring had spoken of the »considerable burden« for the people, an »insurmountable ignorance of the law, which above all else must be the guiding principle (*Richtschnur*) of everyone's civic life, to be shackled and by means of its [law's] flexible ambiguity soon [the people] to become a plaything, [or] soon to have their belongings exposed«. Efforts were taken in the following decades to cast off some of the shackles of the past, to tear down the Roman law façades from the institutions – as Christian Thomasius phrased it at the beginning of the 18th century in a well-known expression concerning the *lex Aquilia* – and to present them as a product of pure *ratio*. People claimed a *usus modernus* or *hodiernus*, the ›contemporary‹ use of traditional law, they urged for an acceleration and higher predictability of the proceedings. The further history of both the judicial and constitutional reforms in Prussia are well known. They led to the judicial reforms and culminated in the enactment of the *General Law for the Prussian States* (ALR, 1794), which was characterised as a »Janus-faced« codification. This characterisation points to a duality: the ALR was a document born in the spirit of the Enlightenment and Absolutism, a »self-disciplining of the monarchy«, and at the same time, it reinforced a historically outdated social culture. Instead of »the same for everyone«, the highest principle of justice was »to each his own«. It was not least this attempt to maintain an order based on inequality which was seen as a decisive factor for the failure of the »*veritable Verfassung*« (true constitution), as de Tocqueville would later formulate it.

The unification of law based on principles, the struggle against territorial legal fragmentation, the displacement of custom and regulatory autonomy associated with status, the monopolisation of the production of law and rise of (state-based) laws, codification, centralisation of justice, acceleration of the supposedly never ending judicial process, equality as a principle of justice, transparency, predictability, rationality of law, the commitment to and emancipation from the past, discourses about temporality and the need for reform – these are just some of the broader themes that legal historiography has pursued since the »saddle period«, in other words the 19th and a considerable part of the 20th centuries. Notwithstanding the importance of these developments, over the past several decades, questions lying outside of these themes have become more pressing: concerning the ongoing legal diversity also in the 19th and 20th centuries, the meaning of non-state law, the continuous and intensification of judicial law-making, the denationalisation of law and justice, the emergence of multi-level systems and transnational legal regimes, and the non-rational aspect of law. From the perspective of legal theory and scholarship dedicated to normativity, there is ever greater interest in the hidden factors that influence and shape the production of law – and which impact on the *arbitrium Judicis* as well. How do we cope with some preconditions of the juridical practice that have been invisible to a historiographical tradition, for instance, which saw the Western legal tradition as a process of rationalisation, which depicted interpretation of law as a mere act of subsumption, which asked for law in books and law in action, but not for the praxeological dimensions of this? What does implicit knowledge mean, what roles do aesthetic perception, emotions, historical conceptions of time play within the production of law? What does taking them into consideration mean for our conception of law? These are but a few of the questions that serve as the background for the contributions of this issue of *Rechtsgeschichte – Legal History*.

In the thematic focus »Multinormativity«, eleven contributions, stemming primarily from the

German-speaking community, are not addressing the slow emergence of statehood and its juridical forms of action as a process of an increasing absorption of functions and legal sources, but rather asking about constellations and modalities of legal diversity, about constellations of interaction in and the normative levels behind the juridical praxis. This panorama extends from »collaborative legal pluralism« of spiritual, secular and moral-theological normativity in the 16th century to the *differentiae-literature* and the *ius commune* of the 17th and 18th centuries to scholarly practices and the standardisation of good scholarly praxis in the same period. The 19th and 20th-century courts of honour are presented as places where different normative rationalities came together, the internal pluralisation of the normative orders through a more consistent democratisation of norm generation in the present are worked out, and the normative charging of transnational rights since the 1970s are demonstrated by the example of the *OECD Guidelines for Multinational Enterprises* and their interaction with state, national or intergovernmental and international law. Two authors deal with the symbiosis of legal and illegal normative orders in the area of criminal politics, another contribution takes up legal aesthetics and analyses the coupling of value judgments (both of an aesthetic and moral kind), and in doing so delves deep under the surface of normative thinking and acting. Two further contributions devote their attention to observing talk about legal diversity.

That this year's »Focus« can be found under the heading »Multinormativity« refers to the fact that it is one of the four research focus areas here at the Max Planck Institute, which – after »Space« and »Translation« in *Rg* 23 (2015) and *Rg* 24 (2016) – now takes centre stage. Both what this means and wherein lies the difference between »multinormativity« and »legal pluralism« is the subject of an introductory contribution at the beginning of the »Focus« section. In the book reviews as well, a particular emphasis on monographs that take up the historical forms of normative diversity is evident. We are very grateful to the reviewers for making it possible for us to publish so many reviews in languages other than those in which the books were written. Multilingualism is for us here both a reality and a guiding principle, and in contrast to last year's issue, which was almost completely in English, this issue of the *Rg* tips the scale in favour of German language contributions.

The second thematic Focus is in some respects closely related to issues raised in the »Multinormativity« section, yet the contributions here don't necessarily have a specific interest in or focus on normative research and emerged out of a research project at the Max Planck Institute for Human Development (Berlin). This research examines the history of law and emotions, a perspective that has garnered increased attention on the international stage within the past few years. Even in the Law and Emotion scholarship, which is not specifically oriented toward historical analysis, the focus for some clearly involves the deconstruction of specific guiding narratives of law as an objective, rational, scientific shaping of social relations – and to some extent even here normative claims are raised. The increasing consideration of emotions, of empathy, of special circumstances exerts a centrifugal force on the legal system based on the principle of unity. For this reason, and in the face of the attempt – also at stake in the first »Focus« section – to make the presuppositions of juridical thinking, acting and deciding visible, we are more than pleased to include the studies and surveys regarding the history of emotion and law into this issue of our journal. The coordinator of this »Focus« section, Daphne Rozenblatt, has written an introductory text on the topic. Moreover, we owe a debt of gratitude to her for the series of images accompanied by an *Introductory Note on Images of Legal Feeling*. Perhaps the images found throughout this issue represent a case of »synaesthetic« as it is described in the Focus section »Multinormativity«.

In the »Research« section we are again printing an extensive contribution about the contemporary history of legal scholarship in the Berlin Republic. In the context of the Institute's project *Legal Scholarship in the Berlin Republic*, the results of which will be published toward the beginning of 2018, Jan Thiessen dealt so exhaustively with the history of trade- and corporate law – in the language of the Berlin Republic: the company law – that we decided to publish the long version of his article in this issue. Some additional material will be published in the MPI research paper series (SSRN). In his contribution, Thiessen takes us deep into the workshops and conference rooms of the making of commercial law. He traces the reforms in this field of law, but above all the interactions of the various institutions, interested parties and per-

sons involved in its production. He shows the increased importance of normative spheres like corporate governance codices, the tendency toward denationalisation and the emerging push toward regulation, not to mention the self-image of the actors involved, who positioned themselves to become potential evaluators, scientific authorities, legal designers or future honorary professors. In other words, Thiessen has produced a piece of radical contemporary history.

At the beginning of this issue of *Rechtsgeschichte – Legal History*, there is a reflection about the major question of the relationship between law, time and legal history. Andreas Thier has taken up this challenge. He offers a concise summary of the long-running debates on time as a fundamental dimension of the meaning of social action, which led to the uncovering of a historical multiplicity of time conceptions and to an intensive historiographic reflection about one's own actions – and Koselleck's »time layers« (*Zeitschichten*) mark for him, as well, an important point along this path. The historical regimes of time are of particular interest for scholarship on legal history, for time is a constitutive dimension of law, and law itself is a medium of temporal conceptions – with everything this entails. Thier demonstrates this by means of looking at some of the functions of time and temporality as epistemic elements of law, with a view toward the dialectic of immutability and adaptation, toward its identity-granting function for legal orders, as a dimension of governance as well as in the modality of acceleration as a justificatory element for the reduction of complexity. Using precisely selected prominent examples stemming from the classic texts of legal history – such as the *potestas legislatoria*, the conception of office (*Amtsbegriff*), the eternity clause, systems of knowledge ordering, natural law, statute of limitation and legal fiction, *damnatio memoriae* or *periculum* and *periculum in mora* – he illustrates the diverse realisation of law and time between the early Middle Ages and modern period. Reading his article makes the relative lack of attention dedicated to these connections within legal history all the more astonishing. Yet his contribution might just change this situation – and thereby accomplish what we have set out to do in this issue: to stimulate reflections about law.

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