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Thomas Duve

Editorial

Zum ersten Mal erscheint in diesem Jahr 2021 die *Rechtsgeschichte – Legal History* als Zeitschrift des »Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie«. Die beiden Änderungen des inzwischen mehr als ein halbes Jahrhundert alten Namens – also der Zusatz »Rechtstheorie« und die Streichung »europäische« – stehen für die Erweiterung unserer Arbeitsgebiete in den letzten Jahren. Dass wir nicht mehr allein »europäische« Rechtsgeschichte betreiben, diese heute vielmehr als Rechtsgeschichte von Europa in globalhistorischer Perspektive oder als Geschichte der europäischen Integration erforschen, ist nicht zuletzt in den Beiträgen dieser Zeitschrift seit 2010 deutlich geworden.

Auch die Rechtstheorie war am Institut in der Vergangenheit bereits mit unterschiedlichen Konjunkturen präsent. Doch mit der Berufung von Marietta Auer zur Direktorin am Max-Planck-Institut zum 1. September 2020 hat die Max-Planck-Gesellschaft eine zusätzliche neue Forschungsabteilung »Multidisziplinäre Rechtstheorie« eingerichtet, die neben die bestehenden rechtshistorischen Abteilungen tritt. Marietta Auer gibt in ihrem Beitrag zu Beginn dieses Heftes im Teil *Recherche* einen Einblick in das Forschungsprogramm, mit dem sie nach Frankfurt gekommen ist. Wir – die Direktoren der rechtshistorischen Abteilungen »Europäische und vergleichende Rechtsgeschichte« (Stefan Vogenauer) und »Historische Normativitätsregime« (Thomas Duve), die Leiterinnen unserer Forschungsgruppen sowie alle Mitarbeiterinnen und Mitarbeiter – halten dies für eine wichtige institutionelle Weichenstellung. Vor allem sind wir aber sicher, dass sie auch für die Rechtsgeschichte eine wichtige intellektuelle Stärkung mit sich bringt. Was für das Institut und das Fach gilt, gilt auch für die Zeitschrift, in deren Herausgeberkreis sie nun eingetreten ist: Willkommen!

Wie sehr das Fach einer auch rechtstheoretisch reflektierten Methode bedarf, versucht der zweite Beitrag im Rechercheteil zu verdeutlichen. Unter dem mit einem Fragezeichen versehenen Titel »Rechtsgeschichte als Geschichte von Normativitätswissen?« wird hier der Versuch unternommen, eine Methodik für eine Rechtsgeschichte jenseits der Kategorien der Moderne zu skizzieren (Thomas Duve). Dabei wird deutlich, in welch hohem Maße auch eine solche auf die nachmoderne Kondition des Rechts ausgerichtete Rechtshistorie auf der geduldigen Rekonstruktion von historischem Normativitätswissen aufbauen muss. Ein eindrucksvolles Zeugnis einer solchen rechtshistorischen Grundlagenforschung ist der dritte Beitrag im Recherche-Teil: Der Rückblick von Wolfram Brandes auf die über Jahrzehnte hinweg am Institut durchgeführte Forschung zur Byzantinistik. Diese wurde noch von Dieter Simon angestoßen und konnte durch langjährige Förderung der Göttinger Akademie der Wissenschaften von Wolfram Brandes bis in das Jahr 2020 fortgeführt werden.

Auch zwei der drei *foci* stammen aus Forschungsprojekten der rechtshistorischen Abteilungen des Instituts. Der Fokus zu »Early Modern Books in Motion and the Production of Normative Knowledge«, der von Manuela Bragagnolo herausgegeben wird, knüpft an ihre Arbeiten in der Abteilung »Historische Normativitätsregime« zu Mediengeschichte und Rechtsgeschichte insbesondere in den *Iberian Worlds* an. Mit der *Bildstrecke* dieses Jahres hat Michael Widener von der Lillian Goldman Law Library der Yale University eine kleine Geschichte der juristischen Bücher zusammengestellt und in einer Marginalie kommentiert. Der zweite Fokus, herausgegeben von Sigfrido Ramírez Pérez und Stefan Vogenauer, widmet sich mit der *Oral History* einer Methode, die in der Abteilung »Europäische und vergleichende Rechtsgeschichte« vor allem in der Forschung zur Rechtsgeschichte der europäischen Integration genutzt wird. Der dritte Fokus schließlich enthält fünf Beiträge, die im Juni 2019 auf der Tagung des *XXVth Forum of Young Legal Historians* vorgetragen worden sind. Die Organisatoren, Wouter De Rycke, Cornelis Marinus in 't Veld, Maxime Jottrand, Romain Landmeters, Stephanie Plasschaert, haben die Auswahl eingeleitet.

In der diesjährigen *Debatte* geht es um ein Buch, das bereits im Vorfeld seiner Publikation hohe Erwartungen geweckt hat: Martti Koskenniemis über 1000-seitiges *To the Uttermost Parts of the Earth*. Das Werk beginnt mit dem Hinweis, dass es sich nicht um eine Geschichte des internationalen Rechts handele – und wird doch, wie in der

Einleitung zur Debatte hervorgehoben wird, unweigerlich als eine solche gelesen werden. Dreizehn Kolleginnen und Kollegen aus unterschiedlichen Disziplinen und Wissenschaftskulturen haben ihre ersten Leseeindrücke skizziert, Martti Koskenniemi hat auf diese reagiert. Eine wie stets große Zahl von *Rezensionen*, auch in diesem Heft in vielen Fällen von Mitarbeiterinnen und Mitarbeitern des Instituts erstellt, sowie eine weitere – umfangreiche – *Marginalie* zu Wechselbeziehungen zwischen Formen des Handels, Recht und Architektur von Johannes W. Flume runden dieses Heft ab.

Die Themen der Zeitschrift zeigen auf eindrückliche Weise, wie sehr uns Michael Stolleis fehlen wird. Er war nicht nur Direktor des Instituts und langjähriger Herausgeber dieser Zeitschrift. Wie in unserem Nachruf nur angedeutet werden kann, war er neben vielem anderen auch ein Pionier der Völkerrechtsgeschichte, er hat sich früher als andere mit der Verbindung von Bildern, Architektur und Recht beschäftigt, die europäische Integration hat er aufmerksam begleitet und in seine Geschichte des öffentlichen Rechts integriert, und nicht zuletzt waren ihm Fragen der rechtshistorischen Methode stets ein besonderes Anliegen. Was vielleicht weniger bekannt ist: Auch die im *Fokus* publizierten Vorträge des XXV. *Forum of Young Legal Historians* in Brüssel 2019 wären ohne ihn wohl nicht gehalten worden. Denn Michael Stolleis war es, der mit den Mitteln des Gottfried Wilhelm Leibniz-Preises im Jahr 1992 junge Rechtshistoriker aus Ost und West zu einer ersten Besprechung nach Frankfurt einlud. Es ging ihm um die Zusammenführung der Disziplin nach dem Fall der Mauer. Aus der Initiative wurde bald eine Institution: Das sogenannte »Forum junger Rechtshistoriker«, das zum ersten Mal 1995 in Halle tagte, 1996 in Berlin stattfand und sich 1997 in Graz »Europäisches Forum junger Rechtshistorikerinnen und Rechtshistoriker« nannte. Wieder einige Jahre später – und eher als im Fall des Max-Planck-Instituts – fiel der Zusatz »europäisches« weg. Inzwischen ist das Forum ein Treffpunkt für junge Rechtshistorikerinnen und Rechtshistoriker aus der ganzen Welt geworden. Michael Stolleis hätte seine Freude gehabt, die in dieser Ausgabe publizierten Beiträge der Jubiläumstagung und die vielen anderen Schlaglichter auf die bunte *Rechtsgeschichte* von Byzanz bis Brüssel in den Händen zu halten.–

■

Thomas Duve

Editorial

The 2021 issue of *Rechtsgeschichte – Legal History* is the first to be published by the »Max Planck Institute for Legal History and Legal Theory« (mpilhlt). The two changes to the name that the Institute carried for over half a century – the addition of »legal theory« and the deletion of »European« – reflect the expansion of our research areas over the last decade. That our research no longer focuses on »European« legal history, but rather explores the legal history of Europe in a global-historical context or as the history of European integration has been very visible in the contributions to this journal since 2010.

Legal theory, too, had already been part of various endeavours undertaken at the Institute in the past. With the appointment of Marietta Auer as the third director of the Max Planck Institute on 1 September 2020, however, the Max Planck Society created an additional research department dedicated to »Multidisciplinary Theory of Law«, which joins the existing two legal-historical departments. In her contribution to the *Research* section of this issue, Marietta Auer gives an insight into the research programme with which she has come to Frankfurt. We – the directors of the legal-historical departments »European and Comparative Legal History« (Stefan Vogenauer) and »Historical Regimes of Normativity« (Thomas Duve), the heads of our research groups and all members of staff – consider the addition of this third department a crucial decision regarding the Institute's future course. Above all, we are confident that it will also intellectually strengthen legal history. What is true for the Institute and the discipline also applies to this journal, whose board of editors Marietta Auer has now joined: Welcome!

How much the discipline of legal history needs a theoretically reflected methodology is the subject of the second *Research* article in this issue. Under the title »Legal history as the history of normative knowledge?«, deliberately ending in a question mark, the article attempts to outline a methodology of legal history beyond the categories of modernity (Thomas Duve). It demonstrates to what extent a legal history oriented towards the condition of law after modernity must also build on the patient reconstruction of historical knowledges of normativity. An impressive example of such fundamental research in legal history is the third contribution to the *Research* section: Wolfram Brandes' review of the work on Byzantine studies conducted at the Institute over more than four decades, initiated by Dieter Simon. Thanks to many years of funding from the Göttingen Academy of Sciences and Humanities, Wolfram Brandes was able to continue this research until 2020.

Two of the three *Focus* sections in this issue also arise from research projects carried out in the legal-historical departments at the Institute. The one on »Early Modern Books in Motion and the Production of Normative Knowledge«, edited by Manuela Bragagnolo, is connected to her work on legal history and media history, particularly of the *Iberian worlds*, in the department »Historical Regimes of Normativity«. For this issue's series of images, Michael Widener of the Lillian Goldman Law Library at Yale University has assembled a short history of legal books, with his contribution to the *Marginalia* providing context and commentary.

The second *Focus* section, edited by Sigfrido Ramírez Pérez and Stefan Vogenauer, is dedicated to the method of oral history, which is used in the department »European and Comparative Legal History« above all in the context of research on European integration. The third *Focus* presents five contributions originally presented at the *XXVth Forum of Young Legal Historians* in Brussels in June 2019. The organisers of the conference, Wouter De Rycke, Cornelis Marinus in 't Veld, Maxime Jottrand, Romain Landmeters and Stephanie Plasschaert, also provided the introduction to this section.

This year's *Debate* focuses on a book that raised high expectations already in advance of publication: Martti Koskenniemi's over 1000-page long *To the Uttermost Parts of the Earth*. Though the work starts with the proviso that it does not represent a history of international law, it will, as the introduction to the section makes clear, inevitably be read as such. Thirteen colleagues from different disciplines and academic cultures have contributed their impressions on first reading the book, and the section ends with a response by Martti Koskenniemi. After the as always sizeable *Critique* section,

including a large number of reviews written by researchers at the Institute, a further *Marginalia* contribution on the interrelationships between forms of trade, law and architecture by Johannes W. Flume completes this year's issue.

The topics assembled in the journal poignantly demonstrate how much Michael Stolleis will be missed. Not only was he a director of this Institute and for many years the editor of this journal. As can only be hinted at in our obituary, he was, among many other things, a pioneer of the history of international law; he was among the first to explore the connection between images, architecture and law; he closely followed European integration and included it in his history of public law; and, last but not least, questions of legal-historical method were always a special concern of his. Less widely known might be that the contributions to the *XXVth Forum of Young Legal Historians* in 2019 published in this issue would probably not have been held without the foundations laid by him. In 1992, using the funds of the Gottfried Wilhelm Leibniz Prize that he had been awarded the year before, Michael Stolleis invited young legal historians from East and West Germany to Frankfurt for a first discussion with the aim of bringing the discipline together after the fall of the Wall. This initiative soon turned into an institution: the »Forum junger Rechtshistoriker« met for the first time in Halle in 1995, took place in Berlin in 1996, and in Graz in 1997 called itself the »Europäisches Forum junger Rechtshistorikerinnen und Rechtshistoriker«. Some years later – earlier than the Max Planck Institute – it dropped the qualifier »European«. Today, the Forum has become a meeting of young legal historians from all over the world. Michael Stolleis would have been pleased to hold in his hands this issue with the contributions to the 25th anniversary conference and the many other spotlights on the rich and diverse history of law from Byzantium to Brussels.–

■

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In memoriam

Thomas Duve

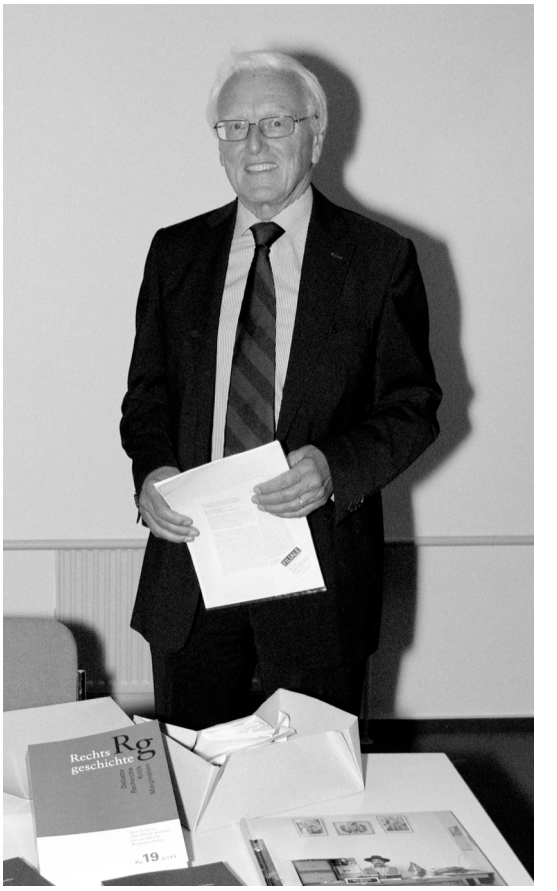
Michael Stolleis (1941–2021)

Wenige Bilder dürften unsere Vorstellung vom frühneuzeitlichen Staat so sehr geprägt haben wie das Frontispiz des 1651 publizierten »Leviathan« von Thomas Hobbes. »Keine Macht auf der Erde lässt sich mit ihm vergleichen«, steht über dem Kopf des majestätischen Ungeheuers geschrieben.

Wer 1941 in Deutschland geboren wurde und in den 60er Jahren Jura studierte, hatte allen Grund, nach der Macht des Staates zu fragen: nach staatlichem Unrecht auch mit den Mitteln des Rechts, nach dem Versagen der Eliten, nach der Rolle der furchtbaren Juristen im Nationalsozialismus. Die 68er und das Brandt'sche »Mehr Demokratie wagen« wiederum gaben vielen die Hoffnung, dass ein anderer Staat möglich wäre: ein Rechts- und Sozialstaat, der nicht zum Mittel von Unterdrückung würde – der Gerechtigkeit schafft und Lebenschancen für alle bietet.

Für Michael Stolleis begann die Auseinandersetzung mit der deutschen Vergangenheit schon in jungen Jahren. Sein Geburtstag am 20. Juli, auch die eigene Familiengeschichte, erscheinen aus späterer Perspektive wie ein Auftrag zur Beschäftigung mit dem Unbegreiflichen. Zum Schlüsselerlebnis wurde dem Siebzehnjährigen der Besuch von Brechts »Der aufhaltsame Aufstieg des Arturo Ui« im Theater am Schiffbauerdamm. Im Jurastudium erst in Heidelberg, dann in Würzburg, kaufte er wie so viele am Universitätseingang das »Braunbuch« aus der DDR, in dem Material über die Verstrickung bundesdeutscher Juristen in den Nationalsozialismus veröffentlicht wurde. Er besuchte die ersten Ringvorlesungen zum Nationalsozialismus und suchte einen unbelasteten Doktorvater.

In dem Münchener Rechtshistoriker Sten Gagnér fand er mehr als einen solchen. In der Dissertation zum Spätaufklärer Christian Garve ging es nicht zuletzt um die Staatsräson, also um die Grenze zwischen Rechtsgeltung und Rechtsbruch, um den Ausnahmezustand als Instrument des Rechts, um Recht im Unrecht – um eines der großen Probleme der Rechtsgeschichte, das Michael Stolleis sein Leben lang begleitete. Die Habilitationsschrift zu Gemeinwohlformeln im nationalsozialistischen Recht wandte sich diesem Lebensthema direkt zu. Die Beschäftigung mit dem Nationalsozialismus erschien ihm, wie er es



Michael Stolleis im Max-Planck-Institut für europäische Rechtsgeschichte am 9. September 2011. Im Vordergrund die ihm anlässlich seines 70. Geburtstages gewidmete Ausgabe der Rg 19 (2011). Foto: Otto Danwerth

in einer Ansprache aus Anlass der Verleihung des Balzan-Preises im Jahr 2000 formulierte, wissenschaftlich interessant und ein Gebot politischer Moral: Warum, so fragte er sich seit seiner Studienzeit, benutzt eine brutal und martialisch auftretende Diktatur, die schon von Anfang an Gegner zusammenschlug, einsperrte und tötete, weiterhin die Rechtsform? Warum sind, mit Brecht, die Zeiten der äußersten Unterdrückung auch meist die Zeiten, wo viel von großen und hohen Dingen gesprochen wird? Die Methode der vorsichtigen Rekonstruktion des Sprachgebrauchs, mit der Michael Stolleis die Gemeinwohlformeln untersuchte, verdankte er der Begegnung mit der Wittgenstein'schen Sprachkritik im Seminar von Sten

Gagnér. Sie wurde ihm wie manchem anderen Schüler des heute weitgehend vergessenen Gagnér zum Bekenntnis. Zur Sprache gehören auch die Bilder, wie Michael Stolleis in seiner bekannten Studie zu Metapher und Bild des Auges des Gesetzes zeigte.

Eine Arbeit wie diese zum Nationalsozialismus im Jahr 1973 an der Münchener Juristischen Fakultät – also der eines Karl Larenz und eines Theodor Maunz – vorzulegen, war nicht ohne Risiko für den weiteren wissenschaftlichen Weg, auch wenn erste bahnbrechende Studien wie die von Bernd Rüthers den Weg für eine Auseinandersetzung mit der Rolle des Rechts im Nationalsozialismus geebnet hatten. Die Savigny-Zeitschrift, das Flaggschiff der Disziplin, beschränkte sich auf eine knappe Anzeige – vielleicht auch, weil es das Fach »Juristische Zeitgeschichte« noch gar nicht gab; es war Michael Stolleis selbst, der später entscheidende Impulse für dessen Etablierung im universitären Fächerkanon gab. Auch die Kombination des Öffentlichen Rechts mit der Rechtsgeschichte und dem Kirchenrecht war kein Karrieregarant. Doch in Frankfurt, wohin er 1974 berufen wurde, herrschte ein liberaler Geist. Die Universität wuchs, die juristischen Grundlagenfächer waren stark, man suchte originelle Köpfe. Das Sozialrecht und das evangelische Kirchenrecht, mit dem er sich als Assistent von Axel Freiherr von Campenhausen beschäftigt hatte, wurden nun zu seinen Hauptarbeitsgebieten im öffentlichen Recht.

In der Rechtsgeschichte kehrte Michael Stolleis zurück in die Frühe Neuzeit, in die Zeit des Wachstums des Leviathan. Studien zu Staatsdenkern im 17. und 18. Jahrhundert, zur politischen Theorie des 17. Jahrhunderts und zu Staat und Staatsräson in der frühen Neuzeit entstanden. Vor allem aber reifte der Plan einer Wissenschaftsgeschichte des öffentlichen Rechts. 1988 erschien deren erster Band, drei weitere folgten. Zunächst einbändig als Gegenstück zur Privatrechtsgeschichte Franz Wieackers konzipiert, diesem suggestiven, voraussetzungsreichen Bekenntnisbuch, wurde die Geschichte des öffentlichen Rechts zu weit mehr: Es entstand eine gelehrte Gesamtdarstellung des *ius publicum* zwischen 1600 und 1990, die es so nirgendwo gegeben hatte – nicht in Deutschland, nicht in Italien, auch nicht in Frankreich, dem er sich besonders verbunden fühlte. Geleitet vom festen Vorsatz, ideengeschichtliche Gipfelwanderungen und Fortschrittsgeschichte zu vermeiden und orientiert an Leitfäden wie Johann Stefan Pütters »Litteratur des Teutschen Staatsrechts« (1776–1783) und Robert von Mohls »Geschichte und Literatur der Staatswissenschaften« (1855–1858), erschließt sie bis in kleinste Details institutionelle Kontexte der Wissensproduktion, Fächergeschichten von Recht und Politik, Literaturgeschichten, Verfassungs- und Ideengeschichte von vier Jahrhunderten. Für die traditionell auf das Privatrecht konzentrierte Rechtsgeschichte öffnete sich mit dieser Geschichte eine neue Welt.

Parallel dazu entstanden unzählige Rezensionen zur Rechtsgeschichte der Neuzeit, Sammelbände zu deutschen Juristen jüdischer Herkunft, zur Geschichte der Rechtsgeschichte, Studien zum Sozialrecht und dessen Geschichte. Auch diese Zeitschrift betreute er als Herausgeber, selbst nach seinem Ausscheiden war er einer der treuesten und fleißigen Rezensenten. In einem großangelegten Forschungsprojekt am Max-Planck-Institut für europäische Rechtsgeschichte, in dessen Direktorium Michael Stolleis 1991 eintrat und das er zwei Jahrzehnte lang maßgeblich prägte, wuchs in geduldiger Quellenerschließung ein Repertorium der Policeyordnungen der Frühen Neuzeit. Die darauf aufbauende Forschung zur frühneuzeitlichen Policey legte eine Dimension obrigkeitlicher und staatlicher Verhaltenssteuerung frei, die der Rechtsgeschichte bis dahin praktisch unbekannt gewesen war. Sie führte das Fach zugleich in einen neuen Dialog mit den Geschichtswissenschaften, vor allem über Säkularisierung, Konfessionalisierung, Sozialdisziplinierung und Normimplementierung. Dass Michael Stolleis die Rechtsgeschichte klar als historisches Fach konturierte, methodenbewusst argumentierte und überzeugend präsentierte, machte ihn zu einem gesuchten Gesprächspartner für die Rechts- und Geschichtswissenschaften. Über die Jahrzehnte entstand so ein Gesamtbild, das er zunehmend europäisch einbettete. Europäischer ideeller Gemeinbesitz, so bilanzierte er im Rückblick auf seine Geschichte des öffentlichen Rechts, waren neben der Suche nach der Bindung der Staatsgewalt an das Recht, dem Schutz von Zonen der Privatheit und Selbstentfaltung, dem Rechtsschutz durch richterliche Entscheidung auch die Verantwortung der Obrigkeiten für eine gerechte Sozialordnung.

Es war auch diese Einsicht in den Rechts- und Sozialstaat als kulturelle Errungenschaft der europäischen Geschichte, die Michael Stolleis dazu motivierte, sich nach dem Fall der Mauer mit

besonderer Energie der Rechtsgeschichte der DDR und Osteuropas zuzuwenden. Das Max-Planck-Institut gab ihm den institutionellen Rahmen. Die Mittel des 1991 verliehenen Gottfried Wilhelm Leibniz-Preises setzte er dafür ein, und in den 2000er Jahren führte er ein größeres Projekt zur Rechtsgeschichte Südosteuropas in Kooperation mit dem Exzellenzcluster »Die Herausbildung normativer Ordnungen« zu Ende. Die Förderung junger Forschender aus diesen Regionen war ihm ein besonderes Anliegen, so wie er ohnehin viel Zeit und persönlichen Einsatz in den Aufbau und die Ausbildung einer jungen europäischen rechtshistorischen Forschergemeinschaft verwandte. Das Institut und die Kooperation mit den Rechtshistorikern der Goethe Universität gaben ihm die Möglichkeit dazu, und er hat nie bereut, sich für die Rechtsgeschichte und nicht für die ihm ebenfalls angebotene Direktorenstelle am Münchener Max-Planck-Institut für ausländisches und internationales Sozialrecht entschieden zu haben. An Preisen und Ehrungen, vor einigen Jahren dem *Pour le Mérite* für Wissenschaft und Kunst sowie dem Amt des Vizekanzlers, an Akademiemitgliedschaften und Ehrendoktorwürden fehlte es nicht. Er freute sich über diese, und er konnte das durchaus mit leiser Selbstironie feststellen.

Vor allem verstand Michael Stolleis sich jedoch als Beobachter und Erzähler der Rechtsgeschichte, dieser Geschichte des großartigen Versuchs, die Grundlagen für ein friedliches und gerechtes Zusammenleben zu schaffen – die zugleich aber auch eine Geschichte einer dauernden Gefährdung zivilisatorischer Errungenschaften und der Zerbrechlichkeit menschlicher Existenz ist. Als Historiker und damit Spracharbeiter, als der er sich sah, waren ihm Handwerkstugenden wichtig, wie er sie in der Winzerlehre in der heimischen Pfalz gelernt hatte. Solidität schätzte er höher als Extravaganz; um Eleganz brauchte er sich nicht zu bemühen. Selbstdisziplin, Detailfreude, Zuverlässigkeit und Fairness hielt er für unbedingte Voraussetzungen wissenschaftlichen Arbeitens; und fehlten sie, konnte er durchaus schneidend werden. Geisteswissenschaftliche Verbundforschung und deren Relevanzrhetorik sah er mit zunehmender Skepsis, jemanden als gelehrt zu bezeichnen, war für ihn Zeichen höchster Wertschätzung. Großzügigkeit mit seiner Zeit und seinem Wissen, Zugewandtheit und Verständnis wurden für viele seiner Begleiter und Schülerinnen und Schüler zum Vorbild.

In den letzten Jahren zog es ihn, der am liebsten Literatur und Kunst studiert hätte, immer mehr zum Erzählen. Das Spiel mit Form und *genre* war auch ein Stück Freiheit, das er nach Jahrzehnten disziplinierter Forschung genoss. Die Akademie für Sprache und Dichtung war ihm besonders ans Herz gewachsen, im Buch »Margarethe und der Mönch« erzählte er Rechtsgeschichte in Geschichten. Der letzte Band, den er vor wenigen Wochen fertigstellte, trägt den Titel »recht erzählen«. Es sind Miniaturen aus Frankfurt und der heimatlichen Region, in denen sich das Wachstum des Leviathan spiegelt, dessen Macht und Größe ihn sein Leben lang umtrieben.

Die Herausgeber und die Redaktion der Zeitschrift trauern um Michael Stolleis und sind dankbar für alles, was er für uns getan hat.

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Thomas Duve

Michael Stolleis (1941–2021)

There are few images that have shaped our idea of the early modern state as much as the frontispiece of Thomas Hobbes' »Leviathan«, published in 1651. Above the head of the majestic colossus is written »There is no power on earth to be compared to him«.

Those who were born in 1941 in Germany and studied law in the 1960s had every reason to question the power of the state: after the injustices committed by the state – also through the use of the law – after the failure of the elites, after the role of the »terrible jurists« in National Socialism. However, the 1968 movement and Brandt's »Dare more democracy« (*Mehr Demokratie wagen*) in turn gave many hope that a different state could be possible: a constitutional and welfare state that would not become a means of oppression, but rather one that could ensure justice and offer life opportunities for all.

For Michael Stolleis, the confrontation with German history already began at a young age. His birthday on 20 July, and his own family history, appear from a later perspective as a mandate to engage with the unfathomable. As a seventeen year old, his visit to the theatre at Schiffbauerdamm to see Brecht's »The Resistable Rise of Arturo Ui« was formative. While studying law, first in Heidelberg, then in Würzburg, he bought, like so many others at the university entrance, the »Brown Book« from the GDR, which published material on jurists from the Federal Republic and their involvement in National Socialism. He attended the first lecture series on National Socialism and sought out an untainted doctoral supervisor.

He found more than such a person in the Munich legal historian Sten Gagnér. His dissertation on the late enlightenment philosopher Christian Garve was not least about the *Staatsräson* (»reason of the state«), ie the boundary between the validity of the law and the violation of law, about the state of emergency as an instrument of law, about law in situations of injustice – one of the great problems of legal history that accompanied Michael Stolleis throughout his life. His habilitation thesis on formulas for the common good (*Gemeinwohlformeln*) in national socialist law directly addressed this lifelong topic. The study of National Socialism appeared to him, as he put it in a speech on the occasion of being awarded the Balzan Prize in 2000, to be both scientifically interesting and a requirement of political morality: From his student days, he asked himself why does a brutal and martial dictatorship – one that from the very beginning beat up, imprisoned and killed its political opponents – continue to use legal form? Why is it, following Brecht, that the times of extreme oppression are also generally the times when there is so much talk of great and lofty things? The method of carefully reconstructing the use of language that Michael Stolleis employed to examine the formulas for the common good owed much to his encounter with the Wittgensteinian critique of language in Sten Gagnér's seminar. It became a creed for him, as it did for many other students of the now largely forgotten Gagnér. Language also includes images, as Michael Stolleis demonstrated in his well-known study on the metaphor and image of »The Eye of the Law« (*Das Auge des Gesetzes*).

To submit a dissertation like this on National Socialism in 1973 at the Munich law faculty – ie that of Karl Larenz and Theodor Maunz – was not without risk to his further academic career, even if pioneering studies such as that of Bernd Rüthers had paved the way for an examination of the role of law in National Socialism. The Savigny journal, the flagship of the discipline, limited itself to a short announcement of his thesis, perhaps also because the field of »contemporary legal history« did not even exist yet; it was Michael Stolleis himself who later gave the decisive impulse for its establishment in the canon of university subjects. In addition, the combination of public law with legal history and canon law was no guarantee for his career prospects. However, in Frankfurt, where he was appointed professor in 1974, a liberal spirit prevailed. The university was growing, the basic legal subjects were strong and original minds were sought. Social law and Protestant church law, which he had engaged with as assistant to Axel Freiherr von Campenhausen, became his main focus areas in public law.

In legal history, Michael Stolleis turned back to the early modern period, to the time of the growth of the Leviathan. This resulted in studies on political philosophers of the 17th and 18th centuries, on

the political theory of the 17th century and on the state and the »reason of the state« in the early modern period. Above all, however, his plan for a history of the science of public law was maturing. The first volume was published in 1988; three others followed. Initially conceived as a single-volume counterpart to Franz Wieacker's history of private law, this highly influential book that was based on a strong philosophical conviction about the nature of law, the history of public law became much more: an erudite overall account of *ius publicum* between 1600 and 1990 emerged such as had never existed before, not in Germany, not in Italy, not even in France, to which he felt particularly attached. Guided by the firm resolution to avoid writing a highbrow history of great minds or narratives of progress, and oriented towards guides such as Johann Stefan Pütter's »Litteratur des Teutschen Staatsrechts« (1776–1783) and Robert von Mohl's »Geschichte und Literatur der Staatswissenschaften« (1855–1858), it explores, down to the smallest details, the institutional contexts of knowledge production, the histories of the fields of law and politics, literary histories, constitutional history and the history of ideas over four centuries. For legal history, traditionally concentrated on private law, this work opened a new world.

In parallel, he produced countless reviews on the legal history of the modern period, collected works on German lawyers of Jewish origin, works on the history of legal history, and studies on social law and its history. He also supervised this journal as editor, and even after his retirement he was one of its most loyal and diligent reviewers. In a large-scale research project at the Max Planck Institute for European Legal History, the institution where Michael Stolleis became director in 1991 and which he decisively shaped for two decades, a repository of early modern so-called police ordinances (*Policeyordnungen*) grew through a patient collection of sources. The research on early modern police ordinances that built on this uncovered a dimension of authoritarian and state control of behaviour that until then had been practically unknown to legal history. At the same time, it led the subject into a new dialogue with the historical sciences, in particular in relation to secularisation, confessionalisation, social discipline and norm implementation. The fact that Michael Stolleis clearly defined legal history as a historical subject, argued with an awareness of method and presented with a brilliant rhetoric, made him a sought-after dialogue partner in legal and historical scholarship. Over the decades, an overall picture emerged which he increasingly embedded in a European context. Against the background of his history of public law, he claimed that the shared European ideal not only involved the search for the binding of state power to the law, the protection of zones of privacy and autonomy, and legal protection through judicial decisions, but also the responsibility of the authorities for a just social order.

It was also this insight into the rule of law and the welfare state as cultural achievements in European history that motivated Michael Stolleis to turn with particular enthusiasm to the legal history of the GDR and Eastern Europe after the fall of the Berlin Wall, and the Max Planck Institute gave him the institutional framework to do so. For this purpose, he used the funds from the Gottfried Wilhelm Leibniz Prize awarded in 1991, and in the 2000s he completed a larger project on the legal history of South Eastern Europe in cooperation with the Cluster of Excellence »The Formation of Normative Orders«. Support for young researchers from these regions was a particular concern of his, just as he spent a great deal of time and had a great personal commitment to developing and training the young European legal history research community. The Institute and the cooperation with the legal historians at the Goethe University Frankfurt gave him the possibility to do just this, and he never regretted having decided for legal history and against the directorship also offered to him at the Max Planck Institute for Foreign and International Social Law in Munich. There has been no lack of prizes and honours: a few years ago he was inducted into the order *Pour le Mérite* for Sciences and Arts and more recently was appointed to its Office of Vice Chancellor, along with receiving numerous academic memberships and honorary doctorates. He was always pleased to receive these, and could certainly state this with a quiet self-irony.

Above all, however, Michael Stolleis saw himself as an observer and narrator of the history of law, this history of the great attempt to lay the foundations for peaceful and just coexistence – which is, at the same time, also a history of the constant threat to civilisational achievements and the fragility of human existence. As a historian and thus one who works with language (*Spracharbeiter*), as he saw himself, the virtues of craftsmanship were important to him, as he had learned them in his

apprenticeship as a vintner in his native Palatinate region. He valued integrity more than extravagance; he did not need to strive for elegance. He considered self-discipline, attention to detail, reliability and fairness to be the essential prerequisites for scientific work, and if they were lacking, he could be quite blunt. He viewed the emphasis on collaborative research structures and the associated rhetoric of relevance with increasing scepticism; for him it was a mark of the highest esteem to call someone erudite. His generosity with his time and his knowledge, kindness and understanding became exemplary for many of his companions and students.

As someone who would have preferred to study literature and art, in recent years he was increasingly drawn to storytelling. Playing with form and genre was also a piece of freedom he enjoyed after decades of disciplined research. The Akademie für Sprache und Dichtung (Academy for Language and Poetry) was particularly dear to his heart, and in the book »Margarethe und der Mönch« he told legal history in stories. The last volume, which he completed just a few weeks ago, is entitled »recht erzählen« (telling the story right and, at the same time, narrating law). They are tales from Frankfurt and his native region, reflecting the growth of the Leviathan, whose power and greatness had been a lifelong preoccupation of his.

The editors and the editorial staff of the journal mourn Michael Stolleis and are grateful for all he did for us.

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Recherche research

Marietta Auer

What is Legal Theory?

A common way for philosophers to start their inquiries is to ask questions beginning with »What is…?«. In the case of legal theory, such an inquiry might look odd at first given the long-standing tradition of this discipline, reaching back far into 19th-century legal positivism and 20th-century analytical jurisprudence. Yet, more recent times have seen novel uncertainty about the research agenda and intellectual scope of legal theory.[1] Legal positivism, a hotly debated field especially in Anglo-American jurisprudence up to the millennium, has declined in attention ever since. Likewise, in German legal theory, the old opposition between legal positivism and natural law has lost much of its theoretical power during the last decades.[2] Overall, the tradition of analytical philosophy seems somewhat exhausted. As the German legal philosopher Eric Hilgendorf put it, the development of legal theory has arrived at a dead end. Its stalemate has become tangible in »fruitless formalizations, scholasticization, and an impoverished research agenda«, which reflects »the crisis of legal philosophy, and, ultimately, of all theoretical fields of jurisprudence in German legal academia«. Yet, Hilgendorf also suggests that there might be a light on the horizon stemming from new research questions.[3]

I share Hilgendorf's impression. This seems to be the right time to ask anew just what legal theory is, what kind of questions it poses or answers, or what guidance it can give to the study of law. In the present article, I propose an understanding of legal theory as the foundation of a theoretically challenging jurisprudence. Legal theory, in my view, should be capable of connecting doctrinal law with philosophy, but also with the insights and methods of many other fields of scientific inquiry ranging from cultural studies to sociology, history, political science and economics, to fields as remote as physics, biology, medicine or geoscience. In short, I propose an understanding of legal theory as a philosophical theory of multidisciplinary jurisprudence. In what follows, I address questions such as: How is this approach supposed to work? What is the added value of such a seemingly anarchical, »fancy« multidisciplinary legal theory? Why is it not enough to limit legal scholarship to the science of doctrinal law or, at best, to individual fields of interdisciplinary study such as law and history or law and economics?

None of these questions can be answered without first addressing another fundamental question: What is the epistemic status of legal knowledge? Put differently, what is the goal of legal scholarship? What is there to know about the law, and how do we know it? In the present article, I set out to give at least a tentative answer in four parts. I begin with the status of academic law as a scientific enterprise, contested between doctrinal law and the classic ancillary »law and …« subjects such as law and economics or law and literature. Second, I discuss this contested status from the point of view of the history of science by introducing a classic author, namely Hermann Kantorowicz. Third, I turn to the history and current academic status of legal theory, which increasingly seems to be torn between a novel »fancy theory« on the one side and the classic middle ground between legal doctrine and legal philosophy on the other. From this vantage point, I finally set out to conceptualize legal theory as a philosophical theory of multidisciplinary jurisprudence.

1 For the full version of the argument presented in this article, see Auer (2018a).

2 For the development of legal theory in the 30 years of the »Berlin Republic«, see Auer (2018b).

3 Hilgendorf (2013) 114: »Der seit den 1990er Jahren zu konstatierende Stillstand in der deutschen Rechtstheorie, der sich u. a. in fruchtlosen Formalisierungen, Scholastifizierung und Themenarmut bemerkbar macht, wird damit zum Symbol für eine Krise der Rechtsphilosophie und letztlich der gesamten juristischen Grundlagenforschung in Deutschland. In jüngster Zeit mehren sich allerdings Anzeichen, dass es gelingen könnte, die Sackgasse zu verlassen und neue Fragestellungen zu erschließen.« All translations of German language quotations are the author's.

I. Legal theory: a contested middle ground

The German tradition of legal scholarship is still mainly focused on doctrinal law and, much to the ridicule of international observers, conceptualized as »legal science«.[4] This conception of the field, however, burdens the epistemic status of legal scholarship with riddles. Ever since Julius von Kirchmann's famous saying that three corrective words of the legislator are sufficient to turn entire law libraries into maculation,[5] it is tempting to use the contingency of legal doctrine, or the ephemerality of positive law more generally, as an argument against its suitability as an object for serious scholarly inquiry. Serious science seems to be an enterprise in need of an independent, unchanging object of study. But doctrinal jurisprudence necessarily falls short of this demand because its object, legal doctrine, is in a constant flux of change. Worse even, doctrinal change occurs in part precisely because of the deliberate normative impact exercised by doctrinal scholarship on the development of legal doctrine.[6] There is, in other words, no way of separating the academic theory from the practice of doctrinal law. Yet, this objection against the scientificity of legal scholarship, already put forward by Kirchmann, loses much of its force when one takes into account that there is no shared understanding of what legal doctrine actually is in the German academic discourse. To date, defenders and critics only agree on the vague point that the academic pursuit of legal doctrine is inextricably linked to legal practice.[7] This insight, however, gives rise to yet another problem for the scientificity of legal study. Legal doctrine, understood as a hybrid between legal science and legal practice, seems to suffer from an incurable epistemological contradiction in terms: What if theory cannot be practice or vice versa.

At first glance, this practice-bound understanding of legal scholarship also conceptually excludes or at least burdens the possibility of legal theory as a separate field of inquiry. If there is something like a relevant objective of legal theory, it seems to describe a conceptual lacuna, a topical absence in the place where a theoretical methodology of jurisprudence should be situated. This is where the classic »law and …« fields come into play. Among them are research subjects such as law and economics, law and literature, philosophy of law, sociology of law, legal history, legal anthropology or comparative law. All of these classic pathways of interdisciplinary legal study share the aim to find scientificity in legal study by linking it to a field outside the law. In this vein, in a much-cited report on the perspectives of German legal scholarship issued in 2012, the German Council of Science and Humanities (Wissenschaftsrat) maintained that in order to fully exhaust the depth of its matter of inquiry, academic legal research needs to incorporate the entire breadth of »historical, linguistic, philosophical, social, political, economical, psychological, criminological, and other perspectives«, as well as the respective repertories of methods. The Council concludes that there can be no such thing as legal scholarship without interdisciplinary references.[8]

Taken literally, however, this poses a serious challenge for legal scholarship as an independent field of research. While the Council of Science and Humanities is certainly right in urging more interdisciplinary research in law, this demand appears to be rather unfortunately framed by deliberately widening the existing antagonism between legal

4 For the recent German debate on the academic status of legal doctrine, see, e. g. Kirchhof / Magen / Schneider (2012); Jestaedt (2014); Bumke (2014); Kuntz (2016); Bumke (2017); Lennartz (2017); Auer (2017); Jansen (2020). For French perspectives and critiques, see Jestaz / Jamin (2004); Kiesow (2014). For an Anglo-American view, see, e. g. Balganesh (2015).

5 Cf. Kirchmann (1848) 23.

6 For a pointed critique, see Lepsius (2012).

7 See only Esser (1972) 97; Jestaedt (2012) 137; Jestaedt (2014) 5–6.

8 German Council of Science and Humanities (Wissenschaftsrat) (2012) 33: »When legal scholarship integrates historical, linguistic, philosophical, social, political, economical, psychological, criminological, and other perspectives, it simultaneously adopts their methodologies. It appropriates different epistemological methods to understand its object of inquiry, thereby unfolding the rich variety of meaning naturally entailed in the law (the conditions of its creation and validity, the legal permeation of various areas of life and of different social spheres, the durability and resilience of norms, questions of justice, etc.). Legal scholarship cannot, therefore, afford to dispense with these interdisciplinary relations.«.

doctrine and interdisciplinary legal scholarship. However, this antagonism, mirrored in many statements within the recent debate on the scientificity of legal scholarship, unnecessarily burdens the relationship between both sides of the discipline. It obscures or even completely cancels out the complexity of research located precisely in the contested middle ground between legal doctrine and interdisciplinary legal scholarship. Yet, it is precisely this middle ground where the interesting research questions of current legal theory are situated. Thus, researchers who are interested in a theoretically sophisticated jurisprudence should not have to decide between either legal doctrine or interdisciplinary research, but should rather aim at combining both approaches towards legal scholarship in the middle ground of multidisciplinary legal theory.

Just to dwell on the unnecessary antagonism between legal doctrine and interdisciplinary scholarship a little longer: It should be clear that both sides suffer a loss of epistemic resources by pursuing their antagonistic opposition. Moreover, when taken individually, both approaches towards legal scholarship tend to produce distorted pictures of the respective other half of the discipline. For the classic formalistic account of doctrinal jurisprudence, one may refer to the German pandectist Bernhard Windscheid's infamous saying that it is not the task of the jurist »as such« to be concerned with the ethical, political or economic deliberations governing the legislative branch.[9] Interestingly enough, however, the same insular thinking also comes to the fore in the opposite progressive camp which rejects the primacy of doctrinal law and opts for interdisciplinary legal scholarship instead. In a recent article, the German legal philosopher Thomas Gutmann compared the center-periphery model of legal discourse orbiting around legal doctrine with the geocentric model in astronomy.[10] But this polemic, comprehensible as it may seem from the philosophical fringes of the juridical universe, again only serves to restate and reinforce the classic formalistic view of an autonomous legal doctrine with no real use for interdisciplinary research. More precisely, what is still lacking is a description of the unchartered middle ground, the unexplored relation between both fields. The question of just what this in-between means, how precisely doctrine and interdisciplinary theory interact in this middle ground, how each of them contributes to the epistemic performance of legal scholarship as a whole remains unanswered. To use Gutmann's metaphor, all we have is a theory of space which presents us with a choice between geocentric and heliocentric models of the solar system – but regardless of the model we choose, we nevertheless remain equally ignorant of what happens in the interspace.

II. Hermann Kantorowicz and the theory of legal science

In the present part, I will highlight the problem of the unchartered interspace between the legal subdisciplines from a historical perspective. In an article published in the 1928 volume of the Columbia Law Review, Hermann Kantorowicz, founder of the German free law movement, developed a system of categorization for all academic subdisciplines of legal scholarship.[11] The article, co-authored and commented on by the American scholar of jurisprudence Edwin W. Patterson, was the result of Kantorowicz's first foray into American legal academia. Among other noteworthy insights, it contains the following »division of the whole of legal science«:[12]

9 Windscheid (1904) 112: »Die Gesetzgebung steht auf hoher Warte; sie beruht in zahlreichen Fällen auf ethischen, politischen, volkswirtschaftlichen Erwägungen oder auf einer Kombination dieser Erwägungen, welche nicht Sache des Juristen als solchen sind.«

10 Gutmann (2015) 109: »Wir sind, wenn wir wissen wollen, was das Recht leistet und anrichtet, wie es funktioniert, woraus es lebt, woher es kommt und wohin es sich bewegt, auf eine Vielzahl von Beobachterperspektiven verwiesen, von denen keine für sich reklamieren kann, die entscheidende zu sein. In diesem wissenschaftlichen Universum ist das eben genannte Zentrum-Peripherie-Modell einer allein um die Dogmatik kreisenden Rechtswissenschaft in etwa so relevant und tragfähig wie das geozentrische Weltbild seit 1650.«

11 Kantorowicz / Patterson (1928) 679–707. With regard to Kantorowicz, see generally Muscheler (1984); Ibbetson (2004); Auer (2015); Jansen (2020); Augsberg / Lettmaier / Meyer-Pritzl (2020) with further references.

12 Kantorowicz / Patterson (1928) 691.

	Constructive branches (dealing with the objective meaning of law)	*Empirical branches* (dealing with the realization of law)	*Deontological branches* (dealing with the value of law)
Systematical cognition of law in general (constitutional, penal, commercial, maritime law, etc.)	General Jurisprudence	Sociology of the Law	Philosophy of the Law
Individualizing cognition of a particular law (Roman, English, German, European law, etc.)	Particular Jurisprudence	Historical Jurisprudence	Legislative Jurisprudence

As its title suggests, Kantorowicz's system aims at a comprehensive classification of all contemporary fields of legal research. It offers a six-part classification scheme that is divided twofold: vertically, into constructive, empirical and deontological branches, and horizontally, into systematic-general and particular-individual fields of legal research. Both directions are construed as cross-cutting, thus doubling the number of possible research fields to six. The left column comprises all subjects usually identified as »doctrinal«, namely, the doctrinal study of any particular legal system, to be found under the heading »particular jurisprudence« in the lower left box. The adjacent center and right columns are the domains of interdisciplinary legal research. Here, we find the philosophy and sociology of law (upper right and upper center) as well as »historical jurisprudence« or legal history in the lower center box. On the lower right, there is a further field entitled »legislative jurisprudence«. This field can be mapped onto recent legal policy approaches, such as normative readings of law and economics. There are, on the other hand, some fields missing in Kantorowicz' scheme that one would expect to be included in a comprehensive map of legal research today, most notably law and economics as a general theory with not only normative and legislative but also descriptive and analytical relevance for the study of law.

There is one remaining category in Kantorowicz' scheme which has not been addressed yet, namely, the upper left box labeled »general jurisprudence«. What is the significance of this field, and what would be its contemporary counterpart? The equivalent in German early 20th-century scholarship is the so-called »Allgemeine Rechtslehre«. Around the turn of the 20th century, the Allgemeine Rechtslehre (or general jurisprudence) became the common denomination for a theoretical – albeit decidedly non-philosophical – reflection of the concept and foundations of law.[13] Its distinctive characteristic was precisely that it did not understand itself as a part of the philosophy of law, but rather as a general chapter of the science of positive law. Its rise was, not surprisingly, closely linked to the rise of legal positivism since the late 19th century. It aimed at conceptualizing general features and structures of the law, such as objective and subjective right, obligation, duty and liberty, the architecture of the state, the so-called »statics« and »dynamics« of law. Defined by this epistemic interest, the Allgemeine Rechtslehre became the precursor to modern legal theory. Its most elaborated version may be seen in Hans Kelsen's »Pure Theory of Law«. Consistent with this view, Kantorowicz locates the study of general jurisprudence in the left column and aligns it with doctrinal legal scholarship, whereas he divorces it from both the center and right columns, especially from the upper right box containing the philosophy of law.

Kantorowicz' model is still well suited to reflect upon the current position of legal theory between »general jurisprudence« as a general part of legal doctrine, on the one hand, and a non-doctrinal, interdisciplinary research agenda, on the other. The middle ground between both views of legal theory is precisely what is missing in Kantorowicz's

13 With regard to the development of general jurisprudence and legal theory in the 19th century, see in particular Brockmöller (1997); Funke (2004).

scheme and what still remains unaccounted for in the current discussion. But this is not the only takeaway from Kantorowicz' scheme of legal sciences relevant for today's efforts at mapping the legal landscape in terms of the theory and history of legal science. There are at least three further reasons why Kantorowicz's model still merits a closer look today:

First, its three-columned structure is not a random feature but reflects a neo-Kantian worldview which continues to exert influence on the methodological division between the modern sciences and humanities. By expanding the well-known Kantian dualism of Is / Ought, early 20th-century neo-Kantian philosophers and jurists like Wilhelm Windelband, Heinrich Rickert, Emil Lask and Gustav Radbruch developed a tripartite worldview of epistemic and ontological realms.[14] For Neo-Kantianism, there exists a third world sphere apart from both Is and Ought. This third realm is sometimes referred to as the world of »value« (Wert), while others call it, less normatively laden, the realm of »sense« or »meaning« (Sinn). Kantorowicz subscribes to the latter view, while he also uses the Heideggerian notion »being-as-it-is« (So-Sein) for this intermediate sphere of the non-ideal, yet non-neutral, man-made sphere of »meaning« between what there is (Da-Sein) and what ought to be (Dasein-Sollen).[15] The reason finde-siècle Neo-Kantians invented this third sphere was the realization that, after the demise of idealistic natural law in the 19th century, the old idealist Ought category was no longer adequate to describe the thoroughly contingent nature of culturally shaped normative phenomena such as positive law. Thus, the third category of »value« or »sense« emerged as an independent ontological and epistemic way to describe human culture, artifacts and other man-made spheres of meaning. In the landscape of the theory of science around 1900, this insight is reflected in the widening gap between the empirical sciences, on the one hand, and the hermeneutical humanities, on the other. Ever since the late 19th century, the sphere of the Is had been the domain of the expanding former, while the Ought, bound to pre-modern metaphysics and incompatible with modern conceptions of scientific objectivity, had lost its epistemic power. In this situation, the neo-Kantian category of »value« or »sense« provided a new epistemic and ontological bracket for the humanities with their hermeneutical methods and contingent normativities.

Second, where does the law fit into this picture? At first sight, law provides the perfect example of a cultural artifact with contingent normativity and hermeneutical methodology. Legal scholarship thus seems predisposed to fit into the neo-Kantian category of »value« or »sense«. Kantorowicz's answer, however, is more complex. One of Kantorowicz's most significant insights about the structure of legal scholarship, which can be derived from his model above, is that it actually replicates the tripartite structure of neo-Kantian epistemology within its internal organization. In Kantorowicz's view, legal scholarship cannot be aligned with any single epistemic path in its entirety. Rather, the law comprises all three worldviews as distinguished by Neo-Kantianism – the empirical, the normative, and the cultural.[16] More precisely, Kantorowicz restricts the culturalist or »constructive« dimension of law, aligned with the neo-Kantian domain of »value« or »sense«, to the research fields in the left column, i. e. the doctrinal branches of legal scholarship and general jurisprudence. All other fields of jurisprudential inquiry – notably the fields in the center and right columns, such as history, philosophy, and sociology of law fall outside the realm of »meaning«. According to Kantorowicz, the fields in the center and right columns are part of the intra-legal domains of the Is and the Ought, with their respective empirical and normative methodologies. The upshot is that legal research can only realize the full depth of its potential when all epistemic pathways are pursued in their entire breadth. Kantorowicz even suggests that this feature singles out the science of the law from the canon of most of the other sciences and humanities, which appear to be much more tightly

14 See Jansen (2020) with further references.

15 Kantorowicz / Patterson (1928) 682–686: »sciences of reality«, »sciences of value«, and »sciences of objective meaning«. With respect to Kantorowicz's version of Neo-Kantianism, see Muscheler (1984) 45–65; Saliger (2007) 245–247; Auer (2015) 802–803; Auer (2018a) 23.

16 For a close reading and further references, see Auer (2015) 803; Auer (2018a) 24–25.

tied to their respective empirical, hermeneutic, or normative methodologies. It is this insight which makes Kantorowicz's theory of science still relevant. It almost forestalls the German Council of Science and Humanities' recent statements.

Lastly, one important question remains unanswered. Does one have to be a believer in neo-Kantian epistemology in order to approve of Kantorowicz's model of legal science? The obvious answer to this question is a clear »No«. Kantorowicz's model has much to offer even if it is only read as an attempt at mapping interdisciplinary legal pluralism. According to this reading, it offers the insight that legal scholarship should place at least equal importance on both doctrinal and extra-doctrinal research, if not more on the latter. Kantorowicz, however, goes one crucial step further. The tripartite model of Neo-Kantianism does more than just arranging legal research fields into a pluralistic enterprise. It proposes something deeper than a mere arbitrary collection of epistemic pathways. Rather, it offers a comprehensive theory of the world by claiming a necessary connection of the three spheres: the Is, the Ought, and the Value. This further claim, however, can only be raised on metaphysical grounds.[17] At this point, scholars interested in interdisciplinary legal research should ask themselves just what the unspoken metaphysics of their own research agenda implies. There is always a personal philosophy inherent in research projects which resort to the Is in some parts, to the Ought in others, and to the Value whenever convenient. When left unexamined, such philosophy amounts to no less than ideology. I will return to this point in the concluding part of this article.

III. The development of legal theory

Before returning to Kantorowicz in the final part, I will look more closely at the historical development of legal theory as a separate field of academic legal study. Recent times have witnessed the blurring of the seemingly clear epistemic borders between fields such as philosophy of law, legal history, and law and economics. Crosscutting research projects have paved the way for a novel amalgam of these and further fields without distinct borders. These novel research combinations are increasingly labeled as »legal theory«. This can be framed as the hypothesis that modern legal theory has grown into a new umbrella concept for almost any kind of intra- as well as interdisciplinary research on legal foundations today.

This development stands in some contrast to the early development of legal theory since the late 19th century. As discussed above, the origin of legal theory as a field of study was rooted in the late 19th-century general jurisprudence.[18] The key feature of this field was its deliberate opposition to the classic philosophy of law and, consequently, its close alignment with positive law. Around 1900, general jurisprudence had begun to challenge the much older philosophy of law as the core concept of theoretical thinking about law. The concept »philosophy of law« had emerged from the legacy of post-Kantian natural law around 1800.[19] Its initial purpose, still visible today, was post-metaphysical theorizing about normative questions of universal right. During the 19th century, however, it became evident that more was needed than a philosophical theory of justice to deal with the novel theoretical questions posed by positive law. By the late 19th century, both philosophy of law and general jurisprudence struggled for dominance within the same contested middle ground between doctrinal jurisprudence and extra-legal philosophical scholarship.[20] What resulted was an ongoing intellectual and institutional battle for the pre-eminent theoretical approach to the fundamentals of law. The initial aim of general jurisprudence to develop an analytical general theory of law was preserved in legal theory throughout the 20th century, notably in its positivistic branch from Hans Kelsen to H. L. A. Hart and his followers. On the other hand, the normative philosophy of law has experienced a renaissance beginning with John Rawls's »Theory of Justice« and has been back in the game ever since this »normative turn«. Even today, some legal

17 Cf. Auer (2018a) 25–26. Against Pawlik (2020), this claim does not imply the author's commitment to a neo-Kantian foundation of the philosophy of science. For the author's epistemological commitments, see infra n. 24.

18 Supra n. 13.

19 For the history of legal philosophy, see, e. g. Vesting (2015) 16–19.

20 Dreier (2007) 28–32.

philosophers maintain that legal theory is no more than an analytical subdiscipline of legal philosophy.[21]

The more recent development of legal theory, however, disproves the latter contention. Legal theory has moved away from analytical philosophy into realms of multidisciplinary scholarship hitherto unknown, including sociological systems theory, media theory, peace and conflict theory, historical and cultural studies, behavioral psychology, bioethics, and many other fields.[22] Thus, there is no way how the boundaries of legal philosophy could still serve as the disciplinary perimeter of legal theory today. We are in fact witnessing an almost complete reversal of the traditional relationship between legal philosophy and legal theory: The latter is replacing the former as the generic, higher-order concept for theoretical research on the foundations of law. Compared with the classic normative philosophy of law, modern legal theory, dealing with almost any kind of interdisciplinary research, follows a much broader and methodologically more unspecific approach. The tail seems to be wagging the dog.

What does this development imply for the perspectives of legal theory as a field of legal research? There are, as always, at least two possible views of the cathedral. One is to welcome the pluralization of interdisciplinary legal discourses. The new style of multidisciplinary studies which has developed under the old heading of legal theory seems to match exactly the vision of future legal scholarship as devised by the German Council of Sciences and Humanities. The result is a novel and unforeseeable amalgam of theory, or, to use a term borrowed from the American critical legal theorist Duncan Kennedy, a »fancy theory«. Kennedy notably uses three attributes to describe his own fancy theory: the »assimilation«, »cannibalization«, and, ultimately, the simple »use« of theoretical fragments borrowed from other disciplines, in particular the French and German critical theories in the tradition of Marx and Freud.[23] If one subscribes to this bold view, it is neither possible nor necessary for a fruitful multidisciplinary legal theory to fully comply with the original conceptual and methodological framework of the extra-juridical theories imported into the law. To use another fancy term coined by the French anthropologist Claude Lévi-Strauss, multidisciplinary legal theory rather functions in the mode of »bricolage«.[24] Bricolage literally describes the handicraft work which fits together new theoretical buildings out of existing theory fragments which, in the ideal case, gain new, unexpected meaning in the light of their new contextualization. The resulting multidisciplinary theory amalgam has the interesting property of finally transcending the borders of intra-legal and extra-legal research: Where general jurisprudence and analytical legal theory were battling to cover the middle ground between doctrinal law and the classic »law and …« fields, the new multidisciplinary legal theory has gone full way towards transcending the disciplinary boundaries between law and its surroundings. This way of doing legal theory is more than just another field of study. Rather, it offers a fluid theoretical resource, equivalent to the constant capacity of legal discourse to modernize itself by taking on the insights and methods of other disciplines. Seen in this way, legal theory might be the pathway to finally overcome the much-criticized antagonism between doctrinal law and interdisciplinary legal study.

The downside of this development is that legal theory might lose its scholarly contours if it abandons any plan of what to take from which field of science and how to use it. After all, the agenda of analytical philosophy, which had shaped the contours of legal theory from the days of H. L. A. Hart up to around the millennium, provided intellectual coherence and a visible research agenda for the field. The concept »legal theory« stood for a distinguishable intellectual enterprise with its own research questions, styles, and institutional resources. By contrast, this clear focus of legal theory seems to be vanishing.[25] Yet, it is a trade-off because the previous clarity came at the cost of

21 For a critique, see Dreier (2007) 28–32.

22 Cf. Auer (2018b) 125–137.

23 Kennedy (1993) xi: »The Continental ›fancy theory‹is based on Freud and Marx, but I am mainly conscious of trying hard to assimilate, to cannibalize and then actually use, structuralism, neo-Marxism, phenomenology, existentialism, and postmodernism (and, I suppose, whatever else may come into fashion).«

24 See fundamentally Lévi-Strauss (1997) 29–36; Derrida (2016) 241. For bricolage in legal theory, see Gutmann (2015) 113. Closely related is the concept of »rhizome-thinking«, cf. Deleuze / Guattari (1977).

25 For this development, see Auer (2018b) 137–141 with further references.

an »impoverished research agenda«, as rightly criticized by Hilgendorf above.[26] It should be regarded as a gain rather than a loss that legal theory has ended its almost exclusive engagement with the fine points of legal positivism in the past years. However, there is a remaining risk that legal theory will lose its disciplinary focus together with its sources in fields like sociology, philosophy, anthropology, or economics if the result of their fusion is no more than an unclear transdisciplinary theorizing around a re-emerging core of doctrinal jurisprudence. Understanding legal theory as a catchall phrase for any theory transplant that cannot be integrated into doctrinal scholarship under a more specific heading will ultimately harm legal theory – or, for that matter, philosophy of law, law and sociology, law and economics, or any other field of interdisciplinary legal study. To return to something like the 19th-century general jurisprudence, i. e. legal-style philosophizing without philosophy, might indeed give rise to the renewed question whether it is necessary to invest academic funding or to endow chairs for research on the fundamentals of law at all. This recurring question has obviously been a major institutional challenge to all theoretical endeavors in the law throughout the past decades. Seen this way, the declaration of a new fancy theory of unclear multidisciplinary pedigree might thus indeed be regarded as a symptom of crisis rather than as a sign of fruitful innovation.

IV. Multidisciplinary legal theory: philosophical foundations

How can legal theory avoid this pitfall and continue on its recent path of fruitful multidisciplinary research? My sense is that it is better not to worry too much about institutional concerns. Multidisciplinary legal theory offers enough internal substance to fuel research agendas that cover entire academic careers. But where lies the origin of this internal substance? I propose the following answer: Well-reasoned legal theory needs a philosophical grounding in a philosophy of science. A fruitful approach to legal theory should encompass or at least be conscious of its own philosophical presuppositions about the epistemic structure of legal research. At first view, this return to philosophy may come as a surprise. After all, it was the metaphysical baggage of natural law and normative philosophy of law which caused its steady decline and the concurrent rise of the anti-metaphysical research agenda of general jurisprudence since the 19th century. Why, then, should today's legal theory start a novel inquiry into its philosophical foundations?

To better understand this, it might help to start the argument from the opposite side of philosophy as an academic discipline. Given the irrevocable demise of precritical metaphysics, which went hand in hand with the rise of the empirical sciences since the 19th century, one may ask oneself why philosophy is still on the map of academic endeavors today at all. Yet, one brief look at the book review or comment section in any major newspaper is enough to show that philosophy unchangingly matters whenever fundamental questions on human life, society, knowledge, and action are at issue. To date, philosophy continues to live from its ancient Greek root as the origin of all human insight. Although it has lost its ancient, medieval, and even early modern role as the leading field of intellectual inquiry, it still provides a necessary structural resource, or meta-epistemology, to question the borders of modern science. Philosophy of science can teach when and how to transcend the borders of given fields of knowledge and to merge them into something new. In short: Philosophy has survived in the form of philosophy of science as the origin of multidisciplinary thinking in any field of scientific inquiry.[27]

Therefore, it is a fundamentally philosophical insight that legal scholarship cannot restrict itself to doctrinal jurisprudence or mere »law and …« studies in classic foundational fields such as legal history, legal philosophy, or law and economics. The landscape of legal scholarship can and should be mapped onto the entire landscape of the sciences and humanities. If law is to remain a relevant field of future academic inquiry, legal scholarship should offer relevant insights about the society as a whole and the world as it is shaped by the law. Thus, it is certainly possible to practice legal scholarship on a solely doctrinal basis or to restrict it to

26 Supra n. 3.

27 See, classically, Windelband (1921) 1–8; cf. Auer (2018a) 47–50.

singular interdisciplinary fields such as the examples given above. Nonetheless, it should become clear at this point why the German Council of Sciences and Humanities is right in demanding a broader, multidisciplinary approach in order to exhaust the depth of legal inquiry. According to this picture, philosophy of science comes into play as a meta-methodology which allows for the reintegration of the insights taken from fields as diverse as sociology, economics, linguistics, psychology, history, cultural studies, bioethics, or climate science into a comprehensive picture of the world as addressed by the law. This is finally where legal theory can be reframed as a philosophical theory of multidisciplinary jurisprudence: Its philosophical thrust will help us understand that the epistemic goals of doctrinal legal research and any other inquiry within the legally shaped world are much closer related than it may at first seem. However, this also presupposes imagining something else entirely under the heading of philosophy of law than what is usually practiced under this heading in law schools. In particular, there can be no closed canon of philosophical insights, findings, or concepts which specifically pertain to the law. Rather, any epistemological insight might be relevant for the law. Philosophy of science is no more and no less than the structural resource behind the methods and epistemic goals of each and any field of science. It provides the inexhaustible source of further inquiry whenever the individual disciplines reach their limits of cognition.

If this is correct, there can be no legal theory without philosophy of science. At this point, Kantorowicz's model of legal sciences merits one further glance. Kantorowicz's model implied not just a plurality but also a systematic order of epistemic pathways of legal inquiry. As seen above, however, it is not necessary to share Kantorowicz's neo-Kantian assumptions about the existence of such a metaphysical unity in order to gain insights from his model.[28] Thus, it is doubtlessly possible to conduct successful multidisciplinary legal research without ever questioning the metaphysical groundings of one's own epistemic beliefs. Yet, the mere avoidance of reflecting the metaphysical preconditions of one's research agenda does not amount to showing its being free from metaphysics. In fact, the opposite is true: There is no such thing as a rational epistemology without metaphysical presuppositions about the ontological coherence of the world observed. Consequently, there is no fundamental legal theory without a philosophy of science which questions its own metaphysical groundings. This is the final challenge to multidisciplinary legal theory: to bring to light the unquestioned metaphysical preconditions of law's epistemic pathways. In the words of Karl Popper:

> »Even the analysis of science – the ›philosophy of science‹ – is threatening to become a fashion, a specialism. Yet philosophers should not be specialists. For myself, I am interested in science and in philosophy only because I want to learn something about the riddle of the world in which we live, and the riddle of man's knowledge of that world. And I believe that only a revival of interest in these riddles can save the sciences and philosophy from narrow specialization and from an obscurantist faith in the expert's special skill, and in his personal knowledge and authority; a faith that so well fits our ›post-rationalist‹ and ›post-critical‹ age, proudly dedicated to the destruction of the tradition of rational philosophy, and of rational thought itself.«[29]

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28 See supra n. 17.

29 Popper (2002) xxvi (Preface to the first English edition, 1959).

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Thomas Duve

Rechtsgeschichte als Geschichte von Normativitätswissen?

Rechtswissenschaft und historische Wissenschaften beschäftigen sich seit einiger Zeit – wieder – intensiv mit »Wissen«. Auch die Rechtsgeschichte hatte sich in den 90er Jahren unter dem Eindruck der Diskussionen um die »Wissensgesellschaft«, der Sache nach aber auch schon viel früher, historischen Wissenskulturen, historischen Wissensordnungen, der Regulierung von Wissen, der Bedeutung von Wissen historischer Akteure oder des Staates zugewandt. Doch ließe sich Rechtsgeschichte *insgesamt* als eine »Geschichte von Normativitätswissen« schreiben? Und: Ist das überhaupt notwendig und sinnvoll?

Alle drei Fragen werden in diesem Beitrag, der mit einer Skizze der Konzeption einer solchen Rechtsgeschichte als Geschichte von Normativitätswissen beginnt (I.), bejaht. Der Beitrag ist explorativ, er baut allerdings auf inzwischen bereits einige Jahrzehnte lang geführten Diskussionen in der Wissenschaftsgeschichte, der Wissensgeschichte, der Rechtsgeschichte und Rechtstheorie auf, beispielsweise wenn Rechtsnormen als »Handlungstypus regelhafter Informationsverarbeitung unter Unsicherheitsbedingungen« konzipiert und Rechtstraditionen insgesamt als Prozess der Aneignung und Verarbeitung von normativer Information verstanden werden. An frühere Studien zur Methode der Rechtsgeschichte und vor allem zur frühneuzeitlichen Rechtsgeschichte anknüpfend, ist er ein Versuch, über die *Dekonstruktion* hinausgehende Überlegungen für die *Konstruktion* einer Methode der Rechtsgeschichte für die Gegenwart und Zukunft zur Diskussion zu stellen – wenn man so will, für eine Rechtsgeschichte jenseits der Moderne.[1]

Jede Neuerung muss allerdings darlegen, dass sie im Vergleich zum *status quo* Erkenntnischancen birgt und nicht bloß effektvoll das Rad neu erfindet. Denn gerade die sog. europäische oder westliche Rechtsgeschichte hat wichtige Einsichten in historische Prozesse der Normbildung vermittelt. Sie reflektiert diese zum Teil auch bereits aus einer Perspektive, die man als wissensgeschichtlich bezeichnen könnte. Daran kann und muss man anknüpfen (II.).

Blickt man genauer hin, so konzentriert sich die deutschsprachige Forschungstradition, die in diesem Beitrag im Mittelpunkt steht, allerdings auf einen besonderen Ausschnitt aus der Rechtsgeschichte, nämlich auf das, was die Historische Rechtsschule das »Juristenrecht« nannte. Dessen Geschichte wurde im 20. Jahrhundert in eine

1 Aufgrund der Weite des Themas musste ich vor allem in den Abschnitten zur Forschungsgeschichte weitgehend auf Nachweise verzichten; um interdisziplinäre Anschlussfähigkeit zu erleichtern, habe ich insbesondere im Teil II eine radikal vereinfachende Darstellung gewählt. Ich verweise für detailliertere Darstellungen und viele Literaturhinweise auf vorherige Publikationen, in denen einige der hier im Zusammenhang präsentierten Überlegungen entwickelt worden sind. Sie beginnen mit einer kritischen Auseinandersetzung mit der deutschen Tradition der sog. europäischen Rechtsgeschichte, vgl. Duve (2012), bilanzieren Möglichkeiten einer transnationalen Rechtsgeschichte, vgl. Duve (2014), und die rechtshistorische Forschung der letzten Jahrzehnte im deutschen Sprachraum, vgl. Duve (2018a). Der wissensgeschichtliche Ansatz wurde erörtert, erprobt und fortentwickelt in Duve (2018c); Duve (2020a); Duve (2021); Duve (2020b). Wichtige Inspirationen waren Scattola (2006); Glenn (2014); Schuppert (2014); Schuppert (2015a); Schuppert (2017); Schuppert (2019b); Schuppert (2021); Vesting (2015) – von Vesting auch das Zitat, Rz. 65. Die Debatte aus dem Bereich der Wissenschafts- und Wissensgeschichte habe ich nicht zuletzt durch Lorraine Daston, Jürgen Renn, Matteo Valleriani kennengelernt. Einen Bezug der Wissensgeschichte zur Rechtsgeschichte stellte in einem Kolloquium am MPI für – damals – europäische Rechtsgeschichte im Jahr 2013 Jürgen Renn her, vgl. Renn (2014). Die Überlegungen zu Normativitätsregimen haben wir in einer Arbeitsgruppe am MPI diskutiert, ein Entwurf dieses Beitrags wurde auf einer Sitzung des Seminar zu Methoden der Rechtsgeschichte am Department »Historische Normativitätsregime« am MPI für Rechtsgeschichte und Rechtstheorie im März 2021 besprochen. Anlass für diesen zusammenfassenden und in mancher Hinsicht einführenden Überblick war die Einladung von Gunnar Folke Schuppert und Ino Augsberg zur Teilnahme an einer Tagung »Wissen und Recht«, aus der eine größere Publikation hervorgehen soll. Ich danke beiden, dass sie der Publikation meines Beitrags in der *Rg* zugestimmt haben. Wie man sieht: Erzeugung von Wissen ist ein sozialer Prozess – die intellektuelle Haftung bleibt individuell.

voraussetzungsreiche teleologische Erzählung eingeschrieben, deren Fluchtpunkt das Recht des Nationalstaats und der westlichen Moderne war. Die Bilanz des Rückblicks ist deswegen gemischt: Es gibt sehr viel von der Tradition zu lernen, aber zugleich sind wir in ihr gefangen (III.).

Das wird besonders deutlich, wenn man nach den blinden Flecken und Defiziten dieser Forschungstradition fragt. Hier fällt zunächst auf, dass die deutsche Variante der europäischen Rechtsgeschichte, wie auch andere europäische Traditionen, nicht die tatsächliche Vielfalt von Regelungs- und Entscheidungskollektiven, auf die sie selbst aufmerksam gemacht hat, in ihre Erzählung und deren tragende Grundbegriffe integrieren kann. Mithilfe einer wissensgeschichtlichen Perspektive kann dies gelingen, am besten, wenn man diese als epistemische Gemeinschaften und Gemeinschaften der Praxis begreift (IV.).

Auch verfügt die Rechtsgeschichte als Fach nicht wirklich über ein begriffliches Instrumentarium, um die Prozesse der Normerzeugung durch diese vielfältigen Akteure angemessen zu beschreiben; der meist implizite Rechtsbegriff, der ihrer Forschung zu Grunde liegt, ist zu eng, und ihr methodologischer Nationalismus steht ihr im Wege. Der weite Begriff des Normativitätswissens bietet hier Abhilfe (V.). Die diachrone Intertextualität, aber auch die Reproduktion von Recht im Raum, lassen sich im Anschluss daran als großer Prozess der Translation von Normativitätswissen verstehen (VI.).

Eine auf diesen Grundlagen stehende Rechtsgeschichte, die man vielleicht auch als eine Historische Epistemologie von Normativität bezeichnen könnte, hätte natürlich nicht alle ihre Methodenprobleme gelöst. Doch überwindet sie Pfadabhängigkeiten und kann einen Ausweg aus manchen Aporien weisen, die sich aus der Forschungstradition ergeben haben. Vor allem stellt sie leistungsfähige Begriffe zur Verfügung, mit denen einige der großen Themen der Rechtsgeschichte, also z. B. die relative Autonomie des Rechts und dessen Reproduktions- und Transformationslogiken, systematisch und anschlussfähig adressiert werden könnten. Ein Ziel einer solchen Rechtsgeschichte könnte nicht zuletzt im besseren Verständnis der Formen der Produktion von Normativitätswissen liegen. Rechtshistorische Forschung könnte damit gesprächsfähiger werden für das Nachdenken über normative Ordnungen der Gegenwart und der Zukunft – und für die Reflexion über die mit der Digitalisierung unserer Kultur verbundenen dramatischen Veränderungen in den Formen der Produktion von Recht. Sie würde neben die »große Erzählung« eine zwar nicht gleichermaßen eingängige, aber analytisch fruchtbarere Perspektive setzen (VII.).

Das ist im Moment und trotz erster Umsetzungen in rechtshistorische Forschungspraxis noch Zukunftsmusik. Beginnen wir deswegen wenigstens mit einer Skizze, wohin eine solche intellektuelle Reise gehen könnte: Wie könnte eine Rechtsgeschichte als Geschichte von Normativitätswissen aussehen?

I. Eine Geschichte von Normativitätswissen?

Eine Geschichte von Normativitätswissen würde bei dem elementaren Befund ansetzen, dass normative Ordnungen das Ergebnis einer kontinuierlichen sozialen und kulturellen Konstruktionsleistung sind. Sie werden von einer Vielzahl von Akteuren und Aktanten hergestellt. Normative Ordnungen entstehen und verändern sich in einem großen diachronen Prozess der Speicherung, Verarbeitung, Autorisierung – und natürlich zugleich auch des Vergessens und der Deautorisierung – von Information. In diesem Prozess, den man auch als Translationsvorgang bezeichnen kann, werden die als relevant selektierten Informationen auf ein konkretes Handlungsfeld, nämlich die Erzeugung von Normativität im Blick auf einen bestimmten Lebensbereich, bezogen. Informationen werden damit, so der hier bevorzugte Sprachgebrauch, zu Normativitätswissen. Dieses Wissen ist höchst vielfältig: es umfasst Diskurse, Praktiken, Regeln, Normen und Prinzipien, explizites oder implizites Wissen.[2] Es ist also das Mittel der Normerzeugung wie auch deren Er-

2 Normativitätswissen kann man – in Anlehnung an eine Beschreibung kulturellen Wissens – bezeichnen als Gesamtmenge der Propositionen, die die Mitglieder einer epistemischen Gemeinschaft für wahr halten bzw. die eine hinreichende Anzahl von Texten als wahr setzt. Es kann sowohl implizites als auch explizites Wissen umfassen und sich auf als gesichert geltende Fakten, begriffliche und theoretische Konstruktion sowie kulturelle Denk-, Orientierungs- und Handlungsmuster erstrecken und ist in der Regel auf eine Vielzahl unter-

gebnis, und in dieser kontinuierlichen Translation und den damit unvermeidlichen Variationen liegt auch der Schlüssel zu Stabilität und gleichzeitiger Veränderung von Recht.

Das zur Verfügung stehende Wissen sowie die historischen Bedingungen, unter denen diese Translation von Information in Normativitätswissen stattfindet, geben der jeweiligen normativen Ordnung ihre konkrete Gestalt. Sozio-ökonomische Grundlagen, Machtverteilungen, ästhetische Kategorien, soziale Deutungsmuster und vieles mehr wirken auf diesen Prozess ein. Deswegen ist beispielsweise die Herrschaft von Personen über Sachen oder über andere Personen oder über beides gemeinsam in verschiedenen Regionen oder Epochen unterschiedlich ausgestaltet. Diese historischen Konkretisierungen von Möglichkeiten sind in der rechtshistorischen Forschung mit zum Teil den Quellen entnommenen, zum Teil auch mit aus Abstraktionen gewonnenen Begriffen bezeichnet worden, z. B. *possessio*, Gewere, Munt oder Besitz, dingliches Recht, Leibeigenschaft. Wissensgeschichtlich gesehen sind dies freilich bloß Namen für die Ergebnisse von kontingenten Prozessen der Verarbeitung und Erzeugung von Normativitätswissen. Diese Bezeichnungen weisen allerdings auf Verdichtungsprozesse hin, und sie sind natürlich selbst höchst aufschlussreich: denn warum eine bestimmte Form von Normativitätswissen als »Recht« oder als »Gewohnheit« etc. bezeichnet wurde, hatte Gründe, und gerade in der Frage nach diesen Gründen liegt ein wichtiges Anliegen der Rechtsgeschichte. Das gilt für die Quellenbegriffe, und auf einer reflexiven Ebene auch für die analytischen Begriffe: Warum schreiben wir etwa als »Rechtsgeschichte« vor allem die Geschichte einer bestimmten Form von Normativitätswissen, und nicht die eines anderen *modus*?

Weist ein historisches Arrangement von Praktiken, Regeln, Normen und Prinzipien eine gewisse Stabilität auf, kann man dieses auch als historisches »Regime« bezeichnen. Man kann dann z. B. ein Dependenzregime beschreiben, das die Gestaltung von Abhängigkeitsverhältnissen bezeichnet; oder ein Sachherrschaftsregime, das die Beziehung zwischen Personen und Gegenständen regelt. Da diese Regime auf die Herstellung von Normativität für einen bestimmten Handlungsbereich gerichtet sind, kann man sie auch ein »Historisches Normativitätsregime«, jeweils bezogen auf einen bestimmten Gegenstandsbereich, nennen.[3]

Auch die Praktiken, Regeln, Normen und Prinzipien der Herstellung von Normativität als solcher gehören natürlich zu diesen Regimen: Denn man erzeugt für die Lösung eines Problems ja nicht nur eine inhaltliche Regelung, sondern man tut dies *auf eine bestimmte Weise* – nämlich so, wie man üblicherweise Regelungen vornimmt. Man folgt expliziten oder impliziten Konventionen. Man handelt unter bestimmten Bedingungen, auch medialer, materialer Natur. Man kann diese Voraussetzungen und Bedingungen des Handelns auch als »Normativitätserzeugungswissen« bezeichnen.

Auch dieses Normativitätserzeugungswissen ist historisch vielleicht stabil, aber sicher nicht statisch. Es lässt sich auch als Wiederholungsstruktur verstehen, die sich in der Wiederholung selbst verändert. Es entwickelt dabei eine eigene Transformationsdynamik. Mit neuen Medien beispielsweise dürften sich die Formen der Normerzeugung verändern, und trotz der häufig kapillaren Wirkung technologischer Innovation auf alle Lebensbereiche führen solche neuen Medien zwar zu Veränderungen in der Form der Produktion von Wissen und dann auch des Inhalts selbst, aber nicht notwendigerweise zugleich auch zu Veränderungen in den spezifischen Handlungsfeldern; andersherum mag es sein, dass sich beispielsweise politische Herrschaft und rechtlicher Rahmen ändern, juridische Praktiken aber weitgehend stabil bleiben.[4] Vor allem in dieser Eigendynamik des Normativitätserzeugungswissens dürfte der Schlüssel zum Verständnis der in der Rechtsgeschichte

schiedlicher Medien, Akteure und Institutionen verteilt; auch Werte gehören dazu. Wissen wird dabei zu Normativitätswissen, wenn und soweit es auf das Handlungsfeld »Normativität« bezogen ist; »Normativität« wird dabei verstanden als die Eigenschaft, verpflichtend zu sein. Zum Begriff vgl. ausführlicher unten, Abschnitt V.

3 Historische Normativitätsregime lassen sich definieren als Beobachtungen von mehr oder weniger stabilisierten historischen Arrangements von Diskursen, Praktiken, Regeln, Normen und Prinzipien und deren kontingenten Bedingungen, die bei der Herstellung, Vermittlung und Durchsetzung von generalisierbaren Verhaltenserwartungen in Bezug auf ein bestimmtes Handlungsfeld relevant sind. Zum Begriff ausführlicher unten, Abschnitt V.

4 So beispielsweise das Ergebnis der Studie von Pihlajamäki (2017). Zur Wechselwirkung von Medium und Inhalt z. B. Hespanha (2008); Meyer (2020); Bragagnolo (2020).

spätestens seit der Historischen Rechtsschule immer wieder diskutierten, lange Zeit im Metaphysischen gesuchten oder mit diffusen Begriffen wie »Rechtskultur« oder »Rechtstradition« verbundenen Vorstellung von der sog. »relativen Autonomie«, der »Eigengesetzlichkeit« des Rechts liegen.

Betrachtet man dieses (meist implizite und schwer zu isolierende) Metawissen gesondert und findet auch hier stabile Arrangements, so kann man von einem »Historischen Normativitätserzeugungswissensregime« sprechen.[5] Ändert sich also ein Normativitätsregime, so mag dies auf soziale, ökonomische, mentalitätsgeschichtliche etc. Veränderungen hinweisen; es mag aber auch eine Veränderung im Bereich des Normerzeugungswissens gewesen sein, die dahinterstand. Meistens sind beide Prozesse in vielfältiger Weise miteinander verbunden, und es dürfte kaum möglich sein, die Veränderung von Normativitätserzeugungswissensregimen zu rekonstruieren, ohne Normativitätsregime zu beobachten.

Man wird also Rechtsgeschichte durchaus als eine Geschichte der Erzeugung von Normativitätswissen schreiben können, bei der man unterschiedliche Historische Normativitätsregime herausarbeitet, verkettet und vielleicht auch vergleicht. Ähnlich wie in der Historischen Epistemologie der Wissensforschung haben die sich wandelnden historischen Formen der Erzeugung von Normativität selbst – also die Historischen Normativitätserzeugungswissensregime – eine besondere, geradezu grundlegende Bedeutung. Denn sie beeinflussen die Art und Weise der Normerzeugung als solche.

Doch warum so kompliziert? Ist das notwendig? Ist Rechtsgeschichte nicht ohnehin schon als Geschichte der Normerzeugung geschrieben worden? – Ja – und nein.

II. Ein großer Prozess diachroner Intertextualität

Tatsächlich hat sich, so scheint es, gerade die deutsche Variante der europäischen Rechtsgeschichte intensiv mit der Geschichte der Normerzeugung beschäftigt.[6] Die Rekonstruktion von Regelungstraditionen, die *longue durée*-Perspektive auf die Herausbildung von Dogmatik und System, gehören geradezu zu ihren Markenzeichen. Die vielfältigen Beobachtungen, die diese quellennahe und tief in historische Regelungsrationalitäten eindringende Forschung hervorgebracht hat, kann man auch als Beschreibung eines jahrhundertelangen Prozesses diachroner Intertextualität lesen.

Diese in der mehr als zweihundertjährigen Forschung herausgearbeitete, maßgeblich von der Historischen Rechtsschule und der mit dieser einsetzenden Tradition geprägte große Erzählung der Rechtsgeschichte beginnt bekanntlich in Rom. Sie zeigt nicht nur das Nachdenken über eine Fülle von Regelungsproblemen, die uns noch heute beschäftigen. Sie macht auch deutlich, wie Texte der römischen Juristen aus der Zeit des klassischen römischen Rechts noch in der Antike vielfach aufgenommen, angepasst, für die eigene Zeit verändert und damit stets auch in andere Kontexte eingebettet wurden. Gerade die sprachliche und gedankliche Dichte machte die Texte, die zum Teil Jahrhunderte nach ihrer Entstehung in den Digesten zusammengestellt worden waren, zu Objekten vielfältiger Interpretation. Mit Konzilsbeschlüssen, ersten Dekretalen und Kanonessammlungen trat neben das römische in der sog. nachklassischen Zeit das kanonische Recht, das Recht der Kirche. Eher selten wird in den Darstellungen auf jüdische und griechische Traditionen verwiesen, noch seltener auf altorientalische Rechte, trotz deren großer Bedeutung. Rom bleibt die zentrale Referenz.

5 Normativitätserzeugungswissensregime sind somit Normativitätsregime besonderer Art, die das »intellektuelle Betriebssystem« von (anderen) handlungsfeldbezogenen Normativitätsregimen darstellen. Allerdings sollte das nicht zu dem Schluss verführen, dass jedem Normativitätsregime ein bestimmtes Normativitätswissensregime zugeordnet ist und umgekehrt. Vielmehr ist davon auszugehen, dass Normativitätswissensregime durchaus ihren eigenen Reproduktions- und Transformationslogiken folgen, die gerade nicht an die Grenzen eines handlungsfeldbezogenen Normativitätsregimes gebunden sind. Zum Begriff vgl. ausführlicher unten, Abschnitt V.

6 Die folgenden, vor allem der Herausarbeitung einiger Linien dienenden Ausführungen sind mit Blick auf die deutschsprachige Tradition geschrieben. Natürlich ist diese nicht von anderen zu trennen, weist aber doch zahlreiche Besonderheiten auf; sie ist z. B. der italienischen enger verwandt, unterscheidet sich allerdings deutlich z. B. von der spanischen und französischen. Für ausführliche Nachweise vgl. die in Anm. 1 zitierten Arbeiten.

Die Forschung zur Geschichte des römisch-kanonischen Rechts, die im 19. Jahrhundert bereits auf vielen Vorarbeiten aufbauen konnte, hat seitdem gezeigt, wie diese Normen an ganz unterschiedlichen Orten Europas verarbeitet und damit auch verändert worden sind. Gerade die Berufung auf das Alter oder die besonderen Entstehungsumstände verliehen diesen Texten hohe Autorität, auch wenn – oder gerade weil – sie sich mit der Zeit veränderten: Denn mit jeder Abschrift, mit jeder neuen Texttradition und kulturellen Übersetzung in andere lokale oder regionale Umstände konnten neue Bedeutungen entstehen. Die vielfach kopierten Sammlungen mittelalterlichen Rechts waren *living texts*, weil sich ihr Inhalt durch Abschreibefehler, bewusste Manipulation oder schlicht durch viele, angesichts neuer Umstände als notwendig empfundene Anpassungen im Laufe der Zeit stark veränderte.

Mit der Institutionalisierung der Textbearbeitung in den ersten Universitäten im Hochmittelalter – also dem, was häufig als die Geburt der Rechtswissenschaft bezeichnet wird – verfestigten sich viele Normen, Regeln, Prinzipien und Praktiken des Umgangs mit den Texten. Man erklärte nun »den Text mit dem Text«.[7] Das *ius commune* (das sog. gemeine Recht) entstand, dem das zunehmend nach der Systematik dieses *ius commune* begriffene Partikularrecht (*ius particulare*) gegenübergestellt wurde. Das Netz der Intertextualität wurde immer dichter. In Glossen und Kommentaren, Konsilien und anderen Textgattungen entwickelten Juristen an einer zunehmenden Zahl von Orten Europas unter Bezug auf antike Quellen neue Texte und kreative Lösungen für die Probleme ihrer Zeit. Sie arbeiteten an Begriffen und einer Dogmatik für das Recht des städtischen Lebens, für Handel und Wirtschaft, für Religion und Politik. All das geschah im Kontext einer kulturellen Blüte, der Gründung von Städten und Universitäten, der Scholastik. Es begann ein Prozess, der später als »Rezeption« des gelehrten Rechts bezeichnet und als zentral für die Herausbildung einer gemeinsamen europäischen Rechtsgeschichte und der europäischen Rechtskultur überhaupt angesehen wurde.

Bereits im Hoch- und Spätmittelalter vermehrte sich wegen dieser enormen Produktivität der an der Normsetzung Beteiligten, der Herausbildung von Institutionen, dem Wachstum der Ordensgemeinschaften und vieler weiterer Faktoren das zur Verfügung stehende Wissen in geradezu exponentieller Weise – trotz der Flaschenhals-Effekte, wie sie epochemachende Texte wie das *Decretum Gratiani*, die als *Concordia discordantium canonum* bezeichnete Sammlung kirchlicher Autoritäten aus dem 12. Jahrhundert, mit sich brachten. Kaiserliche und päpstliche Rechtsetzung, die Wissenschaft, die insbesondere im kirchlichen Recht immer neue Sammlungen produzierte und das sog. neue Recht (*ius novum*) autorisierte, aber auch institutionelle Rechtspraxis produzierten unablässig neue *leges*, Privilegien, Dekretalen, Glossen, Kommentierungen, die mit den Bestehenden verwoben wurden. Schichten legten sich über Schichten, und neue Wissensordnungen bildeten sich heraus.

All das ist vor allem für die römisch-kanonische Tradition, in geringerem Maße auch für die sog. germanistische Linie nachgezeichnet worden. Auch in dieser wurden wichtige Rechtsbücher wie z. B. der Sachsenspiegel oder eine Fülle von Stadtrechten verfasst, kopiert, übersetzt. Es bildeten sich Stadtrechtsfamilien und ähnliche Regeln enthaltende Aufzeichnungen von Handelsbräuchen. Die dabei entstehenden Rechtsräume waren vielfältig. Sie folgten Handelsrouten, dynastischer Politik, Bündnissen und Eroberungen. Sie waren keineswegs koextensiv mit den Räumen der sog. Rezeption. So ist der Ostseeraum aus der Perspektive der Geschichte des Handelsrechts eng verbunden, während das sog. gelehrte Recht in Skandinavien trotz einer beachtlichen Präsenz des kanonischen Rechts weniger Einfluss hatte. Doch insgesamt wurden auch durch diese vielfältigen Kommunikationsprozesse lokale und regionale Überlieferungen in die Sprachen und damit auch Grundbegriffe anderer Zeiten und Räume übersetzt, zunehmend mit Methoden des gelehrten Rechts. »Romanistik«, »Germanistik« und »Kanonistik«, die aus der Konfrontation im 19. Jahrhundert stammenden Bezeichnung für die drei großen Rechtsmassen und deren Wissenschaft, lassen sich deswegen vielleicht unterscheiden, aber sicher nicht trennen.

Die Medienrevolution des späten 15. und 16. Jahrhunderts trug dazu bei, diesen Prozess der Vervielfachung und Assimilierung von Wissen in Bezug auf Recht nochmals zu intensivieren. Auch diese Pluralisierung von normativen Optionen

7 Bellomo (1993).

wird in dem Maße deutlicher, in dem Mediengeschichte und Rechtsgeschichte kombiniert werden. An einer zunehmenden Zahl von Orten wurde immer mehr Wissen, also Normen aller Art, Kommentierungen, Urteile etc., in immer mehr Medien gespeichert. Dadurch war dieses Wissen noch leichter verfügbar, Varianten konnten nebeneinandergelegt und verglichen werden, und mehr und mehr Widersprüche fielen auf. Diese mussten durch wieder neue Interpretationen gelöst werden. Der Buchdruck brachte insofern einerseits eine Standardisierung von Texten, zugleich aber auch viele neue Textunsicherheiten, nicht zuletzt im Blick auf die *bestseller* des Buchdrucks und -handels, die in vielen, oft unterschiedlichen Auflagen, manchmal vielleicht sogar unterschiedlichen Exemplaren, verkauft wurden. Auch neue Formen der Textbearbeitung, etwa philologische Quellenkritik des Humanismus, vervielfachten die Lesarten. Man versuchte, dieser Vielfalt mit Strategien der Autorisierung von Texten, der Zentralisierung von Normsetzung oder einer Monopolisierung der Interpretation zu begegnen.

Die europäische Expansion, Reformationen, die mit diesen historischen Großereignissen verbundenen Neugründungen von Universitäten, die Kommerzialisierung der Buchherstellung, der frühneuzeitliche normsetzende Staat, Bürokratisierung und Professionalisierung des Juristenstandes und viele weitere Faktoren beschleunigten diesen Prozess. Bald wurden normative Texte auch nicht mehr allein in den Metropolen oder in den Kanzleien der frühneuzeitlichen europäischen Staatenwelt, sondern an vielen Orten auf der ganzen Welt produziert, in Manila und Mexiko. Man beobachtete sich, wechselte die Sprachen und übersetzte das Wissen in zum Teil nun völlig andere Realitäten. Auch dafür wurde das verfügbare Wissen zusammengestellt, ausgewählt, angepasst. Neue *genres* und Ordnungssysteme versuchten, diesen »early modern information overload«[8] einzuhegen. Denn auch wenn Klagen über die unübersehbare Fülle von Autoritäten, auf die man sich berufen konnte, und die damit einhergehende Willkür und Unberechenbarkeit der Justiz schon jahrhundertealt waren: dieses Maß an Unsicherheit erschien nun nicht mehr hinnehmbar. Unbestimmtheit war zweifellos auch eine Regelungs- und Herrschaftstechnik. Doch zugleich strebte man nach Zentralisierung, Kontrolle, Berechenbarkeit des Rechts.

Betrachtet man die Vielfalt der über Jahrhunderte angesammelten Autoritäten und die Versuche, diese Vielfalt zu beherrschen, so lassen sich – um abzukürzen – auch die folgenden klassischen rechtshistorischen Epochen wie die des Naturrechts, des Usus modernus, des aufgeklärten Absolutismus, aber auch die Historische Rechtsschule, die Bemühung der Pandektistik um Dogmatik und Systembildung, die Kodifikationen und vieles mehr als Versuche der »Schließung« (*closure*) interpretieren, um einer kontinuierlichen diachronen Reproduktion und damit Mutation von Normen entgegenzutreten.[9] Lange hoffte man, dass diese Schließung mit Dogmatik, System, Kodifikation, Juristenausbildung und Justizreformen endgültig gelingen würde.

Vielen Juristen erschien die dahinterstehende Vorstellung einer Monopolisierung der Rechtserzeugung und einer systematischen Geschlossenheit als großer Sieg, anderen als Tragik. Realität waren der »juristische Absolutismus«[10] der Moderne und die Einheit des Rechtssystems niemals. In jedem Fall aber zeichnete die Rechtsgeschichte mit ihrer Erzählung von der Entwicklung des Rechts von den römischen Juristen zu den Kodifikationen der Nationalstaaten den langen Weg des Rechts in die – je nach Standpunkt ersehnte oder gefürchtete – juristische Moderne nach.

III. Juristenrecht auf dem Weg in die Moderne

Das ist eine faszinierende Geschichte. Dass man sie erzählen kann, ist umso eindrucksvoller, als sie zunächst eigentlich geradezu ein Nebenprodukt rechtswissenschaftlicher Forschung war – nämlich der »Geschichtliche[n] Rechtswissenschaft«,[11] die das Fach Rechtsgeschichte nachhaltig geprägt hat.

8 Rosenberg (2003).

9 Die Interpretation dieses Prozesses als *closure* bei Glenn (2014) unter Bezug auf Lawson (2001).

10 Zur Formulierung des »Juristischen Absolutismus« und dessen Bedeutung Grossi (1998).

11 So der programmatische Titel der berühmten, von Eichhorn, Savigny und Göschen gegründeten Zeitschrift, deren erster Band 1815 erschien, digital verfügbar unter http://hdl.handle.net/hdl:11858/00-001M-0000-002E-3FD5-0.

Diese Geschichte ist auch heute keineswegs ausgeschrieben. Im Gegenteil, eine die nationalen Perspektiven überwindende europäische Rechtsgeschichte ist »immer noch ein Projekt«,[12] und sie hat noch großes unausgeschöpftes Potential. Denn »Wie die Juristen die Welt sahen«[13] ist nicht nur für das Recht relevant. Viele Deutungsmuster der Wirklichkeit sind im juridischen Diskurs auf den Begriff gebracht worden, sickerten in andere Bereiche ein, wurden angeeignet, verändert, übersetzt, in die Sphären des Rechts zurückgeführt. In dieser Geschichte sind, wie hier nur angedeutet werden konnte, zudem beeindruckende Rekonstruktionen der Textualität von Recht zu finden, der Transformation von Wissensordnungen, der Emergenz neuer Wissenspraktiken, und diese Befunde werden zunehmend in der Sprache der Wissensgeschichte formuliert.[14] Es gibt also zahlreiche Einsichten aus der Forschungstradition, an die eine wissensgeschichtliche Perspektive anknüpfen kann und muss, wenn sie sich mit der Herstellung von Normativitätswissen beschäftigt.

1. Juristenrecht

Doch tritt man zunächst nochmals einen Schritt zurück, fragt nach den impliziten Grundannahmen dieser Forschungstradition und historisiert sie, so werden auch die Grenzen dieser großen kollektiven intellektuellen Anstrengung deutlich. Denn hinter den vielen Akteuren, Orten und Themen dieser Geschichte scheint recht deutlich der Umriss dessen auf, was man im 19. Jahrhundert das »Juristenrecht« nannte: Die europäische Rechtsgeschichte beginnt mit der Rechtsschöpfung durch die römischen Juristen der klassischen Antike und durch die katholische Kirche, die ausdrücklich als Rechtskirche verstanden wird. Sie entwickelt sich weiter durch die Verfasser von Kompilationen, Rechtsbüchern, Glossen und Kommentaren. Sie mündet in juristische Dogmatik und Systembildung, in Ideen und Institutionen des Privatrechts und in neuerer Zeit des öffentlichen Rechts und seiner Wissenschaft.

Rechtsgeschichte ist, näher besehen, in der hier skizzierten Forschungstradition vor allem die Geschichte der von Juristen und ihrem kirchlichen Äquivalent, den Kanonisten, erzeugten Normen, sei es in Form von Gesetzen, Rechtssammlungen, Dogmatik oder Kodifikationen, die gerade aus deutscher Perspektive vor allem eine Leistung der Wissenschaft, also der Juristen, sind. Es sind Juristen, die in einem diachronen, medial vermittelten Kommunikationsprozess immer wieder Normen aus der Vergangenheit aufnehmen, verarbeiten und fortbilden. Auch wenn man auf die Praxis blickt, interessiert vor allem die Gerichtspraxis, also die des Juristen. Hinter der Vorstellung des Juristen verbirgt sich natürlich eine ganze Fülle unterschiedlicher sozialer Phänomene, die in verschiedenen historischen Regimen jeweils besondere Funktionen ausübten. Doch in der historiographischen Konstruktion werden Juristen und ihr Recht zum Kontinuitätsfaktor, selbst noch durch ihr Fehlen in einem »Zeitalter ohne Juristen«.[15] Juristen waren und sind die Verwalter und Erzeuger des Rechts,[16] und das in kontinuierlicher Metamorphose befindliche Juristenrecht gibt der großen Erzählung der europäischen Rechtsgeschichte ihre Einheit.

2. Von der geschichtlichen Rechtswissenschaft zur Apologie des Juristen

Diese Konzentration auf den Juristen ist sicher auch die Selbstbespiegelung eines Standes. Sie ist vor allem aber die Folge der Prägung des Fachs durch die Historische Rechtsschule. Denn deren Rechtsentstehungslehre hatte das Juristenrecht zum fast ausschließlichen Gegenstand der Rechtsgeschichte gemacht und damit akademische Praktiken, Konventionen, Relevanzhierarchien und nicht zuletzt Institutionen der Wissensproduktion etabliert, die bis weit in das 20. Jahrhundert stabil blieben.

Die Präferenz der Historischen Rechtsschule für das Juristenrecht lässt sich gesellschaftsgeschichtlich analysieren, erklärte man doch mit den Juristen letztlich sich selbst für zuständig für die Rechtsfortbildung und den Bau der juristischen Monumente der Nationalstaatlichkeit, vor allem in Form der Kodifikationen. Doch man tat dies auf der Grundlage einer Rechtsentstehungslehre, die philosophisch gegründet war und die sich zudem auf

12 Stolleis (2011a).
13 Hespanha (2015).
14 Vgl. z. B. Meyer (2006); Thier (2007); Dusil (2018).
15 Bellomo (2005) 35ff.
16 Simon (1988).

eine eindrucksvolle Überlieferung stützen konnte. In einem großen, von Savigny selbst initiierten und mithilfe der *respublica litteraria* ausgeführten transnationalen Projekt wurden massenhaft Handschriften gesichtet und spektakuläre Funde gemacht, und die in diesen Texten enthaltenen juristischen Gedanken beeindruckten durch ihre Tiefe und Prägnanz. Die Rechtswissenschaft könnte, das war auch jenseits aller Streitigkeiten zwischen Berlin und Heidelberg klar, ihrem »Beruf« zur Gesetzgebung dann am besten nachkommen, wenn sie dieses über Jahrhunderte gereifte Juristenrecht rekonstruierte, nach den lokalen Artikulationen suchte und diese in den Kodifikationen auf eine höhere Abstraktionsstufe heben würde. So wie die Sprachwissenschaften aus dem Gebrauch auf die Grammatik schlossen, wollten die Juristen aus der historischen Überlieferung das Alphabet und die Grammatik des Rechts freilegen.

Was das »Juristenrecht« war, war schon damals natürlich keineswegs eindeutig, so wenig, wie die Historische Rechtsschule einheitlich war.[17] Auch dass man gerade dieses Juristenrecht zum Hauptgegenstand der geschichtlichen Rechtswissenschaft erklärte, war alles andere als unumstritten. Im Gegenteil: »Volksrecht« und »Juristenrecht« wurden zu Kampfbegriffen in einer (rechts-)politischen Auseinandersetzung, die das Fach spaltete. Doch spätestens nachdem sich Rechtsgeschichte, Rechtsdogmatik und Rechtsvergleichung um 1900 ausdifferenziert hatten, vollends dann mit den Irrwegen der sog. juristischen Germanistik im NS und deren konsequentem Abbruch nach 1945, hatte sich das Juristenrecht der romanistisch geprägten Tradition als der zentrale Fluchtpunkt rechtshistorischer Beobachtungen etabliert. Damit waren die Pfade gelegt, auf denen man weiterschritt, selbst wenn das weltanschauliche oder rechtstheoretische Fundament sich änderte. Savigny blieb der Leitstern, das Programm der Historischen Rechtsschule Legitimationsquelle und Inspiration, auch wenn bald andere Rechtsentstehungslehren und Auffassungen vom Zweck rechtshistorischen Arbeitens die Debatte dominierten. »Begriffsjurisprudenz«, »Freirechtsschule« und Rechtsgeschichte als geisteswissenschaftliche Rekonstruktion von »Denktypen« sind einige der Stichworte und Kampfbegriffe aus diesen grundlegenden Debatten um Recht und Geschichte im ausgehenden 19. und beginnenden 20. Jahrhundert, die hier nur kurz benannt werden können. Sie haben die spätere Rechtshistorie in folgenreicher Weise geprägt.

Wissenschaftsgeschichtlich ragt das 19. Jahrhundert deswegen noch weit in das 20. hinein. Es prägte die Praktiken der Produktion rechtshistorischen Wissens. Dogmengeschichtliche und geistesgeschichtliche Rechtsgeschichten wurden nun als »innere« und »äußere« Rechtsgeschichten weitgehend unverbunden nebeneinander betrieben; die dahinterstehenden, eigentlich unversöhnlichen rechtsgeschichtstheoretischen Anschauungen gerieten im rechtshistorischen Forschungsalltag weitgehend in Vergessenheit. Wirkungslos blieben sie allerdings keineswegs, im Gegenteil: Die wohl einflussreichste große Erzählung, Franz Wieackers *Privatrechtsgeschichte der Neuzeit*, ist ein nur aus dieser Frontstellung der ersten Jahrhunderthälfte verständliches Bekenntnisbuch – und eine im Licht der moralischen Katastrophe verfasste Apologie des Juristen.[18]

Von höchst unterschiedlicher Seite berief man sich auch nach 1945 weiter auf die Historische Rechtsschule und ihr Programm. Carl Schmitt bekannte sich in seinem Vorwort zum *Nomos der Erde* zu ihr, da nur »in einer richtig und fruchtbar gewordenen Geschichtlichkeit« die Rechtswissenschaft in ihrem Existenzkampf »den Boden ihres eigenen Daseins« behaupten könne.[19] Mit etwas weniger Pathos wandte sich ein europäischer Kreis führender Rechtshistoriker in den 50er Jahren dem Projekt eines – so ausdrücklich – »Neuen Savigny« zu (im Rahmen des IRMAE),[20] europäisch ausgerichtet und bis in das 19. Jahrhundert weitergeführt; in den 60er Jahren wurde mit dem Max-Planck-Institut für europäische Rechtsgeschichte eine Forschungsinstitution gegründet, in der man bis in die frühen 80er Jahre an diese intellektuelle Tradition anknüpfte. Im Klima der neuen Kodifikationswelle in den Staaten des ehemaligen Ost-

17 Vgl. dazu Haferkamp (2018).
18 Rückert (1995). Die Formulierung »Bekenntnisbuch« bei Landau (2010) 50.
19 Schmitt (2011) [1950], Vorwort, 6.
20 Genzmer (1961).

blocks, der europäischen Integration und der Internationalisierung der 90er Jahre wurde mit neuem Enthusiasmus gefordert, »Savigny's Vermächtnis« einzulösen.[21] Rechtshistoriker folgten nun erneut dem Weg des Juristenrechts von Rom über Bologna und nun nach Brüssel, aber auch durch Südafrika oder Lateinamerika. Wieder reklamierte vor allem die historisch-vergleichende Privatrechtswissenschaft eine führende Rolle bei der Fortbildung und Harmonisierung von Recht.

Doch auch jenseits dieses von der geschichtlichen Rechtswissenschaft inspirierten Privatrechtsprojekts bekannten sich noch um die Jahrtausendwende bedeutende Rechtshistoriker zur Rechtsentstehungslehre der Historischen Rechtsschule und hofften, mit ihrer Hilfe Genese und Geltung in Verbindung bringen zu können.[22] Der von der geschichtlichen Rechtswissenschaft geprägte, auf das Juristenrecht konzentrierte Rechtsbegriff, die Vorliebe für die *longue durée* und die Rekonstruktion von Regelungstraditionen, die von der geisteswissenschaftlichen Tradition der Rechtsgeschichte hervorgebrachte Periodisierung und die Orientierung an Autoren, die für Denktypen standen, waren zu weitgehend unhinterfragten Konventionen geworden. »Generationen von Juristen wuchsen mit diesem historischen Orientierungsraster auf«[23] und arbeiteten sich weiter am Juristenrecht ab.

3. *Rechtsgeschichte als Geschichte der Moderne*

Neben diesem deutschen Modell einer »Privatrechtsgeschichte als europäische Rechtsgeschichte« mit ihrer dogmengeschichtlichen und ihrer geisteswissenschaftlichen Variante etablierten sich seit den 80er Jahren zunehmend auch andere Rechtsgeschichten.

Besonders wirkungsvoll wurde vor allem außerhalb der Disziplin eine Rechtsgeschichte der Herausbildung von Staatlichkeit, zum Teil mit starker Betonung der Bedeutung der Religion, wie etwa in Harold J. Bermans *Law and Revolution*. Ein neues Terrain betrat die Geschichte des öffentlichen Rechts und seiner Wissenschaft, und eine kulturwissenschaftlich erneuerte Verfassungsgeschichte brachte neue Perspektiven in das von der Rechtsgeschichte etwas stiefmütterlich behandelte, weil vor allem von Vertretern des Öffentlichen Rechts betriebene Fach. In enger Verbundenheit mit den Geschichtswissenschaften wandte man sich vor allem im Zuge der Reichskammergerichtsforschung der Geschichte der sog. Rechtspraxis, vor allem der Justizpraxis, sowie der Geschichte des disziplinierenden, strafenden, ordnenden Staates zu.[24] Man kann viele dieser Forschungen, soweit sie sich mit den (im weiten Sinne) institutionellen Bedingungen der Normerzeugung beschäftigen, als Geschichten institutioneller juridischer Praxis bezeichnen.

Nicht zuletzt im Bewusstsein der Notwendigkeit einer stärkeren historischen Kontextualisierung betteten sehr viele der aus der Rechtswissenschaft stammenden Geschichten institutioneller juridischer Praxis ihre Befunde ausdrücklich oder unbewusst in größere Beobachtungsperspektiven ein.[25] Sie schilderten, affirmativ oder kritisch, einen Prozess der Professionalisierung, Säkularisierung, Sozialdisziplinierung, Rationalisierung und – als spezifischer Teilerzählung – der langsamen Verwissenschaftlichung oder Differenzierung von Recht in Europa. Getragen vom teleologischen Zug eines Fachs, das die Gegenwart verstehen will, konstruierte diese (europäische) Tradition der Rechtshistorie eine zweitausendjährige Geschichte, die zielgerichtet in die Gegenwart nationalstaatlichen Rechts in Europa führte.

Besonders anschaulich wird diese Teleologie zur modernen Rechtswissenschaft bei Franz Wieacker, dessen Darstellung für die zweite Hälfte des 20. Jahrhunderts geradezu paradigmatisch und auch jenseits der Rechtsgeschichte weit rezipiert wurde. Es sei, schreibt er in seiner Privatrechtsgeschichte der Neuzeit, »kein zu gesuchtes Bild,

21 Zimmermann (1998).

22 Landau (2013), Vorwort, 13 und an anderen Stellen.

23 Haferkamp (2019) 907 in seinem prägnanten Überblick über die Entwicklung. Auf die Prägung der Wieacker'schen Periodisierung durch Kantorowicz' »Epochen der Rechtswissenschaft« von 1914 weist hin Landau (2010) 54.

24 Vgl. zum Strafrecht den Überblick von Härter (2018); zur Verfassungs- und Verwaltungsgeschichte Stolleis (2017); zur Geschichte des öffentlichen Rechts Stolleis (2014); zur Kulturgeschichte der Verfassung Stollberg-Rilinger (2008); zur Bedeutung des kirchlichen Rechts und einer öffentlich-rechtlichen Perspektive auf die »westliche« Rechtsgeschichte vgl. Berman (1991); zur Geschichte von Gerichtsbarkeit und Verfahren Oestmann (2015).

25 Vgl. für ausdrückliche Reflexion z. B. die Überlegungen von Stolleis (2011b).

wenn man sagt, Holland habe die Fackel der großen Rechtswissenschaft unserem Lande weitergereicht, die einst in Italien entzündet wurde und von dort nach Frankreich und weiter nach den Niederlanden gewandert war«.[26] Kein Zweifel auch, dass dieser Pfad zugleich der einer Rationalisierung war, die Europa – oder, wie Wieacker an anderer Stelle formuliert: die »europäisch-okzidentale« Rechtskultur[27] – von allen anderen unterschied: Die Glossatoren hätten »den großen römischen Juristen die Kunst abgelernt, die vitalen Konflikte des zwischenmenschlichen Lebens nicht mehr im Bann irrationaler Lebensgewohnheiten oder durch Gewalt zu entscheiden, sondern durch intellektuelle Diskussion des autonomen juristischen Sachproblems und nach einer aus dieser Sachproblematik begründeten allgemeinen Regel. Dieser neue Anspruch des Juristen hat das öffentliche Leben in Europa für immer juridifiziert und rationalisiert; unter allen Kulturen der Erde ist durch ihn die europäische die einzig legalistische geworden«.[28]

Diese Chronotopie sowie die Konzentration der Rechtsgeschichte auf eine Geschichte von Juristenrecht und damit die Konstruktion eines scheinbar einheitlichen Raum-Zeit-Zusammenhangs, nicht zuletzt die Einbettung in eine Weber'sche Rationalisierungsteleologie, machten nicht allein Wieackers Erzählung so ungemein suggestiv.[29] In dieser Synthese und Rekomposition einer langen Forschungstradition und in der klaren Linienführung liegt die eindrucksvolle Leistung – und, wie inzwischen immer deutlicher wird, auch die Grenze der Tradition der Rechtsgeschichte als Geschichte von Juristenrecht.

IV. Epistemische Gemeinschaften

Recht wurde und wird – darin liegt die erste, fundamentale Begrenztheit der großen Erzählung[30] – nämlich natürlich nicht allein von Juristen, sondern von einer Vielzahl von Regelungs- und Entscheidungskollektiven hervorgebracht. Recht ist ein Kulturprodukt, und Rechtserzeugung ein sozialer Prozess, der nicht allein in staatlichen Institutionen stattfindet, sondern in vielen und höchst unterschiedlichen sozialen Gemeinschaften. Nimmt man diese *in abstracto* heute wohl kaum bestrittenen Feststellungen ernst, so wird deutlich, dass der fast ausschließlich am Juristenrecht orientierte, auf die moderne Staatlichkeit hinführende Rechtsbegriff der Rechtshistorie offenbar nicht wenige Normproduzenten im Dunkeln gelassen hat. Das dürfte auch daran liegen, dass diese Vielfalt nicht in das Bild einer Monopolisierung von Recht durch den Staat, in die Vorstellung eines juristischen Absolutismus', der Rationalisierung und Modernisierung passten. Wendet man sich dieser Vielfalt zu, verliert die lineare große Erzählung ihre Stringenz und Strahlkraft.

1. Regelungs- und Entscheidungskollektive

Dabei hat die Rechtsgeschichte selbst eine Fülle von Kenntnissen über diese vielfältigen Normproduzenten hervorgebracht. Schon vor einem Jahrhundert wurde die fast ausschließliche Konzentration auf Juristenrecht kritisiert, freilich nicht so sehr im Blick auf die Rechtsgeschichte, sondern auf die Rechtswissenschaft insgesamt. Besonders deutlich geschah dies im Werk von Eugen Ehrlich, das seit den 1990er Jahren auch wegen des Unbehagens am nationalstaatlichen Rechtsbegriff vor allem in Rechtstheorie und Rechtssoziologie wieder stärker beachtet wird.[31]

Vor ihm hatten freilich bereits Otto von Gierke, auf den Ehrlich sich stützt, später Otto Hintze und Otto Brunner auf die geradezu überragende historische Bedeutung von dem hingewiesen, was man heute in der Sprache der Governancetheorie als Regelungs- und Entscheidungskollektive bezeichnen könnte.[32] Das Werk dieser Autoren geriet allerdings – wie zahlreiche Einsichten der germa-

26 Wieacker (1967) 169.
27 Wieacker (1985).
28 Wieacker (1967) 69.
29 Nur hingewiesen sei auf die recht intensive Debatte um Wieackers Werk in Behrends / Schumann (Hg.) (2010) sowie im Anschluss an die grundlegende Kritik von Winkler (2014), mit ausführlichen und zum Teil sehr kritischen Rezensionen z. B. von R. Zimmermann, H.-P. Haferkamp und P. Landau.
30 Zu großen Erzählungen in der Rechtsgeschichte vgl. Rückert (2008).
31 Ehrlich (1989) [1913], der übrigens bereits von der Bedeutung »praktischen Wissens« spricht, a. a. O., 16.
32 Vgl. zu Governancekollektiven, Regelungsstrukturen und der Nutzung der Governancetheorie für eine für eine Regelungswissenschaft Schuppert (2011), Schuppert (2015b), sowie die Beiträge in Esders / Schuppert (2015).

nistischen Rechtshistorie – durch die Zeitläufte weitgehend in Vergessenheit und wird gegenwärtig erst langsam wiederentdeckt.[33]

Es schien auch wegen dieses Traditionsbruchs und der damit einhergehenden Wissensverluste geradezu bahnbrechend, als vor allem Rechtshistorikerinnen und Rechtshistoriker aus Spanien, Portugal und Italien seit den 70er Jahren des 20. Jahrhunderts wieder auf die überragende Bedeutung der korporativen Grundstruktur der spätmittelalterlichen und frühneuzeitlichen Gesellschaften aufmerksam gemacht haben.[34] Teilweise sprechen sie – unter Rückgriff auf die weite Bedeutung von *iurisdictio* im mittelalterlichen Recht[35] – von einem »jurisdiktionellen Paradigma« der spätmittelalterlichen und frühneuzeitlichen Rechtsgeschichte.[36] Sie sehen bis in das 19. Jahrhundert hinein ein jurisdiktionszentriertes, nicht normzentriertes System als geradezu grundlegendes Dispositiv. Trotz der von der spezifischen Forschungsgeschichte bestimmten Ausgangslage – man wollte sich nicht so sehr von einer Rechtsgeschichte als Juristenrecht als vielmehr einer national(istisch)en, etatistischen und legalistischen Tradition der Institutionengeschichte lösen – lassen sich viele ihrer Beobachtungen auch auf andere Räume übertragen und fruchtbar mit dem Denken der germanistischen Tradition und heutiger Forschung etwa zu Diversität und Recht verbinden.

Mit dieser Wiederentdeckung von Korporationen im weitesten Sinn, aber auch von loseren sozialen Gemeinschaften und kollektiven Akteuren im Schatten (früh-)neuzeitlicher Staatlichkeit, ging eine gesteigerte Aufmerksamkeit für sog. informelle Verfahren der Normsetzung, Entscheidungsfindung und Normdurchsetzung einher. Auch die wechselseitige Öffnung von Rechtsgeschichte und sog. allgemeiner Geschichte trug dazu bei, rechtshistorische Forschung aus ihren Pfadabhängigkeiten zu lösen. Eine Rechtsgeschichte der Gerichtspraxis, Sozialgeschichte, historische Kriminalitätsforschung, *subaltern studies* etc. haben – seit einiger Zeit auch gegen die Einseitigkeiten einer rein sozialdisziplinierenden Perspektive – inzwischen das Ausmaß dessen deutlich gemacht, was der teleologische rechtshistorische Blick auf das Juristenrecht und die Herausbildung der staatlichen Institutionen lange verbarg.

Eine solche Sensibilisierung für den Korporatismus und für die Rolle sozialer Gruppen bei der Normenproduktion und Konfliktregulierung – und die damit veränderten Vorstellungen, was eigentlich das Objekt der Rechtsgeschichte ist: also nicht mehr allein Juristenrecht – ist besonders wichtig, wenn man Rechtsgeschichten jenseits von Europa schreiben will. Sie hat z. B. zu einer grundlegenden Neubewertung der Verfassungsgeschichte Lateinamerikas geführt, bei der Prozessanalysen an die Stelle teleologischer Erzählungen der langsamen Nationalstaatswerdung treten.[37] Viele Einzelstudien führen lebendig vor Augen, wie Normen aus der Praxis hervorgegangen, wie eng verflochten theoretisches und praktisches Wissen sind und wie sehr die Erzeugung von Recht gerade davon abhängt, unter welchen konkreten Bedingungen Rechtsbegriffe interpretiert werden.[38] Aber auch die deutsche Forschung weist selbst für das ausgehende 19. und das 20. Jahrhundert zunehmend auf die Bedeutung von Sonderordnungen hin. Sie zeichnet anhand von neuen Typen von Quellen ein sehr viel differenzierteres Bild von Rechtserzeugung und -durchsetzung, als die herkömmliche Perspektive einer zunehmenden und weitgehend linearen Zentralisierung und Monopolisierung der Erzeugung von Recht in der Moderne vermuten lässt.[39]

Der Blick auf vielfältige soziale Gruppen, auf Regelungs- und Entscheidungskollektive, auf ganz unterschiedliche *modi* von Normativität, bricht aber nicht allein die Linearität der Erzählung der Rechtsgeschichte als Geschichte von Juristenrecht oder der Herausbildung des modernen Staates als linearem Prozess der Verdichtung.[40] Er birgt auch erhebliches komparatives Potential und erscheint unverzichtbar, wenn Rechtsgeschichte in globaler Perspektive betrieben werden soll. So ist beispielsweise in der Forschung zur Frühen Neuzeit in Deutschland, in Lateinamerika und zur Qing-Dynastie in China auf die überragende Bedeutung der sozialen und wirtschaftlichen Einheit

33 Vgl. zur Wissenschaftsgeschichte der Germanistik Dilcher (2017) sowie für die »junge« geisteswissenschaftliche Ausrichtung Liebrecht (2018); zur Germanistik während des NS Schäfer (2015).

34 Vgl. den Überblick bei Hespanha (2018); Hespanha (2019).

35 Grundlegend dazu Costa (1969).

36 Eine gute Zusammenfassung bei Agüero (2007).

37 Agüero (2016).

38 Vgl. Mejía Quiroga (i. E.); Dias Paes (2021); Sirotti (i. E.).

39 Collin (2016), insbesondere 145 ff.

40 Dazu der Überblick bei Schennach (2019).

des Hauses hingewiesen worden.[41] Da Normerzeugung und -durchsetzung in diesen Hausgemeinschaften, die ihrerseits zu einer Matrix und Metapher für andere Gemeinschaften wurden, regelmäßig gerade nicht durch Juristen erfolgte, erweitert sich mit dem Blick auf diese auch der Kreis der maßgeblichen Akteure, Aktanten – und damit der Quellen der Rechtsgeschichte erheblich. Hier wird deutlich, dass die Überwindung der Konzentration auf Juristenrecht auch die Möglichkeit der Neubewertung der Rolle derer gibt, die in der traditionellen europäischen Rechtsgeschichte bisher fast überhaupt nicht vorkommen – und damit z. B. eine in höherem Maße gender-sensible Rechtsgeschichte zu schreiben. Die Öffnung hat zugleich auch einen Effekt auf die klassischen Objekte der Rechtsgeschichte: denn auch Institutionen-, Dogmen-, Ideen-, Normen- oder Wissenschaftsgeschichte würden anders geschrieben, wenn das von den Regelungs- und Entscheidungskollektiven hervorgebrachte praktische Wissen eine angemessene Systemstelle erhalten würde.[42]

Nur angedeutet werden kann hier schließlich, dass in dem herkömmlichen, am Juristenrecht orientierten und nationalstaatlich entworfenen Bild von der Rechtsgeschichte auch die vielfältigen Regelungs- und Entscheidungskollektive aus dem Bereich des Religiösen unterrepräsentiert sind – einer normativen Dimension des sozialen Lebens, die aus einer Reihe von wiederum wissenschaftsgeschichtlich zu erklärenden Gründen über lange Zeit geradezu kategorisch aus der Rechtsgeschichte ausgeschlossen worden ist. Denn auch im Bereich von Normen, die von Religionsgemeinschaften produziert und durchgesetzt wurden, gab es zwar »Juristenrecht«. Dieses ist konsequenterweise auch recht intensiv erforscht worden: nämlich das kanonische Recht und die Kanonistik der katholischen Kirche, in den protestantischen Kirchen die jeweilige Kirchenrechtswissenschaft, die Rechtserzeugung durch Konsistorien und das landesherrliche Kirchenregiment. Doch mindestens ebenso wichtig war die Normerzeugung durch Konzilien und Kirchengerichte, deren Bedeutung nicht mehr allein für das Mittelalter, sondern auch für die Neuzeit zunehmend erkannt, aber gerade für die Frühe Neuzeit und Moderne bisher wohl kaum angemessen bewertet wird; das überkommene Bild, die Frühe Neuzeit sei in der Geschichte des katholischen Kirchenrechts eine Phase der Stagnation, ist allein aus der Perspektive der Geschichte des Juristenrechts gezeichnet und unterschätzt die Dynamik der Transformation und Adaptation dieser universal gedachten normativen Ordnung in der Praxis.[43] Von besonderer Bedeutung waren darüber hinaus jedenfalls in der Frühen Neuzeit die Moraltheologie, also eine praktische Theologie, und die an diese anknüpfenden normativen Praktiken. Außerdem bestand und besteht die Welt natürlich nicht allein aus christlichen Gemeinschaften – Normen wurden von vielfältigen religiösen Gemeinschaften alltäglich produziert und durchgesetzt, oft im Stillen und dennoch keineswegs weniger wirksam.

2. *Epistemische Gemeinschaften und Gemeinschaften der Praxis*

Aus einer wissensgeschichtlichen Perspektive kann man diese Regelungs- und Entscheidungskollektive als epistemische Gemeinschaften und Gemeinschaften der Praxis bezeichnen.

Man kann diese in verschiedenen Disziplinen gebrauchte Vorstellung[44] recht allgemein auf Gruppen von Personen[45] beziehen, denen eine bestimmte *episteme* gemeinsam ist, also grundlegende Vorstellungen über die Welt und die Voraussetzungen des Denkens und Handelns in ihr, und deren Handlungen sich in irgendeiner Weise auf ein gemeinsames Handlungsfeld beziehen. Objektive oder subjektive Kriterien, also Zugehörigkeit zu bestimmten sozialen Gruppen,

41 Duve (2004); Zamora (2017); Zhang (2017).

42 Vgl. dazu konzeptionell Duve (2020a) sowie anhand der Technik der Epitomierung Meyer (2020).

43 Vgl. dazu Bertram (Hg.) (2005); Fantappiè (2008).

44 Insbesondere in Politikwissenschaft und Internationalen Beziehungen ist der Begriff intensiv diskutiert worden, vgl. den Überblick bei Haas (2012); mit inhaltlichen Erweiterungen Cross (2013). Eine interessante Anpassung der Konzeption für das Internationale Recht durch Cardenas / d'Aspremont (2020); Bianchi (2019); Bogdandy / Urueña (2020) nutzen das Konzept in einer für die hier beschriebenen Zwecke anschlussfähigen Weise in ihrer Arbeit zum lateinamerikanischen transformativen Konstitutionalismus; auf epistemische Gemeinschaften bezieht sich ebenfalls Glenn (2014) 41.

45 In der Wissenschaftsgeschichte wird die Bezeichnung epistemische Gemeinschaften auch benutzt für »families of editions, grouped according to their content, that eventually came to shape knowledge within and by way of the European educational framework«, vgl. Valleriani u. a. (2019).

Nutzung bestimmter Handlungsformen, aber auch ähnliche Grundvorstellungen über die Welt oder in Bezug auf die Zugehörigkeit zu einer Gemeinschaft, können zu ihrer Definition herangezogen werden. Rechtshistorisch lässt sich beispielsweise die Schule von Salamanca als eine solche epistemische Gemeinschaft und Gemeinschaft der Praxis verstehen, mit durchaus weitreichenden Konsequenzen für deren Konzeption.[46]

Von »epistemischen Gemeinschaften« und »Gemeinschaften der Praxis«[47] zu sprechen bietet eine Reihe von Vorteilen. Denn diese Bezeichnung ist nochmals offener als die bereits hilfreiche Formulierung der Regelungs- und Entscheidungskollektive.[48] Fragt man nämlich nach epistemischen Gemeinschaften und Gemeinschaften der Praxis, so muss man nicht auf eine soziale Einheit blicken, die Regelungs- oder Entscheidungskompetenz in Anspruch nimmt. Man kann auch Angehörige von Gruppen oder Netzwerke erfassen, die nur schwache oder vielleicht keinerlei soziale Strukturen ausbilden und die dennoch auf der Grundlage einiger geteilter Annahmen Normativitätswissen erzeugen. Man denke an Handelsbräuche, die sich aus der Praxis herausbilden und durch Verschriftungen an vielen Orten stabilisiert werden, ohne aber durch ein konkret zu benennendes Regelungs- und Entscheidungskollektiv (also etwa einen *consulado*, *consulat* etc.) legitimiert zu sein;[49] oder an ästhetische Normen, Amtsverständnisse, einen Habitus, geteilte Werte, die im Handeln entstehen und sich durch komplexe soziale Prozesse generalisieren.[50]

Epistemische Gemeinschaften kann es überall dort geben, wo Menschen Normativitätswissen produzieren, also auch in den lange Zeit von der Rechtsgeschichte kaum beachteten Gemeinschaften, die sich jenseits von Staatlichkeit bewegten, z. B. in den Religionsgemeinschaften, oder bei den Angehörigen indigener Völker oder aus Afrika und Asien in andere Weltteile als Sklaven verschleppten Menschen. Vieles, was in der Soziologie und Ethnologie unter dem Stichwort der Informalität und im Blick auf die Gegenwart erforscht wird, von der Mafia über informelle Märkte oder Normen der *Favelas*, findet man natürlich *mutatis mutandis* auch in der Rechtsgeschichte – nur selten aber in der Rechtshistorie.[51]

Der Begriff ist zudem besonders geeignet, um Prozesse dezentraler kollektiver Normenproduktion zu erfassen, was ein wichtiges Anliegen transnationaler und globaler Rechtsgeschichten ist. Er erlaubt es, nicht-territorial gebundene kommunikative Strukturen in die Betrachtung einzubeziehen, die aber deswegen nicht unbedingt »personal« sein müssen, was meist als Gegenstück zur Territorialität angenommen wird. Man muss auch nicht Sprach-, Traditions-, Erzähl-, Wert-, Solidar- und Anerkennungsgemeinschaften unterscheiden.[52] Die Bezeichnung erscheint schließlich geeigneter als die der Kommunikationsgemeinschaften,[53] denn epistemische Gemeinschaften können durchaus auch dann bestehen, wenn keine – unmittelbare – Kommunikation stattfindet: Zum Beispiel, wenn die epistemische Gemeinschaft durch den Bezug auf gemeinsame Referenzen besteht. Katholische und protestantische Naturrechtslehren aus der Zeit nach den Reformationen beispielsweise weisen zahlreiche Gemeinsamkeiten auf, aber deren Vertreter kommunizierten entweder gar nicht oder die Kommunikation war eingeschränkt, und die Nähe ergibt sich zum Teil lediglich über ge-

46 Duve (2020c); Duve (2021).

47 Streng genommen bedarf es gar nicht der Unterscheidung zwischen epistemischen Gemeinschaften und Gemeinschaften der Praxis, da letztere auch als epistemische Gemeinschaften angesehen werden können, vgl. mit Gründen, die den hier vorgetragenen Überlegungen sehr nahestehen Adler (2019), insbes. 298 ff. Doch die ausdrückliche Nennung mag die Bedeutung der in der Rechtsgeschichte häufig gerade nicht berücksichtigten Gemeinschaften der Praxis und die Sensibilisierung für Rechtserzeugung als Akte sozialer Praxis unterstreichen. Das gilt umso mehr, als die Fixierung der Rechtsgeschichte auf bestimmte Autoren – auch ein Erbe der Prägung durch das Juristenrecht – immer wieder dazu verleitet, die Bedeutung der Normerzeugung in der wissenschaftlichen, forensischen, anwaltlichen oder alltäglichen Praxis zu unterschätzen.

48 Schuppert (2017) 59 ff. spricht von Regelungskollektiven.

49 Vgl. dazu jetzt die Beiträge in Gialdroni u. a. (Hg.) (2020).

50 Vgl. zu den Beispielen die Diskussion im Fokus »Multinormativität« der *Rechtsgeschichte – Legal History* 25 (2017); zur Wertegeneralisierung als Folge von Handlungen vgl. Joas (1999).

51 Vgl. z. B. mit Bezug auf die Rechtsgeschichte Losano (2000).

52 Gertenbach u. a. (2010).

53 Zu Kommunikationsgemeinschaften vgl. auch Schuppert (2015a) 296 ff., zu »epistemic communities« a. a. O. 228 ff. und Schuppert (2019a) 65 ff. Die Begriffe sind aber natürlich nah, vgl. auch Pogner (1999).

meinsame Referenzpunkte in der vorreformatorischen Tradition.[54] Der Blick auf epistemische Gemeinschaften kann auf diese Weise nicht allein Verflechtungen und soziale Gruppen, sondern auch (auf gemeinsame Anfänge zurückgehende) Koevolutionen erfassen und damit Bedingungen dezentraler Normenproduktion sichtbar machen.

V. Normativitätswissen

Die Vielfalt epistemischer Gemeinschaften und Gemeinschaften der Praxis produziert auch eine Vielfalt von Normen. In dieser Rechtsvielfalt, oder auch dem sog. Rechtspluralismus, wird bekanntlich geradezu ein Charakteristikum sog. vormoderner Gesellschaften gesehen.[55]

Doch auch diese Sichtweise ist bei näherer Analyse dem Paradigma des Juristenrechts auf dem Weg in die Moderne verhaftet; sie spiegelt gewissermaßen die im vorigen Abschnitt herausgearbeiteten Defizite im Blick auf die Normproduzenten nun auf der Seite der Produkte, also der Normen. Vor allem beschäftigt sie sich nicht wirklich (oder eher äußerlich) mit der *Herstellung* von Entscheidungen – also mit dem Faktor, der auch aus rechtstheoretischen Gründen geradezu entscheidend ist. Um das tun zu können, dürfte es hilfreich sein, nicht von »Rechtspluralismus«, sondern von »Normenvielfalt« zu sprechen, vor allem aber Bedingungen und Voraussetzungen des juridischen Handelns in die Analyse einzubeziehen und diese unter dem Begriff des »Normativitätswissens« und dessen Spezialfall, dem »Normativitätserzeugungswissen«, zusammenzufassen.

1. Normenvielfalt

Blickt man nämlich genauer hin, so handelt es sich bei vielen rechtshistorischen Untersuchungen zur Rechtsvielfalt und verwandten Phänomenen eigentlich nicht um einen (wie auch immer zu bestimmenden) Rechtspluralismus,[56] sondern um einen *Rechtsquellenpluralismus*: Meistens interessiert man sich nämlich eigentlich nur für die vielfältigen Normen, die von den Juristen als relevant für die Herstellung von Entscheidungen angesehen wurden. Die Perspektive ist also erneut die des Juristenrechts, eingebettet in die Vorstellung einer zunehmenden Absorption unterschiedlicher Rechtsquellen durch die sich etablierenden staatlichen Formen von Recht.

Auch diese Analyse der Rechtsquellenvielfalt ist natürlich wichtig, und die Untersuchungen der frühneuzeitlichen deutschen Gerichtspraxis haben gezeigt, dass die Theorie der Praxis, z. B. die Statutentheorie, die Praxis nicht wirklich zu steuern vermochte.[57] In einer Fülle von Studien ist auch analysiert worden, wie gemischte Gerichte gearbeitet haben, und dass jurisdiktionszentrierte historische Regime häufig verschiedene Möglichkeiten boten, zu Recht zu kommen. Doch andere *modi* von Normativität wie die sog. sozialen Normen wurden oft aus der Perspektive der Staatlichkeit erfasst (etwa *infrajustice* als »unterhalb« oder »jenseits« staatlicher Justiz angesiedelte Formen der Konfliktregulierung), als Alternative zum Recht angesehen und gewissermaßen einer anderen Welt zugeordnet (zum Beispiel Duelle). Oder sie interessierten vor allem in dem Maße, in dem man deren Verrechtlichung oder Verwissenschaftlichung beobachten konnte, zum Beispiel im Fall des Zeremonials und der Zeremonialwissenschaft.[58] Doch waren solche Verrechtlichungen und Verwissenschaftlichungen der sog. sozialen Normen keinesfalls die Regel, und sie formalisierten und versprachlichten zudem lediglich einige Teile des normativen Universums. Die unterhalb dieser Schwelle bleibenden oder sich außerhalb dieser Prozesse herausbildenden Normen wurden kaum jemals Teil der am Juristenrecht orientierten, auf die staatlichen Institutionen und das staatliche Recht hingeführten Rechtsgeschichte – obwohl die Menschen natürlich nicht Bürger zweier Welten und die normativen Sphären eben nicht isoliert voneinander waren.

Von welch großer Bedeutung diese jenseits des Rechtlichen liegenden, mit diesem aber eng verflochtenen normativen Sphären sind, haben kultur- und sozialhistorische Forschungen zu Spiel-

54 Zu territorialen und deterritorialen Gemeinschaften vgl. auch Schuppert (2015a) 283 ff., zu Kommunikationsgemeinschaften a. a. O., 296 ff.; zu dem Beispiel der Naturrechtslehren Duve (2020c); Duve (2021).

55 Grossi (1995); Stolleis (2008b).

56 Vgl. zu der langen und wechselvollen Geschichte der Begriffsverwendung und den vielfältigen Bedeutungen umfassend Seinecke (2015).

57 Oestmann (2002).

58 Vec (1998).

regeln, Konventionen, Routinen, ganz besonders deutlich auch die Kulturgeschichte der Verfassung vor Augen geführt.[59] Wenn man nun aber – mit guten Gründen – im Blick auf kontinentaleuropäische Rechtsgeschichten und deren imperiale Räume für die sog. Vormoderne von einer jurisdiktionszentrierten Form der Rechtsfindung ausgeht (»Jurisdiktionsparadigma«) und dieser zur Kontrastierung eine normzentrierte Form der Rechtsfindung in der staatlichen Moderne gegenüberstellt, so wird besonders deutlich, dass eine allein am *Rechtsquellenpluralismus* ansetzende Vorstellung von Rechtspluralismus unzureichend ist. Sie entstammt der Welt der westlichen Moderne, auch wenn sie gerade Alterität erfassen will; sie ist für ein (überdies reduktionistisch verstandenes, nämlich an der Fehlvorstellung der Rechtsfindung als sterilem Prozess der Subsumtion orientiertes) normzentriertes System gemacht und blind für die Regeln der juridischen Praxis. Die – hier nur aufzurufende[60] – rechtstheoretische Einsicht in die Tatsache, dass juridisches Handeln und damit auch Normerzeugung notwendigerweise sozial und pragmatisch zu verstehen sind, fordert aber die Beachtung gerade dieser Regeln der juridischen Praxis. Sie zwingt geradezu dazu, neben den primären Regeln, also den Verhaltensregeln, und den sekundären Regeln, also den Operationalisierungsregeln, eine weitere Dimension einzubeziehen, nämlich die Voraussetzungen und Bedingungen juridischen Handelns.[61]

2. *Praxeologie*

Bei den regelhaften Voraussetzungen und Bedingungen juridischen Handelns geht es nämlich gerade nicht um die »Theorie der Praxis«, also z. B. um die inzwischen eindrucksvoll aufgearbeitete historische Rechtsquellentheorie und juristische Methodenlehre.[62] Diese würde eben zu den sekundären Regeln gehören. Es geht vielmehr um ästhetische Normen, Konventionen, Routinen, aber auch um die normative Dimension von Materialität und Medialität des Rechts sowie eine Fülle weiterer Faktoren, die Einfluss auf den Prozess der Normerzeugung haben, manche davon auch als »injunktive« Normen bezeichnet. Häufig handelt es sich um das nur »vor Ort«, »in der Praxis« oder durch »learning by doing« zu erwerbende praktische Wissen – eine Chiffre für vielfältiges implizites Wissen, das gerade dadurch, dass es nicht ausdrücklich gemacht wird, so bedeutsam wie schwer zu entdecken ist. Auch Machtfaktoren, ökonomische Bedingungen und ihre Auswirkungen auf die Formen der Wissensproduktion können als solche Bedingungen der Praxis in die Analyse integriert werden, wie dies in der Wissenschaftsgeschichte beispielsweise unter dem Stichwort der politischen Epistemologie getan wird.

Diese Voraussetzungen und Bedingungen des Handelns wurden lange Zeit in der Rechtsgeschichte überhaupt nicht oder nur sehr wenig beachtet. Doch sie sind in den letzten Jahren zum Teil unter dem Stichwort der historischen Praxeologie,[63] der Sache nach zum Teil auch im

59 Vgl. insbesondere Stollberg-Rilinger (2008).

60 Vgl. einführend z. B. Vesting (2015), insbesondere Rz. 60 ff., 191 ff.; Buckel u. a. (Hg.) (2020), insbesondere zu Neuem Rechtsempirismus, Nachpositivistischem Rechtsdenken; vgl. auch Kuntz (2016).

61 Die Terminologie knüpft an die Unterscheidung von Hart (1961) an, die deutsche Übersetzung als »Regel« folgt der Ausgabe bei Suhrkamp 2009.

62 Schröder (2021).

63 Praxeologie meint eine häufig wissenschaftssoziologische und zumeist machtanalytische, empirische Arbeitsweise, die der Beschreibung von Praktiken dient. Das Ziel liegt darin, kommunikative und körperliche Praktiken und deren implizite gesellschaftliche Logik – und nicht in erster Linie mentale Prozesse, Theorien oder Ideen – in den Fokus zu nehmen, vgl. Frietsch (2013) 311. Eng verbunden – wenn nicht sogar gleichbedeutend damit – ist die Praxistheorie, insbesondere die in der Wissenschaftsforschung entwickelte, deren Hauptabsicht darin liegt, die Erzeugung wissenschaftlicher Ergebnisse nicht mehr nur aus der Logik einer Theorie, die sich immer weiter entwickelt, zu verstehen, sondern auch aus einer Logik der Praxis, zum Teil sogar als Ethnographie der Forschungspraxis, vgl. den Überblick von Hillebrandt (2009) 369. Einen Überblick aus der Perspektive der Frühneuzeitforschung gibt z. B. Füssel (2019). Zur Globalgeschichte und dem »practice turn« vgl. z. B. Epple (2018).

Umfeld der kulturwissenschaftlichen Rechtswissenschaft intensiver diskutiert worden, rechtshistorisch zum Beispiel anhand der Bedeutung ästhetischer Wahrnehmungen für die Normerzeugung.[64] Lorraine Daston hat aus der Sicht der Wissenschaftsgeschichte, deren Zuwendung zur Wissensgeschichte nicht zuletzt durch die sog. »Praxiswende« motiviert war, Praktiken lapidar bezeichnet als »roughly, what scientists actually do as opposed to what they say they do.«[65]

Der Begriff der »Multinormativität«[66] zielt darauf, die drei genannten Ebenen – Normenvielfalt, also primäre, sekundäre und Regeln der Praxis, wenn man so will: tertiäre Regeln – zu integrieren und auf die normative Dimension der Bedingungen der Praxis aufmerksam zu machen. Er verweist auf die Normen hinter den Normen und ist damit nicht nur erheblich weiter als der üblicherweise benutzte Begriff des Rechtspluralismus. Er vermeidet auch dessen gefährliche Polysemie, eurozentrische Perspektivität und einige andere Laster: Rechtspluralismus stellt nämlich in sehr vielen Fällen das »Recht« in den Mittelpunkt und grenzt »Nicht-Recht« davon asymmetrisch ab, ist normzentriert, wird häufig zur Taxonomie gebraucht und ist entsprechend statisch, nicht selten Teil eines normativen Projekts und verleitet durch die Bezeichnung des »-pluralismus« zu dem Fehlverständnis, es handele sich um eine irgendwie geordnete, systematische Vielfalt.[67]

3. *Normativitätswissen*

Wissensgeschichtlich formuliert kann man diese Multinormativität als Teil von Normativitätswissen ansehen. Dieses Normativitätswissen umfasst allerdings zudem noch eine Fülle weiterer Wissensformen. Denn bei der Herstellung normativer Aussagen werden ganz unterschiedliche Arten des Wissens mobilisiert wie z. B. Faktenwissen, Folgenwissen, Kontextwissen, Raumwissen etc.,[68] das in eine rechtshistorische Analyse einzubeziehen ist.

Erst mit einer Sensibilisierung für diese unterschiedlichen Wissensformen und die Gesamtheit des Normativitätswissens dürfte es gelingen, normative Welten rechtshistorisch besser zu entschlüsseln, in denen es keine »Juristen« gab – also den Großteil der Rechtsgeschichten, auch in Europa. Die Notwendigkeit wird allerdings auch in diesem Bereich besonders deutlich, wenn man auf Normerzeugung beispielsweise unter Bedingungen des europäischen Kolonialismus blickt. Die von asymmetrischen Strukturen und sog. Interlegalität gekennzeichneten Übertragungs-, Aneignungs- und Übersetzungsprozesse lassen sich nur durch eine sorgfältige Analyse des Normativitätswissens und insbesondere der Praktiken derer verstehen, die diese Prozesse vollzogen haben. So zeigen beispielsweise Studien, wie indigene Akteure im kolonialen Hispanoamerika Institutionen des Rechts der kastilischen Invasoren anhand ihrer eigenen Vorstellungen von Sachherrschaft interpretierten und damit transformierten, zugleich aber Elemente des Normativitätswissens der kolonialen Ordnung in ihr eigenes Denken integrierten;[69] wie christliche Speisegebote oder -verbote scheinbar eingehalten, letztlich aber gewissermaßen subversiv reinterpretiert wurden;[70] wie aber auch die koloniale Herrschaft auf funktionalen Missverständnissen beruhte, etwa weil man solche Prozesse der Reinterpretation als Variation der eigenen Normen und Praktiken verstand und damit geltungserhaltend interpretierte.[71] Vieles, was in der inzwischen sehr umfangreichen Forschung zu solchen kolonialen und nach-kolonialen Konstellationen als »Hybridität« bezeichnet, mit dieser Bezeichnung allerdings bloß beschrieben wird, dürfte sich entschlüsseln lassen, wenn man Normerzeugung als Prozess und im Blick auf das dabei mobilisierte Normativitätswissen analysiert.

64 Eine Sonderstellung hat sicherlich Latours *La fabrique du droit* aus dem Jahr 2002, in deutscher Sprache nun Latour (2016). Vgl. im übrigen z. B. Gephart (2012); Hespanha (2008); Vesting (2011–2016); Vismann (2000), Vismann (2012). Zur Rechtsästhetik grundlegend Damler (2016a) sowie auf ein konkretes Feld, das Konzernrecht, gewendet Damler (2016b); ein Beispiel für den Einfluss sinnlicher Wahrnehmung auf die Interpretation des weltberühmten völkerrechtlichen Vertrags von Tordesillas bei Duve (2017a).

65 Daston (2017) 139.

66 Duve (2017b).

67 Etwas ausführlicher zu dieser zugespitzten Kritik Duve (2017b); grundlegend Seinecke (2015), der die Problematik der Polysemie und anderes hervorragend herausarbeitet und den Begriff in einer interessanten und der hier vertretenen Position nahen Wendung retten möchte; mir scheint allerdings die m. E. entscheidende praxeologische Dimension nicht mehr in den Begriff einzubringen zu sein.

68 Vgl. dazu aufschlussreich die Liste der Arten des Wissens bei Hoffmann-Riem (2016) 307 ff.

69 Herzog (2015).

70 Ferlan (2018).

71 Zaballa Beascoechea (2018).

Diese Prozesse der Anverwandlung, die Nutzung von Normativitätswissen, das aus einem anderen Kontext stammt und nun in die eigene Weltsicht integriert, angeeignet und damit notwendigerweise verändert wird, sind keineswegs auf Situationen in frühneuzeitlichen Imperien beschränkt. Sie stehen auch im Mittelpunkt der für die europäische Rechtsgeschichte geradezu identitätsstiftenden Vorstellung vom kulturhistorischen Vorgang der sog. Rezeption des gelehrten Rechts im europäischen Mittelalter und der Frühen Neuzeit. Auch dieser wird besser verständlich, wenn man nicht allein die Ausbreitung eines als tendenziell statisch verstandenen Rechts in Raum und Zeit verfolgt, sondern auf dezentrale und soziale, eng mit der Praxis verbundene Prozesse der Wissensproduktion durch Verarbeitung und Herstellung von Normativitätswissen achtet. Auf diese Weise könnte ein komplexeres Bild entstehen als das üblicherweise bloß anhand des Juristenrechts gezeichnete, in dem der kulturhistorische Vorgang der Rezeption vor allem als Prozess der linearen Verwissenschaftlichung und Rationalisierung bewertet wird.[72] Auch die oft ebenfalls als unidirektionaler Prozess des Exports europäischer Normen geschriebenen Geschichten der »Europäisierung der Welt«[73] oder der Globalisierung von Recht werden komplexer, wenn man auf die Prozesse der Aneignung von Normen aus anderen Regionen achtet, diesen Aneignungsvorgang aber mithilfe des Normativitätswissens – also den kulturellen Praktiken, Weltanschauungen, Normen etc. – analysiert, das den lokalen Akteuren zur Verfügung stand.[74]

Die Weite des Wissensbegriffs, die zugleich Problem und Chance der Wissensgeschichte ausmacht, bietet die Möglichkeit dazu. Auch wenn vereinzelt eine Definition von Wissen sogar geradezu abgelehnt wird, da diese überhaupt erst der Gegenstand der Disziplin sei,[75] gibt es natürlich durchaus eine Vorstellung, was gemeint ist.[76] Von Seiten der Wissenschaftsgeschichte, aus der sich ein wichtiger Teil der Wissensgeschichte ausgebildet hat, wird hervorgehoben, der Begriff bezeichne »die Gesamtheit des Wissens, das Mitgliedern einer Kultur, gleich welcher Epoche oder geographischen Herkunft, eigen ist und innerhalb dieser Kultur tradiert wird. Ein so verstandenes, an bestimmte Kulturen gebundenes Wissen kann sowohl implizites als auch explizites Wissen umfassen und sich auf als gesichert geltende Fakten, begriffliche und theoretische Konstruktion sowie kulturelle Denk-, Orientierungs- und Handlungsmuster erstrecken.« Wissen sei »in der Regel auf eine Vielzahl unterschiedlicher Medien, Akteure und Institutionen verteilt, sodass Wissenskulturen nicht unbedingt kohärente Gebilde sind, sondern von divergierenden Strömungen und Autoritätskonflikten durchzogene Formationen bilden, die miteinander im Austausch stehen«.[77] Das für die Rechtsgeschichte besonders wichtige herrschaftsrelevante Wissen wird aus der Perspektive der Geschichtswissenschaft verstanden als »sämtliche Informationen«, die »innerhalb eines bestimmten gesellschaftlichen Handlungszusammenhangs dazu geeignet sind, herrschaftliche Ansprüche zu legitimieren, durchzusetzen und zu tradieren. Dazu zählt beispielsweise Wissen um die Herkunft der beanspruchten Güter, Wissen um die zeitgenössischen gerichtlichen Prozessverfahren oder Wissen um Verwaltungstechniken, die den jeweiligen Bedürfnissen adäquat sind.«[78]

Normativitätswissen könnte man deswegen – in Anlehnung an eine Beschreibung kulturellen Wissens[79] – bezeichnen als Gesamtmenge der Propositionen, die die Mitglieder einer epistemischen Gemeinschaft für wahr halten bzw. die eine hinreichende Anzahl von Texten als wahr setzt.[80] Es kann

72 Vgl. zu der klassischen Perspektive auf diesen Prozess z. B. Sellert (1998).

73 Headley (2008).

74 Vgl. dazu Duve (2020b). Beispiele etwa zur Translation deutschen Verfassungsrechts in die chinesische Kultur bietet Li (2019).

75 Landwehr (2007) 801.

76 Vgl. Renn / Hyman (2012); ein systematischer Überblick auch bei Abel (2014).

77 Müller-Wille u. a. (2017) 3, mit Hinweis auf Neumann (2013).

78 Hier zitiert Landwehr (2007) 806; Hildbrand (1996) 86 f.

79 Neumann (2013).

80 In besonders anschaulicher Weise hat James Boyd White die Vorstellung von »legal knowledge« 2002 im Blick auf die US-amerikanische Rechtspraxis, beschrieben als »an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language; this may in fact be the closest analogy we have, for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world – how to use legal language to create legal meaning«, White (2002) 1399.

sowohl implizites als auch explizites Wissen umfassen und sich auf als gesichert geltende Fakten, begriffliche und theoretische Konstruktion sowie kulturelle Denk-, Orientierungs- und Handlungsmuster erstrecken und ist in der Regel auf eine Vielzahl unterschiedlicher Medien, Akteure und Institutionen verteilt; auch Werte gehören dazu.[81] Wissen wird dabei zu Normativitätswissen, wenn und soweit es auf das Handlungsfeld »Normativität« bezogen ist; »Normativität« wird dabei verstanden als die Eigenschaft, verpflichtend zu sein.

Diese ihrerseits weite Bezeichnung »Normativität« hat den Vorteil, dass sie nicht an einem engen, vom staatlichen Recht ausgehend konzipierten Rechtsbegriff festhält.[82] Sie ist strukturell offen für andere *modi* der Erzeugung von Verbindlichkeit. Zusammen mit der Weite des Wissensbegriffs macht diese Offenheit den Begriff des Normativitätswissens geeignet für vergleichende oder globalgeschichtliche Forschungen, die auf einen anderen als den Normenbegriff aus einer kulturellen Tradition angewiesen sind: Indem »Normativitätswissen« alles bezeichnet, was der Herstellung von Normativität dient und zugleich auch die Ergebnisse dieses Prozesses, kann der Begriff alles erfassen, was unter den unterschiedlichsten Umständen dazu gedient haben mag. Er schließt damit religiöse Normativität ein, rechtliche, aber auch alltägliche soziale Normen und Praktiken. Er ist damit weit, aber zugleich befreiend.[83]

4. *Spezialfall Normativitätserzeugungswissen*

Wie einleitend skizziert, gehört zum Normativitätswissen auch das, was man »Normativitätserzeugungswissen« nennen könnte, also das Wissen, das für die Erzeugung von Normativität als solcher relevant ist: das sich also nicht auf das »Was«, sondern auf das »Wie«, auf die Herstellung von Normativität selbst richtet. Dieses Wissen kann sich darauf beziehen, wie Normen hervorgebracht werden, die Bindungskraft beanspruchen können, und wie solche Bindungsansprüche in Verfahren realisiert werden. Es kann explizit oder implizit sein. Explizit wäre es z. B. im Fall der Methodenlehre, also den im System selbst festgelegten Operationalisierungsregeln; implizit, wenn es um die Normen hinter den Normen geht, also z. B. um Konventionen, also die praxeologisch zu erfassenden Normen. Normativitätserzeugungswissen ist gewissermaßen das Betriebssystem des Rechts.

Die Unterscheidung und damit Hervorhebung des Normativitätserzeugungswissens als Spezialfall von Normativitätswissen erscheint sinnvoll, weil dieses für die rechtshistorische Forschung von besonderer Bedeutung ist. Denn die Veränderung von Recht in bestimmten Handlungsfeldern hängt eben nicht allein von Veränderungen in diesen Handlungsfeldern ab, sondern mindestens auch von den Grundannahmen darüber, wie überhaupt Normativität hergestellt wird. Auch diese Grundannahmen und die Bedingungen des Handelns sind dem Wandel unterworfen. Wenn sich beispielsweise die medialen oder materialen Bedingungen ändern, kann dies Veränderungen des Normativitätswissens nach sich ziehen, wie es anhand von Kulturtechniken wie etwa der Epitomierung oder auch des Buchdrucks gezeigt worden ist.[84] Die Aufmerksamkeit für diese häufig verborgenen Faktoren muss an die Seite der leichter zu erfassenden Veränderungen der äußeren Bedingungen treten, also etwa der ökonomischen Faktoren, der Machtverhältnisse etc.

Erst in ihrem Zusammenspiel dürften sie Veränderung verständlich machen. Wenn – um ein anderes Beispiel zu nennen – im Laufe des 19. Jahrhunderts an vielen Orten der Welt und in vielen Handlungsfeldern gesetzgeberische Maßnahmen zum Schutz benachteiligter Bevölkerungsgruppen zu beobachten sind, so dürfte dies nicht allein auf

81 Die Kriterien, nach denen normative Information von normativem Wissen unterschieden werden kann, sind höchst vielfältig und voraussetzungsreich. Einen Überblick über einige Verwendungsformen und Abgrenzungen gibt, insbesondere im Blick auf die rechtshistorische Mediävistik, Dusil (2018) 3 ff. Seine Grundentscheidung für einen bestimmten, später weiter ausdifferenzierten Wissensbegriff steht im Zusammenhang mit seinem an Arbeiten vor allem von Christoph Meyer, Andreas Thier und anderen anschließenden Interesse an der Ordnungsbildung in mittelalterlichen Rechtstexten, siehe z. B. Meyer (2006); Patzold (2013); Thier (2007); Thier (2011).

82 Zu einer für die Zwecke einer Rechtsgeschichte als Geschichte von Normativitätswissen befreienden Normativitätsvorstellung, die von taxonomischen Absichten und der Geltungsproblematik entlastet ist und sich intensiv mit vielen der hier angeschnittenen Fragen beschäftigt, vgl. Möllers (2015).

83 Zu der emanzipatorischen Funktion der Wissensgeschichte und ihrem heuristischen Wert vgl. auch Jordheim / Shaw (2020).

84 Meyer (2020); Bragagnolo (2020).

ökonomischen, soziologischen, ideologischen Faktoren und veränderten Wertvorstellungen beruhen. Es dürfte mindestens auch auf einer grundlegenden Verlagerung eines auf Ungleichheit beruhenden jurisdiktionszentrierten Normativitätsregimes bis zur europäischen Sattelzeit hin zu einem auf Gleichheit beruhenden, normzentrierten Normativitätsregime der Moderne beruhen – deswegen bediente man sich nun der juridischen Handlungsform »Gesetzgebung«. Über das Schutzniveau selbst sagen die Veränderungen in der Form der Herstellung des Schutzes allerdings wenig aus; es konnte zwar »modern« und höher scheinen, entgegen dem ersten Anschein vielleicht aber sogar weniger hoch sein.[85]

Das verweist darauf, dass historisches Normativitätserzeugungswissen durchaus eigenen Reproduktions- und Transformationslogiken folgen kann. Es hat selbst eine kontingente Geschichte, die sich gewissermaßen im Inneren oder im Vollzug der Veränderungen der Normativitätsregime beispielsweise in Bezug auf Eigentum, Dependenz, Sicherheit ereignet. Es dürfte nicht zuletzt diese Inkongruenz der Veränderungsdynamiken sein, die für die gleichzeitige Stabilität und Dynamik der Historischen Normativitätsregime sorgt.

VI. Normerzeugung als Prozess der Translation von Normativitätswissen

Wenn Rechtsgeschichte sich als Prozess der Normerzeugung durch die Aufnahme, Neuschöpfung und Transformation von Normativitätswissen begreifen lassen soll, stellt sich die Frage, wie man sich diesen Prozess näher vorzustellen hat. Im Anschluss an informationswissenschaftlich inspirierte Arbeiten beispielsweise von H. P. Glenn und deren Kombination mit der in der kulturwissenschaftlichen und wissensgeschichtlichen Forschung etablierten Vorstellung der »Translation« lässt sich Normerzeugung als Prozess der Translation von Normativitätswissen verstehen.

1. Reproduktion und Transformation als Translation

Die großen Fragen nach der Reproduktion und Transformation von Recht in Zeit und Raum haben die Rechtsgeschichte natürlich schon seit langem beschäftigt. Sie sind lange Zeit vor allem unter den Stichworten Rezeption, Transfer, Transplant oder eben als Entwicklung, Evolution, Tradition etc. analysiert und mit bestimmten expliziten oder impliziten Theorien des Wandels in Verbindung gebracht worden. Diese Theorien stammten aus Geschichtsphilosophie, Rechtsphilosophie, Psychologie, Biologie, Kulturtheorie, Soziologie, Ökonomie. Früher benutzte man dafür Worte wie »Geist«, »Wesen«, »Natur« und den schillernden Begriff der »Rechtstradition«, heute bezieht man sich explizit auf Theorien, vor allem auf ökonomische, institutionen-, system- oder evolutionstheoretische.

Aus einer wissensgeschichtlichen Perspektive bietet es sich an, die Reproduktion von Recht in Raum und Zeit schlicht als einen Prozess der Translation von Normativitätswissen zu beschreiben. Das bietet nicht nur die Chance, metaphysische Eintragungen zu vermeiden oder intellektuell zu kapitulieren, indem man einfach auf die *black box* der »Rechtskultur« verweist. Der Blick auf »Translation« als kulturelle Übersetzung kann vielmehr auf eine bereits recht gut etablierte Forschungsdiskussion zurückgreifen und deren theoretisches Potential für die Rechtsgeschichte mobilisieren.[86] Denn Kulturgeschichte und Translationswissenschaften beschäftigen sich bereits seit langer Zeit mit der Analyse der Phänomene kultureller Translation,[87] und für Teile der Wissenschaftsgeschichte waren Phänomene der Translation von Wissen sogar ein wesentlicher Anstoß für die Zuwendung zur Wissensgeschichte.[88]

Auch für die Rechtsvergleichung, Rechtswissenschaft und die Rechtsgeschichte ist diese Perspektive inzwischen als fruchtbar identifiziert und erprobt worden,[89] zumal sie auf zahlreiche hoch-

85 Vgl. zu den Schutzregimen Meccarelli (2016); in Lateinamerika beispielsweise dürfte die Etablierung eines auf Rechtsgleichheit gerichteten Rechtssystems zum Teil sogar eine deutliche Schlechterstellung indigener Völker nach sich gezogen haben, vgl. Duve (2018b).

86 Vgl. den Überblick in Duve (2012).

87 Vgl. z. B. Burke (2007); Burke (2009a); Burke (2009b); Burke (2012).

88 Müller-Wille u. a. (2017) 10; Secord (2004); Renn / Hyman (2012); Daston (2017).

89 Vgl. z. B. Langer (2004); auch White (1985); White (1990).

sensible Beschreibungen von Regelungstraditionen aufbauen kann, die vielleicht nicht unter Nutzung der Terminologie, aber der Sache nach genau diese kulturellen Übersetzungsprozesse quellennah anhand des Juristenrechts nachzeichnen. Viele Studien zeigen detailliert die Lokalisierungs- und Regionalisierungsphänomene, also die Konstitution von Bedeutung durch die Auswahl und Übersetzung derjenigen Autoritäten, die man für die Lösung des konkreten Falls oder der anstehenden Frage für einschlägig hielt.[90]

Besonders deutlich wird dies in der europäischen Frühen Neuzeit und in deren Kolonialsphären, da der materiale Rechtsbegriff dieser Jurisdiktionskultur eine solche Konkretisierung geradezu forderte, entsprechende Instrumente und Lehren bereitstellte und kulturelle Praktiken hervorgebracht hatte, durch die das *arbitrium* fast grenzenlos werden konnte.[91] In den Kolonien werden deswegen auch in diesem Fall manche Charakteristika der frühneuzeitlichen europäischen Rechtsgeschichte gleichsam wie unter dem Vergrößerungsglas sichtbar, freilich zugleich immer auch mit der Gefahr der Verzerrung des Bildes. Auch für die konstitutive Phase von Nationalstaatlichkeit in Lateinamerika oder Asien sind inzwischen wichtige Einzelstudien entstanden, die diese Prozesse der Normerzeugung durch Konkretisierung normativer Angebote unter lokalen Umständen deutlich machen und diese Phänomene als Translationsprozesse aufarbeiten.[92]

Ein besonderer Wert der Perspektive der Translation liegt darin, dass sie geradezu dazu zwingt, nicht von einer Wandlung »von etwas« und damit potentiell essentialistisch, sondern prozedural von einer Kette immer neuer Akte der Erzeugung von Normativitätswissen auszugehen. Da in diesem Akt der Erzeugung von Normativitätswissen selbst das gesamte Normativitätswissen aktiviert wird, weil die Praktiken der Normerzeugung ihrerseits zum Normativitätswissen gehören, handelt es sich um einen Prozess, der performativ ist: In dem Akt der Erzeugung von Normativitätswissen verändert sich dieses selbst.

2. *Theorie und Praxis*

Rechtsgeschichte als Translation von Normativitätswissen zu schreiben, kann deswegen auch dabei helfen, die immer wieder zu findende, reduktionistische und dysfunktionale Entgegensetzung von »Theorie« und »Praxis« zu überwinden.[93] Denn nicht selten wird Rechtsgeschichte vor allem als Geschichte der »Theorie« angesehen, also als Geschichte von Ideen, Normen, Institutionen, Dogmen, Wissenschaft – eine Geschichte, deren Quellen vor allem Bücher und staatliches Recht seien. Gegen diese Form der Rechtsgeschichte gerichtet, zum Teil auch aus ihr heraus, hatte sich vor inzwischen fast einem halben Jahrhundert eine Sozialgeschichte von Recht etabliert, die auf sog. Dokumente der Praxis blickte, oft auf Justizakten, und die eine ganz andere Welt offenzulegen schien. So kam es dazu, dass man immer wieder lesen kann, »Theorie« und »Praxis« seien zwei voneinander zu trennende Ebenen; auch trifft man vielfach auf die Unterscheidung zwischen einer »Geschichte der Praxis«, einer »Normengeschichte« und einer »Wissenschaftsgeschichte«. Diese traditionelle, habituell und institutionell gestützte Trennung, vor allem aber das Ausspielen der einen gegen die andere, ist in der rechtshistorischen Forschung mit recht pragmatischen Argumenten kritisiert worden.[94] Tatsächlich ist diese Unter-

90 Vgl. ausführlicher Duve (2020a). Dort unterscheide ich zwei Stufen der Translation: eine erste, in der normative Information zu Normativitätswissen wird, indem sie auf ein Handlungsfeld bezogen wird; eine zweite, in der dieses allgemeine Normativitätswissen für die Lösung eines konkreten Falles erneut in die Realität übersetzt, also konkretisiert wird.

91 Duve (2007); Mejía Quiroga (i. E.).

92 Dias Paes (2021); Sirotti (i. E.); Li (2019).

93 Etwas ausführlicher dazu bei Duve (2020b).

94 Oestmann (2014) und die anschließende Diskussion in *Rechtsgeschichte – Legal History* 23 (2015), http://rg.rg.mpg.de/de/Rg23/Debatte.

scheidung auch nur forschungsgeschichtlich zu erklären und führt, näher besehen, in zahlreiche Widersprüche hinein.[95]

Die Kritik ließe sich freilich noch viel grundlegender formulieren. Denn nur eine Rekonstruktion der zeitgenössischen politischen Sprache verleiht einen Zugang zur Bedeutung von Praxis – und diese politische Sprache lässt sich nun einmal in vielen Texten konzentriert finden, die zur sog. »Theorie« gezählt werden, oft aber eben aus der »Praxis« stammen. Grotius, um nur ein berühmtes Beispiel zu nennen, schrieb gerade als Praktiker.[96] Vor allem aber haben die performativen, kontextuellen, post-positivistischen Rechtstheorien, die Recht als soziale und kulturelle Praxis verstehen, mit überzeugenden Gründen auf die Unmöglichkeit der Trennung von »Theorie« und »Praxis« aufmerksam gemacht. Es gibt kaum eine Theorie ohne Praxis und keine Praxis ohne ein Mindestmaß an »Theorie«. Fasst man diese Überlegungen zusammen, so besteht das Geschäft der Rechtsgeschichte in nichts anderem als in der Interpretation verschiedener Praxisformen, allesamt Teile eines großen historischen Sprachspiels, das es zu entschlüsseln gilt[97] – und für dessen Entschlüsselung man auf unterschiedliche Medien zurückgreifen muss. »Theorie« und »Praxis« lassen sich also nicht trennen, und auch die häufig zitierte Unterscheidung von ›*law in the books*‹ und ›*law in action*‹[98] und der Verweis, Ersteres sei bloße Theorie, werden dieser unauflöslichen Verflochtenheit beider Dimensionen nicht gerecht.[99] Beide als Teil von Normativitätswissen anzusehen hilft dabei, diese Dichotomien zu überwinden.

3. Glokalisierungen

Eine wissensgeschichtliche Perspektive, die Normerzeugung als Translation von Normativitätswissen ansieht, kann schließlich dabei helfen, ethnozentrische oder diffusionistische Perspektiven zu überwinden, wenn es um die Reproduktion von Recht im Raum geht. Sie bietet damit eine geradezu unentbehrliche Voraussetzung für jede Form von Globalrechtsgeschichte.[100]

Das gilt zunächst im Blick auf die Begriffsbildung. Die große Erzählung der Rechtsgeschichte arbeitet mit dem, was man in Anlehnung an die anthropologische Forschung »emische Begriffe« nennen kann, also Begriffe, die aus der und für die Teilnehmerperspektive formuliert sind. Diese »Eigenbegrifflichkeit«[101] ist deswegen für die beobachtete Gemeinschaft genauso wichtig und aussagekräftig, wie sie für einen Vergleich ungeeignet ist. Sie hilft gerade nicht, andere Formen der Normerzeugung zu analysieren. Dafür bedarf es einer Sprache, die möglichst wenig voraussetzungsvoll ist, deren Begriffe also keine impliziten Präferenzen für bestimmte kulturelle Systeme und damit verbundene Kategorien wie »Recht« und »Nicht-Recht« oder für Dynamiken wie die am westlichen Selbstbild konzipierte »Modernisierung« enthalten. Sie müssen vielmehr offen für unterschiedliche kulturelle Systeme sein – wie es

95 Denn rechtshistorische »Normengeschichte« greift natürlich auch auf »Praxis« zu, wenn sie richtigerweise die Herausbildung von Normen nicht mehr – wie lange Zeit üblich – einfach anhand von Gesetzen oder anderen Normsetzungen rekonstruiert, sondern z. B. auch aus der Justizpraxis. Auch »Wissenschaftsgeschichte« ist sinnvollerweise nur als Geschichte institutionalisierter Praxis zu betreiben, jedenfalls dann, wenn man diese nicht in gänzlicher Ablösung von heutigen wissenschaftsgeschichtlichen Standards als weitgehend kontextfreie Geschichte einer Kette von Ideen großer Juristen schreiben will. Die sog. »Praxisgeschichte« schließlich ist so, wie sie betrieben wird, nicht eine Geschichte juridischer Praktiken, sondern mindestens auch eine richtigerweise aus der Praxis geschriebene Geschichte von Gerichtsverfassung und Prozessrecht – man könnte jedenfalls diesen Teil damit durchaus der »Normengeschichte« zuschlagen. Geht es ihr dagegen um die Rekonstruktion von Alltagsleben, Geschlechterrollen, Ehrkonflikten etc., so dürfte es sich um Sozial-, Geschlechter-, Kulturgeschichte etc. handeln. Denn nicht die Quelle, sondern das Erkenntnisinteresse definiert die Zuordnung.

96 Vgl. z. B. Van Ittersum (2006).

97 Vgl. dazu Stolleis (2008a).

98 Vgl. zu den verkürzten Lesarten Halpérin (2011) 45.

99 Keine wirkliche Lösung sind auch Neuschöpfungen wie »*jurispractice*«, ein Begriff, der zur Beschreibung administrativer Praxis dienen soll, von Lauren Benton definiert als »patterns of strategic behavior that is simultaneously cultural and, through its repetition, institutional in effect.« Denn auch wenn damit ein weiter, auf normengenerierende Praxis gerichteter Begriff verwandt wird, wird eine klare Grenzlinie zu dem Normativitätswissen gezogen, in dessen Horizont gehandelt wird: »norms make spectacularly bad objects of analysis«, betont Benton, und »historians have dull tools with which to uncover supposedly determinative ›normative structures‹ operating in deep background to legal behavior and utterances.« Benton (2018) 276, 275, 280.

100 Ausführlicher dazu Duve (2020b).

101 Landsberger (1926) 355.

die Vorstellung einer Translation von Normativitätswissen ist.

Rechtsgeschichte als Geschichte der Translation von Normativitätswissen zu betreiben hat schließlich auch einen heuristischen, wenn man so will, geradezu disziplinierenden und damit epistemische Risiken vermindernden Effekt.[102] Denn die Konzentration auf die Prozesse der Wissenserzeugung führt zwangsläufig zu einer Priorisierung des Lokalen und damit einer Rekonstruktion auch transnationaler oder globaler Geschichte aus der lokalen Perspektive. Denn mit der Rekonstruktion von Translationsprozessen werden zwangsläufig lokale Quellenbestände zum privilegierten Objekt und zur bevorzugten Methode; es geht ja gerade um eine Rekonstruktion der Bedingungen und Voraussetzungen des Handelns, hier also der Translationsleistung. Natürlich erledigen sich damit keineswegs die ebenfalls seit langem und in jüngerer Zeit wieder intensiver diskutierten Fragen nach dem Verhältnis von Global- und Lokalgeschichte. Doch diese Perspektiven ergänzen einander, vielleicht sogar derart, dass man mit Recht behaupten kann, dass gute Globalgeschichte nur gute Lokalgeschichte sein kann – und umgekehrt.[103] Eine Globalrechtsgeschichte wird damit zu einer Geschichte von unzähligen Translationsvorgängen von Normativitätswissen an unterschiedlichen Orten. Sie kann zu dem Bild einer Glokalisierung von Wissen in Bezug auf Normativität für bestimmte Handlungsfelder – also zum Beispiel Dependenzregime, Diversitätsregime, Eigentumsregime – und in Bezug auf die Herstellung von Normativitätswissen selbst führen. Das dürfte helfen, Ähnlichkeit und Differenz, die Dynamik dieser Prozesse der Herausbildung von Regimen, letztlich auch das Vorhandensein einer polysemen Sprache des Rechts auf internationaler Ebene zu erklären.

VII. Ausblick

Was ergibt sich aus dem Rückblick, der Historisierung der Forschungstradition, der Defizitanalyse und den Schlaglichtern auf die Möglichkeit, Rechtsgeschichte als Geschichte der Translation von Normativitätswissen zu schreiben?

Das Hauptanliegen dieses Beitrags bestand darin, auf das Potential einer wissensgeschichtlichen Perspektive auf die Rechtsgeschichte hinzuweisen und einige Grundbegriffe dafür vorzustellen. Eine Motivation für diesen Vorschlag lag darin, dass die *toolbox* der deutschen Variante der europäischen Rechtsgeschichte an ihre Grenzen gerät, wenn sie globalhistorische Perspektiven entwickeln möchte. Die Überlegungen reichen allerdings weiter und schlagen letztlich eine Methodik der Rechtsgeschichte vor, die nicht allein für die Globalrechtsgeschichte, sondern für die Rechtsgeschichte insgesamt vielversprechend erscheint; der Beitrag ist hoffentlich also ein Beispiel für die häufig postulierte produktive Irritation von Nationalgeschichten durch Globalgeschichte.

Das dürfte nach aller Erfahrung auf einige Skepsis in der Zunft stoßen. Doch der Versuch erscheint vielleicht etwas weniger vermessen, wenn man auf die Erfahrungen der Wissenschaftsgeschichte, teilweise auch der Kunstgeschichte, blickt, die sich in einer breiten Diskussion ähnliche Fragen nach ihren wissenschaftlichen Konzepten und Praktiken stellen.[104] Vor allem die Wissenschaftsgeschichte befindet sich bereits seit gut zwei Jahrzehnten in einem bemerkenswerten Prozess der Öffnung und Erweiterung, dessen Ausgangslage erstaunliche Parallelen zur Situation der Rechtsgeschichte aufweist. So lag ein wesentliches Anliegen der Zuwendung der Wissenschaftsgeschichte zum Wissen darin, den Wissenschaftsbegriff zu de-europäisieren und damit die modernisierungstheoretische Orientierung der klassischen Wissenschaftsgeschichte zu überwinden; ähnliches

102 Ausführlicher dazu bereits Duve (2012); Duve (2020b).

103 So mit interessanten Folgeüberlegungen Wenzlhuemer (2017).

104 Überblicke bei Renn (2015); Daston (2017), Müller-Wille u. a. (2017). Zur verwandten Methodenproblematik in der Kunstgeschichte aufschlussreich z. B. Joyeux-Prunel (2019).

gilt für die Kunstgeschichte und deren *global turn*. Im Zuge dessen wurde die Bedeutung praktischen Wissens betont und vor allem in der Wissenschaftsgeschichte nach einer Terminologie gesucht, mit der die Prozesse der dezentralen Wissensproduktion, des Transfers und der Translation beschrieben und analysiert werden können. Der Anstoß zu dieser Neuorientierung kam nicht zuletzt durch die Rezeption praxeologischer Theorieangebote, die Renaissance der Studien Ludwik Flecks und Hans-Jörg Rheinbergers Überlegungen zur Historischen Epistemologie.[105] In ähnlicher Weise sind in den letzten beiden Jahrzehnten auch jenseits der Wissenschaftsgeschichte eine Reihe von wichtigen Überlegungen vorgelegt und praktisch umgesetzt worden, in denen »Wissen« zum Teil sogar als neuer Bezugsrahmen historischer Forschung bezeichnet wurde[106] – jenseits älterer Debatten um die »Wissensgesellschaft«, um die historische Bedeutung von Wissen etwa für Imperiengeschichte oder die Geschichte der Staatsbildung, die natürlich weiterhin relevant sind.[107]

Der Rückblick auf die Forschungstradition und deren Grenzen sollte deutlich machen, dass auch die Rechtsgeschichte von einer solchen kritischen Reflexion und Revision ihrer Grundbegriffe profitieren könnte. Denn sie folgt mit ihren wissenschaftlichen Traditionen und Praktiken einem Paradigma des Juristenrechts, das zutiefst voraussetzungsreich ist, der Welt der Nationalstaatlichkeit entstammt und in eine teleologische Struktur eingebunden ist. In ihre Grundbegriffe und Praktiken sind Rechtsvorstellungen und Kampfbegriffe des 19. und beginnenden 20. Jahrhunderts wie die des »Juristenrechts« eincodiert, und viele Ergebnisse rechtshistorischer Forschung lassen sich in die auf dieser Grundlage geschriebene große Erzählung nicht einbinden. Auch die Norm- und Praxisbegriffe werden in ihr in geradezu erstaunlicher Weise wenig reflektiert. Rechtshistorische Forschung muss sich deswegen kultur-, sozialwissenschaftlich und rechtstheoretisch informieren, ihre eigenen Traditionen kritisch reflektieren und auf dieser Grundlage ihre eigenen Begriffe bilden. Die inzwischen fundamentale, von ganz unterschiedlicher Seite stammende Kritik an den die große Erzählung auch der Rechtsgeschichte tragenden »gefährlichen Prozessbegriffen«[108] macht diese Notwendigkeit offensichtlich.

Eine wissensgeschichtliche Perspektive auf die Rechtsgeschichte könnte nicht nur dazu beitragen, dass wir unsere Tradition gewissermaßen »exotisieren«, sondern auch einen neuen intellektuellen Bezugsrahmen bereitstellen und damit der gegenwärtigen Tendenz zur Zerstreuung der Forschung in eine Fülle unverbunden nebeneinanderstehender und zum Teil inkommensurabler Einzelbeobachtungen entgegenwirken.[109] Diese Perspektive ist natürlich nicht so eingängig wie die üblichen großen Linien und Erzählungen es sind, an deren Endpunkt unser selbstgewisses Heute steht. Sie würde aber ein komplexeres und vielleicht sogar ganz anderes Bild der Vergangenheit unserer normativen Ordnungen erkennen lassen. Vor allem würde sie nicht mehr eine Vorgeschichte nationalstaatlicher Ordnungen des 19. und 20. Jahrhunderts erzählen, also eine Vorgeschichte des Rechts der Moderne – und damit wahrscheinlich eine Geschichte des Gestern.[110] Sie würde Rechtsgeschichte vielmehr gesprächsfähig machen[111] für

105 Fleck (2011), mit einer Einführung auch zur Renaissance seiner Arbeit; eine neuere Zusammenfassung auch der eigenen Position und der Debatte zur Historischen Epistemologie in Rheinberger (2017).

106 Sarasin (2011); Landwehr (2007); Füssel (2019).

107 Vgl. auch Jordheim / Shaw (2020) und die Beiträge in dem von ihnen herausgegebenen *special issue*.

108 Joas (2017).

109 Zur »Exotisierung« als Strategie vgl. bereits Koskenniemi (2011); zu der auch durch Internationalisierung und Interdisziplinarität verursachten Zerstreuung der Forschung in unverbundene Einzelbeobachtungen vgl. Duve (2018a).

110 Vgl. zu den nachmodernen, postmodernen etc. Rechtstheorien Buckel u. a. (Hg.) (2020), insbesondere zu Neuem Rechtsempirismus, Nachpositivistischem Rechtsdenken mit weiteren Nachweisen; die Diagnose eines grundlegenden Bruchs auch z. B. bei Douglas-Scott (2013); Auer (2018b).

111 Insbesondere mit den inzwischen recht zahlreichen Ansätzen, Rechtswissenschaft kulturwissenschaftlich, rechtssoziologisch und rechtstheoretisch gerade auch als *modus* der Wissensproduktion zu verstehen, wie es auf der in Anm. 1 genannten Tagung »Wissen und Recht« geschah und z. B. von Schuppert (2019b), Boulanger (2019), letztlich aber wohl auch von Möllers (2015), Auer (2018b) und anderen vorgeschlagen wird.

das Nachdenken über die »postmoderne Kondition des Rechts«,[112] an der sich die Rechtswissenschaft heute abarbeitet und in der sich durch die Digitalisierung unserer Kultur gerade das dramatisch verändert, was in diesem Beitrag als »Normativitätserzeugungswissen« bezeichnet worden ist.

■

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112 So Auer (2018a), 135 ff., die dies als zentrales Thema der Rechtstheorie der ›Berliner Republik‹ ansieht.

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Wolfram Brandes

Byzantinische Rechtsgeschichte in Frankfurt – eine Bilanz

Von 1974 bis zum 31.12.2020, also gut 46 Jahre lang, wurde in Frankfurt am Main die Geschichte des byzantinischen Rechts und insbesondere seiner Quellen intensiv und sehr ertragreich erforscht. Der folgende Artikel versucht in Form einer knappen Bilanz, die institutionellen Bedingungen, die handelnden Personen sowie die Ziele und Schwerpunkte der fast ein halbes Jahrhundert währenden Aktivitäten zu umreißen. Da die Forschungsergebnisse in eine Flut von Veröffentlichungen mündeten, nehmen die zitierte Literatur und der bibliographische Anhang einen gewichtigen Teil der Darstellung ein.

Dieter Simon, Jura-Professor an der Goethe-Universität (Lehrstuhl Zivilrecht und Römisches Recht, 1968–1991), hatte in der Mitte der 1970er Jahre erfolgreich bei der Deutschen Forschungsgemeinschaft ein Projekt zur »Edition und Bearbeitung byzantinischer Rechtsquellen« eingeworben. Damit knüpfte er an die einschlägigen (und bis heute maßstabsetzenden) Forschungen und Editionen von Karl Eduard Zachariae von Lingenthal (1812–1894)[1] an. Bis heute sind Zachariaes »Geschichte des griechisch-römischen Rechts«,[2] seine umfassende Edition der wichtigsten byzantinischen Rechtstexte (*Ius Graeco-Romanum*, I–VI)[3] sowie seine zahlreichen gelehrten Abhandlungen[4] für die Disziplin unersetzliche Publikationen. Das Frankfurter Forschungsprojekt sah sich stets in seiner Tradition stehend.[5]

Als Lehrstuhlinhaber an der Universität Frankfurt gründete Dieter Simon 1976 die Reihe *Forschungen zur byzantinischen Rechtsgeschichte*, in der bis zum Ende des Projektes am 31.12.2020 fast alle Forschungsergebnisse publiziert wurden. Insbesondere die Unterreihe *Fontes Minores* (bis 2021 erschienen 13 Bände) spielte in der internationalen Forschung eine herausragende Rolle.[6] Sie erschienen zunächst im Klostermann Verlag, ab Bd. VIII (1982) bei der von D. Simon mitbegründeten Löwenklau-Gesellschaft.[7] Nachdem Simon (im Jahre 1980, bis 2003) Direktor des Max-Planck-Instituts für europäische Rechtsgeschichte (jetzt: Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie) geworden war, konnte das DFG-Projekt »Byzantinisches Recht« in dieses Institut übersiedeln, das es bis zuletzt beherbergte.

Simon wurde 1989 zum Vorsitzenden des Wissenschaftsrats der Bundesrepublik berufen. In seine Amtszeit fielen der Untergang der DDR und die Mammutaufgabe, deren Wissenschaftssystem mit all seinen Problemen in die Wissenschaftslandschaft der Bundesrepublik zu überführen.[8] Deshalb verlängerte die Bundesregierung Simons Amtszeit bis 1992. Im Jahre 1995 wurde er darüber hinaus zum Präsidenten der drei Jahre zuvor neu gebildeten Berlin-Brandenburgischen Akademie der Wissenschaften gewählt (bis 2005). Mithin kam er in dieser Zeit kaum dazu, sich mit byzantinischer Rechtsgeschichte zu befassen. Ab 1996 war er außerdem als Honorarprofessor an der Humboldt-Universität zu Berlin tätig.

Im Jahre 1990 wurde das Projekt als Arbeitsstelle (»Edition und Bearbeitung byzantinischer Rechtsquellen«) von der Akademie der Wissenschaften zu Göttingen mit Sitz im erwähnten Frankfurter Max-Planck-Institut übernommen. Dies erwies sich als ein Glücksfall im doppelten Sinne: Denn einerseits profitierte die Arbeitsstelle in erheblichem Maße von den Möglichkeiten eines Max-Planck-Instituts, und auf der anderen Seite garantierte die Göttinger Akademie die Finanzierung.

1 Siehe Simon (1988, 2021b); Fögen (1990) (jeweils mit der relevanten älteren Literatur); der ihm gewidmete Artikel in der Wikipedia ist, um es freundlich auszudrücken, defizitär.
2 Zachariae von Lingenthal (1892, 1955).
3 Zachariae, IGR (1856/1870); Nachdruck: I. und P. Zepos, JGR (1931, 1962).
4 Zachariae (1973).
5 Siehe z. B. auch den auf Initiative von M. Th. Fögen nachgedruckten Band: Zachariä's Reise in den Orient in den Jahren 1837 und 1838 (photomechanischer Nachdruck der Ausgabe Heidelberg 1840), Frankfurt 1985 sowie die in Anm. 1 genannten Aufsätze.
6 Siehe unten S. 83–89 den bibliographischen Überblick.
7 Gegründet als gemeinnütziger Verein, der als Verlag fungierte.
8 Dazu etwa Kocka / Mayntz (1998); Simon (1998).

Von 1990 bis 2006 amtierte Simon als Arbeitsstellenleiter. In diesen Jahren war er in erster Linie mit seinen verschiedenen Funktionen – in Berlin – befasst, so dass er sich nur am Rande mit Fragen der byzantinischen Rechtsquellen beschäftigen konnte. 2006 übernahm die Funktion der Arbeitsstellenleiterin deshalb Marie Theres Fögen, die ursprünglich seit den 1970er Jahren am Frankfurter Projekt beteiligt war und 1995 als Professorin für Römisches Recht, Privatrecht und Rechtsvergleichung an die Universität Zürich berufen worden war sowie seit 2001 zudem als Direktorin am Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt amtierte.[9] Nach ihrem Tod (2008) bekleidete Eleftheria Papagianni diese Position (bis 2012).[10]

Seit 2012 war dann erneut Dieter Simon Arbeitsstellenleiter (bis 2017). Nunmehr hatte er die Zeit, um sich wieder der byzantinischen Rechtsgeschichte zuwenden zu können. Er bewirkte eine (auch bibliographisch) sichtbare Intensivierung der Forschungstätigkeit. 2017 wurde er Vorsitzender der wissenschaftlichen Kommission der Akademie der Wissenschaften zu Göttingen, die die Arbeit der Frankfurter Arbeitsstelle leitete. Deshalb übernahm Bernard Stolte (Universität Groningen),[11] ein bewährter Freund und Kollege der Frankfurter Arbeitsstelle, für die Jahre 2017–2019 deren Leitung. In den letzten beiden Jahren (2019–2020) hatte Wolfram Brandes diesen Posten inne. Ihm oblag die »Abwicklung« – eine nicht sehr angenehme Tätigkeit.

Die primären Ziele der Tätigkeit der Arbeitsstelle bestanden vor allem in (1) der Bestandsaufnahme der Überlieferung des byzantinischen Rechts, (2) der kritischen Edition von einschlägigen Texten (Neueditionen oder Editionen von bisher ungenügend edierten Texten), (3) der Erforschung und Beschreibung der Literatur- und Überlieferungsgeschichte des byzantinischen Rechts, (4) der Erstellung von Hilfsmitteln (Repertorien zur Erschließung des handschriftlichen Bestands), (5) der Durchführung von materiell orientierten Studien zum byzantinischen Recht (inkl. Verwaltungsrecht und praktischer Rechtsanwendung). An diesen Vorgaben orientierten sich stets die Aktivitäten der Frankfurter Arbeitsstelle.

Die Publikation der meisten Arbeitsergebnisse (Editionen, Einzeluntersuchungen u. a.) erfolgte in den *Forschungen zur byzantinischen Rechtsgeschichte* (bis 2018 insgesamt 36 Bände), wobei insbesondere die Unterreihe der *Fontes Minores* (bis 2021: 13 Bände) hervorzuheben ist – nicht zuletzt wegen ihrer großen internationalen Resonanz.

Durch die Übersetzung von Spyros Troianos' fundamentalem Werk über die »Quellen des byzantinischen Rechts« (2017)[12] rüstete sich Dieter Simon, der, wie gesagt, 2012 erneut die direkte Leitung der Frankfurter Arbeitsstelle übernommen hatte, für die Rückkehr zur byzantinischen Rechtsgeschichte. Mehr als deutlich zeigt sich das in seiner intensiven Arbeit an der (zusammen mit Roderich Reinsch besorgten) Neuedition der *Peira* des Eustathios Rhomaios, die kurz vor der Publikation steht,[13] sowie an einer Reihe von aktuellen Aufsätzen.[14]

Die jahrzehntelange Arbeit der Frankfurter Arbeitsstelle »Edition und Bearbeitung byzantinischer Rechtsquellen« konzentrierte sich auf die im Folgenden genannten Komplexe. Neben diesen Schwerpunkten publizierten die Mitarbeiter natürlich auch zu einer Vielzahl weiterer Themen, die hier nicht alle erwähnt werden können.[15]

9 Siehe unten S. 84 eine Übersicht ihrer Publikationen, die aus dieser Tätigkeit resultierten. Im Herbst 2007 kündigte sie ihren Rücktritt als Direktorin des Max-Planck-Instituts aus Gesundheitsgründen an. Ihre Professur in Zürich behielt Marie Theres Fögen bis zu ihrem Tod im Januar 2008 bei.

10 Eleftheria Papagianni (Universität Athen), Schülerin von Spyros Troianos, arbeitete engstens mit dem Frankfurter Projekt seit den 1970er Jahren zusammen und weilte zeitweise alljährlich zu Studienaufenthalten in Frankfurt. Siehe auch Papagianni / Troianos (1998); Papagianni (2005); Papagianni / Troianos / Burgmann / Maksimović (2019).

11 Bernard Stolte (Universität Groningen) ist einer der ältesten Kooperationspartner des Frankfurter Projektes. Siehe etwa FM VIII (1990); Stolte (1990); Stolte (2021).

12 Troianos 2017. Übersetzt wurde die 3. Auflage dieses Werkes, das 2011 in Athen erschien (Οι πηγές του Βυζαντινού Δικαίου). Die 1. Auflage erschien 1986.

13 Sie wird in den *Forschungen zur byzantinischen Rechtsgeschichte. Neue Folge* (bei De Gruyter) erscheinen.

14 Simon (2021c,e) und Simon / Neye (2021).

15 Die Publikationen von Burgmann sind in Burgmann (2015) und Burgmann (2018a und 2018b), die von Schminck in Schminck (2018), die von Fögen sind im bibliographischen Anhang aufgelistet (siehe S. 84), wo sich auch die einschlägigen Arbeiten von Simon (siehe S. 83–84) finden. Zu den Arbeiten von Brandes siehe unten S. 79, 86–88.

Repertorium der Handschriften des byzantinischen Rechts

Sofort nach dem Beginn der Arbeiten in den 70er Jahren des 20. Jahrhunderts wurde intensiv begonnen, eine umfassende Sammlung der relevanten griechischen Handschriften (in Form von Mikrofilmen) anzulegen. Dies war eine ausgesprochen kluge Entscheidung, denn angesichts der Preise, die die entsprechenden Bibliotheken heute verlangen, wäre das Anlegen einer derartigen Sammlung allein aus finanziellen Gründen unmöglich. Ziel war Vollständigkeit, was zu geschätzten 95% auch erreicht wurde. Nahezu alle wichtigen Handschriften mit byzantinischen Rechtstexten standen nun zur Auswertung bereit. Neben den griechischen Handschriften wurde auch eine größere Anzahl von (christlich) arabischen und armenischen Handschriften in verfilmter Form angeschafft. Alle diese Handschriften werden in einem klimatisierten Raum der Bibliothek des Max-Planck-Instituts aufbewahrt und stehen auch in Zukunft der Forschung zur Verfügung.

Schon früh wurde beschlossen, diese einzigartigen Handschriftenbestände in einem umfassenden Repertorium zu erschließen – nicht nur als Grundlage der eigenen Arbeiten, sondern auch als ein essentielles Hilfsmittel für die internationale Forschung. Dabei handelte es sich um eine sehr aufwendige Arbeit, nicht zuletzt deshalb, weil viele dieser Handschriften bisher nur äußerst ungenügend beschrieben und analysiert wurden. Der erste Band des Repertoriums der Handschriften des byzantinischen Rechts, das primär die Handschriften des weltlichen Rechts behandelte, erschien 1995.[16] Da in den Handschriften sehr häufig keine klare Trennung zwischen weltlichem und kirchlichem Recht vorgenommen wurde, enthält bereits dieser Band auch zahlreiche Angaben zu Texten des Kirchenrechts. Von Anfang an wurden (soweit möglich) die Rechtstexte erfasst, die bis zum Jahre 1204 entstanden. Dies hatte in erster Linie pragmatische Gründe. Trotzdem wurde auch über Rechtsbücher späterer Zeiten (z. B. die *Hexabilos* des Konstantinos Harmenopoulos[17]) geforscht.

Nach Forcierung der Arbeiten am Repertorium konnte der zweite Band (in zwei Teilen) im Jahre 2010 und 2017 erscheinen.[18] Damit war eines der Hauptziele der Tätigkeit der Frankfurter Arbeitsstelle erreicht worden.

Die *Peira* des Eustathios Rhomaios

Die aus der Zeit um das Jahr 1000 stammende Sammlung namens *Peira*[19] von Entscheidungen des kaiserlichen Richters Eustathios Rhomaios,[20] zusammengestellt von einem *syntaktes* genannten Kompilator, ist eine einzigartige (und auch die einzige) außerordentlich bedeutende Quelle für die byzantinische Rechtspraxis. Schon sehr früh hatte sich Dieter Simon damit befasst.[21] Dieser Text, 1856 erstmalig ediert von Zachariae von Lingenthal (ohne Autopsie der einzigen Handschrift, dem Cod. Laur. 80.6, f. 481r–636v – siehe Repertorium [I] Nr. 68) sowie das weitere Schrifttum des Eustathios Rhomaios[22] waren all die Jahre hindurch immer wieder Gegenstand der Arbeit der Frankfurter Forschungsstelle. Bereits 1979 edierte Schminck zwei eherechtliche Entscheidungen des Eustathios,[23] 1993 edierte Ludwig Burgmann den *tractatus de creditis et de teste uno*,[24] der ebenfalls Eustathios zugesprochen wird. Roderich Reinsch, der einige Jahre für die Frankfurter Forschungsstelle arbeitete (bis er 1986 einen Ruf an die Ruhr-Universität Bochum erhielt) gab 1986 einen Text des Eustathios über das *Hobolon* heraus.[25] Gäste des Projektes (wie Nikolas Oikonomides oder Helga Köpstein) wie auch Mitarbeiter trugen durch

16 Repertorium I (1995).
17 Siehe S. 77–78.
18 Repertorium II–III (2010, 2017).
19 Zur *Peira* siehe Troianos (2017) bes. 239–243; Simon, in: ODB 1617; Simon (2021e); Simon (2018), jeweils mit der älteren Literatur.
20 Der Beiname »Rhomaios« weist ihn als Angehörigen der Familie *Rhomaios* aus, die seit dem 10. Jh. vielfältig bezeugt ist und aus der zahlreiche Juristen (Richter) hervorgingen. Siehe zuletzt Brandes (im Druck).
21 Simon (1973).
22 Die Eustathios zugeschriebenen Texte bei Simon (2018) 483f. mit Anm. 4 verzeichnet.
23 Schminck (1979) 252–266 = Schminck (2018) 138–147, sowie Schminck (1979) 224–240 = Schminck (2018) 110–126; ein weiteres eherechtliches *hypomnema* des Eustathios bei Rh.-P. V, 341–353.
24 Burgmann (1993) 48–67 = Burgmann (2015) Nr. VII, 222–241.
25 Reinsch (1986) 246.

diverse Untersuchungen zur Erforschung der *Peira* bei.[26] Hervorzuheben sind eindringliche Untersuchungen von Ludwig Burgmann.[27]

Nach all diesen Bemühungen wird die Edition (nebst Übersetzung und ausführlichem Kommentar) der *Peira*, nunmehr basierend auf der Florentiner Handschrift,[28] von Roderich Reinsch und Dieter Simon neue Maßstäbe für die Erforschung der byzantinischen Rechtsgeschichte setzen. Sie wird noch in diesem Jahr (2021), spätestens aber 2022 in den *Forschungen zur byzantinischen Rechtsgeschichte. Neue Folge* (wohl als Band IV) erscheinen.

Edition und Erforschung der byzantinischen Rechtslexika

Die byzantinischen Juristen seit der sog. Makedonenzeit, als die (griechischen) Texte der Antecessoren des 6. Jahrhunderts rezipiert wurden, fanden in diesen griechischen Übersetzungen (hervorgegangen aus dem Rechtsunterricht) des justinianischen Rechts viele lateinische *termini technici*, die der Erklärung bedurften.[29] Aus diesem Grunde fertigte man Lexika an, die sich regelmäßig in den juristischen Handschriften finden.[30] Seit den 1970er Jahren befasste sich Ludwig Burgmann mit diesen seit Jahrhunderten vernachlässigten Texten. Bereits 1977 behandelte er sie in einem umfassenden Überblick und edierte ein erstes Lexikon (aus dem Codex Scor. 173 (S) L II und L III).[31] Dem folgte die Edition des sog. Lexikon ἄδετ.[32]

Eine Zusammenfassung dieser Studien, nunmehr in engster Kooperation mit den Groninger Kollegen (insbesondere Roos Meijering und Bernard Stolte) erschien 1990 (als Band 17 der *Forschungen zur byzantinischen Rechtsgeschichte = Fontes Minores* VIII). Hier wurden weitere Rechtslexika ediert und einschlägige Untersuchungen vorgelegt.[33]

Auch in den folgenden Jahren wurden in *Fontes Minores* Editionen derartiger Lexika veröffentlicht – ein Umstand, der reflektiert, wie groß die internationale Beachtung dieser Forschungen und Editionen ist.[34]

Eherecht und Familiengut

Die eherechtliche Literatur der Byzantiner ist erstaunlich umfangreich und in den juristischen Handschriften außerordentlich oft vertreten.[35] Mitarbeiter und Gäste der Arbeitsstellen edierten eine größere Anzahl dieser Texte (stets mit eingehender Analyse).[36]

Besondere Aufmerksamkeit erhielten die Eherechtsnovellen des 8. Jahrhunderts[37] oder das Ehegüterrecht in den Urteilen des Eustathios Rhomaios (in der *Peira*).[38] Das Eherecht (sowie sog. Ehehindernisse) im 11./12. Jahrhundert war ebenfalls mehrfach Gegenstand verschiedener Abhandlungen.[39]

Im Juli 1989 wurde zu dieser Thematik eine Tagung am Historischen Kolleg in München ver-

26 Besonders wichtig und bis heute von höchster Relevanz ist Oikonomides (1986). Siehe auch Köpstein (1993); siehe auch Fögen (1992) zu familienrechtlichen Kontinuitäten.

27 Burgmann (2003) = Burgmann (2015) Nr. X; Burgmann (2005) = Burgmann (2015) Nr. XII; Burgmann (2008) = Burgmann (2015) Nr. XIII.

28 Da, wie gesagt, Zachariae, die Handschrift nie persönlich benutzen konnte und seine Edition auf der (mangelhaften) Abschrift eines Herrn Meier basierte, wird die neue Edition von Reinsch / Simon endlich eine gesicherte Textgrundlage bieten, die die weitere Forschung mit Sicherheit voranbringen wird.

29 Siehe Burgmann (1991) = Burgmann (2018a) 116–134 (Nr. III).

30 Ein Blick in die Register des Repertorium I–III (1995, 2010, 2017) zeigt das zur Genüge.

31 Burgmann (1977) Edition: 120–146 = Burgmann (2018a) Edition: 63–89.

32 Burgmann (1984).

33 Lexica Iuridica Byzantina (1990); Meijering (1990); Fögen (1990a); Fögen (1990b); Burgmann (1990 = Burgmann (2018) 1–89 (Nr. I); Stolte (1990a).

34 Burgmann / Gastgeber / Diethart (1998); Gastgeber / Diethart (1998).

35 Siehe nur die Register in: Repertorium I–III (1995, 2010, 2017).

36 Schminck (1979) = Schminck (2018) 107–106 (Nr. V); Mahruhn (1981); Papagianni / Troianos (1998); Burgmann (1981) = Burgmann (2018a) 270–281 (Nr. VI).

37 Simon (1976); Kresten (1981).

38 Simon (1986).

39 Burgmann (2003); Schminck (1991) = Schminck (2018) 393–425 (Nr. XIII); siehe auch Schminck (2016) = Schminck (2018) 827–838 (Nr. XXXIX).

anstaltet.[40] Der daraus hervorgegangene und 1992 publizierte Sammelband setzte Standards in der internationalen Forschung.

Kanonistische Forschungen: Aristenos, Synopsen

Da in Byzanz eine Trennung von weltlichem und kirchlichem (kanonischem) Recht in der Praxis kaum möglich ist, was sich u. a. auch in sehr vielen juristischen Handschriften widerspiegelt, erstreckte sich die Forschungstätigkeit der Frankfurter Arbeitsstelle auch auf das kanonische Recht. Immer wieder wurde Studien aus diesem Forschungsbereich publiziert, die etwa den großen Kanonisten Theodoros Balsamon aus dem späten 12. Jahrhundert betreffen[41] oder das Prooimion zu einer Überarbeitung des Nomokanons in 14 Titeln.[42]

Der wichtigste Beitrag zur Erforschung des kanonischen Rechts war die Edition des Kommentars des Aristenos – eines der drei großen Kanonisten des 12. Jahrhunderts – zur *Synopsis canonum*. Hier bewährte sich die enge Zusammenarbeit mit den griechischen Kollegen (E. Papagianni und Sp. Troianos). Nach langjährigen Arbeiten, was nicht zuletzt auf die sehr breite handschriftliche Überlieferung zurückzuführen ist, konnte dieser 2019 als Band 1 der *Forschungen zur byzantinischen Rechtsgeschichte. Neue Folge* erscheinen.[43]

Ein weiterer Forschungsgegenstand betraf die sog. Konzilssynopsen, die historische Informationen über die Konzilien, die die Kanones erließen, enthalten. Es gibt sie in (sehr) großer Anzahl und in sehr unterschiedlichem Umfang.[44] In so gut wie jeder juristischen Handschrift findet sich mindestens einer (oft auch mehrere) dieser Texte. Sie bieten, vereinfacht gesagt, die historische Legitimierung des Kirchenrechts.[45]

Im Jahre 2013 erschien die Edition (nebst Übersetzung und Kommentar) einer ausgesprochen umfangreichen Konzilssynopse aus dem Ende des 9. Jahrhunderts, die z.T. heute verlorene Quellen verwendete und wertvolles historisches Material enthält.[46] Dieses Projekt ging auf die Edition eines Teils dieser Synopse durch Günther Christian Hansen zurück.[47]

Die mit Abstand bekannteste dieser Synopsen ist die sog. Hoeschelsche Konzilssynopse (nach David Hoeschel, der 1595 diesen Text [nach nur einer Handschrift] erstmals edierte). Im Auftrag der Frankfurter Arbeitsstelle edierte (und analysierte) Antonia Giannouli diesen so weit verbreiteten Text,[48] so dass nunmehr eine aktuellen wissenschaftlichen Ansprüchen genügende Textausgabe zur Verfügung steht.

Aus diesen Forschungen ging die Idee einer größeren internationalen Tagung hervor, die im Oktober 2017 (*Konzilien und kanonisches Recht in Spätantike und frühem Mittelalter. Aspekte konziliarer Entscheidungsfindung*) stattfand und die die konkreten Entstehungsbedingungen von Kanones auf den lokalen und ökumenischen Konzilien untersuchte.[49]

Auch die unten näher behandelten Patriarchalakte könnten in diesem Zusammenhang aufgeführt werden; ebenso die Forschungen zum Eherecht, das in starkem Maße von der kirchlichen Gesetzgebung dominiert wurde. Obwohl Ende 2020 die Arbeiten der Arbeitsstelle eingestellt wurde, wird Kirill Maksimovič einen bisher ungedruckten Kanoneskommentar (ca. 1200 entstanden), der sich im Codex Sinaiticus 1117 findet,[50]

40 Eherecht und Familiengut (1992); die Beiträge: Selb (1992); Fögen (1992); Burgmann (1992) = Burgmann (2018) 135–148 (Nr. IV); Schminck (1992); Beaucamp (1992); Kravari (1992); Macrides (1992); Goria (1992); Thür (1992); Troianos (1992); Papagianni (1992).

41 Simon (1985); Fögen (1995); Brandes (2017a).

42 Schminck (1998) = Schminck (2018) 509–538 (Nr. XIX).

43 Papagianni / Troianos / Burgmann / Maksimovič (2019).

44 Siehe die Übersicht bei Hoffmann / Brandes (2013) 15–25.

45 Und keineswegs dienten sie didaktischen Zwecken, wie man früher annahm.

46 Hoffmann / Brandes (2013).

47 Hansen (1998).

48 Giannouli (2021).

49 Brandes / Hasse-Ungeheuer / Leppin (2020); siehe unten S. 88 im bibliographischen Anhang die Übersicht über die einzelnen Beiträge zu dieser Tagung.

50 Zu dieser Handschrift siehe Repertorium III (2017) Nr. 521. Bereits Tiftixoglu / Troianos (1993) hatten aus diesem wichtigen Kodex unbekannte Kaiserurkunden und Basilikentestimonia ediert und untersucht.

demnächst zum Druck befördern. Da er bereits geraume Zeit an diesem Projekt gearbeitet hat, sind die Arbeiten sehr weit fortgeschritten, so dass mit der Publikation 2022 oder 2023 (in den *Forschungen zur byzantinischen Rechtsgeschichte. Neue Folge*) gerechnet werden kann.

Rechtsbücher, Ecloga, Eisagoge, Prochiron

Die mustergültige Edition der Ecloga,[51] des Rechtsbuchs der Kaiser Leon III. und (dessen Sohn) Konstantin V., stellt bis heute einen Meilenstein der byzantinistischen Rechtsgeschichte dar.[52] Nicht nur die unübertroffene, auf einer sehr großen Anzahl herangezogener Handschriften basierende Textkonstituierung und die einfühlsame deutsche Übersetzung zeichnen dieses Buch aus. Auch die durch Burgmann gesicherte Datierung ins Jahr 741 hatte für die »allgemeine« historische Byzantinistik bzw. die in vielen Punkten unklare Geschichte der ersten Phase des sog. Byzantinischen Bilderstreits im 8. Jahrhundert erhebliche Auswirkungen.[53] Auch die Edition der *Appendix Eclogae*, die eine erhebliche rechtsgeschichtliche Bedeutung hat, ist zu erwähnen.[54] Diesem wichtigen Gesetzbuch wurden mehrere Studien gewidmet.[55] Die *Ecloga* wurde ins Slavische und ins Arabische (bzw. Koptische) übersetzt. Leder edierte die arabische Übersetzung,[56] Ščapov und Burgmann edierten die slavische Übersetzung.[57] Letztere Edition ist angesichts der erheblichen Bedeutung der *Ecloga* für die Rechtsentwicklung in der Kiever Rus' besonders hervorzuheben.

Leider kamen die Arbeiten an der Edition des *Prochiron* und der *Eisagoge* wegen einer schleichenden Erkrankung Burgmanns nicht voran.[58] 1986 legte Schminck die kritischen Editionen der Proömien der Basiliken, der *Epitome legum* und der *Eisagoge*[59] in einer stark beachteten Monographie vor.[60] Leider verhinderten dessen Krankheit und Tod die Fertigstellung der Edition der *Eisagoge*. Diese Aufgabe haben Martin Vučetić (Mitarbeiter 2016–2018) und Timo Christian (Mitarbeiter 2016–2019) seit dem Jahre 2016 übernommen. Obwohl beide jeweils neue Stellen in München und Frankfurt antraten, führten sie dieses Projekt fort. Die revidierte deutsche Übersetzung (Christian) ist bereits vollendet, und die Edition des griechischen Textes (Vučetić) steht kurz vor der Fertigstellung, so dass in wenigen Jahren mit der Publizierung gerechnet werden kann.

Bereits 2014 konnte die Edition der arabischen Übersetzung des *Prochiron* veröffentlicht werden.[61] Burgmann edierte außerdem die sog. *Ecloga Basilicorum* (1988), eine reich kommentierte Auswahl aus den ersten zehn Büchern der Basiliken.[62]

Kaisergesetze, Patriarchal- und Synodalakte sowie kanonisches Recht

An erster Stelle ist hier die umfangreiche Edition (mit deutscher Übersetzung) des Novellensyntagma des Athanasios von Emesa zu nennen. Nach umfangreichen Vorarbeiten[63] konnten Dieter Simon und Spyros Troianos diese im Jahre 1989 publizieren.[64]

Die Rolle des Kaisers als Gesetzgeber in der Spätantike und in Byzanz war mehrfach Gegenstand der Forschungstätigkeit der Arbeitsstelle. Dies betraf sowohl die Rolle des Kaisers (als Institution) in der byzantinischen Gesellschaft[65] als auch Untersuchungen zu einzelnen Gesetzen bzw. Novellen.[66] Eine Zusammenschau lieferte Burgmann.[67] Er publizierte auch einen Überblick über

51 Zu dieser Edition siehe zuletzt Simon (2021) bes. X.
52 Burgmann (1983).
53 Siehe nur das Register von Brubaker / Haldon (2011) 910.
54 Burgmann / Simon (1979).
55 Siehe schon Simon (1971); Simon / Troianos (1977); Goria (1980); Burgmann (1992) = Burgmann (2018) 135–148 (Nr. IV).
56 Leder (1985).
57 Ščapov / Burgmann (2012).
58 Immerhin kann auf Burgmann (1998) verwiesen werden.
59 Wobei er den Titel (*Eisagoge*) dieses bisher »Epanagoge« genannten Rechtsbuchs erstmalig sicherte.
60 Schminck (1986).
61 Pahlitzsch (2014).
62 Burgmann (1988); vgl. Troianos (2017) 225.
63 Simon / Troianos (1979); Simon (1984a); Troianos (1985); Simon (1986a); Simon (1986b).
64 Simon / Troianos (1989).
65 Simon (1984); Simon (1984b); Simon (1995); zum Justinianbild siehe bes. Prinzing (1985); Fögen (1987); für die Spätantike siehe Fögen (1993).
66 Burgmann (1994) = Burgmann (2018a) 149–159 (Nr. V) (Nikephoros III Botaneiates); Brandes (2005a) (Ed. 13 Justinians); Fögen (1989) und Fögen (1990c) (Leon VI.); Vučetić (2014) (Ioannes I. Tzimiskes).
67 Burgmann (2005a) = Burgmann (2015) Nr. XI; siehe auch Burgmann (2002) = Burgmann (2018a) 301–322 (Nr. XIV).

die byzantinischen Rechtsbücher.[68] Andere Editionen und Untersuchungen betrafen einzelne Novellen bestimmter Kaiser[69] und bisher übersehene Kaisergesetze.[70]

Umstritten waren die Datierungen verschiedener Rechtstexte, die in der Wissenschaft jeweils mit »Nomos« bezeichnet werden: *Nomos Mosaïkos*,[71] *Nomos Rhodion nautikos*, *Nomos georgikos* und *Nomos stratiotikos*. Die von Schminck[72] vertretenen Datierungen und Zuweisungen an den Patriarchen Photios widerlegte Burgmann auf souveräne Weise. Überhaupt bietet sein 2009 erschienener Artikel eine grundlegende zeitliche und inhaltliche Einordnung dieser vier sog. »Gesetze«, die in der aktuellen Forschung noch einer angemessenen Rezeption harren.[73]

Die Analyse der gesammelten juristischen Handschriften führte zum Fund diverser Patriarchal- und Synodalakte, die entweder bisher unbekannt waren oder nur ungenügend ediert worden waren.[74] Andere Untersuchungen betrafen wichtige kanonistische Quellen (etwa die Konzilssynopsen), worauf oben bereits eingegangen wurde.[75]

Byzantinisches Recht in der Rus', im Kaukasus und im Kalifat

Die Rezeption des byzantinischen Rechts in den slavischen Ländern (Kiever Rus', Bulgarien) war ein bevorzugtes Forschungsgebiet von Ludwig Burgmann.[76] Insbesondere der slavischen Rezeption widmete er mehrere Abhandlungen.[77] Hervorzuheben ist die wesentlich von ihm (zusammen mit Hubert Kaufhold und armenischen Kollegen) erarbeitete umfassende Bibliographie zu dieser Thematik.[78] Dieser 1992 erschienene sehr nützliche Band müsste natürlich heute aktualisiert werden.

In diesem Kontext ist auch auf die bereits erwähnte Edition der slavischen Fassung der *Ecloga* zu verweisen.[79] In Zusammenarbeit mit Kirill Maksimovič erarbeitete Burgmann (über viele Jahre) ein zweibändiges Wortverzeichnis (griechisch-altsalvisch) zum *Syntagma in 14 Titeln*.[80] Maksimovič, der 2013–2020 bei der Frankfurter Arbeitsstelle angestellt war, befasste sich, nicht zuletzt auf Anregung von Burgmann, mit der Problematik der slavischen Rezeption des byzantinischen Rechts.[81] Daneben untersuchte Burgmann den Ursprung des serbischen Nomokanon.[82]

Aus der Zusammenarbeit mit armenischen Kollegen und Kolleginnen ging ein Band hervor, der die armenische Übersetzung der altkirchlichen Kanones (nebst dazugehörigen Untersuchungen) enthält.[83] In diesem Zusammenhang wurde in den *Forschungen zur byzantinischen Rechtsgeschichte* ein wichtiger Band über die armenischen Übersetzungen byzantinischer Rechtsbücher publiziert.[84]

Ein weiterer Bereich dieser Forschungen betraf die christlich-arabischen Übersetzungen byzantinischer Rechtstexte. Auf die arabische (koptische) Übersetzung der *Ecloga* wurde bereits verwiesen.[85] Johannes Pahlitzsch (jetzt Professor für Byzantinis-

68 Burgmann (2011).
69 Simon (1976) (Konstantin V.); Konidaris (1982) (Herakleios); Burgmann (1981) = Burgmann (2018) 234–269 (Nr. V) (Eirene); Schminck (2005b) = Schminck (2018) 627–682 (Nr. XXVII) (Makedonenzeit); Schminck (2016) = Schminck (2018) 827–838 (Nr. XXXIX) (Leon VI.).
70 Simon (1976); vgl. Kresten (1981); Tiftixoglu / Troianos (1993).
71 Ediert von Burgmann / Troianos (1979a).
72 Schminck (1999) = Schminck (2018) 539–546 (Nr. XX); Schminck (2005) = Schminck (2018) 621–626 (Nr. XXXVI); Schminck (2005a) = Schminck (2018) 683–702 (Nr. XXVIII).
73 Burgmann (2009) = Burgmann (2015) Nr. XIV = Burgmann (2018a) 363–374 (Nr. XVIII); zum *Nomos georgikos* siehe schon Burgmann (1982) = Burgmann (2018) 282–285 (Nr. VII).
74 Siehe z. B. Troianos (1979); Schminck (1979) = Schminck (2018) 107–106 (Nr. V); Burgmann (1985) = Burgmann (2015) Nr. V; Konidaris (1981); Macrides (1985); Macrides (1992); Papagianni (2005)
75 Siehe oben S. 74–75. Siehe noch Simon (1987a).
76 Siehe den umfassenden Überblick Burgmann (1996) = Burgmann (2018a) 199–295 (Nr. VIII).
77 Burgmann (2018b) 357–362 (Nr. XVII) (bisher unpublizierter Vortrag, Moskau 2006);
78 Burgmann / Kaufhold (1992).
79 Siehe oben S. 75; Ščapov / Burgmann (2012).
80 Burgmann / Maksimovič (2011).
81 Siehe Maksimóvič (1998). Er stellte auch die Edition des Kommentars des Aristenos zur *Synopsis legum* fertig. Siehe Papagianni / Troianos / Burgmann / Maksimovič (2019); vgl. auch Černyševa (1998).
82 Burgmann (1995).
83 Shirinian / Muradyan / Topchyan (2010).
84 Kaufhold (1997).
85 Siehe oben S. 75.

tik an der Mainzer Universität) edierte im Auftrag der Frankfurter Arbeitsstelle die arabische Übersetzung des *Prochiron*.[86] Burgmann publizierte einen Überblick über die Übersetzungen byzantinischer Rechtstexte in verschiedene Sprachen, auf den ausdrücklich hingewiesen sei.[87]

Verwaltungsgeschichte, Hochverrat, Prozesse

Nach dem überraschenden und vorzeitigen Tod von Josef Sonderkamp 1990 trat Wolfram Brandes am Ende jenes Jahres in das Projekt ein. Als ausgebildeter Historiker widmete er sich – neben der jahrelangen Mitarbeit an den Handschriftenbeschreibungen, die in den drei Bänden des *Repertoriums der Handschriften des byzantinischen Rechts* publiziert wurden –der Auswertung und Fruchtbarmachung der in der Arbeitsstelle gewonnenen Sachkenntnis zur byzantinischen Rechtsgeschichte. Es entstand eine umfassende Darstellung der byzantinischen Verwaltungsgeschichte (mit einem Schwerpunkt auf der Geschichte der Finanzverwaltung als *nervus rerum* der zivilen wie militärischen Strukturen des spätrömischen / byzantinischen Reiches) vom 5. bis zum 9. Jahrhundert: der Phase der byzantinischen Geschichte über die angesichts der eklatanten Quellenarmut am wenigsten bekannt ist. Die umfangreiche Monographie erschien 2002.[88]

Insbesondere wandte er sich dem Komplex der Hochverratsprozesse zu. Ausgangspunkt war der Hochverratsprozess gegen den noch heute als Heiligen verehrten Papst Martin I. im Jahre 653 (sowie den damit im Zusammenhang stehenden Prozess gegen Maximos Homologetes zwei Jahre später).[89] Nach römischen Recht wurde beide als Hochverräter (wegen des *crimen laesae majestatis*) verurteilt. Theologische Konflikte spielten kaum eine Rolle (bzw. wurden vom kaiserlichen Gericht vermieden). Weitere Fälle von derartigen Hochverratsprozessen vom 6. bis zum 13. Jahrhundert wurden ausführlich analysiert und ihre erheblichen Auswirkungen auf historische Entwicklungen umfangreich untersucht.

Aus der Zeit zwischen dem Kaiser Herakleios (610–640) und der Kaiserin Eirene (780–802) sind keine kaiserlichen Novellen überliefert.[90] Man meinte (und meint bis heute), dass die Kaiser der Zwischenzeit eben keine Novellen erließen. Da aber gerade in dieser Zeit gravierende Umwandlungen des Staates und andere einschneidende Ereignisse als Ergebnisse von kaiserlichen politischen Entscheidungen stattfanden, die ohne gesetzliche Regelungen kaum denkbar sind, wurde nach Hinweisen in den relevanten Quellen gesucht. (Nota bene: Die Quellensituation gerade in dieser Zeit ist notorisch schlecht.). Insbesondere gravierende Änderungen der kirchlichen Verwaltungsstruktur (zu Lasten des römischen Papsttums) am Ende des 7. Und in der Mitte des 8. Jahrhunderts wurden unter den genannten Annahmen untersucht (Schicksal des sog. Östlichen Illyrikum und der päpstlichen Patrimonien Unteritaliens und Siziliens). Dies mündete in eine Reihe (z.T. sehr umfangreicher) Abhandlungen.[91]

Eine wichtige Abhandlung von Burgmann betraf die Organisation der Rechtsprechung in der mittelbyzantinischen Zeit.[92]

Harmenopoulos, Hexabiblos

Der bedeutende Jurist (*sebastos*, Richter in Thessaloniki, *nomophylax*, *krites katholikos*) Konstantin Harmenopoulos kompilierte im 14. Jahrhundert die sog. Hexabiblos (wohl 1345), ein Handbuch des weltlichen Rechts (in sechs Büchern; daher der Name).[93] Dabei stützte er sich auf ältere Rechtsbücher (*Procheiron*, Michael Attaleiates, *Synopsis*

86 Pahlitzsch (2014).
87 Burgmann (2005b) = Burgmann (2018a) 322–345 (Nr. XV).
88 Brandes (2002); siehe auch Brandes (2016); Brandes / Haldon (2008).
89 Brandes (1998); Brandes (2008); Brandes (2013); Brandes (2017).
90 Zu Herakleios' Novellen siehe Konidaris (1982), zu denen der Kaiserin Eirene Burgmann (1981a) = Burgmann (2018) 234–269 (Nr. V).
91 Besonders Brandes (2014a); Brandes (2018) und bereits Brandes (2005).
92 Burgmann (1997) = Burgmann (2018a) 242–267 (Nr. X).
93 Siehe die Übersicht von Fögen, in: ODB 902; Troianos (2018), bes. 316–321 (mit aktueller Bibliographie).

Minor, *Peira*,[94] Julian von Askalon). Harmenopoulos organisierte das relevante Material so geschickt für den praktischen Gebrauch, dass sein Handbuch eine außerordentliche Verbreitung erlebte und bis ins 19. Jahrhundert in Griechenland (wie auch in mehreren Balkanstaaten) geltendes Recht repräsentierte. Diese Umstände erregten schon früh das Interesse von Marie Theres Fögen.[95] Allein die außerordentliche Anzahl erhaltener Handschriften (bis ins frühe 19. Jahrhundert) erschwert bis heute eine regelgerechte neue Edition dieses wichtigen Textes. Leider konnte Frau Fögen ihre Pläne bezüglich der *Hexabiblos* des Hermenopoulos nicht weiterverfolgen, nachdem sie 1995 Professorin für Römisches Recht (nebst Privatrecht und Rechtsvergleich) an der Universität Zürich geworden und 2001 außerdem von der Max-Planck-Gesellschaft als Direktorin an das Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt berufen worden war.

Erst in jüngster Zeit nahm Marios Tantalos (Athen / Groningen) die Arbeiten an der *Hexabiblos* im Auftrag der Frankfurter Arbeitsstelle (Werkverträge mit der Akademie der Wissenschaften zu Göttingen) wieder auf. Ziel ist eine heutigen Ansprüchen genügende wissenschaftliche Edition dieses so wichtigen Rechtsbuches – ein Vorhaben, das allgemein als eines der wichtigsten Desiderate der byzantinistischen Rechtsgeschichtsforschung angesehen wird. Tantalos hat inzwischen bedeutende Fortschritte bei der Erfassung der relevanten Handschriften und der Benutzung älterer Rechtsbücher[96] erreicht und arbeitet zielstrebig auf eine Edition hin. Doch diese wird dann nicht mehr in den Frankfurter *Forschungen zur byzantinischen Rechtsgeschichte* erscheinen können.

*

Fast ein halbes Jahrhundert lang wurde in Frankfurt auf höchst produktive Weise die byzantinische Rechtsgeschichte erforscht. Zahlreiche Editionen und sehr viele Untersuchungen zu den verschiedensten Aspekten der Rechtsgeschichte (und darüber hinaus) wurden publiziert. In enger Kooperation und freundschaftlicher Zusammenarbeit mit den Kollegen in Athen und Groningen wurde eine byzantinistische Spezialdisziplin etabliert. Die internationale Resonanz war enorm, was sich nicht zuletzt durch die zahlreichen Gäste des Projektes und Stipendiaten (etwa der Humboldt-Stiftung) belegen lässt.

Dies alles hat nun ein Ende gefunden. In Deutschland ist die institutionalisierte byzantinistische Rechtsgeschichte damit beendet. An keiner hiesigen Universität oder Akademie wird dieses Fach weiterhin betrieben. Keine Stiftung und ebensowenig die DFG fördern Projekte, die in irgendeiner Weise die byzantinistische Rechtsgeschichte auch nur tangieren.

Was bleibt, sind die Publikationen, die in diesem kurzen Überblick dokumentiert werden; und es bleibt die umfangreiche Sammlung von verfilmten Handschriften des byzantinischen Rechts, die in der Bibliothek des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie der Forschung weiterhin zugänglich sein werden.[97]

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94 Siehe jetzt ausführlich Simon / Neye (2021).
95 Fögen (1981); Fögen (1986).
96 Siehe jetzt Tantalos (2021).
97 Hier findet sich auch eine der weltweit besten und umfangreichsten Spezialbibliotheken für die byzantinistische Rechtsgeschichte.

Bibliographie

Abkürzungen

BZ = Byzantinische Zeitschrift
FBR = Forschungen zur byzantinischen Rechtsgeschichte
FBR NF = Forschungen zur byzantinischen Rechtsgeschichte. Neue Folge
FM = Fontes Minores
JÖB = Jahrbuch der byzantinischen Byzantinistik
ODB = Oxford Dictionary of Byzantium, ed. by A. Kazdan et al.
RIDA = Revue international des droits de l'antiquité
Rh.-P. = G. A. Rhalles / M. Potles, Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων, I–VI. Athen 1852/1859 (Nachdruck Athen 1966)
RJ = Rechtshistorisches Journal
TM = Travaux et Mémoires
ZRG RA = Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung
ZRVI = Zbornik radova vizantološkog instituta

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Prīa ministros dat
& ritus officiorum.
Altera dat testes: & cetera iudiciorum.

Tertius.

Regorius a episcopus seruus b seruorum dei. Dilectis

Tertia de rebus: & vita p̄sbyterorum.
Quarta docet quales sint nexus coniugiorum.
Ultima de vitijs: & p̄nis tractat eor̄. Sic sic & breuius.
Judex: iudicium: clerus: sponsalia: crimen.

Fokus focus

Manuela Bragagnolo

Books in Motion and Normative Knowledge Production in the Early Modern Iberian Worlds. An Introduction*

How was normative knowledge produced in the early modern period? One obvious way to answer this question is to study the contents of legal books. But we can also look at these books as material objects. This second approach invites us to consider that knowledge was also the result of material and social processes of production.[1] It also means having a broader look at legal materiality more generally.[2]

»Medieval and early modern learned law« was »deeply rooted in a literary tradition«, and every »development of legal learned knowledge« was »embedded in the written page«. In medieval and early modern learned circles, »to master the law was to read books«. But, most importantly, the materiality of books does »carry meaning«.[3] With these words, António Manuel Hespanha in 2008 stressed the need to expand the scope of legal historical research, which had, up to that point, traditionally focused on the intellectual output of the so-called ›author‹. In the article, Hespanha demonstrated the strong connection between the development of early modern Western legal theory and the changes in the physical format of the book, specifically in the layout of the printed page. On the basis of this, he proposed taking into account the interconnections between the content and the materiality of the objects that contributed – maybe more than other forms of media – to the storage, mobilisation and communication of normative knowledge: books, specifically legal books.[4] In this way, Hespanha tried to bridge the gap between »material bibliography and legal history«. This gap was not only methodological, but also one between two branches of knowledge – book history and legal history – which largely ignored one another, with only few exceptions, for a long time.[5]

In the last decades, a ›Copernican shift‹ in book studies saw attention move from the ›author‹ to the ›reader‹, opening up new areas of research. This shift has greatly affected the fields of history of knowledge and history of science, and, more recently, has begun to have an impact on legal history as well.[6] Legal historians have begun taking the materiality of legal books seriously. They have started to analyse law in the past as a broader cultural phenomenon by looking at legal books, paying particular attention to legal knowledge, legal culture and legal literacy as well as to the readers of legal books, in different geographical areas.

For instance, along with a renewed interest in those ›doctrinal‹ legal books that most influenced Western legal culture in the age of print,[7] research on continental Europe has developed new method-

* The *Focus* is the outcome of a virtual workshop hosted by the mpilhlt in June 2020. It owes its origins from the ›hallway and canteen discussions‹ on legal books that I enjoyed with Airton Ribeiro da Silva and Idalia García, who were guests at the Institute before the pandemic changed our lives. I am very grateful to the speakers at the workshop as well as to those who joined the discussion virtually, providing very interesting food for thought. I am particularly thankful to Pedro Rueda for his always inspiring and generous contributions to the dialogue between book history and legal history.

1 On the history of science approach to knowledge production that takes into account materiality, see Renn / Damerow (2003); Blair (2010).

2 For an overview of the recent approaches to legal materiality, see Johnson (2018). See also Paes (2019) and the special issue on »Legal Materiality in Law and Text Culture«: Yoon Kang / Kendall (eds.) (2019).

3 Hespanha (2008) 12.

4 On the connection between the printing press and the law, see also Vesting (2013).

5 For some of the few early examples of legal historians paying attention to the materiality of legal books of the medieval and early modern periods, covering both continental Europe and England, see Osler (1995, 2000); Colli (2002, 2005); Backer (1999, 2000, 2002). From the field of history of knowledge, and with particular attention being paid to the material context of the production and circulation of legal books, see Maclean (1992).

6 Eamon (1994); Johns (1989); Valleriani (2017).

7 Dauchy et al. (eds.) (2016).

ologies for studying the dissemination of early modern legal books across borders, far beyond the author's intentions.[8] In addition, the actors involved in this process as well as the role of censorship of legal books have become objects of study,[9] as have jurists' readings and the authorship of legal books.[10]

Even though attention has focused mainly on printed books, scholars have clearly stressed the »continued existence of an important production and market of legal manuscripts in the age of printing«.[11] Also in the area of law, manuscript and print coexisted for a long time, and manuscripts were preferred in specific cases.[12] Very recently, the materiality of medieval legal culture, combining approaches from legal history and from the history of the book, has been explored, following a »manuscript-led perspective« and highlighting the importance of the »contextualization of legal texts within the materiality of the written word« in order to understand »how laws and related texts were actualized and adapted«.[13] The cultural and material history approach has also been applied to the study of the most important medieval Castilian code, the *Siete Partidas*. Here, the analysis of the regulation of legal writing at both the normative and the documentary level has been used to explore both the techniques and the theory of medieval codification.[14]

Moving to England, following the stimulating and critical debate initiated by the publication of Elizabeth Eisenstein's works,[15] scholars working on the history of the common law have been exploring the »impact of the printed word on legal development«,[16] showing that, even though the printing press constituted »one of the most important of all episodes in Western history«,[17] it was not *per se* an agent of change. The introduction of printing did not automatically lead to an increase in the production of legal books. Scholars instead link the later explosion of legal books to early modern business practices, employed especially in the law book trade. They have shown that the development of printed legal material was the result of a complex interaction between lawyers, printers, the Stationers' Company and the state, and influenced by the regulatory structures that were put in place.[18]

A similar approach has been adopted for studying the »production, circulation and reception of legal knowledge in China«.[19] A recent study has shown that the commercial printing revolution in early modern China fundamentally transformed the Chinese judicial system and legal culture. It concluded that commercial publishers introduced new sources of judicial authority, transformed the popular view of law and fostered popular legal awareness in Qing local society.

Of course, these studies have taken different typologies of legal books into account. On the one hand, together with the more traditional learned legal literature,[20] scholars have been working on official legislative texts.[21] For instance, the publication of the first royal acts in France has been analysed to explore the impact of the printing press both on legislative power and on legal practice.[22] On the other hand, another particularly innovative focus of research has been on popular and pragmatic handbooks and manuals, which played a fundamental role in early modern legal literacy

8 Beck Varela (2016).
9 Beck Varela (2013).
10 Savelli (2011); Beck Varela (2017, 2018).
11 Hespanha (2008) 15. On manuscript circulation and scribal publication in the early modern period, see Love (1993, 2013); Bouza (2001); Richardson (2009).
12 Harvey (2015) 125.
13 Gobbitt (2021) 3.
14 Velasco (2020).
15 Eisenstein (1980, 1993); Johns (1989); McKitterick (2003). For the discussion, see the AHR vol. 107 Forum: Grafton (2002); Eisenstein (2002a, 2002b); Johns (2002).
16 Baloch (2007) 390.
17 Johns (2002) 107.
18 Baloch (2007); Harvey (2015).
19 Zhang (2020) 5.
20 Book historians have recently started to pay attention to learned legal books as well. See Panzanelli Fratoni (2020).
21 Harvey (2015) 143–239; Zhang (2020) 3–110.
22 Prévost (2018). The form of legislative texts has been explored also from the perspective of the history of the book. Cf. Ruiz García (2011).

and allowed legal knowledge to reach a wider audience, both in European societies[23] and in imperial China.[24]

A particular kind of pragmatic normative literature, related to the sphere of religious normativity and moral theology, played a fundamental role in normative knowledge production in Ibero-America.[25] Moral theology was the new producer of normative knowledge in the early modern Iberian worlds. Pragmatic books mobilised the knowledge that was needed to produce normative statements. Through these »small« pragmatic »books«, which often came out of a web of global normative knowledge production such as the School of Salamanca, the solutions to the questions and problems that the »big empires« had to face in the turbulent decades of the 16th century circulated on a global scale.[26] Only partially printed in overseas territories, the great majority of the books circulating in America were printed in Europe and then imported. For Spanish America this happened via Seville.[27]

As we have seen so far, legal historians have started to look at legal books to inquire into the processes of how normative knowledge was produced in the early modern Iberian worlds, which is the object of this *Focus*. An entirely new field of investigation and exchange between branches of knowledge has been developed and has opened up new avenues of inquiry.

Regarding the legal culture of early modern Spanish America, looking at the materiality and, above all, at the circulation of legal books is particularly meaningful. One of the components of this multifaceted legal culture was precisely related to the Spanish and, more generally, the European learned legal tradition, which travelled from Europe to the Americas also through books.[28] The construction of this legal culture was a very complex phenomenon that cannot, of course, be reduced to a mere process of reception. Rather, it was the outcome of processes of adaptation, cultural translation and ›glocal‹ knowledge production that as yet have not been fully explored.[29]

So far, many studies have been dedicated to the authors and texts that circulated, as well as to the channels through which the European legal tradition reached America.[30] However, not enough attention has yet been paid to the materiality and to the media dimension of these (and possibly other) legal books. Such an approach can add other dimensions to the investigation.[31]

I opened this introduction by mentioning that, according to historians of science, the material context of knowledge production matters. For this reason, a dialogue between book history and legal history is needed to take a step forward in the understanding of the production of normative knowledge in the early modern Iberian worlds. The categories used to analyse a book's life cycle can be particularly helpful in this regard. I am referring to Robert Darnton's »communications circuit«, which looks at book production, circulation and consumption, and which has recently been revisited by Bellingradt and Salman. Especially when we consider the normative knowledge production on the imperial scale of the Iberian worlds, where books circulated largely between the two sides of the Atlantic (and, of course, also in the Pacific parts of the empires, which, unfortunately, we could not cover with this *Focus*), the theoretical perspective of »books in motion« appears particularly fruitful.[32] It also takes into account the »materiality, sociality, and spatiality« of the »communications circuit«. It goes without saying that in the production of normative knowledge in the Iberian worlds, the circulation and consumption of normative books played a fundamental role.

The articles of this Focus are intended as a first step into a necessary dialogue between book historians and legal historians working on legal books. In the contributions, three book historians (Pedro Rueda, Idalia García, and Natalia Maillard Álvarez) and one legal historian (Airton Ribeiro da Silva Jr.) look at legal books in the early modern

23 Korpiola (2019).
24 Zhang (2020) 111–143.
25 Duve / Danwerth (eds.) (2020).
26 Duve (2020) 29–31; Duve (2021).
27 Danwerth (2020).
28 Already at the end of the 1990s, Víctor Tau Anzoátegui stressed the importance of looking at the diffusion of legal books and the composition of colonial libraries to investigate the construction of a common reference culture. Tau Anzoátegui (1997) 73.
29 Duve (2020).
30 See in particular Barrientos Grandón (1993, 2000). For a historiographical overview of the so-called *Derecho Indiano*, see Hespanha (2017).
31 Cf. Duve / Danwerth (eds.) (2020); Duve et al. (eds.) (2021).
32 Bellingradt / Salman (2017).

Iberian worlds, covering New Spain, Brazil, the Atlantic trade, and the city of Seville.

The contributions focus on the circulation of legal books from Europe to the Americas, their use and their readers. By what routes and what means did normative books circulate in the early modern Iberian worlds? Who were the actors involved? Which editions did circulate, and in which communities of practice? How did these travelling books and their use shape legal practices? Furthermore, did the material conditions of the use of legal books in judicial activity contribute to the production of normative knowledge? Who were the readers of legal books? These are some of the questions that the articles in this *Focus* try to answer, making an important contribution to legal historical research by showing how questions and methods from the history of the book can fruitfully be applied to study the production of normative knowledge, too.

From the methodological point of view, the contributions mainly use contemporary documentary sources to look at one face of the »two-sided reality of bibliographic research«,[33] the »external history« of legal books. Amongst the archival documents analysed by the contributors are book lists prepared for different purposes, such as for the book trade, censorial control, or notarial post-mortem documentation.

Pedro Rueda (*Law Books in the Hispanic Atlantic World: Spaces, Agents and the Consumption of Texts in the Early Modern Period*) tracks the circulation of legal books in the Atlantic world through the commercial networks and circuits of the Carrera de Indias (the system of armed convoys of ships crossing the Atlantic). He investigates the distribution channels and the activity of the agents who made the circulation of law books between Europe and the Spanish Crown's American territories possible, namely the merchants and booksellers, as well as the readers who placed the orders, who played crucial roles in the consignments of legal books printed in Europe that travelled first to, and then within, the Americas.

Rueda demonstrates how the infrastructure that enabled the circulation of law books between Europe and the Americas shaped the availability of normative knowledge stored and mobilised in legal books. Through his documentary analysis of book shipments, he is able to follow the ›lives‹ of legal books that circulated between Europe and America, and the readers (jurists, theologians, professors, but also Crown officials and municipal office holders) who needed them as necessary tools for their professional activity, to continue their academic studies or to perform their duties in colonial institutions. Some of these books were ›pragmatic‹ books as well.

Idalia García *(Orden dentro del desorden: circulación de libros de derecho en Nueva España, 1585–1640)* looks at the circulation of legal books in early modern New Spain by studying the private and institutional libraries established by royal officials and religious orders. Her approach includes the analysis of book lists written by the Inquisition interested in controlling the books that entered New Spain. She studies not only the contents of the lists but also their form in order to understand how these lists worked and to decipher their meaning as cultural practices. Her analysis of the book lists has been used to create a bibliographical database for identifying early modern editions in historical documents. This allows us to identify the editions of the books which were transported from Europe to the Americas via the commercial networks, proving their actual presence in certain defined communities of practices.

Airton Ribeiro da Silva Jr. *(Magistrates' Travelling Libraries: The Circulation of Normative Knowledge in the Portuguese Empire of the Late 18th Century)* explores a different way in which legal books circulated in Portuguese America. In fact, he looks at the books that the magistrates, members of the Portuguese judicial administration, took with them when moving from one judicial post to another across the pluricontinental empire. Censorship sources allow him to identify and reconstruct the »travelling libraries« that these »itinerant magistrates« brought with them to help them with their temporary overseas appointments. These »portable collections« allow him to identify the indispensable working tools that the magistrates used for their judicial functions on the most remote fringes of the global Portuguese empire.

33 Infantes (2012). On this point, see also Pedro Rueda's article in the present *Focus*.

In addition to »travelling libraries«, the *Focus* takes into account also the private libraries of jurists and other legal professionals in early modern Spain as a way of accessing the readers of legal books. Natalia Maillard Álvarez *(Lectores de obras juridicas en la Edad Moderna [Sevilla, siglos XVI–XVII])* studies the readers of legal books in early modern Spain by analysing the inventories of private libraries recorded in Seville, the city that was the centre of the Atlantic trade, in the 16th and 17th centuries. The data extracted from the notarial documents that she examines are collected in a database of asset inventories produced between 1550 and 1634. Maillard Álvarez traces the profiles of a diverse range of readers who collected legal books – both legal professionals, with or without university legal education, and those outside the world of law – and discusses the kinds of legal books preserved in their libraries in the late Spanish Renaissance.

Legal books were essentially working tools. The articles in this *Focus* provide complementary pictures of legal books in motion in the early modern Iberian worlds from different observation points: books stored in private libraries in Seville, composing the ›portable‹ libraries travelling with magistrates in Portuguese America, crossing the Atlantic in the commercial book trade, or travelling from Europe to reach libraries of religious orders in New Spain.

These contributions show that looking at legal books as material objects and analysing them ›in motion‹ can open up new research paths to better understand the factors that contributed to normative knowledge production in the early modern Iberian worlds. For instance, it appears crucial to assess the impact of the logics and actors of the book market on the production of normative knowledge, or to investigate the interaction between the material conditions in which legal professionals performed and the production of normative knowledge across continents. Moreover, due to the »epistemic indeterminacy«[34] of early modern books and the differences in form and content between editions, the identification of the specific editions of legal books present in certain defined epistemic communities could also contribute to identifying the normative knowledge available. Finally, outlining the profile of the readers of legal books ›in motion‹, who were the »main performer[s] of every process of reception or creative appropriation of a text in a different context«[35] could allow us to access another level of normative knowledge production by observing in detail how ›universal‹ legal knowledge was transformed and adapted to concrete local contexts.

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34 Johns (1998) 36.

35 Beck Varela (2016) 201. On the active role of the reader in the production of meaning, see e. g. Chartier (1992).

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Der dritt tail

Epitaphion Vdalrici Tenngler.

Dum preſes moderor ſuluorum iura leonum
Altipoliq; rogo credita ſceptra míhí.
Dumq; quaterſenam fecundo germíne prolem;
Amplector trigamus. factus abunde ſenex.
Dum radíans ſpeculum venturis conſecro ſeclís;
Fatalem claudít parca moleſta díem.

Pedro Rueda Ramírez

Law Books in the Hispanic Atlantic World: Spaces, Agents and the Consumption of Texts in the Early Modern Period

The Materiality of the Printed Book: Law Books »Turned into Goods«

At the beginning of the 18th century, Francisco Solanes, a professor of law at the University of Barcelona, penned an interesting essay on the practice of politics entitled *El emperador político, y política de emperadores* (Barcelona, 1706), which contained his reflections on the impact of the large number of law books in the discipline of civil law that was being taught in the universities.[1] He criticised what he regarded as the excessive amount of such books and their cost. In his opinion,

> mayor es el daño, que se ocasiona de tantos libros como se hallan impresos en la facultad de la Jurisprudencia: a ese inconveniente puede fácilmente el Príncipe hallar el remedio en la prohibición de los extranjeros, y dificultad en la impresión de los naturales. Dejo el perjuicio de tanto dinero como se gasta en la compra de ellos. ([G]reat is the harm of so many books appearing in print in the Faculty of Jurisprudence: to this problem the Prince can easily put a remedy by prohibiting the foreign books, and by making it harder to print native [Spanish] ones. I'll leave aside the damage done by so much money being spent on them.)[2]

Solanes' desire that the production of texts be controlled was also an important element of the reform proposals addressed to the Spanish Crown by the *arbitristas*, and were in line with their mercantilist ideas. To the argument cited above, Solanes added that printed texts »[se han] mudado en mercancía« (»have been turned into goods«) to such an extent that »la multitud de tantos libros ha confundido la verdadera Jurisprudencia: el ingenio del juez se halla turbado a veces con la variedad de los autores« (»the plethora of so many books has confounded true Jurisprudence: the ingenuity of the judge is overwhelmed at times by the variety of scholars«).[3] The step from texts to goods, whereby printing became a business, marked a key development. The spread of law texts opened up greater access to legal sources; as books became goods, the availability of texts grew.

The fact that books were »turned into goods« was key to the circulation of texts in the Americas. The movement of books in the Atlantic world can be studied in terms of the routes, the networks, the agents and the book trade itself.[4] Alternatively, attention can be given to the texts in circulation, the readers who had an interest in them, and the formation of collections by means of trade channels. Though the methodologies and research questions of these approaches differ, both entail an analysis of books moving from one set of ports to another, looking at the participants involved, the goods exchanged and the spaces in which they moved.[5] These multiple approaches reveal the shape of the universe of book circulation, which included international trade between continents as well as the movement of books between the different viceroyalties and within each viceroyalty. On this subject, Yun Casalilla cautions that the »spread of European consumption models to the Americas proved slow and difficult«, which is an aspect to bear in mind when addressing the consumption of books, which required a knowledge of Spanish (or Latin) and reading skills.[6]

Books as objects of communication and exchange played a prominent role in the transfer of European legal culture to the New World and its (re-)use in establishing rules and norms in the

1 This research is part of a project entitled »Networks of Knowledge: the Sale and Circulation of Printed Books in Spain and Latin America« (HAR2017-84335-P, 2018-2021), Ministry of Science and Innovation, Spain.

2 Solanes (1706) 22.

3 Solanes (1706) 23.

4 Imízcoz (2017); Adorno (2008).

5 Bellingradt / Salman (2017); Hinks (2017).

6 Yun Casalilla (2019) 73.

American territories. By following Beck Varela's approach of combining the methods of legal history with those of book history, we can analyse the spatial and temporal dimensions of the history of law books in the Americas.[7] The volumes that traversed Atlantic helped to establish networks and forge bonds between the two shores.[8] Specifically, the transport of books between Europe and the American territories revolved around commercial networks, the traffic on the *Carrera de Indias* (a system of armed Atlantic fleets), and the loading and unloading of crates between one set of ports and another. In the early modern period, the different parts of the world were connected by means of these circuits.[9] Indeed, Spain's system of fleets framed the overall context that governed the supply of books to its different territories. The Atlantic (and Pacific) space and the temporal rhythms of the traffic help us to grasp the possibilities for the arrival, redistribution and consumption of books in Latin America in the early modern world.

Books travelled along, but were not limited to, the established routes of early commercial capitalism. At times, individuals created their own networks to obtain copies. At other times, they turned to colleagues or friends to request manuscript copies of texts that were hard to obtain. Both formal and informal networks contributed to the creation of such contacts, increasing one's chances of obtaining texts. This necessarily raises a host of questions that we do not always have the methodological tools or the sources to answer. As Duve notes regarding the history of law, it is appropriate to »promote epistemic pluralism«,[10] and this view can also be applied to the history of the book, which has important connections with other research traditions.[11] Regarding the history of the book, for instance, Infantes emphasises the need to bear in mind the »realidad bifronte de la investigación bibliográfica«, the »two-sided reality of bibliographic research«.[12] On the one hand, it is necessary to engage in the physical study of a specific copy of a work (i. e. to study its formal and material structure), which offers an »internal« history of the object by analysing the materiality of its printed editions. On the other, it is also essential to analyse the archival sources (i. e. focusing on the reconstruction of a work's publication history using documents that refer to its production, circulation or consumption), so that an »external« history of the work can be assembled. By adopting this twofold perspective of the history of the book, we can address aspects and questions such as the new forms of printed legal books, as, for example, Ruiz García has done for Castile;[13] how legal books came to be known to readers; how erudite or pious discourses shaped reading and gave rise to particular practices of reading and of use;[14] how the avenues by which printed books travelled along the Atlantic circuits became established; how bookselling agents offered these volumes for sale and attracted the interest of buyers; how book ownership can be traced (beyond post-mortem inventories); and how the uses of books can be reconstructed. Each of these issues poses a major challenge, which we will only partly address below, specifically by turning our focus to books in circulation. At the same time, however, it is important to remember that the life cycle of texts also includes control, censorship and reception.[15] As Hespanha notes, »here is a bundle of issues, which are clearly at the centre of the history of written legal communication«, and there is still much work to be done in order to draw connections between the issues raised in the history of the book and those raised in the history of law.[16]

The first step that enabled the circulation of printed books in the American territories was the emergence of networks of exchange and of agents who were able to create the necessary infrastructure. The books produced in printing presses in the Americas were essential for local communities, but they covered only a portion of their existing needs, particularly those related to missions and works in indigenous languages, works for learning Christian doctrine and educational texts.[17] The local output was limited and controlled by the authorities, especially the viceroy and the colonial courts known as *audiencias*. In 1575, Viceroy Martín

7 Beck Varela (2016).
8 González Sánchez (2011).
9 Cooper-Richet / Mollier (eds.) (2012).
10 Duve (2016) 836.
11 Tanselle (2009).
12 Infantes (2012).
13 Ruiz García (2011).
14 Nakládalová (2013).
15 Beck Varela (2018); Campillo Pardo (2017); Hernández Santiago (2020).
16 Hespanha (2008) 39.
17 Griffin (1994); Garone Gravier (2012).

Enríquez wrote to Philip II of Spain that »lo que toca a las emplentas [= imprentas] hay aquí dos y fuera de cosas que importan muy poco se les tiene bien cerrada la puerta« (»regarding printing presses there are two here, and, apart from things that matter very little, they are well locked up behind closed doors«).[18] The output of the printing shops in Mexico City in the 16th and 17th centuries amounted to 2307 printed books. Of the total, at least 156 were in indigenous languages: 94 printed in the 16th century and 62 in the following, especially in the Nahuatl and Purépecha languages.[19] During the second half of the 18th century, printing presses were also established in the interior territories of the viceroyalty, in addition to those that already existed in Mexico City and Puebla, but this did not cause the Atlantic commercial book trade to collapse. Indeed, the import of books continued and the demand grew even stronger. Between 1750 and 1778, Spain's system of fleets carried on average about 175 crates a year to the American territories, and the figure rose to an average of 213 crates a year in the period of free trade from 1779 to 1819.[20]

Atlantic networks: books shipped on the *Carrera de Indias*

The importation of books from Europe to the American territories revolved around the arrival of fleets or individual ships. By comparison, we know little of the books that sailed in the opposite direction. In any event, however, the voyages back and forth across the Atlantic world shaped the spaces of book circulation. By analysing the movement of texts, it is possible to identify the interests involved in the formation of the consumption patterns of imported works. Books circulated from Asia and Europe to the major cities of the Americas as well as from the American territories to Europe. It is important to recall that the circulation of objects (and ideas) also enabled new knowledge to reach the West from the East.[21]

Together, this set of factors makes the book traffic of the *Carrera de Indias* essential to an understanding of how the American book market operated. Booksellers and merchants were the main agents in the book trade. In 1605, the merchant Rodrigo Arias de Buiza, a regular traveller on the *Carrera de Indias*, bought a consignment of 24 legal books from the Seville bookseller Hernando Mexía for 34.402 *maravedís*. Arias purchased them for onward delivery to Acuña Olivera, a student at the University of San Marcos in Lima. The latter received a major consignment of works that included Juan Gutiérrez and Juan Matienzo, a *Recopilación*, the *Praxis* of Gonzalo Suárez de Paz and another by Ignacio López de Salcedo, as well as the works of other authors and a Bible.[22] Not only did agents like Arias play a crucial role in shaping the Atlantic trading channels, their activities also influenced the availability of books. In addition, the rhythm of the fleets, their arrival or absence, proved critical for the supply of books. The market received volumes when vessels reached port. In all likelihood, their arrival affected the prices of books as it did the prices of other goods, generally pushing them downward. Numerous bookselling businesses sprang up soon after the arrival of the ships, sparking conflicts of interest between newcomers in the trade and more established merchants. It is quite likely that the market at times became saturated with some titles. The risks for the booksellers involved, whether newly arrived from Europe or already established in Mexico City or Lima, were considerable, and some ventures failed.[23] In many cases, the trade was conducted using bills of exchange that hampered businesses because they required endorsements and guarantees. Indeed, payment very often remained pending, much to the dissatisfaction of European sellers. In most cases, there was a clear indication of the need to make sales in cash, not on credit, in order to obtain precious metals (basically silver coins), cocoa and indigo, which could then be loaded on the galleons for the return voyage to Spain.

The personal and commercial bonds on the two shores of the Atlantic helped to forge transnational communities that proved enormously effective in ensuring the security of exchanges.[24] Some book merchants were tireless travellers who accompanied consignments of books from one Spanish Crown territory to another and carried on business

18 Archivo General de Indias (AGI), Mexico, 19, n. 159, f. 1r.
19 Chocano Mena (2000) 225–226.
20 Gómez Álvarez (2012).
21 Romano (2018).
22 AGI, Contratación, 1145A, *San Vicente*, f. 271.
23 Jiménez (2014).
24 Palmiste (2010).

with both local booksellers and individual buyers. If they ran into economic problems or other difficulties, they typically turned to networks of acquaintances or relied on the help of people who came from the same place they did, even if they were not relatives and did not work in the same trade. Belonging to the same nation, being a compatriot, coming from the same place of origin, residing in the same locale, and being naturalised subjects of the Spanish Crown were all forms of sociability that helped to build the Atlantic networks. Spanish booksellers and naturalised foreigners enjoyed certain advantages because they had greater access to shipping. They could do business without the restrictions placed on foreigners or on enemies of the Spanish Crown. This was the case, for example, with the Venetian Simone Vassalini, who set up shop in Madrid as a bookseller and imported printed books from Italy. In 1597, Vassalini printed a catalogue entitled *Index librorum*, which featured a vast selection of law titles. The law books came largely from Venice, whence Vassalini typically imported books and where he even published some titles, such as the *Responsorum* (Venice, 1602) by Tiberio Deciani.[25] Vassalini's catalogue, which was the first sales catalogue ever published in Spain, featured books for sale in his stall in Madrid's Calle del Arenal near the steps of the Church of San Felipe, not far from other bookshops in Calle Mayor. A few years later, in 1608, documents show that Vassalini was naturalised in Castile. His new status enabled him to travel to Seville and register a shipment of books to the West Indies, which included a consignment of 666 copies of 235 different titles.[26]

The Atlantic circuit accounted for the prominent role played by Seville booksellers and by the merchants on the *Carrera de Indias*, who took responsibility for loading shipments of books in Seville and Cádiz, frequently set sail themselves to sell the books, and stayed in constant contact with Crown officials in customs offices and at ports. The collaboration between booksellers and merchants was commonplace on the *Carrera de Indias*. Indeed, the relationship benefited both groups. The booksellers made use of viable commercial channels with solid networks and, in exchange, could ship books at lower risk. Many authors of legal books also used these channels to send their own works. For example, Dr Pedro Díaz Noguerol, a lawyer to royal councils and a resident of Madrid, dispatched nine crates of books to Seville in 1643. The crates, which were »aforrados de libros de la nueva recopilación de las leyes y alegaçiones juris de Noguerol« (»packed with copies of the new compendium of laws and Noguerol's legal arguments«), were intended for delivery to Luis de la Barreda, a prosecutor in the Real Audiencia of Lima.[27] As the quotation suggests, the copies of Noguerol's *Allegationum iuris* (Madrid, 1641), which the imprint noted was produced »expensis Petri Coello« (»at the expense of Pedro Coello«), were being distributed by the author himself. In other cases, an author's heirs distributed his books. For example, »dos balas con libros impresos« (»two bales of printed books«) were sent to Lima in 1662 by the heirs of Gabriel Álvarez de Velasco.[28] In this case, the shipment might well have contained books by the author that had been published that same year in Lyon, specifically the *Iudex perfectus seu De iudice perfecto Christo Iesu* and the *Epitoma legis humanae, mundique fictione, veritatis divinae, aeterni, temporalisque differentia*.

Booksellers also drew on merchants to conduct sales in Mexico. Families involved in the book trade set up networks in the main distribution centres on the basis of blood ties and professional connections. Inclusion in extensive commercial networks offered coverage and security. In this respect, the booksellers followed the model established by the merchants and traders of the *Carrera de Indias*. Drawing on wills and inventories, we can trace the blood ties that defined some of the book merchants' relationships, while dowry letters and receipts of payment provide clues about the loans, debts and other economic relationships that built agencies and created partnerships. The pieces of the puzzle are only partly known. In cases like the Calderón family, research has identified a dynasty that succeeded in establishing itself as book merchants and printers.[29] In other cases, we know only portions of the family trees and bookselling businesses in question, because a great deal of data is missing and the prosopographic information at

25 Cagliari, University Library, ROSS.D.115.

26 AGI, Contratación, 1150, *N.S. del Juncal*, f. 65.

27 AGI, Contratación, 1187, *Santa Cruz y San José*, f. 68; *Jesús, María, José*, f. 54.

28 AGI, Contratación, 1206, *Santiago*, s. f. (no folio).

29 Ward (2013).

times proves insufficient. This is the case with the Balli or Bally family. The family's roots can be traced back to Juan Bally, a native of Paris, who was a factor of the well-known bookseller Gaspar Techsel. Shortly afterwards, however, a member of the family appears as a visitor in Seville, following the typical approach of Castilian booksellers to travel to Seville in order to transact business in the West Indies.[30] Pedro Bally sailed for Mexico City and in 1595 began activities related to the book trade from the viceroyalty while at the same time launching into book printing, as he owned both a bookshop and a printing press.[31] In 1618, the *licenciado* Juan Bautista Bally, a lawyer and rapporteur in the Real Audiencia of Mexico City, stated that he was the

> hijo legítimo de legítimo matrimonio de Pedro Bally y de Catalina del Balle difuntos vecinos desta ciudad [de México] los quales fueron hijos legítimos, el dicho Pedro Bally de Juan Baptista Bally y de Catalina Rodríguez vecinos y naturales de la ciudad de Salamanca en castilla la vieja y la dicha Catalina del Balle fue hija legítima de Salvador Rodríguez y Ana Nuñez de Ávila vecinos desta ciudad. (legitimate son of the legitimate marriage of Pedro Bally and Catalina del Balle, deceased residents of [Mexico] City, who were legitimate children, the said Pedro Bally of Juan Baptista Bally and Catalina Rodríguez, residents and natives of the city of Salamanca in Old Castile, and Catalina del Balle was the legitimate daughter of Salvador Rodríguez and Ana Nuñez de Ávila of this city.)[32]

The family's book businesses in Salamanca, Seville and Mexico City flourished, but the third generation chose instead to pursue studies and focus on various activities in the administration of the viceroyalty.

Book markets: distribution points

It is important to remember that written or reading culture formed part of a complex fabric in which an oral and visual culture was also constantly present and very important in public activity.[33] Bernardino Fernández de Velasco, the Duke of Frías, recalled in a miscellany entitled *Deleyte de la discreción, y fácil escuela de la agudeza* that conversation was a resource as useful as the sword, that it served as a shield, and that wit was a defensive weapon

> que se cultiva, imprimiendo en el archivo de la memoria auxilios a el entendimiento, valiéndose de lo que se oye, y lee, y aplicando en tiempo oportuno a los asuntos (that is to be cultivated, imprinting aids to understanding in the archive of memory, making use of what is heard or read, and applying it to matters at the right time).[34]

Visual, oral and written / reading culture shaped the social fabric in which books were used. By understanding the particular ways that books became available, we can see that not all legal books circulated in the same way, and that some entered more readily into the circuits of buying and selling, without forgetting that readers were faced with a limited availability of texts. In 1615, Martín Peláez wrote from Lima to the Franciscan Luis de Guzmán, who lived in Cuzco, reminding the latter that he had ordered some books. In his letter, Peláez says, »[B]uscaremos los libros en desembarcando las cargaçones« (»We will search for the books in the cargo being unloaded«). He notes, however, that »han de ser difíciles de hallar por ser tan exquisitos« (»they must be hard to find because they are so exquisite«), and asks that Guzmán »me avise vuestra paternidad de otros que sean a su propósito para que faltando los de la memoria los compremos« (»advise me, Father, of others that may serve your purpose so that we can buy them if the ones on the list are missing«).[35] Indeed, the relationship of supply and demand proves hard to reconstruct in the case of the world of books in the viceroyalties. There is, however, evidence of texts written for the American market and also of the interests of some readers in the Americas, who sought out certain texts. In some cases, authors showed an interest in sending their writings to readers scattered over the vast territories. Some

30 Bécares Botas (2006) 75–76.
31 Jiménez (2007) 38–39.
32 AGI, México, 234, n. 24, f. 1r.
33 Bouza (2003).
34 Fernández de Velasco y Pimentel (1749) 1.
35 Biblioteca Nacional de España (BNE), Mss. 18619 (6).

texts turned out to be ideal for settling legal questions and obviated the need to consult a great number of works by legal scholars. The Franciscan Antonio Delgado, for example, wrote *Regla y Aranzel de prelados* (1598), which he dedicated to the president of the Council of the Indies and intended »para todos los eclesiásticos, seculares y regulares y para los jueces y testigos y acusadores y abogados« (»for all clerics, secular and regular, and for judges and witnesses and prosecutors and lawyers«). Delgado's book was regarded as useful

> para las partes remotas de las Indias, por tener el dicho libro muchas notables y advertencias utilísimas y necesarias, para los que habitan aquellas partes (for the remote parts of the Indies, because it contains many important words of advice that are highly useful and necessary for anyone living in those parts).[36]

The collection was more useful than an entire set of tomes because the reader would not need to »revolver muchos libros« (»rummage through many books«) in order to find a complete list of legal facts and data.[37] The suitability of the work's content for the American colonies reflects the view of the Spanish Court that there was a need for useful books to ensure that American readers would not be distracted from their missions and professions.

In the American case, there is very clearly a substantial difference between the capital status of Lima and Mexico City at the head of the viceroyalties and the remainder of their respective territories. The contrast between a small number of well-supplied centres and the rest of the vast territory was stark. In places like Honduras, for example, it was necessary to import books from other points in Central America or directly from Seville, as the Dominican Domingo de Azcona did. In 1557, Azcona received a consignment of theology books, patristic texts, »un derecho canónico pequeño con glosa en tres cuerpos« (»a small canon law book with glosses in three volumes«) bound in boards covered in calfskin, and »una suma seluest[r]ina en un volumen encuadernado« (»a *Summa Sylvestrina* in a bound volume«).[38] Spain's American territories clearly present a mixed picture with their varying densities of population and levels of wealth, and their small number of cities with bookshops, which were very few across the colonies as a whole. The commercial networks of book distribution were limited. They focused primarily on supplying urban centres and penetrated only occasionally into rural areas. Annual religious pilgrimages to chapels and saints' shrines or other festivities with large gatherings of people might have justified the occasional visit of a bookseller or merchant with booklets and verse for sale to places outside the main urban centres. These many interlinked channels made up the overall network of book distribution, with its limitations at the local level, the occasional shortcomings of a market that was not yet well-established, and the restrictions imposed by agents of the Inquisition on the circulation of certain texts. Paying a visit to the capital of a viceroyalty or any of the other more populous cities in the colonies was an ideal occasion to buy books. In many cases, visits to sort out administrative matters, attend court proceedings or do business provided opportunities to satisfy one's intellectual curiosity and readerly interest, buying volumes in bookshops or more general stores, at stalls in the streets, or from vendors who sold their wares in markets and squares. Nor should we forget the important role of auctions, which put many books by law scholars back into circulation when they were bought by booksellers or individual buyers.[39]

Regarding the circulation of books, we have to some extent a better understanding of supply than of demand. It proves complex to find out the reasons for the acquisition, exchange and lending of books. Correspondence and the records of the Inquisition are two essential sources for learning who read what and for determining the contexts in which texts were circulated, read and used. The lists of shipped books, the accounts of visiting commissioners, and the lists of seized books submitted to the Mexican inquisitors offer clues of enormous interest. Even so, the information is limited to a small sample of the books in circulation, and it yields hardly any clues about the readers or their

36 Delgado (1598).
37 Delgado Torreneira (1598) ¶3v.
38 AGI, Contratación, 1079, n. 8, *Los Tres Reyes*, f. 67r.
39 García (2019).

reasons for purchasing and consuming texts. Prominent in the book business in Mexico City, for example, were several networks like that of Diego Navarro Maldonado, who was very well-connected to booksellers in Medina del Campo and Seville. In 1597, Ambrosio Duport, who was a factor and brother-in-law of the Lyon bookseller Pierre Landry, sent 12 crates of books valued at 119.000 *maravedís* from Medina del Campo to Seville; the books were then registered by Domingo de Corcuera for delivery to Diego Navarro Maldonado.[40] Maldonado also had a relationship with another bookseller in Medina del Campo, Benito Boyer. Boyer had 25.758 volumes in his bookshop in 1592. Some of these made the journey to Mexico City, when substantial consignments of his books were shipped at the behest of his widow Beatriz Delgado for delivery to Diego Navarro Maldonado, including books that he received in 1595 at a value of 582 *reales*.[41]

At the beginning of the 17th century, the bookseller Diego López opened up shop in the Mexican city of Puebla, which was known in colonial times as Puebla de los Ángeles. López's bookshop lay in the »calle del Carmen que va a la iglesia mayor« (»calle del Carmen that leads to the main church«). That is, the shop was situated in the vicinity of Puebla Cathedral, a key location for potential ecclesiastical customers and a visible spot for the large number of visitors who had dealings with the church and diocesan administration. Something similar also occurred in Mexico City, where the main bookshops were located in thoroughfares that enjoyed the foot traffic of potential buyers, which in urban centres tended to be near the courts, ecclesiastical seats or municipal buildings. These well-known shops were run by specialist booksellers. However, books also circulated by being sold at stalls in a number of the city's public spaces, such as squares and markets. In the market of El Parián and the nearby Portal de Mercaderes de México, passers-by could purchase not only goods from Asia or Europe, but also local products including printed books and *menudencias* (chapbooks).[42] Stalls of this kind also existed in other cities, such as Lima, creating simple points of sale that were small, well-defined spaces built of wood or masonry. The texts on offer must have been more limited than those available in the bookshops, and their supply was likely tailored to suit the public who visited these bustling parts of the city to do their daily shopping. In one of the stalls in the market of El Parián, in 1758, the bookseller Cristóbal de Zúñiga y Ontiveros had 2032 titles (with 6000 copies), mostly small-format booklets, pamphlets or single sheets.[43] In addition to these fixed points of sale, others sprang up on city corners, in the doorways of buildings, and even on some of the bridges of Mexico City. These spaces, which were regulated by the municipal government, attracted modest sellers who set up a little stall or small table to sell their wares, which in some cases included books. In addition, street vendors often hauled a crate or basket on their backs or shoulders, bringing devotional booklets, simple, cut-price school texts, printed sheets of verse and accounts of events to the least well-served parts of the city.

Many Mexicans also went to bookshops to sell books, and it was not unusual for readers to disencumber themselves in this manner when they moved to another city or left in search of brighter prospects. In other cases, books came up at auction. In wills, books were very often treated as goods to be sold like any other household item, so that executors would be able to carry out the provisions of wills. The result was a constant circulation of texts that would re-enter the channels of buying and selling. Booksellers seized the opportunities available to them and attended public auctions in order to acquire volumes at good prices. Auctions might also draw individual buyers interested in the purchase of particular titles. The sale of second-hand books helps to explain the continuing survival of certain works and their return to circulation, extending their useful life-

40 AGI, Contratación, 1125, *Santa Elvira*, f. 143r–144v; *El Espíritu Santo*, f. 140r–143r.

41 AGI, Contratación, 1112, *La Concepción*, f. 28; see Bécares Botas / Iglesias (1992).

42 Moreno Gamboa (2009).

43 Suárez Rivera (2013) 219–250.

span and presence in the hands of readers. For instance, it accounts for the presence of works by Erasmus and other early humanists in the late 16th century in Mexico and elsewhere. While book merchants sent barely any copies of such texts from Europe, a number of second-hand specimens passed through successive hands. These humanist works retained their prestige among learned individuals like Francisco Rodríguez de Valcárcel, who was appointed bishop of Cartagena in 1650 and set sail for the New World with an exquisite library that included some »*Apophthegmes* of Erasmus« and expurgated texts like the »lesicon de Calvino expurgado« (»expurgated lexicon of Calvin«).[44] In other cases, auctions featured books that were out of date. These items included medical texts, legal texts and liturgical texts published prior to the Council of Trent, which might ultimately have been discarded, sold as packing paper, or recycled as endpapers in bindings.

Readers in search of texts: supplying the libraries of individuals

In some cases, readers could satisfy their interests outside of the circuits of bookshops in Mexico City or Lima. Informal supply channels were critical in areas with limited provision, in distant territories, and in areas with little commercial traffic, but the overall scope of such informal exchanges is, of course, very hard to determine. Mechanisms of circulation that helped to address any shortages or needs for books in a relatively unstructured book market with significant supply shortfalls included obtaining and exchanging books through local or regional networks, drawing on personal favours and making use of friendships and other relationships. In areas off the main trade routes, having an acquaintance or relative pay a visit from the capital of the viceroyalty or being able to rely on a contact in Europe might also prove useful. In addition, readers occasionally formed alliances to obtain books. In 1633, the Discalced Carmelite Francisco del Espíritu Santo submitted to the inquisitors of Seville a list of books that he was sending to the Bishop of Guadalajara three titles in nine volumes »in a small crate«:

> obras de Stefano Graçian que se intitulan *Disceptationes forenses* en cinco tomos de folio y las obras de Tomás Sánchez, los tratados de matrimonio en dos cuerpos y en otros dos los tratados de los preceptos del decálogo (works of Stefano Graziani entitled *Disceptationes forenses* in five folio volumes and the works of Tomás Sánchez, the treatises on marriage in two volumes and the treatises on the precepts of the Ten Commandments in two other volumes).[45]

The crate was shipped to the bishop, but it was also accompanied by six additional crates for the Discalced Carmelites of Mexico City to »repartirlos en la provincia« (»distribute them in the province«). This was a favour, like many others, among members of the clergy who could obtain supplies of books through networks of contacts and exchange.

At another level, some individuals also had relationships with merchants or agents who took charge of managing their book requests in Europe.[46] Many of the shipments leaving Seville and Cádiz were dispatched to such individuals. For instance, Captain Juan de Manurga took part in book shipments between 1656 and 1680. In 1680, we can find »two crates of books« addressed to Fr. Fernando de Rojas (O.F.M.) in the province of Yucatán, together with »un cajón de libros retulado al Ilustrísimo señor obispo de Guadalajara« (»a crate of books addressed to His Holy Grace the Bishop of Guadalajara«) and another »tres cajones de libros« and »dos cajones de pinturas retuladas a Don Phelipe de Sabalza can[ónigo] de Mechoacan« (»three crates of books [and] two crates of paintings addressed to Don Phelipe de Sabalza, canon of Michoacán«).[47] In other words, Manurga shipped books to individuals in three

44 AGI, Contratación, 1197, *N.S. del Rosario y San Francisco*, f. 27r.

45 AGI, Contratación, 1179, *San Esteban*, f. 30r. The text refers to Stefano Graziani and his work entitled *Disceptationum forensium iudiciorum* (Romae: typis Iacobi Mascardi, 1615–1625, 5 vol.). The editions of works by Tomás Sánchez are *De sancto matrimonii sacramento disputationum* and *Operis moralis in præcepta Decalogi*.

46 García / Montiel (2010).

47 AGI, Contratación, 1234 and 1235.

different destinations in Yucatán, Guadalajara and Michoacán, none of which had bookshops or printing presses, so that the recipients could obtain consignments of books directly via the *Carrera de Indias*. If we go one step further, we can also find readers who sent letters to Mexican or European booksellers to obtain the books they needed. However, the low number of surviving letters makes it difficult to gauge the scale and significance of this way of acquiring books. That said, there is some evidence in notary archives and court proceedings. In any event, booksellers responded to the requests, prepared the packages and sent them to their recipients through intermediaries, although we cannot attribute to the latter any role as cultural mediators.[48] In this respect, a degree of caution is called for because the intermediaries might conceal who the key players actually were, for example, when foreign booksellers used factors to gain entry to the American market. The documentary evidence shows that there were requests for books from America sent to Spain, either to colleagues in the same profession or to family members. Those in America could also count on the help of the *peruleros* (Peruvian merchants who travelled to Spain or Iberian merchants with interests in Peru), to whom private individuals gave money to buy books in Spain for sending back to Mexico or Peru.

The recipients of consignments of professional books included not only councillors in the courts, lawyers and other legal professionals, but also Crown officials of varying ranks. In some cases, jurists also distributed books either as a favour to other colleagues or as a collaborator in the distribution of certain books. Owners of legal books were highly diverse and it is hard to summarise their reading interests. They appear as frequent buyers in the documents, but there are significant differences as well as commonalities among their interests, depending on their income, post and profession. Their requests for books from Europe reveal their professional interests, particularly regarding books that were necessary to carry out their work, given that many of those asking for books were jurists, theologians or teachers in schools and universities. In some cases, they were in charge of administering assets, preparing reports or pleading cases in court. As a result, the books were a necessary instrument for the conduct of their professional activities, the pursuit of their academic studies or the performance of their duties in colonial institutions. For instance, after holding various offices in the colonial administration, Alonso Gómez de Cervantes succeeded in obtaining the post of city councillor in Mexico City in 1604. In 1603, he had ordered a shipment of six books to be sent from Seville, including

> un derecho civil de los nuevos, un derecho canónico gregoriano, las obras de Bartulo, la nueva recopilación de las añadidas, lexicon juris, esposiçio Tito Livium (one of the new books on civil law, a volume on Gregorian canon law, the works of Bartolus, the new compendium of added laws, a *lexicon juris* and an exposition of Livy).[49]

This was a modest consignment with some of the basic works needed by a jurist, namely Justinian's corpus of civil law and the canon law of Pope Gregory's decretals, the remarkably successful legal works of Bartolus, the *Nueva Recopilación* of the laws of Castile, a lexicon of law and a book with commentary on a classical author.

The judges and prosecutors in the *audiencias* were doubtless one of the core groups to collect legal books, which they built into professional libraries that followed them to various destinations as they rose through the ranks of the courts.[50] Antonio López de Calatayud y Sandoval wrote to the Spanish king from Riobamba to request a position as judge, recalling that he had spent six years in various posts and had been trained »en los estudios mayores en Salamanca en entrambos derechos« (»in higher studies in Salamanca in both areas of the law«).[51] Shortly thereafter, he was

48 Herrero Sánchez / Kaps (2017).
49 AGI, Contratación, 1142, *N.S. de la Candelaria*, f. 228.
50 Márquez Macías (2002). For the »travelling libraries« of Portuguese magistrates, see the article of Ribeiro da Silva in this Focus.
51 AGI, Quito, 30, n. 3.

appointed to the position of judge in Guatemala City, where he carried on in the role from 1622 to 1632. While he was in the city, a relative named Antonio López de Calatayud, who was also a judge, sent him a consignment of 20 titles in 1625. The consignment contained the »works of Farinaccio in 14 volumes«, the »works of Paulo de Castro in eight volumes«, Juan Pedro Moneta, Antonio Fabro, Giacomo Antonio Marta, Agustino Capucii (the *De regimine principe*, uncommon in other shipments), the recently published *Tractatus de iurisdictione* (Zaragoza, 1624) of Luis de Saravia, and the *Política para corregidores* by Jerónimo Castillo de Bobadilla, together with other law books and a few history books in Spanish.[52] In short order, he went on to be named judge in the Real Audiencia in Charcas (1632–1636) and then in Lima (1636–1643).[53] His career reflects a *cursus honorum* that appeared to be restricted to the West Indies for those who entered the service of the Spanish Crown. As Juan de Solórzano Pereira reminded the Count-Duke of Olivares in his request to return to Spain in 1623,

> [Nuestros] servicios se hacen en partes tan remotas y los señores de la cámara de Castilla nos tienen como por vasallos de otro Rey, lo que recibimos por premio, nos sirve de sepultura, y mientras vamos adquiriendo más méritos y antigüedad, venimos a hallarnos más olvidados, atrasados y desfavorecidos. ([We] carry out our services in very remote parts and the lords of the Chamber of Castile keep us on as vassals of another king, [so that] what we receive as our reward serves as a tomb, and while we continue obtaining more merits and seniority, we come to find ourselves more forgotten, left behind and disadvantaged.)[54]

In other cases, we can glean information on book shipments from their declaration as goods, typically at the time of loading for the *Carrera de Indias* by servants or other shipping agents who specialised in cargo bound for the West Indies. In 1608, a servant of Bartolomé Morquecho, a prosecutor in the Real Audiencia of Panama, submitted cargo for shipment with a »Memoria de los libros que llevo« (»Report of the books that I carry«), containing 59 entries from a collection of both branches of law, a Bible and the *Politica* of Justus Lipsius.[55] It was common for servants or colleagues to manage the registration and embarkation of a shipment in order to facilitate its passage through customs, which was an onerous task involving considerable red tape and several visits to various offices of Seville's *Casa de la Contratación* and the customs inspectors. Lists of titles point to the works that jurists selected to take with them for their jobs in the Americas. When the judge Miguel Calderón de la Barca went to Mexico City in 1692, for instance, he took a total of »cuatro cajones de libros vistos por el Santo Tribunal« (»four crates of books inspected by the Tribunal of the Holy Office of the Inquisition«) and »otro cajón con un reloj« (»another crate with a clock«). Unfortunately, we do not have any details of the specific titles in his library.[56] The formation of libraries often preceded their shipment. In many cases, however, it is not possible to determine why some books were selected for the journey. Examples include readers who took books for entertainment, holders of posts in the local administration who were fond of poetry, and scholarly interests that bore little relation to an individual's professional areas of activity. The variety of printed matter that crossed the Atlantic reflected the particular interests of individuals and gave rise to disparate and sometimes heterodox libraries.[57]

Practical books, common readings

As Korpiola notes, »a ›legal professional‹ is a vague concept«. In addition to jurists with a university education, it also included people from a wider range of backgrounds. Nor should we forget the importance of apprenticeship and learning on the job, as in the case of notaries. In the early modern period, many individuals started their careers in other activities and then went on to work for the Crown or the ecclesiastical administration or to hold posts in the justice system.[58]

52 AGI, Contratación, 1174, *Nuestra Señora del Pilar de Zaragoza*, f. 103.
53 Schäfer (2003), vol. II, 475, 483 and 507.
54 BNE, Mss. 9373, f. 198r.
55 AGI, Contratación, 1153B; Contratación, 5297, n. 52.
56 AGI, Contratación, 1252.
57 Ramos Soriano (2011) 229–239.
58 Korpiola (2019) 1.

The Lima notary Pedro Pérez Landero addressed the subject in his book *Práctica de visitas y residencias apropiada a los reinos del Perú* (Naples, 1696):

> No suele ser el mejor abogado en los estrados el jurista, que en las escuelas ganó los aplausos de más ingenioso, y sutil; sino el que con muchos años de abogacía adquirió un conocimiento experimental del modo más acertado de conducir a feliz expediente los pleitos. (The best lawyer on the benches is not typically the jurist who wins plaudits in the schools as the most astute or subtle, but rather the one who has in many years of working as an advocate acquired experiential knowledge of the most successful way to guide cases to a happy resolution.)[59]

Such professionals could obtain a practical education in the courts and needed a number of books to understand administrative proceedings, the rules of institutions, etc. In the following, we will seek to identify the variety of interests in pragmatic normative literature, which has been analysed by Duve and, in the case of shipments of such works to Latin America, by Danwerth.[60]

Searching for the most relevant books for a jurist could bring into play an entire family network. For instance, relatives living in Cáceres offered to send a consignment of legal books to the Mexican branch of the family, so that a young student named Gonzalo would have the tools necessary to launch his professional career. After various difficulties, the books finally reached the New World, but the young man's father, in 1613, wrote from Mexico City to his relative in Spain complaining about the delivery. He notes that

> no puedo dejar de sentir el antigüedad de los libros que vuestra merced envió a Gonçalo, y sin Partidas, ni Recopilaçión y Covarrubias y Antonio Gómez y obras de Navarro. (I cannot help but regret the age of the books that you sent to Gonzalo, which did neither include the *Partidas*, nor the *Recopilación*, Covarrubias, Antonio Gómez, nor the works of Doctor Navarrus.)[61]

His remarks offer a very interesting insight into the preferences for certain basic titles of Spanish law and their commentators as well as for the works of Martín de Azpilcueta, who also went by Doctor Navarrus. Such disagreements over the usefulness of specific books also prove to be highly valuable for understanding the renovation of legal texts. Characterising some books as »old« and specifying the titles absent from the ideal library of a jurist indicates precisely what the preferences were.

In many cases, Crown officials, municipal office holders and other officials in the administration did not require any formal legal training. Such readers needed practical books to perform their daily tasks in the administration or courts. Pedro Pérez Landero wrote as much in his *Práctica de visitas y residencias*, when he proposed to the reader that the text could »facilitar este género de estudio experimental« [»facilitate this type of experiential study«], and recalled that »en todas artes se han escrito diversos libros de prácticas« [»various books of practices have been written in all the arts«].[62] Some authors identified these new audiences, wrote texts for distribution as commercial goods, and even took part in their distribution. In 1601, two vessels set sail on the *Carrera de Indias* from Seville with a total of 36 copies of »las políticas de Bouadilla« (»the *Política* of Castillo de Bobadilla«). In this case, the books were sent »por cuenta del licenciado Castillo de Bovadilla porque son suyos y le pertenecen« (»at the expense of the licentiate Castillo de Bobadilla because they are his and belong to him«).[63] That is, the author himself, Jerónimo Castillo de Bobadilla, was sending a consignment of his *Política para corregidores y señores de vasallos en tiempo de paz y de guerra* (1597), which provided guidance on matters of government, settling matters of *ius commune* and particularly on applying Spanish royal law.[64] The

59 Pérez Landero Otañez y Castro (1696), Al lector.
60 Duve (2020); Danwerth (2020).
61 Sánchez Rubio / Testón Núñez (2018).
62 Pérez Landero Otañez y Castro (1696), Al lector.
63 AGI, Contratación, 1137.
64 Danwerth (2016).

book reached the hands of magistrates like Luis Enríquez de Monroy, who obtained it in 1621,[65] a year after his appointment to the bench.[66] Shortly after taking his post as magistrate of San Felipe de Austria, Monroy received a consignment of 25 titles from Seville. The books included basic legal texts such as »un derecho civil« (»a civil law book«), a copy of the *instituta canónica* (»institutes of canon law«) and the *Partidas* of Gregorio López, but also practical books such as the *Instrucción política y práctica judicial* by Alonso de Villadiego, the abovementioned *Política para corregidores* by Jerónimo Castillo de Bobadilla, the *Tratado de escrituras* by Antonio de Argüello, a book on *Arte legal* (»legal arts«) almost certainly by Francisco Bermúdez de Pedraza, and the *Examen de testigos* by Francisco González Torneo. In addition, the shipment contained other books on subjects that related to these concerns, including works on morality, politics and religion, such as *Gobernador cristiano* by Juan Márquez, which offered moral reflections on justice and rule.

Books were consumed in a more limited manner than other goods. They were cultural objects in use by diverse social groups, particularly among peninsular and creole Spaniards, but also among indigenous people. In Oaxaca, the chronicler Francisco de Burgoa encountered a *cacique* (an indigenous leader) seated at a table in the middle of a hall »con anteojos puestos y algunos libros« (»with his spectacles on and some books«), which included the *Curia filípica*, the *Escrituras* of Tomás de Palomares »y otros pleitos de litigantes« (»and other cases of litigants«).[67] Books that contained the rules of a community could hold the key to the functioning of a religious community, the administration of a municipal government, or the legal framework of the justice system. Some sources – such as the description by Judge García de Palacio of his visits to Yucatán, analysed by Cunill – show the importance of the written document, the spoken word transformed into documentary records, and the ritual of displaying the exercise of authority.[68] Within these textual frameworks, the writing of agreements and the reading of ordinances and rules were matters of daily practice, which were transformed into notarial deeds that, in the case of the Andes, »provid[ed] a transcultural interface in which Spanish officials, European landowners, and Pasto *caciques* created written artifacts of colonial culture«.[69]

In conclusion, the aim of this paper has been to identify the intermediaries engaged in the traffic of books and trace some of the legal texts in circulation. Clearly, not every published book was available to readers in the Americas or circulated widely. The rhythms of provisioning, the supply that circulated, and the availability at points of sale depended on, and thus were shaped by, the traffic of books on the *Carrera de Indias*. This is particularly clear for many of the technical or professional books used by legal professionals, but it is also true for practical books and texts on *ius commune*.

■

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65 AGI, Contratación, 1171, *El Espíritu Santo*, f. 118.
66 AGI, Contratación, 5793, l. 1, f. 288–291.
67 Brokmann Haro (2008) 173.
68 Cunill (2016).
69 Rappaport / Cummins (2012) 123.

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Idalia García

Orden dentro del desorden: circulación de libros de derecho en Nueva España, 1585–1640

»Con un poco de tuerto, llega el hombre a su derecho«
Juan de Mal Lara (1568)

Entre circulación de libros y saberes jurídicos

La circulación de saberes entre Europa y el territorio americano constituye una característica de los procesos de intercambio cultural que definieron la primera globalización que se inició en el siglo XV. Saberes que prácticamente fueron depositados y transmitidos en forma de libros, manuscritos e impresos, y cuya circulación consolidó redes de intercambio mercantil e institucional de grandes dimensiones fortaleciendo a comunidades de interpretación en todos los territorios americanos durante el periodo colonial. Pese a todos los desastres bibliográficos, esos libros constituyeron una herencia y heredad bibliográfica para las nacientes naciones del siglo XIX; ella es también la base de una construcción cultural y jurídica que todavía define el orden social en América Latina. Sin embargo, la circulación de libros jurídicos es una temática aún poco explorada en los estudios históricos del derecho, a pesar de la atención puesta en las formas mediante las cuales tales libros »penetraron« en los territorios americanos.[1]

De ahí la finalidad de esta reflexión: mostrar otro enfoque que contribuya a la historia del derecho desde la historia de los libros.[2] Ciertamente, no es novedad analizar listas de libros de la América española para determinar las temáticas que circularon. Lo que no se ha considerado es el proceso o trámite que explica las fuentes, en este caso inquisitoriales, para comprender a través de éstas el uso y la finalidad de los libros. Estas relaciones permiten rastrear algunas ediciones de la literatura legal que circularon en territorios americanos como la Nueva España y, así determinar el tipo de impacto que éstas tuvieron en la sociedad de su tiempo. Es decir, el número de veces que una obra (o la edición de la misma) se encuentra presente en la documentación histórica, así como el lugar en el que fue registrada, ya sea una colección particular, institucional o su presencia en el mercado libresco.

Esta es una condición que prácticamente no se aborda en ciertos estudios históricos, porque han prevalecido las consideraciones negativas sobre la documentación que contiene registros de los libros del pasado, ni tampoco se ha prestado suficiente atención a las formas de los registros. En cierta manera, no hemos analizado esas formas de registro de los libros en la documentación histórica ni las razones que explican esos registros como una práctica cultural de su época. Ciertamente, la mayoría de estudios dedicados a los libros que circularon en el pasado se ha realizado sobre inventarios *post mortem*.[3] Estos instrumentos sucesorios, elaborados después del fallecimiento, enumeran libros de forma breve (autor y título o sólo el título), debido a la finalidad que tenían: la transmisión de la heredad en términos económicos.

En efecto, la circulación de los libros ha cobrado atención para la historia del libro que se escribe en México y España, pero no en las que corresponden a las investigaciones dedicadas a la literatura jurídica que suelen resaltar a los autores, corrientes de pensamiento y obras más que a las ediciones en circulación. Encontrar títulos relacionados con la literatura jurídica en documentos del México colonial, no es una tarea complicada con las ventajas tecnológicas que ahora tenemos, como catálogos institucionales, de proyectos y bibliotecas digitales. Empero, requerimos determinar qué estamos buscando para no perdernos en esa balumba de datos que pueden ser las memorias de libros.

Los estudios de historia del derecho que nos preceden no definen qué se entiende por esta

1 Barrientos Grandón (1993) 11.
2 Darnton (2008) 136.
3 Luque Talaván (2013) 184.

literatura, por tanto, no contamos con un concepto claro de literatura jurídica ni tampoco acerca de qué es un libro de derecho en la época de los impresos antiguos. No obstante, en esos textos ambos conceptos son usados como sinónimos de una misma idea. Pero acaso autores como Castillo Bobadilla, Leonardo Lessi, Luis de Molina y Domingo de Soto, ¿contaban todos ellos con una misma concepción de justicia? Seguramente no, porque la aplicación de la justicia en diferentes ámbitos (real, eclesiástica o inquisitorial) daba sentido diferencial a sus usos sociales y a su comprensión entre los diferentes estamentos de una sociedad. Ciertamente, reflexionar sobre la justicia (que bien podría ser idealizada) en un texto, no necesariamente se correspondería con la práctica jurídica que veían los letrados de las Audiencias o del Arzobispado, por citar algunas instituciones de la época.

Como lo demuestran numerosos testimonios históricos, todos esos autores mencionados (y varios más) circularon en la Nueva España y en otros territorios de la América española, también porque en ese vasto territorio los letrados debían ser hombres de letras y de libros.[4] Por eso, el Derecho ha sido uno de los grandes temas de interés en el estudio en la cultura escrita en la Nueva España como otros (v. gr. los libros de caballería o las obras de un predicador famoso como Antonio de Vieyra), en detrimento de temáticas quizá más mundanas como los libros de cocina o los de estilos de cartas que, en cierta manera, también ordenaron una parte del mundo cotidiano. Así, entre los textos dedicados a la literatura jurídica o temática jurídica, nos enfocamos en un tipo de obra,[5] la literatura jurídica que había en cierto territorio, las obras del Derecho Indiano,[6] el impacto de un autor reconocido,[7] entre otros más. Tal caleidoscopio de enfoques hace el problema de estudio más complejo de lo que parece, porque debemos intentar definir ciertos conceptos básicos para el análisis de ese mismo objeto.

Ahora bien, esas obras también comparten el uso de expresiones como »libros de derecho«, »literatura jurídica« y »literatura normativa« para referirse una circulación especializada de saberes. Por lo mismo, no está del todo claro a qué se refieren cuando se escribe genéricamente sobre estos libros o tipo de literatura desde la Historia del Libro. Así, acercarnos a los libros de derecho o a la idea de libros jurídicos desde esta disciplina puede resultar problemático sin definir ciertas coordenadas culturales necesarias.[8] En efecto, podemos acercarnos a la idea de ciertos libros de derecho en el Antiguo Régimen a través de los autores clásicos o más representativos,[9] quienes constituyen las fuentes de conocimiento del derecho,[10] de las lecturas recomendadas por un profesor universitario,[11] según la forma material de los impresos,[12] según su vinculación con la resolución de problemas cotidianos (literatura pragmática),[13] entre otras propuestas. Empero, todos estos acercamientos requieren contrastar sus resultados o interpretaciones frente a los libros de otras disciplinas (respecto a la materialidad) o, si esas lecturas ya identificadas se corresponden con los textos que había en las colecciones de un catedrático universitario y en la de un letrado dedicado a la praxis jurídica.[14]

No contar con un concepto claro es un problema pero no una imposibilidad para emplear algunas estrategias que permitan comprender qué clase de libros eran considerados en la temática del »Derecho« o que conformaron esa idea de literatura jurídica o normativa. Esta condición no cambiaría la idea de identificar aquellas obras que contribuyeron a construir un orden social en los territorios del Nuevo Mundo. En este tenor, el Virreinato de la Nueva España resulta idóneo para este tipo de estudio, no sólo por su extensión geográfica sino por las particularidades de las culturas indígenas autóctonas.

Ciertamente los españoles rechazaron algunas ideas religiosas de estas comunidades por cuestiones que parecen obvias (politeísmo, sacrificios humanos, bigamia), y de ahí la destrucción de sus libros. Empero, los misioneros de varias órdenes reconocieron valores e ideas en las prácticas culturales de ciertos grupos precolombinos, y esa realidad transformó su propia idea de mundo. Tal

4 Hoeflich (2002–2003) 87.
5 Vargas Valencia (2018).
6 Luque Talaván (2003).
7 Van Ittersum (2011).
8 Panzanelli Fratoni (2020) 70–73.
9 Dauchy et al. (eds.) (2016).
10 Luque Talaván (2003) 76–78.
11 Beck Varela (2018).
12 Hespanha (2008).
13 Danwerth (2017) 361.
14 Osler (2005).

contraste entre culturas posibilitó que, tanto órdenes religiosas como autoridades coloniales, escribiesen e imprimiesen nuevos libros para crear una red de conocimiento que soportó y contribuyó al diseño del orden social de las colonias americanas.[15] Este es un conocimiento que se aprecia claramente en las colecciones bibliográficas, como un reflejo del uso que hacía de los libros, en las órdenes religiosas, los funcionarios de la época (de la Corona, el Arzobispado y la Inquisición), tanto como en aquellas personas de diferentes estamentos y con acceso a los libros. En efecto, los testimonios históricos evidencian una circulación de libros con mayor impacto social del que suponíamos y aplicable a muchas temáticas de la época.

Libros de derecho, literatura jurídica o literatura normativa: tras el rastro de un objeto complejo

Entre los países latinoamericanos que fueron territorios de la América española, México es más afortunado en la conservación de documentos históricos coloniales. Y en esa riqueza documental existen numerosos y diferentes testimonios que evidencian la presencia de libros y, por tanto, ayudan a entender la circulación de saberes en un tiempo y geografía específicos. Ciertamente, la mayoría de estos testimonios están relacionados con procedimientos del tribunal del Santo Oficio o, en cierta manera, relacionados con esta institución. Son testimonios históricos que se conocieron básicamente a través de transcripciones publicadas en dos ediciones del Archivo General de la Nación (AGN) en 1914 y 1939.[16]

Ambas ediciones mexicanas formaban parte de un proyecto divulgativo de este repositorio, el cual lamentablemente no tuvo el seguimiento que se deseaba. Pese a esto, nadie imaginó el enorme impacto que ambos libros tendrían para explicar la cultura de los libros en la Nueva España. Empero, un conjunto de esos documentos publicados fueron interpretados erróneamente y, en consecuencia, valorados negativamente en todo su potencial informativo para comprender las dinámicas de la circulación de saberes. Por razones difíciles de precisar, esos documentos no fueron relacionados con los libros, impresos y manuscritos, que heredamos de ese mismo pasado virreinal. Una geografía cultural cuyas evidencias son de una enorme complejidad con múltiples interpretaciones y desde diferentes enfoques.

Gradualmente conocimos más documentos coloniales, pero no consolidamos una corriente de estudio sobre esa cultura del libro, como sí se generó en otras latitudes (Francia, Italia o España, por ejemplo). Ese conjunto de fuentes históricas, donde está la noticia de libros en Nueva España, tampoco suscitó el interés por caracterizar y diferenciar la naturaleza de los testimonios como reflejo directo de ciertos procedimientos novohispanos. Lo anterior retrasó comprender la consecuente relación que existe entre todos estos testimonios que, en conjunto, permiten comprender a las comunidades de interpretación y sus correspondientes dinámicas de consumo libresco. Entendemos aquí por comunidad de interpretación aquella formada por quienes comparten ciertas prácticas culturales.

En materia de libros dicha comunidad, denominada por los historiadores como »gentes del libro«,[17] estaría compuesta por personas con capacidad de lectura y de escritura, como impresores, escribanos, maestros de letras y de escritura, pendolistas, operarios de prensa, mercaderes de libros, libreros, bibliotecarios, encuadernadores, lectores e incluso inquisidores. Esta comunidad puede ayudarnos a identificar la red que producía, movía y consumía esos libros de derecho en la Nueva España, tarea que evidentemente requiere conocer o identificar cuáles eran los autores de esos libros y los títulos de sus obras, y cuáles no lo eran.

Como hemos dicho, los »libros de derecho« en el Antiguo Régimen conforman una categoría desarrollada y usada para entender a ese conjunto libresco como una manera de solventar cierto problema de investigación histórica. Así, básicamente podemos entender en esa literatura especializada estos libros como aquellos que eran útiles para el trabajo del jurista, pero ello también aplicaría para los libros producidos por éste. Empero,

15 Duve (2016) 12.
16 Fernández del Castillo (2014) y O'Gorman (1939).
17 Verger (1997) XIII.

no podemos referimos aquí únicamente a esos individuos que estudiaban o »professaban las leyes«,[18] sino también a quienes empleaban cualquier libro normativo en el ejercicio de su oficio, fuese este religioso o civil.

Ahora bien, encontramos dos tendencias en la caracterización de historia del derecho. Una reconoce que esa categoría estaba formada por los libros empleados en la formación universitaria de estos juristas. La otra se conformaba por aquellos libros que eran parte sustancial en su práctica jurídica, los denominados pragmáticos. Entre ambas tendencias siempre habrá correlación, pues los juristas se formaban en universidades y, por tanto, parte de esa literatura les acompañaría en su desarrollo profesional, ya fuese como juez, profesor de derecho o en la abogacía, entre otras. En esa literatura estarán representados tanto el derecho civil y el derecho canónico, como el conocimiento imprescindible para el ejercicio de la profesión jurídica.[19] Estos libros del »letrado jurista«,[20] arribaron a la América española desde el siglo XVI, no solamente acompañando a los juristas egresados de universidades sino también a otros oficiales de la administración colonial y a todos los religiosos. Todos ellos son libros que se pueden documentar en testimonios históricos, tanto bibliográficos como documentales.

Ahora bien, ¿podemos trazar el rastro de esos libros para contribuir a una definición más cercana a este producto librario? Sin duda, pero estaremos en la misma línea de pensamiento que resuelve sólo una pregunta de investigación: ¿qué libros tenía y usaba un jurista novohispano? Una respuesta que ya han dado con anterioridad autores como Malagón Barceló, Barrientos Grandón o Luque Talaván. Respecto a sus interpretaciones, es pertinente ahora reflexionar sobre las fuentes históricas de las que extrajeron la información sobre la literatura jurídica y los libros de derecho en la Nueva España. Malagón, en principio, empleó las listas de libros publicadas por Edmundo O'Gorman en el Boletín del Archivo General de la Nación.[21] En dicha edición se publicaron 35 documentos de diferente naturaleza, donde se da noticia de libros circulando en el territorio novohispano entre 1585 y 1694.

La mayoría de estos testimonios documentales responden a procedimientos inquisitoriales para el control de libros pero están más representados libreros y mercaderes. Según los inquisidores, estos conformaron el grupo social de mayor riego porque estaban a cargo de los mecanismos de abastecimiento de libros (permitidos y prohibidos) para cualquier persona residente en el territorio. Entre estos libreros se encontraban Simón de Toro, Hipólito de Rivera, Francisco Rodríguez Lupercio y Paula de Benavides, quienes estaban obligados desde 1612 a entregar anualmente relaciones de sus libros en venta al Santo Oficio.

Los otros documentos de la compilación de O'Gorman están relacionados con lectores o personas con posibilidad de lectura. Estos son: Juan de Luyando (1585), Francisco de Omaña quien declaró ser escribano público (1614), Diego González Batres (1614), el mercedario Gregorio de Cartagena (1614), el cura Fernando Rodríguez de Figueroa (1614), Gabriel de Vega (1616), Simón García Becerril (sin fecha), el presbítero Manuel Correa (1621), el jesuita Francisco Bello (1660), el franciscano Martín del Castillo (1660), Juan de Oviedo y Córdoba (1660) y el Capitán Joseph de Estrada (1661). Ninguna de estas personas fue oidor, fiscal, abogado, bachiller o »letrado jurídico«, exceptuando el escribano quien formaba parte de esos practicantes del derecho[22] como lo prueban las cinco obras del derecho de su colección.[23]

Por su parte, Barrientos Grandón incluyó en su estudio sobre la literatura jurídica, además de la información de O'Gorman y en consecuencia la misma de Malagón, a otras bibliotecas institucionales de la Nueva España: el Colegio de San Pedro y San Pablo de México, el Real Colegio Seminario Tridentino de México, el Colegio Real y más Antiguo de México y los conventos franciscanos de Luis Gómez Canedo. Entre las colecciones privadas que este autor empleó para su estudio, hemos podido identificar las siguientes:

18 Diccionario de Autoridades (1734), vol. IV.
19 Biersack (2009) 45.
20 Pelorson (2008) 13.
21 Malagón Barceló (1959) 11; O'Gorman (1939).
22 Agüero (2014) 6.
23 O'Gorman (1939) 681–683.

Nombre	Cargo	Fuente	Siglo
Francisco Cervantes de Salazar	Catedrático de Retórica	Millares Carlo	XVI
Pedro Nogales Dávila	Obispo de Puebla	AGN, Expolios	XVIII
Felipe Ignacio Trujillo y Guerrero	Obispo de Michoacán	AGN, Expolios	XVIII
Fray Francisco de la Cuesta	Obispo de Manila y Michoacán	AGN, Arzobispos y Obispos	XVIII
Juan Ignacio María de Castorena y Urzúa	Obispo de Veracruz	AGN, Arzobispos y Obispos	XVIII
Juan José de Escalona y Calatayud	Obispo de Michoacán	AGN, Clero Regular y Secular	XVIII
Francisco Pablo Matos Coronado	Obispo de Michoacán	AGN, Arzobispos y Obispos	XVIII
Diego Felipe Gómez de Angulo	Obispo de Antequera	AGN, Expolios	XVIII
Manuel José Rubio Salinas	Arzobispo de México	AGN, Clero Regular y Secular	XVIII
Luis Fernando de Hoyos y Mier	Obispo de Michoacán	AGN, Expolios	XVIII
Pedro Anselmo Sánchez de Tagle	Obispo de Durango	AGN, Expolios	XVIII
Rafael José de Berger	Obispo de Linares	AGN, Expolios	XVIII
Luis de Piña y Mozo	Obispo de Mérida	AGN, Clero Regular y Secular	XVIII
Alonso Núñez de Haro y Peralta	Arzobispo de México	AGN, Expolios	XVIII
Ignacio Ramón Moreno	Abad de la Colegiata de Santa María de Guadalupe	AGN, Civil	XVIII
Manuel Ignacio González del Campillo	Obispo de Puebla	AGN, Arzobispos y Obispos	XVIII
Antonio Bergoza y Jordán	Obispo de Oaxaca	AGN, Arzobispos y Obispos	XVIII
Juan Francisco de Castañiza	Obispo de Durango	AGN, Arzobispos y Obispos	XVIII
José Manuel Messia de la Cerda y Vargas	Alcalde de la Real Audiencia de México	AGN, Judicial	XVIII
Sebastián Calvo de la Puerta	Alcalde de la Real Audiencia de México	AGN, Civil	XVIII
Diego López Bravo de Molledo	No se declara	AGN, Civil	XVIII
Francisco Antonio Barroso	Mercader	AGN, Clero Regular y Secular	XVIII
José Antonio de Hoyos	Panadero	AGN, Civil	XVIII
Matías Alcedo	Chocolatero	AGN, Civil	XVIII
Ignacio Castro	No se declara	Torre Revello	XVIII
Pablo Robledo	Colegio de San Pedro y San Pablo de México	AGN, Clero Regular y Secular	XVIII

Como se puede apreciar, entre estas colecciones personales analizadas hay pocas bibliotecas de juristas, a diferencia de las colecciones de oidores, abogados y fiscales que se incluyeron para Argentina, Chile y Perú. Por su parte, Luque Talaván trabajó con fuentes de diferente naturaleza: algunas bibliográficas (incluyendo la citada de O'Gorman), cajones enviados a América, listas de libreros, inventario de bienes de difuntos, »inventarios de bibliotecas – conventuales, particulares y públicas – [que] se guardan en el Archivo Histórico Nacional (Madrid), en el Archivo General de la Nación (México), en el Archivo General de la Nación del Perú y en la Biblioteca Nacional del Perú«.[24]

Lamentablemente, Luque no especifica en este enorme esfuerzo cuáles fueron esas bibliotecas institucionales y privadas que analizó para que podamos diferenciar entre las colecciones de juristas y las correspondientes a los prelados incluidos como obispos y arzobispos. Ahora bien, si la noción sobre la circulación de libros de derecho en el territorio novohispano no se basó exclusivamente en los libros de juristas, ¿podemos decir que entre las bibliotecas de prelados y letrados había más similitudes que diferencias? Entonces, ¿cuáles

24 Luque Talaván (2003) 182–183.

fueron los libros que diferenciaron a las colecciones de letrados en la Nueva España? ¿Estas colecciones respondían necesariamente a las necesidades profesionales del oficio o el cargo?

Tal planteamiento no es una ociosidad pues debemos pensar en las bibliotecas de oidores, fiscales, abogados, alcaldes, corregidores y bachilleres en leyes, escribanos y notarios como oficiales de la justicia en la América española para definir mejor los libros de derecho. Ciertamente, el contenido de dichas colecciones probablemente no cambiará demasiado la nómina de autores y obras jurídicas identificadas con anterioridad. Pero su inclusión contribuirá a delinear mejor la geografía cultural de los libros de derecho que estaban presentes en el virreinato novohispano. Debemos recordar que estos libros no estaban aislados, sino que conformaban un universo de conocimiento interrelacionado con otras disciplinas. La biblioteca de cada jurista era un universo conceptual y personal, que no estaba constituido exclusivamente por literatura normativa. No debemos olvidar los otros libros, porque también ayudan a comprender el uso que cada letrado daba a esas obras en su vida y práctica cotidiana.

Otras fuentes y otras miradas: las ediciones jurídicas en circulación

Intentar circunscribir la esfera de la literatura normativa, desde los aspectos materiales como lo hace la Historia del Libro y a partir de los contenidos como puede hacerlo la Historia del Derecho, no es en absoluto un asunto »trivial«. Por el contrario, comparto el que el trabajo conjunto entre ambas disciplinas puede ser un »campo prolífico para más investigaciones y reflexiones«.[25] Por eso, queremos presentar una mirada desde la cultura escrita para apuntalar una noción sobre los libros de derecho. Quizá así podremos obtener propuestas de mayor consenso, que reconozcan o atribuyan autores, obras y ediciones, como objetos materiales producidos desde el derecho canónico y civil y relacionados con alguna escuela de pensamiento como la de Salamanca.

Nuestra mirada está interesada en la circulación de la literatura normativa entre 1500 y 1861, porque incluye las fechas de fundación de las primeras ciudades en la América española y el cierre definitivo de las bibliotecas de las órdenes religiosas que estuvieron activas durante el periodo colonial novohispano. Estas últimas cerraron con la exclaustración de 1861 y representan la base del legado bibliográfico en la mayor parte de los países de la región latinoamericana. Legado bibliográfico que se conserva principalmente en las bibliotecas nacionales, aunque el saqueo y la dispersión de las colecciones que se dio durante la segunda mitad del siglo XIX produjo que algunas piezas se integrasen a repositorios extranjeros.

En México existen todavía numerosas fuentes bibliográficas y documentales que no han sido consideradas en cualquier estudio sobre la cultura escrita de la Nueva España. Estas también son útiles para abordar la reflexión sobre los libros de derecho o la literatura jurídica. Recordemos que nos referirnos a esos libros que usaban quienes »profesaban« las leyes en el periodo virreinal, lo que incluía a aquellos que debían haber pasado por las universidades pero también a quienes participaban en la práctica jurídica y habían sido formados en otras opciones educativas.[26] Es decir, pensamos en documentar más que a los libros del letrado. Nos interesan los libros de todo oficial o funcionario que haya trabajado en alguna materia del derecho en la administración colonial. Por tanto, aquí descartaremos las colecciones de los prelados, que ya han sido empleadas en estudios anteriores, pero no los libros del derecho canónico que se encuentren en las bibliotecas de tales oficiales mencionados.

Para conocer estos libros también podemos acercarnos desde otros enfoques que queremos proponer. Uno, pretende seguir caminos del pasado y recuperar los libros considerados en la temática jurídica, desde los inventarios impresos que se hacían para la venta de una colección. En este rubro debemos destacar aquellos que se asemejen al inventario del Consejero Real Lorenzo Ramírez de Prado,[27] que se organizó en diferentes disciplinas entre las que se encuentra: »Libros de juristas«. Dicha categoría está dividida en dos grupos coincidentes con la formación del jurista: Derecho civil y canónico.[28] Y después se divide en cinco clases: 1) Derechos, Civil y Canónico, Interpretes, Lectu-

25 Hespanha (2008) 38.
26 Carabias Torres (2012) 148 y 152.
27 Entrambasaguas (1943).
28 Tau Anzoátegui (2011) 16.

ras, Tratados y Materias; 2) Consulentes y responsos, 3) Decisiones de Rota y otros varios Tribunales, 4) Políticos, Económicos y Epístolas Familiares; y 5) Apologías, invectivas e informaciones en Derecho.[29]

Lo interesante de este inventario y, especialmente su utilidad, es que los registros tienen todos los datos para identificar las ediciones de esas obras y autores. Incluso algunas abreviaturas coinciden con la que se empleaba en documentación histórica: »Felicianus de Vega Relect. in 2. decreti Limae 1633«,[30] por lo que ayuda a identificar obras registradas con menor información en otros testimonios históricos: »Vega Relectiones Canonice«,[31] pero no permiten apuntar la edición. Una información similar puede extraerse de catálogos de libreros,[32] memorias de estos mismos entregadas a la Inquisición como las que se encuentran en O'Gorman,[33] que afortunadamente no son las únicas conservadas;[34] además contamos con inventarios y catálogos de bibliotecas institucionales de conventos, colegios, noviciados y otros institutos en la Nueva España.[35] En todos los casos, distinguimos aquellos testimonios que organizan temáticamente su contenido.

Existe también otro tipo de listas de libros que tienen las mismas características y quizá más de lo que suponíamos. La más importante diferencia que encontramos en estas listas es que fueron hechas por personas en el transcurso de su vida, a diferencia de un inventario *post mortem*. Tal condición condujo a comprender mejor el proceso inquisitorial del que fueron parte y que no se tenía estudiado. Este proceso de revisión comenzó, aparentemente, cuando el tribunal novohispano dio inicio a sus actividades; por eso contamos con testimonios desde fines del siglo XVI y hasta 1716 con datos excepcionales sobre las ediciones en circulación de la época. Esta es una realidad ya incuestionable: la mayoría de los testimonios históricos que dan prueba de la presencia de libros en el Virreinato de la Nueva España están directamente vinculados con el Santo Oficio de la Inquisición.

Estas son evidencias producidas entre el siglo XVI y el XVII, para cumplimentar un ordenamiento inquisitorial que buscaba controlar la circulación de los libros prohibidos y hacer la expurgación de los libros que así lo requiriesen. Hasta 1612, ese ordenamiento incluyó a lectores, libreros y mercaderes de libros quienes debieron entregar relaciones de libros cuando los inquisidores lo requirieron. Después de esta fecha, el control se siguió implementando pero enfocado más a lectores de todos los estamentos. Tales listas, denominadas »memorias« en la propia documentación, son interesantes por dos cosas: una, como testimonio de la circulación de la literatura normativa en este territorio; otra, es la presencia de un canon bibliográfico entre la gente del libro a la que nos hemos referido.

Resulta importante reconocer esta característica frente a la valoración negativa que tienen las listas de libros en la investigación histórica mexicana. En efecto, siempre se les ha considerado indescifrables por la escasa información bibliográfica que aportan. Sin embargo, tal apreciación se hizo basándose en testimonios que ofrecen datos básicos: »Autos acordados del Consejo«,[36] que por ello pueden representar un problema de identificación. Además para dicha apreciación, por extraño que resulte, no se consideraron otras evidencias que tenían más datos sobre libros en circulación y que ya se conocían: »Fr. Alfonsus a Castro. De Potestate Legis Penalis. Dos libros. Antuerpiae. Anno 1568. Si tiene el de (ilegible) es necesario hacer en él lo que anda el expurgatorio. Folio 36. Eclesia«.[37] Ciertamente, estas listas son resultado de la práctica del canon bibliográfico compartido entre una comunidad de interpretación como una forma de ordenar ese universo libresco.

Este canon fue una especie de regla desarrollada desde el siglo XV con la intención de organizar y compartir información bibliográfica, no sólo entre comunidades de interpretación sino también entre las gentes del libro. Un buen ejemplo de este intento normativo se encuentra en la revisión que hizo la Congregación del Índice vaticana, entre 1599 y 1600, de las bibliotecas de las ordenes religiosas de Italia. De esta acción resultó un minucioso inventario de libros y manuscritos que estaban disponibles para la lectura de esos religiosos.[38] Ahora bien, Thomas Duve describe a una

29 Ramírez de Prado (1660), fol. 1r.
30 Ramírez de Prado (1660), fol. 3r.
31 Pino (1758), fol. 11v.
32 Rueda Ramírez (2017) 459.
33 O'Gorman (1939).
34 Juristas (en folio, en cuarto, en octavo y el doceavo), Lagua (1768), fol. 79r–88v.
35 Osorio Romero (1986).
36 Lagua (1768), fol. 79r.
37 O'Gorman (1939) 808.
38 Borraccini (2014) 179.

comunidad epistémica como el grupo que comparte y emplea el mismo tipo de conocimiento como el Derecho, la Medicina o la Teología.[39] Entonces, ¿las gentes del libro pueden ser considerados algún tipo de comunidad epistémica? o ¿ese tipo de comunidad implicaría niveles de comprensión de ese conocimiento específico?

De esta manera, sería diferente el nivel de conocimiento y el uso de la información entre un maestro de novicios en un Convento y un religioso que vivía en una comunidad indígena. En el primer supuesto, el maestro tenía siempre numerosas opciones de lectura y, en el segundo, estas se reducirían bastante. Esta diferencia la podemos apreciar justamente en las listas de libros y en las peticiones para su envío a territorios distantes. Estas listas o memorias se pueden dividir en dos tipos diferentes. Una, con mayores datos y, otra, con ligeras variaciones entre el registro de autores, títulos y lugares de impresión. En efecto, no tenemos una buena repuesta para explicar por qué algunas personas usaban un tipo de registro u otro. De cualquier manera, ambos representan una información invaluable para entender la circulación de libros en el pasado y son una herramienta invaluable para una posible definición o comprensión de los libros de derecho.

En este mundo de registros bibliográficos del periodo colonial, es evidente que se pueden identificar las más importantes obras que han sido reconocidas por la Historia del Derecho, aunque no exista una definición clara sobre tal literatura. Empero, para el caso novohispano no se han considerado como prioridad colecciones de juristas para delinear ese conjunto de libros. Entonces, ¿podríamos definir a estos libros como aquellos que son parte de la literatura normativa (en la que se ordenan aspectos de la convivencia social), y que manifiestan, definen y regulan el marco de la justicia como expresión del derecho (natural, divino y positivo)? Tal comprensión ampliaría nuestra búsqueda e incluiría otras obras que igualmente fueron usados para la construcción de ese orden social.

Además, hay otro aspecto fundamental para la historia de los libros: la edición en circulación y el número de ejemplares. La edición es la que recibe el acto de lectura. Ciertamente, el formato, el diseño de una página, el trabajo de un impresor, el papel y otras características de la materialidad de un objeto bibliográfico fueron importantes para los lectores. Las personas siguen escogiendo sus libros en función de esas peculiaridades. No obstante, tal elección también estaba determinada por la oferta del mercado libresco de su tiempo: libros nuevos, libros de segunda mano, distribución comercial o privada, rutas y redes comerciales.[40] Por otro lado, los libros de la época que nos interesan fueron producidos durante el periodo de la imprenta manual y, por esa razón, cada edición podría presentar variantes y estados. Tales aspectos resultan fundamentales cuando se trata de rastrear un censo de los ejemplares de una obra específica, porque esas pequeñas transformaciones podrían afectar la transmisión de un texto.[41]

Un problema añadido es la correcta identificación de las ediciones del pasado en la documentación histórica. Una tarea que a veces es complicada y no únicamente por el canon bibliográfico empleado. Este es un aspecto sobre el que no hemos reflexionado, pese a que la historia del libro y de las bibliotecas, tanto como la historia del derecho, utilizan diferentes listas de libros para dar cuenta de las obras jurídicas que son características de una época o de una escuela. Por eso, combinar testimonios, como el inventario de Ramírez y otros similares, es bastante útil porque en algunos casos tienen abreviaturas de títulos y ciudades como se uso en otros testimonios. De igual manera, autores, obras y ediciones que tenemos localizadas porque contamos con datos más precisos, permiten identificar obras y autores en registros con menor información.

Esa es la premisa con la que hemos trabajado, en una investigación dedicada a las bibliotecas privadas de la Nueva España, la cual evidenció que en el territorio se habían usado indistintamente las dos formas del canon bibliográfico a las que nos referimos.[42] Sin embargo, esas evidencias fueron testimonios procedentes del siglo XVIII que responden al trámite inquisitorial reglamentado en 1632. Este procedimiento reconocía la venta de bibliotecas de

39 Duve (2016) 8.
40 Raven (2015) 147.
41 Moll (2011) 27–46; Osler (2005) 18–19.
42 García (2020) 167–169.

difuntos como una práctica cultural frecuente, por lo cual obligaba explícitamente a herederos, albaceas y libreros interesados a entregar una relación de esos libros para autorizar su venta. Este tipo de comercio alimentaba un mercado de segunda mano bastante vigoroso y posibilitaba la circulación de libros prohibidos que habían sido previamente autorizados para su lectura.

Sobre esa base, trabajamos las otras memorias de libros de los dos siglos anteriores y que responden al otro proceso inquisitorial mencionado líneas atrás. El valor de estas evidencias no sólo es su temporalidad, porque son anteriores a los documentos de O'Gorman, sino la rica información que aportan para conocer el abastecimiento y demanda de libros jurídicos en el territorio novohispano durante la primera época colonial. Para esta propuesta no usamos todas, sino un conjunto fechado entre 1585 y 1629, que se corresponden con 19 lectores y 11 libreros o mercaderes de libros. De estos 30 testimonios, 22 tienen prácticamente toda la información necesaria para ubicar una edición. En total estas memorias arrojaron el registro de 1,369 obras en circulación.

En este conjunto, ¿cuáles son los libros de derecho o la literatura normativa que estamos buscando? ¿Cómo debemos seleccionarlos? ¿Por un catálogo o enfocándonos en las lecturas de un profesor universitario? Esta es la complejidad a la que nos hemos referido, que es mayor cuando enfocamos la atención en las ediciones registradas. Por ejemplo, las tres ediciones de vocabularios jurídicos:

Vocabulario utriusque Juris lugduni apud Jabus Mith. 1535
= Antonio de Nebrija (1444–1522), Vocabularium utriusque iuris […], Lugduni: apud haeredes Iacobi Iuntae: Iacobus Forus excudebat, 1559 (CCPB000268319-9). No hemos encontrado ejemplar conservado de la edición registrada.

Yten Vocabularium etrius Juris emendatum id auctius quam lingua cinter opera Alexadr. Scot ic. lugduni apud horatium cardon CIC .DCIIII
= Alexander Scot, Vocabularium vtriusque iuris, emendatius et auctius […], Lugduni: apud Horatium Cardon, 1604 (CCPB000413153-3)

Bocabulario de ambos derechos impreso lugduni año MDLXXIX [1579]
= Vocabularium iuris vtriusque. Huic singulas a lexico […], Lugduni: apud Simphorianum Beraud, 1579 (IT\ICCU\RLZE\037755).[43]

Estos diccionarios son disciplinares y especializados, de ahí que no sea extraño que los dos primeros pertenecieran a dos bachilleres: Juan de Aguirre y Juan de Arciz. Mientras que el tercero perteneció al agustino Juan de Montemayor. Tenemos otro registro »Yten vocabulario juris«, ¿a cuál de esas ediciones podemos atribuir este otro vocabulario? No tenemos ahora una respuesta definitiva a este tipo de preguntas, pero entre más ediciones identificamos se reducen las posibilidades de otras obras y ediciones.

Así, si seguimos a los historiadores del derecho que ya han identificado autores y obras del derecho, en esta documentación mencionada encontramos ediciones de las obras de Diego de Covarrubias y Leyva, Martín de Azpilcueta, Luis de Molina, Domingo de Soto, Pedro Núñez de Avendaño, Alfonso de Acevedo, Jodocus Clichtoveus, Filippo Decio, Konstantinos Harmenopoulos, Giacomo Menochio, Tomás de Mercado, Juan Yañez Parladorio, Gabriel de Monterroso y Alvarado, Juan de Hevia Bolaños, Alonso de Villadiego Vascuñana y Montoya, Prospero Farinacci, Garzía Mastrillo, y Jerónimo Castillo de Bobadilla, entre otros más. Evidentemente son estas ediciones del Concilio de Trento, ordenanzas, las Decretales, y legislación española.

Consideraciones finales

Las ediciones de estos testimonios relacionados con la literatura normativa son 150, más 12 registros que no hemos logrado identificar y que, suponemos, pertenecen a esta disciplina y un manuscrito interesante: »Otro de iustitia et iure del Padre Hortigosa«. Esta información la hemos ingresado en KOBINO, una base de datos bibliográfica diseñada para identificar ediciones antiguas en documento históricos novohispanos y relacionar ese dato con algún ejemplar todavía conservado en repositorios contemporáneos.[44] Se trata de

43 Montemayor (1612), fol. 2r; Arciz (1622), fol. 1r; Aguirre (1629), fol. 301r.

44 Catálogo disponible en: https://libant.kohasxvi.mx/cgi-bin/koha/opac-main.pl.

un proyecto en desarrollo que nos permite facilitar el manejo de este caudal de información bibliográfica. Por eso, mencionamos a Castillo de Bobadilla, lo que resulta ideal para mostrar la problemática de las ediciones entre los libros de derecho, porque también es un autor reconocido por sus aportaciones entre los juristas.[45]

Hasta ahora, en toda la documentación recuperada entre los siglos XVI y XVIII, identificamos en circulación siete ediciones diferentes de su obra *Politica para corregidores y senores de vassallos*: Amberes (1704, 1750), Madrid (1597, 1649, 1759 y 1775) y Medina del Campo (1608). Aquí encontramos la primera edición que se mandó expurgar por el Santo Oficio. ¿Es este un libro de derecho? Sí, es un libro pragmático de literatura normativa de amplia circulación en el mundo hispánico. Otra obra de impacto es la que corresponde al jurista español Diego de Covarrubias y Leyva, de quien encontramos cinco de sus ediciones en circulación (1592, 1594, 1614, 1638, y 1762), además de seis ediciones de comentarios e interpretaciones a su trabajo. Covarrubias es un autor reconocido en la historia del derecho como miembro de la Escuela de Salamanca.[46]

Cada una de estas ediciones se relaciona con un poseedor y todavía falta información por procesar. Es interesante reflexionar sobre estas ediciones en las colecciones novohispanas, especialmente porque es un aspecto que no se ha considerado en otros textos relacionados con la circulación de libros en este territorio. La lista más completa de obras y autores con la que contamos es la de Luque Talaván con 1250 títulos para el mundo indiano,[47] pero que no registra ni a todos los autores que publicaron temáticas jurídicas ni contempla todas las ediciones que estuvieron presentes en la Nueva España. Por ejemplo, no contempla a los juristas Sebastián Brant y Manuel Román Valerón, entre otros, de quienes encontramos ediciones y ejemplares de sus obras: la *Expositio titulorum* (1526, 1587 y 1619) y el *Tractatus de transactionibus* (1664, 1665, 1681 y 1757).

¿Cómo explicamos este fenómeno frente a la apropiación y lectura de los textos jurídicos? ¿Existen diferencias sustanciales entre esas ediciones? ¿Las características materiales de una edición determinaban la elección de un poseedor? ¿O son esas ediciones resultado de la oferta disponible en el mercado local de libros? En el grupo de poseedores que hasta ahora integramos para representar a los juristas tenemos dos oidores, tres bachilleres, un abogado y un prebendado. Es decir, el entorno ideal para encontrar libros de derecho, que se abastecía de un mercado local asociado a las redes europeas del libro. Por eso, creemos importante integrar las colecciones de los juristas que no fueron consideradas en estudios previos para delinear mejor este universo disciplinario. Esta es una tarea que pretendemos hacer con un conjunto de memorias que, hasta ahora, se compone de 32 testimonios entre los siglos XVI y XVIII.

Estas memorias dan mejor cuenta de los libros que circulaban en esa comunidad epistémica integrada por los juristas que trabajaron en la Nueva España, como Antonio Caldera de Mendoza, todos letrados que contaban algún tipo de formación universitaria. Ese conocimiento disciplinar lo encontramos también en las bibliotecas institucionales de las órdenes religiosas, colecciones que igualmente se están integrando en KOBINO a través de proyectos específicos. Ciertamente, existen investigaciones que trabajan con la circulación de libros en este territorio. El problema es que no se comparten los datos y, que no se trabaja con bases bibliográficas diseñadas en los principios del acceso abierto. Sólo así se construye un espacio colaborativo a largo plazo. No obstante, con la información que estamos compilando en KOBINO podremos determinar qué literatura normativa llegó al territorio y cuál se vendió en el mercado local. Y lo que nos resulta más interesante, es que podremos determinar el impacto de ciertas ediciones por la tendencia que se encuentra en los testimonios.

También interesa comprender las dinámicas del mercado del libro en un territorio tan vasto como el novohispano. De los libreros y mercaderes depende una parte del abastecimiento de libros, el otro es el de segunda mano con sus diferentes características. En ese mercado, tenemos dos tendencias claras que definen la distribución de tan particular mercancía: eslabones familiares de redes internacionales asentadas en el territorio y otros aventureros que buscan una oportunidad en un

45 Danwerth (2016).
46 Giuliani (2016).
47 Luque Talaván (2003) 259–638.

mercado apetecible. Para unos fue un gran negocio y, para otros, un desastre monumental. Lamentablemente, de todas esas ediciones que da cuenta del testimonio del pasado, no quedan ejemplares conservados en México y, a veces, en el mundo. Este es el terrible resultado de un proceso de destrucción y saqueo que comenzó con las bibliotecas jesuitas, y que todavía no podemos decir que se ha terminado.

Finalmente, parece necesario entender el uso que se daba en esa comunidad epistémica para construir un concepto funcional en los estudios de historia del derecho. Es difícil, por ahora, obtener más respuestas de las que aquí esgrimimos. Entre más evidencias compilemos, tanto bibliográficas como documentales, podremos entender mejor la mecánica de los libros en una disciplina con fronteras nebulosas. Ese concepto para »libros de derecho« sólo puede ser resultado de un trabajo colaborativo entre la Historia del Derecho y la Historia de los Libros. Todo un desafío para el que se requieren enfoques y metodologías interdisciplinarias y una constante negociación.

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Airton Ribeiro da Silva Jr.*

Magistrates' Travelling Libraries: The Circulation of Normative Knowledge in the Portuguese Empire of the Late 18th Century

Introduction

Before being appointed as *ouvidor*, Manuel José Baptista Felgueiras had served the Portuguese crown as *juiz de fora* in two small municipalities in mainland Portugal. For a newly qualified lawyer like him, the position of *juiz de fora* was the usual point of entry into the magistracy, followed by the post of *ouvidor / corregedor*, higher up the judicial hierarchy, and culminating in a seat on a high court as *desembargador*.

On October 30, 1801, the expected appointment as *ouvidor* came. It was, however, located in a remote and minor jurisdiction in Portuguese America: Espírito Santo. These overseas posts were virtually a mandatory step in every typical judicial career – and may even have provided a shortcut to the highly coveted seat on the *Casa da Suplicação*, the Portuguese Court of Appeal. This was the case with Manuel José. His loyal services overseas were duly rewarded, with an appointment not only as *desembargador* when he returned to Portugal, but also as deputy of the *Mesa da Consciência*.

In moving from one jurisdiction to another, and particularly when serving in remote and often isolated posts, judges had to carry everything they needed with them, as things would have been very hard to come by locally. What a Portuguese judge of the late 18th century needed most was books. Thus, on April 30, 1802, shortly before embarking, the newly appointed judge petitioned the Crown administration, asking permission to carry with him eight books. Permission was granted and the books were duly shipped.

Thanks to the control that the Portuguese Crown exercised over the circulation of written material, it is possible for us today to know exactly which books an itinerant magistrate, such as José Manuel, took with him when assigned to an overseas position on the eve of the liberal era. The present study examines eleven lists of books made by magistrates assigned to judicial positions throughout Portuguese America in the late 18th century as a way of shedding light on the kind of normative information these judges needed for their work overseas. This study attempts to ascertain which books were especially ›useful‹ for travelling judges, which genres were considered suitable for these professionals, and whether these libraries differed from stationary ones.

Books have been extensively studied by legal historians, but the focus has mostly been on their *content*. Scholars of the history of legal thought often studied books without paying much attention to them as concrete material objects[1] whose production and dissemination in fact constitute a multifaceted collective endeavour, involving a multitude of individuals extending far beyond the individual authors.[2] The approach adopted here thus attempts to include the study of books as physical objects in legal history, considering the book as a printed medium – bulky yet fragile – and relating book ownership to judicial practice. Developments in the field of book history are thus key to our approach.[3] Legal history is essentially a textual enterprise: a field that works on legal texts.[4] Generally speaking, normative information[5] can circulate and be transmitted by way of various spheres of communication. It can be shared orally, yet the literary tradition – in the form of either printed material or manuscripts – predominates. Within this tradition, books are the main means by

* This article is the result of a post-doctoral research project entitled ›The controlled circulation of normative knowledge in the Portuguese Empire‹ developed at the Max Planck Institute for Legal History and Legal Theory in 2020.

1 The main source is Hespanha (2008), who also refers to these new trends in Hespanha (2019b) 14.

2 Darnton (1982) 67–69.

3 For a methodological approach combining book history and legal history, see Beck Varela (2016) 197–203.

4 Costa (2006).

5 Duve (2018) 24–25.

which legal texts have been transmitted, especially with regard to the ›scientific‹ law cultivated by learned lawyers.[6] As Hespanha reminds us, this object ensured that the knowledge of erudite law reached the most distant locations, even where no individual with legal authority was present.[7] Hence, viewing law books from a different kind of perspective, as *law books in motion*[8] and as objects in which normative information is stored, may shed valuable light on how the global circulation and translation of normative knowledge took place within the Portuguese empire, and how this came to engender a legal regime of such extensive reach.[9]

The article begins by describing the complexity and vast extent of the Portuguese system of justice in the 18th century. This was largely a consequence of the pluricontinental distribution of judicial positions. In the second section, the careers of eleven *letrados* (›lettered‹ or ›learned‹ jurists, that is, those who studied law at university) who were appointed *ouvidores* in Portuguese America between 1799 and 1806 are used to illustrate the Portuguese judicial *apparatus*. In this period, the circulation of written materials was controlled by the Crown, obliging judges to seek authorization to carry books with them. The third section therefore is dedicated to describing the censorship sources that allow us to identify the collection of books that accompanied each judge when he travelled. Finally, in the last section, an analysis of these book lists leads us to the conclusion that these collections of legal books comprised what I will call travelling libraries: portable collections of professional books indispensable for work in overseas jurisdictions.

The administration of justice in a pluricontinental empire

The Portuguese Empire had no general model or uniform strategy in terms of imperial political administration of its widely dispersed dominions.[10] Structures of government in the colonies had to be adapted to local conditions, resulting in a complex mosaic of distinct jurisdictions. Trading posts and medieval institutions like seignories, where a nobleman ruled by way of delegation, coexisted with areas under central control, occupied and governed by officials in the service of the king.[11] In these more stable land holdings, such as those in Portuguese America, the traditional structure of government – including the administration of justice – had been to some extent replicated,[12] notwithstanding a number of concessions to local peculiarities.[13] Shaped by a corporative conception of society, these dominions ended up reproducing a constellation of decentralized powers, in which the power of the Crown was in constant competition with local interests.[14]

In this context, the most visible face of the *imperium* – and indeed, its main function in the *Ancien Régime* – was the administration of justice. This means that delivering justice was accorded high priority in the organization of society. Though designed to resolve conflicts, the judiciary itself could constitute a motive for power disputes, largely in consequence of its being structured as a multiplicity of disparate semi-autonomous local bodies sharing power and yet subordinate to the jurisdiction of the Crown. At the lowest level, jurisdiction was mostly exercised by a lay member of the local elite elected by the municipal council (*juiz ordinário*), but in exceptional circumstances, it could also be conducted by a law graduate appointed by the Crown (*juiz de fora*).[15] Immediately above these, with geographically broader and hierarchically higher jurisdiction, there were magis-

6 Nevertheless, the persistence of the circulation of manuscripts in the age of printing cannot be ignored. See Hespanha (2008) 15; for Spain, see Bouza (2016).
7 Hespanha (2015), § 26.
8 Bellingradt / Salman (2017).
9 Following the approach proposed by Duve (2020b). Cf. also Benton (2002).
10 Hespanha (2010a) 52–57.
11 Cabral (2015).
12 For a general description of justice administration in Brazil, see Camarinhas (2009b).
13 Subtil (2011) 35; Hespanha (2012).
14 Hespanha (1994); Cunha / Nunes (2016) 7–8.
15 This literally means ›judge from afar‹. Descriptions of the Portuguese organization of justice are based on Hespanha (2006) 361–374.

trates chosen by the local ruler, *ouvidores* in places where a donation system with seignorial jurisdiction still prevailed, or *corregidores* appointed by Lisbon in places where the jurisdiction of the Crown held sway. Broadly speaking, this arrangement persisted throughout the *Ancien Régime*. This was true even in the 18th century, which saw a rapid expansion of the judicial system in Portuguese America into the vast Brazilian interior[16] alongside growing restrictions on the powers of the local land holders. In consequence, most of the seignorial judges were replaced by royal ministers – although, in Portuguese America, the term *ouvidor* was used indistinguishably for both royal and seignorial judges.[17]

In the delicate balance of power between local autonomy and Crown intervention in a colonial domain, magistrates appointed by the Portuguese Crown were supposed to tip the balance in favour of the interests of the king.[18] The procedures involved in the career of a magistrate provide clear evidence of this, and it was especially true in the late 18th century, when magistrates constituted the driving force behind centralization within an imperial policy oriented towards integration.[19] In the first place, progression in the career of a magistrate depended on royal appointment,[20] and a certain loyalty to the king was therefore expected. Second, the purpose of three-year appointments was to prevent the establishment of local ties. Likewise, an attempt was made to circulate magistrates around the various Portuguese dominions, appointing them to a succession of remote posts until they attained the coveted position of *desembargador*, the highest rank of a judicial career. At least, this was the intention of the Crown. In the *distant* reality of the colonies – a distance that was not just the result of spatial separation – the defence of Crown interests that the circulation of magistrates through a variety of temporary posts was aiming to achieve may not have been forthcoming. The autonomy and self-regulation of the administration of justice overseas[21] and the openness of the *ius commune* to the specificities of the colonies could lead to a centrifugal distribution of power that worked against the intentions of the Crown.[22]

Despite the multifaceted structure outlined above, the judicial body could be perceived to be homogeneous in terms of the formal education it received. With a few rare exceptions of individuals being trained at Salamanca or Bologna, all judges were alumni of the University of Coimbra, which provided standardized instruction. This uniform background and the very institutional architecture of justice provided a certain unity regarding the law in all the territories that made up the Portuguese empire. The *Ordenações Filipinas* in force in Portugal and the vast written tradition of the *ius commune* were also applied overseas. Of course, the manner in which this vast body of normative literature was in fact interpreted and activated in the colonial context could vary, principally as a result of the characteristic plasticity of the *ius commune*.[23]

In short, the Portuguese administration of justice functioned through a complex and pluricontinental network of judicial posts[24] in which magistrates were empowered by their offices and established as a homogeneous class circulating beyond the confines Europe[25] and operating as mediators between royal interests and local claims, or even on their own behalf.

By the second half of the 18th century, in an attempt to impose a greater structure on the judicial system in Portuguese America and shore up

16 Cunhas / Nunes (2016) 17.
17 Camarinhas (2012a) 98.
18 Schwartz (2011).
19 Paquette (2013) 23.
20 Camarinhas (2013) 85.
21 Hespanha (2010a) 65.
22 Russell-Wood (1998) stressed this paradox: »Havia um relacionamento simbiótico entre a Coroa e a magistratura: criaturas do rei, a quem deviam suas nomeações e a autoridade a eles delegada, os magistrados enquanto uma coletividade eram fortes e consistentes sustentáculos da autoridade real. Enquanto tal, representavam os olhos e os ouvidos do rei. Era a este grupo que os reis se dirigiam no cumprimento de obrigações extra-judiciais de natureza social, econômica e administrativa, assim como nos serviços de natureza especial. Nos séculos XVII e XVIII, nenhum segmento no Brasil colonial se constituía enquanto uma classe profissional tão poderosa. Embora reforçassem a autoridade da Coroa, os desembargadores da Relação (a casa de apelação mais alta na colônia) poderiam igualmente constituir-se em uma ameaça à autoridade do vice-rei. Em um grau inferior, os ouvidores das comarcas poderiam desafiar a autoridade investida pelo rei na pessoa do governador.«
23 Hespanha (2006), see also Cabral (2018).
24 Camarinhas (2018).
25 As Duve asks (2014) 36: »can we really understand ›Europe‹ as a legal space without considering the imperial dimensions which went far beyond the borders of the continent?«

the authority of the Crown in all parts of the empire, the number of judicial posts was increased with the creation of new *comarcas* and *ouvidorias* (judicial districts) by the *Desembargo do Paço* (the highest court and administrative body). The consolidation of the Crown's political and judicial apparatus resulted in many magistrates being appointed to serve in Portuguese America, including the eleven men of letters examined here, who crossed the Atlantic with their books to practice what they had learned in Coimbra between 1799 and 1806.

The magistracy: ascension through mobility

As the designation *lugares de letras* makes clear, these judicial positions were restricted to *letrados*,[26] i. e. those who had graduated in civil or canon law, usually from the University of Coimbra, the only university in the Portuguese world. Judicial posts (*juiz de fora*, *ouvidor*, *desembargador*) were distributed across the pluricontinental empire without strict or formal distinctions being made between metropolitan and overseas posts. The concept of *network* is often used to describe the tangle of sea routes and trade posts of which the dynamic Portuguese empire was composed.[27] The metaphor is also useful for describing the architecture of the Portuguese administration of justice, not only in so far as it included judicial positions in a wide variety of different locations geographically very distant from one another – such as Goa, Angola or Rio de Janeiro – but also as they involved intensive circulation of individuals from post to post. While a nobleman resident in Spanish America could graduate in *leyes* or *cánones* and then hold a judicial position without ever having to cross the Atlantic, a subject of the Portuguese empire born in the colonies would invariably have to move continents in order to become a magistrate.[28]

Put simply, the life of a Portuguese magistrate was marked by mobility. The careers of the eleven magistrates examined here amply exemplify this. The following table provides information on a) their birthplaces, if they were *reinóis* or »filhos da terra«;[29] b) whether they had studied canon law or civil law at Coimbra, and the year they completed their studies; and most importantly, their assignments and allocations in the service of the Portuguese Crown, in particular c) what posts they held before d) being assigned as *ouvidores* in Portuguese America, and then e) how their careers progressed. Later, this prosopographical analysis will help us to understand the kinds of libraries they used for their work.

The table shows that five of the magistrates were born in Portuguese America,[30] yet none of them were assigned to their respective birth towns. This practice was avoided by the Crown, especially in the case of first positions in a judicial career, to prevent the establishment of client networks through which social capital could exercise greater influence. Of the five, four reached the highest judicial post of *desembargador*, three of them in Portugal. This suggests that there was no discrimination on the basis of geographical origin.

The three-year duration of each judicial appointment determined the rotation of appointments around the pluricontinental network, resulting in an intensive circulation of personnel. Even in such a small sample of eleven judges, the mobility intrinsic to the Portuguese magistracy is clearly evident. A magistrate would have to assume posts in different places, often overseas, in order to progress in his career. Most of the magistrates included in the group examined here had served at least once as first-instance judges on the peninsula by royal appointment before being appointed *ouvidores* in Portuguese America. The one exception – João Baptista dos Guimarães Peixoto – had been given the post of prosecutor, a function usually exercised by local lawyers under royal authorization. The position of *ouvidor* therefore required previous experience, preferably in a location other than one's new appointment.

26 Bluteau's dictionary (1728) in fact listed ›jurist‹ as one of the meanings of *letrado*.

27 Subrahmanyam (2019); Hespanha (2019a) 21–24.

28 For a comparative analysis of the Spanish and Portuguese administration of justice, see Ponce / Camarinhas (2018) 364–366.

29 For a recent study of *métissage* and the always multifaceted question of identities, see Hespanha (2019a), which, sadly, was one of his last publications.

30 Camarinhas (2012b) 122, confirms the conclusions of more general studies that noted a growing proportion of Brazilian-born magistrates over the course of the 18th century.

Name of magistrate	Place of birth	Education/ year of grad.	Previous posts	Appointment at time of travel	Subsequent appointments
Alberto Antonio Pereira	Portugal	Civil law (1786)	Juiz de Fora, Benguela (1799)	Ouvidor do Espírito Santo, 1806	Desembargador da Bahia (1812)
Caetano Pereira Pontes	Brazil	Civil law (1789)	Juiz de Fora, Valença (1798)	Ouvidor da Comarca do Rio Negro, 1802	Desembargador da Bahia (1802)
Domingos Manuel Marques Soares	Portugal	Canon law (1761)	Juiz de Fora, Vila da Figueira (1778)	Ouvidor da Comarca de Serro do Frio, 1789	Desembargador do Rio de Janeiro (1797), do Porto (1806)
Francisco Lopes De Sousa Faria Lemos	Brazil	Civil law (1781)	Juiz de Fora, Fundão (1784)	Ouvidor do Mato Grosso, 1794	Desembargador do Rio de Janeiro (1799), do Porto (1804)
Gregorio José Da Silva Coutinho	Brazil	Civil law (1788)	Juiz de Fora, Crato (1790), Ouvidor da Paraíba (1797)	Ouvidor do Ceará, 1802	[Owner of a sugarcane mill, Paraíba (sesmaria, 1816)]
João Baptista Dos Guimarães Peixoto	Brazil	Canon law (1788)	Advogado (PE) Promotor de Justiça (1791)	Ouvidor do Parnaguá, 1798	Casa de Suplicação (1808), BR 1812; Ouvidor em Macau (1809)
Joaquim Teotonio Segurado	Portugal	Civil law (1796)	Juiz de Fora, Melgaço (1797)	Ouvidor de Goiás, 1803	Desembargador do Rio de Janeiro (1804), do Porto (1824), da Casa de Suplicação (1826)
José Albano Fragoso	Portugal	Civil law (1789)	Juiz de Fora, Monsaraz (1796)	Ouvidor do Rio de Janeiro, 1799	Desembargador do Rio de Janeiro (1806), da Casa de Suplicação (1814)
Manuel Joaquim Ribeiro Freire	Brazil	Civil law (1777)	Juiz de Fora, Cabeço de Vide (1793)	Ouvidor do Mato Grosso, 1799	Juiz da Índia e Mina (1806), Desembargador do Porto (1810)
Manuel José Baptista Felgueiras	Portugal	Civil law (1783)	Juiz de Fora, Ovar (1789), Torre de Moncorvo (1796)	Ouvidor do Espírito Santo, 1802	Desembargador da Casa de Suplicação (1822), Deputado da Mesa de Consciência (1825)
Modesto Antonio Mayer	Portugal	Civil law (1778)	Juiz de Fora, Alenquer	Ouvidor de Vila Rica, 1799	Intendente geral dos diamantes (1801–1807)

Table 1: Careers of the itinerant magistrates appointed as *ouvidores* between 1799 and 1806 in Portuguese America[31]

Service overseas was frequently viewed with trepidation by magistrates. The journey could be daunting and the colonies could pose a multitude of difficulties. To compensate for this, the Crown encouraged judges to take up posts in remote parts of the vast Empire by rewarding them with a career jump, offering a position on the highest courts in the land immediately after having served overseas.[32] Indeed, nine out of the eleven magistrates examined here were subsequently promoted to the position of *desembargador* – a lifetime appointment. Modesto Antonio Mayer, meanwhile, was appointed to the equally prestigious – and profitable – position of *Intendente dos diamantes*, also reserved for *letrados*. Its holder was responsible for the inspection and supervision of the mining and

31 Information gathered from sources such as Subtil (2010) and the magnificent *Memorial de Ministros* database organized by Nuno Camarinhas, and from archives such as the *Registo Geral de Mercês* and the *Processo de Leitura de Bacharéis*, in the Arquivo Nacional da Torre do Tombo, and official correspondence available at the Arquivo Histórico Ultramarino.

32 Camarinhas (2013) 186: »To set up a new jurisdiction was always a difficult task; setting it up overseas, where the bureaucratic network was weak and with little support from other magistrates, was more difficult still. Since the mid-seventeenth century the church had established a series of advantages to complement service in the colonies: longer terms (normally six years), higher salaries and, probably the most important, a guaranteed promotion to a ›first bench‹ post, or even a place on an appeal court and the rank of *desembargador*, at the end of the term – in other words, access to a position for life. In this way service in the colonies offered a career short cut, as a way of skipping stages and becoming a *desembargador* much sooner. The Brazilian appeal courts were the main destination for these promotions, and hence it acted as a route to the top level of the judiciary«.

trading of diamonds in an effort to suppress smuggling.[33] Only Gregorio José da Silva Coutinho left royal service entirely on relinquishing the post of *ouvidor*. He nevertheless was granted a sugarcane mill as a *sesmaria* (royal donation) in Paraíba and subsequently settled there.

For the most part, therefore, magistrates did not stay put in the locations where they served. These positions were only temporary stopping posts on the way towards further promotion. In addition to there being no intention of settling, the appointment might furthermore be situated in a remote location. Some were on the coast – Rio de Janeiro, Espírito Santo, Ceará – and, in these cases, goods were more readily available. Others, however, could be very remote – such as the Brazilian *sertões*, where a significantly restricted variety of European goods arrived with far less frequency. To give just one extreme example: Caetano Pereira Pontes was assigned to the judicial district of São José do Rio Negro in the heart of the Amazon rainforest. Its main town, accessible only by river boat, in 1773 had a tiny population of approximately two thousand inhabitants.[34]

Books were quite scarce in Portuguese America.[35] In contrast to the Spanish colonies, the strict Portuguese policy of maintaining dependency on the metropole prevented both the foundation of universities and the establishment of printing presses.[36] The market for books was confined to larger cities, such as Rio de Janeiro, Salvador and Olinda, and books were often sold by merchants alongside other goods. Where convent libraries existed, judicial officials could also resort to those. In fact, some convents had the largest libraries in Portuguese America,[37] usually including an extensive collection of law books. Some places, however, had no library at all.

Due to this uncertainty regarding the supply of books, magistrates needed to have all the material they required already prepared before they took up the post. No matter where the judge was assigned, he was better off taking his own books with him than trying to find them in the colonies. However, as will be explained in the next section, authorization was required to carry books within the Portuguese empire.

The controlled circulation of books

During the Pombaline period, known for its enlightened reformism,[38] the Portuguese government institutionalized secular censorship to monitor the diffusion of ›correct‹ ideas, controlling both political and religious content, and consequently suppressing or amending seditious and subversive works. Hitherto, censorship in Portugal had been carried out by a trio of institutions: the Portuguese Tribunal of the Holy Office, the Diocesan Ordinary and the *Desembargo do Paço*.[39] However, in 1768, the Marquis of Pombal ordered the creation of the *Real Mesa Censória*, which was to be responsible for controlling and authorizing the printing, sale and transportation of books.[40] In contrast to most Catholic monarchies in Europe, where censorship had been exercised concomitantly by a variety of different institutions – such as the universities or the Church – the Portuguese Crown henceforth monopolized censorship[41] to the exclusion of any other power.[42] This was all part of its agenda of political centralization.

The broad-ranging duties[43] assigned to the *Real Mesa Censória* included the control of the circulation of ideas. Every piece of writing, be it a printed book or a manuscript, needed the censor's approval in order to be shipped anywhere in the pluricontinental Portuguese Empire, even from one city to another within the peninsula, regardless of whether it was for sale or private use. In short, whether books were destined for Macau, Goa, Luanda, Cabo Verde or Rio de Janeiro, a request had to be submitted to the *Real Mesa Censória*, which would subsequently check each volume

33 Cf. Furtado (1999).
34 In addition to the indigenous population dispersed all over the Amazonian region. Arquivo Histórico Ultramarino, Conselho Ultramarino, Pará, Cx. 72.
35 Rizzini (1988) 228, 233.
36 Hallewell (2005) 72–73.
37 Moraes (2006) 4–23.
38 Bethencourt (2009).
39 Cf. Martins (2005).
40 Marques (1963).
41 Tavares (2018) 120.
42 Including that of the Roman Curia, after the reenactment of the *beneplácito régio*. Silva (2005) 235–236.
43 These included ordinary duties, such as examining manuscripts before printing, but also some unusual ones, such as the obligation to examine all undergraduate theses from the universities of Coimbra and Évora, and also the responsibility for selecting the manuals called »Minor Studies« to be used for teaching in schools.

against the Index of expurgated books and the lists of books forbidden by the government.[44] It is precisely these lists of books submitted to the Crown censors that constitute the principal sources of information on these magistrates' travelling libraries.[45]

The first observation that should be made regarding this kind of source is that, since censorship is involved, books widely known to be banned were unlikely to be included in the lists submitted to the censor.[46] Examination of the lists reveals very few cases of authorization being refused. In other words, so far as the control of circulation is concerned, the ›censors at work‹ remained largely unseen. On those rare occasions when a forbidden book was found on the list by the censor, the entry was marked with an X – or more uncommonly, an annotation – and the request was granted with the following proviso: »concedem licença para os que não forem proibidos« (»a licence is granted for those [books] that are not prohibited«). This was the case with the excerpt from a list reproduced below. The censor has annotated the entry *Obras de Condillac* with the words »excepto Traité des sensations […]«.[47]

An overall assessment of the documents indicates that regulations could vary over the years. For example, one of the magistrates studied here, Joaquim Teotonio Segurado, experienced no difficulty shipping a copy of *La Scienza della legislazione* by Gaetano Filangieri to Goiás in the Brazilian interior in 1804.[48] However, an attempt by a trader to ship the same book to Rio de Janeiro in 1817 did not enjoy such leniency.[49]

This example brings us to another observation. Some individuals may have received privileged treatment when requesting permission. All of the eleven magistrates studied here, without exception, emphasized in their requests that they had been appointed to the post of *ouvidor*. This is only to be

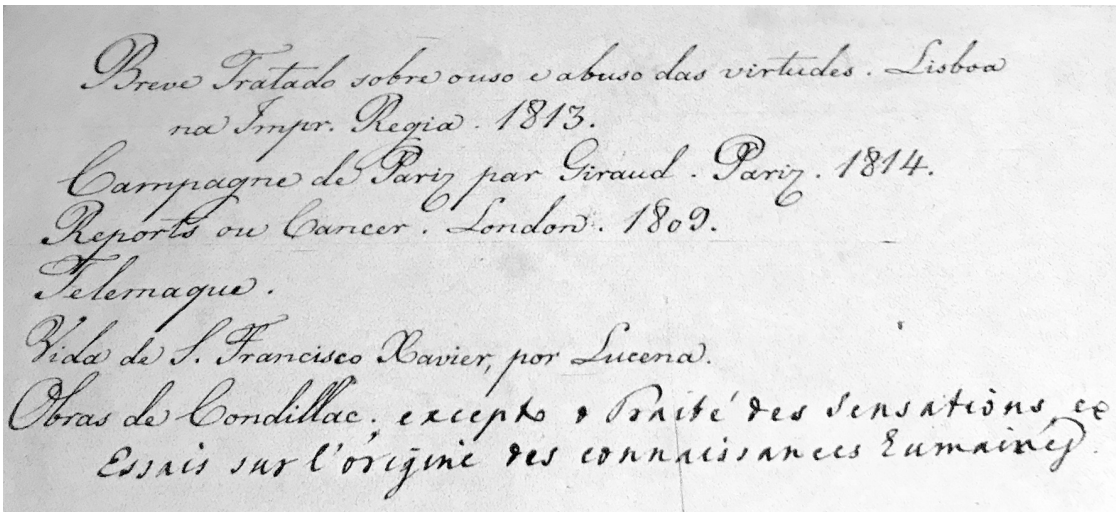
Breve Tratado sobre o uso e abuso das virtudes. Lisboa
na Impr. Regia. 1813.
Campagne de Paris par Giraud. Paris. 1814.
Reports on Cancer. London. 1809.
Telemaque.
Vida de S. Francisco Xavier, por Lucena.
Obras de Condillac. excepto o Traité des sensations e o
Essais sur l'origine des connaissances humaines.

Figure 1: Example of a censored book's refused permission. November 1817

44 The system of censorship outlined here underwent slight alterations in subsequent years. Nevertheless, control over the movement of books remained generally unchanged.

45 Recently, these sources have been examined to investigate the circulation of books in the Portuguese Empire, in particular between Brazil and Portugal. Nevertheless, there has been scant use of this approach in relation to legal history, since most Brazilian studies of book history have investigated literary genres such as novels and poetry, and avoided legal texts. Cf. Abreu (2003).

46 Walsby (2013) 12–13: »Most of the lists compiled in the early modern period would not have included volumes that were liable to attract the attention of the censors. The catalogue of a private library drawn up by or for its owner might purposefully exclude works considered to be heretical or too licentious by the authorities.« This is similar to authors and publishers of deliberately disruptive texts not even attempting to gain royal authorization in France, as described by Darnton (2015).

47 Arquivo Nacional da Torre do Tombo, Real Mesa Censória, Cx. 155, mf. 1382. Request by Francisco de Paula Oliveira, September 20, 1817.

48 Arquivo Nacional da Torre do Tombo, Real Mesa Censória, Cx. 160, maço 64.

49 Arquivo Nacional da Torre do Tombo, Real Mesa Censória, Cx. 155, mf. 1382. Request by the widow Lima Viana and Sons, April 22, 1817.

expected in a hierarchically stratified society such as that of the Portuguese Empire in the final years of the *Ancien Régime*.[50] This could constitute a signal to the censor to treat their applications differently. In fact, most forbidden books were not completely banned and the rules did not apply to everyone. Generally, there was a concern that censored material should not reach members of the general public, who could misinterpret some ideas, but such material could be read by enlightened educated men.[51] By the same token, the *Real Mesa Censória* could grant concessions regarding reading matter. Control over the books owned by magistrates in the service of the Crown could therefore be more flexible. This would also explain why the lists made by magistrates are generally less comprehensive than those compiled by booksellers, who often also included the year, size and place of publication.[52]

The care taken in writing these lists brings us to the last observation regarding this source: the lack of information that makes it difficult to identify the precise edition.[53] Sometimes only the author is listed, while other items are listed solely by the title, as can be seen in Figure 1.[54] One interesting case is that of the *Manual prático judicial, cível e criminal* by Alexandre Caetano Gomes, first published in 1748, which is the third most commonly cited title, appearing in seven out of ten libraries. Although no entry expressly mentions the author, it can be identified by consultation of studies on the legal literature of the period and bibliographical works.

In short, the booklists shed valuable light on the circulation of normative information, so long as they are assessed using a methodology that takes into account and is supported by works of reference that provide accurate identification of the books listed. In the present study in particular, these booklists provide new insights into the circulation of men and their printed material, revealing how the one is intimately entwined with the other.

Travelling libraries: »quero poucos e bons«

Jeronymo da Cunha, in *Arte de Bachareis, ou Perfeito Juiz*,[55] a short deontological manual intended for judges taking up their first positions, devotes a whole chapter to providing an account of which books a judge should possess.[56] He starts by noting that common opinion considers that the larger a magistrate's library, the better. Cunha, however, argues the exact opposite to be true: to him, utility is more important than quantity. As outlined above, mobility was an intrinsic feature of a Portuguese magistrate's career. Cunha reminds his readers of this and argues that, when choosing books, one must take into account, as he puts it, the »gypsy life« of a Portuguese judge.[57] The temporary nature of overseas posts was one reason why a magistrate might be reluctant to move all his belongings. Besides, books were expensive, heavy and fragile.[58] Cunha also warned that books could get lost or damaged with all that frequent travel, and this is why he recommends »only a few and good books«, or, as the marginal note of this section says: »he should select the best«.[59]

While there was no limit on the number of books a magistrate might keep in his stationary library, travelling libraries were usually relatively small. Such a small collection of books could be transported without much effort. According to Camarinhas' study of the stationary libraries of Portuguese magistrates at the time of their death,

50 The dispute over the manner of how to appropriately address representatives of the judiciary at the Real Audiencia of Quito provides a good illustration of the importance of ceremonies and marks of distinction; see Herzog (1995) 183–199.

51 Tavares (2018) 383.

52 Since booksellers' lists generally provide more information, database projects like *KOBINO – Circulación de libros en la Nueva España* by Idalia García (UNAM) are essential for the precise identification of editions, furnishing references for other researchers who study the shipping of books overseas.

53 Walsby (2013) 18.

54 Figure 1 shows, for instance, that some entries detail the place and year of publication, but the third is referred to only as »Telemaco«, which stands for *Les Aventures de Télémaque* by François Fénelon, a bestseller at the time, as noted by Abreu (2003) 114.

55 Cap. XVII – Dos livros, que deve ter o juiz Cunha (1743) 103–106.

56 Cf. Hespanha (2018).

57 Cunha (1743) 103: »Ao Juiz pertence mais cuidar nesta eleição; porque como participa da vida de cigano; isto he, que não tem domicílio certo, e anda de Villa em Villa e de Cidade em Cidade por isso mesmo se deve poupar a conducções, e carretos, quanto puder […].«

58 Hespanha (2015), § 26.

59 Cunha (1743) 103: »álem [sic] de que se perdem, e damnificaõ com estas voltas; e assim quero poucos, e bons«; marginal note of section 2: »Deve eleger os melhores […].«

over the same period, these contained an average of 145 titles, around five times more than the average of 27 found in the eleven travelling libraries studied here.[60]

Comparison of the book lists of these eleven *ouvidores* in the form of a network analysis shows how these relate to each other and reveals the most important items of a magistrate's travelling library. Figure 2 illustrates the points where the magistrates' libraries overlap, using a sample of seventy titles.

This diagram attempts to represent visually a two-mode network, showing connections between two distinct sets of entities: titles and magistrates. The dots and lines show the relationships between books and their respective owners: larger fonts indicate the magistrates, smaller ones the book titles, while the lines represent ownership. In this network, the closer to the centre a title is situated, the more frequently it appears in the magistrates' libraries. Those that appear in only one collection thus tend to be located on the margins. For the same reason, libraries that have more books in common tend to conglomerate, while those with fewer interactions are spaced further apart.

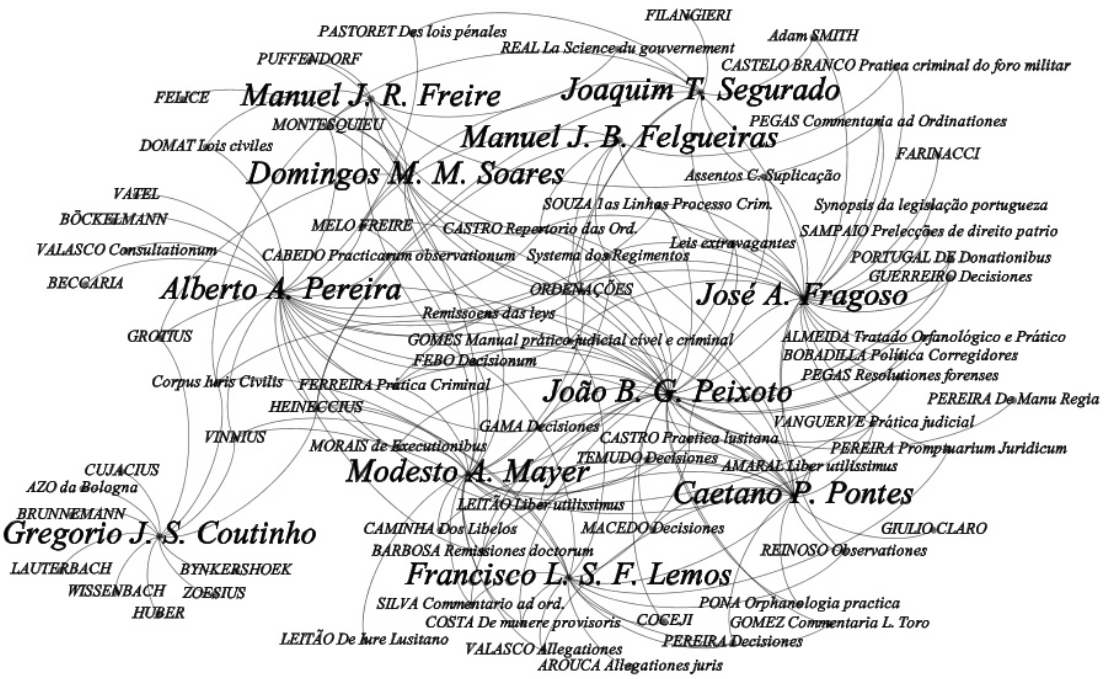

Figure 2: Network graph representing similarities between magistrates' libraries

60 Camarinhas (2009a). I have relied significantly on this extraordinary study of magistrates' libraries. Camarinhas, however, used postmortem inventories, while the present study is based on censorship documents. A source that contains a list of books from a given library always captures a collection at a specific point in time. Thus, while Camarinhas' work is based on the libraries of deceased judges, usually at the end of their careers – and we cannot make assumptions as to why the deceased judge acquired and maintained each book listed during his lifetime – censorship lists capture a specific point in mid-career, allowing us to conjecture that the books were chosen precisely for use in the overseas jurisdictions to which the magistrates were relocating. Thus, their provisional, concise and professional character means that these travelling libraries can provide us with more information regarding the ratio decidendi than a stationary one.

The most striking feature of this network – which renders this approach highly useful – is that the book lists share many titles in common, with the exception of that of Gregório José da Silva Coutinho, who appears on the far left of the diagram, largely detached from the others. As mentioned above, the *ouvidor* of Ceará was the only one who subsequently left the legal profession, becoming a *senhor de engenho* in Portuguese America. In addition, his collection of books was not a travelling library but a shipment of volumes to a stationary library already in existence at the location. The titles in this collection do not include the legal books typically used by magistrates, as the following table presenting the fifteen most commonly occurring titles demonstrates.

	Titles	Frequency
1.	Ordenações	9
2.	Castro, Repertorio das Ord.	7
3.	Gomes, Manual prático	7
4.	Heineccius	6
5.	Corpus Iuris Civilis	5
6.	Castro, Practica lusitana	5
7.	Systema dos Regimentos	5
8.	Leis extravagantes	5
9.	Febo, Decisionum	5
10.	Melo Freire	5
11.	Ferreira, Prática Criminal	5
12.	Leitão, Liber utilissimus	4
13.	Remissoens das leys	4
14.	Barbosa, Remissiones	4
15.	Vanguerve, Prática judicial	4

Table 2: The titles most commonly appearing in travelling libraries

As a general rule, travelling libraries aimed to include only the essentials and left out any material deemed superfluous. This explains why these collections contained predominantly legal titles. In a few cases, history books and Latin, Portuguese, French and even English dictionaries were included – these being present in five of the collections. Religious books, on the other hand, are almost entirely absent, and, so far as *belles lettres* are concerned, only José Albano Fragoso allowed himself the luxury of some poems by Bocage. The content of these lists is thus predominantly professional in character, with each book serving as a work tool for the magistrate.[61]

This preference for a »few good books« also governed the choice of specific legal books according to the genres of legal literature available during the Portuguese *Ancien Régime*: commentaries on the *Ordenações*, casuistry literature (mostly *decisiones*), manuals on forensic and notarial practice, legal repertories and other reference works, and finally some specialized monographs.[62] A magistrate's travelling library needed to include at least one copy of each genre, but he could not afford to include many of the same type. That being so, a judge would definitely need one work of commentaries on the laws of Portugal. Alberto Antonio Pereira and Caetano Pereira Pontes selected the traditional *Remissiones Doctorum*,[63] José Albano Fragoso chose Pegas' *Commentaria*,[64] while Francisco Lopes de Sousa Faria Lemos preferred a more up-to-date version of Pegas produced by Manuel Gonçalves da Silva.[65] The same goes for forensic and notarial practice – that is, books relating to procedural issues. There was no point, for instance, in transporting both *Orphanologia practica*[66] and *Tratado Orfanológico e Prático*.[67] Caetano Pereira Pontes chose the former, while José Albano Fragoso opted for the latter.

Casuistry books exhibit a slightly different pattern. While the *praxis* regarding orphans was the same in both of the aforementioned books, each collection of *decisiones* – works of legal doctrine commenting on the decisions and precedents handed down by a high court, usually the *Casa da Suplicação* – provided different sets of *decisiones*.[68] Of the various collections of *decisiones* available,[69] the magistrates usually picked two or

61 In a stationary library, on the other hand, the proportion of legal books was around 52%, according to Camarinhas (2009a) 9.

62 I follow the division of genres of legal literature found in Hespanha (1982) 518–524 and Silva (2000) 362–363.

63 Barbosa (1620).

64 Pegas (1669–1703).

65 Silva (1731–1740).

66 Pona (1713).

67 Almeida (1794).

68 Cf. Cabral (2017).

69 The lists of books included Cabedo (1602), Castro (1603), Fonseca (1643), Gama (1578), Macedo (1660), Valasco (1597).

three. Belchior Febo[70] was the author most commonly selected, appearing in five libraries, usually in combination with other titles. This was the case in the library belonging to the *ouvidor* of Espírito Santo, Alberto Antonio Pereira, who opted for a combination of Febo, Gama and Cabedo.[71]

The title appearing most frequently was unsurprisingly the *Ordenações do Reino*, followed by the *Repertório das ordenações* by Manuel Mendes de Castro,[72] included in seven out of eleven travelling libraries. These repertoires and other reference works were indispensable tools for the jurist of the *Ancient Régime*, since they attempted to confer some order on the dispersed and complex royal legislation, doctrinal authorities and *estilos das Cortes* with the aid of an analytical subject index in alphabetical order.[73] This is the case, for example, with the *Liber utilissimus judicibus*, which was included in four of the libraries. As the title indicates, this volume was moving towards a more pragmatic approach: providing ready-to-hand condensed normative knowledge.[74]

The clearest example of this type of literature[75] is probably the *Manual practico judicial, civel, e criminal*.[76] The book was *compact* – comprising just 270 pages of civil and criminal procedures for both ecclesiastical and secular jurisdictions – and easily *readable* –written in the vernacular and providing succinct, simplified guidelines. As is usual in pragmatic literature, the prologue addressed the intended readers.[77] These were ordinary judges and judicial officials who were not *letrados* but nevertheless had to deal with matters relating to the law.[78] Despite this, it was the third most commonly found title, selected by seven of these learned and experienced magistrates for inclusion in their travelling libraries. Unsurprisingly, its transportability – one *quarto* volume – and compactness made it an ideal book for a travelling library.[79] These features of pragmatic literature were of especial importance in the frontier regions of the Empire.[80]

The aforementioned titles were part of the literary tradition of law in the Portuguese *Ancien Régime*. In general, this accorded with the lists of recommended books found in deontological manuals.[81] However, most of these were written and published in the 17th century, still under the influence of the *ius commune*. Despite persisting until the 19th century, the literary tradition of the *Ancien Régime* was already in decline by the mid-18th century.[82] This *corpus* of literature, based on the *auctoritas* of *communis opinio* – increasingly criticized by Enlightenment authors – subsequently had to share the shelves of libraries with literature that advocated the consolidation of the authority of the Crown. Books such as the aforementioned *Remissiones Doctorum*, which reformists disapproved of for their lack of method and system,[83] could thus be found alongside copies of the compendium of *Elementa juris civilis* by Heineccius,[84] known for its ›axiomatic‹ method.[85] The latter was, in fact, the fourth most commonly featured title in the collections studied here, being present in six libraries. The main proponent of this tendency in Portugal and clearly associated with the *usus modernus pandectarum* was Pascoal de Melo Freire,[86] whose work could not fail to be present in the libraries of the late 18th century. In fact, this author's name appeared in half of the book lists. Three copies of the official collection of *assentos*[87] in the magistrates' libraries provide further evi-

70 Febo (1619–1625).
71 Cabedo (1602), Febo (1619–1625), Gama (1578).
72 Castro (1604).
73 Hespanha (1982) 522–533. Those preferred by the judges include Amaral (1610), Leitão (1690), Pereira (1664) and Sousa (1778, 1783–1791).
74 Hespanha (2008) 31.
75 The books on forensic and notarial practice that can also be found in the magistrates' libraries are: Cabral (1711), Castro (1619), Ferreira (1730), Sousa (1785).
76 Gomes (1750).
77 Danwerth (2020) 105.
78 Gomes (1750) ii: »Para estes escrevo e não para os que já sabem.«
79 Hespanha (2008) 28: »it disseminates basic legal learned knowledge in peripheral regions, a fact of outstanding importance in the colonial world, where the legal library of a learned European lawyer could hardly be found.«
80 Danwerth (2020) 90.
81 Araujo (1743) 83–84; Cunha (1743) 103–105. The same holds true for the ›study guides‹ analyzed by Beck Varela (2018).
82 Hespanha (2010b).
83 Aragão (1781) 128–129: »Esta obra ainda he de hum jurisconsulto do seculo decimo sexto; com tudo bem se mostra a falta de Ordem, de Methodo, e de Systema, que na composição dela teve seu autor.«
84 Used in Coimbra after the Pombaline reforms; see Costa / Marcos (1999) 92–93.
85 Schröder (2016) 259.
86 Hespanha (2016) 311; Silva (2000) 402.
87 Collecção Chronologica dos Assentos das Casas da Supplicação e do Civel.

dence of this movement towards the centralization of power and monopolization of law by the Crown.

The composition of these libraries in fact clearly signals the transition that would irrevocably lead to the liberal state and its codes. It is, however, a microcosm. A travelling library was thus the *perfect distillation* of the stationary library: a miniature version of the *corpus librorum*. Its requirement of portability necessitated the inclusion of a reduced number of books, but the essentials were always included. Far from being a mere collection of books moving from one spot to another, this was a judge's toolbox, and, like any good toolbox, it had to contain the tools the judge would need to apply the law wherever in the pluricontinental Portuguese empire the Crown might send him.

Conclusion

The widely dispersed territories that made up the Portuguese empire were governed by a highly complex global legal regime. Among the multitudinous layers of jurisdictions and normative orders within this regime, secular justice occupied a prominent position. In the 18th century, *letrados* appointed by the Crown moved around a network of judicial posts on multiple continents, from Goa to the Amazon rainforest. These men brought with them a continuous stream of normative information, stored in and transmitted through printed media. The present article has examined one part of the dynamics of this global circulation of normative information: namely the official one, involving the Crown. Knowledge of the extent and type of normative knowledge available to the magistrates operating in colonial regions is critical for understanding the dynamics of the huge variety of normative orders in existence within the Portuguese legal regime.

To help them with their temporary overseas appointments, these judges put together *travelling libraries* containing the essential genres of legal literature in fashion during the late 18th century: including *decisiones*, repertories and practical books, deriving from the *ius commune* tradition, along with the new systematic *compendia*. The content of these libraries provides precise testimony regarding the state of legal literature in the final years of the *Ancien Régime*, indicating an ongoing transition towards legalism. Doctrinal books, which constituted their own authority as sources of law, had already for some time been gradually losing ground to state law.

Travelling libraries, with their reduced size and clear focus on judges' professional needs, provided the perfect vehicle for bringing normative information to the most remote fringes of the global Portuguese empire, where this material would serve locally as the basis for judicial settlements.

■

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CONSTITUCION

DE LA

MONARQUIA ESPAÑOLA,

PROMULGADA EN MADRID A 18 DE JUNIO DE 1837;

IMPRESA DE ORDEN DE S. M.

LA REINA GOBERNADORA.

MADRID:
EN LA IMPRENTA NACIONAL.
1837.

Natalia Maillard Álvarez

Lectores de obras jurídicas en la Edad Moderna (Sevilla, siglos XVI–XVII)

El presente artículo se centra en los lectores de obras jurídicas en la Edad Moderna. Nuestro principal objetivo será elaborar un perfil de los lectores que atesoraron libros de Derecho y el tipo de obras que tuvieron en sus bibliotecas durante el Renacimiento tardío español. Con este fin, tomaremos como punto de partida la ciudad de Sevilla y una extensa muestra de sus bibliotecas privadas en la segunda mitad del Quinientos y el primer tercio del Seiscientos. Para aproximarse al estudio de las prácticas de lectura y la formación de bibliotecas en esa época existen distintas fuentes,[1] siendo una de las más fructíferas la documentación notarial, en especial los testamentos y los distintos tipos de inventarios de bienes.[2] Esta segunda modalidad documental reviste un valor muy especial para los historiadores, pues nos da acceso a las casas de los hombres y mujeres del pasado, y nos permite, siempre con precauciones, establecer estadísticas sobre el porcentaje de lectores, su distribución socio-profesional o por género, y el tipo de lecturas preferidas en un lugar o época determinados. Gracias a los inventarios, podemos reconstruir a lo largo del tiempo la evolución de los gustos y ciertas prácticas lectoras. Por ello han sido una de las fuentes preferidas por los historiadores del libro a la hora de estudiar a los lectores del pasado.[3] Contamos, de hecho, con numerosos trabajos sobre bibliotecas de juristas tardo medievales y modernas en España.[4] No podemos olvidar, sin embargo, las limitaciones que la utilización de este tipo de documentos puede entrañar. En este sentido, Benito Rial Costas subrayaba tres aspectos: la falta de representatividad social, dado que una buena parte de la población quedaba excluida o estaba poco representada; las ocultaciones, en especial de libros prohibidos; y, por último, la dificultad que implica identificar los libros que encontramos en los inventarios.[5] En muchas ocasiones los títulos no se describen con detalle, o se registran empleando un lenguaje complejo de descifrar para el investigador actual. Conocer la edición precisa de un libro incluido en un inventario notarial es, al menos para los siglos XVI y XVII, una tarea con frecuencia imposible.

Por otro lado, el marco geográfico de nuestro estudio, la ciudad de Sevilla, alcanza en la época que aquí estudiamos el máximo de su apogeo como gran centro del comercio atlántico y, a la vez, comienza una larga decadencia.[6] Esto se refleja en la riqueza de sus Protocolos Notariales que presentan, por regla general, un buen estado de conservación.[7] Para estudiar las lecturas de los sevillanos, contamos con una base de datos en la

1 Ejemplos de las diversas formas de aproximarse al estudio del libro y la lectura en la España moderna pueden encontrarse en Pedraza Gracia (2008).

2 Walsby / Constantinidou (eds.) (2013).

3 En el caso español, la bibliografía es muy extensa. Junto a innumerables trabajos sobre inventarios de bibliotecas singulares, por regla general de miembros de la élite, entre los estudios que parten de los inventarios de bibliotecas de una comunidad destacan aquellos que se centran en analizar la posesión de libros en una ciudad concreta como hacen Berger (1987), Peña (1996), Pedraza Gracia (1998), Prieto Bernabé (2004), Maillard Álvarez (2011) o Álvarez Márquez (2014); mientras que otros estudiosos han preferido centrarse en un grupo determinado de lectores, como las mujeres – Cátedra / Rojo (2004) – o los lectores de literatura espiritual: Pérez García (2005).

4 Entre otras, podemos citar: Wagner (1979); Clara i Resplandis (1993); Iglesias Ortega (2000); Quintanilla (2000); Pérez-Villegas Ordovás / Planas Rosselló (2000); Espino López (2003); Pedraza Gracia (2017).

5 Rial Costas (2010). Mucho antes, Roger Chartier ya había advertido sobre los problemas de adoptar una óptica excesivamente cuantitativa en la historia de la lectura, Chartier (1991) 182–185; o de vincular excesivamente las diferencias culturales en el Antiguo Régimen a la división socio-profesional, Chartier (1996) 27–28.

6 Para una valoración general de la historia de Sevilla en la época, sigue siendo útil Domínguez Ortiz (1991).

7 Alonso García (2007). Sobre la evolución de la institución notarial en Sevilla en el siglo XVI, resulta imprescindible consultar Rojas García (2014). Los Protocolos Notariales de la ciudad se encuentran en el Archivo Histórico Provincial de Sevilla (en adelante: AHPSe).

que hemos registrado 450 inventarios de bienes realizados ante notario entre 1550 y 1634, y en los que se listó al menos un libro. La naturaleza de estos documentos y las causas que llevaron a su redacción pueden ser muy variadas, lo que tiene consecuencias sobre la información que ofrecen: en la mayoría de los casos se trata de inventarios post mortem (IPM), es decir, aquellos realizados tras el fallecimiento del dueño de los bienes. Las almonedas, también comunes en los registros notariales, nos permiten conocer un momento muy interesante en la vida del libro, aquel en el que cambia de propietario, y registran el precio de venta en el mercado de segunda mano. Asimismo, contamos con testamentos que incluyen inventarios de bienes; con algunas particiones en donde los bienes se inventarían, se valoran económicamente y se reparten entre los herederos del propietario;[8] y con unos pocos inventarios de capital, un tipo de documento que da fe de los bienes del marido antes de contraer matrimonio.[9] La documentación recogida en la base de datos se ha completado con noticias extraídas de los testamentos que, realizados también ante notario, nos ofrecen una información de carácter más personal y cualitativo.

Hemos de considerar que los documentos notariales fueron creados generalmente con una intención económica, no buscando el rigor bibliográfico, por ello no pueden responder a todas las preguntas que quisiéramos hacerles. De los 450 inventarios recopilados, la mayoría ofrece algo de información (aunque no siempre suficiente) sobre todos o algunos de los libros, mientras que aproximadamente en una cuarta parte de los registros, la biblioteca queda consignada con una escueta frase del tipo »çiento e setenta y nueve libros de leyes y diez grandes y pequeños, enquadernados en tabla y quero y en pargamyno«.[10] En ocasiones resulta sospechosa la ausencia de libros en el inventario de un determinado individuo, a lo que se añade el hecho de que no siempre es posible saber a qué miembro de la familia pertenecían los libros recogidos en un inventario, y mucho menos qué uso se les daba. Con todo, la documentación notarial sigue siendo, como afirmara Fernando Bouza, »el pilar básico sobre el que se ha de construir una historia de la lectura«.[11]

Los índices de posesión de libros arrojados por los inventarios de bienes sevillanos son consistentes con los de otras capitales españolas, donde encontramos que entre un 25 y un 30 por ciento de los inventarios contenían al menos un libro.[12] Por regla general, las colecciones más pequeñas (de cinco volúmenes o menos) son las más abundantes y, si bien en el primer tercio del siglo XVII se percibe una tendencia a atesorar más libros, éstas siguen siendo más del 20% de la muestra. Encontramos también que el clero, la nobleza y los profesionales liberales fueron los que más y mejores bibliotecas poseyeron, seguidos de lejos por mercaderes y artesanos.

Una característica que permanece invariable a lo largo de los años es la relación entre el tamaño de las bibliotecas, su orientación temática y el género: en las colecciones más reducidas, predominan los libros de rezo, piedad y liturgia, y son, además, mayoritarias entre las mujeres.[13] Por el contrario, a mayor tamaño, más posibilidades hay de que nos encontremos ante una biblioteca profesional, compuesta por lo que Pedraza ha denominado »libro-

8 La información recogida en este tipo de documentos ha hecho que sean especialmente útiles para los historiadores económicos, que los han empleado para estudiar los niveles de vida en la Sevilla moderna: Rodríguez Vázquez (1995) y Aguado de los Reyes (1994).

9 La base de datos parte de la elaborada en su día para la realización de mi tesis doctoral. Una vez filtrada dicha base y traspasados los datos al programa FileMaker, quedaron 313 inventarios con libros correspondientes a la segunda mitad del siglo XVI, a los que se han añadido 137 fechados entre 1601 y 1634. La base de datos contiene tres tablas distintas: en la primera se recogen los datos esenciales de cada lector o poseedor de libros; en la segunda se registran de manera individual los libros que aparecen en los inventarios, procurando, siempre que sea posible, una identificación de los mismos en base a los catálogos bibliográficos disponibles; la tercera es una tabla relacional, en la que cada entrada vincula a un lector con un título concreto.

10 IPM del Licenciado Rodrigo Yáñez Bravo, AHPSe, Leg. 5885, s.f.

11 Bouza Álvarez (1992) 113.

12 Maillard Álvarez (2011) 38–40.

13 Este es un fenómeno que se repite en otras ciudades. En palabras de Nievas Baranda, »las mujeres, excluidas de la profesionalización, reducirán su campo de lectura a la devoción y el entretenimiento, con excepciones«, Baranda Leturio (2005) 23. Véase también: González de la Peña (2005).

herramienta«.[14] Esto nos va a dar la primera pista sobre el perfil de los poseedores de libros jurídicos: por lo general, aunque veremos que hay excepciones, se trata de profesionales del Derecho. Tal es el caso del licenciado Alonso Guillén, que dejó al morir en 1570 »dozientos y çinquenta libros poco más o menos entre grandes e chicos que son de leyes y cánones que eran del estudio del licenciado«.[15] Podemos intuir que los »nueve caxones de libros«, que se inventariaron en el IPM del señor licenciado Pedro Rodríguez de Herrera, oidor en la Real Audiencia de Sevilla, también contendrían una buena cantidad de libros jurídicos, pero el escribano no se molestó en detallar los títulos, algo muy frecuente en los inventarios de bibliotecas de juristas, cuyo tamaño parecía alentar la desidia de los notarios.[16] Igualmente, la biblioteca con »çinco mill y tantos cuerpos poco más o menos«, del doctor Luciano Negrón, quedó sin detallar, aunque sospechamos que sería una de las más importantes en la Sevilla de la época.[17]

Para conocer a los lectores de libros jurídicos en Sevilla hemos dividido este trabajo en dos partes: para comenzar, analizaremos las bibliotecas de los juristas sevillanos y, a continuación, intentaremos ver cual fue la penetración del libro jurídico más allá de los círculos de los profesionales del Derecho.

Bibliotecas de los juristas sevillanos

La ciudad de Sevilla vio crecer en la Edad Moderna el número y tamaño de las instituciones que requerían el conocimiento de expertos formados en Derecho, como la Universidad, la Real Audiencia,[18] la Inquisición o la Casa de la Contratación, en la que se dirimían litigios entre mercaderes.[19] Al calor de estas instituciones, y de la »afición a los pleitos« característica de la Europa moderna,[20] la necesidad de letrados profesionales fue también en aumento y, con ellos, la demanda de libros jurídicos. Abogados, jueces, procuradores y otros expertos en Derecho, debieron contarse entre los clientes más comunes y rentables de los libreros sevillanos, que con frecuencia dependían de las importaciones para poder suplir su demanda.[21] Esa dependencia con respecto a los libros impresos en el extranjero queda clara en la biblioteca del licenciado y abogado de la Real Audiencia,

14 Pedraza Gracia (2015) 21. Según el autor, »se trata de libros que poseen un carácter profesional por lo que se encuentran de manera principal en las bibliotecas de juristas y notarios, mercaderes, médicos y cirujanos y religiosos«.

15 AHPSe, Leg. 5969, fol. 83r–87r. Junto a los libros, se listan tres cubiletes de madera con un escritorio, donde estaban colocados, más cuatro bancas y dos escabeles del estudio del licenciado.

16 El inventario se realizó el 15 de junio de 1590 (AHPSe, Leg. 14372, fol. 1213r–v).

17 AHPSe, 12644, fol. 625r–628v. El inventario se realizó en 1606. Negrón era hijo de un eminente jurista sevillano de origen genovés y había estudiado derecho canónico en Salamanca y Sevilla, donde llegó a ser arcediano, además de formar parte de los círculos humanistas de la ciudad y actuar como consultor del Santo Oficio, Pozuelo Calero (2015). Podemos encontrar muchos ejemplos de grandes bibliotecas de juristas que quedaron sin detallar en sus inventarios, como la del doctor Arias de Borja, oidor en la Casa de la Contratación, que dejó a su muerte en 1600 »una librería con sus estantes« (AHPSe, Leg. 13733, fol. 223r–225v); la del licenciado Luis Fernández Escudero de la Umbría, abogado sevillano fallecido en 1600, cuya biblioteca fue despachada por el escribano con estilo lacónico: »Todos los libros de leyes, que son muchos« (AHPSe, Leg. 1622, fol. 385r–386v); o la del licenciado Juan de Aguilera, alcalde de la Real Audiencia, que dejó, al fallecer en 1613, »la librería con dos estantes« (AHPSe, Leg. 12692, fol. 1033r–1036v).

18 Santos Torres (1986).

19 Fernández Castro (2014).

20 Kagan (1991) 21.

21 Sobre la desigual geografía europea del libro en los primeros siglos de la imprenta puede consultarse Pettegree (2008). Tras llegar a Sevilla, una parte de esos libros no se vendían en la ciudad, sino que se embarcaban hacia el Nuevo Mundo para surtir las bibliotecas americanas, Rueda Ramírez (2017).

Jerónimo de Santa Cruz, una de las mejor descritas en la muestra, puesto que ofrece información sobre formato, lugar y fecha de publicación de la mayoría de los libros de Derecho. De las dieciséis ciudades mencionadas, solo seis son españolas, destacando entre ellas Salamanca, que se repite nueve veces. Nada que ver con los números de Venecia (48 libros) o Lyon (49),[22] cuyos tipógrafos se revelan como los auténticos proveedores de libros de Derecho para los lectores españoles.[23]

Podemos dividir las bibliotecas de los profesionales del Derecho en dos grupos o comunidades de lectores en función de la formación de sus dueños,[24] la cual afecta claramente a la constitución de sus colecciones y su relación con lo escrito:[25] por un lado, encontramos las de aquellos individuos con formación universitaria, con independencia del puesto que desempeñen (hay oidores, fiscales, abogados, procuradores, inquisidores, colegiales …) y de que sean laicos o eclesiásticos, y por otro, las bibliotecas de los notarios y escribanos y que son mucho más modestas en todos los sentidos. Los primeros son miembros de una élite intelectual europea, que se comunica en latín y comparte una formación y unas lecturas que traspasan fronteras.[26] Con frecuencia, habrían estudiado fuera de Sevilla (en Salamanca o Alcalá de Henares, incluso en Italia o Portugal).[27] Desde que en el siglo XII el Derecho volviera a adquirir en Europa la condición de disciplina autónoma,[28] sus practicantes habían estado estrechamente unidos a los libros y la cultura escrita en su desempeño cotidiano, quizás más que ninguna otra profesión. La formación universitaria en leyes añadía una distancia extra entre los juristas y el resto de la sociedad, puesto que dicha formación se basaba en el derecho romano.

El segundo grupo, el de los notarios y escribanos, se caracteriza por haber recibido una formación de carácter gremial, muy apegada a las costumbres del reino, lo que se refleja en sus lecturas.[29] Pero en ambos casos, lo que les une es que las obras de Derecho formaban parte de su arsenal de trabajo.

Observando con detenimiento la documentación, podemos comprobar que las bibliotecas del primero grupo, además de su practicidad, cumplían una función de prestigio social que llega a reflejarse incluso en su aspecto físico. En una época en que los normalmente pocos libros de un hogar suelen guardarse en arcones y cajas, los letrados podían presumir de organizar los suyos en estantes y »librerías«, rodeados de mobiliario y objetos propios del trabajo intelectual. Un buen ejemplo de cómo podía ser el estudio dentro del hogar de un experto en Derecho nos lo proporciona el inventario del mencionado licenciado Jerónimo de Santa Cruz, quien tenía una de las bibliotecas más interesantes aquí estudiadas, dividida en dos secciones: la »memoria de los libros del estudio«, con 232 entradas, y la »memoria de los libros curiosos que no son de leyes«, con 150 títulos. Junto a los libros, el despacho se completaba con un rico mobiliario que incluía cinco bancos de nogal, cinco mapas, »un estante de caoba grande de tener los libros curiosos« y »un estante del estudio de pino de tener los libros«. Por otro lado, aunque apenas he encontrado testimonios al

22 El documento fue otorgado por su esposa en marzo de 1609: AHPSe, Leg. 6865, fol. 650r–665r. La tercera y cuarta ciudad de la muestra son Frankfurt (14 ediciones) y Turín (13) respectivamente. Las ediciones de algunos autores españoles de esta biblioteca sí fueron hechas en las prensas de la península ibérica, como las »Partidas de Gregorio López in fol. Salmant. con las remisiones a la nueua recopilación a la margen, 1576, in 4 tomis«. Sin embargo, incluso en estos casos nos encontramos con libros impresos en el extranjero, como »Nauarri opera cum consilij autis in fol. leon 1595 in 3 tomis«, es decir, las obras de Martín de Azpilcueta impresas por Jean Baptiste Buysson en Lyon (Catálogo Colectivo del Patrimonio Bibliográfico Español: CCPB000290158-7. http://catalogos.mecd.es/CCPB/cgi-ccpb/abnetopac/O12180/ID3a5f684d/NT5, consultado el 28/02/2021).

23 No resultaba extraño, de hecho, que cuando una edición de algún autor español realizada en la península tenía éxito, la obra se reimprimiera posteriormente en el extranjero, véase Ruiz Fidalgo (2004) 265–309.

24 Cavallo / Chartier (1997) 14–15. Los autores resaltan que las distintas »comunidades de interpretación« se relacionan con lo escrito de una forma particular. En el caso de los profesionales del Derecho sevillanos, veremos que esa relación no solo es peculiar en cuanto a las lecturas, sino también en cuanto al mobiliario y configuración física (e incluso decorativa) de sus bibliotecas.

25 Sobre la formación de los especialistas en leyes y el aprendizaje legal en general, véase Korpiola (2019).

26 Burke (2000) 18–31. Sobre la formación de los letrados españoles y los libros utilizados en la misma, véase Beck Varela (2018).

27 Carabias Torres (2005) destaca la importancia de Salamanca como »centro de formación de lo que con los siglos se denominó burócratas«.

28 Stein (1999) 52.

29 Villalba / Torné (2010).

respecto, no debía ser extraño entre los letrados el uso de libros y cuadernos de memoria donde registrar apuntes y asuntos profesionales. Como ejemplo, el inquisidor Andrés Gasco tenía un »libro de mano de cosas de derecho« en 1566, mientras que el procurador Jerónimo de los Reyes, guardaba en un cajón un libro pequeño con el siguiente rótulo: »Libro de Memorias de los gastos que se hazen en los gastos de pleytos del año de setenta e dos«.[30]

Las bibliotecas de los juristas requerirían una inversión de capital considerable, máxime si tenemos en cuenta que buena parte de estos libros se imprimían, como hemos señalado, en el extranjero.[31] Cuando el licenciado Gaspar Vallejo Alderete, miembro del Consejo Real y oidor en la Real Audiencia, hizo inventario de sus bienes de cara a contraer matrimonio en el año 1600, valoró sus libros (junto a los cajones y estantes en que se guardaban) en mil ducados.[32] En 1575, entre los bienes subastados en la almoneda de doña Ana de Hoces, se encontraban los »libros viejos enquadernados e maltratados de la librería« que había pertenecido a su esposo, el licenciado Antonio de Ulloa, alcalde de corte en la Chancillería de Granada y fallecido en Sevilla diez años antes. Pese a su mal estado de conservación, el librero Juan de Medina adquirió el conjunto por 500 ducados.[33] De hecho, al igual que los juristas debían ser buenos clientes de los libreros, estos encontraban en las almonedas de los primeros un lugar en el que adquirir (o recuperar) obras de Derecho, para volver a venderlas buscando la máxima rentabilidad.[34]

En la adquisición de estas bibliotecas podían jugar también un papel muy destacado las familias, ya sea a través de la herencia, la dote o la financiación el gasto requerido para comprar los libros. Por ejemplo, la biblioteca del doctor Bartolomé Hidalgo, valorada en 1.500 reales (136 ducados), estaba constituida en parte por la de su suegro, el jurado Martín de Nurueña.[35] Asimismo, parece que el curtidor Jerónimo Orozco, que ni siquiera sabía escribir, comprendió que invertir en la »librería« de sus hijos actuaría como un complemento necesario a la escalera social que serían sus estudios, también costeados por él. Eso al menos se desprende de su testamento, redactado en 1560, donde declara haber gastado en sus dos vástagos más de cuatro mil ducados que, entre otras cosas, se emplearon en libros, estudios y enviarlos a América.[36]

Las obras jurídicas en las bibliotecas de los letrados

Si dirigimos nuestra mirada al contenido de las bibliotecas de los letrados sevillanos, al menos en su parte profesional, encontramos que entre los títulos que más se repiten se encuentran aquellos que formaron la base del Derecho europeo durante siglos: el Corpus Iuris Civilis y el Corpus Iuris Canonici. Estas obras se editaban con frecuencia en varios volúmenes, muchas veces incluyen glosas y no es raro encontrarlas juntas en la misma biblioteca.[37] De hecho, esto ocurre hasta en ocho oca-

30 AHPSe, Leg. 3429, fol. 824–840v y AHPSe, Leg. 14289, fol. 359r–362v.

31 En el caso de la ciudad de México, las bibliotecas de los juristas en el primer cuarto del siglo XVII suelen estar valoradas entre los 300 y los 1.200 ducados, véase Manrique (2019).

32 La cifra es más impresionante si consideramos que todos sus bienes muebles fueron valorados en menos de 5.000 ducados: AHPSe, Leg. 12601, fol. 536r–543r.

33 AHPSe, Leg. 3469, fol. 1204r–1206r.

34 Palmiste (2004). Entre los pujadores por la biblioteca del licenciado Luis Vázquez de Alderete, en 1602, estaba el librero Fernando Mexía, aunque finalmente fue adquirida por el doctor Fernán Páez de la Cadena, que ofreció por ella 200 ducados: AHPSe, Leg. 12617, fol. 389v.

35 AHPSe, Leg. 1119, fol. 561r–602v.

36 AHPSe, Leg. 99, fol. 533r–535r. Sobre el lugar de las bibliotecas y los estudios de leyes en las estrategias familiares de ascenso social en el Atlántico ibérico puede consultarse el interesante caso estudiado por Testón Núñez (2018). En Aranda / Sánchez González (2005), podemos encontrar un ejemplo de cómo el tesón familiar a la hora de reunir y transmitir libros a lo largo de varias generaciones podía llegar a constituir una auténtica »herencia intelectual« en forma de la biblioteca de una familia de jurisconsultos.

37 Aunque las obras que conformaban la base del derecho canónico se reunieron y publicaron con posterioridad a las del derecho civil, ambos corpus tendieron a fusionarse y sus practicantes parecen no haberse distinguido entre sí, siendo habitual titularse en ambos derechos. Véanse Herzog (2019) 101 y Dios (2016) 13–14.

siones, y no solo en inventarios de eclesiásticos.[38] En general, en la muestra se observa una preferencia por el Derecho Canónico, que aparece en 17 bibliotecas, frente a las 11 en las que encontramos el Derecho Civil; sin embargo, hay más lectores que parecen preferir tener alguna de las partes del segundo por separado y, en este caso, las *Instituta* son, sin duda, las favoritas.

Fue sobre ambos Corpus que se desarrolló la labor de los glosadores, compiladores y tratadistas medievales, especialmente en Italia, donde destacaron Bartolo Sassoferrato y Baldo degli Ubaldi en el derecho civil, y Juan Andrés y Nicolás Tudeschi (el Abad) en el canónico.[39] Estos y otros autores del conocido como *mos italicus*, aparecen con frecuencia en las colecciones de los profesionales del derecho, tanto del siglo XVI como del XVII. De nuevo, suele tratarse de obras que ocupan varios volúmenes, como los »Abades« en ocho cuerpos que tenía el doctor Cristóbal de Zambrano en 1574[40] o los »Bartuli, lectura, consilia, etc. in fol. Ven, 1575 in 10 tomis«, del mencionado Jerónimo de Santa Cruz en 1609, es decir, diez tomos de las obras de Bartolo Sassoferrato publicadas en Venecia por Lucantonio Giunta il Giovane en 1575.[41]

Los glosadores de la Edad Media elaboraron también *summas*, como la *Summa Azonis*, la más famosa exposición sistemática del *Código*, obra de Azo, jurista del siglo XIII, que aparece hasta en diez bibliotecas de la muestra. No faltan tampoco, como era de esperar, ni la *Summa Armilla*, de Bartolomé Fumo, ni la *Glosa ordinaria*, escrita por Accursio. Por otro lado, desde fines del siglo XIII los grandes juristas europeos van a preocuparse en mayor grado por la práctica del Derecho, dedicándose a la elaboración de *Commentaria*, *Consilia*, *Praxis* y *Tractatus*, como las de Bartolomé Cepolla, uno de los autores más presentes a lo largo de la muestra (también en diez ocasiones), siendo sus *Cautele* y sus *Consilia Criminalia* los títulos más repetidos.

Pese a la mayor influencia del *mos italicus*, encontramos que el *mos gallicus* o humanismo jurídico, también penetró en las bibliotecas de la ciudad, produciéndose una coexistencia más que una batalla entre ambos, lo que, por otro lado, parece haber sido común entre los letrados de Castilla.[42] Así, en las mismas colecciones localizamos, junto a los autores del *mos italicus*, a representantes de la otra corriente, como Andrea Alciato[43] o, más avanzado el siglo XVII, Jacques Cujas o François Hotman.[44] Lo mismo sucede con las obras de autores españoles, y no es extraño que un jurista reúna entre sus libros títulos de Diego de Covarrubias, de carácter humanista, junto a otros de Gregorio López, López de Palacios Rubios o Rodrigo Suárez, que mantuvieron vivo el *mos italicus* en la península.

Junto a este tipo de tratados, ocupan también un lugar destacado en las bibliotecas de los letrados las distintas recopilaciones de leyes, ordenanzas y reglas de las corporaciones de la época, tanto laicas como eclesiásticas. El derecho castellano conoció un nuevo impulso desde el siglo XIII, que se sustanció en la aparición del *Fuero Real* y de las *Siete Partidas*. Eran asimismo fundamentales las *Leyes de Estilo* o las *Leyes de Toro*, dictadas por los Reyes Católicos. Estos textos se encuentran con mucha frecuencia comentados por autores como Antonio Gómez (para las Leyes de Toro) o Gregorio López (para las Partidas). Esta serie de textos reviste un interés especial porque no solo están entre los más abundantes, sino que son el tipo de obras de Derecho que van a gozar de mayor difusión social,

38 Tal era el caso del doctor Juan Bravo, colegial de la universidad de Sevilla, quien poseía en 1573 un »derecho canónico, tres cuerpos, pequeño« y un »derecho ciuil, pequeño, en diez cuerpos« (AHPSe, Leg. 3460, fol. 587–593v); o del doctor Cristóbal Zambrano de Guzmán, rector en la misma universidad, que poseía un derecho canónico y otro civil, ambos viejos (AHPSe, Leg. 3467, fol. 670r–672v). Uno de los ejemplos más paradigmáticos es, de nuevo, el de Jéronimo de Santa Cruz, en cuyo inventario recogen un »derecho canónico gregoriano cum glosis in 4° ven. 1595 de rubrica colorada y negra in 4 tomos«, y un »derecho ciuil cum glosis in 4 ven 1591 de rúbrica colorada y negra en 5 tomos«. AHPSe, Leg. 6865, fol. 650r–665r.

39 Merchán Álvarez (2001) 122–125.

40 AHPSe, Leg. 3467, fol. 670r–672v.

41 AHPSe, Leg. 6865, fol. 650r–665r.

42 Alonso Romero (2004). Según Tomás y Valiente (1996) 308, »es una afirmación de validez general la consistente en destacar la mayor influencia del mos italicus tardío en España y la escasa presencia del humanismo jurídico. Creo que esa tesis es correcta; pero también es cierto que el humanismo no fue ignorado por completo entre nosotros«. Salustiano de Dios va más allá, sosteniendo que abundaron los autores situados »en posiciones intermedias«, Dios (2016) 18.

43 Drysdall (2003).

44 Hespanha (2002) 141–142. Una obra de Cujas y hasta tres de Hotman, estas impresas en Lyon en la década de 1560, poseía Jerónimo de Santa Cruz.

aunque no cambie tanto su orientación práctica, como veremos en el caso de los escribanos. Al margen de la legislación propiamente española, posiblemente la obra más repetida sean los cánones y decretos emanados del Concilio de Trento, que se encuentran principalmente en las bibliotecas de miembros del alto clero (tengan o no formación jurista), aunque también en las de algunos letrados laicos, como la del Dr. Cristóbal Franco de Ribadeneira, abogado en la Audiencia de Sevilla, inventariada en 1600.[45]

Por otro lado, entre los autores españoles debemos incluir también a aquellos que ayudaron a sentar las bases del Derecho Internacional, como Domingo de Soto, y aquellos que reflexionaron sobre el trato a los herejes, como Alfonso de Castro, o sobre la teología moral, como Martín de Azpilcueta.[46] De ellos se encuentran distintas obras en las bibliotecas de los juristas aquí estudiados, destacando el tratado *De Justitia et Jure* de Soto. En el caso de Azpilcueta, encontramos hasta 15 obras suyas en la base de datos, de entre las cuales las más difundidas, fueron el *Manual de confesores y penitentes* (en catorce bibliotecas) y el *Compendio y sumario de confesores y penitentes* (en cuatro). Sus lectores fueron eminentemente titulados superiores o miembros del alto clero (encontramos a un inquisidor, como Andrés Gasco, o a un arcediano, como Jerónimo Manrique),[47] si bien, fuera de este estrecho círculo tuvo también algunos lectores, como veremos.

No encontramos en estas bibliotecas obras dedicadas en exclusiva al derecho indiano, pero sí hallamos algunos ejemplares de las Ordenanzas de la Casa de la Contratación, así como obras jurídicas que incluían reflexiones sobre el derecho aplicable a los territorios americanos, como la *Novam, diligentem, ac perutilem expositionem capitum*, de Francisco de Avilés, presente en cinco bibliotecas, o del *De expensis e melioratioribus*, de Juan García de Saavedra.[48]

En definitiva, podemos decir que los juristas reunieron algunas de las colecciones más importantes de la época, superando con frecuencia el centenar de volúmenes y, aunque no todo en ellas fueran obras jurídicas,[49] sí se aprecia una fuerte orientación profesional.

Bibliotecas de escribanos y notarios

Dentro de los profesionales del Derecho, hemos englobado también a un grupo con características específicas, conformado fundamentalmente por escribanos y notarios. Se trata de personas que no suelen tener estudios universitarios (no se mencionan, de hecho, en ninguno de los ejemplos registrados). Sin embargo, su desempeño cotidiano les obliga a utilizar y conocer el Derecho, al menos el que asiste a los negocios y actos de la vida cotidiana, tales como constituir compañías comerciales, redactar testamento o hacer inventario. Su vida transcurría entre papeles, pero a diferencia de los letrados con formación universitaria, los notarios solían tener bibliotecas más bien modestas, que rara vez superaban la decena de títulos, y sus obras de derecho se centraban fundamentalmente en la legislación aplicable en Castilla.

Hasta once entradas de la Base de Datos se corresponden con inventarios de escribanos y varios de ellos solo tenían libros de rezo. Entre los que sí tenían obras jurídicas, prima, como decimos, la practicidad. Francisco de Vega, escribano real que en 1560 se preparaba para viajar a Perú declaraba tener, junto a unos evangelios, un libro de »las Cortes de los años pasados y notas«.[50] Del tipo de obras de las que se servían los notarios para su labor nos dan ejemplo los inventarios de Juan de Villalobos (1570) y Juan de Tordesillas (1608).[51] En el primero encontramos buena parte de la legislación castellana (Partidas, Fuero Real y Ordenanzas Reales), junto a un libro de Hugo de Celso y unas

45 AHPSe, Leg. 1620, fol. 971r–974r, 1041r y ss.

46 Sobre este tipo de literatura, véase Duve / Danwerth (eds.) (2020).

47 AHPSe, Leg. 12459, fol. 83r–99v.

48 Ambos autores se mostraron partidarios de la aplicación en Indias del derecho castellano; véase Barrientos Grandón (2000).

49 El licenciado Marcos Felipe, por ejemplo, atesoraba 285 volúmenes »grandes y chicos, de latín y romance, de derechos y theología y humanidad«, además de un misal nuevo con su correspondiente atril: AHPSe, Leg. 10578, fol. 988r–992r.

50 AHPSe, Leg. 6743, fol. 117v–120r.

51 AHPSe, Leg. 2338, fol. 1143r–1145r y AHPSe, Leg. 12656, fol. 912r–930v. En ambas bibliotecas encontramos obras de devoción, aunque la segunda, mucho más rica (25 volúmenes), incluye también obras de literatura e historia, como un Petrarca o una »Historia del descubrimiento de las Indias de Portugal«.

»notas de Ribera«, es decir, la *Primera parte de escrituras y orden de partición y cuenta y de residencia judicial, civil y criminal*, del escribano granadino Diego de Rivera.[52] En la biblioteca de Juan de Tordesillas, un hombre muy rico, encontramos una *Recopilación y leyes del reino* (posiblemente la obra de Diego de Atienza), una *Instrucción de escribanos y jueces* y hasta tres libros distintos sobre los fueros de Vizcaya. Otros funcionarios también podrían equiparse en cultura libresca a los notarios. Tal parece ser el caso de Gonzalo Cerezo, alguacil en México, cuyos bienes se inventariaron en Sevilla en 1568, encontrándose entre sus libros una »prática civel de escribanos«.[53]

Lectores de libros jurídicos más allá de los círculos profesionales

Con respecto a los lectores de obras de derecho más allá del mundo profesional, debemos empezar aclarando que rara vez van a interesarse por títulos internacionales y más estrictamente jurídicos. En la almoneda de bienes del humanista Don Diego Girón, junto a numerosos clásicos grecolatinos y los principales humanistas europeos, encontramos un Derecho Civil, pero no hay más rastro de este tipo de obras.[54] Más llamativa resulta la presencia en el inventario de bienes de María Garnica, realizado en 1580, de una *Instituta* y un *De iustitia et iure obtentionis ac retentionis regni Nauarre*, de Juan López de Palacios Rubios.[55] Quizás se tratase de libros de su esposo, aunque tampoco parece ser jurista y, en cualquier caso, por su orientación temática no parece que ésta fuera una biblioteca profesional.

En la curiosa y bien surtida biblioteca de Francisco Núñez Pérez, fallecido en 1573, hallamos también una *Instituta*, pero el resto de las obras de Derecho parecen vincularse sobre todo a sus necesidades como mercader.[56] Así, encontramos unas *Ordenanzas del prior y cónsules de la Universidad de mercaderes de Sevilla* y otras del Consulado de Burgos, junto a recopilaciones de leyes y pragmáticas (posiblemente relativas al comercio) o una *Práctica civil y criminal e instrucción de escribanos*, de Gabriel Monterroso. También es él uno de los pocos laicos sin título universitario que tiene obras de Martín de Azpilcueta en su biblioteca, en su caso el *Manual de confesores y penitentes*, y lo interesante es que el perfil de estos lectores es siempre muy parecido: se trata de mercaderes muy ricos o miembros del patriciado urbano, como el mercader de azúcar Bartolomé de Frías Marañón o Don Alonso Martel, que tenían un ejemplar del *Compendio* de Azpilcueta en 1580 y 1600, respectivamente.[57] En conclusión, pocos pero escogidos lectores.

A modo de conclusión

En conclusión, pese a que en el conjunto de las colecciones recopiladas en la base de datos, los libros de Derecho, ya sea civil o canónico, constituyen uno de los apartados más abundantes, tanto en número de volúmenes como en variedad de títulos, no podemos decir que estas obras se encontraran muy extendidas socialmente, a tenor del escaso recorrido que suelen tener más allá de las bibliotecas de los distintos especialistas en Derecho, aunque encontramos excepciones que son reveladoras del papel y el uso que los libros jurídicos podían tener en aquella sociedad.

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52 En la licencia real incluida en la edición de 1605, realizada por Juan de la Cuesta en Madrid a costa del librero Francisco de Robles, se recoge la denominación del libro como »Notas de Diego de Ribera«, aunque en la portada aparezca el título extenso. Como dato curioso, ese año saldría, del mismo taller y también a costa de Francisco de Robles, la primera edición del Quijote.

53 AHPSe, Leg. 12392, fol. 1031r–1033r.

54 Girón fue discípulo de Juan de Mal Lara y continuador suyo al frente del estudio de gramática, donde se formaron varios humanistas sevillanos. Al fallecer dejó una biblioteca con más de 150 libros, caracterizada por la erudición; véase Maillard Álvarez (2002).

55 AHPSe, Leg. 2365, fol. 758v–763r.

56 Núñez Pérez pertenecía a una familia muy activa en el comercio internacional y fue amigo del humanista Benito Arias Montano. Su biblioteca se estudia en Fernández Chaves / Maillard Álvarez (2021).

57 AHPSe, Leg. 4100, fol. 880r–917v y AHPSe, Leg. 6835, fol. 1039r–1041v.

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TABULA OPTIMA SUPER BREVIARIO DECRETORUM.

Quomodo secundum philosophos, & physicos. Situs est dispositio perfecti ad optimus. attende diligenter quicunqs acumine ingenij & uite sanctimonia ad optimū monachā illum summū anelas cēm uirtutis plenitudinē. in sanctorū decretis cēm diuini saporis suauitatē. oēmqs facilem & amenam uias ducens spūs sancti ad uirtutis felicitatē & gloriam. Sed tates ad idem ꝓpositum in una eademqs carta conueniunt. Deide nota distinctiones. causas & qstiones in superiori latere. melius tñ in marginibus destris & sinistris libri. Rubrice uero p signate sunt. Capitula p ☞ nisi aliter in fine auctoritatis ostensa sint. Idcōqs est ordo in breuiario decretalium. Lege itaqs feliciter ut sine labore. & dispēdio & tēporis diuturnitate in admirandū predicandumqs. & uenerandum uirum euadas.

☞ Abel & cayn .32. 36.48.67 .106.
Abbas .17.
Abusio potestatis .18 .40.
Absolutio.23. 29.40.41. 76.77.
Abiron.24. Abolitio .27.
Abigail.62. Absalon.73.
Abortum procurare .62.
Acab.14.26.69.98.104.
Accoliti.6. Accusator falsus .14.
Accusator & iudex .26.33.
Accusator deficiens.26.27.33.34.
Acculator sit irreprehēsibilis.30.34.
Accusatio quomodo fiat .28.30.
Accusati non accusent anteqs se purgent .33.
Accusare qui non possunt .33.
Adas & eua .78.97. 99.104.114.
Adulatio.14.70.
Adulterium.16.27.91.93.109.
Aduersitas.36. Admonitio.70.

Sigfrido M. Ramírez Pérez, Stefan Vogenauer

Using Oral Methods for European Legal History: Methods, Sources, Projects

There is no need to justify the use of oral testimony in the field of contemporary (legal) history, and recourse to this genre of historical sources is not exclusive to contemporary (legal) historians. The institutionalisation of oral history as a sub-discipline began in the US during the 1960s with the establishment of the Oral History Association in 1966 and its journal *Oral History Review* in 1973. In Europe, during this period a variety of approaches emerged, pioneered by the English tradition of oral history led by Paul Thompson during the 1970s.[1] In »The voice of the past«, the founder of the journal *Oral History* (1969) and the Oral History society in the UK called for a more scientific status for the discipline, engaging in a methodological and substantive dialogue with other social sciences, in particular sociology and anthropology. The aim was to study the practice of preserving the testimony of common people – not just the »great men« of the elites – in their everyday lives. These studies were to include not just »historical moments« and »hard facts«, but also emotions and experiences. The process of historicizing the personal lived experiences of social actors requires the mediation of social scientists; by generating various types of oral testimony these scholars create meaningful insights that can be used, like any other historical source, to interpret the larger structures and historical trends of a particular period and space.[2]

We are delighted and honoured to edit this focus section on the use of oral history for research on contemporary European legal history. In doing so, we can include a British contribution that stems directly from this pioneering European tradition: the Parliament Oral History Project. In this first contribution, Emma Peplow and Priscila Pivatto, who are responsible for this ambitious project, provide us with some of the key reflections from this tradition applied to an institution of near mythical status in European legal history: the British Parliament. They describe not only the methodological principles and operational choices for this project on the life stories of UK Members of Parliament (MPs), but also focus on a particular example of legal and historical relevance: the approval of the bill permitting abortion. Further information on this project can be found in their recent monograph, where they thematically and chronologically analyse the political lives of MPs.[3] The politicians were interviewed within the framework of a formal project managed by both a historian (Peplow holds a PhD in history from the London School of Economics and Political Science) and a lawyer (Priscilla Pivatto holds a PhD in public law from the University of São Paulo). The project has been running for nearly a decade, and there are structural reasons for it to continue on a permanent basis, given the growing number of actors it has analysed.

After this strongly institutionalised project covering a venerable establishment, the second contribution focuses on an oral history of a much younger institution: the European Parliament. Contrary to what might be expected, this project was not initiated by the institution itself, with the intent to glorify its past. It is, rather, a modest – but valuable – bottom-up, private initiative without institutional support. It was set in motion by a particular type of actor in parliamentary life: retired top civil servants of the European Parliament. They inject continuity into an institution where the main actors, the Members of the European Parliament, are regularly changing, even if few of them remain in office for a long time. The contribution is written by Alfredo de Feo, former Director of the library and archives of the European Parliament, and Michael Shackleton (PhD in international studies, University of Warwick), formerly responsible for the European Parliament TV Channel. Both have previously done research and teaching on the European Parliament. They present an overview of how useful a modest project like this can be for researching certain key legal issues

1 Thompson (1988).
2 Wallenborn (2006).
3 Peplow / Pivatto (2020).

in the short, but intense, life of the Parliament. They focus on the role of soft law and informal politics in inter-institutional relations (scrutiny of the Commission, parliamentary majorities) in the expansion of the key functions of the institution, which has only been directly elected since 1979. They provide just a small example of the more detailed chapters that can be read in their 2019 co-edited monograph, where they and other top former civil servants use oral interviews with MEPs to analyse some of the key moments in the history of the European Parliament and its contribution to the development of the European Union.[4] This »history from below« is also a »history from within«; this allows us to re-visit key moments through the eyes of those who experienced them, the MEPs, and first-hand observers, the civil servants of the Parliament.

Of course, legal history research on the European project should not omit the history of European courts, which are further key actors alongside parliaments and executives. The final two contributions of this focus section address them. The first is a comparative project designed by Nina-Louisa Arold Lorenz (JSD Stanford). In her doctoral and postdoctoral research, she collected more than 50 interviews with judges, advocates general and senior administrative staff of the European Court of Human Rights in Strasbourg (established in 1959) and the Court of Justice of the European Union in Luxembourg (1952).[5] Her project aimed to uncover the European human rights cultures of both European courts in order to understand how a complementarity can exist between two Courts that have evolved in parallel for more than 60 years, although they operate in separate legal spheres that prevent direct legal interactions between them. The methodological approach here is very different because of the applied nature of the research, which used oral testimonies to enquire about this particular topic and did not intend to make the content of the interviews accessible or public. In a way, this is the typical approach of social scientists, who make use of structured interviews as a complementary source to test various research hypotheses.[6] These interviews are elaborated after a systematic analysis of available written sources, such as, in this particular case, the judgments related to human rights in both courts. Dr Lorenz attempted to deconstruct the thick notion of »legal culture« through structured interviews about ideas, values, expectations and attitudes of the actors that make the institution.

But as shown by the second article presented here about an apex court, the Spanish Constitutional Court, historians and lawyers may use oral history not just for research, but also for constructing and elaborating a broader public memory of key legal institutions in a democratic state. This is the great ambition of two Spanish professors of administrative and constitutional law, Miguel Beltrán (University of Castilla-La Mancha) and Daniel Sarmiento (Complutense University Madrid). Their aim is to preserve the testimony of the first judges of the Spanish Constitutional Court and enquire as to the origins of this young court (established in 1980) through the creation of a documentary.[7] This is yet another initiative from below and without much internal institutional support, although Beltrán had served as law clerk at the Court and Sarmiento in a similar function at the European Court of Justice. They developed the project to fill a research gap by focusing on the historical origins of the Court and its founding, which is often a decisive period for any institution, with important organisational choices, which are path-dependent beyond this formative period. In a way, these two scholars made methodological choices very much in line with what is now being experimented with and used in the growing field of public history, where non-professional historians aim to elaborate the memory and history of the past in the public sphere.

We hope that readers will agree that these four distinct projects show the benefits that legal historians can reap from the use of oral sources. This might simply involve structured interviews for specific topics for exclusive use, the creation of oral archives with life stories from key legal actors for public access or projects in which oral testimonies serve for memorial purposes and documentaries. Oral history can also facilitate the preservation of public and private written sources, most importantly private papers (diaries, agendas, personal

4 De Feo / Shackleton (2019).
5 Arold Lorenz (2007); Arold Lorenz / Groussot / Petursson (2013).
6 Della Porta (2010).
7 Beltrán / Sarmiento (2017).

notes), which can help to advance our understanding of the past. Taken seriously, oral history, and more broadly public history, can serve to complement legal historians' use of qualitative data and the more recent trend towards quantitative methods, such as using big data as developed in the field of digital humanities. The »voices of the past« are of fundamental importance for contemporary legal history and provide us with a variety of uses, as illustrated by the four projects presented in this focus section. But it should be emphasised that these are not conclusive. Legal historians can draw upon many further approaches and traditions. The French school of oral history of the public administration, for example, has for nearly two decades provided both new insights on methods and practices of oral history for the study of law-making institutions in government and other executive bodies.[8] Indeed, any oral history programme will have to start by taking stock of these various traditions and methods before customising its own approach based on its own research object and scientific endeavour.

We are extremely grateful to our contributors. Three of the following four contributions were presented at a workshop in February 2018, organised by what was then the »Max Planck Institute for European Legal History« on the use of oral sources for the study of European legal institutions. The recent change in name to »Max Planck Institute for Legal History and Legal Theory« is but a reminder that institutions constantly evolve, their personnel changes and institutional memories can fade away quickly. Oral histories are the historian's tool to prevent them from falling into obscurity once and for all.

■

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8 Descamps (2006); Descamps (2019).

Emma Peplow, Priscila Pivatto

A Different Approach to Legislative Bodies: Reflections on the History of Parliament Oral History Project and Laws Around Abortion

I. Introduction

Legal history studies have been working with a wide range of sources, subjects and methodologies in an effort to cover various perspectives and a plurality of legal experiences. One of many ways to approach legal history is to focus on institutions officially dedicated to law making: governments, tribunals and parliaments. More traditional sources for writing the history of these bodies would include documents like reports, debates, proceedings and votes. Oral history interviews can be used as a source to add different perspectives on these materials. Interviews with individuals formally involved in the creation and transformation of legislation can offer a deeper insight into how laws were made. Memories of these individuals' motivations, feelings and actions can give researchers a more intimate perspective of the state and can enrich our understanding of the conventions and negotiations that created the final legislation.

Focusing on the people who together make up an institution, the History of Parliament Trust (HPT) was founded in 1940 and has since produced thousands of biographies of parliamentarians covering more than three hundred years of British parliamentary history.[1] Following this approach, in 2011 the Trust, in cooperation with the British Library, began an oral history project. Over 175 life story interviews have been completed with former members of the UK Parliament that are largely available to researchers of all kinds.

This article will discuss the organisation and the structure of the History of Parliament Oral History Project, practical aspects of conducting interviews and some challenges and achievements that the project has faced through the years. The text is based on a presentation given at the workshop *Oral History of the European Court of Justice* held by the Max Planck Institute for European Legal History in 2018.[2]

II. Background

The founder of the History of Parliament Trust, Josiah Wedgwood, a Member of Parliament (MP) himself, initiated an innovative research project in the 1930s. He asked members of the 1885–1918 Parliament to answer a questionnaire about their lives and motivations. Wedgwood never completed the project, but his willingness to record MPs' »minds not deeds« was an inspiration for the History of Parliament's oral history project.[3] Our main goal is to create a new archive for future researchers. Interviewing former MPs now is a way to create, collect and preserve their personal narratives about their lives and the history of the institution they were part of.

A sound archive of oral history interviews with mainstream politicians is still rare in Britain, a reflection of the »history from the bottom up« perspective of many UK oral historians.[4] The methodology developed differently in the USA,

1 All work published up to 2010 is available on the History of Parliament Trust website www.historyofparliamentonline.org.

2 For more detail on many of the issues raised here, please see Peplow / Pivatto (2019).

3 For more on Josiah Wedgwood's questionnaire, see Baines (2012).

4 »Large numbers of political diaries, memoirs and autobiographies are readily available and much large-scale research into the roles of the politician has been undertaken. However, interviews for these projects are rarely under the life story model and often anonymised. Many authors have used interviews with MPs as sources for their researches about Parliament and we could mention, among others, the works of Nirmal Puwar, Boni Sones and Donald Searing.Nevertheless, those authors were exploring specific topics through the interviews and did not have a wide scope of a life story approach.« Peplow / Pivatto (2019) 96.

where the first oral history projects featured interviews with members of the scientific, arts and political elites.[5] In Europe the development of oral history was influenced by social and cultural history. Oral historians wanted to give voice to subjects who were underrepresented or not represented at all in the archives. Although for some time oral historians debated the merits of the two approaches and elite versus non-elite interviewing, now oral history is widely used to study a variety of topics and different subjects, from activists and community history to MPs and institutional history.[6]

Another difference in the two traditions is that in the USA oral history emerged as an archival practice, while in Europe it is rooted in the work of social historians. In creating an archive, the priority is to collect material to act as a complementary source for a wide range of researchers. For social historians, the chief concern is to create new historical narratives about everyday lives of people normally excluded from the archive. As the two traditions engaged with each other, the two practices gradually converged and both began to be understood through the ideas of shared authority and intersubjectivity, especially following the works of Michael Frisch, Luisa Passerini and Alessandro Portelli.[7]

The History of Parliament oral history project was designed with these perspectives in mind. The interviewees are undoubtedly part of a political elite, but this does not mean that they do not have *hidden stories* and experiences that are not recorded in traditional sources. Throughout there is a clear separation between the creation of the source, i. e. the interview itself, and the later uses and interpretations of the material. However, the interviews are not understood as a collection of static data or a *window into the past*. The interviews are narratives constructed in the encounter between interviewees and interviewers, where reflections about the past are drafted in the present, with awareness of the future.

Therefore, the memories recorded are told from the personal perspective of the interviewee, sharing events important to them and their personal feelings. Our project approaches oral history through a »whole life story« methodology, exploring connections between an individual's life experience and significant historical events that are described using their own words. »A life story is the story a person chooses to tell about the life he or she lived, told as completely and honestly as possible, what the person remembers of it and what he or she wants others to know of it, usually as a result of a guided interview by another«.[8] Thus, the History of Parliament oral history project is not a theme-oriented or community history project. It does not have a specific agenda; instead the interviews discuss every aspect of a politician's life.

III. The Sound Archive

The interviews are the central element of the project, but building a sound archive neither starts nor ends with them. Many decisions had to be taken before interviews could begin: how to select the interviewees; who the interviewers would be and how they would be trained; how long the interviews should be and where they should be held; which recording equipment to use; what accompanying material would be produced after the interview; the legal documentation required; and how to archive the material.

Considering the reflective and intimate nature of the project and the amount of time needed for life story interviews, the HPT project only interviews former MPs and not those currently sitting or actively pursuing a political career. We felt that the politicians would be more open to discuss their lives and experiences in the House of Commons if they had left the lower house some time ago and did not intend to return to it. There are around 950 living former MPs and, although in an ideal world the project would interview all of them, due to limited resources choices had to be made.

The project intends to create, capture and explore a variety of perspectives on parliament. We intend to include politicians from different backgrounds, genders, parties, constituencies, status and time spent in Parliament. Although all the interviews are individual life stories, they are connected through the common experience of being

5 Sharpless (2007) 12–19.
6 Ritchie (2011) 5.
7 Grele (2007) 34–54.
8 Atkinson (2001) 125.

an MP and give different perspectives on similar topics.

Since 2011, 380 former Members have been invited to take part in the project and 241 agreed to be interviewed. The project has now completed over 175 interviews. In general, there is a party and gender balance that matches the historic composition of the House of Commons. We have conducted interviews with 146 men and 32 women. We have interviewed 82 Conservatives, 73 Labour Members, 20 Liberal / Social Democrat / Liberal Democrat, one Ulster Unionist, one Scottish National Party and one independent MP. It is essential for the project to keep this balance while covering a broad range of individuals, and the project organisers keep these aims in mind whilst choosing who to invite to interview. At the start, the project also prioritised older Members. The majority (105) entered Parliament for the first time before or in 1979; 72 were elected between 1981 and 1997 and only one got his first seat after 1997. Most of them (117) left the House before or during the 1997 election. More recently, the age criteria has been less important than the more practical consideration of the interviewees' location. In a nationwide project with a small budget, it is more efficient to choose those based close to the interviewers.[9]

The project's interviewers are mostly volunteers, recruited mainly among people with experience in oral history, or with close knowledge of late twentieth century British politics. In association with the British Library, the project has trained around forty interviewers, which include postgraduate students, academics, journalists, archivists and parliamentary staff. Usually they have one full training day in a small group and later they are advised on a one-to-one basis. For each interview they are given details about their interviewee and a reading list of background research materials. Methodological issues are discussed in group follow-up sessions and through individual feedback evaluations, with the intention to keep the interviews in accordance with project guidelines.

One of the challenges of having a large scale oral history project is working with many different interviewers. The relationship between the interviewee and the interviewer is one of the most important elements in an oral history interview. Working with a group of interviewers adds a layer of diversity to the archive, and although there is an attempt to keep it consistent through semi-structured interviews, each interviewer will of course have their own style.

Despite of that, all the archive interviews are based on a common list of topics prepared by the project organisers. This is not a strict questionnaire, and there is no sort of data-collection exercise. Instead, the project has a flexible schedule of questions divided in four sections: a) before Parliament, about their early lives, family and education, how they got involved with politics and how they became an MP; b) Parliament, exploring their daily lives in the Commons and how they approached the job of being an MP; c) government, discussing their experience of being a minister or a whip; d) and after Parliament, reflecting upon electoral defeat or a decision to stand down and readjustment to life outside Westminster.[10] No single set of questions would be enough to cover the interviewees' wide variety of life experiences, thus the topics are broad and open-ended, allowing the interviewee to take charge of the narrative and leaving space for the interviewer to adapt their approach and prepare tailor-made questions. The interviewee does not have access to the questions at any point.

Therefore, the interviews can vary considerably in length and content. Although the average interview is four and a half hours in total and is usually recorded over two sessions, there are interviews as long as twenty-four hours and a couple that are shorter than an hour. Some interviewees, especially the ones still active in the House of Lords, only had a short amount of time for the interview. Others were too ill to talk for hours. Sometimes the relationship between the interviewee and interviewer simply did not work. Unfortunately, at times these limitations just have to be accepted.

It is expected that the interview will be held over multiple sessions, which occur if possible on different dates. A good life story interview needs a good rapport between interviewer and interviewee and time helps to mature their relationship, allowing the interviewee to relax and open up more during the process. Multiple sessions also enable reflection after each session and the opportunity to return to

9 Peplow / Pivatto (2020) 3–4.
10 Peplow / Pivatto (2019) 96–97.

themes or incidents that were not explored in earlier meetings.

The project leaders recommend that the interview takes place at the former MP's home. Generally, being at home in their own environment and a comfortable atmosphere encourages the interviewees to talk. This also distinguishes the oral history interview from other types of interviews, especially from journalistic and social science interviews, and helps the interviewee relax and tell their own story. A small number of interviews were held in offices, particularly in the House of Lords. Although these interviews tend to be more professional and susceptible to interruptions, in most of the cases the location did not harm the interview, the exception being when the interview took place in a public area such as clubs, shared offices or hotel lobbies, where there was too much background noise and interference.

Another central element for the rapport between interviewer and interviewee and for the success of the project as a whole is the legal and ethical arrangements. The interviewers and project leaders have a duty of confidentiality and a responsibility to share details of the project's aims and the intended use of the recordings with the interviewee. Before the interview the interviewee must sign a participation agreement form and when the interview is finished both interviewee and interviewer must sign a recording agreement form, covering copyright and access conditions. As a general rule, the copyright in the recording and accompanying summary is assigned to the History of Parliament Trust. The interviewees can close sections or the entire length of their interview for a defined amount of time, but requests to delete parts of the interview or close extracts forever are not possible. The interviewers and project leaders can also recommend closures in case of libellous or sensitive information involving third parties. So far a very small number of the project interviews are closed or have access restrictions. Of course, oral history projects should also follow legal requirements on data protection.[11]

Alongside the legal agreements and the recording itself, the third key document for any oral history project is the transcription or summary produced after the interview. This is essential to make the interviews accessible to future researchers who did not participate in the process of the interview but want to use them as sources. The History of Parliament oral history project creates time-coded summaries that can be searched for topics of interest or keywords, following British Library guidelines and opening up the interviews to others. The summary is not a full transcription, but it covers the content of the interview, indicating topics, names, places and events discussed.

Although the History of Parliament project makes sure that these summaries are prepared as an archival tool, the interviews are not a written source and should not be treated as one. The way an interviewee tells a story is important: the accent, tone of voice, pauses, rhythms, hesitations, crying, laughs, the interaction with the interviewer, all these details are important and part of the narrative. The project is trying to record memories of events, but does this by collecting voices, not just words.

Given the value that is placed on the recording itself, the audio quality is a critical issue. To be archived in the British Library they must be recorded as Waveform Audio File files and the Library recommends the use of H5 Zoom recorders with lapel microphones. The interviewers need to be trained to use the equipment correctly. Whilst in recent years some projects have introduced cameras and filming into their interviews, the History of Parliament oral history project neither has the resources to do so nor believes video greatly adds to the source. Whilst it is interesting to capture facial expressions and the body language of the interviewee, a camera can be intrusive and make it harder to develop a good relationship with the interviewer, harming the quality and openness of the words spoken. Instead the HPT illustrates its collection with photographic portraits.[12]

IV. Oral Histories and Abortion Legislation

All of the above organisational decisions were made because of the HPT's commitment to create

11 The Oral History Society issued a guide about Data Protection available at: https://www.ohs.org.uk/advice/data-protection/.

12 Fogerty (2007) 212–213.

an original historical archive of sources made with the informed consent of the interviewee. Projects such as this, interviewing people with higher status in public institutions – who have probably had media and legal training and who are already part of the historical archives – face special complications in achieving this goal. Parliamentarians, judges, ministers and other public figures are used to having their words recorded and might be more conscious about opening up during an interview. Also, their lives might be already well documented, making it harder for the interviewer to go beyond their own rehearsed stories. In our recent publication we discuss in detail these two main issues: »legacy building« and repeating »practised narratives«.[13] Yet, oral history can be an important research tool to challenge and expand historical narratives.

This oral history project helps to emphasise that Parliament is not just a state institution, but a living one with its own practices and cultures. The plural narratives created and collected by the project reveal many different individual experiences of law making. These may not appear in traditional sources but feature strongly in our sound archive.

The various roles an MP plays is a topic discussed in depth during these interviews,[14] but there is no doubt that passing, scrutinizing and opposing legislation is at the heart of an MP's role and a way they, as individuals, can make a difference in the world.[15] Social legislation was one issue very important to MPs and many interviewees remember drafting and debating these laws. For the remainder of this paper we will discuss memories of some controversial and deeply personal legislation: laws around abortion. This is an example of how oral history can be used to understand the complexities of the process of law making and *how things are done* inside an institution, while also providing some personal perspectives on Parliament. Included here are memories of the Abortion Act 1967, which legalised abortion on certain grounds, and of later amendments or attempts to amend this law in the late 1980s and 1990, including aspects of the Human Fertilisation and Embryology Act 1990.

The Abortion Act of 1967 was not introduced as part of the then government's legislative programme, but was proposed by the Liberal MP David Steel as a private member's bill and supported by the government.[16] Although MPs might be involved in campaigns and disputes over legislation throughout their careers, there are practical elements that can be more important to the passage of a law, including luck. David Steel was lucky enough to be able to propose the legislation after placing highly in the Speaker's ballot for private members' bills, meaning that he would have the parliamentary time to introduce, and possibly pass, legislation of his choice. Although abortion was and remains a controversial issue, David Steel decided that it was the right time to propose it. Here is how he remembers the occasion:

> »Luck was involved … in drawing number three in the Speaker's ballot for Private Members' Bills. If that hadn't happened I would not have been able to present the Abortion Reform Bill. I was the seventh, I think, MP since the war who tried to get the law changed. All previous attempts had failed not because of lack of support but because of lack of time. … What happened was I then got lobbied by various groups. The three most vociferous were the Abortion Law Reform Association, the campaign for homosexual equality and the plumbers registration [*laughs*]. To this day I don't know if the plumbers ever got registered. … The Abortion Law Reform Association had actually the best case, partly because the bill had already gone through the House of Lords – it was waiting to be picked up in the Commons – and partly because at the election I had received all the bumpf from these organizations, and I had ticked the box to say if elected I would support reform of the law. … Having said I would support it, given the opportunity actually to do something about it was not something I

13 Peplow / Pivatto (2019) 98–101.
14 Peplow / Pivatto (2019) 101–103.
15 Peplow / Pivatto (2020) 136–148.
16 At the start of each new parliamentary year, backbench MPs enter the Private Member's Bill ballot, the winners' bills take priority when time is allocated for debates. For more on Private Members' Bills, see Patrick / Sandford (2012).

could miss. … It was quite difficult. One or two of my key supporters were Catholics and therefore totally opposed to what I was doing. … It was quite a tricky period. I didn't decide right away.«[17]

The participation of lobby and pressure groups was crucial to the development of social legislation. For the MPs proposing a private member's bill, often without the support of the government or civil service, it was efficient to work together with groups that had been drafting and lobbying for legislation for many years. For the MPs scrutinizing legislation, lobbying could help them to formulate arguments and deepen their own understandings on an issue. The Conservative MP Jill Knight comments on being lobbied about the Abortion Bill by two local doctors. Before the meeting she remembers being likely to abstain, but after an hour and a half with them she became a strong voice against the Bill.[18]

As with many pieces of legislation, the approval of the Abortion Bill relied on cross party collaboration. Although introduced by a Liberal, it was the Labour MP Peter Jackson who acted as a *whip* and became a strong organiser and supporter of the bill. Cooperation among parties could be vital to pass legislation. It could operate informally, based on personal arrangements, or be more organised through all-party parliamentary groups. Many interviewees also remembered that their knowledge of procedure could be a key tool to pass or oppose bills, and filibustering could block legislation even if the bill had significant support. Peter Jackson described in his interview why he was known as *rent-a-whip* during the procedures of the Abortion Bill:

»What I did [to support David Steel's Private Member's Bill for abortion reform], with a man called Alistair Service, who was the lobby officer for ALRA [Abortion Law Reform Association] we interviewed Members of Parliament who we thought would be sympathetic. Obviously David would give us the commitment on the Liberal Members. … There were a few Conservatives who were helpful. … The [opposition] had twenty-eight, that's all they could bloody muster. We had treble figures. We had a massive majority in terms of the composition of the [bill] committee. I was a fool. I said we should hear the arguments on the other side. … I was the whip, so it was my role to let them speak, and for us to vote down their amendments. … My objective was to get through the committee stage as soon as possible. We had to get into the third reading and not to lose time. An effective filibuster was put up. … This in my view was my most successful parliamentary activity. I was known as rent-a-whip, that was what I was called. … I was able to get a large number of Labour Members, with, I understand, the support of [Home Secretary] Roy Jenkins, [to call for extra time]. In cabinet there was a lot of support for additional time. … All that bloody Wilson could do was to say how many seats in the North West the Labour government would put at risk. He wasn't interested in women, he was interested in majorities. But there were enough members to overrule him.«[19]

By the late 1980s abortion was still controversial in Parliament and there were several attempts to amend the law. The Conservative MP Ann Widdecombe described the importance of the dynamics and culture inside Westminster to the passage of legislation. Here is her testimony about the strategies and tactics of the pro-life MPs:

»I was always, always very pro-life. … I made a speech. … The Chamber was packed out, gallery was packed, everybody wanted to speak. I was a new Member; I was very, very surprised that I was called, but I was called. I made a speech and that impressed David Alton [MP for Liverpool Mossley Hill, leader of the anti-abortion campaigns] sufficiently that he asked me to be a teller. In those days it was still only radio, … but he wanted a woman's voice reading the result. … That really was the beginning of cooperation

17 Interview with David Steel, interviewed by Mike Greenwood, HPTOHP, Politics, BL, catalogue reference C1503/55 [00:28:10–00:31:30].

18 Interview with Jill Knight, interviewed by Mike Greenwood, HPTOHP, Politics, BL, catalogue reference C1503/0014 [00:31:34–00:33:50].

19 Interview with Peter Jackson, interviewed by Sandy Ruxton, HPTOHP, Politics, BL, catalogue reference C1503/0046 [2, 00:08:40–00:14:05].

between myself and David Alton. … After that I started to get involved in the mechanics of the campaign, both in the country and in Parliament. David asked me to sit on the committee on his bill … and that was my first experience of real controversial committee work. … [Committees are] very different on Private Members' Bills, where you really are genuinely fighting it out. The tactics, parliamentary tactics that went on, were huge. I learned a lot about tactics; I learned a lot about the mechanics of committees, about organization, about taking decisions. … Major decisions … had to be taken, as well as tactical decisions, how you played things. What [amendments] you wanted to come back for report stage so the whole House would have a go at it, what you wanted to get disposed of in committee. … Probably the most interesting committee I ever served on. … We knew that they would try to frustrate either report stage by tabling thousands of amendments so that we were talked out, … or they would … lay innumerable petitions. … We knew they would do something.«[20]

Oral history interviews also reveal the pressures faced by MPs when deciding their position on a piece of legislation. They had to consider their party, their personal ambitions and principles as well as the views of the constituents they represented. Especially in cases of conscience, like abortion, many MPs faced dilemmas as both lawmakers and representatives of a constituency. Conservative MP David Price asked: »Do you follow your own conscience, or try to discern the will of a divided public?«[21] The Conservative MP Edwina Currie described how important it was to debate the issue of abortion with her constituents:

»When you win the trust of your constituents what comes forward then is invaluable. It is political gold dust it is. You can't gather it in handfuls but it creeps in ways that make your language authentic, your sensitivities absolutely spot on, your knowledge well ahead of many of the pundits. … I would ask constituents to organize a meeting. I would say that I wanted to ask their opinion and I meant it. I would go back to Westminster full of admiration for them. One example was abortion law reform. I know my views, but I need to know theirs. I remember going to a meeting of the Mother's Union and [explaining] the proposals. … They said, ›We've talked about this with our families. We want the law as generous as possible.‹ ›Why? You surprise me. Why?‹ ›Well, it could be our daughters, couldn't it? We don't want to see their lives ruined for a mistake‹. That's your sentence [to use in debate]: you don't want to see their lives ruined for a mistake. I said, ›It's a free vote and my instinct is to vote for twenty-four weeks. … How does that go with you?‹ They said that's fine, so that's what I did. I spoke in that debate and I was able to express the view of good women.«[22]

The relationship between an MP and their local party or constituents could be especially sensitive in marginal seats. Labour MP George Foulkes remembers a heated debate in his constituency party about abortion between a pro-life group of Catholics and pro-choice supporters. After some debate they agreed that Foulkes as the MP should make his own decision. Foulkes says it felt good »first of all to consult them, they liked that, but then for them to have the confidence that they were letting me make my own mind up«.[23] However, in other places constituents and party members were not so forgiving. Although Labour MP Hillary Armstrong argued that »you've got to do what you think is right«,[24] some MPs had to face the consequences of voting against the wishes of vocal groups of constituents, such as the Labour MP Eric Moonman:

20 Interview with Ann Widdecombe, interviewed by Simon Peplow, HPTOHP, Politics, BL, catalogue reference C1503/176 [4, 00:22:15–00:27:40].

21 Interview with David Price, interviewed by James Freeman, HPTOHP, Politics, BL, catalogue reference C1503/19 [1, 01:06:10–01:09:40].

22 Interview with Edwina Currie, interviewed by Henry Irving, HPTOHP, Politics, BL, catalogue reference C1503/163 [2, 00:46:10–00:48:30].

23 Interview with George Foulkes, interviewed by Alison Chand, HPTOHP, Politics, BL, catalogue reference C1503/159 [1, 01:41:05–01:42:35].

24 Interview with Hillary Armstrong, interviewed by Emma Peplow, HPTOHP, Politics, BL, catalogue reference C1503/103 [2, 01:15:10–01:16:00].

»There was an issue which I was supporting with Leo Abse on abortion. … I had a group of people from the Catholic Church came in on Friday night surgery. They were very polite, they told me about this, and I listened to them. They said, ›We don't expect you to decide now but we want you to think about it‹. I said, ›OK, well, you know I have made speeches [in favour]‹. ›Yes, of course‹. One was a priest and the rest were very kind. They went out and then after they'd gone, because I used to sit by myself, there was a knock on the door in the council offices and the priest put his head round the door and he [gave me a petition]. He said, ›We forgot to give it to you, here it is, you needn't count the numbers, its 1,603‹. My majority was 1,602 [*laughs*]. That's what I often say that's probably why I lost the bloody seat because I didn't do what he wanted, but that was quite funny.«[25]

Throughout these interviews memorable stories and very personal experiences emerge from the MPs' narratives. Interviewees can be emotional when remembering their motivations and the decisions they made, allowing researchers to go beyond more prosaic written sources. The anecdotes they tell and the explanations they give for their actions paint a more colourful picture of British political history. Liberal Democrat MP Jenny Tonge described how international development became her passion, particularly access to contraception and legal abortion across the developing world, because »What we really had to fight for was women's autonomy, women's empowerment, … but you can't be empowered unless you've got power over yourself«.[26] Peter Jackson told a vivid story, and his voice breaks when he remembers the case of one of his constituents who was sentenced for illegally performing abortions. He then met her husband and children:

»My mind on the abortion issue was very much concentrated by – I could strangle the man – a judge who gave a woman a long jail sentence [for carrying out an abortion.] I sounded off in Parliament. I don't know what I did but I made the lead story in the Sheffield newspapers, which surprised me, in criticism of this particular judge. As a result of this, I was put in touch with a working-class man who was the husband of the lady who was sent to prison for I think it was four years. I went to see him and he had three kids and he wasn't skilled in childrearing and he was devastated by this. I felt very sorry for him [*voice breaks*] I can still see it now. That concentrated my mind, like nothing, to see a family's life being destroyed by a shit judge. If you ask me what was my most important contribution it would be my role in bringing about rights for women which they never had before, and hopefully not sending women to prison [for abortion].«[27]

V. Conclusion

The history of the British Parliament is not just a list of elections and legislation, but one of individuals who often had complicated motivations and rich personal experiences. The History of Parliament oral history project is an effort to expand and deepen our understanding of the UK Parliament and some of the people that made the institution: the MPs. Memories from inside Parliament reveal missing information about motivation, informal cross-party collaboration and use (and misuse) of procedure that helps to demonstrate how the institution actually worked. By having access to those memories, we can better understand how individuals shaped, and were shaped by, Parliament, as well as the variety of approaches to lawmaking.

25 Interview with Eric Moonman, interviewed by Rosa Gilbert, HPTOHP, Politics, BL, catalogue reference C1503/33 [01:02:55–01:04:40].

26 Interview with Jenny Tonge, interviewed by Florence Sutcliffe-Braithwaite, HPTOHP, Politics, BL, catalogue reference C1503/148 [1, 00:16:00–00:17:25].

27 Interview with Peter Jackson, interviewed by Sandy Ruxton, HPTOHP, Politics, BL, catalogue reference C1503/0046 [2, 00:15:45–00:18:00].

The project will continue to grow and evolve, and the HPT still hopes to interview every former MP, although the task grows with each general election. Whilst there are certainly issues that emerge from interviewing those so used to being under public scrutiny, the archive is rich in details that cannot be gleamed elsewhere and encourages researchers to challenge more traditional sources. Instead of the final legislation our focus is on the human dimension of the UK Parliament, which depicts a very different legislative body than traditionally understood.

■

Extracts in this article are taken from the History of Parliament Oral History project with kind permission of the History of Parliament Trust. The collection is archived in the British Library's sound archive with the reference C1503 and some recordings are also available online: https://sounds. bl.uk/Oral-history/The-History-of-Parliament-Oral-History-Project

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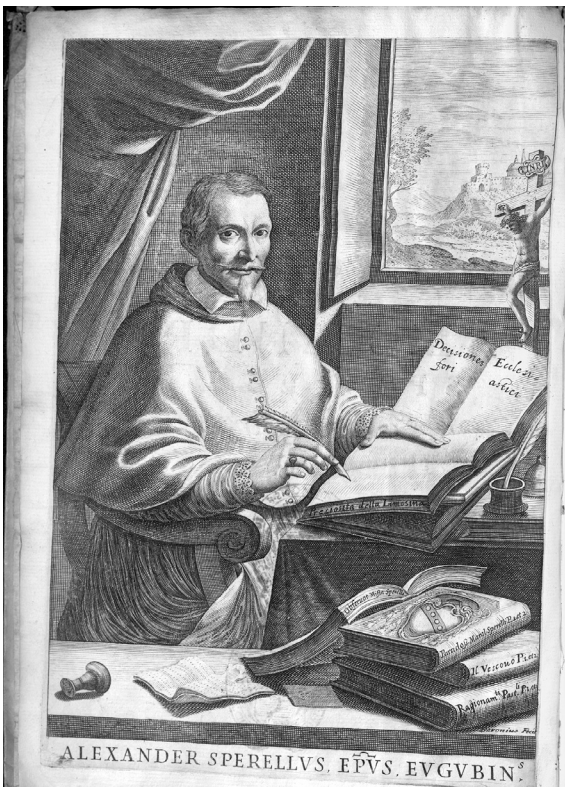

ALEXANDER SPERELLVS. EPVS. EVGVBIN.S

DECISIONES
FORI ECCLESIASTICI,

Auctore

ALEXANDRO SPERELLO

VTRIVSQVE SIGNATVRÆ REFERENDARIO

EPISCOPO EVGVBINO

Summi PONTIFICIS Prælato Domestico, & Assistente.

Pars Prima.

IN PRAECIPVIS, (QVIBVS PRAEFVIT) TRIBVNALIBVS FIRMATAE diligentique methodo ad Theoricam, & Praxim dispositæ.

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European Legislation and Politics as Seen by Former Members of the European Parliament

A New Tool for Researchers

I. Introducing the Collecting Memories Project[1]

This project started during a walk in the Oxfordshire countryside by two »young« pensioners, former officials of the European Parliament (EP), the authors of this article. We realized that we have had the great opportunity to have followed the evolution of the institution for a large part of the last 40 years, ever since the first 1979 direct elections, and we considered that it was regrettable that a large part of the story of the EP should be relegated to »old people's memories«.

We decided that our own personal memories should be kept for our grandchildren, but collecting the memories of Members of the Parliament (MEPs) was a worthwhile undertaking. Three other former colleagues joined us in this adventure, all with broad experience in different departments of the institution. The Collecting Memories project then took off, with the Historical Archives of the European Union offering to include the project in its oral history collection[2] – a collection which already includes an extensive set of interviews with Commissioners, Commission officials and other leaders inside the EU. The Parliament itself has carried out interviews with its past Presidents and Secretaries-General, but we wished to expand the set of former MEPs interviewed.

The project had inherent limitations. It was self-financed, relying on the goodwill of the interviewees and support from the Historical Archives, the Former Members' Association and a small group of students at Maastricht University. As we depended on participants to volunteer to contribute, we could not guarantee geographical, political or gender balance. You will be disappointed, for example, if you are looking for Eurosceptic interviews, as none of these members responded to our invitation. The quality of the interviews is also not of a professional standard: often tea or coffee was served during the interviews and telephones were not always switched off, though in our view this adds to the human quality of the conversations.

Our ambition is that this oral history of the European Parliament will continue into the future. We and other colleagues who have since joined us will continue to add further interviews. A database now exists and we hope that researchers and historians will consult it and find it useful for their work. Even the book that we have published[3] to accompany the archive is just an appetizer to encourage researchers to consult the primary source.

As one of our interviewees pointed out, it is rare that individual MEPs have a direct personal impact on the EU, but they have contributed »to a collective effort, which constitutes the output of the Parliament«. These memories of active MEPs are intertwined with personal comments and anecdotes that have made our work particularly attractive and interesting.

The 40th anniversary of the first direct election of the European Parliament offered the perfect opportunity to look back at what the Parliament has and has not achieved over the last four decades, and how its members have contributed to the creation of a unique model of parliamentary democracy at the European level. History is constantly being reviewed, so these interviews offer material to reflect on the evolution of the European Union. The contributions seem to us partic-

1 The Colleting Memories project is part of the Oral History programme of the Historical Archives of the European Union (HAEU), in Florence, where more than a hundred interviews are deposited.

2 All the interviews can be found and listened to, free, on the HAEU website: https//archives.eui.eu/en/oral_history/#CM_EP.

3 De Feo / Shackleton (eds.) (2019).

ularly relevant at a time when the pressure to reform the functioning of the institutions is visible across much of public opinion.

One of the particularities of our project is that it has not followed an institutional path, even if a good number of office holders have been interviewed. There are also several backbenchers who have contributed and influenced the course of the European project. A second particularity is that it is not an academic work and does not aim to compete with the large literature on the EP.[4] Rather we wanted to complement these academic analyses and to facilitate future research by looking at the history, evolution and character of the EP through the personal perspectives of its former MEPs: the human face of the evolution of the European Parliament.

The methodology followed was very simple. We started with a questionnaire, followed by an oral interview, face-to-face where possible or by phone or Skype. Up to now the database contains more than 100 of these interviews (mainly in English but some in French, Italian and Spanish), which are mostly of around an hour in length. The interviews normally follow a similar pattern: you will hear the same kind of questions being asked by all five interviewers, although the emphasis given by each interviewee to each question does vary, as they go backwards and forwards between specific topics. To facilitate the work of researchers we structured the material derived from the interviews and questionnaires into around ten categories,[5] and this became the backbone of the book we have co-edited on the project. Such a categorisation cannot capture all the richness of the information that we gathered, but we felt it was important to offer a point of departure for research rather than obliging listeners to make their way through a large volume of material, much of which might not be relevant to their particular interests.

To give a flavour of the interviews and of the book that accompanies them, here we identify three areas that may be of particular interest for legal researchers, not just looking back at the history of the EP but also in terms of the future development of the institution:

- The Role of Soft Law
- Scrutiny of the Commission
- Majorities in the Parliament

In each case we have indicated the particular contributions of members to the topic by placing their comments in quotation marks to differentiate them from the rest of the text, without indicating the name. At the end of the article, you will find the list of members that are relevant for this article.

II. The Role of Soft Law

The Treaty and secondary legislation establish the powers of each institution: this is what first year students are taught. The effective competences of a democratic parliament, however, can only be understood by looking beyond formal provisions. This becomes immediately obvious if one considers how these competences have been acquired. They were not given without a struggle, as our interviews attest. One MEP, newly elected in 1979, »complained to his Prime Minister about the lack of competences of the EP and asked for his support in the Council to reinforce EP competences. The Prime Minister responded bluntly: Forget it, no government will give powers to the parliament. If the EP wants more powers, it has to take them«.

The taking of those powers was not marked by the bloodshed that has accompanied the development of parliamentary institutions in some nation states, but rather witnessed the EP using all the means provided by the Treaties, both what was included and what was not forbidden, to extend its competences. It sought to establish practices which Member States found it difficult not to give formal status to. The Intergovernmental Conferences (IGC), which prepared the new Treaties, »have rarely introduced new institutional novelties, but, in most cases, the IGC formalised practices already consolidated in legal texts«.

The increase in the Parliament's authority has emerged through the development of practices established in documents, such as exchanges of letters, joint declarations and interinstitutional agreements, as well as through a degree of self-

4 Among others, two key publications: Corbett / Jacobs / Neville (2016) and Ripoll Servent (2018).

5 The ten categories are: Choosing the Parliament, Working Inside the Parliament Machine, Living Inside the Political Groups, Playing a Part at Major Moments, Influencing and Shaping Policy, Scrutinizing and Holding to Account, Making a Mark Beyond the EU, Communicating the Work of the Parliament, Keeping in Touch with National Societies and Looking to the Future.

empowerment. For the latter, one can look back as far as 30 March 1962, when the group leaders of the Assembly proposed a short resolution which stated: »Claiming that its name is not identical in the four official languages of the Community, decides to take the name ›European Parliament‹«. It did not change the powers of the institution but altered how it was perceived and evaluated as a legislative body, rather than just a place of debate. Lawyers and diplomats from the Member States sitting in the IGC do not usually take hasty decisions. The change of name was formalised only 24 years later in the Single European Act (1986).

However, right from the start the Treaties had given the EP the power to set its own Rules of Procedure, adopted by qualified majority, to define internal procedures and voting rules. Such rules are not neutral. The »EP has often stretched the EP Rules of Procedure to impose procedures not foreseen by the Treaties, always trying to maintain a reasonable approach, to avoid that stretching the elastic too much, in case it breaks and you can harm your fingers«. These Rules and the various documents exchanged with the other institutions have contributed to the creation of what is often referred to as »soft law« – a category that is widely aired in the interviews.

A. The appointment of the Commission

The control of the executive is one of the traditional parliamentary prerogatives. The EP has made the procedure of appointing the President of the Commission, the individual Commissioners and ultimately of the Commission, as a college, one of its institutional battles. The EP established procedures not only to influence the nomination but also the agenda of the future President of the Commission, none of which were laid down in the Treaties.

The Parliament elected in 1979 informally approved a resolution of endorsement of the Commission but it was without any immediate effect. However, after the Parliament's request to be consulted, before the Council appointment of the President of Commission, was included in the internal procedure of the Council following the Genscher-Colombo initiative,[6] the European Council of Stuttgart, in June 1983, went further and invited the President of COREPER[7] to »consult the enlarged Bureau of Parliament on the candidate chosen by the Council«.

The Treaty of Maastricht (1992) formalized the consultation of the Parliament on the candidate chosen by the Council. The Parliament's Rules, defining the procedure, went further, indicating that in the case of a negative vote, the Council would be asked to withdraw the candidate. The psychological impact of these changes was evident when the next Commission was appointed. The Parliament »got Santer (the next Commission President) to make a commitment that he would resign if his new Commission did not have a majority in the EP«.

Subsequently, the Amsterdam Treaty (1997) formalized the procedure established by the Rules and gave the EP the power to approve the Commission. Parliament's Rules of Procedure (1999) once again went further and mentioned the »election« of the President based on a programme and confirmed that in case of rejection the Council has to appoint a new candidate. Ten years later, the Treaty of Lisbon finally recognized that the EP »elects« the President of the Commission.

B. The »soft« budgetary powers

»The budgetary power, since 1970, has been the first real competence of the European Parliament, but the rules of the Treaty had important limitation to this power«. The EP had the final decision on so-called non-compulsory expenditure (NCE),[8] but with important restrictions.[9] To avoid these limitations, the »EP supported the Delors proposal

6 Genscher-Colombo initiative by the German and Italian governments in November 1981 to give new impetus to the integration process, https://www.bpb.de/nachschlagen/lexika/das-europalexikon/177014/genscher-colombo-initiative.

7 Comité des Représentants Permanents / Committee of Permanent Representatives. See Conclusions of the European Council of Stuttgart June 1983, https://www.consilium.europa.eu/media/20680/1983_june_-_stuttgart__eng_.pdf.

8 Non-compulsory expenditure was basically everything except agriculture, international agreements and pensions. In the 1980s it represented about 30% of total expenditure, by 2000 more than 50%.

9 EP could increase NCE by half of the Maximum Rate of Increase (MRI) calculated each year by the Commission.

to create a multiannual planning, which increased the rigidities, creating five categories of expenditures among the NCE, but at the same time, allowing a large increase over a period of the five to seven years«. The EP committed to respect the ceilings of the different categories of expenditure.

The global increase of expenditure was not the only advantage that the EP achieved. Following the agreement in 1988 on the Delors proposals,[10] an interinstitutional agreement complemented the multiannual planning. »This Interinstitutional Agreement (IIA) – renegotiated at each renewal of the Multiannual planning – gave to the EP a stronger political role in all the procedures«.

Several examples of the way the Parliament was granted recognition were mentioned by MEPs during the interviews. The »EP was involved in the Common, Security and Foreign Policy (CSFP). A procedure to keep the EP informed was included in the IIA«. The same was true for international agreements where the EP was involved throughout the negotiations. An ad hoc procedure was also established for agriculture expenditure, so that the EP could present draft modifications to agriculture expenditure. Another area where the EP »imposed its approach was the introduction of budgetary flexibility and special funds outside the financial framework«.

Overall, since 1988, the budgetary procedure, in spite of the Treaty, witnessed a structure of dialogue between Council and Parliament that was not necessarily differentiated by the nature of the expenditure (compulsory or non-compulsory). This interinstitutional cooperation was then reflected in the Lisbon Treaty, which incorporated the pragmatic changes introduced since 1988 and eliminated the distinction between compulsory and non-compulsory expenditure. The formal end of this distinction was a mixed blessing for the Parliament, which lost some bargaining power. As was noted in the interviews, »›soft‹ law gave the EP more flexibility and leeway for the negotiations but they (MEPs) all recognized that this loss of power in the budgetary area was largely compensated by the increase of EP competence in the legislative domain«, where the EP now shares decisions on almost all EU legislation with the Council.

10 The proposals also included the launch of the Single Market and the doubling of the structural funds.

III. Scrutiny of the Commission

Scrutiny is one of the key activities of any Parliament. Due to the particular institutional architecture of the EU, the scrutiny activity of the European Parliament is necessarily more focused on the Commission than on the Council.

A. The fall of the Santer Commission

A large number of our interviewees drew attention to the case of the dismissal of the Santer Commission, widely perceived as a »significant milestone in the history of the European Parliament, even a high watermark of parliamentarism«. As one interviewee put it, »the Santer Commission was a mess. It had been so bad that we needed to do something. Parliament needed to show that it would not tolerate this type of abuse«. The decision was not easy, as the facts relating to budgetary discharge were intertwined with political considerations, dividing those who did not want to sanction an EPP President of the Commission and those who were unwilling to vote against a Socialist Commissioner.

In the end, a large majority was ready to vote for the motion of censure but the interviews reveal different reasons for such a vote. For some it was the result of the Commission failing to understand its changing position in the EU. It showed itself to be »arrogant, counting itself to be central to Community life and independent, whereas in a democracy no institution can be politically independent«. From another perspective, it was rather the result of the way the questions at stake were framed. »The issue was not one of accountancy but of public accountability«. Once the dispute was presented in this way, President Santer could no longer defend his position in terms of collective responsibility. »The shield of responsibility was transformed into a sword of accountability«. In this sense, the events of 1999 were the result of a struggle over the nature of parliamentary democracy at EU level.

B. Scrutiny of the legislative cycle

Following the resignation of the Santer Commission, the EP wanted to enlarge its scrutiny to include the whole legislative cycle. Romano Prodi, Santer's successor as Commission President, found himself »obliged to agree a first Framework Agreement designed to structure relations between Commission and Parliament«. In particular, it was meant to enable the EP to oblige the Commission to respond more directly to its political agenda from the drawing up of a legislative programme through to its implementation. This Framework Agreement, which was renewed with each incoming President of the Commission, irritated the Council[11] considerably. It felt the EP was trying to acquire a right of legislative initiative through the backdoor, hence the »massive attack« that it launched against the Parliament. In the end, the Council did agree to participate in the 2016 Interinstitutional Agreement on Better Law-Making,[12] which sets a series of initiatives and procedures to improve the cooperation in all phases of the legislative cycle.

C. Hearings of Commissioners

In 1995 the EP decided for the first time to submit individual Commissioners to hearings modelled on US Congress »confirmation hearings« on presidential nominations to judicial and executive posts. It was »not easy to get it through. Delors was absolutely against in the beginning. The College of Commissioners would be undermined if there were votes on individual Commissioners. We agreed to renounce on single votes in return for Delors' and Member State Governments' support for the new procedures which had no Treaty base«.

In practice, this innovation has worked remarkably well and has come to be accepted by all parties as contributing to greater transparency. On several occasions, the Parliament has successfully requested the replacement of a nominee or a change of portfolio, without governments or the Commission President demurring. 2019 is the most recent example, with three Commissioners not passing the test of the hearings and being replaced. At the same time, it is a procedure that has never found a place in the treaties nor indeed has the investiture of individual Commissioners, underlining once again the importance of »soft law« in the development of the Parliament's influence.

IV. Majorities in the EP

Since the first European Assemblies in the 1950s, delegates have always been organized in political groups and not national delegations. Priestley[13] defines the political groups as »the stand-out feature of Parliament's organisation. The decision that members should be grouped by political family rather than national delegation is one of the main reasons why the Parliament has developed politically as an institution«.

The majorities created by the political groups are the real motor of the European Parliament decision-making process. Since the beginning, the presidents of the different groups have created a coordination structure, which has been called the Conference of Presidents since 1993. The decisions of presidents of the groups have constantly shaped the policy of the institution.

The majorities created within and between the groups are essential for political decisions to be reached. This is especially the case in all those areas where a qualified majority is required, such as the election of the President of the Commission, the signature of international treaties / agreements (including enlargements), annual and multiannual budgetary decisions, ordinary legislation (at second reading) and all the consent procedures.

Since 1979 one can identify from the interviews three specific phases in the development of the system of political majorities:

- The enlarged family
- *Grosse Koalition* or Grand Coalition
- Variable majorities

11 A Statement was issued by the Council on October, 21st 2010, denouncing the Framework Agreement, which could modify the balance of power established by the Treaties, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/117238.pdf.

12 Interinstitutional Agreement between the European Parliament, the Council of the EuropeanUnion and the European Commission on Better Law-Making, OJEU L123, 59, 12.05.2016, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:123:FULL&from=en.

13 Priestley (2008).

A. *The enlarged family*

In the ten to fifteen years after the first direct elections, the leaders of the political groups worked together to find solutions that were acceptable to almost all groups. »Decisions were not predetermined by the big political families but taken in a quite consensual way. This was also possible as all the political groups had the common objective to fight to get more power and every single opportunity was used to reinforce the EP role in the EU Institutional triangle«.

In the 1980s, there were six main political groups. All were quite homogenous internally with diverse ideological approaches. In addition to the two largest groups, EPP and PSE, there was a Gaullist group, composed mainly of French members, a powerful conservative group almost exclusively made up of British MEPs, a sizeable communist group, and a liberal group. At that time, »cooperation between political groups was possible on many subjects, often with majorities beyond the traditional right / left division«. Several decisions were taken within this framework, from setting up committees of inquiry to determining the way in which the Parliament should be managed, as well as questions of substance. It was also possible to discuss and elaborate legislative texts on important areas, something naturally favoured by the limited powers of the Parliament.

B. *Grosse Koalition or Grand Coalition*

The friendly atmosphere of the 1980s faded with the strengthening of EP legislative competences »and the two largest groups assumed a greater role in driving the Institution, marginalizing the smaller groups«. This approach was favoured by the presence, in the two largest groups, of a strong component of German MEPs from the CDU, CSU and SPD, who were used to this approach at the national level. In reality, to give continuity and stability to the EP, if the Parliament was to take advantage of its growing legislative role, there was little alternative. The *Grosse Koalition* reached its high point in 2014 (before and after the elections) with the agreement between European People's Party (EPP) and the Socialists & Democrats (S&D) to reject any candidate for President of the European Commission proposed by the European Council who had not been put forward by one of the European Political Parties before the European elections (the so called *Spitzenkandidat* procedure).

The solidity of the agreement of the two major groups, supported by most of the other groups, convinced reluctantly the European Council to appoint Jean-Claude Juncker, candidate of the EPP, group with the highest number of seats after the elections. The *Grosse Koalition* consolidated after the appointment of J.-Cl. Juncker. Monthly meetings of the Leader of the EPP and S&D group with the President of the Commission[14] were the motor of the activity of the Commission, contributed to set the political agenda and outline the solutions for the most sensitive dossiers.

However, such an institutional alliance could not eliminate political differences. There had always been a tension in the search »to maintain a balance between political confrontation and cooperation for legislative issues«, with a strong desire of some not to underplay the right / left difference. One way of doing this was by looking for majorities with other groups. Here the Liberals in particular have played an important part as a swing group that »allied itself with the centre left on the environment and civil rights, but with the centre right on defence and economy and thereby exerted a strategic effect on the positions of the Parliament«. In liberal eyes, the group represented a »genuine microcosm of the political landscape of the centre parties in Europe, assuring balance and multiplication between the political traditions of the south and the north«.

C. *Variable majorities*

The day after the EP elections in May 2019, it appeared clear that the alliance between EPP and S&D was no longer sufficient to guarantee a qualified majority in the European Parliament,

14 Those meetings of the parliamentary majority of the Commission were called G5, as they grouped the President and Vice President of the Commission, the Leaders of the two largest groups and the President of the EP.

with the two parties no longer enjoying more than 50% of parliamentary seats. This situation is not entirely new, as several interviewees pointed out. Since the first direct elections, three Presidents of the EP were not chosen by the EPP or PSE, as a result of an agreement between the two groups: there have been two Liberals, Simone Veil and Pat Cox, and one European Democrat, Lord Henry Plumb. If we exclude Simon Veil, who was elected by a large horizontal majority, »the other two Presidents were elected by an alliance of the EPP with the Liberals and the Conservative parties«.

However, it now seemed to be becoming a much more deliberate policy choice. Already in the run-up to the 2019 elections, »the S&D group decided to abandon the principle of the ›Grosse Koalition‹ and regain more autonomy to mark its differences by the EPP. This led to the end of the structured majority and the creation of more variable majorities, linked to the different proposals«. This experiment has become the rule in the EP elected in 2019. To reach a qualified majority, necessary for the most significant EP decisions, the contribution of other political groups is now essential. Vote Watch[15] shows how, in the first six months of the 2019 Parliament, the RENEW group (former ALDE or Liberal group) was the group that was part of the winning majority for the largest number of votes (more than 90% of decisions), while S&D and EPP were both below 90%. Two other groups follow: the Greens were in the winning majority close to 80% of the time and surprisingly, given its size, the GUE or Left Unity group was in that majority for 70% of decisions. The variable majorities that have emerged in the first part of this parliamentary term show that a left coalition wins on environmental issues and home affairs, while the centre right dominates on trade and foreign policy.

Another element to keep under consideration is the unity of each political group. If in the past, the traditional political groups shared many of the same values and showed a high level of unity especially on important votes, the EP elected in 2014, and even more so the EP elected in 2019, has a much less monolithic feel to it. National parties often adhere to a political group more for functional utility than because they share a strong ideological view. In addition, the political groups are increasingly pragmatic and ready to increase their size even if this leads to lesser ideological cohesion. In conclusion, the groups appear less united than before, which necessarily has an impact on the search for majorities.

Clear majorities will, however, be crucial as soon as the EP has to decide on financial resources for the next programming period, to authorize important measures like supporting the fight against Covid-19 and to approve future legislation. The existence of different possible majorities will make the work of the Commission harder, as on each single measure they will have to find the majority ready to support its proposals. At the same time, if the EP does not express a clear majority, it will lose influence, giving more space to the Council and the Commission.

V. Concluding remarks

The points raised above give a simple overview of how individual MEPs have perceived their influence on the institutional balance within the EU. However, it is important not to end without mentioning a topic touched on by nearly all the interviewees, namely the institution's impact on legislation, with the development of co-decision, or what is now called the ordinary legislative procedure, and the consent procedure for international agreements.

A few examples can be cited of the kind of balances that the institution was able to help to achieve. The EP had a decisive role in shaping the REACH legislation for chemical products.[16] The »legislation, adopted, takes into account the needs of big and small companies as well of those of final users. The legislation made Europe a world leader in the sector. An outcome that could not have been reached without the MEPs' contribution and the cooperation among the major political groups«. Similarly, in the negotiations leading to the adoption of the Services Directive,[17] the compromise

15 Vote Watch: European Parliament: current and future dynamics, January 2020, https://www.votewatch.eu/blog/european-parliament-current-and-future-dynamics/.

16 Reach Regulation 1907/2006 OJ L 396, 30.12.2006, p. 1.

17 Directive 2006/123/EC on services in the internal market OJ L 376, 27.12.2006, p. 3.

proposed by the responsible committee, »to find a balance between liberalising the production but maintaining a monopoly on transport and distribution of energy«, facilitated the agreement. And the EP could also be very influential on international agreements. No national parliament would have been capable »of stopping an international agreement signed by all Member States and the EU with the US Government to transfer personal data from the Society for Worldwide Interbank Financial Communication (SWIFT) to the US territory«. The EP rejected this agreement and only approved it after »substantial modifications were introduced in the balance between security and protection of civil rights«.

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Nina-Louisa Arold Lorenz*

A Summary: Portraying the Legal Culture and the European Human Rights Culture of the European Court of Human Rights and the European Court of Justice through Interviews

I. Introduction

In October 2019 a new impetus was made to reopen the process of the European Union (EU) to accede to the European Convention on Human Rights (ECHR).[1] This political process aims to underline the EU's commitment to common values, democracy, the rule of law and respect for human rights. Accession would allow individuals to challenge acts of EU institutions at the European Court of Human Rights (ECtHR). The accession process, which opens up issues of structure and hierarchy between the two courts, had been put on hold by Opinion 2/13 of the European Court of Justice (CJEU),[2] which declared the draft accession agreement partly incompatible with EU law. Opinion 2/13 was delivered after the findings of Arold Lorenz, Groussot, Petursson were completed. The intention here is not to discuss the possible accession of the EU to the ECHR and Opinion 2/13, as both have been discussed widely in literature.[3] However, as already expressed by former ECtHR judge Françoise Tulkens prior to Opinion 2/13: »[T]he quality of the relationship between the European Convention on Human Rights and Union law will determine to a large extent the future of European law in general and of the legal culture inspiring it.«[4] This inspiration will depend on the legal cultures of the two European courts. Therefore, to study the legal cultures of the two courts, especially in regard to human rights, is particularly relevant with regard to the currently re-opened accession process.

The starting point in studying the legal culture of the ECtHR and CJEU is to identify the points where different legal systems interact or even converge. An illustration published in a Swedish law article portrayed differences amongst European cultures when advertising a hammer.[5] To sell well, the Swedish hammer ad would show a hammer above a flower and use the slogan »[I]t does not hurt the nails« as it is »[E]nvironmentally safe, [and] socially progressive«. In Germany a hammer would be advertised as »Approved by Deutsches Hammer Institut« and the ad would show a hammer in front of scientific papers and seals. A hammer in the United Kingdom would be advertised by »Royal Appointment« of her Majesty and would place two hammers like crossed swords in front of a coat of arms. In contrast, a French

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1 From the EU side, a letter of 31 October 2019, co-signed by the President and the First Vice-President of the European Commission, informed the Secretary General of the Council of Europe that the European Union stood ready to resume the negotiations on its accession to the European Convention on Human Rights. This was subsequently taken further and »[o]n 15 January 2020, the Ministers' Deputies approved the continuation of the ad hoc terms of reference of the Steering Committee for Human Rights (CDDH) to finalise as a matter of priority, in co-operation with the representatives of the European Union, in an ad hoc group 47+1 and on the basis of the work already conducted, the legal instruments setting out the modalities of accession of the [ECHR] including its participation in the Convention system and, in this context, to examine any related issue.« See https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights (20 May 2020), see further https://eu2019.fi/en/article/-/asset_publisher/neuvosto-sitoutunut-eu-n-liittymiseen-euroopan-ihmisoikeussopimukseen (20 May 2020).

2 CJEU Opinion 2/13 of the Full Court on the Accession of the European Union to the European Convention on Human Rights, 18 December 2014, ECLI:EU:C:2014:2454.

3 See for the discussion on the draft accession: Arold Lorenz/Groussot/Petursson (2013) 219–278; for further discussions see Lock (2011) 1025; Lock (2015) 239.

4 Tulkens (2013) 16, paragraph 58; see reference in Arold Lorenz et al. (2013) 7.

5 See as published in Norberg (1994/1995) 378.

hammer would mirror the elegance of Catherine Deneuve, who would hold a hammer created exclusively by Maxim's Paris.[6] While these amusing examples are based on stereotypes, they contain a certain grain of truth. Taking this further, if a caricature advertising a tool as simple as a hammer lifts the veil of cultural differences, how do these cultural differences play a role when differences in legal culture meet on international benches? Do national legal cultures, embodied by individual judges, clash constantly? Do these tensions arise especially in probing questions of human rights? During the 1990s, Pierre Legrand held legal convergence to be impossible as there are »irreducible differences between legal families based on different mentalités«.[7] He explains »it would be like a common law lawyer acting only as if he were a civil law lawyer, but he could never be one.«[8] Based on this, if put in the context of international / European law on the European benches,[9] »irreducible« differences of mentalités ought to have an impact on decision-making. While criticized by Roger Cotterrell[10] for being too vague, Lawrence Friedman's[11] definition of legal culture is used as a basis for the study at the ECtHR and CJEU. Friedman defines legal culture as »ideas, values, expectations and attitudes towards law and legal institutions, which some public or part of the public hold«.[12] This definition allows for the inclusion of features beyond the ideology and doctrine of lawyers and thus is better suited to the study of European courts.

Both the ECtHR in Strasbourg and the CJEU in Luxembourg are monitoring institutions for their respective regional organizations. The ECtHR is a monitoring institution for the Council of Europe, with 47 member states, and aims to monitor member state compliance with the human rights enshrined in the ECHR.[13] The CJEU is a monitoring institution for the European Union, with 27[14] member states, and aims to monitor the EU legal system and its unity.[15] While the CJEU is not primarily a court for human rights issues, the EU Charter of Fundamental Rights is legally binding and a growing number of cases at the CJEU touch on human rights issues.[16] Each member state selects a judge in respect of its legal system.[17] The judge's function is to explicitly incorporate knowledge of each of the legal systems present in the regional organizations, rather than defend the individual respective member state. Consequently, benches become meeting places of legal pluralities (beyond the mere divide of civil and common law). With ECtHR member states ranging from Iceland to Azerbaijan and CJEU member states ranging from Ireland to Slovenia, the legal systems and thus legal cultures of these states are significantly different.

Interviews conducted (mainly) with members of the courts to find out where differences matter, how experiences impact and how interviewees described elements of the legal cultures were key to the studies. In Arold Lorenz, Groussot, Petursson this was joined by their perspectives on human rights and the perceived interaction between the CJEU and ECtHR in order to find out whether there is a common European human rights culture. For the ECtHR, the analysis consisted of a combination of structured interviews with 38 judges and clerks in 2001 and 2002; a field study

6 The remaining images would show: The Belgian hammer ad would show two hammers being »[L]inguistically correct hammers exactly the same but totally different« for the French speakers and the Flemish speakers. The Italian »Amore Hammer« would be »(I)resistible to women« and displayed with a (naked) beauty. »The Dutch Economy hammer« would be shown as disassembled in three parts and advertised as »Half price – Assemble yourself«. Finally, Switzerland would be displayed with the »Swiss Army Hammer« advertised as »[M]ost effective investment tool in Europe«. See Norberg (1994/1995) 378.

7 Legrand (1996) 74.

8 Legrand (1996) 74.

9 Acknowledging that there is a difference between being transplanted into another national legal system or being joined together to operate within international / European law.

10 Cotterrell suggests to rather focus on »legal ideology tied to legal doctrine as means on how to structure thoughts on law and translate them into practice by lawyers«, see Cotterrell (1997) 15–21.

11 For his reply to Cotterrell see Friedman (1997) 34.

12 Friedman (1975) 223.

13 For a list of the current member states of the Council of Europe see https://www.coe.int/de/web/portal/47-members-states (15 April 2020).

14 With the exit of the United Kingdom from the European Union in 2020, the CJEU will be reduced from 28 judges to 27.

15 See https://europa.eu/european-union/about-eu/countries/member-countries_en (15 April 2020).

16 Arold Lorenz / Groussot / Petursson (2013) 161–217.

17 Arold (2007) 47–49 and Arold Lorenz / Groussot / Petursson (2013) 28–29.

(in January/February 2002) and a case law analysis of (153) cases (1998–2001) that invoked Arts. 8, 9 or 10 ECHR.[18] The analysis at the CJEU consisted of structured interviews with 25 judges and advocates general in 2008, 2009 and 2010,[19] alongside an analysis of doctrines and dynamics in the selected case law that focused on human rights.[20] It was supplemented by scrutinizing policy documents,[21] and a field study.

II. Institutional Set-up as the Framework for Interaction

The institutional set-up of the two courts frames the interaction of members of the courts. Both the ECtHR and CJEU are modern buildings where the assembly halls are elevated from the ground by giant legs and have annexed administrative offices.[22] Following on from these outside impressions of where the members of each court assemble, it is interesting to note how these meetings take place. Daily interaction forms an important aspect of cultural exchange. The procedures and rules of the courts establish intimate settings for legal interaction.[23] Starting in more detail with the ECtHR, article 27 ECHR allows the court to compose chambers, committees and a Grand Chamber. The requirement that ECtHR benches are to be composed with reference to balance the legal system of the member states was »court made« as it is part of the ECtHR Rules of the Court (Rule 25 II Rules ECtHR). It is not easy to balance these different legal systems, as the diversity among the ECtHR sections shows. Taking the sections when the ECtHR was first meeting as a permanent court in November 1998,[24] the allocation of members in Sections I and II (four sections at that time) were as follows: Section I: Ms. Palm (Sweden); Ms. Thomassen (the Netherlands); Mr. Ferrari Bravo (San Marino); Mr. Jörundsson (Iceland); Mr. Türmen (Turkey); Mr. Birsan (Romania); Mr. Casadevall (Andorra); Mr. Zupancic (Slovenia); Mr. Pantiru (Moldova); Mr. Martuste (Estonia). Section II: Mr. Rozakis (Greece); Mr. Baka (Hungary); Mr. Wildhaber (Switzerland); Mr. Conforti (Italy); Mr. Bonello (Malta); Ms. Straznicka (Slovakia); Mr. Lorenzen (Denmark); Mr. Fischbach (Luxembourg); Ms. Tsatsa-Nikolovska (FYRM); Mr. Levits (Latvia); Mr. Kovler (Russia). ECtHR benches are formed from these sections as Grand Chambers (seventeen judges), chambers (of seven or five judges, article 26 ECHR), committees of three judges (article 28 ECHR) or as a single judge formation (article 27 ECHR).[25] The judgments contain voted outcomes, and concurring or dissenting opinions are allowed and published as part of the judgments. At the ECtHR clerks are centrally staffed and work in units (Registry) independent from the judges' cabinets. When a case is assigned, the reporting judge works together with clerks and this working system rotates. In 2012 the

18 Arold (2007) 17.

19 Arold Lorenz/Groussot/Petursson (2013) 5.

20 Arold Lorenz/Groussot/Petursson (2013) 161–217.

21 Arold Lorenz/Groussot/Petursson (2013) 219–278.

22 Even structure of building and architecture provides, as Swedish scholar Modéer points out, some interesting insights into understanding justice and its relevancy for legal culture. For his work on courthouses and Scandinavian legal culture generally see Modéer/Sunnqvist (2012). In Strasbourg the building has a transparent glass facade and a colourful inside, in Luxembourg the building has a darkened glass facade and more subtle colours of black, white and gold inside. Strasbourg is a court accessible to all individuals who claim to be a victim of a human rights violation as protected by the ECHR, hence sliding glass doors fit this image well. The image of transparency even fits the transparency of decision-making, with the disclosure of voting behaviour and separate opinions. Luxembourg is foremost a court for reference of interpretation by member state courts and complaints among EU institutions. Its decision-making is closed, no transparency of voting or dissent is given. Here the architecture underlines an image of a more remote building. Arold (2007) 41–43; Arold Lorenz/Groussot/Petursson (2013) 59–64.

23 Arold (2007) 53–65; Arold Lorenz/Groussot/Petursson (2013) 10–21.

24 Protocol 11 entered into force on 1 November 1998. Individuals may claim to be a victim under the Convention according to Art. 34 ECHR. Interstate claims can be lodged according to Art. 33 ECHR. At the time of the book Arold (2007) the ECtHR was composed by 41 judges. For the current composition of sections see https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#newComponent_1346152041442_pointer (14 April 2020).

25 The reduced number of judges in a Chamber, the committee of three judges and the single judge formation were introduced by Protocol 14. The basis of the research was the earlier composition of either Grand Chamber or Chamber formations.

Registry comprised around 270 lawyers (plus 370 members of staff).[26] The recruitment process is independent from the individual judges' offices. The languages of the ECtHR bench are English and French, and translations are provided during deliberations.

Decision-making at the CJEU takes place in the setting of a chamber of three judges, a chamber of five judges, the Grand Chamber of thirteen judges, or the Full Court in exceptionally important cases.[27] The respective national judge does not necessarily participate in the decision-making. French is the only language of the CJEU bench. The format of judgments is modelled after the French legal system and a core notion at the CJEU is the secrecy of deliberation (article 35 Statute of Court CJEU). In other words, the CJEU speaks with one tongue. Hence dissent or concurrence during the deliberation is not evident in the judgments. Prior to deliberation, the advocate general provides a legal assessment of the case in an opinion delivered to the bench. The judges are not bound by the opinion.

III. Biographies

To allow for a more complete picture of the interactions on the bench it is essential to look at the individuals who participate in the deliberation. Who are these people? What do we know about their individual religious, educational, political and vocational experiences in order to understand the different influences on the bench? Published biographies reveal some first insights on higher education, language skills and individual career paths, and they invite specification and expansion during the interviews. Studying the biographies also helps to understand the complexity of personalities involved in forming legal culture. They reveal a variety of esteemed legal careers among members of the court. Looking at a few examples from the varieties of backgrounds of current and past judges at the ECtHR and CJEU helps to understand the vocational plurality.[28] Judge Elisabeth Palm had a distinguished career within the Swedish judiciary before joining the ECtHR as its first female judge.[29] Judge Françoise Tulkens was a learned expert on criminal law with wide academic experience in Belgium before joining the ECtHR.[30] Allan Rosas was a well-known academic in Finland, Director of the Abo Institute for Human Rights and had served as a legal advisor and the Deputy Director General of the Legal Division at the European Commission before joining the CJEU. Jean Claude Bonichot was President of a Division at the Conseil d'Etat in France and an experienced academic before joining the CJEU.[31] Many judges had a plurality of legal professional experience, with the result being that the categorization of legal professions was not always clear cut. However, an empirical overview was provided in the studies.[32] It showed that at the time of the studies most members of court were grouped as former academics, with the next most numerous being former career judges.

IV. Interviews

As primary data, interviews[33] were essential to understand the legal culture of the courts, as »formal legal reasoning – usually in writing – has no necessary connection with the actual mental processes. A written opinion is not a photograph or X-ray of a judge's mind.«[34] While case law analysis will show the product of how law is interpreted and how – on a multi-national bench – a com-

26 Arold Lorenz / Groussot / Petursson (2013) 16.

27 Art. 251 TFEU and Art. 16 Statute of the Court (CJEU).

28 This is a random selection of short biographies and does not reflect individuals interviewed. For a list of current judges please refer to: Council of Europe, Presentation of Court see https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=and CJEU https://curia.europa.eu/jcms/jcms/Jo2_7026/en/ (14 April 2020).

29 She was elected first woman judge to the ECtHR in 1998.

30 See for further ECtHR judges: Arold (2007) 67–69.

31 Arold Lorenz / Groussot / Petursson (2013) 26.

32 Arold (2007) 52; Arold Lorenz / Groussot / Petursson (2013) 23.

33 Please note that the quotes and findings are summarized from Arold (2007) and Arold Lorenz / Groussot / Petursson (2013). For a full account of the findings and the context please refer to the books. As expressed there, a few quotes were subject to language editing.

34 Friedman (1975) 235.

monly agreed solution to a legal problem is formulated, one needs to look behind these written statements in order to trace the legal culture and ask the individuals concerned as to their ideas, values, expectations and attitudes towards law. The interviews were designed as structured interviews, following Jose Toharia.[35] The initial set of interviews at the ECtHR was conducted in 2001.[36] Further research was then conducted through interviews at the CJEU in 2008, 2009 and 2010.[37] Focus in all interviews was legal culture in terms of ideas, values, expectations and attitudes towards law, and how the diversity of backgrounds mattered especially in issues of human rights. In both sets of interviews, the questions covered the influence of national legal system, East / West political exposure[38] and prior vocation. Human rights were taken up at the CJEU particularly, as it constituted the main part of the study by Arold Lorenz, Groussot and Petursson to discover the European human rights culture. The European human rights culture is based on the legal cultures of the courts, the judges' perspectives on human rights and the special interplay between the ECtHR and CJEU.

The answers given in the interviews at the ECtHR were ordered systematically according to legal family, historical political embedding, vocational experience and common commitment. In order to put the individual perspectives of interviewees into the context of case law, an empirical study was added. The empirical study of case law at the ECtHR scrutinized voting in cases concerning article 8 ECHR (protection of private life and home), article 9 ECHR (freedom of religion) and article 10 ECHR (freedom of speech)[39] at: 1) a general level, 2) at the subject matter level, and 3) in individual sample cases. For the CJEU, these areas were supplemented by issues of human rights and the institutional relationship between the courts. As the CJEU judgments do not disclose voting outcomes, the analysis was structured differently and exemplary cases concerning human rights were selected.[40]

A. Legal families

The original research by Arold on the legal culture at the ECtHR started with an assumption that legal families[41] meeting on the bench could be a potential source for conflict. The majority of the interviewed ECtHR judges suggested that these national differences actually make a difference in cases when discussing the detail, as highlighted in this quote »The nationality matters in the detail; even the meaning of specific words can be quite different.«[42] In these cases, stronger discussions on the bench about the protected ambit of rights are likely, and different experiences might be shared while supporting the legal arguments. Here national experience serves as insight into particularities of a legal system. In general, legal families would rather impact on the style of discussion, not the outcome of a case. In sum, a Germanic drafting style would discuss point for point in a very detailed manner, a Scandinavian style would be shorter and more directly to the point, a Mediterranean approach would explore the background of the case more extensively, and the common law style would be more narrative and would distinguish the present case from other cases.[43] Such variations in style would not affect the legal solution itself.

The CJEU interviews suggested too that differences in legal families of the members of bench would not affect the substance of a case, but rather the style of approach. Most of these different approaches taken in legal reasoning would concern the style of reasoning but not the legal outcome. As it was expressed:

> How we are able to work together [and have] different backgrounds? Well, I think the main reason is that the members of court who come here and who have no specific experiences with the field of EU law are confronted with a discipline which exists in itself in a way and which already has quite a history, not only in

35 For his work on judges in Spain see Toharia (1974). See further Arold Lorenz et al. (2013) 5; Arold (2007) 16.

36 Arold (2007) 17.

37 Arold Lorenz / Groussot / Petursson (2013) 5.

38 The interviewees at the ECtHR pointed towards including political experience against the background of Eastern enlargement of the courts in the 1990s, which was taken up for further interviews.

39 These ambits of ECHR protection were chosen based on the expectation that issues raised in these cases would be likely to show more cultural variations or conflicts on the bench.

40 Arold Lorenz / Groussot / Petursson (2013) 125–159.

41 See as well discussion in Arold Lorenz (2021).

42 Arold (2007) 74.

43 Arold (2007) 113.

> legal doctrine but [also] in the case law. So quite often, if not so in the majority of cases, we embark in legal discussions which are not at all directly linked to the legal backgrounds or to practical experiences that we received in our own law systems. I think it is more the exception that we establish in the Court, during the discussions, real differences between our approaches which are based on national experiences.[44]

The CJEU established an atmosphere of communality where strong individualistic views would be an irritant. If, exceptionally, a clash of legal backgrounds occurs during decision-making, it would be seen as positive: »[I]t is only exceptionally that I am confronted with a real discussion or a real clash between our legal backgrounds; on the contrary it is quite positive to see that.«[45] Judges disassociate themselves from their national backgrounds when answering the question at hand:

> The whole system is designed for an abstract question to be met with an abstract answer. And so the judge has to get rid of his training, which is to resolve the dispute between Mrs. Smith and Mr. James, and to see the principle that underlies the legal answer, but I think we all see that.[46]

On the bench, decision-making is an intellectual logic exercise that goes beyond the individual study of law. While it was expressed that national legal differences matter for style of argumentation rather than outcome, the findings at the CJEU showed that the differences in background of legal families can be grouped in three different categories. Two of them have immediate impact and concern either the style of how to present legal arguments or are used as valuable experience for »pulse-taking«. The category with less immediate impact refers to legal principles and doctrines that influence the court in the long-term.[47] An example is the influence of the French legal system on the court structure and format of judgment. Other long-term influences on doctrine are possible, such as the principle of proportionality as influenced by the German legal system.[48]

Several judges and advocates general have themselves written about the differences in approach and the interaction of the different legal families.[49] Judge Lenaerts has published on what he calls the »comparative method«.[50] He describes an approach of a certain convergence between the national legal solutions, sometimes »interlocking« to the benefit of Community law and sometimes leaving discretion to the member states. Another dimension of using differences in national legal background on the bench is to test reactions on the bench as a »pre-test« or »pulse taking« of potential clashes with national legal particularities. Lenaerts calls the deliberations an exercise in »psycho-diplomacy« with national courts, where the judges carefully »take the pulse« of what an acceptable solution is.[51] The different nationalities on the bench are essential for checking the acceptability level of legal outcomes.

B. Historical and political embedding

At the ECtHR[52] in general, judges from former Eastern Bloc states were seen to bring in more experience with economic and social rights but with approaches varying diversely from cautious to rather pro-active.[53] Some interviewees found Eastern judges a bit more reluctant to speak up during the deliberations. Others expressed their surprise as to how similar the approaches were to their own (Western) approach or how independent the Eastern approaches on a case were.[54] Structurally, the inclusion of many more Eastern States in the Council of Europe and the EU has had a significant impact on the size of the courts. With the growth in size, the proximity and encounters of colleagues

44 Arold Lorenz / Groussot / Petursson (2013) 114.
45 Arold Lorenz / Groussot / Petursson (2013) 114.
46 Arold Lorenz / Groussot / Petursson (2013) 115.
47 Arold Lorenz / Groussot / Petursson (2013) 111.
48 Arold Lorenz / Groussot / Petursson (2013) 116.
49 See examples discussed in Arold Lorenz / Groussot / Petursson (2013) 116.
50 Lenaerts (2003) 876.
51 Lenaerts (2003) 904.
52 Note: At the time when the study on the ECtHR started, the Eastern enlargement of the ECtHR was rather recent.
53 Arold (2007) 71.
54 Arold (2007) 71.

changed. Ultimately, however, it was seen that human rights reasoning has a commonly shared basis that is independent of political structures, as expressed in this quote: »The Convention protects values of a democratic society in comparison to a totalitarian society. We might have experienced a totalitarian system. But the values in the Convention are human values. They are coming from the nature of a human being.«[55] Eastern newcomers would not change general trends at the ECtHR but rather change the balance of existing trends.[56] At the CJEU it was also expressed that judges from Eastern states would not change the general trends but rather affect pre-existing balances of approaches. A few interviewees noticed, however, a certain sensitivity of especially Eastern judges in seeing human rights issues in cases, but were cautious to identify a systematic influence.[57]

C. Vocational experiences

During the ECtHR interviews it was highlighted that there was often a stronger divide in approach based on vocational experience. As the individual biographies reveal, the plurality of legal careers extends to all legal professions, including different specialisations of law. This variety is seen as astonishing, as expressed in the following quote:

> What strikes me is that the experiences of the judges is so different; some are professors in either criminal, civil or public law; others, as myself, are judges, and others, which I would call various kinds of law[yers], diplomats, ambassadors, or advocates […] Of course all are very well trained lawyers with interest in human rights, but the backgrounds are very, very different.[58]

While the bench embraces this variety of legal professions, the main divide was described to generally run between former career judges and former academics. Whereas former judges would be concerned predominantly with the legal question at hand, academics would look for the legal questions' wider implication within the development of international law. One interviewee expressed this notion as follows: »[J]udges see only cases, cases, cases, but they do not see the larger picture, the further meaning for law.«[59] This statement was supplemented by the following quote: »[J]udges go to the point; they do not make long speeches on irrelevant facts. But professors have a broader approach; they take things into account that I think to be irrelevant.«[60] Or, as summarized by another member of the court, »[J]udges and lawyers look at the details, professors look at the general picture, and politicians at geopolitical issues and traditions.«[61]

This applies to the CJEU too, where interviewees supported the difference between the approaches of an academic (concerned with the wider implication of the case) versus that of a judge (concerned with the facts mainly) as the two main lines of division between judicial approaches.[62] This difference of approach was expressed in the following quote:

> Yes, [vocational background] is certainly making a difference. It plays quite an important role in the approach to cases, the academic approach or the more practical approach. Someone who has had, before coming here, exclusively an academic experience, has another way [of working] than those that have a lot of experience working with cases either as a judge or someone that has worked with public administration. But that is obvious, and enriches the debate. Having different inputs is not a disadvantage, but a huge advantage.[63]

CEJU judges generally expressed excitement about learning from their colleagues. Also, it might help to understand a colleague's reasoning better, if one shares experiences in the form of similar career background, such as with former academics or former judges.[64] The universal im-

55 Arold (2007) 71.
56 Arold (2007) 72.
57 Arold Lorenz / Groussot / Petursson (2013) 110–111.
58 Arold (2007) 73.
59 Arold (2007) 73.
60 Arold (2007) 73.
61 Arold (2007) 73.
62 Arold Lorenz / Groussot / Petursson (2013) 107–108.
63 Arold Lorenz / Groussot / Petursson (2013) 107–108.
64 Arold Lorenz / Groussot / Petursson (2013) 109.

pression was that of a respectful debate within a team where its members share mutual respect for each other.

D. Common commitment

In the interviews at the ECtHR, the notion of the court being a »melting pot« was raised.[65] Generally, there was a noticeable joint belief in human rights at the ECtHR, where the judges have a common commitment – as protectors of the ECHR – to protect the individual against human rights violations. While there might be variations in approach, this common commitment is the strongest force to bridge gaps between nationalities and legal systems.[66] The high expectations between colleagues might pose a risk too, as was pointed out in the following quote from an ECtHR interviewee about peer pressure: »[I]f you are not playing with the rules, if you don't contribute – you are out; there is a lot of peer pressure here and judges easily become marginalised.«[67] Generally, as part of the legal culture, the CJEU interviewees showed high respect for, as well as high expectations towards their colleagues. With the absence of dissenting opinions at the CJEU, judges are »condemned to solidarity«. There is a strong force felt to avoid voting in controversial decisions. This was generally seen as quite positive. In the absence of disclosure of voted outcomes this might surprise. The reason behind this is the judges' vision of collegiality and team spirit.[68] Members of court are joined together like a family. Efforts are taken to make sure all opinions are reflected in the judgment and if – rarely – a vote takes place, it seems rather stressful. This push for consensus reveals a vision of the judges as being the final resort, offering one solution about the interpretation of the treaties given by one voice.[69] It also points towards judges who see themselves as unity, a unity in which judges are more comfortable if the legal solution is built on consensus.[70]

E. Human rights

When asking at the CJEU whether individual differences would surface more often in human rights cases than in other cases, surprisingly interviewees did not notice this. Strong discussions are not reserved for human rights cases. All cases, including the most technical ones, may cause strong discussions on the bench. It was expressed that human rights do not provoke clashes in general terms and no considerable difference with regard to background emerges in human rights cases when compared to other cases.[71] An increase in cases concerning human rights was noticed by the interviewees, partly because the incoming parties would invoke human rights more frequently, partly because the judges internally would be inclined to invoke human rights issues. »I think first of all that there is a change in the arguments presented to us. In most cases the human rights question or argument is brought by the parties or intervening parties and is not *ex officio* brought up by the court itself.« When asked about changes introduced by the EU Charter of Fundamental Rights, a number of interviewees pointed out that the CJEU is not a human rights court. Human rights questions are taken up and considered, but not exclusively, as the main task is to guarantee the uniform application of Community law.[72] When asking about the relationship between the CJEU and ECtHR, the different nature of the ECtHR as an international court, with a public international law approach, different to the specifics of EU law as a discipline of its own, was pointed out.[73] Generally the relationship between the two courts is one of respect, as highlighted by this quote:

65 Arold (2007) 80.
66 Arold (2007) 79.
67 Arold (2007) 155–156.
68 Arold Lorenz / Groussot / Petursson (2013) 120.
69 This again reflects a vision of stability that is different to disclosing the discursiveness of law like in a common law system (or at the ECtHR), see Arold Lorenz / Groussot / Petursson (2013) 121.
70 Arold Lorenz / Groussot / Petursson (2013) 121.
71 Arold Lorenz / Groussot / Petursson (2013) 151.
72 Arold Lorenz / Groussot / Petursson (2013) 156.
73 Arold Lorenz / Groussot / Petursson (2013) 156.

> [T]here is a level or wary, courteous respect between the courts. Inasmuch as the Strasbourg court has the Convention, we have European Community law but with fundamental rights on the side. We certainly have respect for each other; we also […] know that it would be good if we didn't tread on each other's toes.[74]

ECtHR case law has been referred to in CJEU jurisprudence as established precedent. At the same time, with the growing volume of human rights both in CJEU case law and relating to the EU Charter, as was expressed by one interviewee, there might be a pull toward stronger autonomy with regard to human rights in the case law of the CJEU.[75]

V. Some Numbers from the Case Law Analysis

The impressions given in the interviews were analyzed and contextualized with the case law. An empirical analysis of ECtHR case law showed an overall high amount of unanimity (generally 70%).[76] This number might surprise, given that the ECtHR allows dissenting and concurring opinions. When looking at cases invoked under article 8 ECHR (private and family life: 64% unanimity, 31% dissent and 5% concurrence), article 9 ECHR (freedom of religion: 87% unanimity, 13% dissent and no concurrence), and article 10 ECHR (freedom of expression: 51% unanimity; 31% dissent and 18% concurrence)[77] some variations seemed to depend on the subject area of the case (for example as subject areas under article 8 ECHR (protection of private life and home):[78] a) custody cases, b) taking children into public care, c) integrity of the home, d) surveillance of correspondence / interference in personal data, and e) expulsion cases; article 9 (freedom of religion):[79] manifestation / practice of religion; article 10 ECHR (freedom of speech):[80] a) political speech and b) cases of defamation in the media. However, when these subject areas were examined no clear result concerning background parameters and respective outcome emerged in these groupings.[81] Taking this a step further and looking at the reasoning in a selection of cases, some variation in approach was found mostly linked to vocational background.[82] Because of the absence of dissenting and concurring opinions at the CJEU, empirical testing of voting behaviour at the CJEU was not possible. The analysis of sample judgments and opinions of advocates general provided some insights on tendencies.[83] Cases such as *Mangold* or *Kadi* seem to support a stronger autonomy of the CJEU with regard to human rights. Then again, cases such as *Römer* or *Dominguez* avoid going forward and continuing to build a clear human rights authority by way of explicit use of the EU Charter.[84] The analysis uncovered a lack of systematic use of EU fundamental rights in the case law and showed an interesting tension between judicial activism and minimalism.[85] Furthermore, when analysing the case law, the use of »alternative sources«,[86] – such as references to general European ancient history (ancient Greek and Roman history), philosophy, myths or even religion – to support legal claims[87] was found in legal reasoning both at the ECtHR and CJEU.[88]

74 Arold Lorenz / Groussot / Petursson (2013) 157.
75 Arold Lorenz / Groussot / Petursson (2013) 153.
76 Arold (2007) 92.
77 Arold (2007) 93.
78 Arold (2007) 104–107.
79 Arold (2007) 107–108.
80 Arold (2007) 108–109.
81 Arold (2007) 110.
82 Arold (2007) 112–152.
83 Arold Lorenz / Groussot / Petursson (2013) 125–159.
84 For a discussion of these and further cases, and activism versus minimalism, see Arold Lorenz / Groussot / Petursson (2013) 161–217, especially 175.
85 Arold Lorenz / Groussot / Petursson (2013) 172–181.
86 This phenomenon shows the need for parting judges or advocates general to search for common reference points that go beyond one's national cultural heritage and thereby transmit legal arguments.
87 Arold (2014) 129; Arold (2010) 275. A short systematic analysis of the use of the term »philosophy« in the case law showed that 1) philosophy is part of the facts; 2) philosophy is part of comparison to other documents of international law; 3) philosophy is used to explain the meaning of ECHR or EU law; 4) philosophy is used to support a legal argument.
88 The writers of opinions who use such ›alternative‹ sources display a balanced mix of legal families and are members of court both from the East and West, and while a number are written by former academics (with the noted overlap in career paths) this applies to the other vocational backgrounds too; see Arold (2014) 135. More recent examples are added in Arold Lorenz (2021).

VI. Conclusion

»Yes, we do have a shared vision, a spirit of ideals and a human rights spirit! You can smell it, when it is there, especially if you look in the cases.«[89] As said above, case law does not provide X-rays of judges' minds, the combination of interviews with case law analysis provides reliable proofs of legal culture. As legal culture is formed by ideas, values and expectations towards law, it remains a somewhat intangible, impressionistic and fluid portrait. Legal culture has institutional aspects, where attitudes and actions between members of court form habits. The interviews, which provided strong insights into the dynamics inside the courts, showed that there is very little difficulty caused by national legal cultures on the bench. Working style differences of approach might in some cases be linked to vocational experience (and on rare occasions to political / historical embeddings). These differing attitudes did not change the legal outcome – they mattered for style rather than substance. In summary, with their legal cultures both courts successfully surmount the risk of tensions between national legal cultures. The members of the courts find diversities rather enriching. Individual pluralities do not weaken but rather strengthen the European benches and are generally overwritten by the legal cultures of both courts.

Looking at the European human rights culture, which builds on the legal culture, communalities as well as differences were found when comparing the two courts.[90] Both European courts have distinctive features in their legal cultures tied to their institutional set-up. The French civil law institutional model left its impact on the legal culture of the CJEU, while the ECtHR is more flexible, leaning towards a common law model. The mode of decision-making is important for the courts' legal cultures. With the strict secrecy and short textual reasoning at the CJEU modelled after the French legal system, this »Frenchness« also marks the CJEU legal culture. While the ECtHR is a public international law court, the CJEU operates within European law and is marked by »high law density«. At the ECtHR, employing a more transparent way of decision-making with longer judgments and allowing separate and dissenting opinions, as well as employing two working languages on the bench, the legal culture is rather common law-like.[91] When it came to human rights, the interviews showed some variation and different tendencies between judicial activism and minimalism that could be seen in the case law. While both courts have their visions of human rights, their core missions – namely for the CJEU to protect the EU legal system and for the ECtHR to protect the values of the ECtHR – are fundamentally the same. The study of Arold Lorenz, Groussot, Petursson on the European human rights culture discovered a number of paradoxes that shape European human rights protection: a paradox between the two courts, one of which was not entrusted with human rights protection from the beginning, but now seems to serve as an engine in the European human rights landscape; a paradox between judicial activism and minimalism within the (human rights) case law; a paradox between complexity and simplicity (of human rights); and a paradox between political ambition and judicial sense.[92] As expressed there,

> [t]he European human rights culture is made up of the actors of the two [European] Courts' beliefs, ideas, habits and attitudes towards human rights as expressed in interviews and case law. The political dimension is manifested in declarations, such as by the former President of

89 Arold (2007) 79.

90 Arold Lorenz / Groussot / Petursson (2013) 219–291.

91 While there are some similarities between the legal cultures of both institutions, there are also significant differences. The ECtHR, as separate legal system, is in its basic features rather one of common law than of civil law. While founded on the Convention text from the 1950s, the legal work of the judges needs constant interpretation of the Convention's meaning today and is heavily influenced by the body of case law. Compared to the EU with all its legislation, the Convention is supplemented by the use of ECtHR case law. Using the concept of precedent, the argument style and the individual responsibility of judges through freely concurring or dissenting opinion are much more reminiscent of common law than civil law. It also allows legal creativity. In Luxembourg the structure is more reminiscent of a civil law model, with high law density (all European legislation). Precedents are used for coherency of case law. Arold Lorenz / Groussot / Petursson (2013) 65.

92 Arold Lorenz / Groussot / Petursson (2013) 283–291.

> the European Commission, José Manuel Barroso [who called upon an European human rights culture], and political actions, such as the [EU] Charter and the accession of the EU to the ECHR. Those two forces, the judicial and political one, interact and are at the risk of colliding. Recent political trends endanger the political one, as new judicial cautiousness or minimalism shows.[93]

As legal attitudes and case law might change, and new judges (and advocates general) join the courts, further interviews are called for. A glance at some more recent case law from both courts already suggests changes.[94] Legal culture does not remain static. Arold Lorenz, Groussot, Petursson have suggested, in one of the conclusions, that the accession of the EU to the ECHR will be difficult, based on the mindset and case law at that time.[95] Further interviews at the European courts and further case law analysis seem timely, given the recent push towards accession. Clearly, a pan-European human rights culture cannot only be pressed for politically. It is the legal culture, as Tulkens reminded us at the beginning, especially the beliefs and attitudes, that needs to carry the inspiration.

■

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93 Arold Lorenz / Groussot / Petursson (2013) 287–288.

94 For a discussion of CJEU and ECtHR case law post Opinion 2 / 13 and how the CJEU presumably seeks to re-establish trust between the two courts, see Gill-Pedro / Groussot (2017) 258.

95 Written prior to CJEU Opinon 2/13, see Arold Lorenz / Groussot / Petursson (2013) 288–290.

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Miguel Beltrán, Daniel Sarmiento

Making »*Un Tribunal para la Constitución*«: A Documentary on the Creation and First Years of the Spanish Constitutional Court (1980–1986)

I. Introduction: Why a Documentary about the Constitutional Court?

In 2011 the Vice-President of the »first« Constitutional Court of Spain, Mr. Jerónimo Arozamena, died at 87. After reading his obituary,[1] we realized that by then only five of the first twelve judges were alive, and all five were over 80. We then started thinking about how their memories and experiences concerning establishing a new Court might be preserved. We thought that for this purpose the best option would be interviewing them and filming the interviews, and eventually, if the material was interesting or valuable, and if we could find the technical means and – above all – a producer, to put them together in a documentary.

We have just mentioned the »first« Constitutional Court. It is important to make it clear that by »first« we refer to its creation in 1980 and to the appointment of its twelve judges (ten in February 1980 and two in November 1980). It would be the »first« Court, presided over by Judge Manuel García-Pelayo until his resignation in 1986. The period of time in which this »first Court« was in office (and also the previous period 1978–1979 during which the Constitution and the Organic Law of the Court – *Ley Orgánica del Tribunal Constitucional*, hereinafter LOTC – were drafted and passed) would be the subject of our documentary.[2]

As far as we know, there was no direct account of the Court across those years. By »direct« we mean information or articles published by the main actors involved in the creation and initial functioning of the Constitutional Court, such as judges, politicians or journalists, during what we can call the founding period of the Spanish constitutional system (between 1978 and 1982).[3] And by »account« we refer not to scholarly or scientific publications by lawyers, legal scholars, historians or political scientists, but rather to interviews, biographies, etc., in which the relevant aspect is the personal experience or perhaps the socio-political context. What we try to point out is that it was practically impossible to find non-legal accounts, or personal recollections, about the creation of the Court in any format: written, video or audio.

We thought that this was an important lacuna in the constitutional history of Spain, and probably also in the narrative of the Transition to democracy after 1975. Looking back to 2011, when Mr. Arozamena passed away, we realized that within a few years the possibility of collecting and gathering first-hand accounts of that specific period and of events regarding the creation of the Constitutional

1 There were actually two obituaries in *EL PAÍS*: one by Bonifacio de la Cuadra (the legal correspondent, who would later be interviewed in the documentary), on 9 April 2001 (Cuadra 2011); and another one by former Minister of Justice, and later Supreme Court Judge Fernando Ledesma, on 14 April 2011 (Ledesma 2011).

2 It is commonly understood that the presidency of García-Pelayo was the »first« Court, and probably the same also happens with the second presidency of Francisco Tomás y Valiente (1986–1992) – even though four Judges were replaced in 1989. Since then, every renewal of the Court (four judges are appointed every three years) has coincided with a new President. But the truth is that the count of the Courts (at the moment of writing this article the eleventh Court is in office) is relatively seldom used, and for instance »the seventh Court« or the »Casas Baamonde Court« – meaning the Court presided by María Emilia Casas Baamonde from 2004 to 2011, being the seventh President since 1980, is not as frequently used as for »the Warren Court« or »the Rehnquist Court« in the United States. So, the only period of the Court which is almost unanimously referred to with a number is the García-Pelayo Court (1980–1986), that is, the »first« Court.

3 We have taken 1978 as the initial year of that period, because it was then when the Constitution was drafted and passed, and 1982 as the final year of that period, because then Spain experienced a political watershed, due to the victory of the Socialist party in the general elections held in October 1982. Regarding specifically the Constitutional Court, its »founding« period is the »first« Court (1980–1986).

Court would no longer exist. The protagonists would no longer be living, and oral or first-hand accounts would be lost forever. We thought it was worthwhile exploring the possibility of how we could contribute to filling the lacuna. But we also felt – and perhaps this was even more relevant – that it was important to do it quickly, for obvious reasons regarding the age of the remaining judges and other relevant actors.

Indeed, some materials about this »first« Court did exist, but most of them had been written by scholars. In fact, the approach taken by legal scholars regarding the Constitutional Court focused in general on the comparative aspect (that is: comparing the new Court to other European Courts) or on how the »first« Court dealt with specific issues (constitutional rights, decentralisation, remnants of the Franco dictatorship, etc.). This means that some matters were relatively overlooked, such as: how was the LOTC drafted and passed by the legislature in 1979? What was the appointment process for the first twelve judges? What was the role of political parties in this process? How did the Court work without precedents, case law, or tradition, and without being ingrained in the legal structure? What was the personal vision or perception the judges had concerning their task? When designing the documentary, we thought that these aspects would be better explained if the persons we interviewed were not just the judges, but also »external« actors such as politicians, journalists, legal scholars (both from Spain and from other countries) and other professionals (for instance, prosecutors or attorneys).

So our aim was to combine, on the one hand, a documentary for lawyers or for legal scholars, based on technicalities and on legal or constitutional concepts, with, on the other hand, some elements for a general, non-specialized audience. This does not mean that we were dismissing making a contribution to the legal field: it just means that, as legal scholars, we wanted to combine our own academic understanding, which was obviously predominant, with a broader view consisting of collecting personal recollections of the judges and other relevant actors, and perhaps eventually a historical assessment of the »first« Court. This conception of the documentary with a »generalist« perspective – some way between journalism, or communication aimed at the public at large, and legal scholarship – would be a constant challenge for us.

When we started to gather journalistic sources, or even academic sources, we noticed that their number was less than we had thought. Historiography about the »first« Court was not abundant, nor was that concerning Title IX of the Constitution (which refers to the Constitutional Court). The LOTC, passed in 1979 by the same legislature that had drafted the Constitution, had indeed been the subject of study by legal scholars, but in a theoretical, strictly scholarly fashion rather than from a broader or non-strictly legal perspective, for instance focusing on the personalities of the judges,[4] the inner functioning of the Court, or how the newly created Court was perceived by Spanish society.

Regarding audiovisual materials, our initial idea was that in the public television archive (the only one that existed when the Court was created) we could find interviews or documentaries. But some signs suggested that these sources might be scarce.[5]

II. Conceptual Issues: Interviewees, (No) Narrator and Script

By the fall of 2011 we were determined to move forward in the project of filming the documentary. But at that time, it was merely a fanciful idea. First, we had no producer – because we had not started to look for one. And second, and above all, we were not audiovisual professionals (at best, we had some basic, largely theoretical notions of cinema). So the first step was to build the structure of the project, and its budget, and write a memorandum

4 Prof. Enrique Alonso García pointed out in 1989 that, contrary to the US tradition, in Spain the personal or professional aspect of judges is not considered a public or interesting matter, or relevant whatsoever: see »Prólogo« to Beltrán de Felipe (1989) 6.

5 The most famous series of documentaries about the Spanish Transition, directed by Victoria Prego in the nineties, focused on the period 1975–1977, following the mainstream idea that the Transition started when General Franco died in November 1975 and ended when general, free elections were held for the first time in June 1977, and therefore did not cover the Constitution, the LOTC or the creation of the Constitutional Court in 1980 (see also Prego (1996)). In 2011 the website of the Constitutional Court did not contain any audiovisual material.

in order to have something we could show to prospective producers.

We were extremely lucky regarding the producer. In October 2011, we scheduled a meeting with Mr. Alfonso Candau, then-President of the Official Board of Land Registrars (*Colegio de Registradores de la Propiedad y Mercantiles de España*, hereinafter *Colegio*).[6] We gave him a very short memorandum about the project and he was enthusiastic about it. He immediately presented the proposal to produce the documentary to the Council of the Board, which was then accepted. We were at that time, and still are, very grateful to him and to Mr. Celestino Pardo. It was not at all obvious that they – or any other person – would put trust and money in an audiovisual project lead by two law professors with no previous experience in cinema, and which dealt with a topic that could fairly be considered uninteresting (as far as we knew, no one had had this idea before, seemingly because it was not appealing).[7]

By December 2011 we had started to design the documentary. First of all we had to make decisions on several crucial questions. For example: Who should we choose to interview? And how many interviews should we conduct? Should we write down some questions and send them to the prospective interviewees, or should we film the interviews in a more responsive, improvised fashion, without a structured plan? And of course we had to recruit a team of technicians (cameraman, lighting specialist, sound recorder, editor). In sum, we had to establish a complete production plan. We were fully aware that this was a task which normally would be carried out by a film production company, but we could not turn to such a company for two reasons: first, because the *Colegio* had made it clear that it wanted us to be in charge of the project (it was an assignment based on personal trust), and second, and mostly, because with the budget we had been given we could absolutely not afford to hire a film production company.

The only thing which was clear to us was the object of the documentary (the initial period of the Constitutional Court), its format (interviews with relevant protagonists of this period) and its tenor (the aforementioned tone half-way between a scholarly undertaking and a more generalist film), and that it would be somewhat heterodox, given that we would not have the help of a production company. We were aware that there was a risk of creating some kind of »home movie« that did not meet the ordinary standards of cinema – which would mean a failure.

We began by selecting the persons we wanted to interview. As mentioned above, in early 2012 five of the first twelve judges were still alive, and we managed to contact them relatively quickly. Three agreed to be interviewed (Mr. Aurelio Menéndez, Mr. Luis Díez-Picazo and Mr. Francisco Rubio Llorente).[8] Mr. Rafael Gómez-Ferrer initially agreed but after a few days declined, and Ms. Gloria Begué declined our proposal. We thought, and still think, that being able to count on the collaboration of three out of five was sufficient to create a comprehensive documentary. We also thought we should try to interview relevant politicians from that period. Mr. José Pedro Pérez-Llorca (Minister of the Justice in the centrist government 1979–1980, and a prominent attorney) did not want to be interviewed, but Mr. Juan Antonio Ortega, his undersecretary (*Subsecretario*

6 In Spain the land registrars are public officials that keep the registry of real estate property and in some cases collect the related taxes. They also keep the official registry of corporations and companies.

7 Actually, the role that the *Colegio* played in the long period of filming, editing, and distributing first the documentary and later the book (2012–2017) was exemplary. By this, we mean that when Mr. Candau was replaced by Mr. Aguilera in 2013, after a corporate election, the *Colegio* continued to support the project (even more: it decided to publish it as a book, as will be explained later). And when Mr. Aguilera was replaced by Mrs. María Emilia Adán in 2017, the *Colegio* did the same; Ms. Adán even presented the book to King Philip: see Revista Registradores, no. 82 (2018). In Spain this kind of institutional policy is not so common, for many newly elected officials and politicians neglect or cancel the projects that have been initiated by the former administration.

8 Mr. Menéndez was Minister of Education in the first government of the Transition presided over by Mr. Adolfo Suárez, in 1976, and was a prominent lawyer and commercial law professor. Mr. Díez-Picazo was also a lawyer and a civil law professor (in the 1960s he had been the main disciple of Mr. Federico de Castro, and probably at the time he was the most prestigious private law scholar in Spain). Mr. Rubio Llorente was a constitutional law professor, and he had a very important role when drafting the constitution, as a high-ranking official of one of the legislative chambers (he was its General Secretary). As the documentary shows, he had also drafted the LOTC and, as a newly appointed judge, he participated decisively in the process of choosing Mr. García-Pelayo as the first President of the Court.

del Ministerio de Justicia) did. His collaboration was extremely important, for, as he would explain in the interview, he was the person in charge of negotiating the appointments with the opposition (the Socialist party). In the socialist field we contacted President Felipe González, who gently declined, and Mr. Gregorio Peces-Barba. The latter was a very relevant politician: he was a law professor, he had been one the seven members of the committee who drafted the initial text of the Constitution (known as the *fathers of the constitution*), and he was Mr. Ortega's counterpart in the negotiations for the first appointments to the Court (he later would be speaker of one of the chambers). We contacted him in the spring of 2012, and he took some time to schedule a meeting (due to illness), so we only spoke on the phone and by email (we discussed the questionnaire and the format of the recording). We scheduled the interview for September, but unfortunately Mr. Peces-Barba died in July.

Apart from the first judges and politicians, we thought that the members of the committee who initially drafted the Constitution (its *fathers*) would give a valuable testimony. Of its seven members, only three were alive (Mr. Pérez-Llorca, Mr. Roca and Mr. Herrero), and, as mentioned, we could not interview Mr. Peces-Barba. The three were retired from politics and at that time they were prestigious attorneys or high-ranking officials. Mr. Pérez-Lorca did not show interest in being interviewed. Mr. Herrero told us that he thought his remembrances of how the Committee conceived and designed the Constitutional Court were not particularly vivid and therefore he thought his testimony would be uninteresting. Mr. Roca agreed to be interviewed. We already had covered the three main groups (the first judges, politicians and members of the Constitutional Committee), so we went on with other persons whose testimony we considered interesting. First, the law clerks of the Court during the period 1980–1986.[9] We contacted four very relevant clerks, from which three agreed to be interviewed (Mr. Jaime Nicolás, Mr. Alvaro Gil-Robles and Mr. Juan Antonio Xiol).[10] Second, European legal scholars who could speak of how the Court was seen in other countries.[11] Third, Spanish legal scholars.[12] And finally we invited a journalist[13] and a public attorney.[14] So we had 15 persons who we considered

9 The law clerks are mentioned, but not in detail, in the 1979 LOTC. They were, and still are, selected from lawyers (judges, prosecutors, law professors, civil servants), generally in the early stages of their career. They can be recruited for professional, permanent positions in the Court as civil servants, after a tough selection process, or they can be appointed on a temporary basis. The latter is actually how almost all the clerks are recruited. The duration of the appointment and the age of the clerks differ considerably from the US Supreme Court (in Spain the period of service in the 1990s was four years, and the recruitment age was around 35 years old – one of us served as law clerk from 1998 to 2002 and until then those were the approximate figures, but now both the duration and the age at recruitment are probably higher).

10 Mr. Nicolás was very close to President García-Pelayo (he left the Court when Mr. García-Pelayo resigned), Mr. Gil-Robles would later be appointed Defensor del Pueblo (Ombudsman) of Spain and Commissioner for Human Rights of the Council of Europe, and Mr. Xiol was General Secretary of the Court from 1982 to 1986 (he later became Judge of the Supreme Court). This was the position he held when we interviewed him in March 2012, but in June 2013 he was appointed to the Constitutional Court (he appears in the documentary as former law clerk and as Supreme Court judge, despite of the fact that when the documentary was exhibited he was already a Constitutional Court judge). The other relevant law clerk which we invited to participate in the documentary was Mr. Javier Jiménez Campo, a law professor who had joined the Court in 1984. But in 2012 not only was he still in office, but he was the General Secretary of the Court. Therefore he wisely thought he should not participate because his views might be considered »official« views instead of personal recollections. We are very grateful to him for the invaluable help and suggestions for the shooting of the documentary.

11 We invited Prof. Armin von Bogdandy, from Frankfurt, Germany; Prof. Pierre Bon, from Pau, France; and Prof. Luciano Vandelli, from Bologna, Italy. The three had a deep, first-hand knowledge of the Spanish constitutional justice system (Bon and Vandelli had spent time in Madrid in the 1980s and were friends or acquaintances of some of the judges or law clerks of the Court).

12 Those were Prof. Carmen Chinchilla, from the University of Alcalá in Madrid (she had also served as law clerk at the Constitutional Court, but not during its first period) and Prof. Victor Ferreres, from the University Pompeu Fabra in Barcelona, who probably was at that time and still is the most prominent Spanish expert on constitutional jurisdiction.

13 Mr. Bonifacio de la Cuadra, who from its establishment in 1976 to 2005 had been the legal correspondent of *EL PAÍS*, the main Spanish newspaper, and as such had written many pieces regarding the Court.

14 Mr. Jesús García Torres, who had been the main public attorney to the Court from 1980 to 2013.

fairly representative for making a good documentary about the first years of the Constitutional Court.

We owe a specific mention to Prof. Eduardo García de Enterría. He probably was the most prominent Spanish public law scholar, attorney and judge in the second half of the 20th century. Regarding the Constitutional Court in particular, in 1979 he was commissioned by the government to draft the LOTC, as would be later explained in the documentary by Mr. Rubio Llorente. At that time he had published some articles which were extremely important to disseminate the idea that Constitutional law was »real« law (not a political set of ideas) and that, accordingly, the Constitutional Court was a »real« court that reasoned and functioned as any other court, that is, applying the law and not political ideas.[15] As he was the direct academic mentor of one of us, we thought we had a unique opportunity to get his testimony. Unfortunately, in 2012 he was no longer in good health and declined to be interviewed. Prof. García de Enterría passed away in September 2013, at 90.

During the conception process we took a technical decision regarding how to build the narrative (it was also a conceptual decision). We had to decide whether there would be a narrator or not, that is, if we would use voice over or not. We decided not to. We wanted to be transparent, in the sense of giving all the space to the protagonists. And also if we acted as narrators it would seem that our vision of the period was important, which was not the case (in the years covered by the documentary – for instance in 1980 – we were 5 and 16 years old). Therefore we decided not to appear in the film in image or in voice. This created a huge problem, or at least this is how we non-audiovisual-professionals perceived it. If we were not to lead the narration, then the script, or the guiding thread would have to be built just on the interviews – on what the interviewees would answer or comment to our questions – so we would not be masters of the whole account. We would need to construct the thread in a somewhat impressionist fashion, using bits of the answers. This was considerably more difficult, but perhaps more faithful to our aim of being transparent and putting the focus on the interviewees. It is not just that we did not want to hog the camera: it is that we thought that it was the technical solution which best fitted in our conception of the documentary.

III. The Filming and Editing Process (2012–2014)

At the time we contacted these persons, we were also conceiving how we should conduct the interviews. We thought the best idea would be to write down a questionnaire and send it to the person, so he or she could know the object and purpose of the interview (and of the documentary). Indeed, when we made contact we had already explained this. But it was likely that they would feel more at ease and more confident if the interview was previously prepared by means of a written questionnaire that they would receive some days before filming. Such ease and confidence was a key issue for us. We were not journalists who would eventually inquire about potentially tough, controversial matters, or about confidential aspects of the judgments, or about how the Court worked.[16] Our aim was not

15 The articles were compiled in a seminal book: García de Enterría (1981), titled *La Constitución como norma y el Tribunal Constitucional* (The constitution as a norm and the Constitutional Court). Mr. Bon, in the interview, refers to this book. The importance of Prof. García de Enterría regarding the Constitutional Court is revealed by Mr. Rubio Llorente in the interview: he said that Prof. García de Enterría was offered (apparently by the Government) the position as judge in the first Court, and as he was reluctant, he was told that if he agreed to it he could choose all the other judges (see »*Un Tribunal para la Constitución*«). Although this probably was exaggerated, it clearly shows his influence and *auctoritas* with the main stakeholders.

16 Judges are bound to observe strict confidentiality regarding the deliberations of the Court. This was the main reason former Judge Gómez-Ferrer gave when declining to be interviewed. We thought it was a quite extreme interpretation of his confidentiality duties, particularly when more than 30 years had passed, but we respected it. It might be important to mention that the confidentiality applies also to law clerks (Art. 86 of the by-law of the Court makes it an extremely serious offence for the clerks »to breach the duty of secrecy« and a serious offence »to breach the duty of discretion and guardedness«). This explains that in Spain there exist no »inner accounts« of the Court, contrary to what happens for instance in the US, where former clerks have published books or articles on their experience (see Lazarus (1998); O'Brien (1986)), where clerks in general are the object of books (Peppers / Ward (2012)), and where prestigious journalists have published books about the interior of the Court, see Woodward / Armstrong (1979); Toobin (2007).

to make a documentary that would attract tabloid headlines. But even so we absolutely wanted to create an atmosphere of confidence. For that purpose, we worked hard on the questionnaires, which combined questions about the personal background and recollections of the judges with questions regarding constitutional matters.

Most importantly, we told the interviewees that they could refuse to answer some of the specific questions we submitted to them – even when the warning was probably irrelevant, for it was evident that they had the right to do so. We also told them that, after filming, we would send them the footage and a transcript, in case they wanted to withdraw any recorded content. After filming no one objected to any question nor wanted to eliminate any footage.[17] In any case, the fact that we had carefully chosen the questions and that they were submitted to all the prospective interviewees a week in advance of filming made it possible for them to later be published as a coherent and meaningful book.

Before and during the filming of the interviews we also did some archival research. We thought it was important to situate the Court in its context, from a historical point of view. Therefore, we consulted the archives of the three main newspapers of that time (*El País*, *ABC* and *La Vanguardia*), where we found valuable documents to use in the documentary. We also visited the *Archivo General de la Administración* (General Archive of the Administration), but we found practically nothing relevant. For instance, we tried to find the records – if they existed – on the negotiation process to appoint the first judges, but all attempts were in vain.[18] At the time of filming the interviews (2012 and part of 2013) there was no general law for consulting public archives, and the specific norm which might allow it (an article in the Administrative Procedure Law) was insufficient for that purpose.[19]

Obtaining images and audiovisual material was crucial for us. A documentary that only showed people speaking, with perhaps some newspaper front pages or articles, would be too boring even for a specialized audience, such as lawyers. So we tried to obtain video footage from the archive of *Radiotelevisión Española*, hereinafter RTVE, the public broadcasting corporation. As it was the only TV channel that existed in 1980, we supposed it would contain a lot of video recordings of the establishment of the Court in July 1980. The access to the archives for research purposes is relatively easy, and we had the opportunity to actually watch some very important historical material. The problem was that using it for a documentary was expensive because it was recorded in the old format (magnetic tape), and digitalizing it cost more than we could afford. Besides, the footage also featured the King, and the RTVE official told us that it was likely that before authorizing the use of such audiovisual content they would have to ask the Royal Household (Casa Real) for permission. Still, there was another possibility of incorporating the video recordings in the documentary. If the project was assessed by RTVE, and considered sufficiently appealing, it would co-produce the documentary and allow us to use the recordings for free. Unfortunately, after examining the memo and checking a few samples of the questionnaires, RTVE told us they were not interested. As a result, we could not use any of the material we had seen for the documentary, which clearly diminished the value and quality of the final product.[20]

17 This undoubtedly generated trust with the interviewees (most of them did not know us personally) and made the interviews easier and smoother. However, it also raised in us some doubts about the tone of the questions and of the interviews: we might had been too »soft«, or too friendly, or not critical enough; and this might explain, as we will mention later, that practically none of the interviews contained criticisms vis-à-vis the Court.

18 This material was in the personal archives of Mr. Juan Antonio Ortega, and he allowed us to take some brief shots of the documents (but not to scan them).

19 In December 2013 a law regarding transparency and access to public files was passed (*Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno*), but its provisions did not enter into force until December 2014, and therefore we could not use it for getting the information and documents we needed.

20 Years later we noticed that one of these main materials had been made public in the RTVE's website: it was a program, broadcasted in 1984 under the title »Dentro de un orden«, in which the President of the Constitutional Court Manuel García-Pelayo and its Vicepresident Jerónimo Arozamena were interviewed, and Mr. Ignacio de Otto, who at that time was serving a Law clerk at the Court, explained with some detail what was the Court and how it worked. See: Dentro de un orden – Tribunal Constitucional (1984).

Regarding photographs, the process was easier and more successful. We consulted the archive of *ABC* (a very prominent newspaper) and bought some interesting pictures. We also asked to consult the archive of the Constitutional Court, which we thought would contain lots of material. We were allowed to make copies and to use – for free – more than 120 pictures. Some of the interviewees were so kind to give us pictures, and at the end of the day we were quite satisfied regarding the pictures (but not regarding RTVE's audiovisual material, whose absence was very frustrating).

Filming the 14 interviews took from March 2012 to June 2013. The next step was the transcription of all the interviews, which took longer than expected. This was partly due to the fact that the transcription was done by the communication staff of the *Colegio*, who had to do it at the same time as their normal workload, and also because some of the interviews were quite long. The length was due to the interviewees elaborating extensively in their answers,[21] and also because practically no one removed any of the questions. So we had recorded around nine hours of raw footage, which the *Colegio* took some time to transcribe. We also kept on trying to collaborate with RTVE and visited some other archives, such as that of the *Consejo General del Poder Judicial* (the committee in charge of the judiciary). By the end of 2013 everything was transcribed and we could start putting the pieces together. We had tentatively structured the script in six parts and arranged the pieces around them.[22] This was by far the most complicated, time consuming aspect of the process. We should also mention that in October 2013 the *Colegio* held elections, in which the person – President Candau – and the Council that had supported the project were defeated. The complete Council changed, and we had to present the ongoing project to the new President, Mr. Gonzalo Aguilera, and his team. As mentioned, they fully supported the continuation of the documentary.

In the spring of 2014 we were ready to start the editing process. After a few drafts, and after one of us had composed and recorded the music, by the end of 2014 we completed a first version we could show to the producer. The *Colegio* gave its OK, and the documentary was ready to be shown.

IV. The Premiere (2015) and Dissemination as a Book (2017)

Initially the *Colegio* did not have a clear idea of what to do with the documentary. This was partly due to the fact that the project had been conceived and initiated under a different Council, partly to the fact that publishing audiovisual materials is not the main activity of the *Colegio* – it was the first time it had done so – and partly because the format on which the documentary would be published (DVD) was rapidly becoming obsolete, and the *Colegio* was reluctant to launch it online (via Youtube).

Given all this, the *Colegio* decided not to take any decision regarding the publication of the documentary, or its dissemination, before gauging the opinion of some scholars, judges, journalists, etc. So for that purpose the Council decided to organize some previews in order to get some feedback. The *Colegio* turned to the *Centro de Estudios Políticos y Constitutionales* (CEPC), an official body for research and publishing, with whom the *Colegio* had a collaboration agreement. The CEPC agreed to schedule a premiere on July 2015, to which it invited two of the protagonists of the documentary (Mr. Rubio Llorente and Mr. Ortega Díaz-Ambrona), moderated by a long-tradition journalist, Mrs. Pilar Cernuda. Some of the current Constitutional Court judges attended, as well as other relevant scholars and some politicians.

Apparently, the preview / premiere was a success; at least we received very positive comments, and the President and other members of the

21 Mr. Bon's answers consisted of a twelve-page written essay, which he gave us after the interview.

22 The parts were: 1: Conceiving the Court; 2: Establishing the Court and appointing the Judges; 3: The kick-start of the Court and the election of the President; 4: The Court at work; 5: Constitutional matters; 6: A Court for the Constitution.

Colegio (particularly Mr. Juan María Diaz Fraile, the person in charge of the research department) told us so. So the *Colegio* agreed to organize some more screenings, and also authorized us to do it on its behalf. Between July 2015 and July 2016 ten screenings took place, hosted mainly by universities, and at all of them one or two relevant personalities or public figures were invited to the colloquium scheduled afterwards.[23] As a result, hundreds of scholars, students and perhaps journalists or political analysts had the chance to watch the documentary, and many others found out about it (by word of mouth and through social networks, because many of the universities that hosted the screenings posted a brief news item or some pictures). Many of them started asking us, and the *Colegio*, where could they purchase it or watch it.

This series of events and successful screenings persuaded the *Colegio* that it was worthwhile to publish or disseminate the documentary. In late 2016 Mr. Aguilera told us that the Council had decided to publish the documentary not just in an audiovisual format, but also as a book that would include the documentary. This was a possibility that we had in mind from the beginning and one we had briefly discussed with President Candau, but we were aware that it would increase the final budget of the project significantly. In any case, it was merely hypothetical, and Mr. Candau was no longer President when the documentary was edited and shown. The publication of the project in a printed format was exhilarating news for us. First, because it gave a solution to a certain deadlock regarding how the documentary would be disseminated. Second, because it gave us the chance to show the complete versions of the interviews – as we said before, the documentary contained only a small part of the footage, equivalent to approximately 10% of the total. And third, because a print edition (rather than an online launch) gave us, and the *Colegio*, the possibility of adding more pictures or even a foreword.

It had taken approximately one year and a half to transcribe and edit the interviews, to select and buy new photographs, to complete the archival research, to keep on negotiating with RTVE on the use of the historic videos, to decide the format of the documentary attached to the book (DVD or memory card), to send the proofs to all the interviewees in case they wanted to correct or add anything, and to edit a final version of the documentary. The *Colegio* wanted to publish the book in a luxury format, which was expensive (the budget was also increased by the cost of the memory cards containing the documentary). Therefore it was not clear whether there would be a market for such an expensive book. Probably for that reason, the *Colegio* decided not to publish it as a normal, commercial book but as a non-commercial or complimentary book.

In the summer of 2017 the book was almost ready to be published. The *Colegio* asked the Constitutional Court if they would host a screening of the documentary, which took place not as an official event but on the occasion of the summer break drinks reception, in July 2017.[24] Perhaps for this reason, the *Colegio* turned again to the Court and asked if it would be willing to host a more formal presentation of the book, which by September 2017 had already been published.[25] The problem was that at that time the Court was very busy with the appeals regarding the Catalan secession, and apparently could not or did not want to organize a formal presentation. And there was another issue: the *Colegio* was holding elections in December 2017, and therefore some daily business was halted.

Although the book had already been published, only few people could actually read it because it

23 Apart from the premiere in the CEPC, these were the other screenings which took place in what we could consider the first stage of the dissemination of the documentary: UIMP, Magdalena Palace, Santander (July 2015); University of Valencia (September 2015); University of Granada (October 2015); in the XXIst meeting of the Association of clerks of the Constitutional Court (*Asociación de Letrados del Tribunal Constitucional* – Cuenca, November 2015); University of Córdoba (November 2015); University of Málaga (January 2016); University of Valladolid – Campus of Segovia (March 2016); Chaminade College, Madrid (April 2016); University of Castilla-La Mancha, in Toledo (April 2016); Royal College of Spain (*Real Colegio de España*) in Bologna, Italy, in May 2016.

24 At least two of the judges (Mr. Xiol – one the protagonists of the documentary – and Mrs. Roca) had already participated in some of the previous screenings.

25 Beltrán de Felipe, Sarmiento (2017).

was a non-commercial edition and because its presentation, which the *Colegio* wanted to take place in the Constitutional Court, had been delayed. In addition, there was another change in the *Colegio*: Mr. Aguilera lost the elections to Mrs. María Emilia Adán (the first female President of the *Colegio*). So again a new Council would need to deal with a project which had been supported and launched by the previous Council. Luckily enough, Mrs. Adán, and many members of the newly elected Council, knew about the documentary and the book, and her attitude was completely favourable.[26] The presentation was agreed with the CEPC and it took place in April 2018.

By that time, other screenings had taken place,[27] and in February 2018 Mrs. Adán presented the book to King Philip VI, on the occasion of a Royal Audience to the newly appointed Land Registrars (*Registradores*).[28] We have to mention also a sad circumstance: by that time two of the documentary's protagonists had passed away.[29]

V. The Impact of the Documentary

We think the documentary and the book represent a contribution, perhaps a small one, to the ongoing debate about the Spanish Transition. Indeed, for many[30] the Transition ended in December 1978, when the Constitution entered into force – and therefore the period covered by the documentary would not be included in the debate. Besides, this debate on the Transition is generally a political one, sometimes bitter and partisan, while legal and even constitutional aspects are frequently disregarded. Nevertheless we believe the documentary can shed some light upon a not-too-well-known but important part of the Transition or the post-Transition: the Constitutional Court, whose protagonists had never before given their testimonies on film. It definitely possesses other valuable, more specific aspects, such as disclosing for the first time the lists of candidates exchanged between the government and the Socialist Party in order to appoint the judges, or some details described by Mr. Menéndez about his unsuccessful attempt to be elected President.[31]

In reality the documentary might possess other values, but this is not ours to expound or to decide.[32] Nevertheless, we think that its main contribution might be to start filling the lacuna of oral or audiovisual sources relating to contemporary constitutional law in Spain. By that we do not mean to say that the documentary is in itself »good«, or that its content deserves praise: we just want to highlight the fact that there was no other documentary or film about the Constitutional Court.[33] This undeniable value is even more important if we take into account that the documentary gathers the testimony of very relevant persons (Constitutional Court judges) who are no longer living, and therefore it is unique. We say this for the obvious, sad reason that there will be no further opportunity to interview Mr. Díez-Picazo, Mr. Rubio Llorente or Mr. Menéndez.[34]

26 The book had already been published and its costs paid, so not disseminating it would be an incomprehensible decision.

27 It was the second stage of the screening process: in the University of Alcalá (October 2016); in the University of Valladolid (February 2017); in the University of Alicante (June 2017).

28 See Revista Registradores, no. 82 (2018).

29 Mr. Diez-Picazo died in October 2015 and Mr. Rubio Llorente died in January 2016 (the screening of the documentary in the University of Granada, on 9 October 2015, was one of his last public appearances).

30 See *supra* n. 5.

31 There are other features which, from our point of view, make the documentary quite unique, such as the recording in the Plenary Hall, which as far as we know had never been done before.

32 Some people gave us negative or critical feedback: they had expected a complete, updated view of the Court, instead of an historical account limited to the »first Court«.

33 Except the TV program mentioned *supra* in n. 20.

34 Mr. Díez-Picazo died in 2015, two months after the premiere of the documentary; Mr. Rubio Llorente died in 2016, but he had the chance of presiding over a seminar in which the documentary was screened; Mr. Menéndez died in January 2018. Mrs. Begué, who declined to be interviewed, died in 2016, so the only »first« judge still alive at the time of writing these pages is Mr. Rafael Gómez-Ferrer, born in 1937, who declined to be interviewed.

Apart from that, the documentary – and later the book – has had a considerable impact. As we mentioned before, the documentary was screened at universities and cultural institutions in Spain and also in Italy and Germany.[35] The *Colegio* gave its consent to some colleagues to use the documentary as teaching materials, so presumably many law students in Spain have had the opportunity to watch it. The book has been reviewed several times, in Spanish law journals as well as abroad.[36] Since May 2019 the book has been available on Amazon.

■

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35 Before the publication and presentation of the book there were 14 official screenings hosted by universities or cultural institutions and approved by the *Colegio*, and since July 2018 there have been three more (University of La Coruña in November 2018; University of Cádiz in October 2019; University of Extremadura in October de 2019). Two more were cancelled or postponed due to the COVID-19 pandemic in spring 2020.

36 See reviews by Duarte Martínez (2018); by Azpitarte Sánchez (2018), by Requejo Pagés (2018). In December 2018, it was mentioned by Prof. Joseph Weiler on the *European Journal of International Law blog* as one of the ten best law books of 2018, see Weiler (2018).

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25th Annual Forum of Young Legal Historians: Introduction

It was a time of reflection when over 120 speakers and interested visitors slowly filed into the stately Palace of the Academies in Brussels to attend the inaugural session of the 25th Annual Forum of Young Legal Historians in the morning of Wednesday, 5 June 2019. Over the course of the next two days, when the usual grey made way for a cheery summer sky, more than 80 presentations were delivered across 26 panels by young researchers from an array of countries within and without the European Union. Visitors from France, Germany, Belgium, the Netherlands, Ireland, Italy and other Western European countries were joined by many scholars from the continent's eastern half, including Poland, Hungary, Romania, Croatia, Estonia and Serbia, many of whom were more than loyal in their attendance. This gathering was further complemented by colleagues from Turkey and Israel, and even some from as far afield as Mexico and Brazil, along with a familiar face (to AYLH Forum regulars) from Australia. The geographical diversity reflected the long journey taken by the Association of Young Legal Historians since its earliest conception at the Max Planck Institute for Legal History and Legal Theory in Frankfurt.

Among keynote speeches by inter alia Lauren Benton (Yale University; president-elect of the American Society for Legal History) and Simona Cerutti (École des Hautes Études en Sciences Sociales), Thomas Duve, one of the directors of the Max Planck Institute, chose to deliver some of his thoughts on 25 years of AYLH Forums, as they are called, and the evolution of legal historical scholarship since the 1990s. From professor Duve's recollections, as well as documents from previous congresses, and some personal anecdotes by older colleagues and professors, it is possible to briefly highlight in these pages some developments that have taken place within the organisation since the first few small meetings in Frankfurt in 1992 and 1993. Only in 1995 did the society and the annual conference obtain their official names, at the foundational Forum in Halle. For the next few years, all Forums continued to take place in Germany or the German-speaking world, like Austria or central Switzerland. Judging from the programmes, this founding generation of Forums mostly featured neighbouring scholars, with only the occasional speaker from Italy or Hungary. This began to change in the 2000s, when Forums began to be organised in Budapest, Warsaw and Seville. By the 2010s, congresses took place in the Netherlands, France, Italy and England, and even in Israel and Serbia – of which the latter's formal dinner was more than usually worthy of remembrance, according to legend. During this time, membership and diversity fluctuated, although there was a general upward trend.

Perusing old conference proceedings, it is interesting to see how some organisational aspects changed throughout the years. As in any organisation that reaches a certain age, the AYLH has gone through a number of different approaches in its internal structure. Some have remained, such as the rule that the association is run by an executive board that is composed simply of the organisational committees of last year's and next year's Forum, or its principal objective of providing a platform to early career researchers in the broad field of legal history, defined as anyone not holding an academic chair in legal history. Other rules have laxed somewhat, manifest in the recent admittance of professors into panels, though only as moderators. Still others have grown stricter, as evident from the shifting language policy. While the organisers of 2007's Seville Forum still maintained that discussions should be held in different languages, as there was »no de facto lingua franca in legal history«, calls for papers increasingly began to recommend that talks in English were »likely to receive the widest audience«, until they finally plainly stated, as the one for Brussels also did, that everyone had to present in English. Consequently, the trend towards English as the primary international scientific language of the early 21st century now appears to have been adopted by the AYLH. Though this entails some advantages, such a single »trade language« does not come without risk either, as was prominently discussed at the opening session, which warned, among several other things,

of the overshadowing of scholarship composed in other languages.

Themes similarly evolved along with the times. As membership grew and new regions began to include themselves, the Forum cemented its ambition to support doctoral researchers through the statutory obligation that congress subjects need to be as wide as possible to accommodate as many varieties of research into the history of law as possible. In doing so, the AYLH has over the years provided a stage to a broad net of topics, both thematically as well as methodologically. Professor Duve recounted that around the turn of the millennium, attendees marvelled at a fully digitalised *Sachsenspiegel* on CD-ROM. It is likely that in another 20 years, many current methods will be looked at just as endearingly.

Perhaps it was thus only apt that the anniversary congress focused its gaze on the politically sensitive issue of legal »identity«, and its more concretised cousin »citizenship«. As the global events of 2020 have abundantly demonstrated, the rights, privileges and discriminations that have historically been associated with identity, typically in the form of various citizenship statuses, continue to resonate into the present. Whether argued by some to have caused modern inequalities, or resorted to by others to contextualise an often simplified past, notions of identity and citizenship have frequently been implied into a normative framework of law – secular or religious, individual or collective – and have just as many times constituted a hotly contested dividing line. The 25th Forum brought together researchers from over 22 countries, who discussed these issues from antiquity until the 20th century. No less than five panels were dedicated to Eastern Europe alone, along with two on Latin American affairs. It would be impossible to do justice to the range of discussions held in Brussels in the summer of 2019 in just a few lines.

Instead, *Rechtsgeschichte* has opted to include a representative sample of contributions in the present *Focus*. The first starts with Roman law. Anna Iacoboni (Sorbonne University) investigates how in the late Republican period Cicero and Sallust invoked *libertas* and the *mos maiorum* to criticise contemporary politics. This is followed by Stephen Hewer's (Trinity College Dublin / Ghent University) detailed look at law in practice by examining the relevance of legal status before the courts in 13th-century English Ireland. Federica Paletti (University of Brescia), meanwhile, turns attention to the problems met by the Venetian Republic to regulate the many paupers, vagrants and bandits roaming its hinterland during the 16th century. Crossing the Alps, the intellectual transformations of German *Staatskirchenrecht* are analysed by Florian Reverchon (Université Lyon III / Université Paris II-Panthéon-Assas). Finally, Dóra Frey's (Andrássy University) paper straddles the 19th and 20th centuries in its discussion of the citizenship laws of Hungary, as the nation sought ways to accommodate ethnic Hungarian peoples left scattered by the travails of the dual monarchy, two World Wars and communism, before finally becoming a member of the European Union.

These contributions, in multiple languages, address two ways history can inform our understanding of modern conditions, or can, inversely, refuse to be instrumentalised for anachronistic purposes. There can be little doubt that inherited German *Staatskirchenrecht* is little adapted to Muslim minorities or modern atheism. Vice versa, the disparate cases of 16th-century Venetian paupers or 13th-century Irish peasants illustrate that the past was very often too complex to be caught into a few simple catchphrases. This remains a wise precept for historical science, and one which the AYLH will no doubt continue to defend for the next 25 years.

■

Anna Iacoboni

Libertas as an Expression of Roman Identity in Cicero and Sallust*

I. The meaning of *libertas* in the late republican period

At the end of the Republic, the appeal to tradition, *libertas* and *ius*, the fruit of the achievements of the *maiores*, has an identity value.[1] *Libertas* and *ius* are associated with the sovereignty of the Roman people. Tradition is evoked with different meaning by *optimates* and *populares*, but with the common aim of legitimizing their political power – both claiming to be worthy heirs of the *maiores*.[2] At that time, the evocation of these values has an individualistic scope and is reduced to a topic of political propaganda. Tradition is implemented in an instrumental way in order to achieve particular political interests of the moment and no longer to pursue the common good of *res publica*. The ruling class does not have a common political project, and the dialogue between it and tradition has broken down. Individualism generates the moral and, consequently, the political crisis of the state.

In Cicero and Sallust the positive sense of the individual is contrasted with the denunciation of individualism. On the one hand, both authors appeal to the citizens who represent the nobility based on individual virtue, which takes the place of *nobilitas* based on blood ties. This conception has a sense that could be called anthropocentric. On the other hand, freedom and tradition are demagogically exploited in an individualistic way.[3] Sallust states that both *optimates* and *populares* are strug-

* I dedicate this article to my Father.

1 In his *De Republica*, Cicero defines the Rome of the time of the *maiores* as *morata*, definition that indicates that the state is founded on tradition. Cic., Rep., 5,1; 2: »*Nam neque viri, nisi ita morata civitas fuisset, neque mores, nisi hi viri praefuissent, aut fundare aut tam diu tenere potuissent tantam et tam fuse lateque imperantem rem publicam. Itaque ante nostram memoriam et mos ipse patrius praestantes viros adhibebat, et veterem morem ac maiorum instituta retinebant excellentes viri*«. (»For neither men alone, unless a State is supplied with customs too, nor customs alone, unless there have also been men to defend them, could ever have been sufficient to found or to preserve so long a commonwealth whose dominion extends so far and wide. Thus, before our own time, the customs of our ancestors produced excellent men, and eminent men preserved our ancient customs and the institutions of their forefathers.« Translated by J. C. Rolfe). *Res publica* was characterized by a remarkable political balance based on the union between strong moral foundations and illustrious men capable of defending the latter. This morality-based political stability has been replaced by the deep political instability of Rome at the end of the Republic. Iacoboni (2014a, 2014c).

2 According to Moatti's definition of *mos maiorum*, the latter is a particular form of *consuetudo* that concerns the *maiores*. Moatti (1997) 35, 321. It consists of »particular cases of applications«, it is not absolute, it has an oral and consensual character and is the main foundation of the *Ius Quiritium*. Rech (2006) 21; Orestano (1967) 136–137. The oral nature and flexibility of the custom make it possible for the ruling class to manipulate it. Arangio-Ruiz (1942) 56; Orestano (1967) 54–155; Serrao (1974) 36. With regard to the political sense of the appeal to *mos maiorum*, we allow ourselves to quote Iacoboni (2014a, 2014b, 2014c, 2015). As for the legal sense of *mos maiorum* and about the relationship between *mos*, *aequitas*, *lex* and *consuetudo* as sources of law in Cicero, I refer to Iacoboni (2014a, 2019).

3 Moatti (1997) 35; Wirszubski (1957) 14; Pianezzolla (1957) 145. Concerning the propaganda purpose of this invocation, we are referring to Momigliano (1951). Lyasse (2003) examines this value at a time other than the one we deal with. Until the 2nd century BCE, the evocation of freedom is present especially in *populares'* claims. From the 1st century onwards, however, this value is also evoked by the *optimates* to legitimize their power. See Dognini (1998) 86. The reforms of the Gracchi are also aimed at restoring freedom to the people. Sall., Iug., 42, 2 quoted by Dognini. The *optimates* in turn evoke freedom from the time of the Gracchi. In his *Philippicae*, Cicero appeals to freedom in an *optimas* sense, calling himself *princeps libertatis*. Cic., Phil., 4, 1; 14, 20, quoted by the author. The *auctoritas* and *dignitas* of the Senate are put in parallel with freedom. Dognini quotes Cic., Phil., 3, 8; 3, 36; 11, 21. According to Dognini, Sallust restores freedom with the meaning of plebeian vindication. In this regard, Sallust contrasts *popularis* freedom with *nobilitas* and *potentia paucorum*. Sall., Iug., 87, 2 quoted by the author. Cf. Iacoboni (2014a, 2014b, 2014c).

gling to pursue their own interests, hiding this instrumental political struggle on the pretext of fighting for noble principles, *honesta nomina*, such as the rights of the people and the defense of *auctoritas* of the senate.[4]

At the end of the Republic, the imitation of the ancestors by citizens is based on a materialistic criterion and consists not so much in matching *maiores* in virtue but in overcoming their political and economic prestige. Sallust relates that in the Rome of the past the sight of the *imagines maiorum* ignited a flame in the spirits of illustrious citizens such as Quintus Fabius Maximus and Publius Cornelius Scipio that could not be extinguished except after equaling the virtue of ancestors. Even the *homines novi* are no different from the *nobilitas* that they attack, and they attempt to usurp important political responsibilities.[5]

Cicero and Sallust place their hopes for the moral and political renewal of the state in a new *nobilitas*.[6] Marius represents this new, true, nobility. *Homo novus*, he cannot boast of *imagines maiorum*. However, his *nobilitas* is not inherited by blood bond, passively, but is acquired through the concrete exercise of *virtus* and individual merit. Instead of *imagines maiorum*, Marius can show off the scars he obtained in the war.[7] The virtue, which to Marius inspires his whole life, becomes his own nature, *ex consuetudine in naturam vortit*.[8] Marius proudly claims his identity, his own »I«, as opposed to the *alii* that make up the traditional nobility, the *vetus nobilitas*, based on family belonging, nobility that rests on the brave deeds of the ancestors, *maiorum fortia facta*.[9] He evokes the flame that incited Scipio and Quintus Fabius Maximus to practice virtue, comparing that flame to the light

4 Sall., Cat., 38, 3–4: »*Namque, uti paucis verum absolvam, post illa tempora quicumque rem publicam agitavere honestis nominibus, alii sicuti populi iura defenderent, pars quo senatus auctoritas maxuma foret, bonum publicum simulantes pro sua quisque potestas certabant*«. (»For, to tell the truth in a few words, after that time, whoever disturbed the state under the guise of honorable slogans – some as though defending the rights of the people, others so that the senate's influence might be dominant – under pretense of the public good, each in reality strove for his own influence«. Translated by J. C. Rolfe).

5 Sall., Iug., 45, 30. Sall., Iug., 4, 7–8: »*At contra, quis est omnium his moribus quin divitiis et sumptibus, non probitate neque industria cum maioribus suis contendat? Etiam homines novi, qui antea per virtutem soliti erant nobilitatem antevenire, furtim et per latrocinia potius quam bonis artibus ad imperia et honores nititur: proinde quasi praetura et consulatus atque alia omnia huiuscemodi per se ipsa clara et magnifica sint, ac non perinde habeantur ut eorum qui ea sustinent virtus est*«. (»By contrast, given today's morality, who in the world is there who does not vie with his ancestors in riches and extravagance rather than in uprightness and exertion? Even new men, who in former times always relied upon worth to outdo the nobles, now strive for power and distinction by relying on intrigue and open fraud rather than noble practices; just as if a praetorship, a consulship, and all else of the kind were distinguished and illustrious in and of itself and were not valued according to the merit of those who uphold the dignity of those offices«. Translated by J. C. Rolfe). With regard to studies focused on Sallust, I refer to La Penna (1968); Syme (1939); Valvo (2006); Latte (1999).

6 In his *Pro Sestio*, Cicero believes that the *nobilitas* is the result of the citizen's *magnitudo animi*. This value cannot be inherited. Overcoming the traditional distinction between citizens in ordines, the author appeals to the best citizens from a moral point of view. Cicero theorizes a broader conception of *nobilitas* and *optimates*.

7 Sall., Iug., 85, 17. Marius claims to have actively built his virtue in war, *militando*. The *nobilitas*, on the other hands, achieve this goal through the *legere* and the *audire*.

8 Ibidem, 9: »*Mihi, qui omnem aetatem in optumis artibus egi, bene facere iam ex consuetudine in naturam vortit*«. (»As for me, I have spent my entire life in the best practices, and good conduct has become second nature as a result of habit«. Translated by J. C. Rolfe). Sall., Iug., 85, 29–30; 85, 4–5. Marius constantly claims his »I«. Sall., Iug., 85, 4: »*Mihi spes omnes in memet sitae*«. (»My hopes are all vested in myself and must be maintained by my own worth and integrity.«) Sall., Iug., 54, 17; 54, 19.

9 Sall., Iug., 85, 4: »*Ad hoc, alii si delinquere, vetus nobilitas, maiorum fortia facta, cognatorum adfinium opes, multae clientelae, omnia haec praesidio adsunt; mihi spes omnes in memet sitae, quas necesse est virtute innocentia tutari; nam alia infirma sunt*«. (»Furthermore, if others make mistakes, their ancient nobility, the brave deeds of their ancestors, the power of their relatives and in-laws, their many retainers, are all at their disposal, for protection; my hopes are all vested in myself and must be maintained by my own worth and integrity. For other resources are weak«. Translated by J. C. Rolfe). Cf. also Sall., Iug., 85, 17; 23.

of truth that mercilessly highlights even their vices.[10] Sallust thus contrasts a positive conception of the individual with his condemnation of individualism.

Both *populares* and *optimates* evoke freedom to oppose a condition of subjugation.[11] However, the latter appeal to this value to maintain their prerogatives, while the *populares* invoke this principle to affirm freedom from absolutism and the enjoyment of freedoms under the rule of law.[12]

The concept of freedom is paralleled by citizens' rights.[13] The *provocatio*, the introduction of the written and secret vote thanks to the law of the *leges tabellariae* and the establishment of the tribune of the *plebs* are expressions of *libertas*.[14] The freedom the *populares* refer to is that conquered by the ancestors in parallel with the rights of the people. The *optimates* conceive *libertas* as a value that preserves the authority of the senate.[15] For Cicero, therefore, the freedom of the people consists in the ability to satisfy the *boni*.[16] Otherwise, complete *libertas* of the people results in anarchy, *licentia*.[17]

Especially since the time of the Gracchi the issue of freedom has been central to the political debate between *optimates* and *populares*. The latter claim to be those that represent the true *libertas* and values of ancestors, thus putting in place a contrast with the *optimates*.[18]

II. *Mos maiorum*, *aequabilitas* and *libertas* in Cicero

The Greek concept of freedom in the state translates into the equality of all citizens before the law.[19] This notion is the *ἰσονομία*.[20] Roman *libertas* has a strong legal scope, as it consists of the civil rights that the laws guarantee.[21] *Ius*, *lex* and *imperium* are linked to freedom.[22] The *ius* is the set of citizens' rights, the *lex* is made up of duties, and the *imperium* is the sovereignty of the people represented by the authority of the magistrate. Freedom must be moderate so that it does not become *licentia*, anarchy.[23] The conception of *libertas* is closely linked to that of *civitas*. While *libertas* denotes the individual considered individually, the notion of *civitas* concerns the citizen in relation to the community. *Libertas* indicates the legal condition of the free man who is economically independent. The Roman people are by definition free; the Roman citizen enjoys the constitutional rights of freedom.[24] *Libertas* is compatible with the principles of *Romana disciplina*, *instituta patrum* and *mos maiorum*.[25] On the one hand, the freedom of the *plebs* is related to the *fides* that binds the plebeians to the ruling class. On the other hand, the authority of the patricians is the guarantor of the freedom of the plebeians, just as the latter defend their freedom while not questioning the

10 Ibidem, 23. Arena (2012) 5–6.
11 Arena (2012) 6.
12 The *populares* defend the interests of the people, while the *optimates* protect those of the Senate. The *optimates* are the aristocrats, even those who are not part of the *nobilitas*. See Hellegouarc'h (1972) 502; Gelzer (1912) 102; Strasburger (1939) 773–798; Syme (1939) 18; Van Ooteghem (1963) 406; Meier (1966) 550–615; Nicolet (1976) 176. The distinction between these two political forces is affirmed at the time of the reform of Tiberius Gracchus, in 133 BC. Cic., Rep., 1, 31. Perelli (1982) 6. In the *Pro Sestio*, Cicero extends the concept of *optimates* even to *libertini*. Cic., Sest., 96–98. See Mandel (1984) 294; Robb (2010) 61–62; Syme (1939); Meier (1966) 116–150.
13 Cic., Verr., 2, 1, 25. Arena (2012) 28.
14 The *provocatio ad populum* protects against death sentences without trial and against flagellation, after the *lex Porcia*. The *lex Valeria* of 300 BCE and the *lex Porcia* of the 2nd century BCE guarantee the right to appeal to the people in the case of severe punishments, death sentences and severe penalties. The *lex Sempronia* of 123 BCE interdicts to condemn the citizens to death without the authorization of the people gathered in court or assembly. Arena (2012) 50 quotes Cic., Cat., 4, 10; Sest., 61; Sall., Iug. 31, 16–17.
15 Cic., Leg. 3, 25; Cic., Rep. 2, 55.
16 Ibidem, 38: »*Vos quidem, ut video, legem antiquastis sine tabella. sed ego, etsi satis dixit pro se in illis libris Scipio, tamen ita libertatem istam largior populo, ut et auctoritate valeant et utantur boni*«. (»Well, I see that you have rejected my law without the use of the ballot! But let me explain – though Scipio has given a sufficient defence of these ideas in my former work – that I am granting this freedom to the people in such a way as to ensure that the aristocracy shall have great influence and the opportunity to use it.« Translated by Clinton W. Keyes). Cf. Wirszubski (1957) 557.
17 Cic., Rep., 1, 68; 3, 23.
18 Brunt (1979) 282–330.
19 Wirszubski (1957) 13.
20 Pohlenz (1956) 36. Regarding the ἰσονομία, I refer to Hdt. 3, 80; 5, 37; Th. 4, 78; Pl., R. 563.b.
21 Hellegouarc'h (1972) 543.
22 Wirszubski (1957) 26.
23 Dognini (1998) 85; Wirszubski (1957) 17–18.
24 Brunt (1979) 18; Wirszubski (1957) 11.
25 Wirszubski (1957) 18. The author quotes Liv. 5, 6, 17.

power of the senate in the legal and political field.[26] In this sense, the concept of *libertas* concerns the Roman people, not just the *plebs*, while that of *auctoritas* relates to the senators. *Auctoritas* adds to *libertas* as the prerogative of senators.[27] For *optimates*, freedom means the maintenance of their power.[28] *Regnum* and *dominatio* are opposed to *libertas* and indicate a condition of subjection.[29] The freedom of the people is established in the republican political system; the *regnum*, conceived strictly, therefore denotes the absolute monarchy. If the *regnum* indicates a political regime opposed to the republican constitution, the abolition of the monarchy and the transition to the republic are expressions of freedom, of which the republican institutions are guarantors.[30] The concepts of *dominatio* or *regnum* have not only this meaning, but also indicate excessive power held by a single citizen or a group of people. Opposition to the arbitrary power of the magistrate also means fighting against the *regnum*.[31] The *populares* denounce the *dominatio paucorum* of the *optimates*, while the *nobiles* lash out against the rule of unjust.

The notion of *aequum ius* does not mean that all citizens enjoy equal political rights, but that they are equal before the law.[32] The concepts of *aequum ius*, *aequa libertas* and *aequae leges* indicate a mandatory law for both patricians and plebeians.[33] *Aequa libertas* denotes, in addition to equality with respect to the law, the equality of fundamental political rights. However, it does not exclude differences between citizens.[34] The *eleutheria* of Athens in the fifth and fourth centuries BCE essentially meant democracy and was based on *isonomia* and *isegoria*, that is, on the principles of equality of political rights.[35]

The Greek concepts of *eleutheria*, *isonomia* and *parrhesia* were considered in Rome as expressions of *licentia* and not of *libertas*. The *populares* claim the *aequa libertas*, which consists of the right to

26 The plebeians are subjected to the *auctoritas* of the *patres* from the legal point of view. See Heinze (1925) 364; Kloesel (1935) 8; Hellegouarc'h (1972) 543.

27 Hellegouarc'h (1972) 544. The *libertas* evoked by the *populares* contrast the *concordia* to which the *optimates* are appealed, especially from the 1st century BC.

28 Syme (1939) 157.

29 De Martino (1973) 141.

30 Ritter (1997) 613 quotes Rhet. Her., 4, 66; Sall., Cat. 7, 2–3; Cic., Flacc. 25; Liv. 1, 17, 3. Wirszubski (1957) 13; Brunt (1979) 291; Dermience (1957) 158–159.

31 Ibidem, 612.

32 Cic., Top., 9, quoted by Arena (2012) 71. The notion of freedom can be put in parallel with the condition of the citizens *sui iuris* whose rights are guaranteed by law. The rights of *provocatio*, suffrage and the legal prerogatives of the tribune of the *plebs* protect citizens by preventing their subjugation. The Roman rights that are an expression of freedom are immunity against arbitrary coercion of magistrates and against the punishments imposed by them, as well as a certain political participation. See Brunt (1979) 297. The right of *provocatio ad populum*, which consists of the right to a regular trial, the prohibition of inflicting corporal punishment on citizens thanks to the laws Porciae and *Semproniae* and the *auxilium tribunicium*, are mentioned by Cicero as foundations of freedom. See Dermience (1957) 159; Wirszubski (1957) 44. The *ius auxilii* exercised by the tribune of the *plebs* is also an essential element of freedom that protects citizens from those who hold *imperium*. The *auxilium* he exercised consists of the *intercessio* against a *pars maiorve potestas*. Wirszubski (1957) 44. The *ius auxilii* exercised by the tribune of the *plebs*, established thanks to the demands of the people, then protects all citizens. Members of the ruling class also evoke the *ius auxilii*. Pani (2011) 58. Cicero also associates *auxilium* with *libertas* and *iura* in Cic., Verr., 2, 5, 173 quoted by the author. Freedom is related to *auxilium* and provocatio. The latter is a form of *auxilium*. The author quotes Cic., Dom. 33; Orat. 2, 191. The tribunes of the *plebs* are called *vindices omnis iuris* because they protect the freedom of citizens. Cic., Leg., 3, 9; 3, 15; Sall., Hist. frg., 3, 34, 25; Liv. 2, 23, 2; 2, 28, 7, quoted by Arena (2012) 53. They are *custodes et defensores civitatis*. The tribunate of the *plebs* is the *telum* set up by the *maiores* to defend freedom. Hellegouarc'h (1972) 546 quotes Sall., Hist. frg., 3, 48: »*Vis tribunicia telum a maioribus libertati paratum*». Cic., Leg. agr., 2, 16: »*Sic confirmo, Quirites, hac lege agraria pulchra atque populari dari vobis nihil, condonari certis hominibus omnia, ostentari populo Romano agros, eripi etiam libertatem, privatorum pecunias augeri, publicas exhauriri, denique, quod est indignissimum, per tribunum plebis, quem maiores praesidem libertatis custodemque esse voluerunt, reges in civitate constitui*«. (»Thus I maintain, O Romans, that this admirable and popular agrarian law gives you nothing, but makes a present of everything to certain individuals; it holds lands before the eyes of the Roman people and robs them even of liberty; it increases the wealth of private persons and exhausts the fortunes of the State; lastly, the most disgraceful thing of all, a tribune of the people, a magistrate whom our ancestors intended to be the protector and guardian of liberty, is to set up kings in the republic.« Translated by J. H. Freese).

33 The drafting of the Twelve Tables is put in place following the people's demand for the *aequatio iuris* or the *aequatio libertatis*. Liv. 3, 31, 7.

34 Iacoboni (2014a, 2014c).

35 *ἐλευθερία*, Pi. P. 1. 61. Hdt. 1. 62. 95. A. Ch. 809. Pl. Lg. 698a. Id. R. 329 c. *ἰσηγορία*. Hdt. 5.78. X. Cyr. 1. 3. 10. D. 21. 124.

access to the judiciary. In this regard, the establishment of the tribunate of the *plebs* is a central achievement acquired by the *plebs* as part of the demand for equality of political rights.

The *plebs*, while free, must recognize the *auctoritas* of the patricians.[36] *Res publica* therefore does not mean the government of the people, but the participation of the people in the life of the state. Freedom is made up of the set of principles that make the state a republic.[37] The ability to rule is included in the constitutional rights of freedom, but to exercise it, it is necessary to have dignity and *auctoritas*. *Libertas* is the lower limit of citizens' political rights that provide for different degrees of *dignitas*.[38] If *libertas* concerns all the citizens but it indicates in particular the legal condition of the *plebs*, *dignitas* denotes above all the legal condition of the senatorial order.[39]

Libertas does not exclude but rather provides for the granting of greater political prerogatives to members of the ruling class. According to Cicero's political conception, the *optimates* must have the greatest political prerogatives, while only a formal and limited *libertas* can be granted to the *plebs*. If total freedom were granted to the *plebs*, the power of the *optimates* would be called into question and anarchy would follow. Cicero's conception of *aequabilitas* provides for the award of political office proportional to the merit of citizens.[40] The author thus opposes a democratic vision that erases the distinctions »naturally« existing among citizens. The *aequabilitas* is exalted in the mixed constitution. Thanks to it, responsibilities are attributed to the *optimates*. On the other hand, the *aequabilitas* is denied in democracy, because in it the differences between the citizens are erased. The mixed constitution exalted by Cicero is based on the coexistence of monarchical, aristocratic and democratic elements, *aequatum et temperatum ex tribus rerum publicarum modis*, »moderate and balanced form of government, which is a combination of the three good simple forms«.[41] This makes this form of constitution, defined as *libera res publica* by Cicero, perfectly balanced and politically stable, *ex summis et infimis et mediis interiectis ordinibus*, »brought about by a fair and reasonable blending together of the upper, middle, and lower classes«.[42] The mixed constitution is drawn up by the *maiores* and is exemplary for its political stability. It achieves a perfect union of the foundations of the main systems of government; it is *iuncta moderateque permixta*, a political regime immune from the risk of decadence of simple constitutions, governed by *ratio*.[43] Cicero affirms an anthropocentric view, stating that the Roman constitution is not founded by a single citizen, but by many wise

36 Wirszubski (1957) 27; Finley (1993) 204–205. Cf. also Iacoboni (2014b).

37 Hellegouarc'h (1972) 548; Crifò (1990) 346. *Libertas* imposes itself in the *res publica*, because the people express their will. The *regnum* is opposed to it and consists of the power of a single citizen. The republican constitution is *libera civitas*, according to Cicero. The author quotes Cic., Dom. 33; Mil. 7, 13; Phil. 1, 4. 2, 116; 3, 29; 5, 12; Off. 2, 24; 3, 36.

38 Heinze (1925) 354–355; Crifò (1981) 198.

39 Hellegouarc'h (1972) 550.

40 In his *De Inventione* (Cic., Inv., 1, 2; 1, 112), Cicero contrasts a society based on law, and therefore evolved, with a union based on the strength. Equal law for all marks the transition from an almost animal condition, to society understood as a community governed by the regulatory function of law. In the *Rhetorica ad Herennium*, the equal right for all citizens is paralleled with respect for tradition and is assimilated to justice. Iacoboni (2014a, 2014c, 2019).

41 Cic., Rep., 1, 69. Translated by Clinton W. Keyes. Perelli (1990) 76; Narducci (1999) 73–77; La Penna (1975); Ferrary (1982) 723–804; Mazzarino (1966) 184–185; Carrasco García (2005). Cicero compares the *concordia* present in the mixed constitution to musical harmony. Cic., Rep., 2, 69. *Concordia* is related to justice and guarantees political stability. Cic., Rep., 2, 69 quoted by Pagnotta (2007). The Roman constitution is not simply mixta, like those of Lacedaemon or Carthage, but is *temperata*, because in it there is a perfect balance of the main systems of government. Cic., Rep., 2, 42.

42 Cic., Rep., 2, 69. Translated by Clinton W. Keyes.

43 Cic., Rep., 1, 69: »*Hoc in hac iuncta moderateque permixta constitutione rei publicae non ferme sine magnis principuum vitiis evenit*«. (»This does not usually happen in the case of the mixed and evenly balanced constitution, except through great faults in the governing class.« Translated by Clinton W. Keyes).

citizens who have made Rome a model of political stability over the centuries. Thanks to the *ratio*, the rulers can oppose political decadence.[44]

The state is firmly governed by the ruling class. The *mos maiorum* and the *instituta maiorum* are the foundations of the *res publica*. The people may have limited political participation for a few issues, *res quasdam*.[45] The mixed constitution provides for the dominance of the *optimates* and that guarantees relative freedom to the people. Fairness is achieved in the mixed constitution, because political responsibilities are conferred in it on the basis of the value of the individual citizen. For this reason, the mixed constitution, inherited from the ancestors, is an exemplary political system for its stability. On the contrary, in democracy, distinctions between citizens based on *gradus dignitatis* are removed. Cicero's praise of the mixed constitution translates into the exaltation of the regime of the *optimates*.[46]

The provision of limited political participation does not affect the dominance of the best citizens, but rather strengthens it further. By giving the people the illusion of playing a decisive role in political life, the risk of the people implementing political destabilization is averted. This creates a perfect political compromise between granting limited freedom to the people and the authority of the ruling class. This political project is inherited from the ancestors.[47]

44 Grimal (1986) 261; Narducci (2009) 341. Cicero differs from Polybius' conception of the mixed constitution. The author believes that citizens can counter the process of decadence of political regimes through the *ratio*. Cic., Rep., 1, 68. Cicero is influenced by the conception expressed by Aristotle in the fifth book of his *Politics*. Lintott (1997) 81–82. The *princeps*, a leading citizen of the ruling class, is the one who is able to defend the political balance of the mixed constitution. See Narducci (1999) 80; Lepore (1954) 266; Berti (1997) 279; Pagnotta (2007) 107. The notion of a regime *moderatum et permixtum* is taken up by Plato and expresses the concept of just measure, assimilated by Plato to One and Good. Plat., Pol. 283 E–284 C. Aristotle prefers the middle-class political system to the monarchical, aristocratic and democratic power union, which is realized in Solon's constitution. Arist., Pol. 2, 12, 1273 b-35, 1274 a 3 quoted by Berti (1997) 282; Lintott (1997) 71. Aristotle, unlike Plato, does not conceive the concept of just measure in a mathematical sense, as it is a principle that can vary. The Aristotelian conception of mixed constitution is probably taken from Thucydides. Thuc. 8, 97, 1 and 2 quoted by Berti (1997) 282–295; Lintott (1997) 70; Iacoboni (2014a).

45 Cic., Rep., 2, 56: »*Tenuit igitur hoc in statu senatus rem publicam temporibus illis, ut in populo libero pauca per populum, pleraque senatus auctoritate et instituto ac more gererentur*«. (»Well then, at the period of which I have been speaking, the government was so administered by the senate that, though the people were free, few political acts were performed by them, practically everything being done by the authority of the senate and in accordance with its established customs.« Translated by Clinton W. Keyes). See Hellegouarc'h (1972) 549.

46 Cic., Rep., 1, 53: »*Nam aequabilitas quidem iuris, quam amplexantur liberi populi, neque servari potest (ipsi enim populi, quamvis soluti ecfrenatique sint, praecipue multis multa tribuunt, et est in ipsis magnus dilectus hominum et dignitatum), eaque, quae appellatur aequabilitas, iniquissima est. Cum enim par habetur honos summis et infimis, qui sint in omni populo necesse est, ipsa aequitas iniquissima est; quod in iis civitatibus, quae ab optimis reguntur, accidere non potest*«. (»For that equality of legal rights of which free peoples are so fond cannot be maintained [for the people themselves, though free and unrestrained, give very many special powers to many individuals, and create great distinctions among men and the honours granted to them], and what is called equality is really most inequitable. For when equal honour is given to the highest and the lowest – for men of both types must exist in every nation – then this very ›fairness‹ is most unfair; but this cannot happen in States ruled by their best citizens.«) Iacoboni (2014c).

47 Cic., Leg., 3, 38: »*Vos quidem, ut video, legem antiquastis sine tabella. sed ego, etsi satis dixit pro se in illis libris Scipio, tamen ita libertatem istam largior populo, ut auctoritate et valeant et utantur boni*«. (»Well, I see that you have rejected my law without the use of the ballot! But let me explain – though Scipio has given a sufficient defence of these ideas in my former work – that I am granting this freedom to the people in such a way as to ensure that the aristocracy shall have great influence and the opportunity to use it.« Translated by Clinton W. Keyes) – Ibidem, 3, 39: »*Quam ob rem nostra lege nostra libertatis species datur, auctoritas bonorum retinentur, contentionis causa tollitur*«. (»Hence our law grants the appearance of liberty, preserves the influence of the aristocracy, and removes the causes of dispute between the classes.« Translated by Clinton W. Keyes). Cicero believes that only a fictitious freedom, *species libertatis*, can be granted to the people. In Cicero's *De Legibus* the granting of secret voting to the people is considered a necessary evil for the *optimates*. However, they restrict the exercise of the people's freedom by controlling the votes of the people. Cicero theorizes the concept defined by Lepore as »prudent gradualism«. The latter prevents the risk of an individual citizen implementing political subversions in the state. This political project achieves an orderly freedom. Lepore (1954); Salerno (1999) 25. Concerning *leges tabellariae* I quote Nicolet (1976) 361–362; Wirszubski (1957) 35–37.

Even the tribunate of *plebs* is defined by Cicero as a *temperamentum* elaborated by the political intelligence of the *maiores*, which gives the illusion of political equality to the *plebs* by extinguishing all impulse for rioting, and realizes a perfect political balance, the *salus rei publicae*.[48]

III. *Libertas* in Sallust

In the late republican period, individualism consists of the crisis of the founding values of Roman identity. We can evoke speeches of *populares* and *optimates* spokesmen in Sallust's *De coniuratione Catilinae*, the *Bellum Iugurthinum* and in the *Historiae*. Memmius' speech, in the *Bellum Iugurthinum*, and Macer's speech, in the *Historiae*, which represent the *popularis* conception of freedom. *Libertas*, the legacy of the *maiores*, is opposed to the enslavement of the *plebs* to the ruling class. Catilina's speech in the *De coniuratione Catilinae* focuses on a generational contrast. He places the physical strength and youth of his followers in opposition to the old age and moral corruption of the oligarchy. The invocation of *libertas – vindicare in libertatem* – joins the appeal to *amicitia*, a political notion, and consists of the call for a unified policy. Philippus and Cotta represent the *optimas* vision of freedom. The *ius* of the *plebs* is put in parallel with its freedom in both Memmius' and Macer's speeches. Freedom is conceived as a fundamental principle in the rights of the *plebs*.[49]

In the *Historiae*, Lepidus attacks Sulla, even though he has been a supporter. He accuses the people of being incapable of claiming their rights and freedoms. Sulla's followers, instead of being free to enjoy their rights, are subjected to Sulla and commit unjust acts. In doing so, they have trampled on the honor of the ancestors, of whom they are not worthy. The enjoyment of the rights and freedom of the Roman citizen are put in parallel. Sulla and his supporters violated the principle of sovereignty and freedom of the Roman people that dates back to the time of the ancestors. Lepidus makes a political provocation, asking how Roman people can claim to defend against peoples who are enemies in foreign policy, when they are not able to defend the constitutional principles of *res publica* such as freedom. In his speech, Lepidus thus asks his audience a question that aims to shake his conscience: »*Nam quid a Pyrrho, Hannibale Philippoque et Antiocho defensum est aliud quam libertas et suae cuique sedes, neu cui nisi legibus pareremus*«?[50]

Freedom is mentioned as a fundamental element of the Roman *res publica*. Enjoying the political rights of the people is linked to freedom.

Lepidus asks the people not to grant what is left of their identity, *spolia*. Macer also refers to the *spolia* of the *plebs* in his speech. Roman citizens are a negative *exemplum* for descendants. The Roman people, natural rulers, have been deprived of the *ius* and of the *imperium* and have nothing but *servilia alimenta relicua*.[51] Sulla claims to establish peace and harmony while the people are subservient, in *otium cum servitio*.[52] The *res publica* is destroyed at the price of the citizens' blood, and the rights of the people are torn by Sulla.[53] Lepidus, despite

48 Ibidem, 24: »*Sed tu sapientiam maiorum in illo vide: concessa plebei a patribus ista potestate arma ceciderunt, restincta seditio est; inventum est temperamentum, quo tenuiores cum principibus aequari se putarent, in quo uno fuit civitatis salus*«. (»But consider the wisdom of our ancestors in this matter. When the Senate had granted this power to the plebeians, conflict ceased, rebellion was at an end, and a measure of compromise was discovered which made the more humble believe that they were accorded equality with the nobility; and such a compromise was the only salvation of the State.« Translated by Clinton W. Keyes).

49 Lana (1991) 115; Valvo (2006) 83; La Penna (1968) 282. Sall., Hist. frg., 48, 1; 48, 6; 48, 12; 48, 15. Sall., Hist. frg., 48, 2; 48, 4; 48, 14; 48, 22 quoted by Pani (2006) 193–194.

50 Sall., Hist. frg., 1, 4: »For what was kept safe from Pyrrhus, Hannibal, from Philip and Antiochus if not liberty and each man's abode and our privilege of being subject to nothing except the laws?«.

51 Ibidem, 11–12: »*Populus Romanus, paulo ante gentium moderator, exutus imperio, gloria, iure, agitandi inops despectusque, ne servilia quidem alimenta relicua habet*«. (»The Roman people, a short while ago the controller of the nations, has been stripped of power, glory and rights; without the means to live and an object of contempt, it does not have left even the rations of slaves.« Translated by John T. Ramsey).

52 Ibidem, 24.

53 Ibidem, 25. Even Macer, in his speech, refers to the blood of citizens, who expresses their identities and dignity. Sall., Hist. frg., 5, 17.

having *summum imperium*, claiming his *maiores*, defends the interests of the people. He prefers the *periculosa libertas* to the *quietum servitium*.[54]

Cotta's speech in the *Historiae* focuses on the *optimas* sense of *libertas*.[55] Cotta, a corrupt member of the nobility, denies being responsible for the political situation of the time, attributing it to external factors. He declares that he is worthy of his ancestors and recalls the *gloria maiorum* at the beginning and end of his speech. Cotta urges the people to recover from difficulties and to defend the state for the glory of their ancestors.[56] The *gloria maiorum* is therefore evoked by Cotta in an opportunistic and individualistic way to legitimize himself.

Macer's speech to the *plebs* focuses on the contrast between the *libertas* of the people, which derives from the political achievements obtained by the *maiores*, and the condition of subjugation of the *plebs*.[57] In both Macer's and Memmius' speeches, the appeal to *libertas* coincides with the memory of the sovereignty of the people. Macer puts freedom in parallel with the enjoyment of full rights, recalling the legal-political achievements of the *maiores*, such as the establishment of the tribune of the *plebs*, the annulment of the need for ratification of the vote by the patricians and the access to patrician magistrates. Roman people must justify themselves to the ancestors for the loss of rights and freedom, principles opposed to the *servitium* that the *plebs* are in. On the contrary, the *otium* is mentioned by Macer as a notion with a positive meaning and contrasted with the concept of *servitium*.[58] Macer, like Memmius, proposes himself as a guide for the *plebs* in the struggle for freedom, preferable to the passive condition in which the *plebs* live. The frumentary law is considered a *pretium serviti*, which indicates that freedom can be bought for a small sum, equal to the rations of a prisoner.[59] What remains of the *plebs*, its *spolia*, is in the hands of the nobility. The people have been deprived of their rights, conquered by their *maiores*. All that remains for the people is the right to vote. Macer compares the *plebs* to sheep, shapeless masses, denouncing the absence of political conscience and cohesion.[60] The political unity of the ruling class is placed by Macer in opposition to the inaction of the *plebs*.

Macer calls for the restoration of the power of tribunate of *plebs*, *telum* established by the ances-

54 Ibidem, 26: »*Mihi, quamquam per hoc summum imperium satis quaesitum erat nomini maiorum dignitatis atque etiam praesidi, tamen non fuit consilium privatas opes facere, potiorque visa est periculosa libertas quieto servitio*«. (»For my own part, although through this supreme power enough had been gained as measured by the glorious name of my ancestors, my status and even my protection, nevertheless it was not my plan to amass personal wealth, and it seemed to me that freedom accompanied by danger is preferable to servile tranquility.« Translated by John T. Ramsey).

55 Cotta is elected consul in 75 BCE, in a complex context due to the political uprisings that follow the consulate of Lepidus and the war of Spain against Sertorius. The people's revolt against the consuls is also due to the famine and rising wheat prices. Perl (1967) 75; Malitz (1972).

56 Sall., Hist. frg., 2, 13: »*Per vos, Quirites, et gloriam maiorum, tolerate advorsa et consulite rei publicae*«. (»I implore you in your own name, Citizens, and by the glory of your ancestors: endure adversity, and take counsel for the nation.« Translated by John T. Ramsey).

57 Macer is tribune of *plebs* in 73 BCE and praetor in 68. After Cotta's death in 73, the consuls M. Terentius Varro Lucullus and C. Cassius Longinus, established free grain distributions of five ways each for 40,000 citizens. Such a measure is considered by the Romans insufficient, a way to enslave the people. Regarding the concept of *dominatio* put in place by the ruling class, Sall., Hist. frg., 5, 6; 11; 23; 28. *Servitium*: Sall., Hist. frg., 5, 13.

58 Sall., Hist. frg., 3, 13. Latte (1999) 205.

59 Ibidem, 19.

60 Ibidem, 3, 6: »*Itaque omnes concessere iam in paucorum dominationem, qui per militare nomen, aerarium, exercitus, regna, provincias occupavere et arcem habent ex spoliis vostris; cum interim, more pecorum, vos, multitudo, singulis habendos fruendosque praebetis, exuti omnibus quae maiores reliquere, nisi quia vobismet ipsi per suffragia, ut praesides olim, nunc dominos destinatis*«. (»Therefore, all have now submitted to the mastery of a few men, who, under the pretext of a military situation, have seized control of the treasury, armies, kingdoms and provinces. These men possess a stronghold formed from your spoils, while in the meantime you, after the fashion of cattle, offer yourselves, a great throng, to be controlled and exploited by mere individuals, after having been stripped of all that your forefathers left you, except for the fact that by your ballots you now play a direct role in designating masters for yourselves, just as formerly you did protectors.« Translated by John T. Ramsey).

tors to protect the rights of the *plebs* and its freedom.[61] The people believe that they are free, but they are oppressed and condemned to political inaction and to subjugation.[62] Macer hopes that the *plebs* will defend their freedom and rights, a legacy of the *maiores*, by expressing the same political unity and determination as the ruling elite. He does not push the people to revolt, but rather not to sell off their dignity and their identity, represented by their blood, to the nobility.[63]

Memmius' speech in *Bellum Iugurthinum* is anti-nobility. Memmius, like Macer, denounces the passive attitude of the *plebs*. Memmius' defense of freedom is implemented by exercising his individual freedom and is a principle passed to him by his father.[64] The nobility holds all the power and has handed over the laws of the *plebs* and its *maiestas* to the enemy. Memmius recalls that the plebeians are *in imperio nati*, and therefore should not accept such a condition of slavery.[65] The Roman people are considered to be »naturally« the ruler of the people and this makes slavery contrary to the status of the Roman citizen. Like Macer, to the political unity of the nobles – defined *amicitia* between the *boni* and *factio* between the *mali* citizens – from which power derives, Memmius opposes the inaction of the *plebs*. This contrast is also present in Catilina's speech. Memmius states that the *ius* and the ancient *maiestas* must be defended with double determination by the people because these values, in parallel with freedom, were actively conquered by the *maiores* through their struggles and have been their moral legacy.[66] In this sense, the freedom and the rights of the people are expressions of the *mos maiorum*.

If the *plebs* cared about freedom as the nobility firmly retains its power, the best citizens would have important roles.[67] *Amicitia* or *pax* cannot exist between nobles and *plebs*, because they have *diversae mentes*, an expression that indicates a profound diversity of nature, not just a political contrast. For this reason, it is not possible to find a compromise with the nobility.[68] In both Macer's and Memmius' speeches, the evocation of the political rights of the *plebs* and its freedom, the legacy of the ancestors, are closely related to the claim of the sovereignty and identity of the Roman people.

In Philippus' speech, the evocation of *libertas* legitimizes the power of the senate. Philippus mentions the tribunician power as a destabilizing political factor. He urges the illustrious citizens, the *boni*, to courageously defend the state, their »natural« mission that was carried out with pride in the past.[69] Philippus evokes freedom in parallel with the law in reference to Lepidus' subversive policy and condemns the *socordia* of the senators that makes them unable to forcefully defend the ideals of harmony and freedom.[70] He refers to the excellent sense of *libertas*, considering the plan to restore the power of the tribunes of the *plebs* as a source of *discordia*. On the contrary, from a senatorial point of view, *libertas* and *concordia* consist in the maintenance of the power of the senate.[71] Freedom in the *optimas* sense therefore translates

61 Ibidem, 12: »*Itaque cetera ex licentia aut odio aut avaritia in tempus arsere; permansit una res modo, quae utrimque quaesita est et erepta in posterum, vis tribunicia, telum a maioribus libertati paratum*«. (»Therefore, other disturbances have flared up for a time out of lack of restraint or hatred or avarice; only one issue has persisted, which has been the object of contention on both sides and has been snatched from you for hereafter: the tribunician power, a weapon established by your ancestors for the defense of liberty.«). Sall., hist. frg., 3, 1: »*Si, Quirites, parum existumaretis quid inter ius a maioribus relictum vobis et hoc a Sulla paratum servitium interesset, multis mihi disserundum fuit, docendique quas ob iniurias et quotiens a patribus armata plebes secessisset utique vindices paravisset omnis iuris sui tribunos plebis*«. (»If you were underestimating, Citizens, what a difference there is between the rights left you by your forefathers and this slavery imposed by Sulla, I would have to speak at length, and you would have to be taught the injuries on account of which, and how often, the plebeians took up arms and seceded from the patricians; and also how they established the tribunes of the commons as the protectors of all their rights.« Translated by John T. Ramsey). See Latte (1999) 231.

62 Ibidem, 27: »*Ita pugnatur et vincitur paucis; plebes, quodcumque accidit, pro victis est et in dies magis erit, si quidem maiore cura dominationem illi retinuerint quam vos repetiveritis libertatem*«. (»Thus fighting and conquest are for the benefit of a few; whatever happens, the commons are treated as vanquished. And this will be more so every day, if indeed those men put more care into retaining their mastery than you do into regaining your freedom.« Translated by John T. Ramsey).

63 The blood of citizens is also mentioned by Lepidus. Sall., Hist. frg., 1, 25.

64 Sall., Iug., 31, 4. Ibidem, 6.

65 Ibidem, 12; 20.

66 Sall., Iug., 31, 17. He recalls the two secessions on Mount Sacred, in 494 BCE, and on the Aventine, in 449 BCE, put in place by the *plebs*.

67 Ibidem, 16.

68 Ibidem, 17.

69 Sall., Hist. frg., 3, 10–20.

70 Ibidem, 11.

71 Ibidem, 14.

into the protection of the *auctoritas* of the ruling class, thus having a conservative reach.

The intent of this analysis is to emphasize that, at the end of Roman Republic, the appeal to the ancient values that were the result of the political achievements of the *maiores* such as *libertas* has an identity component and responds to the desire of the citizens of the late-Republican period to restore the exemplary political balance of the Rome of the ancestors – a balance constituted by the union of illustrious citizens, worthy descendants of the *maiores*, capable of defending the moral foundations of the state, and a *res publica* firmly rooted in the latter.[72] Evoking these values has an identity meaning for both the *optimates* and the *populares*, although the sense of these notions is totally opposite. Cicero and Sallust appeal to ancient values, wishing to revive the Rome of *maiores*. However, they are aware that these principles have lost the collective meaning they possessed at the time of the ancestors, and are exploited in an individualistic way by the citizens of their time. On the other hand, the ruling class does not live up to the model of ancestors, and above all lacks a unitary political project. The evocation of freedom and law in the late Republican age is based on incorrect premises, because it is implemented in an individualistic and demagogic sense and is no longer aimed at realizing the collective good of *res publica*. If individualism prevents the moral and political restoration of the *res publica* of the *maiores*, the citizens who embody the *nobilitas* of *virtus* and pursue the good of the state are the only ones who can restore the values of the ancestors.

■

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72 Cic., Rep., 5, 1 e 2.

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Legal Identity and 13th-Century English Ireland

I. Introduction

In 1166, the old story goes, Diarmait Mac Murchadha, rí (*rex*) of Laighen, was exiled – by both his rivals and allies – so he fled to Bristol, England to seek aid.[1] He returned the next year with English and Welsh mercenaries, shortly followed by larger English forces, all invited by Rí Diarmait to assist his return to power. Diarmait granted lands throughout Laighen to the English, but these were deemed insufficient in quantity. The mercenaries quickly spread out into other *cúigidh* (provinces of Ireland), taking lands by force and establishing several colonies.[2] The effect of this series of invasions was that English lords (men and women) had a large patchwork of various territories taken from (or, on a few occasions, given by) the Gaelic and *Austmenn* (whom I call »Ost-people«) peoples of Ireland.[3] These various colonies accounted to the English exchequer in Dublin, but it was during the reign of John of England (1199–1216) that English law was officially instituted in parts of Ireland.[4] The effects of the invasions and the establishment of English colonies in medieval Ireland have been hotly debated for centuries. The concern of this article is the question of »citizenship«, legal identity,[5] the law of persons, and legal practice.

Based on one or two medieval petitions and a hyperbolic treatise from the early 17th century, most 20th-century scholars argued that since some Gaels did not have access to the English royal courts in Ireland, none did.[6] The most cited petition asked for every Gael to be granted access to the English courts, and this was taken as proof of the inverse (that *no* Gaelic person had access to the courts).[7] Many scholars spilled a great deal of ink agreeing that no Gaelic person could use the English royal courts in Ireland and therefore *all* Gaelic people were regarded as unfree by birth (*nativitas*) by the English in Ireland. On the other hand, a few scholars took the time to search the surviving royal court rolls to determine whether non-English people could use the English royal courts in Ireland.[8] The former group of scholars made a seemingly convincing argument: that only *English* people could use the *English* courts in Ireland. While this sounds axiomatic, it is not based on case law. In order to sort the rhetoric from legal facts, we must consult the court rolls. The oldest still extant today are from 1252.[9] These royal court records establish the case law necessary to reconstruct the 13th-century law of persons in English Ireland.

A »citizen« in English Ireland in 1200 or 1300 was specifically a recognised member of a city, which was the seat of a bishopric and not simply a large urban centre, and the records of English Ireland use this terminology. However, contemporaries did conceive of a system in which certain people were allowed to use the English royal courts in Ireland, hold lands in fee, be a juror, serve as a

1 For the full story, see Duffy (1997) 57–80.

2 Goddard Orpen, and Robin Frame following the former's example, argued that there was not *one* English lordship in medieval Ireland, but instead a patchwork of lordships or colonies: Orpen (2005); Frame (1977) 3.

3 The Scandinavian-Gaelic peoples of Ireland have been called many names by modern historians, but the only medieval names for them are *Austmenn* (usually called »Ostmen« by Irish historians), Dubliners (and similar names for the four other urban centres), or *Gaill*. They probably called themselves Dubliners or *Austmenn*, but more likely they just referred to themselves by their personal name, which was the usual practice for both the English in Ireland and for the Gaels. *Gaill* is the Gaelic term for »other« (non-Gaelic) people from Ireland. It is usually translated as »foreigner« but that misses the point of the term, as it was generally not used for people from outside of Ireland, e. g. those from England (*Saxanaibh*) or Scotland (*Albanaigh*).

4 Brand (1992), 445–463, especially n. 14.

5 »Identity« is a translation of *genus* – the term occasionally used in court records – and is used here instead of »ethnicity« or »nationality« because neither of those terms would work for all of the groups being discussed, and »category« is too vague.

6 See, for example, Otway-Ruthven (1950); Frame (2013). The 17th-century treatise was John Davies's *A discoverie of the true causes why Ireland was never entirely subdued*. For a detailed recounting of the »state of the question«, see Hewer (2018a) 3–9.

7 Otway-Ruthven (1949); Gwynn (1960); Phillips (1996).

8 Nicholls (1982); Parker (1992) 134–141, 173–187; Duffy (1993) esp. 32–47, 59–65; Duffy (1999); Smith (1999) 75; Purcell (2003–2004).

9 For a list of surviving court rolls, see Hewer (2018a) 288–301.

bailiff, and have their life, limbs, and goods protected by the criminal arm of the courts; and others did not have some or any of these rights. An early 13th-century legist (the author of *de legibus et consuetudinibus Angliae*) described two legal types of people under English law: free (*libera/liber*) and bond (*serva/servus*).[10] One point of law to note is that the terms *serva* and *servus* were not used by the English royal courts in Ireland; instead, they employed *nativa* and *nativus* to designate legally unfree people. I translate *nativa/-us* as »unfree« to differentiate it from »bond« (*serva/-us*). Nevertheless, the legist's point about legally free and unfree people did apply. The central focus here is: how can we determine who the royal courts acknowledged as a »free« person?

II. Medieval tests of legal freedom

The tests of legal freedom under 13th-century English law have been analysed by numerous scholars, and most of these tests also applied to the English law in medieval Ireland.[11] One problem to note is that not every English person passed all of the tests of legal freedom. No English woman in any of the surviving records was allowed to be a juror in a royal court or serve as a royal bailiff. This is not to say that English women in medieval Ireland had no power or agency. On the contrary, some English women held immense power, such as the right to hang criminals at their own private gallows.[12] So, when previous historians wrote of »the English«, they really meant only the English men who held at least five shillings' worth of free lands (which was the usual minimum requirement to be a juror). Many English women held hundreds – some even thousands – of acres of land. Being denied one of the tests did not mean that someone was unfree (unless they were denied because of naifty/*nativitas*), but crucially, passing one of the tests did then and does now manifest someone's freedom. One may notice that »royal« is repeated frequently in this analysis. That is because in 13th-century English law, tests of legal freedom had to come from royal courts (in Ireland: itinerant, Dublin bench, and the justiciar's court, which were roughly equivalent to the itinerant, Westminster bench, and *coram rege* in England). Some scholars have speculated that unfree people in England could be sued (but could not bring any action) in county courts.[13] For this reason, county courts are not included as royal courts in the historiography and in this study. Manorial studies have revealed that unfree people in England could be manorial jurors, suitors, and provosts (sometimes called »reeves«).[14] Manor courts were the only available medium for the unfree to sue on their own. Some injured *native/-i* could convince their lord to sue on their behalf in a royal court, but this would not work if their lord had caused the injury.

Before examining the rest of the legal tests of freedom and individual cases, it is important to note the numerically largest groups in medieval English Ireland. There were the Irish Gaels (*Gáedhel*), Ostpeople, English, Welsh,[15] and Scots. The Scottish Gaels were not distinguished from the non-Gaelic Scottish people by the English courts in Ireland.[16] There were also other people present in Ireland at the time, such as Luccans,[17] Manx, and French, but they do not appear in many court records, and most were in English Ireland under an English royal safe conduct. One group that does not appear in the English court records is Normans. The distortion of medieval English identity has been well demonstrated by John Gillingham many years ago and does not need to be repeated here.[18] These groups are referred to as »legal identities« in this article because this is a study of legal status. Many individuals did refer to themselves as »Scottish« or »Welsh« (etc.) in the royal courts in Ireland, but this was in a colonial context. The courts did not usually recognise differences within these legal umbrella groups and lumped

10 The author was historically believed to have been Henry de Bracton, but Paul Brand argued that the original author was William Ralegh: Brand (1992) 447.

11 For example, Hyams (1980).

12 Hewer (2018a) 180–181.

13 Hyams (1980) 133, n. 42. But see the case from English Ireland (see n. 20 below) when the jury stated that being answered in a county court was sufficient proof of legal freedom.

14 Evans (1996) 211–220; Poos/Bonfield (eds.) (1998).

15 The »Welsh« in English Ireland appear to have mostly been *Cymry* (and a few English settlers from Wales), but in the English records they were always called *Wallenses* (as opposed to *Brittones* or *Cymry*). In the Gaelic sources, Welsh people were usually called *Bretnach* and *Mac Bretnach*.

16 Hewer (2018c).

17 For Luccans, Florentines, and Lombards in English Ireland, see O'Sullivan (1962).

18 Gillingham (1993); Gillingham (2002); Gillingham (2007).

together peoples who belonged to different polities, in some cases even if these were currently at war with each other.[19]

1. *Ability to plead in court*

The first legal test was prior use of the English royal courts in Ireland. This right actually had several aspects to it. Some people could sue certain writs but were not allowed the use of others. What is known to experts on medieval English law, but must be mentioned here, is that certain writs and certain actions were not available even to English men who held more than five shillings' worth of free land. To use the writ of an assize of novel disseisin (a fast court case for recent, illegal dispossession of real property), the demandant (plaintiff) had to have been in seisin on the day that she or he claimed to have been disseised. Many case records show that the royal courts quashed assizes when the jury determined that the plaintiff had been in seisin continuously on the day in question (was not disseised on that day or at all) or had never been in seisin of the lands in fee (such as a farmer or lessee: *firmaria/-us*). These cases can give us valuable information on legal freedom, though. When an English person sued Gaelic, Welsh, or Ostpeople and lost due to the defendants using one of these peremptory pleas, this shows that the defendants could plead in court. This is confirmed by jury verdicts, these same defendants suing as plaintiffs in other cases, and by comparisons with the common law in England. A non-English plaintiff losing a case is not evidence of a lack of franchisement and is definitely not evidence of naifty.

In 1295, a jury stated that since William le Teynturer, the son of a Gaelic man and an Ostwoman, had been answered in the Limerick county court (which was not the same as a royal court) during his plaint of replevin, he was free in English Ireland and the defendants had to answer his assize of novel disseisin.[20] William, despite being the son of a Gael, did not identify as Gaelic but instead as an Ostperson when he was in court. The jury in this case stated that as an Ostman, William was free, but that was not the law in English Ireland. Many Ostpeople were denied access to the royal courts and some were regarded as unfree.[21] The justiciar's court in 1295 probably allowed this verdict because it was then under the control of a custos, a temporary justiciar, who was a magnate from English Ireland and not a legal expert. Some Gaels as defendants did not even have to reply to the charge, juries and courts would still protect their freeholds. In 1252, William Otewy brought an assize of mort d'ancestor against Thomas Ó Riagain for lands in Limerick that he claimed to have belonged to his father, Walter Otewy. Thomas said nothing against the assize (he made no technical pleas against William's claim) and the assize jury reported that Walter Otewy was never in seisin of the lands so that Thomas could prevent William from legally inheriting them – the claim in an assize of mort d'ancestor. Thomas was left in seisin of his free lands.[22] In 1278, Maurice fitz John Laweles brought an assize of novel disseisin against Maolmórda Ó Fearghail for one messuage. The jury reported to the court that Maurice, while underage, had demised the messuage to Maolmórda out of »custody and friendship« and to pay him for nurturing Maurice. Maolmórda was left in peaceful seisin.[23] This Gaelic man was not only allowed to have seisin of free lands and to use the courts, he also had been the legal guardian of an English child.

Law in action can also be used to study the legal status of women. Sybil Long brought an assize of novel disseisin for common pasture in co. Limerick against three people in 1252. They came to court and said nothing against the assize. The assize determined that the defendants had not disseised Sybil as she described in her writ – which could mean a technical error in her wording or that she was not disseised at all.[24] The verdict does demonstrate that Sybil held free lands and that she could sue for them on her own. Saidhbhín inghean Mhac Dhonnchadha was sued several times. In one case

19 This footnote could be an entire article. Due to exigencies of space, I provide only a few references. For the Gaels, see Hewer (2018a) 9–15. For a few examples when the English recognised differences, see Hewer (2018b) 172 (n. 24), 177–178, 182 (n. 83). For the Scots, see Barrow (2003); Brown (2004).

20 Mills (ed.) (1905) 14, 59.

21 Hewer (2018a) 145–156.

22 An Chartlann Náisiúnta: The National Archives, Dublin [ACN], RC 7/1, 197–198.

23 ACN, RC 8/1, 53–54.

24 ACN, RC 7/1, 169.

in 1301, she called Geoffrey le Blund to warranty her claim to two acres in co. Tipperary.[25] Geoffrey was present and immediately warranted Saidhbhín. Her legal status was cemented by this as she had pleaded in court and been warranted. If Geoffrey lost, she would get two acres of his lands in return. In co. Cork in 1260, Mariota widow of William le Waleys sued Raghnailt Ó Céadfadha for Mariota's dower in Kinsale.[26] Mariota lost because William had never been in seisin of the lands so that she could have a dower from them, and Raghnailt was left in peaceful possession. Both women appear to have been single, but we do not know that for certain. Both, however, were allowed to use the royal courts.

Married women in medieval English Ireland were not usually allowed to sue on their own.[27] If a married woman made a business deal with someone and that person defaulted, the former could not sue for damages or debts. The same was true if she owned free lands and someone stole those. The injured woman's husband, with the woman or her attorney beside him, had to sue on her behalf (with a few extraordinary exceptions). In fact, some husbands sold or leased their wife's free lands and the woman had to sue to recover those after the husband died. This happened so often that the English chancery created a writ called *cui in vita* (while her husband was alive, she could not oppose him). These married women could be English or other, commoner or noble, but still did not pass the test of legal freedom of being able to sue a writ in a royal court.

The ability to sue a writ in the English royal courts in medieval Ireland was not restricted to English people. On the one hand, free, non-English people could sue writs; on the other, married free women, including English women, usually could not sue a writ on their own despite being legally »free«.

2. *Attempts at denial of access to courts*

Not every Gael or Ostperson was allowed to use the royal courts, although denial of access must not be mistaken for unfree status. Some of the free Gaels and Ostpeople who were denied access to the royal courts purchased grants of access from the crown of England, either through a petition to the king himself, the king's justiciar in Ireland, or at the Dublin exchequer. The free Gaels and Ostpeople who could not use the royal courts and had not yet purchased a grant should be referred to as »unaccepted« for brevity's sake. A few dozen of these grants survive, and when a grantee encountered trouble in a court, they presented their grant. In one instance, we can see that an enfranchised man was legally free but not English. Thomas fitz Gerald was labelled a *Hibernicus* (the English colonists' othering label for some of the Gaels and Ostpeople) and the justiciar seized Thomas's burgages in Drogheda.[28] Thomas's father, Gerald fitz John, had received a grant from Edward I of England twenty years earlier.[29] Thomas's burgages were returned to him, but he was not an English man despite his father being enfranchised by charter. Clearly, Thomas, Gerald and John are not Gaelic names, so we cannot be certain that any of them were in fact Gaels – but they definitely were not considered English. We also have records of Welsh and Scottish people born in Ireland. In 1297, Henry Scot brought an assize of novel disseisin against Laurence fitz Henry Trynedyn. Laurence replied that Henry was a *Hibernicus* and would not answer his writ. Henry replied that he was an English man – an *Anglicus* – from Scotland, and that he and his father had always used English law. The jury reported that Henry was a *Scotus* – that is, a Scottish man – and not an English man, but that he did use, and had access to, English law.[30] The court accepted this verdict. In 1332, Richard fitz Robert le Crouther brought an assize of novel disseisin against four people. Two defendants claimed that the extent of the messuage and lands in question was not correct and wanted the writ quashed for false claim. One of these defendants added an additional plea: that Richard was a *Hibernicus* and also that he was not of free blood. Richard replied that his grandfather had been born in Wales, that he (Richard) was Welsh (*Wallensis*),

25 ACN, RC 7/8, 108–110.
26 ACN, RC 7/1, 257.
27 In medieval England, many married women could: McIntosh (2005).
28 ACN, RC 8/1, 338; Mills (ed.) (1914) 352.
29 Public Record Office, National Archives of the UK, Kew, Surrey [PRO], C 66/103, m. 11.
30 Mills (ed.) (1905) 158; Hewer (2018c) 212–214.

and that he was free. The jury agreed and their report implied that all Welsh people in English Ireland were considered free and had access to English law.[31] Other records (landholding) contradict this and are mentioned below. The main point is that having access to the English royal courts in Ireland did not make someone *English*, and one did not have to be English to access the courts.

Since some of the example cases include defensive pleas that claimed that a *Hibernica/-us* could not use the English royal courts in Ireland, this claim should be addressed. In 1303, Maurice Scadan sued Giolla na Naingeal Mac Clereigh, *Hibernicus* of Maurice, for a trespass. This case was heard in the Dublin bench.[32] If Mac Clereigh had been unfree, Maurice never would have sued the former in the Dublin bench. The justices would have considered that a manumission of an unfree tenant, and even if they allowed the case to proceed against an unfree defendant (in contradiction of the law), the lord lost chattels if their unfree tenant was amerced.[33] This was because medieval English courts and society considered the chattels of all unfree people to be the legal property of their lord. There were unfree Gaels who attempted to sue in the English royal courts and there were defendants who claimed that a plaintiff was an unfree Gael.[34] Most of the cases being examined here, however, do not involve pleas of naifty.[35] Another case highlights the problem. Hugh fitz William sued John Tebaud for half an acre of land and the profits of a mill in co. Cork; Tebaud replied that he did not have to answer Hugh as the latter was a *Hibernicus*. Hugh said that this did not bar him from court or suing, as his father had enfeoffed him of the tenement and put him in full seisin.[36] The question was not one of naifty, but instead of enfranchisement – or lack thereof – based entirely on identity. The court did not rule this case on that plea, so this claim is tentative. But the court did allow Hugh to bring an assize and it was not quashed with a plea of naifty (the bar against unfree plaintiffs).

Additional royal-court cases indicate that in medieval English Ireland, holding free lands in fee proved someone was free and therefore answerable in court. Several defendants attempted to quash writs against them not by claiming that the plaintiff(s) was unfree (*nativa/-us*) but instead that she/he was a *Hibernica/-us*. Many of these plaintiffs replied with their supposed legal identity and did not mention their freedom because that was not the issue for the jury to determine: the issue was access to the royal courts. Of course, this should not be taken to mean that this time period saw the end of legal unfreedom or of the existence of *native/-i* in English Ireland. It is important to note, however, that out of the roughly dozen or so surviving cases in which the *est Hibernica/-us* plea was employed, it only worked twice, and one of those was against a free (seemingly English) widow.[37]

3. Holding free lands

Titles to free lands were a reason for many court cases and, more importantly for this study, landholding records can fill a critical lacuna from the court rolls. There are many intersections between having access to the courts and holding lands in fee, as Hugh fitz William's case indicated. We can see that many women held lands in fee when they sold the lands to someone or donated them to a church, including Gaelic women. In 1258, Sláine widow of Giolla Phádraig the butcher granted lands in the suburbs of Dublin to Ralph the cook.[38] In 1299, two English men sued every burgess of Clonmel, claiming to be their lords. These suits are a great source for women and Gaels holding burgages and being sued in the Dublin bench. There were at least ten women holding burgages in Clonmel: Margaret Lowys (held two),

31 ACN, RC 8/17, 150–152; Hewer (2018b) 197–198.
32 ACN, RC 8/2, 168.
33 Hyams (1980) 20–21, 126–151; Briggs (2008).
34 Hewer (2018a) 23–32; Hewer (2018b) 180–190.
35 Two of the defendants in Richard le Crouther's case claimed that he was of unfree blood, and the defendants in William le Teynturer's case claimed that he was servile.
36 Mills (ed.) (1905) 336–337.
37 For the two cases, see Hewer (2018a) 128–129, 136–137. Other cases include allegations of unfreedom, but these do not.
38 McEnery / Refaussé (eds.) (2001) no. 88.

Lucy la Chartere, Agnes Randalf, Elena Thony, Roes Arthur, Isabel Thark, Agnes Thony, Eva Mustard, Agatha la Boteler, and Sybil Map.[39] These cases also reveal eight Gaelic men holding burgages. Gaels also appear on rentals and extents of manors. In 1311 at Imaal, Donnchadh Mac Maoilsheachlainn and Hugh, Morvuth, Faolán, Baltor, Meiler, and Robert Ó Tuathail were listed as free tenants, together with the extent of each of their holdings. Additionally, the extent listed that some owed suit of court at the manor court, and others were free from that obligation.[40] There are even land grants to Gaels. In 1277, Thomas de Lega granted an acre and half of land along with a messuage in Corbally, liberty of Kildare, to Neamhain Ó Fionnghalaigh to hold by socage tenure (which meant that he simply paid rent and owed no military service).[41] There are many other surviving records like these.

Land records also demonstrate that non-Gaelic people could be unfree. In 1331, a detailed survey was made of all of the unfree tenants at Lisronagh; at least three were Welsh (John Rhys, Peter Walche, and David Rhys), and one appears to have been English (Philip Peke).[42] Another type of record (a royal pardon for crimes) supports the existence of unfree English tenants in English Ireland. In 1310, the chief justice of the Dublin bench met with a Gaelic rí, Mathghamain Mac Mathghamhna, and the justice stipulated that Mathghamain had to satisfy all of the English *native/-i* (unfree tenants) of the marches of co. Louth whom he had injured recently.[43]

Relying on the jury verdicts and court judgments that stated that holding free lands guaranteed access to the royal courts as indicative of the law, manorial extents and criminal court cases demonstrate that additional Gaels held free lands and therefore had access to the courts, and simultaneously that Welsh and English people could be considered legally unfree. Being unfree did not mean that that person was Gaelic, and being Gaelic did not mean that that person was unfree.

4. Warrantors and other positions of power

In order to prove one's title to land in an English royal court in medieval Ireland, someone could either present a charter, ask the jury to view the lands in question, or call another person to come to court and give a warranty. Warranting was not the same as being a witness or an oath-helper; it usually was done by the grantor of lands. Promising to provide a warranty was typically part of a land grant. As noted earlier concerning the case of Saidhbhín inghean Mhac Dhonnchadha, to warrant a case meant that the person giving the warranty (the warrantor) took over the case from the person who called them (the warrantee). If the warrantor lost the case, the warrantee lost the lands in question, but the warrantor provided lands of equal value or size to the warrantee. Warranting in court is thus an immensely helpful phenomenon for studies of legal status because the warrantor had to hold free lands in fee in order to be able to give them away. Various cases show that women could be warrantees and warrantors. Stephen de Britann was sued for nine acres of land with an assize of mort d'ancestor. He called Margaret, abbess of Hogges, to warranty.[44] In 1290, Reginald de St James was sued for a messuage and lands in co. Limerick. He called Juliana, sister and heir of Maurice fitz Gerald senior, to warranty. Juliana was present and provided a »writing« (*scriptum*) that showed that the plaintiff's father had granted the manor to her brother. She won the case.[45] In 1306, Robert Ardaugh sued Alice the Lange and ten other people with an assize of novel disseisin for a messuage in Dundalk. Two of the fellow defendants called Alice to warranty and the rest made no claim to the messuage and denied having possession of it. Alice warranted the couple and the jury found that Robert had no claim to the messuage.[46]

Medieval society had legally recognised hierarchies beyond »free« and »unfree«. The court rolls provide significant evidence for classifying or tax-

39 ACN, RC 7/6, 77–78, 80–82; RC 7/7, 24–31, 165–167, 176–181; RC 7/8, 158.

40 Donnchadh Mac Maoilsheachlainn and Morvuth and Faolán Ó Tuathail were free from suit of court. The rest owed suit: White (ed.) (1932) 20.

41 Curtis (ed.) (1932) no. 204.

42 Curtis (1935–1937) 46–47.

43 Griffith et al. (eds.) (1956) 161.

44 ACN, RC 7/1, 468–469.

45 ACN, RC 7/2, 142.

46 ACN, KB 2/4, ff. 588–589.

onomising socio-legal status in 13th-century English Ireland. In 1299, several royal bailiffs and sergeants were amerced for summoning men to juries who did not hold at least five shillings' – or in one case 10 shillings' – worth of free lands.[47] Other records state that jurors should be knights, but if not enough from the area were available, then the bailiffs and sergeants were to summon »legally knowledgeable« men.[48] Bearing this in mind, the records of jurors manifest several aspects of legal identity. In 1216, an agreement was made that certain juries in co. Cork would contain twelve law-worthy Gaels to determine if someone who was alleged to be a *nativa/-us* was in fact unfree.[49] At that point, the English had been in Ireland almost fifty years and the existence of Gaelic men who were »legally knowledgeable« about English law indicates that these men were more than just accepted. In 1299, the escheator of Ireland formed a royal inquisition into lands held in chief of the crown of England. The inquisition had two parts, a jury from the *villa Hibernicorum* of Roscommon and a jury from the borough of Roscommon.[50] The former included Robert Ó Mughróin, Mac Muireagán Mac Giolla Bhrighdhe, Andrew Ó Domhnalláin, Donn Sléibhe Ó Martain, Eugenius Ó Cléirigh, Aodh Ó Martain, and Eochaid Mac Máille, and the latter included Philip Ó Conbhuidhe, Ainghle Mac Giolla Aindréis, and Niall Mac Searraig. These men cannot be denounced as unfree. They were investigating lands held in chief of the king of England for the escheator, and the records are clear that jurors had to be more legally knowledgeable and of higher social standing than an »ordinary« free person. Other juries contained Welsh and Scottish men, but women are noticeably absent from jury lists. Merchants, such as the Luccans, could not usually be on a jury because they did not hold free lands in English Ireland.

The ability to work for the crown of England was reserved for certain people, usually those politically connected or, for regional posts, locals with power and influence. In 1324, Aymer de Valence, an English noble, died, and his liberty of Wexford was taken into the crown's hand. The escheator took the oaths of royal bailiffs to oversee the liberty during the escheat. Gilbert Ó Maoil Áeducáin was named as sergeant of the vill of Odogh [in Kilkenny, but part of Aymer's liberty], and Maurice Ó Dubhagáin was made the »foreign sergeant«, meaning he oversaw lands surrounding the vill.[51] For the term of 1242–1243, Simon Ó Muireadaigh was the viscount of co. Dublin.[52] Viscounts (*vicecomites*) in the 13th century were royally appointed bailiffs of royal counties or were bailiffs of large areas in the liberties who reported to the seneschal. From 1279 to 1281, Hugh de Kent was collector of the new custom for the vill of Galway, and at the same time he was named as a burgess and merchant of Galway.[53] Nearly 20 years later, in 1297, the same Hugh de Kent of Galway, now called a *Hibernicus*, received a grant of access to the royal courts from Edward I of England.[54] There were many more Gaelic bailiffs, sergeants, provosts, attorneys, narrators, and collectors. They served the crown of England, English lords, and all sorts of commoners of English Ireland.

Lords also employed bailiffs and receivers (financial bailiffs). Women could be receivers, even for other women. William fitz Roger Owen claimed Alice wife of Walter de Kenley was his receiver for one of his manors.[55] William's court case against Alice failed, so there is no legally definitive proof that she served in this position. Assuming that Alice was his receiver, this act exhibits significant agency by a married woman in 13th-century English Ireland. Receivers would have been required to be literate and possess notable skills in mathematics and record-keeping.

47 Mills (ed.) (1905) 296, 298. See also (fines from 1297), ACN, RC 7/5, 128–129, 213.
48 Hewer (2018a) 55–58.
49 Nicholls / MacCotter (eds.) (1996) 76–79.
50 Mills (ed.) (1905) 268–269; Dryburgh / Smith (eds.) (2007) no. 100.
51 Dryburgh / Smith (eds.) (2007) no. 234.
52 PRO, C 66/277/2.
53 36th Report of the deputy keeper of the public records and keeper of the state papers in Ireland (1904) 54, 73; Sweetman (ed.) (1877) 419; Sweetman (ed.) (1879) no. 1; Sweetman / Hancock (eds.) (1886) no. 692.
54 Sweetman / Hancock (eds.) (1886) no. 19.
55 ACN, RC 7/5, 46–47.

They had to keep written records of all of their accounting work (*compotus*) and, at the end of their term, deliver the records to their employer. Elena wife of Pagan Inteberge was the receiver of Isabel wife of Henry Moryz for an unspecified term.[56] This case is even more remarkable because a married woman had hired another married woman to be her receiver. Both demonstrate considerable agency.[57] Alice and Elena appear in the records because they did not return their records on time and their former employers sued them (and their husbands). There were almost certainly many more women receivers who remain hidden from our eyes because they returned their account records on time and therefore were not sued.

III. Legal status under criminal law

The final point to consider when asking whether a person was a legal member of medieval English Ireland is the »protection« of life, limb, and goods. This is a highly debated and misunderstood point in the histories of medieval Ireland. The English royal courts in medieval Ireland did not »protect« anyone from death or maiming. The courts inflicted corporal punishment against some felons and awarded compensation to certain injured people or their relatives and denied it to others. A large and historiographically overlooked aspect of criminal cases in the royal courts is that the possessions of people who could not sue a civil case were protected. English people who stole goods from Gaels were hanged frequently.[58] In 13th-century English Ireland, legal status in criminal cases was different than in civil cases. English men with sufficient lands to be a juror could be outlawed and killed by a *posse comitatus* or captured and executed after a court judgment. In many situations, English men were not only not protected »of life and limb« by the courts, they were liable to lose life and limb by the order of the courts! Outlawry occurred when an individual was charged with a crime (or sometimes when accused of a »criminal« action with a civil appeal) and did not appear to answer the charge. After a certain number of non-appearances, the accused was outlawed.[59] Just as with civil cases, women's status under criminal law does not match the traditional arguments put forward by scholars. Women – English, Gaelic or other – could also be outlawed and hanged.[60] An outlaw was supposed to be captured and brought to court to face the charge, but in some circumstances, an outlaw could be killed without a judgment. In co. Tipperary in 1295, Alessia widow of Walter fitz Walter le Bret appealed thirteen men of the homicide of her husband, which was her personal action and not an indictment. The accused who did not appear were ordered to be outlawed if they did not appear by, at least, the fourth county court, the usual process for outlawry from an indictment. Some of the accused did appear and one of them, Walter le Bret, answered that he had been viscount of co. Tipperary on the day in question and with a *posse comitatus* had pursued »malefactors« (unconvicted criminals or convicted »general evildoers«). Walter then said that Alessia's husband and another man had been with the malefactors and had attacked the *posse*. The death of Alessia's husband during this attack, Walter claimed, was therefore no crime and was not against the peace.[61] No judgment was made then, and none survives, but one of the accused (John de London) paid £ 20 for a pardon a month before the appeal was heard; he clearly felt that he would be convicted and probably hanged. Alessia withdrew her appeal against this man because he had a royal pardon, but she was still gaoled for false appeal and had to pay 20 shillings to be released from gaol.[62] Not anyone or everyone could kill an outlaw. In 1297, James de Boy killed Adam fitz Ralph, an outlaw, in Meath. Adam had been outlawed in the liberty of Kildare (just south of Meath) for robbery and being a malefactor. James claimed that the officers of the liberty of Kildare had given him permission to kill Adam wherever James found him after Adam had killed James's relative. The royal court did not accept this plea and James had to pay a fine to be pardoned for slaying Adam.[63]

Another type of justifiable homicide was self-defence. In co. Cork in 1295, John fitz Nicholas de

56 ACN, RC 7/3, 108. No judgment in the surviving record.
57 Both women's husbands were involved in the court case, so they were not *come femmes soles*.
58 Hewer (2018a) 218–224.
59 There were mesne processes, but they are not particularly relevant to this study. For that discussion, see Hewer (2018a) 208–210.
60 Hewer (2018a) 208–209.
61 Mills (ed.) (1905) 60.
62 Mills (ed.) (1905) 57, 60.
63 Mills (ed.) (1905) 195.

Roche was charged with the homicide of Henry fitz Nicholas de Roche. The jury reported that Henry had tried to kill John and that John had fled but, in the pursuit, killed Henry in self-defence. John was acquitted and his chattels were returned.[64] However, a verdict of self-defence was not always an automatic acquittal of the charge of homicide. Some accused had to obtain a pardon after the jury verdict.[65] A third type of allowed homicide was accidental. In 1302, Walter the White was crushed to death by the mill at Leyiston, Kildare, by accident. The jurors declared that clearly no one was suspected, but the court ordered that the parts of the mill that killed him were forfeit as a deodand (the physical objects that killed someone were forfeit to the king for killing: the usual practice).[66] In 1311, Richard le Venour, servant of William fitz John, was leading a cart of William's oats and fell. The cart ran over Richard and killed him. William was not charged with any crime and he was allowed to keep possession of the deodand until it was assigned to a monastery.[67] Gregory Ó Toráin was driving his cart towards a moor in Kildare when he found a young boy out in the road. He shouted for the boy's mother to move her son, but she did not get there in time and as it was on a down-hill slope, Gregory could not stop the cart before it ran over the boy. Gregory immediately fled the scene so his goods were forfeited (the law for everyone), but the jury said that the death was an accident and the court granted him permission to return to his home without having to buy a pardon.[68] A relevant, but tangential, aspect of this case is that the court's treatment of Gregory Ó Toráin demonstrates that he was free. He owned chattels and the court recognised this. An unfree person's chattels would have been handed over to their lord.

On some occasions, accidental deaths were not automatically forgiven. Henry fitz William Hamond killed his own mother by misadventure (the usual legal term), but had to get a magnate to request that Henry be allowed to pay 40 shillings for a pardon.[69] There were probably more facts involved in this case, but those were not recorded in the surviving record. Pardons for homicide in English Ireland were a regular occurrence. Wealthier people could buy a pardon, but once Edward I of England began his wars with Scotland (1296), most slayers had to serve in the English army in Scotland to avoid the noose. James Hareberge killed an Englishman named Craddoc le Waleys (a rather Welsh name). Hareberge went to Scotland and fought to secure his pardon, which was granted.[70] Some slayers paid a fine for a pardon but were then ordered to serve in Scotland additionally.[71] The families of the victims in these instances were not compensated and the slayers were not corporally punished by the courts (the men who received these pardons all survived the wars in Scotland).

All of these situations are important when examining the courts' treatment of the homicide of Gaelic people. The royal courts ordered the hanging of English men and others for killing Gaels, and outlawed many more for killing Gaels and then fleeing.[72] This treatment, however, was not universal. Certain Gaels were called »*Hibernica/-us* of [a lord]«, usually an English lord, in a criminal case investigating the Gael's death. In most of these cases, the slayer was pardoned the crime of homicide and ordered to pay a *resolucio* to the lord.[73] These Gaels appear to have been regarded as *native/-i* (unfree). Lords in England sued for the death of their unfree tenants (called »villeins«).[74] Where the English law in Ireland diverged the greatest from the law in England was concerning the slaying of Gaels labelled *Hibernice/-i* who did not have a lord. These Gaels were seemingly free (in that they were not unfree tenants of a lord from English Ireland) but were not »free« to the English royal courts in Ireland in the sense of being considered members of English Ireland. One case illustrates this point. Geoffrey fitz Thomas Broun killed John Stakepol and was charged with the homicide of an Englishman. The jury returned that Stakepol had been a *Hibernicus* and was the son of Domhnall Ó Glasbháin. Broun

64 Mills (ed.) (1905) 64.
65 Griffith et al. (eds.) (1956) 320.
66 Mills (ed.) (1905) 444–445.
67 Griffith et al. (eds.) (1956) 171–172.
68 Griffith et al. (eds.) (1956) 319.
69 Griffith et al. (eds.) (1956) 251.
70 ACN, M 2542, 321; Griffith et al. (eds.) (1956) 26–27.
71 ACN, KB 2/7, ff. 2r, 4r.
72 Hewer (2018a) 180–185.
73 Hewer (2018a) 188–197.
74 Hyams (1980) 136–137.

was released from all charges without even an amercement or fine.[75] No one alleged that Stakepol was unfree.

IV. Conclusions

In 13th-century English Ireland, identity and acceptance were crucial. Parties in court vigorously argued over who was »English« and who was not. Despite this rhetoric, many juries specified that non-English people enjoyed access to the English royal courts and had certain rights and privileges. Other people did not. The most disadvantaged groups were the unfree, women (especially married women), and unaccepted Gaels and Ostpeople, but just as modern Black feminist theorists have argued, there were many intersections of power and discrimination.[76] An unfree Gaelic woman or Ostwoman would stand to be oppressed in various ways simultaneously (by her lord, by her priest, by her husband, and by her neighbours). English women could own extensive tracts of lands, have lordship over liberties, hang criminals in their own courts, and order their bailiffs to mistreat tenants. These same women might not have a choice in their first, second, or even third husbands, who could then sell or lease away their lands without their consent, and they could not sue to recover these lands until the husband had died. At least one group of rural English people were labelled *native/-i* (unfree), which disrupts the predominant current understanding of legal status in 13th-century English Ireland. Their existence contradicts the discourse at that time as well as the many court judgments that declared that being English in English Ireland made someone free and accepted ipso facto. English law, however, was already equipped with traditions, customs, and defensive pleas to prevent unfree English people from enfranchising themselves in a royal court. Presumably, if these English *native/-i* went to the Dublin bench, their lord would interrupt the case with a plea of naifty. This hypothesis is confirmed by the fact that the record which names the English *native/-i* was created at the behest of the chief justice of the Dublin bench.

Some Gaels, Ostpeople, Welsh, and Scots were allowed to use the English royal courts in Ireland but were not considered English. There also existed legally unfree people in English Ireland, but this did not mean that all Gaels and Ostpeople were unfree. Neither did being English in medieval English Ireland automatically provide all legal rights and privileges. Besides the few unfree English people, English women had to negotiate for power in a discriminating society. The law-in-action method provides numerous insights into the nuance of society and power in medieval English Ireland.

■

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75 Mills (ed.) (1914) 520.
76 Crenshaw (1989).

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Federica Paletti

Appartenenze ed esclusioni

Dinamiche sulla cittadinanza nella Terraferma veneta tra XV e XVI secolo

I. Introduzione

Civitas est hominum multitudo societatis vinculo adunata. [1]

La *civitas*, scriveva Isidoro di Siviglia nelle *Etymologiae*, è fatta da coloro che la abitano, e non dalle pietre delle sue case e delle sue mura, diversamente sarebbe più corretto chiamarla *urbs*. [2]

La definizione isidoriana ha una forza indubitabilmente suggestiva là dove privilegia l'idea di città, quale luogo simbolico, espressione di una forte identità collettiva. [3] In particolare, dando rilievo al contributo che i singoli abitanti svolgono nella costruzione di una dimensione cittadina comunitaria, chiama in gioco il complesso concetto di cittadinanza che, come ampi studi hanno dimostrato, si è manifestata in varie forme, tanto che all'età moderna non si sono trasmessi un unico modello o un'unica idea di cittadinanza. [4]

È il caso di precisare, sin da queste prime battute, che nel proseguo il termine »cittadinanza« è impiegato per indicare il legame che si crea tra l'individuo e la comunità in cui si trova a gravitare, [5] così da includere non solo rapporti statici, atti a privilegiare il momento identitario e di appartenenza, ma altresì quelli dinamici, esplicitantisi in forme di partecipazione.

Si può riscontrare quale cifra comune ad esperienze giuridiche, maturate in contesti geografici, politici e culturali diversi fra loro, che il godimento di libertà, privilegi, immunità, secondo graduazioni disposte dalle istituzioni urbane, nonché la partecipazione alla vita della città venivano accordati a coloro che erano qualificati *cives*. Per contro, coloro che non vantavano o perdevano quegli elementi formali atti a connotarli quale cittadini, o, ancora, versavano in condizioni che, di fatto, li ponevano ai margini, non solo non godevano di adeguate protezioni giuridiche ma, in taluni casi, erano banditi, perseguiti, condannati. [6]

In tale direzione, può rappresentare un interessante campo d'indagine la peculiare situazione politico-istituzionale della Serenissima Repubblica di Venezia a cavaliere tra Quattrocento e Cinquecento, con particolare riferimento ai territori e alle comunità dell'entroterra.

Muovendo dall'esame di fonti custodite negli archivi, quali patti, statuti, ducali e provvisioni, emergono dinamiche di inclusione ed esclusione, praticate nelle città della Terraferma, che consentono di apprezzare le diverse connotazioni e sfumature che assunse la »cittadinanza« nelle terre venete, precisando sin d'ora che esulano dall'esame gli spazi, anche in senso giuridico intesi, del territorio extra-lagunare definito come Stato da Mar.

In particolare, all'incirca dalla metà del XVI secolo, in anni cruciali per la formazione degli stati moderni nel contesto geografico europeo, [7] si registrarono forme sempre più penetranti di *iurisdictio*, [8] esercitate da Venezia, divenuta ormai Serenissima Signoria, verso il suo dominio nell'entroterra.

L'organizzazione di pratiche di governo sempre più disciplinate e coagulate verso il potere centrale

1 Isidoro di Siviglia (*editio* 1801) XV, II, 1.

2 Nella direzione di valorizzare anche l'elemento spaziale quale prospettiva d'indagine sulla città e sul territorio si rinvia alle pagine di Costa (2003); Meccarelli (2015); Marchetti (2006); Mannori (2008). Con riferimento, nello specifico, all'esperienza veneta si rimanda a Fusar Poli (2020).

3 Cassi (2013) 79–80 si sofferma sul valore della città nell'immaginario collettivo medievale.

4 Ascheri (2011); Menzinger (2017).

5 Costa (2005) 3–6.

6 Costa (1999); Milani (2017) 192–193; Zendri (2016).

7 Al riguardo rimando ai contributi raccolti in Fioravanti (2002) nonché a Fioravanti (2010).

8 Il tema impegna da sempre la migliore storiografia ed interseca in prospettiva sincronica e diacronica temi quali quello della sovranità e della cittadinanza. Mi limito a rinviare a Costa (1969), e per l'ambito più strettamente connesso all'esperienza dello Stato veneto a Fusar Poli (2020) 7–8.

si tradussero non solo in forme di controllo amministrativo da parte di Venezia in tutta la Terraferma, ma, altresì, in un progressivo »occuparsi e preoccuparsi« di quei soggetti che potremmo definire »l'altra faccia della cittadinanza«,[9] nel tentativo enfatico ed insistente di perseguire la quiete e la pace del Dominio.

Ed è rintracciando le sorti di tali individui nelle carte d'archivio e le reti di obblighi, divieti, esclusioni che vennero approntate nei loro confronti, che si cercherà di proporre, nelle note che seguono, alcune considerazioni in ordine ai confini, necessariamente mobili,[10] che la cittadinanza ricevette nelle terre soggette alla dominazione veneziana.

II. Appartenenze. La cittadinanza nella Repubblica di Venezia

Per comprendere le declinazioni spazio-temporali che, nei lunghi secoli di vita della Repubblica di Venezia,[11] incontrò la cittadinanza – sebbene, stante la pluralità di forme riscontrate, ben si potrebbe ricorrere al concetto di *cittadinanze* – è opportuno ricordare che, durante il Quattrocento, secolo connotato dall'espansione del Dominio sulla Terraferma,[12] Venezia regolò i rapporti con le Città, che andava via via assoggettando, mediante i cosiddetti *patti di dedizione*.

Per la Serenissima tali patti rappresentavano strumenti giuridico-istituzionali che, unitamente alla mediazione dei Rettori, valevano per impostare, affermare e regolare il dominio sulle città della Terraferma, come ben hanno messo in evidenza gli studi di Gian Maria Varanini e Aldo Mazzacane.[13] Le concessioni pattizie registravano contenuti variabili in funzione del contesto territoriale e delle suppliche e petizioni che il patriziato locale manifestava. L'atteggiamento tutorio e paternalistico, ma parimenti di controllo, che emerge dal tenore delle singole disposizioni pattizie dà la cifra della sovranità che Venezia sarebbe andata esercitando sulla Terraferma, sul crinale di un confronto sempre più acceso con le realtà territoriali, specie quelle al di là del Mincio,[14] pronte ad inoltrare rivendiche e maggiori richieste di autonomia e a non cristallizzare i rapporti alle rubriche del *pactum*.

Lo schema seguito nelle varie dedizioni si ripeteva pressoché inalterato: la città dominata si assoggettava alla Signoria e questa, a fronte del giuramento di fedeltà, si obbligava a riconoscere i diritti quesiti, a mantenere gli assetti istituzionali preesistenti, le consuetudini e i privilegi sussistenti al momento della resa, a riconoscere le norme statutarie, sebbene ne sorvegliasse, con una certa duttilità, le richieste di revisione.[15] Sull'assetto istituzionale preesistente della dominata si andava in tal modo sovrapponendo il regime proprio della Serenissima che riservava alla propria nobiltà gli uffici maggiori e gli incarichi di carattere politico, oltre ad un controllo nella fase delle nomine delle cariche locali.

Il *pactum deditionis* era, dunque, nevralgico per l'impostazione dei futuri rapporti tra Venezia e le città dell'entroterra. Va precisato che il ricorso a forme negoziali tese sia ad instaurare forme di dominio diretto che a regolare pragmaticamente i rapporti economici-fiscali,[16] non era una peculiarità ascrivibile solo a Venezia ma accomunava anche altre esperienze politico-istituzionali e giuridiche del contesto europeo, tese alla ricerca di un equilibrio endogeno, tra centro e periferie, ed esogeno, con altri poteri sovrani. Si pensi, per restare ai confini della Serenissima, al dominio sforzesco-visconteo, di cui ci ha offerto una ricostruzione Giorgio Chittolini.[17]

Venendo ai temi che si intendono in questa sede affrontare, è indubbio che il patto di dedizione costituiva la cornice giuridica entro il quale la cittadinanza, o le cittadinanze, ricevevano definizione. Cornice, tuttavia, non fissa dal momento che la dinamicità dei rapporti con le comunità locali portava spesso a nuove insistenti petizioni e correlativamente, ma non automaticamente, a nuove concessioni e privilegi, destinati ad incidere proprio sul perimetro della cittadinanza e della sovranità.

9 L'espressione è mutuata da Costa (1999) 42.
10 Calore/Mazzetti (eds.) (2019) 3–14.
11 Sulle diverse forme e modelli statuali assunti dalla Repubblica di Venezia, Fusar Poli (2020) 27 e ss.
12 Viggiano (1989); Varanini (2011a); Varanini (2015).
13 Mazzacane (1980); Varanini (1991); Varanini (1995); Varanini (2011b) 26–29.
14 Montanari (2005); Valseriati (2015).
15 Sulle modalità con cui Venezia si approcciò alle importanti *reformationes* statutarie avviate nel Quattrocento nelle città del Dominio da Terra, si veda Viggiano (1993).
16 Rizzi (2015) 238.
17 Chittolini (1978).

Chi poteva reputarsi cittadino? chi poteva acquisire la cittadinanza? quali obblighi e privilegi erano accordati ai cittadini?

Venezia era solita accordare nel *pactum deditionis* la cittadinanza *de intus tantum* ai *cives* della città assoggettate.

Per comprendere la portata di detto riconoscimento, va precisato che i cittadini veneziani erano distinti in originari e acquisiti.[18] I primi erano i nati in Venezia da padre veneziano e, dal 1569, si richiedeva vi abitassero da almeno tre generazioni; i secondi lo divenivano per grazia o per privilegio e in quest'ultima ipotesi, a loro volta, venivano distinti in *cives de intus et extra* e *cives de intus tantum*.

Il cittadino *de intus tantum* godeva di alcuni privilegi che gli consentivano di accedere ad alcuni ministeri minimi della città, all'esercizio di alcune arti principali e ad alcune riduzioni sul pagamento dei dazi e dei tributi; il cittadino *de intus et de extra* godeva, oltre che dei privilegi interni, altresì del potere di navigare con diritto di mercanteggiare nei luoghi e negli scali del Veneto commercio e di godere all'estero delle esenzioni e dei privilegi riconosciuti ai veneziani originari. L'accesso alla cittadinanza *de intus o de extra* era regolata da provvedimenti del Maggior Consiglio e, in seguito, dalla magistratura dei Provveditori de Comun.

È evidente che traducendosi l'acquisizione della cittadinanza in immediati privilegi tra cui quello della navigazione e del commercio, Venezia a più riprese intervenne, soprattutto nel corso dei secoli XIV e XV, con cospicua normativa a definire i requisiti per l'accesso alla cittadinanza *de intus*. Nel 1258, si richiedeva una pregressa residenza di dieci anni nella città di Venezia. Nel 1305 l'obbligo di residenza veniva innalzato a 15 anni per la cittadinanza de intus ed a 25 anni per quella de extra. Nel 1348, i Provveditori de Comun introdussero ulteriori facilitazioni per l'acquisizione della cittadinanza eliminando la tassa d'iscrizione alle Arti e abbassando il periodo di residenza precedente alla concessione. Ulteriori provvedimenti, più o meno temporanei, che favorivano l'immigrazione di mercanti, artigiani e di imprenditori di una posizione sociale elevata furono adottati nel 1371, nel 1382 e nel 1407. Nel 1371 veniva stabilito che chi fosse arrivato con la propria famiglia ad abitare nella città sarebbe stato riconosciuto subito cittadino de intus, previa approvazione dei Provveditori de Comun. Nel 1382 l'obbligo di residenza veniva ulteriormente ridotto ad 8 e 15 anni rispettivamente per la cittadinanza de intus tantum e de intus et extra, mentre nel 1407 veniva offerto il privilegio della cittadinanza de intus immediatamente a coloro che avessero sposato una donna veneziana. Il privilegio della cittadinanza veneziana doveva essere rinnovato ogni cinque anni prestando giuramento alla Repubblica.

Il perimetro entro il quale venne a definirsi la cittadinanza nella Repubblica di Venezia era direttamente determinato dalla particolare articolazione delle fonti del diritto. Venezia, come già ricordato, all'atto della conquista non sovvertiva le fonti del diritto locale,[19] in particolare non uniformava le leggi e gli statuti delle città assoggettate, ne accettava le diversità mossa dall'interesse di affermare la sua sovranità anziché le sue leggi.

Tale sistema, che è stato definito di »separatezza giuridica«, vedeva la compresenza e vigenza di due diversi diritti, che mantenevano la loro identità e rimanevano svincolati da rapporti di tipo gerarchico. Da un lato, il diritto veneziano o veneto, pragmatico e refrattario alla recezione del *ius commune*, sì che in caso di lacuna delle fonti veneziane si ricorreva alla consuetudine (*usum*) e, in sua mancanza, alla »*conscienciam sine fraude*«, che costituiva norma di chiusura di tutto l'ordinamento. Dall'altro lato, vi era il diritto di Terraferma, ricco di particolarismi, ma amalgamato dalla comune matrice romano-giustinianea.

Se i patti di dedizione dettavano le linee fondamentali per l'acquisizione ed il mantenimento dello *status* di cittadino in rapporto con Venezia, parimenti ogni città del Dominio manteneva in vigore il proprio diritto locale, i propri *Statuta civitatis*, dove regolava la condizione giuridica del

18 Sull' acquisizione e godimento della cittadinanza nella Repubblica di Venezia si rinvia agli studi di Zannini (1993); Casini (1992); Mueller (1998); Molà / Mueller, (1994); Calabi (1996); Trebbi (2001); vallerani (2017) 136 e ss.

19 Sul rapporto *ius proprium - ius commune* si vedano senza pretesa di esaustività alcuna Ascheri (2000) 153 e ss.; Bellomo (1999) 217 e ss., 475 e ss.; Caravale (1994) 258–266, 473–490; Cavanna (1982) 45–53, 59–65, 70–74; Cortese (1995) 247–304; Di Renzo Villata (2006), 217 e ss; Grossi (2006) 223–235; Grossi (2007) 48 e ss., 56 e ss.; Birocchi / Mattone (2006); AA. VV. (1980); Padoa Schioppa (2016).

cittadino, originario di quel territorio, e con esso dei suoi beni. Gli *Statuta* avevano validità ed efficacia circoscritte entro i confini territoriali della città che li aveva emanati secondo le formule »*Statuentes non possunt extra territorium statuere*« (gli statuti non possono ordinare extra-territorio) e »*statutum non ligat nisi subditos*« (lo statuto non obbliga che i sudditi).[20]

Si prenda, ad esempio, una delle città del Dominio, Brescia. La rubrica 202 degli *Statuta Civitatis* prevedeva che lo stato di civis si acquisiva »*si protestatus fuerit coram abbate, et ancianis comunis brixie, se velle stare et habitare continue, vel pro maiori parte anni, in civitate brixiae, cum familia sua, et approbatus fuerit per dictos abbatem et ancianos homo bonae conditionis*«. Ai forenses, che si trovassero in terra bresciana »*causa laborandi vel aliqua artem exercendi*« e che godessero di buona opinione e fama, venivano garantite »*immunitate reali et personali per decem annos continuos*«, ma pur sempre era richiesto che esercitassero una qualche arte e avessero una buona reputazione.[21]

La non extraterritorialità dello statuto poneva problemi circa la condizione degli stranieri: a quali leggi dovevano rispondere? La *scientia iuris*, a partire da Bartolo da Sassoferrato in avanti, sosteneva che lo straniero seguiva per le condizioni personali (intese quali capacità d'agire, età legittima, interdizione) la legge del luogo ove era originario e per i beni posseduti la legge del luogo ove erano siti.[22]

Tali criteri incontravano eccezioni specie in ambito criminale dove la legge penale da applicarsi era la *lex loci commissi delicti* e non lo statuto del luogo di origine o di domicilio. Si riconosceva alla *respublica* o al *princeps* il potere di emanare norme valide sul territorio posto sotto la loro giurisdizione da applicarsi a tutti coloro che a diverso titolo vi dimoravano o transitavano, indipendentemente dalla loro condizione di stranieri o cittadini.

A partire dal Cinquecento, ed in particolare dopo la sconfitta di Agnadello, detta *iurisdictio* venne esercitata da Venezia con sempre maggiore intensità. La necessità di conservare l'*auctoritas* e la *potestas*, anche al cospetto dell'Europa, sulle terre difese, si tradusse, oltre che in un esercizio sempre più accentrato dell'amministrazione della giustizia e dell'imposizione e riscossione capillare di imposte, altresì in un maggiore controllo di coloro che dimoravano in quelle terre, il tutto declinato secondo la formula, quasi mitizzata, del ›buon governo‹.[23]

III. Esclusioni

È nella cornice giuridico-istituzionale, come sopra tratteggiata, che Venezia sollecitava ed imponeva alle Città, facenti parti del suo Dominio da Terra, l'adozione di un'imponente legislazione per arginare la pericolosità di quei soggetti, reputati »*perturbatori della quiete e del pacifico vivere*« dell'intero Dominio.

Il Consiglio dei Dieci, organo di polizia e tribunale criminale che poteva ingerirsi in qualsiasi materia che riguardasse la quiete e sicurezza dello Stato e la libertà dei sudditi,[24] ordinava di controllare, espellere e reprimere, con pene variabili, tutti coloro che mettevano a repentaglio l'incolumità della vita e dei beni dei sudditi che abitavano quelle terre nonché »il quieto e pacifico vivere« del Dominio.

Nelle ducali e nei decreti che Venezia inviava alla Terraferma e le cui disposizioni andavano inevitabilmente ad intrecciarsi, se non a sovrapporsi, con lo *ius proprium* già in vigore nelle singole *civitates*, pare di cogliere un processo di progressivo e pragmatico accentramento della sovranità, tale da far venire meno quella »separatezza giuridica« che aveva caratterizzato, sin dagli anni lontani del patto di dedizione, i rapporti tra le città dominate e la Dominante.

Si moltiplicavano non solo gli interventi normativi, ma altresì gli atti di controllo amministrativo che vedevano nei Rettori i principali intermediari e cerniere di collegamento con Venezia, invitati ad intensificare il loro controllo ed azione.

Il »buon governo«,[25] il cui perseguimento veniva alimentato e quasi mitizzato da Venezia con toni sovente di retorica paternalistica, specie dopo la sconfitta di Agnadello, non si limitava ad inter-

20 Sul rapporto tra straniero e legislazione, anche statutaria, si rimanda a Ascheri (1988), Ascheri (1989) e Storti (1990).

21 Paletti (2018) 128.

22 Storti (2012).

23 Fusar Poli (2020) 104–105.

24 Maranini (1974) 384–472.

25 Benzoni (2011) 270–271.

essare il buon funzionamento della giustizia e la pace, ma altresì la sicurezza all'interno del Dominio.

Può venire qui nuovamente in soccorso l'esempio del distretto di Brescia, tra i più vasti ed economicamente produttivi di tutta la Terraferma, che veniva »interessato« da questa normazione ed invitato a rispettare le leggi del Dominio prima ancora di quelle espressione della sua *potestas*. I decreti del Consiglio dei Dieci, inviati con lettere ducali, venivano registrati nella Cancelleria Prefettizia della Città con ordine di procedere alla pubblicazione »ne' loci soliti« e con ordine di farli osservare in ogni loro parte e per tutto il distretto soggetto alla giurisdizione del Rettore destinatario.

In detti provvedimenti ricorrevano, con incessante e sempre più intensa frequenza, disposizioni contro forestieri, mendicanti, vagabondi, zingari, banditi.

Vale dunque la pena soffermarsi brevemente su detti soggetti, sulla rete di obblighi e divieti di cui furono destinatari così da verificare quanto queste misure siano state atte ad incidere sul loro rapporto con le comunità locali e con lo Stato veneto e, in ultima istanza, sulla dimensione della cittadinanza nell'esperienza veneta.

1. Vagabondi

Se già glossatori e commentatori si erano interrogati sulla categoria del vagabondo giungendo a configurarlo come persona effettivamente priva di domicilio o di una residenza fissa e come tale »priva di giurisdizione«,[26] anche successivamente la dottrina non smise di interrogarsi su tale figura, animata dal tentativo di dare una puntuale descrizione di quei soggetti, le cui condotte ed i cui comportamenti, equivoci e mutevoli, e come tali non facilmente inquadrabili, andavano ad intercettare l'area del giuridicamente rilevante, ed in ispecie, in una sorta di *climax* negativo, l'area del criminale.

Interessante la qualifica che ne dava Jacopo Menochio,[27] nei suoi commentari *De arbitrariis iudicum quaestionibus et causis*.[28] Egli scriveva che vagabondi, birboni, finti mendicanti o finti infermi e simili persone viziose ed odiose, erano odiati e riprovati dalle leggi tanto antiche che moderne, dovendo intendersi per vagabondi quelli che vanno vagando per il mondo e non hanno sede o abitazione fissa in alcun luogo, e tra essi dovevano includersi i banditi, da reputarsi vagabondi quando non eleggono domicilio in alcun luogo.

La condotta del vagabondo ricevette nella Repubblica di Venezia una progressiva criminalizzazione.[29] L'errare per le terre del Dominio senza una professione o occupazione non era più condotta neutra e tollerata dalla Repubblica: degradata a criminale, essa veniva perseguita con vigorosi proclami e ducali, che andavano ad arricchire ed integrare, non sempre organicamente, il pluralistico sistema delle fonti delle città dominate. L'esigenza di controllare gli spostamenti, specie del tempo notturno,[30] ritenuti forieri di pericoli, violenze e disordini rispondeva ad una politica preventiva e di mantenimento dell'ordine pubblico.

E così in una decisione del Consiglio dei Dieci del 1567 si ordinava a tutte le Città del Dominio di espellere »tutti gli homini vagabondi et ociosi, così terrieri come foresti che non cavano il loro vivere et vestir o da sue intrate o da qualsiasi essercitio et arte«. La pena per chi fosse stato trovato nei confini dello Stato, oltre il termine indicato, era la galea con i ferri ai piedi per tre anni continui e, in caso d'invalidità a vogare, la prigione per il medesimo periodo. Non bastando, nel 1574 il Consiglio ritornò a normare sui vagabondi precisando che tali dovessero essere considerati anche coloro »che servono per bravi accompagnando particolari con le armi«. Venivano puniti anche coloro che li ospitavano »in casa overo in Camera locanda overo altrove a loro spese et salario o senza«, con il bando di dieci anni dalla città o dal territorio del quale erano sudditi o, qualora fossero forestieri, banditi dal dominio per il medesimo periodo di tempo.

La costante dilatazione del termine »vagabondo« ed il continuo inasprimento delle pene erano, tuttavia, segni di una giustizia inefficace, condannata più a scrivere la legge che ad applicarla.

26 Storti (2013) 70–73; Storti (2012); Dani (2018) 75 e ss.

27 Sulla figura di Menochio si rinvia a Valsecchi (2009), nonché Valsecchi (2013); Beretta (1990); Holthöfer (1995); Birocchi (2002) 244–246; Padoa Schioppa (2016) 288–289.

28 Menochio (1600), Casus CCCCCXXXI, *Vagabundi qui et de eorum poenis brevis explicatio*.

29 Meneghetti Casarin (1984).

30 Sulla notte quale *tempus mala praesumptio*, si veda Sbriccoli (1991).

2. *Gli zingari*

La categoria di soggetti contigua a quella dei vagabondi era quella degli zingari, o *cingani*, che il giurista veneto Marco Ferro nel suo *Dizionario* ebbe a definire »una sottocategoria dei vagabondi«.[31]

Degli zingari si sanzionava la vita errabonda e si lamentava che avessero la propensione a creare disordini nei luoghi in cui fissavano la loro dimora. Non mancavano sospetti poi intorno ad una loro intima propensione al crimine. I documenti d'archivio riportano frequenti provvedimenti che Venezia imponeva a tutte le terre del Dominio per la repressione e l'allontanamento »sfratto« degli zingari dal Territorio.[32]

Valgano su tutti, due provvedimenti, tra i tanti prodotti da Venezia, per dimostrare quanta viva fosse l'esigenza di interdire agli zingari l'accesso alla comunità e alla sua vita e, al contempo, rendere ostile ogni loro permanenza sul suolo veneto al punto da sottrarre loro ogni forma di tutela anche personale.

Nel dicembre del 1549, il Consiglio dei Pregadi ordinava a tutti i Rettori di Terraferma di non »non far più Patenti, né in Voce dar licentia ad alcun Cingano, Vagabondo di poter venire e stanziare nel Dominio« e, al medesimo tempo di »mandar fuori dalle Territori«, affidati alla loro reggenza, tutti i cingani e vagabondi entro dieci giorni dalla pubblicazione del proclama.

Di lì a qualche anno nel 1558, il Senato stabiliva l'immunità per chi avesse catturato o ucciso uno zingaro che vagava nelle terre del Dominio. L'*impune occidi* da misura straordinaria ed eccezionale diveniva in tal modo il mezzo privilegiato dall'ordinamento della Repubblica di Venezia per sopprimere coloro che, a causa del loro errare, si classificavano criminali.

3. *I banditi*

Un'altra categoria destinataria a più riprese di un sempre maggiore interesse da parte delle autorità veneziane era quella coagulata attorno al lemma »bandito«.

In ispecie dalla seconda metà del Cinquecento, l'imponente produzione normativa della Dominante estese e dilatò la portata giuridica del termine »bandito«,[33] oltre i confini che, almeno sino alla prima metà del Cinquecento, gli statuti cittadini e la disciplina dello *ius commune* le avevano conferito.

Banniti o banditi erano coloro che venivano colpiti da un provvedimento di bando per non essere comparsi nel termine della citazione in giudizio o dell'inquisizione avanti al podestà o al suo giudice del maleficio. La contumacia, qualora non veniva sanata, aveva il valore di una confessione e l'imputato contumace veniva condannato. Il bando era quindi uno strumento di natura processuale che comportava la sospensione delle tutele giudiziarie sino a che il contumace non adempiva all'obbligazione.[34]

Fu solo dall'età moderna in avanti, come rilevato da Mario Sbriccoli, che la criminalistica iniziò ad elaborare il crimine di banditismo.[35] I giuristi di diritto comune preferivano individuare ed isolare quei comportamenti, tipicamente riconducibili al *modus operandi* dei banditi e che costituivano autonome fattispecie (*latrocinium*, *depraedatio*, *crassatio*, etc). Per contro con l'affermarsi delle potenze territoriali e della loro sempre più estesa *iurisdictio* sul finire del Cinquecento il bandito divenne colui che, colpito da bando, era per ciò stesso criminale.

Rispetto ad altre esperienze giuridiche coeve, la legislazione veneziana seppe mantenere distinto lo strumento del bando dai crimini ulteriori che colui che era stato colpito da bando andava compiendo.[36]

E tuttavia, l'esame delle fonti restituisce l'immagine di cospicui e talvolta contraddittori interventi delle autorità veneziane, volti ad arginare la piaga dei banditi che commettevano nelle terre del dominio »delitti scellerati«.

La politica veneziana mirava a controllare capillarmente il territorio della Terraferma e progressivamente avocare a sé l'amministrazione della giustizia che riguardava i »banditi«.

Sistemi di impunità, graduati secondo la gravità del delitto, venivano concessi a coloro che catturavano un bandito, a cui si accompagnavano sotto

31 Ferro (1778–1781) 834.
32 Fassanelli (2011).
33 Lacchè (1988) 359–376.
34 Milani (2017) 179.
35 Sbriccoli (1986) 488.
36 Lacchè (1988) 359–376.

forma premiale taglie di diversa entità e la possibilità di depredare legittimamente il bandito di tutti i suoi beni. Quand'anche poi fosse intervenuta la liberazione dal bando, al bandito »liberato« erano interdetti la circolazione ed il transito nelle terre dalle quali era stato bandito, salvo intervenisse la pace di chi era stato offeso o, in via suppletiva, la decisione dei Rettori.[37]

4. *Mendicanti*

Merita, infine, un cenno il tema dei mendicanti. Le fonti normative che si occupano di tali soggetti sono prevalentemente locali: è lo *ius proprium* della città a dominare, mentre quello veneziano rimane ai margini.

Si trattava per lo più di norme atte a disciplinare forme di assistenza e soccorso a chi si trovava in condizioni economiche e sociali svantaggiate,[38] ma altresì a distinguere i veri mendici dai falsi mendici, in forza di alcuni caratteri di contiguità che le autorità ravvisavano con i vagabondi.

La lettura delle fonti ci consegna prevalentemente due ordini di ragioni che inducevano le cariche cittadine tra cui anche i Rettori, diretta espressione e raccordo tra le autorità veneziane ed i Consigli locali, ad intervenire e ad istituire, da un lato, aiuti e, dall'altro, forme di controllo contro presunti abusi.

Il primo motivo congiungeva elementi di ordine strettamente spirituale, *salus animarum*, con quelli più laici di tutela della *sanitas*: ottenere la salvezza nel »giorno orrendo del giudizio« ma altresì la protezione della Città dai pericoli delle calamità e della peste. Il processo diventerà sempre più marcato nel corso del Cinquecento: poveri e mendicanti passeranno dalle cure della Chiesa, che in loro vedeva *alteri Christi*, alle cure della città o, per usare la felice espressione di Giorgio Cracco, passavano dalla »misericordia della Chiesa alla misericordia del principe«.[39]

Il secondo ordine di ragioni riguardava la necessità di riportare ordine e decoro alla città la cui quiete si riteneva essere stata »perturbata« dai poveri mendicanti. Coloro che fossero stati sorpresi a mendicare tra le mura della città, ma erano abili al lavoro, erano giudicati non meritevoli di alcun soccorso.[40]

Ed è nel ravvisare in loro potenziali »ministri di sceleragine« che le autorità veneziane giustificavano il loro intervento a fianco di quelle locali. L'adozione di provvedimenti che limitavano giorni e luoghi delle questue, l'avviamento degli abili al lavoro a mestieri utili per la cosa pubblica, la condanna a ricoveri coatti presso istituti creati appositamente dalle cariche cittadine, l'espulsione dalle mura della città con ordine di non farvi più ingresso rappresentavano le maglie di una rete di obblighi e divieti tese a confinare e punire chi della mendicità faceva un uso non tollerato, perché considerato destabilizzante della pacifica vita del Dominio.

Il disvalore verso condotte di vita reputate ignave e verso un impiego del corpo »non sano« perché orientato all'ozio e non al lavoro sarebbe diventato il filo rosso degli interventi normativi ed amministrativi della Repubblica contro i *pauperes* richiedenti l'elemosina, non graditi alle autorità e come tali degni di repressione ed espulsione.[41]

IV. Cenni conclusivi

Entro il quadro sopra prospettato, pare di poter svolgere in via conclusiva almeno due ordini di rilievi.

Un primo rilievo riguarda direttamente i protagonisti / destinatari degli interventi delle autorità veneziane e locali. Vagabondi, banditi, forestieri, zingari, mendicanti, ognuno con le proprie *qualitates* personali, non rispondevano ad un unico »*tipo*«, né godevano del medesimo »*status*« giuridico dal momento che i lemmi, impiegati dal legislatore veneziano, all'incontro con quelli del legislatore della città di Terraferma, erano polisemici, frutto ed espressione di dinamiche storico-sociali e territoriali differenti. Condividevano, tuttavia, la medesima condizione di fondo: erano individui collocati »ai margini« della Repubblica, non integrati nei suoi spazi giuridici ed estranei – si pensi ai banditi – alla rete di tutele e privilegi di cui godevano gli altri cittadini. La normazione, che sempre più copiosa andò ad interessare detti soggetti, era tale da racchiudere in sé elementi dall'impatto quasi »costitutivi« poiché andava introducendo, indirizzando e plasmando, nello spazio e

37 Paletti (2018) 175–177.
38 Pullan (1982); Pullan (1994).
39 Cracco (1989).
40 Di Simone (2018); Geremek (1999); Geremek (2001) 123 e ss.
41 Paletti (2020).

nel tempo, lo *status* giuridico di detti soggetti e così del *civis*, o del buon *civis*, della Repubblica di Venezia.

In secondo luogo non può non rilevarsi come il progressivo indirizzarsi delle autorità veneziane verso un modello di governo dell'intero territorio più accentrato ed uniforme, sebbene, almeno sino al XVI secolo, ancora sensibile alle diverse realtà locali, impresse un nuovo corso all'idea di cittadinanza veneta e veneziana. L'adozione di un rilevante numero di ducali, proclami, ordini dai contenuti, quanto meno per la sede che ci occupa, ripetitivi, andava consolidandosi e pervadeva i sistemi giuridici locali pur senza soppiantarli, anzi sovrapponendosi. Permanevano le norme di diritto locale a regolare appartenenza e partecipazione dei cittadini alla comunità, ma andavano aggiungendosi nuove disposizioni dalla Dominante, preoccupata di escludere e negare l'appartenenza al Dominio per coloro che sovvertivano l'ordine e la pace che si era prefissa di garantire e preservare ai suoi sudditi.

Da dette forme di »estraneità« alla *civitas*, decretata ed, al contempo, accentuata per il tramite di provvedimenti repressivi e restrittivi, si ritiene possano trarsi utili elementi per una lettura critica della cittadinanza tra tardo medioevo e prima età moderna.

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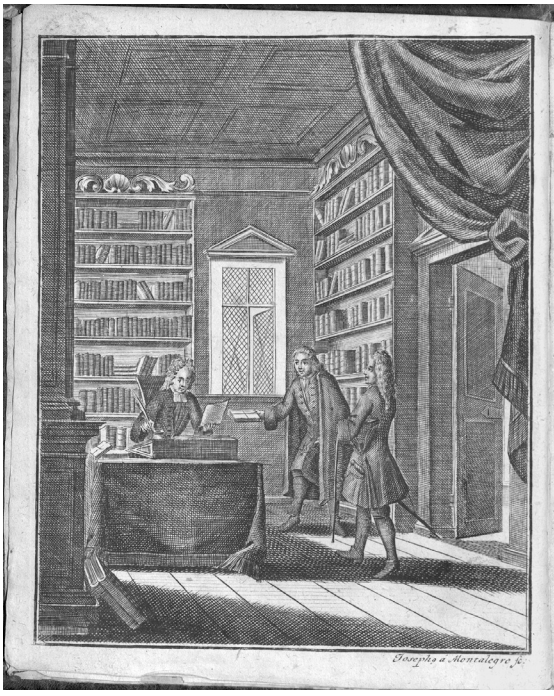

Joseph a Montalegre f.

Vollständiges

Und nach dem heutigen Curial-Stilo eingerichtetes

FORMULAR

Darinnen

Verschiedene Instrumenta und Wechsel-Protest, wie sie von denen Notariis ausgefertiget werden, allerhand Obligationes und Schuld- Bürgschafft und Gesellschafts-Verschreibungen, Kauf- Mieth oder Bestand Tausch- und Vertausch-Briefe, Vollmachten, Inventarien, Beschreibungen, Theil-Zettul, Kauf- und Verkauf-Register, Vormundschafts- und Curatel-Rechnungen, Donationes, Leben- und Wechsel-Brief, Verträg und Vergleiche, Compromissen, Cessiones, Delegationes, Verzicht und Quittungen, Testamenta, Codicillen, Legat-Zettul, Testaments-Beylagen, Heyraths-Pacten, Einkindschafften, Lehr-Abschieds- und Geburts-Briefe, Cautiones, Reverie, Vocations- Praesentations- und Intercessional-Schreiben, allerhand Arten von Suppliquen, Klag-Libellen und andern gerichtlichen Productis, und dergleichen mehr, zu finden und anzutreffen sind;

Nebst

Einer gründlichen Erklärung und kurtzen Anweisung, wie solche zu verfertigen, was für Cauteln darbey zu beobachten, auch was die in diesen und dergleichen Negotiis vorkommende Exceptiones, Beneficien und Clausuln für einen Effect und Würckung haben.

Allermäniglich/

Bevorab aber denen Studiosis, Procuratoribus, Notariis, Actuariis, Beamten, Schreiberey-Verwandten, und andern angehenden Practicis, zum täglichen Gebrauch und Nutzen

Heraus gegeben von

Joh. Jodoco Beck, JCto Hochgräflich Hohenloh-Neuensteinisch- und Hochgräflich Giechischen Rath, der Hochlöbl. Republique Nürnberg Consiliario, bey der Universität Altdorf Pandectarum Professore Publico, und Facultatis Juridicæ Assessore Ordinario.

Nunmehro bey dieser

Fünfften Auflage

Aufs neue revidirt, von denen vorigen Druckfehlern gereiniget, auch an vielen Orten verbessert und vermehrt, und mit einem vollständigen Register versehen.

Mit Röm. Kayf. Majest. allergnädigster Freyheit.

Franckfurth und Leipzig,

In Commission Joh. Georg Lochners, Buchhändlers. A. 1750.

Florian Reverchon

Citoyenneté et identités religieuses dans la doctrine allemande du droit public ecclésiastique au XIX^e^ siècle. Aux sources intellectuelles du modèle allemand de sécularisation

En 2019, l'hebdomadaire *Der Spiegel* attirait l'attention de l'opinion publique allemande sur la situation d'une citoyenne, se disant athée, à qui l'Église protestante de Berlin réclamait le versement de l'impôt religieux (*Kirchensteuer*) assurant le financement des cultes.[1] Cette affaire illustre une particularité, partagée par l'Allemagne et quelques autres pays en Europe: le baptême est, pour l'État, un acte juridique, générateur d'obligations – fiscales en l'occurrence –, auxquelles on ne met fin qu'en déclarant à l'administration quitter l'Église concernée (*Kirchenaustritt*). La foi (ou son absence, si l'on se *déclare* sans religion) appartient donc à l'identité du citoyen, et non seulement, comme dans les pays sous un régime de stricte laïcité, à celle de l'individu.

Telle est la conséquence nécessaire du système de reconnaissance des cultes au sein de l'État: la plupart des communautés sont juridiquement organisées, au niveau fédéral ou régional, sous la forme de corporations du droit public, *Körperschaften des öffentlichen Rechts*, jouissant d'un statut protecteur,[2] exorbitant du droit commun des associations. L'État ne reconnaît pas en elles de simples fondations d'utilité publique, mais leur délègue des prérogatives essentiellement régaliennes, comme celle de lever l'impôt pour financer leurs activités.[3] En outre, l'État, loin d'être indifférent aux appartenances religieuses ou de les considérer comme des questions purement privées, se charge d'assurer à celles-ci une visibilité dans l'espace public, y compris à l'école, lors des cours de religion, et à l'université, dans les facultés de théologie.[4] Une branche du droit public, le *Staatskirchenrecht* (droit public ecclésiastique), enseignée à l'université, regroupe les normes étatiques régissant les corporations religieuses.

Celles-ci reposent principalement sur cinq articles, issus de la Constitution de Weimar (art. 136–139 et 141 WRV), intégrés à la Loi fondamentale par renvoi (art. 140 GG). Ceux-ci garantissent l'indépendance des droits civiques à l'égard de la religion (art. 136, aujourd'hui redondant avec l'art. 4) et permettent à toute association religieuse, pourvu qu'elle soit assez stable, d'obtenir le statut privilégié de corporation publique (art. 137). Tel est le cas des diocèses catholiques et des *Landeskirchen* protestantes (fédérées en une *Evangelische Kirche in Deutschland* commune aux luthériens et aux réformés), mais aussi des diocèses des Églises orthodoxes, de nombreuses Églises libres chrétiennes et des communautés juives (regroupées dans le *Zentralrat der Juden*) et bouddhistes.[5] Les cinq millions de musulmans vivant en Allemagne, en revanche, n'ont pas d'organisation similaire.[6] L'égalité, formellement établie, peine ici à se traduire dans les faits. L'ouverture de principe à toutes les religions n'empêche pas, au reste, un relatif conservatisme: la constitution assure aux seuls cultes – en réalité presque tous chrétiens[7] – déjà organisés de fait en corporations publiques en 1919 de conserver leur statut, quand les autres,

1 Hipp (2019).
2 Scheuner (1974) 76.
3 BVerfGE 102, 388, évoque des »attributions de souveraineté« (hoheitliche Befugnisse), citant le droit de lever l'impôt; la soumission des contrats de travail avec leurs employés à des règles dérogatoires du droit commun, proches, mais non identiques à celles des fonctionnaires (*Dienstherrnfähigkeit*, cf. Campenhausen (2006) 252–254); l'octroi du statut de bien public à certains éléments de leur patrimoine (*Widmungsbefugnis*).
4 Campenhausen (2006) 196–250 parle à ce sujet d'»affaires communes« (*gemeinsame Angelegenheiten*), soit exactement l'expression utilisée au XIX^e^ siècle.
5 La liste complète des corporations reconnues, au niveau régional, est disponible sur le site du ministère de l'Intérieur allemand. Elle comporte également certaines associations spirituelles laïques (*Weltanschauungsgemeinschaften*).
6 Seule, à notre connaissance, une association du culte ahmadiste, dissidence de l'islam apparue au XIX^e^ siècle, s'est fait reconnaître, en Hesse, comme *Körperschaft des öffentlichen Rechts*. Les communautés turques n'y sont pas parvenues.
7 Demel (2011) 87–138.

après avoir dû le demander, peuvent, en théorie, le perdre.[8]

Le droit revendique donc l'empreinte de l'histoire. De fait, la Constitution de Weimar reprenait déjà, sans guère modifier son esprit général, un mécanisme mis en place par la plupart des États allemands au cours du XIX[e] siècle. La question confessionnelle y avait été résolue, non par la dissociation pure et simple entre citoyenneté et religion, mais par l'organisation d'une parité institutionnelle entre Églises catholique et protestante.[9] Selon la présentation stylisée et systématique qu'en donnait la doctrine juridique, celles-ci, en tant que *öffentlich-rechtliche Korporationen*, jouissaient de toutes sortes d'avantages (*Schutzrechte*, y compris l'impôt cultuel, généralisé dans la seconde moitié du siècle), avec pour pendant une ingérence renforcée de l'État (*Aufsichtsrecht* justifiant le contrôle du choix des évêques catholiques ou la représentation de l'État au sein des consistoires protestants). Cette économie d'ensemble, que les juristes nommaient *Kirchenhoheit* (traduction allemande du latin *jus majesticum ecclesiæ* évoquant l'idée d'une souveraineté propre de l'Église dans son domaine, reconnue par l'État) et s'efforçaient de retrouver dans la plupart des régimes concrètement en vigueur dans les territoires de l'Empire, offrait un modèle distinct du *territorialisme* d'Ancien Régime (où les princes protestants considéraient l'Église comme une administration relevant de leur souveraineté) ou du *gallicanisme* dans ses fondements absolutistes, distinct également de la *théocratie* ou de la *reconnaissance d'une Église d'État* (les États allemands n'*ont* pas de religion, disait-on), distinct enfin de la *séparation* (où les cultes relèvent de la simple police administrative). Il traduisait une forme d'alliance singulière entre les deux confessions chrétiennes dominantes et l'État, destinée, non à assurer l'égalité entre tous les cultes, mais à préserver le rôle public de la religion dans le cadre d'une nation se pensant biconfessionnelle.

En 1919, à l'Assemblée nationale constituante de Weimar, les conservateurs souhaitaient maintenir ce système, au contraire des sociaux-démocrates, partisans de séparer l'État des Églises, pour faire de celles-ci de simples associations privées, comme en France. Le compromis final, proposé par le libéral Friedrich Naumann, fut de renoncer à la séparation, mais en permettant à toutes les sociétés religieuses d'acquérir les droits d'une corporation publique.[10] Ainsi préservait-on les usages existants, et les juristes le vocabulaire habituel, tout en *organisant le pluralisme*. En 1949, faute d'un accord entre la CDU et le SPD, ces articles furent intégrés sans changement dans l'actuelle constitution.

La doctrine allemande contemporaine a donc raison de souligner que, en dépit d'évolutions sensibles portées notamment par la jurisprudence du Tribunal constitutionnel de Karlsruhe, les mécanismes fondamentaux du *Staatskirchenrecht*, à commencer par celui consistant à choisir les sociétés religieuses qu'on veut privilégier, n'ont guère changé depuis deux siècles.[11] Les mêmes institutions, initialement destinées à affirmer l'identité chrétienne de la société allemande, permettent aujourd'hui d'assurer la neutralité religieuse de l'État[12] (que Richard Puza qualifie de »positive«,[13] pour la distinguer de la neutralité-abstention des pays laïques). Dans le processus de sécularisation des sociétés modernes et de leur droit, l'Allemagne a ainsi suivi une voie différente de la France, de la Belgique ou de l'Italie: le moment le plus décisif n'y fut pas un conflit entraînant la rupture de l'État avec une Église dominante, la séparation et la proclamation de la liberté religieuse comme moyen de défense, mais la décision de traiter paritairement les catholiques et les protestants, sans remettre en cause la participation institutionnelle des Églises. Par la suite, l'idée que l'État favorise les religions demeura et fut approuvée par les juristes: la question fut seulement et reste encore de savoir lesquelles doivent l'être. Partant, les identités religieuses n'ont jamais quitté le champ du politique, et, si l'État peut se montrer neutre à leur égard en refusant toute discrimination sur ce fondement, il ne peut leur être tout bonnement indifférent.

8 Art. 137 § 5 WRV. C'est pourquoi la doctrine distingue, dans un jeu de mots devenu habituel, entre corporations *gekoren* (élues) et *geboren* (originaires).

9 Tout un courant théologique était favorable alors à l'union des Églises protestantes, y compris au plan dogmatique. Des institutions (synodes ou consistoires) communes furent créées dans certains États, notamment la Prusse.

10 Cf. Kim (1996); Morlok (2018).

11 Scheuner (1974) 10.

12 BVerfGE 19, 216; Schlaich (1972).

13 Puza (2005) 517.

Cette coopération traduit un choix politique, le refus de la séparation. Juridiquement, celui-ci a trouvé de solides défenseurs auprès de la majorité des professeurs de droit ecclésiastique (*Kirchenrecht*) du XIX^e^ siècle, qui tentèrent de justifier la compatibilité entre le principe de liberté religieuse et celui d'un »État chrétien«. Dans cette matière où la législation des États, peu abondante, laissait place aux constructions purement doctrinales – qui à leur tour devenaient le cadre mental des juges et fonctionnaires de l'administration formés par le droit –, ils imposèrent une systématique et un vocabulaire communs qui se retrouvèrent, notamment par l'intermédiaire de l'influent titulaire de la chaire de *Kirchenrecht* à Berlin et député à Weimar en 1919, Wilhelm Kahl, dans la constitution.[14]

Pour éclairer la tension, présente encore aujourd'hui, entre l'octroi d'un statut public à des institutions religieuses au sein de l'État et l'affirmation simultanée de sa neutralité confessionnelle, il est donc impossible, à côté de facteurs politiques qui jouèrent un rôle évidemment non négligeable, de ne pas s'intéresser à la construction scientifique de ce droit »savant« qu'était le *Staatskirchenrecht*. La question des relations entre l'Église et l'État, qui, dans la plupart des pays, fut surtout politique – le débat se jouait à la chambre ou dans les journaux –, était en effet étudiée et enseignée en Allemagne au sein des universités. C'est en tentant ici d'esquisser les contours de ce que serait une histoire intellectuelle du droit ecclésiastique public, dans la période, le XIX^e^ siècle, où il acquit ses traits fondamentaux, que nous voudrions donner quelques clefs interprétatives du processus de sécularisation juridique en Allemagne.

L'affirmation d'une citoyenneté indépendante la religion, achevée en 1871 avec l'émancipation des Juifs, fut un processus long, qui ne conduisit pas non plus à chasser totalement les appartenances confessionnelles du champ du droit (I). C'est que, majoritairement, on se ralliait alors à une conception chrétienne de l'État, qui ne saurait être indifférent à la religion. Les professeurs enseignant le droit ecclésiastique donnèrent corps à cette idée en justifiant, par un système original marqué par un point de vue fondamentalement chrétien, les lois qui la mettaient en application (II). Ce système ne fut pas remis en cause par la libéralisation incontestable de leurs idées à la fin du siècle, ni par la conception d'un *Staatskirchenrecht* autonome se rapprochant de la notion purement administrative de »régime des cultes« (III).

I. L'émergence d'une citoyenneté indépendante de la religion

Dans le premier quart du XIX^e^ siècle, toutes les distinctions juridiques entre sujets de confession chrétienne avaient cessé d'exister dans les États allemands. La liberté de conscience et de culte en leur faveur était affirmée dans la plupart des constitutions. L'article XVI de l'Acte de la Confédération germanique de 1815, en imposant de reconnaître l'égalité civile et politique entre tous les chrétiens, ne faisait d'ailleurs qu'entériner des réformes déjà introduites dans la majorité des territoires pour faire de tous les chrétiens des citoyens (*Bürger*) à part entière (édit de tolérance prussien de 1788, en faveur des catholiques, luthériens et réformés, repris dans l'ALR de 1794; *Religions-Edict* wurtembergeois de 1806; *Religionsedikt* bavarois de 1809 en application de la constitution de 1808, repris dans la constitution de 1818). Cette évolution, portée par l'esprit du temps et des souverains éclairés, était en outre rendue nécessaire par les redécoupages territoriaux consécutifs à la sécularisation des principautés ecclésiastiques en 1803 et au congrès de Vienne, qui firent apparaître de fortes minorités confessionnelles au sein d'États auparavant assez homogènes (Rhénanie catholique en Prusse, Franconie protestante en Bavière).[15]

Toutes les difficultés concrètes ne disparurent pas avec cette émancipation juridique. Le mariage, soumis au droit civil quant à ses effets, relevait encore (jusqu'à l'introduction du mariage civil dans tout l'Empire en 1875) de la compétence des Églises quant à ses conditions de validité. Chaque citoyen était donc soumis, en cette matière, au droit interne de l'Église dont il relevait, ce qui complexifiait les unions mixtes entre catholiques et protestants. Le droit canonique, depuis 1741, les tolérait à la condition que l'époux pro-

14 Landau (1993) 409.

15 Pour les détails de ces réformes, cf. entre autres Huber (1957) ou Link (2017).

testant promît par écrit de baptiser et d'élever les enfants issus du mariage dans la foi catholique. Lorsque le roi Frédéric-Guillaume III de Prusse étendit en 1825 aux provinces rhénanes un règlement désignant la religion du père (éventuellement protestant) pour l'éducation des enfants, il rencontra l'opposition du très ultramontain évêque de Cologne, Clemens von Droste zu Vischering (1773–1845), nommé en 1835. La brouille culmina en 1837, lorsque l'évêque récalcitrant fut démissionné par le roi (qui n'en avait du reste guère le pouvoir), puis, devant son refus d'obtempérer, emprisonné. Cet épisode, qui trouva une issue négociée quelques années plus tard, souligne les limites de la liberté religieuse, dont l'exercice se trouvait empêché par l'absence de sécularisation de domaines traditionnellement laissés à l'Église et par l'intégration de données confessionnelles dans la législation même de l'État.[16]

Les autres cultes, quoique tolérés, étaient placés dans une situation moins avantageuse. C'est ainsi que, au plan individuel, le sort des Juifs fut soumis à de longues vicissitudes.[17] Certaines réformes éclairées, au début du XIX[e] siècle, leur avaient accordé une quasi-égalité civile les écartant seulement de certaines fonctions publiques: *Konstitutionsedikt* du Bade (1809) leur interdisant les fonctions politiques représentatives (pour lesquels des preuves de la *Nationalität*, soit la conformité à l'esprit allemand, étaient exigées[18]); édit prussien (1812) leur accordant la pleine jouissance des droits civiques, sauf la faculté d'occuper les emplois régaliens. La Bavière (1813), moins en avance, introduisait un système de matricules permettant de limiter le nombre de Juifs dans chaque commune, et de restreindre leurs libertés économiques pour ne pas nuire aux chrétiens … L'article XVI de l'Acte de la Confédération germanique ajournait le règlement global de la question. Sous la pression des intérêts agrariens, d'émeutes antijuives (*Hep-Hep-Bewegung* en 1819), et d'une vision conservatrice liant nation et christianisme, la situation recula. En Prusse, une loi fermait aux Juifs les fonctions de professeur d'université (en 1822, pour empêcher Eduard Gans d'obtenir un poste à Berlin) et de maire (*Städteordnung* de 1831). Des débats eurent lieu à l'Assemblée provinciale en 1824–26, puis en 1847 (conduisant à une loi plus restrictive dans les territoires polonais). L'avancée des idées libérales, après la révolution de 1848, permit de vaincre les réticences, et de lever toutes les restrictions, dans le Wurtemberg en 1861–64, en Bavière en 1861, dans le Bade en 1862, dans la Confédération de l'Allemagne du Nord en 1869, puis dans tout l'Empire en 1871.

Ainsi s'achevait le processus qui, étendu sur près d'un siècle, conduisit à dissocier le statut civique et l'appartenance religieuse. Il fut bien plus long qu'en France, où il n'avait fallu que deux décrets de l'Assemblée constituante, le 24 décembre 1789, pour tous les non-catholiques à l'exception des Juifs, puis le 27 septembre 1791, pour ces derniers. Comme le résume Adrien Duport, député à l'origine du second décret, »aucune distinction [ne serait plus alors] mise entre les droits politiques des citoyens à raison de leurs croyances«.[19] Les lois civiles y seraient indifférentes, y compris, après le 20 septembre 1792, celles organisant le mariage. La dissociation entre confession et citoyenneté était nette, radicale, et la France était alors le seul État du monde à avoir franchi ce pas.[20]

La divergence est donc sensible entre un »modèle« français de sécularisation (qui fut aussi celui de la Belgique en 1830 et de l'Italie après 1860), fondé sur l'indifférence du droit à la religion, et un »modèle« allemand, fondé sur la reconnaissance des appartenances religieuses par le droit, dans une perspective pluraliste d'abord cantonnée aux seuls chrétiens. On ne saurait y voir le simple reflet d'une opposition entre tradition catholique et protestante,[21] mais une conséquence indirecte du biconfessionnalisme propre aux territoires germaniques. Les lois, pour assurer la paix civile, durent organiser la parité concrète entre les sujets des deux confessions, qui du reste était largement acceptée dans les mœurs. Jamais il ne fut question d'un

16 En Prusse, on arriva même après l'introduction en 1847 du mariage civil pour les Juifs et les sectes non reconnues, à ce résultat paradoxal qu'un Juif pouvait, selon la loi de l'État, épouser civilement un chrétien membre d'une Église dissidente, mais non un catholique ou un protestant, soumis au droit ecclésiastique en cette matière.

17 Brenner et al. (1996).

18 Nipperdey (1983) 250.

19 Propos prononcé le 28 septembre 1791 devant l'Assemblée constituante, cité dans Winock (2004) 21. La seule entorse à ce principe, dans l'histoire contemporaine de la France, fut la législation raciale sous le régime de Vichy.

20 Certains États américains maintenaient en effet alors des restrictions liées à la religion.

21 Contra: Monod (2013) 19.

libéralisme aussi abstrait et général qu'en France. L'émancipation était progressive et plus ou moins complète selon la confession: les droits de *tous les hommes* en tant qu'hommes étaient complétés par ceux spécifiquement accordés aux pratiquants de *telle ou telle religion*, suivant la logique du privilège, et non du droit inné.

En corollaire, la question de la liberté religieuse individuelle n'était pas totalement distincte de celle du statut des cultes. La parité civique entraînait, au moins pour les chrétiens, la parité des cultes au plan institutionnel. C'est celle-ci que systématisèrent et défendirent les juristes allemands au XIX^e^ siècle.

II. Entre science du droit et politique: la justification des liens entre les Églises et l'État dans la doctrine du XIX^e^ siècle

Les rapports entre les Églises et l'État, loin de n'être qu'une question politique, étaient aussi l'objet d'un enseignement spécifique dans les universités, dans le cadre d'une discipline alors singulière en Europe, le *Kirchenrecht* (*jus ecclesiasticum*). Celle-ci avait été construite dans la seconde moitié du XVIII^e^ siècle par des juristes proches de l'École moderne du droit naturel pour aborder conjointement avec le droit canonique celui propre aux Églises protestantes.[22] L'exposé spécifique à chaque religion (correspondant au droit positif) était introduit par une partie générale et abstraite (relevant, elle, du droit naturel, s'appliquant aux Églises *in abstracto*, y compris les communautés juives[23]) où l'on décrivait entre autres les fondements du *nexus ecclesiæ cum republica*. L'approche dominante était collégialiste:[24] les Églises sont des *collegia*, des associations, par conséquent soumises aux lois et à la surveillance de l'État où elles se situent (*jus circa sacra*), mais disposant aussi de droits naturels propres (*jura in sacra*). Elles peuvent être plus ou moins favorisées par l'État (prohibées, tolérées pour la *devotio domestica*, ou admises à célébrer *publiquement* leur culte), en vertu du *jus reformandi*, c'est-à-dire du droit d'admettre ou non une corporation au sein de l'État. Cette idée d'une gradation dans le statut des corporations religieuses (avec au sommet celui de *öffentlich-rechtliche Korporation*) fut reprise dans l'ALR,[25] codification jusnaturaliste par excellence, tandis que la Bavière inscrivait la notion de *öffentliche Korporation* dans l'édit de 1809. On ne peut cependant parler, à ce stade, de transcription de cette terminologie dans toutes les législations.

Dans la science juridique, celle-ci fit en revanche carrière, en dépit de la fin de la domination du jusnaturalisme et du ralliement, à partir de la décennie 1820, de la majorité des canonistes à l'école historique, sous l'influence de Ferdinand Walter (1794–1879, professeur à Bonn) et Karl F. Eichhorn (1781–1854, professeur à Göttingen).[26] Les manuels de *Kirchenrecht* continuèrent en effet de se consacrer, non seulement au droit interne des deux Églises, mais encore au droit »externe«,[27] c'est-à-dire aux rapports avec l'État, abordés dans un exposé introductif intitulé souvent *Verhältnis der Kirche zum Staat*, *Kirchenstaatsrecht* ou *Staatskirchenrecht*. Suivant la méthode décrite par Heinrich F. Jacobson (1804–1868, professeur à Königsberg), ils étaient traités d'un triple point de vue »philosophique [à la recherche du système idéal], historique et dogmatique [en droit positif]«.[28] C'est ici que les juristes, reprenant la terminologie collégialiste et admettant que la notion de corporation servît de genre commun sous lequel l'État subsumait les Églises,[29] donnaient une synthèse comparée des législations allemandes, au moyen des deux catégories que nous avons mentionnées, *Schutzrechte* (»avantages accordés à l'Église par le droit de l'État, par lesquels s'affirme son intérêt public à son existence et son action«[30]) et *Aufsichtsrechte*. Ce système préservait selon eux à la fois les pouvoirs de l'État et la *Kirchenhoheit* (c'est-à-dire l'autonomie de l'Église dans ses affaires propres).

22 Le premier manuel d'enseignement mêlant les deux droits en les présentant suivant un plan commun est celui de Böhmer (1763).

23 Une illustration de cette dichotomie entre droit naturel et droit positif se trouve dans Wiese (1793), influent manuel plusieurs fois réédité jusqu'en 1826. Voir en particulier les explications données dans la deuxième édition: Wiese (1799) V et 18.

24 Un exposé très complet des thèses de ces auteurs est donné par Schlaich (1969).

25 L'ALR distingue les *Religionsgesellschaften* interdites (II, 11, § 14), *öffentlich aufgenommen* (§ 17) et *geduldet* (§ 20).

26 Eichhorn (1831), vol. I.

27 Walter (1829) 2.

28 Jacobson (1831) 6.

29 Mejer (1869) 220.

30 Richter (1853) 104.

Que ce qu'on commençait à appeler *Staatskirchenrecht* ait été construit scientifiquement comme une branche du *Kirchenrecht*, et non du *Staatsrecht*, avait plusieurs conséquences. C'est ainsi que la question de la liberté religieuse du citoyen était pratiquement passée sous silence – non que les auteurs y fussent hostiles, mais telle n'était pas la perspective, plus institutionnelle, retenue par une matière où l'individu apparaît surtout en tant que fidèle. De même, seul le régime des cultes chrétiens était étudié. Les tentatives de jeunes enseignants encore inspirés dans les années 1830 par leurs aînés de l'*Aufklärung*, pour étendre le *Kirchenrecht* au droit hébraïque (et par conséquent y intégrer les données législatives relatives au culte juif), n'eurent guère de suite:[31] le droit ecclésiastique restait chrétien, et même limité au catholicisme et à la religion réformée.[32] Le *Staatskirchenrecht* n'était pas non plus vu comme un droit autonome; au contraire, tout en admettant que seul le droit »issu de l'Église« fût au sens strict du droit ecclésiastique, on donnait du *Kirchenrecht* une définition suffisamment large pour pouvoir y inclure également les normes d'origine étatique »ayant pour objet l'Église«[33] ou déterminant les rapports de droit (*Rechtsverhältnisse*) de l'Église.[34] Le »droit public des religions«, comme on dirait aujourd'hui, était en somme structurellement abordé d'un point de vue chrétien.

Il n'est donc guère étonnant qu'aucun canoniste n'ait été partisan d'une plus grande séparation entre l'Église et l'État, même après que ce principe eut été énoncé par le Parlement de Francfort.[35] Majoritairement conservateurs, ils approuvaient les privilèges reconnus aux Églises catholique et protestante. Ceux-ci étaient justifiés, au minimum, par le constat sociologique que la religion intéresse, pour des raisons historiques, plusieurs domaines de la vie publique en Allemagne avec lesquels ses liens devaient être protégés par l'État,[36] ou, dans une perspective qui n'est pas sans rappeler celle du despotisme éclairé, par son utilité collective (*Gemeinzweck*).[37]

Toutefois, l'opinion la plus répandue était que l'État lui-même devait être »chrétien«.[38] L'expression *christlicher Staat* avait été popularisée par un opuscule du philosophe du droit Friedrich J. Stahl (1802–1861, professeur à Berlin) paru en 1847 à l'occasion du débat sur l'émancipation des Juifs à l'Assemblée provinciale de Prusse. Stahl y développait une conception organiciste de l'État, d'inspiration schellingienne. L'État est un »être collectif éthique (*sittliches Gemeinwesen*), reposant sur une conscience (*Gesinnung*) éthique et réalisant une idée éthique; or la reconnaissance de la vie (*Lebenswürdigung*) éthique est indissociablement reliée à la religion, si bien que l'État d'un peuple chrétien doit se distinguer substantiellement de tout autre«.[39] C'est bien parce que le peuple allemand est organiquement chrétien que la religion doit être un »principe vital qui pénètre l'État partout et en entier«.[40] L'État chrétien, affirme-t-il, n'est pas une théocratie,[41] il n'a pas la religion pour but direct, mais »la religion chrétienne est le critère du jugement d'après lequel il poursuit ses autres buts et ordonne ses rapports vitaux (*Lebensverhältnisse*)«.[42]

Concrètement, un tel État doit avoir un lien avec l'Église (*Band zur Kirche*), ce qui implique sa reconnaissance. Il doit suivre les principes chrétiens dans sa législation et son administration. En conséquence, il accorde certes les droits civiques (*bürgerliche Rechte*) à tous les nationaux, car le christianisme implique la tolérance, mais restreint »les droits politiques aux membres des Églises chrétiennes reconnues«.[43] Ceux-ci ne sauraient occuper une fonction publique leur conférant de l'autorité,[44] ni siéger à la chambre: un député non-chrétien pourrait en effet à bon droit s'offusquer qu'on y affirmât publiquement le Christ Fils de Dieu, ce qu'un peuple chrétien doit pourtant bien croire. Stahl, non sans finesse, comprend bien que l'extension des droits politiques indépendamment

31 À Giessen, le jeune *Privatdozent* catholique Heinrich L. Lippert édita ainsi quelques années à partir de 1831 des *Annalen für katholisches, protestantisches und jüdisches Kirchenrecht*.

32 Seul faisait exception le manuel de Walter, s'étendant à »toutes les confessions chrétiennes« et traitant donc conjointement du droit des Églises orthodoxes – y compris, donc, en Allemagne.

33 Bluhme (1858) 11.

34 Richter (1853) 3–4.

35 Cf. le dernier paragraphe de cette partie.

36 Walter (1855) 82–83.

37 Herrmann (1849) 52.

38 Entre autres, Jacobson (1831–1833), vol. II, 64; Stahl (1847); Walter (1855) 82–83; Richter / Dove / Kahl (1886) 324. La formule est ajoutée par Kahl et ne figure pas dans l'édition précédente du manuel, à laquelle il n'avait pas collaboré.

39 Stahl (1846) 153.

40 Stahl (1847) 13.

41 Stahl (1847) 27.

42 Stahl (1846) 154.

43 Stahl (1847) 31.

44 Bismarck, lors du débat de 1847, avait déclaré qu'il se sentirait rabaissé (*niedergedrückt*) s'il devait obéir à un Juif; Brenner et al. (1996) 56.

des religions conduirait *in fine*, soit à chasser toute référence à celles-ci dans la loi (c'est le modèle laïque), soit à leur étendre le système paritaire valable pour les catholiques et les protestants (c'est la voie suivie par l'Allemagne contemporaine).[45] Tous ces arguments servaient en particulier à rejeter l'émancipation complète des Juifs, non en raison de leur »caractère spécifique« ou de leur défaut d'appartenance à la nation – Stahl, par ailleurs Juif converti, fait un vibrant hommage à leur participation à la science et à l'art spécifiquement allemands[46] –, mais à cause de leur religion. C'était là une conséquence logique, valable aussi pour les membres de sectes déistes non chrétiennes.

Sans toujours se référer explicitement aux doctrines de Stahl, les canonistes marquaient néanmoins par l'emploi de l'expression *christlicher Staat* leur adhésion à une conception organique du peuple et de l'État.[47] Le peuple allemand s'identifiant au christianisme en général (et non à l'une des Églises particulières, raison pour laquelle les canonistes mettaient toujours en avant l'unité de l'Église chrétienne fondée par le Christ), l'État ne pouvait être indifférent à la religion: ce serait *unsittlich*.[48] Le statut public (*öffentlich*) des Églises traduisait cette coopération, non dans un esprit d'entente cordiale entre deux entités antagonistes, mais dans le but de favoriser le développement religieux de la nation. Telle était la valeur du système (un peu idéalisé par la théorie) de la *Kirchenhoheit*, qui permettait d'affirmer l'identité chrétienne de l'État et les liens organiques de l'Allemagne avec la religion tout en réalisant la liberté civile (voire politique, car tous n'étaient pas hostiles à la participation politique des non-chrétiens).

À l'extérieur du cercle des canonistes, il existait bien sûr des voix pour s'opposer à ces conceptions. La constitution de l'Église Saint-Paul, approuvée par le Parlement de Francfort en 1849, reflétait ainsi le point de vue des libéraux: jouissance des droits politiques indépendamment de la confession (§ 146); mariage civil obligatoire (§ 150); interdiction pour l'État de privilégier une corporation religieuse sur une autre (§ 147, ce qui aurait mis fin de fait au système de la *Kirchenhoheit*, ou l'aurait étendu à tous les cultes). Jamais entré en vigueur, ce texte demeura en quelque sorte le manifeste du libéralisme politique en Allemagne. Il finit par trouver quelques échos jusque dans la doctrine du *Kirchenrecht*.

III. Vers une sécularisation et une libéralisation du *Staatskirchenrecht*?

Dans les trois dernières décennies du XIX[e] siècle, la science du *Kirchenrecht* connut deux évolutions corrélées. Au plan didactique, tout d'abord, on remarque une certaine autonomisation de la partie consacrée aux règles civiles applicables aux Églises tendant à supplanter l'exposé du droit ecclésiastique interne. Le manuel de *Kirchenrecht* écrit par Wilhelm Kahl (1849–1932, professeur à Berlin) l'illustre nettement, dont le premier volume, sur plus de deux cents pages, présentait uniquement le *Staatskirchenrecht*, tandis que le volume suivant, qui devait traiter du droit interne, ne parut jamais.[49] Le droit ecclésiastique, comme matière, était ainsi supplanté par le droit *public* ecclésiastique. Paul Hinschius (1835–1898), professeur de *Kirchenrecht* à Berlin, avait aussi, quelques années auparavant, rédigé, dans le *Handbuch des öffentlichen Rechts* de Marquardsen, une synthèse d'envergure sur le seul *Staatskirchenrecht.*[50] Cela revenait certes, dans une certaine mesure, à éditer à part, en l'enrichissant, l'introduction traditionnellement consacrée à ce sujet dans une présentation scientifique du droit ecclésiastique, mais ce geste coupait justement les liens entre ce dernier et la branche du droit public s'appliquant aux corporations religieuses, apparaissant désormais explicitement comme telle. Cette scission résolvait une aporie à laquelle la doctrine se montrait de plus en plus sensible: de quel ordre juridique le *Kirchenrecht*, qu'on enseignait alors en combinant normes étatiques et normes ecclésiastiques, était-il le droit?

Détaché du droit religieux (qui présentait, il est vrai, moins d'intérêt pratique dans la formation des

45 Stahl (1847) 23–24. L'extension des droits politiques impliquerait notamment une forme de respect réciproque, interdisant par exemple de critiquer la religion d'autrui à la chambre.

46 Stahl (1847) 44.

47 Telle qu'on la trouve par exemple exposée dans Bluntschli (1851–52) 530–532, lui aussi partisan de l'État chrétien.

48 Herrmann (1849) 15.

49 Kahl (1894).

50 Hinschius (1883).

futurs juristes depuis que le mariage civil avait été rendu obligatoire en 1875 et que le baptême dans tel ou tel culte n'avait plus aucune incidence sur la citoyenneté), le *Staatskirchenrecht* pouvait désormais avoir un spectre plus large: Joseph Heimberger (1865–1933) consacrait en 1893 sa thèse d'habilitation à »la situation des Juifs en Bavière au regard du *Staatskirchenrecht*« en y abordant les questions classiques (statut juridique des corporations, éducation religieuse à l'école, fiscalité du culte), mais pour les communautés juives.[51] À Vienne, Max H. von Heinlein (1865–1935) publiait en 1899 un *Grundriß des Staatskirchenrechts*,[52] en forme de manuel pour ses étudiants, et y intégrait le régime du culte juif – tout comme Hinschius. Dans la formule *Staatskirchenrecht*, le mot *Kirche* n'était alors plus qu'un vestige étymologique. Max von Seydel (1846–1901, professeur de *Staatsrecht* à Munich), sans abandonner l'expression traditionnelle, préférait celle plus générale de *Recht der Religionsgesellschaften*.[53] La doctrine contemporaine adopte parfois, dans un souci de neutralité, un usage similaire.[54]

L'autre évolution, à la fois cause et corollaire de la précédente, correspond à l'abandon généralisé de la notion d'État chrétien. Kahl y voyait un programme politique incompatible avec la parité, conduisant au baptême obligatoire et au rejet du mariage civil.[55] Hinschius formulait une critique similaire: »réaliser la chrétienté« ne doit pas être le but de l'État, qui ne serait pas compatible avec l'émancipation des Juifs, ni donc avec la liberté religieuse.[56] Car – et là est bien, selon nous, la nouveauté apportée par Hinschius –, c'est désormais la liberté individuelle de conscience qui sert de fondement à l'ensemble du système. C'est elle qui implique la liberté collective du culte, dans la tradition du libéralisme politique:

> »Les hommes qui vivent dans l'État ne poursuivent ni uniquement ni principalement des buts juridiques (*Rechtszwecke*), mais bien plus économiques, ainsi que spirituels, culturels (*Bildungszwecke*), éthiques (*sittlich*), et religieux. L'ensemble organisé (*Ordnung*) des relations dans ces domaines, le droit émis par l'État, sert seulement à ce qu'ils puissent mieux et plus sûrement atteindre ces buts.«[57]

On souscrira donc à la thèse de Peter Landau, qui voyait »l'origine du *Staatskirchenrecht* moderne« dans la seconde moitié du XIX[e] siècle. Il s'est alors à la fois, en tant que discipline, émancipé du droit ecclésiastique et, en tant que doctrine, détaché des conceptions organicistes pour se rallier à un individualisme plus libéral, tandis que, à la même époque, les États suivaient une voie comparable. Il ne nous semble cependant pas qu'il soit uniquement le »produit de la pensée libérale«, ou d'un compromis entre celle-ci et le catholicisme politique.[58] Les éléments de continuité avec la période antérieure dominent en effet, en particulier le rejet de la séparation, pourtant au cœur du programme libéral, et la valorisation du *statu quo*.

Hinschius et Kahl donnaient dans leurs synthèses une typologie assez similaire des types de relations que l'on peut envisager entre l'Église et l'État. Celles fondées sur l'unité entre les deux entités (Église d'État, théocratie, coordination), rejetées par Hinschius comme appartenant au passé, s'opposaient à la séparation (dont la Belgique fournissait un exemple, consistant à traiter les Églises comme toute autre association) et à la *Kirchenhoheit* en vigueur en Allemagne.[59] Tous deux s'accordaient pour considérer ce dernier système comme le plus adapté à l'Allemagne. Sans verser dans l'organicisme romantique de la génération précédente, Hinschius notait simplement que »la religion de la plus grande partie des citoyens exige par nature d'être considérée par l'État autrement que celle d'une petite secte insignifiante«:[60] argument sociologique, pratique. L'une des craintes, exprimée par Kahl, alors que le *Kulturkampf* était encore dans les esprits, était que l'Église

51 Heimberger (1893).
52 Hussarek von Heinlein (1899).
53 Seydel (1893), vol. VI.
54 Pour un bilan, Hollerbach (1994) et Heinig / Walter (2007). La 5[e] édition de Campenhausen (2006), à paraître en 2022, abandonnera le titre classique de *Staatskirchenrecht*, au profit de *Religionsverfassungsrecht* (droit constitutionnel de la religion), choix déjà fait depuis 2009 par Unruh (2018c).
55 Kahl (1894) 272–275.
56 Hinschius (1883) 243–244.
57 Hinschius (1883) 238.
58 Landau (1993) 484; dans le même sens Heckel (1966–67).
59 Hinschius (1883) 189–190; présentation légèrement différente chez Kahl (1894) 246, qui distingue *Kirchenstaatstum*, *Staatskirchentum*, *Staatschristentum*, pour les systèmes fondés sur l'unité, et *Koordination*, *Kirchenhoheit*, *Trennung*, pour ceux fondés sur la séparation.
60 Hinschius (1883) 262.

catholique profitât de la séparation – et de la plus grande liberté qu'elle entraîne – pour accroître, au moyen du parti du *Zentrum*, son influence politique.[61] Il est vrai que Emil Friedberg (1837–1910, professeur à Leipzig), en 1872, avait à l'inverse, dans un ouvrage à forte teneur politique, soutenu la séparation (allant jusqu'à la suppression du ministère des cultes) comme l'unique moyen de »décléricaliser«[62] la population selon lui trop fortement soumise au joug de l'Église catholique, mais cette idée n'eut guère de suite. Non sans résignation, Karl Rieker (1857–1927, professeur à Leipzig puis Erlangen), authentique libéral favorable en théorie à la séparation, jugeait cette hypothèse irréalisable:

> »Cet idéal devra pour le moment attendre encore longtemps pour être réalisé en Allemagne. L'État allemand est encore entièrement de l'avis que la religion n'est pas une affaire seulement individuelle, mais aussi collective; il faudrait qu'il accomplît une rupture complète avec son passé, pour trancher le lien qui l'a pendant des siècles uni avec l'Église et pour laisser la religion à l'initiative privée.«[63]

Tout invitait donc au *statu quo*. De fait, Hinschius et Kahl conservaient l'usage traditionnel consistant à étudier successivement les formes de reconnaissance des sociétés religieuses, puis les *Schutzrechte* et *Aufsichtsrechte* de celles admises au rang de corporations publiques. D'autres systèmes étaient pourtant possibles, à l'image de celui, plus »publiciste«, de Max von Seydel, groupant la matière par domaines (droit des biens, droit fiscal, etc.). Le maintien d'une analyse dialectique – à des privilèges répond une surveillance accrue de la part des autorités civiles – n'était pas neutre. Il marquait l'adhésion à l'économie d'ensemble de la *Kirchenhoheit*, et à son caractère essentiel: des Églises reconnues paritairement comme *Korporationen des öffentlichen Rechts* parce qu'elles ont »par excellence un caractère public« et ne sauraient être vues comme de simples associations d'utilité collective.[64] Pour donner un contenu au concept de corporation du droit public – qui, sous cette forme ou sous d'autres, était employé depuis plus d'un siècle sans être vraiment défini –, Kahl renvoyait à un article où Rudolf Sohm (1841–1917, professeur à Leipzig) voyait dans l'octroi de ce titre la marque d'une *ethische Gleichordnung* (équivalence éthique) entre l'État et l'Église reconnue. La thèse de Sohm consiste à dire que la corporation, soumise à l'État juridiquement (ce qui revient à affirmer l'existence d'un *Staatskirchenrecht* purement séculier), compense cette subordination par l'affirmation théorique d'une *dignité* égale à celle de l'État, et par la garantie que l'État prend en compte dans son droit le but de l'Église.[65]

On était là à mille lieues, non seulement de la séparation, mais encore de la neutralité religieuse. En outre, il n'était pas question d'étendre ce statut à des Églises non chrétiennes. Sohm, Kahl et Hinschius ne l'envisageaient pas plus que le droit positif ne le faisait. Le *Staatskirchenrecht* était certes devenu un ensemble cohérent intellectuellement, mais il resta, jusqu'après la Seconde Guerre mondiale, enseigné dans le cours de droit ecclésiastique. Kahl, dans son manuel, s'efforçait encore – de manière peu convaincante, mais habile – de justifier que des normes étatiques eussent bien leur place parmi le *Kirchenrecht*.[66] Les conditions universitaires de formation des notions du *Staatskirchenrecht* le maintenaient donc dans un »univers chrétien«.

La transcription de ces notions, qui relevaient jusqu'alors en partie de la conceptualisation doctrinale, dans l'ordre juridique de la République de Weimar changea peu les cadres mentaux des juristes ou des fonctionnaires. La possibilité désormais explicitement offerte à n'importe quelle communauté religieuse de devenir *Körperschaft des öffentlichen Rechts* modifiait bien évidemment le droit positif – aucun *Land* n'aurait pu inscrire dans son droit, comme la Prusse de 1850, que l'État favorise la religion chrétienne.[67] Elle aurait sans doute été exploitée si l'antisémitisme latent n'en avait dissuadé les principaux intéressés, mais elle ne constituait pas une rupture radicale: Ulrich Stutz ne s'y trompait pas en parlant alors de séparation boiteuse (*hinkend*).[68] C'est après la dictature nazie que l'interprétation de normes par ailleurs inchangées,

61 Kahl (1894) 305.
62 Friedberg (1872) 782–783.
63 Rieker (1893) 474.
64 Kahl (1894) 305.
65 Sohm (1873) 176.
66 Kahl (1894) 82–116.
67 Art. 14 de la constitution de 1850.
68 Stutz (1926) 54.

dans une Allemagne ralliée au libéralisme démocratique, évolua vers le régime actuel de neutralité.

IV. Conclusions

En ayant centré l'étude qui précède sur la doctrine juridique – et, plus exactement, la doctrine juridique enseignée, qui donne à voir les articulations fondamentales d'une science –, nous ne voulons prétendre que la science du droit soit le principal moteur des évolutions politiques. Le relatif retard de l'Allemagne dans la réalisation effective d'un droit de citoyenneté entièrement sécularisé, et, plus encore, de l'égalité entre les cultes, n'est pas la conséquence des conceptions développées ici ou là dans les facultés, mais s'explique par des facteurs politiques (le poids du conservatisme) et sociaux (le biconfessionnalisme). Les idées des juristes – du moins, celles qui étaient *enseignées* dans un tout qu'on appelait *système* – permettent néanmoins de comprendre, non la chronologie, mais les ressorts du processus de réalisation de la neutralité religieuse de l'État en matière juridique. L'interprétation donnée à la notion centrale de *Körperschaft des öffentlichen Rechts*, doit beaucoup aux canonistes de la seconde moitié du XIX^{e} siècle, qui y voyaient le moyen de concilier un désir presque unanimement partagé de considérer la religion chrétienne comme un principe irradiant le droit de l'État avec la liberté religieuse et une vision inclusive de la citoyenneté. C'était le complément moral qui distinguait alors le *Staatskirchenrecht*, tel qu'ils le concevaient, d'un simple droit administratif des cultes, et défendait la prétention des Églises à être des institutions publiques.

Aujourd'hui, cette justification »morale« de la reconnaissance d'un statut public à certains cultes tend à s'estomper. Le Tribunal constitutionnel de Karlsruhe et, avec lui, la doctrine allemande y voient généralement, non plus la pétition d'une forme de lien nécessaire entre des »partenaires de même rang«,[69] mais une conséquence institutionnelle de la liberté religieuse,[70] qu'on continue toutefois de juger mieux servie par une séparation »amiable«, plus proche d'une coopération que d'une véritable laïcité.[71] L'intégration de cultes minoritaires à ce système après 1945 a montré sa viabilité. La situation des musulmans, aujourd'hui, présente des enjeux différents, en raison de leur nombre. Les réticences à se saisir de la question ne s'expliquent certainement pas seulement par la nature des règles juridiques (le statut corporatif est assez largement accordé désormais[72]) mais surtout par des motifs politiques ou sociaux, communs à de nombreux pays européens. Elles créent néanmoins en Allemagne une inégalité de fait d'autant plus patente que les cultes reconnus ont des ressources fiscales importantes (5,9 milliards d'euros en 2019 pour l'Église protestante; 6,7 pour l'Église catholique[73]).

69 Freisenhahn (1974) 562: »ebenbürtige Vertragspartner«.

70 Dans sa décision du 19 décembre 2000 relative aux témoins de Jéhovah, le Tribunal constitutionnel affirme: »[…] le statut de corporation du droit public est un moyen de déploiement (*Entfaltung*) de la liberté religieuse« (BVerfGE 102, 370, 387). Unruh (2018b) 2312–2313 (avec bibliographie) montre bien en quoi cette décision modifie l'interprétation du statut de corporation du droit public. Celui-ci est désormais la prolongation du droit fondamental à la liberté religieuse, en ce qu'il permet aux cultes reconnus une indépendance financière.

71 L'expression est usuelle; par exemple: Unruh (2018b) 2221–2223: »freundliche Trennung«. La jurisprudence interprète l'interdiction d'une Église d'État, formulée à l'art. 137, § 1 WRV, comme purement institutionnelle (BVerfGE 108, 282–299), mais n'excluant pas la coopération, que nombre d'auteurs placent au même rang que la neutralité parmi les principes directeurs du *Staatskirchenrecht* (Wolff (2018) 929; Muckel (2006) 271–272 évoque même une forme de complémentarité entre Église et État).

72 BVerfGE 102, 370, 394–395: la décision d'accorder le statut ne peut être fondée sur le contenu de la foi, ni le critère de loyauté envers l'État.

73 https://de.statista.com/statistik/daten/studie/12520/umfrage/kirchensteuereinnahmen-in-deutschland/; consulté le 14 mars 2021.

Une conséquence plus fondamentale du processus de sécularisation en Allemagne est à notre avis ce principe non écrit, mais jamais contesté par la jurisprudence constitutionnelle, selon laquelle la religion n'est pas qu'une affaire privée. Nous avons vu, au cours de l'étude, que l'adjectif *öffentlich*, s'agissant des cultes reconnus, a toujours été employé pour signifier, précisément, que l'État n'est pas indifférent à cette matière, au point que certains organes de l'État ont constitutionnellement le droit d'interroger les individus sur leur appartenance religieuse.[74] De là viennent les incompréhensions que suscite parfois le *Kirchensteuer*, chez des gens qui, croyant l'inverse, avaient négligé de renseigner l'administration. L'État peut bien être tolérant, il n'en est pas moins curieux.

■

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74 Art. 136 § 3 WRV: aucun individu ne peut être obligé de révéler ses convictions religieuses (c'est-à-dire le contenu de sa foi: on parle de *Schweigerecht*, Unruh (2018a) 2208–2210), mais, tempère le texte, les autorités peuvent demander à quel association religieuse (*Religionsgesellschaft*) appartient un individu lorsque des droits ou devoirs en dépendent. La principale application est en matière fiscale: chaque contribuable déclare sa religion, l'impôt religieux étant prélevé sur ses revenus. Le Tribunal de Karlsruhe considère cette obligation déclarative, conséquence nécessaire du statut *public* de corporations habilitées à lever l'impôt, conforme à la constitution, notamment à l'art. 4 GG (BVerfGE 49, 375).

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Dóra Frey

Regulation of the Citizenship of Ethnic Hungarians Living Abroad: Ethnopolitics, Demographical Issues and Humanitarian Aspects – Bilateral and Unilateral Solutions

I. Introduction

In my paper, I present the history of the Hungarian citizenship regulations of the late 19th and the 20th centuries concerning ethnic Hungarians living abroad. These directives have been present since the development of modern citizenship law in the second half of the 19th century. The Hungarian citizenship law has been based on the principle of *ius sanguinis* from the very beginning, so the ancestry of a Hungarian citizen is the main link between the state and the citizen. The principle of *ius loci* came to force as an auxiliary to avoid situations of statelessness. Is the citizenship of ethnic Hungarians living abroad an extended understanding of the *ius sanguinis*? Is Hungarian ancestry and mother tongue a link strong enough for Hungarian citizenship? Is this the case even when not residing in Hungary? The answers to these questions have changed according to the specific demographic and political situation. In my paper, I try to explain the history of the regulation and its legal, political and historical background.

Although the practical importance of citizenship decreased in the European Union, this was not the case in the first half of the 20th century, and even today we should not underestimate the symbolic meaning of the link that citizenship creates between the state and the people. This effect is even stronger among people living in the former territories of the historical Kingdom of Hungary. After the unsuccessful referendum on 5 December 2004 and the act on simplified naturalisation in 2010, the issue is still a matter of political discussion, which generates strong emotions in Hungary and among the members of the Hungarian community abroad, making objective considerations and research on the topic difficult.

II. Citizenship of ethnic Hungarians in the second half of the 19th century

1. The First Citizenship Act and its effects

At first glance, it would seem that the question of citizenship of ethnic Hungarians became important after 4 June 1920, with the Peace Treaty of Trianon, as substantial – predominately Hungarian populated – territories became part of the surrounding countries. As a result, 13 million people, of which 3.3 million were ethnic Hungarians, lost their Hungarian citizenship. However, the first regulation pertaining to this issue predates the treaty by several decades, from the period of the dual monarchy of Austria-Hungary. The aim of this measure was to raise the ratio of Hungarians in this multi-ethnic state, and not to resolve the consequences of the territorial losses that took place in the 20th century.

When the first modern regulation on citizenship, Act No. 50 of 1879, was enacted, ethnic Hungarians constituted only a relative majority in Hungary, approximately 40% of the population. According to the 1881 Census (the first statistical polling of native languages), only 6.206.000 of the 15.642.000 inhabitants of Hungary claimed Hungarian as their native language (national affiliation was not asked, just mother tongue). At the same time, 2.325.000 people claimed Romanian as their mother tongue, 2.325.000 South-Slavic people (the Austro-Hungarian and Hungarian statistics did not differentiate between the Serbian and Croatian populations), 1.882.000 Germans and 1.779.000 Slovaks.[1] Increasing the ratio of the Hungarian population was a key goal, and plans were made to achieve it.[2] Since the assimilation of the other nationalities was proceeding too slowly from the perspective of the decision-makers, the settlement of ethnic Hungarians seemed to be a viable course

1 Az 1881. év elején végrehajtott népszámlálás (1882) 214.
2 Parragi (2000) 41.

of action. Two significant Hungarian ethnic groups resided abroad at that time: the Szekelys of Bukovina lived in the Austrian part of the dual monarchy in five villages after fleeing the violent suppression of an uprising in 1764[3] referred to as the Madéfalva Massacre, and the Csango people in Moldavia (at that time part of the Kingdom of Romania) living in that territory since the Middle Ages.[4]

Act No. 50 of 1879 concerning the obtainment and loss of Hungarian citizenship, commonly called the First Hungarian Citizenship Act, regulated re-naturalisation as a special case of the naturalisation in § 38 of the act. Neither Hungarian ancestry nor Hungarian as the native language played a role here. The only criterion to reobtain citizenship was former Hungarian citizenship. This means that an ethnic link was not enough to justify re-naturalisation, and the Citizenship Act ensured no privileged obtainment of citizenship for people with Hungarian ancestry.

2. *The act concerning naturalisation of repatriated groups – a solution for a multi-ethnic state?*

From the point of view of the Hungarian political class, and according to Act No. 44 of 1868 pertaining to the equal rights of the nationalities, the Hungarian nation was »the one and only political nation« in the Kingdom of Hungary. The leading role ethnic Hungarians played in politics, state administration, science etc. and the supremacy of the Hungarian language were often criticised by the national minorities – mainly by the Romanian, Slovak and Serbian populations. The increase in the ratio of ethnic Hungarians was meant as an answer to these voices. Measures to force the assimilation of other groups varied, and the settlement of ethnic Hungarians was planned as an additional attempt.

Since the five abovementioned villages in Bukovina were overpopulated, poor and part of the inhabitants forced to work seasonally on *latifundia* in Moldavia, the Szekelys of Bukovina requested a resettlement to Hungary, even petitioning to the prime minister in 1882. Given that the inhabitants of Bukovina were Austrian citizens – for there was no common Austro-Hungarian citizenship during the period of the dual monarchy – the Hungarian government did not want to risk a conflict with Austria. As such, the settlement was formally not implemented by the state administration, but instead by a committee – and further settlements were also planned, as the name Csango-committee suggests.[5] About 4.000 Szekelys were settled from Bukovina to three villages in the Lower Danube region (near what is today Pancevo, Serbia) in 1883. While not organised by the state, it was nevertheless supported by the Hungarian authorities, in particular by the government commissioner of the Lower Danube region.[6]

The settlement caused administrative and legal problems regarding the legal status of the settlers, who had Austrian citizenship,[7] as Bukovina was a province of the Austrian part of the dual monarchy. Because their forefathers left Hungary more than 100 years earlier, therefore they were never Hungarian citizens in the modern sense, re-naturalisation was not a suitable solution for the Szekelys of Bukovina. Thus, they had to fulfil the conditions of naturalisation in accordance with § 8 of Act No. 50 of 1879. They had to obtain a place of origin (*községi illetőség*), live and pay taxes in Hungary for five years, demonstrate an excellent moral character, have enough property or income to provide for themselves and their family, and had to submit an application to the Minister of Home Affairs – a long, complicated and expensive process. A particular problem was the place of origin (*községi illetőség*), a special Hungarian legal institution similar to the *Heimatrecht* or *Heimatberechtigung* in various legal systems of the German-speaking realm. It was neither equivalent to the permanent residency nor to the place of birth in many cases. Instead, it was a legal connection between a citizen and a commune, and it was conditional upon residency and tax payment, in some cases requiring a formal application. This status and the accompanying process existed from 1871 to 1948, and it caused a number of problematic issues within the context of the citizenship law, primarily due to its differences to permanent residency.[8]

A common citizenship in the Austro-Hungarian Monarchy never existed, and even a double Austrian and Hungarian citizenship was prohibited, as

3 Sebestyén (1989) 16.
4 Lükő (1936) 15–24.
5 Sebestyén (1989) 99.
6 Sántha (1942) 84–99.
7 Ferenczy (1930) 68.
8 Parragi (2000) 41.

regulated by a treaty between the two parts of the monarchy.[9] In other cases it presented no difficulties, as citizens in the other part of the monarchy were guaranteed the freedom of movement and economic activity.

To meet this challenge and to make repatriations easier, a new act was proclaimed: Act No. 4 of 1886 concerning the naturalisation of repatriated groups and targeting the organised settlements of ethnic Hungarians to Hungary. According to the justification of the act, while the resettlement of the Szekelys and the Csangos was planned, it also applied to the repatriation of the descendants of the emigrants to the USA.[10] According to the First Citizenship Act, emigrants lost their citizenship after ten years of non-residency, or after five years if they were naturalised in the USA, as stipulated in an 1870 agreement between the Austro-Hungarian Monarchy and the USA (proclaimed in Act No. 43 of 1871). These measures affected 1.39 million people who left the Kingdom of Hungary until 1910 (90% of them emigrated to the USA), but about two-thirds of them did not speak Hungarian as their mother tongue.[11]

The repatriated groups could apply for Hungarian citizenship together in a single official request, free of any charges and the place of origin was determined by the Minister of Home Affairs. For the naturalisation of repatriated groups, the rules of the re-naturalisation were adopted, the only difference being that an ethnic link was now sufficient (versus having an ancestor with Hungarian citizenship). Moreover, the possibility of obtaining Hungarian citizenship was given only to persons who moved to Hungary, not to people living abroad.

Act No. 4 of 1886 concerning the naturalisation of repatriated groups was created as an ethnopolitical measure to increase the ratio of ethnic Hungarians in Hungary, a then multi-ethnic state. This action, however, was not particularly successful: although a new regulation for the settlement was established, no larger settlements were organised by the Hungarian state until the First World War. Nevertheless, about 2.000 Szekelys of Bukovina moved to Hungary in small groups to different villages in Transylvania as the result of private initiatives, most of them (ca. 700 persons) to Déva (now Deva, Romania).[12] While no concrete plans were made for the repatriation of the Csangos, and after the First World War, the topic disappeared from the political agenda for decades,[13] Act No. 4 of 1886 nevertheless remained in force.

III. The first half of the 20th century – the effects of wars and peace treaties

1. The Peace Treaty of Trianon and its effects

The end of the First World War and the Peace Treaty of Trianon of 4 June 1920 (in Hungary proclaimed in Act No. 33 of 1921) resulted in a completely new situation: Hungary lost two-thirds of its territory, and the inhabitants of these territories lost their Hungarian citizenship, more than 3 million ethnic Hungarians among them.

The peace treaty profoundly impacted internal issues of citizenship. As the Austro-Hungarian Monarchy constituted a single subject of international law, the international treaties dealt with it as one state. The separate peace treaties were signed with each of the successor states after the First World War, with Austria in Saint-Germain on 10 September 1919, which regulated the disbanding of the Austro-Hungarian Monarchy and the so-called Österreichische Länder, the Austrian part of the monarchy.

According to Art. 61 of the Treaty of Trianon:

> »Every person possessing rights of citizenship (*pertinenza*) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain ipso facto to the exclusion of Hungarian nationality the nationality of the State exercising sovereignty over such territory.«[14]

Pertinenza meant the place of origin (*községi illetőség / Heimatberechtigung*) and was not in every case identical with the place of permanent residence. For people who obtained the *pertinenza*

9 Varga (2005) 551.
10 Ferenczy (1930) 116.
11 Parragi (2000) 40.
12 Sebestyén (1989) 118.
13 V. Kápolnás (1994) 255–261.
14 https://wwi.lib.byu.edu/index.php/Treaty_of_Trianon.

later than 1910, permission was needed to receive the nationality of the new country they lived in. (Art. 62)

Of course, there was need for corrective actions, and there were two types of measures: the first was based on the ethnic link. Article 64 of the Peace Treaty of Trianon regulated the so-called ethnic option, which meant that ethnic affiliation was the main link between the state and the citizen:

> »Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall within six months from the coming into force of the present Treaty severally be entitled to opt for Austria, Hungary, Italy, Poland, Roumania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt.«[15]

The so-called optants were obliged to move to Hungary within twelve months.[16] A husband's citizenship decision applied to his wife and the underage children. This right of the ethnic option, ensured by international law, was open not just to the Hungarians but to all inhabitants of the former Austria-Hungary Empire. It gave ethnic Hungarians living in the neighbouring countries the possibility to opt for Hungarian citizenship on the condition they moved to Hungary. Exercising the option required a birth certificate, a birth certificate of the father and the certificate about the place of origin – which, of course, complicated the whole process, especially for those needing to obtain the documents from another country.[17] Without clear proof of citizenship, it was also quite complicated to get passports or similar personal documents.

The other regulations, both on the international and national level, were corrective measures for the problems caused by the Treaty of Trianon: foremost among them was that place of origin, rather than permanent residence, was decisive when it came to the determination of future citizenship after the treaty. This regulation meant that many people living in so-called »little« Hungary lost their Hungarian citizenship, as their place of origin lied outside of the new borders. The peace treaty itself contained corrective regulations for just such cases. People who lived in a transferred territory but had a former place of origin in the territory remaining Hungarian could opt for Hungarian citizenship within 12 months, in accordance with Article 63 of the treaty. Many people who spent only a few years in territories now belonging to the neighbouring states made use of this option, including teachers, officers of the state administration, employees of the railways and the postal service. Since they had no possibility to continue their professional careers in another country, they moved back to Hungary.

The deadline of six to 12 months to decide whether to opt in or out was rather short, and there were a great number of people living in Hungary either without Hungarian citizenship or a clear civil status. Therefore, there was also a unilateral solution in Act No. 17 of 1922 § 24. Somewhat surprisingly, this was a budget act pertaining to the first half year of the budget term 1922–23 – by no means a typical form of law-making when addressing citizenship issues. In contrast to the ethnic option of the peace treaty, this act included a supplementary regulation for persons actually living in Hungary or being forced to move there, as the post-monarchy successor states Czechoslovakia and the Serb-Croat-Slovene Kingdom had the right to refuse citizenship to any person who moved to their territories after 1910. The Minister of Home Affairs was granted the jurisdiction to decide matters of civil status if it was unclear or contentious. In such cases, ethnic affiliation and permanent residence together built the case for the Hungarian citizenship.

There was a third corrective possibility. The re-naturalisation of persons who lost their Hungarian citizenship after 26 July 1914 was possible via a decision by the Minister of Home Affairs, abandoning the conditions of Act No. 50 of 1879,[18] in cases deserving special consideration, if they already lived in Hungary, or were about to move

15 https://wwi.lib.byu.edu/index.php/Treaty_of_Trianon.
16 Kisteleki (2000) 57.
17 Parragi (2000) 42.
18 Ferenczy (1930) 115.

there and had permission to do so. The Minister of Home affairs was responsible for granting the permission to move.[19] Both the special consideration required for re-naturalisation and formal permission to move to Hungary by the Minister were necessary measures to control the number of persons moving to Hungary. Since the Hungarian state government did not think it would be able to settle large numbers of people who did not possess any anterior residency in the country, the Minister did not grant many permissions. Even at that time, many of the refugees arriving from the neighbouring countries lived in railway cars or other temporary shelters for years.[20]

Nevertheless, the number of the re-naturalised persons as a result of Act No. 17 of 1922 was still quite high. Approximately 350.000 people moved to Hungary,[21] and many thousands had to be re-naturalised, as their place of origin was outside of the new borders, although they in fact lived in the territory referred to as »little« Hungary.

Act No. 17 of 1922 was a supplementary regulation designed to resolve the consequences triggered by the Treaty of Trianon for hundreds of thousands of refugees from the surrounding countries, so there was a distinct humanitarian dimension behind the ethnic link. Although also decided unilaterally from the top-down, the motivation for this act was very different from the one behind the 1886 law on the naturalisation of repatriated groups. This was not an ethnopolitical measure, but instead a correction of the effects brought about by the peace treaty. Another further relevant difference was that the ethnic link was not sufficient to obtain Hungarian citizenship, given that former citizenship was necessary. Since the aim of this regulation was to make the status of all persons living in Hungary absolutely clear, the regulation was adapted to the real-world situations of the people.

Since Hungary was a nation-state with 89% Hungarian native speakers after 1920, the ethnopolitical considerations faded into the background for the next two decades.[22] The repatriation of ethnic Hungarians was not forced, on the one hand, because Hungary was a nation-state, and on the other, the main goal of Hungarian politics after the First World War was the revision of the Trianon Peace Treaty – the rather substantial Hungarian population in the so-called »divided territories« was one of the arguments for this change of focus.

2. *The territorial revision before and during the Second World War – once again a multi-ethnic state*

The next change in attitude towards citizenship of ethnic Hungarians came in the years just prior to the Second World War, when Hungary successfully revised the Trianon Peace Treaty with the support of Nazi Germany and Italy. The First Vienna Award in 1938 returned territories to Hungary from Czechoslovakia. In 1939, Carpathian Ruthenia was occupied by the Hungarian army as Czechoslovakia was dissolved. In 1940, the Second Vienna Award transferred the northern part of Transylvania from Romania to Hungary, and finally Hungary occupied the Vojvodina in 1941. As a consequence of this territorial increase, Hungary once again became a multi-ethnic state, but Hungarian communities still resided in the surrounding countries, most of them in South-Transylvania.

The first Vienna Award did not include any specific regulation on citizenship; instead, it obliged the two parties, Hungary and Czechoslovakia, to find a solution to this issue in a separate agreement. An agreement was reached in February 1939, and the regulation was similar to Art. 64 of the Trianon Treaty in that ethnic Hungarians living in territories in Czechoslovakia could opt for Hungarian citizenship.[23]

The Second Vienna Award dated 30 August 1940 made it possible to opt for either Hungarian or Romanian citizenship, according to Art. 4. The same article allowed Hungarians with permanent residence in Romanian territories »assigned from Hungary in 1919« and left under Romanian control after September 1940 to waive their Romanian citizenship. Interestingly, many Szekelys of Bukovina lost their Romanian citizenship after Roma-

19 Ferenczy (1930) 119.
20 Parragi (2000) 43.
21 Ferenczy (1930) 112.
22 Parragi (2000) 42.
23 Parragi (2000) 42.

nian authorities required them to decide between Hungarian or Romanian citizenship.[24] However, this was a false interpretation of the Second Vienna Award, because Romania obtained Bukovina from Austria and not from Hungary, thus the Szekelys of Bukovina were Austrian rather than Hungarian citizens. In fact, the Vienna Award made residency in territories that had belonged to Hungary before 1918 and remained Romanian after the Award – and not ethnic affiliation – the basis of the option, so it would not have applied to the Szekelys of Bukovina.

As Hungary was once again a multi-ethnic state, the resettlement of persons of Hungarian nationality resurfaced on the political agenda,[25] taking into account that Act No. 4 of 1886 was still in force. New plans were made for the settlement of ethnic Hungarians to Hungary in the newly obtained territories with a mixed population. Plans for the resettlement of the Szekelys of Bukovina (about 13.000 persons) and 150.000 Csangos from Moldavia were made, as well as, in the long term, the resettlement of all Hungarians living in the neighbouring countries once the future borders of Hungary became clear. The goal was to create national states to avoid ethnic conflicts and wars. The idea of the so-called ethnic separation was quite common in the period between the two world wars, and it was partly realised in South-Tyrol.[26] The German programme »*Heim ins Reich*« (Back home to the *Reich*), which aimed to resettle ethnic Germans from eastern Europe to the newly occupied Polish territories, followed this idea as well.[27]

In fact, 13.000 Szekelys of Bukovina were resettled to the occupied Vojvodina in May–June 1941 at their own request.[28] This was regulated by an agreement between Hungary and Romania, and Act No. 4 of 1886 was applied this time to naturalise these people. However, the plans to resettle the Csango people could not be carried out due to the events of the Second World War. Spontaneous migrations also occurred. In one such case, more than 150.000 Hungarians left southern Transylvania, which remained Romanian territory after the Second Vienna Award, as they opted for Hungarian citizenship (and even more ethnic Romanians from North Transylvania did so to obtain Romanian citizenship).[29]

3. The Peace Treaty of Paris and its effects

After the Second World War, the situation was quite similar to that right after the First World War: the Armistice Agreement signed in Moscow on 20 January 1945 obliged Hungary to evacuate the territories returned before and during the war, and the borders according to the Trianon Treaty were again reinstated. Consequently, many native Hungarians living in these areas lost their Hungarian citizenship without obtaining citizenship of another country. Since neither explicit regulations on citizenship nor even provisions about offering options – as found in the Treaty of Trianon – were included in the Peace Treaty of Paris of 10 February 1947 (proclaimed in Act No. 18 of 1947 in Hungary), the inhabitants of the former Hungarian territories did not receive the citizenship of the new home state as part of the treaty. An important issue with regards to citizenship involved the ethnic Hungarians in Czechoslovakia, who were not affected by the population exchange treaty with Czechoslovakia on 26 February 1946. The problem was that the neighbouring states refused citizenship to many Hungarians, and the peace treaty did not obligate them to do so.

Romania refused citizenship to all of the so-called optants (persons who opted for the Hungarian citizenship after the Second Vienna Award) and persons who moved after the Second Vienna Award to now Romanian territories.[30] On 10 February 1949, Hungary and Romania approved a bilateral treaty on citizenship issues (proclaimed in Act No. 14 of 1949), as a corrective measure for the situation resulting after the Second World War.[31]

The second Czechoslovakian state denied citizenship to all Hungarian persons in accordance with No. 33 of the so-called Benes decrees from 2 August 1945 (formally decrees of the president of the Czechoslovakian Republic): persons who had obtained Hungarian citizenship after the First Vienna Award (but lost it after the Vienna Awards were declared void) and all other persons with

24 Sebestyén (1989) 126.
25 V. Kápolnás (1994) 255.
26 Tilkovszky (1991) 106.
27 Seewann (2003) 343.
28 A. Sajti (1984) 47; Vincze (2001) 147.
29 Parragi (2000) 44.
30 Vincze (1999) 191.
31 Parragi (2000) 44.

Hungarian nationality. In June of 1946, the ethnic Hungarian inhabitants of Czechoslovakia were given the possibility of obtaining citizenship by means of the so-called »*reslovacisation*«: they had to declare that they want to be Slovaks »again«, as their ancestors were Slovaks that went through Hungarisation over the centuries. The purported aim of the campaign was to remove the Hungarian minority – even from the statistics. In the end, about 400.000 Hungarians chose this option, many of them not even able to speak Slovakian.[32]

Since the situation from the Hungarian point of view was much like that after the First World War, the legislation passed by the government after the Second World War was also quite similar. There were supplementary regulations, such as government order No. 5.070/1945, which presumed Hungarian citizenship to all persons who had obtained the citizenship according to the withdrawn regulations and had their permanent residence in Hungary,[33] but in this case, the permanent residence was the decisive factor rather than the ethnic link.

Furthermore, Act No. 60 of 1948, the Second Citizenship Act, included the following supplementary regulations: all persons able to prove permanent residence in Hungary, possessing no other citizenship and either themselves or their parents born in the territory of the Kingdom of Hungary before the Trianon Treaty, the so-called historical Hungary, were Hungarian citizens. This regulation concerned many Hungarian refugees who left the neighbouring countries after the war and included the same regulation content as government order No. 5.070/1945, the difference being that here Hungarian citizenship was given versus assumed.[34]

Another instance of privileged naturalisation was given to persons born in historical Hungary with ancestors who possessed Hungarian citizenship at any point in time, and have permanent residence in Hungary or are intending to move there, and to persons born in historical Hungary and living in Hungary, even if they were not able to confirm the Hungarian citizenship of their parents. In practice, this meant people born to Hungarian parents after 1920 as foreign citizens in neighbouring countries. Both options required the Minister of Home Affairs to decide on a case-by-case basis as well as cases deserving special consideration.[35]

The so-called Population Exchange Treaty between Hungary and Czechoslovakia, signed on 27 February 1946, was just such a special case. Almost 100.000 people lost Czechoslovakian and obtained Hungarian citizenship under the treaty and were forced to leave Czechoslovakia.[36]

The measures between 1918 and 1948 regarding citizenship of native Hungarians can be divided into three groups: first, the option of selecting Hungary made possible by the Trianon Treaty and the Vienna Awards. In this first group, the people made individual decisions, assuming they met the only criterion, that is, being able to prove Hungarian ethnicity. And while the Hungarian government tried to keep the number of persons falling into this category relatively low, for economic reasons, a great number of people obtained citizenship via this measure.

The second group is made up of the supplementary or corrective regulations for persons affected by the peace treaties of Trianon in 1920 and Paris in 1947. The Hungarian literature on this topic calls them repatriation measures. Some of these types of measures adapted the law to fit the factual situation, while others opened up possibilities of a privileged naturalisation or re-naturalisation. They often decided on cases deserving special consideration. Proof of former Hungarian citizenship, either personally or paternally, was decisive in these cases, not Hungarian ethnicity. In practice, however, these acts affected persons of Hungarian nationality.

Third, population exchanges effectively amounted to forced ethnic-based relocation, and unlike all other measures, it resembled ethnopolitical aspects of Czechoslovakia rather than Hungary. After the Second World War, Hungary became even more of a nation-state: about 70.000 Slovakian nationals settled in Czechoslovakia as a result of the Population Exchange Treaty, and 150.000 German native speakers were forced to leave the country. While large groups of Hungarian minor-

32 Vadkerty (2007) 323.
33 Parragi (2000) 44.
34 Act No. 60 of 1948 § 27.
35 Kisteleki (2000) 60.
36 Vadkerty (1999) 166–167.

ities still remained in the surrounding states, their problems were simply not on the political agenda at that time. According to the official position, one of communism's explicit goals was to solve the issue of national minorities in all countries under the Soviet Union's sphere of influence. Relationships with the »socialist brother nations« should not be disturbed by the problems of the Hungarian minorities, so the state-controlled media didn't mention them, and Hungarian diplomacy made hardly any efforts to push this topic. In other words, the problem was officially non-existent.

IV. The communist period: denial of the Hungarian minorities?

The Third Citizenship Act, Act No. 5 of 1957, regulated privileged naturalisation: it was possible to obtain Hungarian citizenship without the required three years of permanent residence if one could prove that an ancestor had been a Hungarian citizen – again a measure primarily targeting ethnic Hungarians. The applicant had to prove permanent residency in Hungary or that they were about to move to Hungary. In the latter case, permission had to be obtained from the foreign police authority. Since the conditions for being granted permission were not public, this was regulated by means of secret directives.[37]

Although it was admitted by the Third Citizenship Act, Hungary signed similar bilateral treaties to avoid dual citizenship with all other countries in the socialist bloc. Whether these treaties were signed to avoid providing Hungarian citizenship to Hungarian minorities in the surrounding countries is still quite controversial. The diplomatic records do not show any indications of this being the case, and treaties were also signed with countries that didn't have a Hungarian minority (for example, Poland or Mongolia). However, one paragraph in the treaties did effectively block this possibility: the naturalisation of citizens of the other party nations was not possible without the agreement of said party. Romania was able to block ethnic Hungarians from Romania applying for naturalisation in Hungary by refusing to agree.[38] Another problem was the fact that these treaties were not made public; many people addressed by them did not even know of their existence.

V. From the democratic transition to the present: legal unification of the Hungarian nation?

After the democratic transition in Hungary, the new citizenship Act No. 55 of 1993 was enacted; at the same time, the situation of Hungarian minorities in neighbouring countries also became an item on the political agenda. The Fourth Citizenship Act admitted Hungarian ancestry as a case of privileged naturalisation: only one year of permanent residence was required (instead of eight years) if the applicant declares his / her Hungarian nationality and had ancestors possessing Hungarian citizenship. It made the naturalisation of Hungarians from neighbouring countries possible, assuming they lived in Hungary and fulfilled all other requirements.[39]

The Hungarian citizenship of ethnic Hungarians living abroad was an issue in the decades after the democratic transition in 1989–1990.[40] In 2004, an NGO, the World Association of Hungarians (*Magyarok Világszövetsége*), started a plebiscite for a referendum on the topic. This referendum was held on 5 December 2004, and was unsuccessful, with less than 37.49% of the electorate voting. According to the regulations at that time, more than 25% of the voters had to vote for the measure, which was not the case: 51.57% voted for and 48.43% voted against it.[41] Given that the then government (a coalition of the social democratic MSZP and the liberal SZDSZ parties) was against dual citizenship of ethnic Hungarians, and a two-thirds majority was required to modify the Citizenship Act, no new regulation was enacted. The result of the referendum caused outrage and disappoint-

37 Parragi (2000) 46.
38 Parragi (2000) 47.
39 Parragi (2000) 48.
40 Körtvélyesi (2011) 49.
41 Announcement by the National Voting Office (https://static.valasztas.hu/nepszav04/main_hu.html).

ment among Hungarian communities abroad and widened the divide within Hungarian public opinion.[42]

In the campaign leading up to the parliamentary elections of 2010, simplified naturalisation of ethnic Hungarians was one of the central promises of the then opposition and today's government parties, FIDESZ and KDNP. On 26 May 2010, the modification of the Citizenship Act was the first legislative act of the newly elected parliament, which had the necessary two-thirds FIDESZ-KDNP majority. The modification of the Citizenship Act was admitted with a clear majority,[43] with even some members of the opposition voted in favour of it. There were 344 »yes« votes, 3 »no« votes, 5 abstentions and 21 members were absent.[44] The new regulation came into force – as a symbolic act – on 20 August 2010, the Hungarian national holiday, and was applied after 1 January 2011.

According to the new regulation, anyone who has ancestors with Hungarian citizenship, or can establish their likely Hungarian ancestry, and speaks Hungarian, except for persons previously convicted or under a criminal proceeding, or if the naturalisation endangers the public and national security of Hungary, can apply for citizenship. Neither permanent residence in Hungary nor the intention to relocate there are required. Although the new regulation was designed for ethnic Hungarians – as the declared justification for the act is the »legal unification of the nation« – declaration of one's Hungarian ethnic affiliation is not a requirement, just ancestry and knowledge of the Hungarian language. This change is an effect of modern international law on the law of citizenship: ethnic neutrality is required and a genuine link between citizen and state is obligatory,[45] according to the so-called European Convention on Nationality, Treaty No. 166 of the Council of Europe from 1997 (in Hungary proclaimed in Act No. 3 of 2002).

The clause requiring »likely Hungarian ancestry« is particularly interesting, as it is expected to pertain to those applicants whose ancestors never possessed Hungarian citizenship, which today can only be the case if their ancestors never lived in the historical territory of Hungary, including the whole Carpathian Basin. In practice, this encompasses one of the larger ethnically Hungarian groups, the Csangos, who have been living in Moldavian territories since the Middle Ages, and who consequently have legally never been Hungarian citizens. Unsurprisingly, the regulation quickly became known as the »Csango clause«.[46]

Such simplified naturalisation allows for all ethnic Hungarians to obtain Hungarian citizenship – the government advertised it as an act to bring legal unification of the Hungarian nation. Since 2011, more than 1.1 million people have applied for the simplified naturalisation, most of them without permanent residence in Hungary.[47] For the inhabitants of Ukraine and Serbia, it also means obtaining the EU citizenship, including the right of the free movement of persons and the four freedoms of the single market, as well.

The new regulation was also criticised: first, the high risk of abuse was cited, as Hungarian ancestry need only be probable, and no rigorous check of the documentation or Hungarian language proficiency is carried out. It is estimated that several thousand Ukrainians and Serbians obtained Hungarian citizenship and the freedom of movement in the EU without actually fulfilling the requirements.[48] The second criticism holds that the FIDESZ-KDNP coalition followed its own political agenda, as the Hungarian citizens living abroad gain the right to vote for the party list of the Hungarian parliament elections. At the last elections in 2018, 266.000 persons voted without residence in Hungary for the party list (they have no vote in the constituencies), 96% of which voted for the common party list of FIDESZ-KDNP, but this resulted in no additional seat.[49] Independent

42 Körtvélyesi (2011) 49.
43 Act No. 44 of 2010 regarding the modification of Act No. 55 of 1993 pertaining to Hungarian citizenship.
44 https://hvg.hu/itthon/20100526_elfogadtak_kettos_allampolgarsag (HVG 26th May 2010).
45 Parragi (2000) 38.
46 Körtvélyesi (2011) 49.
47 Announcement made by State Secretary Dr. Zsolt Semjén in his report for the Committee of National Togetherness of the Hungarian Parliament on 9 December 2019 (https://www.parlament.hu/documents/static/biz41/bizjkv41/NOB/1912091.pdf).
48 Dobos / Dobos-Balogh (2019) 57–63.
49 Announcement of the National Voting Office on 3 May 2018 (https://www.valasztas.hu/levelszavazas-jegyzokonyv).

of political preferences, the fact cannot be denied that several hundred thousand voters neither living in Hungary nor directly affected (if at all) by the decisions made there have the right to vote in the parliamentary elections.[50] The third point is that the freedom of movement made possible by means of Hungarian citizenship increases the emigration of the ethnic Hungarians and weakens the Hungarian communities, especially in Carpathian Ruthenia (Ukraine) and the Vojvodina (Serbia).[51] It should also be mentioned that of the surrounding countries with a significant Hungarian population, Slovakia prohibits dual citizenship and withdraws Slovakian citizenship if someone obtains Hungarian citizenship. Consequently, most of the ethnic Hungarians in Slovakia remained Slovak citizens and never applied for Hungarian citizenship.

The most recent regulation regarding the citizenship of ethnic Hungarians was portrayed as a symbolic act, as »the legal unification of the Hungarian nation«, or »correction of the injustice of Trianon«, although it also has other political and social effects. This is the first measure that doesn't require moving to Hungary and made hundreds of thousands of people dual citizens.

VI. Summary

The question of Hungarian citizenship of ethnic Hungarians has been on the agenda in Hungary since the beginning of modern citizenship law. Both the regulations and their underlying motivations have varied. With the exception of the First Citizenship Act, Hungarian ancestry has played a role in most of the regulations, though with different emphases.

In the era of the dual monarchy, the rationale for simplified naturalisation of ethnic Hungarians was to increase the ratio of Hungarians in the Carpathian Basin of the multi-ethnic Hungarian state. Act No. 4 of 1886 was created to facilitate the resettlement of ethnic Hungarians who had never been Hungarian citizens, with Hungarian ancestry being the only link.

The second period in the history of the citizenship regulation extends from just after the First World War until after the Second World War, in which the goal was to counter the consequences of the territorial changes undergone by Hungary and the re-naturalisation of ethnic Hungarians who lost their Hungarian citizenship but lived in Hungary, those who were about to move there voluntarily or even forced to do so.

After the communist period, when the naturalisation of ethnic Hungarians was made difficult, the ethnic link became even more important after 1993: if someone had Hungarian ancestry, then privileged naturalisation was possible after one year of residence. The current simplified naturalisation regulation possesses a strong symbolic character, and it is the first one not based on residency in Hungary or an ethnic link: ancestry and language skills are sufficient to become a Hungarian citizen.

■

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In omnibus aliquid. et. in aliquo omnia.

Ich dencke, Seh, und hör: ich lese, red und schreib,
Damit Verstand und will nie ungebessert bleib.

Kluge CONDUITE
Eines künfftigen Gelehrten,
Und insonderheit eines
Rechts-Gelehrten,
Oder:
Vernünfftige MANIER,
Sowohl
Andere Disciplinen, als fürnemlich die Rechte auf Universitäten zu studieren, worinn gezeigt wird, sowohl was, als wie viel, und wie man studieren solle.
Sammt einer Vorrede
Von denen Klagen über die Eytelkeit,
Zumahlen
Deß vielen Bücher-schreibens.

Franckfurt und Leipzig,
Verlegts Johann Friedrich Schmid, 1715.

Forum forum

Thomas Duve

»This is not a history of international law«. A Brief Introduction into the Debate on Martti Koskenniemi's *To the Uttermost Parts of the Earth*

The history of international law has been one of the most dynamically growing fields of legal historical research of the last two decades. Remarkably, the so-called »historical turn« in the scholarship of international law did not emanate so much from historians as from the legal discipline of international law itself. Perhaps this is why, despite important early impulses – not least from the recently deceased Michael Stolleis, to whom we dedicate a brief obituary in this issue[1] – this research has developed institutionally and to some extent also intellectually largely alongside the realm of legal history.

The emergence of this international field has led to fascinating insights and fruitful irritations not least for legal historians. Traditionally nationally-oriented legal history suddenly found itself confronted with a mostly English-language legal historical discussion on international and transnational law. Postcolonial theories and politics resonated in the arena of legal history. Historical analyses of law, which often seemed rather marginalized in law schools, suddenly became downright trendy. At the same time, however, research on the history of international law developed in some cases with a certain intellectual independence from the state of research in history and legal history. Particularly in the debates about the relationship between law and history, about concepts and methods, many problems have been hyped that (legal) historians had been dealing with for many decades at least, leading to a somewhat distorted and in some cases simplistic picture about (legal) historical methods.[2]

If there is one person to be identified as the center of this fascinating »historical turn«, it is undoubtedly Martti Koskenniemi. His pivotal role has been highlighted on several occasions. However, he is an exceptional phenomenon not only because of his charismatic intellectual leadership in the field, but also because of his method – and the book that is the subject of this debate is the latest and best proof of this. Because, like few others, he combines political *impetus* with patient close reading of historical sources. More than any, he tries to follow the avalanche of research and debates in the major European languages in the history of international law, history of political theory and history of empires. Not least, he has experienced legal practice and knows that legal knowledge is, as it has been rightly said, »an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language«.[3] For many years, he has been concentrating on a major project to place his *Gentle Civilizer of Nations* in a broader historical context leading from the Middle Ages to modern times: What could be more natural than to put this book up for debate – and, through the venue, and above all the choice of participants, create a forum in which the often separately conducted discussions about the history of international law and (legal) history of the late Middle Ages and modern times are brought together?

The book and the contributors to the debate

To the Uttermost Parts of the Earth contains twelve chapters, with a brief introduction and conclusion, and a 101-page bibliography. It is divided into three parts: Part 1: *Towards the Rule of Law*, with chapters starting with the conflict between Philip IV (the Fair) and Pope Boniface VIII, which led, at the beginning of the 14th century, to the Pope issuing the famous *Unam Sanctam* bull. It leads the reader

1 See in this issue Duve (2021b).
2 See on this for example Benton (2019); Fitzmaurice (2018).
3 White (2002) 1399.

into the emergence of the new understanding of *ius gentium*, *dominium* and sovereignty, and presents the political theology of *ius gentium* and Italian and Dutch readings and interpretations, not least by Hugo Grotius. Parts 2 and 3 are dedicated to *France* and *Britain* as the central imperial powers that shaped the language of law, while part 4 covers *Germany*, its natural law discourse and the many reinventions of natural law between the 16th and early 19th century, mainly in academic discourse. It ends where his *Gentle Civilizer of Nations* started.

Undoubtedly, a book of this breadth cannot be reviewed by a single person, even less so in the short statements our contributors were asked to deliver. We are all the more grateful to those colleagues that have, nonetheless, agreed to participate in the debate and sent us their thoughts. With Tamar Herzog, Jean-Louis Halpérin, Amalia Kessler, Cristina Nogueira da Silva, we are lucky to have statements from leading legal historians from France, Portugal and the US, working on the early modern and modern legal history of France, Germany, Spain, Portugal and their imperial formations in comparative perspectives. Jean-Frédéric Schaub, Bartolomé Yun-Casalilla, Jörn Leonhard are most prominent historians of the European empires and their global histories. Chen Li's fascinating research on Sino-Western relations and the global history of Empires and Jessica Marglin's impressive expertise on the legal history of modern North Africa and the Mediterranean made it possible to set Martti Koskenniemi's book into »non-North-Western« perspectives. Jean d'Aspremont, Inge Van Hulle, Madeleine Herren, Gunnar Folke Schuppert, all of them leading historians of international law, the history of international organizations, transnational movements and experts in analyzing the language of law, have shared their views on Martti Koskenniemi's book with us. Martti Koskenniemi himself immediately agreed to our suggestion for a debate and was willing to respond to the comments, written on the basis of the proofs that were facilitated to us by CUP. I am sure that the observations made in the debate as well as Martti Koskenniemi's response can help to integrate the diverse disciplines into a larger conversation that overarches academic and regional traditions.

Questions raised

It is not the part of the convenor of a debate to comment on the comments, or on the response. Although it would be tempting to relate the book with the methodological reflection on legal history as a history of knowledge creation through translation published in this same journal, or to the research on global legal history, or the »School of Salamanca«, developed at the Max Planck Institute.[4] Neither will I summarize the praise of the book, rightly called an encyclopedic treatment proposing a clear idea about how law is being produced. Nor does it make sense to discuss the points raised by the contributors to the debate in their concise statements, to which Martti Koskenniemi is responding.

However, many of the points raised in the debate refer to fundamental problems of writing transnational or global legal history. I am just listing some of them which seem especially promising for the future debate on how to write global legal history:[5] How to relate national and transnational legal histories, and what consequences does it have if the emplotment starts with, as in this case, France, and not with, for example, Italy (Halpérin, Herzog)? How to adequately balance the roles different European empires played, emancipating from all kinds of black legends (Schaub)? What about empires like the Russian, or Swedish, that played a major historical role, but only a marginal one in the writing of Global History (Leonhard)? What about the Islamic worlds (Marglin, Schaub) and China and their impact on the European legal imagination (Li)? How to write a history that necessarily follows a certain temporality without making the different temporalities leading into a teleological narrative invisible (Herren, Leonhard, with slightly different appreciations)? How to deal with the incommensurability of »law« and other modes of normativity, especially if not stemming

4 On legal history as a process of knowledge creation see in this issue Duve (2021c); for the research on the School of Salamanca see Duve (2021a).

5 On the challenges and opportunities see Duve (2020).

from the Christian tradition (Marglin), and what does this mean for the recognition of historical information as a legal historical source (Li)? How much »state« is there still inherent in our history telling (Herzog)? How to integrate the norm-creating practice, institutions, ordinary people, and the agency of non-Europeans into this history (Halpérin, Kessler, Leonhard, Nogueira, Schaub, Yun-Casalilla)? How to write a legal history in its own right, trying to understand the recursive structure of the production of law, while at the same time recognizing that law might only be »the code of capital« or at least deeply embedded into a political economy (Schuppert, Van Hulle, Yun-Casalilla)? How much of what was »lying around« can and must be integrated into the »conceptual cage of intellectual history« (Herren)? How to understand the processes of (cultural) translation of normative knowledge from different periods and times – as *bricolage* or with other notions – and what are the drivers in this process (Herren, Leonhard)? To what extent does legal imagination change the limits of the language (d'Aspremont) – and what does this mean for the shifting limits of our worlds?

Dealing with Eurocentrism

These questions already show that, in fact, as Martti Koskenniemi stated at the beginning, his book »is not a history of international law« (Koskenniemi 2021, 1). It is much more: »It is a history of the legal imagination as it operates in relationship to the use of power in contexts that we would today call international«. It aims at nothing less than providing a historical model for the production of law – or the legal argument – before modernity.

A lot could be said about this ambitious goal that is in a certain way rooted in his early writings.[6] However, as the same debate shows, due to the author and his position in the field, the book will inescapably be read as a history of international law. It might not least be this way of reading the book that induces one to suspect a certain Eurocentrism in his writing. But, one wonders, how can Martti Koskenniemi be »Eurocentric«, if he spent decades of his life uncovering and denouncing western legal imperialism?

A brief look at a text published precisely ten years ago in this same journal might help: *Histories of International law*: *Dealing with Eurocentrism*.[7] In this contribution to a special issue on the occasion of the 70th birthday of Michael Stolleis, Martti Koskenniemi sketched out »four directions to deal with Eurocentrism in the history of International law« (Koskenniemi 2011, 171). Looking at this article today, with his new book in hand, the piece not only reads as an introduction into the position of *To the Uttermost Parts* in the wider historiographical field. More importantly, one can clearly see the choice he made from the four options described ten years ago. A first direction, he summarized in 2011, »consists of the careful demonstration of the colonial origins of an international legal rule or institution« (Koskenniemi 2011, 171). Here, dealing with Eurocentrism means showing how international law has imposed Eurocentric ideas on others. »Another way of dealing with Eurocentrism is by focusing on the encounter between Europe and the New World as an important, even foundational moment to the discipline itself« (Koskenniemi 2011, 172). In this approach, non-European actors receive a certain, although passive, role in the creation of international law. The third way of dealing with Eurocentrism directs the »attention to the hybridization of the legal concepts as they travel from the colonial metropolis to the colonies and their changing uses in the hands of the colonized« (Koskenniemi 2011, 173). These studies complicate the idea of a Europeanization of the world. Finally, the fourth technique is to »exoticize (provincialize) Europe and European laws« (Koskenniemi 2011, 174).

Martti Koskenniemi – I believe – opted for the fourth way of dealing with Eurocentrism, developing an analytical framework of how legal imagination operates (see especially Koskenniemi 2021, 4–8, as well as the Conclusion and Epilogue) that goes far beyond what he laid out in *From Apology to Utopia*. Thus, with the thorough description of the European debates from the 14th to 19th century, he is not only following his »obsession« to »think

6 See Koskenniemi (1989), especially on the reversibility of the legal argument, 449; in the Introduction, XXIII, he draws on Claude Lévi-Strauss' ideas that language molds discourse beyond consciousness.

7 Koskenniemi (2011).

about law in the context of power, namely the power of law as language« (Koskenniemi 2021, 8). Moreover, he is putting the strategy of exoticizing our past into practice. The aim of his intellectual history is to unmask seemingly timeless and universal ideas as contextually bound to particular projects or interests. »Eurocentrism might then be destabilized with the realization that ›Europe‹, too, is just a continent with its particular interests and neurosis, wisdom and stupidity – rather like realizing that the choice for a French restaurant is also to opt for ethnic food« (Koskenniemi 2011, 175).

■

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Li Chen

Reimagine International Law and Relations?

A Short Reflection

This new monumental book further consolidates the reputation of Martti Koskenniemi as one of Europe's most influential and stimulating historians of international law in our time. Surveying a large body of European writing on domestic and international law, commerce, and politics from the 13th to the late 19th centuries, the book provides a remarkably thorough, insightful, and critical analysis of the relevant literature. It is filled with illuminating passages about the core arguments of celebrated theologians, philosophers, diplomats and lawyers, ranging from Thomas Aquinas, Francisco de Vitoria, Jean Bodin and Hugo Grotius through Thomas Hobbes and John Locke to Adam Smith and Emer de Vattel, before ending with international lawyers like Georg Friedrich von Martens. Unlike most conventional studies of these texts, however, the book is »not a history of international law but a history of the legal imagination« (953). It explores how the legal arguments about the power of sovereignty and the power of property were imaginatively employed to rationalize, critique, or codify the ideas and practices of the European states and empires in face of considerable domestic changes or international expansion. Contrary to the interpretation of much of the pre-existing scholarship, the author argues that »European power is neither the power of sovereignty nor of property but always a particular, locally specific combination of the two. *Sovereignty and property are the yin and yang of European power*« (958–959). Needless to say, the discourses on sovereignty and property were central not just to the emerging European nation states but also to the formation and transformation of the modern international order. This book is a highly valuable contribution to the critical scholarship to further demonstrate how and why that was and has been the case.

Since many an expert has already commented on what is discussed in the book, I will use the very limited space to briefly note what has been suppressed or excluded by the European legal imagination about sovereignty and property, which, as the author has pointed out, was a Eurocentric »male imagination« throughout this period (12–13, 956). Its ethnocentric assumptions often left the European thinkers and empire builders ill prepared for international encounters in which their presumably natural, international or universal legal principles were not only unrecognized as such but tenaciously contested or counteracted. Such encounters and resulting epistemological jolts called into question the taken-for-granted sense of identity and hierarchical boundary between *oneself* and the racial, cultural, political or juridical *other*. In this regard, China was, and to a great extent has remained, a classical example.

In a book of over 1000 pages, China is discussed only in about six pages (777–782), focusing on the perspectives of British officials and empire builders during the period from 1834 to 1860, around the time of the two Opium Wars. Besides the fact that this book is already huge and understandably cannot cover many topics, this brief coverage and its focus are also partly attributable to the nature of the sources. This instance thus highlights the difficulty of trying to achieve what the author has envisioned as a major contribution of this book: critically re-examining the history of Eurocentric legal imagination in order to enable us to reimagine the historical and contemporary international legal and political orders. One recurring question for this reader is: To what extent can we actually achieve that reimagining when our sources, knowledge, epistemology, and normative assumptions are still so profoundly influenced by the once dominant colonial legal discourse that Koskenniemi has so brilliantly analyzed.

Moreover, instead of treating the history of Sino-European encounters as just another example of the global expansion of European culture and power, it might be more fruitful to understand it as a counterhegemonic case in which the universalist or ethnocentric assumptions of the European discourses of sovereignty and property were seriously challenged. From the early 16th through the early 19th centuries, the late imperial Chinese government not only refused to recognize the European assertions of cultural superiority or »natural« rights to trade, travel, and proselytize in Chinese territory, but also had the resolve, resources, and institu-

tional capacity to frustrate most European attempts at securing those »rights« and to avoid what happened to Mughal India and elsewhere at that time. To the dismay of the European empire builders, the Chinese authorities also had their own discourses and imagination about domestic and international power, national security and interest, and cultural and political hierarchy. These Chinese discourses and policies have long been dismissed by commentators – then and later by modern scholars – as ethnocentric, primitive, or irrational. That once dominant interpretation was considerably influenced by the competing European legal discourses and imagination analyzed by Koskenniemi and other postcolonial scholars. As revisionist scholarship has recently shown, it is these competing interests, ideologies, imaginations, and politics of empire *in specific and changing* historical circumstances, not the alleged clash of *essentialized* cultures or civilizations, that accounted for the Sino-Western conflicts in the 18th and 19th centuries. This then leads to the question of what impact this kind of direct, external challenge might have had on the European legal imagination itself.[1]

In fact, China would remain the biggest and most notorious obstacle to the global domination and symbolic hegemony of European colonial powers. Given that China still had about one third of the world's total population and the largest GDP even on the eve of a humiliating defeat of the Opium War of 1839–1842, what the above-noted European writers long imagined to be natural, universal, or international legal principles or practices could *not* be convincingly so considered until the Chinese had been brought into the fold. The post-1842 Sino-Western relationship, based on the treaty system, foreign extraterritoriality, and gunboat diplomacy in China, only served to temporarily codify the Euroamerican discourses of sovereignty, property, and domination. In spite of enormous changes over the last one and a half centuries since then, China, for various reasons, has remained an essential and essentialized marker to signify the cultural, ideological, and racial *other* and negative foil in the evolving Euroamerican legal imagination. The current rise of Sinophobia in many places, dramatized by the tensions and politicized sentiments surrounding the Covid-19 pandemic, is only the most recent reminder. The fact that the balance of economic and geopolitical power has gradually shifted back in favor of China in recent years has further complicated the dynamics of international relations.

One of the significant contributions of Koskenniemi's book lies in its nuanced analysis of how those European ideas and texts acquired symbolic power and became the hegemonic discourse about sovereignty and property in the modern era. Given that the rules of the game of the modern international order have continued to be largely determined by some of the same (former) colonial or imperial powers, the deep-rooted exclusionary and hierarchical logic of the earlier legal imagination can hardly be expected to vanish anytime soon. Readers may wonder, once again, how a new international society can be reimagined – under the current international power structures – differently from two or three centuries ago. If it cannot, what kinds of fundamental changes have to be effected before that becomes realistic? Relatedly, in what ways will a critical re-examination of the history of earlier European legal imagination like Koskenniemi's facilitate that kind of change or rethinking?

Furthermore, Koskenniemi's analysis includes numerous examples of the divergent or even irreconcilable views among the leading European thinkers under study even though he did not go further to explore the implications of these internal tensions. For instance, Sir William Blackstone maintained that »[t]he law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world« (648), while his contemporary British compatriot Adam Smith proclaimed that »[t]he regard for the laws of nations, or for those rules that independent states profess or

1 See, e. g., Li Chen, Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics, New York 2016; Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law, Cambridge (MA) 2013; Lydia H. Liu, Clash of Empires: The Invention of China in Modern World Making, Cambridge (MA) 2006; James Hevia, English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China, Durham 2003; John Y. Wong, Deadly Dreams: Opium, Imperialism, and the Arrow War (1856–60) in China, Cambridge 1998.

pretend to think themselves bound to observe in their dealings with one another, is often very little more than mere pretence and profession« (671). Despite these contradictions, the European law of nations was often presented by the European empire builders to the Chinese (and other non-Western peoples) as universally true and legally binding during the 18th and 19th centuries. Instead of stressing the seemingly totalizing domination of the Euroamerican discourse of international law and power, a critical re-examination of the historical processes and forces that helped to suppress these internal contradictions and universalize the imperial discourse may allow us to challenge, *from within*, its presumed coherence and legitimacy in the past and present.[2] A history of the early modern European legal imagination is also a history of the politics of boundary-making and the present book certainly helps lay bare many of the taken-for-granted epistemological and normative prejudices of that imagination and their enduring influence upon the international legal and political order of our own time. Let us hope that a very different kind of reimagination will be on the horizon.

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2 Chen, Chinese Law in Imperial Eyes (n. 1).

Jean d'Aspremont

Legal Imagination as Resistance

In its author's own saying, *To the Uttermost Parts of the Earth* constitutes a history of legal imagination understood as a history of the ways in which ambitious men, mostly in Europe, used the legal vocabularies available to them in order to react to import events in the surrounding world« (1). As a history of legal imagination, *To the Uttermost Parts of the Earth* continues – and decisively contributes to – a now firmly established scholarly tradition of engagement with legal imagination in the international legal literature. In fact, nowadays, international lawyers often invoke imagination to refer to the discursive, argumentative, interpretive, performative possibilities that are offered (or refused) to them by their tradition, their training, their discipline, their vocabularies, their forms, their symbolic universe, their history, their regime of truth, their belief system, the structure of their argumentation, etc. That the author perpetuates such engagement with legal imagination is no coincidence, for Martti Koskenniemi himself has long been instrumental in elevating legal imagination into one of the points of entry into the scrutiny of international lawyers' ways of thinking.

Limited space has been allocated to the contributors of this *Forum*. Because I feel embarrassed to speak about an impressive 1107-page long history of legal imagination within such a restricted space, I want to start by saying something about space. I particularly wish to say a few words about the space provided by Martti Koskenniemi's book *as a book*. A book often comes across as a neat, linear, totalizing and systematic container for a set of pre-existing ideas, historical findings, stories, arguments, etc. The 1107 pages of *To the Uttermost Parts of the Earth* can certainly be perceived this way. Yet, in my view, there is no book that functions just as the container for pre-existing ideas, historical findings, stories, arguments, etc. Indeed, for I believe there is no content that pre-exists its inscription, a book cannot be distinguished from its content. A book, as inscription, always supplants its ever deferred and always absent content. This book is no exception to that.

The reason I am making this point – which I noticeably borrow from French poststructuralist literary theory – is to highlight why I believe that Martti Koskenniemi's *To the Uttermost Parts of the Earth* offers us less a set of pre-existing ideas, historical findings, stories, arguments, etc. that ought to be interpreted by exegetic readers but more a *space* where something happens and will be happening in the decades to come. As a book, it is a space for a great variety of events that are yet to come. What happens and will happen in the space provided by his monograph is and will be the result of his readers exercising imagination. What I mean here is that the readers of *To the Uttermost Parts of the Earth* are bound – just as the contributors to this *Forum* are as they venture into the space offered by that volume, to fill it through the exercise of imagination. Imagination is one of the ways in which one fills the space provided by the inscriptions with which one engages in order to make something happen. Interestingly, *To the Uttermost Parts of the Earth*, as a book on the history of legal imagination, offers a space now for imagining how lawyers, theologians, merchants, poets, philosophers, medical doctors and economists have themselves filled the space available to them through their imagination then. In that sense, *To the Uttermost Parts of the Earth* is a happening about centuries of happenings or, said differently, it is a space about uses of space then and now. This entails that the readers are not only following the footsteps of all the protagonists whose stories and interventions are told by Martti Koskenniemi in his new book; they are also caught in the same indefinite space.

The abovementioned emphasis on the idea of space could be construed as supporting a reading of *To the Uttermost Parts of the Earth* as yet another book on the constraining dimension of structures and, thus, on the limited repertoire of possibilities left to international lawyers by virtue of their specific regimes of truth. After all, the idea of space comes with the idea of capacity, limit, boundary, possibility, etc. What is more, a reading of *To the Uttermost Parts of the Earth* that foregrounds the limited discursive, argumentative, interpretive, performative possibilities available to international lawyers would not be entirely unwarranted, for Martti Koskenniemi has long been interested in how structures govern and repeatedly made the point that only certain discursive, argumentative, interpretive, performative possibilities are within

reach because of the work of structures. In that sense, it is very tempting to read this book as a continuation of the author' structural work on international law's limited possibilities. Yet, I read *To the Uttermost Parts of the Earth* in the opposite way. I actually take it as a work on the thinking of the impossible then and now. Let me explain this point, which is my way to fill the space provided by the book in the very limited space allotted by the convenors of this *Forum*.

Whilst Martti Koskenniemi is prompt to recognize – drawing on Gaston Bachelard's notion of epistemological obstacles – that vocabularies constitute »the historical baggage that limits what is possible to imagine in a persuasive fashion today« (4), he regularly indicates that exercises of imagination by the lawyers, theologians, merchants, poets, philosophers, medical doctors and economists that populate his history of legal imagination are works *around* the vocabularies that »block« thinking and »simplify« reality (3). For Martti Koskenniemi, imagination is a tool that allows one to shift between discourses, distort vocabularies, and possibly use the language against itself. This is also how I read what the author is trying to tell the readers in the last chapter of the book. Indeed, in that final part, the author, after rejecting point blank the old modernist assumption that language mechanically carries content and thought, immediately takes distance from the opposite view according to which language enjoys full primacy over content and thought. Martti Koskenniemi specifically writes that »[o]ne of the ways in which I find the thesis about the primacy of language to thought and action to be too strong is that it exaggerates the passivity of imagination« (952–953). In my own reading of that concluding chapter, the author is telling us that the structure governs *but not entirely*. This dent in the sovereignty of the structure is, for Martti Koskenniemi, the work of imagination. To put it simply – and maybe somewhat simplistically – imagination, for Martti Koskenniemi, is the way out of the structure.

That imagination, according to my reading of Martti Koskenniemi's understanding it, is the way out of the structure is the very reason why I read *To the Uttermost Parts of the Earth* as a work on the thinking of the impossible. For I believe that there is no way out of the structure and that the outside of the structure remains within the structure, the striving for an »outside« of the structure that comes with the exercise of imagination is bound to belong to the impossible. In other words, trying relentlessly to get out of the structure is a type of thinking of the impossible.

It should be made clear that thinking about the impossible is no minor thing, let alone a fantasy. It could be argued that, as a form of thinking, thinking about the impossible is the greatest form of resistance at the disposal of international lawyers against their tradition, their training, their discipline, their vocabularies, their forms, their symbolic universe, their history, their regime of truth, their belief system, the structure of their argumentation, etc. In that sense, imagining, as it is construed by Martti Koskenniemi in *To the Uttermost Parts of the Earth*, is resisting. His history of legal imagination is thus a history of resistance.

A final observation is warranted. Whether all the multitude of acts of resistance by these ambitious European lawyers, theologians, courtiers, professors, advisers, political writers, etc. have resisted the just or the unjust is yet another question – and *To the Uttermost Parts of the Earth* allows us to think that more often than not resistance has gone hand-in-hand with injustice. Speaking of a better world, as Martti Koskenniemi recalls on several occasions in his book, requires that we are able to speak of the injustices of the past as they have been produced by exercises of imagination, including by the work of resistance.

■

Jean-Louis Halpérin

Une histoire transnationale des imaginations nationales?

Vingt ans après son maître ouvrage, *The Gentle Civilizer of Nations*, Martti Koskenniemi nous donne à lire une somme impressionnante d'histoire des idées sur le droit des gens du début du XIV^e^ siècle au milieu du XIX^e^ siècle. En 2001, il écrivait que le droit international moderne ne commençait pas avec Grotius ni avec les traités de Westphalie. En 2021 il traite de l'auteur du *De jure belli ac pacis* et remonte même à la querelle entre le roi de France Philippe IV le Bel et le pape Boniface VIII. Il ne s'agit nullement d'un reniement par rapport à la thèse centrale de *The Gentle Civilizer of Nations*. En précisant, dès l'introduction de *To the Uttermost Parts of the Earth*, que ce livre n'est pas une histoire du droit international et en terminant cette nouvelle enquête avec l'œuvre de Bluntschli, là où commence *The Gentle Civilizer of Nations*, Martti Koskenniemi consolide au contraire sa thèse selon laquelle le droit international moderne ne serait né que dans le dernier tiers du XIX^e^ siècle. Cette thèse de la «rupture», contrastant avec la présentation *continuiste* des traditionnelles histoires du droit international, est désormais confortée par une étude des plus approfondies d'un ancien droit des gens relevant moins de la normativité du droit positif que d'un ensemble de discours et d'idées sur les rapports pacifiques ou guerriers entre des puissances souveraines.

Pour caractériser son objet d'étude, Martti Koskenniemi parle d'imagination juridique, combinant des éléments de ce que d'autres appellent la culture, l'idéologie ou la conscience juridique. Il justifie le choix original de ce terme en arguant du fait que des juristes de profession ont dû, avec l'avènement de puissances souveraines et surtout avec la découverte du Nouveau Monde, imaginer de nouveaux outils et bricoler toute une série d'argumentations, le plus souvent au profit du pouvoir qu'ils servaient. En cela on serait tenté de dire, en français, que l'imagination juridique n'est pas un imaginaire utopique, mais un discours sur le droit dont les effets associent savoir et pouvoir, pour utiliser le vocabulaire de Michel Foucault.

Témoignant d'une maîtrise extraordinaire des textes et de l'historiographie qui leur a été consacrée, l'ouvrage apporte une contribution majeure à l'histoire des idées sur le droit des gens du XIV^e^ au XIX^e^ siècle et tous les lecteurs y apprendront une multitude de relations nouvelles que la très fine analyse de Martti Koskenniemi découvre entre les sources, leur contexte et nos problématiques contemporaines. Dans le cadre d'un *Forum* sur ce livre aux multiples facettes, je voudrais poser trois questions sur le plan choisi par l'auteur, puis sur l'association qu'il propose entre idées et pratiques, enfin sur le moment de la rupture entre l'ancien droit des gens et le droit international moderne.

Trois parties sur quatre consacrées aux conceptions française, britannique et allemande

Martti Koskenniemi a fait le pari audacieux de commencer par l'imagination juridique dans l'univers chrétien autour de la France du début du XIV^e^ siècle. On peut comprendre ce point de départ lié à l'émergence de la souveraineté royale, voire étatique, et à l'usage qui a été fait des textes du droit romain sur le *jus gentium* dans cette opposition entre le pouvoir temporel et le pouvoir spirituel, impliquant aussi toute une série de débats sur le *dominium* (une autre idée-force du livre étant de ne pas séparer droit de juridiction et droit de propriété). Le lecteur peut être un peu déconcerté par le saut chronologique, dans le chapitre 2 de cette première partie, à la théologie politique des auteurs espagnols du XVI^e^ siècle, sans passer par l'intermédiaire du Grand Schisme qui a donné lieu aussi à d'âpres débats sur les conflits de souveraineté. Nul doute cependant que la période consécutive à l'établissement de l'empire espagnol en Amérique est une étape décisive dans la réflexion sur la colonisation, dans ses aspects de droit privé comme de droit public. L'enchaînement paraît aussi justifié, dans les chapitres trois et quatre, avec les leçons italiennes (notamment celles de Gentili et Botero), puis avec Grotius.

Les trois parties suivantes, consacrées respectivement à la France de 1625 à 1804, à l'Angleterre (puis à la Grande-Bretagne) de 1450 à 1830 et à l'Allemagne de 1500 à 1821, suivent un plan fondé sur l'idée que chacun de ces trois grands pays

européens a vu se développer, sur plusieurs siècles, des manifestations spécifiques (en lien avec l'exercice du pouvoir et les politiques suivies, notamment par les deux premières puissances coloniales et commerciales) de cette imagination juridique relative au droit des gens. Martti Koskenniemi justifie cette approche nationale par les processus propres à l'éducation des juristes et par les politiques suivies par les gouvernants qui varient d'un pays à l'autre. Se seraient ainsi formées des traditions, fondées sur la plus grande proximité des auteurs avec les textes exprimés dans leur langue et les débats agitant leur espace public, qui justifieraient la prise en compte d'une imagination collective dans une dimension fondamentalement nationale. Martti Koskenniemi ne manque pas de nuancer cette thèse, en montrant la circulation des textes d'un pays à un autre, quitte à la relativiser avec d'excellents arguments, par exemple sur la lecture tardive et partielle de Grotius par les juristes français. Ce plan pose néanmoins ma première question, centrale pour les historiens du droit, de la combinaison des histoires nationales (qu'elles portent sur les idées comme sur les normes) et des études insistant sur les phénomènes transnationaux.

Des idées performatives et liées à des pratiques régulières?

S'inscrivant pleinement dans les problématiques actuelles de l'histoire des idées, l'ouvrage de Martti Koskenniemi n'est pas le récit d'un même débat d'idées supposé faire dialoguer des auteurs séparés dans le temps et dans l'espace. C'est une histoire contextualisée de théories développées avec des arguments juridiques et qui sont étroitement liées aux projets politiques des gouvernants, à leur pratique des relations avec les autres États et finalement avec le droit tant privé que public. Si le livre n'est pas une histoire du droit international, ni une histoire des relations internationales, il porte bien sur des idées qui présentaient souvent un caractère performatif et visaient à inspirer ou à légitimer des pratiques: celles relevant des diplomates, des rédacteurs de traités, ou des juges amenés à trancher des conflits impliquant des relations avec les colonies ou des étrangers. Il suscite de ce fait une deuxième question sur l'interaction entre idées et pratiques et sur la possibilité que des régularités factuelles se transforment en règles juridiques, par exemple du fait de l'application des traités par les tribunaux.

Où se situe la rupture donnant naissance au droit international moderne?

Si l'on suit Martti Koskenniemi, deux étapes préliminaires, celle du gallicanisme et de la conquête du Nouveau Monde, ont été nécessaires avant que ne se constituent ces trois imaginations nationales en France, en Grande-Bretagne et en Allemagne. Mais ne peut-on arguer que la Révolution française et les guerres napoléoniennes ont consacré la ruine de l'ancien droit des gens et que la naissance des États-nations a engagé la réflexion sur les questions de conflits de lois et de droit international privé, dont la nouvelle science du droit international public, développée particulièrement en Allemagne, serait le prolongement? Bluntschli et Mancini ne sont-ils pas davantage les héritiers de Savigny et de Story que de Grotius et de Vattel?

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Madeleine Herren

No Esperanto for Law? A Fascinating Book Paves the Way for Future Investigations

The author begins his book of over a thousand pages on the history of international law with the sentence »this is not a history of international law«. With this drumbeat on page one, the book almost triggers the reader to connect with René Magritte's *La trahison des images*, the paradigmatic visualization of a paradox, whose inherent analytical power was described by Michel Foucault in his analysis of Magritte's work. With the paradoxical introduction, Martti Koskenniemi's *To the Uttermost Parts of the Earth. Legal Imagination and International Power, 1300–1870* unfolds into a consistently sustained strategy of narrating across disciplinary borders and epistemological frameworks with admirable coherence and consistency. Taken from a sermon given in 1622 by the dazzling John Donne, the title of the book declares metaphorically that legal imagination developed on the slippery grounds of Eurocentrism, where the »uttermost part of the world« was always presumed far distant from the European self, and certainly not perceived on equal terms.

The key concept of the book, *legal imagination*, unfolds within the established history of ideas and concepts (with Koselleck well represented in the bibliography). However, Koskenniemi introduces the notion of *legal imagination* as an opportunity to consider what is »lying around« in the political and intellectual environment of those involved in the making of international law. Used several times, the »lying around«-notion indeed oversteps the regular historiographical limits in which the history of ideas measures and develops the historicity of *Geschichtliche Grundbegriffe*. As a consequence, in pointing at the potential influences of wars (e. g. referring to the Seven Years' War as a truly global war), the conceptual cage of intellectual history opens up and allows the author to integrate the shifting of national and political characteristics in their respective historical contexts. This specific and rather unexpected historical framing of the topic somewhat compensates for the still existing (and also addressed) fact that this history of legal imagination remains tied to an exclusively male and Western perspective, and highlights the big powers as those paving the way to international law.

Presenting a dynamic framing instead of a linear history of concepts and ideas, the book convincingly masters the *longue durée*, which spans from 1300 to the 1870s. Fascinatingly, the long time span has nothing to do with a chronology of development, in which complexity increases the closer to the present we get. The book connects past and present in a convincing way in giving up a linear narrative where more technical opportunities create more connections and commerce, and therefore increase the pressure for legal regulation. The presentation of overlapping developments, controversial situations, and the ambiguity of concurring factors makes the book even more attractive for an interdisciplinary scholarly audience. Koskenniemi is entirely right in sometimes describing a »mixed bag of things« as a coherent concept (e. g. in the case of Molloy, 598), and the »composite« character of early modern states as their main (and ambivalent) characteristic.

From an analytical point of view, the author describes the use of different vocabularies as legal *bricolage*, which refers to a notion introduced by Claude Lévi-Strauss more than fifty years ago. This conceptual choice is surprising, particularly as in the period following the end of the Cold War, academic reorientation started in almost every field and discipline struggling with vocabularies old and new. To take historiography, for obvious reasons, the paradigmatic shift to global history should explicitly avoid methodological nationalism and develop a new conceptional framing, which includes the notions of connectivity and entanglements, actor-centered networking methodologies, the concept of transculturality, studies on a micro-global level, and a transtemporal approach, among others. The latter had the intention of exceeding periodization with the inclusion of circulations and exchange of concepts not only within the realm of time but also of space. The manifold translations of Bluntschli's work provide an interesting example for the 19th century, now less understood as simple circulation than in its specific form of adaptation with the reading of Bluntschli in China as an example. Within this rationale, there is a remarkable ongoing counternarrative,

e. g. Tingyang Zhao introducing the Chinese tributary system as the core element of Asian globality in his book *Redefining a Philosophy for World Governance*.

Reverting to the concept of *bricolage* questions the discourse of the last 20 years in a substantial way. The reader is curious as to why the historicity of the global with its conceptual debates is fading out beyond the strong notion of *bricolage*, all the more as the book aims – among many other fascinating inputs – to recontextualize the use of history. The introduction of a historical perspective is presented in this book as crucial to the history of international law. The question is whether a global historical approach could be considered within this discussion.

There is much to be said about the convincing structuring of the broad subject matter as well as about the large statements made at the beginning of the chapters, cast as if from a single mold. I take the aspect of legal colonialism as a topic obviously connected to global history but also one that unfolds the crucial interplay between the liberty to trade and the security of property in interesting ways. To me, colonial and consular law provide an almost ideal field for testing the operative impact of legal imagination on the one hand, and for bringing the question to the fore to what extent the globality of international law asks for a specific perspective on the other hand. The author makes a strong argument for grounding the dynamics of bricolage in the West, stating that »imagining starts at home«, all the more »there is no global Esperanto for lawyers to justify rights or duties purported to have a universal scope« (956). Indeed, the world of international organizations – which coordinate epistemic communities across borders in new ways – starts later than the book's focus, although the organization with the highest impact in the field of law is already mentioned, namely the *Institut de droit international*. It is of course paradoxical to ask more from a book of this density and extension, but the research rationale definitely invites to connect the transnational epistemic communities founded in the second half of the 19th century with (the much older) consular and colonial law. With the latter, key elements in the legal imaginaries confront a challenging environment, claiming special privileges for foreigners on the one hand, and safeguarding the concept of sovereignty despite extraterritorial prerogatives on the other.

In this respect, I found the chapters discussing chartered companies especially interesting. This topic may also give reasons to ask to what extent the structural remains of memories or heritage shaped 19th century access to global trade more than expected and long after the chartered companies were dissolved. In close connection, the transfer of power from the companies to the colonial states led to a messy situation of overlapping layers of colonial law of different spatial and temporal origin, about which the Colonial Office in London was still complaining in the 20th century. Within the most disputed transit corridors of the world, with almost every nation present that ever owned a ship – e. g. the spatial environment of the strait of Malacca, and more recently the Arctic – the overlapping layers of law turned into a legal challenge. We might go even as far as to presume that in those partly extraterritorial, partly colonial spaces, legal imagination necessarily flourished in an Esperanto-like legal vocabulary, and that these ambivalent places attracted the best and most creative lawyers as the only ones able to master the legal complexities involved. But the opposite is the case: whoever had to start – or worse, finish – his legal career in the colonies was not to be envied, as the example of Sir Francis Piggott, Chief Justice in Hong Kong (1905–1912) and expert in extraterritorial law may show. Esperanto for law may be the serious object of a volume to follow …

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Tamar Herzog

Alternative Pasts and Alternative Futures

Martti Koskenniemi's most recent book tells the complex and convoluted story of the emergence of several key concepts and orienting ideas that led to the legalization of relations between polities. The monograph is built like a tower reaching to the skies and held by both horizontal and vertical scaffolding, and several points make it particularly compelling as well as exceptionally important. These include the affirmation that relations with the other begin with relations with the self. It is impossible to understand inter-polity dynamics without inquiring on the way rulers imagined their powers over their own subjects and territories. Equally illuminating is the observation that, although these powers might have gradually delineated a »public« law, much of what we now identify as such began in the »private« sphere. The call to remember that people write for a reason is powerful, as is the statement that all scholars are necessarily part of a community whose members, often operating under radically different circumstances, nonetheless engage in dialogue with one another and with past interlocutors. These actors move from the universal to the particular because they constantly apply theoretical discussions to concrete cases, while also perpetually reconsidering the general rule because of concrete decisions.

Following these maxims, yet operating like George Lucas in Star Wars, Koskenniemi departs from the present to return to the past. He seeks to answer the question what happened before the 19th century and explain »the formation and consolidation of the immensely powerful frame that differentiates and juxtaposes sovereignty with property that generates a realm of public authority in contradistinction to private rights and institutions« (11). This *Histoire Régressive* sets him on a path that enables important discoveries yet also obscures many other factors.

Koskenniemi's point of departure, for example, is with the French jurists who labored to define the relations between the French monarchs, popes, and emperors as well as vis-à-vis French lords and vassals. From these debates about royal sovereignty, Koskenniemi draws a compelling argument leading to Vitoria, Gentili, Grotius, and others. Directed at revealing the evolution of royal sovereignty and the emergence of kingdoms, this point of departure makes perfect sense as it describes the very beginning of state-building the way we have come to imagine it: a monarch who reaffirms himself both internally and externally, in order to improve his position in relation to other powers and challengers. At the center of this analysis are relations of subordination: who is subordinate to whom, in which way, and to what degree. Those who engage in the elaboration of these ideas are mostly French and they are moved by the interests of the French monarchs (or their rivals). Some discussants studied in Bologna, and here and there an Italian makes an appearance (James of Viterbo (33) and eventually Bartolus and Baldus (51, 71), but the discussion itself is presented as internal to the kingdom of France.

How would this story change if, instead of seeking to understand how we got here, we observed the multiple possibilities that existed in the past? For example, if we began with the 11th-century investiture conflict or the 12th-century Italian city-states, what would we have captured that Koskenniemi does not?

The investiture conflict featured many of the questions identified in 13th- and 14th-century France. Yet, beginning from it would award a better understanding of why Roman law became such a powerful instrument, and how it intertwined with canon law, theology, and certain practices that from the 11th and 12th centuries came to be identified as sufficiently »customary« to produce a papal revolution.[1] It would affirm that issues of sovereignty were first raised by popes, not secular powers, and that, though much energy was directed at competing with emperors, the biggest challenge was to domesticate the bishops, against

1 The classic work of Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition, Cambridge (MA) 1983, has both admirers and critics but there is much to it that still holds true. See, most recently, Larry Siedentop, Inventing the Individual. The Origins of Western Liberalism, Cambridge (MA) 2014, 196–207, where the author concludes that »the example of the church as a unified legal system founded on the equal subjection of individuals thus gave birth to the idea of the modern state« (207).

whom the popes began a true jurisdictional warfare. The Italian city-states would contribute by focusing our attention on the emergence of jurisdiction (*iuris-dictio*) rather than sovereignty as the first and foremost tool of government and interpolity relations. In the 11th to 13th centuries, Italian municipalities successfully fought against both imperial and papal pretensions and they transited from an older type of relation (feudal?) to a new social reality based on commerce. These polities were also the first to come into intense contact with non-Europeans through trading mostly in luxury goods. Their governments constantly engaged in relations with one another.[2]

Yet, the structures that sustained them were mostly jurisdictional. Rather than unitary bodies headed by a king, these states were imagined as conglomerates made of a plurality of communities and corporations, with government mainly being charged with both announcing and applying the law.[3] In such a setting, public authority was diffused rather than concentrated and relations were not only, not even mainly, vertical and focused on subjection, but had important horizontal and pluralistic dimensions. Of particular centrality was the culture not of property, but of possession, where *dominium* never marked a permanent situation but instead referenced a constantly evolving state of affairs, which required continuous assertion, cultivation, and use. Looking at the investiture conflict or Italian cities would have also clarified the degree to which the different interlocutors, regardless of where they were born, resided, studied, or whom they served, formed part of the same communicative system.[4] Thus, even when they employed their legal imagination at the king's service (114) or were indispensable for monarchs (115), their jurisprudence was never a local affair. Its first loyalty was to the common enterprise of discovering an order that they all believed in, even as they disagreed as to what it was and how it should be best defended.

At stake in these short comments is not the wish to argue that one could have begun earlier or that additional elements could have been considered. Neither do I want to repeat the cliché that law »was conceived in Italy, developed in France and improved in Holland«.[5] Instead, the claim is that remembering these alternative pasts would have affected the way we read Vitoria, Gentili, and others, and would have contributed to the emergence of a distinct narrative that would have followed a distinct thread that could explain the more pluralistic present.

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2 Niktitas E. Hatzimihail, Bartolus and the Conflict of Laws, in: Revue Hellénique de Droit International 60 (2007) 11–79.

3 Pietro Costa, Iurisdictio. Semantica del potere politico nella iuspubblicistica medievale (1100–1433), Milan 1969; António Manuel Hespanha, A historiografia jurídico-institucional e a *morte do estado*, in: Anuario de Filosofía del Derecho 3 (1986) 191–227; Maurizio Fioravanti, Stato e costituzione, in: idem (ed.), Lo Stato moderno in Europa. Istituzioni e diritto, Bari 2002, 4–36.

4 António Manuel Hespanha, The Law in the High and the Late Middle Ages: The Learned *Ius Commune* and the Vernacular Laws. Southern Europe (Italy, Iberian Peninsula, France), in: Heikki Pihjalamäki et al. (eds.), The Oxford Handbook of European Legal History, Oxford 2018, 332–357; Jean-Louis Halpérin, Est-il temps de déconstruire les mythes de l'histoire du droit français?, in: Clio@Thémis. Revue électronique d'histoire du droit 5 (2012), https://www.cliothemis.com/, who criticizes the move to equate the history of law with the history of the state, and Soazick Kerneis, La forge du droit. Naissance des identités juridiques en Europe (IVe–XIIIe siècles), in: Clio@Thémis. Revue électronique d'histoire du droit 10 (2016), http://www.cliothemis.com/Rome-and-the-Barbarians-the.

5 Luigi Nuzzo, Between America and Europe. The Strange Case of the *derecho indiano*, in: Thomas Duve, Heikki Pihjalamäki (eds.), New Horizons in Spanish Colonial Law. Contributions to Transnational Early Modern Legal History (Global Perspectives on Legal History 3), Frankfurt am Main 2015, 161–191, http://dx.doi.org/10.12946/gplh3, 181. These ideas were already present in Franz Wieacker, Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung, Göttingen 1967, 169.

Amalia D. Kessler

Beyond Texts: Institutions and the Historical Pursuit of Non-Elite Forms of Legal Imagination

To the Uttermost Parts of the Earth is a remarkable work of intellectual history – elegant, creative, and erudite. Koskenniemi's account weaves together an extraordinary array of texts penned between the 14th and 19th centuries by a broad range of European jurists, theologians, princely advisers, and ambassadors, among others, in order to trace how languages of law were deployed to justify (and more rarely critique) the consolidation and deployment of power and resources, especially in relation to foreign lands. Situated in differing social, political, and geographic contexts, these actors engaged in what Koskenniemi describes as »legal imagination«, creatively assembling legal, political, religious, and scientific discourses to advance their particular interests and agendas. The resulting »*bricolage*«, he claims, played a profound, even determinative role in establishing the frameworks through which, to this day, we make sense of the world and its problems, »outlin[ing] for us what those ›problems‹ are in the first place« and suggesting possible »recipe[s] for dealing« with these (952). In so arguing, Koskenniemi goes both deep and broad, providing subtle, close readings of individual texts – contextually situated against the particular political, economic, and religious struggles animating authors and readers – but without ever losing the forest for the trees. Thus, despite its massive length, the book never devolves into a series of disjointed essays but is instead artfully held together by several powerful throughlines – including, most importantly, sustained reflection on how languages of public and private power, sovereignty and property, emerged in constitutive relation to one another over the course of centuries.

Koskenniemi presents his book as a work of »critical legal history« (957). By examining how elite, white European men developed the frameworks of law that justified the creation and deployment of power across the globe, he seeks to shine critical light on the structuring legal frameworks of public / private and foreign / domestic that continue to undergird the vastly unequal distribution of resources and geopolitical power. These frameworks, he demonstrates, were not a product of neutral legal science, but the offshoots of profound political, religious, and economic struggle. Yet, despite the extraordinary erudition and scope of his undertaking, his critique goes only so far. While he appeals to Lévi-Strauss' metaphor of *bricolage*, Koskenniemi's *bricoleurs* are largely not people who work with their hands, but are instead decidedly members of the elite. His choice to neglect the legal imagination of the many ordinary individuals caught up in historical struggles over power and resources makes it ultimately impossible for him to move beyond the »hierarchies and exclusions« that he bemoans (13). The end result is not only to silence these voices, but also to limit the forms of imaginable *bricolage*, making the legal frameworks that he critiques appear that much more fixed and inevitable.

Consider, for example, Koskenniemi's account of the *lex mercatoria*. As he details, appeals to *lex mercatoria* played a key role in the competition between common-law and civil-law jurisdictions in 16th-century England. As the civilian High Court of Admiralty struggled to preserve jurisdiction over commercial and maritime matters, its defenders claimed that such issues were best heard in a civil-law-based court with knowledge of the *ius gentium* – a body of law familiar to merchants abroad. In response, common law jurists argued for the jurisdiction of the common law courts by depicting the *lex mercatoria* as at once deeply rooted in England, dating »from time memorial«, and a component of the law of nations and natural law (579–584). Thereafter, by the late 17th century, such jurists deployed similar claims about the centrality of the *lex mercatoria* to English law in order to promote a vision of the state as dependent on merchants and their property (592–598). As Koskenniemi argues, it was this understanding of the centrality of trade to the empowerment of the state (and merchant interests) that underlay Chief Justice Mansfield's subsequent, 18th-century efforts further to incorporate core aspects of the *lex mercatoria* into the common law, including not least, negotiability (653–656).

It is beyond cavil that the language of *lex mercatoria* played an important role in facilitating the

rise of the British commercial empire, while also empowering common law jurists and their merchant (and parliamentarian) supporters. But the *lex mercatoria* was more than just an elite discourse. It was also a set of practices developed by a broad range of (mostly) merchants, engaged in such vital but mundane activities as keeping accounts, extending credit, and pursuing dispute resolution. Take, for example, negotiable instruments. Describing negotiability as a »contemporary market practice[]« (653), Koskenniemi treats its emergence as a given, such that the question becomes how an elite actor like Mansfield undertook the *bricolage* necessary to justify and facilitate its further development within his own preferred institutional power base (the common law courts). But how precisely did practices of negotiability become a given in the first place? This too can be told as a story of legal imagination – but one involving a different, more expansive set of *bricoleurs*.

Across the Channel, in precisely the period that Mansfield was struggling to ensure that the common law courts gave full recognition to negotiability, the *juridiction consulaire*, or merchant court, of Paris was working through myriad questions relating to the legitimacy and application of negotiability (and associated practices) on an iterative, case-by-case basis. As I have argued elsewhere, over the course of the 18th century, the court eventually embraced negotiability, as well as practices linked to it – such as discounting bills of exchange and endorsing bills without specifying a date or endorsee. But the process by means of which this occurred was long and contested. On a case-by-case basis, parties and their representatives, judges, and court-appointed arbiters took very different positions on these matters. Those involved in these proceedings were an eclectic group, consisting not only of elite wholesalers, but also of artisans and retailers, lawyers and even an occasional priest. So too, some women participated. In so doing, these actors engaged in their own *bricolage*, appealing to a mix of statutory law, merchant custom, religiously engrained, highly relational notions of commercial morality, and more recent conceptions of the social utility of expansive, risk-taking commercial endeavors (ones that paralleled but never directly referred to the elite discourse associated with the physiocrats). Such non-elite, institutional *bricolage* played its own role in facilitating the emergence of a *lex mercatoria* that – as both language and practice – helped to undergird the rise of the modern commercial state and society. And importantly, the mundane, iterative nature of this non-elite *bricolage* makes more visible the extensive contestation and struggle underlying the ultimate outcomes.

It is, of course, too much to ask that in a book of this already vast scope, Koskenniemi should also have undertaken an extensive analysis of non-elite forms of legal imagination. But to the extent that we heed his insistence on the constitutive power of language, it is vital that we recall that language and the legal imagination that it facilitates are not within the exclusive purview of elites. By studying institutions (and the intersections of language and practice that these enable), rather than just texts, we can uncover how ordinary people – including, the non-Europeans, non-whites, non-Christians, and women, whose marginalization Koskenniemi seeks to critique – also pursued forms of world-shaping *bricolage*.

■

Jörn Leonhard

Temporalität und Handlungsmacht: Zwei Anknüpfungen an Martti Koskenniemi

Das Leitmotiv von Martti Koskenniemis Buch bildet eine spezifische »longue durée«: die lange Dauer zwischen 1300 und 1870, in der sich der Zusammenhang zwischen »Legal Imagination and International Power« entwickelte und unterschiedliche Varianten hervorbrachte. Das Buch ist aber weit mehr als die dichte Beschreibung der Vorstellungswelt einzelner Autoren anhand einer Gipfelwanderung entlang von Kant, Vitoria oder Grotius. Den Kern der Interpretation bildet weniger eine konventionelle »history of legal ideas«, sondern ein spannender Blick auf die unterschiedlichen Sprachen aus Philosophie, Theologie, Politik, Römischem oder Naturrecht, und selbst aus Naturwissenschaften wie Biologie und Physik, aus denen Autoren zu unterschiedlichen Zeiten in Frankreich, Spanien, Italien, England, den Niederlanden und Deutschland schöpften, um ein Recht zwischen Staaten und damit langfristig einen Ordnungsrahmen internationaler Beziehungen zu imaginieren.

Für die zeit- wie raumspezifische Kombination dieser aus verschiedenen »languages« geschöpften Interpretamente nutzt der Autor den suggestiven Begriff der »bricolage«. Die beiden Wirkungsdimensionen von Macht, die dabei immer wieder in den Blick geraten, sind souveräne Herrschaft einerseits und Eigentum andererseits – mit beiden Begriffen sind zugleich die Sphären des öffentlichen und privaten Raums angesprochen, eine klassische Dichotomie der politischen Theoriebildung. Mit der Kernthese des Buches versucht der Autor, die hermetische Abschließung dieser Praxis- und Wirkungsräume zu durchbrechen. Das internationale Recht entsteht nicht als Normierung aus einem Guss, sondern als »bricolage«, als Überlappung und Interferenz von Vorstellungen von souveräner Herrschaft und Eigentum. Es gehe um »the imaginative use of both these two idioms to create structures of legal argument that are respectful of local tradition but also sensitive to novel circumstances and the needs of change« (958). Erst in der Kombination aus beiden Elementen lasse sich die Geschichte europäischer Herrschaft verstehen. Diese Geschichte präge »neither the power of sovereignty nor of property but always a particular, locally specific combination of the two. Sovereignty and property are the yin and yang of European power« (959).

Die nachfolgenden Bemerkungen, formuliert aus der Sicht eines Historikers mit besonderen Interessen am Verhältnis von Sprache und Geschichte, an Vergleich, Transfer und Verflechtung sowie Problemen der Temporalität, können angesichts der Fülle und Tiefe der Analysen in diesem Buch allenfalls symptomatisch und gleichsam pointilistisch ausfallen – darin sind sie notwendigerweise beckmesserisch. Anstatt völlig Neues einzuführen rekurrieren sie an mancher Stelle eher auf eine Reflexion aus dem Text und fragen nach der Kalibrierung einzelner Perspektiven. Vor diesem Hintergrund erkenne ich vor allem zwei produktive Anknüpfungspunkte für eine Diskussion.

Erstens suggerieren der Begriff der »bricolage« und der Verweis auf die unterschiedlichen »languages«, aus denen die Deutungsakteure dieses Buches schöpfen, vielleicht mehr, als sie wirklich analytisch erklären. Das führt direkt in das anregende hermeneutische Zentrum des Buches, nämlich das Verhältnis zwischen Sprache und Erfahrung. Zum einen durchzieht das Buch eine eigentümliche Spannung zwischen historischer und analytischer Sprache, denn Begriffe wie »Herrschaft«, »Souveränität« oder »Eigentum« sind selbst historisch, bilden aber zugleich Kernelemente des analytischen Vokabulars des Forschenden. Diese Spannung ist nicht aufzulösen, weil es keine räumlich oder zeitlich übergreifende Metasprache gibt. Aber man muss diese Differenz zwischen analytischem Gebrauch und historischen Bedeutungsschichten doch immer im Blick behalten.

Zum anderen werden durch den Begriff der »bricolage« unterschiedliche Bedeutungsangebote tendenziell und vorschnell synchronisiert. Demgegenüber müsste man für den Zusammenhang von »legal imagination« und »international power« verschiedene Ebenen von Temporalität berücksichtigen, die hier nur anzudeuten sind. Das ist zunächst die Frage nach einer spezifischen »Ungleichzeitigkeit«. Sie betrifft nicht nur die Trennung zwischen der »ex eventu«- und der »ex post«-

Perspektive, also zwischen der bereits angesprochenen historischen und der analytischen Verwendung eines Begriffs. Vor allem enthalten die von Koskenniemi angesprochenen »languages« ganz unterschiedliche Eigenzeiten von theologischen, politischen oder rechtlichen Motiven oder Topoi, mithin eigene historische Rhythmen und Konjunkturen. Daraus ergibt sich, dass es dogmatische Epocheneinteilungen mit einem vermeintlich klar definierten »vorher«/»nachher« nicht gibt, sondern Überlappungen und Überhänge. Mit einer solchen Perspektive kann man auch der Gefahr vorbeugen, aus der retrospektiven Logik eine Meistererzählung der Genese des internationalen Rechts zu schreiben.

Man kann die Frage nach den Temporalstrukturen noch in einer anderen Weise vertiefen. Mit dem Begriff der »Präfiguration« hat Hans Blumenberg die in der Rhetorik wichtige Bezugnahme auf ein vergangenes Geschehen im Sinne einer Vorausdeutung akzentuiert: Was also in der Vergangenheit angekündigt wird, wird in der Gegenwart aktualisiert (oder wird, falls nicht eingetreten, umso mehr in der Zukunft erwartet). Ein klassisches Beispiel sind Ereignisse, die im Alten Testament geschildert und als historische Ankündigungen von Taten verstanden werden, die sich in der Gegenwart oder nahen Zukunft tatsächlich ereignen. Auch für das internationale Recht müsste man solche Prozesse untersuchen, zumal die in dem Buch behandelte lange Dauer ja eine Vielzahl von diachronen Rekursen und Anverwandlungen enthält. In jedem Fall entsteht durch die Präfiguration eine kontinuierliche Bedeutungskette mit großer Suggestionswirkung.

Schließlich erscheint die Sphäre des Rechts als ein besonders aufschlussreiches Beispiel von Wiederholungsstrukturen, wie sie Reinhart Koselleck untersucht hat. Historische Veränderungen sind weder auf bloße Wiederholung noch ständige Innovation reduzierbar; in ihnen greifen vielmehr zyklische und lineare Elemente ineinander, oder anders gesagt: Das Recht und eben auch die »legal imagination« sind ohne das Zusammenspiel von Wiederholung und Einmaligkeit nicht zu erfassen. Nur durch iterative und repetitive Strukturen, durch Rekurrenzprozesse, können Veränderungen in das Recht eingeschrieben werden – man denke nur an das dynamische Verhältnis zwischen dem Innen und Außen eines Staates, an die Permeabilität von Gesellschaft und Staat vor dem Hintergrund neuartiger politischer und sozialer Erwartungshorizonte. Auch Vorstellungen vom Recht zwischen Staaten sollten in diesem Sinne als Wiederholungsstruktur untersucht werden. Sie setzen eine iterative Anwendung von Gerechtigkeit, Rechtssicherheit oder Vertrauen in Institutionen oder Prozessen voraus und reflektieren die Spannung zwischen ad hoc-Einzelfalllösungen und Wiederholungsgeboten etwa im Blick auf überzeitliche Normen. Für das Verständnis von internationalem Recht in diesem Sinne ist entscheidend, dass auch Wiederholungsstrukturen nicht statisch, sondern historischem Wandel unterworfen sind.

Zweitens ist die von Koskenniemi beobachtete Novität, dass Vorstellungen von souveräner Herrschaft und Eigentum nicht dichotomisch zu betrachten sind, sondern sich immer wieder neu miteinander verknüpften, jedenfalls für Globalhistoriker und vor allem für solche, die sich mit Empires, mit der Dynamik von realen und imaginierten Zentren und Peripherien im langen 19. Jahrhundert beschäftigen und überhaupt mit der Komplexität von kolonialen Konstellationen, keine besondere Überraschung. Damit verbinden sich aber Fragen an die Perspektivität des Buches und seine Erklärungsreichweite. Der Autor weiß sehr genau um das Problem, das aus einer Weltsicht aus den europäischen Metropolen hervorgeht. Diese Perspektive auf Kolonialgesellschaften entspricht gleichsam einer Weltgeschichte Europas, aber sie rückt die Handlungsmacht von Akteuren in der »situation coloniale« zuweilen auch zu sehr in den Hintergrund. Doch gerade die Sphäre des Rechts und der Versuch, europäische Konnotationen von Herrschaft, Macht, Eigentum oder auch Arbeit auf Kolonialgesellschaften zu übertragen, provozierte immer wieder Konflikte, zwang europäische Kolonialakteure vor Ort zu vielfältigen Kompromissen und ließ für Menschen in Afrika oder Asien eigene Handlungsmacht entstehen. »Agency« war jedenfalls eine ambivalente Größe, die Vorstellungen eines europäischen Zentrums und einer kolonialen Peripherie unterlief.

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Jessica M. Marglin

Notes Towards a Socio-Legal History of International Law

In an article published in 2016, Martti Koskenniemi suggests new ways to approach the history of international law.[1] He calls for weaning scholars of their almost exclusive focus on relations among European states and on the established canon of jurists (Gentili, Pufendorf, Grotius et al.). *To the Uttermost Parts of the Earth* masterfully rewrites the history of international law along these lines. In these pages, the usual suspects share space with thinkers better known for their contributions to other fields, such as Machiavelli, Adam Smith, and Jeremy Bentham. European colonial expansion is not an afterthought but a central dimension of international law. And questions of inter-state relations are deeply embedded in theology, political economy, and philosophy.

Yet not all elements of the agenda Koskenniemi laid out five years ago are as apparent in *To the Uttermost Parts of the Earth*. His 2016 article also notes the absence of social history in the study of international law: this, I fear, largely remains the case. Other sub-fields of legal history expanded beyond the study of ideas decades ago, and scholars have long recognized the advantages of combining legal (and extra-legal) thought with the experience of law on the ground. The work of socio-legal historians is filled with archival references, correspondence, legal briefs, courtroom proceedings, and rulings. Yet scholars of international law have largely remained in the realm of intellectual history.

What might it look like to write a history of international law not from the perspective of those who *thought* about it, but from the perspective of the individuals who *lived* it? Beyond the walls of the universities and government offices where great men wrote about law, ordinary people pursued unpaid debts, married and divorced, inherited, bought and sold across political and legal frontiers. Low-level judiciary were tasked with making decisions about how international law should regulate these people's lives. And consuls and statesmen navigated the daily business of managing international relations in accord with a diverse array of legal norms. As Lauren Benton and Lisa Ford observed, »some of the most important conversations about global order were occurring far away from law schools and halls of diplomacy«.[2]

Needless to say, no book can do everything, and Koskenniemi's latest does plenty. Nor do I mean to imply that Koskenniemi is unaware of how a socio-legal approach might change our view of international law (he quotes the above line from Benton and Ford, 792). Nonetheless, it is worth observing what remains beyond our field of vision when we focus on the intellectual history of law. From my perspective – as an historian of North Africa and the Middle East – the Islamic world is largely out of sight in Koskenniemi's account. The Ottomans were by far one of the most powerful early modern empires in Europe, and a crucial trading partner for Venice, France, Britain, the Netherlands, the Habsburg Empire, and many other European polities. Yet the Ottoman Empire apparently did not figure prominently in the juridical, economic, and political thought relating to international law – and thus occupies very little space in Koskienniemi's pages. Readers of *To the Uttermost Parts of the Earth* might understandably conclude that the Ottomans hold little interest for the history of international law.

But the work of historians who base their studies on archives, court rulings, and legal briefs suggests quite the opposite. Take the question of whether Muslim-ruled polities like the Ottoman Empire, or its semi-autonomous provinces like Tunisia, should be included within the purview of international law. Was the law of nations limited to Christendom, or did it reflect a universal set of principles that could be applied to all polities? Throughout *To the Uttermost Parts of the*

1 Martti Koskenniemi, Expanding Histories of International Law, in: American Journal of Legal History 56,1 (2016) 104–112.

2 Lauren Benton, Lisa Ford, Rage for Order: The British Empire and the Origins of International Law, 1800–1850, Cambridge (MA) 2016, 4.

Earth, Koskenniemi tracks a range of responses to this question, including many thinkers who derived the law of nations from natural law and thus, like Aquinas, considered it applicable »to conditions of human life everywhere« (81).

Yet in instances when European courts had to decide how to apply international law to states like Tunisia, many balked at the prospect of extending the law of nations beyond the boundaries of Christendom (including Christian-ruled colonies). In a drawn-out lawsuit from the early 17th century, Murad Bey, the Bey of Tunis, sued a Corsican merchant living in Livorno. To adjudicate the lawsuit, Tuscan jurists had to decide whether to apply the Islamic law of inheritance and obligations.[3] The Corsican merchant's side argued that the religious barrier separating Christians from Muslims meant that the Livornese court could ignore Islamic legal principles with impunity; their duty was to favor the rights of Christians over those of Muslims. In a case involving the estate of a Tunisian who died in Livorno in 1873, some Italian lawyers contended that the law of nations only applied to Christendom: general principles of international law – such as the freedom of expatriation – did not extend to Tunisia. Others contended that Tunisia had been part of the Roman Empire, and thus that *ius commune* applied there – making this North African state part of the »family of nations«.[4] Neither the blatant pro-Christian favoritism of the Murad Bey case, nor the idea that the previous territory of the Roman Empire should determine the boundaries of the international, were prominent strands in legal thought. Yet these were the ideas put forward in cases that hinged on putting the principles of international law into action.

The importance of law-in-action becomes even more apparent when we try to understand how non-Western polities conceived of international law. While a handful of studies examine »Islamic international law«, the very category artificially imposes European modes of legal thinking onto Islamic jurisprudence, at least for the pre-modern period. Yet again, this may be a matter of needing to ask different questions and look at different sources. Rather than seek out an intellectual history of »Islamic international law« in books of *fiqh* (Islamic jurisprudence), we might be better served by examining the practices of Muslim-ruled polities in their relations with other states, regarding the rights and responsibilities of their subjects towards foreigners, and concerning the laws of war and peace. The study of responsa (Arabic, *fatāwā*; Ottoman, *fetvalar*) written by the Ottoman *şeyhülislams* (heads of the Ottoman legal and religious hierarchy) suggests the importance of treaties in Ottoman legal thought. In a *fetva* from the early 17th century, the *şeyhülislam* explained that raids against Venetian subjects carried out by Ottoman provincial governors were against Islamic law. This was because such raids contravened the treaties (*ahdnames*) between the Sultan and Venice.[5]

Koskenniemi's scholarship – not only in this book, but throughout his distinguished career – does an enormous service to expand and reshape our understanding of international law. But more remains to be done. Especially for those of us working on the Middle East and North Africa, we still require more granular histories that tell stories about how law traveled across political, cultural, and religious frontiers. It is this bottom-up approach that can tell us how questions of international law intersected with some of the most pressing matters of the day, from the quotidian concerns of merchants to the diplomatic relationships among states.

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3 Guillaume Calafat, Jurisdictional Pluralism in a Litigious Sea (1590–1630): Hard Cases, Multi-Sited Trials and Legal Enforcement between North Africa and Italy, in: Past and Present 242 (2019) 142–178.

4 Jessica M. Marglin, Nationality on Trial: International Private Law Across the Mediterranean, in: Annales. Histoire, Sciences Sociales 73,1 (2018) 83–118.

5 Joshua White, Fetva Diplomacy: The Ottoman Şeyhülislam as Trans-Imperial Intermediary, in: Journal of Early Modern History 19 (2015) 199–221.

Cristina Nogueira da Silva

Legal Imagination, the Power of Texts and some Hidden Contexts

In his book, Martti Koskenniemi provides a remarkable reconstitution of the genesis of legal vocabularies on the relations between domestic communities and their exterior – a set of political entities of diverse nature and size that was at times imagined as an »international community« regulated by a »law of nations« whose foundation was nature. This law acquired different names and meanings (natural law, *ius gentium*) as what was being defined as »natural« changed. In the end, it is the category of »natural law« itself that is questioned by the historical plurality of its meanings (949).

Another concept that gives unity to Koskenniemi's narrative is that of »legal imagination« – a historiographical category. The author's idea is that not everything can be said or thought, because of constraints relating to linguistic contexts and conventions, but that it is nevertheless possible to use old languages imaginatively, create hybrids or use languages »against themselves« (953). The historical agents of this creative work are a group of theologians, political philosophers, professors, politicians, government office-holders, shareholders in trading companies, merchants and lawyers selected by the author. We do not, however, find out why he selected them (because they are the most read, the most quoted or influential in their time? those whose views had the greatest impact? because it is agreed, by historiographical consensus, that they – or some of them – are the authors of the history of international law?). What unites them is the recognition of the potentialities of the legal vocabulary that they mix with other languages, imported from religion, science or political economy, in a double process, – synchronic and diachronic – of »bricolage«. Koskenniemi's thesis is also that legal ideas emerge from concrete problems and solutions, and that their intelligibility is linked to intellectual contexts, social structures and heterogeneous audiences that are intended to be persuaded, as well as to events that range from a more macro scale (such as the discovery of the New World or the French Revolution) to a more micro level (such as the discussions around the jurisdiction of privileged companies or the Haitian revolution).

By reading this book together with the author's previous reflections,[1] we realise that the book concretises a Skinnerian programme applied to »questions that interested the lawyer«,[2] as well as an attitude of critical distancing from classical approaches to the history of international law. There is no transhistorical dialogue between the succeeding historical agents, although there are »windows of communication«. Nor, in general, are there any teleological goals inscribed in the complex and discontinuous dialogue allowed by those windows.[3] Nevertheless, a teleological dimension of the historical process does appear at times. For example, in the very first chapter, when the process of *state building* is referred to (114–115) in relation to the use that medieval jurists of the 13th–14th centuries made of Roman law idioms to account for the competition between the universal powers (pope, emperors) and smaller political communities (kingdoms, cities, feudal lordships) of that time. In the late middle ages, the dynamics of this debate were strong and their outcomes uncertain, as was the associated balance of plural

1 Martti Koskenniemi, Why History of International Law Today, in: Rechtsgeschichte – Legal History 4 (2004) 61–65, http://dx.doi.org/10.12946/rg04/061-066; idem, Histories of International law: Dealing with Eurocentrism, in: Rechtsgeschichte – Legal History 19 (2011) 152–176, http://dx.doi.org/10.12946/rg19/152-176; idem, Vitoria and Us. Thoughts on Critical Histories of International Law, in: Rechtsgeschichte – Legal History 22 (2014) 119–138, http://dx.doi.org/10.12946/rg22/119-138.

2 Koskenniemi, Why History of International Law Today (n. 1) 64.

3 Koskenniemi, Histories of International law (n. 1) 153; Koskenniemi, Vitoria and Us (n. 1) 123.

powers, all of which were intrinsically limited.[4] Roman texts, on the other hand, were not uniform; their structure was versatile, adaptable to the foundation of political forms of diverse nature and breadth.[5] Finally, the otherness of medieval legal and political thought invites historians to try to imagine the political world as medieval authors saw it and to look for alternative paths to the *state building* process, even if these paths were cancelled out by subsequent historical pathways.

In this book, the production of meaning is seen as occurring on three articulated levels. The first has to do with the construction of internal sovereignty and its impact on the conceptualisation of the relationship between domestic communities of sovereigns and subjects on the one hand, and of the relations with what lies outside, on the other, as well as the impacts generated internally by the idea of a legal order that was beyond the domestic jurisdiction of sovereign powers. The second level concerns the relationship between political communities of the Christian world that were in commercial competition or at war. The third and last level has to do with the relationship between both these and the communities and individuals who were in another »outside« – that of the non-European territories and populations. A relationship in which the most transtemporal of the grammars that emerged from this long history was constituted – that of the hierarchies of the human world. The author's well-known openness to the post-colonial dimension of international law is reflected here, as is his commitment to confront Eurocentrism, and his positions against radical historical relativism: there are no timeless dialogues, but history is also not a succession of closed contexts, without communication among themselves and with the context of the historian.[6] Because of this perception, Koskenniemi does not hesitate to stress that, while re-reading Thomist doctrines within their own new political and intellectual contexts, the theologians of the »School of Salamanca« legitimized the European presence in the New World and its role in violence and injustices. The same sensitiveness to the post-colonial dimensions of historical legal discourses is apparent when Koskenniemi concludes that the abolition of slavery in Santo Domingo was not a consequence of the Declaration of the Rights of Man and of the Citizen of 1789, or when he highlights the discriminatory positions of the »international community« towards the young state of Haiti in 1804.

However, there is one aspect that Koskenniemi had identified as important in his previous texts but which is almost absent from this book: colonised peoples' creative use of the legal concepts forged in Europe.[7] These peoples were not passive subjects of this history. Contact with them reinforced identities that appear in the book as almost self-evident, such as that of the Christian world or of Europeans.[8] It is also known that they had expectations about the behaviour required of Europeans, although this is a difficult dimension to grasp, and that they constructed their own versions of the unilateral discourses that were produced about them. They claimed rights in agreements (mentioned briefly, 507) and in peace treaties, they resorted to judicial instances – as was the case, already well studied, of the enslaved populations – and they recreated ideas, as has been explored by Christopher Bayly.[9] But in this book, the only occasion where their capacity to act emerges is during the French revolutionary process, when slaves and former slaves mobilised legal documents, such as the *Code Noire* (536), or revolutionary vocabulary (540) in their favour.

Besides being a reconstitution of concepts and ideas, this book is also a reconstitution of the thought of historical authors. Koskenniemi provides us with information about them which is sometimes very rich and complete, but it would have also been interesting to have a more developed reflection on the constraints which the positions they occupied within the power structures of the time dictated to their imaginations. Kosken-

4 Antonio Truyol y Serra, Souveraineté, in: Archives de Philosophie du Droit 35 (1990) 313–329, 315; Maurizio Fioravanti, Constitución, de la Antigüedad a nuestros dias, Madrid 2001, 33–69.

5 António Manuel Hespanha, Cultura Jurídica Europeia. Síntese de um Milénio, Lisboa 2017, 39–46, 124–129.

6 Koskenniemi, Vitoria and Us (n. 1) 124.

7 Koskenniemi, Histories of International law (n. 1) 173.

8 Tamar Herzog, 1596 – ¿Qué es ser español en Europa y en América in: Xosé M. Núñez Seixas (ed.), Historia mundial de España / de las Españas, Barcelona 2018, 305–311.

9 Christopher Bayly, Recovering Liberties. Indian Thought in the Age of Liberalism and Empire, Cambridge / New York 2011.

niemi explains that the interest of the book is less in »what people may have believed than how their imagination was confined within the authoritative speech and writing« (6). But what the imagination creates or recreates from these conventions depends on variables that are beyond the academic training of the agents, the universe of their readings or their self-representation as counsellors, teachers, judges, etc. The interests and intentions of those who were writing and of the target audiences they aimed to persuade, even if socially and culturally determined, should be taken into consideration. It is possible to imagine that if Francisco Vitoria had not been an advisor to the Spanish Emperor and a protagonist of the Counterreformation, he might have drawn other conclusions from the universe of conventions that he drew on for the raw materials of his thinking. In the same way we can imagine that Grotius or Locke could have reflected differently had they not been directly involved in the international trade interests of their time. The seriousness of their debates as well as the determination of how far they believed in their own arguments (they probably did) is not at issue here, nor is the thesis that they could have played freely with conventions, functionalising them according to their interests.[10] Rather, it is that power relations, in their various and dynamic dimensions, constitute a variable to be considered in a history of law that is also a history of power. This is even more important when we are facing prescriptive discourses that are self-legitimising by reference to the neutrality and universality of their enunciations, either based on theology, on reason or on science. An investigation into the »counter-hegemonic« readings of these statements at the moment of their reception would also enrich this discursive framework.

The wealth and completeness of this book is overwhelming. But its breadth does not always make it easy for the reader to grasp the innovative recreations of tradition or the ruptures that are tearing at the historical fabric. The organisation of the information on the basis of authors and classical space-temporal contexts (medieval, early modern or enlightened Spain, France, England, Germany) can hide other connections, continuities and ruptures that could be highlighted if other spatial contexts had been chosen.[11] Thus, for example, one important lesson of this book is that, from the 17th century onwards, the hegemony of scientific discourse produced effects in the legal discourse, giving rise to a radical change in legal vocabulary. Language and metaphors from the natural sciences turned into »linguistic convention«. But the significance of this rupture, whose dynamics were not guided by national frontiers, is diluted in the succession of spaces and authors, losing explanatory autonomy in this long and admirable history.

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10 António Manuel Hespanha, Categorias. Uma reflexão sobre a prática de classificar, in: Análise Social 168 (2003) 823–840, 825.

11 Massimo Meccarelli, The Assumed Space: Pre-reflective Spaciality and Doctrinal Configurations in Juridical Experience, in: Rechtsgeschichte – Legal History 23 (2015) 241–252, http://dx.doi.org/10.12946/rg23/241-252.

Jean-Frédéric Schaub

Sous-estimer l'imagination juridique de l'Europe du Sud?

Il s'agit d'un ouvrage remarquable par l'ampleur des sources mobilisées, par la profondeur des analyses produites. Loin de ressembler à un manuel d'histoire du droit traditionnel, ce précis multiplie ressources documentaires et angles d'attaques. Par rapport aux livres d'histoire des relations internationales et de théorie du droit international, l'ouvrage s'émancipe du cadre de l'État national souverain, et ne se laisse pas enfermer dans d'une opposition simple entre droit public et droit privé, entre intérieur et extérieur des entités politiques et des territoires. Ce livre constituera un outil et une référence indispensable pour tous les travaux avenir dans le domaine de l'histoire du droit international. Sur la longue durée (1300–1870) le livre embrasse tout l'Ancien Régime dans son épaisseur chronologique. Le mouvement de l'exposé suit un modèle classique qui permet au lecteur de se repérer aisément: depuis l'affirmation de la royauté territoriale française du début du XIVe siècle, à la renaissance des études juridiques en Italie, l'affirmation d'un impérialisme universel dans l'Espagne du XVIe siècle, la défense néerlandaise de la liberté des mers, la formation d'un empire anglais puis britannique fondé sur l'institutionnalisation du commerce, sans oublier une ample réflexion sur les terres impériales à propos de l'équilibre des puissances sur le continent européen.

Le droit, tel qu'un historien généraliste peut l'observer, se présente comme un système de stabilisation des conditions de décision et d'arbitrage des conflits qui procure aux membres d'une société une certaine prévisibilité sur les conséquences de leurs actes et de ceux de tous les autres membres. Ce système est enraciné dans une imagination métaphysique ou cosmogonique sur la nature de l'homme et fonctionne à la condition de mettre en œuvre un certain degré de technicité dans la formalisation de raisonnements qui convoquent et combinent les normes disponibles. Le droit se distingue d'autres régulations présentes dans la société par une activité de qualification des faits qui adopte la forme double d'une traduction conceptuelle et d'une déduction logique de norme à norme. Le moins que l'on puisse dire c'est que le concert des puissances ne se présente, ni en théorie ni en pratique, comme une *societas*. C'est pourquoi, on applaudit le refus d'accorder l'extraterritorialité au droit international par rapport au droit en général, ce que permet l'usage du terme imagination, par lequel les différents systèmes normatifs se trouvent intégrés et mis en relation.

Si le droit international, comme un objet d'histoire, ne fait pas exception, il est nécessaire de compléter l'exposé des doctrines par l'examen d'affaires et de cas particuliers, entendus comme source jurisprudentielles du droit. Même si les entités politiques qui gouvernent des territoires (monarchies, empires, républiques, réseaux urbains) ne forment pas une *societas* ou ne sont pas les composantes d'une *respublica*, la résolution de conflits concrets qui s'opère sur les lieux mêmes de leur manifestation peut mobiliser des savoirs juridiques de toute nature et une imagination qui leur donne une tonalité singulière. Les négociations frontalières, comme l'a montré Tamar Herzog, sont des processus où s'improvisent et s'éprouvent les normes qui règlent les relations entre entités qui ne font pas société, même si les populations concernées font l'expérience quotidienne de la coexistence. De même, les configurations sociales, politiques et culturelles qui influent sur le déroulement des congrès diplomatiques, comme ceux du milieu du XVIIe siècle, apparaissent comme déterminants pour la fixation des normes issues de ces négociations, comme l'explique Pedro Cardim. Un jeu d'échelles s'impose, qui articule les analyses proposées dans le livre avec des études de cas, afin de vérifier la validité des textes de doctrine, mais tout autant pour révéler les sources pragmatiques de propositions théoriques qui donnent forme normative à des situations de fait et à leur résolution.

J'ai lu le livre de Martti Koskenniemi à la lumière de mes intérêts et de mes compétences limitées. Un désaccord mérite d'être signalé. L'ouvrage consacre à la puissance espagnole du XVIe siècle l'importance qu'elle mérite. Mais il le fait en limitant la diffusion de l'imagination juridique espagnole à la première moitié de ce siècle, alors que l'apogée de la puissance impériale espagnole

est postérieure, conséquence de l'union des couronnes d'Espagne et du Portugal après 1581. Par son activité diplomatique, par le rayonnement de ses chaires universitaires, par l'attraction qu'il exerce même auprès de ses adversaires comme le montre José Javier Ruiz Ibáñez, pour l'importance de traités portant sur les relations internationales (Saavedra Fajardo), le foyer espagnol alimente l'imagination juridique sur les relations entre puissances au moins jusqu'au milieu du XVIIe siècle. L'éviction de l'Espagne après l'abdication de Charles Quint, c'est-à-dire après que la monarchie espagnole a cessé d'occuper la fonction impériale, traduit une conception de l'histoire européenne centrée sur les pays qui devinrent les grandes puissances à la fin de la période: le Royaume-Uni, la France, les Provinces Unies, l'Empire et la Prusse. Ce biais téléologique accorde un poids disproportionné aux pays qui ont dominé les relations diplomatiques au XVIIIe siècle et qui furent le théâtre des premières étapes de la Révolution Industrielle. Comme si l'imagination du droit international s'était déployée à partir du défi de l'hyperpuissance espagnole, mais en quelque sorte sans elle dans une discussion qui ne l'aurait plus concernée après 1550.

Ce choix, classique dans l'historiographie de l'Europe du Nord-Ouest et du Centre, procède à la relégation de l'apport intellectuel du Sud de l'Europe. Hors du moment initial de la création de l'université de Bologne, l'Italie est également trop absente de l'ouvrage, de même que le Portugal, alors que c'est au Sud que se trouvait le réseau des facultés droits civil, de droit canon et de théologie qui ont enfanté le *Ius Commune*, dont l'impact a concerné même les universités réformées. Ce déséquilibre se retrouve dans la bibliographie du livre. En effet, l'immense production en histoire et philosophie du droit qui s'est développée dans les facultés le droit l'Italie de l'Espagne et du Portugal, mais aussi d'Argentine ou du Mexique, depuis une cinquantaine d'années n'est que peu convoquée. L'absence de Paolo Grossi et Pietro Costa, de Bartolomé Clavero et António Manuel Hespanha, mais encore d'Edmundo O'Gorman, ainsi que de bien d'autres savants du Sud de l'Europe ou d'Amérique Latine, dessine une géographie intellectuelle partielle. Il s'agit là d'un choix contestable mais, il est vrai, habituel. Il appelle des compléments, ce qui est le cas de toute entreprise de cette nature. De même, on peut regretter que la dimension russe, de la rivalité avec la Suède au partage de la Pologne, des entreprises grecques de la Grande Catherine au soutien des chrétiens des Balkans, soit une fois encore exclue de l'horizon européen, reléguée dans cet autre Orient dont Larry Wolff a montré comment il fut inventé par les Lumières.

On peut alors s'étonner que Martti Koskenniemi déplore le fait que les auteurs du passé qu'il commente soient tous des «hommes blancs». Il n'y a aucune raison scientifique, politique ou morale de s'excuser de travailler sur l'Occident chrétien, pas plus que sur l'oumma islamique ou sur l'empire de Chine, domaines dont les sources ne seraient pas moins masculines. L'Occident chrétien est un objet parmi d'autres possibles et dont on fait l'histoire à partir des traces qui en ont été conservées. Si l'on entend sortir de l'attraction qu'exerce l'Occident chrétien, le moyen en est connu et c'est le seul valide: il faut lire le droit musulman dans sa langue ou analyser l'administration chinoise dans ses registres. On ne peut résoudre sur le plan moral la difficulté qui découle de l'impossibilité d'analyser de première main tous les systèmes normatifs dans leur pluralité. Il convient de créer les conditions d'une collaboration entre savants et peut-être de commencer par critiquer le privilège intellectuel accordé au Nord-Ouest et au Centre européen au détriment du Sud au détriment du Sud et de l'Est non moins européens. Avant de provincialiser l'Europe, commençons déjà par critiquer sa hiérarchisation interne.

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Gunnar Folke Schuppert

Property Rights as a Governing Institution

A Few Selected Remarks

Two forms of dominium: jurisdiction and property

A credo of Martti Koskenniemi is that there is a relationship between law and power. This credo, which I support, is impressively confirmed when taking a look at one specific part of jurisdiction, namely the regime of property rights. Political power is the application of influence, whereas allocating property ownership as a legal position is awarding power. Thus, there are two different forms of exercising power.

As Martti Koskenniemi presents under the headline »Ruling Humans and Owning Land« (66 ff.), the regime of normativity during the age of feudalism consisted of two legal relationships: legal relationship of fiefdom between the king and the vassal, which subjugated the vassal under the »jurisdiction« of the king, and the law of the entrusted ones, offering the possibility to handle the fief in the same way as one's own property. The result is clear: »the two forms of dominium – jurisdiction and property – would gradually come to express the relative separation of political and economic governance« (72).

Every form of exercising power – in the sense of influence over a third party – must be legitimated and justified. Offering narratives of justification is – as one can see in the example of Jean Bodin's doctrine of sovereignty – one of the main tasks of law. Because a legally valid form of power is by tendency one that is equipped with legitimacy and as such an assertive form of power.

The justification game

If there is one discipline of law that could show how the »justification game« works it definitely is international law. Because of this, international law can – with only some aggravation – be defined as the *factory for narratives of justification*. Three examples are given to prove that.

The first example is colonialism, a form of power, which, simply put, was connected to an extremely high number of formulas of legitimization. The most common were found easily: discovery, conquest, cession and occupation. Their relative weight was naturally subjugated to development; cession in the form of unequal treaties and occupation became the favored options. The second example concerns the imperialistic conquest of the world, a mission that was presented with great effort as »*mission religieuse et civilisatrice*«. The third example must obviously include Hugo Grotius questioning the Portuguese trade monopoly with his jusnaturalistic argument of the »mare librum« in his role as advocate for the Dutch East India Company.

What can be observed here is something like a fight for the semantic supremacy; sovereign is – in a modification of Carl Schmitt – not the one who has the power over the situation in an emergency but the one who has the power over the essential »moral legal vocabulary«. Following this idea, one can speak of a »semantic imperialism«.

The necessity of private property in a trading and commercial world

In light of the prevailing understanding of property as being linked to »common property«, a large argumentative effort was always needed in order to justify the existence of private property, which only seemed to offer an opening for unhealthy high profit gain, while also infecting Christian society with the disease of inequality. Still, private property has been established as legal institution: »[…] by the year 1000 a de facto system of landed power had come into existence in the Frankish realm that would be formalized with the help of the church, the rise of seigneurial courts and the spread of an expert culture of lawyers giving these facts legal meaning. There was little one could do about landed property had emerged« (93).

Facing this, one might choose a pragmatic way of dealing with it by seeking sanctuary in Aquinas' »*utilitarian justification*«. In this way »property was needed because (1) everyone is more diligent when they procure something to themselves; (2) human

affairs are more orderly with private property and (3) there will then be a more peaceful state of things«. But this utilitarian approach, which was followed by the influential school of Salamanca, falls short.

Thanks to Koskenniemi's book, I feel supported in my belief that »moral-legal reasoning« was not a suitable medium through which to act against the inevitable development into a commercialized world participating in global trade. The reason for this is rooted in institutional economics. In trade, as well as while commercially participating in markets of any nature, transaction costs (as they are called in institutional economics) must be paid. Transaction costs in this sense would be, for example, costs to gain information about future trading partners, costs for the completion of a contract, and costs for control of the right satisfaction of the treaty. Only if the property relations and the content of the treaties are clear, can the »transaction costs« stay in an economically reasonable frame. This leads to the next point.

The relationship between state and property as a relation of mutual support

The relationship between state power and private property is highly important – a conclusion which is presented as *leitmotif* throughout the whole book. Three scenarios are imaginable:

In the first scenario state power functions as potential threat to the undisturbed use of property. Property can be expropriated, highly taxed or can be made unattractive by other means. But, in doing this, the state would itself fail in its task to protect the property of citizens seeking relief in its jurisdiction. Because, as John Locke famously put it: »the great and chief end […] of men uniting into commonwealths, and putting themselves under government is the preservation of their property«.

The second scenario places the core of political communization in the »community of property holders«. Under the headline »rule by property«, Koskenniemi states »the state was needed only to get rid of the inconveniences experienced by property-holders in the natural state, to make the enjoyment of rights and the enforcement of contracts more secure« (635). The Lockean state was – as Macpherson put it – »in effect a joint-stock company whose shareholders were the men of property«.

Neither scenario matches the essential point that the state and private property guaranteed by the state present a *community of mutual utility*. To make my thesis plausible, I want to introduce the term *infrastructural function of law*.

In this third scenario, law functions as guarantor of the infrastructure needed to enable private cooperation gain. In this context, one could also speak of the state's role in the supply of law, for example through the supply of the organization type of a limited stock company or modern patent law. Without all of these forms of legislative supply, the industrial revolution would not have been able to take place in the same way or with the same velocity as it did. In return for this legislative supply, the state demands to participate in the economic success of its citizens through taxation, and it then uses the economic activity of its citizens to keep the mills of public welfare going.

Transforming goods into capital: the transformative power of law

From these considerations it is not a long way to the main thesis of Katharina Pistor, recently presented in her book *The Code of Capital* (Princeton 2019): »Das Kapital regiert durch das Recht« (»Capital reigns through law«). According to Pistor, capital is mainly composed of two components: a good and a legal code. The example of an invention as a good and its coding as intellectual property shows that each and every good can be changed into capital by giving it the right legal code, thus enhancing its tendency to create wealth for its owner. These codings are accomplished in and by the core institutions of private law: the law of contract, the law of property, collateral security law, corporate law, and insolvency law. And this time, the main »keepers of the codes« are not scholars of international law but highly professionalized lawyers working in »big law firms«.

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Inge Van Hulle

The Comforts and Confines of the Legal Imagination

In *To the Uttermost Parts of the Earth*, Martti Koskenniemi walks us through the legal imaginations of intellectuals operating within the lecture halls of Salamanca and Göttingen, in the Italian city states, on the bustling streets of Amsterdam, and within the palaces of Versailles and Westminster with a narrative ease and analytical sharpness that is awe-inspiring. It stands without question that this work is an intellectual tour de force. A comparable analysis of the major traditions of European law-writing in an international context simply does not exist for the period 1300–1870. What we do find is excellent, more focused studies on major thinkers (the »European white men«) or particular legal traditions or area studies. However, Koskenniemi has done so much more than merely present us with an overview of European legal thinking. In fact, from the outset he warns the reader that »this is not a history of international law«, but rather a history of the legal imagination. It is through the use of their legal imagination that lawyers, intellectuals, advisors engaged in their craft. They used the languages available to them in an exercise that Koskenniemi calls *bricolage*, namely the puzzling together of legal concepts and arguments in order to »imagine« a novel interpretation of an old problem or to solve a pressing legal issue. In what follows, I will focus mainly on some of the methodological implications of the concept of the legal imagination in conjunction with Part III, which focuses on Britain.

Legal imagination as described by Koskenniemi has an important sociological dimension: intellectuals were shaped by the legal vocabularies they were educated in. When thinking about the world beyond their own borders, they projected on an international level the legal tools, idioms and grammar they had encountered in their immediate domestic surroundings. If this all sounds quite straightforward – i. e. to say that the history of ideas is shaped by the context in which those ideas were formed, has by now become commonplace in intellectual history – the result, however, certainly is not. In fact, one might say that in *To the Uttermost Parts of the Earth* international legal thought has finally become »domesticated« (for lack of a better term). What is recounted is indeed not a static world of legal reasoning confined to what we would traditionally associate with international law (i. e. war and peace, treaties, jurisdiction, etc.), but the dynamic and creative process of action and reaction of early modern and enlightenment intellectuals to all manner of legal incidents, ideas and concepts that they encountered first and foremost at home, but which gradually also encompassed the world outside of Europe. In doing so, international legal thinking is connected to ideas on the science of government, reason of state and political economy that circulated in the domestic settings in which intellectuals operated. The methodological implication is that a focus on the legal imagination allows for a view that transcends contemporary boundaries of legal subfields, such as private law, public law or international law, which are all too often projected onto the past.

The book also provides an insight into Koskenniemi's own legal imagination, into the process of *bricolage* he pursued in what he considers to be driving forces behind legal debates about power in the early modern world and in the selection of protagonists. In this particular instance the author's attention is drawn towards the uses of power in society, as exemplified by discussions about sovereignty and property. For example, Part III of the book reveals how Britain's legal and commercial culture centred around the creation of a flourishing nation based on commerce. From the outset, merchants and private companies received a special role in enhancing the power of the state through arguments that highlighted the benefits of peaceful commerce. While monopolies were abhorred by some, the navigation laws guaranteeing total control over all colonial trade nevertheless acted as a kind of »Magna Carta« of the seas. The specificity of the history of English international legal thinking has already been argued by others (Michael Lobban, Daniel Hulschebosch and David Armitage, to name but a few) in – perhaps most obviously – the varying interpretations of the notion of *ius gentium* or the existence of an insti-

tution such as Doctors' Commons, which provided a home to English civil lawyers.

What is particularly compelling, however, is Koskenniemi's illustration of how legal thinking happened in dialogue with early strands of political economy and the conclusions he draws from this in explaining the dearth of major intellectual writings on the law of nations in Britain at the turn of the 18th century. It is indeed true that apart from a few attempts by people such as Sir James Mackintosh and the lawyer-turned novelist Robert Plumer Ward,[1] British intellectuals did not cultivate international law to the extent that their French or German counterparts did. International (legal) thought between the end of the 18th century and the start of the 19th century has already been the focus of (legal) historians, such as Jennifer Pitts and Casper Sylvest, primarily through the lens of the rise of liberalism and empire. These contributions also take into account the writings of Jeremy Bentham, James Mill, John Stuart Mill and, of course, John Austin, but it remains unclear why »international law was relegated to the fringes of academic or intellectual preoccupations« in England.[2]

Drawing a line from Smith to Bentham and Austin, Koskenniemi highlights the importance of a strand of thought that considered law-making as an exercise in political economy. Bentham had discredited both common law and natural law. Policy-makers were advised not to focus on some abstract notion of what was morally good, but rather through observation to focus on which actions caused pleasure or pain. International law was then seen as the law of »a universal commercial society«, bolstered by the state so that individuals could maximise profits and minimise losses. This, combined with the shock of the Napoleonic wars and the preponderance of Britain on the high seas and in colonial trade, meant that there was no great need to reflect on the law of nations.

In a last section of Part III, British attitudes towards the world outside of Europe are scrutinised. Early 19th-century British foreign policy is characterised by Koskenniemi as revolving around the »centrality of mercantile interests and the involvements of the government in protecting them while presenting itself as merely enforcing the rule of law«. Intervention supposedly only occurred for the protection of trade. This point is illustrated by reference to some of the »gunboat« policies of British Foreign Secretary, Lord Palmerston, who indeed epitomises what some have called Britain's »informal empire«. I wonder to what extent the abolition of the Transatlantic slave trade is the »odd duck« in Koskenniemi's story that posits intervention as happening solely for economic reasons. By 1780, a group of abolitionists of diverse backgrounds condemned both slavery and the slave trade on the basis of arguments centring on natural law, Christianity, liberty and reason. Abolitionist lobbying led to the famous Act for the Abolition of the Slave Trade in 1807. Humanitarianism thus proved a major driver for legislative change. The slave trade was also widely condemned by British intellectuals and legal protagonists, even though British merchants stood at the helm of the Transatlantic slave trade in the 18th century. David Eltis has shown that it was destined to become even more profitable, in fact.[3] It is true that Britain's actions to secure the abolition of the slave trade internationally were driven by economic motives. As Koskenniemi also points out, intervention for the purposes of suppressing the slave trade often intersected with economic arguments and with ideas of so-called legitimate commerce, which in reality meant free trade with Britain. Nevertheless, Palmerston himself instigated anti-slave trade actions abroad and supported the violent suppression of slave traders in West Africa (e. g. when Captain Joseph Denman bombarded the Gallinas in 1840) with great enthusiasm also in the absence of economic motives.[4]

At the end of his analysis, Koskenniemi offers some thoughts on the limits of the legal imagination. We are indeed prisoners to the legal language and concepts that we are imbued in, if only because, as lawyers and academics, employing

1 There are more authors than James Mackintosh and Robert Pulmer Ward. For a general overview of most British international legal writing for the early nineteenth century, see Casper Sylvest, International Law in Nineteenth-Century Britain, in: British Yearbook of International Law 75 (2004) 9–70.

2 Sylvest, International Law in Nineteenth-Century Britain (n. 1) 13.

3 David Eltis, Economic Growth and the Ending of the Transatlantic Slave Trade, Oxford 1987.

4 Inge Van Hulle, Britain and International Law in West Africa. The Practice of Empire, Oxford 2020, 96–99.

authoritative language is often the only way to make a credible argument. I think an awareness of this is both depressing and hopeful. Depressing, because, as the European language of the law has spread outside of Europe's borders, it has suppressed or obliterated all else. The question is to what extent we can recover or reimagine a legal language that does justice to the experiences and past of the Global South. Hopeful, because Koskenniemi's book should remind us of the responsibility we have as educators in shaping the legal imagination of others through what we write, say and do. It is up to us to help a new generation both within and outside our law schools and history departments to rise beyond the past and current limits of our discipline imposed by Eurocentrism, racism and gender bias.

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Bartolomé Yun-Casalilla

Contexts, Protagonists and Legal Imagination: the Spanish Monarchy as a Reference for a Methodological Discussion

This book is a titanic effort to analyze how legal language has been used to justify, reinforce and exercise authority in different historical contexts. It is thus a history of the legal imagination and how it shaped legal and power relations in Europe between 1300 and 1870 at different times and in different spaces. *Rechtsgeschichte – Legal History* invites different authors to provide comments on specific aspects of this volume from each of our intellectual perspectives. Allow me, then, to offer a few reflections as a historian of the political economies of Iberian empires and globalization.

To the Uttermost Parts is not specifically about political economies, nor is it about globalization. Koskenniemi even denies his interest in the tension between »universalism and particularism« that would bring his text closer to global history. Hence, his methodology revolves around the contextual and »local« analysis of a great diversity of agents or »protagonists« – theologians, politicians, lawyers, etc. – who resorted to, and reformulated, their »legal vocabularies« to respond to a series of both intra- and extra-European challenges. This is done, and this is part of its merit, without forgetting that this »legal imagination«, and the intellectual *bricolage* to which it gave rise in each context, were inserted in legal traditions – always »European« – that go back to ancient Rome and in particular to natural law and the law of nations, which are both very present in the text.

The proposal to fit the history of law into the contexts of power relations and, therefore, into that of institutions in the broad sense, while not new, undoubtedly proves to be good news. Moreover, Koskenniemi – despite his *excusatio non petita* – makes a contribution to the history of European globalization, insofar as he studies how Europe's globalizing aperture affected the debate on international trade, ideas about property rights, sovereignty and jurisdiction, the European conception of the normative status of non-European societies, and how these new worlds changed Europe.

Like any methodological choice, Koskenniemi's has its pros and cons. It is this aspect that I would like to analyze on the basis of his study of the political theology of *ius gentium* and the expansion of »Spain« [sic] (1524–1559) (Chapter 2) and by also considering its implications for the book as a whole.

The choice of texts of Vitoria, Soto or Azpilcueta as the most important references in the Thomistic tradition is more than justified by the decisive role of the Salamanca School in the history of international law, commerce, debates on slavery, property rights and just war. Although not new, Koskenniemi's vindication of the confession as the communicative field between praxis – economic praxis, above all – and theology serves to demonstrate the social impact of that school. But it is doubtful that this »intellectual space« is sufficient to study the legal imaginary and the dialectic between economic praxis and the legal language that mediates the relationship between these »protagonists« and behaviors in the field of commerce, taxation, and others. A deeper analysis of other theorists of theology, but above all of political economy, such as Tomás de Mercado – to whom two quick references are made, though he had personal contact with the New World and transatlantic trade – would have served to uncover other dimensions of the problem. Above all, it would have clarified the mediations through which the images of the New World reached the Salamanca theologians and the way they conditioned their thinking, which, in turn, would also be a means to better understand America's agency in this process. On the other hand, and to continue considering the example of Mercado, his *Suma de Tratos y Contratos*, expressly addressed to merchants, also evidences another dimension of the problem: the distrust of its author, and probably of other people at the time, of those who, after training for »four years in Salamanca«, believe themselves capable of »penetrating« the complexities of the »practice« of commerce and of Sevillian trade, as well as of providing advice on moral matters. This appreciation is not trivial and refers to an analytical level that is not that of moral theology. Moreover, as far

as Koskenniemi's arguments are concerned, if, according to Mercado, »to confess to someone who is not appropriate for one's status is not to confess fruitfully«, this implied a very strict limit to the »wider frame of maneuver«, attributed to the casuism that stems from this theology. In other words, if Medina's probabilism could have had an influence on the way in which the legal imagination affected society, it remains to be studied how far this influence actually reached in practice.

If this level, closer to daily practice than to pure theology, needs to be analyzed, something similar occurs with respect to the perception of the king's American vassals and their human condition. Here, too, there is another intellectual space to be considered: that of the juridical and political reality of the composite monarchy. Traditional historiography has always related the problem of the enslavement or not of the Indians to the theological-moral debates of the time. But it is also known that, since the 15th century, a concern of the crown and of the cities, which clashed with the crown for this reason, was the preservation of the royal patrimony, systematically plundered by the alienations made to the nobility. The Indians being natural vassals of the monarch and associated with the royal patrimony, the crown's attempt to avoid their enslavement reflected, apart from theological and moral reasoning, its desire to prevent the dispossession of this American patrimony. It is therefore necessary, also in this case, to introduce additional protagonists – the crown, the nobility, the cities and the kingdom represented in Cortes – and another contextual level – that of the preservation of the royal patrimony and of the king's vassals – in order to understand the problem well. There may be a moral theology, but reasoning in terms of political economy accompanied the theological debate. Las Casas' text itself, quoted by Koskenniemi (161), is very revealing in this regard.

Similar reasoning can be applied to the debate about the king's power to levy taxes for war. The issue is well studied by Koskenniemi when he refers to the theory of the »king has to live off his own« in medieval France (Chapter 1) or in pre-revolutionary England (Chapter 8). But when in the Spanish case he contextualises the formation of a new legal imagination only – or preferably – in Salamancan theology, he blurs the fact that this debate has one of its most important roots in the demands of the Cortes that taxes should not be paid for the benefit of the Habsburg dynasty – »foreign«, by the way – unless such a benefit coincided with the interests of the kingdom or the defense of Christianity; an idea that had been already very present since the 15th century. Ultimately, this additional level, the political economy of taxation, and those other protagonists – the cities and the kingdom – are key to understanding the legal imagination. It is not that Koskenniemi is wrong. But the equation of theology / legal language / power and authority (»the main theme« of the book) is insufficient to comprehend what happened in its full dimensions. Furthermore, this choice, which gives priority to Dominican thought, leaves out »protagonists« who form a whole tradition of thought with origins in St. Augustine – barely present in this section of the book – and which passes over the Franciscans, who preached an egalitarianism even more radical than that of the Dominicans, as well as a theory of labor value such as that of Martínez de Mata. This egalitarianism, which Norman Cohn referred to years ago in other contexts, would be very present in the Spanish picaresque and would also be one of the keys to the development of »Paulist« theories of labor, trade, usury and value, without which it is impossible to understand the transformations in the Hispanic and perhaps European legal imaginary.

In short, this type of analysis and its reductionism to the School of Salamanca contrasts markedly with other chapters (those dedicated to France or England, for example), where the plurality of actors and protagonists is much more present. This imbalance even prevents possible comparisons that would have been useful for the book as a whole and for the history of the Spanish Monarchy and Spain – always a victim of exceptionalism – in general. A development of the subject at the same analytical level as that of these other countries would also have served to place America and its influence on European thought – starting with Hobbes himself – on a more visible level.

Generally, here would now come the ritual and stupid accusation of Eurocentrism. In this case the criticism would be doubly stupid, since this is a book about the history of Europe. But a title that evokes »the uttermost parts of the earth« makes one wonder about what happened outside Europe, about the way in which other societies responded to the challenge of globalization. Obviously, Koskenniemi is under no obligation to answer this question, which would force him to write a differ-

ent book. But a critical reader has the right to wonder to what extent this story about legal imagination and international power did not draw on contacts at the borders between Europeans and other parts of the earth. Especially if we know that there were adaptations and changes in the »legal vocabulary« in those »peripheries« and even among the Creole elites, who manipulated, accommodated and rejected the discourses analyzed by the author. A study of the writings of the Andean author Felipe Guamán Poma de Ayala (1534–1615) would have pleasantly surprised – I believe – both the author and his readers. On the other hand, there are many studies, starting with those referring to legal pluralism in the early modern period, which oblige us to consider the problem from this point of view. Just as it is legitimate to doubt that many of the problems raised in this book can be studied by taking an identification of Europe *only* with the Roman-Christian tradition that shaped the natural law and the law of nations as a starting point. Of course, the external contaminations are missing. And the result of a study that considered them would have been a more decentralised image of the problems studied.

There are many other topics to discuss, and the questions that this book raises are very rich and varied. The value of the book lies precisely in that. This is an exceptional study, despite some weakness of local knowledge – including bibliographic knowledge – that those of us who read it from our own specialization might find. Its methodological proposal is groundbreaking and has argumentative strength; the intellectual effort of erudition and use of primary and secondary sources is admirable. The first – the methodological proposal – may be limited and insufficient in some cases. Most probably, to each choice of discursive levels and protagonists that is made, other protagonists and other intellectual and global spaces that had as much importance as those chosen by the author for each case can be opposed or added to. Perhaps some would see this outcome as a weakness. But it is also a great virtue: *To the Uttermost Parts of the Earth* encourages us to ask ourselves about other explanatory levels, complementary or discordant, in future works. It is undoubtedly a seminal book that I predict will have and wish a great influence on the development of its discipline. ■

Martti Koskenniemi

Response – »*Imagination begins at home*«

I am enormously thankful to Thomas Duve and the contributors for having taken on the burden of reading at least part of this mammoth work and providing incisive comments and criticisms even before its formal publication. Understandably, many commentators focus on the apparently paradoxical move that *To the Uttermost Parts of the Earth* makes, at a time of global history and legal transnationalism, towards the European, even the domestic. Instead of showing the reader how ideas crisscross the world and translate from context to context, here they appear reduced to parochial expressions of the ambitions and anxieties of European elites. But the paradox may be only apparent; as Duve notes in his introduction, the choice to begin from »home« arose from giving up the effort to grasp the world as a whole – a dubious ambition characterizing much of past European historiography. Why is there not more on China (Li Chen) or on Islamic or the North African communities (Marglin)? Quite apart from the need to draw limits in an already massive work, the author confesses to his ignorance about the indigenous vocabularies operating in non-European locations during the period covered here. The fact that this is not a social history, as Marglin rightly notes, but an exploration of the languages of *law* directed attention to European elites for which it was often a predominant idiom. It would be worrying if this choice were, as Kessler suggests, to »silence« the »voices« of »many ordinary individuals«. But I suppose it would be an even greater wrong if it stuck in their mouths words they would never have uttered. No assumption is made here about »law« being a universal language.

For non-European actors, too, imagination starts at home. Or as Li Chen puts is, they had »their own discourses and imagination about domestic and international power«. This did not make it impossible for those at the sharp end of European legal power to turn that power against the Europeans, as Nogueira da Silva rightly points out. Although this is mostly a 19th-century phenomenon, more might have been said about it. The question of agency, raised by Leonhard, is important. But if »law« is spoken, who then is the agent? I agree with Herren that there might have been more on colonial and consular law – but rather than meeting the point about Eurocentrism, might that not in fact strengthen it? Are there not traces of Whig history in the new global and transnational approaches? Might they be understood as an effort to relaunch a familiar universalism without its more obviously problematic features? It often seems to me that the more inclusive the effort, the greater the risk of ending up simply supplementing an exotic flourish to a conventional frame. Perspective is unavoidable; there is nowhere else to begin than »home«, a place we carry »to the uttermost parts of the earth«.

Schaub and Herzog enquire about the priority given to Northern and Western Europe at the expense of Southern Europe, Italian city-states or the Gregorian reformation. These locations provide starting-points to the massive works by Pocock and Skinner on the one hand, Berman on the other. Their writings involve powerful, though sometimes only implicit assumptions about the nature and role of law in history. While their discussions of Machiavellian republicanism and the papal revolution have inspired parts of the text, I did not wish to engage in a polemic with them but have chosen to tell a story different from theirs. I am a little surprised that the comments do not invoke what to me was perhaps the most important underlying motivation for the choices I made – namely to explore the legal formation what is commonly called »capitalism«. Histories of international law have not connected their narratives about diplomacy, war and European expansion to the simultaneous emergence of a specific form of political economy whose legal idioms today control the production and distribution material values across the world.[1] My interest was to examine how the specific configurations of »sovereignty« and »property« did precisely that.

1 This may now be changing. See especially Ntina Tsouvala, Capitalism as Civilisation. A History of International Law, Cambridge 2020, and Rose Parfitt, The Process of International Legal Reproduction. Inequality, Historiography, Resistance, Cambridge 2019.

I have been struck by the neglect in earlier histories of international law of the way European expansion was also the spread of commercial practices and attitudes about the economy that have played and continue to play a hugely important role in organization of global power. I am glad that the commentators noticed and two of them even cited the punchline my students have heard over again across the years: »sovereignty and property are the yin and yang of European power«. Legal training is still negatively impacted by the separation of public and private law; bringing them together could, it seems to me, usefully employ Leonhard's point about different temporalities, overlaps and dependencies. Economics and politics have had their particular rhythms, with law responsible for much of their diachronic arrangements. My work is only a pointillist effort to draw attention to a limited number of moments or locations in which the two vocabularies have been entangled; sometimes one leads, sometimes the other, with the dependent party following more or less meekly behind. This dialectic lies at the heart of what Schuppert calls the »justification game« operating with respect to European forms of power. Schaub makes the useful point of reminding us that law's power often operates as a form of conflict-resolution. But it also provides conflicts a legal form and supports engaging in conflict in the first place – an aspect not always visible in systemic studies situating themselves elsewhere than the »home« that is always in need of defense. More work is needed to produce a more systemic account of the way private and public power are co-created and collaborate so as to produce the global world that we recognize as ours. I hope D'Aspremont is right to suggest that *To the Uttermost Parts of the Earth* might assist in opening a space for such work.

In preparing this work, I found histories of economic thought quite disappointing. Many of them either began only with Adam Smith or treated the earlier periods as an extended anticipation of his descent to the world. Moreover, they usually did not show much interest in or understanding of the role of law in the construction of the »economy« as a special type of imagining human relations. Conspicuously, they did not dwell at any length on slave trade – arguably the most significant practice of long-distance commerce in the early modern period – probably because that might have undermined the progress narrative that always undergirded them. Van Hulle notes that I omitted to mention the debates on abolition. This, I admit, was part of my contrarian reaction to the practice of always citing abolition in legal histories and rarely the fact that the slave trade and slavery itself were legal systems of great sophistication. I wanted to eliminate the ideological supposition that the introduction of legal or economic thinking in something was in itself a good thing as well as to show how the two languages operated, as they still do, inside each other so that one cannot be really understood in its complexities without a good grasp of the other. »Economics« is young as a specialist vocabulary and understandably anxious to show its independence from its parents, law, philosophy and theology. There is reason to hope that once that infantile disorder will pass, it will be possible to engage in more extensive research on the co-constitution of these vocabularies and their attendant practices.

As the comments show, this is not a »full« history of legal imagining in Europe, even less across other continents and periods. Halpérin rightly notes the relative absence of private international law themes and Kessler's remark about the sparse attention to legal imagining by merchants is to the point. I also agree with Nogueira da Silva that the self-representations and role constraints of these men might have been described at greater length. But I did not engage in this work simply to write a history, even less a total history. I am interested in these stories because of what they tell us about what David Kennedy calls »rule by articulation«, the way in which the structures of today's power have been constituted by their articulation in legal forms.[2] In the period treated here, Europe rose to world dominance. This was in part a result of its military superiority but to a great extent also of its economic power – all of such power articulated as legal claims about sovereignty and property. Some years ago, Antony Anghie demonstrated how the ostensibly generous projection of natural

2 David Kennedy, A World of Struggle. How Power, Law and Expertise Shape Global Political Economy, Princeton 2016, 135–138.

law to govern the indigenous population in the Americas by the Spanish 16th century theologians meant subordinating them to a specialist vocabulary whose authoritative speakers were those very same Spaniards.[3] To be able to say, with authority, what notions that govern human relationships mean in some contexts, is an enormously important aspect of exercising power over those relationships. I was interested how that authority was constituted in the half-millennium that governed the consolidation and global expansion of European statehood. How did sovereignty and property attain the content they did and came to organize the way people imagined their relationships? How was it that these European discourses, as Van Hulle puts it, »suppressed and obliterated all else«? While chapter 2 presented theology as the master vocabulary of power, chapters 3 and 4 saw it being set aside by more influential articulations from Roman civil law and natural law. The three geographical sections then proceeded to give a more detailed account of the way the relationships addressed by the languages of sovereignty and property configured themselves in, respectively, France, Britain and Germany.

A final point was also to say something about this imagining as a »prehistory« of international law, a theme addressed in the briefest of terms in the second section of the epilogue. Much of the conceptual baggage from the period treated in *To the Uttermost Parts* is available for today's legal bricoleurs. But the spirit of international professionalism characterizing what began at the meetings of the *Institut de droit international* in 1873 is not the same as that which went before, though fragments of earlier imagining continue to influence academic efforts (weak as they are) to provide coherence to present law. I am struck by the way the powerful publishing houses especially in the Anglophone world keep feeding the market with literature suggesting that international law's ambitions could be met by recourse to philosophy, economics, »international relations« or moral reasoning. The resulting conflict of the faculties reminds us of the 18th century, when European intellectuals believed they were just a hair's breadth away from the truth about human society that would finally make them free. As this prehistory lands in that same market, I hope it might persuade experts in those vocabularies that they, too, examine the world from a »home« that has a history within which choices were made that now determine the limits of what it is possible to imagine within them.

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3 Antony Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge 2004, 13–31.

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Kritik critique

Caspar Ehlers

Mit Tunnelblick durch Europas Wissenslandschaft*

Um es gleich vorweg zu sagen: Wer diesen Band bei seinem Titel nimmt, wird enttäuscht sein. Das slawische Europa kommt ebenso wenig vor wie das islamische (von Erwähnungen in zwei Beiträgen abgesehen), und auch Byzanz wird nur von einem Artikel berührt. Das titelgebende Europa wird ganz aus der christlichen (mithin: meist katholischen) und jüdischen Tradition (immerhin drei Essays von insgesamt 19) heraus definiert. Ein solcher »Tunnelblick« überrascht schon. Europa von den Pyrenäen bis an die Oder und ohne den Balkan und Griechenland unter dem Aspekt des Wissens zu betrachten, erfordert schon … Ja, was eigentlich?

Mit seiner gediegenen Ausstattung und im *coffee table book*-Format ist der Band durchaus ansprechend gestaltet, der hohe Preis von 200 Euro dürfte allerdings den Leserkreis begrenzen. Für wen hier geschrieben wurde, wäre demnach die zweite Frage an das Buch.

In der eloquenten »Introduction« von Marcia Kupfer (10–32), die sie mit Nikolaus von Kues eröffnet, findet man eine diskursive Auslegung der Inhalte des Bandes, aber keinen Hinweis, warum sich Astronomie, Mathematik, Medizin und andere *life sciences*, um es modern auszudrücken, ohne ›östliches‹ Wissen hatten entwickeln können. Es ist schließlich hinlänglich bekannt, dass die iberische Halbinsel die Kontaktzone zwischen Arabern, Christen und Juden seit dem Frühmittelalter war; man denke nur an Gerbert von Aurillac, den späteren Papst der Jahrtausendwende Sylvester II. (* um 950, † 1003), dessen von Zeitgenossen – wie Kaiser Otto III. – geschätzte und gepriesene Bildung er nicht zuletzt seinem Aufenthalt jenseits der Pyrenäen zu verdanken hatte, wo er das Astrolabium kennenlernte.

Teil I zur »Visualization between Mind and Hand« wird von Mary Carruthers eröffnet (»Geometries for Thinking Creatively«, 33–44), deren Überlegungen der unmittelbar folgende Beitrag von Lina Bolzoni zur Seite zu stellen ist (»Visualization of a Universal Knowledge: Images and Rhetorical Machines in Giulio Camillo's Theatre of Memory«, 45–60), da beide jeweils frühmittelalterliche mit frühneuzeitlicher Kognitionslehre verbinden. Jeffrey F. Hamburger spannt einen Bogen von der Karolingerzeit bis in das ausgehende Mittelalter bzw. mit Charles S. Peirce († 1914) gar bis in die Moderne: »Mindmapping: The Diagram Paradigm in Medieval Art – and Beyond« (61–86).

Der zweite Teil über »The Iconicity of Text« wird von Beatrice Kitzinger eröffnet (»Framing the Gospels, c. 1000: Iconicity, Textuality, and Knowledge«, 87–114), die sich mit den bekannten Arkadenhofdarstellungen der Evangeliensynopsen auseinandersetzt. In der graphischen Darstellung durchaus vergleichbar sind die Einbindungen von Glossen in Handschriften und frühen Drucken, die Lesley Smith vorstellt (»Biblical Gloss and Commentary: the Scaffolding of Scripture«, 115–136). Die jüdische Perspektive tritt im Beitrag von David Stern, »The Topography of the Talmudic Page« (137–162) erstmals hinzu, bei dem vor allem die Vergleichbarkeit der Anordnungen von Text und Kommentar in einem offenbar geteilten logischen System hervorsticht.

Gerade auf logische Systeme der Scholastik zielt die Abhandlung von Ayelet Even-Ezra, die mit Diagrammen und Schemata das auf Ordnung der Gedanken ausgerichtete, strenge System verständlich macht (»Seeing the Forest beyond the Trees: A Preliminary Overview of a Scholastic Habit of Visualization«, 163–182). Dem steht korrespondierend eine Einführung in das magische Denken jüdischer Gelehrter gegenüber (Yuval Harari, »Functional Paratexts and the Transmission of Knowledge in Medieval and Early Modern Jewish Manuscripts of Magic«, 183–210).

* Marcia Kupfer, Adam S. Cohen, J. H. Chajes (eds.), The Visualization of Knowledge in Medieval and Early Modern Europe (Studies in the Visual Cultures of the Middle Ages 16), Turnhout: Brepols 2020, 520 p., ISBN 978-2-503-58303-7

In die Frühneuzeit führt schließlich A. Mark Smith, »More than Meets the Eye: What Made the Printing Revolution Revolutionary« (211–228), der anhand von Textstellenvergleichen den Übergang vom verbreiteten Manuskript zum frühen Buchdruck aufzeigt.

Nach der Ikonizität stehen im dritten Teil (»Graphic Vehicles of Scientia«) die grafischen Elemente im Vordergrund. Nicht zuletzt in diesem Abschnitt kommt die hervorragende Bildreproduktion des Bandes zu voller Blüte, wenn es um die Vorstellungen vom Universum oder des Raumes und der Zeit geht, denen sich jeweils ein Beitrag widmet: Barbara Obrist, »The Idea of a Spherical Universe and its Visualization in the Earlier Middle Ages (Seventh–Twelfth Centuries)« (229–258), Marcia Kupfer, »The Rhetoric of World Maps in Late Antiquity and the Middle Ages« (259–290) bzw. Faith Wallis, »Visualizing Knowledge in Medieval Calendar Science: a Twelfth-Century Family of 'Graphic Glosses' on Bede's *De temporum ratione*« (291–326).

Mit den Bereichen der Musik (John Haines, »The Visualization of Music in the Middle Ages: Three Case Studies«, 327–340) und der Medizin (Peter Murray Jones, »Visualization in Medicine between Script and Print, c. 1375–1550«, 341–360) wird die Übersicht der Disziplinen der »Scientia« beschlossen, der sich freilich nur wenig an den sieben freien Künsten des Mittelalters orientiert.

Teil IV., »Diagrammatic Traditions«, enthält den einzigen Byzanz gewidmeten Beitrag von Linda Safran, »A Prolegomenon to Byzantine Diagrams« (361–382). Der Überblick aus der Feder von Adam S. Cohen, (»Diagramming the Diagrammatic: Twelfth-Century Europe«, 383–404) widmet sich dem Wandel der diagrammatischen Visualisierung von Texten zum Diagramm, von dort über das *imaginistic diagram* und dem *diagrammatic image* zum Bild anhand zahlreicher Beispiele und deren phantastischer Reproduktion. Madeline H. Caviness, »Templates for Knowledge: Geometric Ordering of the Built Environment, Monumental Decoration, and Illuminated Page« (405–428) zeichnet den Weg von der Vorlage zum monumentalen Glasfenster am Beispiel der Kathedrale von Canterbury und Vergleichen dazu nach. Hier – und nur hier – wird der Übergang der Visualisierung von Bedeutungen von einem Medium auf ein anderes angesprochen. Die Nutzung einer im weitesten Sinne diagrammatischen Darstellung zur Unterweisung im hochmittelalterlichen christlichen Glauben ist Gegenstand von Lucy Freeman Sandlers Essay zu »Religious Instruction and Devotional Study. The Pictorial and the Textual in Gothic Diagrams« (429–448), der sehr eindrücklich um Beispiele der jüdischen Kabbala erweitert wird (J. H. Chajes, »The Kabbalistic Tree«, 449–473).

Es sind gerade diese beiden letzten Beispiele, die die Ausrichtung des Sammelbandes exemplifizieren. Es geht nicht um Europa als geographischen Kontinent, sondern um eine europäische Tradition aus jüdischen und christlichen Wurzeln. Arabische Einflüsse werden nur im Zusammenhang mit der mittelalterlichen Vorstellung eines sphärischen Universums – das Astrolabium wurde oben schon genannt – im Beitrag von Barbara Obrist thematisiert und visualisiert, was an dieser Stelle zu unterlassen auch sehr seltsam gewesen wäre. Eine Erwähnung finden die arabischen Wissenschaften ferner bei A. Mark Smith, der das Buch der Optik von Ibn al-Haytham (um 1030) zitiert (211).

Auch Marcia Kupfers bereits genannte Einleitung bringt keine Erklärung für diese Auswahl der Themen und Beiträger. Sie verortet den Sammelband in die Spitze der ideengeschichtlichen Forschung, bezieht sich auf die Berliner Philosophin Sybille Krämer (11 f.) und andere Referenzen, erläutert anschließend die vier Teile des zu besprechenden Buches, enthält sich aber einer Zusammenfassung. Immerhin kommt in der Einleitung einmal der arabische Einfluss zur Sprache (»lateinische Übersetzungen arabischer Texte«, 21).

Hier hätte man sich mehr Beispiele für den Wissenstransfer gewünscht, zumal sich ja Europa im Mittelalter gerade dafür angeboten hätte. Dennoch ist lobend festzuhalten, dass der Sammelband gehaltvolle Darstellungen bietet, die Beiträge hohen Ansprüchen gerecht werden und durch die Fülle und Qualität der Abbildungen kaum Wünsche offenbleiben. Dass das Recht nicht eigens thematisiert wurde, ist anhand der methodischen Leitfragen nicht zu kritisieren. Rechtshistorisch Interessierte werden genügend Aspekte ihrer Disziplin angesprochen finden, die zur weiteren Reflexion über Wissensregime und normsetzende Praktiken einladen.

Ein Literaturverzeichnis, bedauerlicherweise aber kein Register, schließen das aufwendige und mit den angegebenen Einschränkungen sehr gelungene Sammelwerk ab.

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Jesús Vallejo

Las leyes sabias del Rey Sabio*

Una parte considerable de lo que el autor ofrece en el primer tercio de este libro (capítulos 2–6) tiene origen en su obra *The Learned King. The Reign of Alfonso X of Castile*, publicada en 1993 por la Universidad de Pensilvania y cuya traducción española, a cargo del acreditado especialista Manuel González Jiménez, fue editada por la Universidad de Sevilla en 1999. Ahí están ya los elementos básicos de la visión de nuestro sabio autor sobre el entendimiento que el rey Sabio tuvo de su situación dinástica, de la posición que ocupaba bajo su Dios y sobre su pueblo, de su condición de hacedor de leyes y de las demás potestades que le correspondían para *regere recte* la extensa Corona que heredó de su padre, entendimiento cuya efectiva actuación convirtió su reinado en una creciente cadena de conflictos familiares y estamentales que aquí se abordan, sobre todo, desde la perspectiva que ofrece su obra legislativa.

Al lector de estas páginas le interesará saber que el autor mantiene y reitera su particular hipótesis acerca de la formación de los tres principales *libri legales* alfonsinos, que difiere de lo que se puede considerar estado general de la cuestión tanto en las exposiciones de conjunto de la historia jurídica peninsular como en las más específicas de la bajomedieval castellana. La pieza central de la explicación de O'Callaghan es el Espéculo, origen, según declara, tanto del Fuero Real como de las Partidas. Contrariamente a lo que han defendido voces tan autorizadas como la de Aquilino Iglesia, el autor afirma que el Espéculo se terminó, lo que da por probado en virtud de la reproducción, bien conocida, de pasajes de sus leyes en diversas decisiones regias en torno a 1260. Esas citas proceden de la parte conservada de la obra (libros I–V), claro está, con lo cual su poder probatorio acerca de su finalización completa solo puede estar sustentada por la suposición – tan tenida por cierta en las páginas que reseñamos que ni siquiera se expresa en ellas – de que únicamente de una compilación terminada y formalmente promulgada (en Cortes de 1254, según el autor) cabría esperar una utilización como esa.

Y sin embargo, si atendemos a las concepciones vigentes por entonces sobre la elaboración de las leyes, tal suposición es difícil de sostener. Otro obstáculo considerable para dar tanta relevancia histórica al Espéculo es su paupérrima tradición manuscrita, centrada apenas en un solo códice muy tardío e ignorado durante siglos. Nuestro autor supera el escollo mediante su ingeniosa interpretación de un fragmento del prólogo del Espéculo: »damos ende libro en cada villa sseellado con nuestro sseello de plomo e touiemos este scripto en nuestra corte, de que sson ssacados todos los otros que diemos por las villas«; este pasaje se referiría, según O'Callaghan, a dos libros y no a uno: el sellado con el sello de plomo (Fuero Real) y el que quedaba en la corte (Espéculo). Pero no es muy convincente que se elabore un modelo para extraer de él obras distintas al mismo, todas además iguales entre sí, y que ese modelo se conserve precisamente para que »sse acaesçiere dubda ssobre los entendemientos de las leyes […] que sse libre la dubda en nuestra corte por este libro«. Las constatables diferencias de regulación entre Fuero Real y Espéculo (imaginemos, por poner un ejemplo sencillo y plausible, la posible incertidumbre sobre días feriados a efectos procesales) harían imposible aclarar o enmendar en todos los casos el uno por el otro. O'Callaghan liga además, como es habitual, la elaboración de las Partidas (las considera fruto de la revisión del Espéculo) al *fecho de imperio*, que, arrancando en 1256, no puede ser causa del propio Espéculo. Este queda así sin objeto inicial preciso, situado entre un vivo Fuero Real que el rey extendía mediante concesiones particulares y unas Partidas que enfatizaban »his new imperial status« (13).

Hay preocupación, según se ve, por la cronología relativa de estas obras y por su proceso de

* Joseph F. O'Callaghan, Alfonso X, the Justinian of His Age. Law and Justice in Thirteenth-Century Castile, Ithaca / London: Cornell University Press 2019, 374 p., ISBN 978-1-5017-3589-9

formación, pero no mucha por la posible identificación de las finalidades que con cada una de ellas el rey pudo perseguir. Esa desatención no me parece especialmente problemática teniendo en cuenta lo que O'Callaghan pretende en este libro. Independientemente del empeño que pone en el posible problema de la promulgación de estas obras, las tiene por expresión de la voluntad del monarca, y eso es lo que más importa: asumiendo la particularizada vigencia del Fuero Real y la estrecha vinculación entre Espéculo y Partidas, O'Callaghan hace ver, muy pertinentemente, hasta qué punto el propio texto de estas últimas muestra que el rey las quiso leyes (16–17).

Ello permite considerar en conjunto estos tres »Codes«, lo que posibilita el propósito del libro que reseñamos: valorar el impacto que la obra legislativa del monarca castellano tuvo en su tiempo (para lo cual el autor pone en juego una extensa panoplia de fuentes complementarias, normativas, documentales y literarias) y, en un didáctico ejercicio de notable ambición, exponer los contenidos de sus leyes en todo el amplísimo universo de cuestiones que regularon, no dejando al margen de la indagación ni el señalamiento de las posibles fuentes de las normas regias ni los problemas de su aplicación efectiva.

Esto último no es siempre posible, desde luego, pero ha de reconocerse que el autor administra con maestría su excelente conocimiento de las fuentes documentales pertinentes. Me parece destacable el cuidado con el que aborda la pluralidad jurisdiccional en los capítulos referidos a ordenación judicial y proceso (7 y 8, respectivamente), asunto tan conflictivo y complejo en la Castilla de entonces como difícil de valorar desde la perspectiva parcial de las leyes regias.

Desde las páginas iniciales del libro, la obra legislativa de Alfonso X se sitúa en la órbita del *ius commune*, lo que no deja de remacharse con precisas alusiones a ambos *corpora iuris* a lo largo de los ya aludidos capítulos en los que se presenta al rey como *princeps* y en los que vemos desenvolverse su labor como hacedor y mantenedor de la justicia en su reino. En todo lo relativo a tales cuestiones, tratadas en la primera mitad de este volumen, la coherencia entre los tres libros de leyes alfonsinos es alta y posibilita su integrada comprensión dentro de los parámetros propios del derecho común.

En los capítulos siguientes, que se enfrentan a las que podríamos identificar como cuestiones de derecho privado, esto es, materia matrimonial y sucesoria, de estado de las personas y de propiedad y obligaciones (capítulos 9–12), la exposición habría de variar necesariamente y distanciarse de ese compacto enfoque hasta aquí dominante. No hay ya posibilidad de atender a las leyes del Espéculo (pues la regulación pertinente estaría en los libros VI y siguientes, perdidos o nunca redactados), y las de Fuero Real y Partidas presentan divergencias de concepción y regulación que constituyen en sí mismas una de las más características notas de la historia bajomedieval del derecho de Castilla; son divergencias que no se resolvieron del todo ni siquiera en las Leyes de Toro de 1505, directamente enfrentadas a ese problema, y por tanto se proyectaron también a los siglos posteriores.

O'Callaghan no ceja, sin embargo, en su pretendida exposición conjunta, que afecta ahora a materias en las que el Fuero Real dejó ver sus más tradicionales raíces castellanas (de lo que el autor es muy consciente, 137) y su vinculación a la tradición teodosiana filtrada a través de la *Lex Visigothorum* y de su versión romanceada o Fuero Juzgo, y en las que los juristas redactores de las Partidas desplegaron su sapiencia en el derecho civil de origen justinianeo. No hay tratamiento específico de esta problemática, pero el lector podrá comprobar que, pese al predominio que se otorga a las Partidas en este largo recorrido por el derecho alfonsino, el autor ha de centrarse en significativas ocasiones en el Fuero Real: sucede en materia de arras, por ejemplo (142–143), en la que además se señalan coincidencias con el Fuero Juzgo y se traen a colación otras compilaciones de derecho territorial castellano en relación con la llamada ley del ósculo. Menos problemas de coherencia entre los libros alfonsinos se observan en los dos últimos capítulos sustantivos, el dedicado a delitos y penas y el que expone la legislación específica que afectó a moros y judíos (capítulos 13–14).

El último capítulo, »The Juridical Achievement of Alfonso X«, contiene una llamativa sorpresa. Donde el lector podría esperar una simple recapitulación sobre los logros del rey Sabio, O'Callaghan enumera las que considera »The Lessons of el Rex Magister«. En la corta pero sustanciosa lista encontramos asuntos como la promoción del bien común, la preservación del imperio de la ley, la protección del entorno o la aceptación del otro. ¿Anacronismo? Lo parece, pero léanse esas apasionadas páginas y podrá comprobarse hasta qué punto están movidas por la conciencia ciudadana de un historiador que nos ha llevado de la mano

haciéndonos conocer por sus leyes un rey y un reinado y que nos desvela al final del recorrido la pulsión personal que lo ha guiado en su solitario trayecto previo de aprendizaje. El contraste que va marcando en cada epígrafe con quienes tienen la función de *regere* su propio país, que no lo hacen desde luego *recte* (son páginas escritas y publicadas bajo la presidencia de Donald J. Trump), llega a convertirse en una verdaderamente emotiva y edificante lectura en los párrafos dedicados a »The Qualities of a Political Leader«. No sé si esas últimas páginas ayudan a conocer a Alfonso X, pero sí a Joseph F. O'Callaghan. Y merece la pena leerlas.

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Christoph H. F. Meyer

Was von christlichem Recht und Juristenleben übrigblieb*

Schon seit längerer Zeit spielt das Verhältnis von Recht und Religion in der rechtshistorischen Forschung eine wichtige Rolle. Entsprechend verhält es sich, wenn auch in bescheidenerem Maße, für biographische oder prosopographische Nachschlagewerke. Beide Tendenzen überschneiden sich in dem 2021 erschienenen Sammelband »Law and the Christian Tradition in Italy. The Legacy of the Great Jurists«. Das Buch ist ein Ertrag des Publikationsprojekts *Great Christian Jurists in World History*, das vom *Center for the Study of Law and Religion* der Emory University (Atlanta) unter Leitung von John Witte Jr. koordiniert wird. Das Wirken von ca. 1000 großen christlichen Juristen soll einmal in 50 Bänden dargestellt werden. Bei den bislang erschienenen handelt es sich zumeist um Aufsatzsammlungen, in deren Mittelpunkt ein Land oder eine Region steht.

Das gilt auch für den hier interessierenden Italienband. Auf ein Vorwort von John Witte Jr. (X–XIII) und die Einführung der Herausgeber Orazio Condorelli und Rafael Domingo (1–24) folgen 26 Aufsätze zu 27 Personen. Aus dem Mittelalter finden sich: Irnerius (A. Padovani, 25–40), Gratian (A. Larson, 41–55), Azzo und Accursius (E. Conte, 56–69), Sinibaldus Fliscus / Innozenz IV. (K. G. Cushing, 70–81), Henricus de Segusio / Hostiensis (K. Pennington, 82–97), Thomas von Aquin (C. J. Reid Jr., 98–127), Cinus de Pistorio (G. Speciale, 128–144), Johannes Andreae (P. D. Clarke, 145–159), Bartolus de Saxoferrato (O. Condorelli, 160–178), Baldus de Ubaldis (J. Kirshner, 179–197), Paulus de Castro (S. Lepsius, 198–215) und Nicolaus Tedeschis / Panormitanus (R. H. Helmholz, 216–229). Die Frühneuzeit ist vertreten durch: Thomas Cajetan (W. Decock, 230–244), Andreas Alciatus (A. Wijffels, 245–265), Robert Bellarmin (L. Sinisi, 266–280), Albericus Gentilis (G. Minnucci, 281–296), Giovanni Battista De Luca (I. Birocchi, 297–310), Giambattista Vico (M. N. Miletti, 311–330) und Cesare Beccaria (M. G. di Renzo Villata, 331–347). Der Moderne schließlich sind zuzuordnen: Pietro Gasparri (A. Lupano, 348–361), Contardo Ferrini (R. Domingo, 362–375), Luigi Sturzo (R. Astorri, 376–390), Francesco Carnelutti (G. Chiodi, 391–406), Alcide De Gasperi (O. Descamps, 407–419), Arturo Carlo Jemolo (C. Fantappiè, 420–431) sowie Giovanni Battista Montini / Paul VI. (J.-P. Schouppe, 432–445). Ein ausführliches Register (446–468)

* Law and the Christian Tradition in Italy. The Legacy of the Great Jurists, hrsg. von Orazio Condorelli, Rafael Domingo (Law and Religion), London / New York: Routledge 2021, xiii, 468 p., ISBN: 978-0-367-85710-3

zu Personennamen, Werkstiteln und ausgewählten Sachbegriffen beschließt den Band.

Die dieser Auswahl zugrundeliegenden Schwerpunktsetzungen ergeben sich aus Überlegungen der Herausgeber, über die sie in der Einführung Auskunft geben. Im Mittelpunkt des Erkenntnisinteresses steht die Bedeutung christlicher Werte für die Ausprägung westlicher Rechtstradition und die Rolle der Juristen dabei (1–2). Deren Leistungen beleuchten die Gesamtentwicklung in Richtung einer wechselseitigen Durchdringung von christlichem Glauben und Rechtsdenken (4). Die Kategorie des Juristen wird so gefasst, dass sie auch Personen einschließt, die zwar nicht die »soziale Rolle des Juristen im engeren Sinne« innehatten, wohl aber »einen wesentlichen Beitrag zu der Interpretation und der Entwicklung des Rechts im weitesten Sinne des Wortes« (3) geleistet haben: »In our book, in short, we have included personalities who, beyond the specific social role of the jurist in the strict sense, in our opinion have made a significant contribution to the interpretation and development of the law in the broadest sense of the term.« (3) Diese Weichenstellungen sind nicht nur bedeutsam in Hinblick auf den Kreis der berücksichtigten Personen, sondern auch für den zeitlichen Schwerpunkt des Bandes, der in der Vormoderne liegt. Der entsprechende Fokus erklärt sich den Herausgebern zufolge (4) daraus, dass sich Europa im 12.–18. Jahrhundert durch eine tief im Christentum verwurzelte Kultur auszeichnete, die auch im Recht Niederschlag fand, während in der Moderne eine vergleichbare Wirksamkeit christlicher Vorstellungen schwerer erkennbar ist.

Die einzelnen Beiträge stammen fast alle von einschlägig ausgewiesenen Autoren, deren Darstellungen sich auf der Höhe aktueller Forschung bewegen. Die Artikel folgen einem einheitlichen Schema. Nach Leben und Werk(en) oder Tätigkeit der betreffenden Person kommen ausgewählte Schwerpunkte in den Blick, die sich in ihren Schriften zeigen oder in den Aktivitäten erkennbar sind. Erwartungsgemäß finden sich bei Juristen (im engeren Sinne) oft, aber nicht immer Beobachtungen, die einen Bezug zu Religion, Theologie oder (katholischer) Kirche haben, während bei Nichtjuristen rechtlich-normativen Fragen besondere Aufmerksamkeit zuteil wird. Der einzige Artikel, der etwas aus dem Rahmen fällt, ist Charles J. Reids Aufsatz zu Thomas von Aquin. Der Verfasser nimmt für seine Darstellung zwar den mit Abstand größten Raum in Anspruch, enthält dem Leser aber wesentliche Informationen vor. Das gilt nicht nur für das Leben des Aquinaten und sein Gesamtwerk, sondern auch für so grundlegende bibliographische Angaben wie die vom Verfasser benutzten Editionen.

Es wäre verlockend, einige Beiträge etwas genauer zu betrachten, doch fordern die Gesamtkonzeption des Sammelbandes und die Frage nach dem christlichen Einfluss in ungleich stärkerem Maße zu einer Vergewisserung heraus. Diese setzt beim Kreis der berücksichtigten Personen an, der bemerkenswerte Akzente erkennen lässt. Denn wenngleich die Herausgeber auf das große Reservoir von 2159 Einträgen im *Dizionario biografico dei giuristi italiani* verweisen (3–4),[1] sucht man eine Reihe der behandelten Personen in diesem Nachschlagewerk vergebens. Das gilt nicht für die recht gut vertretenen Kanonisten, wohl aber für die Theologen Thomas von Aquin, Cajetan und Bellarmin sowie für einzelne Personen, die nach einer juristischen Ausbildung (vornehmlich) im außerrechtlichen Bereich tätig waren (Luigi Sturzo, Alcide De Gasperi, Giovanni Battista Montini / Paul VI.). Die Gründe für die Berücksichtigung dieser beiden, aus gängigen rechtshistorischen Rastern fallenden Gruppen werden womöglich etwas klarer, wenn man die übrigen Personen genauer in Augenschein nimmt.

Von Interesse sind in diesem Zusammenhang zunächst die Vertreter des Mittelalters und der Frühneuzeit. Sie sind in erster Linie als Gelehrte anzusprechen. Nur der Kanonist Sinibaldus Fliscus könnte, wenn man sich auf sein Wirken als Papst Innozenz IV. konzentriert, auch als Mann der Praxis durchgehen. Betrachtet man die chronologische Abfolge der behandelten Personen, dann fällt auf, dass abgesehen von den erwähnten drei Theologen und dem fachfremd tätigen Vico durch-

1 Dizionario biografico dei giuristi italiani (XII–XX secolo), hg. von Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti, 2 Bde., Bologna 2013.

gängig bekannte Namen der italienischen Rechtsgeschichte, insbesondere des *ius commune* versammelt sind, die in ihrer Anordnung für bestimmte Epochen oder Strömungen innerhalb der Rechtsentwicklung stehen. Die Vermutung liegt nahe, dass die Auswahl der vormodernen Juristen entlang einzelner großer Linien der italienischen Rechtsgeschichte erfolgte und man so zu berühmten Vertretern des weltlichen und kirchlichen Rechts gelangte.

Wie verhält es sich nun mit dem christlichen Einfluss in den Werken oder der Tätigkeit dieser Rechtsgelehrten? Ein Blick in die entsprechenden Einträge vermittelt ein uneinheitliches Bild. Die theoretische und praktische Bedeutung der Kanonisten (Gratian, Sinibaldus Fliscus / Innozenz IV., Hostiensis, Johannes Andreae, Panormitanus und De Luca) für die christliche Rechtskultur Italiens ist offensichtlich. Nicht ganz so klar ist das Bild, das sich aus den Artikeln zu Vertretern des weltlichen Rechts ergibt. In den Darstellungen zu Irnerius, Bartolus, Baldus, Paulus de Castro und Albericus Gentilis finden sich längere Passagen, aus denen deutlich hervorgeht, dass sich der betreffende Jurist auch mit Fragen beschäftigt hat, die man dem Themenbereich Religion bzw. Kirche zuordnen kann. Ob dagegen entsprechende Belege auch für Azzo, Accursius, Cinus, Vico und Beccaria existieren, lässt sich aufgrund der jeweiligen Artikel kaum beurteilen. Die spärlichen einschlägigen Hinweise, die sich darin finden, lassen sich schwerlich als Beleg für eine eingehendere Beschäftigung mit den fraglichen Themen deuten, zumal gerade im Mittelalter ein Recht ganz ohne christliche bzw. kirchliche Bezüge praktisch undenkbar war, so dass auch in den Schriften der Legisten entsprechende Bezugnahmen keine Seltenheit sind.

Im Vergleich zur Vormoderne vermitteln die Aufsätze zu den Juristen des 19. und 20. Jahrhunderts einen etwas anderen Eindruck. Abgesehen von vier mehr oder weniger bekannten Vertretern der Kanonistik und der weltlichen Rechtswissenschaft, von denen einer (Ferrini) in der katholischen Kirche als Heiliger verehrt wird, finden sich drei fachfremd tätige Juristen, darunter der 2018 heiliggesprochene Giovanni Battista Montini / Paul VI. Gerade mit Blick auf diese drei Personen zeichnet sich ein Unterschied zur Vormoderne ab, waren doch vier der sieben Vertreter der Moderne (Gasparri, Sturzo, De Gasperi, Montini / Paul VI.) primär in der rechtlichen bzw. außerrechtlichen Praxis tätig – sei es, dass sie in der Politik oder der Kirchenleitung eine zentrale Position innehatten, oder sei es, dass sie bei der Kodifikation des kanonischen Rechts oder der konziliaren Normgebung eine wesentliche Rolle spielten.

Die gerade skizzierten Beobachtungen führen zu der Frage, inwieweit die Personenauswahl den allgemeinen Darstellungszielen des Buchs gerecht wird. Es gelingt den Herausgebern, vielfältige biographische Einblicke in zentrale Aspekte christlichen Normdenkens und kirchlicher Rechtskultur zu eröffnen. Voraussetzung dafür ist die vergleichsweise starke Präsenz von Kanonisten sowie von fachfremd tätigen Juristen und Theologen. Durch die Einbeziehung der beiden letztgenannten Gruppen werden deutliche Akzente gesetzt in Richtung einer stärkeren Berücksichtigung theologisch geprägter Traditionen normativen Denkens und einer außerrechtlichen Praxis, die mit Arbeit im Dienste der Kirche oder christlicher Gerechtigkeitsvorstellungen in Verbindung stand. Die so erreichte Weitung der Perspektive ist gerade aus Sicht einer Rechtshistorie, die sich stärker kulturgeschichtlich verortet, von erheblichem Gewinn.

Nicht so deutlich erkennbar sind die Hintergründe dieser Weichenstellung. Ins Auge fällt zunächst die sehr weit gefasste Kategorie des Juristen. Dass diese nicht unproblematisch ist, sich dem Vorwurf einer Verwässerung oder Inflation des Juristenbegriffs (Thomas von Aquin als Jurist?) aussetzt, war den Herausgebern sicherlich klar. Auf sachlicher Ebene versuchen sie, die Erweiterung mit den Bedürfnissen interdisziplinärer Analyse zu begründen (3). Das vermag nicht sonderlich zu überzeugen. Aufgrund ihrer oben zitierten diesbezüglichen Bemerkung könnte man allerdings auch zu dem Schluss gelangen, dass die sehr weit gefasste Kategorie des Juristen auf einem erweiterten Rechtsbegriff beruht. Das wäre theoretisch etwa im Sinne von Multinormativität oder Rechtspluralismus durchaus begründbar, doch sucht man entsprechende Hinweise vergeblich. Vielleicht spielen aber noch andere Gesichtspunkte eine Rolle, die mit der Darstellungsökonomie des Sammelbandes zusammenhängen.

Möglicherweise haben die Herausgeber hier aus einer Not eine Tugend gemacht. Das Problem ist unschwer erkennbar. Wer nach dem Einfluss des Christentums auf das Recht fragt, hat dabei zumeist das weltliche Recht vor Augen, denn dass das Christentum für die Entstehung des Kirchenrechts eine *conditio sine qua non* war, ist selbstverständlich. Was nun die christliche Durchdringung des welt-

lichen Rechts angeht, so steht außer Frage, dass Kanonisten und Theologen dazu Wichtiges beigetragen haben. Entscheidend für die Rechtsentwicklung war jedoch letztlich der Beitrag der Juristen des weltlichen Rechts. Damit rücken noch einmal die Sammelbandartikel zu den vormodernen Legisten in den Blick. Wer sie liest, könnte den Eindruck gewinnen, dass durch die Berücksichtigung gerade der Theologen das – vorsichtig ausgedrückt – lückenhafte Bild ergänzt wird, das einige Aufsätze zu Vertretern der Profanjurisprudenz vom Einfluss von Christentum und Kirche vermitteln. Hier zeigen sich Defizite, die sich nicht allein aus einem möglichen Desinteresse der Bearbeiter erklären, sondern zumindest teilweise auch daraus resultieren, dass die fraglichen Aspekte im Werk der betreffenden Juristen nur eine untergeordnete Rolle spielen.

Dass die Rechtsgelehrten dennoch ausgewählt wurden, dürfte nicht zuletzt auf eine Vorliebe für bekannte oder »große« Juristen zurückzuführen sein, die wiederum in engem Zusammenhang steht mit einem starken Interesse an der Rechtskultur des *ius commune*, in der aus Sicht der Herausgeber die christliche Kultur des vormodernen Europa ihren (wichtigsten) juridischen Ausdruck gefunden hat (4). Der Rückgriff auf das Gemeine Recht gleichsam als Modell christlichen Einflusses auf das weltliche Recht des Mittelalters und der Frühneuzeit ist jedoch nicht nur in sachlicher, sondern auch in methodischer Hinsicht von Bedeutung. Das Paradigma des *ius commune*, in dem alles (scheinbar) seinen Platz hatte, begünstigt ein kleinteiliges, vergleichsweise harmonisches und teilweise statisches Bild. Die Verzahnung von christlichen Normen und weltlichem Recht in der Vormoderne erscheint dann weniger als ein dynamisches Verhältnis und eher als eine variationsfähige Konstante, die, wenn schon nicht gott-, so doch vorgegeben ist. Angesichts der außerwissenschaftlichen Implikationen von Teilen der Ius Commune-Geschichtsschreibung[2] und dem recht emphatischen Bekenntnis, das die Herausgeber zum christlichen Charakter der westlichen Welt abgeben (1), könnte hier bei dem einen oder anderen Leser der (unbegründete) Verdacht aufkommen, der Sammelband transponiere unausgesprochen eine essentialistische Botschaft oder verfolge gar eine ideologische Agenda.

Nicht zuletzt in diese Richtung geht eine grundsätzliche Kritik, die Oliver Lepsius unlängst am gesamten *Great Christian Jurists*-Projekt geübt hat.[3] Er hält eine Suche nach großen christlichen Juristen für »fehlgeleitet«[4] und die entsprechende Fragestellung wohl nicht nur in Hinblick auf den von ihm besprochenen USA-Band für sinnlos, wenn nicht gar gefährlich. Ob Lepsius damit dem Vorhaben gerecht wird, erscheint schon deshalb zweifelhaft, weil der Gesamtertrag des Projekts noch gar nicht überschaubar ist und seine Kritik großenteils auf Mutmaßungen und Bewertungen beruht. Dennoch sind Lepsius' Überlegungen anregend, und zwar nicht zuletzt *ex negativo*, wenn man sich mit Blick auf den Italienband fragt, wie sich das christlich-kirchliche Element vielleicht noch etwas stärker herausarbeiten und der mögliche Eindruck einer gleichsam apriorischen Harmonie von Recht und Glaube zugunsten eines eher dynamischen Verständnismodells korrigieren ließe. Vor diesem Hintergrund fällt vor allem der von Lepsius betonte Gegensatz von Recht und Religion ins Auge, der es ihm fragwürdig erscheinen lässt, mit Blick auf Juristen das Attribut »groß« nicht nur auf die fachlichen Fähigkeiten, sondern auch auf den christlichen Glauben zu beziehen.

Solche Zweifel sind kein Proprium der Moderne. Das zeigt das alte Wort »Juristen böse Christen«.[5] Jenseits ihrer historischen Hintergründe verweist die Sentenz auf ein Spannungsverhältnis zwischen der Tätigkeit des Juristen und seinem christlichen Glauben bzw. Leben. Interessant daran ist hier nicht so sehr das persönliche Fehl-

2 Susanne Lepsius, Ius Commune, in: HRG, Bd. 2, 2. Aufl., Berlin 2012, Sp. 1333–1336, Sp. 1335–1336.

3 Oliver Lepsius, Rez. zu: Great Christian Jurists in American History, hg. von Daniel L. Dreisbach, Mark David Hall (Cambridge Studies in Law and Christianity), Cambridge 2019, in: ZRG KA 106 (2020) 466–482, insbesondere 466–470.

4 Ebd., 482.

5 Michael Stolleis, Juristenbeschimpfung, oder: Juristen, böse Christen, in: Politik – Bildung – Religion. Hans Maier zum 65. Geburtstag, hrsg. von Theo Stammen, Heinrich Oberreuter, Paul Mikat, Paderborn u. a. 1996, 163–170; Rolf Lieberwirth, Juristen, böse Christen, in: HRG, Bd. 2, Berlin, 2. Aufl., Berlin 2012, Sp. 1426–1429. Vgl. auch Courtney Kenny, Bonus jurista, malus Christa, in: Law Quarterly Review 19 (1903) 326–334.

verhalten, sondern der in der oder mit der Person des Juristen ausgetragene potentielle Konflikt zwischen dem weltlichen Recht auf der einen und christlichen Rechts- und Moralvorstellungen auf der anderen Seite.[6] Erinnert sei nur an den im Sammelband nicht berücksichtigten Gregor VII., den Investiturstreit und die damit einhergehenden rechtlich-kulturellen Veränderungen, denen nicht erst seit Harold Berman wesentliche Bedeutung für die europäische Rechtsgeschichte zugestanden wird. Wer wissen will, welchen rechtlichen Niederschlag dieses innerhalb einer grundsätzlichen Gemeinsamkeit von weltlicher und geistlicher Gewalt sich vollziehende Ringen um Normen im Spätmittelalter und zum Teil noch in der Frühneuzeit gefunden hat, muss nur einen Blick in die Differentienliteratur werfen.[7] Sie und andere gelehrte Quellen könnten als Ausgangspunkte für weitere, vielleicht etwas »konfliktfreudigere« Erkundungen von Recht und christlicher Tradition im Spiegel von Juristenbiographien dienen. Einzelne Ansätze dafür finden sich bereits in vorliegenden Sammelband, wenn man etwa an die Darstellung zu Robert Bellarmin und seiner Lehre von der *potestas indirecta* denkt (272–274). Auf den Fundamenten, die von Condorelli, Domingo und ihren Autoren für Italien gelegt worden sind, ließe sich so weiter aufbauen.

■

Manuela Bragagnolo

Early Modern Books and Their Laws: Privileges of Print in Renaissance Italy*

Within the »vastissimum oceanum« of early modern privileges, which individualized law for individuals, groups or local and regional areas,[1] privileges of print are normative sources of particular interest that can be analysed form different perspectives.

An interesting outcome of the ERC funded *Early Modern Book Trade* project, led by Angela Nuovo, the collective volume *Privilegi librari nell'Italia del Rinascimento* looks at the privileges of print intertwining with book history and economic history approaches.

The book has the merit of gathering some of the most recent and cutting-edge research on early modern privileges of print. The six contributions in the volume, which opens with an introduction by

6 Rudolf von Scherer, Handbuch des Kirchenrechtes, Bd. 1, Graz 1886, 2.

7 Alphonse van Hove, Prolegomena (Commentarium Lovaniense in Codicem Iuris Canonici, Vol. 1,1), Mechelen / Rom, 2. Aufl. 1945, 569–570; Jean Portemer, Recherches sur les »Differentiae juris civilis et canonici« au temps du Droit classique de l'Eglise. L'expression des »Differentiae«, Diss., Paris 1946; Helmut Schnizer, Differentienliteratur zum kanonischen Recht. Eine unbekannte Literaturgattung als Beleg zur dialektischen Kraft des kanonischen Rechts in der Privatrechtsentwicklung der Neuzeit, in: ders., Rechtssubjekt, rechtswirksames Handeln und Organisationsstrukturen. Ausgewählte Aufsätze aus Kirchenrecht, Rechtsgeschichte und Staatskirchenrecht (Freiburger Veröffentlichungen aus dem Gebiete von Kirche und Staat, Bd. 42), Freiburg i. Ü. 1995, 138–157; Mario Ascheri, Le ›Differentiae inter ius canonicum et ius civile‹, in: Der Einfluss der Kanonistik auf die europäische Rechtskultur, Bd. 1: Zivil- und Zivilprozessrecht, hrsg. von Orazio Condorelli, Franck Roumy, Mathias Schmoeckel (Norm und Struktur, Bd. 37,1), Köln u. a. 2009, 67–73. Vgl. auch Udo Wolter, Ius canonicum in iure civili. Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte (Forschungen zur neueren Privatrechtsgeschichte, Bd. 23), Köln / Wien 1975.

* Erika Squassina, Andrea Ottone (eds.), Privilegi librari nell'Italia del Rinascimento, Milano: Franco Angeli 2019, 410 p., ISBN 978-88-917-9725-4, Open access: http://ojs.francoangeli.it/_omp/index.php/oa/catalog/book/430

1 Heinz Mohnhaupt, Privileg, neuzeitlich, in: Handwörterbuch zur deutschen Rechtsgeschichte, ed. by Albrecht Cordes et al., vol. IV, 2nd ed., Berlin 2018, col. 821–828.

Angela Nuovo (*Introduzione. Le politiche legislative sulla stampa in età moderna*), look at privileges of print as a system born in Venice but that then spread all over Europe. Amongst the crucial objects of investigation are the ways in which the request and granting of privileges of print, which excluded everyone else from printing, importing and selling a book, within a specific geographical context, became a common practice for all the actors involved in book production and trade in the early modern period. Nuovo stresses the great interest of studying privileges of print, not only as a crucial key to access to the understanding of the early modern book market. Systematic studies of privileges of print could also shed new light on other so-far-unexplored historical dimensions, such as the crucial role of privileges in the definition of the nature and function of the author in the editorial system (13).

More generally, the book not only offers a comparative analysis of different systems in early modern Italian states. The contribution of economic history is fundamental for clarifying, in a decisive way, the significance of the institution of the book privilege (14).

In this vein, the first two contributions of the book propose an economic history examination of the institution of the privilege as an instrument of economic policy for promoting innovation.

Francesco Ammannati (*I privilegi come strumento di politica economica nell'Italia della prima età moderna*) provides a general framework of the early modern privilege system from an economic history perspective. In particular, he focuses on privileges as a fundamental component of the new regulations that spread throughout Europe after the original Venetian one, introduced in 1474, aiming at protecting the innovation, perceived as crucial for the economic growth. Three kinds of inventions were protected: technical procedures, machines and consumers goods. The *iter* for requesting a privilege was similar everywhere, based on the inventor's supplication showing the two main characteristics required to obtain a privilege: innovation and public utility. The adoption of the Venetian system as a model contributed to the use of the privilege in similar forms in all the European states, thus »laying the bases for an European market of the invention« (35).

Stefano Comino, Alberto Galasso, and Clara Graziano's chapter (*Brevetti e limitazioni alla concorrenza nei corpi di mestiere della Repubblica id Venezia*) is dedicated to the 1474 Venetian law, which was the first formalized regulation for the concession of patents. Studying the use of patents in Renaissance Venice after the approval of the regulation, it sheds new light on the factors determining the rapid success of the new institution. In particular, the chapter points out the important and active role played by Venetian corporations, especially those with fewer connections to political power, in the consolidation and use of the patent system, and in the promotion of innovation.

After this introductory section on privileges and patents for new inventions, the following core part of the volume is dedicated to the privilege of print system, originally related to the introduction of the technology of print in Italy (namely in Venice), and then applied to the production of single books. Great attention is paid to the two most important centres of book production in Italy (and also, to a certain extent, in Europe): Venice and Rome, highlighting the specific, different logics and aims which stood behind their privilege of print systems (for Venice it was the promotion of the innovation and of the local book industry, while Rome cared more about the doctrinal correctness and orthodoxy of the printed texts), as well as the conflicts between the two powers, especially around the publication of religious books. But the interesting and less explored context of the privilege of print system in Milan is also taken into account.

Angela Nuovo and Paola Arrigoni (*Privilegi librari nello Stato di Milano (sec. XV–XVI)* precisely analyse the introduction and first decades of the privilege system in Milan, concurrent with the introduction of the technology of print. Although it remained a much smaller centre of book production compared to Venice, Milan introduced the technology of print very early. The chapter analyses the development of the book privileges in Milan, highlighting the evolution of commercial and authorial privileges, as well as privileges granted to foreign printers for the purpose of pure administrative revenue. It also provides some first very interesting quantitative analysis of the privileges requested and granted in connection with book production in Milan.

Jane C. Ginsburg (*Proto-proprietà letteraria ed artistica: I privilegi di stampa papali nel XVI secolo*) focuses on the specificities of the system of papal privileges of print as a form of »proto-property in

literary and artistic work«. In particular she focuses on the author's role in this process: in fact, differently from other States in which the privileges were granted to printers, editors and authors, papal privileges were mostly granted to authors.

Based on an impressive study of about 500 unpublished documents (privileges and petitions), preserved at the Vatican Apostolic Archives in Rome, the author explains how the papal privilege system worked, highlighting the procedure, the beneficiaries, the protected works (mainly religious and legal books), the geographic area and the enforcement of the privilege. Particularly interesting is the analysis of the motivations that stood behind the granting of a privilege, which makes the Papal privilege system different from the others: together with the protection of the petitioner's economic investment and the public utility, papal privileges expressly aimed at rewarding the author (or, less often, the printer) in maintaining high quality standards of the work's accuracy and conformity to Church doctrine. This is the reason why derivative products, such as translations, compendia, and the apparatus of glosses, could also be protected by a papal privilege. A rich table (141–284) published as an appendix to the chapter, collects and catalogues the Papal printing privileges and related documents preserved at the Vatican Apostolic Archives, also identifying the work for which the privilege was granted (often providing a bibliographic cross-reference).

Andrea Ottone (*Il privilegio del Messale riformato. Roma e Venezia fra censura espurgatoria e tensioni commerciali*) explores the conflicts between Rome and Venice around the publication, supervised by specific commissions, of the new editions of liturgical and doctrinal books after the Council of Trent. Originally, texts such as the new *Roman Catechism*, the *Breviary*, the *Missal,* or *Corpus Iuris Canonici* were planned to be printed in Rome, and covered by the papal privilege, in order to guarantee direct control from the Papacy in the passage from the manuscript to print. But this generated a tension between Rome and the Venetian book industry. Ottone's chapter focuses on a specific phase of this conflict, between 1601 and 1603, around the publication of the Roman *Missal.* In this conflict, Rome used the instrument of the expurgatory censorship to guarantee the correctness of both the textual form and the doctrine mobilized in the book, thus trying to put into practice its claims of authorial control on canonical texts. The chapter analyses the rich documentation now available, and stresses, in an innovative way, the economical and juridical aspects more related to the production and commercialization of the religious book.

Based on the attentive cataloguing and analysis of a remarkable documental corpus, organized in a fully accessible online database, Erika Squassina's chapter (*I privilegi librari a Venezia, 1496–1545*) finally focuses on the Venetian privilege system from its beginning to the Council of Trent. The author shows how, from a privilege *pro arte introducenda* for the introduction of the new technology of print in Venice, the privilege system was then transferred to the book production, considering each edition an innovation. It soon became the only system printers had to protect themselves and their economic effort from a competition perceived as unfair.

The chapter provides an overview of the use and abuse of the privilege of print in Venice, as well as of the legislation through which Venice, in the first half of the 16th century, tried to regulate and improve the system. It also offers an interesting analysis of the typologies of applicants (authors but most of all printers), of the objects of legal protection (typographical innovations but most of all printing and selling of literary works), and of the business strategies behind obtaining a Venetian privilege, which allowed for the control of the entire Italian market, due to the crucial role of Venice not only in the book production but also in the book trade.

The chapter ends with the presentation of the database of early modern Venetian privileges, entitled *Early Modern Privileges in Venice*, which is one of the most impressive results of the *EMoBookTrade* Project, and is fully accessible online (http://emobooktrade.unimi.it). The database, which is unique in its genre, currently contains the privileges granted by the Republic of Venice up to 1553, but will reach to 1603. In comprises 460 transcriptions, testifying the granting of privileges by the magistrates in charge. A list of the Venetian privileges of prints granted to authors is printed as an appendix to the chapter.

In conclusion, this volume is a fundamental reference work for the investigation of the early modern privilege system in Italy. But a better knowledge of the privilege of print system could serve research of even broader scope. Books were objects that, more than others, stored and mobi-

lized knowledge in the early modern period. A better understanding of the regulation that stood behind the book production and trade, and of the way in which the protagonists of the early modern book world made use of the privilege system, could therefore, for instance, shed new light on not yet explored aspects of early modern knowledge production.

■

Marek Starý

Rechts- und Sprachtransfer in Mittel- und Osteuropa*

Es dürfte kaum zu bestreiten sein, dass das sächsisch-magdeburgische Recht über Jahrhunderte grundlegend die Entfaltung des Rechts in Ost- und Mitteleuropa beeinflusst hat. Dem Transfer dieses Teiles der Rechtskultur aus Magdeburg gen Osten ist die Bücherreihe »Ius Saxonico-Maideburgense in Oriente« gewidmet, deren fünfter Band die Anwendung des sächsischen Stadtrechtes auf dem Gebiet von zwei slawischen Nachbarstaaten in den Blick nimmt, nämlich Tschechien und der Slowakei.

Die Vernunftheirat, welche die Tschechen mit den Slowaken seit 1918 für ein dreiviertel Jahrhundert in einem Staat zusammenschloss (wobei diese Rolle zuvor der Herrscher erfüllte), kann kaum etwas am Tatbestand ändern, dass die böhmischen Länder im Mittelalter und in der frühen Neuzeit – trotz gegenseitiger Kontakte und Einflussnahmen – eine etwas andere Entwicklung als das Gebiet der künftigen Slowakei genommen haben. Daher stellt die sehr sinnvolle gemeinsame Untersuchung der tschechisch-slowakischen Problematik in einem Band keine Selbstverständlichkeit dar.

Es überrascht aber, wie unterschiedlich die Passagen, welche jeweils die böhmischen Länder und die Slowakei betreffen, verfasst sind. Diese Unterschiedlichkeit wird bereits im Vorwort wie auch an anderen Textstellen erwähnt. Begründet wird sie u. a. mit der »Rücksicht auf die nicht vergleichbare Quellenlage« (1) oder dem Verweis auf die Tatsache, dass »die Rezeptionssituation in beiden Untersuchungsgebieten trotz vieler Gemeinsamkeiten aus rechtshistorischer Perspektive nicht homogen erscheint« (517) – zweifellos bedeutende Aspekte. Andererseits wäre es in praktischer Hinsicht noch nützlicher, wenn die Bearbeitung beider Regionen möglichst viele Vergleiche enthalten würden.

Unterschiedliche Ansätze werden gleich im ersten Kapitel sichtbar, das dem Rechtstransfer gewidmet ist. Der den böhmischen Ländern gewidmete Teil beginnt mit einer kurzen Skizze der Entwicklung der Verwaltung und der Rechtsprechung dieses Gebiets (11–25). Dabei war die Herausforderung für die Verfasserin Katalin Gönczi sehr groß, eine so umfangreiche Problematik auf einer begrenzten Zahl von Seiten zusammenzufassen. Diese anspruchsvolle Aufgabe ist ihr gut gelungen, auch wenn darüber diskutiert werden kann, welcher Raum der Entwicklung des Landrechtes gewidmet werden sollte, das durch die Einflüsse des magdeburgischen Rechtes höchstens am Rande berührt war. Es überrascht auch der Umstand, dass in der Rekapitulation der territorialen Zusammensetzung der böhmischen Krone die sog. *feuda extra curtem* kaum behandelt wurden: relativ umfangreiche deutsche Enklaven, auf die sich auch die Lehnsoberhoheit der böhmischen Könige bezog.

* Inge Bily, Wieland Carls, Katalin Gönczi, Marija Lazar, Sächsisch-magdeburgisches Recht in Tschechien und in der Slowakei, Berlin / Boston: De Gruyter 2021, 685 S., ISBN 978-3-11-044402-5

Behandelt werden zudem der Landesausbau und die Stadtentwicklung (25–34), auswärtige Rechtseinflüsse (34–47) und kurz auch die Transferwege zwischen den böhmischen Ländern und Magdeburg (47–48). Im reichhaltigen Anmerkungsapparat wird bedauerlicherweise die tschechische rechtshistorische Literatur relativ wenig reflektiert; häufiger als spezialisierten Studien begegnen wir handbuchartigen Kompendien sowie im Ausland veröffentlichten Studien tschechischer Autoren.

Der »slowakische Teil« dieses Kapitels verzichtet erstaunlicherweise völlig auf jegliche Einführung in die Problematik der Geschichte und Rechtsorganisation von Oberungarn, wenn wir von der etwa einseitigen Zusammenfassung der Berichte aus der Zeit des Großmährischen Reiches und Anmerkungen zu den Kircheninstitutionen, welche ihren Einfluss hier geltend gemacht haben, absehen (48–49). Dem Bereich Landesausbau und Stadtentwicklung ist lediglich ein kurzes Unterkapitel gewidmet (49–50), ergänzt um die knappe Darlegung der königlichen Unterstützung durch Stadtprivilegien (51–52) und einigermaßen umfangreichere Passagen über die Blütezeit der Städte insbesondere im 14. Jahrhundert (52–56). Gründlicher ist die Frage des Rechtstransfers bearbeitet: also der Wege, auf denen das magdeburgische Recht in dieses Gebiet gelangte (56–72). Besonders interessant ist hier, dass die Herkunft des Silleiner Stadtrechtes ihren Ursprung im schlesischen Teschen hatte, was die Existenz der Bindungen von böhmischen Ländern zu den benachbarten Gebieten des Königreiches Ungarn bestätigt. Ein kurzer Ausblick zu weiteren Einflüssen auf das Stadtrecht auf dem Gebiet der heutigen Slowakei beendet das Kapitel.

Am augenscheinlichsten kommt der Unterschied zwischen beiden so konzipierten Teilen der Veröffentlichung in den historisch-linguistischen Passagen zum Ausdruck, welche zweifelsohne den Kern und wichtigsten »Mehrwert« der Veröffentlichung bilden. Als Ausgangspunkt für den Sprachvergleich wurde, zumindest was die deutschen Texte anbelangt, das Sächsische Weichbild als grundlegende repräsentative Sammlung von Normen des magdeburgischen Rechtes gewählt, welche sich intensiv außerhalb der Grenzen von Sachsen verbreitete, wovon viele erhaltene Abschriften und auch spätere Übersetzungen zeugen. In Böhmen ist eine solche Übersetzung in einem Manuskript erhalten, das in der zweiten Hälfte des 15. Jahrhunderts entstanden ist und den vielsagenden Titel »Práva saszká« (Sächsisches Recht) trug. Die anders gelagerte Situation in der Slowakei war auch der Grund, warum hier das Silleiner Rechtsbuch zum Ausgangspunkt geworden ist, welches auf Deutsch 1378 niedergeschrieben und 1473 ins slowakisierte Tschechisch übersetzt wurde. Zudem ist die Sammlung Zipser Willkür berücksichtigt, deren älteste Abschrift der Mitte des 15. Jahrhunderts entstammt.

Während die teilweise unterschiedlichen Ausgangspunkte nachvollziehbar sind, können die bereits auf den ersten Blick inkommensurablen Ansätze Fragen aufwerfen. So legt Inge Bily für die böhmischen Länder eine minutiöse deutsch-tschechische kontrastive Wortanalyse vor (135–396), deren Bestandteil ein umfangreicher rechtsrelevanter Wortschatz im frühneuhochdeutsch-alttschechischen Vergleich ist (169–343). Dagegen stellt das von Marija Lazar verfasste Pendant für das slowakische Milieu nur einen relativ spärlichen Text über linguistische Forschungen zum sächsisch-magdeburgischen Recht in der Slowakei dar (457–516), obwohl er interessante Aspekte und auch methodische Anregungen enthält.

Man könnte fragen, ob in diesem Fall nicht die Gelegenheit verpasst wurde, zum Zwecke weiterer linguistischer Erforschung das Material nebeneinander zu behandeln. Auf diese Weise hätte man klären können, in welchem Maße das mittelalterliche und frühneuzeitliche Tschechisch in den böhmischen Ländern und das slowakisierte Tschechisch in Oberungarn im Bereich der Rechtsterminologie einander ähnelten oder sich vielmehr voneinander unterschieden. Denn das erwähnte Lexikon beruht auf der deutsch-tschechisch-polnischen Trichotomie, wobei das Deutsche die Grundlage bildet und jedem deutschen Terminus auch ein tschechischer und polnischer hinzugefügt wird. Die tschechischen Begriffe werden dann in eine alphabetische Liste geordnet, die auf die entsprechenden Stichwörter unter dem deutschen Äquivalent verweisen.

Die Einbeziehung polnischer Termini als Ergebnis der vorangehenden Forschungen ist sicherlich sinnvoll (vgl. 171). Inwieweit dies praktikabel ist, ist natürlich eine ganz andere Frage. In linguistischer Hinsicht ergibt es für Allgemeinhistoriker, nicht nur für Rechtshistoriker vielleicht mehr Sinn, dass die lateinische Begrifflichkeit (zumindest in den Grundkonturen) aus den lateinischen Übersetzungen des Sächsischen Weichbildes extra-

hiert werden konnte. Auf jeden Fall würden es aber Forscher aus der tschechisch-slowakischen Region schätzen, wenn in dieses Wörterbuch auch die Äquivalente aus dem Silleiner Rechtsbuch, ggf. aus der Zipser Willkür miteinbezogen würden; denn damit könnte gezeigt werden, in welchem Maße die Entwicklung der Rechtssprache in der Slowakei andere Wege als im tschechischen Staatsgebiet nahm. Ebenso hilfreich wäre die Erarbeitung eines selbstständigen Wörterbuchs auf Grundlage der deutschen und tschechischen Fassung des Silleiner Rechtsbuchs.

Der tschechisch-deutsch-polnische Wortschatz ist gründlich bearbeitet, und zwar auf der Grundlage methodischer Ausgangspunkte (131–132, insbes. 169–175). Der dreisprachigen Übersetzung folgt eine kurzgefasste Definition des Rechtsbegriffs (logischerweise nur auf Deutsch). Danach werden verschiedene Wortverwendungen des einschlägigen Terminus ergänzt, die aber nur ins Tschechische übersetzt sind. Deren reale Verwendung im Kontext des Rechtstextes wird durch die entsprechenden Abschnitte aus der deutschen und tschechischen Fassung des Sächsischen Rechtes dokumentiert. Der beigefügte Kommentar hat im Grunde ein linguistisches, kein rechtshistorisches Gepräge, wobei darin (möglicherweise überflüssig) wieder polnische Äquivalente angegeben werden. Jedem Stichwort sind verkürzte Literaturverweise beigefügt.

In Bezug auf die Zahl der gründlich ausgewählten Stichworte fallen nur geringfügige Unzulänglichkeiten auf. So findet man z. B. das Stichwort »(Fron-)Bote« (215–216), worauf ein weiteres Stichwort »Boten« (216–217) folgt. Der Logik der Sache angemessener wäre es, beide gemeinsam zu behandeln und, falls die alphabetische Einordnung unter dem Buchstaben F gewählt wurde, einen entsprechenden Verweis hinter dem Begriff »Bote« zu setzen.

Beim deutschen Begriff »Gericht« wird als zweites tschechisches Äquivalent der Begriff »právo« angegeben (224–225). Während in historischer Hinsicht diese Übersetzung richtig (und mit einschlägigen Textabschnitten aus den Quellen belegt) ist, wäre es nützlich zu betonen, dass der Begriff »právo« hier nicht die gleiche Bedeutung wie in der modernen Sprache hat (nämlich »das Recht«), sondern dass es sich um die alte, institutionelle übertragene Bedeutung handelt, welche dem gegenwärtigen tschechischen Äquivalent des Begriffes »Gericht« entspricht (»soud«). Auf jeden Fall sollte der Verweis auf das Stichwort »Gericht« beim tschechischen Begriff »právo« angeboten werden (272). Einer ähnlichen Uneindeutigkeit begegnet man auch beim Begriff »Recht« (275–280). Denn auch hier gilt, dass in manchen Fällen (Wortwendung Nr. II, IV) unter »Recht« die Rechtsinstanz verstanden wird, für die die betreffende Person zuständig ist, was nicht ausreichend betont wird.

Das Verb »vererben« (322) wird in dem einzigen angebotenen Textabschnitt ins Tschechische als »dědit« übersetzt. Das Problem besteht aber darin, dass in dem deutschen Text nicht das Verb »vererben«, sondern nur »erben« verwendet wurde (»sy erbit ir teil«). Dieses Stichwort sollte logischwerweise unter dem Buchstaben E eingeordnet werden. Die tschechische Übersetzung spiegelt konsequent das deutsche Originalmuster (»ta žena dědi svoj diel«) wider, somit entsprechen weder sie noch das deutsche Original der geläufigen zeitgenössischen Rechtsterminologie. Denn hinsichtlich seiner Bedeutung wird damit in der Tat »vererben«, im Tschechischen »odkázat« gemeint.

Unter dem Terminus »Vormund« (326–327) werden als tschechische Entsprechungen die Begriffe »poručník«, »ručitel« und »opatrovník« erwähnt. Den letztgenannten findet man aber nicht in der Stichwortliste, und er kommt auch in keinem der zitierten tschechischen Textabschnitte vor. Während »opatrovník« zumindest hinsichtlich seiner Bedeutung angemessen ist, entspricht der Begriff »ručitel« (alttschechisch »rukojmě« oder »jistec«) vielmehr dem deutschen Begriff des Bürgen.

Schließlich bietet das Substantiv »Wergeld« (333–334) in der Kopfzeile als alttschechisches Äquivalent das übernommene »vergelt«. In der Tat belegen aber auch die beigefügten Textbeispiele für das tschechische Gebiet die Verwendung des möglicherweise geläufigeren lokalen Begriffes »odklad«, der allerdings in der Begriffsliste fehlt (siehe 268).

Bei allen genannten Beispielen handelt es sich naturgemäß um Marginalien, welche keinesfalls die Qualität der geleisteten Arbeit mindern. Solche Hinweise könnten eher für den Fall vom Nutzen sein, dass das ganze Corpus noch weiter aktualisiert wird.

Neben den überaus interessanten Erkenntnissen aus dem Bereich von linguistischen und rechtshistorischen Kontexten bietet das Buch eine Reihe von Übersichtskapiteln (Teile), welche als Aus-

gangspunkt für die weitere Forschung dienen können. Auf das historische Lexikon folgt das dreisprachige Wörterverzeichnis der Rechtstermini (403–445), woran die deutsch-tschechisch-polnische Übersicht der Titel relevanter Quellen des magdeburgischen Rechtes anschließt (446–456). Ebenfalls nützlich ist der Forschungsüberblick zu den Untersuchungsgebieten Tschechien und Slowakei (77–97); auch wenn sich hier die Frage stellt, ob man nicht neben der chronologischen Gliederung die Veröffentlichungen, welche sich auf die böhmischen Länder und die Slowakei beziehen bzw. solche Arbeiten, die auf dem Boden dieser Länder entstanden, klarer von derjenigen, die in Deutschland (also »von jenseits der Grenze«) verfasst wurden, getrennt werden sollten. Nicht minder wichtig sind das Verzeichnis der erhaltenen Handschriften bzw. der Drucke von grundlegenden Quellen (99–126) sowie die grundlegende geographische Übersicht (527–533) und das umfangreiche Quellen- und Literaturverzeichnis; danach folgen noch die Hilfsregister.

Trotz der genannten kleineren Einwände, welche lediglich den subjektiven Blick eines tschechischen Nutzers repräsentieren, besteht kein Zweifel daran, dass hinter dem Buch ein großes Pensum beachtlicher Arbeit steht und dass dieses Buch einen prinzipiellen Beitrag zur Erkenntnis der Verbreitung des magdeburgischen Rechtes in die böhmischen Länder und in den Raum der künftigen Slowakei darstellt. Es bleibt also nur zu bedauern, dass ein ähnliches Werk nicht bereits früher an tschechischen rechtshistorischen bzw. historisch-linguistischen Arbeitsstellen entstanden ist.

■

Daniel S. Allemann

The School of Salamanca Under Scrutiny*

Teaching evaluations, research assessments, and quality management reviews are part and parcel of academic life in the 21st century. Such processes are propelled by magic words like »excellence«, »output«, or »impact«. And they are often portrayed as features of a broader transformation of the university landscape in recent decades.[1] Yet it is worth remembering that instruments for assessing academics and their work are not a novel phenomenon. As early as the 16th and 17th centuries, members of the famous School of Salamanca regularly came under scrutiny. Several times a year, the university's president examined whether the chairs under his aegis lectured and taught in ways that corresponded to their professorial obligations. The historian of philosophy José Barrientos García has recovered the records of these disciplinary visitations. In his latest book, he offers fresh insights into the inner workings of the Faculty of Theology at Salamanca between 1560 and 1641.

This time frame is noteworthy, for it only begins after the School of Salamanca's celebrated heyday during Francisco de Vitoria's and Domingo de Soto's lifetimes. The vast majority of modern scholarship, not just in legal history, turns to emerging centers of scholastic learning elsewhere after the 1550s.[2] This trend continues in light of recent endeavors to place the School of Salamanca in a

* José Barrientos García, La Facultad de Teología de la Universidad de Salamanca a través de los libros de visitas de cátedras (1560–1641), Madrid: Editorial Sinderesis 2018, 1148 p., ISBN 978-84-16262-30-4

1 See e. g. Kathleen Lynch, Neo-Liberalism and Marketisation: The Implications for Higher Education, in: European Educational Research Journal 5,1 (2006) 1–17.

2 For an excellent bibliographical study of recent scholarship on the School of Salamanca, see Celia Alejandra Ramírez Santos, José Luis Egío, Conceptos, autores, instituciones: Revisión crítica de la investigación reciente sobre la Escuela de Salamanca (2008–19) y bibliografía multidisciplinar, con prefacio de Thomas Duve, Madrid 2020. Available online: https://e-archivo.uc3m.es/handle/10016/30100.

global context.[3] Barrientos García, by contrast, swims against the current and takes a closer look at Salamanca at a time that is conventionally sidestepped in the stories that we tell about the theologians of its »school«.[4] The rationale for this choice is due to the nature of Barrientos García's principal sources: the so-called »books of the visitations of chairs« (*libros de visitas de cátedras*) that are preserved in the university's archive only cover the period after 1560. We know that such inspections also took place before, but no earlier records have been preserved (13).

Barrientos García's voluminous book is conceived as a reference work. At its core we find detailed information on each of the theology professorships at Salamanca in this period. In strictly chronological order, Barrientos García discusses the scope and holders of these chairs before delving into the *libros de visita*, which provide accounts of the professors' teaching methods and of whether the materials they covered corresponded to the official study plans (14). Three to five times a year, the principal and his secretary (sometimes also accompanied by the most senior professor) visited each academic during class and picked two pupils who were asked to evaluate their teacher (155–156). Barrientos García admits that most of the takes from students were benevolent and formulaic. But he rightly underscores that the visitation books provide a unique window into the theology curriculum at Salamanca.

Before we turn to this in more detail, it is worth commenting on the book's ample and intriguing introduction. In 147 pages, Barrientos García showcases the fruits of four decades of research on the Faculty of Theology at Salamanca in the 16th and 17th centuries.[5] We learn, for instance, that the academic schedule consisted of 7.5 hours of daily lectures (except Sundays and holidays) and a break that only lasted from early September to mid-October. Yet students were solely required to attend six months of coursework to pass an academic year (17–18). And merely the lectures of the two most prestigious professorships were mandatory: those of the prime chair, the first hour and a half each morning, and those of the vespers chair in the afternoon (24, 310, 1088). To graduate with a bachelor's degree, five annual courses were required and, from 1594, the degree was reduced to four years (65).

Students not only had an important role in evaluating their professors. What may sound surprising to our ears is that they also played a decisive role in professorial appointment procedures. In fact, it was the student body alone that decided which candidate obtained a given chair, while the university's president and his council of non-professorial academics solely oversaw the process (80–81). While this might seem like an appealing system, it suffered from serious problems. Before the age of photo IDs, it was often difficult to verify whether those enrolled as students were the same as those who were present to cast their vote (84). Moreover, since it was possible to enroll for courses throughout the academic year, it routinely occurred that monks from convents elsewhere matriculated at the University of Salamanca for the sole purpose of participating in the appointment process (106). Dirty dealings and corruption were the order of the day – and Barrientos García does not shy away from drawing parallels to his own experience within the (Spanish) university sector today (120).

He also expounds why questions about the teaching style of professors featured so prominently in the visitation books. Francisco de Vitoria had introduced dictation for note-taking as a lecturing method during his time in Salamanca, but this practice was formally prohibited within the whole university in 1561 (35–37). Three years later, Juan Pérez de Cubillas, a professor of medicine, explained in the Faculty Assembly that having students take notes prevented them from actually understanding the subject matter, for it meant that they solely studied their scratch pads instead of actual books. Worst of all, Pérez suggested,

3 Thomas Duve, José Luis Egío, Christiane Birr (eds.), The School of Salamanca: A Case of Global Knowledge Production, Leiden 2021.

4 An important exception is Juan Belda Plans, La Escuela de Salamanca y la renovación de la teología en el siglo XIV, Madrid 2000.

5 Among his many publications are academic monographs as well as editions of primary texts. See e. g. José Barrientos García, Lucha por el poder y por la libertad de enseñanza en Salamanca: Estatuto y juramento de la universidad (1627), Salamanca 1990; and Luis de León, Tratado sobre la ley, ed. by José Barrientos García, transl. by Emiliano Fernández Vallina, El Escorial 2005.

students did not even set foot in the lecture halls and sent their servants instead (40–41). Despite such critical voices and official rules, dictation remained a tolerated practice within the Faculty of Theology and was admitted again in 1575 (62).

At the heart of Barrientos García's book are detailed discussions of each chair within the Faculty of Theology. Only three of those were permanent positions: the prime and vespers chairs (chapters 2 and 3) as well as the Bible chair (chapter 7). While the latter was dedicated to lectures on the Latin Vulgate, the former centered on the exegesis of Thomas Aquinas's *Summa theologiae*. The other professorships within the Faculty of Theology were less prestigious, badly paid, and, in most cases, restricted to fixed-term contracts of four years (78). All of them were devoted to readings of scholastic luminaries: there was a chair of Duns Scotus (chapter 5), a professorship of Durand de Saint Pourçain (chapter 6), and one of Aquinas (chapter 4) – a remnant from before Vitoria had exchanged the *Summa* for Peter Lombard's *Sentences* as the main teaching book for the prime and vespers chairs (121–128, 135–142). But importantly, in the period under consideration, all these professorships, except the Bible chair, were focused on Aquinas. Even the teachings of Scotus and Durand were approached through the lens of Saint Thomas's interpretations.

In the chapters that constitute the book's core, then, Barrientos García essentially reconstructs which questions of the *Summa theologiae* were treated by which chairholder in what year. As such, the reference work is not only informative for those interested in the history of the Faculty of Theology. It also serves as handy guide for scholars working with published texts of Salamancan theologians who are now in a position to quickly and easily look up when a given thinker first touched upon matters that later appeared in print.

For Barrientos García, however, the visitation books he has uncovered are above all a testament to the deterioration of the theological formation at Salamanca. If the gradual replacement of the *Sentences* with the *Summa* marks the inception of the »golden age« of Salamancan theology for most scholars, Barrientos García argues that it was also that which ultimately led to the School of Salamanca's demise.[6] In his eyes, the hegemonic status of Aquinas's works pushed all other scholastic texts to the margins, significantly narrowing the intellectual breadth and depth of theological education. More than that, Barrientos García laments that due to a mix of changes in the university statutes and professors' unwillingness to comply with study plans, students no longer worked through all the central passages of the *Summa* during their degree (1089–1093). Fundamental questions of law, justice, right, or the morality of commerce that were at the heart of the theological debates of the time were almost completely sidestepped in the Salamancan lecture halls after Domingo de Soto's death in 1560 (306–307, 438–439, 560–561, 676). Even though Barrientos García fails to engage with recent scholarship on Iberian scholasticism, the overarching thesis of his book nevertheless constitutes a thought-provoking contribution to recent debates about the nature and scope of the School of Salamanca.

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6 On the *Sentences* in early modern Salamanca and beyond, see Lidia Lanza, Marco Toste, The *Sentences* in Sixteenth-Century Iberian Scholasticism, in: Philipp W. Rosemann (ed.), Medieval Commentaries on the Sentences of Peter Lombard, vol. 3, Leiden 2015, 416–503.

Vincenzo Lavenia

Teologia della restituzione nell'America spagnola*

Il volume mette a disposizione dei lettori, in traduzione castigliana e nella versione originale in latino (*Controversia de restitutione necessaria pro iniuriis et damnis in omnibus humanorum bonorum generibus*), un testo inedito oggi conservato alla Biblioteca Nacional de Colombia come parte del manoscritto 95. Si tratta della traccia di un corso di teologia morale tenuto nel 1668 alla Universidad Javeriana Colonial da un gesuita, Martín de Eusa (1631–1693), che non ha lasciato una consistente produzione a stampa come altri padri della Compagnia a lui contemporanei. Trascritto dal maestro ausiliare di Eusa, Marcos del Campo, il corso non si segnala certo per la novità delle posizioni difese dall'autore, ma costituisce una preziosa fonte per la storia della filosofia e dell'insegnamento della teologia morale nelle Indie occidentali, che attende ancora una trattazione complessiva.

Infatti, se non mancano edizioni di testi e singole ricerche, nonché una storia della teologia in America Latina, in più volumi, curata da J. I. Saranyana e altri, sarebbe utile comprendere meglio e in modo critico fino a che punto il trapianto dei modelli di insegnamento della teologia cattolica pre- e post-tridentina nel mondo coloniale abbia costituito una semplice imitazione dei corsi universitari impartiti nel Vecchio Continente o se abbia invece affrontato materie più attinenti alle questioni di ortodossia e di ortoprassi, di etica e di casistica che investirono i fedeli e il clero nel Nuovo Mondo, nell'epoca della Seconda Scolastica e più avanti, quando trionfò la corrente probabilista. In ogni modo, i curatori forniscono informazioni non solo sulla biografia dell'autore, ma anche sulla storia della Universidad Javeriana, assai importante per il territorio del futuro vicereame di Nueva Granada, nata dal collegio gesuitico di Santafé (1604) e nel corso del Seicento riconosciuta come uno *Studium* abilitato, in concorrenza con quello domenicano, a rilasciare i titoli accademici sia dal papato sia dalla monarchia spagnola, anche nell'ambito della teologia. Inoltre nell'introduzione Carlos Arturo Arias spiega bene come si articolasse il metodo di insegnamento scolastico e lo schema di formazione previsto dalla *Ratio studiorum* adottata in tutti i collegi della Compagnia di Gesù alla fine del XVI secolo. Secondo quel piano di studi, se la filosofia veniva impartita nella facoltà delle Arti, il corso di teologia doveva snodarsi in quattro anni, e già nel primo prevedere lezioni sulla teologia morale e sulle materie *de iustitia et iure*, senza contare altri insegnamenti di casistica e di teologia ›economica‹ previsti negli anni seguenti. Testo di partenza era ovviamente la *Summa* di Tommaso d'Aquino, che veniva commentata secondo i modelli inventati nel Collegio Romano da Juan Azor alla fine del Cinquecento.

Come sappiamo, i numerosi trattati *de iustitia et iure* e i corsi di teologia morale, non solo gesuitici, traevano ispirazione soprattutto dalle pagine della *Secundae Secundae*, dove la materia della giustizia e dell'obbligo morale di restituzione era affrontata nelle questioni 58–62. Anche il corso di Eusa parte da quelle pagine, avendo tuttavia alle spalle oltre un secolo di trattati e di commenti dedicati in modo specifico all'argomento: da quelli del frate minore Juan de Medina e del frate predicatore Domingo de Soto a quello di Pedro de Navarra, senza contare le opere dei gesuiti Luis de Molina, Lenaert Lessius e Juan de Lugo (1642), quest'ultimo, secondo Arias, la fonte principale su cui si basò il corso di Eusa.

Ma la riflessione sul precetto della *restitutio* – è bene ricordarlo – aveva alle spalle una storia ben più lunga, che risaliva a un episodio evangelico (quello del pubblicano Zaccheo che si pente e restituisce i beni che ha frodato in Lc, 19,2–10) e ad altri passi della Scrittura, come Dt 22,28–29, dove si sanziona lo *stuprum* (o deflorazione di una vergine), obbligando il colpevole a riparare sposan-

* Martín de Eusa, Controversia sobre la obligación de reparar las injusticias y los daños causados contra cualquier clase de bienes humanos. Estudio introductorio de Carlos Arturo Arias, transcripción de Erika Tanács, traducción de Fernando Muñoz, Manuel Domínguez Miranda y Carlos Arturo Arias (Biblioteca Virtual del Pensamiento Filosófico en Colombia), Bogotá: Pontificia Universidad Javeriana 2020, 264 p., ISBN 978-958-781-461-3

do la vittima e risarcendo la famiglia per il danno inflitto al ›capitale sociale‹ dell'onore. Più tardi Agostino nell'epistola 153 formalizzò il precetto *non remittetur peccatum nisi restituatur ablatum* (confluito nel *Decretum*) e dopo il XIII secolo quel dovere morale venne analizzato da quanti si occuparono della confessione auricolare e dei peccati. La *restitutio*, in sostanza, fu definita come un *actus commutativae iustitiae* che estendeva al foro esterno, ai singoli e alla comunità i benefici derivanti dal perdono e della soddisfazione sacramentale prevista nel foro interno per un danno originato da alcune specie di peccato o crimine. Così, sin dal tardo medioevo, quando nei manuali per i confessori e nei corsi di teologia si trattava della restituzione, si finì per affrontare soprattutto materie economiche come i guadagni illeciti derivanti dalla simonia, dall'usura, dai cambi, dagli investimenti sul debito pubblico, da contratti di dubbia liceità, dal gioco d'azzardo, dal contrabbando e dalla frode dei tributi.

Inoltre, a partire dal Quattrocento e soprattutto dal Cinquecento, l'evoluzione dei contratti economici, la crescita della fiscalità statuale e gli scambi mondiali (non ultimo quello degli schiavi) che videro coinvolti gli imperi iberici alimentarono la dottrina teologico-giuridica sulla *restitutio*, che si estendeva su materie come la riparazione di un danno fisico o della buona reputazione (la *restitutio famae*, che meritò un intero trattato stilato dal frate Antonio de Córdoba nel 1553). Quando occorreva risarcire la persona o l'istituzione danneggiata, con quali strumenti, in che misura? E quando si incorreva nel peccato non assolvendo al precetto di restituire o riparare un danno? Occuparsi di restituzione, a partire dal XVI secolo, significò affrontare materie come quella del *dominium*, del giusto prezzo, del vincolo in coscienza della legge umana positiva, anche se con il tempo la teologia morale rinunciò a intervenire sulle materie di foro esterno (come i doveri fiscali) per concentrarsi sul tema del peccato.

Si può considerare Eusa come un vero e proprio autore, si chiede Arias nella sua introduzione? O si tratta semplicemente di un mero epitomatore di opinioni riprese da altri e più illustri teologi? La risposta è che si tratta dello schema di un corso universitario di teologia morale come tanti ne esistettero. Divisa in sette dispute, la *Controversia* definiva l'argomento della restituzione (1) e poi affrontava in modo ordinato le questioni derivanti dai danni spirituali (2), da quelli corporali (3), dall'omicidio (4), dallo *stuprum* (5), dall'adulterio (6) e dalla violazione dei beni materiali altrui (7). Di particolare interesse è la terza disputa, dove si discute pure del suicidio, della liceità di uccidere la donna adultera, della strage di innocenti nel corso di operazioni di guerra e dell'aborto procurato per salvare una partoriente in pericolo di vita. Si tratta di materie in cui Eusa non si limitò a riprendere Lugo (la cui opera risaliva al 1642), ma aggiornò la discussione fino a riportare il dibattito recente sul momento dell'animazione dei feti e i primi pronunciamenti ufficiali del Sant'Uffizio romano contro il cosiddetto ›lassismo‹ (1665). Il testo si interrompe alla disputa settima, che avrebbe dovuto trattare del furto e dei beni ingiustamente posseduti, ed è un peccato, se si pensa che un secolo prima, sfruttando il precetto della *restitutio*, *fray* Bartolomé de las Casas aveva provato a costringere gli *encomenderos* in punto di morte a restituire i beni ingiustamente sottratti ai fedeli indigeni per guadagnare il paradiso e compire un'operazione di giustizia. Ma il testo di Eusa non mostra alcuna sensibilità per le questioni più spinose che toccavano la vita morale e la giustizia nei domini spagnoli del Nuovo Mondo. La *Controversia* è un testo scolastico che suscita interesse proprio in quanto opera di ricompilazione.

Pochi appunti si possono muovere ai curatori del volume, per esempio il fatto che la parola *restitutio* venga tradotta a volte con il lemma *restitución* e più spesso con quello di *reparación*, che attenua la connotazione teologica presente nel termine latino. Ma forse basterà concludere dicendo che per collocare storicamente il problema affrontato l'edizione del testo avrebbe guadagnato dal confronto con i rilevanti studi di Paolo Prodi, Wim Decock, Daniel Schwartz, Jean-Pascal Gay, Nicole Reinhardt, Ruth Hill, David M. Lantigua, solo per citare alcuni dei migliori interpreti della teologia economica e morale cattolica della prima epoca moderna.

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José Luis Egío García

Los conceptos de *aequitas* y *epieikeia* en la modernidad temprana*

Recientemente publicado por la editorial Brill, el libro *Equity in Early Modern Scholarship* de Lorenzo Maniscalco constituye un sólido ejercicio de historia conceptual acerca de las nociones de *aequitas* y *epieikeia*, cuyos contextos de uso y diversas acepciones en el medievo tardío y la primera modernidad son no sólo rastreadas, sino contrastadas y problematizadas. Por las páginas del libro desfilan las interpretaciones del concepto de *aequitas* y las notables contribuciones a su carga semántica que realizaron autores tardo-medievales como Bartolo, Baldo, Aquino o Gerson y una pléyade de figuras de la modernidad temprana, inscritas tanto en el humanismo jurídico (Budé, Melanchthon, Oldendorp, Salamonius, Connan, Douaren, Doneau, por mencionar sólo a algunos nombres ilustres) como en la segunda escolástica (prestando Maniscalco un interés equivalente a teólogos como Soto, Molina o Suárez y a canonistas como Azpilcueta, Covarrubias o Mendoza).

Se trata de un sistematismo y grado de profundidad analítica sin precedentes en anteriores acercamientos al concepto de equidad, como el propio Maniscalco apunta con lucidez en la »Introducción« y »Conclusiones« de su estudio. En estas secciones el autor pasa revista, de forma brillante, a una historiografía jurídica sobre el concepto que, o bien se había perdido en la misma gran diversidad de matices que la noción de *aequitas* presenta en los escritos jurídicos y teológicos analizados, o bien había tendido a formular hipótesis generalizadoras a partir de una serie de lecturas mucho más restringida y artificialmente limitada a partir de criterios geográficos, gremiales o confesionales. En este sentido, frente a buena parte de la literatura académica precedente, que había marcado una escisión abrupta entre los desarrollos del concepto de *aequitas* provenientes de los ámbitos jurídico y teológico-moral en la modernidad temprana, Maniscalco muestra cómo esta hipotética frontera, que aún se mantenía sólidamente pergeñada en el período tardomedieval, se fue diluyendo progresivamente hasta desaparecer, prácticamente, conforme avanzaba la modernidad. Como subraya el autor del libro, merced, en buena parte, a la popularización de los comentarios escolásticos *De iustitia et iure* y *De lege* en el ámbito ibérico, se fue generalizando en toda Europa un tipo de acercamiento híbrido tanto al concepto de *aequitas* como a otros conceptos centrales para la historia de las normatividades. De esta forma, hacia principios del siglo XVII resultaba ya difícil distinguir si un determinado estudio o reflexión en torno al concepto de *aequitas* provenía del ámbito de la teología moral o del estrictamente jurídico, como acertadamente hace notar Maniscalco, ofreciendo síntesis de obras de este período como el *Libello Singulari de Aequitate*, *Indulgentia et Facilitate* de Hugo Grocio.

El punto de mayor convergencia de los enfoques teológicos que, inspirados en algunas cuestiones de la *Summa theologiae* de Aquino, tendían a rescatar el concepto aristotélico de *epieikeia* y a definir la misma como una necesaria intervención correctiva sobre el texto de la ley, y los enfoques jurídicos en torno a la equidad como uno de los principios de interpretación de la ley y la intención del legislador, lo encuentra Maniscalco en el *Tractatus de legibus ac deo legislatore* de Francisco Suárez. Para el autor del libro, éste supone el intento más logrado por exponer, a la vez que conciliar, ambas perspectivas sobre las distintas dimensiones normativas del concepto de *aequitas*. De acuerdo también a Maniscalco, ningún otro autor antes de Suárez habría logrado conceptualizar con un nivel semejante de claridad las características específicas que presentaba la equidad entre los diversos tipos de interpretación, razones que convirtieron rápidamente a su *Tractatus de legibus* en una referencia insoslayable también para los juristas, haciendo que su análisis fuera seguido y hasta reproducido por numerosos autores desde las primeras décadas del siglo XVII (teólogos como Lessius, Bonacina o

* Lorenzo Maniscalco, Equity in Early Modern Legal Scholarship, Leiden / Boston: Brill Nijhoff 2020, 243 p., ISBN 978-90-04-40480-9

Laymann y canonistas como Streinius o Reiffenstuel, entre otros muchos).

A la vez que acerca a la teología y el derecho de la primera edad moderna – apuntalando una tendencia historiográfica a la que otros volúmenes publicados en esta misma colección *Legal History Library* de Brill ya habían contribuido enormemente, en especial la influyente obra de Wim Decock, *Theologians and Contract Law* –, Maniscalco se distancia en su análisis de la literatura académica que dio por hecho acríticamente la existencia de un hipotético ›telón de acero‹ entre autores católicos y protestantes. Como queda claro en su perspectiva de conjunto sobre los usos del concepto de *aequitas* en la primera modernidad, este límite o barrera confesional se habría caracterizado por su gran porosidad y permeabilidad, no determinando en absoluto, pese a una serie de silencios obligados sobre algunas de las autoridades consultadas, el contenido de los desarrollos doctrinales en torno a la equidad y otros conceptos. Identificar este tipo de afinidades en el tratamiento y uso de conceptos como el de equidad requiere, eso sí, de una lectura atenta y en profundidad de las fuentes, algo que Maniscalco hace, por ejemplo, con los *Comentarii de iure civili* del calvinista Hugues Doneau. Como las obras de otros correligionarios se trata, en opinión de Maniscalco, de unos comentarios que, pese a carecer de cualquier referencia explícita a autores católicos, estarían muy influidos por las perspectivas de teólogos escolásticos como Cayetano y Domingo de Soto, partidarios de limitar la labor correctiva del ideal de equidad a la restricción de normas generales cuya aplicación en ciertos casos podía resultar injusta y problemática.

Tanto la estructura de *Equity in Early Modern Scholarship* como los aportes concretos que supone para la historiografía acerca del concepto de equidad y los aspectos que merecerían ser objeto de investigaciones ulteriores son apuntadas con gran clarividencia por el propio autor de la obra en su »Introducción« y »Conclusión«. Ello hace que, en realidad, sea sea prácticamente innecesario un trabajo de reseña al uso. El lector apreciará que el libro es resultado de un cuidado extremo puesto por Maniscalco no sólo en estas secciones introductorias y conclusivas, sino en la totalidad de los capítulos. Las distintas secciones y subsecciones se abren siempre, por ejemplo, con unos cuantos párrafos de transición que explican la necesidad y motivos que llevaron al autor a atender a un determinado autor u obra y la relación existente entre esta determinada fuente y las previamente analizadas. Asimismo, al cerrar la sección dedicada a los desarrollos doctrinales de cada autor o período, Maniscalco ofrece, por lo general, resúmenes muy atinados de los contenidos y problemáticas abordadas. Gracias a la meticulosidad y esmero con los que el autor pone en práctica de forma sistemática estos procedimientos de redacción, lo que hubiera podido ser un engorroso e indigesto acercamiento a una multitud de fuentes (unos 150 tratados tardo-medievales y modernos, sin contar en este elenco los grandes corpus jurídicos y fuentes antiguas como los escritos de Aristóteles, Cicerón o Quintiliano, también tenidas en cuenta por Maniscalco) se convierte en un producto muy acabado, cuya lectura no sólo resulta instructiva sino placentera.

Como decíamos, desde un alto grado de autoconciencia de los límites de su propia investigación, su autor es capaz de identificar los temas y fuentes que, por diversas razones, han debido quedar fuera de su estudio. Maniscalco se excusa, en especial, por haberse visto obligado a prescindir de todo un mundo de fuentes archivísticas y géneros impresos como los de los *consilia* y las *decisiones*. Es consciente de que este tipo de textos le hubieran permitido investigar los posibles usos del concepto de *aequitas* en la práctica jurídica de la modernidad temprana y dirimir si el rescate del ideal aristotélico de la *epieikeia* tuvo alguna influencia en el trabajo diario de jueces y abogados.

Pasando a mencionar ahora algunos aspectos que, en nuestra opinión, hubieran podido recibir un tratamiento diferente y elementos que Maniscalco ni integra ni menciona él mismo como limitaciones de su propio trabajo, de modo que la reseña del libro vaya más allá de lo que, con agudo autocriticismo, apunta su mismo autor, nos parece problemático, en primer lugar, que la reflexión sobre las metodologías de la historia conceptual esté totalmente ausente en la misma. En este sentido, mientras que Maniscalco abunda en su introducción en reflexiones sobre las tendencias y características de la historiografía previa, la utilidad y ventajas derivadas del empleo de las metodologías propias de la historia conceptual, que son las que, en nuestra opinión, subyacen realmente a la mejora sustantiva de su aporte sistemático, no se tematizan en absoluto. No se trata de un asunto menor en la medida en que, al prescindir de la reflexión sobre las pautas metodológicas que inspiraron y fueron puestas en práctica en la redacción

de la obra, el mismo análisis historiográfico que el autor lleva a cabo en los primeros compases de la misma resulta afectado, perdiendo una parte importante de la profundidad analítica que hubiera podido tener. No encontramos en *Equity in Early Modern Legal Scholarship* ningún tipo de paralelismo con las obras que, en fecha reciente, han reconstruido los cambios sustanciales en los sentidos de otros conceptos fundamentales para la historia de las normatividades y el derecho, ni una teorización más amplia sobre la interrelación que, en el plano formal y metodológico, guardan estos nuevos trabajos. La investigación pierde también el enorme potencial que su autor hubiera podido extraer de la misma en tanto que modelo de escritura acerca de temas y conceptos esenciales para la historia del derecho.

En contraste también con la historiografía precedente, uno de los *atouts* de la obra de Maniscalco es que no se limita a estudiar las obras y perspectivas sobre la equidad de los grandes tratadistas, sino que dedica también una atención importante a diccionarios jurídicos y epítomes. En *Lexica iuris* como los elaborados por Spiegel, Oldendorp, Schard, Kahl o Duprat encuentra el autor de *Equity in Early Modern Legal Scholarship* importantes indicios de la »popularización« del concepto moderno de equidad como *epieikeia*. Pese a superar, merced a este aporte clave, a trabajos anteriores, al tratarse de un estudio limitado casi por completo a obras jurídicas y teológicas que se imprimieron en los siglos XVI y XVII, quedan fuera del mismo importantes fuentes manuscritas o rescatadas e impresas sólo en fecha contemporánea. En el caso de algunos de los círculos intelectuales a los que se acerca Maniscalco, la atención a este último tipo de fuentes resulta, sin embargo, imprescindible para poder comprender y explicar bien desde una perspectiva histórico-conceptual la génesis y desarrollo de las discusiones en torno a la equidad.

Por ejemplo, en su perspectiva de conjunto sobre las aportaciones de los tomistas ibéricos del siglo XVI, que Maniscalco presenta con acierto como comentarios y debates en torno a ciertas *quaestiones* de la *Summa theologiae* (*Ia–IIae*, q. 96, a. 6; *IIa–IIae*, q. 120), llama poderosamente la atención que los razonamientos pioneros de Francisco de Vitoria – muy influyentes para escolásticos posteriores, así quedaran en forma manuscrita y no fueran publicados hasta el siglo XX – sobre una equidad entendida como *epieikeia* y en torno a la reconducción práctica de la ley en los casos en los que la aplicación estricta de la letra de la misma atentaba contra el bien común, hayan sido totalmente obviados. Hay, sin embargo, varios trabajos clave sobre Vitoria y la *epieikeia* en la literatura académica en castellano – publicaciones de Cruz Cruz o Zorroza – que, de haber sido tomados en cuenta, hubieran podido ayudar a Maniscalco a situar con mayor precisión el origen de varias de las ideas recurrentes en la escolástica ibérica. Como muestran los autores citados, la *epieikeia* es, de hecho, un concepto y mundo particular de debates que Vitoria no sólo abordó de forma pionera, sino con gran detenimiento en sus clases en Salamanca, abarcando sus análisis una cuádruple vertiente filológica, filosófica, moral y jurídica.

Las publicaciones de Cruz o Zorroza hubieran podido servir también como útil orientación para contrastar con mayor rigor una de las tesis más contundentes defendidas en la obra de Maniscalco, a saber, la identificación de los escritos de Suárez como el punto de convergencia más sistemático de los debates en torno a la equidad como interpretación o como corrección de la ley y como la perspectiva más influyente en los siglos XVII y XVIII. Se trata de una tesis interesante y verosímil, pero cuya prueba exhaustiva requiere, en nuestra opinión, poner en la balanza otros aportes sistemáticos y realizados con la misma pretensión de exhaustividad en el ámbito escolástico ibérico. Pensamos, en especial, en los detallados comentarios a la *Summa* de Domingo Báñez, que sintezan la tradición de comentarios salmantinos precedente, o en aportes como los realizados por Francisco de Araujo a mediados del siglo XVII.

Junto a los desarrollos doctrinales elaborados por teólogos como Vitoria, Báñez o Araujo, también queda fuera de la obra reseñada las reflexiones sobre *aequitas* y *epieikeia* que realizaron los civilistas salmantinos. Al no comparecer, de hecho, en el estudio de Maniscalco, ningún civilista salmantino o ibérico, se desprende indirectamente del mismo la errada impresión de un mundo intelectual poblado en exclusiva por teólogos y canonistas. Por no mencionar más que a una referencia insoslayable, ya Seelmann o Carpintero apuntaron a la importancia de las reflexiones de Fernando Vázquez de Menchaca sobre esta temática. Hubiera sido importante, sin duda alguna, traerlas de nuevo a colación en esta perspectiva general, un ejercicio que hubiera podido iluminar tanto la alegada singularidad de Menchaca como ayudar a determinar si el impacto de las perspectivas teológicas entre

los civilistas europeos, tan bien estudiado por Maniscalco en los escritos de Bolognetti, Grozio o Doneau, se produjo así mismo – y, quizás, con anterioridad – entre los civilistas salmantinos.

Las ausencias o lagunas mencionadas, imposibles de evitar, prácticamente, en una perspectiva de conjunto como la elaborada por Maniscalco, no oscurecen el hecho de que las páginas que dedica al tratamiento de la equidad en la Escuela de Salamanca sean algunas de las más agudas elaboradas hasta la fecha sobre este importante tema. Maniscalco sintetiza con gran acierto tanto las tendencias generales de la argumentación salmantina como los ricos matices específicos aportados a los debates de su tiempo por autores como Soto, quien en su *De iustitia et iure* se mostró, por ejemplo, a favor de extender la labor correctiva de la *epieikeia* incluso a aquellos casos en los que la injusticia que podía resultar de la aplicación de la ley fuera tan sólo probable, posición en la que el dominico se singularizó frente a la tradición precedente y la opinión mayoritaria entre sus coetáneos. Evita Maniscalco continuamente, con su mirada directa y sin prejuicios a las fuentes, la falsa impresión de continuidad y homogeneidad cuasi absoluta transmitida por trabajos anteriores sobre la *epieikeia* en la escolástica ibérica. Como bien muestra Maniscalco, aun compartiendo con Soto, Juan de Salas, Bartolomé de Medina, Gabriel Vázquez y otros colegas del *studium* salmantino una serie de inquietudes y referencias comunes a Aristóteles o Tomás de Aquino, canonistas como Azpilcueta o Covarrubias, e incluso teólogos como Luis de Molina, se mantuvieron mucho más apegados al enfoque humanista de la *epieikeia* como interpretación de la ley acorde a la *mens legislatoris* que a la perspectiva netamente tomista de Soto y compañía. En la medida en que muestra en su gran complejidad de matices un ejemplo del tipo de diferencias doctrinales existentes entre los teólogos y juristas salmantinos, el análisis de Maniscalco apuntala la idea de una Escuela de Salamanca a entender más como una comunidad de producción de conocimiento normativo caracterizada por el empleo de un *ars inveniendi* específico y el recurso a un patrimonio común de *auctoritates*, que como un equipo de celosos guardianes de una serie de doctrinas o dogmas.

A pesar de constituir el estudio más amplio realizado hasta la fecha sobre el concepto de *aequitas*, se echa, por último, de menos su problematización en contextos extraeuropeos. En la medida en que el espacio cultural europeo de los siglos XVI y XVII, al menos en lo tocante a los imperios ibéricos, no se limitó al marco geográfico estrecho del continente europeo, sino que se extendió a las Universidades, colegios e instituciones de administración y gobierno creadas en sus dominios americanos y asiáticos, dejar fuera de antemano a autores y tratados escritos en estos contextos de ultramar supone renunciar a todo un ›nuevo mundo‹ de reflexiones en torno a la *aequitas*.

Pensando, precisamente, en que el amplio patrimonio de regulaciones normativas recogido en el *ius commune* y el derecho castellano tuvo que ser adaptado e interpretado en contextos inéditos y no previstos por los legisladores originarios; considerando también que la imposibilidad de consultar al legislador para que esclareciera el texto de la ley o lo complementara era un problema que se hacía especialmente grave en los contextos ultramarinos y que, además, en estos contextos se producía, por ver primera y de forma inédita en la historia, el encuentro entre un sinfín de leyes y códigos creados en Europa y una serie de pueblos e individuos con costumbres y tradiciones normativas muy diversas y cuyos peculiares estatutos jurídicos y teológicos podían ser vulnerados en el caso de una aplicación estricta de las leyes de los conquistadores, los ideales correctivos y moderadores recogidos en los conceptos clásicos de *aequitas* y *epieikeia* ocuparon un lugar fundamental en las reflexiones de los principales juristas y teólogos indianos. Se trata de una línea de investigación que, aunque insuficientemente desarrollada, ha sido ya explorada en valiosos trabajos de especialistas como Víctor Tau Anzoátegui, Francisco Cuena Boy, Miguel Anxo Pena o Sebastián Terráneo acerca de los razonamientos en torno a la equidad y la *epieikeia* de importantes figuras del derecho y la teología moral indianas (Alonso de la Peña Montenegro, Diego de Avendaño, Juan de Zapata y Sandoval, Casimiro Díaz, entre otros). Aunque se trate, ciertamente, de personajes desconocidos para la comunidad académica internacional y de figuras al margen del canon de grandes juristas occidentales asentado en la historiografía, nos parece que un acercamiento a sus obras y a los debates y matices inéditos que términos como los de *aequitas* y *epieikeia* suscitaron en su traducción cultural a los contextos americano o asiático, resulta hoy en día insoslayable en cualquier estudio que se pretenda exhaustivo.

■

François Jankowiak

Les cardinaux dans tous leurs états à l'âge moderne*

Prenant place dans la précieuse série des guides ou »compagnons« publiée sous l'égide des éditions Brill, cet ouvrage, disons-le d'emblée, offre une approche à la fois systématique et didactique, particulièrement convaincante, de la figure des *porporati* et des fonctions cardinalices à la période moderne. Les trente-cinq contributions formant ce volume, réparties en huit vastes chapitres thématiques, en restituent le caractère multiforme à la lumière de l'historiographie la plus récente, celle ayant notamment bénéficié de l'ouverture aux apports des sciences sociales et d'une perspective d'analyse globale.

Sans prétendre ici rendre compte de manière exhaustive de la richesse de cet ensemble, l'examen du plan retenu par les curateurs scientifiques est à lui seul évocateur de ces rôles institutionnels ou symboliques graduellement assumés par les cardinaux, à la confluence de plusieurs domaines ou zones grises, encore imparfaitement délimités et dont la différenciation croissante au long de la période constitue précisément un enjeu capital de la modernité politique comme ecclésiale. Le caractère entrelacé des fonctions assumées au sein de l'Église et, pour nombre de ces »Princes de l'Église«, au sein des États, à l'échelon local (Rome, les États pontificaux, la cour et la chapelle pontificales, la Curie romaine) comme universel (ainsi dans le cadre des congrégations romaines ou de l'expansion missionnaire), à la lisière aussi des sphères spirituelle et temporelle et des dimensions publique et privée, dessine progressivement le portrait d'un cardinal de la première modernité. Les coordinateurs du volume admettent l'intérêt d'en dégager un idéaltype, comme un acteur à la fois central et au profil complexe, plus institutionnalisé également qu'à la période médiévale – telle est du moins l'une des hypothèses majeures avancées dans l'introduction (3) – lors même que les réformes du Sacré Collège et de la Curie successivement orchestrées par Sixte-Quint en 1586 et 1588 purent provoquer à moyen et long termes, un déclin de l'influence des cardinaux au sein du gouvernement central de l'Église.

Cette évolution est retracée avec beaucoup de finesse et d'efficacité dès le premier volet de l'ouvrage, consacré à la définition du cardinalat et des fonctions qui lui furent confiées (origines médiévales, Sacré Collège, création et renonciation des cardinaux, conclave, émergence du cardinal neveu), avant que soit exposée la place du cardinal au sein de l'institution ecclésiale (partie 2, offrant des analyses stimulantes sur les rôles et actions des cardinaux au sein de l'Inquisition et de la Pénitencerie apostolique mais aussi sur leur rapport à la théologie), ses relations avec le pouvoir séculier (partie 3, couvrant l'activité des cardinaux légats et des nonces, ainsi que celle des cardinaux de couronne placés, si l'on peut l'écrire ainsi, entre Rome et le monde), l'administration de ses propriétés et de son patrimoine (partie 4, incluant aussi une contribution sur les origines sociales et l'éducation des cardinaux), la dimension romaine (partie 5, comprenant un article sur la vacance du Siège apostolique qui aurait pu tout aussi bien figurer en partie 1), les missions (partie 6, terme ici réducteur car y sont évoquées également les relations avec les mondes non chrétiens et avec les Grecs et les Églises orientales), la littérature et l'historiographie (partie 7, laquelle traite notamment des traités dépeignant l'idéal du cardinal) et enfin les arts visuels (partie 8).

L'historien du droit et des institutions en particulier trouvera nombre d'éclairages et de mises au point synthétiques sur de nombreuses questions liées au gouvernement central et local de l'Église

* Mary Hollingsworth, Miles Pattenden, Arnold Witte (eds.), A Companion to the Early Modern Cardinal (Brill's Companions to the Christian Tradition 91), Leiden / Boston: Brill 2020, 705 p., ISBN 978-90-04-31096-4

romaine, aux relations diplomatiques entre le Saint-Siège et les États, au statut et aux prérogatives des cardinaux (même si les sources canoniques, à l'exception des traités de Giovanni Battista De Luca, sont peu sollicitées) et à la gestion de leur patrimoine privé, ainsi que sur des aspects jusque-là davantage délaissés par l'historiographie mais très stimulants, appelant des approfondissements ultérieurs, à l'exemple des protectorats exercés par les cardinaux sur les confréries et instituts religieux, ou des enjeux liés à la détention du titre – diaconie, église ou évêché suburbicaire – qui leur est assigné par le pape en consistoire lors de leur création. Loin d'une représentation, somme toute classique, des cardinaux comme simples »créatures« des papes et leur demeurant subordonnées, cette vaste synthèse – augmentée d'une riche et très utile bibliographie placée en fin de volume (617–686) – dresse un panorama complet des nombreux rôles et fonctions assumés par les cardinaux au sein d'un milieu romain non exclusivement ecclésiastique, au sein d'une société de cour, celle de l'entourage pontifical, au sein d'un appareil gouvernemental en voie de profond renouvellement, au sein d'un État pontifical en mutation, et enfin au cœur de rapports de force internationaux et d'activités missionnaires auxquels le Saint-Siège s'efforce de donner des orientations conformes aux principes tridentins.

C'est peut-être ce caractère de visibilité des cardinaux, celle individuelle de Princes de l'Église mais aussi celle institutionnelle de hauts responsables ecclésiastiques – une élite romaine et du monde, saisissable à diverses échelles – marqué et renforcé par le port du chapeau ou de la barrette rouge, qui fait mieux saisir le sens de la fameuse décision adoptée par Urbain VIII en 1630 de leur accorder l'usage du titre d'Éminence, acteurs majeurs et figures centrales d'instances atteignant elles-mêmes, au long de la période considérée, un degré inédit de centralisation. En cela, il est aussi l'un des marqueurs les plus fiables d'une modernité ecclésiale dont les signes et les manifestations – institutionnelles comme symboliques ici – excèdent la seule dynamique posttridentine. ■

Benedetta Albani, Alexandra Anokhina, Francesco Giuliani, Anna Clara Lehmann Martins

Reinterpreting the Counter-Reformation from the Ibero-American Perspective*

The Counter-Reformation is a historiographical category which is associated with the profound changes that took place within the Catholic Church from the 16th century onwards. Since the mid-20th century, European and North American historians have ceased to identify the Counter-Reformation exclusively as a *reaction* of Catholicism against the influxes of Protestantism. The alternative interpretation posed by scholars such as Hubert Jedin (and later on Ronnie Po-Chia Hsia and John W. O'Malley) is that Catholic reformist impulses ran in parallel to – and even preceded – Luther's Reformation, corresponding to an autonomous, complex movement, with a variety of forms of expression.

With regard to law, the most impactful change related to the Counter-Reformation was the Council of Trent (1545–1563). Among other things, this normative *corpus* established a new disciplinary paradigm for the Catholic clergy and laity that

* Macarena Cordero, Jorge Cid (eds.), Contrarreforma católica, implicancias sociales y culturales: Miradas interdisciplinarias, Santiago de Chile: Editorial Cuarto Propio 2019, 404 p., ISBN 978-956-396-068-6

lasted for over three centuries. Not by chance, the historiography on the Counter-Reformation encompasses a wide range of approaches to the Council of Trent, from the monumental pictures of its genesis to the specific studies on its adaptation to local contexts. The book *Contrarreforma católica, implicancias sociales y culturales: Miradas interdisciplinarias*, edited by Macarena Cordero and Jorge Cid, now joins this historiography. Bringing together articles written mostly by young researchers, this work seeks to offer, in an interdisciplinary fashion, fresh contributions on the Counter-Reformation, the Council of Trent and the heterogeneity of its effects in the Ibero-American territory.

The book is structured in four sections. With the absence of section titles, the reader is invited to put forward her / his own interpretation on the connections (and disconnections) between the articles; this is also what we attempt with this review.

The first section of the book is dedicated to broad aspects of intellectual history: constructing the image of the ideal clergy, the narrative identity approach applied to Biblical reading practices, and early modern political thought. The contribution of Fermín Labarga focuses on 16th-century Spanish priest Fernando Contreras as an exemplary figure. The discussion on post-Tridentine actors as role models (or anti-models) – be they bishops or parish priests, friars or nuns, ecclesiasticals or laymen, men or women, some portrayed as embodiments of the Counter-Reformation values, others as negative, deviating examples – interests other authors in the book. For his part, Labarga examines the trajectory of clergyman Contreras, in particular his labor in the rescue of captive Christians and the conversion of Muslims in Africa. The author relies on the testimonies from Algiers, Tétouan and Ceuta that were attached to the canonical process that led Contreras to be entitled venerable by Pope Pius VI in 1786. In the second article, Mike von Treek approaches how the Counter-Reformation established specific conditions for the practice of reading the Scripture, giving room to long-lasting models of more and less »apt readers«. While comparing reading practices in Protestant and Catholic contexts, von Treek recognizes in the Counter-Reformation the origin of problems that became very strong and manifest from the 19th century to present day. Among them is the marginalization of the Biblical readings of the uneducated, the poor, women, indigenous persons, non-Catholics etc., in sum, of all groups that do not fit in the Counter-Reformist »apt reader model« (an educated, male, European priest). This section closes with an essay by Felipe Schwember, who explores the link between Salmantine political philosophers and modern contractualism. The author focuses on the School of Salamanca's interpretation of the social contract. The views of Salamanca's theologians on Aristotelian and Aquinian thought are at the centre of this text. In particular, the author investigates the role of the concept of natural law in the development of the idea of political freedom.

The book's second section revolves around one of the famous foes of Counter-Reformation: Protestantism. It discusses Protestants' points of view and points of view on Protestantism. The article by Bettine Baader focuses on the latter, more precisely on the relationship between Protestant Reformation and Max Weber's thesis on the *Disenchantment of the World*, a relationship often taken for granted even by present day historians. With a methodologically stimulating text, Baader demonstrates that the *Disenchantment* refers not to the whole Reformation, but to Calvinism – and, in particular, to Weber's own portrait of it, a portrait which, with little support of historical sources and much reliance on intuitive methods, contained generalizations and anachronisms typical of 19th-century progressive views on history. Baader's article stands as a reminder of the relevance of historical context to a proper assessment of the qualities and limits of theories. The next contribution belongs to the category of Protestants' points of view. Diego Melo Carrasco approaches the perspective of Martin Luther on Islam, based on the prologue that the reformist wrote to Bibliander's edition of the Koran. Presenting a topic little explored by historiography, Carrasco's text shows that the horizon of concerns of the Reformation's leaders went beyond the critique of the Catholic Church, challenging, to some extent, the perfect *action / reaction* relationship between Reformation and Counter-Reformation. The section closes with Ana Hontanilla's account of how reports from 18th-century British travelers used to picture Spain as a *barbaric* territory. The connection established in these documents between *barbarism* and Catholic institutions (above all, the Inquisition), besides evoking the liberal context of the travellers (many of them, one may suppose, of Protestant descent), recalls the negative, regressive connotation that Protestant

historians would attach to the category of Counter-Reformation one century later.

If one of the book's aims is to offer an account of the variety of uses and interpretations of the Council of Trent in Ibero-America, going against discourses that address the Counter-Reformation as a homogeneous phenomenon on both sides of the Atlantic, this objective meets an organized – though at times superficial – fulfillment in the book's third section. It is, moreover, a section that displays at its best the interdisciplinary potential of Counter-Reformation as a research field, for its articles present subjects closely related to the arts (painting, literature, music) and, at the same time, offer a rich overview of intertwining elements from politics, ecclesiastical administration and economy. Through the section, the diversity of (cultural) *translations* of the Council of Trent in Ibero-American space is explained by factors such as: (i) the adoption of varied post-Tridentine literature by local actors during the elaboration of local normative *corpora*, as seen in Fernando Guzmán's text about the Tridentine doctrine on sacred images in Ibero-American synods and provincial councils; (ii) the survival and transformation of indigenous elements (*contraconquista* elements) in contexts of evangelization, as allowed by the mimetic potential of Catholicism, as claimed by Luz Ángela Martínez in her analysis of the groundbreaking poetic work of Sor Juana Inés de la Cruz, and as present in Daniel Astorga's account on the process of assimilation of *Mictlan* into Christian Hell in Fray Andrés de Olmos' *Tratado sobre los siete pecados mortales*, both cases from Nueva España; (iii) the persistence of »misunderstandings« about what the Council of Trent actually disposed, in addition to the necessity of adapting Tridentine precepts to local limitations of personnel and material, as pointed by Laura Fahrenkrog, in her text about musical practices in Asunción del Paraguay. This section also includes Jorge Cid's reflections on the formal bridges between the Counter-Reformation *alias* in the arts, the Baroque, and 20th-century Neo-Baroque.

Moving to the fourth and final section, two articles are more closely related to the functioning of ecclesiastical and secular jurisdictions in the late modern age. These are the contributions of Nelson Castro Flores and Macarena Cordero Fernández. The remaining texts, by Mario Prades Vilar and Mariana Labarca Pinto, focus on the so-called actors of the post-Tridentine period. Castro Flores' work is part of the broad debate on the original adaptations that the Council of Trent received in local context. The author proposes the category of *episcopal reformism* to address the central role of bishops in local reforming processes in the Archbishopric of La Plata during the 18th century, in particular in the field of indigenous evangelization. The main objects of his analysis are the normative efforts of bishops to eradicate superstition and foster intimate, personal forms of devotion among the natives. It is noteworthy that, even though historiography usually emphasizes the conflicts between the papacy and secular powers during this period, Castro Flores claims that Bourbon regalism and Pope Benedict XIV's *renovación cristiana* would have *converged* towards the development of episcopal reformism. Such a bold assertion gives a wider, interconnected, even global flavor to his local-level narrative. Still in the realm of jurisdictions in post-Tridentine times, Macarena Cordero's article focuses on the approach that different *foros de justicia* had towards bigamy in 18th-century Chile. Due to its complex character – encompassing sin, crime and an »open door« to heresy – bigamy was then under the competence of three *foros*: the ecclesiastical court, the secular court, and the Inquisition. While analyzing three paradigmatic cases, Cordero offers a comprehensive and comparative overview of the activity of the three jurisdictions, emphasizing their distinct procedures, solutions and aims. The article of Prades Vilar in turn approaches an unexpected actor among post-Tridentine exemplary figures: the Jesuit model of the Christian soldier. By employing the historiographical category of confessionalization, Prades Vilar expands the borders of classical studies on evangelization, usually limited to the relations between missionaries, evangelizers and indigenous communities. Instead, he analyses the complex process of evangelization of Spanish soldiers by the Society of Jesus in Chile between the 16th and 17th centuries. Finally, in Mariana Labarca Pinto's chapter we meet yet another group of Tridentine actors: the nuns. The author's point of observation is the history of science and medicine. More precisely, Labarca Pinto exposes how physicians interpreted and treated hysterical disorders perceived in Italian convents during the 18th century. Attentive to the changes also in the discourse of the nuns as patients, this text proposes an interesting reflection on how 18th-century medicine connected the roots of psychological disorders not to supernat-

ural causes, but to elements such as violence and sleep deprivation in Catholic convents – arguments that we usually associate with 20th-century psychiatry.

In general, Cid and Cordero's book is successful in displaying many concepts established around the Council of Trent by different research fields. The articles comprise both concepts with a long-standing presence in the history of religions and the history of art (Counter-Reformation, Baroque) and new constructions (*Contraconquista*, episcopal reformism, Neo-Baroque, etc.). This conceptual variety mirrors the diversity of approaches and interpretations present in the work. However, the absence of a common understanding on the meaning of Counter-Reformation among the authors, or perhaps the absence of an introductory discussion on the history of Counter-Reformation as a historiographical category poses many questions to the readers. Through the articles, one often wonders: what is understood as Counter-Reformation by this author? In the period between the Council of Trent and the Vatican Council II, is it accurate to brand every attempt of Catholic reformism as »Tridentine« or »Counter-Reformist«? What are the limits of the historiographical use of this terminology?

Even without explicitly addressing these questions, or without proposing a more or less common assessment on the Counter-Reformation, Cid and Cordero's book undoubtedly constitutes a contribution to the debate. One of the book's major advantages is that of expanding to Ibero-American territory research issues which for too long seemed to belong only to Europe. It succeeds in demonstrating that the Catholic Reform unfolded on the other side of the Atlantic in a unique fashion. And more: it opens the way for new research questions. To a major extent, such a rich outcome is due to the diverse disciplinary background of the authors. Their areas of expertise encompass history, history of art, literature, music, philosophy and theology. Thus, the reader has the opportunity to appreciate the distinctiveness of each approach. Nevertheless, with distinctiveness comes dissonance. In some articles, the analysis of historical sources lacks elements that would be fundamental from a historian's point of view, such as a review of the historiography available. Besides, there are cases in which an author's use of concepts could be considered by a historian as anachronistic or overgeneralizing. In any case, rather than an occasion for interdisciplinary tension, the book serves as an opportunity to consider the methodological view of the other, in an attitude of, so to speak, methodological empathy.

Overall, the case studies that comprise the book are quite successful in offering a general perspective on long-standing issues of the Counter-Reformation, and they are also accessible to an audience that has little in-depth knowledge on the interpretations and uses of the Council of Trent in Ibero-American territory. It is proof that debates on the Counter-Reformation are the object of constant, fruitful renewal.

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Pilar Mejía

Inquisiciones como reacciones intermitentes*

La abundante producción historiográfica sobre las inquisiciones nunca se ha detenido. Por suerte, contamos con mecanismos académicos de actualización como este volumen, que nos ofrece un recorrido por las diversas inquisiciones durante dos milenios y sus recientes tendencias historiográficas. Y esto es justamente una de sus virtudes: presentar la historia de los modos de proceder contra posibles errores en materia de fe en sus diferentes contextos y desde una perspectiva comparativa amplia. Gracias a ello, su editor Donald S. Prudlo puede afirmar que, más allá de todas las

* Donald S. Prudlo (ed.),
A Companion to Heresy Inquisitions,
Leiden / Boston: Brill 2019, 314 p.,
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imágenes historiográficas sobre las inquisiciones, éstas representaban reacciones normativas o respuestas intermitentes ante realidades y desafíos heterodoxos localizados. En una perspectiva de larga duración, sus instrumentos de control social y arrepentimiento no parecieron ser tan efectivos ni duraderos por sí mismos, pero en cambio ayudaron a dar forma a diversas prácticas piadosas laicas, así como toda una serie de transformaciones administrativas eclesiásticas. El libro busca situar estas reacciones localizadas en sus contextos, demostrando una vez más las desmesuradas fijaciones sobre el mito de la inquisición y las dificultades para desvirtuar estas poderosas imágenes.

Dividido en cuatro partes y una introducción, esta compilación ofrece un recorrido cronológico por los orígenes de la *inquisitio hereticae pravitatis*, las inquisiciones medievales, ibéricas e italianas. Si bien pueden leerse como partes independientes, su lectura conjunta ofrece un panorama para entender que los debates teológicos, jurídicos, penales y procedimentales respondían a casos particulares, sobre los cuales se generó una amplia producción normativa.

La introducción nos brinda un recorrido por las historiografías de la inquisición: desde el impacto de las obras literarias en la reproducción de las imágenes de terror, pasando por las compilaciones históricas de autores católicos y protestantes desde el siglo XVI, el surgimiento de una historia secular en el siglo XIX, el interés historiográfico por los judíos desde la postguerra, la aparición en los años 60 de investigaciones socio-económicas y miradas postcoloniales interesadas en las particularidades de las inquisiciones en territorios africanos, asiáticos y americanos. Recientemente, ha surgido el interés por las formas de control social, las religiosidades femeninas, la sexualidad y sus relaciones con los tribunales seculares. Mientras que en todo este recorrido abundan las microhistorias, las historias nacionales y globales, escasean estudios sobre los fundamentos espirituales de las inquisiciones y sus prácticas administrativas en materia de herejía, temáticas que este volumen busca resaltar.

La primera parte analiza los fundamentos histórico-teológicos de las *inquisitiones heretice pravitatis*. Christine Ames (cap. 1) muestra que para entender la mentalidad detrás de cualquier persecución de herejía, es necesario comprender la centralidad de conceptos tales como comunidad, disciplina, autoridad, penitencia y salvación. Destaca la importancia de diferenciar cualquier tipo de investigación en materia criminal (*inquisitio*), de la formalidad legal que nacía en la alta edad media como *inquisitio hereticae pravitatis*. Particularmente interesante es el análisis que presenta sobre los usos reiterados del pasado bíblico y de otros tiempos o lugares donde no había herejías para justificar su persecución en otros contextos en la alta edad media. Michael Frassetto (cap. 2) refuerza esta idea mostrando que, si bien durante el primer milenio se desarrollan sus fundamentos espirituales, en la antigüedad sólo se presentó un único caso documentado de herejía en Europa. Es sólo hasta el siglo XI y XII cuando encontramos una producción normativa que responde a nuevos debates sobre los peligros de la herejía, su persecución y la pena de muerte. Las autoridades conciliares fueron esenciales en estos debates, aunque sus respuestas no fueron ni sistemáticas ni centralizadas.

En la segunda parte, dedicada al análisis de las inquisiciones medievales, Henry Ansgar Kelly (cap. 3) muestra cómo se fueron adaptando los procedimientos del derecho romano para configurar nuevas formas de proceder ante acusaciones de herejía. Particularmente destaca las transformaciones ocurridas entre diferentes métodos: *purgatio, accusatio* e *inquisitio*, sus desventajas prácticas y caída en desuso; así mismo, la importancia del Concilio IV lateranense en el desarrollo de una serie de medidas para la protección de los acusados. Lucy Sackville (cap. 4) muestra cómo la institucionalización de la inquisición pontificia estuvo acompañada de una diversidad de posiciones desde el papado, el episcopado, las órdenes mendicantes y las autoridades seculares, reflejadas en la gran producción normativa ocurrida en el siglo XIII (cartas papales, material conciliar, constituciones, privilegios, *summae*, compilaciones, manuales y tratados). Se trata de un periodo caracterizado por la sofisticación del debate y conocimiento de teólogos y canonistas, hasta el punto en que, como lo muestra Robin Vose (cap. 5), ya en la baja edad media se contaba con una serie de mecanismos burocráticos, gremios profesionalizados, formas de trabajo con las autoridades seculares y un amplio corpus normativo. Sin embargo, se advierte el peligro de sobredimensionar las prácticas inquisitoriales. Ellas eran puntuales para determinados lugares, adquirían matices diferentes en cada reino y no tenían una entidad permanente, mientras que en otros lugares se ejercían otras formas de control. Si para el siglo XV estas inquisiciones

eran puntos de acción focalizados, esto cambiaría con las reformas protestantes y las expansiones imperiales.

La tercera parte se ocupa de las metamorfosis de las inquisiciones ibéricas modernas. Helen Rawlings (cap. 6) destaca su control por parte de las coronas española y portuguesa, las tensiones con Roma y la aparición de nuevas categorías para diferenciar diversos tipos de cristianos. Las persecuciones a los judíos fueron intensas y localizadas, pero sobre todo contribuyeron al desarrollo de la leyenda negra. Sin embargo, señala que los juicios a conversos fueron decreciendo y estos nuevos cristianos, por su importancia económica y comercial, recibían perdones, mientras se prestaba más atención a los protestantes. Werner Thomas (cap. 7) muestra una serie de transformaciones en el siglo XVI: el abandono de tribunales itinerantes y la fijación de oficinas locales, la burocratización y protección de sus miembros y colaboradores, el establecimiento de su independencia económica y el interés de perseguir nuevas herejías. El desarrollo de un sistema de control y promoción social, apoyado por gran parte de la sociedad, permitió que sus actividades sobrevivieran sin ser cuestionadas hasta el siglo XIX. Lucia Castigan (cap. 8) muestra las diversas facetas de la inquisición portuguesa en su fluctuante relación política con la corona española. La migración de judíos y conversos de España a Portugal, luego a Brasil, donde no había tribunales permanentes, y a los Países Bajos, muestra las particularidades logísticas y formas de tolerancia allí desarrolladas. Como lo reconoce el editor, queda un vacío en esta tercera parte, al no contar con un capítulo sobre las inquisiciones en Hispanoamérica; sin embargo, esto es una oportunidad para que la historiografía hispanoamericana se nutra de un contexto más amplio.

Por último, la cuarta parte se ocupa de las inquisiciones italianas. Elena Bonora (cap. 9) destaca las características que hicieron de la inquisición romana una institución organizada, cuyas estructuras, procedimientos y red de tribunales, permitieron darle dimensiones globales a sus actividades y relaciones diplomáticas. Destaca también las fluctuantes relaciones con los diferentes cardenales y autoridades civiles. También muestra su ágil transformación en las materias a juzgar, pasando de perseguir herejías a ser más un órgano de control social en el siglo XVII. A diferencia de las otras inquisiciones modernas, esta sobrevivió y en 1965, modificando sus procedimientos, tomó el nombre de Congregación para la doctrina de la fe. Finalmente, Francisco Barberiato (cap. 10) muestra las reconfiguraciones de la inquisición en la República de Venecia en medio de un ambiente de lucha contra la propia Roma. Al ser un centro comercial con población itinerante no católica, y debido a todas las limitaciones de su competencia, sus actividades se enfocaron más en la persecución de defectos del clero y excesos de misticismo.

Con un exhaustivo recorrido histórico, el libro evidencia las diferentes transformaciones y particularidades de los procedimientos inquisitoriales. Su principal conclusión transversal es mostrar el accionar inquisitorial como un amplio panorama de reacciones localizadas y con debatible efectividad contra las herejías mismas. Estas diferentes respuestas intermitentes a las transformaciones de los »errores« de fe, venían acompañadas de periodos de intensa producción normativa, expresada en distintos géneros (cartas, material conciliar, manuales, sermones, *sumae* y compilaciones). Esta larga historia de producción normativa debe entenderse en el marco de diversas acciones inquisitoriales, como reacciones intermitentes, fruto de diferentes focos de debates y no el de una sola institución.

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Airton Ribeiro da Silva Jr.

Histórias do saber jurídico a contrapelo*

Tende-se a conceber o direito como um saber que, ao longo dos séculos, foi manejado por um grupo muito restrito do ponto de vista social. Uns poucos profissionais que formaram uma elite letrada e instruída nos herméticos meandros do discurso jurídico. O livro organizado pela historiadora do direito finlandesa Mia Korpiola, no entanto, desestabiliza essa imagem. Ao revelarem práticas de produção e apropriação do saber jurídico às margens do direito erudito, os artigos presentes no livro sugerem que esse grupo que, de alguma maneira, lidava com o direito foi ligeiramente maior do que tradicionalmente se confiou. Cada capítulo desvenda um mundo particular de profissionais e de caminhos para a educação jurídica que não costumam povoar as narrativas sobre o passado jurídico.

O livro oferece ao grande público investigações apresentadas três anos antes em Turku durante o seminário ›*Learning Law by Doing: Exploring Legal Literacy in Premodern Societies*‹. O âmbito geográfico coberto pelos trabalhos é amplo, reunindo várias ›Europas‹. Há tanto experiências ›centrais‹ do Sacro Império Romano-Germânico, França e Itália, quanto da distinta Inglaterra ou mesmo da Suécia e Finlândia nas ›bordas‹ da Europa. Igualmente largo é o arco temporal que se estende do medievo às vésperas do Estado liberal. A despeito dessa variedade espacial e cronológica, os artigos encontram unidade na potente ideia de *letramento jurídico (legal literacy)*. Com o declarado propósito de ampliar a perspectiva concernente às profissões jurídicas, e os respectivos meios de instrução para alcançá-las, o letramento jurídico, compreenderia, conforme adianta Mia Korpiola na introdução, o conhecimento acerca do direito, bem como habilidades jurídicas. Tal definição, por si só, não seria útil não fosse sua apreensão em graus de uma escala entre dois extremos, do completamente letrado ao completamente iletrado, que permite compreender o grau de letramento jurídico de qualquer pessoa do passado em contato com o direito.

Os cinco artigos que compõem a primeira parte do livro enfocam na prática como meio de aquisição do saber jurídico, revelando uma quantidade de agentes intermediários que gravitavam no entorno da justiça letrada. Enquanto um período como aprendiz de escrivão, conforme delineado por Kitrina Bevan, poderia capacitar um inglês medieval para exercer a atividade, um estágio no Tribunal da Câmara Imperial, como demonstrou Anette Baumann, conferia conhecimento e distinção suficientes para ser um procurador leigo. Marianne Vasara-Aaltonen nos apresenta uma Suécia do século XVII onde a administração da justiça ainda não havia atingido o grau de profissionalização de outros vizinhos europeus, e até mesmo em altas cortes, a magistratura popular era encontrada. A escassez de juízes letrados, impunha a experiência prática como principal meio para aquisição dos conhecimentos e habilidades necessários à atividade do juiz. No mesmo período, a situação da administração da justiça na Finlândia, que estava sob domínio sueco, não era distinta. Petteri Impola nos ilustra esse contexto com a história de Gabriel Abrahamsson que sem estudos universitários, nem origem nobre, era estimado em sua cidade como procurador leigo. Fechando a unidade, Anna Kuismin, em uma perspectiva *desde baixo*, parte de histórias de pessoas comuns que foram empoderadas pela valorização do finlandês frente a língua sueca, até então oficial na administração e educação. Tais narrativas permitem observar como, no contexto da emergência do nacionalismo na Finlândia do século XIX, a apropriação de *letramento jurídico*, permitiu a ascensão social permitindo o envolvimento com a administração local.

Na segunda parte do livro, o protagonista é o livro jurídico. Não aqueles vários volumes de tratados escritos em latim que porventura formavam o direito erudito, opaco aos não-iniciados, mas o *livro jurídico popular*. Tanto o artigo de Annamaria Monti, que parte de uma perspectiva comparada entre os mundos italiano e anglo-americano, quanto no de Laetitia Guerlain e Nader Hakim, focali-

* Mia Korpiola (ed.), Legal Literacy in Premodern European Societies, Cham: Palgrave Macmillan 2019, 264 p., ISBN 978-3-319-96862-9

zado no espaço francófono, recuperam esse gênero da literatura. A literatura jurídica *pragmática* vem recebendo maior atenção por parte da historiografia, justamente por conter importantes vestígios sobre o uso do saber jurídico nas dinâmicas da vida cotidiana. Escrita não para juristas treinados, o propósito desse gênero era justamente facilitar o acesso ao conhecimento jurídico. Logo, constituíam-se em um importante meio de aquisição de *letramento jurídico*. Não é fortuito, então, que tais livros pragmáticos estivessem nas prateleiras das bibliotecas privadas de funcionários da administração pública de pequenas cidades finlandesas sob domínio sueco, como aborda Mia Korpiola em seu artigo. Partindo de uma cuidadosa análise de inventários *post-mortem* do século XVIII, a autora rastreia a difusão do livro jurídico de modo a compreender o tipo de livro jurídico que compunha a coleção de diferentes pessoas sem educação jurídica formal.

Como um todo, o que se propõe com o livro em questão é, partindo da categoria *letramento jurídico*, ir além da obviedade do direito erudito e da justiça letrada presente nas altas cortes. Descentrar o olhar, porém, não é tarefa simples. Transparece em vários artigos a dificuldade em encontrar fontes que permitam a análise dessa cultura jurídica não oficial, bem como os limites que as fontes acessíveis apresentam. Anette Baumann, por exemplo, contorna a falta de fontes sobre a *Reichskammergericht* com um escrito autobiográfico, fonte tão valiosa quanto rara. Mia Korpiola mostra-se consciente dos limites impostos pelas fontes ao advertir que os livros listados em inventários não implicam na leitura e manuseio, e podem ainda ter sido incluídos na coleção pouco antes da morte do possuidor. A despeito desses desafios, os autores mostram que é possível escrever uma história do direito mais compreensiva e adequada à compreensão do fenômeno jurídico no descentralizado Antigo Regime.

Nesse ponto, o *letramento jurídico* mostra-se categoria particularmente profícua para a apreensão do direito em contextos periféricos, onde o direito erudito era uma realidade distante e a justiça local se realizava pelas mãos amadoras de juízes leigos, escrivães, rábulas e meirinhos. Ao historiador do direito que lida com vastos e plurais espaços coloniais – penso aqui, particularmente, nos Impérios Ibéricos – é difícil não encontrar um paralelo com o contexto descrito por Marianne Vasara-Aaltonen. Ou ainda, pensar na importância da literatura jurídica popular e pragmática, descrita por Annamaria Monti, Laetitia Guerlain e Nader Hakim, em lugares – como a América Portuguesa – em que não havia universidades a prover instrução jurídica formal.

Seguindo o legado de Savigny, a historiografia jurídica manteve por muito tempo certa preferência pela história do direito escrito e cultivado pelo seleto grupo de juristas treinados. As histórias narradas no livro preparado por Mia Korpiola, tomando emprestado a expressão de Walter Benjamin, escovam essa história a contrapelo, revelando que o saber jurídico não era monopólio exclusivo das profissões jurídicas, mas parte das práticas cotidianas de sociedades passadas. *Legal Literacy in Premodern European Societies* fornece algumas ferramentas para quem se propuser a explorar esses mundos.

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Bertram Schefold

Die theologischen Quellen von Wirtschaft und Recht bei Lessius*

Leonardus Lessius war ein Theologe von europäischem Rang, dessen Werke bis ins 19. Jahrhundert immer wieder aufgelegt wurden. Im 16. Jahrhundert waren die Niederlande das reichste Gewerbegebiet Europas, aber hier tobten auch die Religionskriege und der Freiheitskampf der Niederlande, die sich zu einem großen Teil mit Lessius' Lebensdaten (1554–1623) überschnitten. Er stammte aus bescheidenen Verhältnissen, hätte ein Handelsmann werden sollen, gelangte aber mit einem Stipendium an die Universität, schloss als Bester ab und trat, noch keine 18 Jahre alt, dem noch jungen Jesuitenorden bei. Die Seligsprechung hat man nicht für ihn erreicht, aber er galt zu Lebzeiten als das Orakel der Niederlande, weil er für deren spanischen Teil in wirtschaftlichen und politischen Fragen Rat gab, und er ist uns heute als einer der bedeutendsten Spätscholastiker durch die Fortführung der Rechtswissenschaft und des im Rahmen der Ethik entwickelten ökonomischen Wissens bekannt. 1999 erschien sein Hauptwerk *De iustitia et iure caeterisque virtutibus cardinalibus* von 1605 in der Reihe der Klassiker der Nationalökonomie mit einem Kommentarband.[1] In dieser eng bestimmten Perspektive ist Lessius einer der Großen in der Geschichte der Wirtschaftswissenschaften zu einer Zeit, als diese noch nicht als eine selbstständige Disziplin verstanden wurden.

Das Buch von Wim Decock behandelt zu etwa zwei Dritteln Lessius' Beitrag zum Wirtschaftsdenken, stellt diesen aber in den weiteren Zusammenhang seiner Theologie und möchte damit beweisen, dass die geistige Wendung, die nach Max Weber wesentlich zur Entstehung des modernen Kapitalismus beitrug, nicht allein jenen calvinistischen Sekten verdankt wird, auf die sich Max Weber in seiner Protestantischen Ethik hauptsächlich bezieht, sondern auch aus dem katholischen Wirtschaftsdenken in der Spätscholastik, das während der Gegenreformation hervorwächst. Wie Decock selbst hervorhebt, ist dies keine neue These. Er erinnert beispielsweise an Amintore Fanfani, der vor seiner politischen Karriere, die bis zur Präsidentschaft der Versammlung der Vereinten Nationen führen sollte, als Wirtschaftshistoriker ein ähnliches Projekt – unter Betonung der Gegensätze zwischen kapitalistischem Geist und von katholischen Vorstellungen eines christlichen Lebens geprägten Normen – verfolgt hatte.[2] Ein anderer Strang der Argumentation führt in der Mitte des Buchs von den spätscholastischen Erwägungen, wann Monopole verderblich sind und Kartellabsprachen zu verurteilen und wann eine Privilegiengewährung doch sinnvoll sein kann, etwa zum Schutz des geistigen Eigentums von Büchern oder Erfindungen, zur Genese des Ordoliberalismus und der sozialen Marktwirtschaft. Da sind einerseits die päpstlichen Enzykliken, insbesondere *Quadragesimo anno* von Pius XI. (1931), die Eucken und Müller-Armack inspirierte (im Buch Kapitel VII), andererseits die Forschung über diesen Gegenstand zu nennen. Joseph (später Kardinal) Höffner promovierte während des Kriegs bei Walter Eucken über die Monopoldebatte der Reformationszeit.[3] Er war dem Freiburger Kreis und dem Widerstand verbunden. Die dem Protestantismus zugehörigen Gründer der Sozialen Marktwirtschaft fühlten sich dem katholischen Wirtschaftsdenken verpflichtet. Fanfani in Italien arbeitete auch auf den Kompromiss zwischen Markt und gesellschaftlicher Bindung hin, der dort wäh-

* Wim Decock, Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius, Paris: Zones sensibles 2019, 248 p., ISBN 978-2-930601-41-0

1 Leonardus Lessius, De iustitia et iure caeterisque virtutibus cardinalibus Libri IV, hg. v. Bertram Schefold, zus. mit: Vademecum zu einem Klassiker der spätscholastischen Wirtschaftsanalyse, Kommentarband zum Faksimile-Nachdruck der 1605 in Leuven erschienenen Erstausgabe, Düsseldorf 1999.

2 Bertram Schefold, Amintore Fanfani e le tesi di Max Weber, in: Alberto Cova und Claudio Besana (Hg.), Amintore Fanfani: formazione culturale, identità e responsabilità politica, Mailand 2014, 115–128.

3 Joseph Höffner, Wirtschaftsethik und Monopole im 15. und 16. Jahrhundert, Jena 1941.

rend der Zeit des italienischen Wirtschaftswunders durch die Christdemokraten vertreten wurde.

Doch der Reihe nach. Auf dem Weg über die Biographie von Lessius und die Rezeptionsgeschichte führt Decock zur theologischen Quelle des Lessius'schen Wirtschaftsdenkens. In der Spannung zwischen Gnade und freiem Willen betonen die Jesuiten den letzteren: Der Mensch muss sein Heil verdienen. Die Prädestination kann zu Haltlosigkeit führen. Statt sich in das Schicksal zu ergeben, soll der Mensch durch gute Werke sich einen Schatz im Himmel schaffen. Schon auf Erden wird er nach seiner Arbeit und dem Verdienst beurteilt. Hier gelingt es Decock, die rechtlichen und ökonomischen Schriften des Lessius mit seinen theologischen zu einer überzeugenden Einheit zu verbinden, deren immanente und historische Sinnhaftigkeit einleuchtet und beeindruckt. Ein Beispiel: Mich hatte früher gewundert, dass Lessius[4] die Unterschiede in den Soldzahlungen, die Offiziere und Soldaten verschiedener Ränge empfangen, nicht durch die distributive, sondern durch die commutative Gerechtigkeit erklärt. Es geht nicht um den Rang im Sinne des Standes, sondern um die Arbeit, die der Staat als juristische Person vom Soldaten als Individuum mietet – eine Formulierung, die durch Decocks Interpretation der säkularen und theologischen Lehre des Verdiensts bei Lessius an Tiefe gewinnt.

Das zweite Kapitel setzt sich mit Max Weber auseinander. Decock erweist sich hier als weit besserer Kenner als jene italienischen Autoren wie Fanfani, Nuccio, Todeschini, die konstatieren, dass der italienische Frühkapitalismus zeitlich der Reformation vorangeht, sodass sie Weber widerlegt zu haben glauben, wenn sie zeigen, dass sich im Spätmittelalter in den oberitalienischen Städten kapitalistische Verhältnisse entwickelten. Als ob sich Weber damit nicht selbst schon in seinen allerersten Publikationen befasst hätte! Weber geht es um den *modernen* Kapitalismus, kapitalistische Formen gab es schon in früheren Zeiten, insbesondere im Altertum, und die Aufgabe des Historikers besteht darin, zwischen diesen und dem modernen Kapitalismus zu differenzieren. Das gelingt Decock sehr schön und in knapper Form. Weber habe sich auf Schriften gestützt, welche die protestantische Ethik in konkrete Normen für das Alltagsleben umsetzen wie im bekannten Beispiel von Benjamin Franklin. Dem entspräche aber auch eine riesige Literatur im Katholizismus, die, Weber ergänzend, heranzuziehen wäre; und Lessius ist der Autor, der in einzigartiger Weise sein theologisches Konzept mit Konkretisierungen durch Wirtschaftstätigkeit verbindet, weil er sich auf Beobachtung und Beratung des Handels einlässt, insbesondere an der noch führenden Börse in Antwerpen.

Im dritten Kapitel gelangt Decock auf dem Weg über die juristischen zu den ökonomischen Kategorien. Er wird anhand der Wandlungen des Vertragsrechts erklärt. Einfache Übereinkünfte haben im römischen Recht vor Gericht keinen sicheren Bestand, es bedarf des Schwurs, der Bezeugung, des schriftlichen Vertrags, aber das frühe Christentum näherte die Extreme einander an. Im Auge Gottes hat das Wort die Kraft des Schwurs. Von den Christen wird eine höhere Verlässlichkeit gefordert. Decock verfolgt, wie das kanonische Recht ins Zivilrecht eindringt und schließlich über das Naturrecht eine Säkularisierung erfährt. In diesem Übergang nimmt Lessius eine eigene, genau die Stufen differenzierende Stellung ein.

Im vierten Kapitel geht es um Markt und Wucher. Der Autor zeigt sich hier wenig geneigt, die Geschichte der Wucherverbote *ab ovo* zu entwickeln und muss dann doch immer wieder auf die historische Logik zurückgreifen. Aus dem einfachen Appell, den Stammesgenossen oder christlichen Nächsten mit Darlehen zu unterstützen und dieses nicht dazu zu benutzen, ihm das Fell über die Ohren zu ziehen, wurde eine Zinslehre, in der man zunehmend genötigt war, den Realitäten nachzugeben und Zinsentschuldigungsgründe zuzulassen, woraus dann schließlich die Anfänge ökonomischer Theorie im Sinne einer Kausalerklärung wurden. Man kann dies im Kulturvergleich belegen. Der Islam wollte die Gefahr des Wuchers bannen, indem schon früh bestimmte institutionelle Formen einer Zinsnahme legalisiert wurden, die das islamischen Bankwesen heute ausbaut. Die chinesische Oberschicht sah auf die Kaufleute herab, hatte aber gegen Zinsnahme nichts einzuwenden, sodass sich dort vom Altertum bis ins 19. Jahrhundert ein vormodernes Kreditsystem entwickelte, das man als solches nicht in Frage stellte und dessen innere Logik man auch

4 Lessius, De iustitia et iure (wie Anm. 1), II, i, 1 (4).

nicht theoretisch zu erfassen suchte. Decock unternimmt keinen derartigen Vergleich. Er stellt vor allem fest, dass Lessius Wucher kaum mehr kennt, außer dem kleinen Dorfwucher, der durch Pfandleihhäuser bekämpft werden soll. All die vielfältigen Kreditbeziehungen, die sich im Handel, der Seefahrt, in der Industrie und an der Börse ergeben, werden auf die Wuchergefahr hin untersucht, aber schließlich doch exkulpiert, wobei für Lessius die rechtliche Form des Kreditvertrags eine zuweilen entscheidende Rolle spielt. Dabei wird teilweise modernen Begriffen vorgearbeitet. Beispielsweise wird der Kauf einer Schuldverschreibung zu einem Diskont nicht als Kreditgewährung interpretiert, sondern als Tausch eines weniger liquiden Titels gegen Geld, was universal eintauschbar ist, sodass ein Diskont sich von daher rechtfertigt. Das weist auf Liquiditätspräferenz voraus. Indessen spielt der Zeitverlauf doch eine Rolle. Die Antwort lautet: Nicht die Zeit schaffe den Gewinn, sondern die *industria*. Also ist *lucrum cessans* ein zulässiges Argument, und hinzu tritt das Risiko, *periculum sortis*. Schließlich gibt es noch die *carentia pecuniae*, die Bedürfnisse der Kassenhaltung; wer sich bei dieser einschränkt, um ein Darlehen zu geben, hat ein Recht auf Kompensation.

In weiteren Kapiteln werden Informationen und Spekulationen, Risiken, Versicherungen, aber auch der Verkauf fauler Kredite behandelt. Hier erfolgt eine Legitimation über den gerechten Preis, welcher allgemeiner Wertschätzung entspricht. Da sind die Grenzziehungen schwierig und bedürfen einer detaillierten Erörterung. Ist der gerechte Preis an den modernen Begriff einer an den Kosten orientierten Preistheorie für die lange Periode anzubinden oder an die Wertschätzung? Wie sind die ethischen Grenzen im Umgang mit privater Information zu ziehen? Müssen Mängel des Objekts beim Verkauf offenbart werden oder besondere Kenntnisse über die künftige Entwicklung der Lage im Handel?

Nach der Diskussion der Konkurrenzbeziehungen, auf die wir schon hingewiesen haben, kehrt Decock zum weiteren Rahmen zurück und zeigt nochmals, wie sich das Lessius'sche Wirtschaftsverständnis in seine Theologie einfügt. Hier werden insbesondere späte Schriften des Lessius einbezogen, die, soweit ich sehe, von der modernen ökonomischen Dogmengeschichte nicht beachtet worden sind. Suárez hatte getadelt, dass die enge Analogie von wirtschaftlicher Tätigkeit und Erkaufen des Seelenheils durch gute Werke an ein Wettrennen um den Preis des Heils erinnere. Da betonte Lessius, dass die Gnade doch immer notwendig bleibe und dass sie vom Menschen angenommen werden müsse. Lessius wendet sich aber auch in diesen Schriften immer wieder der Lebenspraxis zu. Er entwarf eine Diätetik, die ein asketisches Leben empfiehlt und sich an der Tugend der Mäßigung orientiert.

Das Buch ist gut geschrieben und wirkt trotz der oft abstrakten Gegenstände mit seinen vielen historischen Bezügen lebendig und charaktervoll. Im Einzelnen bleibt viel zu entdecken, natürlich auch manches hinzuzufügen.

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Karl Härter

Oberste Richter im Spannungsfeld von Reichskammergericht, Kaiser und Reichsadel*

Forschungen zum Justizpersonal und zu Richtern sind in der frühneuzeitlichen Rechtsgeschichte eher rar. Zwar liegen einzelne Studien zu höchsten Gerichten wie dem Reichskammergericht vor, dessen Oberhaupt und höchster Richter – der kaiserliche Kammerrichter – war bislang allerdings noch nicht monographisch erforscht. Insofern schließt Maria von Loewenichs in Münster entstandene Dissertation eine Forschungslücke und entwickelt interessante Analyseperspektiven: Einerseits vertrat und repräsentierte der Kammerrichter den Kaiser als obersten Gerichtsherrn in einem der beiden Höchstgerichte des Reiches, das andererseits als reichsständisches Gericht konstruiert war und zunehmend an justizieller Autonomie gewann. Letztere war in der Reichskammergerichtsordnung reichsrechtlich verankert, stand aber im Spannungsfeld zur normativen Ordnung der traditionalen Adelsgesellschaft des Alten Reiches. In dieser bildete das Amt des Kammerrichters eine Ressource, um symbolisches Kapital für die Inhaber und ihre adligen Familien zu akkumulieren, reichspolitische Klientelnetzwerke zu stärken und den Einfluss des Kaisers auf die Reichsjustiz zu sichern. Mit dem Kammerrichter als Kristallisationspunkt im »Prozess der Ausdifferenzierung und des Gewinns an Autonomie« (15) der Reichsjustiz untersucht die Fallstudie eine Thematik, die auch für eine global orientierte Rechtsgeschichte interessante Fragestellungen aufweist, wie die nach dem Funktionswandel des Richteramtes, der Autonomie imperialer Justizsysteme, der Einflussnahme von Herrschaftseliten auf höchste Gerichtsbarkeit und dem historischen Spannungsverhältnis zwischen Amt und Prestige bzw. Recht und sozialen Normen.

Wie in der Einleitung (Kap. I) knapp dargelegt, nutzt die Autorin verfassungs-, sozial- und kulturhistorische Ansätze, darunter auch die neueren Forschungen zu symbolischem und zeremoniellem Handeln sowie Versatzstücke der Systemtheorie (»Legitimation durch Verfahren«). Letzteres bleibt allerdings eher allgemeine Absichtserklärung: Systemtheorie wird kaum stringent als theoretisches Deutungsmuster eingesetzt und lässt sich bestenfalls bedingt auf das vormoderne Reichssystem und die traditionale Ständegesellschaft anwenden. Die theoretisch-konzeptionelle Fundierung und Diskussion von »justizieller Autonomie«, »Ausdifferenzierung« und »Ökonomie der Ständegesellschaft« hätte folglich fokussierter auf den zeitgenössischen Kontext von Reichsjustiz, Reichsadel und Reichsverfassung erfolgen können: Die »ständische Gesellschaft«, zu der die Kammerrichter als Mitglieder der Funktionselite »Reichspersonal« in Bezug gesetzt werden, meint letztlich den Reichsadel. Empirisch ist die Fallstudie dann auch auf die neun zwischen 1711 und 1806 am Reichskammergericht amtierenden Kammerrichter und ihr gesellschaftliches bzw. reichspolitisches Umfeld begrenzt. Diesen Zuschnitt begründet von Loewenich überzeugend mit der Quellenlage und der Wetzlarer Zeit des Gerichts (ab 1697): Im 18. Jahrhundert traten Ausdifferenzierung, Autonomiegewinne, Klientelwesen, kaiserliche Besetzungspraxis und damit einhergehende Konflikte am Reichskammergericht deutlicher zutage. Die hierfür relevanten, in unterschiedlichen Archiven überlieferten Quellen – darunter Gerichtsprotokolle, Urteilsbücher, Akten der Reichskanzlei, des Mainzer Erzkanzlers und der Visitationen des Reichskammergerichts sowie Nachlässe der Kammerrichter – hat von Loewenich umfassend herangezogen, gekonnt systematisch ausgewertet und daraus exemplarische Fallbeispiele und Konflikte behandelt.

* Maria von Loewenich, Amt und Prestige. Die Kammerrichter in der ständischen Gesellschaft (1711–1806) (Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 72), Köln: Böhlau 2019, 276 S., ISBN 978-3-412-22121-8

Die im Hinblick auf Ansatz und Fragestellungen stringente empirische Untersuchung erfolgt in zwei Teilen: Der erste verfassungsgeschichtliche rekonstruiert das Amt des Kammerrichters im Kontext von Reichsrecht, Justizverfassung und der reichspolitischen »Akteure« Kaiser und Reichsstände (Kapitel II); der zweite (Kapitel III) analysiert den sozialen-familiären Kontext der Kammerrichter, Einsatz und Gewinn von ökonomischem, sozialem und symbolischem Kapital und die Nutzung der Ressourcen des Richteramtes. Anhand von Auswahl und Amtseinsetzung des Kammerrichters, Vakanz des Richteramtes und Amtskontinuität während eines Interregnums sowie der Amtsausübung in der reichsgerichtlichen Praxis von Audienz, Plenum und Senat und den damit verbundenen prozessbezogenen Aufgaben und Kompetenzen des Kammerrichters erhellt der erste Teil das Spannungsfeld zwischen eigenständiger Rechtsprechungsinstanz des Reiches und kaiserlicher höchstrichterlicher Gewalt. Letztere repräsentierte der Kammerrichter in vielfältigen zeremonialen Praktiken, einhergehend mit zahlreichen Konflikten, die von Loewenich detailliert herausarbeitet. Im Ergebnis nutzte der Kaiser das Richteramt, um Einfluss der Reichsstände und Autonomiebestrebungen des Reichskammergerichts – politisch und symbolisch – zurückzudrängen. Im Kernbereich reichskammergerichtlicher Verfahren und Rechtsprechung blieb der kaiserliche Einfluss auf die Kammerrichter z. B. im Hinblick auf dessen umstrittenes *votum decisivum* bei Stimmengleichheit allerdings eng begrenzt. Autonomiestreben und Ausdifferenzierung des Höchstgerichts ließen sich bestenfalls bremsen.

Der zweite Teil richtet die Perspektive auf die aus dem mindermächtigen Reichsadel stammenden Amtsinhaber, beleuchtet im Rahmen von detaillierten Familienbiographien deren Karrieren und die Strategien der betreffenden Adelsfamilien und arbeitet den Einsatz von materiellen und sozialen Ressourcen, aber auch die mit dem Gewinn des Richteramtes verbundenen Zugewinne an symbolischem Kapital, sozialem Prestige und Aufstiegsmöglichkeiten im Reichssystem heraus. Über das Amt des Kammerrichters konnten sich die betreffenden Adelsfamilien in das kaiserliche Klientelsystem einbringen, und der Kaiser konnte dies wiederum nutzen, um Autorität und Einfluss zu stärken. Anhand gut gewählter Fallbeispiele zeigt die Autorin auch die damit verbundenen Zeremonial- und Rangkonflikte auf und verweist auf das Problem der juristischen Qualifikation der Kandidaten bzw. Amtsinhaber. Obwohl alle Jura studiert hatten, erkennt die Autorin Professionalisierungstendenzen erst bei dem 1797 ernannten (vorletzten) Amtsinhaber und misst juridischen Karrierefaktoren im Vergleich zu politisch-familiären eine bestenfalls sekundäre Bedeutung zu. Freilich übersieht sie, dass beispielsweise der 1763 ernannte Kammerrichter von Spaur mit einer juristischen Dissertation promoviert worden war.

Rechtliche Kontexte arbeitet von Loewenich dagegen prägnanter für die Nutzung der Ressourcen des Kammerrichteramtes heraus. Konkrete Amtsausübung und damit einhergehende Konflikte werden anhand klug gewählter Fallbeispiele ausgeleuchtet. Sie betreffen Verfahrensfragen wie die Ausschließung des Kammerrichters von Prozessen, das Problem der Befangenheit, die Einflussnahme zugunsten der eigenen Klientel durch die Einsetzung »gewogener« Senate, Assessoren und Referenten, die Beschleunigung von Verfahren sowie »Beziehungskorruption« und »Richterbestechung«. Zwar existierte eine rechtliche Grauzone, in der sich den Kammerrichtern Handlungsspielräume zugunsten ihrer Klientel eröffneten, die Autorin zeigt aber auch Normenkonkurrenz, Rollenkonflikte und Verrechtlichungstendenzen auf. Das Reichskammergericht versuchte, Assessoren zu suspendieren, die Kammerrichter mussten eine direkte Konfrontation mit dem Kaiser vermeiden, die ebenfalls zu einer Suspendierung führen konnte; offene Korruption und Bestechung wurden im Rahmen der Visitation des Reichskammergerichts verfolgt, und der Korruptionsvorwurf fand Eingang in den öffentlichen Diskurs. In der zweiten Hälfte des 18. Jahrhunderts entwickelten auch die Kammerrichter eine stärkere Sensibilität gegenüber Korruption und Bestechung, und die Besetzung von Senaten und Beauftragung von Referenten mit bestimmten Fällen wurden dem Kammerrichter entzogen und neuen Regeln unterworfen. Insofern kann die Autorin zumindest Tendenzen der Professionalisierung und der Autonomisierung des Verfahrens konstatieren, zumal auch das Reichskammergericht als Institution versuchte, Einflussnahmen durch Kaiser und Klientele abzuwehren und Autonomie zu behaupten.

Ihre überzeugenden empirischen Ergebnisse hält die Autorin in zwei kurzen Zwischenresümees und einer abschließenden zweieinhalbseitigen Zusammenfassung fest, wobei sie im Deutungshorizont von Reichskammergericht, Kaiser und

Reichsadel verbleibt. Betont wird die Bedeutung des Richteramtes für das symbolische, soziale und politische Kapital mindermächtiger Adelsfamilien und die Nutzung als Ressource, um im Kontext von adligen und kaiserlichen Klientelnetzwerken Einfluss auf die Reichsjustiz zu nehmen. Die für die reichskammergerichtliche Praxis untersuchten Bereiche und Konflikte belegen das Spannungsverhältnis von justizieller Autonomie und Ausdifferenzierung des Rechts zu den Normen der vormodernen Adelsgesellschaft und einem traditionalen Verständnis des Richteramtes als (symbolisch-zeremonielle) Repräsentanz des Kaisers als dem höchsten Gerichtsherren. Zwischen kaiserlichen Interessen, Klientelnetzwerken und Ausübung des höchsten richterlichen Amtes blieb die Rolle des Kammerrichters im Reichskammergericht prekär und bedurfte beständiger Absicherung durch Zeremoniell und symbolisches Kapital.

Eine tiefergehende Analyse, inwiefern sich diese für das Reichskammergericht und das Amt des Kammerrichters treffend beobachteten Konstellationen wandelten, gibt von Loewenich allerdings nicht. Weder erfolgt eine Diskussion und Einordnung der Ergebnisse in die Forschung noch nutzt die Autorin das vorhandene Potential eines Vergleichs mit Reichshofrat und Reichstag oder der allgemeinen Entwicklung von Richteramt und Justiz in der Frühen Neuzeit. Insofern beschränkt sich der Erkenntnisfortschritt der Arbeit auf valide und auch rechtshistorisch interessante empirische Beobachtungen für Reichskammergericht und Kammerrichter, weitergehende und insbesondere rechtshistorische Deutungs- und Vergleichsperspektiven bleiben freilich den Leserinnen und Lesern überlassen.

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Alexander Kästner

Urteilen über Suizid als soziale Praxis*

Das vorliegende Buch ist die stark gekürzte Version einer Dissertation, die 2015 an der Universität Tampere eingereicht wurde. Der ursprüngliche Titel lautet »Suicide in Seventeenth-Century Sweden. The Crime and Legal Praxis in the Lower Courts«. Er verweist präziser auf den zeitlichen Zuschnitt der Studie und auf den maßgeblich zugrundeliegenden Quellenbestand an Gerichtsakten schwedischer Stadt- und Landgerichte. Für die Überarbeitung wurden wesentliche Teile der ursprünglichen Darstellung gestrafft, was insbesondere den Details und der Tiefe einzelner Forschungsdiskussionen zum Nachteil gereicht, soweit ich das überblicke – die ursprüngliche Dissertation wurde mir von der Verfasserin freundlicherweise zur Verfügung gestellt. »Suicide, Law, and Community in Early Modern Sweden« ist ein Buch, das sich an ein breiteres akademisches Publikum auch jenseits der Historischen Suizidforschung richtet und vor allem übergreifende Befunde und ausgewählte Fälle präsentiert. Dies sollte vor der Lektüre klar sein, um zu verstehen, weshalb insbesondere die Einleitung und das Fazit eher allgemein gehalten sind und das Fazit auch keine weiterführenden Forschungsperspektiven aufzeigt. Als eher unglücklich muss die verlegerische Entscheidung bezeichnet werden, jedem Kapitel ein gesondertes Quellen- und Literaturverzeichnis folgen zu lassen. Das geht zu Lasten des Umfangs und erweckt auch den falschen Eindruck, es würde sich bei den Kapiteln um jeweils eigenständige Aufsätze handeln.

* Riikka Miettinen, Suicide, Law, and Community in Early Modern Sweden (World Histories of Crime, Culture and Violence), Basingstoke: Palgrave Macmillan 2019, XII + 346 S., ISBN 978-3-030-11844-0

Die Studie ist empirisch stark aus dem historischen Quellenmaterial heraus entwickelt und betrachtet ca. 200 Fälle – die angegebene Anzahl variiert zwischen den Kapiteln aufgrund der Überlieferung und Informationsdichte zu einzelnen Fällen auf den unterschiedlichen Gerichtsebenen. Eine Karte (14) verdeutlicht die beeindruckende räumliche Dimension der Studie, die neben den Territorien des heutigen Zentral- und Nordschwedens auch die finnischen Gebiete Schwedens während der Großmachtzeit einschließt sowie die mit Russland umkämpften karelischen Territorien um Wyborg und Kexholm (Priosersk). Dieser Umstand ist strafrechtshistorisch spannend, da in den angrenzenden Gebieten der Nowgoroder Rus bzw. im Großfürstentum Moskau Selbsttötungen bis ins 18. Jahrhundert nicht als Kriminaldelikt galten, während in Zentralschweden bzw. in den Territorien der Kalmarer Union vorsätzliche Selbsttötungen wie in Europa sonst üblich als *peccatum vel crimen atrocissimum* postmortal bestraft wurden. Die regionalen Besonderheiten und die geringe administrative Durchdringung der Peripherie wirkten sich u. a. auf die vorgerichtliche Praxis des Umgangs mit Suizidenten aus.

Der große Vorzug von Miettinnens Studie gegenüber anderen Untersuchungen zu Selbsttötungen in Schweden besteht darin, konsequent die Bestandteile der Verfahren im Umgang mit (mutmaßlichen) Selbsttötungen zum Gegenstand einer mikrohistorischen Analyse zu machen und zugleich eine Ebene des interterritorialen Vergleichs unterschiedlicher Rechtsräume einzuziehen (die 2016 abgeschlossene Wiener Dissertation von Evelyne Luef fügt dem einen Vergleich zwischen Schweden und den Habsburger Territorien hinzu und ist online verfügbar). In der Konsequenz hangelt sich die Kapitelgliederung zunächst entlang eines Überblicks über Einstellungen gegenüber Selbsttötungen und den unmittelbaren Reaktionen auf konkrete Suizidfälle nach dem Fund einer verdächtigen Leiche (Kap. 2). Ein Ausgangspunkt sind die über Jahrhunderte hinweg diskutierten schematischen Bestimmungen für Selbsttötungen (Verbrennung der Leiche im Wald oder Schandbegräbnis an abgelegenen Orten) in *Kristofers Landslag* von 1442. Dessen Geltung blieb umstritten, bis es Karl IX. im Jahr 1608 mit Änderungen nachdrucken ließ. Faktisch markiert damit das Jahr 1608 den Beginn des engeren Untersuchungszeitraums, die Einführung des *års lag* im Jahr 1734 dessen Ende. Die Konsequenzen der Einführung von Appellationsgerichten (*hovrätter*) für die großen Gerichtsbezirke Schwedens im Jahr 1614 (Stichworte: Zentralisierung, Verrechtlichung, Professionalisierung) bilden den roten Faden für die weitere Erzählung, die sich auch als ein Beitrag zur Rechtskultur Schwedens im 17. Jahrhundert versteht. Ausgangspunkt ist hier die Beobachtung, dass die örtlichen Gerichte in ihren Entscheidungen eng an den Wortlaut der mittelalterlichen Bestimmungen gebunden waren, die entsprechenden Urteile aber zunehmend einer ausdifferenzierten Urteilspraxis der *hovrätter* unterworfen und revidiert wurden. Entscheidend für erste Reaktionen auf Selbsttötungen waren mitunter die erheblichen Distanzen für die Gerichte (auf dem Land tagten diese dreimal jährlich) und die geringe Siedlungsdichte – wichtig, wenn man bedenkt, dass eine Laienjury bestehend aus zwölf ortsansässigen Landbesitzern gemeinsam mit einem Richter und im Zusammenspiel mit einer Vielzahl weiterer örtlicher Gerichte zu urteilen hatte. Nicht selten blieben Leichen wochen- oder monatelang am Fundort liegen oder hängen, bevor sich ein Gericht mit dem Fall beschäftigte. Für die östlichen Territorien sind auffällig häufig Berührungen der Leiche oder das Abschneiden von Erhängten nach dem Auffinden überliefert, was auf die erwähnten unterschiedlichen Traditionen verweist. Systematisch unterbelichtet bleibt in der gesamten Studie die Beobachtung, dass die lutherischen Kirchengerichte entgegen der Bestimmungen des *Kristofers Landslag* seit dem letzten Drittel des 16. Jahrhunderts stille Beisetzungen auf dem Friedhof anordnen konnten; entscheidend wird diese Differenz für Miettinen erst, nachdem die Kirchengerichte 1686 dazu verpflichtet wurden, bei der Behandlung mutmaßlich vorsätzlicher Suizidenten die weltlichen Gerichte einzubeziehen – ab diesem Zeitpunkt wird auch die Überlieferung spürbar dichter, was vermuten lässt, dass viele Fälle zuvor durch kirchliche Instanzen geregelt wurden. Die Tatsache, dass es sich bei Suiziden um *delicta mixta* handelte, wird in der Studie nicht gleichgewichtig behandelt. Der Fokus liegt einseitig auf der Überlieferung der weltlichen Gerichte.

Kapitel 3 nimmt die vorgerichtlichen Untersuchungen und die Kommunikation vor Ort in den Blick, die den weiteren Umgang mit den Leichen von Suizidenten und die späteren Verhandlungen von Suizidfällen vor lokalen Gerichten bestimmten. Erhebliche Herausforderungen waren etwa die gerichtliche Bewertung der Aus-

sagen von Verwandten der Suizidopfer sowie das Rekrutieren einer hinreichenden Anzahl positiv beleumundeter Zeugen. Da es für Gerichte und Amtsträger ebenfalls bis 1686 keinerlei finanzielle Anreize gab, in Suizidfällen zu ermitteln, kam so manche Untersuchung auch nur widerwillig und schleppend in Gang. Zudem spielte die Güterkonfiskation nach Suiziden in Schweden keine Rolle.

Kapitel 4 bildet sodann das Herzstück der Studie. Hier untersucht Miettinnen die konkreten Verhandlungen während der öffentlichen Gerichtstage vor Ort, das Anhören von Zeugen, die Rolle der Schreiber für das Verfassen von Protokollen und den wachsenden Einfluss der Rechtsprechung der *hovrätter*. Ergänzend werden daher die Bestände des *Svea hovrätt* in Stockholm herangezogen, während die Überlieferung des ebenfalls wichtigen *Turku hovrätt* von erheblichen Verlusten geprägt ist. Die lokalen Gerichte werden als soziale Arenen und Schnittstellen staatlicher und lokaler Akteure konzipiert, in denen verschiedene Wahrheitsansprüche verhandelt wurden. Unter den Sachverständigen spielten nur Pfarrer bzw. Ortsvikare als Experten für ein gutes Leben eine signifikante Rolle, sie waren in 40% der Fälle involviert. Medizinische Expertise war mangels Personal faktisch abwesend. Für die Appellationsgerichte wurden zunehmend Wille und Intention (hier der Rechtsentwicklung im Alten Reich hinterherhinkend) wichtig, die in den mittelalterlichen Bestimmungen gar nicht vorkamen. Dies trug maßgeblich zu einer vielgestaltigen Urteilspraxis bei.

Kapitel 5 fokussiert sodann die Analyse zielgerichtet auf diese Urteilspraxis, auf die Kategorienbildungen in den Endurteilen sowie auf deren Einbettung in soziale Kontexte. Die Reputation und Integration eines Suizidenten waren ebenso entscheidend für das Urteil wie die Einschätzung von Frömmigkeit, Lebenswandel und persönlichem Charakter. Die Strafe des Verbrennens kam langsam außer Gebrauch; und man könnte über die Studie hinausgehend die These formulieren, dass sich die schwedische Praxis zunehmend der ambivalenten Normalität und ausdifferenzierten Praxis im Umgang mit Selbsttötungen annäherte, wie sie bspw. für die Territorien des Alten Reichs belegt sind. Das mag auch damit zusammenhängen, dass die Richter vor Ort vor ihrer Berufung schrittweise in ein System der praktischen Ausbildung an den Appellationsgerichten eingebunden wurden, deren Urteilspraxis kannten und daher in eigenen Urteilen antizipierten.

Die Leistung der Studie besteht darin, eine detaillierte und innerhalb der schwedischen Rechtsräume vergleichende Analyse zu allen relevanten Akteuren, Institutionen und Verfahrensweisen von der Ebene der Gemeinden bis hin zu den Hochgerichten für den Umgang mit Selbsttötungen vorgelegt zu haben. Eine solche Studie fehlte bislang für den skandinavischen Raum, und sie ist eine mehr als willkommene Ergänzung für die historische Suizidforschung. Mit dem vorliegenden Buch hat Riikka Miettinen den Grundstein für die künftige Einordnung und Perspektivierung weiterer Lokal- und Einzelfallstudien gelegt, wenngleich für manche Details die Dissertationsschrift unverzichtbar bleibt.

■

Heinz Mohnhaupt

Peregrinatio Academica und Rechtskulturvergleich*

Seit dem Mittelalter ziehen ganze Schwärme von Studenten – Studentinnen gab es noch nicht – durch ganz Europa zu den führenden Universitäten, um dort eine wissenschaftliche Ausbildung zu erlangen und um anschließend in ihren Heimatländern eine berufliche Existenzbasis zu finden. Die Studenten bilden Reisegruppen und Netzwerke, schließen sich an den »ausländischen« Universitäten zu eigenen »nationes« zusammen, erlangen unabhängig von ihrer Herkunft mit der Immatrikulation gemeinrechtliche Privilegien, die sie zu einem eigenen Stand erheben. Für die Studenten aus Schweden und Finnland untersucht Vasara-Aaltonen (A.) in ihrer von Heikki Pihlajamäki betreuten Dissertation die Reiseströme der Studenten von der schwedischen Peripherie an die mitteleuropäischen juristischen Fakultäten. Das Verhältnis von Studienreisen, Universitätswahl und Entwicklung einer juristischen Profession in Schweden ist das Kernthema, das A. mit großer Umsicht behandelt und deutlich von den adeligen Kavalierstouren unterscheidet.

Der gewählte Zeitraum von 1630 bis 1800 umfasst Früh- und Spätaufklärung, die zunehmend Beobachtung und Erfahrung zu Grundlagen der Wissenschaften erklärten und Bücherwissen oft nachrangig einstuften. Erfahrungen und Beobachtungen »by travelling« sowie der ausländische Universitätsbesuch werden zum Fundament für juristische Bildung auch unter einem vergleichenden und wissenssoziologischen Aspekt. Im 17./18. Jahrhundert werden »peregrinatio studiosorum«, »prudentia peregrinandi« und »utilitas peregrinationis« in Dissertationen sowie Enzyklopädien behandelt und damit gleichsam zu einer generellen aufklärerischen wissenschaftlichen Forderung und Fragestellung erhoben (so z. B. bei Conring, Bernegger, Pütter).[1] A. hat die schwedische studentische Reisepraxis in die europäische Dimension dieser wahrlich internationalen »Peregrinatio Academica« gestellt.

Schwedische / finnische Studenten waren an 27 europäischen Universitäten eingeschrieben – die meisten an der holländischen Universität Leiden und an den deutschen Universitäten Jena, Greifswald, Rostock und Halle. Dagegen fallen die Zahlen der Studenten an den anderen deutschen und ausländischen Universitäten London, Oxford, Rom, Paris, Angers und Amsterdam stark ab. Von schwedischen Universitäten – auch Dorpat gehört als schwedische Gründung dazu – werden Uppsala und Lund nur wenig besucht. Protestantische Universitäten bestimmen das Bild. Einen zeitlichen Schwerpunkt der Universitätsreisen besonders hinsichtlich der Studenten aus Turku bilden die Jahre 1630–1640 und 1660–1670, während zwischen 1790–1800 nur eine geringe Wanderbewegung besteht (73 f.). A. hat ihre Untersuchungen auf die Studenten der Universität von Turku als ein besonders signifikantes Beispiel für schwedische Universitätsreisen konzentriert, weil das geschlossene Quellen-Corpus der vorhandenen »online database« besonders aussagekräftige biographische Daten bietet, die exemplarisch auch für das europäische Phänomen der »Peregrinatio Academica« stehen. Die 1640 gegründete Akademie von Turku war die erste Universität in Finnland, das bis 1809 Teil des schwedischen Königreichs und insoweit mit der schwedischen Rechtsentwicklung eng verbunden war, so dass sich die Reisen der finnischen und speziell der schwedischen Studenten in der Analyse nicht immer klar unterscheiden lassen.

A. hat in zahlreichen Universitätsarchiven die Spuren der schwedischen Studenten genau verfolgt und somit gleichsam deren Reisewege aus der Zeit von vor 400 bis vor 200 Jahren noch einmal abgeschritten. Ausgewertet werden Universitätsstatuten, Matrikulationslisten, Vorlesungs-

* Marianne Vasara-Aaltonen, Learning Law and Travelling Europe. Study Journeys and the Developing Swedish Legal Profession, c. 1630–1800 (The Northern World, Vol. 87), Leiden / Boston: Brill 2020, 427 S., ISBN 978-90-04-43165-2

1 Vgl. Heinz Mohnhaupt, Reisen, vergleichen, erkennen. Zu Praktiken juristischer Erkenntnis durch Komparatistik, in: Gerald Kohl et al. (Hg.), Festschrift für Thomas Simon zum 65. Geburtstag. Land, Policey, Verfassung, Wien 2020, 194–198; ähnlich für Schweden Vasara-Aaltonen, Learning Law, 264.

verzeichnisse, »recensie lists«, »Catalugus candidatorum«, Fakultätsakten und die »Alba Scholasticorum, Professorum und Amicorum«.

Einen zeitlichen Ausgangspunkt bilden – nach einem Rückblick auf das späte 16. Jahrhundert – die seit 1630 eingeleiteten Verwaltungs- und Justizreformen in Schweden. A. untersucht die Reisen der finnischen / schwedischen Studenten an ausländische Universitäten nach gleichlautenden Fragestellungen in vier Schritten: 1. Die soziale Herkunft der Studenten, zumeist unterschieden nach Adeligen und Nichtadeligen; 2. Das wissenschaftliche Profil der besuchten Universität nach Professorenschaft und Lehrprogramm; 3. Studentenzahlen[2] nebst Studienfächern und Abschluss; 4. Karrieren der Studierten in ihrem Heimatland. Fragestellung und Untersuchung zielen somit auf Formen und Möglichkeiten des Wissenserwerbs, Zirkulation des Wissens, Ausbildungsstandard und die Professionalisierung des Juristenstandes insgesamt, der zur Trägerschicht für die Entwicklung von moderner Staatlichkeit in der schwedischen Monarchie des 17. und 18. Jahrhunderts wurde. Methodisch ermöglicht der gewählte Fragenkatalog diachronen und synchronen Vergleich, den A. unterschiedlich intensiv nutzt, aber immer erkennbar macht: Aufstieg des Adels in Kronämter, Apellationsgericht, Diplomatie und des Nichtadels in städtische Ämter, Pfarrstellen, Advokatur und Lehrberuf; Unterschiede und Gemeinsamkeiten unter den konfessionell gebundenen Universitäten; Verhältnis zwischen heimischem schwedischen und fremdem livländischen Recht sowie von Ius Commune und Ius Publicum, soweit es sich im Lehrprogramm verschiedener Universitäten niederschlägt.

Seit der Reformation in Schweden 1527 war die Wahl der Universitäten nicht nur von der Entfernung und vom wissenschaftlichen Rang bestimmt, sondern entscheidend von der konfessionellen Ausrichtung als lutherische, calvinistische oder katholische Universität. Die aufnehmenden Länder bzw. Universitäten konnten Beschränkungen erlassen und Erklärungen über die Religionszugehörigkeit verlangen (66 f.). Das erklärt, warum die von religiöser Toleranz geprägte Universität Leiden im 16. und 17. Jahrhundert eine besondere Anziehungskraft entfaltete. Diese bildet für A. das dominierende Beispiel für das Verhältnis zwischen dem Studentenzustrom aus Turku und dem in Leiden vermehrten Unterrichtsangebot von öffentlichem Recht zwischen 1625–1649. Die Dissertationen, die A. erwähnt, werden jedoch nicht auf die Aktualität ihrer wissenschaftlichen Fragestellung befragt.

Ein anderer Grund für die wachsende Attraktivität der norddeutschen Universitäten bestand darin, dass mit dem Westfälischen Friedensschluss 1648 auch Teile Pommerns mit den Universitäten Greifswald und Rostock unter schwedische Territorialhoheit gelangten. Schwedische Studenten studierten somit hier formal an schwedischen Universitäten, an denen sie jedoch von deutschen Professoren im Ius civile und deutschen Ius publicum ausgebildet wurden. Die Einseitigkeit deutschen Rechtsunterrichts kollidierte jedoch mit dem schwedischen Hoheitsanspruch, so dass das schwedische »kanslikollegiet« 1702 empfahl, auch Grundlagen des schwedischen Rechts zu unterrichten, was jedoch nicht verwirklicht wurde, wenngleich auch Nettelbladt Vorlesungen über schwedisches Recht hielt (178). Es lag im schwedischen Interesse, schwedisches Staatsrecht auch in Greifswald zu lehren, um schwedische Studenten so an das schwedische Mutterland zu binden. A. weist nach, dass auch an der Universität Jena in Dissertationen von schwedischen Studenten auf schwedisches Recht Bezug genommen wurde (147).

Die »Perigrinatio Academica« führt zu rechtlichen »entanglements« und gibt dem Begriff der Rechtskultur eine neue Dimension. Politische Einflüsse, schwedische Machtpolitik nach dem 30-jährigen Krieg und Reformbedarf im schwedischen Justiz- und Verwaltungssystem verlangten studierte Juristen mit »statsklokhet« (262), so dass zwischen 1640 bis 1680 der sogar von der Krone finanziell unterstützte Zustrom finnischer / schwedischer Studenten am größten war, um dann ca. 1750 als Antwort auf die innere schwedische

2 Für diese Daten stützt sich A. hauptsächlich auf die grundlegenden Forschungen von Hilde de Ridder-Symoens, Mobility, in: dies., A History of the University in Europe, vol. II, Cambridge 2003, 416–448; Margreet Ahsmann, Collegium und Kolleg, Der juristische Unterricht an der Universität Leiden 1575–1630 unter besonderer Berücksichtigung der Dissertationen, Frankfurt am Main 2000.

Staatskonsolidierung ganz auszulaufen. Die »Peregrinatio Academica« zeigt als frühe Europäisierung juristischen Wissenstransfers am Beispiel der schwedischen / finnischen Studenten ihre sowohl kulturelle als auch staatspolitische Bedeutung. ■

Miloš Vec

Fashion Victims Everywhere?*

Montaigne hatte Vorbehalte gegenüber der Luxusgesetzgebung. In seinen *Essais* kritisierte er nicht nur die unmoralischen Untertanen, sondern gleichermaßen die unvollkommenen Produkte des Gesetzgebers. Die einen übertrieben es mit ihrem Aufwand, die anderen bekämpften ihn, allerdings kontraproduktiv: »Die Art und Weise, wie unsere Gesetze die törichten und eitlen Ausgaben für Tafel und Kleidung zu begrenzen suchen, dürfte ihrem Ziel zuwiderlaufen«, heißt es bei Montaigne (deutsche Übersetzung von 1998 durch Hans Stilett). In diesem oft zitierten Essai I, 43 »Des lois somptuaires« kamen Moralkritik und Gesetzgebungskritik zusammen. Als Beispiel für Luxus führt Montaigne übrigens vor mehr als 400 Jahren »das Recht, Steinbutt zu essen sowie Samt und Goldtressen zu tragen« an. Damit ist man gleich beim Titel des Sammelbandes: »The Right to Dress«. Auf dem geschmackvollen Buchcover sieht man ein prachtvoll gewandetes Paar, das ca. 1640–50 auf Fliesen gemalt wurde. Beider Stoffe sind voller Ornament. Während sie ihm eine Teeschale (?) reicht, hält er ihr ein schönes Tuch im symbolischen Austausch entgegen. Der originelle, globale Anspruch des Bandes wird hier offensichtlich mit einer außereuropäischen Illustration kostbarer Gaben geschmackvoll in Szene gesetzt. Umso bedauerlicher, dass das Bild selbst keine Würdigung durch historische Interpretation erfährt und die Herkunft nicht offengelegt wird.

Luxusgesetzgebung ist längst ein Klassiker verschiedener historischer Disziplinen geworden, und Kleidung hat immer eine zentrale Rolle dabei gespielt (demgegenüber weiß man weniger über die Regelung von Speis und Trank). Kulturwissenschaften, Lokal- und Regionalgeschichte, Ethnologie, Religionsgeschichte, Geschlechtergeschichte, Sexualgeschichte, Textilgeschichte, Modegeschichte haben darüber geforscht, aber auch die Rechtsgeschichte. Denn die Verbote kleideten sich ihrerseits in aufwändige Gesetzesform mit überbordenden Präambeln. Die Rechtsvorschriften wurden erarbeitet, verhandelt, erlassen, bekannt gemacht – und gelegentlich sogar durchgesetzt. Für Italien lassen sich zwischen 1200 und 1500 mehr als 300 Aufwandsgesetze nachweisen, in den deutschen Territorien sollen es in der Frühen Neuzeit sogar 3.000–5.000 gewesen sein. Neu und verdienstvoll ist der Anspruch der beiden in Warwick bzw. Cambridge arbeitenden HerausgeberInnen Giorgio Riello und Ulinka Rublack, eine Übersicht über die Kleidungsgesetzgebung in globaler Perspektive zu bieten. Dass dabei das Potenzial wissenschaftlich nicht ausgeschöpft wird, liegt an der verpassten Chance, sich mit den intensiven rechtsgeschichtlichen Forschungen der vergangenen Jahre und Jahrzehnte auseinanderzusetzen.

Der Band eröffnet mit einer lesenswerten Einleitung worauf 18 Einzelstudien anschließen, die Kleidergesetzgebung in bestimmten politisch-geographischen Einheiten analysieren. Weil der Forschungsstand gerade in globaler Perspektive sehr ungleichmäßig ist, bleibt das Schwergewicht der Darstellung auf einigen europäischen Territorien. Italien nimmt mit drei Kapiteln besonders viel Platz ein und bekommt einen eigenen Abschnitt. Andere (west-)europäische Staaten werden jeweils in Einzelkapiteln behandelt; Ostmittel- und Ost-

* Giorgio Riello, Ulinka Rublack (eds.), The Right to Dress: Sumptuary Laws in a Global Perspective, c. 1200–1800, Cambridge: Cambridge University Press 2019, 505 p., ISBN 978-1-108-47591-4

europa fehlen gänzlich, Russland gehört ein Beitrag. Das ist so viel wie ganz Afrika, vertreten durch den Aufsatz von Toby Green über Benin und Dahomey. Japan, China und das Osmanische Reich erhalten auch jeweils einen Beitrag. Dazwischen liegen fünf interessante Aufsätze über das Wirken der europäischen Imperien in Übersee; denn auch dort gab es das Regelungsfeld der Kleidergesetzgebung.

Global ist die Perspektive des Sammelbandes insofern, als das Regelungsfeld und die Regelungsinstrumente innerhalb einzelner Staaten untersucht werden, aber Staaten weltweit einbezogen sind. Es bleibt unklar, inwieweit die Kategorien »medieval and early modern« (4) globalgeschichtlich taugen. Ob es ein gemeinsames, transnationales Muster des Aufstiegs, der Intensivierung und schließlich des Vergehens von Kleidergesetzgebung gab, wird nicht wirklich untersucht und nicht systematisch verfolgt. Vergleiche sind aber in den insgesamt gut gelungenen Einzelbeiträgen immer wieder eingeflochten und wurden von den Herausgebern auf vorbereitenden Workshops systematisch gefördert. In der Gesamtschau zeigen sich immer wieder neue Konstellationen zwischen sozialen, politischen, ökonomischen, fiskalischen, rechtlichen, religiösen, konfessionellen und kulturellen Faktoren (2). Die Funktionszuschreibungen sind daher ähnlich, aber nicht identisch. In der Einleitung heißt es: »In Europe and elsewhere sumptuary laws could become a tool used by states to regulate manufacturing systems and moral economies via the medium of expenditure and consumption of not only clothing but also banquettes, festivities and funerals« (4). Die allgegenwärtige Prämisse könnte demnach soziale Ungleichheit lauten. Die Zügelung innovativer oder hoffärtig imitierender Modelust belegt den Wunsch nach visueller Codierung und stabiler Differenzierung der Gesellschaft in ihren Kleidern. Universell scheint die Sehnsucht nach einer Lesbarkeit der Welt: Die Menschen sollen äußerlich scheinen, was sie auch in Wahrheit sind. Rang, Status, Geschlecht sollen an ihrer Kleidung ablesbar sein. Jedenfalls sollen sie nicht mehr darstellen, und sie sollen Kleiderpracht nicht übertreiben; denn es geht immer um das erlaubte Maximum. Nach Beispielen für einen vorgeschriebenen Mindestaufwand sucht man vergebens.

Die Verbote trafen in manchen Fällen die städtischen Eliten, wie man bei den Gerichtsverfahren in Padua (210–239) sehen kann. In anderen Fällen wurden Indigene gemaßregelt, wie beispielsweise im kolonialen Lima des 17. Jahrhunderts mit seinem rassistischen, gegen indigene Männer gerichteten Verbot, Schwerter und andere Waffen zu tragen, während den indigenen Frauen Kleidung aus Wolle, Seide oder Spitze untersagt wurde (9, vgl. auch den Beitrag von Rebecca Earle, 325–345). Auch in Brasilien wurde Sklavinnen ab ca. 1700 untersagt, sich in Seide und Stickereien zu hüllen (30); ob es vorher wirklich erlaubt war? Frauen scheinen Kleidervorschriften überdurchschnittlich streng getroffen zu haben, siehe etwa die Klage des Antwerpener Jesuiten Adriaen Poirters, der sich über jene ereiferte, die ein kleines Kreuz zwischen ihren teilweise unbedeckten Brüsten trugen, denn »so hänge Christus zwischen zwei Mördern« (93). Fremden wurden manchmal Privilegien zuteil, die sie besserstellten als die eigenen Untertanen, wenn es um Fragen von zweifelhaften Accessoires (z. B. das Brusttuch), opulenten Textil-Materialien, ausländischer Warenherkunft, oder Verbote auffälliger Muster, Schnitte und Farben ging (32, 163). In anderen Fällen durfte man ihnen gerade nicht jene Kleidung verkaufen, die die Einheimischen tragen mussten (381). Schließlich gab es auch Fälle, in denen Kleidergesetzgebung auffälligerweise fehlte. So könnte es gewesen sein bei den indischen Moguln, im Iran der Safawiden, der niederländischen Republik und dem britischen, niederländischen und französischen kolonialen Amerika (19). Die Herausgeber vermuten, dass dort andere Formen von sozialer Kontrolle vorhanden und funktional äquivalent wirksam waren.

Bedauerlich ist, dass die jahrelangen rechtsgeschichtlichen Forschungen zur Policey- und Gesetzgebungsgeschichte praktisch unbeachtet bleiben (aber Fußnote 81 auf Seite 61). Denn hier hätte man Vergleichsmaßstäbe gewinnen können. Sie hätten die Normsetzung auf diesem besonderen Feld der Luxusverbote verständlicher gemacht, wenn man sie in allgemeine Regulierungstrends eingebettet hätte. Ganz zu schweigen davon, dass es auch vielfach spezielle, neuere Arbeiten zur Policeygesetzgebung auf genau diesem Feld gibt. Ferner haben die Studien zu Policey und Policeywissenschaft Phänomene sowohl der Normvermittlung als auch Normimplementation in einer Weise behandelt, die wichtige und hilfreiche Stichworte für die globale Erforschung der Kleidergesetzgebung hätten bieten können. So aber bleiben vereinzelte Beobachtungen zu einem lernenden Staat, der sich in Normsetzung autoritär engagiert,

Durchsetzung aber vielfach aushandeln muss oder gar auf Sanktionierung verzichtet, hinter dem dort erzielten Wissensstand zurück.[1]

Im 19. Jahrhundert verschwindet die Luxusgesetzgebung in Europa wieder (10, 18, 32, 271, 290, 297). Wie so oft, ist auch hier das Verdämmern und Außer-Kraft-Setzen von Recht weitaus weniger gut erforscht als der vorausgehende Prozess von Normproduktion, Inkraftsetzung und Verrechtlichung.[2] Zu Recht weisen Riello und Rublack darauf hin, dass es aber nach wie vor fiskalische Steuerung und andere Maßnahmen mehr gibt, die Luxus regulieren und Aufwand drosseln (18). Nur gestreift werden Vorschriften, die bis heute in bestimmten Institutionen, Situationen oder Milieus Kleidung im engeren Sinne vorschreiben (18). Die Herausgeber vermuten, dass die Abschaffung bzw. der Rückgang der Kleidungsvorschriften maßgeblich durch den Aufstieg ökonomischer Überlegungen in sozial zunehmend mobil gewordenen Gesellschaften motiviert war. Darüber würde man gerne bei anderer Gelegenheit Genaueres wissen.

Montaigne selbst war übrigens ganz Traditionalist, berief sich in seinem Essai »Des lois somptuaires« auf Plato und sprach sich gegen Wandel aus. Wie auch bei den Gesetzen, bei denen es um wahre, ewige Geltung gehe, müsse man in der Kleidung Veränderung fürchten. »Bald dieses, bald jenes Urteil zu übernehmen, der jeweils letzten Mode hinterher zu laufen und deren Erfinder zu verehren; das führe zu Sittenverderbnis, und alle althergebrachten Institutionen würden der Geringschätzung und Verachtung preisgegeben«, referiert er Plato zustimmend. Montaigne glaubte, wenn die Könige anfangen würden, dem Aufwand zu entsagen, wären alle Wünsche im Volk nach Pracht in einem Monat erlahmt, »ohne Verordnung und ohne Edikt. Wir alle würden ihnen auf dem Fuß folgen«. Das mag als Analyse von Mode wie auch von wirksamen Luxusverboten etwas einfältig klingen. Aber was Einzelne zu ihrem Stil neigen lässt und Gesellschaften in ihrem Wandel antreibt, wissen oft auch deren klügste Denker nicht. ■

Caspar Ehlers

Predigen weltweit*

Der von einem Forschungsverbund um das Flagler College in St. Augustine, Florida, herausgegebene Sammelband vereinigt unter drei Sektionen insgesamt 19 Beiträge sowie eine Einleitung von Beverly Mayne Kienzle (Harvard University, xxi–xix) und ein die Sektionen zusammenfassendes Vorwort des Leiters dieser Gruppe, Timothy J. Johnson (Flagler College, 1–12). Der Band steht im Zusammenhang mit anderen zuvor veröffentlichten Tagungsbänden, die sich dem Thema der christlichen Mission, nicht nur in Mittelamerika, widmeten.

Der erste Teil »New Worlds in this Life and the Next« geht das Thema der Predigt aus verschiedenen Perspektiven an: der anthropologischen (Laura Gaffuri, 15–27), der monastischen jüdisch-christlichen aus dem Kloster Admont (John D. Young, 28–42) und mehrfach der franziskanischen am Beispiel Bonaventuras (Benjamin P. Winter, 43–56), Bernardinos da Siena (Steven J. McMi-

1 Michael Stolleis, Was bedeutet Normdurchsetzung bei Policeyordnungen der Frühen Neuzeit?, in: FS Peter Landau, Paderborn 2000, 739–757.

2 Michael Stolleis, Vom Verschwinden verbrauchten Rechts, in: Summa. FS Dieter Simon, Frankfurt am Main 2005, 539–558.

* Timothy J. Johnson, Katherine Wrisley Shelby, John D. Young (eds.), Preaching and New Worlds. Sermons as Mirrors of Realms Near and Far (Routledge Studies in Medieval Religion and Culture 13), New York / London: Routledge 2019, 344 p., ISBN 978-0-367-66398-8

chael, 71–84) und italienischer Altäre der Renaissance in Franziskanerkirchen (Sama Mammadova, 85–97) sowie der Predigten des Dominikaners Vinzenz Ferrer über den Antichrist (Carolina M. Losada, 57–70). Der zweite, »New Identities in New Worlds«, wendet sich den Karmelitern (Ralf Lützelschwab, 101–119), den Dominikanerinnen (Carolyn Muessig am Beispiel der Predigten von Tommasina Fieschi, 120–134), der Leichenpredigt für den Bamberger Bischof Otto (Helmut Flachenecker, 135–150), den Übersetzungen der Predigten von Maurice de Sully in die Volkssprache (Beata Spieralska, 151–162), der Verwendung von Dantes Komödie in deutschen Predigten (Pietro Delcorno, 163–184) sowie der Imaginierung franziskanischer Missionare in italienischer Kunst und Predigt (Nirit Ben-Aryeh Bebby, 185–197) zu. Schließlich ist der dritte Teil »Sermons, Missions, and New Worlds« gewidmet. Er bietet Studien zur visuellen Predigt in Russland (Marie Anne Polo de Beaulieu und Victoria Smirnova, 201–226), zum Neuen Jerusalem als Bild für die Neue Welt im Kreuzzug Iwans IV. (Valeria Kosyakowa, 227–242), den Predigten Stefan Jaworskis und Theophan Prokopowitschs (Sergei O. Zotov, 243–255), den Verbindungen zwischen alter und neuer Welt an Beispielen aus Italien und Kalifornien (Filippo Sedda, 256–266) bzw. den spanischen Franziskanern in der Neuen Welt (Francisco Lavier Rojo-Alique, 267–279), den Timucua im heutigen Florida (George Aaron Broadwell, 280–294) sowie der Feier franziskanischer Märtyrer in Amerika (Timothy J. Johnson, 295–311). Ein Index (313–321) beschließt den Band.

Alle Beitragenden haben ihre Studien mit einem ausführlichen Anmerkungsapparat versehen, sodass man zu jedem Einzelaspekt auf den aktuellen Forschungsstand gebracht wird. Da aber eine Zusammenfassung fehlt, bleibt es bei einem Kaleidoskop vertiefender Einzelstudien.

Timothy J. Johnson beschreibt jedoch in seinem Vorwort, bevor er die einzelnen Teile und die darin enthaltenen Beiträge zusammenfasst, die Intention des Bandes, nämlich zu erforschen, wie verschiedene Predigten die weitreichenden Anstrengungen offenlegen, die Neue Welt zu adaptieren, zu konfrontieren oder vorauszusehen. Die »Neue Welt« sei dabei nicht auf die *Americas* bezogen, sondern schließe Europa bewusst mit ein.

Von besonderer Bedeutung für die rechtshistorische Forschung im weitesten Sinne sind die Transferprozesse und ihre Träger. Die Fragestellungen des Bandes waren nicht auf das Recht bezogen, da aber Predigen zugleich die Übertragung von Normvorstellungen bedeutet, ist beispielsweise die Rolle der Orden der Dominikaner und Franziskaner in der Neuen Welt gut zu erkennen. Der Vergleich zwischen den Welten Amerikas und Osteuropas erweitert diese Sicht in fruchtbarer Weise. Laura Gaffuris Bemerkungen zu dem Themenfeld, wie in vormodernen Zeiten *the Other* wahrgenommen wurde und ob man etwa von einem »rassistischen Mittelalter« sprechen dürfe, sind deswegen für den Band relevant, weil sie anhand zahlreicher Forschungen zeigen kann, dass im Wesentlichen die Zugehörigkeit zum christlichen Glauben der Rahmen war – mit den bekannten sich verschärfenden Ausgrenzungen der jüdischen Gemeinden in Europa. Es sei eine Erscheinungsform der Frühneuzeit, dass weitere Ausgrenzungskriterien, wie etwa *blood-lines*, entstanden, was auch mit den sich erweiternden Horizonten der europäischen Gesellschaften verbunden gewesen sei, wie zuvor schon der Kontakt in die arabische Welt Einsicht, aber auch Abstoßung hervorgebracht hatte.

Der ›Kontakt‹ zu den *infideles* fand bekanntlich verschiedene Ebenen und Ausdrucksformen, zwischen Kreuzzug und Zwangsbekehrung einerseits und wechselseitigen Begegnungen und friedlicher Mission andererseits. Im Benediktinerkloster Admont entstand im 12. Jahrhundert ohne direkten Kontakt zu Juden ein Predigttraktat gegen sie (John D. Young); die etwa zeitgleich verfasste Leichenpredigt auf den Bischof und Missionar in Pommern, Otto von Bamberg, verglich dessen *vita activa* mit der *vita contemplativa* zugunsten der erstgenannten, die Mission einschließenden Lebensform (Helmut Flachenecker).

Die praktische Anwendung des aktiven Lebens demonstrieren die zumeist personenbezogenen zahlreichen Einzelstudien des Sammelbandes. Von der Verkündigung durch Visualisierung im Russland des 17. Jahrhunderts (Marie Anne Polo de Beaulieu und Victoria Smirnova) oder dem pro-katholischen versus pro-protestantischen Richtungsstreit in der russisch-orthodoxen Kirche in der Zeit Peters des Großen (Sergei O. Zotov) ist ebenso die Rede wie von der Übertragung christlicher Texte aus dem Lateinischen in die altfranzösische Volkssprache (Beata Spieralska) oder der Übertragung ehrender Anreden in die Timucua genannte Sprache der Indigenen in Nord-Florida und Süd-Georgia (George Aaron Broadwell).

Gerade diese weite Themenwahl ist ein hervorzuhebendes Verdienst des Sammelbandes. Wer spezielle zeit- und raumbezogene Interessen an der Missionsgeschichte hat oder etwas über die »Dritte Hand Jesu« erfahren will, ist hier bestens bedient und kann aus den individuellen Beiträgen und ihren Referenzen großen Gewinn ziehen. ■

Manuel Bastias Saavedra

Conocimiento indígena y derecho en el México colonial*

Dos libros hermosos, es quizá lo primero que se puede decir después de leer y estudiar las páginas de los textos reseñados aquí. Los libros *Trail of Footprints* de Alex Hidalgo y *Mapping Indigenous Land* de Ana Pulido Rull contienen tantas reproducciones y detalles (en blanco y negro y en color) de mapas creados por artistas indígenas en Nueva España entre los siglos XVI y XVIII que el lector puede dedicar una buena cantidad de tiempo simplemente a contemplar las diversas imágenes. Pero son los estudios detallados sobre los mapas, sus condiciones de producción y su uso en la solicitud de mercedes de tierras lo que distingue a estos libros de otros que tratan de cómo indígenas y españoles disputaron y negociaron el acceso a la tierra en la América colonial. En cuanto combina la historia rural, social y jurídica con la historia del arte, dedicando tiempo a analizar el estilo, las líneas, las paletas de colores, el uso de sombras y perspectiva, el análisis de Pulido Rull resulta particularmente novedoso y demuestra que la historia del derecho puede avanzar mucho en este tipo de estudios interdisciplinarios.

El foco en mapas indígenas pone de relieve cómo un medio de conocimiento indígena prehispánico persistió hacia el periodo colonial, cómo se transformó, y cómo influyó en configurar tanto la representación del derecho como del espacio en el México colonial. Este es el gran acierto de estudiar la regulación de la tierra y del espacio privilegiando la tradición pictórica nativa por sobre los documentos producidos por el escribano – una posibilidad casi única que se presenta en el contexto de Nueva España, quizá uno de los únicos lugares del Imperio español donde mapas de tierras producidos por indígenas fueron usados tan profusamente en procesos judiciales. 334 de estos mapas indígenas, que pertenecen al Archivo General de la Nación de México, forman parte del programa Memoria del Mundo de la UNESCO.

Ambos libros dejan claro que la producción y el uso de mapas formaba parte de las prácticas y conocimientos culturales del mundo Mesoamericano. Los mapas formaban parte de una tradición pictórica prehispánica que, junto con códices, manuscritos y lienzos, »usaban imágenes para registrar y preservar diversos tipos de conocimiento – histórico, genealógico y geográfico« (Pulido Rull, 66). Pero además de medios de registro y transmisión de conocimiento, la producción de los mapas se basaba en conocimientos asociados tanto con la preparación de materiales para su confección como con las convenciones que los dotaban de sentido. La preparación de los materiales que se usaban en la confección de los mapas – la tinta, el papel, el pegamento para unir diversos pliegos – se basaba en conocimientos y técnicas del periodo prehispánico (esp. Hidalgo, cap. 3; Pulido Rull, 55–56). Asimismo, las convenciones pictóricas – el uso de glifos; la manera correcta de representar caminos, cuerpos de agua, cerros, árboles; el uso de logogramas para representar topónimos; el uso de colores específicos – eran un medio de transmisión de conocimiento común al mundo Mesoamerica-

* Alex Hidalgo, Trail of Footprints. A History of Indigenous Maps from Viceregal Mexico, Austin: University of Texas Press 2019, 166 p., ISBN 978-1-4773-1751-8

Ana Pulido Rull, Mapping Indigenous Land. Native Land Grants in Colonial New Spain, Norman: University of Oklahoma Press 2020, 258 p., ISBN 978-0-8061-6496-0

no (Pulido Rull, 50–57; Hidalgo, cap. 2–3). El uso continuo de los mapas a lo largo del periodo colonial reflejó cambios y continuidades en estas prácticas y conocimientos: la transformación de la función de los mapas, el uso corriente de papel europeo, y el reemplazo de algunos elementos pictóricos, siendo quizá el más evidente la aparición de iglesias para representar centros urbanos.

La historia de los mapas indígenas también nos recuerda constantemente la trágica pérdida de conocimiento nativo que significó la conquista de México. El uso de pinturas e imágenes no sólo sirvió para registrar historias y genealogías, sino que servía de registro ›judicial‹ de litigios en el mundo azteca. Sin embargo, ninguno de estos registros de procesos administrativos, civiles o criminales prehispánicos sobrevivió a la conquista de México (Pulido Rull, 44–47). ¿Cómo se escribiría la historia del derecho latinoamericano si se hubiesen conservado semejantes archivos? Estos vacíos siguen generándose, aún hoy, como lo revela la reproducción del mapa de *Nuestra Madre del Rosario* (c. 1750, 120 x 61 cm) en *Trail of Footprints*, dónde se indica que »Este mapa desapareció en 2008« (Hidalgo, 85). La yuxtaposición de tener el mapa a la vista y la nota sobre su desaparición permite dimensionar la magnitud de las pérdidas de conocimiento generadas por la conquista. El escándalo que significa la pérdida de *un* mapa más que justifica usar el concepto de genocidio cultural para describir la extinción de todo un repositorio de memoria social.

En cuanto al uso de los mapas de tierras en la administración de la justicia, si bien Hidalgo hace una selección de mapas enfocado en la región de Oaxaca y Pulido Rull se enfoca en un corpus más pequeño restringido a mercedes de tierra (aunque el criterio de la selección no queda del todo claro), ambos libros abordan las fuentes de forma similar, estudiando los mapas dentro de los procedimientos jurídicos para los cuales fueron producidos. En este sentido, es evidente que los mapas jugaron un rol importante dentro de la solicitud de mercedes y en la resolución de conflictos sobre el acceso a la tierra entre españoles e indígenas y, por ello, de modo más general fueron un instrumento importante en procedimientos judiciales en Nueva España.

Sin embargo, aun cuando ambos autores dan por sobreentendido que los mapas constituían pruebas (*evidence*) para reforzar la posición de una de las partes, no queda del todo demostrado que esta fuese su única función. Si bien en algunos de los casos discutidos en las obras una de las partes usaba un mapa como instrumento de prueba, en otros eran los mismos magistrados quienes, una vez finalizados los procedimientos, encargaban la producción de »una pintura« (Pulido Rull, 44). En un caso, presentado por Pulido Rull (59), el *corregidor* comisionó una pintura »de las dichas tierras«, una vez que se concluyó el examen de los testigos, la cual se hizo »en su presencia y mientras [aún] se encontraba en las dichas tierras«. ¿Cuál es la función del mapa en estos casos? Un análisis más fino de estas diferencias procesales en el uso y en las funciones diversas que tenían los mapas de tierras, ayudarían a entender mejor por qué este tipo de recurso pictórico se volvió tan común en la administración de la justicia en el México colonial.

Antes de concluir, vale la pena llamar la atención a algunos anacronismos usados por los autores que en alguna medida sugieren una imagen del derecho que no era propia del mundo colonial. Así, la distancia entre leyes escritas y su »aplicación« (Pulido Rull, 4) debiera ser atenuada por una lectura casuística y localizada del derecho; la imagen de »burócratas« coloniales (Hidalgo, 6) debiera ceder a la idea de oficios y jurisdicciones; y la caracterización de las *mercedes* como un »land grant program« (Pulido Rull, 15, 79, 114) – que sugiere la idea de políticas sociales – debiera reemplazarse por un análisis en términos de la economía de la gracia.

Con todo, éstos terminan siendo detalles que no restan en un balance final. Si vemos estos libros como dos investigaciones que intentan resaltar un medio de conocimiento indígena dentro de la administración de la justicia en el México colonial, como lo fueron los mapas de tierras, es indudable su valor para el estudio del derecho en América colonial. El material de base es precioso – en el sentido más amplio de la palabra – y los estudios aquí reseñados abren una veta documental interesante para profundizar la manera en que el derecho en América no fue simplemente el resultado de un proceso europeización, sino que fue co-constituido sobre la base de una profunda tradición de conocimiento indígena.

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Gilberto Guerra Pedrosa

Eine Normativität des Imperiums und eine andere des Marktes am Río de la Plata?*

Die Monopolstellung des iberischen Transatlantikhandels mit Edelmetallen im 17. Jahrhundert ist Historikern gut bekannt. Sie wird aber oft aus einer imperialen historischen Perspektive missverstanden, wenn sie die Vielfalt der Regime vernachlässigt, die im Atlantik regional vernetzt waren und auf lokaler Ebene funktionierten.

David Freeman (Professor an der Universität von Missouri-Kansas City) untersucht die widersprüchlichen Interessen lokaler Eliten, Kaufleute und verschiedener europäischer Mächte rund um Handel und Transport von Silber im iberischen Atlantik. Er entwirft eine sehr überzeugende Argumentation zu den sozialen Beziehungen zwischen Handelsrecht und politischer Marktwirtschaft in Bezug auf den dynamischen Raum des Río de la Plata-Flussbeckens. Statt auf Kolonialverwaltungen oder -gesellschaften konzentriert sich seine Studie auf Beamte vor Ort und private Händler, die einen anderen, genaueren Blick auf die flexiblen Möglichkeiten kolonialen Regierens jenseits nationaler Interessen ermöglichen. Es werden die Grenzen der Implementierung von Gesetzgebung und königlichen Dekreten aufgezeigt, die niederländischen Kaufleuten in der Habsburgermonarchie Handel und Schifffahrt untersagten. Eine Fokussierung auf interimperiale Streitigkeiten zwischen Spaniern und Niederländern kann nach Ansicht des Autors unerwartete Ereignisse verbergen, wie z. B. indirekte Handelskooperationen, die mit Einverständnis lokaler Behörden erfolgten, welche nicht von einem nationalen Imperium gesteuert wurden. Anders ausgedrückt: »Dutch merchants not only provided trading opportunities to their Spanish American partners, but also accessed the silver they needed to trade with the Baltic, the Levant, and the Far East, their Silver World.« (8). Der Autor stellt detailliert dar, wie breit der normative Bereich war, der für lokale Notwendigkeiten und Interessen im Zusammenhang mit dem Silberhandel in der entstehenden Region von Buenos Aires bereitstand. Dieser war auch Ergebnis einer Abfolge von abrupten historischen Ereignissen, die die verflochtene Geschichte des frühneuzeitlichen iberischen Atlantiks beeinflussten. Kurzum, die einzelnen Handelsrouten und illegalen Transaktionen zwischen Schiffen mit exotischen Namen, die in den niederländischen Seehandel involviert waren, offenbaren eine Reihe weiterer kleiner wirtschaftlicher Transaktionen, welche normalerweise bei der – eher aus der Vogelperspektive erfolgenden – Suche nach der normativen Wirksamkeit von Entscheidungen, die von den europäischen imperialen Zentren ausgingen, nicht beachtet werden.

David Freeman nimmt das vom Historiker der frühneuzeitlichen Imperien J. H. Elliott entwickelte historische Konzept der »zusammengesetzten Monarchie« ernst und setzt es in Beziehung zu einem vielschichtigen Geflecht gesellschaftlicher Institutionen zwischen Monarchen, Grundherren und lokalen Eliten in einem gemeinsamen sozialen Umfeld wirtschaftlicher Akteure. Diese historische Interpretation, die den schöpferischen Charakter solcher Imperien hervorhob, kritisierten in letzter Zeit politische Historiker der iberischen Halbinsel, besonders mit Blick auf das 16. und 17. Jahrhundert. Darüber hinaus könnte das Modell der Zentrum-Peripherie-Beziehungen zwischen den imperialen Herrschaftsbereichen der europäischen Zentralmacht und ihren überseeischen Kolonien vereinfacht werden, indem man beide Räume als rechtlich-politisches (Epi-)Phänomen betrachtet. Viele dieser Kritiker wiederholen allerdings die angeprangerten Fehler, indem sie sich nur auf ein Imperium (z. B. das spanische, portugiesische, englische, holländische, französische) oder auf eindimensionale Dynamiken (nur Sklavenhandel, nur Gewürzhandel, nur juristische Aspekte) beziehen. Freeman versucht, diese Fallstricke zu vermeiden,

* David Freeman, A Silver River in a Silver World: Dutch Trade in the Rio de la Plata, 1648–1678, Cambridge: Cambridge University Press 2020, 222 p., ISBN 978-1-108-41749-5

indem er sich erstens zunächst auf die weitverbreitete Gier nach Silber konzentriert, einer zu jener Zeit sehr wertvollen Ware und Grundlage des Weltwirtschaftssystems, von Iberoamerika über die Habsburger Monarchen bis zur chinesischen Han-Ming-Dynastie. Zweitens wählt er einen dezentralen Forschungsgegenstand außerhalb des Rahmens einer starken Einflusssphäre Madrids: das niederländische Handelsnetz im Atlantik. Und drittens kombiniert der Autor die Erkenntnisse der vielsprachigen Historiographie mit einer Analyse archivalischer Quellen aus Spanien, England, Frankreich, Argentinien und den Niederlanden.

Der aus rechtshistorischer Sicht bemerkenswerteste Aspekt des Buches ist die Neubetrachtung der institutionellen Herausforderungen in den Atlantikhäfen und ihrer möglichen rechtlichen Rahmenbedingungen. Das Buch zeigt, wie die historischen Akteure des Río de la Plata-Beckens auf Ereignisse wie den Waffenstillstand zwischen Spaniern und Niederländern, den Westfälischen Frieden sowie die portugiesische Restauration und die darauf folgenden Handelsembargos reagierten. Es wird auch verdeutlicht, wie holländische Kaufleute die Institutionen der Seekontrolle manipulierten, um ihre Schiffe in die Flussmündungen bringen zu können, da das System der Galeonen und spanischen Flotten dorthin nicht vordrang. Anhand einer Sammlung verschiedener, zum Teil detailliert recherchierter Fälle, von Eigentumsbeschwerden bis hin zu einzelnen Petitionen in den Notariaten von Buenos Aires, veranschaulicht der Autor sehr gut die zeitgenössischen Vorgänge bezüglich der Kontrolle und Entladung von Waren sowie der Überwachung der Seewege zwischen den Häfen beim Transport von Sklaven, Waren im Allgemeinen und wertvollen Mineralien wie Silber. Fälle von Betrug, Bestechung, Verkehrsstrategien, klandestinen Transporten von Kaufleuten, sogar Hinweise auf Orte, an denen Seefahrer gefälschte Dokumente erhalten konnten, werden anhand des Systems der *navíos de registro*, *arribadas*, *avisos* und *situados* aufgezeigt. Andere Institutionen, die eher auf dem Land als auf dem Meer verwurzelt waren, wie die *juicios de residencia*, die neben den *cabildos* bestanden, werden als wertvolle Mechanismen zur lokalen Informationsbeschaffung durch die Gouverneure sowie als Berufungskanal zur spanischen Krone beschrieben (59; 182–185).

Allerdings zeigt das Buch leider auch, wie schwierig es für den Historiker ist, in die behandelte Materie einzutauchen, um die Möglichkeit von Normen in der Frühen Neuzeit zu begreifen. Man gewinnt den Eindruck, dass Recht und Wirtschaft von zwei antagonistischen Normativitätsregimen beherrscht werden, von denen das erste immer auf dem Wiederaufleben von Traditionen und das zweite immer auf deren Überwindung beruht. All die geopolitischen Details von Verträgen, Kriegen und politischen Restaurationen zwischen den europäischen Machtzentren und ihre lokalen Auswirkungen, die Haltungen der juridisch-politischen und merkantilen Institutionen zwischen königlicher Politik und den lokalen Entscheidungen der *cabildos* und Gouverneure – all das scheint zuweilen als einfache Konsolidierung der Normalität zu funktionieren. In vielen Fällen scheint Freeman anzunehmen, dass die wirtschaftlich orientierten Individuen – meist Niederländer – diesen institutionellen Arrangements völlig entfremdet waren. Da die Niederländer in erster Linie als Personen dargestellt werden, die vor allem ein ausgeprägtes Gespür für Marktoperationen im Atlantik auszeichnete, konnten sie leicht manipulative Strategien einbauen. Und wenn der Autor im Verlauf des Textes versucht, diese Vereinfachung der Entscheidungsfindung historischer Akteure zu widerlegen, werden Normen zwar relevant, aber zu einem sekundären instrumentellen Wissen, dessen primäre Funktion es wäre, die Risiken von Nutzen und Notwendigkeit zu optimieren.

Trotz der Unterschiede zwischen der Art und Weise, wie die historischen Akteure ihre eigene Periode wahrnahmen und wie die soziale Realität derselben Periode selbst funktionierte, ist es wertvoll, nach den Grundlagen der Beziehungen zwischen den Semantiken und Strukturen der Frühen Neuzeit zu suchen. Das Phänomen sozialer Normen wird vor allem an den Schnittpunkten von Faktizität und Geltung greifbar, die die Vorstellung des Autors von geregeltem und ungeregeltem »*contrabando*« problematisieren. Im Gegensatz zu dem, was der Autor vorschlägt, dürfte zwischen regulierten und unregulierten Praktiken das Wirken anderer Sätze oder Formen von Normativitäten existieren. Über solche transversalen Aspekte von Idealen und Praktiken gibt es eine reichhaltige Literatur aus dem Bereich der moralischen Ökonomie in der frühen Neuzeit, auch über das theologische Verständnis von Verträgen, die in diesem Buch völlig außer Acht gelassen werden. Hier ist auf einige, Lucien Febvre folgende, wertvolle Beiträge unter anderem von Jacques Le Goff, Pier

Giuseppe Pesce, Christoph Bergfeld, Bartolomé Clavero, Wim Decock, Carlos Petit sowie einige Schriften von António M. Hespanha zu verweisen. All diese obligatorischen rechtsgeschichtlichen Referenzen, die in der angloamerikanischen akademischen Welt oftmals leider nicht zur Kenntnis genommen werden, verweisen unter anderem auf die Facetten religiöser Normativitäten im frühneuzeitlichen Europa und Übersee sowie auf deren Zusammenwirken mit katholischen monarchischen Politiken, Vertragspraktiken, kommerziellen wie kriegführenden Allianzen und lokalen Verhandlungsprozessen.

Die Überschneidungen zwischen säkularen und spirituellen normativen Fragen sind auch von Historikern der Niederländischen Westindien-Kompanie in der atlantischen Welt hervorgehoben worden, wie die neuere Arbeit von D. L. Noorlander (*Heaven's Wrath: The Protestant Reformation and the Dutch West India Company in the Atlantic World*, 2019) zeigt. Dagegen enthält Freemans Konzeption, die sich als rechtlich-politisch gerahmte Dichotomie plus Rational-Choice-Verständnis der meist niederländischen Akteure verstehen lässt, einen Widerspruch zu dem von ihm selbst gewählten historischen Rahmen der zusammengesetzten Monarchien. Er übersieht, dass J. H. Elliotts entsprechendes Modell par excellence auf einem kondensierten multinormativen Wissen fußt, das die Verständnisse von Stadt Gottes und Stadt der Menschheit inmitten einer Pluralität von Bekenntnissen und normativen Praktiken bei der Entstehung der atlantischen Welt verschmilzt und vermischt. Der Kern von Elliotts These kann als das Ergebnis eines administrativen Lernprozesses zwischen der habsburgischen Monarchie und den kirchlichen Organisationen interpretiert werden, was die Formen der Angliederung neuer Territorien und die Regelung der Autoritätsbeziehungen zu den anderen Entitäten (zwischen zwei oder mehreren Diözesen, aber auch bezogen auf neue Territorien der Krone sowie ihren *fueros* und lokalen Entscheidungspraktiken) betrifft, die dem Prinzip des *aeque principaliter* folgten. Daher offenbart David Freeman trotz seiner hervorragenden Archivarbeit und der Heranziehung mehrsprachiger Quellen in dieser Hinsicht einen inneren Widerspruch zu seinem Gesamtbild.

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Bruno Lima

Raça, escravidão e liberdade na história do direito*

Becoming Free, Becoming Black: Race, Freedom and Law in Cuba, Virginia, and Louisiana é um livro que veio para ficar. Escrito a quatro mãos, em notável esforço cooperativo, Alejandro de la Fuente e Ariela J. Gross apresentam uma síntese histórica de quatro séculos, alicerçada em um volume assombroso de fontes primárias, argumentando como se deu a construção da raça enquanto categoria jurídica de diferenciação social em três sociedades escravocratas do mundo Atlântico. Subvertendo o usual e esquemático modelo comparativo restrito ao exame semântico de normatividades entre jurisdições distintas, de la Fuente e Gross tomaram outro caminho para escrever uma história do direito comparada da escravidão e da liberdade nas Américas. Os autores optaram, em suma, pela leitura criativa da imensa e multilíngue documentação legal e administrativa colhida em arqui-

* Alejandro de la Fuente, Ariela J. Gross, Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana, Cambridge / New York: Cambridge University Press 2020, 295 p., ISBN 978-1-108-48064-2

vos de Cuba, Espanha e dos Estados Unidos para contar a história do direito, da raça e da liberdade nas três jurisdições analisadas. São os núcleos dos conflitos em primeiro grau, portanto, e não legislações e regulamentos isolados, o *locus* por excelência do complexo jogo de forças de criação de direitos e regimes raciais nas Américas. O resultado da obra é admirável: uma história do direito a partir dos subalternos que não descuida, contudo, da explicação de mudanças estruturais em longa duração, desde a colonização das Américas, no início do século XVI, atravessando a Era das Revoluções, até chegar na conturbada década que assistiu a Guerra Civil dos Estados Unidos.

O livro é dividido em cinco capítulos, que, para além das temporalidades inerentes a cada um, cobrem três grandes faixas temporais: de 1500 a 1750 (capítulos 1 e 2); de 1760 a 1830 (capítulos 3 e 4); e, finalmente, de 1830 até a turbulenta década de 1860 (capítulo 5). O primeiro capítulo é dedicado às bases da racialização no direito no Antigo Regime espanhol, francês e inglês nas colônias de Cuba, Louisiana e Virgínia. De la Fuente e Gross demonstram como o repertório de ideias raciais presente em cada uma das tradições jurídicas envolvidas na colonização informou as autoridades locais a policiar e regular trânsitos, espaços e fronteiras de pessoas não só conforme o seu respectivo estatuto jurídico, mas especialmente conforme o seu marcador racial e pertencimento ancestral. Nesse sentido, os autores destacam como autoridades cubanas utilizaram o conteúdo normativo de posturas policiais de cidades europeias, e. g., Sevilha e Lisboa, para restringir mobilidades em razão da cor da pele; o conceito de limpeza de sangue para segregar racialmente as hierarquias coloniais; e o repertório das *Siete Partidas* como fontes para a construção do racismo. Tudo isso expressava uma empresa colonial que associava branquitude (*whiteness*) com direitos e privilégios e negritude (*blackness*) com escravidão. Na Louisiana, as regulações raciais tomaram de empréstimo experiências normativas de outras jurisdições do império francês, sobretudo das Antilhas francesas, que culminariam no *Code Noir* de 1724, estrangulando pretensões de liberdade, casamentos interraciais, além de coerção racialmente orientada. Na Virgínia, ainda que sem tradição jurídica ibérica ou francesa, os autores notaram como a elite escravocrata local astuciosamente incorporou ao seu repertório colonial inglês escravista o princípio do *partus sequitur ventrem* como meio de vincular e transmitir o status de escravizado baseado na ascendência africana.

No segundo capítulo, os autores exploram as múltiplas possibilidades de se obter alforria e em se reconhecer o casamento inter-racial no período pré-revolucionário. Embora nesse particular o caso cubano destoasse um pouco mais das colônias que viriam a formar os Estados Unidos da América, paradoxalmente, ele passaria a influenciar as expectativas de liberdade – e o medo senhorial – nas regiões vizinhas. Se em Cuba havia chances de se alcançar a alforria mediante pagamento, por verba testamentária, coartação e liberalidade de terceiros, entre outras formas, além de haver certa permissibilidade senhorial quanto a casamentos que cruzassem fronteiras de marcadores raciais, o cenário era bastante diferente tanto na Louisiana quanto na Virgínia. Nestas jurisdições, os legisladores locais repetidas vezes restringiram eventuais entendimentos que viessem a resultar em alforrias ou casamentos entre pessoas de linhas raciais distintas.

No terceiro capítulo, de la Fuente e Gross oferecem um excelente quadro sobre como as demandas de liberdade, notadamente as alforrias, tomaram as cortes e os juízos nas agitadas décadas revolucionárias. Ao passo em que comunidades de libertos negros se tornavam significativamente maiores, sobretudo em Havana e Nova Orleans, escravizados negros e pardos acuradamente compreenderam o instável momento político, que eventualmente poderia resultar no colapso da escravidão, e pressionaram as instâncias legais por liberdade e direitos. A relação entre população negra liberta e escravizados que requeriam sua liberdade seria explosiva e instigaria uma espécie de aceleração histórica de um processo coletivo de mudança de estatuto civil. De la Fuente e Gross ainda sublinham a emergência de argumentos jurídicos que os escravizados passariam a lançar mão em suas demandas por liberdade. Até mesmo no bastião escravocrata que era a ex-colônia, agora estado, da Virgínia, ecos revolucionários deram novo impulso à ação dos subalternos. De posse de um sofisticado conhecimento normativo, escravizados arguiam que possuíam ancestralidade indígena, e não africana, de modo que deveriam ser considerados livres nos termos de lei que proibia a escravização de índios. Em Cuba, formas seculares de aquisição ou reconhecimento de liberdade foram reforçadas com novos instrumentos legais, sendo cada vez mais comum a figura do curador como auxiliar da justiça, além do estabelecimento

da coartação como praxe respeitada nos juízos. Na Louisiana, que começara a Era das Revoluções recém saída do domínio francês, sendo então regida pelo império espanhol, para depois ser incorporada como um dos estados republicanos membros dos Estados Unidos da América, o turbilhão revolucionário também impactou – e foi alimentado por – ações de escravizados, que criativamente amalgamavam expertises libertárias de diferentes repertórios normativos.

No capítulo quarto, os autores enfocam a reação das elites escravocratas às avenidas de liberdade abertas nas décadas anteriores. No estado da Louisiana, surgiram restrições legais de acesso a alforrias. Na Virgínia, reformas escravistas ocuparam o processo legislativo local, chegando ao ponto de a constituição estadual retirar a força normativa de alforrias outorgadas se os ex-escravizados permanecessem no território do mesmo estado. Em Cuba, por sua vez, autoridades da colônia discutiam abertamente meios coercitivos para reprimir as comunidades de negros livres ou libertos. No quinto e último capítulo, de la Fuente e Gross detalham o projeto de construção de regimes raciais mediados pelo direito. Em Cuba, por exemplo, a segregação racial podia ser vista no acesso à terra e à educação. Na Louisiana e na Virgínia dos anos que antecederam a Guerra Civil, diversas normatividades foram efetivadas no sentido de segregar a vida social de negros – independentemente de seu estatuto civil. Severas limitações ao acesso à educação, à formação de comunidades religiosas e à constituição de patrimônio foram tomadas pelas suas respectivas elites escravocratas.

De la Fuente e Gross apresentam distintas regulamentações racialmente orientadas que vinculavam tacitamente o negro à escravidão e o branco à cidadania. Aos primeiros, relacionavam o estigma da escravidão à cor negra de suas peles; quanto aos segundos, em sinal perversamente invertido, era a cor branca de suas peles o que os qualificava para o exercício da vida civil. Sem perder de vista as singularidades de cada sociedade, o que se nota quando os autores apontam com clareza a fluidez dos marcadores raciais de Cuba, de la Fuente e Gross também reforçam em muitas passagens a ideia central do livro: a de que são as leis da liberdade – e não as da escravidão – as que expressam tanto a complexidade de um processo conflituoso de criação e transformação de direitos, quanto a construção de regimes jurídicos racializados. Nisso reside outro grande mérito do livro, qual seja, revisar a dicotomia entre escravo e cidadão, conhecida tese de Frank Tannenbaum, propondo e sustentando a variável da raça não como algo secundário, mas senão como um fator constituinte do direito e dos estatutos jurídicos individuais no Antigo Regime e na Modernidade.

Becoming Free, Becoming Black certamente se firma como leitura obrigatória para estudiosos da história do direito e da história social da escravidão nas Américas. A sólida pesquisa em fontes primárias, aliada a um argumento original, entre outras qualidades, fazem do livro uma referência de excelência ao debate historiográfico sobre racismo e direito – tanto no passado quanto no presente. Paradoxalmente, contudo, como aliás um grande livro costuma sinalizar ao futuro, *Becoming Free, Becoming Black* também provoca os leitores para os limites metodológicos da chamada *social history from below*, tema que certamente ocupará a agenda dessa e da próxima geração de historiadores da escravidão e da liberdade no mundo Atlântico.

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Alain El Youssef

Trazendo o Estado de volta à América Latina?*

A publicação de *El tribunal de la soberanía* é, certamente, uma importante contribuição para o entendimento do processo de formação dos Estados nacionais na América Latina. Organizada por Marta Irurozqui, a coletânea busca combater a imagem largamente difundida de que teria havido uma »omnipotencia del Ejecutivo« (18) na conformação das principais repúblicas da região ao longo do século XIX. Os textos que compõem o livro procuram, dessa forma, reforçar que os congressos nacionais dos países latino americanos se constituíram em »un actor político medular« (15), especialmente no que diz respeito a »la comprensión y el ejercicio públicos de la soberanía popular« (11).

Para tanto, o livro está dividido em oito capítulos, que abordam de forma mais ou menos cronológica a atuação parlamentar em importantes episódios que marcaram a formação dos principais Estados nacionais oriundos da desagregação da América espanhola. No primeiro capítulo, Laura Martínez Renau analisa o Congresso Cisplatino de 1821 e suas implicações para a incorporação da Banda Oriental ao Império do Brasil. No segundo, Elvira López Taverne mergulha no Poder Legislativo para avaliar seu papel no cenário turbulento que marcou as primeiras décadas do Estado chileno. Em seguida, Nely Noemí García Corona recorre à prosopografia para refletir sobre o papel dos clérigos no Congresso do estado de Michoacán durante as crises políticas da Primeira República federal mexicana. No capítulo mais extenso da obra, Inés Quintero e Rogelio Altez se debruçam sobre os debates parlamentares que levaram à dissolução da unidade colombiana, de modo a verificar os princípios sobre os quais a República da Venezuela foi fundada em 1830. Na sequência, o livro retoma a discussão sobre o México com um texto de Marco Antonio Landavazo que aborda as concepções de soberania em confronto durante os momentos críticos que marcaram a fundação da república federal no país. No sexto capítulo, a organizadora da coletânea toma o caso das eleições de 1840 para repensar o papel do Legislativo na construção de uma determinada visão de legalidade eleitoral na Bolívia do século XIX. Na sequência, Víctor Peralta Ruiz analisa as disputas travadas de 1855 a 1860 entre o Executivo e o Legislativo peruanos pelo protagonismo político dentro da nova conformação nacional. E fechando a obra, Flavia Macías e María José Navajas avaliam as estratégias utilizadas por deputados e senadores argentinos no biênio 1892–1893 para salvaguardar as garantias constitucionais e a autonomia das províncias que haviam sofrido intervenção do Executivo.

Em seu conjunto, os artigos que compõem a coletânea são muito bem sucedidos em demonstrar a centralidade do Poder Legislativo para a história política latino americana do século XIX. Por estarem geralmente concentrados em disputas e conflitos travados entre o Executivo e o Legislativo de cada país – notadamente, Banda Oriental (futuro Uruguai), Chile, México, Venezuela, Bolívia, Peru e Argentina –, os textos deixam evidente a existência de um fenômeno mais amplo que percorreu o processo de formação das unidades políticas da região: o papel fundamental dos congressos, especialmente nos momento de crise, para a conformação dos arranjos institucionais dos Estados na América Latina.

No entanto, a principal contribuição do livro carrega consigo aquelas que podem ser consideradas suas principais fragilidades. Como bem destacou Marta Irurozqui na introdução, os congressos latino-americanos do século XIX constituíam »espacios dinámicos de comunicación de lo político y lo público«, na medida em que os debates transcorridos dentro de seus recintos se alastravam pela »prensa« e pelas »tertúlias en la calle, locales o salones« (16). Esse reconhecimento de que o Poder Legislativo possuía uma dimensão que transcendia a dinâmica institucional, abarcando os espaços públicos formados durante os processos de inde-

* Marta Irurozqui (coord.), El tribunal de la soberanía: el poder legislativo en la conformación de los Estados: América Latina, siglo XIX, Madrid: Marcial Pons, 2020, 264 p., ISBN 978-84-9123-747-1

pendência na região, seria digno de nota, não fosse o fato de que a coletânea, como um todo, não concretiza essa premissa. A maioria dos textos que compõem a obra – exceção feita aos capítulos de Inés Quintero e Rogelio Altez, sobre a Venezuela, e de Marta Irurozqui, sobre a Bolívia, que se valem da imprensa como uma variável importante para o desenvolvimento da política parlamentar nos referidos países – pouco ou nada leva em conta os espaços extraparlamentares que influíam direta e indiretamente para o funcionamento dos congressos nacionais.

Isso, na realidade, faz parte de um problema maior que acompanha o enquadramento adotado em *El tribunal de la soberanía*. É notório que os textos da coletânea muitas vezes isolam o mundo da política – e por consequência, do próprio Estado – das outras variáveis históricas que permearam as disputas políticas nas jurisdições em questão. Se, por um lado, os textos trazem referências ao papel de grupos sociais diversos (especialmente, eclesiásticos e militares) para a delimitação das agendas dos congressos nacionais, o mesmo não pode ser dito sobre a economia, levada em consideração somente no capítulo de Elvira López Taverne sobre o Chile. Tal opção vai na contramão daquilo que diversos autores vêm apontando nas últimas décadas: a inserção das nações latino-americanas na economia-mundo capitalista foi um elemento central dos processos de formação dos Estados nacionais na região. Longe de serem compostos exclusivamente por membros de uma elite política apartada das bases materiais da sociedade, os Legislativos (e muitas vezes os Executivos e os Judiciários) dos países da América Latina foram ocupados por homens que tinham um pé fincado no mundo da produção e circulação de mercadorias e outro no mundo dos regimes constitucionais.

Ao ignorar essa dimensão, tão política quanto a parlamentar, *El tribunal de la soberanía* parece retomar, ainda que indiretamente, alguns dos pressupostos explicitados por Theda Skocpol em seu famoso *Bringing the State Back In* (1985). Na introdução da obra em questão, a socióloga norteamericana se concentrou na dimensão deliberativa do Estado para defender a possibilidade – ainda que não de forma estrutural – de sua »autonomia« frente à realidade que o circunda. Mesmo dando mais atenção ao caráter constitutivo dos Estados latino-americanos que a própria Skocpol – mais preocupada com questões teóricas e programáticas –, o livro organizado por Marta Irurozqui acaba caindo no mesmo equívoco. Para evitá-lo, os autores da coletânea teriam que tomar, por exemplo, seus respectivos Estados não como unidades de análise, mas como unidades de observação pertencentes a um todo maior: o sistema interestatal, que se encontrava em franca expansão na primeira metade do século XIX, quando passou a orbitar em torno da Grã-Bretanha.

Essa perspectiva permitiria, igualmente, repensar a circunscrição da obra aos países latino-americanos que adotaram a forma republicana de governo. Para ficar apenas em um exemplo – quiçá, o mais notável –, o processo de formação do Império do Brasil compartilhou uma série de semelhanças com seus vizinhos. Nas décadas que se seguiram à independência brasileira, a ex-colônia portuguesa vivenciou acaloradas disputas políticas entre partidários de um sistema federalista e defensores de um Estado mais centralizado, que resultaram em importantes reformas na Constituição de 1824; registrou presença decisiva de padres e outros membros do clero no Parlamento (e, em certos momentos, também no Executivo); conviveu com seguidos conflitos entre Executivo e Legislativo pelo protagonismo político nacional; teve a composição das legislaturas de sua Câmara dos Deputados vinculada à falsificação dos pleitos eleitorais; e viu sua política parlamentar ser agitada por uma série de sublevações e revoltas, tanto de setores populares como de membros da elite. Em que pese a adoção de uma monarquia constitucional pelos construtores do Estado imperial brasileiro, não restam dúvidas que seu Legislativo teve uma importância equivalente ao das repúblicas latino americanas sobre os destinos do país. Nada mais lógico, portanto, que incluir o caso brasileiro ao conjunto do continente.

A despeito dessas lacunas, é notório que *El tribunal de la soberanía* possui plenas condições de ser incluído na bibliografia obrigatória para aqueles que estudam o processo de construção dos Estados nacionais na América Latina. Para além das ricas informações de teor empírico que os ensaios proporcionam ao leitor, a coletânea fornece uma série de contribuições e ensejos para que futuros historiadores desenvolvam novas abordagens capazes de explicar um fenômeno de dimensões globais e feições locais.

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Armando Guevara Gil

A Continental View of Indigenous Peoples' Rights*

La bibliografía sobre los pueblos indígenas americanos o cualquier otra temática de dimensión continental se caracteriza por un sesgo notorio. Trata los mismos tópicos bajo la presunción incuestionable de una desconexión radical entre el hemisferio norte y sur. Los famosos *Latin American Handbooks* son un claro ejemplo de este divorcio. Asumimos, acríticamente, las narrativas nacionales, regionales e historiográficas que surgieron a raíz de los juegos geopolíticos decimonónicos entre el expansionismo norteamericano, los intentos españoles de reflotar su orbe indiano y los afanes imperiales de Napoleón III que enfatizaban la latinidad de las naciones al sur del Río Grande.

Escrito a contracorriente de esta nítida división hemisférica, el libro de Jonas Bens es un extraordinario aporte para repensar, en su verdadera envergadura continental, la historia de los derechos de los pueblos indígenas. Ni él ni yo nos referimos a los *derechos propios* que algunos intelectuales, líderes indígenas y activistas definen, ucrónicamente, como inmanentes e impolutos. Nos referimos, más bien, a los derechos indígenas alterados y recreados en el fragor de los diferentes ritmos, intensidades y modalidades que adquirió la expansión colonial a lo largo y ancho del continente americano.

Para ilustrar la concreción histórica de estos derechos y las formas de su reconocimiento por los estados (neo)coloniales, Bens selecciona siete casos resueltos en las cortes de Estados Unidos, Canadá y el sistema interamericano de derechos humanos entre inicios del siglo XIX y principios del XXI. Y para explicar cómo se configuraron los regímenes de representación antropológica y enunciación legal de estos derechos apela al dispositivo heurístico de *la paradoja indígena*.

La paradoja indígena fue y es la incorporación subordinada y excluyente de los pueblos indígenas y las comunidades subalternas (e. g., afrodescendientes) a los estados coloniales y republicanos. Esta subordinación produce que sus luchas políticas y legales para reivindicar su autodeterminación se planteen, procesen y prediquen en los términos y condiciones de los estados colonizadores. Es ciertamente contradictorio, como indica en el capítulo 1, que el reconocimiento de derechos considerados originarios deba exigirse y obtenerse en sedes judiciales nacionales o internacionales y que deban ser ejercidos dentro de una matriz de sujeción y dependencia.

La incorporación a esas órbitas coloniales se produce de dos modos. En uno se reconoce la soberanía que los pueblos originarios poseían antes de la colonización y en el otro se reconoce que su diferencia cultural genera derechos especiales. Ese reconocimiento, en sí, es un ejercicio de poder (neo)colonial. Por eso solo admite una soberanía conculcada (e. g., *domestic dependent nations* en Estados Unidos) o únicamente tolera la diferencia cultural bajo la condición de que no transgreda la clásica cláusula de la repugnancia de los ordenamientos coloniales.

Bens dedica los capítulos 2, 3 y 4 a mostrar cómo la soberanía mediatizada genera el reconocimiento de derechos ancestrales. Dedica cada uno de ellos a estudiar los casos Johnson v. McIntosh (1823), Cherokee Nation v. Georgia (1831) y Worcester v. Georgia (1832), que forman la célebre trilogía de decisiones de John Marshall, presidente de la Corte Suprema de los Estados Unidos entre 1801 y 1835. Luego, en los capítulos 7 y 8 estudia cómo se atribuye a la diferencia cultural el potencial de crear derechos especiales. Uno está dedicado al caso Awas Tingni v. Nicaragua (1991) y el otro al de Saramaka v. Surinam (2007), ambos resueltos por la Corte Interamericana de Derechos Humanos (CIDH).

Entre ambas modalidades, el autor detecta líneas de continuidad, las que analiza en los capítulos 6 y 7. Así, presenta el caso Delgamuukw v. British Columbia, sentenciado por la Corte Suprema de Canadá en 1997, para ejemplificar que los argumentos basados en la supervivencia de la soberanía originaria son reemplazados por la

* Jonas Bens, The Indigenous Paradox. Rights, Sovereignty, and Culture in the Americas, Philadelphia: University of Pennsylvania Press 2020, 245 p., ISBN 978-0-8122-5230-9

afirmación de la diferencia cultural, inclusive para la probanza de dominio territorial (e. g., admisión de historia oral). También examina la disputa Aloeboetoe v. Surinam (1991) y la sindica como el precedente que instauró la diferencia cultural como el baremo de la CIDH para reconocer derechos especiales a los pueblos originarios y comunidades subalternas.

Para los historiadores del Derecho interesados en la evolución del reconocimiento de los derechos indígenas en Estados Unidos y Canadá, este libro les resultará muy útil porque sintetiza con maestría los casos presentados y los analiza a la luz de un planteamiento teórico innovador. Para sus similares en América Latina, la obra también será muy ilustrativa porque ofrece un panorama de los poco conocidos desarrollos jurisprudenciales del hemisferio norte, a la par que coloca en perspectiva histórica la opción de la CIDH por la diferencia cultural para tutelar derechos indígenas. Y, para los historiadores del Derecho interesados en una visión de conjunto de los derechos indígenas en las Américas, es un trabajo indispensable porque cuestiona los paradigmas vigentes, tanto la nítida división interamericana como la supuesta autenticidad y ancestralidad atribuida a derechos históricamente sujetos a lo que Bens denomina la paradoja indígena. Por eso mismo es un libro recomendable para etnohistoriadores, antropólogos y americanistas dedicados al estudio de la problemática de los pueblos originarios. Por cierto, es una obra que interpela a los intentos de descolonización de la historia y el Derecho porque, precisamente, estos tienden a incurrir en la paradoja planteada por el autor.

Aunque es una obra rigurosa, bien elaborada y novedosa, presenta algunos errores y omisiones, tanto legales como antropológicos. Por ejemplo, Bens afirma que ambos enfoques, el de la soberanía y la diferencia cultural, atribuibles en principio a los sistemas legales norteamericanos y latinoamericanos, »are indeed interacting and cross-fertilizing independently of their origins« (106). Solo una cuidadosa identificación de la genealogía de los conceptos y de las influencias recíprocas en la historia del reconocimiento jurisprudencial de los derechos indígenas en el continente podría confirmar esta afirmación. Por lo pronto, para América Latina, es mejor tomarla como una fascinante hipótesis de trabajo aplicable al reconocimiento de derechos indígenas a partir de los viejos tratados coloniales identificados, entre otros, por Bartolomé Clavero.

También parece apresurado sostener que las voces indígenas resuenan directamente en expedientes como los del caso Cherokee Nation v. Georgia (1831). El autor presenta un alegato incluido en una compilación hecha por Richard Peters en 1831 como »The Cherokees' Autoethnography« (56–61). Desde el punto de vista antropológico y etnohistórico, es muy arriesgado atribuirle un status de fuente primordial. Primero habría que determinar el grado de mediación y participación de su famoso abogado William Wirt, o de Samuel Worcester y otros misioneros que respaldaban su causa, en la redacción del testimonio. Si nos atenemos a la evidencia documental comparada, más bien se trataría de un documento representativo de la paradoja indígena, por lo que es necesario interpretarlo con todas las precauciones indicadas en el propio libro.

En cuanto a las fuentes que emplea, se extraña el diálogo con la ingente bibliografía escrita en castellano y portugués por académicos latinoamericanos sobre los temas estudiados, en particular sobre la juridización del esencialismo cultural para reivindicar los derechos especiales que se derivan del derecho a la diferencia. Por su identificación con la región, incluyo aquí a Boaventura de Sousa Santos y Bartolomé Clavero. El libro tampoco presta atención a las jurisprudencias nacionales, entre ellas a las emblemáticas decisiones de la Corte Constitucional de Colombia, tan influyente en el Derecho y los movimientos sociales latinoamericanos, y en el sistema interamericano de protección de los derechos humanos. Estas omisiones le impiden ponderar el aporte latinoamericano a la (re)construcción de las categorías antropológicas y legales acuñadas para comprender y defender los derechos de los pueblos indígenas. Finalmente, no queda claro cuál fue el criterio para comparar las decisiones de cortes nacionales (Estados Unidos, Canadá) con sentencias pronunciadas por un tribunal internacional como lo es la CIDH, el que por su naturaleza responde a otra lógica, procedimiento, normatividad y jurisdicción.

Más allá de estas observaciones, se trata de un libro original, muy bien escrito e investigado, cuya lectura recomiendo vivamente.

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Karla L. Escobar H.

Gestionar la multiculturalidad y el arte de pensar la indigeneidad*

Managing Multiculturalism es el producto de un ejercicio etnográfico, de más de cincuenta años, hecho por la antropóloga Jean E. Jackson con diferentes comunidades indígenas en Colombia. A partir de una reflexión juiciosa sobre los conceptos de identidad, multiculturalismo y neoliberalismo, Jackson se embarca a analizar el proceso de construcción de la »indigeneidad« en la segunda mitad del siglo XX en Colombia. Tal ejercicio analítico lo hace a partir de diferentes estudios de caso.

El trabajo de Jackson, profesora emérita de la facultad de antropología del Massachusetts Institute of Technology, inicia en 1968, en la región amazónica colombiana – específicamente con los pueblos tucanos – y después se desplaza a otras regiones del país. Esta narrativa no busca hacer un ejercicio comparativo, sino más bien, dar cuenta de las transformaciones en espacio y tiempo que la categoría de »indígena« tuvo en esos cincuenta años y los debates alrededor de ella. El ejercicio etnográfico de Jackson coincide, además, cronológicamente con el proceso de configuración del movimiento indígena en Colombia, paralelismo usado por la autora de forma magistral para lograr entrelazar sus reflexiones sobre las sociedades estudiadas con un ejercicio auto-etnográfico el cual le permite dar cuenta de la plasticidad de las categorías que estudia.

El trabajo está dividido en seis capítulos, incluida la introducción. El primero introduce al lector en los debates contemporáneos sobre multiculturalismo, identidad y neoliberalismo en tanto claves para comprender las distintas formas en las que se configura la indigeneidad a lo largo de la segunda mitad del siglo XX. Seguidamente, en el siguiente capítulo, hace un ejercicio de contextualización histórica respecto al proceso de configuración del movimiento indígena a finales de los 60s, sus transformaciones y su papel en la constituyente en 1991.

Una vez hecha esta contextualización histórica y teórica, la autora pasa a analizar, en los capítulos 2 y 3, los casos que han estado en el foco de su investigación: las sociedades amazónicas, específicamente las complejidades en los procesos de creación de la »indigeneidad« para los Tucanos y para los Nukak-Makú, particularmente después de 1988 cuando estos últimos »aparecieron« por primera vez en el ámbito nacional. El análisis se centra en la relación de estos pueblos con múltiples actores: el movimiento indígena nacional, las ONGs, los funcionarios del gobierno, los antropólogos y las Iglesias católica y evangélica, entre otros. Igualmente, analiza las tensiones, discusiones y divisiones dentro de los mismos Tucanos (incluídos los miembros del Consejo Regional Indígena del Vapupés–CRIVA), así como las tensiones entre Tucanos y los Nukak-Makú.

En el capítulo cuatro, la autora regresa al foro nacional para detallar otro tipo de sinergias y tensiones que se producen dentro de las diferentes organizaciones del movimiento indígena a nivel nacional, así como las tensiones que se producen entre estas y los organismos estatales en el marco de la Jurisdicción Especial Indígena, creada en la Constitución de 1991. Para ello, la autora analiza tres casos concretos: las protestas de activistas indígenas en 1996, la creación y el debate respecto a la distribución de la de la gaseosa a base de hoja de coca »Coca-Seck« y los juicios contra los líderes indígenas Jesús Piñacué y Francisco Gembuel que tuvieron amplia difusión en medios a finales de los años 90. El análisis de estos casos buscó problematizar las difusas fronteras entre derechos, prácticas culturales y posicionamientos políticos en tanto elementos centrales para la construcción de la indigeneidad en contexto.

Finalmente, en el último capítulo, la autora lleva la pregunta por la indigeneidad a un nuevo contexto: el de los pueblos que han llevado de

* Jean E. Jackson, Managing Multiculturalism. Indigeneity and the Struggle for Rights in Colombia, Stanford: Stanford University Press 2019, 328 p., ISBN 978-1-5036-0622-7

forma reciente procesos de re-indigenización exitosos (aunque muy disputados y conflictivos). Estudia, así, los casos de los Yanacona en el Huila, el Muisca en Bogotá y el cabildo multiétnico en el Putumayo. La autora se esfuerza aquí nuevamente por caracterizar en detalle la complejidad de estos procesos y señala la relevancia de comprender la »indigeneidad« desde el eclecticismo y el dinamismo cultural, en oposición a la idea de una indigeneidad inmutable, »pura« o »incorrupta« que tiende a defenderse en los ámbitos institucionales.

Ahora bien, ¿por qué el trabajo de Jean E. Jackson es relevante para los historiadores del derecho? Quiero destacar tres puntos.

En primer lugar, el trabajo de Jackson es relevante para aquellos interesados en comprender el derecho desde las prácticas y desde los ejercicios comunicativos asociados a ellas. Si bien la autora no hace un estudio detallado de la legislación – debido a que se sale de su mirada disciplinar – sí da cuenta de la interdependencia entre derecho, política y prácticas culturales dando cuenta de la complejidad de las relaciones que se entretejen entre estas esferas aparentemente aisladas.

Al respecto, la autora hace un importante señalamiento que considero clave y que abre varios caminos de reflexión para la Historia del Derecho contemporánea. Así, dice: »Rights are first transformed in struggles in courts, in the media, and on blocked highways – and then transformed again in such forums as mandated round tables in which they are discussed, negotiated, and instantiated or refuted. While the rights are defined by the laws, regulations, and accords that put them on paper, they become real only in the field of action« (170).

Si bien esta idea no es necesariamente nueva para la Historia del Derecho ni para los estudios sociales en derecho, sí lo es la aproximación metodológica que asume para analizar tales dinámicas. La forma en la que Jackson construye su narrativa nos recuerda la importancia de problematizar las categorías – usualmente dicotómicas – a partir de las cuales se construye el conocimiento histórico sobre lo jurídico. La autora no solamente invita a prestar mayor atención a la forma en la que se entreteje teoría y práctica, ya sea en la forma de ley-implementación o teoría científica-práctica cultural, sino que también se detiene a comprender las formas contextuales en las que lo teórico se produce y lo práctico se pone en escena. Así, logra abordar analíticamente las contradicciones, conflictividades e incoherencias propias del derecho, en tanto espacio tradicionalmente descrito como estructurado, lógico y coherente.

En segundo lugar, para aquellos quienes concebimos el derecho como una red de ejercicios comunicativos complejos en el que múltiples actores participan sobre relaciones de poder múltiples y superpuestas, resulta relevante involucrar en el análisis una gran cantidad de interlocutores, como bien lo hace la autora en cada caso que analiza. Jackson logra incluir en su análisis diferentes actores estatales, ONGs, antropólogos, medios de comunicación, pueblos, autoridades indígenas, etc., además de dar cuenta de las divisiones existentes dentro de estos grupos de actores y la forma dialógica y a la vez conflictiva en la que los diferentes procesos de construcción de la indigeneidad se llevan a cabo en medio de todas estas voces. Aunque su objeto de reflexión no es el derecho, su mirada sí le permite a los historiadores del derecho, comprender mejor lo »indígena« en tanto categoría jurídica y, sobre todo, a rastrear la plasticidad de tal categoría.

En relación con ello, otro elemento clave que el trabajo de Jackson nos ayuda a pensar, es la importancia de la puesta en escena o *performance* de la indigeneidad a partir de los diferentes públicos que consumen la alteridad indígena. Para los historiadores del derecho interesados en comprender cómo otras normatividades participan en la creación del derecho, estudiar las formas en las que la indigeneidad es puesta en escena en diferentes foros también abre importantes rutas de reflexión. Las puestas en escena en todos los casos analizados por Jackson no sólo están filtradas por códigos culturales – como es de esperarse –, sino también por principios económicos, morales, intereses políticos, estéticos y, por supuesto, aquellos construidos por la violencia.

Finalmente, considero que el trabajo de la autora le permite al historiador del derecho retomar discusiones que teóricamente están supuestamente superadas como, por ejemplo, los debates alrededor del concepto de »cultura«. Como lo muestra la autora, aunque ríos de tinta se han escrito sobre el concepto de cultura desde múltiples disciplinas y pareciera que la discusión está agotada, su conceptualización sigue siendo un problema fáctico, a partir de lo cual los funcionarios toman decisiones, reparten recursos, formulan proyectos y por supuesto, legislan y juzgan. Así pues, si bien a nivel académico, desde hace muchos años hay claridad respecto a la plasticidad de la mayoría de las

categorías con las que trabajamos, son particularmente los gobiernos, en especial sus ramas judiciales y legislativas quienes presumen la existencia de categorías cerradas y claramente definidas. En este sentido, es urgente una historia del derecho que de cuenta de esta plasticidad en términos jurídicos y, debido a esto, el texto de Jackson puede abrir múltiples caminos de reflexión para nuestra disciplina.

■

Ron Harris

Land Law Meets the Sea*

Humans are terrestrial mammals as the introduction to this intriguing volume reminds us. Their normative orders were shaped on the land. Applying human law to the seas and oceans of this planet was never a straightforward process. Two historical developments placed new challenges and directions on early modern Europe's legal encounters with the seas. The Westphalian order that emerged out of the long religious wars centralized concepts of sovereignty, borders, citizenship and nation states – all land-based concepts. The European expansion through the Atlantic and Indian Oceans to the Americas and Asia gave rise to two new sets of legal problems: the first relating to the encounters between sovereign European states on the high seas around the globe, and the second involving encounters with non-European polities and laws in and around newly annexed islands and seaboards across these oceans. The book chapters deal with various interplays of these reformulated sets of problems in the early modern era.

This volume was edited by two prominent historians whose approaches cross each other in a manner that is highly promising for legal historians. Rosenthal is an emerging historian of the Atlantic World in the first age of revolution. His interdisciplinary approach combines spatial studies, script analysis, and law. Benton is one of the leaders of the historical turn in international law. She is a historian of the legal history of the British Empire and empires in general from a global perspective. The volume they edited is the outgrowth of a conference held in the Huntington Library in Pasadena, California, in 2016. The volume aims at advancing our understanding of how the maritime world contributed to the early modern era's global transformation. It demonstrates the complex relationship between humans and seas, and between terrestrial and maritime spaces.

For the sake of the legal historian readers of *Rechtsgeschichte – Legal History*, rather than conventionally reviewing the chapters one-by-one in the order they appear in the book, or based on the themes suggested by the editors in the *Introduction*, I'll address the question of what legal historians can gain from reading this book. To this end, the chapters in the volume will be allocated into three groups: first, chapters that do not deal at all with law but for which I'll suggest possible links to legal history; second, chapters that make preliminary extension of the non-legal analysis into law and for which I will suggest how they can be used and expanded on by legal historians; and third, chapters that deal head-on with law. As usual, this division is not always crystal clear.

In Chapter 1, Carla Rahn Phillips examines the reasons for serving as crew aboard ships given the extreme risks and hardships involved. There was overlap with and switches taking place between naval service and merchant marine crews as well as officers all the way up to the 18th century. Reasons for going to sea included family traditions, economic incentives, legal conscription requirement, and violent coercion. This chapter lays the founda-

* Lauren Benton, Nathan Perl-Rosenthal (eds.), A World at Sea: Maritime Practices and Global History, Philadelphia: University of Pennsylvania Press 2020, 267 p., ISBN 978-0-8122-5241-5

tion for a future discussion of the application of master and servant law, labor law, slave law, and martial law on board ships.

Margaret Schotte studies the creation of nautical knowledge in Chapter 5. She identifies two basic models: a top-down model used in France and Russia, and a bottom-up model used in Britain and the Dutch Republic. The first model relied more heavily on the study of scientific theory and mathematics, whereas the second model was based on experimentation, practice, and measurement. Many of the more successful explorers and mariners of early modern Europe were actually trained in the second model. The bottom-up model opened up the way for the employment of experienced foreigners and the stealing of nautical knowledge. Chapter 6, written by David Igler, expands the discussion of navigational knowledge beyond Europe to focus on pacific islanders. He reconstructs the travels of a Caroline islander named Kadu on board a Russian ship with a cosmopolitan crew across the South and North Pacific. Igler calls our attention to the methodological complications involved in studying non-European travelers through European sources. These chapters make it possible to further study the role of law in protecting and commercializing European and non-European nautical and geographical knowledge and information at the time in which patent law evolved to protect and monopolize technological craft and industrial knowledge. In Chapter 9, Lisa Norling argues that the common wisdom about a binary gender-based division of labor in which man worked on the sea and women on land is incorrect. The littoral was a complex environment in which women were also getting their hands wet, harvesting the sea, and working with fish. Nevertheless, the further from land, the deeper the water, the larger the prey, and the greater the risk, the more likely men were to do the job. The growing scale of European fisheries in Newfoundland and whaling in the North Atlantic only served to intensify the gender-based division of labor. Here, legal historians can make the next step of asking how the legal regime of gender was extended from land to sea.

Chapter 2, by Adam Clulow and Xing Hang, looks at the way in which Cambodia and Ayutthaya (Siam), two weak South East Asian land-based polities, maneuvered between two maritime regional powers, the Dutch East India Company and Koxinga's Taiwan. While much of the maneuvering was done using conventional diplomatic tools, the authors call attention to the use of legal tools. These were not simply treaties in which the powerful exhorted privileges from the weak. The weak used legal tools such as employing Chinese sailors and designation of secure maritime spaces as means for bypassing treaty restrictions. More can be said about the shared legal understandings within the context of which the treaties were agreed upon, respected as legitimate, and enforced. In Chapter 8, Catherine Phipps examines a unique moment in Japan's history, and in fact in the West's relationship with the rest of the globe. Initially having had to grant territorial and trade concessions to Western powers, Japan soon reclaimed its sovereignty, extended it to its territorial waters, and next moved forward in building its own territorial claims overseas. Once again, the next step would be to ask: What shared legal understanding did the Japanese, the Chinese, and the Westerners have such that Japan was able to both make its claims and legitimized them? In Chapter 7, Jeppe Mulich looks at runaway slaves in the Caribbean. The existence of so many islands, governed by different European countries, in such close proximity to each other provided ample opportunities for marronage. Furthermore, a few of the smaller islets were not claimed by any European country, and vessels had among their crews an indistinguishable mix of ex-slaves and runaway slaves. This chapter touches upon the legal aspect of this phenomenon. The European countries at times collaborated in enforcing the law against the running slaves, yet in wartime they often refused to do this as part of the legal warfare and because they preferred the interest of their own resident employers over those of the foreign slave owners.

The two remaining chapters address the law head-on. Nathan Perl-Rosenthal's Chapter 4 demonstrates how the law dealt with complex multinationalism on board ships. In the era of privateering and in times of declared war, the national identity of a ship had to be discerned. Admiralty jurisdiction, substantive prize law, and evidentiary rules were at play. Letters created on land played a key role in determining the identity of ships and cargo on the high seas. Matthew Taylor Raffety suggests in Chapter 3 that a legal term can serve as a method for bringing coherence to early modern maritime history. He identifies a few relevant realms: the view of maritime law as an extension of municipal and territorial law, or as a distinctly

international law; the normative standing of customs in maritime law; the role of non-state and semi-state actors, such as chartered corporations as creators of maritime law and major players within it; and finally the way in which encounters with indigenous legal orders affected European maritime law.

Benton and Perl-Rosenthal wisely collected wide array of high quality historians that wrote fascinating chapters. Each of the chapters in this volume is valuable for legal historians. The first batch requires more imaginative use, the second shows the path that can be followed more extensively, and the third batch throws legal historians straight into the center stage of legal action. The collection can inspire new research directions for historians of maritime law, colonial law, international law, and beyond.

■

Héctor Domínguez Benito

Vitoria, Scott y el derecho internacional*

Debido a su intensa actividad durante las primeras décadas del siglo XX, James Brown Scott (1863–1943) fue protagonista en la consolidación del estudio del derecho internacional en Estados Unidos. Promotor de asociaciones; fundador y editor del AJIL y hombre fuerte en el Carnegie Endowment for International Peace, entre otras muchas cosas, el carácter fragmentario de la literatura sobre su figura hasta la fecha es sorprendente y comprensible al mismo tiempo. Sorprendente por la relevancia del personaje para una disciplina especialmente preocupada en las últimas décadas por hacer una historia de su tradición; comprensible por la dificultad para ofrecer una visión de conjunto que haga justicia a todos los puntos de vista desde los que se puede abordar la vida y obra – no solo intelectual, sino también política e institucional – del jurista.

Seguramente por esta razón Paolo Amorosa toma como referencia, e incluso escoge como subtítulo, la defensa y promoción del pensamiento católico – y en particular de Francisco de Vitoria – por parte de Scott. Su libro, resultado de una tesis doctoral defendida en la Universidad de Helsinki en 2017, constituye un estimable paso dentro del estudio de la »invención de la tradición« del derecho internacional. Si bien la vocación hispánica de Scott es más o menos conocida, el recorrido minucioso que Amorosa realiza a través del despliegue de una amplia bibliografía y de fuentes consultadas en los James Brown Scott Papers (Georgetown) y el archivo del Carnegie Endowment for International Peace (Columbia) le permite explorar a fondo hasta casi agotar el itinerario intelectual e institucional que llevó a Scott desde Grocio hasta Vitoria; desde la puesta en marcha de la colección de clásicos del derecho internacional en el seno de la Fundación Carnegie hasta la promoción de instituciones como la Association Internazionale Vitoria-Suárez.

No obstante, y al contrario de lo que parece prometer su punto de partida, Amorosa presta una gran atención a otros aspectos no directamente relacionados con la reivindicación del teólogo dominico por parte de Scott y de igual – si no mayor – interés. Sintetiza materiales sobre sus años de formación e inicios profesionales, actualizando una cronología no demasiado tratada en los aportes

* Paolo Amorosa, Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law (The History and Theory of International Law), Oxford/NY: Oxford University Press 2019, 368 p., ISBN 978-0-19-884937-7

de las últimas décadas sobre el personaje. Ofrece, con las relaciones entre Cuba y Estados Unidos como referencia, una solvente panorámica del contradictorio ambiente intelectual – científico y religioso, abanderado de la libertad e intervencionista – en el que Scott interactuó con personajes como Nicholas Murray Butler; Elihu Root, o el propio Woodrow Wilson. Aborda también la oposición del jurista a las ideas de seguridad colectiva en el debate en torno a la construcción de una organización internacional de posguerra. La ideología cultivada por Scott, deudora de figuras clave en su período formativo, se posicionaba en favor del desarrollo de los métodos de jurisdicción voluntaria frente a las tesis que, finalmente, terminaron haciéndose fuertes dentro de escenarios como la League to Enforce Peace o la misma Sociedad de Naciones.

Asimismo, este trabajo da cuenta de su actividad en la institucionalización del estudio del derecho internacional y su generalización en las facultades de Derecho: más allá del despliegue financiero e institucional proporcionado por sus conexiones políticas y su posición en la Fundación Carnegie, Amorosa examina el esfuerzo intelectual de Scott por rescatar al derecho internacional del ámbito de la »moralidad«. Esto se tradujo en dos vías de acción: la insistencia en el constitucionalismo estadounidense como referencia para la construcción del orden internacional, por un lado; y la identificación de una tradición – naturalmente, con sus padres fundadores – que reforzase una construcción genealógica de la propia disciplina, por otro. Es en este último punto donde entran los Vitoria, Suárez, y demás.

A la hora de dar cuenta de la operación »propagandística« de Scott, Amorosa dosifica de manera conveniente el uso de fuentes epistolares, apoyándose en aspectos concretos tanto de la correspondencia de Scott como, en algunos momentos, en la de personajes de su entorno. Muy revelador resulta, en este sentido, el intercambio entre Frank Kellogg y Nicholas Murray Butler a la hora de explicar el »giro hispánico«: Amorosa muestra oportunamente cómo el Secretario de Estado se mostraba preocupado ante el Presidente del Carnegie Endowment for International Peace por el hecho de que la Sociedad de Naciones y las potencias europeas estrechaban lazos con los países latinoamericanos, en los que iba calando cierta desconfianza hacia Estados Unidos. Poco después de semejante intercambio, narra Amorosa, Scott hizo una gira como Carnegie Exchange Professor to Latin America promocionando la narrativa »hispánica« (162–163).

Tales muestras del carácter instrumental que tenía el recurso a otros escenarios, en este caso el católico, se explicitan también en un capítulo en el que se repasa la cercanía de Scott con lo que Amorosa denomina la »concepción católica del derecho internacional«. Ya en 1915, mucho antes de que el jurista estudiase a fondo a Vitoria, se puede leer en su correspondencia lo siguiente: »The great thing is to create public opinion, and I have no better way than to begin with the children in the schools. We Protestants, divided as we are into a thousand and one jarring sects, cannot take, it would seem, concerted action, whereas at a nod from the Pope the whole system of education can be changed in Catholic schools […]« (198). Ante evidencias como estas, el lector no puede dejar de pensar a menudo, aunque Amorosa apuesta por el carácter sincero y bienintencionado del jurista (7), en el tono excesivamente interesado del giro de Grocio a Vitoria por parte de Scott. En cualquier caso, no se puede concluir, ni mucho menos, que Amorosa eluda el *lado oscuro* o las contradicciones de Scott, ni a propósito de sus aporías en el terreno intelectual, ni en relación con el escenario internacional. Estas últimas eran, por lo demás, las contradicciones habituales del internacionalismo liberal anglosajón de principios del siglo XX: ejemplos como la defensa de la enmienda Platt por parte de Scott o su sintonía con el régimen de Miguel Primo de Rivera, convenientemente destacadas por Amorosa, así lo atestiguan.

El capítulo »Apostles of Equality: James Brown Scott and the Feminist Cause« es sin duda el apartado más novedoso. Aunque el giro del jurista hacia el pensamiento católico puede interpretarse como un viraje conservador, plantea Amorosa, también sirvió para justificar su apoyo a los movimientos que promovían la igualdad entre hombres y mujeres, especialmente en relación con un tema controvertido para el derecho internacional de la época: los problemas que acarreaban los matrimonios entre hombres y mujeres de distinta nacionalidad. El esfuerzo de contextualización que exhibe Amorosa en este capítulo lo convierte, más que en una mera exploración de la participación de Scott dentro de estos debates, en una estimable panorámica del activismo por la igualdad de género en Estados Unidos y sus problemas internos. En todo caso, y ciñéndonos a lo relativo a Scott, cabría

preguntarse: ¿realmente su apoyo a esta causa se explica por (o guarda una relación tan directa con) su giro hacia el pensamiento católico, o más bien simplemente el jurista y personajes afines como Doris Stevens se aprovechaban, en momentos puntuales, del barniz »intelectual« o incluso práctico que suponían las remisiones a los Suárez, Vitoria, e incluso la propia Isabel la Católica, a la hora de construir y promocionar sus argumentos?

El expresivo telegrama de Scott a Salvador de Madariaga que cita Amorosa (»I URGE YOUR SUPPORT … ALICE PAUL'S RESOLUTION … WE HOPE SPANISH LEADERSHIP HUMAN RELATIONSHIPS IN ACCORDANCE VITORIA'S PROGRESSIVE LAW NATIONS«, 297) da la medida del carácter instrumental de este tipo de argumentación, que, no olvidemos, tenía lugar al mismo tiempo que debates que – como el de la nacionalidad de las mujeres casadas con extranjeros – enfrentaban a naciones que se veían a sí mismas como modernas y/o individualistas frente a otras que se autopercibían como tradicionales o »familiaristas«. No en vano, en foros como la Conferencia de La Haya de 1930, el recurso al catolicismo era utilizado de forma muy acusada como argumento por parte de estas últimas. Visto así, en la operación de Scott, además de ante un ejemplo más de intento de autojustificación disciplinar, nos encontramos también ante una operación paralela mucho más práctica aún, como era el intento de atraer al paradigma mesiánico estadounidense a naciones consideradas como tradicionales, fundamentalmente las hispánicas y/o las católicas.

Las consideraciones finales no son una mera síntesis de la investigación. Por un lado, constituyen una reflexión sobre el rol del iusinternacionalista como agente, como actor político, pero también como actor capaz de ofrecer una revisión histórica crítica de su propia disciplina. Por otro lado, presentan, con el ejemplo de la utilidad del *ius communicandi* de Vitoria para el programa de libre comercio que promovía el Carnegie Endowment, el problema que supone la conversión de determinados conceptos o principios en »verdades morales incuestionables«, que se vincula con una reflexión muy sugerente acerca de la pérdida de contenido de determinados lenguajes – como el de los derechos humanos – en la actualidad.

En síntesis, nos encontramos ante una obra que va más allá de su propio objeto de estudio. No solo expone de manera solvente quién era James Brown Scott y qué hizo con Francisco de Vitoria, sino que también ofrece un esforzado repaso por la consolidación de la disciplina en Estados Unidos y su vinculación con asuntos políticos de gran interés, además de reflexión sobre el papel performativo que juegan los propios juristas internacionalistas.

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Murat Burak Aydin

Beyond the Sharia and Codified Law Dichotomy: From the Late Ḥanafi Tradition to Mecelle*

The interaction between the ruler and Islamic law was an intricate one. The Ḥanafi school of law was one of the legal schools in Islamic law, and it was the school adopted in the Ottoman Empire. Samy Ayoub, in his book *Law, Empire, and the Sultan*, investigates the transformation of Ḥanafi jurisprudence and its interaction with state authority starting from the 16th century. Islamic juris-

* Samy A. Ayoub, Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafi Jurisprudence, New York: Oxford University Press 2020, XVII + 194 p., ISBN 978-0-1900-9292-4

prudence and legal discourse were not fixed or frozen in time. Samy Ayoub illustrates how late Ḥanafi jurisprudence was in flux and how the interaction between legal scholars and the state shaped the legal opinions of the school between the 16th and 19th centuries. He poses a few main questions in this context: How to »explain the late Ḥanafi jurists' departure from the established norms of their school and their adoption of a new set of doctrines? What are the tools they used to justify such changes? In what ways did Ḥanafi jurists incorporate Ottoman edicts and orders? And how should we evaluate the codification of Ḥanafi legal doctrines in the late nineteenth century?« (4) One of the main arguments of the book is that »late Ḥanafi jurists formulated a set of juristic tools and devices to change, alter or perpetuate early Ḥanafi opinions, even those that originated with Abū Ḥanīfa (d. 150/767), the eponym of the school« (4). He portrays a continuation together with change in Ḥanafi legal thinking, a legal process that considered the necessities and social realities of the time (153). Throughout the book he illustrates the various tools (necessity, customary practice, change of time, widespread communal necessity and others) that late Ḥanafi scholars used to »justify fundamental changes in key Ḥanafi doctrines« (4).

The book brilliantly illustrates the transformation of the relationship between Ḥanafi legal scholars and the state as well as the rulers' influence on the law and the legal discourse. It sheds light on the fact that the alleged dichotomy between men made Sultanic law and Sharia law is not functional. Rather than being a unilateral process of imposition by the Sultan, this was a mutual process between the sultan as a lawgiver and Ḥanafi legal scholars (6–7). Continuity and change in the Ḥanafi legal tradition as well as the codification of Ḥanafi law into Mecelle during the late Ottoman Empire period during the late 19th century are major points of the book.

In the first chapter, the author focuses on the late Ḥanafi jurist Ibn Nujaym (d. 1562–1563), who »was the first Ḥanafi jurist to incorporate the legal scholarship of Ottoman Shaykh al-Islām and Anatolian jurists into his legal commentary« (31). Ayoub argues that Ibn Nujaym played an essential role in shaping Ḥanafi legal discourse in the 17th to 19th century and his works constituted a basis for the Ḥanafi works after him (31–32). The chapter deals with case studies on late Ḥanafi legal reasoning and on sultanic authority. An important argument of the chapter is that late Ḥanafi scholars constituted a continuation of the early Ḥanafi school and they shaped the school according to the new circumstances of the time (47). Moreover, he argues, late Ḥanafi scholars not only considered early Ḥanafi tradition as a valid departure point, they also considered the »milieu« surrounding the opinions of the early Ḥanafi scholars (47). The chapter also elaborates the power of the sultanic authority vis-à-vis Sharia. He portrays this relationship as non-linear: »Late Ḥanafi jurists rejected, accepted, and expanded policies and decisions made by the Ottoman sultan« (62).

The second chapter examines the interaction between increasing sultanic authority on legal matters and the inclusion of sultanic orders in the legal thinking of Ḥanafi jurists in the 17th and 18th centuries. The author challenges the strict separation of Islamic legal scholarship from the state (65–66). The chapter argues that the late Ḥanafi legal commentaries, treatises and *fatāwās*, included the sultanic edicts and orders in the 17th and 18th centuries for the first time (66). He illustrates this point with particular attention to the works of the four jurists, namely Ḥasan b. ʿAmmār al-Shurunbulālī, (d. 1659), ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān Shaykh-Zāda (d. 1667), ʿAlāʾ al-Dīn al-Ḥaṣkafī (d. 1667) and Ḥāmid b. ʿAlī al-ʿImādī (d. 1757) (66). For example, sultanic orders forcing judges to employ certain opinion among various opinions on certain problems within the same school was unique to Ottoman empire and late Ḥanafi jurisprudence (81). The pre-Ottoman Ḥanafi literature had no reference to sultanic orders or edicts (85), whereas the late Ḥanafi discourse incorporated these (93). However, this did not mean that late Ḥanafi scholarship rubberstamped sultanic orders. Instead, they »variously rejected, accepted, and expanded certain policies and decisions by the sultan« and even criticized abusive and corrupt practices (154). Thus, the author points to a conscious interplay between sultanic power and scholars, and he invites us to revisit the alleged »dichotomy between Islamic law and political authority in light of late Ḥanafism« (93).

The third chapter deals with scholar Ibn ʿĀbidīn (d. 1836) and the way he dealt with »departure from earlier authorities' opinions« (95) within the Ḥanafi legal school. The chapter illustrates how Ibn ʿĀbidīn legitimized new opinions and departed

from »the school's authentic narrations« with reference to necessities of the time and the local customs but also by invoking the authority of Abū Ḥanīfa by stating »Were [he] here, he would say the same [on this issue]« (96). He also illustrates how Ibn ʿĀbidīn dealt with embracing the sultanic authority (118) and points to the citations made to Ottoman empire affiliated jurists as well as to Abū al-Suʿūd Efendī, Ottoman Shaykh al-Islām, and to the sultanic orders in his works (119–120).

Finally, the fourth chapter concerns the Mecelle of the Ottomans in the 19th century. The chapter deals with the Mecelle, which is a crystallized and codified version of the late Ḥanafi jurisprudence (117). A major argument of the chapter is that the Mecelle was a sign of »continuity and evolution within the Ḥanafi school, not a radical break from the premodern legal tradition« (132). Even though there were some departures from the early or late Ḥanafi opinions in the Mecelle, they were still justified with the techniques of the Ḥanafi tradition (130). The chapter argues that although the Mecelle pays attention to new social and legal norms of the late 19th century, it still is a »faithful synthesis of late Ḥanafi jurisprudence« (130). On the point of Mecelle, the book states »In short, the Mecelle, at its core, is a Muslim response to modernity and its legal order, argued and justified from within the tradition« (151). Ayoub's contribution to our understanding of the Mecelle and its intellectual baggage is significant and thought provoking. It is also correct that »the Mecelle should be understood as a continuation and transformation of Ḥanafi legal thought« (150). He provides the socio-economic and political context that Mecelle appeared (131–136). Yet, a more nuanced elaboration of the socio-legal context of the empire starting from the early 19th century is necessary to grasp the true meaning of such continuation and transformation.

A striking feature of Ayoub's book is his skilled and convincing use of the primary sources of Ḥanafi scholars. Moreover, his work is in perfect synergy with the growing literature on the formation of late Ḥanafi school and its crystallization into Mecelle, especially the recent contributions from Guy Burak on the Ḥanafi school, Yavuz Aykan on Mecelle, and the works of Wael B. Hallaq on Islamic law. Therefore, it is a valuable contribution to an on-going discovery process of the Ḥanafi juristic discourse in flux. Although the book does not explicitly aim at dealing with the conceptual subjects of the legal history such as codification, legal change, legal transplants, reform and modernity in depth, it does provide a fertile ground for discussing such concepts. These concepts are usually developed and explained with western examples. The material in the book is very rich and valuable for understanding the legal change from a non-western perspective. Such material invites us to think beyond the Ottoman legal history or Islamic law. Therefore, the book opens new questioning opportunities not only for Islamic law and Ottoman law but also the general development and nature of the law throughout the history. Therefore, Ayoub's book is an extremely precious contribution to the literature.

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Donal K. Coffey

Kennst du das Land, wo die Mangos blühn?*

Chintan Chandrachud, der als Rechtsanwalt in einer Londoner Kanzlei arbeitet, veröffentlichte 2017 eine Untersuchung zum *judicial review* in Großbritannien und Indien nach Verabschiedung des Human Rights Act (HRA) im UK 1997 (*Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom*). Sein neues Werk, *The Cases that India Forgot*, bietet eine populäre

* Chintan Chandrachud, The Cases that India Forgot, New Delhi: Juggernaut 2019, XIII + 229 S., ISBN 978-9353450823

Einführung in eine Reihe von weniger bekannten Fällen des indischen Rechts seit Erlangung der Unabhängigkeit im Jahr 1947. Es ist in vier Abschnitte unterteilt – Politik, Gender, Religion und nationale Sicherheit – mit insgesamt zehn Fällen, die über diese vier Abschnitte hinweg betrachtet werden. Jeder Fall wird kontextualisiert, wobei auf die Umstände der Parteien, die vor diesem Gericht erschienen sind, sowie auf einige spannende *nuggets* über die Dynamik innerhalb des Gerichts geachtet wird. Die Urteile der verschiedenen Gerichte werden dann kurz und für den allgemein interessierten Leser, der mit den Nuancen der indischen Rechtsdebatten vielleicht nicht vertraut ist, verständlich dargestellt.

Die ausgewählten Fälle landeten schließlich vor dem Obersten Gerichtshof Indiens; mit Ausnahme des Kapitels über den Personenrechtsfall State of Bombay vs. Narasu Appa Mali, der vor dem Bombay High Court endete, aber wegen der Anziehungskraft, die er auf nachfolgende indische Gerichte ausgeübt hat, aufgenommen wurde.

Die gewählten Themen sind durchweg interessant und oft kontrovers; sie reichen von der Frage der Privilegien der staatlichen Legislative über sexuelle Übergriffe und Quoten im Kastensystem bis hin zur Einrichtung einer quasi-staatlichen paramilitärischen Truppe in Chhattisgarh. Chandrachud verschont das Gericht nicht mit Kritik, wo er sie für angebracht hält, was die Interpretation der Fälle belebt.

Das Buch ist am stärksten in seiner Analyse der inter- und intrainstitutionellen Dynamik der Staatsorgane. Besonders erwähnenswert ist wohl Kapitel 1 über die Gewaltenteilung. Es handelt von einem Fall, in dem die Versammlung von Utter Pradesh die Verhaftung von zwei Richtern des Obersten Gerichtshofs von Allahabad anordnete, die in einer Habeas-Corpus-Petition im Zusammenhang mit einem Fall von Missachtung des Parlaments gegen die Versammlung entschieden hatten. Dies erlaubt es dem Autor, die verschiedenen Machenschaften und politischen Erwägungen zu betrachten, die auf Landes- und Bundesebene unter Beteiligung von Politikern und der Justiz folgten – eine Aufgabe, die er mit einiger Verve erfüllt.

Der Leser wird auch in verschiedene Elemente der indischen Rechtsgeschichte eingeführt, darunter den Versuch, die berühmte Grundstruktur-Doktrin durch Indira Gandhi im Fall Minerva Mills zu umgehen, die Mobilisierung einer Frauenbewegung als Folge des Tukaram-Falls, die Anprangerung des Obersten Gerichtshofs durch Ambedkar bei seinem Eintreten für eine Verfassungsänderung und die Aktivitäten der Nationalen Menschenrechtskommission in Indien.

Die Monographie scheint in erster Linie darauf ausgelegt zu sein, diese Fälle einem nicht-juristischen Fachpublikum vorzustellen; und die Prosa ist so verfasst, dass sie auch für eine allgemeine Leserschaft verständlich ist. Zwei Kritikpunkte können jedoch gegen das Buch vorgebracht werden. Zum einen beginnt die Monographie zwar in einem fast atemlosen Tempo, scheint aber gegen Ende des Buches an Schwung zu verlieren. Die Chhattisgarh-Entscheidung, mit der der Band endet, kommt nicht wirklich zu einem Abschluss, obwohl dies vielleicht darin begründet ist, dass das Thema einfach noch nicht abgeschlossen ist.

Zum anderen gelingt es dem Postskriptum nicht wirklich, die verschiedenen Kapitel zu einer kohärenten Erzählung zusammenzubinden. Dies fällt umso mehr auf, als es unmittelbar auf die Diskussion der Chhattisgarh-Entscheidung folgt, aber es hätte dem Buch ein willkommenes Forum für eine zusammenhängendere Erzählung geboten. In dieser Hinsicht ist die Monographie vielleicht am besten als eine Reihe interessanter und informativer Vignetten zu betrachten – und nicht als eine akademische Abhandlung. Der zweite Kritikpunkt ist vielleicht etwas überzogen, da dies wahrscheinlich von Anfang an die Absicht des Autors war, und die Monographie als solche gelungen ist.

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Gautam Bhatia

To Constitute a Public*

Accounts of the founding of India's Constitution tend to belong to one of three traditions. According to the first tradition, the Constitution was a document of continuity, designed to preserve the colonial apparatus of administration, which would be wielded by the Indian National Congress, the erstwhile party of the freedom, and now the party of government. According to the second tradition, the Constitution was an unwieldy framework of compromise, designed to satisfy a range of disparate factions within the »broad tent« of the Indian National Congress, and reveals no coherent design or overarching set of principles. However, according to the third tradition, the Indian Constitution is a document of principle, one that sets out a vision and a normative blueprint for India, and takes seriously its task of constituting a modern, democratic nation.

Madhav Khosla's India's Founding Moment: The Constitution of a Most Surprising Democracy belongs to this third tradition of thinking and writing about the historical moment that was the founding of the Indian Constitution. India's Founding Moment is primarily a work of intellectual history: Khosla takes seriously the ideas that were at the heart of the framing of the Indian Constitution, ideas expressed, debated and articulated by the founders, both in the Indian Constituent Assembly, and otherwise. Khosla understands the founders to be good faith political actors, genuinely concerned about establishing a flourishing democracy in a post-colonial nation, and with the Constitution serving as the instrument for accomplishing that task.

Khosla isolates three crucial elements of this overall Constitutional vision: »the explication of rules through codification; the existing of an overarching state; and representation centred on individuals.« (4) »In each case«, he continues, »there was an attempt to free Indians from prevailing types of knowledge and understanding, to place them in a realm of agency and deliberation that was appropriate to self-rule, and to alter the relationship that they shared with one another« (4).

In three chapters, Khosla elaborates upon each of these themes. In »The Grammar of Constitutionalism«, he locates the length – and detail – of the Indian Constitution, with its 395 Articles, in the founders' belief that codification would help create a common grammar that would serve as a reference point for Indians as they reconstituted themselves from subjects to self-governing citizens. According to Khosla,

> »[c]odification could provide common meaning to a set of principles relating to democracy in a land without such meaning. Familiar constitution-making endeavours, whether they aimed to limit the exercise of power or to enable it, had already presupposed a great deal of shared understanding. But the Indian context offered no such joint consensus. Codification was an effort to explicate such a consensus.« (38)

In other words, India's colonial past meant that it had not been able to develop, organically, a set of constitutional conventions, through years and decades of popular struggle and politics, that other countries had had the luxury of doing. The absence of such conventions, then, was to be filled in by a detailed written text.

In »The Location of Power«, Khosla takes up a subject that has vexed constitutional scholars – and indeed, lawyers – ever since the founding: Indian federalism. The founders designed a lopsided federal structure, where a double-tiered layer of government existed, but also where all the residuary powers lay with the centre, and indeed, the borders and very existence of provinces could be altered by the centre. What explains this asymmetric form of federalism? Khosla argues that at the heart of the founders' democratic vision lay the necessity for citizens to relate to each other qua citizens, and further, to accomplish this, it was necessary to

* Madhav Khosla, India's Founding Moment: The Constitution of a Most Surprising Democracy, Cambridge (MA): Harvard University Press 2020, 219 p., ISBN 978-0-674-98087-7

»liberate Indians from localism« (73). This could only be accomplished through a centralised governance structure, as the founders were »doubtful of society's internal capacity to reconstitute interpersonal relations« (107). Democracy depended on citizens being able to engage with one another without being *reduced* to their group identities, and therefore, a significant degree of political action had to be assigned as the responsibility of the centre, where such engagement was possible.

This last point allows Khosla to segue into his final substantive chapter, »Identity and Representation«. Here, Khosla tackles another enduring point of contestation: the Indian Constitution's treatment of individuals and groups. Given that, historically, and during the colonial period, representation was mediated *through* groups, why did the Constitution make a radical departure from that by guaranteeing universal adult suffrage? Khosla argues that – stung by the partition of India along religious lines – the entire purpose of the Indian Constitution was »moving away from a representative framework that sought to express identities that were regarded as stable and fixed, and in moving towards a model of citizenship centred on the political participation of individuals« (136). This was because the colonial approach – which treated groups as the *loci* of representation – fundamentally denied Indians political agency by assuming that »individuals within certain groups would act collectively and in specific ways. They were denied the capacity to deliberate and act for themselves as individuals« (138). At the same time, this did not preclude the founders from deploying the category of groups – such as, for example, for the purposes of affirmative action – where, historically, domination and oppression had been instrumentalised through group identity, and where – therefore – individual emancipation was not possible without taking groups into account.

Thus, in sum, the central argument of Khosla's book is that through »codification, centralisation, and representation« (158), the goal of the Indian Constitution was to constitute democratic citizens. Or, to put it in other words, the goal of the Constitution was to foster the conditions that would make democracy possible, in a newly-independent nation that faced many structural and institutional obstacles to democratic flourishing.

India's Founding Moment is a carefully argued account of a significant historical moment – both in the history of decolonisation and in the history of democracy – and repays close study. It also raises further lines of enquiry, and creates the terrain on which further questions can be asked about the history of India's founding. With respect to codification, for example, the Indian Constitution's detail does not preclude the existence of constitutional silences. Indeed, in some cases – such as in provisions involving Parliamentary Privileges – the original Constitution expressly gestured towards the conventions of Westminster parliamentary democracy; in others – such as, for example, provisions dealing with the office of the Governor, the Constitution explicitly refrained from codification – and indeed, it is the absence of codification that has led to sustained litigation before the courts throughout Indian Constitutional history. What determined the founders' choice to subject *one* set of issues to the »grammar of constitutionalism« through codification and not another? India's Founding Moment allows us to frame this question, and at least partially answers it: the founders chose to codify those bits that *they* felt necessary to the »grammar of Constitutionalism« – and it is a further, fascinating question why they felt as they did.

Similarly, the question of centralisation and federalism is complicated by the fact that while it is true that »localism« (in the sense of village-level governance) was seen as enmeshing individuals within community structures they could not escape, it is also true that historically, some of the more emancipatory social experiments in Indian colonial history emanated from provincial governments and the so-called »princely states« (monarchic enclaves within – and subject to the control of – British India). A classic example of this is that of affirmative action, which first began in the state of Kolhapur, and was then adopted by numerous provincial governments as well as other princely states. This history is closer to the classically federal idea of provinces acting as »laboratories« of democracy, allowing for experimentation and social innovation, the more successful of which is eventually taken up at the central level. Was this argument ever seriously made and considered by India's founders?

Finally, the question of representation leaves open the question of those provisions of the Indian Constitution which do appear to subscribe to the idea of group uniformity that Khosla argues that the founders were keen to avoid. Examples include

prohibitions upon land transfers between residents in Scheduled Areas (i. e. India's indigenous peoples) and outsiders; as well as the fact that, by making religious denominations the bearers of constitutional rights through provisions such as Article 26(2), the Indian Constitution appears to preclude the possibility of internal cultural dissent (recent litigation on this issue has led to ambiguous outcomes). It might be fascinating to ask, therefore, how these seemingly conflicting constitutional visions are to be reconciled.

India's Founding Moment is a deep and thoughtful account of the framing of India's Constitution. It locates the Constitution within a history of democracy, democratic ideas and democratic contestations. It is an invaluable contribution to the history of constitutionalism.

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Alexandra Woods

Lawyers at the Front Line*

This is an impressive book that tells the stories of the legal figures involved in the events surrounding the 1895 Jameson Raid in the South African Republic (ZAR). It therefore deals with a well-known subject but from a new departure point, namely from character sketches of the lawyers involved. Some of these are already familiar to the South African legal profession, but Rogers crucially also includes a number of lesser-known figures. Divided into four parts, with the Raid occupying the central position, Rogers adopts a biographical approach to detail the legal-political dynamics of a marked moment in South Africa's long history of race politics.

Beginning with the historical setting in Part I, Rogers immediately provides a sense of context through the use of contemporary terminology, describing the polarisation between the Dutch and English populations, between the agrarian Boers (burghers of the ZAR) and the professional Uitlanders (»outsiders«, referring to the predominantly English-speaking newcomers attracted to the ZAR on the discovery of gold). Rogers discusses the reasons for the Jameson Raid, and finds that Uitlander discontent about the strict franchise laws – despite having been the main grievance propagated at the time – was probably only a minor part within a complex of British imperialist agendas and capitalist interests. But the ground that Rogers really sets in these chapters is that of the racial tensions between the white populations of South Africa in the late 19th century.

Part II introduces us to the *dramatis personae*, the lawyers involved in the centre, at the peripheries, and behind the scenes of the Jameson Raid and the ensuing treason trial. Part III continues their stories leading up to and during the Raid and the subsequent trial. Finally, Part IV considers their divergent careers in the aftermath of the trial. The biographies are replete with factual detail, evidencing extensive historical work on known legal figures such as J. G. Kotzé, John Wessels, Jacob de Villiers as well as William Henry Somerset Bell, the first editor of *The Cape Law Journal* (later *The South African Law Journal*), with additional insight into the roles of James Rose Innes and W. P. Schreiner. What is novel is the regard given to characters less familiar, such as Henry Hull, Edward Hutchison, Willem Van Hulsteyn, and Charles and James Leonard. Rogers dedicates three chapters to the story of Charles, an attorney and one of the lead conspirators, and his ultimate escape to England. He brings these lawyers to life through a careful process of quoting source material illustrative of their personalities. Thus, we learn that self-assurance and outspokenness were significant character

* Owen Rogers, Lawyers in Turmoil. The Johannesburg Conspiracy of 1895, Cape Town: Stormberg Publishers 2020, ix + 517 p., ISBN 978-0-6399892-5-9

traits of William Bell, for example, not only because Rogers tells us so, but through selected excerpts from Bell's commentaries in the *Cape Law Journal*. With this type of detailed attention, Bell and the others are granted their own voice, instead of the author speaking for them.

Despite such comprehensiveness, Rogers nevertheless assumes his readers to have a basic knowledge of South African legal history and the significance of the names and the period in the country's political history. The book is written for lawyers or legal historians, the writing itself revealing a judge's (or historian's) ability to dissect the facts, a balancing of perspectives, interspersed with even-handed commentary. Rogers shows how Charles Leonard's »escape«, for example, was considered cowardly compared to the bravery of those who remained behind to face their trial. Here, he does not downplay Leonard's or the other conspirators' character flaws, but gives their actions justification too. This balanced analysis, based directly on primary sources, not only makes for a reliable account, but also provides a glimpse into the complexity of values and sentiments of the time. What is also fascinating, and goes beyond simply an account of the legal practitioners' roles in the conspiracy, is the insight Rogers gives into the extent to which these lawyers were involved in high politics.

Part III brings us to the climactic event of the Raid and reveals Rogers' excellent grasp on a breadth of sources, in particular when describing the treason trial. From a comparison of dock examinations, personal accounts, law journal publications and newspaper reports, Rogers is able to draw a vivid picture of the gathering crowds in Johannesburg anticipating the coup d'état, the arrest and trial, and prison life, including the fact that Mark Twain (Samuel Clemens) visited them while in gaol, jokingly undertaking to suggest to President Kruger that their sentences be lengthened since Twain considered prison the ideal place to write. This sentiment he also mentioned to a journalist who, on this basis, published an article in which he was infuriated at the »soft life« of the prisoners, leading to a reduction in their rations! Rogers stitches together various sources to relate these details. This is standard historical methodology, but particularly necessary for work on 19th-century law cases. Sources beyond the written case law reports have to be taken into account largely because reported judgments came relatively late to South Africa. The first full publication was *Watermeyer's Reports*, published in the Cape of Good Hope in 1858, which covered cases of the Cape Supreme Court decided in 1857. While *Menzies' Reports* covered 30 years of court cases, beginning in 1828, they were published only posthumously in 1868. Transvaal law reporting began even later, with Kotzé's *Cases Decided in the High Court of the Transvaal Province, with table of cases and alphabetical index* in 1885. Due to this late, and then limited, coverage, judges often relied on handwritten notes, most of which have probably not survived. Moreover, the printed reports now available to legal historians likely contain many inaccuracies, as they were mainly related by news reporters or only written for publication years later. As a result, and as Rogers himself acknowledges, the accuracy of the published arguments and judgments during this time is not as reliable as the verbatim transcripts we have today. Indeed, Rogers shows this by comparing differing *ex tempore* reports of the Jameson trial. In doing so, he highlights the challenge of these sources, but at the same time meets this challenge by careful analysis and an acknowledgment of the biases on all sides. This is a humble approach, which has resulted in a work of integrity.

The book is structured by chapters that are dedicated either to one or to a number of the lawyers involved in the Johannesburg conspiracy. In following the practitioners in their diverging routes after the trial, Part IV inevitably lacks the same level of personal, professional and political interconnections that were traced in the previous chapters. The absence of a centralising theme leads to a slightly staccato effect. However, while one could read the chapters of *Lawyers in Turmoil* in a piecemeal fashion to follow a particular individual's trajectory, say, the book is not comparable to an encyclopedia that can be opened on any page. Rogers' narrative weaves the biographies and events together. And although the strands may become looser towards the end, the dominant themes that run throughout the book are the vibrant political lives of these lawyers, the collegiality of the members of the profession towards each other despite very different political views, and Rogers' general esteem for their characters and professional careers. The issue of race is likewise an overarching theme, the tension seeming as visceral at times as in the later years of South Africa's history. Of course, adding the perspective of other

races would not have been feasible in a book already voluminous, although Rogers does occasionally mention the black, Chinese and Indian positions. However, while the scene remains white and thus partial, Rogers, in bringing lawyers to the front line of his analysis of the Jameson Raid, has contributed a careful and in-depth study in legal history to the history of identity and race politics in South Africa, a far from modest achievement.

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Pamela Alejandra Cacciavillani

Partenze senza destinazione: storie ed eredità di un esilio intellettuale*

Questo libro è un invito di Eva Elizabeth Martínez Chávez ad analizzare, e ripensare, la vita dei giuristi europei che hanno lasciato le loro terre per motivi politici, razziali e ideologici nel corso della seconda parte del XIX secolo. L'attenzione è fissata soprattutto sulla storia dei giuristi spagnoli giunti in Messico a causa della guerra civile spagnola (1936–1939). Martínez Chávez spiega che la guerra perduta e la violenza del regime di Franco sono punti cardinali dell'esilio più grande della storia di Spagna: l'esilio repubblicano del 1939.

Il testo è suddiviso in tre parti intitolate *»El éxodo europeo de entreguerras«*, *»En búsqueda de un nuevo destino« e »Tierra de encuentro y construcción«*. La prima parte permette al lettore di ripercorrere diversi territori europei come l'Italia, la Germania, la Francia e la Spagna, tutti paesi dove l'autoritarismo, e l'intolleranza, distrussero e cambiarono le vite di migliaia di persone. Da sottolineare qui è la riflessione sulle vite dei giuristi fondamentali nella formazione del pensiero giuridico contemporaneo occidentale. Tra di loro spiccano nomi come: Tullio Ascarelli, Norberto Bobbio, Marcello Finzi, Werner Goldschmidt, André Gros, Hermann Heller, Hans Kelsen, Roger Picard, Silvio Trentin.

La molteplicità delle esperienze analizzate non solo mostra l'esilio spagnolo come un fenomeno più ampio, ma mette anche in chiaro le relazioni che già esistevano fra i giuristi europei. Si può dire che queste relazioni formavano una infrastruttura internazionale che, ad oggi, ha fornito la circolazione del pensiero giuridico. Il continente americano occupava uno spazio centrale in questa rete intellettuale. L'autrice fa un bilancio approfondito, dato che c'erano tante Americhe. In questo spazio geografico c'erano paesi privi di libertà come la Repubblica Dominicana, altri dove l'esistenza di una comunità di connazionali svolgeva un ruolo chiave nella scelta della destinazione, come l'Argentina. Inoltre, nel concetto di America c'erano anche gli Stati Uniti, spazio chiave per l'accoglienza della comunità giuridica tedesca. Così, mentre l'Europa attraversava un periodo difficile, l'America era pensata come uno spazio ricco di opportunità. Nessuno di questi esiliati conosceva il destino finale del viaggio e nemmeno la durata, l'unica certezza era la partenza.

In questo contesto, la seconda parte del testo presenta il Messico come uno spazio cruciale per i repubblicani spagnoli per diversi motivi; ad esempio, la politica sviluppata dal presidente Lázaro Cárdenas, la posizione della delegazione messicana nella Società delle Nazioni e il corpo diplomatico messicano specialmente in Spagna e in Francia. Per quanto concerne l'accordo tra la Francia e il Messico (*Acuerdo Franco-Mexicano*) si può dire che questo quadro giuridico non solo garantiva protezione ai rifugiati spagnoli che arrivavano in

* Eva Elizabeth Martínez Chávez, España en el recuerdo, México en la esperanza. Juristas republicanos del exilio, Madrid: Dykinson 2020, 343 p., ISBN 978-84-1324-773-1

Francia, ma anche al loro arrivo in Messico. Tuttavia, c'era una resistenza a questa politica di accoglienza in territorio messicano, l'opposizione si poteva leggere nelle notizie dei principali giornali. L'autrice spiega che gli argomenti erano diversi e distingue fra la paura della popolazione locale, che vedeva in questo approdo un rischio per i lavoratori, e il pensiero politico di destra. I repubblicani spagnoli erano pensati come una risorsa per rinforzare la sinistra, così fu necessario definire il ruolo politico degli esiliati. Martínez Chávez sottolinea e analizza diversi testi giuridici (*Ley General de población*, *Tablas Diferenciales*) che spiegano la situazione giuridica dei repubblicani. Specialmente lo studio dell'articolo 33 della costituzione del 1917 che chiaramente proibiva la partecipazione degli stranieri alla vita politica. Inoltre, lo stesso testo prevedeva l'espulsione di quest'ultimi. Senza quest'analisi non si può comprendere approfonditamente l'avviso di allontanamento per questioni politiche inviato a Luis Recaséns Siches da parte di Alfonso Reyes.

Possiamo affermare che l'aspetto principale della terza parte di questo libro è mostrare l'influenza nel mondo intellettuale messicano di un tipo particolare di esiliati spagnoli: laureati e *doctores* (l'equivalente dei dottori di ricerca) in Giurisprudenza che avevano lavorato come docenti universitari nel campo del Diritto. Con lo scopo di ricostruire questo contesto l'autrice analizza diverse situazioni. Nel caso di Rafael Altamira, ad esempio, vediamo un giurista che già aveva relazioni con il Messico e altri paesi americani prima del suo esilio. Martínez Chávez ha trovato nella sua documentazione migratoria i vantaggi derivati da queste relazioni. In questo caso parliamo di un invito della *Secretaría de Educación Pública* ad Altamira a lavorare esclusivamente nella sua professione. Invece altri giuristi che giunti in Messico non ebbero l'opportunità della docenza, come Moisés Gamero che aprì una pasticceria. Nel mezzo di questo scenario l'autrice analizza diverse esperienze, ad esempio, giuristi che si inserirono come docenti universitari, altri che collaborarono con il governo e infine quelli che aprirono studi legali.

L'autrice interpreta e analizza l'ambiente intellettuale che esisteva quando giunsero i giuristi repubblicani, occupandosi principalmente de *La Escuela Nacional de Jurisprudencia* e *La Escuela Libre de Derecho*. Allo stesso tempo spiega che le riviste giuridiche erano importanti per la diffusione del diritto nazionale, specialmente dei codici civile del 1870 e penale del 1871. In tutti questi spazi e anche in altri gli esiliati trovarono un'opportunità. Martínez Chávez considera che l'integrazione più forte dei giuristi repubblicani era evidente in tre istituzioni: *La Casa de España / El Colegio de México*, la casa editrice *Fondo de Cultura Económica* e anche nelle facoltà dell'*Universidad Autónoma de México*. Attraverso lo studio delle vicende di queste istituzioni, l'autrice riconosce i frutti del lavoro di questi giuristi sottolineando esempi di traduttrici, autori di articoli, creazione di centri di ricerca, organizzazione di seminari, creazione del corso di dottorato in Giurisprudenza e molti altri.

Così si capisce perché il testo non parla degli avvocati che dopo essere arrivati in Messico si allontanarono dal mondo del Diritto, ma non si analizza il caso delle giuriste che giunsero nel paese latino-americano.

Alla fine del suo libro Martínez Chávez dice »ho un debito storico che devo saldare presto« (301). Di che debito parla? Chi sono i creditori di questo debito? Analizzare le storie delle giuriste spagnole che giunsero in territorio messicano è il debito che ha l'autrice con esse. Tutto ciò lo si può notare nella copertina del libro: tutti i giuristi rappresentati sono uomini. Non bisogna sottovalutare questo aspetto; le donne che hanno vissuto durante il regime di Franco subirono una retrocessione in quanto ai loro diritti e alla loro condizione sociale. Citando le parole di Vázquez Osuna »la donna durante il franchismo era un'ombra della [donna] repubblicana«.[1] Sebbene l'autrice raccolga i nomi delle giuriste come, ad esempio, María Luisa Algarra Coma, Florentina Boadella Glota, Ascención Chirivella Marín, Marta Dutrem Domínguez, María Godas Vila, Victoria Kent, Ángela Selke de Sánchez y María Soteras Mauri de Vilalta, nel testo non si raccontano le loro storie e non si parla nemmeno si parla dei loro pensieri giuridici.

1 Federico Vázquez Osuna, Las primeras mujeres juezas y fiscales españolas (1931–1939): Las juristas pioneras, en: ARENAL 16,1 (2009), 133–150 (136).

Nella storiografia il silenzio è sempre pericoloso ma lo è di più nella storia del Diritto, perché raccontare la storia dello sviluppo del pensiero giuridico di una nazione senza riflettere sul ruolo delle donne ha una conseguenza: un diritto androcentrico. Come pagare questo debito? Nonostante l'autrice abbia trovato la forma di saldarlo raccontando una »storia di loro«, non risolve il problema perché come ha già detto Scott questa narrazione »può essere letta sotto forma separatista«.[2]

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Massimo Meccarelli

Legalità sostenibile*

L'esperienza della legalità negli ultimi due secoli di storia rappresenta, per alcuni aspetti, ancora un problema storiografico aperto. Sono stati molto studiati i presupposti storici e teorici che hanno giustificato l'idea di organizzare la produzione del diritto intorno al primato della legge e, insieme, l'idea di definire l'ordine costituzionale sulla base di un principio di separazione dei poteri. Similmente hanno conosciuto rinnovati sviluppi le indagini volte a studiare i processi di costruzione dei sistemi normativi nati da questo passaggio storico. Tutto ciò ha contribuito a fornire un quadro chiaro della performatività del dispositivo ›legge‹, cioè delle modalità con cui essa, a partire dal XIX secolo, è divenuta il perno dei sistemi giuridici in atto. Ciò nonostante restano ancora aspetti da chiarire, soprattutto se si considera il versante opposto, che riguarda i limiti del principio di legalità o, per meglio dire, i vincoli alla realizzazione del programma di riduzione del diritto nella legge. Le ricerche che hanno assunto tale approccio analitico, hanno mostrato come questi vincoli abbiano, essi stessi, contribuito a determinare la prospettiva di senso del progetto di conversione in sistemi monistici, degli ordinamenti basati su un impianto multinormativo e sul diritto giurisprudenziale.

La storia della legalità in età contemporanea, è, dunque, anche una storia dei problemi di sostenibilità, che il programma della riduzione del diritto nella legge ha posto. Essa può essere svolta portando l'attenzione su quegli ambiti necessariamente dinamici dell'ordinamento, dove la rigidità del monismo giuridico è stata messa sotto scacco.

È su tale crinale storiografico che potremmo collocare l'indagine di Malte Becker su *Notverordnung* e decreto legge. L'oggetto – la decretazione d'urgenza – infatti, rappresenta un momento di criticità del procedere della produzione normativa di fronte ai problemi dell'urgenza, della necessità e dell'eccezione. Esso costituisce un momento di distorsione del principio di legalità; al contempo, è un elemento costante, quasi che l'esperienza del primato della legge non sia immaginabile senza quell'altrimenti, che in parte riprende alcuni suoi aspetti caratterizzanti (soprattutto l'elemento potestativo, per cui la produzione del diritto è conseguenza di una volontà politica che pone la norma) ma in realtà ne nega altri altrettanto rilevanti (ad esempio la condizione che tale decisione politica produttiva di normatività, si esprima in regime di separazione di poteri).

Il problema di base del libro è costituito dalla comparazione di due esperienze: quella della Germania e dell'Italia del secondo Novecento. Seppure abbiano in comune alcuni profili di ordine costituzionale e sistematico (entrambe escono da una dittatura; entrambe si rifondano su un momento costituente, entrambe organizzano il progetto per

2 Joan W. Scott, Género e historia, México 2008, 42.

* Malte Johannes Becker, Notverordnung und Decreto-Legge. Der Ausnahmezustand in den Verfassungstraditionen Deutschlands und Italiens, Tübingen: Mohr Siebeck 2020, XIV, 255 p., ISBN 978-3-16-159362-8

la democrazia sul principio di legalità e sulla superiorità della Costituzione), esse divergono nel modo in cui hanno risolto il problema del potere di decretazione del Governo. La Costituzione della Repubblica italiana lo prevede e lo regola all'art. 77; la *Grundgesetz* tedesca si orienta per una più accentuata parlamentarizzazione del dispositivo della decretazione di urgenza.

La tesi del libro è proposta fin dalle prime pagine e poi ripresa in diverse parti e consiste nel rilevare una differente idea del diritto costituzionale nella giuspubblicistica che ha partecipato al momento costituente: in Germania sarebbe stata più forte la concezione giuspositivistica della Costituzione (rafforzata dal fatto che a partecipare al *Parlamentarische Rat* furono per lo più giuristi pratici); in Italia invece tra i giuristi costituenti (i quali provenivano prevalentemente dall'Università) era maggiormente rappresentato l'istituzionalismo.

Per illustrare questa lettura del problema l'Autore non si accontenta di ricostruire i dibattiti nella fase costituente in Germania e in Italia. Egli, opportunamente, prende le mosse dalle origini ottocentesche di questi due Stati, fornendo una ricostruzione diacronica della regolazione del potere di decretazione. Per la Germania in riferimento alla fase preunitaria e al *Deutsches Reich* ci si sofferma sull'impostazione metodologica e giuspositivistica promossa da Gerber e Laband e sulle soluzioni adottate in particolare nella *Preußische Verfassung* e nella *Reichsverfassung*; si osservano poi la Repubblica di Weimar, quando nell'ambito della *Staatsrechtslehre* si svolge la nota *Methodenstreit* e la fase del Nazionalsocialismo, quando la dottrina del *Führerwille* proposta da Carl Schmitt, trova un campo di applicazione. Alla luce di queste premesse viene svolto poi lo studio del dibattito costituente del secondo dopoguerra fino alla *Notstandverfassung* del 1968, che conferma l'opzione per la piena parlamentarizzazione del *Notstandsrecht*.

Riguardo all'Italia, con una scansione temporale simile, si illustra la problematica a partire dal Regno d'Italia – dove la regolazione del potere di decretazione viene affidata soprattutto alle prassi costituzionali e ad alcune prese di posizione giurisprudenziali della Cassazione, che riconoscono all'Esecutivo la prerogativa di emanare norme con forza di legge –, per poi considerare il crepuscolo dello Stato di diritto nei primi decenni del XX secolo, quando si affermano le teorie di Santi Romano che individuano nella necessità la fonte e il limite di legittimazione di quel potere; si passa poi al ventennio fascista, dove il problema riceve una sistemazione legislativa, nel quadro delle riforme per lo Stato totalitario. Lo studio del dibattito costituente italiano rappresenta la tappa finale dell'itinerario.

Grazie a tale ampia ricostruzione l'autore può argomentare la tesi della diversa impostazione, quanto a concezioni e metodo, della giuspubblicistica italiana rispetto a quella tedesca, individuando il profilo decisivo nella differente base assiologica presupposta dalle dottrine istituzionalistiche. In particolare la lettura data da Schmitt al problema avrebbe favorito lo stabilirsi di un nesso forte tra istituzionalismo e dottrine naziste. Ciò spiega la scelta di campo per il giuspositivismo nella progettazione della democrazia in Germania.

Nell'insieme l'analisi appare persuasivamente svolta e la trattazione ben costruita. Alcune questioni restano, però, solo in parte indagate o appaiono risolte in modo impreciso. Ad esempio, se risulta chiaro che la dottrina schmittiana sul potere di decretazione abbia compromesso le possibilità di impiego di un approccio istituzionalistico nella fase costituente post-bellica, meno spiegata appare la dinamica di superamento delle concezioni weimeriane e democratiche dell'istituzionalismo e la loro mancata riemersione nel dibattito costituente per la *Grundgesetz*. In relazione all'Italia l'analisi appare talvolta imprecisa, come ad esempio quando, con una riduzione evidentemente semplificatoria del quadro (la cui complessità però risulterebbe preziosa per capire il dibattito nel secondo dopoguerra) si confonde la scienza giuridica durante il fascismo con la scienza giuridica fascista.

Nel suo complesso, a parte i rilievi di questo tipo, il libro appare riuscire nel proprio intento, offrendo un utile studio comparativo del problema della decretazione d'urgenza e della riduzione dello spazio dell'eccezione nel formato del diritto positivo. Inoltre da esso si possono cogliere spunti per ulteriori percorsi di ricerca.

Uno è appena accennato nel volume e riguarda il rapporto tra gli orientamenti dottrinali che determinano i regimi della legalità e la tradizione. L'Autore, nel registrare la presenza di riferimenti allo *ius commune* nella giuspubblicistica italiana, ricava una schematica giustapposizione tra Italia e Germania (*Tradition in Italien, Technik in Deutschland*), che forse meriterebbe approfondimenti. Nella scienza giuridica italiana il riferimento alla

tradizione è ricorrente, ma soprattutto risponde a strategie discorsive di volta in volta diverse; inoltre lo stesso approccio formalistico tedesco è a sua volta retto proprio dall'invenzione di una tradizione, quella romanistica. Sarebbe, dunque, interessante valutare il rilievo dei diversi usi del passato e del suo portato giuridico, nella soluzione del problema della sostenibilità della legge.

Ci sono poi altri percorsi che fuoriescono dall'oggetto nel libro ma che proprio quest'indagine stimola a considerare. Si pensi al ruolo giocato dalla creazione della giurisdizione costituzionale e delle Corti costituzionali (tratto, per altro, comune a Italia e Germania). Si pensi inoltre alla possibilità di un allargamento dell'analisi comparativa ad altre realtà, (ad esempio la Spagna), la cui storia costituzionale, come quella italiana e tedesca, conosce una fase di involuzione dittatoriale nel Novecento e nelle quali lo stesso processo di convergenza nel formato monistico della legalità durante il XIX secolo, ha avuto uno svolgimento complesso.

Nuovi temi possono emergere a partire dalla lettura di questo volume. Anche in ciò esso offre un contributo allo sviluppo del dibattito storiografico.

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Ruth Dukes

A Forward-Looking History of the German Works Constitution*

Rendered into English, the term »works constitution« may require some explanation. It is not a term of art in English or American law, nor is it immediately obvious – except, perhaps, to someone with pre-existing knowledge of German labour law – to what it might refer. Clues can be found in the work of the pioneering sociologists and scholars of *Industrial Democracy* (published 1897), Beatrice and Sidney Webb, who described freedom of association and factory legislation at the end of the 19th century as a »constitution« for the industrial realm. To wage labourers, they wrote, »the uncontrolled power wielded by the owners of the means of production, able to withhold from the manual worker all chance of subsistence unless he accepted their terms, meant a far more genuine loss of liberty, and a far keener sense of personal subjection, than the […] far-off, impalpable rule of the king.«[1] The legal recognition of collective bargaining and the gradual elaboration of a labour code signified the concession of a »Magna Carta« to the entire wage-earning class, and the extension of the values of liberty and equality from the political into the industrial sphere. A close reader of Otto Kahn-Freund's classic chapter on the *Legal Framework* of industrial relations may recall the passage wherein he writes of »the legal constitution […] if one may use that term« of the »factory or mine, office or workshop«. In England, where the law was silent at the time on worker representation and worker »voice« at the level of the single workplace, the legal constitution was »still that of an absolute monarchy to the rule of which its members have submitted by contract«.[2]

The works constitution is, then, the complex of legal rules and institutions which together serve to ensure that workplace decision making (or, at least, some specific types of decision making) proceeds *democratically*: with the participation of the workforce, rather than unilaterally by management. In Germany, the principal institution of the works constitution is the *works council*, representative of all workers at a particular place of work without any requirement for them to »sign up«, and regard-

* Wolfgang Däubler, Michael Kittner, Geschichte der Betriebsverfassung, Frankfurt am Main: Bund-Verlag 2020, 621 p., ISBN 978-3-7663-6934-5

1 Beatrice Webb, Sidney Webb, Industrial Democracy, London 1897, 841.

2 Hugh A. Clegg, Allan Flanders (eds.), The System of Industrial Relations in Great Britain, Oxford 1954.

less of the matter of their membership, or non-membership, of a trade union. »Works« – *Betrieb* – has been defined by the courts as »the organizational unit within which an employer, alone or with its employees with the help of technical and immaterial means, pursues over time certain work-related purposes that are not limited to the satisfaction of personal needs.« In plainer English, this denotes, as Kahn-Freund put it, the single factory or mine, office or workshop. According to the law, the works council has a suite of rights which ensures its participation in decision-making concerning a wide range of matters from working hours to health and safety. The term »works constitution« appears in the title of the statute that regulates the creation and functioning of the works councils: the *Betriebsverfassungsgesetz*, or Works Constitution Act. Dating back in its original form to 1952, the statute has a predecessor in the Works Councils Act of 1920, which itself had antecedents in the wartime legislation of 1914–1918 and the 19th century.

Publication of this new *History of the Works Constitution* has been timed to coincide with the centenary of the Works Councils Act on 4 February 2020. The authors' motivation in writing it was not only to mark that centenary, however, but also to give extended consideration to matters that have been at the centre of political conflict at several important junctures in Germany's history. Already in the Frankfurt Parliament of 1848, for example, workplace worker representation was debated in the context of proposals to institute new forms of economic democracy as well as political democracy. The establishment of committees was permitted in a draft law, but the Parliament was dissolved before the law could be implemented. Following the coalminers' strike in 1889, demands were made for the formation of works committees to be rendered obligatory in law. In line with Bismarck's plans for the curbing of socialist influence, Kaiser Wilhelm II agreed to these demands and provision was made in statute for the establishment of workplace worker committees (*Arbeiterausschüsse*), albeit not on a compulsory basis. In the face of employer opposition, the provision made little impact. During the First World War, the introduction of obligatory workplace worker committees was the cause of deep-seated conflict between the majority Social Democrats and leadership of the trade unions, on one side, and the left-wing opposition on the other – a conflict which continued to play out for the entire duration of the Weimar Republic. Following the November Revolution of 1918, the revolutionary workers' councils were for a short while symbolic of the fundamental question concerning the constitution of a new democratic Germany: should it involve a form of »council« (soviet) democracy, or should it be based upon parliamentary democracy? In 1945, immediately after the war had ended, a large number of works councils were created spontaneously by workers as an expression of a general will to create a new kind of democracy, one which would take precedence – this time – over the economy. The Works Constitution Act of 1972, which significantly extended the rights of the works councils and strengthened the role of trade unions in the workplace constitution, was the expression of a democratic awakening the like of which the Federal Republic was never to see again (6). What all this goes to show is that the works constitution is not a niche topic in Germany, something of interest only to specialists. It occupies a central position in the economy and in society, and forms an integral element of German history (6).

As they specify in their introduction to the volume, the authors' intention in presenting the history of the works constitution is to identify threads or pathways which indicate the route forward. A great deal of attention is devoted by them to the pre-history of the 1920 Act and they well demonstrate, too, that 19th-century developments in respect of workplace worker representation had forerunners in the self-help – we might say »mutual« or »friendly« – societies created by craft journeymen and coalminers in previous centuries. The book ends with consideration of the current challenges posed to the works constitution in an era of globalisation and digitalisation, when working relations are becoming ever more precarious. History teaches us above all, they write, that the old saying remains valid: »don't expect help from anyone but yourselves!« (7). An effective workplace constitution which makes work more humane can only endure when it is experienced by as many as possible of the affected actors as »theirs«. Despite the many setbacks, this has been achieved to some extent even in a globalised economy. To achieve it, still, in an age of digitalisation is one of the biggest challenges of our time.

Given the identity of the two authors it will come as no surprise that this is a very good book indeed. Wolfgang Däubler is Professor of German

and European Labour Law, Civil Law and Economic Law at the University of Bremen. Michael Kittner is emeritus Professor of Economic, Labour and Social Law at Kassel University and was for many years standing counsel to IG Metall and director of the Otto Brenner Foundation. For several decades now, they have been and remain two of the most prominent scholars of labour law in Germany. In this *History*, they adopt an interesting and fruitful approach to the analysis and storytelling which blends legal analysis with legal history and the sociology of work and the workplace. The starting point for their analysis is the observation that the workplace constitution is the expression of particular political and economic power relations that are shaped not only by the law but by the widely varying practices of different workplaces. The statutory rules and courts' interpretation of those rules comprise only one small part of the bigger picture. Legal rules are supplemented by many informal norms, which guide the actual behaviour of workplace actors. Given the impressive breadth of coverage in the book, and the authors' ambition to identify and explain long term trends and developments, the analysis is not always very detailed; however, thorough referencing provides helpful signposts for anyone who would like to know more.

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Leticia Vita

Teoría Pura del Derecho y filosofía del derecho en el siglo XXI*

Pensar a la Teoría Pura del Derecho como programa y como enfoque específico del derecho, es la propuesta principal de esta obra que reseñamos y que debe ser leída en sintonía con otras tres recientes publicaciones: la de los tomos 6 (*Veröffentlichte Schriften* 1920–1921) y 8 (*Veröffentlichte Schriften* 1922) de la obra completa de Kelsen (*Hans Kelsen Werke*), ambos editados por Matthias Jestaedt y el Instituto Hans Kelsen de Viena en 2020, y la de *Hans Kelsen in seiner Zeit* (Hans Kelsen en su tiempo), editado por Clemens Jabloner, Thomas Olechowski y Klaus Zeleny en 2019. Todas ellas demuestran que el interés por Kelsen y su teoría sigue absolutamente vigente.

Los 24 trabajos que integran esta obra fueron presentados a fines de 2018, en el encuentro de la sección alemana de la Asociación Internacional de Filosofía del Derecho y Filosofía Social (*Internationale Vereinigung für Rechts- und Sozialphilosophie*) en la ciudad de Freiburg. Sus editores son Matthias Jestaedt, profesor de la Albert-Ludwigs-Universität Freiburg im Breisgau y, como señalamos, editor de la monumental obra *Hans Kelsen Werke*; Ralf Poscher, director del Instituto Max Planck de Derecho Penal Extranjero e Internacional en Freiburg y Jörg Kammerhofer, profesor en la Facultad de Derecho de la Albert-Ludwigs-Universität y miembro del grupo de investigación Hans Kelsen.

El prólogo de esta obra destaca un aspecto no tan revisado de la obra de Hans Kelsen: el de su extensa resonancia en otras comunidades académicas. Existe un vínculo muy claro entre la vida de Kelsen, su destino como exiliado y la expansión de su obra en otras latitudes. Recordemos que Kelsen nació en Praga en 1881 y se mudó, a los pocos años, con su familia a Viena, donde vivió la mayor parte del tiempo hasta que se radicó definitivamente en Alemania en 1925. Con la llegada de Hitler al

* Matthias Jestaedt, Ralf Poscher, Jörg Kammerhofer (eds.), Die Reine Rechtslehre auf dem Prüfstand / Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions. Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie vom 27.–29. September 2018 in Freiburg im Breisgau, Stuttgart: Franz Steiner Verlag 2020, 427 p., ISBN 978-3-515-12568-0

poder su destino de exiliado fue confirmado. Si bien recibió ofertas para trabajar en la *London School of Economics* y la *New School of Social Research* en New York, escogió la oferta del *Institut Universitaire de Hautes Etudes Internationales* en Ginebra, por sentirse más cómodo con el idioma francés que con el inglés.

Mientras daba clases en Ginebra, Kelsen alternaba sus seminarios con las clases que dictaba en la Universidad de Praga. Sin embargo, allí recibiría ataques por su origen judío y sus ideas. El estallido de la guerra finalmente lo obligó a trasladarse a los Estados Unidos, donde viajó sin ninguna oferta académica firme. En 1941 ingresó a Harvard como profesor visitante y, en el verano de 1942, recibió una invitación como profesor visitante en la Universidad de California, en Berkeley.

Este recorrido que habla de la »perdida y ganancia« de la vida de los exiliados académicos, ha sido extensamente trabajado por Peter Burke en el marco de su historia del conocimiento.[1] La necesidad de aprender bien un nuevo idioma a edad avanzada, es uno de los principales obstáculos que se presentan. Como lo destacan los editores de la obra que reseñamos, este aspecto no es menor a la hora de entender el alcance y la profundidad de la recepción global kelseniana.

A Kelsen, enfatizan, el nazismo no solo le quitó su nacionalidad sino también su lengua. Luego del exilio, Kelsen tuvo que producir académicamente en otros idiomas (primero francés y luego inglés) y ya nunca lo haría con la comodidad que le brindaba su lengua materna. La *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Teoría Pura del Derecho. Introducción a la problemática científica del derecho), fue publicada, precisamente, por primera vez en 1934 en idioma alemán. Es una obra del exilio que sería de nuevo editada recién en 1960, en el marco de cierto redescubrimiento de Kelsen en la Alemania de postguerrra.

De allí la importancia de las traducciones, sobre todo las buenas, para comprender cabalmente el nivel de la expansión y discusión de su obra y no caer en los consabidos malentendidos. Los editores destacan este punto con especial énfasis, y allí nos interesa detenernos. Para el ámbito hispanohablante destacan la figura protagónica del español Luís Legaz y Lacambra, quien fuera el principal vector de la obra de Kelsen en España, pero también en gran parte de América Latina, en donde esas traducciones circularon muy tempranamente en manos de juristas y profesores universitarios. También señalan los nombres de los argentinos Carlos Eduardo Alchourrón y Eugenio Bulygin, quienes en los años 70 consolidaron un verdadero núcleo de discusión de la teoría kelseniana en Argentina. No mencionan, sin embargo, el excelente trabajo de traducción de la segunda edición de la Teoría Pura del Derecho desarrollado por Roberto José Vernengo, publicado por la editorial Porrúa de México. Para el ámbito anglosajón, finalmente, destacan también el rol de la traducción que llevaron a cabo Bonnie Litschewski Paulson y Stanley Paulson de la primera edición de la Teoría Pura del Derecho.

La obra reseñada se ocupa de algunos de los muchos malentendidos (pero también de ciertos consensos) que se han generado respecto de los conceptos clave de la *Teoría Pura del derecho* de Kelsen. Muchos de ellos han sido generados por traducciones menos atentas, el desconocimiento del idioma alemán o por el abordaje de la teoría kelseniana sin prestar atención suficiente a otros trabajos y nombres de la Escuela de Viena. Este aporte, por si solo, convierte a esta obra colectiva en una lectura de gran interés para quienes estudiamos la teoría jurídica de la República de Weimar.

Los trabajos compilados han sido escritos por 25 especialistas (de ellos, tan solo 4 son académicas mujeres) entre los que se encuentran nombres reconocidísimos de la filosofía del derecho pero también jóvenes de destacado perfil y diversas latitudes. Se trata de 24 capítulos (algunos en inglés y otros en alemán) que se organizan en 4 secciones. La primera, titulada *Die Grundlagen der Reinen Rechtslehre* (Los fundamentos de la Teoría Pura del Derecho) incluye 6 trabajos que se abocan a conceptos centrales de la teoría kelseniana, entre los que se destaca un trabajo de Robert Alexy en el que revisa

1 En particular en Peter Burke, Pérdidas y ganancias. Exiliados y expatriados en la historia del conocimiento de Europa y las Américas, 1500–2000, Madrid 2018.

la teoría de Kelsen en el sistema del no-positivismo para concluir que el tipo de positivismo que mejor encaja con el no-positivismo es el de Kelsen.

En la segunda sección, con el título *Rechtstheorie* (Teoría del Derecho), 5 capítulos se ocupan de las relaciones que la teoría kelseniana plantea entre las normas, y en particular el trabajo de Thomas Hochmann recoge la pregunta por la tarea hermenéutica del jurista en el marco del debate interno de la escuela de Viena.

La tercera, titulada *Die Anwendung der Reinen Rechtslehre auf Rechtsordnungen* (La aplicación de la teoría jurídica pura a los sistemas jurídicos), incluye 5 capítulos que piensan a la Teoría Pura en contextos particulares. Aquí me interesa destacar el aporte de Lena Foljanty, quien innova al mirar la teoría pura en el campo del derecho privado y la relación entre la concepción kelseniana del derecho privado con su idea sobre el rol del poder judicial en la confección de normas y de la democracia.

Por último, la cuarta sección titulada *Ideengeschichtlicher Kontext* (Las ideas en su contexto histórico) revisa aspectos poco tratados del contexto histórico de la teoría pura, incluyendo 8 capítulos entre los que se destacan el de Mario Losano sobre la recepción kelseniana en Italia y el de Stanley Paulson que interpreta la idea de *Grundnorm* (norma básica) de Kelsen en clave de reacción a las ideas de Walter Jellinek.

El balance de la lectura de esta obra es más que atrayente. *Die Reine Rechtslehre auf dem Prüfstand* es un aporte actualizado al campo de estudio sobre la obra de Kelsen en general, y de la Teoría Pura en particular, que reúne al mismo tiempo la mirada de especialistas consagrados y la de jóvenes investigadores. Aporta una visión internacional pero al mismo tiempo propiamente alemana y, sobre todo, despeja más de un malentendido y aporta elementos de discusión para la filosofía del derecho en el siglo XXI.

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Jean-Louis Halpérin

De Bonn à Berlin*

Professeur émérite à la Freie Universität de Berlin, bien connu par ses travaux d'histoire du droit comme par ses prises de position politiques, Uwe Wesel livre dans cet ouvrage une étude sur plus de 70 ans d'évolution du droit dans le cadre de la République fédérale d'Allemagne. Non seulement cette analyse est fort utile pour les lecteurs non-allemands (comme l'auteur de cette recension), mais elle suscite un grand intérêt sur la problématique (héritée de Montesquieu) du lien entre un régime constitutionnel et l'ensemble des règles de droit qui sont appliquées ou modifiées durant ce régime. Elle renouvelle aussi la question de l'histoire contemporaine du droit poussée jusqu'au temps présent par un observateur qui a lui-même vécu toute la période étudiée. Disons tout de suite que, sur cette seconde question, Uwe Wesel réussit le pari de combiner la nécessaire distanciation scientifique avec l'expression de ses propres opinions laissant apparaître un jugement politique. L'auteur ne cache pas ainsi qu'il considère scandaleuse la complaisance dont les magistrats allemands ont fait preuve dans les années 1960 et 1970 à l'égard de leurs prédécesseurs de l'époque nazie, de même qu'il trouve injuste (en sens inverse) la sévérité des poursuites contre les anciens juges de la DDR après la réunification. Ce jugement de valeur, que l'on peut comprendre et partager, ne donne nullement à l'ouvrage le caractère d'un écrit partisan, l'auteur se gardant de toute appréciation dévalorisante sur les personnes des gouvernants ou des juristes étudiés. L'étude

* Uwe Wesel, Rechtsgeschichte der Bundesrepublik Deutschland, München: C. H. Beck 2019, 276 p., ISBN 978-3-406-73439-7

est par ailleurs très technique quand elle aborde des questions relativement pointues de droit civil, commercial ou pénal.

En l'absence d'introduction sur la méthodologie et la problématique de l'auteur, il faut suivre le plan chronologique de l'ouvrage pour en dégager le sens au-delà des renseignements fort utiles qu'il fournit sur les principales lois adoptées de 1949 à nos jours, comme sur certaines évolutions relevant davantage de la sociologie du droit. La première des quatre périodes étudiées est celle de l'occupation par les Alliés de 1945 à 1949, c'est-à-dire jusqu'à la création de la BRD. Pour l'auteur, la capitulation sans conditions créait une situation inédite non prévue par les dispositions de la Convention de la Haye de 1907 sur les territoires occupés, une convention qui avait perdu toute portée avec le régime nazi, l'Holocauste et la guerre à outrance (y compris sous la forme des bombardements alliés frappant les civils). La rupture juridique pouvait être interprétée, comme le firent Kelsen et Nawiasky, comme la fin de tout État allemand. Mais les Alliés, comme les Allemands qui devaient continuer à vivre (contrairement à ce que laisse entendre l'expression de *Stunde Null*), admirent certaines formes de continuité avec la situation antérieure au 9 mai 1945: la confirmation d'un grand nombre de fonctionnaires subalternes, le rétablissement de la structure des communes et des *Länder* puis des tribunaux et le maintien de l'essentiel du droit allemand en vigueur (des règles du BGB à la plupart de celles sur le mariage élaborées en 1938), à l'exception des principales lois nazies qui étaient abrogées. Les processus de dénazification, assez rapidement délégués aux autorités allemandes après les procès des tribunaux militaires et de Nuremberg (dont l'auteur estime le jugement globalement juste, tout en relevant l'indulgence des sentences dans le *Juristenprozess* de 1947, comme le nombre disproportionné de procès organisés par les Français dans leur petite zone d'occupation) mettent en valeur les différences qui n'ont cessé de se creuser jusqu'en 1949 entre les zones d'occupation de l'Ouest et celles de l'Est, avec aussi la constitution de la Bizone et l'échange de monnaies en faveur du D-Mark.

Sans s'appesantir sur les débuts de la Guerre froide, la seconde partie sur l'époque d'Adenauer et Erhard (1949–1966) part des succès de la politique d'Adenauer pour rétablir la souveraineté de la République fédérale (notamment sur la Sarre) et l'intégrer dans l'OTAN comme dans la CECA. C'est seulement après avoir envisagé les difficultés des dernières années du gouvernement Adenauer, puis celles de son successeur beaucoup moins habile en politique qu'en économie, qu'est analysé le processus d'adoption de la *Grundgesetz*. Beaucoup plus que sur les caractères originaux de la Loi fondamentale, l'auteur insiste sur les développements du droit administratif, du droit pénal, du droit de la famille et du droit social au regard de la jurisprudence du BGH et du BVerfG. La thèse, très convaincante, consiste à montrer que la jurisprudence constitutionnelle a été déterminante pour faire rayonner la constitution sur le droit privé, notamment en imposant la réforme des règles du BGB sur les relations entre époux. En même temps, le BVerfG s'est montré plus conservateur en matière de droit pénal, laissant perdurer la répression à l'égard des homosexuels (avec le chiffre considérable de 50 000 jugements de 1953 à 1965). Cette seconde partie donne lieu à quelques notations de sociologie du droit sur l'application limitée de la loi de 1957 sur les licenciements ou sur les revirements de Nipperdey à propos du traitement des grèves.

La troisième partie traite de la période qui va du premier gouvernement de Grande coalition en 1966 jusqu'à la réunification de 1990. À nouveau les transformations du droit, initiées par les sociaux-démocrates ou par les démocrates-chrétiens, sont mises en relation avec les évolutions politiques et jurisprudentielles. Les nouvelles lois sur la famille, la cogestion des entreprises de plus de 2 000 salariés ou la réforme du droit pénal infléchissent nettement des règles d'usage quotidien. L'auteur note qu'à la même époque, les professions juridiques sont peu affectées par ces changements: la réforme des études de droit (1971–1984) échoue et le développement quantitatif de la profession d'avocat ne conduit à des réformes que dans les années 2000.

La quatrième partie portant sur les changements intervenus dans le droit allemand depuis la réunification est une des plus longues. Elle n'occulte pas les débats sur les crises traversées par le BverfG (sur les crucifix dans les écoles bavaroises, sur l'affaire *Soldaten sind Mörder*, sur l'avortement), sur les nouvelles étapes de l'intégration européenne et les réserves qu'elle peut susciter, sur les lois Hartz (qui n'ont pas créé une nouvelle pauvreté, mais n'ont pas résorbé l'ancienne selon l'auteur) ou sur l'accueil des réfugiés lors de la crise migratoire de 2015. À nouveau, les principales

réformes sont replacées dans leur contexte: la refonte du droit des obligations dans le BGB en 2002 est mise en relation avec l'évolution de la jurisprudence sur les parties en état de faiblesse dans un contrat (l'affaire de la caution jugée par le BVerfG en 1993), tandis que l'ouverture du mariage aux personnes de même sexe (2017) est considérée comme une suite logique du partenariat de 2001. En matière de droit pénal, l'auteur accorde une large place aux décisions du BVerfG et de la Cour européenne de Strasbourg sur la rétention de sûreté (*Sicherungsverwahrung*), à la discussion des thèses de Günther Jacobs sur le droit pénal de l'ennemi et sur les réponses proposées en matière de lutte contre le terrorisme, avec les controverses relatives à un possible recours à la torture. S'il est relevé que le taux d'incarcération en Allemagne est inférieur à ce qu'il est en France, en Espagne au Royaume-Uni et plus encore aux États-Unis, on peut regretter que l'analyse ne soit pas plus poussée sur le développement d'une législation sécuritaire et sur les garde-fous que le BVerfG a développés, notamment en matière d'interception des conversations privées.

C'est dans les trois dernières pages, en guise de conclusion, que l'ouvrage s'interroge sur le fondement juridique de la BRD. Pour l'auteur la République fédérale est une création des puissances occidentales, à l'origine imposée de l'extérieur aux Allemands. Ce régime s'est consolidé à la faveur du miracle économique et démocratique amorcé dès les années 1950. L'État de droit s'est enraciné grâce à la jurisprudence du BVerfG et l'on doit rester optimiste dans les capacités de cette juridiction à faire face aux périls renouvelés de la xénophobie et de l'antisémitisme.

L'ouvrage postule ainsi une grande continuité dans le développement du droit allemand sous le régime de la BRD. Cette thèse peut être discutée au regard de l'évolution de la société allemande sur plus de deux générations qui a entraîné notamment d'importants changements dans les professions judiciaires et juridiques. On peut se demander dans quelle mesure la prédominance des juges et des professeurs de droit, encore au cœur de la composition du BverfG, n'a pas été entamée par la montée en puissance d'avocats de plus en plus nombreux. Plus encore, se pose la question de savoir si la réunification n'a pas transformé le régime de Bonn en une république de Berlin qui présenterait une nouvelle configuration juridique.

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Hans-Peter Haferkamp

Der Jurist als solcher*

Welche Rolle spielten Juristen in der DDR-Diktatur? Diese Frage beschäftigt Inga Markovits schon ein langes Forscherinnenleben. Bereits 1969[1] lautete ihre Antwort: Die DDR-Juristen blieben Juristen.

Nun hat sich Markovits ein neues »Labor« (16) gesucht: Die Juristische Fakultät der Humboldt-Universität zu Berlin vor 1989. Und zugleich erweitert sie durch den vergleichenden Blick auf die NS-Zeit die These: Juristen blieben in allen deutschen Diktaturen des 20. Jahrhunderts ganz normale Juristen.

Wie auch sonst in ihren neueren Büchern, sucht Markovits nicht die Nähe zur Forschung. Sie begnügt sich mit dem »Vertrauen meiner Leser in die Glaubwürdigkeit meiner Forschungen« (10), weist die verwendeten Archivalien konkret nicht nach, interessiert sich wenig für die Sekundärliteratur und komponiert aus ihren Aktenstudien ein gut lesbares Buch für das breite Publikum. Nur Spezi-

* Inga Markovits, Diener zweier Herren. DDR-Juristen zwischen Recht und Macht, Berlin: Christoph Links Verlag 2020, 239 S., ISBN 978-3-96289-085-8

1 Inga Markovits, Sozialistisches und bürgerliches Zivilrechtsdenken in der DDR, Köln 1969.

alisten können daher beurteilen, was an diesem Buch neu ist.

Ihre »Protagonisten« (9 und durchgehend) sind die Dozenten an der HU und die sie umgebende Politik. Darüber, was konkret gelehrt wurde, wie geprüft wurde, wie das Studium ablief,[2] was man seitens der HU in die DDR-Gesetzgebung einspeiste und welche Folgen dies für DDR-Bürger hatte, darüber erfährt man wenig.

Im Kern geht es um die internen politischen Auseinandersetzungen und die Konflikte mit der Partei. Es entsteht das Bild durchaus sympathischer Idealisten. Da sind die »young Turks« (155) der 1950er Jahre, denen Markovits auch persönlich oft begegnet ist: Von einem gerechten Sozialismus träumend, entwickeln Intellektuelle wie Klenner, Mollnau und Schöneburg »intelligent, belesen und politisch rabiat« (34) früh mutig eigene Ideen und werden dafür gemaßregelt. Auch Graefrath ist »Opfer der Babelsberger Konferenz« (76) und träumt vom freien sozialistischen Gespräch (157). Da ist der Strafrechtler Lekschas ein »fähiger und stolzer Mann« (175) und auch ein »Schlitzohr« (180), und der Wirtschaftsrechtler Heuer: »jung, energisch« (175). Über allen thront der »bürgerliche« Nathan, der sich viel erlauben kann, alles Menschen voll »intellektuelle(r) Neugier« (179). Wann immer es die politische Situation zulässt, findet Markovits »Strategien, mit denen die HUB-Juristen den Anspruch der Partei auf politischen Gehorsam unterlaufen konnten« (109). Klappt das nicht, zeigen sie sich »von der intellektuellen Enge an der Fakultät« bedrückt (175). Sie können nicht gut mit der Diktatur, sie sind eben »ideologieunbegabt« (200) – und zwar weil sie eben Juristen sind.

Was also sind das für Juristen, deren Loblied Markovits in diesem Buch singt?

Sie sind tief geprägt vom juristischen Handwerk. Juristisch denken, »erfordert Skepsis, Beweise, eine eindeutige Sprache, die Verhandelbarkeit von Positionen und Kompromissbereitschaft« (17). Juristen müssen selber denken, was sofort zum Vorwurf der Partei führt, sie würden dem Recht »eine selbständige, von der politischen Macht getrennte Eigengesetzlichkeit zubilligen« (69). Zwingt man sie dann in die offen politische Sphäre, fühlen sie sich nicht wohl. Politischer Kampf ist ihr Ding nicht: »Juristen lieben Ordnung und Disziplin« (40). Ihnen fehlt »das Talent zum Sprung ins Ungewisse« (100). Sie ziehen sich dann zurück in den »Elfenbeinturm der HU« (39), denn »meine Protagonisten verstanden sich nicht als Rebellen« (44). Im »Minenfeld der Macht« herrscht für Juristen »Unsicherheit und Beklommenheit« (72): »Bei Zweifeln fragt man lieber oben an« (73). Auf Druck reagiert man mit »Gehorsam« (73), passt seine Texte an, wird aber müde und initiativlos. Juristen wollen keinen Streit und können sich doch nicht einfach der Macht unterwerfen.

Und damit waren sie nicht viel anders als »Juristen überall« (98), also auch ihren westlichen Kollegen sehr ähnlich: »Die juristische Methode, die sich deduktiv vom Allgemeinen zum Besonderen bewegt; die Tendenz, ein Rechtsproblem in viele begriffliche Bausteine zu zerlegen; die Beziehungen dieser Bausteine zueinander innerhalb der Logik des Systems; die ›Grammatik‹ des Rechts, in der Juristen miteinander diskutieren, waren in Ost- und Westdeutschland weitgehend identisch.« (84) Mit Blick auf das geltende Recht »dachten die Humboldt-Juristen wie Juristen« (84). Konsequent suchten sie Zugang zu Westliteratur (88). »Wie ihre bürgerlichen Vorgänger an der Berliner Universität waren die HUB-Juristen Positivisten. Sie vertrauten dem geschriebenen Gesetz mehr als dem sozialistischen Richter. Sie liebten die begriffliche Genauigkeit und Vorhersehbarkeit des Rechts, sie liebten das Schritt-für-Schritt juristischer Argumentationen, sie liebten Regelmäßigkeit und Ordnung« (100). Mit bloßen politischen Programmsätzen kommen sie nicht klar, »sie sahen nicht wie richtige Gesetze aus. Sie hatten keine erkennbare juristische Struktur: keine Paragrafen, keine Definitionen, keine Wenn-dann-Bestimmungen« (94). Juristen wehren sich gegen »die politische Verwässerung ihrer Berufssprache« (96). Bei all dem war ihr Denken durch und durch konservativ-bewahrend, denn Juristen »fühlen sich in der bestehenden Rechtssystematik zu Hause und können sich keine andere vorstellen« (93).

2 Hierzu mit vielen Einzelheiten etwa das von Markovits nicht verwendete Buch von Malgorzata Liwinska, Die juristische Ausbildung in der DDR, Berlin 1997.

Sie sind auch dann nicht in der Lage, politische Willkür zu verarbeiten, wenn sie politisch auf der Seite des Staates stehen, denn Ihr Handwerk ist »revisionistisch« (85). Darin liegt zugleich ihre politische Funktion: Auch wenn Juristen politisch den Staat begrüßen, zwingt ihr unentrinnbares Denken zur Willkürabwehr. Es geht nicht um Widerstand. Sie können nicht anders. Indem Juristen das tun, was sie als Juristen tun müssen, nämlich ihr Handwerk auf das Recht anwenden, begrenzen sie Willkür (210), verrechtlichen die Macht und gewinnen »dem Maßnahmenstaat DDR mehr und mehr Land« ab. Und schon allein dadurch bewegte sich die DDR »auf den Rechtsstaat« zu (211). Juristen haben also »zivilisierenden Einfluss«: »Eine Gesellschaft, in der Juristen etwas zählen, ist besser als eine Gesellschaft ohne sie« (210).

Mit einer solchen Riesenthese umzugehen, ist nicht ganz leicht. Konkret wird es ja kaum. Keine Fallstudien, keine vergleichenden Detailanalysen, kein Blick in die konkreten Ergebnisse. Nur zeitgenössische Bekenntnisse zum und Kritik am »Handwerk«.

Waren Technik und Politik wirklich so streng getrennt? Und wie soll man es sich vorstellen, dass eine Ausbildung, die ständig darauf befragt wird, ob sie »positivistisch« ist, im Ergebnis doch wieder »Positivisten« produziert? Einfach deswegen, weil man mit dem »täglichen Arbeitsmaterial des Juristen« (44), insbesondere mit den bürgerlichen Gesetzen, weiter arbeitete, wie Markovits suggeriert? Ging es nicht auch um neue Normtypen, neue Anwendungstechniken, neues »Handwerk«? Das Oberste Gericht der DDR wird damit zitiert, dass Volksrichter sich an den Wortlaut des BGB zu halten hätten (83). Zum Denken des OG passt das freilich schlecht, weil hier – wie etwa die nicht zitierte Arbeit von Knauf gezeigt hat[3] – zeitgleich und ganz antipositivistisch die offene Nichtanwendung des BGB unter Berufung auf politökonomische Argumente praktiziert wurde.

Und natürlich liegt in der Behauptung, der »Positivismus« habe die Köpfe beherrscht, nicht nur eine fragwürdige »Ehrenrettung meiner Protagonisten« (210), sondern auch eine sehr alte Entlastungsstrategie: Genau so argumentierten nach 1945 die NS-Richter, nur umgekehrt: Der »Positivismus« habe sie wehrlos gemacht. Nun also: Glücklich ist, wer Jura studiert hat. Er muss keinen offenen Widerstand leisten und tut dem Land auch so gut? Seit über 50 Jahren wird dem entgegengehalten, dass »Positivismus« im Nationalsozialismus weder die Theorie noch die Praxis bestimmte und – wenn verwendet – kein Denkzwang, sondern eine juristische Strategie war.

Problematisch ist daher das Schlusskapitel. Hier wagt Markovits auf dünnem Forschungsstand eine »Spekulation« (20), indem sie ihre Ergebnisse für Professoren an der HU auf die Richter im Nationalsozialismus überträgt. Sie vermutet, auch nach 1933 würden sich (jenseits der politischen Sondergerichte) »die ordentlichen Richter des Systems (gerade so wie ihre DDR-Nachfolger Jahrzehnte später) vor allem als Juristen definiert haben. Sie wollten ihren Beruf ausüben. Auch ein Maurer, der begeisterter Parteigenosse war, wird unter Hitler eine Wasserwaage und ein Senkblei benutzt haben, um eine gerade Wand zu bauen. Das Werkzeug der Nazi-Richter bestand aus Instituten, Begriffen, Methoden und den geltenden Gesetzestexten. Ich nehme an, dass sie ihr juristisches Handwerkszeug so sorgfältig und effizient benutzten, wie ihr Terminkalender, ihre Ausbildung, ihr Talent und die politischen Umstände es erlaubten.« (216)

Zum Nachweis erzählt sie eine suggestive Geschichte. So habe die Zeitschrift *Kritische Justiz* 1969 versucht, die Veröffentlichung einer Studie von Grunsky zu verhindern, die festgestellt habe, dass noch 1939/40 die Justiz in 14 von 38 veröffentlichten Fällen ganz positivistisch zugunsten jüdischer Parteien entschieden hätte. Zum Nachweis, dass dies ein wohl ungewolltes Ergebnis sei, verweist sie darauf, dass die Untersuchungen der damaligen Gerichtspraxis alle »qualitativer und nicht quantitativer Art« seien (212). Markovits sieht sich als Aufklärerin aus den USA, die das sagen kann, was in Deutschland verboten ist. Aber ganz so einfach ist es nicht. In ihrer begrenzten Literaturkenntnis übersieht sie nicht nur, dass es inzwischen eine ganze Reihe statistischer Untersuchungen zur Justiz im NS gibt,[4] sondern auch,

3 Verena Knauf, Die Zivilentscheidungen des Obersten Gerichts der DDR von 1950–1958, Berlin 2007.

4 Vgl. nur Philipp Hacklander, »Im Namen der Deutschen Volkes«, Berlin 2001; Jonas Küssner, Die familienrechtlichen Entscheidungen des Landgerichts Köln in der Zeit von 1933–1945, Münster 2013.

dass die Fragestellung Grunskys schon oft untersucht wurde, freilich mit deutlich differenzierenden Ergebnissen. Der Mythos vom Juristen, der nicht aus seiner Haut kann, bekam etwa in der Untersuchung von Schiller zum OLG Karlsruhe Risse. Hier waren die Richter besonders in der Anfangszeit massivem politischem Druck ausgesetzt. Es ergab sich ein äußerst uneinheitliches Bild. Manche Richter versuchten eine Entpolitisierung durch Dogmatik und flaggten das Urteil als höflich-unpolitische fachliche Arbeit aus. Andere schoben offensive politische Begründungen in den Vordergrund, um sich politisch abzusichern. Auf beide Wegen blieben jüdische Parteien in der Regel erfolglos. In späteren Jahren, während der »Arisierung«, fand Schiller dagegen ebenfalls Fälle, in denen die jüdischen Parteien obsiegten. Wenn hierbei »an die Stelle des deportierten Klägers bereits der badische Finanzpräsident getreten war«,[5] um zu verhindern, dass ein Unternehmen unter ausländischen Einfluss geriet, wurde freilich deutlich, was auch Dreyer für das OLG Düsseldorf herausstellt: dass »für den Staat in Vermögensstreitigkeiten Interesse am Obsiegen der jüdischen Partei bestand. Denn einen Vermögenszuwachs auf jüdischer Seite konnte man durch gesetzliche Maßnahmen abschöpfen (etwa durch die sog. Reichsfluchtsteuer). Gewann die nichtjüdische Partei, so war deren Vermögensgewinn für den Staat verloren.«[6] Diese Richter wussten genau, was sie politisch taten, auch dann, wenn sie die Rolle des »Juristen als solchen« einnahmen.

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Matthias Schwaibold

Monumentale Enttäuschung*

Dass Gerichtsgebäude Gegenstand rechtshistorischer Betrachtung sein können, ist nicht zu bezweifeln. Ausweislich des Literaturverzeichnisses betritt der Verfasser dieser Zürcher Dissertation wenig erschlossenes Neuland, wofür er Anerkennung verdient. Er stellt einleitend eine These auf und umschreibt die Ziele der Arbeit (Kapitel 1, 1–4); Kapitel 2 ist eine kurze Abhandlung zu »Recht und Ästhetik« (5–10). Kapitel 3 ist im Wesentlichen eine Stilkunde mit Schwerpunkt ab der 2. Hälfte des 19. Jahrhunderts bis zur Gegenwart (11–56). Das 4. Kapitel ist markanten Beispielen von Justizbauten, im Wesentlichen aus der Zeit von ca. 1860 bis 2016 gewidmet (57–124); im Mittelpunkt steht aber der Abschnitt über die Monumentalarchitektur der Justizpaläste bis 1914. Die Schlussbetrachtung (Kapitel 5, 125–129) hebt hervor, dass bisher vor allem die »einschüchternde« Wirkung von Justizbauten in der Literatur behandelt wurde, die man zumindest den jüngsten Gerichtsbauten nicht in gleicher Weise vorhalten kann. Rund 15 indessen durchgehend wenig befriedigende Bilder illustrieren die Ausführungen.

Gleich im Vorwort steht ein Satz, der die Fragwürdigkeit des ganzen Unterfangens beleuchtet: »Ob das Recht in unserer Gesellschaft seine Wirkung, seine Härte oder seine Milde, seine Schönheit und auch seine Würde auf Dauer entfaltet und entwickelt, hängt auch davon ab, welchen architektonischen Rahmen wir ihm zugestehen.« (V) Das ist zwar hübsch formuliert, läuft aber gleich in verschiedene verkehrte Richtungen: Denn das

5 Christof Schiller, Das Oberlandesgericht Karlsruhe im Dritten Reich, Berlin 1997, 355.

6 Martin Dreyer, Die zivilrechtliche Rechtsprechung des Oberlandesgerichts Düsseldorf in der Nationalsozialistischen Zeit, Göttingen 2004, 334.

* Philipp von Schweinitz, Justizbauten als ästhetischer Ausdruck des Rechts. Eine rechtshistorische Untersuchung von Gerichtsbauten in Frankreich, Deutschland und in der Schweiz von der Gründerzeit bis zur Gegenwartsarchitektur (Zürcher Studien zur Rechtsgeschichte, 73), Zürich: Schulthess 2020, XXIV, 129 S., ISBN 978-3-7255-8142-9

»Recht« hat jedenfalls nach Auffassung des Rezensenten weder Schönheit noch Würde; und das Recht beschränkt sich schon gar nicht auf das, was innerhalb von Gerichtsgebäuden davon angewandt wird. Sowenig wie – ernsthaft überlegt – die Qualität der Rechtssetzung von der Bauweise des Parlamentsgebäudes oder der Ausstattung des Ratssaales abhängen kann, sowenig dürfte von den architektonischen Gegebenheiten einzelner Gerichtsgebäude eine Rückwirkung auf »das Recht« insgesamt ausgehen. Gerichtsgebäude sind in allererster Linie Arbeitsplätze und notwendigerweise »Bühnen« oder »Bühnenräume« für bestimmte, justizielle Geschehnisse (insbesondere Prozesse); das »Recht« ist mit solchen Gebäuden sicher weniger verbunden als jeder Rohstoff oder jede sonstige Materie mit einem Industriegebäude und nicht mehr als ein Bürokomplex mit den Inhalten derer, die darin irgendwelche Dienstleistungen erbringen.

Die einleitend (1) formulierte These, wonach sich aus der ästhetischen Gestaltung von Justizbauten Rückschlüsse auf die Wahrnehmung des Rechts in der Zeit ihrer Errichtung ziehen lassen, erscheint wenig überzeugend: Denn genauso müsste sich dann aus Spitalbauten, Kirchen oder Industriebauten etwas über die Wahrnehmung von Gesundheit, Gott oder Wertschöpfung ableiten lassen. Recht, Gesundheit und Wertschöpfung (Gott lassen wir jetzt auf der Seite) existieren aber unverändert vor und nach jeder Baute bzw. werden zeitgleich in unterschiedlich alten Bauten »verwaltet«. Und zwei Gebäude, zwischen deren Errichtung 30 Jahre liegen, können radikal unterschiedlich sein, ohne dass daraus abzuleiten wäre, dass sich in den 30 Jahren »das Recht« oder die Wahrnehmung desselben in gleichem Maße verändert hätten. Man nehme nur das »expressionistische« Amtsgericht Dorsten von 1929 (abgebildet: 43) und stelle es neben das als Beispiel für den Jugendstil angeführte Landgericht I (Berlin-Mitte, 1896–1905, abgebildet: 39). Das BGB und die ZPO galten an beiden Orten doch in relativer Stabilität. Und im »Palais de Justice« in Straßburg (erbaut unter Wilhelm II. 1889–1893 und erwähnt: 35) galten hintereinander, ohne dass er einstürzte, der napoleonische Code Civil bis Ende 1899 und das neue BGB ab 1900, und ab 1919 traten nach und nach wieder die französischen Gesetze in Kraft. Die unterstellte Wechselwirkung stimmt allenfalls dann, wenn man über das einzelne, konkrete Gebäude hinaus etwas sagen könnte; bloß ist die Einzelbaute in allererster Linie das Produkt ihres Architekten, und Architekten sind nicht wirklich dazu berufen, etwas über das Verhältnis ihres »Produkts« zum Recht als solchem verbindlich auszusagen. Dreidimensionales Erleben des juristischen Kontexts (1) findet indessen auch in jeder Anwaltskanzlei und jedem Verwaltungsgebäude statt, und damit hat sich nach Ansicht des Rezensenten die These von Anfang an als wenig tragfähig erledigt.

Denn wie der Verfasser aus einer zuvor ausführlichst herangezogenen Schrift des Württembergischen Beamten-Architekten Theodor von Landauer aus dem Jahre 1900 zitiert (72), sollen die Gerichtsgebäude bzw. Justizpaläste die Bedeutung der höheren Gerichte als staatlicher Institutionen hervorheben – und das hat mit dem »Recht« höchstens indirekt zu tun. Warum dann 120 Jahre später anstelle der »Institution« deren »Gegenstand«, eben das Recht, für die Deutung der architektonischen Botschaft maßgeblich sein soll, wäre zwar eine durchaus spannende Fragestellung, aber die Antwort darauf liefert uns jedenfalls die vorliegende Arbeit nicht. Nach Überzeugung des Rezensenten wird es auf die so formulierte Forschungsfrage auch gar keine sinnvolle Antwort geben können. Nicht umsonst lesen wir sodann (80), dass die Justizbauten des deutschen Kaiserreichs nach damaliger zeitgenössischer Auffassung der Repräsentation »des Staates« (ergo nicht: des Rechts) dienten. An anderer Stelle lesen wir: »Ein Bauwerk ist stets vor dem Hintergrund seiner jeweiligen Kultur- und Zeitgeschichte zu sehen« (11). Womit das »Recht« ausgeschlossen ist, und leider bleibt bis zum Schluss unerklärt, welchen Anteil das »Recht« auf eines der vorgestellten Gebäude denn tatsächlich hatte.

Neben diesen grundlegenden Einwänden ist dem Rezensenten noch Anderes, meist störend aufgefallen: Als praktizierender Anwalt bestreitet er nachdrücklich, dass sich (entgegen 12, 60 f.) die Funktionen eines Gerichtsgebäudes aus den Prozessordnungen oder den Gerichtsverfassungsgesetzen ergeben, und auch aus den Zuständigkeiten an sich folgt nichts für die Architektur (entgegen 13). Inkohärent erscheint sodann die angebliche Beschränkung der Untersuchung auf die Schweiz, Deutschland und Frankreich: Denn die Ausführungen zu den Justizpalästen in Brüssel und Wien nehmen großen Raum ein, es werden sodann Gebäude aus Italien, Indien, Spanien und den USA erwähnt und teilweise sogar im Bild gezeigt, ja

»justizfremde« Bauwerke angeführt. Das ist nicht weiter tragisch, bleibt aber letztlich unerklärt, wie ebenfalls unerklärt bleibt, warum in einer Zürcher Dissertation nicht mehr schweizerische Gerichtsbauten behandelt werden: Es kommen zwar die beiden Bundesgerichtsgebäude, das alte und das neue, in Lausanne vor, desgleichen das Bundesverwaltungsgericht in St. Gallen und das Bundesstrafgericht in Bellinzona; aber die Frage wäre doch, ob diese vier Gebäude für irgendetwas bezüglich des schweizerischen Rechts stehen. Dazu liest man schlicht nichts. Auf S. 103 steht denn auch ein in dieser Hinsicht entscheidendes Zugeständnis über die Gerichtsbauten in Deutschland ab ca. 1960: Es handle sich um eine Vielzahl von Gerichtsgebäuden, die sich nicht von Verwaltungs-, Versicherungs- und Bürogebäuden unterschieden. Womit zugleich gesagt ist: mit dem »Recht« hat es offenbar alles nichts zu tun.

Gewiss treffen wir auf S. 86 auf einen interessanten Gedanken: Die ganz überwiegend in klassizistischem Stil gehaltenen »Justizpaläste« der 2. Hälfte des 19. Jahrhunderts sollen sich von den neugotischen Kirchen und Rathäusern unterscheiden; demgegenüber seien Amtsgerichte in Deutschland häufig neugotisch gewesen. Was letztlich angesichts desselben Rechts, das in allen diesen Gerichten zur Anwendung kam, doch die Eingangsthese eher zu erschüttern denn zu bestätigen vermag. Dass der Neubau des Bundesverfassungsgerichts auch 50 Jahre nach seiner Vollendung gelobt und als Paradebeispiel einer »demokratischen« Architektur hervorgehoben wird (48, 105 ff.), ändert nichts daran, dass er die Gesamtwirkung der Schlossanlage doch ganz erheblich beeinträchtigt hat, wie der Rezensent als geborener Karlsruher nicht unerwähnt lassen kann. Gelungen ist die Passage zur »Bedeutungsarchitektur« (111 f.), die von Gerichtsgebäuden nunmehr verlangt wird (ganz im Sinne des »demokratischen« Bauens, Autorität ausstrahlend, aber nicht autoritär wirkend). Auf S. 125 steht dann die Wiederholung der unbelegt gebliebenen These, wonach die Gebäude ein unterschiedliches Rechtsverständnis belegen würden. Aber in den dazu gelieferten Ausführungen (125 ff.) ist nicht vom »Recht«, sondern vom »Staat« die Rede und vom »Dienstleistungsunternehmen Justiz«. Bezüglich der Gegenwartsarchitektur schreibt der Verfasser abschließend von den Schwierigkeiten einer »eindeutig lesbaren Symbolik« – das ist doch das Eingeständnis, dass es die gerade nicht gibt.

Die Bezeichnung der entsprechend großen Gebäude als »Justizpaläste«, letztlich nichts anderes als eine Eindeutschung des französischen »palais de justice«, ist nicht weiter zu beanstanden; altertümlich bzw. künstlich wirkt dagegen die vom Verfasser gepflegte Sprachregelung, von den Gebäuden »zu« Brüssel, »zu« Paris, »zu Nürnberg« etc. zu reden, statt das weniger prätentiöse »in« zu verwenden. Unpassend ist zudem, wenn aus dem (im Französischen männlichen) »Palais de Justice« auf Deutsch »das« Palais de Justice wird. Ebenso unbefriedigend ist (122 f.), dass die Ende Dezember 2018 abgeschlossene und 2020 gedruckte Arbeit offenlässt, den tatsächlichen Zustand des Neubaus des Palais de Justice in Paris von Renzo Piano – dass er nämlich schon bezogen wurde – festzuhalten. Auf S. 99 findet sich schließlich ein abgründiger Druckfehler: Hitlers »Neue Reichskanzlei« wird als »Neue Rechtskanzlei« bezeichnet.

Man legt die Arbeit mit dem Gefühl zurück, dass einige gute Ansätze unter einer Vielzahl von wenig überzeugenden Überlegungen verschüttet wurden. Insbesondere bleibt damit eine »Schweizerische Gerichtsarchitektur« noch zu schreiben; ob sie tatsächlich zu Erkenntnissen »über« das schweizerische Recht führt, oder umgekehrt einen Einfluss des schweizerischen Rechts »auf« die Gerichtsgebäude in der Schweiz offenbaren würde, wagt der Rezensent indessen zu bezweifeln.

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Philipp Schmitt

The First Steps of Europe's Most Contested Authority*

In his legal dissertation, Martin Thiele undertakes an extensive study covering the early days of the EEC-Commission and its predecessor, the High Authority (HA) of the European Coal and Steel Community (ECSC). He attempts to write a legal history from a public law perspective (15). His approach is threefold. First, regarding the institutional set up of the HA, he focuses on the key actors' legal thought, the negotiations of the ECSC-Treaty of 1951 and its reception in legal science, as well as the failures of the European Defence and European Political Community (EDC and EPC). Secondly, he studies the first steps of the HA in its ambition to secure room to manoeuvre both internally and externally. Thirdly, the last chapter contains an analysis of the Rome Treaty negotiations with a particular focus on the HA's role, as well as an overview of the activities of the early EEC-Commission concluding with the Merger Treaty.

In his first chapter, Thiele analyses the considerations in the French Planning Commissariat under Jean Monnet. He depicts Monnet's experiences in the allied planning authorities during both world wars in a biographical manner (69). His emphasis of Paul Reuter, the adjoint jurist consult in Schuman's Ministry for Foreign Affairs, is noteworthy. Reuter was crucial for drafting both the Schuman Declaration and the initial French proposal for the ECSC-Treaty. Thiele shows how the idea of a powerful sectoral authority found its way from the US Tennessee Valley Authority, which was instrumental in fighting cartels and an example of federal governance, into the Schuman Declaration through a combination of Reuter's suggestions and Monnet's technocratic preferences. Reuter then was one of the presidents of the judicial group during the negotiations and he published the leading study on the ECSC-Treaty in 1953. Despite his multifaceted role, Reuter and his relationship to Monnet, who eventually replaced him with the later General Attorney Maurice Lagrange, still deserves further research. By combining drafts and publications, Thiele explains Reuter's legal thinking and influence. He analyses how the omnipotent HA in the initial French proposal, whilst remaining the main actor, was restrained by adding a Special Council of Ministers and a Court (109). He also shows how the German delegation, which had to back down on its federal demands, succeeded in the establishment of a permanent Assembly (197). It is illuminating to read about the German delegation's frustration at attempting to convey the need for a federal structure – and, indeed, the very concept of federalism – to their French and Belgian counterparts (120 f.). The other delegations' opposition against the German desire for a federal European constitution, however, did not stop its representatives, such as the later EEC-Commission president Walter Hallstein, from using the federal constitution as a metaphor to describe the ECSC (123). Thiele is also interested in the relationships between these different actors, and he relies on biographies and oral history collections, for example, to emphasise the good atmosphere during the negotiations, which makes his work an enjoyable and at times surprising read (133–137).

Thiele then evaluates the contemporary legal literature on the Treaty (143 ff.) and refers to recent sociological accounts of the debate on the legal nature of the ECSC (Bailleux, *Penser l'Europe par le droit, 2014*). He highlights the practical importance of this question: If the Treaties were regarded as international law, this would have led to a narrow interpretation of the HA's competences, so as to safeguard the sovereignty of the member states (157). Like Delfs (Komplementäre Integration,

* Martin Thiele, Motor der Integration: Europarechtsgeschichtliche Grundlegung der Europäischen Kommission, Tübingen: Mohr Siebeck 2019, 569 p., ISBN 978-3-16-157566-2

2015), Thiele emphasises the importance of the debate between monism and dualism in international law scholarship for the development of Community law (165). Whilst one should be aware of the debate, it appears an oversimplification to state that proponents of an independent, supranational European legal order followed monism, and adherents of an international law model followed dualism (166 f.). To map out the actual effects of this debate is difficult. The example is again Reuter, who – despite being a dualist – was a strong proponent of the supremacy of community law and supranationalism, as Thiele himself shows (170, 352). He then provides an account of the negotiations on the EDC and EPC (§ 3). Here he struggles to link these to the later EEC-Treaty, which seems to be only possible by showing where negotiators of the latter declared that they had relied on or decided against the EPC / EDC-drafts. The drive for a more state-like shape of the EPC, for example, with laws instead of decisions (266), led to a standstill. To secure ratification of the EDC-Treaty, France demanded a veto right in the Council and that the latter should only decide unanimously for the first eight years – almost a blueprint for the empty chair crisis of 1965/66. In order to understand later developments, it is important to analyse the growing intergovernmentalism, which lead to the failure of the EDC. This made it questionable to what extent the HA had discretion to act independently and led its officials to conceive themselves as the »dernier bastion communautaire« (293).

The second chapter analyses how the HA became the »motor« of the ECSC. Concerning the internal sphere of the ECSC (§ 4), Thiele focuses on a series of judgments of the European Court of Justice (ECJ) balancing the HA's need for discretion and the boundaries set by the Treaty. He shows how the HA tried to frame these issues in a constitutional law terminology (303). Both Michel Gaudet, the well-known head of the Legal Service (298 ff.), and Lagrange advocated for a discretion of the HA along the lines known from administrative law, whereas the French government, represented by Reuter, advocated for a restrictive interpretation of the HA's competences as applied to international treaties. The ECJ accepted the HA's discretion to weigh different interests (306), a ruling that corresponded closely to Reuter's writings, as Thiele points out (311). He analyses the case law on the problem of implied powers (317) and combines this with sociological and historical findings on Gaudet's agenda to align the ECJ to the US Supreme Court. Whilst a first decision in 1956 seemed to open the door on implied powers, the Court eventually decided against this possibility in 1960 (320 ff.). Here it would have been interesting to discuss how the EEC-Treaty of 1957, which provided for a variety of competences, influenced the Court's willingness to find implied powers in the ECSC-Treaty. Regarding the HA's relation to the Council and the Assembly, Thiele relies strongly on traditional accounts. The institutional entanglements of the Commission and national civil servants in the Council and expert commissions led to permanent debates. At each stage in the process, Monnet wanted an exchange with all the relevant interest groups to secure acceptance; he even sought unanimity where it was not required (330–333). This model of continuous negotiation – despite criticism – has remained in practice ever since. Concerning the external sphere, Thiele also highlights Monnet's aim to secure international recognition and treaty-making power for the ECSC (§ 5). Monnet succeeded in preserving US representation to the ECSC and in involving the HA in the association agreements with the UK. Thiele then takes a brief look at the HA's reaction to the coal crisis of 1959 (§ 6), which does not add significantly to the overall picture but exemplifies the extent to which the ECJ accepted the HA's discretion.

The last chapter provides an account of the efforts of the HA (§ 7) leading to the negotiations of the Rome Treaties (§ 8). Thiele approaches this classic part of integration history with a focus on the HA's role and includes sources from EU and German archives. One criticism is that due to this focus, he slightly overstates the HA's influence, for example, on the cross-sectoral approach of the EEC. His analysis of the shift of power from the supranational authority to the Council of Ministers in the negotiations, however, is quite illuminating. Monnet's confidant Pierre Uri, when editing the famous Spaak Report, advocated the Commission's exclusive right to make legislative proposals (412 ff.), which was combined with a mechanism allowing the Council to only deviate from these proposals with unanimity. Thiele leaves it open to what extent the head of the French delegation, Robert Marjolin, was responsible for this mechanism and whether this contradicts Uri's claims of authorship (419 ff.). His account of this

important element in the relationship between Commission and Council is highly useful to better understand the development of the EEC's institutional set-up. He also provides a nuanced account of the well-known legal drafting group (428). Analysing the points in the Treaty attributed to its members, he shows which were their own original propositions, and which were just fleshed out concepts developed at an earlier stage. In doing so, he shows that the group's influence has been exaggerated in past accounts. Thiele then focuses on how the Commission used its right of initiative as a »motor« (§ 9). When explaining the constant exchange between Commission and national officials, he could have emphasised the continuity of this practice to the one established by Monnet in the HA. In any case, he rightly points out that already the earliest Commission proposal for secondary legislation could be the result of extensive negotiations (457). Regarding the Luxembourg Compromise, Thiele shows to what extent it only summarised already established negotiation routines. After a glance at the origins of comitology, Thiele concludes with an important milestone in European institutional history, namely the merger of the Institutions of the three Communities (§ 10).

All in all, Thiele provides a highly useful account of the first one and half decades of European integration and the institutional development of the Community. His work is well written and a good starting point for every lawyer and historian interested in the legal history of this nascent period of European integration.

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Anselm Küsters, Anna Quadflieg

Stell Dir vor, die EU regelt die Weltwirtschaft und keiner sieht hin*

Januar 2021: China vermeldet inmitten der COVID-19-Pandemie als einzige große Volkswirtschaft ein Wirtschaftswachstum für das zurückliegende Jahr. Joe Biden übernimmt die US-Präsidentschaft. Die Welt blickt gespannt nach Washington und Peking. Würden die beiden Supermächte nach vier Jahren des Trump'schen Protektionismus und einer Pandemie wieder zu dem Multilateralismus zurückkehren, der den weltweiten Handel seit der Mitte des 20. Jahrhunderts geprägt hat? Die Vereinigten Staaten und China – die beiden vermeintlichen Taktgeber der Weltwirtschaft – stehen einmal mehr im Fokus. Der finnischen Columbia-Rechtsprofessorin Anu Bradford zufolge gerät die Europäische Union (EU) dabei zu Unrecht aus dem Blickfeld. Sie argumentiert in *The Brussels Effect. How the European Union Rules the World*, dass die Union den globalen Handel durch ihre Regulierungen europäisiert und dadurch weltweit Unternehmens-, Produktions- und Verarbeitungsstandards anhebt. Mit diesem Perspektivwechsel bereichert Bradfords Buch den Diskurs um den Einfluss des Europarechts auf den Welthandel.

Das Werk weist eine klassische Gliederung in Theorie, Empirie und kritische Diskussion um die Relevanz des *Brussels Effects* auf. Wenngleich der stark operationalisierende Aufbau zu häufigen Wiederholungen führt, gelingt Bradford eine leserfreundliche Struktur mit zahlreichen anschaulichen Beispielen. Im ersten Teil legt sie die Hintergründe und Funktionsweisen des *Brussels Effects* dar. Sie zeigt auf, dass eine Regulierungsbehörde wie die EU in der Lage ist, unilateral Standards

* Anu Bradford, The Brussels Effect. How the European Union Rules the World, Oxford: Oxford University Press 2020, 404 p., ISBN 978-0-19-008858-3

zu setzen und nennt fünf Faktoren, die dazu beitragen, dass sich diese für das Funktionieren des Binnenmarkts entworfenen Standards global durchsetzen: ein großer Absatzmarkt, ausreichende Regulierungskapazitäten, strenge Standards, unelastische Regulierungsgegenstände und eine nichtteilbare Produktion (25–65). Die Relevanz dieser Faktoren, die zusammengenommen den titelgebenden *Brussels Effect* hervorbringen, macht Bradford eindrucksvoll nachvollziehbar.

Gleichwohl scheint nicht ganz klar, warum andere Einflussgrößen in den Fallstudien erwähnt, jedoch nicht systematisch untersucht werden. Hierzu zählen etwa die öffentliche Aufmerksamkeit, die Vernetzung von Interessengruppen, unterschiedliche kulturelle Voraussetzungen oder transnationale Lieferketten. Obwohl der feste theoretische Rahmen wenig Raum für solche zusätzlichen Faktoren lässt, zeichnet sie innerhalb dieses Rahmens gleichwohl ein nuanciertes Bild. So nennt sie neben dem *Brussels Effect* bi- oder multilaterale Abkommen, diplomatische Beziehungen oder den Einsatz in internationalen Organisationen als Beispiele für weitere Mechanismen, durch welche die EU Unternehmenspraktiken multinationaler Konzerne und Rechtssysteme auf der ganzen Welt verändert. Wahl und Erfolg der Mechanismen hängen vom jeweiligen Politikbereich ab. Zudem können sie im Laufe der Zeit variieren und verhalten sich interdependent. So kann die EU den *Brussels Effect* als Hebel nutzen, um ihren Einfluss auf multilaterale Abkommen zu stärken, wie Bradford anhand des Emissionshandels veranschaulicht (86–91). Ihre Analyse ist insofern auch für Akteure aus Politik und Wirtschaft interessant, als ihre Kriterien Hinweise darauf geben, wann Harmonisierung nicht mehr marktgetrieben durchgesetzt werden kann, sondern politisch durch Verträge und Institutionen geregelt werden muss und wann sich beide Regelungsmechanismen gegenseitig verstärken. Weniger überzeugend ist die Feststellung Bradfords, die EU vermöge moralische Imperative wie Mindestlöhne oder die Einhaltung von Menschenrechten nicht durch unilaterale Normsetzung zu verbreiten (3, 89). An anderer Stelle nennt sie, etwa mit dem in der Europäischen Menschenrechtskonvention festgeschriebenen Datenschutz, selbst Beispiele, die einen durch den *Brussels Effect* initiierten Einfluss von EU-Regulierungen auf die Menschenrechtslage in anderen Ländern aufzeigen. Wenn EU-Normen weltweit Tierversuche reduzieren können, wie Bradford belegt, warum sollten sie nicht auch zu fairen Löhnen und Arbeitsbedingungen potentiell beitragen können? Hier wäre beispielsweise an ein Lieferkettengesetz zu denken. Oder übersieht Bradford mit dem starken Einfluss von Interessenvertretern der Wirtschaft, die von höheren Produktionskosten nicht angetan sein dürften, einen weiteren Faktor, der über den Erfolg des *Brussels Effects* entscheidet?

Im zweiten Teil erläutert Bradford anhand von Fallbeispielen, inwieweit ihre Hypothesen in Bezug auf die EU-Regulierung des Wettbewerbs, der digitalen Wirtschaft, der Gesundheit und Sicherheit der Verbraucher sowie der Umwelt zutreffen. Dabei beschreibt sie jeweils die beiden Formen, in denen der *Brussels Effect* auftritt: indem Unternehmen ihre gesamte Produktion und ihr Verhalten an EU-Vorschriften anpassen (der *de facto-Brussels Effect*) oder indem ausländische Regierungen EU-Vorschriften übernehmen (der *de jure-Brussels Effect*). Obwohl die Notwendigkeit, Produkte den Bedingungen des Bestimmungslandes anpassen zu müssen, den Grundfall internationalen Handels darstellt, zeigt bereits die erste Fallstudie des Buches, dass der *de facto*-Effekt bei den verschiedenen Arten von Wettbewerbssachverhalten uneinheitlich auftritt. So wirkt er am stärksten bei Fusionsverboten, die nicht teilbar sind, während er bei Fällen von Missbrauch einer marktbeherrschenden Stellung, bei denen die Parteien ihre Abhilfemaßnahmen oftmals auf den EU-Markt beschränken können, nur marginal globalen Einfluss nehmen kann. Allerdings hat die EU ihre Wettbewerbsnormen aktiv in andere Länder exportiert, die darüber hinaus oftmals freiwillig die Durchsetzungsentscheidungen der EU kopieren, sodass in jedem Fall ein starker *de jure*-Effekt feststellbar ist.

Wie das nächste Kapitel zeigt, unterhalten die meisten multinationalen Unternehmen heutzutage sowohl aus Gründen der technischen und wirtschaftlichen Nicht-Teilbarkeit als auch zur Minimierung von Komplexität und Compliance-Fehlern eine globale Datenschutz-Policy, die sich eng an die europäische Datenschutz-Grundverordnung anlehnt. Diese Nicht-Teilbarkeit wird auch durch das Bedürfnis dieser Unternehmen angetrieben, eine globale Marke zu bewahren und allen ihren Nutzern den gleichen Schutz zu bieten. Darüber hinaus hat die EU Online-Plattformen dazu gedrängt, Inhalte besser in Bezug auf sogenannte *Hate Speech* zu kontrollieren. Dieses Beispiel veranschaulicht, dass der *Brussels Effect* auch dann

eintreten kann, wenn sich die EU zunächst auf eine freiwillige Regulierung beschränkt und diese zudem nicht den strengsten weltweiten Regulierungsstandard darstellt. So sind die Rechtslagen in Bezug auf Online-Konversationen etwa in China und Russland deutlich restriktiver. Erneut ist hier entscheidend, dass multinationale Unternehmen ihre Marke zu schützen suchen und die EU über normative »soft power« verfügt. Daher erstaunt es, warum sich diese Aspekte nicht in Bradfords theoretischem Kriterienkatalog wiederfinden.

Im Fall der Gesundheit und Sicherheit von Konsumenten bewahrheitet sich erneut: Lässt sich die Produktion nur mit hohen Kosten oder technischen Einschränkungen teilen oder an verschiedene Märkte anpassen, greift der *de facto-Brussels Effect*. Dies ist für die Chemieindustrie der Fall, während die Nahrungsmittelproduktion meist ohne größeren Aufwand geteilt werden kann – mit Ausnahme der praktischen Inkompatibilität des gleichzeitigen Anbaus und der Verarbeitung von gentechnisch veränderten und nicht gentechnisch veränderten Produkten. Darüber hinaus spielen die nicht zu den von Bradford definierten Faktoren zählenden internationalen Verflechtungen von Lieferketten und Produktionsprozessen sowie die Veränderung des Verbraucherbewusstseins und – etwa für Nahrungsmittel – die kulturelle oder regionale Verankerung von Erzeugungsprozessen eine große Rolle für die Durchsetzungskraft europäischer Normen. Aus rechtlicher Perspektive konnte sich der *Brussels Effect* im Bereich der Chemikaliensicherheit stärker durchsetzen als in der Nahrungsmittelproduktion, bei der die EU eher auf bi- und multilaterale Kanäle angewiesen ist, um ihre Standards zu exportieren.

Das bereits erwähnte Verbraucherbewusstsein, die globale Vernetzung von Interessengruppen sowie unterschiedliche kulturelle Prägungen zeigen auch im Bereich Umwelt ihre Wirkung auf die normative Europäisierungsdynamik. Als eindrückliches Beispiel für den *Brussels Effect* nennt Bradford die Regulierung gefährlicher Substanzen und Elektroschrott. Allerdings hatten beispielsweise Taiwan und Japan bereits früher als die EU strenge Standards gesetzt (222). Die Vorgeschichte des *Brussels Effects* zeigt in diesem Fall, dass die EU mit ihren Regulierungen nicht immer initial wirkt, doch leider geht Bradford selten auf solche und ähnliche Hintergründe der EU-Regulierungen ein. Daher fehlt eine Einschätzung darüber, wie originell die europäischen Normen eigentlich sind oder inwiefern sie als Reaktion auf gesetzliche Bestimmungen anderer Länder entworfen wurden.

Eine rechtshistorische Einordnung hätte beispielsweise anhand des Umweltrechts verdeutlichen können, dass die Frage, ob die EU ein Politikfeld initial regulieren kann oder nicht, insbesondere von der Anzahl der für die Regulierung verantwortlichen Beamten abhängt. Hier erkennt man, dass Bradford ausschließlich die aktuellen behördlichen Strukturen in Brüssels im Sinn hat und außer Acht lässt, wie sich diese erst langsam im Laufe der Zeit herausgebildet haben – nicht zuletzt eben als Reaktion auf die regulatorischen Vorgaben anderer Akteure. Mit EU-Standards inkompatible Normen in anderen Ländern zwingen die Unternehmen, ihre Produktion zu teilen, wie am darauffolgenden Beispiel der Tierversuche ersichtlich wird, die in China bis 2014 für die Herstellung kosmetischer Produkte sogar vorgeschrieben waren (216–217). Im Bereich der Tierhaltung und -schlachtung konnte sich der *Brussels Effect* vergleichsweise besser durchsetzen, nicht zuletzt mit der Unterstützung von Aktivisten und Interessenvertretern. Diese konnten europäische Normen in ihrer Argumentation als Vorbild nutzen (218). An seine Grenzen ist der *Brussels Effect* schließlich gestoßen, als der europäische Emissionshandel auf den internationalen Flugverkehr ausgedehnt werden sollte (219–221). Hier sendet Bradford ein starkes Signal an die Politik, da sich laut ihrer Analyse selbst der Versuch, europäische Standards zu exportieren, lohne, indem er letztlich neue multilaterale Verhandlungen anregt (231).

Im dritten Teil befasst sich Bradford in scheinbar entwaffnender Weise mit der Kritik am *Brussels Effect* und seinen Zukunftsaussichten. Fast alle Kritikpunkte und Fragen, die beim Lesen der ersten beiden Teile aufkommen, werden behandelt: von den Kosten, die der *Brussels Effect* erzeugt und die schließlich von Konsumenten getragen werden müssen, über Befürchtungen hinsichtlich innovationshemmender Auswirkungen bis zum Vorwurf des EU-Protektionismus. Obwohl Bradford einräumt, dass das unilaterale Setzen weltweiter Standards »sowohl Kosten als auch Nutzen verursacht« (262), kann man sich des Eindrucks nicht erwehren, dass sie den *Brussels Effect* zu verteidigen sucht. So schließt sie mit dem Fazit, seine Vorteile seien unterm Strich höher zu bewerten als seine Nachteile. Zumindest teilweise ist dies das

Ergebnis ihrer sehr weit gefassten Definition von Wohlfahrt, unter der sie versteht, »den Menschen Zugang zu besseren Produkten und Dienstleistungen zu verschaffen […] und dabei die politische Autonomie der Menschen innerhalb der demokratischen Strukturen der Gesellschaft, in der sie leben, zu respektieren« (235). Ein ausgewogenerer Umgang mit den Einwänden bezüglich des *Brussels Effects*, etwa mittels einer strukturierten Kosten-Nutzen-Analyse oder moderner wohlfahrtsökonomischer Modelle, hätte geholfen, eindeutigere Aussagen über distributive und aggregierte Wohlfahrtseffekte zu treffen. Zuletzt argumentiert sie, dass der *Brussels Effect* trotz des wirtschaftlichen Aufstiegs Chinas, des schwächelnden Multilateralismus, der zunehmend individualisierbaren und damit teilbaren Produktionsmöglichkeiten, des Brexits sowie der populistischen Anti-EU-Stimmung weiterhin existieren wird. Allerdings könnte die Kombination dieser verschiedenen Entwicklungen den *Brussels Effect* in einem größeren Maße aufwiegen, als die Autorin dies vorhersehen möchte. Bradford endet indes mit dem Fazit aller Integrationsbefürworter zu allen Zeiten, indem sie angesichts dieser Herausforderungen für eine Expansion der Regulierungsagenda der EU wirbt, da »viele der bestehenden Probleme der EU am besten durch weitere Integration und zusätzliche Regulierungen gelöst werden können« (286).

Bradfords Argumentationslinien überzeugen nicht zuletzt aufgrund der zahlreichen Beispiele, die Anregung für weitere Untersuchungen bieten. So könnten etwa durch digitale Text-Mining-Methoden oder ähnliche quantitative Ansätze konkretere Aussagen darüber getroffen werden, ob ausländische Gerichte zunehmend europäische Entscheidungen als Beispiel für eine etabliertere Rechtsprechung anführen (75–77) oder inwiefern die Mitteilungen der Kommission im Laufe der Zeit eine verstärkte Aufmerksamkeit für die externe Dimension des Binnenmarktes aufweisen (21). Auch die theoretische Forschung kann an Bradfords Aussagen anknüpfen, nutzt sie doch implizit spieltheoretische und neo-funktionalistische Ansätze, um markt- und wertegetriebene Normenharmonisierung auf globaler Ebene zu erklären: »die strengste Regel wird zum Punkt der Konvergenz« (83). Mit theoretischen Ansätzen und empirischer Evidenz aus den Rechts-, Wirtschafts- und Sozialwissenschaften leistet Bradford einen wertvollen Beitrag zum Diskurs über den Einfluss der EU auf den globalen Handel.

Den größten Neuheitswert leistet sie sicher durch ihre theoretischen Ausarbeitungen, die anhand vieler Beispiele für eine breite Leserschaft veranschaulicht werden, wobei die von ihr diskutierten Fallstudien selektiv ausgewählt zu sein scheinen und in einigen Aspekten differenzierter hätten bewertet werden können. Allerdings lassen sich ihre Thesen gerade aufgrund ihres verallgemeinernden Charakters nicht nur auf die »Fähigkeit jeder Hoheitsgewalt, einseitig Regeln für den globalen Markt zu liefern« (64) übertragen, sondern könnten auch zur wirtschafts- oder rechtsgeschichtlichen Analyse etwa der Europäischen Integration im 20. Jahrhundert oder der wirtschaftlichen Einigung Deutschlands im 19. Jahrhundert verwendet werden. Vor allem aber zeigt der *Brussels Effect*, dass Macht heutzutage nicht mehr allein durch Wirtschaftswachstum oder militärische Größe definiert wird, sondern sich auch in subtileren Formen wie EU-Regulierungen entfalten kann. Bradfords Hypothesen und ihre Untersuchung regen also dazu an, den Mythos der Machtlosigkeit Europas angesichts wirtschaftlicher und militärischer Supermächte weiter zu hinterfragen.

■

Thorben Klünder

The Age of a European Empire or the Time to Jettison some Terminological Ballast?*

Oliver Jürgen Junge's dissertation draws a legal comparison between the European Union (EU) and other political entities. His analytical tool is the concept of empire (*Imperium*). He compares the EU with a variety of different empires, including the Roman and British ones. His central question concerns the legal nature of the EU. Is Europe a federation, a confederation or something in between?

Junge begins his book by reflecting on the existing concepts that describe the legal nature of the EU (3–102). He outlines how, over the last decades, EU legal scholarship has continuously invented new concepts in order to overcome the supposed dichotomy between federalism and confederalism. Neologisms like supranationalism, neo-functionalism and multilevel constitutionalism don't convince Junge. He is sceptical of the claim that the EU is *sui generis*, a political entity that cannot be subsumed under pre-existing categories and legal concepts of political structures. By introducing the concept of empire to this discourse, he wants to show similarities between the EU and non-state entities such as the Roman empire or the British Empire.

According to Junge, the legal nature of the EU is a controversial question mainly because of its ambivalence: the EU is at the same time universal (185–219) and heterogeneous, and culturally very diverse (220–258) as it continuously expands its sphere of influence. However, the EU has a number of competences that go beyond those of any traditional international organisation. By introducing the concept of empire, Junge adds a perspective that is helpful for legal historians in understanding that ambivalence. For instance, like historical empires, the EU has no pre-determined exterritorial borders (141–184). Even the borders of the status quo are difficult to determine. Junge compares the EU with its various stages and levels of integration to the Roman and British empires. Externally, the EU has numerous, differentiated relations with its neighbours, so that Junge considers the terms »informal European empire« or »imperial periphery« appropriate (259–299).

Junge highlights that the legal order of an empire is highly dynamic and pluralistic. This implies that an empire does not have a united legal order (*Einheit der Rechtsordnung*) as we know it from states (396–405). Junge points out that this is a fundamental difference between an empire and the modern constitutional state. In the latter, all power is held and exercised in accordance with an encompassing constitution.

What can lawyers learn from considering the EU as an empire? Junge's concept is first of all an innovation. Of course, there is lively research on empires, but it is mostly done in political science. Although the concept of empire has been discussed by lawyers, also in the debates on the legal nature of the EU, to my knowledge no one has yet elaborated it in detail. In German legal scholarship, the field of research in which Junge is moving has primarily and historically been part of *Allgemeine Staatslehre*. However, the criteria employed in political science research on empires naturally differ greatly from those of *Allgemeine Staatslehre*. The former is primarily concerned with empirically measurable power, the latter with adequate normative concepts. Borrowing political science's understanding of empire to analyse the legal nature of the EU thus entails certain difficulties. Junge has to translate the concept from one epistemological community to another. Due to the large scope of the comparison, the legal observations he draws are necessarily somewhat simplistic.

* Jürgen Junge, Imperium: Die Rechtsnatur der Europäischen Union im Vergleich mit imperialen Ordnungen vom Römischen bis zum Britischen Reich, Tübingen: Mohr Siebeck 2018, XXII, 609 p., ISBN 978-3-16-156279-2

Junge presents a host of details drawn from many different time periods, which are better examined by those more familiar with these periods. In this book review, I would therefore like to limit myself to interpreting and evaluating the book in terms of its underlying premises.

Junge's study is itself initially based on an interpretation of contemporary European legal studies. He seems to suggest that European legal scholarship rather simplistically divides associations of states (*Staatenverbindungen*) into two groups, federal states and confederations of states, with nothing in between (*tertium non datur*). However, the current doctrine of the state is not really as orthodox as Junge repeatedly implies. There is no doubt that such a theory can be found, for example, in Paul Laband's *Staatsrecht*. But already in the Weimar Republic, defining the distinction between a federal state and a confederation of states was no longer considered particularly important. For Hans Kelsen, it was merely a matter of degree; for Carl Schmitt, an obfuscation of the politically relevant questions. Even in the first decades of European integration, the question was raised whether the distinction between federal state and confederation of states was not actually a »false problem« (Walter Hallstein). Junge does draw on such literature, but he interprets it as a minority, whereas these texts were, and continue to be, very influential.

A second premise of Junge's book is that it makes sense to look for the »legal nature« of the EU. Now, legal »entities« do not have natures, they have usages; it is, therefore, a metaphor to think of the EU as having a legal nature. In European legal studies, asking for the legal nature of all manner of things is common, and perhaps the metaphor of »nature« misleads us into believing that we are working in a similarly verifiable way as the natural sciences. The search for something's »legal nature« would not be problematic if there existed a shared understanding about which conventions of classification we are discussing when using this umbrella term. This is, however, not the case. Thus, Junge's suggestion that the EU is more similar in nature to historical empires than, say, to a federal state, is also due to the fact that he bases his comparison on criteria that are typical for empire research. But other criteria would also be conceivable, such as the protection of fundamental rights, democracy, and the resolution of jurisdictional conflicts through judicial dialogue. Using these criteria, the EU's similarity to empires would decrease and the parallels with a constitutional state come to the fore.

Determinations of the »nature«, »spirit« or »essence« (*Wesen*) of a legal concept are subject to criticism because they are accompanied by the temptation of what in German legal scholarship is called an *Inversionsmethode* (inverse conclusion) that induces indeterminate concepts and then deduces from them legal consequences that would be implausible if only law was considered. This criticism does not quite apply to Junge, because he does not seek to deduce legal consequences from his use of the concept of »empire«, nor – more importantly – does it serve to justify a certain teleology of integration. Nevertheless, I am left wondering whether attempts to define the essence of European integration are not particularly susceptible to conceptual metaphysics (*Begriffsjurisprudenz*): Junge, too, tends toward an essentialist perspective on empires, as a number of quotations show. For instance, early on his book he asserts that »[t]he legal nature of an order is regarded in a narrower sense as the search for its essence in the totality of its distinguishing legal features« (4); towards the end he concludes that »[o]ne can give the empire a new name, one can reform, change and improve it. But none of this changes the essence of its abstract characteristics« 508), and asserts on the next page that »[t]he essence of European integration did not lie in overcoming the international essence of Europe in favour of a national unity, but neither did it lie in overcoming might by law« (509).

Junge's final premise is that using the concept of empire is better than having no concept at all. I agree with that in part. At least what Junge does is not misleading. Anyone wondering to what extent the EU is an empire can look it up in his book. Therefore, his choice of term is better than many other semantics that circulate unreflectively in European law scholarship. However, the term »empire« also causes problems, because Junge understands it to refer to very different legal phenomena at very different times. This hardly allows for concrete legal doctrinal observations to be made.

Junge's book is very topical. Readers from other disciplines should note that for some years now, and particularly in German European legal scholarship, there has been much discussion about appropriate overarching concepts (*Begriffe*). By its own

admission, this European legal scholarship wants to be »constructive«. But what constitutes an appropriate concept? One that we read a lot into, or whose meaning we know well? I believe the latter.

For European legal scholarship, it would perhaps be more consistent to examine semantics more critically in terms of what they actually mean doctrinally. Instead of introducing ever more new concepts to EU law, it seems more productive to assess the analytical value of the concepts we already have. We should eliminate those that are characterised more by political and historical suggestiveness than legal substance. I believe it is not the vocation of our age to explain the whole of European integration by just one holistic legal concept. But it might be the vocation of our age to weed out a few of the options.

■

Thorsten Keiser

Softes Recht und harte Politik*

Wenn man diesem Buch eines nicht vorwerfen kann, dann einen Mangel an Haltung. Es versteht sich in erster Linie als Plädoyer für ein ökologisches und soziales Europa. Der Klimawandel sei eine Chance zur endgültigen Überwindung des Neoliberalismus und damit zur Herbeiführung eines nachhaltigen Paradigmenwechsels (im Sinne von Thomas Kuhn, 322 ff.). Man müsse die Wirtschaft auf erneuerbare Energien umstellen. Dadurch entstünden viele neue Arbeitsplätze (emplois verts, 313 ff.), allerdings auch Probleme für die Beschäftigten in den klassischen Industriesektoren. Der Wegfall von Arbeitsplätzen könne mit einer allgemeinen Reduzierung der Lebensarbeitszeit und der Lösung der Erwerbsbiographien von überkommenen Kategorien der Produktivität aufgefangen werden. Die zentrale Antwort auf die Frage der Beschäftigung sei, dass man weniger arbeiten solle, denn es komme nicht auf die Quantität, sondern auf die Qualität der Arbeit und des Lebens an (etwa 325). Hier sieht der Autor die Lösung für die Verwerfungen einer sich notwendig von der Kategorie des Wachstums verabschiedenden Wirtschaftspolitik. Solche Anti-Wachstums-Philosophien sind inzwischen weit verbreitet. Ein zentraler Punkt sind dabei stets die Kosten und sozialen Folgen der Transformation, zumal nicht alle arbeitenden Menschen die radikale Umstellung ihrer Lebensentwürfe als Fortschritt begrüßen werden. Der vorliegende Beitrag begnügt sich an dieser Stelle mit einem allgemeinen Verweis auf einen europäischen Unterstützungsfonds, der Übergangsprobleme zugunsten arbeitender Menschen abfedern soll (328).

Die Diskussion über solche Themen kann hier nicht vertieft werden. Stattdessen stellt sich die Frage nach der Relevanz des Buchs für die Rechtsgeschichte. Bemerkenswert ist, dass der Autor seinem Zukunftsszenario eine ausführliche Bestandsaufnahme der von der Ebene der EU ausgehenden Sozialpolitik voranstellt. Diese wiederum wird an große Entwicklungslinien angeknüpft, die bis zur Entstehung der Europäischen Gemeinschaften reichen. Insofern könnte das zwischen Politikwissenschaft und politischer Publizistik anzusiedelnde Werk auch von Interesse für die Geschichte des Arbeitsrechts der EU sein. Schnell wird jedoch erkennbar, dass sich die thematisierten Trajektorien europäischer Sozialpolitik und Arbeitsrechtsgestaltung im Rahmen einer telelogisch-linearen Geschichtserzählung bewegen. Ohne Ironie ist von »goldenen Zeitaltern« die Rede (54 ff., 146 ff., 194 ff.), immer gekennzeichnet von einem »Mehr« an (europäischer) Sozialpolitik, der, ungeachtet

* Philippe Pochet, A la recherche de l'Europe sociale, Paris: puf 2019, 376 p., ISBN 978-2-13-062616-9

vieler Rückschläge, letztlich alles zustrebt, wobei die Frage, warum die seit langem eschatologisch herbeigesehnte Selbstzerstörung des Neoliberalismus trotz der Finanzkrise (!) wieder einmal ausgeblieben ist, mit einem nonchalanten Schulterzucken quittiert und die Beharrungskräfte der überkommenen Ordnung als »mystérieuses« bezeichnet werden (13).

Diesen Zugriff kann man sympathisch-anachronistisch finden oder methodisch unterkomplex. Jedenfalls spricht einiges dagegen, das Buch zu schnell zurück ins Regal zu stellen. Rechtshistorische Arbeiten in diesem noch wenig erschlossenen Gebiet können davon profitieren, weil es eine umfassende Auswertung von Literatur aus dem Bereich der European Studies in Bezug auf Arbeitsrecht sowie Sozial- und Beschäftigungspolitik bietet. Darüber hinaus sind die vorgenommenen historischen Periodisierungen von Interesse. Bei kritischer Relativierung der wertenden Passagen (der Autor sieht sich weniger als Analytiker denn als engagierter Intellektueller mit akademischem Anspruch), findet man gut begründete Darstellungen von Zäsuren der europäischen Arbeits- und Sozialpolitik, bei der Gesetzgebungsvorhaben auf verschiedenen Ebenen im ökonomischen Kontext und im Hinblick auf politische Entscheidungen in den Mitgliedstaaten reflektiert werden. Die Rechtsprechung des EuGH kommt ebenfalls als zentraler Faktor zur Sprache, wird jedoch nicht intensiv ausgewertet. Lesenswert sind die Ausführungen zu historischen Wendepunkten, etwa dem »Thatcherismus« und den Anfängen des europäischen Sozialdialogs (57 ff., 61 ff.). Dabei wandert der Blick immer wieder zwischen der europäischen und der mitgliedstaatlichen Ebene hin und her. Berücksichtigt werden darüber hinaus Auswirkungen ökonomischer Rahmenbedingungen auf die Arbeits- und Sozialpolitik, wobei der Weg zur Währungsunion eine zentrale Rolle spielt.

Neben der Herausarbeitung von Zäsuren ist für die Rechtsgeschichte der methodische Rahmen interessant, der für die Beobachtung einer »Europäisierung« des Arbeitsrechts entwickelt wird. Da es sich nicht um ein juristisches Werk handelt, darf man hier keine Synthese der Effekte europäischen Arbeitsrechts in den Mitgliedstaaten erwarten. Lesenswert ist dennoch ein Abschnitt über die analytischen Instrumente zur Bestimmung des Einflusses europäischer Politik auf die Mitgliedstaaten (224 ff.). Hier werden auch verschiedene Rechtsformen (hard law, soft law) in den Blick genommen; direkter wird von indirektem Einfluss differenziert; und Ansätze zur Erkenntnis nicht erwünschter Effekte werden aufgezeigt (230 ff.). Aufschlussreich ist auch die Beschreibung, wie die Union das Thema Antidiskriminierung für sich entdeckte und besetzte, wobei die bekannte Defrenne-Entscheidung ein wichtiger Impuls war (94 ff.). Die EU erscheint hier als arbeitsrechtliche Innovationsplattform, die in von den Mitgliedstaaten vernachlässigte Gebiete vordringt. Wie in vielen Studien wird beim »gender mainstreaming« viel Aktivität auf europäischer Ebene mit wenig Effekten in den Mitgliedstaaten beobachtet (109 f.), wobei die Entwicklungslinien wie stets bis in die Gegenwart gezogen werden. Beleuchtet werden darüber hinaus die Handlungsspielräume weiterer Akteure, nicht zuletzt der Sozialpartner, die als Faktoren europäischer Arbeitsrechtsentwicklung immer wieder hervorgehoben werden. Hier bietet das Buch einiges an Material zur kritischen Auseinandersetzung und als Anregung für die rechtshistorische Forschung.

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Carine S. Germond

Au-delà de la courbure des bananes – le pouvoir transformateur du droit européen*

»La Communauté n'a pas d'infrastructure administrative, pas de pouvoir direct de coercition, pas d'armée, pas de police. Son unique instrument, sa seule arme, c'est le droit qu'elle fixe.«[1] Ces paroles prononcées par le Président de la Commission européenne Walter Hallstein en juin 1965 devant l'Assemblée parlementaire européenne pointent l'importance du droit dans la construction de l'Europe. L'intégration européenne est donc un phénomène juridique et non pas seulement économique, politique, ou monétaire.

Cette intégration par le droit est le sujet de l'ouvrage écrit à quatre mains par Kiran Klaus Patel, un historien de l'Europe contemporaine, et Hans-Christian Röhl, un spécialiste du droit européen. Les deux auteurs ont choisi de se pencher sur une période charnière de la construction européenne: celle de la mise en place du marché unique, avec la signature de l'Acte unique européen en 1986, au traité de Maastricht de 1992 qui porte l'Union européenne sur les fronts baptismaux. L'intérêt porté à ce dernier traité et la longue série de réformes institutionnelles qui lui succède ont longtemps éclipsé la période qui lui précède, en dépit d'un intérêt sporadique pour le rôle de certains acteurs institutionnels ou individus. Par ailleurs, l'ouverture progressive – bien qu'encore partielle – des archives permet aux historiens et chercheurs d'accéder à des documents historiques inédits. Ce n'est pas un hasard si plusieurs ouvrages publiés récemment s'intéressent plus particulièrement à cette époque dont ils cherchent à réhabiliter les avancées et à mettre en perspective les jalons qu'elle pose pour le développement ultérieur de l'Union.[2]

Surtout, l'intérêt de cette période est, selon Patel et Röhl, double. En premier lieu, les sept années qui séparent la signature de l'Acte unique européen du traité de Maastricht marquent une transformation décisive de la nature du droit européen, un phénomène que Wirsching qualifie de »moment constitutionnel« (236) dans sa postface. Cette transformation explique aussi, pour les auteurs, pourquoi et comment la Communauté européenne s'est imposée comme le principal forum international de coopération en Europe, au détriment d'autres instances de coopération multilatérale. En second lieu, les auteurs affirment que cette transformation, dont les conséquences ne deviendront évidentes que bien plus tard, s'est faite de façon rampante et silencieuse.

Pour les deux auteurs, il est impossible d'interpréter les changements cruciaux qui interviennent en Europe entre 1985 et 1992 sans croiser les regards historiques et juridiques. Ils présentent donc cet ouvrage comme une contribution à une »Selbstklärung« (5) et une invitation au dialogue interdisciplinaire. L'objectif de l'ouvrage n'est donc pas tant de présenter des résultats définitifs que d'explorer un champ encore largement vierge et de poser des jalons exploratoires pour de futurs travaux transdisciplinaires. L'entreprise se veut donc avant pragmatique. Ce parti-pris résolument pragmatique s'explique aussi, comme le souligne Wirsching en postface, par la volonté de ne pas tomber dans les chausse-trappes du discours eurosceptique ou populiste et de ramener à de justes proportions un débat trop souvent normatif.

Le livre comporte cinq chapitres thématiques. Le premier dresse un état des lieux des connaissances historique et juridique. Constatant l'absence d'un réel dialogue entre les disciplines historique et juridique, les auteurs montrent cependant qu'historiens et juristes tendent à interpréter différemment cette période. Si la thèse d'une césure historique fait l'objet d'intenses discussions dans la littérature historique, elle reste encore largement absente des débats juridiques.

* Kiran Klaus Patel, Hans Christian Röhl, Transformation durch Recht. Geschichte und Jurisprudenz europäischer Integration 1985–1992, Tübingen: Mohr Siebeck, 345 p., ISBN 978-3-16-159020-7

1 Renaud Dehousse, L'Europe par le droit: plaidoyer pour une approche contextuelle, in: Politique européenne 1,1 (2001), 63–83 (63).

2 À titre d'exemple: Michael Gehler, Wilfried Loth (eds.), Re-shaping Europe: Towards a Political, Economic and Monetary Union, 1984–1989, Baden-Baden 2020.

Le second chapitre s'intéresse au projet de Delors visant à finaliser la réalisation du marché commun, prévu dans le Traité de Rome mais resté au stade d'une union douanière depuis 1968. Ce choix s'impose à deux égards. En premier lieu, ce projet met en exergue »die Dynamiken an der Schnittstelle zwischen den Mitgliedstaaten und der Gemeinschaft« (3). En second lieu, il montre »die Rolle des Rechts im Rahmen der Europäischen Integration als Instrument, aber auch als Gegenstand der Transformation« (40). En d'autres termes, ce second chapitre vise à montrer comment l'édification du marché commun rompt avec un mode d'intégration, celui de l'intégration par la jurisprudence (*integration through law*) grâce notamment au rôle judicateur de la Cour européenne de justice, en faveur de nouveaux instruments législatifs et juridiques. Par ailleurs, cette transformation s'opère aussi par le biais de changements en matière de prise de décision.

Les deux chapitres suivants tâchent de mettre en perspective ces diverses transformations politiques et administratives, tant à l'échelon européen que national, à l'aide de deux exemples concrets. Patel examine ainsi l'incidence de ces transformations sur les structures politiques et administratives de la République Fédérale d'Allemagne mais aussi les réactions de ces structures face à une »européanisation« qui les affecte directement. En s'appuyant sur de nombreuses archives fédérales et régionales, il met en évidence une relative continuité institutionnelle au niveau des instances politiques. La réaction la plus importante vient des Länder qui s'efforcent de conserver des compétences, par exemple dans le domaine de l'audiovisuel, qui tendent à être remise en cause. A cet égard, cette période représente »einen wirklichen Wendepunkt im Bund-Länder-Verhältnis in europapolitischen Fragen« (177).

La seconde étude de cas porte sur l'organisation commune du marché de la banane. Si l'exemple peut paraître quelque peu abscons, il n'en est pas moins devenu un symbole, souvent décrié, de l'hyper-bureaucratisation et de l'hyper-régulation de l'Union européenne (UE). Il illustre aussi de façon exemplaire la manière dont la création du marché unique – et la jurisprudence qui en résulte – impacte directement les relations externes et commerciales de la Communauté européenne. Les enseignements que l'auteur tire de cette étude sont de deux ordres. Le premier est que la Communauté »verdrängt […] ihre Mitgliedstaaten auch im Außenverhältnis, soweit sie im Innenverhältnis zuständig ist« (204). La seconde est qu'il en est de même pour certaines organisations internationales, telles que le GATT/WTO, qui sont peu à peu supplantées comme instances internationales de régulation »insofern die Mitgliedstaaten sie für die Koordination ihrer Politik nicht mehr benötigen« (205).

Le livre se conclut par une postface d'Andreas Wirsching dans laquelle l'auteur discute les résultats de cette étude à l'aune de trois thématiques structurant certains débats scientifiques et populaires: 1) l'étendue des transferts de souveraineté nationale à un »législateur européen«, 2) le problème du déficit démocratique et 3) une possible réversibilité de la jurisprudence européenne. De son point de vue, une telle étude historico-juridique permet de s'approcher au plus près de la réalité complexe de ce qu'est l'UE, des continuités et ruptures qui la structure. Pour autant, en montrant l'étendue des transferts de souveraineté nationale, il est aussi possible que les deux auteurs apportent sans le vouloir de l'eau au moulin des eurosceptiques et populistes de tout crin.

Enfin les riches annexes qui incluent une liste des bases de données juridiques, européennes et nationales, accessibles en ligne, et certains documents juridiques clés, dont il est fait mention au cours de l'analyse, seront utiles aux lecteurs. Le choix de publier l'ouvrage en allemand réduit cependant sa portée à une audience germanophone. On peut aussi regretter le format très compact du livre qui rend la lecture, par ailleurs souvent technique, ardue ainsi que l'absence d'un index des noms de personnes.

Nonobstant ces quelques desiderata, cet ouvrage devrait intéresser tous chercheurs et étudiants en études européennes. Ce volume ouvre aussi plusieurs pistes de recherches, aussi bien conceptuelles qu'empiriques, notamment pour étayer la thèse défendue par les deux auteurs d'une Européanisation par le droit et pour en préciser le contenu et la portée.

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Mario G. Losano

¿»Sharia councils« para los musulmanes o »One Law for All«? El caso de Gran Bretaña*

Los musulmanes están sujetos al derecho islámico con independencia del ordenamiento jurídico del Estado en que se encuentren; por eso, cuando se hallan o cuando residen en un Estado de *civil law* o de *common law*, están sujetos tanto a su propio derecho personal como al derecho de ese Estado. Esta situación de pluralismo jurídico genera conflictos entre los dos sistemas jurídicos involucrados, cuando uno de los dos prohíbe algo que está admitido por el otro. Esto sucede, por ejemplo, en Gran Bretaña e Irlanda del Norte, donde el Islam es hoy la segunda religión: en 2018 se contaban cerca de 3.400.000 musulmanes, sobre todo sunitas, lo cual equivale al 5,1% de la población total.

El derecho de familia y el derecho matrimonial constituyen el principal objeto de las controversias que los ciudadanos de religión islámica aspiran a resolver sin entrar en colisión con su propia religión, pero buscando al mismo tiempo una situación compatible con el derecho del Estado en el que viven. Como no puede dejarse sin resolver un número cada vez más elevado de casos controvertidos, en Gran Bretaña algunos tribunales aceptan, de hecho, las decisiones de los tribunales islámicos presentes en su territorio. Estos »sharia councils« son, precisamente, el objeto de estudio de Paola Parolari, investigadora de Filosofía del derecho en el Departamento de Ciencia Jurídica de la Università degli Studi di Brescia: *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli* sharia councils *in Inghilterra*, que incluye una amplia bibliografía (187–206). En el subsiguiente análisis de la obra, las palabras árabes se reproducirán sin signos diacríticos; además, por Inglaterra deberá entenderse comprendido el territorio de Gales, ya que se trata de las dos áreas donde se registra una mayor presencia de los *sharia councils*.

Los *sharia councils* »son entes privados compuestos por *ulama* – estudiosos de ciencias religiosas islámicas – a los que pueden dirigirse las personas de religión musulmana que viven en Inglaterra, en el caso de que deseen resolver sus propias disputas con arreglo al derecho islámico […]. Se ocupan principalmente de cuestiones relativas a la disolución del matrimonio islámico y son las mujeres, sobre todo, quienes suelen recurrir a su intervención«, puesto que ellas, »a diferencia de los hombres, no pueden disolver unilateralmente su matrimonio« (89).

La obra se apoya en los conceptos de »derecho policéntrico« y de »interlegalidad«, que se definen de la siguiente manera: »la noción de derecho policéntrico indica la multiplicación de centros de producción del derecho de diversa naturaleza, que no cabe encuadrar dentro de una estructura jerárquica«; »la noción de interlegalidad se refiere, en cambio, a las superposiciones, intersecciones e interacciones que, en este contexto, se producen *de facto* entre formas de derecho policéntricas y heterogéneas«. Se trata de nociones complementarias, »útiles para investigar las transformaciones del derecho en la era de la globalización« (1). Por supuesto, un seguidor riguroso del formalismo jurídico tendería a incluir estas investigaciones en el marco de la sociología del derecho.

El policentrismo y la interlegalidad identifican tres órdenes de problemas: de qué modo pueden coordinarse espacios jurídicos heterogéneos en un contexto de desorden de las fuentes; de qué modo el hecho de moverse en espacios jurídicos diversos (interlegalidad) genera intersecciones inéditas entre derecho estatal y *minority legal orders*; de qué modo la exclusividad de los sistemas jurídicos estatales resulta erosionada por las ponderaciones que las instituciones llevan a cabo respecto a los

* Paola Parolari, Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli sharī'ah councils in Inghilterra, Torino: Giappichelli 2020, VII, 206 p., ISBN 9788892189591. Traducción de la reseña por Luis Lloredo.

derechos fundamentales de las personas de religión islámica sujetas a un ordenamiento distinto. »El propósito de este trabajo – precisa la autora – es poner de manifiesto cómo las interacciones que se producen entre *minority legal orders* basados en la *sharía*, normas internacionales en materia de derechos fundamentales y derecho estatal de los países europeos de inmigración, ofrecen un ejemplo paradigmático de las coordenadas en las que pueden configurarse estas tres cuestiones teóricas« (10).

La primera parte de la obra – *Migrazioni, diritto policentrico e interlegalità*, 15–85 – examina los problemas teórico-jurídicos que el Estado se ve obligado a afrontar en presencia de fuentes que no pueden organizarse en un sistema. »Así pues, los jueces y la interpretación judicial adquieren un papel central en el intento de desenredar esta desordenada complejidad« (17): ante este desafío, los ordenamientos jurídicos de *common law*, que se basan en el precedente judicial, se revelan más adaptables que los de *civil law*, en los que el juez se encuentra vinculado exclusivamente a la ley estatal.

Por otra parte, mientras que el derecho de cuño occidental tiene una estructura piramidal, el derecho islámico o *sharía* es »un sistema normativo policéntrico, plural y dinámico«, que se entrelaza con »varias formas de derecho consuetudinario de implantación local«, así como »con los ordenamientos jurídicos nacionales de los diversos países con mayoría islámica« y, por último, con las normas internacionales y supranacionales y con las normas del Estado de residencia (37). De todo ello se derivan diferencias en las soluciones otorgadas a cada caso concreto; diferencias que, por ejemplo, afectan a los derechos fundamentales.

Además, las propias fuentes de origen islámico sobre derechos fundamentales no son unívocas: la *Declaración del Cairo sobre los derechos humanos en el Islam* suele ser incompatible con la visión occidental de los derechos humanos, mientras que la *Carta árabe sobre los derechos humanos* »se distingue de la anterior por su carácter laico y moderado« (54). Así las cosas, el policentrismo y la interlegalidad involucran a los sujetos agentes y también a los jueces »en un juego de acción y reacción que se distancia significativamente de la experiencia jurídica estado-céntrica« (58).

La conclusión de esta primera parte de la obra pone en tela de juicio la tradicional visión piramidal del derecho de raíz kelseniana y constata que la crisis del derecho como ordenamiento sistemático abre la vía al nuevo paradigma teórico-jurídico de la interlegalidad, a pesar de que el análisis de este nuevo paradigma siga estando »por ahora, poco más que abocetado« (83). Es decir: la teoría general del derecho está transitando de la metáfora de la pirámide a la de la red.

La segunda parte – *Scioglimento del matrimonio islamico y* sharia councils *in Inghilterra*, pp. 89–183 – profundiza en el análisis del modo en el que funcionan los *sharia councils*, cuya implantación en Inglaterra puede explicarse al menos por tres razones: »a) la peculiaridad de la experiencia colonial del imperio británico; b) las características de la inmigración en Inglaterra; c) las políticas internas en materia de multiculturalismo introducidas en los años 70 y 80 del siglo XX« (94).

La indefinición del contexto estudiado se produce por la misma razón de que »no existen datos oficiales del número de *sharia councils* que operan en Inglaterra. Las estimaciones que se han propuesto son a menudo divergentes, no sólo por la dificultad de definir qué es lo que constituye o podría constituir un *sharia council*, sino también por una fuerte tensión ideológica que ha levantado la alarma en torno a su proliferación« (alarma sobre la que volveremos enseguida); además, algunos *sharia councils* »están registrados como entidades de beneficencia (*charities*), otros como actividades comerciales (*business*), mientras que otros no tienen ningún estatus específico con base en el derecho inglés« (98).

Como consecuencia de esta heterogeneidad, la autora se dedica a registrar las diversas orientaciones decisionales de varios *sharia councils* y, a continuación, examina la naturaleza contractual del matrimonio islámico, las modalidades de su disolución y la forma de operar de estos tribunales, que suelen incurrir en contaminaciones con el derecho inglés, hasta el punto de que se podría llegar a hablar de una »British sharia« de naturaleza híbrida (112).

El debate sobre los *sharia councils* se intensificó a partir de la segunda mitad de los años noventa; en particular, en 2008, tanto Rowan Williams, arzobispo de Canterbury, como Nicholas Phillips, »Lord Chief Justice of England and Wales«, »pronunciaron discursos de apertura en los que se planteaba la posibilidad de reconocer las normas jurídicas de los grupos religiosos presentes en Inglaterra« (115), lo cual suscitó críticas, algunas de ellas de intensidad: por un lado, se rechazaba la idea de que hubiera un sistema jurídico paralelo al derecho inglés, pero incompatible con éste; por

otro lado, se rechazaba la *sharía* porque entraba en colisión con los derechos fundamentales, sobre todo de las mujeres. El texto consigna así tanto las tomas de posición contrarias a los »multiculturalistas«, como las propuestas de ley para poner freno a los *sharia councils* (122), así como las posiciones del Tribunal Europeo de derechos humanos (124–128) y las tesis más rígidas de la Asamblea Parlamentaria del Consejo de Europa (128–131).

La parte conclusiva de la obra se dedica a examinar el posicionamiento de las instituciones inglesas frente a los *sharia councils*, a los matrimonios y a los divorcios islámicos en Inglaterra, así como frente a las posibles intervenciones legislativas sobre los *sharia councils*. El análisis de las dificultades derivadas del posicionamiento de los tribunales ingleses resulta de particular interés para la teoría del derecho: en efecto, al menos según el *law in books*, »ni los matrimonios ni los divorcios islámicos que tienen lugar en Inglaterra gozan, en cuanto tales, de reconocimiento por parte del derecho inglés« (164). Sin embargo, la situación cambia si se considera el *law in action*, ya que los tribunales ingleses »llamados a decidir controversias nacidas en la intersección del derecho estatal con los *minority legal orders* de las minorías islámicas presentes en Inglaterra«, a fin de tomar una decisión, »trascienden los límites entre ordenamientos formalmente distintos«, se remiten a fuentes extrasistemáticas con interpretaciones *ad hoc* y practican »lo que se ha dado en llamar *interlegality in reverse*« (165).

Globalmente considerado, el análisis casuístico de los *sharia councils* en »Inglaterra y Gales« descrito en este interesante volumen puede servir como modelo (y como advertencia) en tres sentidos que aquí sólo cabe mencionar de pasada: 1) la minoría islámica no es la única en territorio inglés y, por lo tanto, se plantea el problema de cómo comportarse respecto a las reglas, se consideren jurídicas o no, de otras minorías como la *hindi* o la *sij*. 2) El caso británico puede constituir un útil punto de referencia para otros Estados con minorías musulmanas considerables, como Francia o Alemania. Además, estos problemas no afloran únicamente en Europa, sino también en Estados Unidos y en Canadá. En particular, en 2006, el Estado canadiense de Ontario excluyó del ámbito del derecho de familia la eficacia de las decisiones arbitrales basadas en derechos religiosos o extranjeros: no se prohíben estas decisiones, pero tampoco producen efectos. 3) El reconocimiento de un ordenamiento jurídico paralelo al preexistente en el Estado de acogida puede crear fuertes resistencias, como de hecho sucede en Gran Bretaña con el movimiento »One Law for All«, que podría traducirse con el lema de »la ley es igual para todos«. Los argumentos de este movimiento de protesta han sido expuestos por el islamólogo Denis MacEoin en su libro *Sharia Law or »One Law for All«?*

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Marietta Auer

In weiter Ferne, so nah* **

Harvard – das ist Teil der amerikanischen Popkultur und ein nationaler und globaler Mythos.[1] An der Geschichte der Harvard University und insbesondere der Harvard Law School, der ältesten kontinuierlich betriebenen Law School der Vereinigten Staaten, lässt sich die politische, juristische, intellektuelle und soziale Geschichte Amerikas der vergangenen zwei Jahrhunderte wie durch ein Brennglas studieren. Seit ihrer Gründung im Jahr 1817 hat sie zwei amerikanische Präsidenten, siebzehn Richter des Supreme Courts, zahlreiche Träger weiterer höchster Staatsämter sowie einen erheblichen Teil der Professorenschaft an amerikanischen Law Schools hervorgebracht. Die Autoren, ausgewiesene Spezialisten der Universitätsgeschichte sowie der amerikanischen Geschichte, begründen ihr monumentales Unterfangen, die Geschichte der Harvard Law School in zwei jeweils gut 600 bzw. 800 Seiten starken Bänden darzustellen, daher zu Recht mit dem »Isomorphismus« der amerikanischen Rechtsausbildungskultur, der immer wieder nach Harvard zurückverweist (4 ff.). Dieser Begriff beschreibt die eindrucksvolle Leistung der Harvard Law School, in der Juristenausbildung über zwei Jahrhunderte hindurch maßstabsetzend gewirkt zu haben, und zwar in nahezu allen Bereichen vom Fächerkanon über die Lehrmethode bis hin zum Wirtschaftsmodell der Juristenfakultät. Der hier rezensierte zweite Band des Gesamtwerks umspannt die acht Jahrzehnte vom Dekanat Ezra R. Thayers (1910–1915) bis zu den politischen Fakultätskämpfen der 1980er Jahre. Glänzend geschrieben und mit reichem Bild- und Zahlenmaterial ausgestattet, erweckt er das Harvard des 20. Jahrhunderts so anschaulich zum Leben, dass man die weißen Kirchturmspitzen, roten Backsteingebäude und goldenen Herbstfarben Neuenglands selbst dann buchstäblich vor Augen sieht, wenn man sie nicht wie die Autorin dieser Zeilen tatsächlich kennenlernen durfte.

Je länger man sich mit dem rezensierten Band befasst, desto klarer tritt dabei zutage, dass die Juristenausbildung dies- und jenseits des Atlantiks viel mehr unvermutete Gemeinsamkeiten als Unterschiede aufweist. Das gilt bereits für das erwähnte Wirtschaftsmodell, und zwar erstaunlich unabhängig davon, ob man eine privat finanzierte amerikanische Spitzenuniversität wie Harvard oder die chronisch unterfinanzierte Juristenfakultät einer deutschen Massenuniversität betrachtet. Es gilt weiter für die Lehrmethode, den Fächerkanon, die Wissenschaftlichkeit oder Praxisrelevanz der Ausbildung sowie für die während des gesamten 20. Jahrhunderts nicht abreißende Debatte über juristische Ausbildungsreformen. Doch die Liste ist noch länger: Sie umfasst die Bedeutung von Benotungssystemen und meritokratischen Selektionsmechanismen für die Verteilung juristischer Karriere- und Lebenschancen. Sie umfasst weiter eine Studienkultur, in der Angst und Leistungsdruck eine signifikant größere Rolle spielen als in den Ausbildungskulturen anderer Fächer. Und sie umfasst schließlich den Habitus des durch rigorose akademische Auslese geformten, zu Führungsaufgaben aller Art befähigten modernen Berufsjuristen, dessen Prägung mit der Selbstselektion eines bestimmten Studierendentypus beginnt und sich durch normalisierende Karrierepfade bis hin zur hochselektiven Elite der auf Lebenszeit berufenen Universitätsprofessoren laufend selbst reproduziert. Wiederum ragt dabei das strukturkonservative Beharrungsvermögen der juristischen Fakultäten auf beiden Seiten des Atlantiks gleichermaßen aus dem akademischen Fächerdurchschnitt heraus.

* Bruce A. Kimball, Daniel R. Coquillette, The Intellectual Sword. Harvard Law School, The Second Century, Cambridge (MA) / London: The Belknap Press of Harvard University Press 2020, 880 S., ISBN 978-0-674-73732-7

** Ich widme diesen Beitrag meinem Lehrer Duncan Kennedy zum 80. Geburtstag im Jahr 2022 in Dankbarkeit für alles, was ich von ihm an der Harvard Law School auch und gerade über Juristenausbildung lernen durfte.

1 Einen kleinen Überblick über die seit dem 19. Jahrhundert erschienenen Harvardiana bietet der erste Band des hier rezensierten Werks: Bruce A. Kimball, Daniel R. Coquillette, On the Battlefield of Merit. Harvard Law School, The First Century, Cambridge (MA) / London 2015, 7–12.

Ein Beispiel: Zu den eindrucksvollsten Erträgen des rezensierten Bandes zählt die Mikrogeschichte der jahrzehntelang verschleppten Öffnung der Harvard Law School für Frauen und Minderheiten. Diese Verschleppung betraf alle Ebenen der Institution von den Studierenden über die Professoren bis zum Verwaltungspersonal und konnte sich nicht trotz, sondern gerade wegen des ausgeprägt meritokratischen Selbstverständnisses der Law School, in deren männlich-weiß dominiertem Milieu Juristenausbildung ausdrücklich auch als Charakterbildung nach einem Ideal spartanischer Härte und Männlichkeit verstanden wurde, besonders lange und hartnäckig halten. Für alles, was dem dazugehörigen WASP-Korpsgeist nicht entsprach, war an der Harvard Law School bis weit in die zweite Hälfte des 20. Jahrhunderts hinein kein Platz. Den Autoren gelingt es meisterlich, diese langlebige Dynamik in historischen Querschnitten unter Rückbezug auf den persönlichen Stil und biographischen Hintergrund der jeweils amtierenden Dekane und Universitätspräsidenten sowie eines großen Kreises von weiteren Akteuren und Betroffenen zu veranschaulichen. So bedeutete Minderheitendiskriminierung während des langen Dekanats von Roscoe Pound (1916–1936) unter dem Präsidium des Bostoner Bilderbuch-Brahmanen Abbott Lawrence Lowell (1909–1933) etwas anderes als in den 1950er und 1960er Jahren unter Dekan Erwin Griswold (1946–1967) sowie den Präsidenten James Conant (1933–1953) und Nathan March Pusey (1953–1971); und abermals ganz anders stellte sich die Situation während der 1970er und 1980er Jahre unter der Ägide von Derek C. Bok (Dekan 1968–1971, Präsident 1971–1991) sowie den Dekanen Albert M. Sacks (1971–1981) und James Vorenberg (1981–1989) dar.

Unter Pound und Lowell blieb es unhinterfragter Konsens, Frauen die Zulassung zum Studium an der Harvard Law School zu verwehren, obwohl sich die Fakultät bereits zu Beginn des 20. Jahrhunderts mehrfach für ihre Zulassung ausgesprochen hatte und es in den folgenden Jahrzehnten immer wieder Anläufe qualifizierter Frauen gab, diese Hürde zu überwinden (29 ff. u. ö.). Die Stärke des Werks liegt darin, die selbstreproduzierende akademische Kultur Harvards, die solche Aufbrüche trotz des guten Willens vieler Protagonisten über Jahrzehnte hinweg blockierte, plastisch herauszuarbeiten. Paradigmatisch kommt diese institutionelle Kultur etwa in einer von den Autoren zitierten Stellungnahme Lowells aus dem Jahr 1915 zum Ausdruck, als dieser auf die Frage eines Pressevertreters nach den Gründen für die Ablehnung einer Petition von fünfzehn Frauen, zu gleichen Bedingungen wie Männer zum Jurastudium zugelassen zu werden, sinngemäß antwortete, Harvard könne keine Frauen zulassen, weil die Zulassung Männern vorbehalten sei (31). Nach dem Zweiten Weltkrieg war diese Argumentationslinie allerdings nicht mehr durchzuhalten. Zu diesem Zeitpunkt war Harvard als eine von nur noch fünf Law Schools in den gesamten Vereinigten Staaten, die Frauen den Zugang verweigerten, längst in eine Außenseiterposition geraten. Also hieß die Law School im Herbst 1950 sang- und klanglos den ersten Studienjahrgang von vierzehn Frauen auf dem Campus willkommen, nachdem sich Fakultät und Universität unter dem Technokraten Conant 1949 endlich auf deren Zulassung geeinigt hatten und die Fakultät das Zulassungsverfahren anschließend wegen »mangelnder Erfahrung« mit Frauencolleges monatelang verschleppt hatte (457 ff.). Wieder liefert der Band auch diesseits des Atlantiks reichhaltiges Anschauungsmaterial dafür, was Diskriminierung von Frauen und Minderheiten in der Rechtswissenschaft jenseits des Etiketts dieses schnell ausgesprochenen oder hingeschriebenen Begriffs eigentlich bedeutet: Unter minutiöser Aufbereitung des verfügbaren Zahlenmaterials schildern die Autoren, wie die Zahl der Studentinnen an der Law School bis in die 1960er Jahre hinein stets nur einen Bruchteil der zugelassenen Männer pro Jahrgang ausmachte, weil – so das ständig wiederholte Argument – vermieden werden müsse, dass Frauen qualifizierte Männer von Studienplätzen verdrängen, zumal nicht zu erwarten sei, dass sie in den erlernten juristischen Berufen lange tätig sein würden. Einmal zugelassen, hatten die wenigen Jurastudentinnen im Harvard der 1950er und 1960er Jahre Ordalien zu bestehen wie Einladungen zum Dinner bei den Griswolds, wo jede einzelne von ihnen peinlich befragt wurde, was sie bewogen habe, an die Law School zu kommen und einem Mann den Studienplatz wegzunehmen (469 ff.), oder »Ladies Days« in den Vorlesungen einiger notorischer Professoren, bei denen die Frauen, die sonst übergangen wurden, vor den vollbesetzten Hörsaal zitiert und zum Gaudium der männlichen Zuhörerschaft über »Frauenthemen« wie Ehescheidung oder häusliche Gewalt examiniert wurden (467 f.). Erinnert sich jemand an die hierzulande geführte

Debatte über stereotype Geschlechterrollen in juristischen Ausbildungsmaterialien?[2]

Doch die Frauen reüssierten, und einige Namen überragender Alumnae wie Ruth Bader Ginsburg tauchten, nicht viel anders als die der besten männlichen Alumni, zeitversetzt ab den 1970er Jahren wieder an der Harvard Law School auf, diesmal als Kandidatinnen für die Besetzung von Professuren (477 ff., 695 ff.). Doch mit jeder bezwungenen Karrierestufe wiederholte sich das Elend sexualisierter sozialer Exklusion: Hatten es die Frauen erst in die elitäre »Harvard Law Review« geschafft, erwies sich der weitere Weg zur Professur als versperrt, der über die prestigeträchtigen wissenschaftlichen Mitarbeiterstellen am Supreme Court führte (515 ff., 524). Hatte sich dieser Weg einmal geöffnet, sahen sich die in Harvard angekommenen Professorinnen mit ungreifbaren sozialen Hürden konfrontiert, die vom »lonely lunch syndrome« (701, 703) über vorgebliche Probleme mit der Lehre bis hin zu endlos verschleppten Tenure-Entscheidungen reichten (692 ff.). Die präzise aufbereitete Zeittafel der in den 1970er und 1980er Jahren begutachteten und abgelehnten oder besser von der »spartanischen Kultur« vertriebenen Kandidatinnen für Tenure-Positionen an der Harvard Law School liest sich wie ein Who's Who bedeutender amerikanischer Juristinnen des 20. Jahrhunderts und stellt der Institution ein Armutszeugnis ersten Ranges aus (811 f.). Auch hier gelingt es den Autoren, die am Werk befindlichen sozialen Praktiken an konkreten Einzelschicksalen plastisch hervortreten zu lassen, ohne historische Komplexitäten durch nachgereichte Bewertungen zu reduzieren. So gehen etwa bis heute die Einschätzungen der für den Band eigens befragten Zeitzeuginnen darüber auseinander, ob Dekan Griswold den studierenden Frauen jenseits der abweisenden institutionellen Kultur persönlich wohlgesonnen war oder nicht (469 ff.). Viele weitere eindrucksvolle Geschichten dieser Art könnten hier noch erwähnt werden: Die der offen praktizierten Zurücksetzung jüdischer Studierender und Rechtswissenschaftler in den 1920er Jahren, bei der der spätere NS-Sympathisant Pound und der WASP-Gentleman-Jurist Lowell am selben Strang zogen (173 ff., 178 ff., 253 ff., 797 f.). Die des Kampfes afroamerikanischer Studierender und Rechtswissenschaftler um Gleichberechtigung und berufliche Anerkennung, der erst nach der Bürgerrechtsbewegung der 1960er Jahre Früchte trug (182 f., 480 ff., 643 ff., 690 ff., 706 ff.). Schließlich die der Kommunistenjagd unter Studierenden und Professoren, die in den 1920er Jahren in der aufgeheizten Atmosphäre des Sacco-Vanzetti-Prozesses erstmals ihr hässliches Gesicht zeigte und im McCarthyismus der 1950er Jahre in jakobinischen Terror ausartete, der Karrieren und Leben zerstörte und gegen den selbst die juristische Spitzenkultur der Harvard Law School kaum etwas ausrichten konnte (134 ff., 406 ff.).

Die von den Autoren erzählte Geschichte der Harvard Law School ist jedoch mehr als ein großer Bilderbogen der amerikanischen Gesellschaftsgeschichte und Juristenbiographik. Sie ist auch Rechtswissenschaftsgeschichte, Institutionengeschichte, Fakultätsgeschichte und vor allem nach Amtsperioden übersichtlich geordnete Dekanatsgeschichte, die den Leser immer wieder mit den Fragen konfrontiert: Wie steuert man eine Institution wie die Harvard Law School durch ein Jahrhundert voller politischer Umbrüche? Welche Reformen waren nötig und wurden realisiert, welche Entwicklungen hingegen verschleppt oder verschlafen? Welche finanziellen und personellen Risiken darf und muss man eingehen, um die eigene Spitzenposition zu halten, und wie prekär darf es finanziell höchstens werden? Die überraschende Antwort der Autoren lautet, dass das Wirtschaftsmodell der Law School deutlich prekärer war, als es ihr nach außen zur Schau gestellter Reichtum, ihre zahlreichen exzellenten Studenten und ihre durch das ganze Jahrhundert hindurch

2 Die hier wie dort nur einen kleinen Ausschnitt des Geschlechtseffekts in der Juristenausbildung abbildet; vgl. Daniela Schweigler, Das Frauenbild in der bayerischen Justizausbildung, in: DRiZ 2014, 52–55 sowie weitergehend Emanuel Towfigh, Christian Traxler, Andreas Glöckner, Zur Benotung in der Examensvorbereitung und im ersten Examen, in: ZDRW 1 (2014) 8–27; Phillip Hellwege, Julia Dorfschmidt, Katharina Scharrer, Martina Benecke, Frauen in den Rechtswissenschaften, in: RW 6 (2015), 301–353; Thomas Hinz, Hans Christian Röhl, Geschlechterunterschiede in der Ersten juristischen Prüfung, in: JZ 71 (2016), 874–880.

vorangetriebene üppige Bau- und Expansionspolitik vermuten ließen. Die Autoren konstatieren ein »tuition dependence syndrome«, hinter dem ein über Jahrzehnte hinweg selbstverstärkender Rückkopplungskreislauf zwischen struktureller Unterfinanzierung, großen Jahrgangsstärken und dadurch erzwungener weiterer Expansion der Law School steckt: Aus struktureller Unterfinanzierung folgte die Notwendigkeit, möglichst viele Studierende zuzulassen, um den Betrieb der Law School durch die laufenden Einnahmen aus Studiengebühren zu decken. Für die vielen Studierenden waren Campus und Fakultät aber chronisch unterdimensioniert, so dass immer weiter expandiert werden musste, was wieder neues Geld kostete, das mangels Kapitalreserve nur durch noch mehr Studierende erwirtschaftet werden konnte – und so weiter (105 ff., 216 ff., 569 ff. u. ö.). Fühlt sich jemand an das Finanzierungsmodell der hiesigen Juristenfakultäten erinnert, die ihre typische Drittmittelschwäche im Gesamtplan der Hochschulfinanzierung etwa im Vergleich mit den medizinischen Fakultäten ebenfalls nur durch überproportionale Kapazitätsauslastung wettmachen können, was dazu führt, dass Hörsäle überbelegt, Betreuungsverhältnisse schlecht und Abbrecherquoten hoch sind? So etwas wie Drittmittelschwäche gab es in der ersten Jahrhunderthälfte auch in Harvard, wo Dekane wiederholt an der Aufgabe scheiterten, Alumni und reiche Geldgeber zu Spenden an die Law School und nicht etwa an die im naturwissenschaftlichen 20. Jahrhundert viel einleuchtender nützliche Medical School zu bewegen (347 ff.). Und noch in einer anderen Hinsicht zeigen die Autoren anschaulich, dass Juristenausbildung ein Wirtschaftsunternehmen ist und die Basis hier wie dort den Überbau bestimmt: Die für den Band titelgebende Kultur des »intellektuellen Schwerts«, die bis in die zweite Jahrhunderthälfte hinein in übertrieben feinen Notendifferenzierungen (34 ff., 529 ff., 664 ff. u. ö.) und Durchfallquoten von bis zu einem Drittel im ersten Studienjahr zum Ausdruck kam, war nicht zuletzt direkte Folge der Abhängigkeit von Studiengebühren und einer institutionellen Politik, die jahrzehntelang lieber hohe Einschreibezahlen und hohe Durchfallquoten akzeptierte als auf die Studiengebühren der später aussortierten Studenten zu verzichten (9, 788 u. ö.). Sogar zu dem hierzulande nach wie vor geläufigen Angstmacherspruch aus Erstsemesterveranstaltungen, wonach von den beiden Sitznachbarn bei einem Blick nach links und rechts am Ende des Jahres einer nicht mehr da sein werde, gab es in Harvard einst ein exaktes Pendant (160).

Was hätte man an der Harvard Law School, an der diese Zeiten heute längst vorbei sind, schon früher anders und besser machen können? Die Law School hätte, wie die Autoren für jede Zeitschicht und jedes Dekanat einzeln darlegen, aus der Abhängigkeit von Studiengebühren ausbrechen können, wenn sie rigoros auf das namentlich von der Yale Law School seit den 1920er Jahren erfolgreich als Gegenentwurf zu Harvard praktizierte Boutique-Modell hochselektiver Zulassung, geringer Jahrgangsstärken, kleiner Klassen, wissenschaftlicher Spezialisierung und daraus folgender konstant kleiner, aber exzellent besetzter Fakultät sowie geringer Bautätigkeit umgeschwenkt wäre (586 ff.). Wäre das, wie die Autoren nahelegen, auch ein für Harvard gangbarer Weg gewesen? Die meisten Dekane der Law School waren anderer Ansicht, so namentlich Griswold, der diese Überzeugung 1950 in die schlichten Worte kleidete, seine Vorgänger hätten entschieden, dass Harvard eine große Law School sein solle (515, 553). Nun: Wer es zwei Jahrhunderte lang schafft, die maßgebliche Isohypse für den von den Autoren konstatierten Isomorphismus der amerikanischen Juristenausbildung zu setzen, kann so viel nicht falsch gemacht haben. Und so verfolgt man gespannt, wie die einzelnen Dekane im Spagat zwischen Law School, Universität und Zeitgeschichte der Aufgabe gerecht wurden, die weitreichenden und wagemutigen Investitionsentscheidungen zu treffen, die die Spitzenstellung der Harvard Law School bis heute prägen. Nicht alle waren dieser Verantwortung gewachsen; manche zerbrachen an ihr. Thayer (1910–1915) beging Selbstmord, Pound (1916–1936) mutierte zum Faschisten, und James M. Landis (1937–1946) zog eine Skandalspur ehebrecherischer Verhältnisse und Steuerdelikte nach sich, ehe er am Alkohol zugrunde ging (21 ff., 253 ff., 291 ff.). Indessen hatte die zukunftsweisende Expansion bereits unter James Barr Ames (1895–1910) mit dem Bau der Langdell Hall begonnen, die als Sitz der weltgrößten rechtswissenschaftlichen Bibliothek bis heute das Gesicht der Law School prägt (73 ff., 213 ff.). Wäre es eine Alternative gewesen, dieses Gebäude nicht zu errichten und stattdessen im Baubestand des 19. Jahrhunderts mit einer auf diese Maße eingefrorenen Fakultät und Studentenschaft zu verharren? Wohl kaum. Noch deutlicher wird die insti-

tutionelle Fruchtbarkeit des zukunftsgerichteten Wachstums am Dekanat Griswolds (1946–1967), durch dessen Initiative nicht nur weitere große Bauprojekte realisiert wurden, sondern der auch darüber hinaus für viele zukunftsweisende Reformen von der deutlichen Vergrößerung und Modernisierung der Fakultät über die Einführung eines professionellen Alumni-Managements bis hin zur Abkehr von der Politik überzähliger Zulassungen und hoher Durchfallquoten verantwortlich zeichnete (378 ff.). Seitdem betreibt Harvard bekanntermaßen eine ebenso selektive Zulassungspolitik wie Yale, nur auf höherem Zahlenniveau. Insgesamt zeigt das Dekanat Griswolds, was gutes Hochschulmanagement in der Juristenausbildung bewirken kann – wieder eine unbedingt lesenswerte Lektion auch und gerade diesseits des Atlantiks.

Den Nachfolgern Bok (1968–1971), Sacks (1971–1981) und Vorenberg (1981–1989) fiel die Aufgabe zu, die Law School durch die von politischen Grabenkämpfen geprägten Jahrzehnte von der Bürgerrechtsbewegung bis zur Reagan-Ära zu steuern. Seit den 1960er Jahren hatte sich das gesellschaftliche Klima in den Vereinigten Staaten grundlegend gewandelt. Dabei spielten sich einige der signifikantesten Veränderungen wiederum auf der Mikroebene des sozialen Systems der Law School ab. Ein Beispiel bildet der Niedergang der bis in die 1960er Jahre wichtigsten Frauenorganisation auf dem Campus, der »Harvard Law Wives« (462 ff.). Diese bot den Ehefrauen studierender Männer seit den 1930er Jahren ein Forum zum sozialen Austausch, wobei die Gattin des Dekans als Schirmherrin fungierte und die selbstlose Unterstützung der Karriere der studierenden Männer im Vordergrund stand. Doch mit diesem Idyll dienender Weiblichkeit war es vorbei, als der spätere Dekan Bok auf einem Treffen der Vereinigung im Jahr 1960 dafür warb, dass Frauen sowohl im eigenen als auch im Interesse ihrer Männer ihre eigene Karriere verfolgen sollten. Die empörten Reaktionen zeigten nur, dass das Frauenbild auch auf dem Campus der Harvard Law School längst in unaufhaltsamem Wandel begriffen war. Die dort seit zehn Jahren studierenden Frauen hatten kein Interesse an den Treffen der Harvard Law Wives, weil sie sich in deren Rollenverständnis nicht wiedererkannten. In den 1970er Jahren löste sich die Vereinigung schließlich auf. Auch diese kleine Erzählung erweist sich als exemplarische Mikrogeschichte, die den breiten Verfall hergebrachter sozialer Rollen und Autoritäten seit den 1960er Jahren sogar im konservativen Milieu der Law School illustriert. Die symbolische Macht der alten Ordnung wirkte nicht mehr: Erratisches Verhalten von Professoren, zu Griswolds Zeiten noch an der Tagesordnung (382 ff.), war nunmehr verpönt; aus Klagen über harte Studienbedingungen wurden politisch ausgetragene »grade wars« (664 ff., 734 ff.); Frauen und Minderheiten forderten lautstark Gleichbehandlung; die elitäre WASP-Clubkultur starb aus (741); wo früher durchregiert wurde, musste jetzt langwierig diskutiert werden. Unterdessen explodierten die Studiengebühren mitten in die Rezession der 1970er Jahre hinein (683 ff.).

Am Ende des Bandes steht die durch fakultätspolitische Auseinandersetzungen rund um das »Critical Legal Studies Movement« zerrüttete Fakultät der 1970er und 1980er Jahre (763 ff.). Aus heutiger Sicht wirkt dessen linksradikale Politik gesellschaftlichen Wandels durch Enthierarchisierung der Law School indessen geradezu erfrischend. Dabei ging es noch um ein echtes politisches Ziel, nämlich um die Partizipation bislang ausgeschlossener Gruppen. Die Rollen von Freund und Feind waren klar verteilt, als Duncan Kennedy 1980 sein »Utopian Proposal on Law School as a Counterhegemonic Enclave« formulierte und dabei nicht weniger als eine grundlegende Reform des Zulassungsverfahrens, des Benotungssystems, der Auswahl der Mitglieder der Law Review, der Professorenberufung und Professorenbesoldung forderte, um »the School's role in promoting illegitimate hierarchies« zu reduzieren oder umzukehren (730, 770 ff.).[3]

Man spürt allerdings von ferne schon den Frosthauch politischer Überempfindlichkeit, der seit-

3 Grundlegend und bis heute lesenswert Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System, Cambridge (MA) 1983, neuveröffentlicht: New York 2004. Vgl. bereits ders., How the Law School Fails: A Polemic, in: Yale Review of Law & Social Action 1 (1970) 71–90; ders., First Year Law Teaching as Political Action, in: Law & Social Problems 1 (1980) 47–58.

dem in den amerikanischen Hochschulen Einzug gehalten hat und mit der üblichen Zeitverzögerung inzwischen unübersehbar auch in Europa angekommen ist. Am Ende des Bandes wird deutlich, wie sehr in der gegenwärtigen akademischen Cancel Culture die Saat aufgegangen ist, die durch die gesellschaftliche Polarisierung der Vereinigten Staaten seit der Reagan-Ära gesät worden ist. Natürlich darf dabei auch die Geschichte des Wappens der Law School nicht fehlen, das 2016 unter internationaler Medienaufmerksamkeit abgeschafft wurde, nachdem die Autoren im ersten Band ihrer hier vorgelegten Geschichte den Zusammenhang zwischen dessen Gestaltung in Anlehnung an das Familienwappen Isaac Royalls, der den ersten Lehrstuhl an der Law School gestiftet hatte, und der Herkunft des Stiftungsvermögens aus dessen von Sklaven betriebener Zuckerplantage in Antigua hergestellt hatten (2 ff., 394 ff.). Wieder handelt es sich um ein signifikantes Stück Mikrogeschichte, in der sich die große Zeitgeschichte spiegelt, und man möchte der Harvard Law School wünschen, dass sie noch viele Jahrzehnte und Jahrhunderte in ständiger Transformation auf ihrer einzigartigen Höhenlinie ausharrt, wo der Wind des Wandels rauer weht als anderswo.

■

Amber Rose Maggio

Heimatlos*

Mira L. Siegelbergs Monographie *Statelessness: A Modern History* ist eine umfassende Begriffsgeschichte der Staatenlosigkeit als Konzept und als rechtliches Phänomen. Wie die Autorin im einleitenden Kapital schreibt, bezieht sich das Konzept der Staatenlosigkeit auf eine breite Palette von Fragen rund um die politische Organisation der Menschheit, umfasst gleichzeitig aber einige der destabilisierendsten Entwicklungen der modernen Politik. Siegelberg untersucht diese Themen und Entwicklungen anhand einer Vielzahl von Quellen und legt so eine Ideengeschichte der Staatenlosigkeit vor, die zum Kern der Frage vordringt, wie die politische Organisation um Souveränität dem Menschenrechtsschutz für Staatenlose widerspricht.

Wie man es von einer Geschichte eines Rechtsbegriffs erwarten würde, sind viele der in dem Band herangezogenen Quellen juristischer Natur. Sie reichen von nationalen und internationalen Gerichtsentscheidungen, den Minderheitenverträgen nach der Pariser Friedenskonferenz, den Berichten und Dokumenten des Völkerbundes und den Akten der Haager Kodifizierungskonferenz 1930 bis hin zur nationalen Gesetzgebung und natürlich den völkerrechtlichen Verträgen. Zugleich zeichnet dieses geistesgeschichtliche Werk das politische Denken in der turbulenten Zwischenkriegszeit über den Zweiten Weltkrieg bis in die Nachkriegszeit nach, unter besonderer Berücksichtigung von Rechtstheoretikern und Emigranten. Interessanterweise greift die Autorin auch auf fiktionale Werke zurück, die versuchen, die Erfahrung derjenigen einzufangen, die in dem Zustand leben, keinen Staat zu haben: heimatlos zu sein. Die reiche Vielfalt an Quellen und die Auseinandersetzung mit dem Gedanken der Staatenlosigkeit auf unterschiedlichen Ebenen liefern eine originelle und aufschlussreiche Darstellung, die über die bisherige Forschung zu diesem Thema hinausgeht.

Staatenlosigkeit als Kategorie definiert sich durch ihre fehlende Verbindung zum Staat. Siegelbergs Darstellung der Entwicklung dieses Konzepts zeigt, wie wichtig die Vorstellung von staatlicher Souveränität für die Positionierung von

* Mira L. Siegelberg, Statelessness: A Modern History, Cambridge (MA) / London: Harvard University Press 2020, 318 p., ISBN 978-0-674-97631-3

Staatenlosigkeit in der modernen internationalen Ordnung war. Sie zeigt überzeugend auf, wie nach 1945, als eine andere Zukunft möglich gewesen wäre, Staatenlosigkeit als Kategorie benutzt wurde, um zu »advocate for the validity of the sovereign state as the primary source of rights and law, rather than as evidence for the future of non-state political order« (156). Gleichzeitig verdeutlicht sie den Zusammenhang zwischen dem Konzept der Staatenlosigkeit und dem Status von Individuen im Völkerrecht und belegt, wie dieser mit der Konzeption staatlicher Souveränität verknüpft ist: Nur durch den Staat können Individuen Rechte besitzen, was Staatenlose mit unerfüllbaren Ansprüchen zurücklässt.

Im Laufe des Buches setzt sich die Autorin mit Rechtstheoretikern und politischen Denkern auseinander, vor allem mit Hans Kelsen und Hersch Lauterpacht, aber auch mit Carl Schmitt, Josef L. Kunz, neben vielen anderen. Doch am fesselndsten liest sich Siegelbergs Auseinandersetzung mit Hannah Arendt. Arendt gilt als eine der bedeutendsten politischen Denkerinnen zum Totalitarismus im 20. Jahrhundert, und ihre persönliche Erfahrung der Staatenlosigkeit verleiht ihren Überlegungen zu diesem Thema besonderes Gewicht. Arendt gehört zwar nicht zu den Denkern, die die moderne internationale Ordnung in Bezug auf Staatenlosigkeit geprägt haben, aber ihre Analyse zeigt, dass sie die politisch-rechtliche Ordnung nach dem Zweiten Weltkrieg als konstitutiv für die Marginalisierung der Staatenlosen verstand. Siegelberg verortet Arendt als eine Denkerin ihrer Zeit, die aber auch »critical insights« in die Natur des Problems im Hinblick auf seine formalen, strukturellen Implikationen für die internationale Rechtsordnung bietet (205). Arendt ist es auch, die in Siegelbergs Werk andere Möglichkeiten der Vorstellung einer regionalen oder internationalen Lösung für das Problem der Staatenlosigkeit zum Ausdruck bringt. Siegelbergs Auseinandersetzung mit Arendts Denken im Laufe der Zeit lässt viele Übereinstimmungen erkennen, und es wird deutlich, dass ihre Darstellung der Staatenlosigkeit – obwohl als Geschichte des intellektuellen Denkens konzipiert – große Sympathie mit Arendts Verständnis hegt.

Im letzten Hauptkapitel untersucht die Autorin fundiert, wie die Trennung zwischen Flüchtlingen und Staatenlosen in der internationalen Rechtsordnung, u. a. durch die Flüchtlingskonvention von 1951 und das Übereinkommen über die Rechtsstellung der Staatenlosen von 1954, Staatenlose zu einer Randgruppe in der internationalen Rechtsordnung machte, die bis heute anhält. Gleichzeitig zeichnet sie überzeugend nach, wie die Vergesellschaftlichung der Staatsbürgerschaft die Nationalität und damit die Staatenlosigkeit zu einer weniger juristischen Kategorie degradierte.

Als Historikerin des intellektuellen Denkens und der internationalen Ordnung, und nicht der Staatenlosigkeit im 20. Jahrhundert im Allgemeinen, erwähnt sie nur kurz die Verbreitung der Staatenlosigkeit im Zuge der Dekolonisation (226). Es handelt sich zwar um eine verständliche Entscheidung, doch die Beschäftigung mit Intellektuellen aus ehemaligen Kolonien bezüglich des Phänomens der Staatenlosigkeit hätte eine weitere wichtige Dimension in Bezug auf die Rezeption der Ordnung hinzugefügt, deren Konzeption sie so meisterhaft darstellt – nicht zuletzt, weil eines der zentralen Ziele ihrer Studie darin besteht, die konzeptionellen und normativen Ressourcen zu klären, die zum Verständnis der Bedeutung von Staatenlosigkeit in der Gegenwart zur Verfügung stehen. Auch wenn diese Stimmen das internationale System und seine Marginalisierung von Staatenlosigkeit vielleicht nicht entscheidend geprägt haben, könnten sie sicherlich zu unserem heutigen Verständnis von Staatenlosigkeit beitragen.

Abgesehen von diesem geringfügigen Einwand bietet Siegelbergs aufschlussreiche und fesselnde Monographie eine neue Perspektive für das Verständnis der Geschichte der internationalen Ordnung und der Art und Weise, wie das rechtliche Denken über Staatenlosigkeit diese geprägt hat. Ihre Arbeit ermöglicht es uns, die Frage nach den Rechten des Individuums im Völkerrecht besser zu verstehen, die für die Lösung aktueller und zukünftiger Herausforderungen im Zusammenhang mit Klimawandel, Meeresspiegelanstieg und Massenmigration so zentral ist.

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Alessandro Somma

Non solo razionalità economica. Stato e morale nel pensiero neoliberale*

Si usa ripetere che il neoliberalismo sia mera razionalità economica, in quanto tale votato a fare a meno dello Stato. Si evita così di cogliere il radicale mutamento di paradigma cui rinvia il nome: esplicito nell'evocare la tradizione liberale, effettivamente incline a limitare l'ingerenza dei pubblici poteri, ma a stimolare nel contempo anche e soprattutto un suo rinnovamento.

Eppure questa circostanza è chiaramente evocata nel momento in cui venne coniato il termine »neoliberalismo«, ovvero nel corso del celebre colloquio Walter Lippmann tenutosi a Parigi sul finire degli anni Trenta: quando si volle rifondare l'ordine economico oramai incapace di reggersi sulla mitica mano invisibile, destinata a produrre l'autofagia del mercato. Allora si invocò l'edificazione di uno »Stato forte e indipendente« cui attribuire compiti di »severa polizia del mercato«, per impedire la »disintegrazione« sociale cui preludeva il »rispetto delle regole puramente razionali del gioco della concorrenza«.[1] E questo implicava evidentemente il riconoscimento che la razionalità economica non poteva da sola alimentare il libero incontro di domanda e offerta e dunque il funzionamento della concorrenza: occorreva la mano visibile rappresentata dai pubblici poteri, i quali avrebbero dovuto imporla e anzi impiegarla come strumento di direzione politica del comportamento dei consociati. Il tutto in una fase storica caratterizzata dalla dissoluzione degli imperi alla base di un contesto internazionale cui si era affidato il compito di preservare l'ordine proprietario.[2]

Il ruolo dello Stato nel sostegno dell'ordine economico neoliberale, pure ignorato nel nome di un consolidato fraintendimento circa il senso della locuzione »libero mercato«, non venne trascurato dagli ordoliberali: questi gli attribuirono anzi fin da subito il fondamentale compito di polverizzare il potere economico al fine di condannare gli individui a tenere i soli comportamenti descrivibili in termini di reazioni automatiche agli stimoli del mercato. Ciò nonostante sono numerosi coloro i quali tracciano una netta distinzione tra ordoliberalismo e neoliberalismo, sostenendo che il secondo, diversamente del primo, non ha abbandonato la credenza secondo cui i mercati hanno la capacità di autoregolarsi. Trascurando così la circostanza che non è dato stabilire in termini assoluti la quantità e qualità dell'intervento statale nell'ordine economico cui rinvia il neoliberalismo, essendo queste in funzione di ciò che di volta in volta si rende necessario al fine di rendere il capitalismo storicamente possibile.

Peraltro il neoliberalismo non innova rispetto alla tradizione solo con riferimento al ruolo dei pubblici poteri, bensì anche rispetto a una ulteriore caratteristica cui si dedica se possibile un'attenzione ancora minore: il suo rapporto con la morale. Su questo aspetto ha ora concentrato la sua attenzione l'ultimo libro di Jessica Whyte, professoressa di filosofia nell'Università australiana del Nuovo Galles del Sud.

La morale di cui parla il volume è quella riassunta nella filosofia dei diritti umani, che l'ortodossia neoliberale esalta nella misura in cui consentono di promuovere l'individualismo proprietario, e soprattutto di contrastare l'ingerenza dei pubblici poteri nell'ordine economico: ovviamente non quella destinata a promuovere attivamente il libero incontro di domanda e offerta, bensì quella volta a sostenere l'emancipazione contro il funzionamento della concorrenza. Il tutto opponendosi a un diverso modo di intendere i diritti umani: quello promosso dalle Nazioni unite nella Dichiarazione universale adottata alla conclusione del secondo conflitto mondiale sulla spinta di chi intendeva contrastare il neocolonialismo e promuovere l'equilibrio tra capitalismo e demo-

* Jessica Whyte, The Morals of the Market. Human Rights and the Rise of Neoliberalism, London / New York: Verso Books 2019, 278 p., ISBN 978-1-78663-311-8

1 Alexander Rüstow (1938), in: Serge Audier, Le Colloque Walter Lippmann: Aux Origines du »Néo-Libéralisme«, Lormont 2012, 469 ss.

2 Quinn Slobodian, Globalists. The End of Empire and the Birth of Neoliberalism, Cambridge (MA) / London 2018.

crazia, anche ricorrendo a forme di redistribuzione della ricchezza alternative a quelle realizzate dal mercato.

Whyte documenta come fosse questo il senso dell'opposizione tra società civile e società politica alimentata dai neoliberali raccoltisi attorno alla nota Società Mont Pèlerin, fondata anch'essa alla conclusione della seconda guerra mondiale per dare corpo ai propositi manifestati nel corso del Colloquio Walter Lippmann. Il tutto supportato da una copiosa documentazione volta a illustrare l'approccio evoluzionista dei neoliberali, i quali reputavano che la promozione della parità e la redistribuzione fossero l'aspirazione di corpi politici votati alla regressione, laddove lo sviluppo coincideva con la promozione dei commerci in un contesto cosmopolita.

Proprio un contributo confezionato da Friedrich von Hayek ai tempi dell'incontro parigino anticipava simili propositi nel momento in cui stabiliva un nesso tra sovranità nazionale e conflitto: quello bellico ma anche quello redistributivo. Di qui l'invito alla creazione di una federazione interstatale, cui affidare il compito di realizzare la libera circolazione dei fattori produttivi, sul presupposto che solo abolendo le barriere economiche si sarebbero eliminate le occasioni di conflitto tra Stati nazionali. E solo così facendo si sarebbe spoliticizzato il mercato, ovvero impedito agli Stati di promuovere forme di emancipazione diverse da quelle cui prelude l'equazione che identifica l'inclusione sociale con l'inclusione nel mercato: »sarà difficile produrre persino le discipline concernenti i limiti al lavoro dei fanciulli o all'orario di lavoro«.[3]

Whyte offre numerosi riscontri del nesso tra neoliberalismo e moralità, o meglio tra il primo e la cultura dei diritti umani, pur nella limitata accezione di cui abbiamo detto. Di particolare interesse quelli relativi alla nascita di tre note organizzazioni non governative come Amnesty International, Human Rights Watch e Médecins sans Frontières, di cui si documenta l'oggettivo contributo alla diffusione di un clima culturale di favore per la diffusione del pensiero e delle pratiche neoliberali.

Si intuisce a questo punto che il volume non rileva esclusivamente come mera riflessione storico filosofica sul passato, ovvero che costituisce un importante contributo al dibattito politico attuale, se non altro perché offre uno sfondo culturalmente ricco per affrontare questioni particolarmente spinose. Si pensi a titolo esemplificativo al dibattito, a dire il vero non recentissimo, sulla centralità delle lotte per il riconoscimento, ovvero per l'identità e la differenza, rispetto a quelle per la redistribuzione.[4] Si pensi poi alla sua attuale rivisitazione alla luce di quanto appare una rinuncia da parte delle forze politiche tradizionalmente impegnate sul fronte dei diritti sociali a rivendicarli, anche e soprattutto perché inconciliabili con tensioni neoliberali oramai divenute il loro orizzonte ideale. Magari accompagnando il tutto con una inedita enfasi sul tema dei diritti civili legati al riconoscimento, che rispetto a quelle tensioni è innocua, se non addirittura allineata, per i medesimi meccanismi descritti da Whyte con riferimento alle menzionate organizzazioni non governative.

Ha poi a che vedere con l'attualità politica, sebbene conosca una tradizione risalente,[5] una diversa funzione che la morale ha assunto in combinazione con la diffusione del pensiero neoliberale. Si è detto che quest'ultimo guarda oltre la razionalità economica, perché così facendo contribuisce a neutralizzare il conflitto redistributivo prodotto dal funzionamento della concorrenza. Ebbene, ciò non chiama in causa la sola morale collegata all'individualismo proprietario, bensì anche quella destinata ad alimentare valori premoderni evocati ad arte per alimentare conflitti identitari, e consentire così alla modernità capitalista di prosperare. A dimostrazione che il neoliberalismo non solo richiede l'intervento dello Stato per potersi affermare, ma anche che l'ingerenza dei pubblici poteri non è di per sé fonte di conflitti, come la demonizzazione neoliberale della sovranità nazionale mira a far credere. In verità il conflitto è una prerogativa del mercato e più in generale di un

3 Friedrich von Hayek, The Economic Conditions of Interstate Federalism, in: New Commonwealth Quarterly 5 (1939) 131–149.

4 Scontato il riferimento a Nancy Fraser, Axel Honneth, Umverteilung oder Anerkennung? Eine politisch-philosophische Kontroverse, Frankfurt am Main 2003.

5 Melinda Cooper, Family Values. Between Neoliberalism and the New Social Conservatism, Cambridge (MA) / London 2017.

rapporto squilibrato tra democrazia e capitalismo, il cui recupero richiede inevitabilmente di riportare l'emancipazione al centro dell'orizzonte politico dei pubblici poteri. E con ciò di recuperare in chiave emancipatoria la dimensione nazionale in quanto arena politica entro cui sviluppare il conflitto redistributivo.[6]

Il volume di Whyte contribuisce a identificare le dinamiche che hanno finora impedito un simile risultato, e rappresenta pertanto un contributo importante nella direzione giusta.

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6 Alessandro Somma, Sovranismi. Stato popolo e conflitto sociale, Roma 2018.

Marginalien marginalia

Johannes W. Flume

Constructing the Stock Exchange. On the Rise and Fall of an Iconic Place of Capitalism

I. What is an Exchange?

The question, *what is an exchange?* may prompt self-evident answers. Since the 19th century, economists as well as lawyers have characterised bourses or exchanges as the embodiment of a perfect market. They have variously been described as the »central hub of commerce«,[1] the »most important […] meeting point of purchasers and traders«,[2] the »brain of national economies«[3] or as the »central mechanism of the capitalist system«.[4] For architects, they represent a special type of trading site, while for sociologists and art photographers they show human interaction in acceleration, most famously captured in Andreas Gursky's photograph entitled »Chicago, Board of Trade I. (1997)«. However, our memory is starting to fade: only very recently have all relevant international exchanges terminated floor trading. Trading has undergone a process of liberation from the physical constraints of the exchange hall and transformation into digital space. This brought the long history of exchanges as physical marketplaces to an abrupt end.

But when did this important institution of economic life originate? What essential features distinguished it from other trading venues? Can the *Basilica Julia* (54 BCE to 46 BCE), the *Mercanzia* in Bologna (1382) or the *Lonja* in Barcelona (1383) justifiably be called bourses?[5] According to Fernand Braudel, bourses originated in the Mediterranean region around the 14th century, at the latest.[6] More generally, dating the emergence of the *byrsa*, bourse, *Börse*, or exchange – as the English would call it after a decree of Elisabeth I[7] – is all too often hindered by factual congeries of places and dates, offering little or no guidance.

This article aims to provide a history of the actual place of exchanges within Europe, from its beginning to digital dissolution in the present. The investigation takes us from 15th-century Bruges via 16th-century Antwerp and the golden age of 17th-century Amsterdam through to the present. The appearance of the world's first exchange building was linked to the gradual emergence of international markets in the Low Countries from the late Middle Ages through to the early modern period.[8] By a careful study of both the architectural design as well as the legal and economic functions of the bourse, I argue that this new type of marketplace originated in Antwerp in 1531. Exchanges beyond European borders have been in operation since the eighteenth century, as witnessed in the case of Japan.[9]

In the following, I show how rapid advances in trading methods and technologies were instrumental in shaping the development of exchanges throughout Europe during the past five hundred years. Three epochs may be discerned: the 16th-century *Galerijbeurs* or *Hofhallenbörsen*, the Basilica exchanges of the 19th century – the architectural designs of which came to epitomise ascendant capitalism more than any other type of building – and, finally, the closing decades of the 20th century, which witnessed the waning pre-eminence of the exchange building as physical trading site following the increased use of electronic trading and the end of parquet trading over the last ten years.

1 Grünhut (1885) 3 (author's translation).
2 Lexis (1898) 255 (author's translation).
3 Schmoller (1923) 612 (author's translation).
4 Bernhard (1933) 105 (author's translation).
5 Cf. Auer (1902) 250 (with [reconstructed] ground plan and cross-section of the *Basilica Julia*, fig. 337 sq.); for the latter two, see Schreyl (1963) 13–15. For more details on the non-existence of exchange buildings or functionally comparable locations in ancient Rome, see Fleckner (2010) 95–96 and 462.
6 Braudel (1979) 85.
7 For more details on this point, see below III, towards the end.
8 See Gelderblom (2013).
9 Cf. Schaede (1989); West (2000).

One final caveat: the primary objective is to advance our knowledge of specific types of marketplace in history, namely, bourses or exchanges. Surprisingly enough, although financial markets, market euphoria and bubbles have always been subject to scrutiny, until now little attention has been paid to the basic question as to what impact technological, as well as legal innovations have had on the market design of this prominent institution. While the focus of this paper is on market design, the microstructure of these markets and the contract law of derivative markets, deserves a separate analysis.[10]

II. What about Bruges?

Based on the *urtext* on the emergence of the bourse in Europe, the account of the Italian cartographer, author and merchant Lodovico Guicciardini (1521–1589), oft-cited over the centuries,[11] Bruges is commonly believed to have been the birthplace of the exchange. In travel guides, on the internet and in many popular works on economics, the building located in Vlamingstraat 35, Bruges (which can still be visited today) is called the world's first exchange. Nevertheless, the idea of Bruges as the birthplace of the institution is ill-founded and misleading. *Byrsa Brugensis* was the name for an open square. No exchange building ever existed in Bruges. This is substantiated by a careful re-reading of Guicciardini's account and by analysing the development of Bruges' trading system since the 12th century.

In the first edition of the *Descrittione di tutti i Paesi Bassi* of 1567, Guicciardini describes the spread of the use of the name *Borsa* as follows:

> Ma diciamo vn' poco come cosa considerabile & non indegna di farne mentione, donde venga, & deriui questo nome di Borsa, tanto conuenientemente per accidente a vn' simil' luogo appropriato. E in Bruggia vna piazza molto commoda, a tutte le parti della terra; in testa della qual' piazza è vna grande & antica casa, da quella nobil' famiglia, detta della Borsa, stata edisicata, con le sue armi di viua pietra, sopra la portal, le quali armi sono tre borse. Or da questa casa, famiglia & armi, prese il nome (come comunemente in simili cose auuiene) quella piazza. Et cosi perche li mercatáti dimoranti in Bruggia, elessero, vsauano, & ancor' hoggi per raddotto de loro negocij vsano essa piazza o, Borsa, andando eglino poi alle fiere d' Anuersa, & di Berga, dierono anco a similitudine, & vsanza della loro di Bruggia, il nome di Borsa a quelle piazze, & luoghi, doue essi in detta Anuersa, & Berga a trafficare si raunauano.
>
> Et d'Anuersa parimente tanto è stato fauorito & approuato questo nome, tirandolo ad altro senso, hanno poi ancora i Franzesi, portato non ha molto tempo, il medesimo nome di Borsa a Roano, & insino a Tolosa; & datolo a certe piazze, & loggie mercantili, ordinate al modo di qua, per raddotto de mercatanti […].[12]

But let us say, as a noteworthy and not unworthy thing to mention, from whence this name Borsa, which coincidentally is so adapted to such a place, comes and is derived. There is a square in Bruges, very comforting to all parts of the world; it starts with a large and old house built by a noble dynasty called della Borsa, with its natural stone coat of arms, which are three purses, above the door. It was from this house, lineage and coat of arms that the square took its name (as is commonly done in such a case).

And so, because the merchants who stayed in Bruges chose, used and still today use this square or bourse as their place of business, they also, when they subsequently visited the fairs of Antwerp and Bergen [op Zoom], after the similarity and the use of that in Bruges, gave the name bourse to the places and sites where they gathered to negotiate in the aforementioned Antwerp and Bergen. And in Antwerp this name has also, in a different sense, acquired so much approval and applause that later, not long ago, the French still gave the same name bourse in Rouen and Toulouse, and to certain trading places and houses, in the local manner, as the seat of merchants.[13]

10 See Flume (2019); Engel (2021).

11 Cf. Esquire (1845) 58–59; von Zesen (1664) appended on p. 3 after the index, as supplement to p. 233 of the main text; Hersbach (1726) 55–56; Anderson (1764) 360; Whiter (1800) 89; Kirchenpauer (1841) 1–2; Kulischer (1929) 316.

12 Guicciardini (1567) 67.

13 Author's translation, based on the German translation of the Guicciardini text by van Houtte (1981) 238.

By the middle of the 15th century at the latest,[14] a square located in Vlamingstraat – to the north of the present-day Grand Place (Grote Markt) – was named *die boers*,[15] *de beurs*,[16] *Byrsa Brugensis*[17] or *Oude Burse*.[18] By that time, Bruges had emerged as a pivotal international market. The economic rise of the city was linked to the flood of 1134, which had opened up access to the sea from the Scheldt estuary via the *Zwin*.[19] This paved the way for the gradual rise of the trade fairs in Bruges from 1200 onwards, the concomitant demise of those in Champagne, and the transition from (temporally limited) fair trading to a permanent market within the city.[20] The square described by Guicciardini served as the meeting place of mainly Italian merchants, who specialised in exchange transactions.[21]

1. *Reconstructing the market square*

It has been claimed that this square was named after the van der Beurze family who operated three hostels, two of which were located on the Byrsa Brugensis, between the 13th and 15th centuries.[22] This information is vital for clarifying the function and naming of the market place and adjacent buildings. When standing in front of the house ter Beurze in Vlamingstraat 35, in present-day Bruges, what one sees is by no means the world's oldest bourse but rather one of three hostels erected and operated by the van de Beurze family: in other words, Ter Beurse in Vlamingstraat 35, the Ter Ouder Beurse in Vlamingstraat 37, and De Cleene Beurse, in Grauwerkersstaat 2.[23] Thanks to Antonius Sanderus' (1586–1664) pictorial reproductions in Flandria Illustrata, we have a fair idea as to the appearance of the Byrsa Brugensis square around the middle of the 17th century.

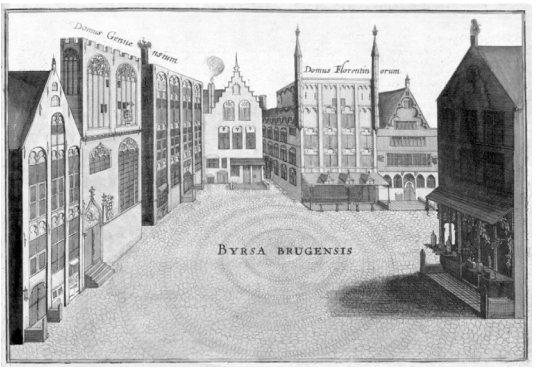

Illustration 1: Antonius Sanderus, Flandria illustrata, Tomus Primus 1641, p. 275[24]

Depicted in clockwise fashion, the illustration features the trading consulate of the Genoese merchants (second building from the left, erected in 1441 (Vlamingstraat 33)), the house Ter Beurse

14 Ehrenberg (1885) 448 states 1448 as the earliest documented date.

15 Hieronymus Münzer »Aliud est forum, ubi conveniunt mercatores: die boers dictum. Ubi inquam Hispani, Itali, Angli, Almani, Ostrogotti, et omnes naciones conveniunt« [cited after Murray (2005) 178].

16 See Ehrenberg (1885) 403 and 448 n. 68 with the remark that a column from Liège, captured as booty, was erected in Bruges »up de buerze«.

17 In *Flandria illustrata* by Antonius Sanderus, 1641, p. 271.

18 In the map drawn in 1562 by Marcus Gerards the Elder.

19 On the routes to Bruges, see Häpke (1911) 5–8.

20 Gelderblom (2013); van Houtte (1977).

21 van Houtte (1981) 244.

22 Devliegher (1975) 418; on the history of the van der Beurze family: Marechal (1949) 15–24; Greve (2011). Nota bene, the name of the family is spelled in countless variations.

23 Devliegher (1975) 418; thus Ehrenberg (1885) 447 is mistaken in claiming that »as far as the spacious and ancient house of the van der Burse family mentioned by Guicciardini is concerned, it is certain that a house called ›ter buerse‹ or ›ter ouder buerse‹ (old exchange) already existed in Vlamincstrate, Bruges, towards the close of the thirteenth century«. In reality, these are not alternative names for the same building, but separate buildings located next to each other (see main text below for more details).

24 Below the illustration can be read the following comment: »Itali quoque eundem modum hic sua habuerunt Prætoria; & nominatim Florentini & Genuenses, in quorum Prætorio hæc insciptio legitur: Hoc Ædificari Fecerunt Mercatores Januenses Brugis Commorantes Anno CIↃ CCCC XLI. CIↃ CCCC XXIX. Utrumque autem hoc Prætorium, tam Florentinorum, quam Genuensium magnifice structum, imminet Bursae Brugensi, eamque a duobus lateribus veluti claudit. (Illustrated as in the original).« (= The Italians also settled here; especially the Florentines and the Genoese, on whose house one reads the following inscription: This building was built in 1441 by the Genoese merchants living in Bruges. And another [inscription] with the same sentence referring to the year 1429. And these two houses, of both the Florentines and the Genoese, are beautifully situated on the Bruges bourse and appear to be attached on each side.) (author's translation).

(third building from the left, built in 1453[25] (Vlamingstraat 35)), the Venetian merchants' building (Ter Ouder Buerse, fourth building from the left, first officially documented in 1285[26] (Vlamingstraat 37)), and finally the trading consulate of the Florentine merchants (fifth building from the left, erected in 1429 (Academiestraat 1)). Sanderus' illustration constitutes a snapshot. Only the Genoese are mentioned by name, since the Venetian merchants had left Bruges in favour of Antwerp at the beginning of the 16th century.[27] Furthermore, by the time of Sanderus' publication, the last person to have borne the name van de Beurze had been dead for 149 years.[28] The abovementioned house Ter Beurse in Vlamingstraat 35, erected by the van der Beurze family in the 15th century in the midst of the Italian trade consulates, operated as a hostel for about 40 years. Whether Guicciardini was referring to Ter Beurse or Ter Ouder Buerse in his Descrittione is impossible to say with absolute certainty.[29]

2. *Hostels and Hosteliers in Bruges*

There should be no misunderstanding, however, about the kind of trading that took place on this square and within the adjacent buildings. James M. Murray[30] points out that a keen interest in the origin of the exchange should not lead us to overlook the key roles played by hosteliers and brokers in the history of trading in Bruges. Indeed, though a more detailed discussion would go beyond the limits of the present article, the hosteliers, or *ostelliers*, were far more than mere innkeepers.[31] During the period of Bruges' economic heyday following the development of the Flemish textiles trade, when the »medieval world market«[32] established itself in the town in the 14th and 15th centuries, the hostels functioned not just as guest houses but as places of hospitality and entertainment, stables, warehouses and trading centres.[33] Commodities were stored in the hostel cellars (*kelnare*) or in nearby storage rooms.[34]

Regarding the significance of the institutional function of the hostel, it is important to note that it was not until well into 14th century that foreign merchants had their own building complexes in Bruges. Hostels in Bruges are not to be confused with *Fondachi* as we know them from the Mediterranean region, which served the merchants of their respective countries as trading places, storage space and dormitory. Such buildings did not exist in Bruges. International trade depended on the use of hostels variously located around the city and the services of the hostelier.[35] The latter provided their guests with information, acted as business agents, were active in commercial transactions and payments, functioned as representatives for absent merchants, and sold the commodities stored on their premises.[36] They were jointly liable for any debts accrued by their guests.[37] It was not uncommon for merchants to be associated with the name of the hostel where they lodged. Thus, a merchant could be referred to as *hospes Roberti de Bursa*.[38] Business transactions between merchants were concluded through the services of either the hostelier, a broker employed by the hostelier (*makelaer* or *couretier*), or else by an independent broker.

Furthermore, by the end of the 13th century, it was obligatory for foreign merchants to draw on the services of a broker for all transactions exceeding five Flemish pounds.[39] It is commonly held that this close association between the merchants

25 Devliegher (1975) 418: »Façade-écran de la maison ›Ter Beurse‹, […] datée 1453 sur une pierre de façade déplacée en 1947«. This part of the facade is shown in Devliegher's appendix under no. 992; there is also a wooden beam with the coat of arms of the family van de Beurze dating to 1453 with illustration of the beam (no. 993) and the house (no. 995–996) [Devliegher (1975) 419].

26 Ehrenberg (1885) 447.

27 Cf. Murray (2005) 179 n. 3.

28 According to van Houtte (1981) 240, the last bearer of the family name died in 1492; this concurs with Marechal (1949) 23 (who refers to Gailliard).

29 See van Houtte (1981) 243; by contrast, Murray (2005) 179 n. 3 claims that it was the *Ter Oude Beurs*.

30 Murray (2005) 179–180.

31 Cf. van Houtte (1983); Gelderblom (2013) 42–52; Häpke (1911) 9–10.

32 Häpke (1908).

33 van Houtte (1983) 182.

34 Greve (2011) 71.

35 Gelderblom (2013) 23 and 45–46; Blondé et al. (2007) 155–156; see also Ehrenberg (1885) 413 with n. 15, who points out that the Florentine merchant Francesco Balducci Pegolotti (1310–1347) in his famous merchant's handbook *Pratica della mercatura* described »the Bruges ›celliere‹ as synonymous with ›Fondaco‹ and ›Magazzino‹«.

36 Gelderblom (2013) 43; Häpke (1911) 10.

37 Murray (2005) 198.

38 van Houtte (1983) 177 and 181.

39 Gelderblom (2013) 45–46.

and the hostels and hosteliers led to the custom of concluding business transactions in the hostel itself or in its immediate vicinity.[40] This enabled both seller and buyer to inspect the goods on-site prior to the conclusion of the contract. Here Rudolf Häpke's account of the daily routine of a German merchant in Bruges proves instructive:

> The working day begins early each morning; it is important to make use of daylight. Buying and selling require considerable time and attention. People prefer to buy ›in person‹. Thus, the merchant himself appears at the sales hall, or even goes down into the goods cellar. One tastes, tests and touches, and perhaps even the sense of smell is exercised. One then moves on to the cumbersome task of weighing […]. The most important thing is yet to be done, negotiating a price, until, finally, the ›God's penny‹ (*Gottespfennig*), a small gift to charitable ends, is paid at the end of the deal, which is then celebrated by drinking wine together (*Weinkauf*).[41]

While commodity trading took place in the vicinity of the hostels and warehouses, merchants also met at various other locations throughout Bruges, among them the Byrsa Brugensis. According to Raymond de Roover, Bruges was a »money market«, the meeting place of which was the *place de la Bourse*. It was at this market that Italians and Spaniards would meet, though not Germans, who did not have banking facilities east of the Rhine at their disposal. According to one of de Roover's sources dating from 1482, all merchants engaging in this activity were known as *marchans de la bourse*.[42]

3. *Etymology and Bruges*

To what extent does this brief digression into the economic history of Bruges advance our understanding of exchanges? In his *Etymologicum Teutonicae Linguae* of 1599, Cornelis Kiliaan (1528–1607), the translator of Guicciardini's work into Dutch, describes the »exchange of the merchants«, or *borse der koop-lieden* as follows: »Bourse (*borsa*), in contemporary vernacular *Bursa*, derived from great house of the bursa, or purse, was the first to be thus designated in Bruges, Flanders«.[43] While the designation »bourse« is not particularly original, it is certainly a fitting name for a Bruges family engaging in merchant trading as hosteliers, or for a square associated with that trade. The medieval word *bursa* (leather wallet or purse) can be traced back to the ancient Latin *byrsa* which, in turn, is based on the Greek word βύρσα (coat, skin).[44] The frequent use of *bursa* (»purse«) as a general term for all manner of economic activity may well have led to its being employed in Bruges, too. In medieval Europe, *bursa* could also refer to a common fund, a commercial cooperation, or a student lodging house.[45] An example of the latter use is the *Bursa* at Tübingen University, erected at the end of the 15th century. The *rescontre*, a key accounting procedure in medieval bills of exchange, was also referred to as »paying with a closed purse« (»*Zahlen mit geschlossenem Beutel*«).[46] All this is likely to have prompted medieval merchants to call a square on which primarily currency exchanges took place »bourse«. With respect to the word bourse as designation for a place of trade, there can be little doubt that this particular name can be traced back to Bruges as an alternative to the Italian market (*mercato*), square (*piazza*) or lodge (*loggia*).[47] In short, trading in Bruges led to the coining of the homonym by which we mean both a purse and the actual place at which trading was carried out. No more, but no less.

40 Greve (2011) 71; van Houtte (1981) 237 and 242; Gelderblom (2013) 45; Ehrenberg (1896a) 81.
41 Häpke (1911) 12–13 (author's translation).
42 de Roover (1968) 28.
43 Kiliaan (1599) 66 (author's translation): »Borse, vulgo bursa ab ampla domo bursae sive crumenae signo insignita Brugis Flandrorum sic primum dicta«.
44 Cf. entry »burse«, in: Simpson / Weiner (1989) 683; entry »Burse«, in: Strauss (1997) 437–442; Whiter (1800) 89.
45 Seiler (1921) 212–213; Rückbrod (1977) 56–57.
46 Koch (1881) 478; van der Wee (1993) 151 with n. 32, according to whom the *rescontre* was a widespread practice in Antwerp in the 16th century.
47 Cf. Kulischer (1929) 316.

III. The World's First Exchange: Antwerp

The exchange building, as a new, distinctive and independent architectonic type of economic life, became evident by 1531 at the latest, with the opening of the exchange in Antwerp.[48] The *Nieuwe Beurs* differed from all previous trading venues in its functional design. The appearance of the world's first exchange building has come down to us in the form of a copperplate engraving featured in Guicciardini's aforementioned book on the Netherlands, published in 1581.

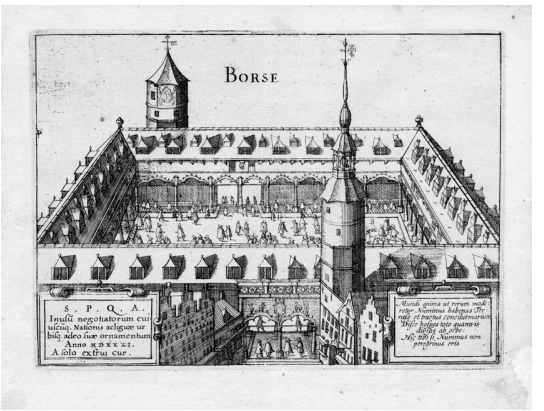

Illustration 2: Lodovico Guicciardini, Descrittione di tutti i Paesi Bassi, 1581, p. 100 sq

Built by municipal architect Dominicus van Waghemakere (1460–1542) in the late Gothic style, the Nieuwe Beurs was a so-called Hofhallenbörse or Galerijbeurs and served as the model for other exchange buildings through to the 19th century.[49] The courtyard measured 51.5m in length and 40m in width, and was enclosed by a two-storey building that on its ground floor included a 6m wide arcade.[50] According to estimates, the construction costs amounted to 300,000 gold crowns.[51] From 1540, the first floor of the building housed the so-called *Schilderspand*, a series of more than one hundred sales galleries in which the first modern European art market established itself.[52]

Two striking and highly significant details help characterise the building's function. The first is that the square is »empty«: the goods are absent.[53] In contrast to the *Fondachi* or the late Gothic trading halls of Flanders, the Antwerp bourse served as an enclosed space not for the on-site purchase or inspection of goods, but for the exchange of information and for the initiation and conclusion of contracts.[54] Daily trading times were restricted and ran from 11am (later 10am) to shortly after 12 noon. Trading is also said to have taken place in the evening around 6pm.[55] Merchants kept up to date about prices by reading »price currents« *(cours des marchandises, Preiskuranten*), printed lists of commodity prices and exchange rates.[56] We have only limited knowledge of what was traded at the Antwerp bourse. Based largely on Guicciardini's account, it is generally assumed that above all financial transactions were concluded at the *Nieuwe Beurs*, mainly relating to bills of exchange and insurances.[57] Conversely, commodity transactions are said to have been made primarily at the so-

48 The »Old Bourse« was a relatively small arcade erected in 1515 at the back of a patrician house in Rue de Jardin; see Peiffhoven (1888) 162–163 (with illustration); Meseure (1987) 22, incl. ground plan and illustration in the appendix under no. 2 f. Dominicus van Waghemakere, who went on to build the *Nieuwe Beurs* 16 years later, had also been the architect of this arcade.

49 For a key contribution to the history of the Antwerp bourse, see Denucé (1931); on its architectural history, see Meseure (1987) passim.

50 Peiffhoven (1888) 165–166; Meseure (1987) 22–23; Schreyl (1963) 16–17; a floor plan as well as a sketch of the interior are reproduced in: Auer (1902) 252.

51 See Calabi (2004) 176.

52 Hierzu Vermeylen (2000); Guicciardini (1567) 99, speaks of »Panto delle dipinture«.

53 Cf. in Weber (2013) 368–369 who distinguishes between »presence of goods (*fairs*)« and »absence of goods (*exchange trading*)« (italicised in original).

54 Cf on trading halls (with reproductions): Schröder (1914); on *Fondachi*: Calabi (2004); Calabi / Keene (2007b) 318–321; Pevsner (1976) 237.

55 See Goris (1925) 108.

56 Cf. McCusker / Gravensteijn (1991) 43–44 and 85–89.

57 On the importance of Antwerp as a money market, see Haussherr (1970) 94–96; van der Wee (1993) 196–197; on the trade of Antwerp's merchants, see Puttevils (2015).

called *Engelse beurs*, the »English Exchange«,[58] built a few blocks away in 1550, where trading began an hour earlier than at the *Nieuwe Beurs*.[59]

The second remarkable detail is to be found in the building's inscription, reproduced in the lower left-hand corner of the etching: *in usum negotiatorum cujuscunque nationis ac linguae* (»Dedicated to the merchants of all peoples and to all languages«). The bourse became the place of general assembly for merchants of all nations: each trading nation had its place at the Bourse, where they could always be found.[60] A plan of the bourse in Amsterdam shows that there, the arcades' pillars were consecutively numbered. Each number was allocated to a type of good, vocational class or group of persons.[61] Similar plans have been preserved for the Royal Exchange in London (1761) and the *Neue Börse* Hamburg (1841).[62] Something of the lively hustle and bustle within the courtyard can be gleaned in two contemporary accounts of the Antwerp and Amsterdam bourses. A poet by the name of Daniel Rogier, cited by Richard Ehrenberg, described the atmosphere in sixteenth-century Antwerp in the following way:

> What one heard was the confusing babble of all manner of languages, and what one saw was a colourful melange of all types of costume; in short, the Antwerp exchange appeared as a miniature world in which were convened all parts of the greater world.[63]

The German writer Filips von Zesen (1619–1689) invoked a similar picture for Amsterdam:

> It is in this trading-house that virtually the whole world is negotiated. Besides German merchants from upper and lower Germany, one might find Poles, Hungarians, Walhalz, French and, indeed, occasionally even Indians, and all manner of other foreign peoples. Here, one speaks of purchasing and goods' values, namely, the trade-off of merchant goods, loading and unloading of ships, and changing and counter-changing. Indeed, here one experiences the condition of all kingdoms and countries of the world and, no less, what is most remarkable about these.[64]

There has been much conjecture as to what buildings might have served as models for the Antwerp bourse. Both the *Fondaco dei Turchi*[65] (erected in 1225) and the *Fondaco dei Tedeschi*[66] (erected in 1228) in Venice have been suggested.

58 Guicciardini (1567) 67: »Ecci poi la gratiosa piazza della Borsa de gli Inghilesi, cosi detta perche la terra a lor' contemplatione con vna bella loggietta, la fece edificare l'anno m. d. l.« (»Then there is the pretty square of the English Exchange, so called because the country erected it in 1550, and it was equipped with a beautiful little loggia«) (Translation courtesy of Salvatore Marino and Pierangelo Buongiorno). An illustration of the *Engelse beurs* – a courtyard framed by a U-shaped, single-story building with a covered arcade – can be found Saunders (1997) 49 (where it is erroneously referred to as Royal Exchange; for more detail, see Calabi / Keene (2007a) 291 incl. n. 15).

59 Cf. Ehrenberg (1896a) 12; Coornaert (1961) 149; van der Wee (1963) 367–368; van der Wee (1977) 331–332.

60 Goris (1925) 108.

61 Leuchs (1839) 512–513; a picture of the »Platte grond van de Beurs te Amsterdam« by Jan Caspar Philips has been preserved in the Leiden University Library; also printed in: van Rooy (1982) 15.

62 See Donowell / Walker (1761) [reprinted in: Saunders (1997) 22]; see also Hume (1767) 106; both plans refer to the Royal Exchange II. (1169–1839); for Hamburg: Klein (1958) 26.

63 Ehrenberg (1896b) 12 (author's translation): »Man hörte dort ein verworrenes Geräusch aller Sprachen, man sah dort ein buntes Gemenge aller möglichen Kleidertrachten, kurz die Antwerpener Börse schien eine kleine Welt zu sein, in der alle Theile der grossen vereinigt waren«.

64 von Zesen (1664) 321 (author's translation): »Auf diesem Kaufhause verhandelt man fast die ganze Welt. Alhier finden sich / neben den Hoch- und Nieder-deutschen kaufleuten / auch Pohlen / Ungern / Wälsche / Franzosen / ja zu weilen auch Indier / und andere fremde Völker. Hier redet man vom einkauf und währte der wahren / vom vertauschen der kaufmannsgühter / vom laden und entladen der schiffe / vom wechseln und widerverwechseln. Ja hier erfährt man den zustand aller Königreiche und länder der ganzen welt / auch was sich in denselben denkwürdigen begibet«.

65 Esquire (1845) 61: »If you demand of me whence cometh that common likeness of a Square, with colums and arches about it, to be seen in all *Bourses*, I do not pretend to decide but yet I will venture to say, that I think the *Hollander* took the plot from the *Venetian's Rialto*, and he again from the *Kanes* of the *Turks*« (italics in the original).

66 Schreyl (1963) 17.

The cloister-like interior was probably also influenced by the form of Antwerp's *Oude Bourse*[67] a relatively small arcade in the Rue de Jardin erected in 1515.[68] Furthermore, the open-roofed courtyard structure indicates that the design of the bourse of Antwerp is beholden to the concept of a marketplace.[69]

In contrast to the view taken here, according to which the world's first exchange was established in Antwerp, Fernand Braudel[70] cautions against the notion that the exchange is an exclusively northern European brainchild: the bourse, he argues, originated in the Mediterranean region by the 14th century, at the latest. As Braudel goes on to explain, in economic history we are familiar with merchants meeting in open-air trading places, in front of or under loggias, or in the interior of a *fondaco*. We know that prior to the construction of the Amsterdam exchange building in 1611, merchants would convene on the *Nieuwe Brug* (New Bridge) or, in bad weather, inside the *Oude Kerk*.[71] Lombard Street in London was considered an especially prestigious location where, towards the end of the 15th century, (foreign) merchants would meet to carry out financial transactions.[72] The Tontine Coffee House in New York, opened in 1793, or Café Linser in Grünangergasse, in 19th-century Vienna, seem to have served similar functions.[73] In Cologne from around 1553 onwards, merchants benefited from a special license from the town council that allowed them to assemble in front of the town hall.[74] Hamburg city council permitted the merchant guild »*Gemeiner Kaufmann*« to conduct financial transactions near the Trostbrücke in 1558.[75] What confirms Antwerp's status as the home of the first bourse of the world, however, is the concept of a building the express purpose of which was to serve as a meeting place for international merchants: the open-roofed, enclosed square. Unlike the *Fondachi*, the Antwerp bourse was neither a wholesale market with an attached warehouse nor an accommodation facility for merchants. The building's function changed in so far as the goods were not »present« and that access remained unrestricted irrespective of nationality. Antwerp's innovative forte lay in the fact that, with Charles V's support, it was able to realise this new type of building.[76] Thus, following Hunt and Murray's assessment, there is no doubt that Antwerp, not Bruges, constitutes »the final architectural embodiment of the ›Bourse‹«.[77]

IV. The Ascent, Apogee and Abrupt Cessation of the Age of the Exchange Building

The events in Antwerp marked the onset of a Europe-wide process of transformation that takes us from scattered, open-air merchants' meeting places to a centralised place of trading with no goods present in the courtyard: the exchange as we now know it. Ultimately, the architectural history of the exchange provides us with a fair idea of how, and in what spatial contexts, the exchange, as an institution evolved from 16th-century Antwerp through to the present.

1. The Hofhallenbörsen or Galerijbeurs since the 16th Century

Until the 19th century, the majority of buildings housing exchanges were adaptations of the characteristic *Hofhallenbörse* or *Galerijbeurs* model

67 The »Old Bourse« was erected at the back of a patrician house; see Peiffhoven (1888) 162–163 (with illustration); Meseure (1987) 22, incl. ground plan and illustration in the appendix under no. 2 f. Dominicus van Waghemakere, who went on to build the *Nieuwe Beurs* 16 years later, had also been the architect of this arcade.

68 In the 14th century, monastic communities are said to have rented their cloister to merchants for their sales transactions, see Meseure (1987) 26.

69 See also Schreyl (1963) 17; a humorous discussion (in verse form) of the advantages of an open, unroofed central courtyard from the pen of Thomas Gresham is printed by Ehrenberg (1896a) 82.

70 Braudel (1979) 99.

71 Spufford (1995) 309; Ogilvie (2011) 368–369; Coornaert (1961) 148; Schreyl (1963) 20 with n. 91 on the merchants' habit of assembling in the open air.

72 Calabi / Keene (2007a) 300–301; Ehrenberg (1896a) 77.

73 For New York: Severini (1981) 31–32; For Vienna: Granichstaedten-Czerva (1927) 14–15; Baltzarek (1973) 93–94.

74 Kuske (1953) 26; Helten (1922) 2.

75 Klein (1958) 4.

76 On the influence and role of Charles V in erecting the bourse, see Spufford (2002) 51–52; Schreyl (1963) 95–96 n. 91.

77 Hunt / Murray (1999) 214.

of Antwerp. Particularly worthy of mention here are the Lille Exchange (1563), the London Royal Exchange I (1566–1666) (and its successor buildings following destruction by fires the Royal Exchanges II (1669–1838) and III (1841)), the Seville Exchange (1593) and the Amsterdam Exchange (1611).[78]

Due to its economic and developmental significance, the Amsterdam bourse stands out as *the* central European market of the 17th century. The meteoric rise of Amsterdam and the Netherlands as a whole – the era known as the Golden Age of the Netherlands – was concomitant with the Dutch Uprising of 1568. The religious wars between the Catholic south and the Protestant north led to the exodus of Protestant merchants from Antwerp and their relocation north to Amsterdam, leading to Antwerp's eventual economic decline.[79] As a conveniently located shipping centre, Amsterdam established itself as Europe's central commodities, finance and capital market. Full of admiration, Daniel Defoe writes in his book *A Plan of the English Commerce* (1728):

> The Dutch must be understood as they really are, the *Caryers of the World*, the middle Person in Trade, the Factors and Brokers of Europe: that, as is said above, they *buy* to *sell* again, *take* in to *send* out: and the Greatest Part of their vast Commerce consists in being supply'd from all Parts of the World, that they may supply at the world again.[80]

The central hub of the economic metropolis was the *Byrsa Amsterodamensis*, built according to the plans of Henrik de Keyser (1565–1621), in which the first modern liquid commodity and stock market was established.[81] The Amsterdam bourse is also the birthplace of European futures and options trading.[82] In the year 1635, the prices of 350 goods were listed weekly, and also translated into Italian, French and English.[83] The trading of the shares of the *Vereenigde Oost-Indische Compagnie*

Illustration 3: Byrsa Amsterodamensis (1612), Claes Janszoon Visscher (1587–1652)

(VOC) and the *Geoctroyeerde Westindische Compagnie* (WIC) and the tulip mania of the 1630s are world-famous and have been the subject of much scholarly discussion. The first descriptions of how exchange trading works also date to this period: the famous *Confusion des confusions* (1688) by Joseph de la Vega (1650–1692), in which exchange trading is presented in dialogue form, the remarkably detailed accounts of the merchant Jean-Pierre Ricard in *Le Negoce d'Amsterdam* (1722) and finally, the *Traité de la Circulation et du Crédit* (1771) by Isaac de Pinto (1717–1787). Notably, the Amsterdam bourse is not, as is often maintained in a striking and misleading manner, the »first securities exchange or stock exchange« in the world, but a general exchange on which commodity and financial securities were traded in the inner courtyard and arranged according to column numbering. Specialisation in securities and commodities exchanges was yet unknown. The Amsterdam bourse, located at the Damrak, operated for 227 years from 1611 until its demolition in 1838 due to dilapidation.[84]

The London Royal Exchange I also deserves brief mention. Established in 1566 by Sir Thomas

78 For further details and references to buildings, see Meseure (1987) 100–107; Schreyl (1963) 16–20.
79 Gelderblom (2013) 32–41.
80 Defoe (1728) 192 (italics in the original); on Defoe's economic writings, see Goetzmann (2016) 322–327, 332–337, 345–346.
81 Among the rich literature on commerce in Amsterdam are Petram (2014); Lesger (2006); Israel (1990); Wilson (1941); Barbour (1950); Smith (1919); Ehrenberg (1892); Scheltema (1846).
82 Gelderblom / Jonker (2005); Flume (2019) 206–209; Stringham (2003).
83 For a detailed account: Lesger (2006); McCusker / Gravensteijn (1991).
84 Cf. Schreyl (1963) 20; van Rooy (1982) 19–21.

Gresham, it initially stood in the shadow of the Amsterdam market.[85] That Gresham was the first to realise this project is no coincidence: having previously been in the employ of the English Crown in Antwerp as its agent in financial transactions, he was entirely familiar with the functions of the bourse. The fact that the English-speaking countries do not use the term bourse but exchange dates back to this period. We read in Guiccardini:

> [I]l medesimo hanno fatto frescamente gli Inghilesi a Londra, autore & fondatore di si nobil' machina & edifitio M. Tomaso Grassano patritio qualificatissimo di quella real' città. Et e notabile che quando fu finito, il detto edifitio la Regina Elizabetta medesima venne a Londra per vederlo, & transferitasi sul luogo lo lodò molto, ma perche ei nó paresse copia della Borsa d' Anuersa, gli dette il nome di Cambio reale, comandando espressamente che non si chiamasse altrimenti, nondimeno tanta forza ha hauuto quel' nome, che non e bastato il suo comandamento a obuiare che non s'appelli comunemente Borsa.[86]

> The same [sc. the construction of an exchange building] was recently undertaken by the English in London, under the auspices of Mr. Thomas Gresham, most honourable patrician of this royal city, namely, as author and founder of this such noble a plan and building. And it is remarkable that once the aforesaid building had been completed, Queen Elizabeth herself came to London to visit it, and at once praised it. And yet, since it did not appear to be a copy of the Antwerp Bourse, awarded it the name Royal Exchange, expressly declaring thereby, that it ought not to be called otherwise. Nevertheless, this name commanded such great power that her command was insufficient to prevent it from being commonly called Borsa.[87]

Guiccardini's account is corroborated by John Stow's own version of the incident in his *A Summarie of the Chronicles of England* (1574), according to which Elizabeth I (1533–1603), following a meal with Sir Thomas Gresham, »caused the same Burse by an Harolt of Armes and sounde of Trompet to be proclaymed The Royal Exchange, so to be called from thence forth and not otherwayes«.[88] Whether, as Guiccardini insinuates, vanity played a role in this attempt to dissociate it from the Antwerp bourse, need not concern us here.

The early history of the Royal Exchange similarly provides a rich source material for the phenomenon of local fixation and the impact of selective regulatory procedure in speculative trading. Whereas, until the end of the 17th century the Royal Exchange was still regarded as London's central trading place,[89] speculative trading in shares and government bonds later gradually shifted to the famous coffeehouses in Exchange Alley.[90] As an early first act of market regulation, a law was passed in 1696 »to restrain the number and the ill practice of Brokers and Stockjobbers«.[91] With the introduction of this statute, trading was restricted to one hundred licensed *brokers* and stringent trading rules were introduced. There can be no question as to the failure of this regulatory measure, since the majority of brokers operating at the Royal Exchange left in 1698, which led to an unprecedented increase in trading at the coffeehouses.[92] It was in these coffeehouses that the renewed endeavour to establish an exclusive club of brokers was undertaken. This, in turn, led to the foundation of the London Stock Exchange in 1773, prior to relocation to a trading room in Capel Court in 1801.[93] Thus, trading once again shifted from the coffeehouses back to an exchange building.

85 Michie (1999) 3; on the Royal Exchanges I–III, cf. the impressive volume edited by Saunders (1997).
86 Guicciardini (1567) 67.
87 The author's translation is based on the German translation of the Guicciardini text by van Houtte (1981) 238.
88 Cited in Nichols (2014) 144–145.
89 See Glaisyer (1997) 198.
90 On coffeehouses: Calabi / Keene (2007a) 308–309.
91 8 & 9 Will. 3, c. 32 (1697); for more details see Smith, C. (1929) 210–211; Morgan / Thomas (1969); Stringham (2002) 4–5.
92 Morgan / Thomas (1969) 26–27.
93 Stringham (2002) 7–10; on the building: Pevsner (1976) 204 incl. reproduction at 12.32.

2. *The Nineteenth Century: The Heyday of the Exchange Building*

The 19th century is *the* century of exchange buildings, culminating in a dense network of both regional and central exchanges.[94] In many places, the construction of exchanges meant that for the first time, merchants' meetings were accommodated in a specially designed building. In many cities, monumental *Basilika-Börsengebäude*, as they are called in German architectural literature, became the central hub of emerging capitalism. The exchanges in Trieste (completed in 1806), St. Petersburg (completed in 1816), and the Paris *Palais Brongniart* (see below figure 4, completed in 1826), as well as – to cite a non-European location – the no longer extant First Merchants' Exchange (1827) of Wall Street, New York, number among the formative examples.[95]

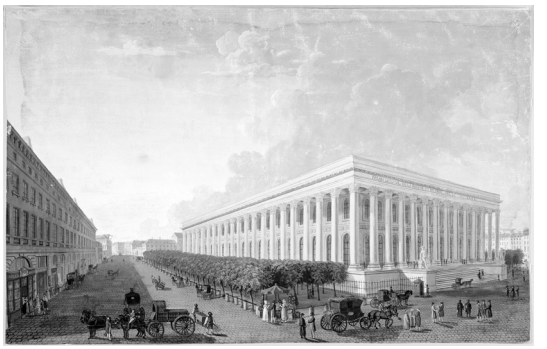

Illustration 4: Palais Brongniart, Paris 1830

Until the 17th century, commodities, government bonds, bills of exchange, and shares were all traded in bourses. Only later were various specialised types of exchanges introduced.[96] The primary difference was between the newly introduced stock exchange: (*Effektenbörsen* or *Fondsbörsen*, *bourse des valeurs*) on the one hand, and produce exchange (*Warenbörsen* or *Produktenbörsen*, *bourse de marchandises*) on the other.[97] Bonds, municipal securities, shares, coupons, dividend coupons, foreign exchange and bills of exchange were traded on the stock exchanges.[98] By contrast, the basic idea of produce exchanges is that only those goods amenable to standardisation can be traded. Such goods range from cereals, crude alcohol, rapeseed oil, petroleum, sugar, coffee, rye, wool, coal, through to iron and copper.

That the 19th century is *the* century of the exchange building is a fact that pertains, above all, to Germany and Austria. To be sure, exchange buildings existed prior to the 19th century in several of the prominent trading places, such as the *Alte Börse* at the Trostbrücke in Hamburg (1583), the *Alte Handelsbörse* in Leipzig (1687) or the *kleine Börse* at the Heumarkt in Cologne (1730). In Frankfurt, financial transactions were carried out in the open-air in front of the city hall, the so-called *Römer*.[99] In Germany and Austria, however, modern, comprehensive exchange markets did not emerge until the second half of the 19th century. These, in some cases eruptive, developments coincided with the construction of many monumental exchange buildings.

In 1841, the *Alte Börse* in Hamburg, erected in 1583, was replaced by the *Neue Börse*, which served both securities and commodities trading. In 1843, the *Alte Börse* on Paulsplatz, the first purpose-built exchange, was opened in Frankfurt, replacing the *Börsensaal* in *Haus zum Braunfels*. In 1879, the *Alte Börse* moved to the *Neue Börse* Frankfurt, which is still in operation.[100] From 1864, commodity trading also took place in the *Alte Börse*, and following the move to the *Neue Börse*, the commodity exchange settled in a building in the vicinity, until its dissolution in 1885.[101]

The *Neue Börse Berlin* was opened in 1863, replacing the meeting places previously located in the *Grotte* in Berlin's Lustgarten (established in 1739) and the *Alte Börse*, established in 1805. By the beginning of the First World War, Berlin had become one of the most important exchanges in

94 Cf. the compilation by Auer (1902) 263–299; for a comprehensive overview: Taeuber (1911); Schacher (1931).

95 On Paris see Auer (1902) 270–272 incl. reproduction on pp. 359–361; on New York see Severini (1981) 31–36 and figures 38–42, and figure 43 on St. Petersburg.

96 On this point see Hellauer (1920) 236–237.

97 On comparative perspectives on these differences see Weber (1894) 17–48 = Borchardt (1999) 141–156.

98 Cf. Borchardt (1999) 143–153.

99 See Trumpler (1909) 82; Coing (1986).

100 For details, see Wormser (1919).

101 See Lerner (1962) 38, 44.

the world, alongside its London and New York counterparts.[102] It consisted of three departments housed in different halls but under a common roof: the stock exchange, the commodity exchange and, from 1912 on, the metal exchange.

In Austria, the *Wiener Börse*, designed by Theophil von Hansen (1813–1891), was opened on the Ring in 1877, where securities and commodities (with the exception of agricultural products) were traded.[103] Exchange trading had earlier taken place at various locations in Vienna. This development is exemplary for many European trading metropolises. The bourse shifted from place to place before finally finding its home in a magnificent building.[104] Thus, when the exchange was first opened by Empress Maria Theresia on the basis of a patent, on 1 September 1771 , it was located until 1802 on the first floor of »*Zum Grünen Fassel* house, at Kohlmarkt in four narrow rooms […] that were no larger than the offices of a medium-sized storehouse«.[105] After having been housed in several temporary establishments, some at well-known Viennese addresses, the exchange, together with parts of the National Bank, moved into the especially designed *Palais Ferstel* on *der Freyung*.[106] When the capacity of the Freyung premises proved too small, a temporary emergency building was erected at Schottenring in 1872, in which trading was carried out until the opening of the *Wiener Börse* at Ringstrasse in 1877. This legendary building housed the exchange until the year 2000. Trading in agricultural products, previously transacted at various coffee houses, also known as *Winkel-Fruchtbörsen*, found a central place in 1890 at the Vienna Exchange for Agricultural Products in Taborstrasse.[107] The building bears the same motto as the old exchange in Antwerp: *in usum negotiatorum cujuscunque nationis ac linguae*.

The scope of the present article prohibits a more detailed discussion of the economic history of the German and Austrian exchanges from the 19th century to the present.[108] Here, it must suffice to point out that the dense network of regional exchanges had all but entirely collapsed by the end of the Second World War. Only Frankfurt was able to maintain its rank as an international financial centre, while Berlin and Vienna failed to regain their pre-First World War stature. It must also be noted that after the Second World War, futures trading in commodities no longer played much of a role in Germany, moving to international commodity markets (Chicago, New York, Paris, London).[109] Efforts to re-establish futures trading in Germany since then have failed, as witnessed by the abortive attempt in 1998 to introduce a commodity futures exchange in Hanover (*Warenterminbörse Hannover* (WTB)), where trading had ceased again by 2009. Currently, commodity derivatives are being traded on the Frankfurt Eurex, and energy derivatives on the European Energy Exchange (EEX) in Leipzig (since 2002).

V. Interior Architecture and Technological Advance

The construction of exchange buildings, some of which significantly altered the municipal structure of metropolises, represents a notable breakthrough in the process of institutionalising market places. They mark the place and time at which trading took place and, ultimately, the context in which the legal framework is to be considered.[110] As Wolfram Engels succinctly puts it, the »construction of exchange buildings marks the starting point of a formal exchange organisation«.[111] The close of the 18th and the early 19th century witnessed a gradual change in the design of exchanges. The buildings' centre was no longer »empty«, as roofs were added to the courtyards, transforming them into indoor spaces geared to the specific requirements of exchange trading. The exchange interiors are now dominated by the metal *corbeille* (basket), as in the Paris bourse, the

102 For details, see Buss (1913); Spangenthal (1903); Buchner (2019); Richter (2020).
103 For details, see Baltzarek (1973) passim.
104 See Granichstaedten-Czerva (1927) passim; Baltzarek (1971) 193–199.
105 Granichstaedten-Czerva (1927) 1 (author's translation).
106 Cf. Granichstaedten-Czerva (1927) 3–7.
107 For details, see Treibl (1908); Heller (1901).
108 For details, see Pohl (1992).
109 Already predicted by Göppert (1918/19) 219 at the end of the First World War.
110 Flume (2019) 199–245.
111 Engels (1980) 57.

Börsenschranke in Vienna and Berlin, and the octagonal pits of North American exchanges.[112] It was in these rooms that the characteristic exchange sign language evolved, for which the Chicago Stock Exchange was particularly renowned.[113]

The *corbeille*, the *Börsenschranke* or the pit, however, not only created a spatial order of designated meeting points for different types of commodities and securities, as had been done in the Amsterdam bourse with the numbering of columns. They also achieved a market division within the exchange itself.[114] The inception of this development dates back to 18th century France. In 1724, following the stock speculation orchestrated by John Law, a state-approved fund exchange was established, the number of *agents de change* restricted, and futures trading prohibited.[115] Prior to the French Revolution, the official bourse was located at 6 Rue Vivienne in the *Hôtel de Nevers*, in the former premises of the *Compagnie des Indes Orientales* (French East India Company). According to Robert Bigo, on March 30, 1774, a three-foot-high iron barrier was erected inside the Exchange Room to mark of a space for the exclusive use of *agents de change*, traders and bankers.[116] The area separated off by the barrier formed the so-called *parquet*; the space between the entrance and the barrier comprised the *coulisse*. In the *Palais de Brongniart* – the magnificent stock-exchange building first occupied in 1826 – this spatial division was maintained, with the *parquet* and the *coulisse* constituting two different markets.[117] The *parquet*, separated off from the rest of the room by the *corbeille*, comprises the official market (*bourse officielle*) organised and mediated by the *agents de change*. The circular *corbeille* is surrounded on all sides by the *coulisse* (also called *marché en banque*) which is accessible to all and thus constitutes the free market (*marché libre*).

This spatial division is mirrored in many European exchanges, as can be seen in the *Wiener Börse* on the Ring, which housed a trading floor and a separate so-called *Arrangementsbüro* (arrangement office).[118] The exchange hall was dominated by the centrally installed, so-called *Schranke* (barrier), a rectangular, cordoned-off area in which the *Sensalen* (accredited brokers) would convene. The transactions brokered by the latter were accordingly referred to as *Schrankengeschäfte* (barrier transactions), and the securities traded exclusively by *Sensalen* were called *Schrankenpapiere* (barrier securities).[119] The barrier, in turn, was encompassed by the *Kulisse*, the free market (*Freier Markt*), on which transactions could be carried out without mediation by the *Sensalen*. Next to the exchange hall was the *Arrangementsbüro* operated by the *Wiener Giro- und Kassenverein*. It was used for the clearing processes of futures contracts.[120]

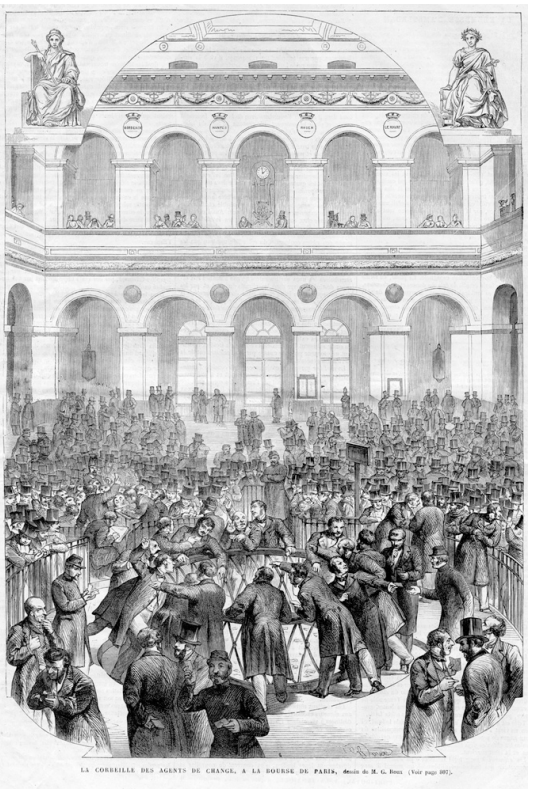

Illustration 5: M. G. Roux, La Corbeille des agents de change à la Bourse de Paris, L'Univers illustré, 1865, p. 805 (Palais de Brongniart)

112 On Berlin: Hilbrink (1925) 33–34; on Vienna: Granichstaedten-Czerva (1922) 17–18; on the US: Duffie (1989) 22–23; for detailed discussion, see Engel (2016).
113 On hand signals see Carlson (2013); Erickson / Steinbeck (1985).
114 Cf. also the concise diagrammes of the division of the interiors of the Berlin, Paris, London and New York exchanges in Prion (1930) 15.
115 Cf. Grünhut (1885) 8; Ehrenberg (1883) 12–13.
116 Bigo (1930).
117 See Hautcoeur / Riva (2012).
118 Cf. Ritter von Hansen (1879) 11.
119 Granichstaedten-Czerva (1927) 20–23; Meithner (1930).
120 Cf. Flume (2019) 226–227.

Technology, too, made gradual headway inside the exchanges.[121] The introduction of telegraph services and telephones accelerated the flow of information and trading enormously. The early stages in this development, as well as the matter-of-fact spirit in which novel forms of telecommunications were integrated into the routine operations of day-to-day stock market life, are well-illustrated in the following characterisation of the Berlin Exchange of 1913:

> The real nerves of the exchange are the telegraph and telephone cables. Should they malfunction, if they are ill, then the entire exchange collapses. Thousands, tens of thousands, hundreds of thousands of marks, if not more, depend upon these simple cables. Thus, the *Reichspost* pays utmost attention to the dispatch and telephone service. The first exchange telephones went into service on 1 April 1881, from which time the number of telephones has increased year to year: the telephone cells housed in the basement in 1885 numbered 88, whereas today they are in excess of 150. Telephone lines were introduced around the turn of the last century, and the efficient broker was quick to acknowledge their great advantages: each word, clearly and distinctly audible, he promptly ceased telegraphing and used the telephone. The early stages of this transformation saw approximately six million telegrams a year dispatched from the exchange, and whereas today their number has dropped by one third, the telephone shows a perpetually upward curve.[122]

It was computer technology that was to definitively revolutionise the place and methods of trading. Whereas discussion as to the pros and cons of floor trading – the so-called open-outcry, as opposed to computer-operated exchange – may have still been an issue around the 1970s, in the 21st century, the latter technology has evidently asserted itself in terms of sheer practicality and cost-efficiency.[123] The most recent and striking example of this is the CME Group's termination of floor trading for commodity futures in Chicago in 2015 and at the New York Mercantile Exchange at the end of 2016.[124] The Frankfurt Exchange ceased all floor trading on 20 May 2011, when trading was transferred entirely to the XETRA system.[125] These are just a few examples among many.

Illustration 6: Trading at the Berlin Exchange in the 1920s

121 On the historical development of technical financial analysis see Lo / Hasanhodzic (2010); specifically relating to the exchanges of the 19th century, see Engel (2015).

122 Buss (1913) 147–148.

123 Markham / Harty (2012); Brummer / March (2013).

124 See »›Open outcry‹ is in retreat but futures and options trading-volumes surge«, Economist, Jan. 5th 2017; Meyer (2016).

125 Panster / Schnell (2011).

The implementation of the computer exchange has led to trading being freed from the physical restraints of both the exchange hall and the traders operating within it, whereby the circle of trading participants can be extended indefinitely. At the same time, the anonymity and the speed of exchange trading have been taken to the extreme, since contracting parties are, for the most part, in contact only by means of computer terminals, either operated manually or automated.[126] The sociologist Karin Knorr Cetina describes this new context of the financial markets as »scoptic systems«.[127] Computer terminals, linked to a wide variety of information and data strands, represent a system for monitoring actual markets, which they display on their screens. The globally operating traders, in turn, exert their influence on these actual markets via their terminals. Economist Peter A. Abken pointedly remarked on the effects of the digitalisation of exchange trading as early as 1991:

> The globalisation of financial markets simultaneously fragments traditional financial transactions marketplaces and integrates them via electronic means. Physical marketplaces (the trading floors) are becoming obsolete, while ›virtual‹ marketplaces – networks of computers and computer terminals – are emerging as the ›site‹ for transactions. The new technology is diminishing the role of human participants in the market mechanism. Stock-exchange specialists are being displaced by the new systems, which by and large are designed to handle the demands of institutional investors, who increasingly dominate transactions. Futures and options floor traders also face having their jobs coded in computer algorithms, which automatically match orders and clear trades or emulate open-outcry trading itself.[128]

The digitisation of trading has had a major, even radical, effect on the form of exchange trading as we have known it since the 16th century. Not only has the form of trading been called into question, but ultimately the historically evolved institution of the exchange itself.[129] What counts now is not physical access and diverse legal regulations governing admission to the exchange building, but the electronic access to a trading system.[130] It is no longer the exchange that guarantees access to the gamut of liquid markets. Not unlike the old coffeehouses, we now have a multitude of (alternative) trading platforms that are difficult to define and classify, including the infamous »dark rooms«. Thus, stock exchanges are now only one among a number of types of trading sites that financial market regulation has to cover.[131]

VI. The End of History?

When looking back over the foregoing five centuries, from the early years of the century to the reality of contemporary electronic markets, we bear witness to a most fascinating process of fundamental transformation. Everything began in the Low Countries: From Bruges we have the name, Antwerp was the first to construct, design and install the actual building and, finally, Amsterdam refined and perfected the institution. From then on, the confines of the courtyard were to physically encompass one of the central mechanisms of the market economy. However, the hectic spaces of the bourses or exchanges were emptied by technological advances, thus rendering the actual physical space of the market superfluous. To be sure, financial transactions analysis will take a different form in the future, since we can no longer simply identify the human actors within the exchange walls. Naturally, this development did not occur overnight. While globally connected markets – or, in other words, global financial cities – are certainly not an invention of more recent processes of globalisation, markets, and more specifically derivatives markets, can be traced back to the 17th-century Amsterdam exchange.[132] The

126 On the importance of speed in exchange trading and in particular, on high frequency trading, see Lewis (2014).

127 Cetina (2003) 7–8; Cetina (2012) 116.

128 Abken (1991) 19.

129 For the architectural perspective on this pivotal aspect, see Mitchell (1996); about the current challenges from the legal perspective: Fleckner (2015).

130 On regulating market access, see Engel / Flume (2020).

131 Cf. Ferrarini / Saguato (2015).

132 For a closer elaboration, see Flume (2019) 229–230; on global cites and global financial centers, see Sassen (1999); Sassen (2012); for a historic account on the economics of risk Engel (2021).

18th and 19th centuries were formative in the development of a regulatory framework of exchange, and the advance of trading techniques.[133] At the beginning of the 20th century, the basis for the field of financial mathematics was established in the seminal works of Louis Bachelier and Vincent Bronzin.[134] Computer technology at the end of the twentieth century, eventually, led to an unprecedented leap in magnitude, speed and interconnection of markets worldwide. The rest belongs to the yet to be told future.

■

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133 See Flume (2019) 209–223.

134 Cf. Davis / Etheridge (2006); Hafner / Zimmermann (2009); on the relevance of financial mathematics for contract law, see Flume (2019) 115–118.

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Michael Widener

From Law Book to Legal Book: The Origin of a Species*

»Law book« is a term with a commonly accepted definition. The *Oxford English Dictionary* defines »law-book« as »1. A book containing a code of laws. 2. A book treating of law«.[1] Put another way, law books are books *of* the law: statutes, case reports, digests, practice manuals, treatises, textbooks and their accompanying reference books such as law dictionaries. They are the books that enumerate and explain the rules and procedures that govern legal systems. They are written or compiled by lawmakers (sovereigns, legislative bodies), law professors or legal practitioners (lawyers, judges, notaries).

But what is a »legal book«? Manuela Bragagnolo did not coin the term in her announcement of the 18 June 2020 workshop of the Max Planck Institute for European Legal History, »What is a Legal Book? Crossing Perspectives Between Legal History and Book History«. She explicitly hearkened to António Manuel Hespanha's 2008 article, »Form and Content in Early Modern Legal Books«,[2] and its call for »bridging the gap between material bibliography and legal history«. In her use of the term, however, Bragagnolo reached beyond the traditional boundaries of legal literature to which Hespanha confined himself and encouraged a broader definition, one that encompasses not only the perspective of the legal profession but also those of publishers and the broader public. She wrote:

> Books were much more than instruments used by the ›men of law‹ at the universities and in courts. Handbooks and pragmatic books, the topics of which also included the expansive fields of moral theology and religious normativity, were also fundamental tools through which ›legal literacy‹ reached a wider audience.[3]

The field of legal history has begun to take greater interest in legal books as social and cultural phenomena, as objects of commerce and as artifacts. This evolving interest has paralleled my own evolution as a custodian, collector and consultant in US academic law libraries. I too have come to embrace a broader conception of legal literature, one that the term »legal book« captures more accurately than the narrower »law book«. If historians and the curators who support them are to proceed on a firm footing, Bragagnolo's question, »What is a legal book?«, deserves an answer.

I will attempt to formulate a definition with the help of images from the books themselves. I have spent my last fifteen years at Yale collecting law books with illustrations.[4] Many of these illustrations show how the legal profession, legal publishers, and critics have attempted to shape law's public image. From these, I have selected ten in which books feature prominently as an element of the image's iconography. They give an indication of how the books' authors and publishers themselves regarded the book and its role in the law.

All of the images of this Rg issue's picture series can be viewed in full color, enlarged and downloaded from the album entitled »From Law Book to Legal Book«[5] in the Yale Law Library's Flickr site.[6] The album also includes dozens of related images.

Book presentation scenes

Book presentation scenes, also called book dedication scenes, are among the earliest illustrations found in legal texts. They are not unique to law books, but are found in a variety of genres beginning in the Middle Ages. In medieval law manu-

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1 Simpson / Weiner (1989) 8, 716.

2 Hespanha (2008).

3 Bragagnolo (2020).

4 See Widener / Weiner (2017).

5 https://www.flickr.com/photos/yalelawlibrary/albums/72157715959547171.

6 https://www.flickr.com/photos/yalelawlibrary/.

scripts they are commonly found at the incipit. They depict the author or compiler presenting his book to an authority figure, typically a pope or monarch. The earliest example in the Yale Law Library collection is an illuminated initial marking the opening of a 14th-century manuscript of the *Clementines* (Figure 1).[7] The earliest book presentation scene in a printed law book that I know of is in the 1477 Basel edition of the commentaries by Panormitanus on the *Decretals* of Gregory IX (Figure 2).[8]

Figure 3 provides all the essential elements of a book presentation scene. It is a detail from the opening page of the 1514 edition of the *Decretals* of Gregory IX, published in Venice by Luca Antonio Giunta. A kneeling Raymond of Peñafort, the compiler of the *Decretals*, presents his finished work to Gregory IX, who is accompanied by his college of cardinals. The same scene, rendered by different artists, appeared in several early 16th-century editions of the *Decretals*. The 1514 Giunta *Decretals* is part of a three-volume set of the *Corpus Juris Canonici*, containing over 450 woodcuts. The set remains the most heavily illustrated work in the history of legal literature.

Although Gregory and Raymond are the most visually prominent figures, the central element is the law book, in this case the *Decretals*, which passes between them. The image's main purpose is to bestow authority on the book. It assures readers that the book carries with it the authority of both the pope and the compiler, and guarantees the text as authoritative and reliable. Authority is a central concern of litigators, judges, professors and students. The book in your hands, says the image, provides a common, trustworthy basis for all parties concerned. The parties may dispute the facts and which laws are applicable, but they can at least agree on what the law says.

In Figure 4, from the 1514 Strassburg edition of Ulrich Tengler's *Layenspiegel*,[9] the cast of characters changes but the basic thrust of the image remains the same. Here Tengler goes all out, invoking the authority of not only the emperor, but also the Holy Trinity and the Virgin Mary, in support of his book. Both of these images depict the »attributes of power« that Hespanha mentions, intended »to stress the authority of their content and to promote the power of its author«.[10]

It must be acknowledged that discourse about a text's authority is not necessarily the only motive for illustrations like these. Images made a book more attractive to buyers, especially those willing to pay extra. Paying homage to a patron could be another motive. The scene in the *Layenspiegel* suggests that Ulrich Tengler's ego played no small part. Images of the pope, like the ones in Gregory IX's *Decretals*, might have been designed to appeal to the primary market for works of canon law, namely the lawyers, bishops and other churchmen who staffed the canon law courts.

Book presentation scenes passed out of fashion before the end of the 16th century. Heavily illustrated law books, like the Giunta *Decretals* and Tengler's *Layenspiegel*, likewise faded away, although the illustrated editions of Joost de Damhoudere's enormously successful *Praxis Rerum Criminalium*, with its 50 or so woodcuts of crimes and criminal procedure, managed to go through 24 illustrated editions between 1554 and 1660. The exception was works on topics such as water law and agricultural law, where illustrations continued to help explain complex technical issues.

Allegorical or descriptive frontispieces became the most common illustrations in law books, especially in German law books of the 17th and 18th centuries. It was as allegorical frontispieces that the book presentation scene returned in the 18th century, with a different cast of characters and different stories to tell. Figure 5 is a prime example. The frontispiece to Juan Sala's *Institutiones romano-hispanae*[11] shows Justitia handing down the *Siete Partidas* to Alfonso X and the *Institutes* to Justinian, with the *Digest* and *Code* lying at Justinian's feet.

Here we see Justitia as the source of law's authority, and the sovereign as merely its custodian. In essence we are viewing an allegorical depiction of natural law, with Justitia as the personification of nature and man's inherent sense of justice. Nevertheless, it is the book that remains at

7 Constitutiones (14th century). Image: https://www.flickr.com/photos/yalelawlibrary/50497427118.

8 Niccolò de' Tudeschi (1477). Image: https://www.flickr.com/photos/yalelawlibrary/8094768730.

9 Tengler (1514).

10 Hespanha (2008) 31.

11 Sala (1788).

the center of the transaction, as the written repository of law. A similar depiction appears in the frontispiece to *Aurora legalis*, Carlo Tebaldo's commentary on the *Institutes* (Figure 6),[12] where Justitia delivers Tebaldo's treatise to a doge as Justinian looks on and the dove of the Holy Spirit hovers overhead.

The final stage in the evolution of the book presentation scene is the frontispiece to a deluxe, folio edition of the Spanish Constitution of 1837 (Figure 7).[13] Here we see the Regent María Cristina de Borbón, the self-styled »Savior of Spanish Liberty«, presenting the book containing the Constitution to a supposedly grateful nation, while blind Ignorance cowers and Strife flees the scene.

All these images reveal the interplay of the law book as symbol, text and artifact. The book shown in the image is a surrogate of the actual text in the accompanying pages, and a guarantee of the text's accuracy. It also reflects the physical fact of the book as an artifact, an object that can be held in one's hands and is accessible to at least some, if not all, of the reading public. R.J. Schoeck writes that »more than any other learned profession, […] the legal profession has clung to its visible symbols of authority, of antiquity, of respect«.[14] The book is a symbol of the law, encompassing both text and artifact. It is a concrete, quotidian object, within the grasp of all. As such it is an increasingly democratic symbol, reflecting the growth of print culture and literacy. »[T]he law like every other cultural phenomenon needs physical means of expression«, writes Schoeck.[15] While Justitia, with her sword and scales, is an almost universally legible icon of the law, she remains an allegory, an abstraction. Even in today's digital universe, the law book continues to serve as a physical, tangible representation of the law.

One aspect of book presentation scenes is particularly relevant in arriving at a definition of »legal book«. These scenes are acts of communication; they show the delivery of a text. The book's role as a communication tool is only suggested in most dictionary entries. The Oxford English Dictionary spends over 41,000 words on the etymology, definitions, and usages of »book« and its permutations, but only hints at the book's role as a communication tool. This role did not escape Hespanha's attention. »According to common sense, a book is only a way of conveying communicative contents«, he wrote.[16] The books in these scenes are texts intended for a broader audience beyond the sovereign or the author. They perform social and cultural functions that distinguish them from private notebooks, correspondence or records of legal proceedings. By the same token, a »legal book«, for our purposes, does not necessarily take the form of a bound, printed codex. Many other physical formats can perform the same function as a codex in communicating about law to an audience. I will return to this point further on.

The author's role in composing these illustrations should not be overlooked. The printing history of the *Layenspiegel* suggests that Ulrich Tengler and his son Christoph were heavily involved in commissioning and specifying the numerous illustrations that adorn the work. Additional evidence comes from an addendum to the earliest editions of Damhoudere's *Praxis rerum criminalium*, where the author complained about lazy and expensive artists who failed to deliver all of the illustrations he commissioned.[17] The political motives of María Cristina de Borbón are obvious.

It is especially important to note the author's role in the allegorical frontispieces of the 17th and 18th centuries, which should not be passed over as mere window dressing. They should be seen, or rather read, as integral to the author's text. They were often conceived, and even paid for, by the author.[18] The best documented instance in law books is Cesare Beccaria's *Dei delitti e delle pene*. The image of Justitia, turning away in disgust from the executioner, derives from a sketch Beccaria sent to the publisher of the third edition.[19] The allegorical frontispiece of Sala's *Institutiones romano-hispanae* is one of dozens in law books of the period which employ law books and law libraries in significant iconographic roles.

12 Tebaldo (1692). Image: https://www.flickr.com/photos/yalelawlibrary/50866366683.
13 Constitución de la Monarquía Española (1837).
14 Schoeck (1983) 46.
15 Schoeck (1983) 48.
16 Hespanha (2008) 11.
17 Damhoudere (1555) 367.
18 Corbett / Lightbown (1979) 46.
19 Venturi (1971) 105–106.

Lawyers and their books

»[T]he world of law, remember, was a world based on the book«, Rodolfo Savelli reminds us.[20] The next group of images portrays lawyers, law professors, judges and law students in their native habitat, books and libraries. Unlike book presentation scenes, these images are more straightforward, with limited use of allegory. Although the legal profession played a role in their creation, they were largely the work of law book publishers. They functioned in large part as a marketing tool, reflecting the legal profession's self-image and the public image it hoped to shape. This image is of the law as a learned profession, a bookish profession, worthy of the public's trust.

One form these images take is portraits of the author. Law books hold a special place in the history of author portraits. Figure 8 shows the very first author portrait to appear in a printed book, Paolo Attavanti's 1479 guide to canon law, *Breviarium totius juris canonici*.[21] As such, it is the forefather of today's author photos on book jacket flaps. Attavanti (1444–1499), a Servite monk, was a doctor *in utroque iuris* and theology, whose other publications included sermons, a commentary on Dante, and a confessional. He is portrayed in the act of writing, in front of a few modest bookshelves befitting his monastic vow of poverty. Author portraits such as Attavanti's appealed to a new source of authority, namely the writer's reputation as a learned scholar. The inclusion of books in the image reinforces this authority.

As author portraits became more common in 17th and 18th-century books, engravings replaced woodcuts as the preferred medium. Engravings allowed for much finer detail than woodcuts, but they were also more expensive, requiring the services of a skilled engraver to incise the images on metal plates, a special engraving press to transfer the image to paper, and in some cases special instructions to the bookbinder. Since many of the legal authors were dead at the time of publication, the publishers must have shouldered the costs of the engraved portraits, expecting to recoup the expense with increased sales. In other words, the portraits must have been good for sales or else the publishers would not have commissioned them.

The portrait of a law book author surrounded by books became fairly common in continental law books of the 17th and 18th centuries. Figure 9 is but one of several examples from the Yale Law Library's collection. The portrait of Alessandro Sperelli (1590–1671) adorns the third edition of his *Decisiones fori ecclesiastici*, published in Venice in 1666 by Paolo Baglioni,[22] who also published a fourth edition in 1698. Sperelli, who was bishop of Gubbio and apostolic nuncio to Naples, is mostly forgotten today but in the 17th century he was a widely published author. Nine of his works, mostly on religious topics and some in multi-volume sets, appeared in 23 editions in the 17th century.

Sperelli is portrayed as a learned and pious churchman, pausing from his writing to gaze on the reader, with several of his published works lying close at hand, most prominently the *Decisiones fori ecclesiastici*. Notably, all the titles except one are titles that Baglioni published the same year or soon after. The portrait thus served to advertise Baglioni's publications. A number of other legal authors were portrayed with copies of their books, including Cornelis van Bijnkershoek[23] and Hugo Grotius (Figure 10).[24] The legend below one of the Grotius portraits is particularly apt: »See you not Learning in his Lookes. / See it more Lively in his Bookes«.

Author portraits were also common in English and Scottish law books. For at least one genre, English case reports, the portraits seem to have been used to combat a crisis of credibility. As the compiler of *The Modern Reports* wrote in the preface to the fifth volume, »Soon after the Martyrdom of King Charles the First, there came forth a flying Squadron of thin Reports.« These reports

20 Savelli (2001) 251.
21 Attavanti (1479).
22 Sperelli (1666).
23 Bijnkershoek (1767). Image: https://www.flickr.com/photos/yalelawlibrary/5474005691.
24 Grotius (1655). Image: https://www.flickr.com/photos/yalelawlibrary/4045846493.

had a reputation for uneven quality and dubious authorship. The same writer understood that publishers were using portraits to give the volumes a patina of reliability: »[L]et the Volumes of Law Books be as they will, the sufficiency of every Author must appear from his Works, and not from his Picture before the Title Page, or from any other Artificial Embellishment there.«[25]

The author portraits in English law books exhibit a marked difference from their continental counterparts: the complete absence of law books in the images. In the 52 examples from the Yale Law Library's collection, a few of the authors are holding documents in their hands, but not a single one is pictured with a printed law book.[26] For some of the authors, the images were touting their authority and reputation as judges, not as writers (which could be questionable in several cases), given that their judicial regalia received prominent display. Perhaps this difference reflects broader contrasts between the common law and the more bookish civil law; something for the comparative law folks to chew on.[27]

In Figures 11 and 12 we move from portraits of known individuals to generic images. We also move toward the edges of legal literature. These are not the great compilations of statutes and court decisions, codes and treatises, but rather the practical, how-to books of daily law practice and study. Figure 11 is from an 18th-century German book of legal forms, with a frontispiece showing a lawyer at work in an office lined with bookcases.[28] Change the clothing and hairstyles and it could be an advertisement for a US law firm today. In actuality, modern law offices look less and less like the book-lined chambers of yore as they increasingly rely on digital resources and jettison their book collections, yet the image persists.

In the image of the studious, bookish lawyer, the professional aspirations of the legal profession coincided with the marketing needs of law book publishers. For the legal profession, books reinforced the perception of law as a learned profession, justifying its social status, its fees and its monopoly on law practice. For the publishers of legal texts, such images flattered their customers and encouraged them to buy more law books.

Figure 12 brings us squarely into the realm of the legal book, a book that is about the law but not of the law. This particular title, *Kluge conduite eines künfftigen Gelehrten, und insonderheit eines Rechts-Gelehrten*,[29] is aimed at a segment of the law book market, namely law students. The text provides advice as well as often critical observations on legal studies, along with an annotated bibliography. It also includes guidance on student life in general, including nutrition, travel and social life. There is an entire chapter on visiting bookstores.

The frontispiece presents a stark contrast to the previous images. Instead of a celebration of legal literature, we have a lamentation. The forlorn student is surrounded by enormous piles of thick, heavy law books, whose spines provide a visual bibliography of the legal literature of the time. There is Carpzov, Stryk, Thomasius, Böhmer, Mynsinger and Pufendorf, to name a few. The book he has opened is the Bible, as if he is praying for divine intervention to help him get through his studies. The image bears a striking resemblance to one published two hundred years earlier, in a collection of the *Singularia* of Lodovico Pontano and other jurists (Figure 13).[30]

Legal books for the masses

With the last two images we move beyond the traditional confines of academic law libraries and legal history collections. After the parade of woodcuts and engravings in early printed books shown so far, the humble 24-page brochure shown in Figure 14 might seem out of place. Its image of law books was apparently cut out from another publication. Its cover looks more like a ransom

25 Anonymous (1711), preface.

26 The only portrait containing any sort of book is the one of Sir Thomas Littleton that appears in the 1639 edition of *Coke on Littleton*, but the single book is obviously a Bible or devotional work since Littleton is pictured in an attitude of prayer. Coke (1639). Image: https://www.flickr.com/photos/yalelawlibrary/37944761276.

27 See Van Caenegem (1987).

28 Beck (1750). The book is one of a series of practitioner titles published by the Nuremberg printer and bookseller Johann Georg Lochner in the mid-18th century with depicting lawyers at work. For a sampling of images, see https://www.flickr.com/photos/yalelawlibrary/albums/72157718137972562.

29 Anonymous (1715).

30 Pontano (1510). Image: https://www.flickr.com/photos/yalelawlibrary/15343095300.

note than a law book. It consists of 12 sheets of yellow bond paper folded in half and stapled in the fold. The text was generated on a typewriter in the years before the advent of desktop publishing. Nevertheless, *How to Use a Law Library*[31] is a more powerful and direct testament to the power of law books than any of the other volumes shown so far.

The Peoples Law School of San Francisco, the pamphlet's publisher, was one of several »Peoples Law Schools« that sprang up in the early 1970s, as part of the movements to promote social and economic justice. It offered free legal education classes and pamphlets like *How to Use a Law Library* as antidotes to a legal system it saw as controlled by the rich and powerful. »This pamphlet was written for lay people, including prisoners, not aspiring legal professionals«, says the introduction. The nominal price of 25 cents, waived for California prison inmates, confirms the purpose:

> Peoples Law School helps people understand how the legal system really operates. Unlocking the law library is part of that process, and may serve in a small way to help individuals and groups survive legal action.

It is but one of a large body of printed materials produced by social movements of both the right and left in the 20th century, with antecedents in the reform movements of early modern Europe.

In Figure 15 we return to the iconography of the law book, in a book written for children. *Kids Law*[32] was prepared by the Children's Law Office at the University of South Carolina School of Law to explain South Carolina law to juvenile readers. The cover shows a jovial law book personified as a judge, and indicates how the image of the law book has permeated the public image of law and lawyers. It brings to mind the expression »throwing the book« at someone, meaning to impose the maximum sentence on a convicted criminal. Law and trials have long been used as motifs in moral tales for children, and as a subject in civic education. Recent years have seen a growth in children's books, including coloring books, designed to explain the legal system to children in language they can comprehend. This literature is a relatively untapped source for understanding how popular conceptions about the legal system take shape, and how the authors attempt to shape these conceptions. Some of the publications fill a critical need to prepare children to deal with strange and often frightening surroundings when they are called into court as witnesses, or sadly even as defendants.

Defining the »legal book«

The images of this Rg issue's picture serieswere chosen from well over a hundred candidates. Both the images themselves and the volumes they come from suggest the contours of a definition of »legal book«. They also begin to suggest the range of materials that the term »legal book« can encompass. Apart from their legal content, they all intend to communicate legal information, to audiences both narrow and broad, both within and without the legal profession.

While the examples are all in the medium of print, manuscripts can also fall within the definition of legal book. Many legal manuscripts from the medieval and early modern eras were created to disseminate legal information to a broader audience. They were a form of small-scale publishing, with the texts duplicated by professional scribes instead of printing presses. Examples from Yale's collection include English case reports, the glossed texts of Roman and canon law produced for the medieval law schools at Bologna and elsewhere, and Italian municipal statutes.

The examples I gave are all codices, even the simple stapled sheets of the Peoples Law School brochure in Figure 14 that most observers would not glorify with the term »book«. In my definition, however, the legal book also includes broadsides, a print genre explicitly designed for public display. Its ones I am most familiar with are the broadsides issued by northern Italian jurisdictions to publicize new laws and regulations,[33] and popular accounts of notorious trials, sometimes in verse, that were common in 19th-century Britain and the United States.[34] Other unusual formats include a comic book on intellectual property[35] and a coloring book on secured transactions.[36]

31 Peoples Law School (1973).
32 Children's Law Office (2010).
33 For example, Genoa (1646).
34 For example, Anonymous (1845).
35 Aoki (2008).
36 Roark (2017).

An argument could be made for excluding fictional works from the definition of »legal book«, but I would argue the contrary. Novels such as *Bleak House* by Charles Dickens[37] have served as potent tools for addressing legal issues, and for reflecting popular views of the law and the legal profession. Satiric verse has been another channel for critiques of the legal system, of which *The Pettifoggers* is one of many 18th-century examples: »Displaying the various frauds, deceits, and knavish practices, of the pettifogging counsellors, attornies, solicitors and clerks, in and about London and Westminster, and all market towns in England.«[38]

As stated above, my definition of »legal book« excludes manuscripts prepared for individual study, such as commonplace books, correspondence and records of legal proceedings, because they are not intended to communicate to a broad audience. I also leave aside the elephant in the room, namely digital media, in spite of its enormous presence in law today. In the task of »bridging the gap between material bibliography and legal history«, the immaterial world of digital media must necessarily be left aside for its own historians.

So, my definition for »legal book« is a text, fixed in a physical medium, intended to communicate about law to the legal profession that shapes and enforces the law, and to the broader public that law affects.

Historians, curators, and the legal book

My definition of the legal book, and the illustrations I have chosen to develop the definition, have implications for historians and curators, particularly in connection with the legal book's role as symbol, as text and as artifact.

Book presentation scenes demonstrate the role of the legal book's parent, the law book, as a symbol of the law itself. The iconography of Justitia as she appears in legal books is further evidence. Her scales, sword and blindfold identify her, but books are quite frequently her companions. The iconography of Justitia has received considerable attention in recent years.[39] The iconographic depiction of the legal book deserves similar attention by its historians. To what extent is its use a deliberate strategy on the part of publishers and authors? More broadly, how is the legal book conceived by its authors, publishers and readers? Illustrations are not the only source. Title pages, prefaces, bibliographies, publishers' catalogues, advertisements and even bindings can tell us what historical actors included, and excluded, in their conception of the legal book.

A handful of law books have themselves achieved an iconic status. Hespanha points to the *Corpora juris* that became regarded as »almost sacred objects, whose physical or intellectual features were to be worshipped«,[40] and to the »princely editions« that »aimed to stress the authority of their content and to promote the power of its author«.[41] Such books have a role to play in legal history collections, especially those connected with law schools. The vast majority of law students are not destined to be legal historians or book historians, but the iconic books of legal literature can at least give them some understanding that they are joining a profession with an illustrious and noble past.

Studies of the typography and design of law books can illuminate their symbolic role. A recent article on the use of blackletter in English law books is a notable contribution.[42] The design of law books also tells a story about early efforts to deal with information overload. The contrast between Hespanha's »princely editions« with the utilitarian and often ugly design of modern law books is striking. Does it reflect general fashions in in book design, and in other fields such as civic architecture? What does it tell us about modern attitudes toward the law?

In considering legal books as texts and as artifacts, we come to grips with the contours of the raw material for scholarship and the collections that support that scholarship. In terms of texts, there is a general consensus about the core, namely the standard editions of statutes, codes, legal trea-

37 Dickens (1853).
38 Anonymous (1723).
39 For example, see Resnik (2010).
40 Hespanha (2008) 13.
41 Hespanha (2008) 31–32.
42 Solon Cristobal (2016).

tises and their related reference tools. The interesting issues, and opportunities, arise on the borders. Figures 12, 14, and 15 provide some examples. A few others will clarify the point further.

In the 19th century a number of books were published containing the US Constitution, a selection of state constitutions and miscellaneous other items such as the Declaration of Independence and George Washington's farewell address. Most were pocket size. There is not much to differentiate one from another, apart from the titles and publishers. A researcher would not consult these for authoritative citations to constitutional law, nor would law libraries seek them out; there are much better sources. When a pair of researchers, Martha Baum and Christian Fritz, examined over a hundred different editions of these little books, they determined that these ordinary, seemingly unremarkable books were widely used as guides by delegates drafting new state constitutions, and also enjoyed a broader audience in the reading public. The authors could not have made their findings based on one or two copies, or based on normal law library collections.[43]

Children's books are another example. If you would have asked knowledgeable book dealers, collectors, or librarians about collecting law-related children's books, most of them (myself included) would have called it a fruitless task. The late Morris L. Cohen, who served as Yale's Law Librarian from 1981 to 1991, proved us all wrong. Over the course of thirty years Cohen and his son assembled a collection of more than 200 children's books that became the core of the Yale Law Library's Juvenile Jurisprudence Collection, which has grown to over 300 titles. The collection provides insights into how young people form their ideas about law, and what sort of ideas the authors try to instill in the young.[44]

Broadsides are also worth considering. A researcher would not seek out a rare, obscure broadside to research veterinary legislation in 18th-century Bergamo, for example;[45] she would consult a statutory compilation. However, the broadside illustrates the public dissemination of health regulations in ways a statutory compilation could never match. It is also an example of a legal printer's business. Books may have enhanced a printer's reputation, but it was broadsides and similar printed ephemera that kept a roof over his head.

Issues of scope, of inclusion and exclusion, are at the heart of collection development decisions by curators of historical law collections. The definition of a legal book determines the shape and scope of legal history collections and impacts the research agendas of historians of the legal book.

Larger libraries with long histories of collecting have already assembled relatively comprehensive core collections of statutes, codes and treatises, collections that smaller libraries will never have the resources to replicate, nor the need to do so given the large and growing corpus of online resources. For libraries large and small, opportunities for building collections with research potential are at the boundaries of the broader field of legal books. Prices for such materials are often more affordable, particularly for ephemera such as pamphlets and broadsides. New collections can also be created by simply looking at existing collections with fresh eyes. The illustrated law collection at Yale was built with both approaches. At least half of the collection was acquired decades ago for other reasons, and some of the most interesting recent acquisitions were purchased at trivial prices because they possess such limited interest for others.

Some of the best opportunities lie with more recent materials. Curators like myself have responsibilities for the historians of the future as well as those of today. Take the history of legal publishing, a topic near and dear to historians of the legal book, as an example. Several years ago my library purchased a set of 19th-century law book publishers' ephemera sent to the G. & C. Merriam Company. I challenge anyone to find a comparable collection of the brochures and promotional materials handed out by West Publishing or Lexis/Nexis from even five or ten years ago. The vast majority ended up in hotel room waste baskets after trade shows. Familiarity breeds contempt, as the saying goes. Recent histories of legal publishers such as West show that the publishers themselves cannot be trusted to preserve their own history.[46] Researchers and librarians need to confront their

43 Baum/Fritz (2000).
44 See Cohen (2003); Widener (2012).
45 Bergamo (1766).
46 Davies (2011) 303–304.

biases against ephemeral materials both old and new.

Ephemera tell their own stories, but they also fill out the histories of individual volumes and genres. Collections that provide broad coverage within and between genres, both physical and intellectual, give historians and teachers the tools to tell rich, nuanced stories. The collections that curators form are data sets, designed to provide answers to existing questions and to provoke new questions, allowing researchers to mix and match, to test whether patterns emerge. In an article about Americana collector Michael Zinman, the great American rare book dealer William Reese described Zinman's »critical mess theory« of collecting:

> You don't start off with a theory about what you're trying to do. You don't begin by saying, ›I'm trying to prove x.‹ You build a big pile. Once you get a big enough pile together – the critical mess – you're able to draw conclusions about it. You see patterns.[47]

Although librarians operate under more constraints than Zinman, the concept is the same.

Today's digital platforms make it increasingly easy to mix and match images of books from all over the world, and to quickly execute searches that not long ago would have been impossible. I used the Yale Law Library's Flickr site to select the images displayed with this article. Online resources have proven especially valuable for research and teaching in a time of pandemic quarantines. Nevertheless, book historians will be among the first to insist that there is ultimately no substitute for the physical book.

This leads to my final point, the legal book as artifact. The books chosen to illustrate this article have much more to offer the book historian than their illustrations might indicate. The image from the 1514 edition of the *Decretals* in Figure 3 does not show expurgated passages in the glosses throughout the book. The 1714 guide for German law students (Figure 12) remains unchanged from when it left the printer's shop, in its temporary pasteboard binding, with the pages unopened and untouched by the binder's knife. You cannot truly appreciate the extravagance of the Spanish Constitution of 1837 in Figure 7, or the cheapness of the pamphlet in Figure 14, until you have them in front of you.

For book historians, artifactual value means evidentiary value. There is growing appreciation among curators for evidentiary value in collection development. While completeness is still important to me, I am more forgiving as regards condition. Volumes with detached boards or spines can be useful for revealing binding structures and manuscript or printer's waste. Clean, unmarked copies were once preferred by collectors, but marginalia and inkstamps tell much richer stories about readers and the history of book ownership.

Author collections provide a useful demonstration of artifactual value. The Yale Law Library has the world's most comprehensive collection of the works of Sir William Blackstone, author of *Commentaries on the Laws of England*,[48] the most influential work in the history of Anglo-American law. Nothing demonstrates Blackstone's influence like the 1,180 volumes on 160 feet / 49 meters of shelves. William Sheppard (1595–1674), one of the most prolific English legal authors of the 17th century, provides another example. A bibliography shows the extent of Sheppard's output, but when his books are lined up it becomes obvious that the majority of his works are little books. Most of Yale's copies retain their simple, unadorned contemporary leather bindings, further evidence of their function as practical handbooks for country lawyers and lay officials, acquired for work and not for show. As objects they also reflect Sheppard the country lawyer and devout Puritan. For a study of an individual author, there is no substitute for the original books in their original states.

Historical collections of legal books are as valuable for teaching as they are for research. They can be considered as an instructional technology, one that will retain its potency and functionality long after the current iteration of smart classroom becomes obsolete. Original artifacts from the past engage a student's interest and senses in ways that a PowerPoint slide will never approximate. The Yale Law Library's rare book collection has hosted classes of law students, graduate students, undergraduates, secondary school students and adult

47 Singer (2001) 66.
48 Blackstone (1765–1769).

learners for both show-and-tell sessions and guided, hands-on class activities. In this aspect, collections like ours function as book museums; more like today's interactive children's museums than yesterday's look-but-don't-touch museums.

If bridges are being sought between book historians and legal historians, legal history collections can help build those bridges. The rise of digital media and the decline in institutional budgets has put increasing pressure on special collections. The intersection between legal history and book history provides new opportunities for rare book librarians like myself, and the legal collections we maintain, to demonstrate our importance for research and teaching. Let's build some bridges with legal books.

■

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  Law offices, https://www.flickr.com/photos/yalelawlibrary/albums/72157627736292996
  Law libraries, https://www.flickr.com/photos/yalelawlibrary/albums/72157626289515082
  Portraits: legal authors, https://www.flickr.com/photos/yalelawlibrary/albums/72157631683050307

The numbers in brackets refer to the pages with the larger image.

FIGURE 1 (40)
Constitutiones cum apparatu Joannis Andree, manuscript on vellum, 14th century (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50497427118)

FIGURE 2 (69)
Niccolò de' Tudeschi (Panormitanus), Lectura super V libris decretalium, Basel: Michael Wenssler, Berthold Ruppel & Bernard Richel, 1477 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/8094768730)

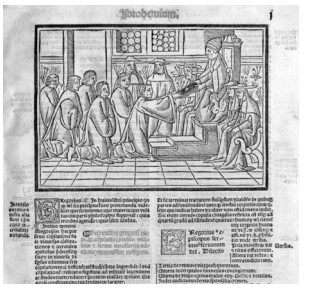

FIGURE 3 (90)
Decretales D[omi]ni pape Gregorij noni acurata diligentia nouissime q[uam] pluribus cum exemplaribus emendate, Venetiis: Luca Antonio Giunta, 1514 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50879348451)

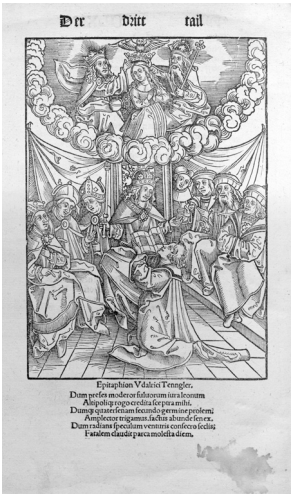

FIGURE 4 (99)
Ulrich Tengler, Der neü Leyenspiegel vö rechtmässigen ordnungē in burgerlichen und peinlicher Regimēten, Strassburg, 1514 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50868554026)

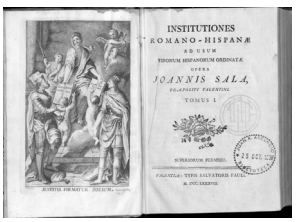

FIGURE 5 (114)
Juan Sala, Institutiones romano-hispanae, Valentiae: Typis Salvatoris Faulí, 1788-1789, volume 1 of 2 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50362581798)

FIGURE 6 (127)
Carlo Tebaldo, Aurora legalis: seu praelectiones ad quatuor libros Institutionum iuris, Patavii: Typis Petri Mariae Frambotti bibliopolae, 1692 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50866366683)

FIGURE 7 (142)
Spain, Constitución de la Monarquia Española promulgada en Madrid a 18 de junio de 1837, Madrid: Imprenta Nacional, 1837 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/22268348241)

FIGURE 8 (153)
Paolo Attavanti, Breviarium totius juris canonici, Milan: Leonhard Pachel & Ulrich Scinzenzeler, 1479 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50874097621)

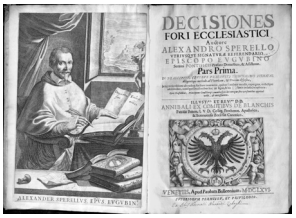

FIGURE 9 (166)
Alessandro Sperelli, Decisiones fori ecclesiastici, Venetiis: Apud Paulum Balleonium, 1666, volume 2 of 2 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50655477532)

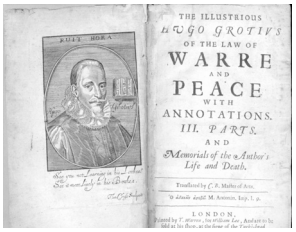

FIGURE 10 (197)
Hugo Grotius, The illustrious Hugo Grotius Of the law of warre and peace, London: Printed by T. Warren, for William Lee ..., 1655 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/4045846493)

FIGURE 11 (232)
Johann Jodocus Beck, Vollständiges und nach dem heutigen Curial-Stilo eingerichtetes Formular, Franckfurth und Leipzig: Joh. Georg Lochners, 1750 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/29305874450)

FIGURE 12 (256)
Kluge conduite eines künfftigen Gelehrten, und insonderheit eines Rechts-Gelehrten, Franckfurt und Leipzig: Johann Friedrich Schmid, 1715 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/45801257285)

FIGURE 13 (295)
Lodovico Pontano, In hoc volumine continentur singularia Ludovici Romani, Parisius: Iehan Petit, 1510, (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/15343095300)

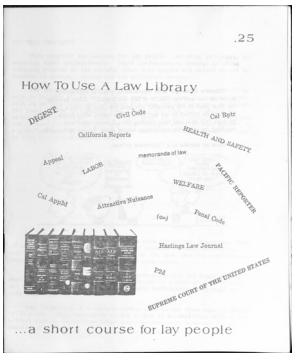

FIGURE 14 (445)
Peoples Law School (San Francisco, Calif.), How to Use a Law Library: A Short Course for Non-Lawyers, San Francisco: Peoples Law School, 1973 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/47141404141)

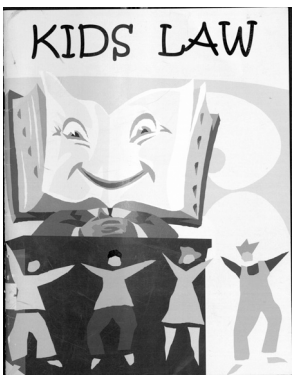

FIGURE 15 (456)
Children's Law Office, University of South Carolina School of Law, Kids Law: A Handbook for Children about South Carolina Law, Columbia, South Carolina, 2010 (Yale Law Library, https://www.flickr.com/photos/yalelawlibrary/50428630316)

How To Use A Law Library

DIGEST

Civil Code

Cal Rptr

California Reports

HEALTH AND SAFETY

memoranda of law

Appeal

LABOR

PACIFIC REPORTER

WELFARE

Cal App2d

Attractive Nuisance

(⇦)

Penal Code

Hastings Law Journal

P2d

SUPREME COURT OF THE UNITED STATES

...a short course for lay people

Marietta Auer

What is Legal Theory?

In recent years, legal theory has developed into a generic term for multidisciplinary legal thinking. Under the heading of legal theory, scholars have explored novel pathways to legal research by using insights and methodologies from a multitude of research fields ranging from cultural studies and economics to genetics and neuroscience. This development stands in contrast to the classic field definition of 20th-century legal theory and 19th-century general jurisprudence. The classic view conceived both legal theory and its precursor, general jurisprudence, as deliberately anti-philosophical approaches to theoretical reflection on the general structures of positive law. More recently, however, a shift in the internal structure as well as the epistemic aims of legal scholarship has taken place. The present article analyses this development within the framework of the history and philosophy of science. It suggests that interdisciplinary knowledge is a vital and indeed intrinsic part of legal scholarship. An unchartered space nevertheless remains between the disciplinary and the multi-, inter- and transdisciplinary forms of legal knowledge. The recent shift in the research agenda of legal theory highlights this theoretical vacuum, and it is precisely here that the present article situates the potential for a philosophically sophisticated legal theory. It argues that legal theory can best fulfil its goal if it provides tools for multidisciplinary theorising as well as categories for critical reflection on the preconditions of legal epistemology. This essay thus presents legal theory as a philosophical theory of multidisciplinary jurisprudence.

Keywords: legal theory, general jurisprudence, multidisciplinarity, philosophy of science, history of science

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Thomas Duve

Rechtsgeschichte als Geschichte von Normativitätswissen?

The article proposes that legal history can fruitfully be understood as the history of the production of normative knowledge. Such a perspective builds on a long tradition of legal historical research on the formation of norms, ideas, doctrines and institutions. For the last two centuries, however, the main focus of legal historical research, especially in the German tradition, was directed towards what has been called »the law of jurists« (*Juristenrecht*). Legal historians were interested, first and foremost, in the formation of the modern Western legal system as a product of the work of jurists. The production of normative knowledge by other epistemic communities and communities of practice received far less attention, nor did legal historians integrate praxeological aspects into their research.

Looking at legal history as a continuous process of the translation – and thus the production – of normative knowledge can provide an analytical framework that helps overcome these constraints. It offers the possibility of integrating different epistemic communities and communities of practice into its analysis and is able to incorporate the study of practices, materiality and other long-neglected aspects of norm production. Not least, it serves as a method for a truly global legal history.

The results of such a legal history might be less suggestive and fascinating than the big legal historical narratives of rationalization, professionalization and the formation of Western law that have inspired legal historians from the northern hemisphere during the 20th century. It can, however, offer a more complex picture of the past and provides us with the intellectual tools for a better understanding of norm production in the 21st century.

Keywords: legal history, history of knowledge, epistemic community, legal historiography

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Wolfram Brandes

Byzantinische Rechtsgeschichte in Frankfurt – eine Bilanz

From 1974 to the end of 2020, the history of Byzantine law was researched in Frankfurt, initially funded by the German Research Foundation and then by the Göttingen Academy of Sciences. The article offers an overview of the most important research foci and, above all, of the results, tangible in a multitude of publications (editions, studies). An extensive bibliographical appendix documents the work of the research centre »Edition und Bearbeitung byzantinischer Rechtsquellen«.

Keywords: Byzantine legal history, Frankfurt, research, project »Editing and researching Byzantine legal sources« of the Akademie der Wissenschaften Göttingen

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Pedro Rueda Ramírez

Law Books in the Hispanic Atlantic World: Spaces, Agents and the Consumption of Texts in the Early Modern Period

The Materiality of the Printed Book: Law Books »Turned into Goods«

This paper analyses the distribution channels for law books in the Hispanic Atlantic world, the agents who took part in the circulation of books, and the recipients of consignments of books. The aim is to identify the infrastructure that underpinned the transport of books from Europe to the Spanish Crown's American territories. In addition, an analysis of the distribution spaces and characteristics of supply provides an overview of the mechanisms that operated in the market for law books in the early modern period. As a result, it has been possible to identify instances of law libraries belonging to Crown and ecclesiastical officials as well as shipments delivered to booksellers, students and holders of civilian or ecclesiastical offices. It has also been possible to demonstrate the presence of pragmatic texts intended for a variety of audiences and to trace consignments bound for judicial officials and notaries, who needed compendiums of the laws and rules in effect in Spain's overseas possessions.

Keywords: circulation of books, booksellers, legal texts, law, Latin America

■

Idalia García

Orden dentro del desorden: circulación de libros de derecho en Nueva España, 1585–1640

Law books circulated widely in New Spain; we find evidence of them both in the private libraries of Crown officials and in the institutional libraries of religious orders. The books were either transported from Europe or acquired in New Spanish cities, where they were available due to the commercial networks established by booksellers from the 16th century onwards. These books contributed to the recreation of a Western normative order in American societies and thus played a key role in the emergence of a new legal culture. The identification of the specific editions used by readers in New Spain requires the analysis both of historical documents and of the books themselves, as far as these are extant. However, this evidence cannot help us answer a number of crucial questions regarding the significance and use of these books: which books were fundamental in estab-

lishing a normative order in the Viceroyalty of New Spain? What was seen as a law book at that time? Indeed, what different kinds and genres of books can be considered legal literature? These questions do not have simple answers, but rather require us to consider also other aspects, such as the contemporary understanding of what constituted typical »jurists' books« during the Ancien Régime, and whether their presence in the collections of *oidores*, judges, prosecutors and lawyers actually reflected these officials' legal practice. In order to approach these questions, this article analyses the earliest extant lists of books from the viceregal period, drawn up between 1585 and 1640. These book lists were prepared in the context of the inquisitorial control over the circulation of books within the Spanish empire and provide us with information on the first wave of books that entered New Spain.

Keywords: legal books, normative literature, circulation of books, New Spain

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Airton Ribeiro da Silva Jr.

Magistrates' Travelling Libraries: The Circulation of Normative Knowledge in the Portuguese Empire of the Late 18th Century

The pluricontinental Portuguese judicial administration was characterized by intensive movement of personnel around and between its dominions, forming a global network of rotating judicial posts. Along with these individuals, their books circulated, too. The present study focuses on the lists of books of eleven magistrates appointed to judicial posts in a range of locations throughout Portuguese America between 1799 and 1807. Censorship sources allow us to identify the books chosen by these itinerant magistrates as being indispensable for the exercise of their judicial function. In view of the cost of shipping, the books' weight and, above all, the temporary character of the functionaries' posts, judges established *travelling libraries*, portable collections of essential professional books. Identifying the books selected by judges as the *work tools* for their overseas judicial activities provides a good idea of the legal literature available in the final years of the Portuguese *Ancien Régime*. Finally, this investigation sheds light on how – and what kind of – normative information circulated in Portugal's colonies along with these agents of the Crown.

Keywords: law books, circulation, Portuguese empire, colonial justice

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Natalia Maillard Álvarez

Lectores de obras jurídicas en la Edad Moderna (Sevilla, siglos XVI–XVII)

This article seeks to analyze who were the readers of law books in Early Modern Spain. In order to do so, we have developed a database with 450 inventories of private libraries registered in Seville between 1550 and 1634. This sample will allow us to study the prevalence of some authors of legal books or law schools over others, and the social and cultural profile of their readers.

Keywords: readers, book history, Seville, law, early modern period

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Emma Peplow, Priscila Pivatto

A Different Approach to Legislative Bodies: Reflections on the History of Parliament Oral History Project and Laws Around Abortion

The History of Parliament Oral History Project has been interviewing former Members of the UK Parliament since 2011. Life stories from inside Parliament reveal missing information about personal motivations, informal cross-party collaboration and use (and misuse) of procedure that helps to demonstrate both how the institution worked and the difficulties of writing and passing legislation. Oral history interviews can be used as a source to add different perspectives on legal history, encouraging researchers to challenge more traditional sources. The paper discusses memories of some controversial legislation where individuals have deeply-held beliefs: laws around abortion. This is an example of how oral history can be used to understand the complexities of the process of law making and *how things are done* inside an institution, while also providing some personal and human perspectives on Parliament.

Keywords: history of Parliament, House of Commons, oral history, politicians' life stories, abortion

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Alfredo De Feo, Michael Shackleton

European Legislation and Politics as Seen by Former Members of the European Parliament

This article is based on the oral interviews that Members of the European Parliament (EP) from 1979 to 2019 have deposited at the Historical Archives of the EU (HAEU) and that are freely available to researchers. Their memories inspired us to focus on some specific features that are, in our view, relevant to the evolution and development of the European Parliament. In the forty years from 1979 to 2019 the EP completely changed its role: from mere discussion forum to co-legislator. Many manuals give an excellent and complete overview of formal and informal EP powers. This is not the aim of this article. Our ambition is to raise curiosity and interest sufficiently for readers to visit the HAEU website and to listen to some of the interviews.

Keywords: European Parliament, soft powers, legislative process, accountability, political groups

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Nina-Louisa Arold Lorenz

A Summary: Portraying the Legal Culture and the European Human Rights Culture of the European Court of Human Rights and the European Court of Justice through Interviews

To show the impact of interviews for European legal studies, this article summarizes the earlier findings of two books, the first by Arold on the legal culture of the European Court of Human Rights (ECtHR), and the second by Arold Lorenz, Groussot and Petursson on the legal culture of the European Court of Justice (CJEU) and European human rights culture. In doing so, this article

draws a portrait of the legal cultures of the two European courts and explains how (and to what extent) differences between European legal cultures brought to the benches of the two courts by their judges (plus for the CJEU: advocates general) impact cases concerning human rights. This article highlights parts of the methodology employed, i. e. a combination of interviews and case law analysis. The results show that there is no clash of a multitude of individual (legal) cultures at the courts; instead, both have established their own legal cultures that unite their members. Importantly, the legal cultures of the ECtHR and CJEU show some distinctive differences, which are relevant when assessing European human rights culture. Studying European human rights culture, in turn, is key for an assessment of the recent attempt to merge the two systems through the accession of the European Union to the European Convention on Human Rights (ECHR).

Keywords: legal culture, comparative law, European law, human rights, interviews

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Miguel Beltrán, Daniel Sarmiento

Making »*Un Tribunal para la Constitución*«: A Documentary on the Creation and First Years of the Spanish Constitutional Court (1980–1986)

This article explains how, from 2012 to 2015, the authors conceived, shot and edited the film »Un Tribunal para la Constitución«, a documentary about the first years of the Constitutional Court of Spain. It also tries to show the film's impact among Spanish scholars, journalists and politicians, first as an audiovisual product and later also as a book. Section I explains the context and the reasons that moved the authors to undertake the project. Section II describes how they conceived the documentary, and the process of finding a producer, writing the script, filming and editing it. Section III deals with the dissemination of the documentary, i. e. its exhibition since its premiere in July 2015, and later the process of publishing it as a book in 2017. It will also attempt to outline the feedback the authors received and its impact among scholars, politicians, journalists, etc. Finally, Section IV gives a brief overview of the impact of the documentary and its main contribution to the historiography of the Spanish transition to democracy and contemporary Spanish constitutional law.

Keywords: Constitutional Court of Spain, constitution of Spain, documentary, Spanish transition to democracy (*Transición*), appointment of judges

■

Anna Iacoboni

Libertas as an Expression of Roman Identity in Cicero and Sallust

In the late Republican period, *mos maiorum*, *libertas* and *ius* are no longer evoked to pursue the common good of the state, as was the case in the Rome of the *maiores*, but instead in an individualistic sense. Cicero theorizes a form of limited *libertas* of the people that does not call into question but rather further legitimizes the authority of the *optimates*. Cicero exalts the mixed constitution, the result of the political intelligence of the *maiores*, because in it the *optimates* have a predominant role, while the people enjoy relative freedom. The mixed constitution implements the principle of *aequabilitas*, which further legitimizes the power of the ruling class. For this reason, Cicero con-

demns democracy in which the principle of *aequabilitas* is denied. The parallelism between enjoying rights and freedom by the citizens, legacies of the ancestors, together with the claim of the ancient sovereignty of the Roman people, have an identity value as principles on which the identity of the Roman *res publica* and the Roman citizen is based, regardless of the latter's membership in the political group of the *optimates* and of the *populares*. The appeal to these principles unites the speeches of the spokesmen of the two political forces – although it is evoked according to opposing political views – in Sallust's *De coniuratione Catilinae*, *Bellum Iugurthinum* and *Historiae*. Although the sense of *libertas* is different depending on whether it is implemented by the *optimates* or the *populares*, freedom is enslaved to the particular interests of the political group or the individual citizen. Individualism is the cause of the decline of the *res publica*. Cicero and Sallust place their hopes of moral and political renewal of the *res publica* in a *nobilitas* that cannot be inherited and is based on individual *virtus*.

Keywords: *libertas*, *mos maiorum*, *ius*, *populares*, *optimates*

■

Stephen Hewer

Legal Identity and 13th-Century English Ireland

The study of legal status in 13th-century English Ireland has suffered from a lack of law-in-action methodology, so many 19th-century assumptions have endured without critique. This article sorts out defensive pleas and petitions from court judgments, and applies decolonial and intersectional-feminist methodologies to the terminology regarding the medieval courts and peoples. It defines legal freedom under medieval English law in Ireland and delineates the methods used by the courts to determine legal freedom. A critical, forensic study of the surviving court rolls has revealed that there were several legal identities (*generes*) allowed to use the English royal courts in Ireland (legally »free«) and intersections with and within these categories. The court rolls also demonstrate that legal identity had different consequences in criminal proceedings than in civil, and that categories such as »the English« or »the Gaels« in medieval Ireland are too broad; the interaction of factors such as identity, freedom or unfreedom, gender, and social status have to be taken into account.

Keywords: status, identity, colonialism, Ireland

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Federica Paletti

Appartenenze ed esclusioni

Dinamiche sulla cittadinanza nella Terraferma veneta tra XV e XVI secolo

From the second half of the 16th century onwards, Venice ordered the cities of its mainland dominions (*Terraferma*) to adopt substantial legislation and to create special magistrates aimed at countering the dangers posed by »disruptors of the quiet and peaceful life«: foreigners, beggars, *pauperes*, vagrants and bandits. The provisions of the decrees Venice sent to the *Terraferma* inevitably intertwined with the *ius proprium* already in force in the individual *civitates*.

The subjects receiving this copious regulatory production did not correspond to a single legal *type*, nor did they enjoy the same legal *status*, since the terms employed by the Venetian and mainland legislation to indicate them were polysemic, the result and expression of different regional historical-social moments and dynamics.

In the decades crucial to the formation of modern states, the intensifying *iurisdictio* exercised by Venice translated in its mainland territories into

an increasing concern with what we might call the »other side of citizenship«. A growing number of obligations, prohibitions, exclusionary measures and, much more rarely, privileges were set up by the communities to deal with non-residents and other marginal groups and individuals. The investigation of the contents of these measures provides a vivid insight into the different forms that the concept of »citizenship«, understood as a link that binds the individual to the political community, received in those decades. Its complex, multiple layers of meaning can only be grasped when the institutional and legal relations between Venice and the cities of the *Terraferma* are taken into account.

Keywords: citizenship, legal *status*, Venice, Venetian *Terraferma*, 16th century

■

Florian Reverchon

Citoyenneté et identités religieuses dans la doctrine allemande du droit public ecclésiastique au XIX^e^ siècle. Aux sources intellectuelles du modèle allemand de sécularisation

It is generally accepted that the legal doctrine of ecclesiastical public law as taught in German universities in the 19th century shaped some of the basic notions of current law, particularly the core idea according to which some churches, or »religious societies«, are privileged by law, whereas others are not. This system was conceived in a context where individual religious freedom and the neutrality of the state were not the leading principles, and where the objective was to create a kind of parity between the two main churches (Catholicism and Protestantism) in bi-confessional societies. The conception of a »Christian state« – that is to say, a state that always seeks to translate Christian principles in its law and in its actions and cannot, therefore, admit non-Christians among its citizens – prevailing among 19th-century scholars, and recognition extended only to Christian churches. This article studies the intellectual transformation of this *Staatskirchenrecht* shaped by Christianity into a more secularized, »public law« oriented vision. It will emphasize the essential moments of these doctrinal evolutions and their reception in positive law.

Keywords: Christian State, *Staatskirchenrecht*, public corporation, religious identity

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Dóra Frey

Regulation of the Citizenship of Ethnic Hungarians Living Abroad: Ethnopolitics, Demographical Issues and Humanitarian Aspects – Bilateral and Unilateral Solutions

The history of the Hungarian citizenship regulations from the late 19th to the late 20th century concerning ethnic Hungarians living abroad is investigated asking the following question: Is Hungarian ancestry and usage of the mother tongue a link strong enough to warrant Hungarian citizenship? The answer to this question has changed over the years in accordance with the demographical and political situation.

In 1879, when the first citizenship act was enacted, ethnic Hungarians constituted only a relative majority in Hungary. Since an increase in

the ratio of ethnic Hungarians was a key goal, a new act was proclaimed, Act No. 4 of 1886 on the naturalisation of repatriated groups.

The end of the First World War and the Peace Treaty of Trianon in 1920 resulted in a completely new situation: Hungary lost two-thirds of its territory, and the inhabitants of these territories, more than 3 million ethnic Hungarians among them, lost their Hungarian citizenship. The peace treaty had a profound impact on the definition of citizenship, thus corrective measures were needed. However, ethno-political considerations waned over the course of the following two decades.

The next significant change happened in the years before the outbreak of the Second World War, when Hungary successfully revised the Trianon treaty and once again became a multi-ethnic state. Plans were made to settle ethnic Hungarians in Hungary, particularly the newly obtained territories with a mixed population. The situation after the Second World War resembled that following the First World War: repatriation measures were on the agenda.

During the era of communism, the issues of ethnic Hungarians living abroad disappeared from the political agenda, and with it their citizenship. This changed with the democratic transition of Hungary 1989–1990. After both the unsuccessful referendum on 5 December 2004 and the 2010 Act regarding simplified naturalisation, the issue remains a matter of political discussion.

Keywords: citizenship law, ethno-political measures, settlement, simplified naturalisation

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Johannes W. Flume

Constructing the Stock Exchange. On the Rise and Fall of an Iconic Place of Capitalism

Marketplaces are fascinating locations for studying socio-economic interactions. One of the most prominent of these places were bourses or stock exchanges. Only very recently and almost unnoticed, the hectic physical spaces of these trading venues have been emptied, following the increased use of electronic trading and the end of parquet trading. This brought to a sudden end the 500-year-old institution as we know it: a physical space dedicated to the sole purpose of meeting, exchanging information, and trading. This article seeks to provide a concise history of constructing and refining one of the most iconic places of capitalism. I argue that combining the architectural history of exchange buildings with an analysis of the legal and economic purpose of the institution provides a powerful tool for locating and evaluating the impact of technological advances on commerce in global history.

Keywords: bourses or exchanges, marketplace, exchange processes, architectural history, financial institutions, impact of digitalisation

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Michael Widener

From Law Book to Legal Book: The Origin of a Species

This article responds to the question posed in the title of the 18 June 2020 workshop of the Max Planck Institute for European Legal History: »What is a Legal Book? Crossing Perspectives between Legal History and Book History«. Bridging the gap between legal history and book history requires a broader conception of legal literature, one that the term »legal book« captures more accurately than the narrower »law book«. The field of legal history has begun to take greater interest in legal books as social and cultural phenomena, as objects of commerce and as artifacts. The article develops a definition of »legal book« using illustrations of law books that are taken from the books themselves, including allegorical images, author portraits, and depictions of lawyers at work. These images highlight the book's function in law as symbol, text, and artifact. The article concludes by pointing to opportunities for collecting, research, and teaching that the broader definition of »legal book« presents for curators and the historians they serve.

Keywords: legal history, book history, legal books, illustrations of law books, Yale Law Library

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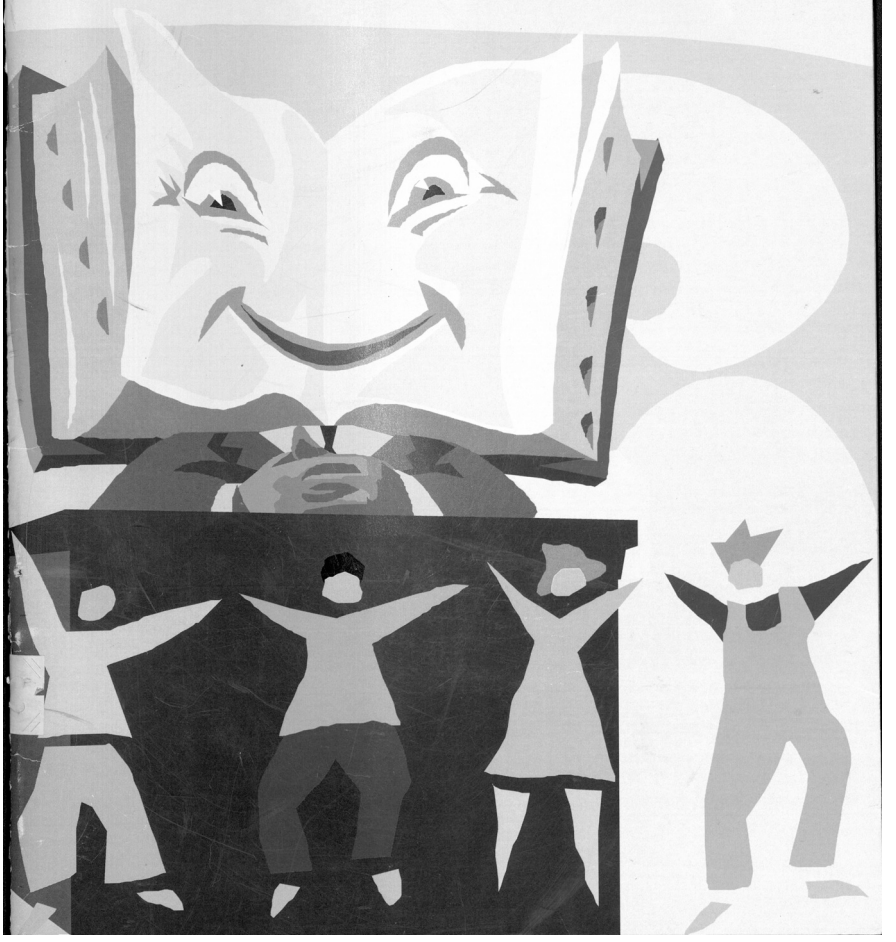

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