

# Comparative Legal History

## ARTICLES

'Agreement', 'Contract' and 'Debt' in Early Chinese Law  
*Geoffrey MacCormack*

'Law and Authority': A Political and Legal Paradigm by Thomas Hobbes  
and its Different Receptions in the USA, Canada, Britain  
and Germany since 1989  
*Marcel Senn*

Law and Commerce: The Evolution of Codified  
Business Law in Europe  
*Johannes W. Flume*

Law between Revolution and Tradition: Russian and Finnish  
Revolutionary Legal Acts, 1917-18  
*Tatiana Borisova and Jukka Siro*

*Comparative Legal History* is a peer-reviewed international and comparative review of law and history. Its articles explore both internal legal history (doctrinal and disciplinary developments in the law) and external legal history (legal ideas and institutions in wider contexts). Firmly rooted in the complexity of the various Western legal traditions worldwide, it also provides a forum for the investigation of other laws and law-like normative traditions around the globe. Scholarship on comparative and trans-national historiography, including trans-disciplinary approaches, is particularly welcome. *Comparative Legal History* is the official journal of the European Society for Comparative Legal History.

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## Preface

On behalf of the *European Society for Comparative Legal History* (ESCLH), we are delighted to present the first issue of the second volume of *Comparative Legal History*. The journal is, of course, only one of our activities – for example we recently contributed a panel to the *American Society for Legal History* Conference (November 2013) – but *Comparative Legal History* is central to our mission. We are proud of our first year and grateful to all of those who contributed to make it a success.

We are pleased, too, that Adelyn Wilson (Aberdeen), already on our Editorial Staff, has, beginning with this issue, taken on the more demanding role of ESCLH Copy Editor for us. She has already made very valuable contributions to the editorial process. We are very grateful to her, to Heikki Pihtilämmäki (Articles Editor) and Agustin Parise (Reviews Editor), and to the rest of our International Editorial Board and Editorial Staff for their efforts on our behalf.

We look forward, too, to our upcoming autumn issue, our first special issue. Edited by Michael Lobban (London School of Economics) and Willem van Boom (Rotterdam), that volume will focus on the First World War (1914–18) and private law across a number of jurisdictions.

Also on the horizon is the ESCLH's third biennial conference, to be held at the University of Macerata (Italy) from 8–9 July 2014. Dedicated to the theme of *Traditions and Changes*, keynote addresses will be delivered by Michael Stollés (Professor Emeritus, Johann Wolfgang Goethe-Universität Frankfurt) and former Director of the Max Planck Institute for European Legal History) and Lauren Benton (Professor and Dean, Graduate School of Arts and Science, New York University).

In addition to the ESCLH elections, the conference will see our first Van Caenegem Prize awarded. The prize is given to the young legal historian who writes the best article, published or accepted for publication, in *Comparative Legal History* in the period between ESCLH conferences.

The ESCLH is an exciting project made possible by the passion of its membership. We look forward to continuing growth and ask you to join us: see <http://esclh.blogspot.com/es/p/membership-information.html> for more details.

Seán Patrick Dorlan, Editor, *Comparative Legal History*  
Aniceto Masferrer, President, *European Society for Comparative Legal History*

15 April 2014

**José María Pérez Collados and Samuel Rodrigues Barbosa (eds), *Juristas de la Independencia* (Marcial Pons, 2012), 735pp, Hbk €70, ISBN 978-8497681889.**

To commemorate the bicentenary of the independence of some Ibero-American countries, and under the auspices of the Chair of Legal Culture of the University of Girona, José María Pérez Collados and Samuel Rodrigues Barbosa edited a book about jurists of the independence period.

The purpose of this book—according to its prologue by Jordi Ferrer Beltrán, holder of the above-mentioned Chair—is to look at the role of jurists, their views of law and the State and even their political positions in the processes of independence and subsequent institutionalisation of Ibero-American countries.

The book's general introduction is by Pérez Collados. The substantive text itself is divided into chapters examining: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, the Dominican Republic, Uruguay and Venezuela.

In the general introduction, entitled 'Las ideas jurídicas: Los juristas iberoamericanos y los procesos de Independencia' ['Juridical Ideas: Ibero-American Jurists and Independence Processes'], Pérez Collados points out that jurists were involved in the independence processes of the different Ibero-American countries, and that such processes involved the construction of new legal forms. To illustrate this point, Pérez Collados reviews the function of jurists, and then compares the effects of the role played by jurists in this continent with that of jurists in different continents at different times. In doing so, Pérez Collados examines colonial law, with special emphasis on the legal status of the indigenous society. He then explores jurists' contributions to the creation of norms and concludes, among other things, that it is necessary to understand the work of jurists vis-à-vis the sources of law, as jurists are the main actors in such a system.

In the chapter entitled 'Los juristas argentinos durante la época de la Independencia' ['Argentine Jurists during the Time of Independence'], Ezequiel Abásolo discusses the legal profession in the Río de la Plata in the times of the viceroyalty, and then describes the impact of the Revolution on lawyers and on the legal profession. The author then discusses the legal profession during the period of the first national government and explores the figure of Manuel Antonio de Castro, to whom he refers as the most outstanding Argentine lawyer in the first half of the nineteenth century.

In 'Los juristas de la Independencia' ['Jurists of the Independence'], Carlos Gerke M examines the situation in Bolivia, and describes the role of the Audiencia de Charcas, established during the reign of Philip II, the University

of San Francisco Xavier, founded in 1624, and the Academia Carolina of 1778. Around these three institutions flourished intense legal activity which set the stage for the dissemination of ideas of autonomy, independence, justice and liberty, which culminated in the creation of the Republic of Bolivia in 1825. The author concludes by referring to the participation of jurists in the organisation of the Republic, by means of contributing to the drafting of the acts, documents and laws by which a State is created.

Samuel Rodrigues Barbosa, the other editor of the book, is the author of the chapter on Brazil, entitled 'Indeterminação do constitucionalismo imperial luso-brasileiro e o processo de independência do Brasil, 1821–1822' ['Indeterminacy of Portuguese-Brazilian Imperial Constitutionalism and the Independence Process of Brazil, 1821–1822'], in which he explores the link between the independence process and the emergence of Portuguese-Brazilian constitutionalism between 1821 and 1822. Rodrigues Barbosa highlights the process of adoption of a constitution for the provinces and the empire as a mechanism that allowed jurists to participate in meetings, councils and chambers and to draft periodicals and pamphlets.

In his article 'Los juristas y la independencia de Chile' ['Jurists and the Independence of Chile'], Javier Rodríguez Torres explores the academic background of jurists, with special emphasis on the role of the Royal University of San Felipe. He also deals with the administration of justice, with reference to the Real Audiencia that functioned between 1567 and 1811, and the relationship of jurists to the written constitutions, power and the codification of laws.

Víctor M Uribe-Urán examines Colombia in his chapter 'Juristas, sociedad, independencia y estado en la Nueva Granada, 1790–1830' ['Jurists, Society, Independence and State in New Granada, 1790–1830']. The author discusses the topic of New Granadian jurists acting at the end of the colonial period and their participation in the independence movement, as well as their contributions to the process of formation of the republican State. Uribe-Urán begins with an analysis of the relationship between jurists, the State and the colonial society, in which he highlights elements of the social, political and cultural history of the period. He concludes that between 1809 and 1821 the jurists had great strategic significance for the promotion of collective actions in support of co-government, autonomy and the final independence of the viceroyalty. The author looks into the role of jurists in the construction of the republican State and the exercise of the most important and strategic offices in the Republic.

In 'Los abogados en la formación y consolidación del estado Costarricense' ['Lawyers in the Formation and Consolidation of the Costa Rican State'], Jorge Francisco Sáenz Carbonell studies the legal profession in Costa Rica during the Castilian domination, and discusses the fact that the legal profession did

not exist through virtually the entire period. The author then refers to Rafael Barroeta y Castilla, the first lawyer to reside in Costa Rica, and analyses the separation from Spain and the role of lawyers in the Constitutional Convention of 1824–5. With reference to the independence period, he discusses the High Court of Justice, the teaching of law, and law textbooks. The author then examines the role of lawyers in the drafting of constitutional texts and codification following independence. However, the author expressly notes that, unlike other Ibero-American countries, in Costa Rica the lawyers who had a leading role in the separation from Spain or the construction of the State generally acted as individuals rather than as representatives of a generation or a political or ideological group.

With a greater focus on the constitutional history of Cuba, the chapter by Beatriz Bernal Gómez, entitled ‘Juristas de la Independencia’ [‘Jurists of the Independence’], examines the most significant of the jurists who participated in the drafting of constitutional bills and proposals. The author reviews the biographies of these jurists and analyses their works from the perspective of the political and legal ideas that they expressed.

No references are made to jurists of the Independence in the chapter by Carlos Landázuri Camacho, entitled ‘Antecedentes y desarrollo de la independencia Ecuatoriana’ [‘Background to and Development of Ecuadorian Independence’], since the study is mainly concerned with the events leading up to the process of independence in Ecuador and the ideological context in which such a process developed.

The chapter by Sajid Alfredo Herrera Mena, entitled ‘Autonomía, independencia y patronato republicano en San Salvador: José Matías Delgado e Isidro Menéndez, 1808–1830’ [‘Autonomy, Independence and Republican Patronage in San Salvador: José Matías Delgado and Isidro Menéndez, 1808–1830’], also refers to the lack of jurists engaging in the creation of systematic law doctrines and emancipation at the time of independence. The article then discusses the independence process and the Right to Patronage of the State as a result of the king’s sovereignty being transferred to the people.

In ‘Los juristas de la independencia en Guatemala’ [‘Jurists of the Independence in Guatemala’], Jorge Luján Muñoz warns of the difficulty—due to the peaceful characteristics of the emancipation process in his country—of considering lawyers as ‘jurists of the independence’. Despite this, the author provides detailed biographies and an account of the role of 14 lawyers who participated in the independence process at the end of the colonial period and in the ensuing independent period. The author concludes with a discussion of the ‘discreet’ activity of most of these lawyers and highlights the figures of José C del Valle, José Mariano Gálvez, Miguel Larreinaga, Alejandro Marure and José María Álvarez. The last of these jurists has passed into the history of law on account

of having authored the work *Instituciones de derecho real de Castilla y de Indias* (1818), used as a textbook in most Ibero-American universities.

The chapter by Darío A. Euraque, entitled 'Los juristas de Honduras en la Independencia y la fundación de su primer Estado: Contextos coloniales y poscoloniales' ['The Jurists of Honduras at Independence and the Foundation of their First State: Colonial and Post-Colonial Contexts'], follows an essentially demographic approach. The author focuses on the issue of independence from a social and economic perspective and reviews the role of jurists in periods long after independence had been achieved.

José Ramón Narváez Hernández addresses the situation in Mexico in 'Juristas y abogados de la independencia de México' ['Jurists and Lawyers of the Independence in Mexico'], in which he examines the ideological foundations of the insurgence that led to independence.

In 'El legado hispánico en la formación del estado en Nicaragua (siglo XIX)' ['The Hispanic Legacy in the Formation of the State in Nicaragua (XIX century)'], Xiomara Avendaño Rojas analyses the political and institutional organisation in the Hispanic and the republican periods. In turn, in 'Juristas de la Independencia' ['Jurists of the Independence'], Salvador Sánchez González focuses on the work carried out by jurists in Panama until well into the twentieth century.

The reviewer found few references to jurists in the chapter by Barbara Potthast and Ignacio Telesca entitled '¿Nueva jurisprudencia o pragmatismo político? Paraguay y su lucha por mantener la Independencia' ['New Jurisprudence or Political Pragmatism? Paraguay and its Struggle to Maintain Independence']. This work is mainly concerned with the dictatorship of José Gaspar Rodríguez de Francia (1813–40).

In 'Entre dos mundos: juristas peruanos del tiempo de la Independencia' ['Between Two Worlds: Peruvian Jurists at the Time of Independence'], José de la Puente Brunke presents a magnificent work which examines the influence of jurists on the definition of notions that are essential to the development of the newly established republic, using as a common theme the analysis of the evolution of legal and political ideas. This is precisely the approach that any legal historian expects from a collective work such as that under review.

Luis E. González Vales discusses one aspect of the history of the law of Puerto Rico, namely the process of adoption of the criminal code following the change of sovereignty.

With regard to the Dominican Republic, in 'Juristas de la Independencia' ['Jurists of the Independence'] Wenceslao Vega B. describes the role of jurists within the legal framework of proclamations, constitutions, laws and the administration of justice.

In 'Los juristas uruguayos durante la época de la independencia' ['Uruguayan Jurists during the Time of Independence'], Ezequiel Abásolo draws on,

among other sources, valuable archival material to examine the role of legal operators in the Hispanic period, in national emancipation, in the Portuguese invasion, and in the initial organisation of the Uruguayan state.

Finally, in 'Abogados en la colonia e ideólogos de la Independencia de Venezuela' ['Lawyers in the Colony and Ideologues of the Independence of Venezuela'], Alí Enrique López Bohórquez presents an excellent work in which he looks at the juridical mindsets of those who can truly be considered to be jurists that contributed to the independence of Venezuela.

The works by de la Puente Brunke and López Bohórquez may be considered to be the ones that best reflect the objectives the editors had in mind when they conceived this voluminous collective work. The book is enriched by the diversity of approaches it encompasses, ranging from social history to demography and legal history. Nonetheless, most of the contributors agree on the following aspects:

1. Rather than gaining independence through a single process, several Ibero-American countries achieved independence in stages, as they had to sever their ties with other powers and even with countries with which they had previously been united as confederations.
2. Universities were a decisive factor in the constitution of Ibero-American legal cultures.
3. Jurists moved between the different Ibero-American countries as a result of the absence of universities or because of political persecution.
4. Jurists participated in the drafting of the instruments that provided the new states with a political and legal framework.

From a methodological point of view, the authors relied upon a vast bibliography and, in many cases, consulted primary sources. In some cases, the periods under analysis extend beyond the period strictly referred to as 'Independence', but this further enhances the value of the work. In sum, *Juristas de la independencia* is a collective work which makes a great contribution to legal history, and is a valuable starting point for further research.

**Viviana Kluger**

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