

***Cosmopolitan Legal Education:  
From Irnerius and the Westphalian Paradigm to the Modern Law School***

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**Abstract**

The law school has not always been one that would be predominantly engaged with national legal matter. The subject of law, as a field of learning, has for a number of centuries been the toy of national educational systems, because law has been the toy of nation States. Law, the discipline, which nowadays draws materials not only from jurisprudence but also from economics, history and political science, has with the rise of the Westphalian paradigm been mostly what the German legal scholars would call a *Landesjurisprudenz* in epistemic terms, a subject mostly destined to serve the needs of a given locality. The article runs counter to what came to effectively become law's traditional approach to education. It posits that the discipline of law as well as legal education in itself would certainly benefit from more cosmopolitan and extrovert models of pedagogy.

Keywords: Cosmopolitan Legal Education, Irnerius, Westphalian Legal Paradigm, Nation State, Law School, Legal Pedagogy, Legal Education

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## 1. Introduction

The aesthetic value of the subject of law can nowadays be found in the fact that law becomes an increasingly cosmopolitan and interdisciplinary subject. Our subject continues to be doctrinal, and rightly so, at least for most intents and purposes, but it clearly isn't as insular as it used to be. Law, as a pedagogic field, moves towards more internationalised and cosmopolitan forms of legal education. It strives to create and maintain a new epistemic unity to it, and it seems to be in the process of moving away from old paradigms of highly provincial models of legal education. Law, the toy of the nation State, has had to follow suit in legal educational terms, legal education being a by and large national exercise (*Landesjurisprudenz*). To this day this approach still somewhat prevails. Nonetheless, it should be maintained that there are positive developments in the sector, making the subject of law somewhat more open-ended, international and less parochial in its outlook. As far as the paper's substantives would be concerned, the paper acts as a critical analytical exposition in the wider area of legal education, taking into account historical and certain contemporary information in the area of its investigation.

## 2. Innerius and *Ius Commune*

Law as a taught subject has not been as insular as it has conventionally been between 1648 and the first decades after the latest world war. Prior to this, up until early modernity, most of Europe would in one way or another traditionally aspire to the teaching of Roman law and Canon law, with or without practical law digressions to local custom. However, law up until relatively recent decades was and continues to be a largely national pedagogic exercise. Law, in the era of modernity, has indeed grown to become the very machinery behind the evolution of modern nation States. A leading German legal scholar, observing the deterioration of the subject into nation-oriented narratives, cautioned his colleagues of such a trend already in the 19<sup>th</sup> century (Von Jhering, 1924, p. 15). Thus, one would also observe in most of the 19<sup>th</sup> and 20<sup>th</sup> century the rather peculiar phenomenon of law being borrowed from other jurisdictions only for the subject to be taught in a rather national fashion, or with a national agenda in mind. This is the story of Europe and the Western world in legal substantive and legal pedagogic terms: most of our laws would have been modelled on modern German, French, English or American laws, only for local educational systems to offer law as a subject to be modelled on the idea of the nation State. However, such a trait has not been unique to the Western world. For instance, Asian and African legal systems have developed their own national legal narratives even though comparative materials have been borrowed or imposed from elsewhere. Of course, if a system borrows materials from other systems, there is no such thing as an implied moral obligation for such a system to teach the subject in the same way it would be taught in the source system but why borrow then? Why not develop unique legal solutions and unique educational and pedagogic models in the first place? Furthermore, the terms "German", "French", "English" and "American" law may be objectionable in themselves, in that French and German law borrowed significantly notions, ideas and doctrines from Roman law in the first place, English law has been informed by Anglo-Saxon and Norman laws and customs, while American law draws on the common law tradition in substantive and procedural terms and so on. To seek "national" origins within these modern sources of law (English law, American law, German law and French law) might, therefore, be an epistemic chimera in itself. What makes American law American? What makes German law German? In any case, continental Europe would, of course, traditionally subscribe to the *ius commune* (common law) tradition, the legal tradition which would combine the forces of Roman Law and Canon Law. This was the law that would be taught and respected in the

formal centres of legal education in Europe. Irnerius would be one of the persons to teach the (re)discovered Corpus Iuris Civilis in the European Occident and would establish the School of Glossators, practically an analytical-explanatory school of thought in legal pedagogy. Nonetheless, whereas Irnerius has been an important figure in the school, it would be important to state that others, such as Bulgarus, one of the Four Doctors, may have played a comparable role to that of Irnerius in the School of Glossators. So too, Pepo, Irnerius' teacher, seems to have been associated with the teaching of Roman law (Clark, 1987, p. 672; McSweeney & Spike, 2015, p. 22 citing Winroth, 2000, p. 158), Matilda of Canossa and her mother Beatrice being the patrons of both Pepo and Irnerius. Of course, the systematisation and the epistemification of law pre-existed Irnerius and the Four Doctors, and continued with the School of Post-Glossators, the Humanist School, the School of Natural Law, the Historical School and the Pandectists (Zepos, 1974, p. 899 citing Vinogradoff, 1929). Irnerius, however, would be one's conventional pre-modern scholar that would lay certain of the critical foundations for the further systematisation and epistemification of law.

Irnerius would be gracefully nicknamed by a jurist, Odofredus, "lucerna juris", the law's lantern, as he made significant contributions to what seemed to be at the time a more cosmopolitan legal subject, such contributions echoing on European legal history and culture. Remarkably, the medieval law schools in Bologna that would be otherwise created by such leading academic legal personalities as Irnerius would achieve permanence and would eventually transform themselves into a university (Russell, 1959, p. 168). The law school of Bologna has also been the mother of modern universities (Sherman, 1908, p. 504). Irnerius would otherwise aim to create universal didactic legal texts in Latin. His works would effectively not only be destined for his students but also for anyone who could speak the Latin of his time. Moreover, his two main contributions as a legal teacher would be the addition of [certain] glosses to the Justinian codification and the adaptation of Justinian's Novellae into the Authenticum (Pennington, 2019, p. 112).

Irnerius was a *de facto* cosmopolitan jurist. There are many reasons that this may well have been the case: first was the fact that he received his education in Italy and taught there, even though he may not have been Italian by descent. Second, his law school in Bologna would draw students from all over Europe (Mather, 2002, pp. 330-331). Third, the same law(s) would effectively be taught by him to a developing but varied class of formally educated lawyers and so on.

## **2.1. The Cosmopolitan Essence of *Ius Commune***

*Ius commune*, on the other hand, represented in itself a sort of universal understanding of the law in continental Europe, as it was based on certain of the fundamentals of Roman law and Canon law, even if it was the case that the local laws of European jurisdictions could take precedence over it up until European laws started to become codified. Historical project Rome, despite its imperialist upbringing, was indeed about a legal equilibrium between the universal and the specific. Rome was the centre of centres, the common spiritual fatherland of all, conquerors and conquered. As Modestinus, probably a Syrian Greek law scholar in the 3<sup>rd</sup> century AD (even though others would question his precise origins (Millar, 1999, p. 102)), put it elegantly "*Roma communis nostra patria est*" (Ando, 1999, p. 30 citing Modestinus ad Dig. 50.1.33). At this point, one notes that the very cosmopolitan essence of *ius commune* would be found in the fact that it would perceive its diverse recipients as subjects of the same essence of law (cosmopolitan universality amongst diverse peoples). Additionally, prior to the era of European legal codifications, especially in the Middle Ages,

legal education in Europe would start to become more concrete, more systematic and, certainly, more scientific. Law was effectively finding itself in the process of gradually transforming itself from an art and a science into something that would more closely resemble a science, even though one could certainly argue that even today law has not wholly and unequivocally transformed itself into a perfect science, a perfect *episteme*. In many respects, law, despite its solid scientific foundations, is still a sort of a scientific art to be mastered than a subject to be taught and learnt *stricto sensu* e.g. the way chemistry, physics or mathematics would be taught and learnt. In any case, Irnerius would be at the forefront of developments that would result in the strengthening of the scientific character of law in the Middle Ages, him effectively introducing the philological and scientific approach to the study of law. As stated, Irnerius must have been a *de facto* cosmopolitan legal personality in his outlook as an educator, in that his law school would attract scholars not just from the Italian peninsula but also from other parts of Europe. To this day, however, one would not be perfectly certain of the origins of Irnerius and there would be significant controversy with regard to who Irnerius actually was. Beyond this, there is speculation that he may have been of German descent (Pennington, 2019, p. 108). In any case, with regard to his approach, his approach was clearly more epistemic than an approach that would mostly resemble a *techne*. An elegant definition as to what constitutes an art over a science is the one that implicitly came from Sherman some time ago, i.e. an art is *mutatis mutandis* a secret science (Sherman, 1908, p. 500). It is the very transparent, rational and methodological essence of a science that makes a cognitive field a science. In this respect, the point to be made here is that in much of the history of ancient Rome Roman law was more of an art, i.e. at least up until 254 BC, when Tiberius Coruncanius first professed law to the public (Chroust, 1955, p. 513; Sherman, 1908, p. 500). In the Eastern Roman Empire too, at least in its first steps, law must have still been both an (emerging) science and an art, with the additional note that the subject was subsequently heavily Hellenised over the centuries (Zepos, 1974, p. 899; Chitwood, 2017, p. 150). Of course, the first attempt to make what clearly was legal art into a rational artistic form (*mutatis mutandis* a science), under the influence of Greek philosophy and the scientific methods of the Stoics, was made by Scaevola the Younger and Cato the Younger (Sherman, 1908, p. 500). Moreover, the very Corpus Iuris Civilis in the 6<sup>th</sup> century AD only strengthened law's path towards scientific enquiry and learning. However, the School of Irnerius seems to have decisively tilted law even closer to the field of *episteme*. Indeed, whilst law had already become more of a science with the major developments, which one observed in the 5<sup>th</sup> and the 6<sup>th</sup> centuries AD in the Eastern Roman Empire (see, for instance, the establishment of the Law School of Constantinople and the Justinian codification), Irnerius, through his systematic approach, moved law even closer to the field of scientific enquiry. Prior to Irnerius, however, law was also clearly and systematically taught in Rome, in the 6<sup>th</sup> century AD, and in Ravenna in the 11<sup>th</sup> century AD (Sherman, 1908, p. 504). However, Irnerius' insistence on the systematic and analytical study of law was nothing but a call for a universal science of law, a universal legal *episteme*, something that legal scholars in the centuries post 1648 would almost certainly observe with a certain sense of nostalgia. Thus, as Zweigert and Kötz remind us, law is [still] clearly at odds in epistemic terms [and, by extension, in pedagogic and educational terms] with the degree of unity which one observes in other epistemic fields:

[t]here is no such thing as “German” physics or “British” microbiology or “Canadian” geology (Zweigert and Kötz, 1998, p. 75)

The nationalisms of Europe have effectively shattered the dream of a united subject of law for the Europeans. Cultural(ist) and national(ist) legal narratives have triumphed, all in the

name of the peculiar and rather mystical notion of the spirit of the people(s). At least up until 1945, these narratives have almost demolished every single hope for a united epistemic legal field, a universal legal science. Law was and, to a great extent, continues to be the toy of the nation State, despite positive developments in European and international law.

Law, however, “whatever the philosophical essence in which it is conceived, is [admittedly] an expression and an element of the whole civilization in a certain space and certain time” (Zepos, 1974, p. 898). Nonetheless, the Eastern Roman Empire’s vision for ‘one law’ was resurrected, if not salvaged, in the Occident by Irnerius and his disciples, who would perceive their subject as one of universalising epistemic essence. The generally superior character of Roman law over the majority of the various European local customs must have been instrumental in this respect. Thus,

Roman law acquired a quasi-divine status; medieval jurists saw it as the universal law of Western Christendom, something close to a Platonic form of law that the laws of individual kingdoms should, ideally, emulate (McSweeney & Spike, 2015, p. 25).

The spread of Roman law throughout Europe, through the initial Eastern Roman Empire’s legislative efforts, the subsequent efforts of the law schools in Bologna and the efforts of *ius commune* scholars in many parts of Europe, would now be close to unstoppable. The march of Roman law almost all over Europe, after 11<sup>th</sup> century AD, resembled only the march of the Roman legions in the building of the Roman Republic and the Roman Empire in the Mediterranean and the then known world. Resistance to it was existent but would eventually become futile. And yet, despite the ever-increasing force of Roman law in the Continent, European legal customs would often be respected, if not prioritised. For instance, Roman law, prior to the enactment of the German Civil Code 1900, would apply in parts of Germany *in subsidio* (Zimmermann, 2006). Nonetheless, Roman law has had the characteristics of a superior type of law, a more sophisticated and coherent type of law, to the point that it would brook few comparisons with the laws of local populations. As a matter of fact, the main historical role of *ius commune* was to fill the great gaps of legal systems in Europe in addition to acting as the medium of interpretation of existing local laws (Mather, 2002, p. 336). New law schools, which would have been modelled on the Bologna law school, were created in Modena, Pisa, Montpellier, Naples, Toulouse, Orléans and Salamanca. All such schools would teach Roman law and Canon Law but deemphasise or disregard local laws (Mather, 2002, p. 332).

The Germanic tribes would, of course, have destroyed the Western Roman Empire in 476 AD but, as stated, law would still be taught in Rome and Ravenna in the 6<sup>th</sup> and the 11<sup>th</sup> century AD respectively. Traces of Roman law would also be found in *leges barbarorum* and in *leges romanae*, the latter being fundamental forms of teaching in the so-called rhetorical schools (Zepos, 1974, p. 900). Nonetheless, the full resurrection of the study of the law in the Occident seems to have effectively occurred through the establishment of the law school in Bologna, which in turn resulted in the creation of the first university with degree awarding powers, the University of Bologna. Roman law in the European West would thus fully re-assert its epistemic unity in the otherwise intellectually dark Middle Ages, despite the fact that one would have noted a certain degree of vulgarisation of such law in the particular geographical space previously. Furthermore, this renewed interest of Western legal scholars in the Eastern Roman Empire’s law would have had significant implications for the development of the world’s legal systems through the medium of late Roman law (McSweeney & Spike, 2015, p. 21). Post-glossators spread the systematic study of law

throughout Italy and imitators would be found in the rest of the European West. From the 15<sup>th</sup> century onwards Chairs of Roman Law would be established almost throughout Europe, in Italy, Spain, France, Germany, Holland, Poland, England and elsewhere (Zepos, 1974, p. 900). Roman law in Europe re-asserted its cosmopolitan essence, in that it would create the substratum for certain common understandings of the law but also much of the basis for new codification projects such as the German Civil Code 1900, which combined, for instance, the intellectual forces of both Roman law and Germanic custom. This state of affairs, i.e. the spiritual spread (“reception”) of Roman law almost all over Europe, reached a certain relative peak approximately half a century before a new political and legal paradigm would be generated in Europe, the Westphalian paradigm. With the exception of England, Roman law would come out victorious as the leading common European legal source in most European countries, even though its extent and form differed from country to country (Zepos, 1974, pp. 901-902). Concurrently, Roman law, where received, would occasionally have to live together with local legal custom and so forth.

### **3. The Anomaly of the Westphalian Paradigm in Legal Pedagogy and Education**

Furthermore, it would have to be maintained that law was never meant to be a national pedagogic exercise. Aside from the absence of the concept of “nation” (as in nation State) in the Middle Ages, the nationalisation of the subject of law was not quite exactly on Europe’s agenda prior to 1648. Law would become ever more nationalised only with the advent of the nation State. Indeed, when Roman law was created the nation State was not even a remote consideration. Beyond this, nation States were, are and will be, for so many reasons, highly artificial entities that arose out of historical accidents or historical designs in the era of modernity. Law, on the other hand, would traditionally aspire to the universal. Cicero was quite adamant in his perception of the law as a universal subject, especially in law’s *ius gentium* manifestation. To him, law, as in *ius gentium*, was clearly not to be confined to Rome alone. So too, Rome would actually recognise the local customs of the conquered (*mos regionis*). One will not examine here the motivations, ulterior or not, of republican and imperial Rome in its approach to show tolerance to the laws of localities. Yet, the point remains: Rome, despite its imperial ambitions, was cosmopolitan enough to at least recognise and accept to a certain extent the local laws and customs in the provinces which it would otherwise rule. However, with the Treaties of Westphalia in 1648, Europe would clearly start moving towards nation-oriented understandings of the law. This would ultimately have considerable implications not just for the national statute books but also for legal education. For instance, the codification movements in Europe would further strengthen nation-oriented traits in the study of law. It has also been observed that law itself would follow the nationalising trends of educational systems, something that has been apparent since early modern education (Rönnsström, 2012, p. 202).

#### **3.1. The Westphalian Paradigm *Per se***

Whilst the Treaties of Westphalia have been celebrated as the Peace of Westphalia in the bibliography, these are the treaties that are ultimately responsible for the rise of the nation State (Westphalian system) and, by extension, for the rise of nationalisms in Europe and the rest of the world. International law still effectively revolves around the Westphalian system (Nathan, 2002). The Peace of Westphalia ended, of course, the Habsburgs ambition for a universal unitary system under the same monarch in much of Europe with the creation and the strengthening of modern nation States. What looked like a necessity at the time resulted in even greater divergences amongst Europeans and, eventually, two world wars. It is not as

if the Treaties of Westphalia have been responsible for the two world wars. Rather, these have been treaties that first allowed the nation States to grow and strengthen to such an extent that the two world wars that followed a few centuries afterwards were but a natural consequence of the rise of the nation State in the face of human history. The idea of cosmopolitan legal education opposes the approach that places the nation State at the exclusive centre of one's analysis, in that nation States are by and large historical artifices and accidents. Here one notes also that, whilst the Westphalian paradigm has served Europe and the world through the medium of international law, its fundamental basis deteriorated into nationalist patterns. Thus, the main concern one would have in relation to the Westphalian paradigm is that it effectively created the conditions for the future nationalisms that devastated Europe and much of the world. One of the victims of the Westphalian paradigm has also been the subject of law, resulting in more provincial understandings to it. What seemed like a paradigm that would eventually favour democracy and the self-determination of a people, albeit through the rather artificial packaging of the nation State, came to be in the long run a precondition of ever more insular legal and political systems. As stated, the Westphalian paradigm still somehow persists in most States around the world. Even if we take modern Europe, as the continent with the slightly more internationalised and cosmopolitan views of what legal education and the nation should be in contemporaneity, much of the rest of the world seems to still subscribe to the Westphalian paradigm. Furthermore, certain legal education developments in recent decades have been rather positive. However, one swallow does not make a spring and the Erasmus initiative alone, an otherwise positive mechanism with regard to the educational mobility of lawyers (and not only) in Europe, is simply not enough in itself to create more cosmopolitan legal jurists. Again, this initiative, which goes back to 1987, stands for a positive development but even the lawyers that graduate from the modern European law school seem to be still largely nation-law oriented. One also observes certain positive developments in a certain few North American law schools but, clearly, similar educational developments need to occur not just in North America and Europe but also around the world. In an ever more cosmopolitan Europe and an ever more cosmopolitan world, it would be quite crucial to inspire our future lawyers to the lost epistemic unity of the subject of law.

Finally, with regard to the overall prevalence of the Westphalian paradigm in recent centuries, the great codification movements in the 18<sup>th</sup>, the 19<sup>th</sup> century and, to a certain extent, in the 20<sup>th</sup> century, were interesting, in that they were "national", on the one hand, whilst heavily drawing on Roman law, on the other hand. From the political point of view, these were clearly national(ist) legal projects, symbolising the unity of the state, close to the Westphalian paradigm. "[T]hese codifications were political, liberal and nationalistic achievements, which in a certain sense express the liberal and nationalistic spirit typical of the 19th and 20th centuries" (Zepos, 1974, p. 903). From the legal point of view, however, such leading civil codes as the French and the German one were also heavily influenced by Roman law, even though local customary law would certainly be recognised within them. Thus, it would seem that the Westphalian paradigm is still with us, even though the penetration of Roman law into almost all of Europe's legal systems would make these systems somewhat more open to a common legal *via media*. The powerful effect of politics into law would allow us to maintain that the Westphalian paradigm still prevails, despite the fact that most of the European lawyers would be mutually intelligible in legal epistemic terms.

#### **4. Why There is Need for a Cosmopolitan Paradigm in the Modern Law School**

The modern law school ought to re-discover the cosmopolitan essence of the subject of law. There are many reasons as to why this should be the case. First, a more cosmopolitan legal subject would allow our students to more thoroughly appreciate diversity but also universality. Second, the sense of freedom that our subject would instil in our future law students and graduates, through more open-ended cosmopolitan legal discourses, would bring the subject much closer to the ideal of liberal education (as opposed to our subject being only doctrinal or fundamentally doctrinal). Third, world-class legal citizens would be created (as opposed to *homines speciales* that mainly specialise in the law of a given locality), as cosmopolitanism and, by extension, cosmopolitan legal education have to do with the creation of world-class citizenry (Platasas, 2015, p. 156). Fourth, the subject would come closer to international law's innate cosmopolitanism (Gordon, 2013, p. 906). Fifth, our future lawyers would be able to more readily attain intercultural fluency skills. Sixth, a more cosmopolitan agenda in the modern law school would also bring the school up to speed not only with contemporary developments, as these arose from the phenomenon of globalisation, but also with the future creation of world-class citizenry, which may already be in the making.

#### **5. Conclusion**

This exposition briefly explored what came to be an *ius commune* approach in legal pedagogy and education post the developments in the medieval school(s) of law in Bologna and elsewhere. In this respect, it also enquired into the developments in the area of legal education from the Middle Ages to the Westphalian paradigm. It has expounded upon the need for a more cosmopolitan type of education and pedagogy in the modern law school. When it came to this article's proposition in favour of more robust cosmopolitan models of legal education and pedagogy, it was manifested that it would not only be the recipients of such that would benefit from them, but also the discipline of law itself, as it would enhance its position in the field of epistemology. Societies themselves would also benefit. In Europe but also in certain schools of North America, one observes the slow but steady rise of more internationalised forms of legal education. It is only hoped that such forms of education will inform the legal educational systems of more countries in the future.



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