

State Law and Legal Positivism

Legal History Library

VOLUME 55

Series Editors

C.H. (Remco) van Rhee, *Maastricht University*
Dirk Heirbaut, *Ghent University*
Matthew C. Mirow, *Florida International University*

Editorial Board

Hamilton Bryson, *University of Richmond*
Thomas P. Gallanis, *University of Iowa*
James Gordley, *Tulane University*
Richard Helmholz, *University of Chicago*
Michael Hoeflich, *University of Kansas*
Neil Jones, *University of Cambridge*
Hector MacQueen, *University of Edinburgh*
Paul Oberhammer, *University of Vienna*
Marko Petrak, *University of Zagreb*
Jacques du Plessis, *University of Stellenbosch*
Mathias Reimann, *University of Michigan*
Jan M. Smits, *Maastricht University*
Alain Wijffels, *Université Catholique de Louvain, Leiden University, CNRS*
Reinhard Zimmermann, *Max-Planck-Institut für ausländisches und
internationales Privatrecht, Hamburg*

The titles published in this series are listed at brill.com/lhl

State Law and Legal Positivism

The Global Rise of a New Paradigm

Edited by

Baudouin Dupret and Jean-Louis Halpérin



BRILL
NIJHOFF

LEIDEN | BOSTON

Cover illustration: Iustitia and Xiezhi, Taipei, Academia Sinica, June 2017, @Baudouin Dupret.

Chapter 1 (The Great Divide in Legal Discourse: Towards a Global Historical Ontology of the Concept of Positive Law) is published in B. Dupret, *Positive Law from the Muslim World* (Cambridge UP, 2021). It is here reproduced with permission.

Library of Congress Cataloging-in-Publication Data

Names: Dupret, Baudouin, editor. | Halpérin, Jean-Louis, editor.
Title: State law and legal positivism : the global rise of a new paradigm /
edited by Baudouin Dupret and Jean-Louis Halpérin.
Description: Leiden ; Boston : Brill Nijhoff, [2022] | Series: Legal
history library, 1874-1793 ; volume 55 | Includes index.
Identifiers: LCCN 2021044670 (print) | LCCN 2021044671 (ebook) |
ISBN 9789004498655 (hardback) | ISBN 9789004498716 (ebook)
Subjects: LCSH: Legislation--History. | Customary law--History. | Law
reform--History. | Rule of law--History.
Classification: LCC K280 .S73 2022 (print) | LCC K280 (ebook) |
DDC 340/.112-dc23/eng/20211105
LC record available at <https://lccn.loc.gov/2021044670>
LC ebook record available at <https://lccn.loc.gov/2021044671>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1874-1793
ISBN 978-90-04-49865-5 (hardback)
ISBN 978-90-04-49871-6 (e-book)

Copyright 2022 by Koninklijke Brill nv, Leiden, The Netherlands.

Koninklijke Brill nv incorporates the imprints Brill, Brill Nijhoff, Brill Hotei, Brill Schöningh, Brill Fink, Brill mentis, Vandenhoeck & Ruprecht, Böhlau Verlag and V&R Unipress.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher. Requests for re-use and/or translations must be addressed to Koninklijke Brill nv via brill.com or copyright.com.

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

Notes on Contributors	VII
Introduction	1
<i>Baudouin Dupret</i>	
1 The Great Divide in Legal Discourse	
<i>Towards a Global Historical Ontology of the Concept of Positive Law</i> 5	
<i>Baudouin Dupret and Gianluca Parolin</i>	
2 Historical Landmarks in Mapping the Spread of Positive Law Teaching	33
<i>Jean-Louis Halpérin</i>	
3 Writing Customs	
<i>Three Episodes in the Process of Positivization of Berber Customary Law in Morocco</i> 70	
<i>Léon Buskens</i>	
4 Ambiguities and Interdependencies	
<i>The Relationship between Legal Positivization and Islamic Law in Colonial India, 1765–1909</i> 113	
<i>Jean-Philippe Dequen</i>	
5 The Positivization of Ottoman Law and the Question of Continuity	150
<i>Avi Rubin</i>	
6 How Government Jurists and Lawyering Approached the “Positivizing” of the Law in China	178
<i>Tzung-Mou Wu</i>	
7 The Meiji Era	
<i>When Japanese Law Became Positivized</i> 215	
<i>Béatrice Jaluzot</i>	
Conclusion	250
<i>Jean-Louis Halpérin</i>	
Index	255

Notes on Contributors

Léon Buskens

has a chair for Law and Culture in Muslim Societies at Leiden University and is at present the director of NIMAR, the Dutch institute in Morocco, based in Rabat. He studies law and culture in Muslim societies from an anthropological and historical perspective, with a particular interest for the history of the European understandings of Islamic and customary law. A recent publication is “Dutch Anthropologists in Morocco. From Exoticism to Islam at Home”, *Hespéris-Tamuda* 55 (2020): 347–390.

Jean-Philippe Dequen

is the Desk Officer for India, Central, South and South East Asia at the Ministry of International Relations and La Francophonie of Québec (Canada), as well a research associate at SOAS, University of London, UK. He has published in the field of the legal history of colonial India, more specifically in relation to Muslim personal law, e.g. “Filiation and Adoption among Muslims in India: The Quagmire of a Religious Minority Law”, *Journal of Law and Religion* 34/3 (2019): 336–355.

Baudouin Dupret

is Directeur de Recherche at the CNRS, based at the institute Les Afriques dans le Monde, Bordeaux (France), and guest lecturer at the University of Louvain (Belgium). He has published extensively in the field of the sociology and anthropology of law in the Muslim world, e.g. *Legal Rules in Practice* (coedited with J. Colemans and M. Travers, Routledge, 2020) and *Positive Law from the Muslim World* (Cambridge, 2021).

Jean-Louis Halpérin

Ph.D. (1985), University Paris II, is currently Professor of Legal History at the Ecole Normale supérieure – Paris Sciences Lettres. He has published monographs and many articles on European and Asian legal history, including *Five Legal Revolutions since the 17th Century. A Analysis of Global Legal History* (Springer, 2014).

Béatrice Jaluzot

is a tenured Associate Professor in Private Law at Lyon Institute for Political Studies and Director of the Lyon Institute for East Asian Studies. She has published extensively in the field of comparative law and Japanese legal history, e.g.

“La réforme du droit des contrats au Japon”, *Revue des Contrats*, 2018/4, and “La pensée juridique de Ume Kenjirō, ‘père du code civil japonais’”, in *Aux sources nouvelles du droit. Regards comparés français-japonais*, Mare et Martin, 2018.

Gianluca Parolin

is a comparative lawyer interested in how a new semiotics of law and governance developed in Egypt in the second quarter of the 19th century. He is Professor of Law at the Aga Khan University in London, where he also leads the Governance Programme. He is the author of *Citizenship in the Arab World* (Amsterdam University Press, 2009), and is currently working on a new book on the law’s *imaginaire* in Egyptian television drama.

Avi Rubin

is an Associate Professor at the Department of Middle East Studies, Ben-Gurion University of the Negev. He has published articles on various aspects of the socio-legal history of the Ottoman Empire during the nineteenth century. He is the author of *Ottoman Rule of Law and the Modern Political Trial: The Yildiz Case* (Syracuse, NY: 2018); *Ottoman Nizamiye Courts: Law and Modernity* (New York, 2011).

Tzung-Mou Wu

is Associate Research Professor at the Institutum Iurisprudentiae, Academia Sinica (Institute of Legal Studies, Taiwanese Academy of Science) based at Taipei (Taiwan). He studies the legal historical dimensions of contemporary political and policy issues, e.g. his chapters in Neil M. Chisholm, ed., “Judicial Reform in Taiwan: Democratization and the Diffusion of Law” (Routledge, 2020), Iiguni Yoshiaki et al., eds., “Titles and Registration System in Land Law: From A Comparative Perspective (in Japanese)” (Nakanishiya, 2018).