

Living Ruins of the Law On Legal Change and Legal History in Late Modernity¹

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1	Law and Language	220
2	Can Legal Ruins be Beautiful?	221
3	The Ruin – A Useful Metaphor	221
4	The Legal Ruin and History	222
5	The Romantic Ruins	223
6	Caspar David Friedrich: The Living Ruins – and the Law	225
7	Natural Law Renaissance in the Ruins of Europe	226
8	Living Ruins of the Law in the Late Modernity	227
9	Crisis of Jurisprudence	228
10	Conclusion	230

¹ Revised version of my valedictory lecture at the Faculty Day, *Forskningens Dag*, The Pufendorf Auditorium, Lund University Law School, May 30, 2007.

1 Law and Language

Scandinavian law was during the period of the homogeneous welfare-state characterized as both exceptional and archetypical. Scandinavian lawyers, however, no longer remain in that paradigm of the *modernity* of the 20th century. All of them have, more or less, changed their legal positions. Scandinavian lawyers are currently constructing a new legal culture, that of *late modernity*. It makes it necessary to also identify the *premodernity*. The Swedish law professors of the 18th, 19th and 20th centuries spoke Swedish to their students. But if we turn deeper in the chronology of the legal history the language used was Latin. From the academic desks at the European universities since medieval times Latin was the common *lingua franca*. It highly contributed to make European culture more bounder-less. It also helped the lawyers to communicate European law as formulated in the *ius commune*. Today the *modernity* of the 20th century has become a ruin of the past. The utopian dreams of an eternal increasingly developing national welfare-state have crashed, the visions of a *folk-home* have run into a blind alley. Consequently “the ruin” increasingly has been used as a metaphor for the current status of the great Western project of the Enlightenment as such. Within legal education and especially legal science the use of the national native tongues has turned into the use of English. Again, the Nordic countries are good examples. The Finnish Professor of law and linguistics Heikki Mattila has recently demonstrated the erosion of diversity regarding languages in legal publications in Finland. Today Finnish lawyers are communicating locally in Finnish and internationally (also within the Nordic countries) in English.²

Walter Benjamin, who will play an important role in this article, also focused on the special problems with translation. He regarded translation as a mode of symbolic violence.³ Translation is related to history, and translation produces silence of another languages and culture. In our time of globalization and post-colonialism the concept of translation raises questions about intellectual imperialism. Current legal cultures are increasingly filled up with legal transplants⁴ and legal transfers⁵, and foreign (colonial) languages are suppressing the national legal culture. On the other hand, in current late modernity, English is increasingly the professional way to communicate globally, especially for us legal historians, whose research for more than two decades has emphasized on *comparative legal history* and *comparative legal*

2 Mattila, Heikki E.S., *Språket och den nordiska rättsfamiljen*, Tidskrift utgiven av Juridiska Föreningen i Finland, vol. 141 (2005), 43 ff.

3 Benjamin, Walter, *The Task of the Translator*. [1923], In: Arendt, Hannah (ed.), *Illuminations*, [Translation Zohn, Harry], Fontana: London 1990, 70 ff.

4 Watson, Alan, *Legal Transplants: An Approach to Comparative Law*. 2nd Edition. Athens, Georgia: The University of Georgia Press, 1993; *Journal of Comparative Law*, Issue 2, 2006.

5 Giaro, Tomasz, *Modernisierung durch Transfer - Schwund osteuropäischer Traditionen*, in: Giaro, T., (Ed.), *Rechtskulturen des modernen Osteuropa. Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2006, 275-344.

cultures. So by talking English you are addressing a wider audience than if you are talking Swedish.

2 Can Legal Ruins be Beautiful?

In November 2005 a symposium was held at the Law Faculty, Lund University, due to an unconscious mistake. The title of this most interesting and fruitful symposium was *The Contract Act 90 Years* (Avtalslagen 90 år).⁶ When the organizers initiated that symposium they were convinced this Swedish statute celebrated its centenary this year, but when they realized that the law was adopted in 1915 – and not in 1905 – they had to adjust the title of the symposium and reduce it with a decade. Well, so what?! Ten years more or less! Who cares? Even legal historians have to accept current historical ignorance and lack of historical consciousness. Students of today will not fail in the exam if they in that sense believe more in 1905 than in 1915!

I'm not making this remark to blame my fellow colleagues for lacking knowledge in legal history. My point is how different the participants viewed the future of this Contract Act and their discourse at the symposium on the possibilities for arranging a real centennial symposium in 2015. Professor Christina Ramberg, Gothenburg University, who herself is a harsh critic of the in her eyes obsolete and outdated Contract Act, paid a tribute to her late colleague and mentor professor Kurt Grönfors, Gothenburg University, who had devoted most of his professional life to the applications of this Act. Christina Ramberg had been sitting at his bed just a few days before he passed away in 2005, and when they discussed the Contract Act the defeatist Kurt Grönfors had told her that this act in his view just remained as a "ruin". In the discussion after her talk some colleagues agreed with the metaphor of regarding the Contract Act a ruin, but if so: "a beautiful ruin". Ruins are constantly eroding but they have to be protected, they argued. Other colleagues were more pessimistic: Thank God we held this seminar in 2005, because in ten years this act will be abolished! Valid law is changing, so throw the old and obsolete law in the trash can – which for them meant to the legal historians. I actually made a bet with a colleague, who was sure the Contract Act would be abolished within ten years. On the other hand by knowledge and experience I have a permanent trust in the sustainability of the ruins of the law, or more precisely in *the living ruins of the law*. That's one reason why I have decided to elaborate on this theme in this article.

3 The Ruin – A Useful Metaphor

The ruin is a metaphor related to time. The ruin is also concretely associated with history and the past. Current constructs regarding time belong to the

⁶ Flodgren, Boel; Gorton, Lars; Lindell-Frantz, Eva & Samuelsson, Per (eds.), *Avtalslagen 90 år. Aktuell nordisk rättspraxis*, Norstedts Juridik Stockholm 2005.

comprehensive scientific discourses of today⁷ (Luhmann, Koselleck, Agamben). These discourses are related to the fact that in our time the chronological concept of time the *modernity* of the 20th century upheld is not regarded as satisfactory. In the *modernity* presence had priority – either past or future was related to this concept. To put it in legal terms: The jurists were only interested in the concept of *valid law*, the law of the presence. Either the past or the future belonged to the concepts of the modern lawyer. Legal history didn't belong to what positivists looked upon as the prestigious fields of valid law. History and traditions were marginalised and scientifically they argued that proposals and legislative suggestions for the future, *leges ferenda*, had to be regarded as politics. Historical problems were thrown to the legal historians and future problems to the politicians. Such legal problems were more or less prohibited as a part of this strict legal science and legal exercise. Within the legal paradigm of the modernity the legal historians to a great extent were identified with the past.

Today this modern construct of legal time is questionized. Let me turn back to this statement later, but first I will give some remarks regarding the concept of the legal ruin and history.

4 The Legal Ruin and History

In European history the ruin has traditionally been symbolizing the relation between the past and the present between the peak and the decline and fall. The ruins symbolized *vanitas*, death, corruptibility and vanity.

The icon of the renaissance was the Gothic cathedral with its flying buttresses striving toward heaven. It represented the peak of the *jurisdiction* or the power of the Roman Catholic Church. The cathedral as metaphor, however, constructed by generations, also included the perspective of continuity, and of the past, the re-naisance, the rebirth of the Greek philosophy and the Roman law at the Italian universities of the 12th and 13th centuries.

An early Swedish example of jurists who used this metaphor was the nobility man Johan Rosenhane, who at the end of the 17th century characterized the Swedish law as a “broken marble wall patched by granite”.⁸ This metaphor was well suited. He used the metaphor of the broken wall to describe a disastrous situation of the old cathedrals of medieval laws, regional, urban and national, which legal rules at that time were either abolished, obsolete or misinterpreted. He used the metaphor at a time when historical reflection was the fashion and the national ruins of the Swedish history were visualized to the educated Swedes

7 Luhmann, Niklas, *Zeit und Gedächtnis*. In: *Soziale Systeme. Zeitschrift für Soziologie*; 2:2 (1996), 307 ff. – Koselleck, Reinhart, *Zeitschichten: Studien zur Historik*, Suhrkamp: Frankfurt/Main 2000. - Agamben, Giorgio, *The Time That Remains: A Commentary on the Letter to the Romans*, Stanford University Press: Stanford 2005; Rosa, Hartmut, *Beschleunigung, Die Veränderung der Zeitstrukturen in der Moderne*, Suhrkamp: Frankfurt/Main 2005.

8 Hafström, Gerhard, *De svenska rättskällornas historia*, 3rd ed. Juridiska Föreningen, Lund 1966, 182. – Cfr K.G.Westman, *De svenska rättskällornas historia*, Juridiska Föreningen Uppsala 1941, 53.

in the prints of the copperplates in Eric Dahlberg's famous work *Suecia Antiqua et Hodierna*.⁹

If the legal ruins for Johan Rosenhane had a pejorative interpretation they were used in a more positive way by the English lawyer William Blackstone. For him the ruins of Rome, Athens and Palmyra, "administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour".¹⁰ Blackstone had a "pragmatic readiness to see virtue in the new-built as well as the old". That was also the obligation of the English *common law*-lawyer: "To sustain, to repair, to beautify this noble pile". The modern lawyers were at least allowed to refine their ancient inheritance, he wrote in the Book IV of his *Commentaries* in 1769.

The same year, in 1769, the first Danish legal historian Peder Kofoed Ancher just like Montesquieu used another metaphor, that of the tree, to describe the spirit of the law, and especially the oak, symbolizing the long living tree as a symbol of continuity. The roots were identified by the medieval laws: they gave nutrition to the stem (the code) and to the foliage with its many branches and leaves, e.g. chapters and paragraphs. The legal oak in this concept was a sacred tree which had to be protected.¹¹

The philosophers of the French Enlightenment didn't have an eye for the past and *l'ancien regime*. Voltaire turned it bluntly, "If the laws are bad, burn them and write new ones". The contemporary term *modern* emanates from this time. It had to be interpreted as oriented towards the future, not towards the past, the *l'ancien régime*. Modern rational cognitive thinking started with the Enlightenment, the great intellectual project of the 18th century. Metaphorically the Enlightenment was related to daylight and the sunbeam. The reaction and the counterforce of the early 19th century, romanticism, however, instead was related to the twilight and to the shady light of the moon. By keeping – not destroying – ruins of the past the romantics helped us to identify the history. Romantic ruins had to be regarded in the dark shadows of a moonlit landscape. Enlightenment was a product of the brain. The romanticism, its representatives emphasized, was a product of the heart.

5 The Romantic Ruins

The interpretation of the ruins changed with the romanticism. In the baroque of the 18th century the ruin was regarded as a *vanitas* sermon, a symbol of corruption. In the early 19th century this sentimental declined, instead it became a symbol of heroic deeds and heroic times.¹²

9 Fehrman, Carl, *Ruinernas romantik. En litteraturhistorisk studie*, Bonniers Stockholm 1956, 29.

10 Priest, Wilfried, *Blackstone as Architect: Constructing the Commentaries*, Yale Journal of Law & the Humanities, vol 15, nr 1 (2003), 118 ff.

11 Kofoed Ancher, Peder, *En Dansk Lov-Historie Fra Kong Harald Blaatands Tid til Kong Christian den Femtes*, Kiøbenhavn 1776.

12 Fehrman, Carl, *Ruinernas romantik*. (1956), 97 f.

The German romanticism mobilized a contra-force to the modern revolutionary project of French Enlightenment. Gustav Hugo's famous lectures in Jena in 1800 brought history back into the discourse, at the same time as the secularization was brought into the intellectual discourse. History and philosophy became the two main theoretical fields of the law at Alexander von Humboldt's new "Reform university" in Berlin, where Friedrich Carl von Savigny as law professor in the 1810's established the important *Historical school of jurisprudence*. The quiet working forces of the law, *die still-wirkende Kräfte des Rechts*, were in Savigny's vocabulary the metaphor of the organically developed law.

The Swedish national poet of the romanticism Esaias Tegnér longed like Germany's Johann Wolfgang Goethe nostalgically to Italy, to the ruins of Rome. For Tegnér they represented "the locality of history". He looked upon Pompeii not as the buried city but as the resurrected one. For the Swedish romanticists the Gothic ruins of the renaissance became much more important than those in Rome. Tegnér even published a poem in 1820, *The Cloister Ruins* (*Kloster-ruinerna*), which demonstrated his influences from German ruin-romanticism.¹³

In this dynamic landscape of the early 19th century the romanticists found their icon not in the cathedral but in its ruins. The Gothic cloister ruin became a favourite subject for the German painter Caspar David Friedrich, who was born and raised in Greifswald, up to 1815 the most Southern Swedish University.¹⁴ One of Caspar David Friedrich's favourite motives was the monastery ruins in Eldena, two miles east of Greifswald in the Swedish province Pommerania. His large painting *Monastery Churchyard in Snow* (*Klosterfriedhof im Schnee*) 1818/19 – where he found the motive in the chancel of the Greifswald Saint James (*Jacobikirche*) – could previously be seen at the National Gallery in Berlin before it got lost in the spring of 1945, at the end of the World War II.¹⁵

This painting is representative for the interdisciplinary analysis of the theme of this talk: *Living ruins*. The cloister ruins are located in a churchyard surrounded by oak trees symbolizing long life. Oaks can be several hundred years old. The same expression is given by the rituals of the monks. In a procession they are entering the ruin, which as a Gothic ruin still is used as a cathedral. The context of the ruin is still alive. Day and night, death and life are connected in this painting which also has a theological interpretation, which has to be indicated. Friedrich was very much inspired by Friedrich Schleiermacher, the great German theologian of the romantics. His individualistic and nature inspired theology to a great extent also inspired the jurists of his time.¹⁶

13 Fehrman, Carl, *Ruinernas romantik* (1956), 132 ff.

14 Gassner, Hubertus, *Empfindsamkeit*, in: *Caspar David Friedrich: Die Empfindung der Romantik* [Exhibition catalogue, Museum Folkwang Essen/Hamburger Kunsthalle], Hirmer Verlag: München 2006, 111 ff.

15 Klosterfriedhof im Schnee 1818-19. Berlin, Staatliche Museen (Kriegsverlust). – Geismeyer, Willi, *Caspar David Friedrich*, E.A.Seeman Verlag Leipzig 1998, 31.

16 Modéer, Kjell Å, *Unter dem gemeinsamen gotischen Gewölbe. Das Verhältnis von Theologie und Recht bei schwedisch-pommerschen Juristen*, in: Alvermann, Dirk; Jörn, Nils & Olesen, Jens E. (eds.), *Die Universität Greifswald in der Bildungslandschaft des Ostseeraums*, LIT Berlin 2007, 236 f.

6 Caspar David Friedrich: The Living Ruins – and the Law

So, what has this painting to do with the law? The German – and Scandinavian – jurist of the early 19th century had generally seen a strong belief in God, and as a civil servant he had to be a Christian. In the oath of the judge he promised to follow the Gospel and the Christian norms.¹⁷ The representatives of Savigny's *Historical school of jurisprudence* believed in a living law, which by tradition or customary law could be traced back to its original sources. So, the living ruins as demonstrated by Caspar David Friedrich represented a metaphor the contemporary jurists felt very comfortable with. The ruins could be located in a winter landscape waiting to be revitalised in the spring – or like another painting by Caspar David Friedrich from the summer of 1825 demonstrated – the living ruin also could be included in a new life, embedded in green foliage. A new life is conceptualized within the historical ruins.

The ruins could be reformed and adjusted to a new time and to a new context. This was also Per Daniel Amadeus Atterbom's view. He was a university teacher from Uppsala who fell in love with the living ruins, as recaptured by nature. His romantic passion for the ruins drew him like Johann Wolfgang von Goethe to Rome. Atterbom met with Caspar David Friedrich's cloister ruins in Eldena close to Greifswald on his Italian journey in 1816.¹⁸

The *pandectists* of the later part of the 19th century tried to walk into these living ruins of the law and try to reconstruct the Gothic cathedral, the *ius commune*. Savigny's mental grandchild Bernhard Windscheid loved to talk about the law professor's legislative work of a codification like that of a worker who constructed the cathedral. The great civil code of 1900, BGB, was the ultimate and visionary goal of this construction. His co-worker Rudolph von Jhering became at the end of his life the main critic of this reconstruction. His constructive jurisprudence tried to adjust the historical ruins of the Roman law into useful concepts in modern life.

The modernity of the 20th century, however, not only tried to kill and destroy the living ruins, they also found the cathedrals in several senses inappropriate for the modern society. The anti-metaphysical concept of law was parallel to the secularization of the modern society. The painting "Wounded Angel" by Hugo Simberg at the Ateneum in Helsinki indicated the upcoming 20th century without any beliefs in angels, cathedrals and their ruins, die "Entzauberung der Welt" to talk with Max Weber's terms.¹⁹

17 Sunnqvist, Martin, *Domareden och dess religiösa inslag* in Modéer, Kjell Å (ed.), *Rätt, religion och politik: Ett rätthistoriskt seminarium tillägnat Magnus Sjöberg*, Rätthistoriska skrifter, vol 9, Stockholm 2008.

18 Atterbom, Per Daniel Amadeus, *Minnen från Tyskland och Italien*, Vol. I, [Svenska klassiker], Atlantis: Stockholm 2002, 42 ff.

19 Weber, Max, *Economy and Society: An Outline of Interpretive Society*, University of California Press: Berkeley 1978.

7 Natural Law Renaissance in the Ruins of Europe

The 20th century has also been described as the century of catastrophes. Fifty millions of people lost their lives during the first and second world wars.

William Golding's post-war novel *The Spire* (1964) takes place in medieval England but was inspired by the reconstruction of the ruins of the Cathedral of Coventry, which with exception for the spire was destroyed by the German Air Forces during the World War II. The architect of the reconstruction had an old belief that stones from an ecclesiastical building expressed strength and purity. He took care of the stones from the old cathedral and let them be a part of the new one. Coventry cathedral became a heroic try in the agnostic post-war era to express a strong personal faith. Golding's novel *The Spire* was inspired by the architect's aims.²⁰

Also in Germany after World War II the reconstruction of democracy and the welfare-state also were identified as living ruins to the context of the law. The ruins of the Parliamentary building in Berlin 1945 became a strong metaphor for the crashed democracy-based *Rechtstaat*. Rebirth of democracy and human dignity in the German Basic Law 1949 and European fundamental values in the European convention for human rights 1950 became archetypes for a *Zeitgeist* in which the rebirth, the *renaissance*, of the natural law in the late 1940's in the aftermath of the great catastrophe of war became another element. It's no coincidence that the transformation of the ruins of the Parliamentary building in Berlin into a new reconstructed shape of the *Bundestag* after the German reunification in October 1990 became a strong metaphor. The Bird of Phoenix of the *Rechtstaat* was recreated in the ashes and ruins of the World War II.

In 1957 Carl Fehrman, a well known Swedish literary historian, published a book on the romanticism of the ruins, *Ruinernas romantik*. The ruins of Europe at that time indicated a common need to reflect about the symbols of the ruins – and how they have been dealt with throughout the European literary history. “We had been a good deal poorer as far as historical knowledge about the past and aesthetic experiences are concerned, if the weapon on destruction in the past had been as effective as those in our age, if the ruins of Rome, and of Greece and of the Orient had been pulverized to atomashes.”²¹

The ruins of the Twin Towers of World Trade Centre in New York City have also been a strong metaphor of the September 11 events, which also dramatically changed the spirit of the law in our late modern society. The ruins in New York 2001 not only became a landmark for the concrete departure from the 20th into the 21st century, they also indicated the eroding ruins of the Jeffersonian metaphor of the “Wall of Separation between State and Church”.²²

20 Mjöberg, Jöran, *Arkitektur i litteratur*, Carlsson Stockholm 1999, 195 ff.

21 Fehrman, Carl, *Ruinernas romantik* (1956), 9. – “Vi vore åtskilligt fattigare, både på historisk kunskap om det förflutna och på skönhetssyner, om förstörelsevapnen i det förflutna varit lika effektiva som samtidigt, om Roms och Greklands och Österlandets ruiner pulvriserats till atomaska.”

22 Dreisbach, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State*, New York University Press: New York 2002.

8 Living Ruins of the Law in the Late Modernity

Living ruins of the law is a metaphor frequently used in current European legal discourses. According to my construct of the law we are currently constructing a new romanticism of our time within the law. A comparison between the legal culture of our time with that of the medieval renaissance and the national romanticism of the 19th century is an important task of research.

My point is that the living ruins of the law in our times again are excavated and reidentified. They are made visible again. Law of today means more than legislation and preparatory works of legislation. Law of today includes different values in forms of justice, customary law and fundamental values.

When I presented the monastery painting by Caspar David Friedrich to representatives of an association of religious communities in Sweden some time ago a pope belonging to the Rumanian Greek orthodox community literally run wild. “In the ruin you can see the archetype, the cathedral as such”, he said. “The ruin is not predicting the apocalypse, it’s eschatological.” What he saw in this picture was not Catholic monks entering the ruin, but representatives of all kinds of religious communities. He read the painting ecumenically, and in our current language: The Western legal tradition as a part of the current trend of legal globalization.

By choosing the metaphor *Living ruins of the law* I indicate that we – like in the times of romanticism constructed by Savigny, Schleiermacher and Friedrich – are experiencing a new time of romanticism, with deep consequences for the law. Just like the French revolutionary Enlightenment wanted to destroy the *l’ancien regime*, we have experienced the modernity of the 20th century with its radical marginalisation of discourses regarding history, traditions and culture. Just like the German romanticism of the early 19th century became an important contra-force to the liberal modern reform-oriented jurists, we are today facing a new romanticism criticizing the modernity of the 20th century.

Kaarlo Tuori’s transnational concept, *the deep structures of law*, has been very useful when legal historians have reached the hands to national state oriented jurists being conscious of the internationalization of the law.²³ The deep structures of the law help us to define the *longue durée* of the law, the law beyond modernity by looking back to the past.

Some years ago I learned in Beijing the old Chinese proverb now used in post-maoist contexts: *Listen to the silent steps of the past*. It can also be a motto for the late modernity of the law. Walter Benjamin was more explicit when he identified history as the story about the relation between silence and justice. This story is what Benjamin will call “a proverb”. He uses explicitly the ruin as a metaphor, “which stands on the site of an old story and in which a moral twines about a happening like ivy around a wall.”²⁴

23 Tuori, Kaarlo, *Towards a multilayered view of modern law*. In: Arnio, Aulis; Alexy, Robert & Bergholz, Gunnar (eds), *Justice, Morality and Society: A Tribute to Aleksander Peczenik on the Occasion of his 60th Birthday 16 November 1997*, Juristförlaget i Lund 1997, 432 ff.

24 Benjamin, Walter, *The Storyteller*, in: *Illuminations* ed. with an Introduction by Hannah Arendt, Schocken Books: New York 1969, 108.

The 20th century experienced many historical trials, and also Walter Benjamin wrote about the relation between history and justice. Interestingly enough history and justice was not related during the modernity of the 20th century. “The law perceived itself either as ahistorical or as expressing a specific stage in society’s historical development. But law and history was separate.”

The Nuremberg trial in 1946 made a change. For the first time it “called history itself into a court of justice”.²⁵ But the Nuremberg trial was just a first try. In Nuremberg only written evidence were admitted, but in the Eichmann trial in Israel in 1961 oral witnesses were admitted and “the whole history of the Nazi persecution and genocide of the European Jews” was put on trial. In the United States the defence in the O.J.Simpson trial in 1995 put the whole historical trauma of the persecution of American blacks and the prosecutor concurrently referred to the “historical injustices inflicted with impunity on battered women and on murdered wives.”²⁶ And recently the United Nations war crimes tribunal in The Hague put on trial crime against humanity and at the same time history on trial. “The [late modern] court helps in the coming to expression of what historically has been “*expressionless*” – again to use a term of Walter Benjamin: “*das Ausdruckslose*” – expressionless. In *The Storyteller* (1936) Benjamin foresaw the Apocalypse, the outbreak of the Second World War. “In [the] buildings, in [the] paintings and in [the] stories [of those who have made the radically new their concern], humanity prepares itself to survive culture, if there is no choice. (1933)”²⁷ As we all know Walter Benjamin himself fell silent.

Walter Benjamin learnt the surviving jurists that they had to identify the silence, the silent history of the losers, the silent destinies of persecuted crime victims, of the law émigrés and of the Nazi and Soviet legal profession. Walter Benjamin’s expressionless – but living – ruins of law have been a hot topic for late modern legal historians since the 1980’s – with the German legal historians Bernhard Diestelkamp and Michael Stolleis in Frankfurt/Main as impressive representatives in this *Vergangenheitsbewältigung* – reckoning with the legal past.

9 Crisis of Jurisprudence

One of the main discourses within current legal theory is about the crisis of jurisprudence. It’s also related to romanticism.

This current crisis of jurisprudence is related to the critic of the concept of the nation state and its legal sources. Legal theory during the modernity focused on the concept of valid law as defined by democratic parliaments and governments. The broad concept of legal sources in the 19th century was

25 Felman, Shoshana, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*, Harvard University Press, Cambridge/Mass. 2002, 11.

26 Felman, Shoshana, *The Juridical Unconscious* (2002), 12.

27 Schweppenhauser, Hermann & Tiedemann, Rolf (eds.), *Walter Benjamin, Gesammelte Schriften*, Vol. 2, Suhrkamp: Frankfurt/M. 1977, 219. – Felman, Shoshana, *The Juridical Unconscious* (2002), 47.

criticized when the paradigm of modernity conquered and increasingly dominated the legal culture. The legal sources of the 20th century excluded e.g. *customary law*, and at the same time the law of the ethnic minorities in the society. The legal culture of the Swedish Sámi, including their laws and rights, had to be abolished so they could be assimilated in the modern nation-state. Today the Sami's collective rights are made visible, and they are used as legal arguments in Scandinavian courts.²⁸ Customary law and legal traditions is a part of the late modern discourse within comparative law.²⁹

Another example is *international public law*. The Swedish welfare-state of the 20th century had a very reluctant view regarding this field of law. The Uppsala School of legal realism regarded international treaties as obscure remnants of natural law. For the law professor of private law, Östen Undén, later Swedish foreign minister, *international public law* was regarded as politics.³⁰ Today this part of the law is regarded as included in the Swedish system of national, supra-national, and transnational laws.

My third example is *comparative constitutional law*. Constitutional law never became an important discourse among jurists in post-war Sweden.³¹ Constitutional problems never became discourses in modern Swedish legal culture. They were pushed over to the political scientists, who dominated the post-war constitutional discussion. Today, however, constitutional law is reconquered to legal science, especially as *comparative constitutional law*.³² One example of living ruins within the constitutional law are the discourses on civil religion,³³ on original intent,³⁴ on preambles³⁵ and fundamental values,³⁶ which

28 Modéer, Kjell Å, *Sedvana och tradition i senmoderna rättskulturer*, Saga och sed 2004, 83 ff.

29 Glenn, H. Patrick, *Comparative Legal Families and Comparative Legal Traditions*, in: Reimann, Mathias & Reinhard Zimmermann, Reinhard (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press 2006, 421 ff.

30 Undén, Östen, *Juridik och politik*, Stockholm 1927.

31 Björne, Lars, *Realism och skandinavisk realism: Den nordiska rättsvetenskapens historia*, Vol. IV (1911-1950), Rättshistoriskt bibliotek, Vol. LXII, Stockholm 2007, 196.

32 Mark Tushnet & Vicki C. Jackson (eds.), *Defining the Field of Comparative Constitutional Law*, Westport, Connecticut: Praeger 2002.

33 Bellah, Robert N., *Civil Religion in America*, Daedalus 96 (Winter 1967): 1–21. – Bellah, Robert N., *The Broken Covenant: American Civil Religion in Time of Trial*, University of Chicago Press: Chicago 1975.

34 Rossum, Ralph A., *Antonin Scalia's Jurisprudence: Text and Tradition*, University Press of Kansas: Lawrence 2006. – Staab, James B., *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court*, Rowman & Littlefield Publishers, Inc.: Lanham 2006.

35 Koch, Henning, *Det materielle demokrati – rettigheder og værdier*, in: Diestelkamp, Bernhard et al. (eds), *Liber Amicorum Kjell Å Modéer*, Juristförlaget i Lund: Lund 2007, 335 ff.

36 Kjell Å Modéer, Kjell Å., *Regering, förvaltningsmyndighet och domstol. Synpunkter på självständighet och rättssäkerhetsgarantier*. In: Behöver demokratin nya spelregler? Konferens om Grundlagen [Dokumentation från Grundlagsutredningens konferens med forskare inom statsvetenskap och juridik 21-22 mars och 18 april 2005], SOU Grundlagsutredningen 2005.

became evident in the work on the architecture of the European treaty law a couple of years ago.

10 Conclusion

When Scandinavian legal historians in the spring of 2007 met with Portuguese colleagues in Lisbon and discussed legal cultures in European peripheries one of our Lisbon colleagues commented the discussions by saying:

– This is odd! I have never met with legal historians before, who are mostly talking about the future.

I found this comment a very nice compliment to legal historians. It was the classical mission of modern legal history from Savigny onwards made concrete: to use legal history as explanations for current events. In late modern legal science legal historians again are included as participants of current legal discourses. A legal historian can for example help you understand the constitutional culture in Iraq, the contemporary will with help of Swedish court of appeal cases from the 17th century, the autonomy of the judiciaries of the Nordic countries in the 19th and 20th centuries, and the jurisdictions of the European supranational Courts with help of judicial parallels in Early modern Europe.

I'm convinced legal history will have a firm place in the legal discourses in the future. Late modern legal science will not only be connected to legal dogmatic and legal functions. Late modern legal science will as well be connected with traditions, with religions, history and culture. Text and context are interrelated. It's not the modernity concept *either – or*. It's the late modern concept *as well – as*.³⁷ Late modern legal history is again connecting the lawyers with their past: *Quod bonum, felix faustumque sit!*

37 Beck, Ulrich & Lau, Christoph (eds.), *Entgrenzung und Entscheidung: Was ist neu an der Theorie reflexiver Modernisierung?*, (Edition Zweite Moderne), Suhrkamp: Frankfurt/Main 2004.