Centre for Advanced Studies in the Humanities and Social Sciences

Reflexive Globalization and the Law:
Colonial Legacies and their Global Implications in the 21st Century

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Basic concept and idea

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1 Starting point

Students demand the decolonization of curricula. Civil society debates the presentation of Non-Western artefacts and entangled histories in the Humboldt Forum. European governments apologize for slavery and genocidal killings, while former colonies request reparations.

The legacies of colonialism and empire are becoming visible everywhere these days. The examples just mentioned indicate a new phase in both, the history of modernity and, more specifically, the dynamics of globalization. While globalization was perceived especially in recent decades mostly in economic terms and often as uni-directional 'Westernization', the new phase also has important intellectual dimensions and is multidirectional; the positions of South and North[1], centre and periphery are redefined and rebalanced. For the purpose of our research, we frame this new phase, tentatively, as reflexive globalization. In this phase, colonial and imperial legacies are discussed increasingly also with regard to the North, Northern premises of concepts, vocabularies and epistemic certainties are questioned in many fields, and Northern domination in systems of knowledge production is critiqued.

Our *Kolleg-Forschungsgruppe* (Center of Advanced Studies, hereafter *Center*) will study the role of law in reflexive globalization and its implications for basic concepts of law. Sustained, iterative conversations between voices from South and North as made possible in a *Center* are the essential path to those studies.

2 State of debate and context

Starting and conducting such conversations has remained a challenge, especially in legal academia. Scholarly reflection on colonial legacies, on different South-North experiences in (conceiving) law as well as attempts to integrate Southern experiences into the conceptual vocabulary of law are only slowly emerging. Even though post-/decolonial theory developed immensely over the past 50 years and many disciplines in the social sciences and humanities have used it, in *legal* academia these theories and colonial legacies had for a long time been **studied, if at all, not in depth.** One notable exception is public international law where scholars started what they called Third World Approaches to International Law (TWAIL) in the late 1990s and by now

[1] We acknowledge that the terms Global South / North need explanation – but can still serve as important markers. In our understanding, they have to be understood as geographical as much as political terms. They also indicate entanglements that go beyond a simple North-South binary without flattening out differences (Dann 2023a).

reshaped the field. Their programmatic aim was to turn to the history of colonialism to rethink the development and use of international law throughout the last centuries and their effects and consequences today. This move coincided with the emergence of global legal history, which also turned especially to the colonial dimension of law, and a growing interest in such questions in general legal history too.

In other areas of legal research, the reflection of colonial legacies has been almost inexistent until very recently. Central insights about the entangled (legal) histories of South and North or about the particularity of Northern concepts and their evolution were therefore mostly ignored.[2] Where Southern contestations to allegedly Northern legal concepts (such as constitutionalism or international criminal justice) have arisen, the **responses** have often been rather **schematic**. While some defend such conceptions as necessary and universal elements of well-ordered societies anywhere, others attack such concepts as neo-colonial, foreign and oppressive. Legal academia was lagging behind in recognizing the varied experiences of law and integrating them into a more reflexive conceptual vocabulary of law.

Lack of interest and schematic responses were also the result of an **absence of suitable spaces** for longer-lasting, intercultural South-North exchanges about law. Old centers (Oxbridge, Paris, US Ivy League law schools) have not made serious attempts to organize them. 'Southern' centers often lack convening power. If exchanges are initiated, most formats don't allow for the longer duration that is necessary for such 'slow comparison' or deal only with very selective areas.

But the current constellation is changing fast not least due to the realization of a **profoundly changed context**. A multipolar world has emerged in the past years, in which the former gross asymmetries in many fields are waning. Be it with regard to economic power, military capacity or technological innovation, the dominance of Northern actors and ideas has vanished. In the field of knowledge production and especially in legal academia, the shift has been slower but the emergence of a multipolar world has started to change the conversation here too.

In this shift, **two trends** have emerged, which provide both a tailwind and some challenges: On one hand, there is a **surging interest** in colonial legacies and their meaning for post-colonial legal orders in the South as well as the North. In the South, a growing number of studies reflect colonial legacies in postcolonial constitutional orders. There is a growing interest also in the North. While the engagement with legacies of colonialism in Germany might stand out, various research projects on imperial legacies in the European integration process and in different constitutional systems across Europe and even the US are also in the making. A similar trend applies to criminal law and crime control. While important preliminary work has been done since the 1980s, in particular by protagonists of critical criminology in Latin America and Europe, we can observe a recent surge of interest in critically interrogating the impact of colonialism on criminal legal orders and practices. Special attention is being paid to colonial legacies in international criminal justice.

[2] This applies especially in Northern and North-dominated international scholarship, while in Southern legal scholarship, colonial legacies were often present, even though not necessarily theorized through post- or decolonial theory or similar frames.

On the other hand, the discourse and especially the notion of ‘decolonization’ have become highly **politicized and polarized**. In Germany, public discourse about the Documenta XV and after the October 7, 2023 attacks in Israel has led to broad critiques of postcolonial studies and Southern voices as inherently anti-Semitic and anti-Western. In India and South Africa, to take examples from the South, Hindu-nationalists as well as radical left-wing writers have adopted the language of decolonization to reject liberal constitutional frameworks as imposed and neo-colonial. On the international level, the international criminal justice system and the International Criminal Court (ICC) have been getting flak from the Global South, in particular from the African Union, for being neo-colonial tools in the hands of the North, resulting, inter alia, in the quest for ‘decolonization’ through withdrawal from and rejection of universal mechanisms of accountability. In a similar vein, Southern states have begun to use international law litigation to address alleged neo-colonialism and international law violations by Northern powers (see e.g. the cases of South Africa and Nicaragua (on Israel and Germany respectively). In return, this politicization and adoption of the term ‘decolonization’ for nativist ends, has now led to a critical discussion on the term of decolonization itself.

In these debates, a similar theme occurs in public discourses but also in scholarly writing on domestic and international law. In domestic law it is the question of whether the constitutions, penal codes and respective legal concepts were **Western impositions or** whether they were **endogenous creations** after or since independence. Similarly, in international (public and criminal) law, it is discussed whether the idea of ‘universal’ concepts embodies a continued neo-colonialism or whether reforms have led to a transformative adaption. The discussion in both domains, moving fast from ignorance to hypertension, is often framed as a polar-opposite choice between wholesale adaption or rejection.

These recent trends and the patterns of discussion only underline the **need for a respectful, horizontal and analytical engagement**. With the new *Center*, we want to **overcome polarizations** or knee-jerk reactions and create a space, where mutual, iterative and reflexive rethinking of colonial legacies in legal notions can take place. Criminal and constitutional law, which the two applicants bring in with complementary sets of expertise, have a particular importance for public ordering and world-making and hence for the history and structure of law in colonial and postcolonial settings, in recent history and current developments. Constitutional law is the frame of the nation-state exported to the South and held as standard, not least in the years after the Cold War and Northern liberal hegemony. Criminal law is a central tool of disciplining and upholding social morals. Extending criminal law ideas more and more to the international level was a central part of liberal hegemony in the 1990s – interestingly, at that time very much driven by African states – with the founding of the International Criminal Court as its crown jewel. Both fields are therefore central arenas for public ordering but also fields, in which the rethinking of South and North takes place.

3 Research plan

We aim to progress not in a strictly sequential manner but rather in a **dialogical process** and through mutual enrichment between the general conceptual framework and particular thematic areas and between the different methodological and disciplinary approaches in our conversations. We plan to study concepts in two thematic areas through four methodological approaches and within one conceptual framework. More concretely, we will study democracy and punishment as examples of concepts from constitutional and criminal law through doctrinal, historical, empirical and comparative approaches and within the overarching conceptual framework of reflexive globalization.

Conceptual framework: reflexive globalization

We are developing the concept of reflexive globalization in order to contextualize, frame and thus better understand the processes and results of the renegotiation of legal concepts triggered by the renewed attention to colonial legacies. The concept is both a framework and an object of study. We use it to understand and study the current ongoing processes of global reflexive renegotiation of legal concepts – and at the same time, we test and want to refine and elaborate it through our examples and conversations.

With the concept, we connect our subject area to larger discussions in the humanities and social sciences on characteristics and phases of **modernity**. More concretely, we connect to two problematizations of modernity – one from the North and one from the South. Following Ulrich **Beck**, we observe the reflexivity in the rethinking of concepts in our times. He suggested that many concepts, which emerged as dominant in the 19th century (such as the nation-state, the Fordist company, the core family) have started to crumble in the late 20th century, lost their clarity and hence became reflexive (Beck 1993). Reflexivity here means that such concepts are questioned, their ambiguities more apparent and alternatives accepted. Connecting to the work of Dipesh **Chakrabarty**, we consider the global, South-North dimension of the rethinking of modern concepts; with him we note the Eurocentricism of much of the legal vocabulary and the urge to overcome, de-centre and 'provincialize' this vocabulary – without giving up on the normative, often ideally emancipatory promises in them (Chakrabarty 2000). In the concept of reflexive globalization we hence combine Beck's notion of reflexivity and Chakrabarty's idea of provincialization or de-centering and argue that today's multipolar, horizontal world allows and actually calls for global renegotiations that lead to a renewed plural and reflexive conceptual vocabulary.

The concept assumes an entangled character of South-North relations, avoids the polarizing choice of rejection or adaption and allows us to look at both **substance and process**. In highlighting the procedural dimension, the concept is especially suited for our purpose, since it captures the perennially evolving nature of law that is driven by many actors - legislatures and courts (as studied in a formal-legal perspective), social movements and civil society (in an empirical-political perspective) but also intellectuals and (legal) academia. The concept draws on conceptual history (in the vein of Koselleck or Skinner), recent discourses on the translation, borrowing or transfer of ideas and studies of vernacularization in legal anthropology and comparative law. It allows us to connect our study of law to similar ongoing work in political theory and social thought that unearths and rediscovers regional concepts of thinking that have been ignored or forgotten in the shadow of Western hegemonic notions.

Approaches

Central for our research is that we are interested as much in the concepts as in the process of illuminating different experiences with them and their reflexive global renegotiation. This presupposes the dialogue with scholars from different countries and cultures and with different methodological approaches. We intend to study four dimensions of law that require a respective set of methods:

- Current **structure and content** of law: Considering law as an autonomous normative order, we will approach it with classic legal, i.e. doctrinal tools.
- **History** of law and ideas: To understand the basis of today's legal norms and notions, we have to understand their histories and conceptual contexts. To that end, we will rely especially on post-/decolonial theory, global history and political theory. We need to step out of the box of Northern 'modern' legal thinking, try to understand other epistemologies of (normative) thinking and (global) structures of knowledge production.
- Law as **cultural / empirical phenomenon** and law as **practice**: Law has not only a normative but also a factual side. Moreover, it has become a language used by actors far beyond the core legal staff to frame public debates and challenge existing structures. Especially in Southern contexts, the ambivalences of the state and its law has had the effect that activists are important voices. We want to understand their role by using qualitative methods of social sciences and humanities (especially anthropology and political economy) but also to think outside traditional scientific methodologies and engage with activist and artistic practices of using law (such as strategic litigation, advocacy work, art exhibitions, theatre performances).
- Law as **local phenomenon**: Law is always the law of a certain place. Therefore we need to engage in a comparative conversation to tease out distinct as much as truly common (universal) features and experiences of legal regimes (beyond faux universalism of Western liberal norms). Listening to voices from different legal cultures and epistemic backgrounds and understanding is integral to reach our research aims.

Thematic areas

Our studies will be grounded in two areas of law, for which the two applicants bring in expertise: constitutional and criminal law. Both areas are central for public ordering, world making and for the study of law in colonial and postcolonial settings. Such a study and rethinking could start with many notions from the conceptual vocabulary of law.[3] By way of example, we focus on two concepts, which exemplify especially well the colonial and postcolonial dimensions of constitutional and criminal law – and which we see in a process of reflexive global renegotiation: (representative) democracy and (international) punishment. Both concepts have one pedigree in political and legal theory of Europe but were also transferred to Southern contexts, where they encountered endogenous traditions and often enough functional equivalents. The encounter over time triggered contestations and Southern alternatives that in turn influence thinking in the North and globally.

While we suggest that these examples are demonstrative for the areas, in which the PIs have already worked, we encourage and will take into account suggestions from fellows for other additional productive areas and concepts to study and learn from.

[3] Such as citizenship, constitution, litigation, rights of nature, harm, responsibility.

Constitutional law and the concept of (representative) democracy

Representative democracy might not be the first concept that comes to mind when thinking about colonial legacies in public law. In fact, one could think that representative democracy was actually introduced at formal decolonization / independence to overcome the authoritarian legacy of colonialism. But at a second look, representative democracy is an especially interesting and important example, as it can showcase the ongoing effects of Western influence on constitutional thinking, where an allegedly universal vocabulary hardly captures (and much less governs) the reality of political practices in many countries. Studying democracy then is not so much about 'colonial legacies' in a strict sense, since democracy was not introduced during formal colonial rule – but about 'epistemic coloniality' in constitutional concepts, thinking and practice. And indeed, a number of core concepts of the law of representative democracy are built on European experiences and conceptualizations. The concept of the public, for example, feeds into our understanding (and laws) of parliamentary deliberation or that of party formation harken back to European (for example Habermasian) conceptions. But often enough, ideal theory and non-ideal reality of law do not fit. One stream of intercultural South-North conversations in our *Center* would study the law of democracy in Brazil, India, Nigeria and the EU – and interrogate its conceptual and cultural preconditions in these heterogeneous contexts.[4]

Criminal law and the concept of (international) punishment

The *Center's* second area for critical inquiry and the rethinking of concepts *vis a vis* colonial legacies concerns the thematic field of criminal law, and more specifically, the concept of punishment. Two interconnected strands of research (consisting of two and three building blocks respectively) shall form part of this thematic field: We want to inquire into general (domestic) criminal law on the one hand and, more specifically, on international criminal law ('international punishment', that is using the concept and vobabulary of criminal law for international wrongs and through international institutions) on the other.

The **first strand of research** focuses on the **domestic** level. It starts from the observation that there is, arguably, a continuing impact of colonialism on modern criminal justice systems in the postcolonial states. Although significant in its own right, colonial criminal law is not merely an historical enquiry because many independent states are still tethered to colonial laws even if these laws may have been discarded as unjust by the colonial powers. The continued application of the colonial notion and concept of 'punishment' in independent states raises pertinent questions which will be addressed in a **first building block**: What was the conception of punishment in formerly colonized states before colonization? How and to what extent did colonial occupation influence and continues to influence the criminal justice system of former colonies? Does or should an understanding of the colonial origins of penal codes impact their validity or legitimacy? What are evident or implied colonial remnants in the conception of crime and punishment? A **second building block** turns, in accordance with our framing of reflexive globalization, from the legacies, practices and contestations in the South to the North. We shall examine, inter alia, to what extent the former colonies were not just a source of wealth expansion for the former colonisers, but also locations for experimentation and innovation to be later adopted at home. In that vein, the relationship between race, crime, punishment and empire becomes cen-

[4] These four polities represent different regions and also different histories and legacies of colonialism. At the same time, they are sustained even though often contested democracies. Other polities could be added, not depending on the input from fellows and discussions at the Center.

tral in understanding how laws and policies of colonial powers are impacted. At the same time, movement of criminal law reforms from formerly colonised countries to other countries (both colonisers and colonized), the 'diffusion from periphery' (Langer 2007), will also be very relevant here. In so doing, we plan to excavate the whole picture: To what extent and in which directions do the responses to crime and and the concepts and institutions of crime control flow from and owe their current shape to colonialism – both in South and North?

The **second strand of research** concerns the notion and concept of 'international punishment' as conceived within the framework of international criminal justice. Arguably, international criminal justice, with the ICC as its centrepiece, dominates the discourse and the frameworks to respond to mass atrocities and political conflicts, which, arguably, is partly driven by the purported 'superiority' of criminal punishment as a primary response to mass atrocities. While criminal punishment indeed formed a backbone of colonial domination, Western concepts of punishment – since the Nuremberg trials spelled out in the distinct body of international criminal law – have also been providing for a powerful 'language' to address attacks on peace, humanity and other wrongful acts of international and/or transnational concern – thereby, perhaps ironically, also contributing to perpetuate an international order which in itself is shaped by the legacies of colonialism. Recently, however, the universalist project of a global criminal legal order came under attack, particularly from voices in the South, for its allegedly neocolonial 'reality' and 'double-standards' (Kaleck 2015, Ambos 2022), plunging the whole project into a crisis (Jeßberger 2022; Jeßberger/Geneuss 2012; see also Burgis-Kasthala 2016, Kiyani et al. 2016) and resulting, inter alia, in efforts to develop regional alternatives, such as a distinct 'international criminal law/court' for the South, be it for Africa or South America (Jeßberger 2017; Jeßberger 2014). Parallel to this trend towards re-nationalization and regionalization, awareness grew, especially in the South, concerning the emancipatory potential of international criminal law, providing a powerful tool also at the disposal of social movements (Jeßberger/Steinl/Mehta 2023; Jeßberger/Steinl 2022). We want to study here, inter alia, to what extent this mobilization which reflects a continuous active engagement with international justice system and its institutions by various actors in the Global South injects the system with a 'Southern' understanding of justice and idea of punishment that goes beyond criminal prosecution (Jeßberger/Steinl 2022; Mehta 2023). This multidirectional and complex development, 'from transitional to transformative justice' (with transitional justice representing the rather classical concept of the 1990ies), indicates what we refer to as reflexive globalization. Against this background, our inquiry into the international dimension of punishment re colonial legacy will comprise three building blocks: A **first block** will focus on the alleged Northern origins of the international criminal justice system elaborating also on blind-spots regarding racial and colonial domination. Not only the concept of international criminal justice at its conception excluded colonial crimes that were happening around that time from its remit, it also laid European ideas of assigning guilt and retributive punishment as the foundation of international criminal justice system (Jeßberger/Geneuss 2020). A **second block** will deal with local, that is Southern contestation and re-negotiation of these concepts, the Nuremberg legacy. Here we will study colonial injustice and alternative mechanisms – either 'traditional', i.e. restorative, or regionally as opposed to globally organized – to respond to mass atrocity. The **third block** in this strand of research will then inquire into how this Southern contestations are again reflected and received in the North and, possibly, impact on the normative shape and practice of international criminal justice.

4 Organisation and fellow programme

The *Center* will be managed by the two Principal Investigators and supported by strategic interlocutors, a core team in Berlin and a global Advisory Board.

Participating researchers

The **PIs** (Philipp Dann and Florian Jeßberger) bring in complementary sets of expertise in different areas of law (constitutional law/criminal law), different regions (Africa/India), and different perspectives of research (theory/practice). The **strategic interlocutors** bring in additional expertise in the areas of history, anthropology, political theory and legal activism. The **Advisory Board** adds not only the crucial international and Southern perspectives, which are fundamental to the *Center* but also further expertise such as feminist theory and international relations.

Philipp Dann has worked on the role of law in South-North constellations in various projects and developed conceptual frames to analyse elements of reflexive globalization in comparative constitutional and in international law (Dann 2013, 2019, 2022, 2023b). In terms of thematic areas, in which he studied the entanglement of North and South and reflexive globalization, the law of democracy and of development finance stand out (Dann 2003, 2011, Dann/Thiruvengadam 2021a; Dann 2014 and 2021b).

Florian Jeßberger builds on his record in the areas of international and transnational criminal law (Jeßberger 2022; Boister/Gless/Jeßberger 2021; Werle/Jeßberger 2020; Jeßberger 2020; Cassese/Cryer/Jeßberger 2015), including transitional justice, and modern history of criminal law (Jeßberger 2016; Jeßberger 2009) as well as his practical involvement (being a member of the ECCHR's Advisory Board since the Centre's foundation in 2007) in transnational advocacy and litigation efforts to provide for accountability for international crimes in the Global South (see also Jeßberger/Steinl 2022; Jeßberger/Kaleck/Schüller 2010; Jeßberger 2007).

Strategic interlocutors

The Center will be supported by four **strategic interlocutors**, who bring in complementary, non-legal expertise. Four distinguished colleagues agreed to serve as strategic interlocutors: **Sebastian Conrad** (Freie Universität Berlin) is a leading scholar of global history. His research on the notion of global history, German colonialism as well as his theorizations of global entanglements and modernity (e.g. 2012a; 2012b; 2016) have advanced the field significantly and will provide crucial input for the *Center*. His insights will be especially helpful to advance the general framing of our research (i.e. the concept of reflexive globalization), which is based on various assumptions about the history of modernity. **Julia Eckert** (Universität Bern) is an expert in the anthropology of law and, inter alia, a co-editor of the topical volume *Law Against the State* (2012) and Editor-in-Chief of the journal 'Anthropological Theory'. She has worked on the ambivalent role of the state and (abusive) state power in the Global South and on the anthropology of democracy. Her work too will speak to and enrich the general framing and work in both streams (public law / democracy, criminal law / punishment). **Jeannette Ehrmann** (Humboldt-Universität zu Berlin) brings in the perspective of political theory. She has published on issues such as postcoloniality, intersectionality and human rights; her book on the Haitian constitution of 1806 (2024) forms a major contribution to the field. Her expertise will be especially valuable for the public law stream, as her work connects postcolonial and intersectional feminist perspec-

tives in democratic theory and practice. **Miriam Saage-Maaß** (ECCHR, Berlin) brings in the activist perspective. She is an internationally renowned human rights lawyer and serves as the Legal Director of Germany's leading NGO applying strategic litigation to address injustices between South and North through courts and collaboration with civil society in South and North. She is also a co-editor of a commentary on the German Supply Chain Due Dilligence Act (2023) and a co-author of *Unternehmen vor Gericht* (2016).

The **core team** will also comprise an Academic Coordinator and an Administrative Coordinator, two postdoc researchers, two doctoral researchers, and student assistants.

An **Advisory Board** will advise the PIs, inform the activities, increase the visibility of the *Center* and participate in the selection of fellows. It comprises of distinguished scholars and practitioners from the Global South and North and shall meet at least once a year (in a hybrid format).

Fellows programme

The fellows programme forms the heart of the *Center*. This can only succeed if we manage to create a trusted space for a diverse group of voices and organize conversations that are open, constructive, non-hierarchical and sustainable. At the same time, we face particular challenges that follow from the South-North dimension of our theme. Three challenges stand out:

- Legal expertise in the Global South is often dispersed. Legal cultures and expertise are less shaped by academia but by diverse institutions and actors. Important interlocutors and great legal intellectuals might be professors, but can also be judges, activists, artists or administrators. How to find them?
- 'International' academic collaboration, also in legal academia, is often dominated by Northern norms, standards and styles. Asymmetries in knowledge production are obvious. Our location in Berlin, the metropole of a former colonial state, and the Northern background of both applicants embody this. How to avoid this?
- In the past year, our topic has become highly polarizing and the international perception of Germany especially in much of the Global South changed profoundly. What used to be seen as an open and self-critical place for scholars, has been put in doubt. How to address this?

These challenges impact three elements of the fellows programme: the selection of fellows, the categories of fellowships and the organization of life at the *Center*.

By distinguishing different **categories** of fellows we want to allow fellowships to reflect the specific needs of the respective groups and to make it as attractive as possible to join the *Center* and relocate to Berlin. Within the categories below, we strive to allow for flexibility to tailor the invitations to the individual needs of prospective fellows – in particular to take into account the specific circumstances and challenges in the Global South. The two general categories of fellows (reflecting seniority and relevant for the amount of the scholarship) are:

- **Senior fellows** (such as professors or in their respective context well-established practitioners or activists);
- **Junior fellows** (such as postdocs or in their respective context aspiring practitioners or activists).

Next to **long-term** (six to twelve months) and **short-term** fellowships (one to three months), we are open for individual arrangements, as we take into account that some candidates will come from institutions that might not allow for longer sabbaticals or are bound by family or other care duties. We will therefore provide for as much flexibility as possible. This includes the possibility of **re-invitation** or dividing a fellowship into smaller parts (e.g. three months in one year, three months in another year).

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