

Noted Publications

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This section introduces publications — predominantly books or articles — deemed worthy of note by comparatists-at-law. It deliberately ranges widely. Readers are invited to bring suggestions for inclusion to the attention of the editor. Presentation of a text here does not pre-empt a fully-fledged review elsewhere in the journal.

Samuel, Geoffrey. *Epistemology and Method in Law*. Dartmouth, Ashgate, 2003. 384 pp. ISBN 1-85521-599-3.

An updated and expanded version of Samuel's *The Foundations of Legal Reasoning* (1994), very favourably reviewed at the time by leading comparatists (see Rudden, B (1995) (44) *International and Comparative Law Quarterly* 728; Bell, J (1995) (15) *Legal Studies* 461; van Caenegem, RC (1997) *Zeitschrift für Europäisches Privatrecht* 549; Johnston, D (1995) *Cambridge Law Journal* 463), this important publication is appearing in the well-known 'Applied Legal Philosophy' series. Samuel aims to unravel the structure of legal thinking and legal knowledge with specific reference to French and English law. This book offers a demanding yet immensely rewarding investigation into such questions as concepts, categories, rules, facts, and other issues crucial to one's understanding of law's intellectual framework. A 'companion' piece is Samuel, G (2004) 'English Private Law: Old and New Thinking in the Taxonomy Debate' (24) *Oxford Journal of Legal Studies* 335.

Lasser, Mitchel. *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*. Oxford, Oxford University Press, 2004. 382 pp. ISBN 0-19-927412-6.

It is difficult to imagine a comparatist who remains unfamiliar with Lasser's (1995) 'Judicial (Self-) Portraits: Judicial Discourses in the French Legal System' (104) *Yale Law Journal* 1325. This book offers a tightened version of Lasser's path-breaking argument. It also expands his research in another direction by embracing the reasoning of the European Court of Justice. On the US scene, this text represents an important gloss on the work of such prominent comparatists-at-law as Roscoe Pound, John Dawson, and John Merryman. The argument is as learned as it is accessible. In my view, *Judicial Deliberations* belongs on the same shelf as Mirjan Damaska's *The Faces of Justice and State Authority* and John Bell's *French Legal Cultures*.

Whitman, James Q. *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*. Oxford, Oxford University Press, 2003. 311 pp. ISBN 0-19-515525-4.

This book offers a fascinating history of punishment from a comparative perspective. The contrast developed by Whitman is that between European laws (in particular, French

and German law) where, despite a strong tradition of social hierarchy and state power, there prevails a merciful and dignified treatment of offenders, and US law which, despite its commitment to democratic egalitarianism, sustains an unrelentingly harsh treatment of transgressors. Whitman has also published two significant comparative studies on dignity: Whitman, JQ (2000) 'Enforcing Civility and Respect: Three Societies' (109) *Yale Law Journal* 1279, and Whitman, JQ (2004) 'The Two Western Cultures of Privacy: Dignity versus Liberty' (113) *Yale Law Journal* 1151.

Gerber, David J. (2001) 'Globalization and Legal Knowledge: Implications for Comparative Law' (75) *Tulane Law Review* 949.

In an insightful paper, Gerber argues that globalisation calls for the development of more sophisticated tools for structuring and interpreting foreign legal knowledge. This text offers a noteworthy example of the need for actualised thought within comparative legal studies.

Legrand, Pierre and Samuel, Geoffrey (2005) 'Brèves épistémologiques sur le droit anglais tel qu'en lui-même' (54) *Revue interdisciplinaire d'études juridiques* 1.

Samuel and I present a comparative examination of the 'scientific' approach to law prevailing on the Continent and the 'ascientific' perspective characteristic of the English standpoint. The paper features extensive references and two detailed case studies.

Stramignoni, Igor (2004) 'Francesco's Devilish Venus: Notations on the Matter of Legal Space' (41) *California Western Law Review* 147.

This paper comes after two other publications similarly philosophical, similarly indebted to the Heideggerian cosmology, and similarly devoted to a poetics of comparison (Stramignoni, I (2003) 'Meditating Comparisons, or the Question of Comparative Law' (4) *San Diego International Law Journal* 57, and Stramignoni, I (2002) 'The King's One Too Many Eyes: Language, Thought, and Comparative Law' *Utah Law Review* 739). Here, Stramignoni's argument addresses the constitution of legal space. Comparison assumes spatial differentiation. Why is it, then, that comparatists-at-law have paid so little attention to this issue? And what does 'space' mean? Stramignoni submits an erudite reflection which ought to matter to comparatists-at-law.

Touraine, Alain. *Un nouveau paradigme: pour comprendre le monde d'aujourd'hui*. Paris, Fayard, 2005. 365 pp. ISBN 2-213-62363-5.

Though never as flamboyant as Pierre Bourdieu, Touraine has long stood as one of the two or three most significant post-war sociologists in France. His latest text — in a number of ways, a *summa* of his earlier work — argues that the West first thought of society in political terms (monarchy, revolution, etc). Then, he claims, the paradigm changed and social thought focused on economics (social classes, wealth, redistribution, etc). Nowadays, a new paradigm has emerged, says Touraine: culture. The argument is that today's modernity is primarily concerned with cultural identity and cultural rights. This analysis may not have much to teach those who, in the anglophone world, have been engaged in cultural studies (in the broadest sense) for the last decades, but

it remains an elegant and insightful essay typical of the production emanating from French intellectuals (not least in the way it eschews all references).

Saunders, Rebecca (ed). *The Concept of the Foreign: An Interdisciplinary Dialogue*. Boston, Lexington, 2003. 300 pp. ISBN 0-7391-0409-8.

Seven academics discuss how the 'foreign' is engaged and defined within the parameters of an academic field (anthropology, history, literary theory, philosophy, social work, and women's studies). Although it contains no law 'as such', this book includes rich interdisciplinary vistas for lawyers interested in comparative studies.

Niort, Jean-François. *Homo civilis: contribution à l'histoire du code civil français (2 Vols)*. Aix-Marseille, Presses Universitaires d'Aix-Marseille, 2004. 931 pp. ISBN 2-7314-0380-2.

This thesis, the publication of which had been awaited for many years, provides a comprehensively documented history of the French civil code between 1804 and 1965. Comparatists-at-law with an interest in French legal culture will find this text most helpful — although it is clearly more of a compilation than a critical work.

Werlen, Iwar. *Sprachliche Relativität*. Tübingen, A. Francke, 2002. 339 pp. ISBN 3-8252-2319-1.

Werlen has written a timely analysis of the full range of linguistic relativism theories, of which the so-called 'Sapir-Whorf hypothesis' is perhaps the best-known and most spectacular variant. Comparatists-at-law interested in the matter of translation and translatability — and who can afford not to be? — will read this thoughtful panoramic reflection with profit.

Jay, Martin. *Songs of Experience: Modern American and European Variations on a Universal Theme*. Berkeley, University of California Press, 2005. 431 pp. ISBN 0-520-24272-6.

There is little doubt that, whether consciously or not, the idea of 'experience' matters within comparative legal studies. Jay, one of the US's leading intellectual historians, explores Western discourse about 'experience' from the 16th century to the present. In the process, he engages a very broad cross-section of European and US thinkers.

Goodrich, Peter (2004) 'Satirical Legal Studies: From the Legists to the Lizard' (103) *Michigan Law Review* 397.

Goodrich offers a historical survey of 'satirical legal studies' which he defines as 'the humorous pillorying of the pretensions of law and lawyers'. The paper's range is extensive and takes us from Roman times to contemporary academic debates in the US. This argument is learned, insightful, and witty. For (not unrelated) thoughts on friendship in the public sphere, see also Goodrich, P (2004) 'The Immense Rumor' (16) *Yale Journal of Law & Humanities* 199.

Cooney, Sean; Lindsey, Tim; Mitchell, Richard and Zhu, Ying (eds). *Law and Labour Market Regulation in East Asia*. London, Routledge, 2002. 282 pp. ISBN 0-41-522168-4.

Produced by members of the University of Melbourne's dynamic Asian Law Centre, this collection of nine essays addresses the matter of labour law and labour market regulation in East Asian states. A thoughtful essay on Vietnam's labour market by Pip Nicholson offers a representative illustration of the book's contents. Approaching Vietnamese labour law with a focus on the period of economic transition from socialism to a form of market economy, Nicholson shows how the new legislation and other regulation have failed to have a significant impact on the labour market.

Jones, J Walter. *Historical Introduction to the Theory of Law*. Oxford, Oxford University Press, 1940. 304 pp.

A masterly theoretical survey ranging from the civilians to Kelsen (and a little beyond), this book provides the reader with a wealth of historical information that continues to be as current as it was a little over sixty years ago. I happen to know that this remarkable book is still available on the second-hand market.

Comaroff, John and Comaroff, Jean (2004) 'Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa' (29) *Law & Social Inquiry* 513.

In their arresting account of the dramatic rise of witchcraft killings in post-apartheid South Africa, the authors reflect on the demands of local culture. They show how 'the big questions of moral relativism and liberal universalism, of cultural difference and legal rationality, are so pressing here'.

Caillosse, Jacques (2004) 'Pierre Bourdieu, *juris lector*: anti-juridisme et science du droit' (56-57) *Droit et Société* 17.

Not only did the late Pierre Bourdieu famously declare in 1991 that lawyers are 'the hypocritical guardians of collective hypocrisy', but his work has steadfastly challenged agency in a context where lawyers regard it as a key notion (suffice it to think of '*la volonté*' in French *droit privé*). Yet, in a succinct and agreeable paper, Caillosse establishes how Bourdieu must be of interest to lawyers. One of the article's signal features is how it relates Bourdieu's work to that of other important French contemporary thinkers such as Pierre Legendre, Bruno Latour, Michel Foucault, and Jacques Derrida.

Ruskola, Teemu (2002) 'Legal Orientalism' (101) *Michigan Law Review* 179.

Ruskola's argument is as timely as it is crucial. Making in-depth reference to the work of philosopher Michel Foucault and drawing on literary and cultural theorist Gayatri Chakravorty Spivak and her idea of 'strategic essentialism', Ruskola effectuates nothing short of a paradigmatic revolution within the field of US comparative legal studies. As he focuses on Chinese law — and as he does so armed with first-hand knowledge of Chinese legal culture and of the Chinese language — Ruskola calls to account the dominant and enveloping epistemological discourse that has operated an institutionalisation of US-German, US-French, and US-Italian comparisons. Along the way, he forcefully argues that 'what comparative law needs [...] is an ethics of

Orientalism' such as will allow 'different kinds of legal subjects to emerge'. This is certainly the brand of 'epistemological break' that Upendra Baxi has been so cogently advocating (Baxi, U (2003) 'The Colonialist Heritage' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 50). For a 'companion' piece, see Ruskola, T (2003) 'Law without Law, or Is "Chinese Law" an Oxymoron?' (11) *William & Mary Bill of Rights Journal* 655.

Cotterrell, Roger (2004) 'Law in Culture' (17) *Ratio Juris* 1.

Although Cotterrell might disagree with my apprehension, I regard this paper as the third instalment in an attack on the concept of 'culture' that began with Cotterrell, R (1997) 'The Concept of Legal Culture' in Nelken, D (ed) *Comparing Legal Cultures* Ashgate at 13-31, and continued in Cotterrell, R (2003) 'Comparatists and Sociology' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 147-51. Cotterrell's views are, as always, thoughtful and thought-provoking. An interesting counterpoint (written from an anthropological perspective) is Brumann, C (1999) 'Writing for Culture' (40) *Current Anthropology* S1.

Monateri, PG (2003) 'The Weak Law: Contaminations and Legal Cultures' (13) *Transnational Law & Contemporary Problems* 575.

I benefited from reading this paper. Monateri offers interesting reflections on the matter of legal borrowing (not least on account of characteristically stimulating statements such as 'it is fully justified to adopt ideological criticism as a proper approach to legal diffusionism', 'culture and difference have always been central concerns of comparative law', and 'comparative law has not normally been transnational at all') which Monateri then supplements with Italian chronicles featuring Italy's 'love affair with the French' followed by 'the coming of the Germans'. By way of conclusion, he observes how 'the process of importing and exporting rules and institutions is an almost unconscious process of integrating them into the ideology of the borrowing system'.

Dorsen, Norman; Rosenfeld, Michel; Sajó, András and Baer, Susanne. *Comparative Constitutionalism: Cases and Materials*. St Paul, West, 2003. 1383 pp. ISBN 0-314-24248-1.

The authors offer an impressive array of documents on such a diverse range of issues as models of constitutional adjudication, federalism, minority and group rights, and criminal procedure ('due process'). No one can fail to be impressed by the sheer bulk of learned information being disseminated here (other, of course, than all US law students for whom this is simply an average-length casebook).

Descheemaeker, Eric (2002) 'Faut-il codifier le droit privé européen des contrats?' (47) *McGill Law Journal* 791.

Although published far away from civil-law Europe, this paper is noteworthy in as much as it features a (new) civil-law voice from Europe opposing the idea of codification of Europe's varied private laws (with specific reference to contract) — what Tony Weir has inimitably styled a 'demented proposal' (Weir, T (2004) *A Casebook on Tort* (10th ed) Sweet & Maxwell at 3).