

Legal Cultures on the move

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Summary: During the last decades we have witnessed a development away from legal positivism, which has left both legal philosophy and legal sociology somewhat disoriented. The establishment of a Centre for the Studies of Legal Culture at the University of Copenhagen in 2008 indicates a need for a theoretical and practical reorientation of legal knowledge which may guide us in our understanding of a changing global and environmental context. This article approaches movements of legal culture through a 'personalized' and 'relational' approach in an attempt to present normative phenomena as interlinked and interacting in time and space. For this purpose three 'figures' exemplifying encounters in and between normative cultures and three 'ways' of movement of legal cultures are presented. The figures are figures of the so called pre historic past, of East and West, and the last a modern legal figure. The ways are historical and physical ways, 'ways and images of norms and beliefs' and 'transformative pathways towards the future'. The meaning of the legal and of legal culture is not static – it is changing.

Keywords: legal culture; law and literature; legal archeology; legal narrativity; biographic method; history and normativity; Tollund man, Matteo Ricci, Radbruch.

»Truly, the jurisprudence of humanity began millennia ago; to ignore this in the teaching and doing of law and jurisprudence..., is to squander the common heritage of mankind« (Baxi 1991, 276)

In the mid 1990s the grand old Italian philosopher, Norberto Bobbio claimed that there had been a gradual shift away from »the old rigid notion of legal positivism«, which had been forced to abandon or attenuate some of its traditional dogmas »such as the omnipotence of the legislator, the unity, completeness and coherence of the legal system, the purely formal validity of norms and the imperative and coercive nature of law«. He continued that he was tempted to say that as an ideology legal positivism had been abandoned, and as a theory it had been extensively revised. According to him this circumvention of 'the gulf between natural law and positive law' was largely the result of »the fact that more so than in the past, we live and work in a universe of shared values, which are those of liberal democracy construed as a set of rules for living together. These rules are based on the acknowledgement

of human rights and are aimed at eliminating the use of force as a solution to social conflict... Yet the skies of our shared ideals are not crystal clear and I see dark clouds looming on the horizon.« (Bobbio 1997).

This development away from legal positivism has left both legal philosophy and legal sociology somewhat disoriented. It has led to a huge literature on human rights, but it has also meant that interests in long term perspectives and in legal history have increased and that we have seen a certain shift from an institutional approach to law towards legal culture (see Nelken 1997) and 'cultural readings' of legal science (Michalsen 2007, 75). The discussion on legal culture was started already in the 1970s by Lawrence Friedman, who has a very broad understanding of legal culture, as referring »to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds« (Friedman 1997, 34). In Friedman's view »legal culture is an essential intervening variable in the process of producing legal stasis or change« (34). What is studied under this heading is »by definition a formative element of 'living law' rather than book law« (36).

The establishment from the beginning of the year 2008 of a Centre for the Studies of Legal Culture at the Law Faculty at the University of Copenhagen, which encompasses both legal history, legal philosophy and sociology of law as well as a number of other areas, especially concerned with changing understandings of (intellectual) property and the environment, is an indicator of the need for a theoretical and practical reorientation of legal knowledge which may guide us in our understanding of a changing global and environment.

Together with the two other articles by Reza Banakar and Roger Cotterell in this issue this article is an attempt to trace 'legal culture' in time and space. This raises both methodological and theoretical challenges. In this article I have decided not to focus on the concept of or a definition of 'legal culture' (see Cotterell and Friedman 1997) but to approach movements of legal culture through what I will call a 'personalized' and a 'relational' approach, in the hope that this approach may inspire other readers and researchers to view normative phenomena as interlinked and interacting in time and space. For this purpose I will present three 'figures' exemplifying encounters in and between normative cultures and three 'ways' of (movement) of legal cultures to underline what Henrik Zahle wrote in his legal philosophy, namely that law is about human affairs. Zahle underlined the importance of law as a human phenomenon (Zahle 200, 324f). I think we will see that relations between humans and nature will again take up a more important role in the future.

Figure of the Past – The Tollund Man (lived about 310-350 BCE in contemporary Jutland)

The Tollund Man
Bridegroom to the Goddess

She tightened her torc on him
And opened her fen,
Those dark juices working
Him to a saint's kept body¹



»An early spring day – 8 May 1950. Evening was gathering over Tollund Fen in Bjaeldskov Dal. Momentarily the sun burst in, bright and yet subdued, through a gate in blue thunder-clouds in the west, bringing everything mysteriously to life. The evening stillness was only broken, now and again, by the rating love-call of the snipe. The dead man, too, deep down in the umber brown peat, seemed to have come alive. He lay on his damp bed as though asleep, resting on his side, the head inclined a little forward, arms and legs bent. His face wore a gentle expression – the eyes lightly closed, the lips softly pursed, as if in silent prayer. It was though the dead man's soul had for a moment returned from another world, through the gate in the western sky.

1 Excerpt from a poem by Irish poet, Seamus Heaney. Reproduced in handwriting and dated 16th October 1973 in Christian Fischer *Tollundmanden – Gaven til guderne. Mosefund fra Danmarks forhistorie*, 2007, Forlaget Hovedland, p. 8. The full poem is available on a website dealing with the bog people both in writing and read by the poet himself. <http://www.pbs.org/wgbh/nova/bog/toll-heaney.html>

The dead man who lay there was two thousand years old. A few hours earlier he had been brought out from the sheltering peat by two men, who, their spring sowing completed, had now to think of the cold winter days to come, and were occupied in cutting peat for the tile stove and kitchen range.

As they worked, they suddenly saw in the peat-layer a face so fresh that they could only suppose they had stumbled on a recent murder. They notified the police at Silkeborg, who came at once to the site. The police, however, also invited representatives of the local Museum to accompany them, for well-preserved remains of Iron Age men were not unknown...« (Glob 2004, 8)

This is the introduction to a famous book on the bog people of the Iron Age by Danish archaeologist P.V. Glob published in 1965 and translated to a number of European languages within a few years – and to Japanese in 2002. Professor Glob was doing archaeological research in Denmark, Western Greenland and in the Persian Gulf amongst others in Bahrain for decades from the early 1950s. He insisted that only through a global perspective could the historical and cultural development of small countries like Denmark and Bahrain be understood.

When the Tollund-man (as he later was called) was found in 1950, he was so well preserved that the peat diggers initially suspected that he might be the victim of a recent murder. Later exhaustive investigations showed that he was actually killed – he had been hanged and then placed in the bog, together with the beautifully crafted leather rope. During the Iron Age contacts across Europe took place regularly. In the 20th century archaeologists and specialists had over decades discussed different interpretations of the findings of bog people in Ireland, England, the Netherlands, Schleswig-Holstein and Jutland (Fischer 2007, 105f). First they were interpreted as criminals, who had been punished for serious deeds, since so many of them were hanged and seemingly brutally mutilated before or afterward being hanged. Glob and later archaeologists interpreted the bog people as being subjected to ritual death, and being given as sacrifice – most likely to the goddess of fertility (Glob 1988, 156f), as also indicated in the poem by the later Nobel laureate, Seamus Heaney, who had read Glob's book (Fischer 2007, 7) .

Fischer (p.167f) speculates that the Tollund man might have been sacrificed during the early religious shift from the Bronze Age worship of the sun and the female goddess which was common in Scandinavia and what is now Denmark and Northern Germany to the Iron Age worship of the Norse god Odin known as Woden in anglo-saxon England and Wodan in old high German – a much more military and destructively oriented belief (Lidegaard 1999, 25-26). These gradual shifts of belief and practice took place over several hundred years.

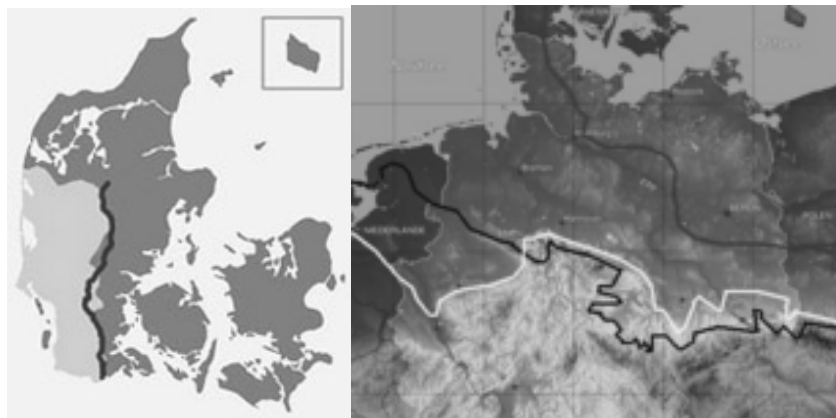
The global relevance of the perhaps most famous bog body in the world, who has been studied repeatedly by interdisciplinary teams of archaeologists, forensic scientists, radiologists, palaeobotanists, and even dentists, can be traced by the popularity and the translations of P. V. Glob's book on him, as well as the many findings on the internet.

Bogs were dangerous places – and also sacred places, and there are many examples of sacrificial gifts found in bogs. Among the most famous is the so-called Gundestrup-cauldron which was sacrificed to the bog and found in 1891 in Rævemosen (literally the Fox Fen) in Himmerland in the northern part of Jutland. It spans about 2 meters and weighs 9 kilo and displays amongst others a probably sacrificial scene where a person is drowned in a vat. Glob writes that it is made in the 'East celtic area' (Glob 1988, 173), while Fischer thinks it is probably from the Black Sea area influenced by Celtic mythology (Fischer 2007, 174). All descriptions agree that it must have been extremely valuable, due to its size, weight and decoration. It is from the Iron Age and dated as being from about year one in what is now often called »common era«.

For somebody interested in legal knowledge and legal culture the figure of the Tollund Man and his age raises amongst others issues of relations between punishment and sacrifice, as well as relations between belief and the ritual acts and practices, which uphold security and stable and beneficial relations between humans and their environment. Living in an age and a part of the ('western') world sometimes characterized by »new punitiveness«, one may ask, what contemporary relations we are experiencing between contemporary ritual punishment and sacrifice.² What ideas and values, attitudes and expectations were producing stasis and change during prehistoric times when differentiation between 'legal' and 'religious' norms were much less accentuated than today? And what attitudes and expectations are producing stasis and change of recent modern Western legal traditions, which are now also undergoing processes of conservation and transformation?

2 I came across this term at a workshop in the Law and Society World Conference in Berlin in the summer of 2007. A book edited by John Pratt and others from 2005 bears the name *The New Punitiveness: Trends, Theories and Perspectives*

The Ways



Ice Age divide in Jutland and 'northern central Europe'³

The Tollund man was found close to a system of roads called Hærvejen, the Army Road, also called the Oxen Road which ran along the water divide separating the peninsula Jutland in the eastern fertile lands and the sandy western lands.

The position of this road Hærvejen (vej = way) is determined by the formation of the landscape by the ice age. For a long time thousands and thousands years ago during the Weichsel ice age lasting from about 110.000-15.000 bce the ice front followed what is today known as the main stationary line – i.e. the limit of the ice covering in northern Europe and the peninsula of Jutland. The ice had pushed large quantities of clay, gravel and rocks ahead of the glacier. The glacial streams ran westward across the areas not covered by ice. Once the ice had retreated, eastward outlets were also made possible. In the time after the ice age this would mean that the streams on either side of the ice front would take either an eastern or western course. The area between the eastward and westward streams is called the water divide. This was the easiest route for passing dry-shod through Jutland, and hence roads were established along the water divide. Remnants of the road system have been found going back to almost 800 years BCE. It was not just one road – rather a system of many small roads formed what we now know as Hærvejen. It was used by traders and their oxen-drawn carts, cattlemen with their herds and pious pilgrims. In times of warfare, it was the natural route for the armies – hence the name, as the Danish name translates into "military road". It was an artery of communication,

3 Images achieved from www.haervej.dk and http://en.wikipedia.org/wiki/Ice_age, where the term 'northern central Europe' is used (August 11, 2008)

through which people, goods, gifts, and ideas entered or passed through the peninsula – voluntarily or involuntarily.

When Denmark was christened – or perhaps rather when King Harald Bluetooth converted to Roman Catholicism around 965 – this was marked by the establishment of the Jelling Stone with Runic inscriptions and an image of Christ on the cross in the (now small) King's town of Jelling situated on the Army Road.⁴ The legal ways and documents were of course influenced by this cultural and normative 'conversion' of formal power symbols. The relationship between king, local 'things', and church influenced the Medieval development of local territorial law books (Landskabslovene – Jydske Lov – the Jutland Law) from the 11th and 12th century. The roads or ways of communication and movement of people, goods, ideas and military illustrate the existence and importance of very long periods of different types of sometimes violent interaction, communication and influence between various parts of what is now called Europe, and which for the last few hundred years were primarily divided along fluctuating national borders which were following other older geological, geographical and cultural borders.

After Christianization the Army Road was gradually linked to roads through Europe to Rome, Jerusalem and Santiago de Compostela. In the year of 2008 some of these walking path and interlinkages are being reestablished with the reestablishment of a pilgrims' route – along with new hostels – starting from the pre-Christian Vi-borg in Jutland – also home to the Western High Court of Denmark next to the Cathedral – running until the present border between Germany and Denmark in Padborg/Flensborg. The idea seems to be to gradually (re)link the pathway up to the Camino de Santiago, which over the last decades has become a very popular walking destination for disoriented Europeans and others who are seeking another relation to themselves and their surroundings.⁵

Today different »European Ways of Law« are again emerging and being studied:

»Europe and European law are formed and reformed as part of the ever-increasing flows of people and ideas in the larger world« (Gessner & Nelken 2007, 1). These flows are nothing new – they have been going on for millennia along systems of ways over land and water – and from the 20th century increasingly also through airways. The human beings who have brought ideas and changes from place to place have suffered, sacrificed and celebrated. Ways of law differ, but they also cross and interact. Llewellyn and Hoebel described differences in their 1942 classic on

4 Mads Lidegaard claims that Danes were already christened by interaction with the iro-celts much earlier (1999)

5 I had the great pleasure of walking from hostel to hostel on the 'Army Road' during a week in July 2008 – coming across the place, where the Tollund man was found – and experiencing that if one follows the water divide in Jutland it is possible to walk for days meeting hardly any people. Probably this may change soon.

different ways of law »*The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence*,« at a time, when there was no doubt about who was primitive and who was advanced. Maybe the choice of title in the 21st century of a title such as »European Ways of Law« indicates that there is less certainty about which legal ways are now the highways, and which are the byways. Experience also with non-European ways of law and their interrelation with nature and culture demonstrate the richness and insights to be had from cultural readings and understandings (Petersen 2001 & 2006).

Figure of East and West – Matteo Ricci (1552-1610, born in Macerata, died in Peking)



Some years ago, when I was editing a book on »Greenland in World Society« (Petersen 2006b) I came across Matteo Ricci in the article to the anthology by Greenlandic-Danish Finn Lynge. Lynge studied philosophy and catholic theology in Copenhagen, France, Rome and the US, and had worked as a curate in Canada in the early 60s, before coming back first to Denmark, and then to Nuuk, Greenland. He worked as a leader of Greenlandic Radio for five years (1974-79) before he became a member of the European parliament for Greenland from 1979-1984 during the few years after Greenland had got Home Rule in 1979, and while it was still a member

of the EU. He was later involved in a lot of different political and cultural consultancy and activities, and was amongst others active on environmental issues.⁶

Finn Lynge wrote an article about the role of the protestant church in Greenland – which was always strongly influenced by the Danish protestant church – and used the example of Matteo Ricci, also called the ‘apostle of China’ (v. Kohl 1916) to demonstrate the importance and value of sensitivity, power of judgement (dømmekraft) and openness in meetings between areas and cultures (Lynge 2006). Lynge underlined how Ricci, who was sent to China to missionize in the 16th century learned Chinese, dressed like the Chinese, built churches in the style of pagodas and gave room for traditional rituals related to ancestor worship in the belief and practice of the new Christian Chinese. Ricci also recognized a different tradition of colours amongst the Chinese and changed the liturgical colours of the church accordingly. According to Lynge, Ricci might have served as a model for the protestant Hans Egede, who christened Greenland – although Egede had probably never heard of Ricci (Lynge 2006, 107f).

In the summer of 2008 I again came across Matteo Ricci, this time in a wonderful novel called »A Quinta Essência« by Portuguese writer, Agustina Bessa-Luis. The protagonist of the novel is a young man from a bourgeois family, who was 16 at the time of the Portuguese revolution of carnations in 1974. His family’s property was taken away and in an act of complicated revenge on the general who wrote the decree enabling the confiscation of the family property, he moves to Macao, then still a Portuguese colony on the way to being transferred to China. His plan is to seduce Illuminada, the daughter of an extramarital affair of the general and a Macanese-English woman. But since Illuminada is under age, he has to wait for years to build up the relationship and await for it to become legal. In this period he comes across Ricci, who is discussed at length in the novel, which shifts back and forth in time.

The most widely accessible source of information of today, Wikipedia, reports that »Matteo Ricci was born in 1552 in Macerata, then part of the Papal States. Ricci started learning theology and law in a Roman Jesuits' school. In 1577, he filed an application to be a member of a Missionary to India, and his journey began in March 1578 from Lisbon, Portugal. He arrived in Goa, a Portuguese Colony, in September 1578, and four years later he was dispatched to China. In 1582, Ricci started learning the Chinese language and customs in Macau, a Portuguese trading post in Southern China, and became a rare Western scholar who had mastered Chinese classical script.«

Although he became most famous for his missionizing work combined with his scientific work as a cartographer and astronomer, Ricci’s career also demonstrates the close relationships over centuries between law and theology. The relations between knowledge, belief, faith and norms are still strongly linked in most parts of

6 See Grønlands Grønne Bog 2001-02 (Biographical information on prominent Greenlanders)

the contemporary world, to the extent that sociologist of religion, Grace Davie claims that contemporary Europe as a secular space is »the exceptional case«, which will not be a model for export (Davie 2002, p.x). This would have as a consequence that globally oriented and interested studies in legal cultures would need knowledge also about meetings between secular and non-secular beliefs, values and attitudes. Ricci's approach and methods seem of contemporary interest here.

Another website on Ricci's contribution to science in China – run by one of the 28 Jesuit Universities in the US, Fairfield University, informs that

Ricci's success was due to his personal qualities, his complete adaptation to Chinese customs (choosing the attire of a Chinese scholar) and to his authoritative knowledge of the sciences. He is remembered for his Chinese works on religious and moral topics, as well as works on scientific topics such as the astrolabe, sphere, arithmetic, measure and isoperimetrics. It is still possible to visit his tomb in the Peking suburbs. The Encyclopedia Britannica reports, »Probably no European name of past centuries is so well known in China as that of *Li-ma-teu* (Ricci Matteo).«...

Matteo Ricci was a pioneer of cultural relations between China and the West, and his profound appreciation of Chinese cultural and moral values enabled him to make China known to the West and the West to China. Ricci made his reputation as a scientist of great versatility, and by his display of such novelties as Venetian prisms, European books and paintings and engravings, sundials, clocks, and maps, he attracted a steady audience. He designed and displayed for the first time his great World Map which brought about a revolution in traditional Chinese cosmography. This was the beginning of his major contribution to the diffusion of knowledge and the religious apostolate he promoted, that is, the composition of works in Chinese on such varied topics as mathematics, literature, apologetics, and popular catechetics. There were more than twenty of these works. The prestige he gained in the highest cultural spheres by his wisdom, scientific knowledge, and capacity for philosophical speculation won him a hearing when he spoke of the gospel message. Without any trace of superiority in his manner, he used a process of dialogue which was characterized by an esteem and respect for everyone. This enabled him to bring the Gospel to the highest non-Christian civilization of his time. By working out a synthesis of the human and moral values in Chinese culture and of the integral gospel message, his method anticipated the pastoral approach of the Church today.

<http://www.faculty.fairfield.edu/jmac/sj/scientists/ricci.htm> 081108

During the 1990s Portuguese legal historian, António Manuel Hespanha was involved with the transferral of the then Portuguese colony of Macao to China. This process gave the impetus to a strong activity on behalf of the Portuguese government, which wanted to leave some lasting legal traces on the space with which they had had special relations for centuries. In an article on »A historic overview of Chinese legal thought« Hespanha writes that until the 19th century China was a model country for Europeans. According to Hespanha this »reflected above all Europe's relative backwardness: Europe was technically less developed, artistically less sophisticated, devastated by plagues and famines, and politically divided« (Hespanha 2003a, p.69).

Hespanha also mentions the role of the Jesuits. The Roman Catholics and especially Jesuits were much feared for centuries especially in protestant Northern Europe, where they were identified with the counter reformation. The second absolute monarch, Christian V (1670-1699), initiated the major legislation that led to the first *Danish Law* of 1683 and shortly after to the *Norwegian Law* of 1687. Danish Law contains six »Books« of which Book II is concerned with *Religion and the Clergy*. Furthermore it states in Book IV that

No one who can be proved to have lapsed into the Papist religion may receive any inheritance, which must pass on to his closest family and heirs; but if he has inherited before he changed his religion, then he retains the inheritance; however, he is not allowed to live in the King's kingdoms. (6-1-1)

If anyone has been to school or university in a Jesuit place, he shall not be allowed to teach, either in the schools or in the churches«. (6-1-2)

One of the earliest modern constitutions in (northern) Europe, the Norwegian constitution from 1814 forbade the entrance of Jews and Jesuits to Norway.⁷ Jews were allowed to enter from 1851, but Jesuits had to wait for more than another century, until Norway in 1956 ratified the European Convention on Human Rights.

»It was above all the Jesuits who enthusiastically spread the message concerning all things Chinese. They studied and adopted the Chinese culture, became *literati* and served in important posts at the imperial court. They argued that as a result of their natural disposition and their culture, the Chinese were very close to the Christian religion. This can be explained first of all by some similarities between the Jesuit's world view and their view of society (the »Secunda Scholastica«) on the one hand, and the Chinese world view on the other; secondly by the Jesuits' evangelising strategy, the aim of which was to integrate themselves, patiently and in depth, into the culture of the peoples they were preaching to« (Hespanha 2003a, p, 69)

The hostility of contemporary Nordic – and especially Danish – legal culture towards other religions, especially Islam, may probably be traced back to this absolutist hostility towards Jews, Catholics and Jesuits.

7 The second paragraph in the Norwegian constitution: Den evangelisk-lutherske Religion forbliver Statens offentlige Religion. De Indvaanere, der bekjende seg til den, ere forpligtede til at opdrage sine Børn i samme. Jesuitter og Munkeordener maae ikke taales. Jøder ere fremdeles udelukkede fra Adgang til Riget. [The evangelical-Lutheran Religion will continue to be the public religion of the state. Those citizens who confess to this are obliged to bring up their children accordingly. Jesuits and monastic orders are not accepted. Jews are still excluded from access to the realm. – my translation]

Ways and images of norms and beliefs

In his attempts to understand and describe contemporary western and Chinese legal culture Hespanha uses the term »legal imagery« and in a table he contrasts these different imageries, which underline the differences in the legal cultures.

| Western legal imagery | Chinese legal imagery |
|--|---|
| Society as a universe of individuals, free and equal | Society as a hierarchically ordered universe of social autonomous bodies |
| Individual free will (freedom) as an ideal | Established social order – with consequent limitations to individual autonomy – as an ideal |
| Social progress (change) as an ideal | Social stability as an ideal |
| Law as the product of State will | Law as the product of community tradition |
| Law as separated from other social norms | Law as embedded in social ethics, education and good manners |
| Statute law as the (only) legal standard | Law as integrated by a multiple set of norms of social behaviour |
| Justice as the product of an official court decision | Justice as the result of community (or community traditional leaders) judgement |
| Official courts as temples of justice, fairness and impartiality | Official justice as a world of greedy petti-foggers and ill-educated people |
| Civil rights as a standard of justice | Obedience and submission to authority as the standard of a well-ordered society |

From António Manuel Hespanha: Feelings of justice in the Chinese Community of Macao. In the same (ed): Feelings of justice in the Chinese Community of Macao. An enquiry. Imprensa de Ciências Sociais, Lisboa, 2003, p.204

The story of Matteo Ricci and the Jesuits in China demonstrates the early links and interconnections between Western and Chinese norms and beliefs, and the historical impossibility to push Western values and attitudes in the meeting between these different cultures. The method used by Ricci in his attempts to convince the Chinese of his normative messages is called the '*accommodation method*' (Bettray S.V.D. 1955).

In a description of this method, Bettray gives a closer description of the elements already mentioned above, namely the accommodation in dressing, in naming, where it was important for Ricci to take a Chinese name, in good manners, and in giving gifts. Bettray further deals with aesthetic accommodation in matters of architecture

and art, social and legal accommodation (including relations to marriage, polygamy and slavery), intellectual accommodation and religious accommodation (especially in relation to Confucianism, Buddhism and Daoism). Today one might perhaps say that Ricci's method is not characterized by 'Euro-centrism'.

In the 21st century there is probably no doubt that the normative orientation will shift from the liberal market law regime and thinking, which has been so prominent in the USA, towards a more Asian inspired understanding of ways of order influenced by community traditions and combined with multiple sets of norms and social behaviours.

There is also no doubt that there will be increased engagements between normative traditions and cultures. While the Jesuits were important mediators from the 16th century, the Germans amongst others have influenced Asian legal culture from the late 19th century with the Japanese adoption of a constitution and commercial law inspired by Prussia leading to a situation of legal pluralism in Japan and much of East Asia (Chiba 1997, 102f). It also seems that with the increased political and cultural opening of China, 'Chinese legal imagery' will be in interaction with German legal philosophy and thinking which was generally very influential also in Europe at the beginning of the 20th century. After the Versailles Treaty a number of Chinese scholars were sent to Europe for studies especially in France and Germany. Some of them have been influential in (re)linking with legal environments in Germany.⁸

8 Information provided by Danish expert in modern Chinese, Mette Thunø, Vicedean of Faculty of the Humanities at the University of Copenhagen. She considers that the Germans have a considerable influence on both educational and legal policies and practices in China (oral communication August 2008).

A Modern Legal Figure – Gustav Radbruch (1878-1949, born in Lübeck – died in Heidelberg)⁹



Gustav Radbruch was born in 'northern central Europe' in the same city and the same period as the later Nobel prize laureate Thomas Mann (1875-1955). In 1901 Mann published his novel on the collapse of a German bourgeois family »*Buddenbrooks. Verfall einer Familie*«, and Radbruch passed his first 'staatsexamen' in Berlin. Both were born a few years after the establishment of the German Kaiserreich, and both lived to experience the collapse of the German empire, the Weimar Republic and the Third Reich. Their lives as those of most Europeans were strongly influenced by the two violent world wars, which are now being renamed as the 'long European civil war' from 1914-1945.

Both came from merchant families in a city of merchants with a history going back to the Hanseatic League. Radbruch was appointed Professor of Criminal and Trial Law and Legal Philosophy in Heidelberg in 1910. In 1914 he accepted a professorship in Königsberg (now Kaliningrad), but shortly after his second marriage in 1915 he signed up as a voluntary in World War I and did not return until 1918. From 1919 until 1926 he had a professorship in Kiel.

Radbruch was a member of the Social Democratic Party of Germany and held a seat in the Reichstag from 1920-24, and during the period from 1921-23 he was Justice Minister for 15 months. In 1920 he and other members suggested a limited decriminalization of abortion. This was to take many years before it was accepted. During his time in office a number of important laws were suggested, one of them a law giving women access to the justice system. During and after WWI women got

9 Image acquired from http://de.wikipedia.org/wiki/Gustav_Radbruch (August 2008)

the vote in a number of especially Northern European countries as well as in the Soviet Union (in 1917), and with the establishment of the Weimar Republic German women received the vote in 1919. Not surprisingly the 1922 legislation, which allowed women to become judges, met serious resistance in the legal profession, among judges and advocates. Women were not considered suited for objective judicial decisions due to their biological constitution commented the female minister of justice, Brigitte Zypries, at a conference in 2004 in Berlin where she spoke about Radbruch's role as a legal politician (Zypries 2004, 17).

In spite of further requests Radbruch did not return to politics after 1924, and in 1926 he again accepted a professorship in Heidelberg, which he had until 1933. As soon as the nazis had come into power they had enacted the legislation with the euphemistic name *Gesetz zur Wiederherstellung des Berufsbeamtentums* (Act on Reestablishment of Civil Service) from April 7, 1933. This legislation was mostly aiming at Jews, but also towards opponents of the Nazi regime. Radbruch, who was not Jewish, was dismissed from his post as the first German professor on May 8, 1933. During the Nazi regime Radbruch worked on issues of legal history and from 1935-36 he went to University College in Oxford and worked on book called »*Der Geist des englischen Rechts*« (The Spirit of English Law) which could not appear until 1946. Immediately after WWII he returned to the University of Heidelberg to reestablish the Faculty of Law.

He has not least become famous because of his 'formula' which was developed in 1946, and which could be said to reconcile positive law and ideas of justice. The formula argues that where statutory law is incompatible with the requirements of justice to an intolerable degree, statutory law as »*unrichtiges Recht*« (»wrong law/right/justice«) must yield to justice, and has been used on several occasions by the German Constitutional Court (Zypries 2004, 19f) which was a result of the American influence on the post-war Federal Republic of Germany.

Why choose Gustav Radbruch as the figure to represent modern legal culture – and not for instance Hans Kelsen or H.L.Hart or a contemporary American legal philosopher? For once because he has become identified with the shift from 'the old rigid notion of legal positivism' as Bobbio called it in 1997. But also because Radbruch is one of the German philosophers who has been influential in South East Asia. He has been translated into Korean by law professor Chongko Choi¹⁰, who was educated in Freiburg, Germany, and who in 2005 published a book entitled *Law and Justice in Korea: South and North*. In a review of this book, professor Thomas Ginsburg, who deals with comparative public law, international law, and East Asia writes that

10 Personal information from professor Chongko Choi, July 2005)

»As a historian, Choi's focus is on intellectual and cultural influences rather than mere adoption of positive legislation. He emphasizes the distinction between formal legal institutions and the living legal culture, suggesting that traditional attitudes and ideas about law may well lag behind legislative developments. This broad approach also helps to emphasize Korea's distinct adaptation of Western legal institutions. Even if formal rules are the same across jurisdictions, the use of law is inevitably shaped by the local cultural environment.« (Ginsburg 2006)

Radbruch was interested in legal culture and as many other German law professors, who had to go in exile during the Hitler-regime and who became comparativists by fate, he dealt with other – foreign – legal cultures.

James Q. Whitman claims that the last couple of years have seen something of »a neo-romantic turn in the philosophy of comparative law«, where a number of scholars have been working to »breathe new life into the grand tradition of Romanticism, insisting on the importance of the cultural 'difference' in the diverse legal systems of the human world and resisting anything that smacks of a belief in some single 'natural law' (Whitman 2003, 312f). He writes that comparatists who today talk about »the problem of 'understanding' the 'other' or of law as 'culture'... are drawing on a tradition that can be traced to late eighteenth- and early nineteenth-century Germany.« He continues with a comparison of sexual harassment law in the US and Germany, and claims that behind »the contemporary European culture of human dignity lies a long history of hierarchical tradition« (p.333). And he ends the article by stating that »really radical legal change is possible, as the revolution in relations between the sexes in our time suggests more forcefully than almost any other example« (p.344). Also in this last respect Radbruch seems to have been a figure struggling to change a patriarchal European (legal) culture at a rather early stage.

Transformative pathways towards the future

Of the three figures of 'legal culture' described above, the first and the last might be associated with ways of violence and war, whereas Matteo Ricci, whom I call the 'figure of east and west' is rather more linked to ways of mission, commerce and knowledge. Experiences of continuity, change and transformation through both peaceful and violent means and interaction are common to all of them.

All these figures are men, as men have dominated the field of institutional normative and legal culture for centuries, and as men have had the cultural and practical possibilities of movement, allowing them to transmit also normative ideas, values and attitudes.

These years are witnessing an enormous mobility and rapid change taking place in almost all parts of the world, due to technological, economic and political developments. After the beginning of the 20th century the European Union – which is

not identical with cultural Europe (Passerini 2007, 257) – has expanded with 12 new member states. Thus what was before 2004 *inter-state migration* of many people has now become *mobility* within the EU. Global migration in general has over the last decades become feminized – women ‘want to see the world’ and they move with much greater ease and much more curiosity than what was the case a century ago (Lalitou 2007, 45f). Processes of movement become less categorical in these times which have also been said to give rise to the appearance of ‘turbulent’ subjectivities (Capussotti, Lalitou & Lyon 2007, 134). Individuals – men and women – who bring with them certain ideas, values, attitudes and traditions, encounter contexts, relations and challenges on their »paths that lead to the future... transformative pathways through which intersubjectivity and interconnectivity are growing« (Passerini 2007, 251).

In an interdisciplinary study of mobility in turn-of-the-millennium Europe Passerini tries »to see the old in tension with the new forms of identification and belonging, based not on opposition, but on openness, mutual collaboration and even attraction« (251). She claims that meanings are changing. »The meaning of ‘woman’ is changing, the meaning of ‘Europe’ is changing, and the concept of ‘being’ or becoming a subject is also changing« (253). One might add that the meaning of the legal and the cultural is also be changing, during this turbulent process. What we understand by citizenship is changing, and movement and the development of a post-national(istic) sense of identity requires »flexible citizenship« and »a new social imaginary« (see Braidotti 2007, 35 & 37). People experience multiple belongings, and migration/mobility is not a one-way process and a once and for all decision.

»There is no longer anything essentially European in the values of tolerance and diversity, except for their historical genesis. It is rather the artificial nature of a European identification that must emerge as a positive aspect. A Europeanness that is being constructed ‘artificially’, as a result of will and determination... De-territorialization, in the sense of not being connected exclusively with a territory, can be an individual and collective experience, but it can also be a cultural operation. Such would be a proposal of dissociating Europe from its traditional boundaries, and envisaging its connections with Mediterranean, African and Middle-Eastern countries: to be European *entre autre*, in the words of Derrida, might be true also of countries and cultures... Cultures too might be European *entre autre*, African, European, gendered, generational, without hierarchies established among these identitarian terms.

For the migrants this might be equivalent to the development of a ‘third’ and post-nationalistic point of view, going beyond the logic of moving between two or three or more nation states, and adopting a stance that is not determined solely by the sense of belonging to any of these states.« (Passerini 2007, 261-262)

In the beginning of this millennium the fear of a new period of a widespread migration of peoples has led European nation states including my own to tighten up their old style legal positivist instruments of legislation. Legal cultures – including the culture of legal positivism – do not change over night, and both stability and chan-

ge requires sacrifices, but under the pressure of movements and practical change and drawn by the attraction of dynamic developments, sacrifices of ideas and values are most likely to take place, and attitudes – in east, west, north and south of wherever we are, are going to change and accommodate to changing conditions.

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