

Ius Commune Conference 2021

Workshop: Comparative Legal History 2021

Thursday, 25 November (14.00 – 18.00)

Theme: Ius Commune in the Making: Great Debates in the History of Law

The workshops on “Comparative Legal History–Ius Commune in the Making” aim to reveal and understand the nature and effects of various legal formants in the development of law. Indeed, forces of legal formants are too often lost or hidden beneath a superficiality of commonalities. History is a living laboratory. In the past, we explored the role of legal actors (Edinburgh 2014), legal sources (Maastricht 2016), force of local laws (Utrecht 2017), methods and dynamics of law (Amsterdam 2018), networks (Leuven, 2019), and paradigmatic shifts (Maastricht, 2020).

The current Workshop aims to explore the way in which debates—be these academic, judicial, social, or political—have an impact on law and society. Further, it aims to explore how these Great Debates gain a place of pre-eminence, triggering divides but also synergy and joint efforts, remaining in the narrative or fading away. Societal and political debates took place on participation in public powers leading to the eighteenth-century revolutions, and the modern constitutions; social debates took place as corollary to the Industrial Revolution, leading to a change in legal reasoning (eg, *Libre recherche scientifique*). Great Debates merit attention (eg, colonialism, economic power of private companies), being palpable across time. Likewise, grand academic debates have been omnipresent, on various levels, occasionally causing stagnation of legal science, yet on other occasions triggering seminal changes. Some legendary debates confirm this statement. For example, the early encounters between Proculians and Sabinians, though shrouded in mystery. Examples are found also in the Medieval Investiture Controversy and in the twelfth-century disputes between Martinus and Bulgarus. The tracing of controversies can extend to the encounters in the modern period on codification between von Savigny and Thibaut or between Kemper and Nicolai. The catalogue of Great Debates ought to include the clash between Loeff and Struycken on the need for separate administrative courts in the Netherlands. The common law was not free of Great Debates, and the quests of Bentham offer rich examples.

Tournaments of Scholars (Sweeney 1972) may keep alive or ignite the interest in the study of a specific aspect of the law or of the actors that shaped the law. This Workshop invites to address those Great Debates, exploring the process of their making and perception, the shifts they may have gestated in the creation, interpretation, and/or application of the law. This Workshop aims to highlight those moments in time in which ideas came to fruition, to find themselves juxtaposed or aligned, and sometimes lost, like tears in rain, throughout the history of law. Further, a look into these seminal debates can explain oscillations and malleability of law, moving across time and space, through legal cultures and systems.

We need to understand and be aware of the different clashes that took place in the past, and hence understand an important way in which law is shaped. As always, calls for change may be heard, from within or from outside the legal domain. History is a necessity, as it offers us the opportunity to identify and analyse change. We seek to identify the nature of these Great Debates and the changes they entailed. Reasons and

motivations for change may be highlighted, and reveal the contextual formants, like prevailing ideologies, in time and space. Great Debates took place at different time periods, including Roman law, the learned *ius commune*, nineteenth-century codification, and the more recent efforts towards a harmonization of law in Europe. Law in the making can be better explained by a look into Great Debates at different times and places.

Organizing Committee

Harry Dondorp, Wouter Druwé, Michael Milo, Pim Oosterhuis, and Agustín Parise

14.00 – 14.10 **Michael Milo** (Utrecht University)
Introductory remarks

Panel 1

Chair: **Harry Dondorp** (VU)

14.10 – 14.25 **Reef Alfahad** (King's College London)
Lessons from the History of Arbitration: English law, Roman Law and Europe Legal Systems

14.25 – 14.40 **Geert Sluijs** (KU Leuven/FWO)
The Horse and the Right: Equine Obstinacy in Early Modern Learned Debates on the Imperium of Magistrates

14.40 – 14.55 **Jonathan Ainslie** (University of Aberdeen)
Positioning Scotland in the Codification Debate

14.55 – 15.15 *Plenary discussion*

15.15 – 15.30 **Coffee break**

Panel 2

Chair: **Agustín Parise** (Maastricht University)

15.30 – 15.45 **Emanuel van Dongen** (Utrecht University) & **Gabriël van Rosmalen** (Utrecht University)
A Comparative Legal Study on the History of Compensation for Non-pecuniary Loss: Great Debates in the Netherlands and Italy during the 19th and 20th Centuries

15.45 – 16.00 **Arantxa Gutiérrez Raymondova** (University of Oxford)
Conceptual and Historical Issues around the Compensation of Non-pecuniary Losses in English and French Law (and how we sometimes reinvent the wheel)

16.00 – 16.15 **Joyman Lee** (University of Glasgow)
Great Debates on the Trust in Quebec and Japan

16.15 – 16.35 *Plenary discussion*

16.35 – 16.50 **Break**

Panel 3

Chair: **Wouter Druwé** (KU Leuven)

- 16.50 – 17.05 **Peter Čuroš** (University of Oslo)
Kelsen v. Schmitt: The Battle of the Century on Autonomy of Law
- 17.05 – 17.20 **Adolfo Giuliani** (Max Planck Institute for Legal History and Legal Theory)
Is Logic or Rhetoric the True Foundation for Judicial Reasoning? The Post-WWII Nouvelle Rhétorique Movement and Its Impact on Legal Historiography
- 17.20 – 17.35 **Pieter-Schalk Bothma** (Cape Bar)
Cross-cultural Academic Debates: Observations from 1960's South Africa
- 17.35 – 17.55 *Plenary discussion*
- 17.55 – 18.00 **Pim Oosterhuis** (Maastricht University)
Concluding Remarks