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Thomas Duve

Editorial

Personae, *res*, *actiones* – diese Ordnungskategorien aus der römischen Antike haben die Rechtsgeschichte geprägt. Jahrhundertelang bemühten sich Juristen darum, durch Rückgriff auf römisches Recht, kirchliches Recht und partikulare Rechte verschiedene Formen der asymmetrischen Abhängigkeit rechtlich zu erfassen, zu rechtfertigen – und manchmal auch zu kritisieren. Sie konstruierten Rechte von Menschen und über Menschen. Konnten in der Frühen Neuzeit und Moderne europäische Juristen deswegen bereits auf ein breites diskursives Feld zurückgreifen, so übersetzten sie dieses Wissen in der europäischen Expansion in für sie neue Realitäten. Sie trafen auf indigene Regelungsstrukturen; sie ersetzten oder assimilierten, was sie vorfanden, mit dem, was sie kannten. Sie gaben Praktiken einen Namen, und sie entwarfen juristische Begründungen zur Gestaltung und Legitimation von asymmetrischen Abhängigkeitsverhältnissen. Das bekannteste Element solcher komplexer *dependency regimes* ist die Sklaverei.

Doch was bedeutete es rechtlich, wenn Menschen als Sklaven leben mussten? Drei Aufsätze in diesem Band widmen sich der Rechtsgeschichte von Sklaverei in Früher Neuzeit und Moderne. Carlo Bersani rekonstruiert den europäischen juristischen Diskurs zu *servi* und *personae* zwischen dem 16. und dem 18. Jahrhundert, mit besonderer Aufmerksamkeit für die koloniale Dimension dieser Geschichte in den iberischen Imperien. Mit solchem Rechtswissen arbeitete man in der Praxis. Matilde Cazzola blickt auf die Jahrzehnte der Abschaffung der Sklaverei und auf das Britische Imperium, insbesondere auf die Karibik, gerade aus den Perspektiven der politischen und der lokalen Praxis. Auch sie zeigt, wie Recht dazu eingesetzt wurde, Formen der Abhängigkeit zu schaffen und anzupassen – auch nach dem angeblichen Ende der Sklaverei. Tamar Herzog analysiert schließlich einige Aspekte der bis heute maßgeblich von der atlantischen Geschichte geprägten Historiographie zur Rechtsgeschichte der Sklaverei. Sie gibt zu bedenken, ob asymmetrische Abhängigkeitsverhältnisse wie die der Versklavung tatsächlich allein der Exklusion dienten – und ob die Exklusion nicht gerade darin bestand, dass man den versklavten Menschen das Recht verwehrte, Eigentum zu haben.

Nicht mit dem Recht der Sklaverei, aber mit der Form, in der Juristen traditionelle Wissensbestände in ihre Zeit übersetzten und damit auch koloniale Realitäten im Lateinamerika des 16. Jahrhunderts zu erfassen versuchten, beschäftigt sich der Aufsatz von Christiane Birr zu Gregorio López. Dessen vielgenutzte Edition und Glossierung der mittelalterlichen *Siete Partidas* diente, ungeachtet ihres gelehrten Charakters, eminent praktischen Zwecken. Durch Edition und Kommentierung aktualisierte López die Tradition, passte sie an und gab durch Rückgriff auf scheinbar altes Wissen Antworten auf neue Probleme. Auf ganz andere, lange Zeit unbeachtete Quellen der Rechtsgeschichte Lateinamerikas weisen Paola Revilla Orías und Pablo Quisbert Condori hin. Sie führen in die lokalen Archive indigener Gemeinschaften in Bolivien, letztlich in das Normativitätswissen dieser Gemeinschaften ein. Der Plurinationale Staat Bolivien, so die offizielle Bezeichnung, erkennt dieses nicht-staatliche Recht an, so dass die Rechtsgeschichte eine unmittelbare Bedeutung für die Gegenwart bekommen hat. Auch deswegen, so betonen die beiden in Bolivien lebenden Autoren, müssen auch andere als die europäisch-kolonialen Rechtsvorstellungen und historiographischen Praktiken verstanden werden. Hier zeigt sich ganz praktisch, dass sich die Globalrechtsgeschichte für andere Quellen, andere epistemische Praktiken und andere als die etablierten, der westlichen Moderne entstammenden Grundbegriffe öffnen muss. Neben den vielzitierten Rechtspluralismus muss, so überlegen wir am mpilhlt auch in weiteren Projekten zur Rechtsgeschichte indigener Völker, wohl auch ein epistemischer Pluralismus treten.

Nur scheinbar weit entfernt von diesen Themen ist der Beitrag von Tobias Schenk zum frühneuzeitlichen Reichshofrat. Denn auch Schenk fragt danach, inwieweit unser rechtshistorischer Blick noch immer vom Paradigma der Staatlichkeit geprägt ist, und in welche großen, von dieser Vorstellung der westlichen Moderne geprägte Erzählungen wir unsere Einzeluntersuchungen zu den Höchstgerichten des Alten Reichs unverändert einschreiben. Er plausibilisiert sein eindrucksvolles Plädoyer für eine globalhistorische, organisationssoziologische, praxeologische und wissensgeschichtliche Analyse anhand von ausgewählten

Beispielen und macht auf der Grundlage seiner jahrelangen Archivstudien zum Reichshofrat damit zugleich auf die Notwendigkeit aufmerksam, die Quellenbasis über die herkömmlicherweise für eine rechtshistorische Analyse herangezogenen Dokumente hinaus zu erweitern. Andrew James Harding legt schließlich eine Fallstudie zum Rechtstransfer in der Welt des *common law* vor, den Fall der Six Widows vom Beginn des 20. Jahrhunderts. Sechs Witwen meldeten sich nach dem Tod eines wohlhabenden Kaufmanns in Singapur bei den Autoritäten der britischen *Straits Settlements* als Erbinnen. Das warf nicht nur Fragen zum chinesischen Gewohnheitsrecht auf, sondern auch dazu, wie sich das englische Recht zu einer in sich wiederum gestuften Polygamie stellte. Harding sieht in der Entscheidung des Falls ein Beispiel eines erfolgreichen *legal transplant* und will damit einen Kontrapunkt zu den langanhaltenden Debatten in der Rechtsvergleichung setzen, ob *legal transplants* nun möglich oder unmöglich sind.

Auch im Rezensionsteil spiegeln sich, wie im Aufsatzteil, die Forschungsfelder des mpilhlt, nicht zuletzt aber die inzwischen geradezu unüberschaubare Vielfalt der Rechtsgeschichte wider. Es geht um Neuerscheinungen zum Prozess gegen Jesus, um jüdische Rechtsgeschichte, um Gerichtsprivilegien, um imperiale und koloniale Rechtsgeschichten und auch um Sklaverei. Um wichtige Bücher zur Kodifikationsgeschichte, zur Verfassungsgeschichte, zur Geschichte des Internationalen Rechts und des Rechts der EU, und um Debatten zum Zusammenhang von Geschichte und Theorie des Rechts bis in die Gegenwart.

Zwei Marginalien schließen den Band ab. Auch sie stehen in engem Zusammenhang zu Themen, die wir am mpilhlt erforschen: Paul Kahn kommentiert kritisch ein Kapitel zum *multicultural state* aus der in diesem Jahr publizierten *Cambridge History of Latin American Law in Global Perspective*; Erk Volkmar Heyen schreibt über Treppen als Schauplätze geschlechtsspezifischer Verherrlichung und Verurteilung, und öffnet den Blick für die Rechtsästhetik. Mit seiner Marginalie war die Entscheidung gefallen, welches Motiv wir für die Bildstrecke der gedruckten Ausgabe auswählen: Treppen in allerlei Gestalt, die aus verschiedenen Epochen und Weltregionen stammen.

■

Thomas Duve

Editorial

Personae, *res*, *actiones* – this classification from ancient Rome has left its imprint across legal history. For centuries, jurists resorted to Roman law, ecclesiastical law and particular laws in their attempts to establish legal categories for various forms of asymmetrical dependencies, to justify them – and sometimes to criticise them. They devised rights which people could hold, or be held by. Thus, in the early modern and modern periods, European jurists already had a wide field of discourse at their disposal; during the European expansion, they translated this knowledge into the new realities they encountered. They came across indigenous regulatory structures and replaced what they found with what was familiar to them. They gave names to existing practices and came up with legal justifications for how asymmetrical relationships of dependency were shaped and legitimised – slavery being the best-known element of such complex dependency regimes.

What did it mean, from a legal perspective, when people had to live as slaves? The *Research* section in this volume consists of three contributions dedicated to the legal history of slavery in the early modern and modern periods. Carlo Bersani traces the European legal discourse on *servi* and *personae* from the 16th to the 18th century, with a particular focus on the colonial dimension of this part of history in the Iberian empires. That was the legal knowledge that was used and applied in practice. Matilde Cazzola looks at the British Empire and its efforts to abolish slavery, in particular in the Caribbean, specifically from the perspective of political and local practice. She, too, shows how law was used to create and adapt forms of dependency – even after the purported end of slavery. Finally, Tamar Herzog analyses some aspects of the historiography of the legal history of slavery, a field that has to date been dominated by Atlantic history. She suggests considering whether relationships characterised by asymmetrical dependencies such as slavery really only served to exclude certain people – and whether perhaps this exclusion consisted precisely in the fact that enslaved people were denied any ownerships rights.

Moving on from the legal questions surrounding slavery, Christiane Birr's article on Gregorio López addresses the way in which jurists translated traditional knowledge bases for their present time in their attempts to get a grasp on colonial realities in 16th-century Latin America. Its erudite character notwithstanding, López' ubiquitously used edition (including his glosses) of the medieval *Siete Partidas* served eminently practical purposes. By way of his edits and comments, López updated tradition, adapted it and by reverting to seemingly old knowledge found answers to new problems. A set of entirely different, long-neglected sources of law is highlighted in the contribution by Paola Revilla Orías and Pablo Quisbert Condori. They offer an introduction to the local archives – and thus to the normative knowledge – of indigenous communities in Bolivia. The Plurinational State of Bolivia, as it is officially called, recognises this non-state law, which means that legal history has a direct impact on and meaning for the present. In the eyes of the two authors, who live in Bolivia, this is yet another reason why it is important to understand legal concepts and historiographic practices other than those of European and colonial origin. This is a practical example for the need of global legal history to open up to other sources, to epistemic practices other than the established fundamental concepts that have their origin in Western modernity. It is necessary that the oft-cited legal pluralism is joined by an epistemic pluralism – a view that the mpilhlt also embraces in other projects investigating the legal history of indigenous peoples.

The contribution by Tobias Schenk on the early modern Imperial Aulic Council *(Reichshofrat)* may seem a far step from these topics, but it is not. Schenk, too, asks to what extent our view as legal historians is still influenced by the paradigm of statehood and which the major narratives are, imprinted by this notion that stems from Western modernity, that we continue to subscribe to when researching the highest courts of the Holy Roman Empire. He presents an impressive plea for an analysis along the lines of global history, organisational sociology, praxeology and the history of knowledge, using select examples to make this plea plausible. At the same time, based on years of archival studies of the Imperial Aulic Council, he points to the necessity of expanding the base of sources beyond the documents that are commonly

consulted for legal historical analyses. Finally, Andrew James Harding presents a case study on the transfer of rights under common law, »the Six Widows' case«, which dates back to the early 20th century. After the death of a wealthy Singaporean merchant, six widows registered their claim as heirs with the authorities of the British Straits Settlements. This prompted questions not only regarding Chinese customary law but also as to what stance English law took vis-à-vis tiered polygamy. Harding describes the decision in this case as an example for a successful legal transplant; in doing so, he aims to offer a counterpoint to long-standing debates in comparative law as to whether legal transplants are actually possible or not.

Like the *Research* section, the book reviews in the *Critique* section reflect the mpilhlt's research areas, but above all the almost unmanageable diversity of current research in legal history. The reviewers assess volumes that look at the trial of Jesus, Jewish legal history, court privileges, imperial and colonial legal history, and slavery. The reviews also cover important books on the history of codification, constitutional history, the history of international law and of EU law, and on debates about the connection between the theory and the history of law from antiquity all the way to the present time.

Two *Marginalia* conclude this volume, again closely aligned with research topics pursued at the mpilhlt. Paul Kahn offers a critical commentary on a chapter from *The Cambridge Legal History of Latin American Law in Global Perspective*, which was published this year, about the »multicultural state«; and Erk Volkmar Heyen writes about stairs as settings for gender-specific glorification and condemnation, opening the reader's eye to legal aesthetics. His contribution settled the question of what motif we would use for the image spread of the print issue: stairs of all shapes and sizes, reflecting a great diversity of epochs and world regions.

■

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Recherche research

Carlo Bersani

Persona, *Homo*, *Res*: Building a Boundary in Early Modern European Legal Thought*

I. *Servi* and *Personae*

According to the Justinianic sources, the same human being, a *servus*, could be understood as *res* or as *persona*: the *servus* was undoubtedly considered *res* but, at the same time, the law of persons expressly referred both to free people and to slaves (D. 1.5.3; I. 1.3 pr.). Although *persona* and *res* were distinct concepts, Roman slaves, »*personae* und *res* zugleich«,[1] would have had »un embryon de personnalité qui s'est constamment développé au cours des siècles«.[2]

This »embryo of personality«, linked to the human condition of the slave[3] and to the notion of *homo*[4], has been emphasised by Roman law scholars.[5] But the subject of this article is not to follow the development of proper Roman law in itself; rather it is how early modern legal jurists used the Roman – and particularly the Justinianic – sources, and, more broadly, how they defined who counted as a *persona*.

As mentioned above, the Justinianic sources offered legal thinkers two possible avenues to pursue: to highlight and examine the condition *(conditio)* of the *servi* as *res* or, on the contrary, to underline and examine their condition as a person. Both were explored between the 16th and 18th centuries. Thus, in his commentary on the Justinian's Institutes, published in 1642, Arnold Vinnen emphasised how the notion of *servus* was open to different possible interpretations: »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res nostrae; et qua persona.«[6]

Nevertheless, the idea that the figure of the *servus* should be primarily, even exclusively, opposed to that of the *persona*, and therefore generally excluded from the subdivision of statuses, came to be asserted with ever increasing force. Instead of elaborating a concept of *persona* that included the figure of the Roman slave, a boundary was set between the concepts of *servus* and *persona* between the 16th and 18th centuries. This article aims to understand the reasons for this choice and to indicate the underlying phenomena and their consequences on the formation of the legal concept of *persona*.

The end point of this development may be seen in a passage by Heinecke, for whom »certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur. […] Servus itaque est homo: est etiam persona, quatenus cum statu naturali consideratur […] sed ratione status civilis est ἀπρόσωπος.«[7] But its origins are far from straightforward.

In his *Commentariorum iuris ciuilis libri X* (1553), François Connan traced the category of the *servus* to the condition of *instrumentum*, capable only of

* Translation by Stephen Conway. I wish to thank the anonymous reviewer, whose insightful observations considerably improved the text.

1 Kaser (1971) 285, recently quoted by Saccoccio (2018) 46 ff; the latter refers to this as the »Doppelnatur der Sklaven«. When Savigny stated that Romans used »die Benennung *persona* […] für jeden einzelnen Menschen ohne Unterschied, namentlich auch für die Sklaven«, he was particularly referring to the use of the expression »persona servi«, e. g. in D. 50,16,215, and D. 50,17,22 pr. Savigny (1840), 2, 2, § 65, 33.

2 Baud (1993) 80, largely based on Morabito (1981).

3 »Mais cette *persona*, qui intéresse le droit, n'est pas nécessairement un ›sujet de droit‹. C'est plus largement l'être humain. Gaius poursuit en effet le *ius personarum* concerne les libres et les esclaves. Or ces derniers ne sont pas, à Rome, des sujets de droit. […] L'esclave est *persona*, parce qu'il est un être humain.« Gaudemet (1995) 2.

4 Referring to Gaius, Agnati wrote that »la categoria ›*persona*‹ include *omnes homines* (Gai., *Inst*. 1.9), poi ripartiti giuridicamente in liberi e schiavi; la naturale e originaria eguaglianza riguarda gli *homines*, non le *personae*.« Agnati (2009) 22.

5 See Agnati (2009) 22–25; Corbino et al. (eds.) (2010), in particular Bürge (2010) and Negri (2010); Gaudemet (1995); Melillo (2006); Paturet (2010); Peppe (2009); Sacchi (2010) 1241 ff.; Stolfi (2007), (2013) 8 ff.; Talamanca (1990) 76 ff. See also the observations of Ribas Alba on slaves as »sujetos potenciales«: understood as subject of duties (»sujeto de deberes«), »la idea de *persona* como *sujeto responsable*, dotada de *voluntas*, abraza por igual a libres y a siervos«, Ribas Alba (2011) 237–238. On the multiple meanings of the term *res* and the difficulty of translating it as »thing«, see Thomas (1980), (2002); Deroussin (2001) 119 ff.; Paturet (2019).

6 Vinnen (1730), 1, 3, 30.

7 Heinecke (1747), 1, 3, §§ 76–77, 19–20.

natural obligations – certainly *res*, but opposed not so much to the concept of *persona* as to that of *homo*.[8] A little later, in François Hotman's *Commentarius in quatuor libros Institutionum*, we read (at least in the 1588 edition) that »[homo] naturale nomen est. Persona, civile. Servi Personam non habent: sed eam a domino mutuantur l. 31 D. de hered. instit. [D. 28.5.31]. Interdum tamen Personae nomen generaliter usurpatur.«[9]

Also in the second half of the 16th century, Doneau's *Commentarii de iure civili* listed *vita*, *incolumitas corporis*, *libertas*, *existimatio* as what is »a natura cuique tributa«.[10] The subject is referred to by the pronoun alone (»cuique«). Shortly afterwards, he addressed the topic of statuses and the notion of *persona*, in pages whose importance has been repeatedly underlined by various historians.[11]

Doneau related the concept of *persona* to the subdivision of statuses offered by the Justinianic sources, and understood status as the foundation of the condition of *persona*.[12] For him, it followed that, as far as *ius civile* was concerned, the personality of the *servus* was linked to that of the *dominus*: thus, referring to a famous passage in the Digest, he reminded the reader that »quod attinet ad ius civile, servi pro nullis habentur *l. quod attinet D. de regul iuris* [D. 50.17.32[13]]«.[14]

Doneau thus did not explicitly contrast the figure of *servus* with the notion of *persona* in this instance. Nonetheless, he represented the *servus*, at least as far as *ius civile* was concerned, predominantly as a thing.[15] As already reported by Coing,[16] the *Iurisprudentia Romana a Iustiniano composita* by Hermann Vultejus, published a year later, also contained an important definition of the concept of person: »persona autem est homo habens caput civile. Quod positum est in tribus, in libertate, in civitate, in familia […].«[17] The concept of *persona* was thus firmly seen as a matter of *ius civile* alone, and for this very reason tended to exclude the *servus*.[18] It was thus consistent that Vultejus explicitly opposed the notion of *servus* to that of *persona* in his *Commentarius in Institutiones iuris civilis a Iustiniano compositas*, published in 1613: »servus igitur homo est, sed non est persona.«[19]

Both Doneau and Vultejus referred to forms of serfdom relevant to contemporary practice and

8 »Ea igitur servorum origo fuit, quod bello capti non occiderentur, sed servarentur ad usus domesticos, possiderenturque a dominis eo iure, quo caeterae res omnes, quae in commune hominum commercium cadunt. […] Hinc quam misera sit servorum conditio, potest apparere, cum in eos esset dominis potestas vitæ & necis: sub quibus ita viverent, ut ne hominibus quidem essent ascribendi. Servus enim, quia servus nihil habet hominis, sed instar pecudis est, rei familiaris & dominicæ instrumentum, ut scribit Aristoteles«, Connan (1558), 2, 1, 74 v. (78 ff).

9 Hotman (1588), 1, 3, 23. The passage is quoted in Deroussin (2015) 19.

10 Doneau (1589), 2, 8, 82.

11 Coing (1962); Cappellini (1990); Hattenhauer, C. (2011).

12 »Aber Donellus setzt den Begriff persona mit der Lehre von den drei status des Menschen im römischen Recht: dem status libertatis, civitatis, familiae in Beziehung. Er bezeichnet (Commentaria de iure civili II, 9) den Status als ius personae und als causa der persona im Rechtssinne. Nur kraft des Status ist man persona.« Coing (1962) 63. On this topic see, more recently, Hetterich (2016) 80 ff.

13 »Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.«

14 Doneau (1589), 2, 9, 86.

15 Hence, regarding slavery by birth »in quo sequimur regulam eamdem, quam in caeteris animalibus dominio nostro subiectis. Nam et servi dominio nostro pariter subiciuntur. Ut ergo quae ex animalibus nostris nascuntur, iure gentium nostri sunt l. 6 D. de acquirend. rerum dominio [D. 41.1.6].« Ibidem, 2, 9, 84–85.

16 Coing (1962) 63.

17 Vultejus (1590), 1, 8, 58.

18 A little further on, Vultejus refers to Petrus Faber's Commentary on the title «de diversis regulis iuris antiqui» who wrote regarding D. 50.17.22 (»pr. In personam servilem nulla cadit obligatio.«) that »personae nomen Iuricons. hoc loco […] non civili sed vulgari loquendi genere posuit. Constat enim iure civili servum nullum esse, personam servum non habere, sed esse *ἀπρόσωπον* ex legibus: ut a Theophilo Institutionum Iustiniani paraphraste traditur *in initio tit. de stipulat. serv.*« Faber (1590), Ad leg. XXII, 19, 64.

19 »Hominis appellatio cum appellatione personae non est eadem. Illa enim, quam haec est generalior. Homo vocabulum est naturae, persona, juris civilis. Omnis persona est homo, sed non vicissim. Inde personam definiebamus hominem, qui caput haberet civile. Hoc autem qui habet, etiam habet naturale. Sed caput civile triplex est, libertatis, civitatis et familiae. Horum servus nullum habet, ut servus in usu juris pro persona non habeatur. Caput quidem habet naturale, quod ipsum si non haberet, ne homo quidem esset, sed non habet civile: de quo capite civili accipiendum est quod dicitur in *l. 3 in fin. D. de capit. minut*. [D. 4.5.3.1] quod servus nullum jus habeat, et Justinianus *in § servus, inf. de cap. diminut*. [Inst. 1.16.4] quod servus nullum caput habeat. Servus igitur homo est, sed non est persona, et quia homo tantum, liber vero ita homo est, ut praeterea etiam sit persona […].« Vultejus (1613), 1, 3, 40. On this, see Stintzing (1880), vol. I, 452 ff., 462; Mazzacane (1968–1969).

customary rights: Doneau mentioned the *adscriptitii*,[20] Vultejus in his *Commentarius* the *homines proprii*. Indeed, Vultejus specified that slavery had disappeared from the Christian world, though forms of servile bondage remained, especially in Germany.[21] What was missing in both works was a clear reference to contemporary slavery and the categories of unfree conditions it comprised. These were by then well-known to legal thought, and would gain particular centrality in the discussions of the jurists of the United Provinces (see section III. below). In the meantime, however, they dominated the thought of the jurists linked to the Second Scholasticism.

II. *Dominium*, serfdom and slavery

During the 16th and 17th centuries, Iberian jurists' discussions of slavery mainly focused on questions arising in two contexts: the indigenous inhabitants of the ›New World‹, on the one hand, and the traffic of enslaved human beings, mainly from Africa, on the other.

Regarding the inhabitants of the New World, it seems that these jurists did not propose a particular and unified category.[22] In Francisco da Vitoria's *Relectio de Indis* (1539), for example, the catalogue of concepts used to classify inhabitants of the New World is rather varied. In the first part (»Quo iure venerint Barbari in ditionem Hispanorum«), Vitoria discussed »infideles« and »haeretici«, and then compared »barbari« to other categories of subject whose condition as *minores* he underlined: »insensati«, »amentes«, »creaturae irrationales«, »pueri«[23] and, on at least one occasion, »rustici«.[24] The concept of natural slavery[25] was at the heart of the issue: »et sic, dato quod isti barbari sint ita inepti et hebetes, ut dicitur, non ideo negandum est habere verum dominium, nec sunt in numero servorum [civilium] habendi.«[26] Nevertheless, also in Vitoria's view, the indigenous people could, at least in part, be governed like *servi*.[27]

On this point, recourse was made to the category of *ius singulare*: the notion of *persona miserabilis* constituted the reference point for interpreting the legal condition of the *Indios*.[28] Furthermore, reflection on the theme of natural slavery and the relation between slavery and *ius gentium* has been indentified as a *leitmotif* in the thinking of Domingo de Soto, Luis de Molina, Fernando Rebelo, Francisco Suárez.[29] Cuena Boy has argued that, generally speaking, these jurists tended to »una teoría cuyo único tema son las vías de acceso al estado servil y no el contenido de este estado«.[30]

However, in some works the comparison of the legal condition of the *Indios* with the better-known forms of serfdom recurred. The indigenous population's condition was conceived on the basis of its relationship with slavery under Roman law, on the one hand,[31] and with servile conditions, on the other. This is the case in the works of Juan de Solórzano Pereira,[32] who discussed the condition of *Indios* more than a century after Vitoria's *Relectio*.

20 Doneau (1589), 2, 9, 86.

21 »ita ut anno Christi 1200, in universo ferme terrarum orbe servi amplius non fuerint […]. Supersunt tamen in locis nonnullis Germaniae etiamnum servitutis illius antiquae quaedam vestigia, cum reperiantur quidam aliis strictiore Jure devincti, ad servorum propius quam liberorum conditionem accedentes, qui cum revera servi non sint, novo nomine Homines proprii, *Leibeygne Leute* appellantur […].« Vultejus (1613) 43.

22 On the matter in general, see Cassi (2007) 92 ff.; Cuena Boy (2022a); García Añoveros (2000); on how the question of populations related to the concept of *dominium*, see Costa (1999) 114; Tellkamp (2004); Tosi (2002).

23 Vitoria (1996 [1539]), 1, 1, pp. 12–31.

24 Ibidem, 1, 1, 15, p. 30.

25 Castilla Urbano (2013) 9–11.

26 Vitoria (1996 [1539]), 1, 1, 16, p. 31. »Civilium« is possibly an interpolation: Pereña (1996) XCIX–CXX.

27 Vitoria (1996 [1539]), 1, 3, 17, p. 98. »Vitoria did not culminate the break with the doctrine of natural slavery. Instead, he fell back on a guardianship similar to that exercised over children or the demented, which left the fate of the Indians in the hands of the Spanish monarchs.« Castilla Urbano (2020) 11. On the gap between theory and practice in the 16th century, see Badorrey Martín (2017) 686 ff.

28 Duve (2008) 166 ff.

29 Cuena Boy (2022a); Castilla Urbano (2013). See also Condorelli (2014) 251 ff.

30 Cuena Boy (2022a) 229.

31 On the influence of Roman law on the thought and discipline of slavery in the Spanish colonies, see the framework provided by Watson (1989) 46 ff.; more recently, see also Navarrete (2006).

32 Solórzano Pereira (1629–1639); idem (1648). On Solórzano Pereira, see García Hernán (2007); Andrés Santos (2010); Duve / Pihlajamäki (eds.) (2015) passim.

Solórzano firmly stated that the indigenous were free: »Indos, et reliquos infideles, qui Fidei praedicandae, et conservandae causa Christianis Principibus subiiciuntur, naturali libertate privandos non esse: itaque summo semper studio a Catholicis nostris Regibus cautum.«[33] He defined this *libertas* chiefly by using Justinianic sources, such as the titles »de statu hominum« of the Digest and »de iure personarum« of the Institutes.[34] But this *libertas* was limited by personal services, and it was on the basis of these that Solórzano addressed the different classifications to which the condition of the *Indios* could be traced. Especially in the part of *De Indiarum iure* dealing with »de personis, et servitiis Indorum«, i. e. the first book of the second volume, he engaged with the traditional categories of serfdom – starting with *coloni* and *adscriptitii* – to define the indigenous population's condition.

One of the several passages in which Solórzano made reference to the forms of serfdom shows how the starting point of his discussion were the Justinianic sources, especially the traditional reference for the theme,[35] the title »De agricolis censitis vel colonis« in the *Codex*,[36] followed by references to passages from the *Liber Extra* as well as the *Siete Partidas* as annotated by Gregorio López.[37] Yet Solórzano also made ample reference to a variety of doctrinal sources, including Johann Friedrich Husanus' *Tractatus de hominibus propriis* of 1590,[38] which he cited at least ten times in the first book of the second volume of *De Indiarum iure*. A little further on, the example of the »homines manus mortuae« of France[39] also recurred. Discussing the German *homines proprii*, Solórzano cited a well-known passage by Zasius, in which the latter wrote that »hos homines in omnibus, & per omnia neque servos, neque adscriptitios, neque colonos, neque capite censos, neque libertos; neque statu liberos esse, sed novam quandam speciem facere, de omnium illorum natura et conditione aliquid participantem.«[40]

Indeed, for Solórzano the different types of serfdom – such as *adscriptitii*, *homines proprii*, *homines manus mortuae* – did not provide an adequate profile to define the legal condition, or possible conditions, of the *Indios*. Nonetheless, they furnished a basis for comparison and, ultimately, some elements to contextualise the different figures. To these elements others must undoubtedly be added in order to complete the picture, such as the concept of »persona miserabilis«[41] mentioned above. The reference to Roman law sources was a constant, however, as it is well shown by Solórzano's discussion of the category of Yanaconas.[42]

Above all, Solórzano constantly referred also to the condition of slaves *stricto sensu* – mainly to »Aethiopes«[43] – regarding which he suggested caution and even reminded his readers of the example of Spartacus' revolt.[44] This was the second context in which Spanish and Portuguese jurists discussed the matter of slavery: the trade of *Aethiopes* from Africa.

Iberian legal thinkers tended to frame the slave trade according to Roman law's scheme and *ex iure gentium.*[45] They particularly focused on the problem of the *titulum servitutis*, as scholars have highlighted for Domingo de Soto.[46] However, in some authors, there was clearly a tendency to attribute the status of legal subjects also to slaves, by reason of their human condition, *qua homines*.

This was the case, for example, in the writings of Luis de Molina, who also paid particular attention

33 Solórzano Pereira (1672), 1, 3, 7, p. 412; 2, 1, 1, 3, p. 2.

34 Ibidem, 2, 1, 1, 17, p. 4; 2, 1, 3, 48, p. 14; 2, 1, 4, 5, p. 20.

35 Conte (1996) 37 ff.

36 Solórzano Pereira (1672), 2, 1, 3, 20, p. 12. In particular, the reference is to C. 11.48.7, 8, 11, 20, 21, 22; also to C. 11.51.1; C. 11.52.1; C. 11.53.1; C. 11.63.4; C. 11.64.1; C. 12.33.3.

37 Solórzano Pereira (1672), 2, 1, 3, 20, p. 12. The reference is to X. 3.49.3; X. 5.6.2; Part. III, 18, 89: Siete Partidas (1611) 112.

38 Husanus (1590).

39 Solórzano Pereira (1672), 2, 1, 3, 33, p. 13.

40 Ibidem, 2, 1, 4, 96, p. 29. According to Zasius, »servi anonymi in nostra Germania homines proprii dicti, nec adscriptitii, nec coloni, nec capite-censi, nec statu liberi, nec liberti sunt, de omnium tamen natura aliquid participant.« Zasius (1550) 113.

41 Solórzano Pereira (1672), 2, 1, 27, pp. 194 ff.; but see also idem (1648), 2, 28, 230 ff.

42 Solórzano Pereira (1672), 2, 1, 3, pp. 9 ff.; idem (1648), 2, 4, 77 ff. The matter is discussed in more detail in Cuena Boy (2006).

43 Solórzano Pereira (1672), 2, 1, 4, 112 ff., p. 31.

44 Ibidem, 2, 1, 4, 116, p. 31.

45 As Cuena Boy put it, there was »una especie de inercia intelectual que impedía, incluso a la mayoría de los más motivados por los intolerables abusos de los traficantes y los propietarios de esclavos, superar el cuadro tradicional de análisis centrado en la concepción de la esclavitud como institución de derecho de gentes.« Cuena Boy (2022a) 217.

46 Cuena Boy (2022a) 193; Amezúa Amezúa (2018) 241. On the matter in general, see also Cuena Boy (2022b).

to various practical circumstances of the slave trade.[47] For Molina – who, however, seems to curtail the possibility of an unquestionably *iustum titulum servitutis* – the slave acquired an intermediate position between being an object and a subject of rights:[48] speaking of the limitations of the »ius dominorum in servos«, Molina chose to point out that »dominium in servos non tam amplum ius tribuit dominis, quam dominium in pecora […]. Tribuit quidem illis ius ad omnes eorum operas, quas recta ratio postulat […].«[49] Most importantly, he also listed several possibilities for the slaves to acquire goods for themselves, such as in case of a »pactum inter ipsos et dominum […]. Atque ea ratione multi servi propria pecunia seipsos redimunt«, or by donation: »quemadmodum enim inter dominum et servum, non qua servus est, sed qua homo, cui accidit ut sit servus, esse potest contractus.«[50]

The Portuguese jurist Fernando Rebelo also attributed limited autonomous subjecthood to slaves in a number of passages:[51] like Molina, he chose to point out that »dominium hominis in hominem non est sicut in pecudem«.[52] When discussing the legitimacy of selling *Aethiopes* in Portugal, he raised the issue of the limitations of the »potestas dominorum«: »cum illud inter Doctores absque controversia certum sit, potestatem dominorum super servos ita limitatam esse, ut solum ad debita, ac consueta sive rationabilia servitia extendatur.«[53]

Regarding the power of masters »quoad personam servi« and »quoad res servi«, Rebelo both circumscribed and asserted the possibility that slaves acquired goods for themselves: the »lex Caesarea«, according to which »quidquid servus acquirit etiam donatione, vel testamento, domino acquirit«, was »abrogata per consuetudinem«: »legitima tamen consuetudo praedictas leges abrogare potuit, et de facto abrogasse videtur in favorem servorum, tamquam miserabilium personarum«; »introductum est, ut servi post consueta servitia, caetera sibi acquirant, unde se possint redimere.«[54]

Generally speaking, it seems that Iberian jurists were careful to avoid an explicit condemnation of the buying and selling of slaves, which they tended to deem unavoidable. At the same time, however, they sought to limit the slave trade's devastating outcomes: thus, although an enslaved person was clearly the object of *dominium*, these jurists consistently resisted explicitly reducing the *servus* solely to a thing. Instead, these legal thinkers allowed a limited catalogue of rights for the slave *qua homo* to emerge, and therefore had no reason to develop a theory of legal statuses in which the *servus* was not *persona*.

III. *Servi, Personae, Leges Civiles*

During the 17th century, jurists in the United Provinces also addressed the issue of slavery, though the subject seems to have been much less central to their thinking than in the Hispanic world.[55] However, they seem to have been much more attentive towards conceiving slavery within the framework of a general status theory.

In his commentary on Justinian's Institutes (1642), Arnold Vinnen – moreover academically linked to Doneau indirectly[56] – emphasised that the notion of »servus« as derived from the Roman law sources was open to different interpretations: »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res

47 Amezúa Amezúa (2018) 244; Cuena Boy (2022a) 205 ff. On Molina, see also Haar / Simmermacher (2014); Hespanha (2001); Kaufmann (2014).

48 Simmermacher (2014) 33 ff.; Kaufmann (2014) 218 ff.

49 Molina (1615), 1, 2, 38, 5, p. 85, on which Kaufmann (2014) 218.

50 Molina (1615), 1, 2, 38, 5, pp. 85–86, on which see Haar-Simmermacher (2014) 479; Kaufmann (2014) 219. Elsewhere, Molina pointed out: »licet autem ex contractu servi civilis obligatio non oriatur, oritur tamen naturalis«, Molina (1615), 2, 2, 261, 6, p. 14, on which see Kaufmann (2014) 220.

51 »O domínio de um homem sobre outro homem não pode ser como o domínio sobre qualquer cabeça de gado. O escravo não pertence totalmente ao senhor; mas, dentro de certos limites, est sui júris.« Mauricio (1977) 181. On Rebelo see Amezúa Amezúa (2018) 249 ff.; Cuena Boy (2022a) 184 ff., 196 ff.; Zeron (2009) 294 ff.

52 Rebelo (1608), 1, 1, 9, p. 67.

53 Ibidem, 1, 1, 10, p. 72.

54 Ibidem, 1, 1, 11, Sectiones I and II, pp. 74–75.

55 »In vain we look for a profound and fundamental discussion on the subject of freedom versus slavery among the jurists. We find arguments in favor of both, but no theory.« Van Nifterik (2021) 161.

56 Feenstra / Waal (1975) 22–25.

nostrae; et qua persona […].«[57] Vinnen made the connection between the concepts of *servus*, *persona* and status very clear: based on the heading of the title »de iure personarum«, he showed how the term *persona* could refer to *homines* in general, and hence also to slaves.[58] From this, he also derived his definition of the concept of status: »item ius personae hic esse, quod statum et conditionem personae sequitur: nam status ipse est personae conditio, aut qualitas, quae efficit, ut hoc vel illo iure utatur; ut esse liberum, esse servum, esse ingenuum, esse libertinum; esse alieni, esse sui iuris. Itaque status rationem causae, ius effecti habet.«[59]

Vinnen made no direct reference to the issue of slavery in the colonies in this passage.[60] Instead, he referred to different types of serfdom: once again the »coloni« and the »adscriptitii«. To Vinnen, both types were ambiguous, placed somewhere between free and servile. He compared them to hermaphrodites,[61] distinguishing between the »coloni«, in whom he considered the free condition to »prevail«, and the »adscriptitii«, whom he denoted as »quasi servi«.[62] But these were not abstract categories: indeed, a little further on we read that

»in hisce et plerisque aliis Christiani orbis provinciis quamvis nulli amplius servi sint reperiuntur tamen adhuc homines conditionis adscriptitiae, sive rusticani glebae addicti et quasi proprii illius loci, cui adscripti sunt; ut in Hannonia, […] in Burgundia et multis partibus Galliae. Hi enim sunt quos vocant, *Gens de main morte*, *Homines manus mortuae* […]. Germania quoque ejusdem conditionis homines habet, quos appellant *proprios* […].«[63]

The picture presented in Ulrik Huber's *Praelectiones iuris civilis* (1678–1689) differed only little from Vinnen's position. Huber argued that the term *persona* could be understood either in a broad sense, equivalent to the notion of *homo* and thus including *servi*, or in a narrower sense, excluding them.[64] Here he, too, returned to the various forms of contemporary serfdom, which on the whole he deemed more likely to belong to the category of *servi* than to that of the free.[65]

Johannes Voet argued differently in his *Commentarius ad Pandectas* (1698–1704). Here, the theme of serfdom was likewise central, and Voet also discussed a fairly extensive catalogue of types

57 »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res nostrae; et qua persona, quatenus puta cognatus dicitur, *l. 14. §. 2 et seq. de rit. nupt.* [D. 23.2.14.2 ff.] quatenus liber fieri, haeres institui, etc. contrahere, et dominum de peculio obligare, ipse iterum naturaliter obligari et alios sibi obligare potest, *l. 14. ff. de oblig. et act*. [D. 44.7.14] Prout igitur consideratur, ita vel ad primum, vel ad secundum obiectum pertinet.« Vinnen (1730) 30.

58 »Unde intelligimus personam hic non qualitatem civis, sed hominis designare, aut potius hominem simpliciter: eamque appellationem tam servo competere, quam homini libero: sicut et in iure passim etiam servo tribuitur, *l. 3 pr. ne quis eum qui in voc.* [*sic*] [D. 2.7.3 pr.] *l. potestatis de verb. sign.* [D. 50.16.215] *l. 22 de reg. iur.* [D. 50.17.22].« Ibidem.

59 Ibidem.

60 On Vinnen in relation to the issue of slavery, see Van Nifterik (2021) 182.

61 »De agricolis et adscriptitii quaeri solet, quibus comparandi? Et quod in re non dissimili respondet Ulp. in l. 10 hoc tit. [D. 1.5.10] etiam hic responderi potest: ejus conditionis aestimandos esse, quae in eis praevalet.« Vinnen (1730) 30.

62 Ibidem.

63 Ibidem.

64 On Inst. 1.3: «Caput de personis duabus divisionibus constat. Prima est in liberos et servos; altera in eos, qui sunt sui vel alieni iuris. Ergo et servi sunt personae, *pr. Inst. de iur. personarum l. 22 pr. de R. I.* [D. 50.17.22] quatenus persona idem quod *homo* est, ut in titulo *D. de statu hominum*, qui respondet huic rubricae *de iure personarum*. At si persona qualitatem civis notet, iam servus erit *ἀπρόσωπος*, *impersonalis.*« Huber (1784) 15. See also Huber (1787) 33 on the title »de statu hominum« of the Digest.

65 »De adscriptitiis sive colonis certo fundo colendo addictis, quales hodieque (manus mortuae Gallis dicti) per Europam habentur, dubitatum est, servi an ingenui sint: videri ingenuos, ait *l. un. C. de colon. Thrac*. [C. 11.52.1] dicuntur servi in *l. 7 C. de agric. et cens*. [C. 11.48.7] nec a servis differre, *l. 21.* [C. 11.48.21] *l. ult. eod.* [C. 11.48.24] Et hoc verius est; quia tam ipsi, quam res ipsorum sunt in Domini potestate, *d. l. un. d. l. 21 et ult*. quia distrahi possunt, *ead. l. 21 l. 2. 4. 7. C. de agric*. [C. 11.48.2, 4, 7] Nihil autem aeque libertati adversatur, quam esse in commercio. Dominum certe quod vendi potest habet.« Huber (1784) 16.

of personal conditions in current law (or *ius hodiernum*[66]) that he thought were characterised by »macula servitutis«.[67] However, his treatment of these conditions was preceded by a direct reference to the issue of slavery in the colonies:

> »Si tamen Christiani cum barbaris bello commissi fuerint, ut ipsi capti barbarorum servituti addicuntur, ita talionis iure captos a se barbaros eodem servitutis jugo pressos tenent; sic ut aliquando ab Ordinibus Foederati Belgii cautum inveniamus, in talibus etiam vigere debent latas de servis leges civiles; addita tantum exhortatione, ne domini eos durius habeant, neve diebus dominicis, aliisque temporibus, ad publica pietatis exercitia destinatis, eos labore gravent. *Instructie van de Staten Generaal, voor de geconquesteerde plaetsen in Brazijl, 23 Augusti 1636, art. 85, 86.*«[68]

The *Instructie* Voet referred to in this passage was intended to regulate the organisation of the Brazilian territories conquered in 1624. The passage also represents an initial emergence of the theme of colonial slavery in the legal thought of the United Provinces. The theme was discussed together with serfdom and in terms firmly anchored in the principle of the common free condition of the Provinces' inhabitants.[69] Applicable were »latas de servis leges civiles«: civil laws in a broad sense, hence the entire Justinianic discipline of slavery, without specifications or restrictions, except for a fairly generic reference to the requirements of religious worship.

A few years before the *Instructie* of 1636, the *Ordre van regieringe in West-Indien* addressed by the States General to the Dutch West India Company on 13 October 1629,[70] had already referred to Roman laws in matters of contracts (the »gemeene beschreven Rechten«),[71] but without direct reference to slavery. That link was made in the 1636 regulations, in particular in the two articles cited by Johannes Voet: Art. 85 stated that »negroes and slaves must be treated well by their lords and masters, and, during the periods usually devoted to worship, sent to the public exercises of religion, and on days of rest they must not be burdened with work«;[72] Art. 86 ordered that »all laws and constitutions established by the common laws [de ghemeyne Rechten] concerning slaves and unfree individuals, and such ordinances as may be established and published on the subject by the council of nineteen« (i. e. the West India Company's management) be applied to them.[73]

Indeed, the 1636 regulations were referred to more than once in subsequent discussions, such as in Eduard van Zurck's 1711 *Codex Batavus*, a work arranged alphabetically by subject. The entry on

66 »This is traditionally understood to mean an ingenious mixture of *ius Romanum* and *ius patrium* (or *ius proprium*), which – of course – differed from country to country (e. g. the Roman-Dutch law for the Province of Holland).« Ahsmann (1997) 428 n. On the concept of *ius hodiernum*, see also Birocchi / Mattone (eds.) (2006); Birocchi (2012).

67 »Quid, quod et multis in locis, ac ipsis vicinis Gelriae Zutphaniaeque partibus, ubi sublatum est servitus jus, inveniuntur etiamnum homines proprii, aut ab iis haud longe diversi, adscriptitiis Romanorum in plerisque similes, nec omni carentes macula servitutis. […]. Atque hi non uno veniunt nomine, antiquitus dicti, Germanicis *leibeigene*, nostratibus *laten*, *lassen*, *keurmoedige*, *schotbare*, *hofhorige mannen*, *wastinische luyden*«. Voet (1776), 1, 5, § 3, 120. To understand the meaning of these and other distinctions, sometimes justified by »obscuro usu«, Voet referred to a particularly rich list of sources, on which see Van Nifterik (2021) 188–189.

68 Voet (1776), 1, 5, § 3, pp. 119–120.

69 »usque adeo, ut, si servus regionum nostrarum, ac plurium gentium aliarum fines intraverit, etiam invito domino possit confestim ad libertatem proclamare«. Ibidem, 119.

70 *Ordre van Regieringe soo in Policie als Iustitie, in de Plaetsen verovert, ende te veroveren in West-Indien*, in: Groot Placaet-Boeck (1664) 1235 ff. On this, see Watson (1989) 102 ff.; Schiltkamp (2003); Van Nifterik (2021) 179.

71 »In andere saecken van allerley Contracten ende handelingen, sullen gevolght werden de gemeene beschreven Rechten«, Groot Placaet-Boeck (1664) 1246. Schiltkamp (2003) 332.

72 »De Negros ende Slaven sullen by hare Heeren ende Meesters wel worden ghetracterrt, ende op behoorlijcke tyden als den Godts-dienst wert gepleecht, tot de publicque exercitien vande Religie werden gesonden, ende met geen arbeydt op de Rustdagen beswaert.« *Instructie van de Ho. Mo. Staten Generael deser Vereenighde Nederlanden, voor de hooge ende lage Regieringe der Geoctroyeerde West-Indische Compagnie*, Groot Placaet-Boeck (1664) 1247 ff.

73 »Ende sullen in haer reguard plaetse hebben alle de Wetten ende constitutien by de ghemeyne Rechten, wegen de Slaven ende onvrye Luyden gestatueert, ende de Ordonnantien die by de Vergaderinge der Negenthiene hier naer souden mogen werden gestatueert ende gepupliceert.« Ibidem. See Batselé (2020) 55–56.

»Slaven« is very brief: van Zurck quoted Articles 85 and 86 of the *Instructie* almost verbatim, with only a few additional remarks on the latter.[74]

Another work in which the 1636 *Instructie* left a trace was Jacobus Voorda's *Differentiae juris Romani et Belgici secundum ordinem digestorum*. Discussing the fifth title of the first book of the Digest (»de statu hominum«), Voorda wrote: »1. omnes homines in Belgio liberi sunt. 2. Sed in America Indiaque servos adhuc Belgae habent, in quos dominica Romanorum potestas ipsis competit. 3. Quin et in quibusdam Gelriae tractibus superest adhuc anomala quaedam servitus colonorum quorundam, qui adscriptitiis haud prorsus sunt dissimiles.«[75] Although he thus did not mention the *Instructie* explicitly, his notes (dating from the mid-18th century, and edited and translated in 2005 as *Dictata ad ius hodiernum*) make it clear that he was actually relying on them.[76]

Also in Voorda's *Differentiae*, then, the issues of slavery and serfdom were discussed together, within a more general treatment of status theory. Generally, legal thinkers in the United Provinces engaged with the topic of slavery in the colonies with reference to the 1636 regulations only sporadically. But in Vinnen as in Huber, in Johannes Voet as in Voorda, slavery and serfdom were treated as closely connected, within the general scheme of persons, to the point that, as has been noted, »also in legal theory a continuum can sometimes be perceived between unfree and free labourers, between slaves and non-slaves«.[77]

IV. *Tertium genus*

In the works of the German jurists who, between the 16th and 17th centuries, elaborated a theory of the status and law of persons, the theme of the *homines proprii* was much discussed: indeed, they took over the place previously occupied by slaves (*servi*) in the Justinianic texts (D. 1.5; I. 1.3) and thus contributed to establishing the boundaries of the concept of *persona*.

As we saw already in section I, *homines proprii* had a prominent place in Vultejus' thinking, who clearly contrasted the notion of *servus* to that of *persona* (»servus igitur homo est, sed non est

74 »Hier toe meene ik dat den brief van del H. Apostel Paulus aen Philemon diendt. 't Was de pyne waerdt in zulke menigte van Slaven, als toen onder de zedelijkste volkeren zelfs waren, met zulk een opmerkelijk geval van den bekeerden Onesimus te leeren, hoe zy en hunne Heeren sich moesten dragen, dat 't Christendom den eigendom en altoos durenden dienst niet wegnam, en dat de Slaven sich hunne Heeren niet mogten ontstelen. Dat wy ook by retorsie volkeren die ons Slaven maken alzo handelen is redelijk, en by Staten Generael geordineert. […] Dat, volgens 't voorschreven artikel, de erfenisse der goederen by gevryde Slaven verkregen als nog gereguleert wordt, en zulks patronen daer toe komen kunnen, in cas geen kindren zijn, is bekent.« Van Zurck (1711) 686.

75 Voorda (1745) 4.

76 »*Belgae habent*: Ibique ipsi a barbaris capti in servitutem rediguntur, eosque captos vicissim in servitutem redigunt«; »*Ipsis competit*: Certe enim *vol. II Placit. Holl. pag.* 1247 a Generalibus foederati Belgii Ordinibus cautum reperimus, in iis servanda ea esse, quae Romano iure de servis statuta sunt.« Voorda (2005) 32–34. Reference to the *Instructie* of 1636 is also central in a series of dissertations, published in Leiden during the 18th century, that discussed the Roman law of slavery, or its philosophical and religious justifications. But they also included pages dedicated to contemporary norms regarding slavery in some colonial territories. See in particular Royer (1762); Herbert (1774) (»in America, Indiaque servos adhuc Belgae habent, in quos dominica Romanorum potestas ipsis competit vide *Edict. Ordin. Gen.* quod prodiit d. 23 Augusti Anno MDCXXXVI, […] artic. 86 […]«, ibidem, 30); Beeldsnyder (1775) (»praeter jus Naturae, quod ibi obtinet, inveniuntur quoque expressae leges, quibus jura et officia, quae dominis in servos incumbunt, apertis verbis indicantur. Huc pertinet Edictum Ordinum Gen. quod prodiit die 23 Augusti 1636 ubi hae leguntur verba, in Art. 85 et 86 […]«, ibidem, 22–23); Vermeulen (1793) (»quod si consideremus leges ab OO. nostris latas, conditio servorum non est pessima, sed ad eam temperandam ac redigendam ad aliquam normam aequitatis, multa egregia statuta sunt in coloniis nostris. 1° OO. constituerunt, ut jus naturae, quod ubique gentium moribus valere debet nullaque lege civili labefactari aut convelli, in nostris quoque coloniis sancte colatur et conservetur. 2° Ut leges Romanae recentiores apud nos valeant«, with a footnote reference to articles 85 and 86 of the 1636 *Instructie*. Ibidem, 40–41). Quite similar is the content of Spencer (1779) – quoted in Huussen (1999) 104, no. 27 – whose author, true to his epithet »curacaviensis«, was particularly attentive to the problems of Curaçao. Here, too, the *Instructie* of 1636 appeared as the starting point and basis of the regulation (e. g. 5 ff., or 31: »pervenio iam ad alteram disputationis partem, qua disquiritur, secundum quasnam leges de iuribus et obligationibus dominorum intuitu servorum iudicandum sit, et quaestiones circa eadem oboriuntes decidendae? Clara sunt hanc in rem verba nostrae constitutionis art. 86 […]«).

77 Van Nifterik (2021) 179.

persona«[78]). According to him, however, »Leibeygne Leute« were not »servi«, though they retained some »vestigia«[79] of ancient slavery.

At least from Zasius onwards – for whom »servi anonymi in nostra Germania homines proprii dicti, nec adscriptitii, nec coloni, nec capitecensi, nec statuliberi, nec liberti sunt, de omnium tamen natura aliquid participant«[80] – German jurists tended to see »Leibeygne Leute« as not corresponding to any of the categories of persons offered in the Justinianic sources. Furthermore, although the term »homines proprii« was generally used to indicate them, no recurring set of rules could be formulated that applied to all of them.[81] However, of greatest interest to us here is the role played by these different categories in defining the legal concept of *persona*.

Particularly significant in this context are the works of some of the representatives of the *Usus modernus*, who were attentive to the themes of *ius hodiernum* and *ius Germanicum*. It is precisely in these works that the categories of current law had to deal with the schemes set out in the Digest and the Institutes.

Thus, Georg Adam Struve stated in his *Iurisprudentia Romano-Germanica forensis* (1670) under the title »de iure personarum seu statu hominum« (though the entire first book is entitled »de iure personarum«) that »personam […] significat hominem in societate civili viventem«.[82] His reasoning on slavery starts from it having fallen into disuse among Christians. However, according to Struve, in some places there are »homines proprii, *eigene Leute*, qui affinitatem cum servis habent«.[83] To these, whom he nevertheless considered free, Struve dedicated a separate chapter (»de secunda personarum divisione, et de potestate dominica«).[84]

In Johann Schilter's *Institutiones iuris*, the issue of slavery dominated the discourse of the title »de iure personarum«, and included the forms of serfdom.[85] Schilter had already discussed these in his *Exercitationes ad Pandectas*, referring to the category of the freedmen and to a form of »germanica libertinitas« characterised by »libertas restricta«.[86] In his *Collegium Pandectarum theoretico-practicum*, published posthumously in 1690, Wolfgang Adam Lauterbach also integrated the condition of *homines proprii* into the general framework of legal status: here we read that, although slavery was obsolete among Christians, its treatment under the title »de statu hominum« was still useful, not least because »veteris illius servitutis adhuc vestigia quaedam supersunt in hominibus propriis […] Germ. *Leibeigene*«. Their status, Lauterbach continued, was called »agricolatio«, »quae est conditio personae, quae, cum aggravatione status sui, ad varia obligatur onera«.[87]

In the *Specimen usus moderni Pandectarum* by Samuel Stryk (1690–1712), the theme of slavery was directly associated with that of serfdom:

> »Summam illam personarum divisionem, quod homines aut liberi sint, aut servi *L. 3 ff. h. t.* [D. 1.5.3] hodie in Imperio Romano non amplius usu servari, in confesso est. Quamvis enim in Germania non omnes homines liberi sint, nulli tamen amplius supersunt servi, sed tertium quasi genus datur, scil. propriorum hominum, quos *Leibeigen* vulgo vocant, et opponuntur *denen freyen Leuten*.«[88]

78 Vultejus (1613) 40.
79 See above, n. 21.
80 See above, n. 40.
81 For example, with reference to David Mevius' work, it has been written that »über die Rechtposition deutscher Bauern könne keine generelle Regel aufgestellt werden, man könne nur die besonderen Gewohnheiten, Satzungen und Bräuche einzelner Landschaften beobachten«. Schulze (1990) 147. On this subject, see also Wiese (2006).
82 Struve (1675), 1, 3, 1, 15.
83 »Quamvis vero hodie inter Christianos ejusmodi homines servi non habeantur, nisi quod a Turcis aliisque barbaricis gentibus capti pro servis inter Christianos censeantur, eo quod istae etiam nationes Christianos captivos pro servis habeant. Sunt tamen in quibusdam locis […].« Ibidem, 1, 3, 6, p. 18.
84 Ibidem, 1, 4, pp. 19 ff.
85 Schilter (1685), 1, 3, 20 ff., particularly §§ 4 and 5, 24–26.
86 »Etsi igitur liberti et adscriptitii revera liberi sunt, restrictior tamen eorum est libertas, quam ingenuorum. Eadem ratio est nostrorum hominum. Quare observandum est, vocem *Leibeigenschafft*, Germanis non denotare servitutem, statui libertatis oppositam, ut in iure Rom. sed significat tantum hominum alias liberorum necessitatem manendi & non emigrandi.« Schilter (1672), »Exercitatio theorico-practica ad Pandectas III. De statu hominum et praejudicialibus actionibus«, 5, 57 ff., particularly 61–63.
87 Lauterbach (1784), I, 5, 13, 85.
88 Stryk (1690), 1, 5, § 1, 78–79.

The statement that slavery was no longer practiced naturally only applied to Christendom: in conflicts with »infideles«, just as Christians could be enslaved, so they in turn could reduce others to slavery: »hinc nostri captivos infideles aequissimo retorsionis iure pro servis habent, et ita in infidelibus captis omnia servitutum jura sibi locum vindicant. Ex quo est, quod Tartari, Turcae et Aethiopes pariter cum servi Romanorum donari, vendi et legari possint, uti experientia idem comprobat.«[89]

Thus, with regard to the »infideles«, Stryk argued that the Roman rules on slavery regained their value as applicable law. By contrast, »homines proprii« differed from slaves,[90] enjoyed »ius connubiorum«, »ius contractuum« and »ius testamentorum«, and had »personam standi in iudicio«.[91] However, Stryk did not consider them entirely free: they formed a »tertium genus« that, within the framework of the law of persons, was distinct from, but related to, Roman slaves.

The link between the forms of serfdom and the legal concept of *persona* perhaps emerged most clearly in Christian Thomasius' *Notae ad Institutiones Iustinianeas*, published in 1712.[92] Thomasius began his title »de iure personarum« with a definition of the term *persona*, the origins of which have been traced back to Samuel Pufendorf.[93] For Thomasius, »est autem persona in sensu juriridico homo consideratus cum statu suo; & status est conditio hominis secundum quam jure singulari utitur intuitu juris publici vel privati; estque triplex, vel libertatis, vel civitatis, vel familiae.«[94]

In the very wording of the title »de iure personarum«, the *homines proprii*, explicitly contrasted to the freemen, replaced the slaves in the original text of the Institutes: according to Thomasius, the distinction between *liberi* and *servi* was in use in Germany, and the *homines proprii* were undoubtedly »servi«, but they were very different from the slaves of the Romans.[95] Like Stryk, Thomasius considered *homines proprii* to have »iura connubiorum, contractuum, testamentorum«,[96] but he did not see them as free.

In these passages, Thomasius' main objective seems to have been to trace the servile conditions existing in the German territories, and with them the main distinction of persons, back to their origins outside of Roman law.[97] To fully understand his reasoning, one must also look at his *Dissertatio de hominibus propriis* of 1701[98] and the *Dissertatio de usu practico distinctionis hominum in liberos et servos* of 1711,[99] to which the *Notae ad Institutiones* actually referred.[100]

But how was the concept of *servus* defined in the *Dissertatio* of 1701?[101] In a passage comparing the notion of *servus* with that of *famulus*, Thomasius wrote: »[M]ercenarii ut personae considerantur seu ut cives, *servi in civitatibus non ad personas pertinent, sed ad res* [emphasis added]. Unde famuli sub

89 »Nec puto, liberari ejusmodi captivum a nexu servitutis, si Christianam religionem receperit, quamvis Pius V, Pontifex sucepto baptismate eos liberos pronunciaverit.« Ibidem, § 3, p. 80.

90 »Quamvis vero horum propriorum hominum in omnibus Germaniae provinciis non eadem sit conditio, et hinc generali conclusione de eorum statu judicari vix possit: putarem tamen, generatim proprios homines in Germania dici posse in eodem statu esse, quo sunt liberi homines, nec servorum conditioni illos adscribendos: Restrictam tamen hanc esse libertatem, ne vergat in praejudicium praedii et inde dependentium servitiorum; hoc enim respectu ipsi eorumque liberi pro glebae abscriptis reputari possunt.« Ibidem, § 5, p. 82.

91 Ibidem, §§ 6–8, pp. 82–84.

92 Thomasius (1712). On this, see Lieberwirth (1955) 109.

93 »Entia moralia, quae ad analogiam susbtantiarum concipiuntur, dicuntur *personae* morales, quae sunt homines singuli, aut per vinculum morale in unum systema connexi, considerati cum statu suo aut munere, in qui in vita communi versantur.« Pufendorf (1672), 1, 1, 12, 10. Coing (1962) 65; Hattenhauer, C. (2017) 172.

94 Thomasius (1712), 1, 3, p. 13. The definition is, however, very close to that in the *Dissertatio de usu practico distinctionis hominum in liberos et servos*, published a year earlier: »*persona* hic est homo, consideratus cum statu suo. Status est qualitas moralis hominis, secundum quam iure singulari utitur intuitu iuris publici vel privati.« Thomasius / von der Portzen (1711), § 2, 3.

95 Thomasius (1712), 1, 3, p. 14.

96 Ibidem, 1, 3, p. 16.

97 On these aspects of Thomasius' thinking, see Luig (1998a), (1998b) 403 ff., (2006) 96 ff.; Lück (ed.) (2006); particularly Mohnhaupt (2006); Kern (2006); Steinberg (2006), esp. 356 ff.

98 Thomasius / von der Lahr (1701).

99 Thomasius / von der Portzen (1711).

100 Thomasius (1712), 1, 3, 13–14.

101 »Rustici servi praestare debent operas indeterminatas, et tales, credo, praestabunt adhuc hodie, ubi pro hominibus propriis habentur.« Thomasius / von der Lahr (1701), § 84, p. 55.

imperio sunt, servi sub dominio. Neque haec differentia Romanis peculiaris est, sed moribus aliarum gentium etiam conformis.«[102]

The nexus between the category of *homines proprii* and the legal concept of *persona*, located on the border between Roman law and *ius Germanicum*, was stated very clearly by Johann Gottlieb Heinecke. In his discussion of the title »de iure personarum« in his *Elementa iuris civilis secundum ordinem Institutionum*,[103] published in 1725, he wrote: »§ 75 Homo et persona in iure maxime differunt. Homo est, cuicumque mens ratione praedita in corpore humano contigit.[104] Persona est homo, cum statu quodam consideratus.«[105]

Heinecke immediately followed this with the definition of status:

> »§ 76. Status est qualitas, cuius ratione homines diverso iure utuntur: isque est vel naturalis, vel civilis, qui iterum in statum libertatis, civitatis, et familiae dispescitur. *L. ult. D. de cap. minut*. [D. 4.5.11] Certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur.«

The *servus* could therefore be considered *persona*, but only according to *ius naturale*: »§ 77. Servus itaque est homo: est etiam persona, quatenus cum statu naturali consideratur: *L. 22 pr. D. de reg. iur.* [D. 50.17.22[106]] sed ratione status civilis est ἀπρόσωπος.«[107]

Heinecke concluded his discussion of the title »de iure personarum« by speaking of *homines proprii*:

> »§ 85 Ceterum Germanicae originis gentes semper haec principia ignorarunt [sic] […] servos quidem habebant, et hodienum passim habent *homines proprios*: sed eos non res esse, iudicant, verum personas, gaudentes iura connubii, contractuum, et testamenti factionis. Attamen glebae vel fundo adscripti, cum fundo venduntur, dominisque operas et censum debent, nec non quibusdam locis certam pecuniam pro libertate matrimonii, et praecipuum ex hereditate, veluti optimum caput, optimas exuvias cet. vid. Harprecht *Tract. de iure mortuarii* [sic],[108] et Potgiesseri *Tract. de statu et cond. serv. in Germania.*[109] Et hactenus serviunt: reliqua sibi adquirunt.«[110]

For Heinecke, the condition of *homines proprii* was therefore literally the reverse of that of Roman slaves: while he located them close to the boundary between person and thing and considered them also as the object of rights (»cum fundo venduntur«), he nevertheless unequivocally stated that *homines proprii* were *personae*, not *res*.

Heinecke returned to the point in his *Elementa iuris Germanici tum veteris tum hodierni*.[111] Here, he opened the treatment of the law of persons with the usual theme »de prima hominum divisione, et speciatim de servilis conditionis hominibus«, but this time according to the *ius Germanicum*, which radically differed from the Roman understanding: »personae ergo Germanis sunt omnes, quibus mens, ratione praedita, in corpore humano contigit, id est eaedem, ac homines.«[112] To define the concept of *persona*, Heinecke thus used roughly the same terms he had employed for the concept of *homo* in Roman law (»Homo est, cuicumque mens ratione praedita in corpore humano contigit […]«[113]), which served to underline how the notions of *persona* and *homo* coincided in the *ius Germanicum*.

102 »Et nescio, cur id immane videatur illustri Puffendorffio, quod servi rebus accenseantur, et quod eodem modo de servo quis dicat, hic meus est, ac de jumento hoc meum est. Etsi enim non negemus, dominum semper recordari debere, servum esse hominem, omnibus juribus humanitatis capacem, debet tamen misereri jumentorum.« Ibidem, § 30, 16; see Pufendorf (1672), 6, 3, 7, 843.

103 On the dating of this work: Wardemann (2007) 102; Feenstra (2004) 306 n. On Heinecke generally, see also Bergfeld (1996), (1999); Luig (2011), (2006) 98 ff.; Tanaka (1995).

104 Other editions use »contingit« (e. g. Amstelodami, Ianssonius-Waesbergius, 1738; Goettingae, Vandenhoek et Ruprecht, 1806). For the various editions, see Wardemann (2007) 102 ff.

105 Heinecke (1747), 1, 3, § 75, 19.

106 »*Ulpianus libro 28 ad Sabinum* pr. In personam servilem nulla cadit obligatio.«

107 Heinecke (1747), 1, 3, § 77, 20. On this point, Heinecke's comparison with the work of Arnold Vinnen when working on his *Commentarius in quatuor libros Institutionum* is of interest, as noted in Luig (2011) 223.

108 This is probably a reference to Harpprecht et al. (1685).

109 Potgieser (1707).

110 Heinecke (1747), 1, 3, § 85, 21–22.

111 On the *Elementa iuris Germanici*, see Luig (1998b) 414; Wardemann (2007) 46 ff., 99.

112 Heinecke (1748), 1, 1, § 20, 9.

113 Heinecke (1747), 1, 3, § 75, 19.

As in his *Elementa iuris Civilis secundum ordinem Institutionum*, Heinecke also followed the discussion of the servile condition in the *Elementa iuris Germanici* with that of the *homines proprii*, with which the title »de prima hominum divisione« concluded.[114] For Heinecke, the fact that *homines proprii* were *personae* did not preclude them from being the object of rights in certain respects: they could, for example, be freely alienated (»a dominis libere alienantur«).[115] Although the *homines proprii* were thus very different from Roman slaves, their condition was still servile.[116]

In these passages by Heinecke, the link between the different forms of serfdom and the elaboration of the legal concept of *persona* appears fully developed: a category of individuals was identified and defined whose members, although servile, escaped the condition of *res*. Although remaining on the border between being the subject or object of rights, Heinecke's *homines proprii* had a residual form of personality. The contrast with the slave under Roman law, who escaped the condition of res only in natural law, guaranteed this residual personality.

But just who in truth were these slaves? As we have seen, Roman regulations on slavery could be seen as law currently applicable to »Tartari, Turcae et Aethiopes« or generically »infideles«: all poorly defined, or at the very least peripheral, categories. In the eyes of the jurists linked to the *usus modernus* movement, the space they inhabited was almost exclusively theoretical.[117] However, it was actually very real.

V. *Choses mobilières*

Antoine Loysel's *Institutes coustumières* (1607) established the principle that »toutes personnes sont franches en ce Royaume, et si tost qu'un esclave a attaint les marches d'iceluy, se faisant baptiser, il est affranchy«.[118] However, also in the works of French jurists who, between the 16th and 17th centuries, provided an outline of categories of persons according to current local law, the various forms of serfdom dominated the discussion.[119]

Thus, in the *Pandectes ou Digestes du Droict françois*, Charondas Le Caron, after insisting that slavery had fallen into disuse, mentioned the »hommes de serve condition«.[120] In Guy Coquille's *Institution au Droict des Francois* (1607), we read that

> »les servitudes qui sont en France, ne sont pas semblables à celles qui estoient en usage aupres des anciens Romains, qui faisoient trafic des personnes serves, comme d'animaux brutes. […] Mais bien sont semblables aux servitudes ascriptices, & colonaires, qui rendoient les personnes attachées & liées aux domaines des champs pour les faire valoir, & y estoient tellement attachées, que le proprietaire du domaine & des serfs y destinez, ne pouvoit vendre les serfs, sans vendre le domaine par une seule vente.«[121]

Similarly, the title »de l'état des personnes« of Gabriel Argou's *Institution au droit français* (1692) opens with »des Serfs de main-morte«.[122]

However, a few years before, the context had been radically changed with the *Édit sur les esclaves des îles de l'Amérique* of March 1685, the so-called *Code Noir*, which explicitly designated slaves movable property (Arts. 44 and 46; Arts. 40 and 42 in the 1724 edict for Louisiana).

The bibliography on the *Code Noir* is extensive.[123] Among other things, it has been debated whether and to what extent the original text actually owed a debt to the sources of Roman law,[124] and it has been widely emphasised that

114 Heinecke (1748), 1, 1, §§ 38 ff., 15 ff.

115 »§ 40. Ex eodem principio consequitur 5. vt homines proprii et soli, et cum familiis, et una cum praediis, quin et cum peculio suo, […] recte alienentur. […].« Ibidem, 1, 1, § 40, 17.

116 »Ex quibus omnibus iam satis patet, […] absurde plerosque negare, Germanis esse servos, multoque absurdius […] homines proprios ab iis servili conditione eximi.« Heinecke (1748), 1, 1, § 47, 20–21.

117 However, regarding the practical outcomes, see Mallinckrodt (2021).

118 Loysel (1607), 1, 1, 3, 1.

119 For an overview on these authors, see Thireau (2006).

120 Charondas Le Caron (1607), 2, 2, 6.

121 Coquille (1607) 134.

122 Argou (1730), 1, 1, 3.

123 Niort (2015) (on the name »Code noir«, see 21 ff.); Niort / Pluen (eds.) (2018); Patisso (2019). For an overview, see Deroussin (2010) 36 ff.

124 Watson (1989) 85 ff.; Palmer (1996); Watson (1997); Mignot (2004) (2010); Palmer (2012); Charlin (2015).

reducing the slave to a thing in the *Code Noir* in no way entailed a negation of his humanity.[125] Moreover, in a similar way to the 1636 *Instructie* of the United Provinces' States General, the 1685 edict dealt with the religious and spiritual education of slaves early on, in its second article.[126]

Of interest to us is the question of what effect, direct or indirect, the norms of the *Code Noir* had on the juridical notion of the person, first and foremost in the works of French jurists of the late 17th and 18th centuries.

In his *Lois civiles dans leur ordre naturel* (1689), Domat closely linked the subdivision of persons, both under the law of nature as well as under civil law, to the concept of status.[127] However, in his discussion of the status of persons under civil law in his work's *livre preliminaire*, Domat did not address the subject of overseas slaves: of the three major dichotomies of Roman law – free and slaves, »citoyen« and »étranger«, »pere de famille« and »fils de famille« – he recognised only the last two as being in use in contemporary France; to these he adds the subdivisions of French law: »gentilhommes«, »bourgeois« and »personnes de condition serve«.[128] While Domat also discussed the subject of slavery in the proper sense, to him, this category seems to have been of above all theoretical importance.[129]

In Robert-Joseph Pothier's *Treatise on Persons and Things*, by contrast, the subject of slavery is defined and explored in full, though there is no direct reference to the *Code Noir*. Pothier's passage on the subject is famous: after describing the legal conditions of ecclesiastics, nobles and the third estate (and before addressing the distinction between »regnicoles« and »aubaines«), Pothier discussed *des serfs*, by which term he denoted both those of servile condition as well as slaves. Nevertheless, he argued that the *serfs* present in some provinces of the French kingdom, called »gens de main-morte et mortaillables«, were in every respect different from the *serfs* of the Romans:

> »Ces esclaves, chez les Romains, n'étaient pas citoyens; ils n'avaient aucun état civil, *pro nullis habebantur*; ils étaient regardés comme des choses, plutôt que comme des personnes, *ut res, non ut personae erant in dominio heri*; c'est-à-dire qu'ils appartenaient à leurs maîtres, de la même manière qu'un cheval, ou tout autre meuble: et par conséquent ils ne pouvaient rien avoir en propre, et tout ce qu'ils acquéraient était dès l'instant acquis à leur maître, à qui ils appartenaient eux-mêmes. Nous avons dans nos Colonies *de ces sortes d'esclaves*, qui sont les Nègres, dont il se fait un commerce considérable. Mais, dans le Royaume de France, on n'en souffre aucuns.«[130]

In this passage, Pothier combined several features that we have already encountered elsewhere. Firstly, he treated the themes of serfdom and slavery together. Secondly, his key reference for slavery was Roman law, which served a number of functions: it was useful for defining the serfs of current local law in opposition to Roman slaves (although the term *serfs* was employed for both), but also for defining the slaves (*esclaves*) that the French owned in the colonies; lastly, he directly contrasted the condition of the slave as a thing (»chose«, »res«) to the condition of person (»personne«).

125 »[L]e rapport théorique entre humanité et personnalité juridique en vigueur à l'époque du Code Noir *n'est pas* celui du droit contemporain […]. Lorsqu'on dénonce le Code Noir comme une négation juridique de l'humanité de l'esclave, on oublie en effet que le statut servile *implique* fondamentalement cette humanité, et que la réification juridique n'est qu'une fiction inhérente à ce statut même. […] Le droit romain nous l'indiquait déjà: la réduction juridique de l'esclave à une *res* ne lui enlevait pas sa qualité humaine.« Niort (2011) 5–6. See also idem (2015) 37–47.

126 »Tous les esclaves qui seront dans nos Iles seront baptisés et instruits dans la Religion catholique, Apostolique et Romaine. Enjoignons aux habitants qui acheteront des Negres nouvellement arrivés, d'en avertir les Gouverneur et Intendant desdites Isles dans huitaine au plus tard, à peine d'amende arbitraire, lesquels donneront les ordres nécessaires pour les faire instruire et baptiser dans le temps convenable.« Code Noir (1788) 30. See also Mignot (2010) 44–45.

127 Domat (1689), Livre prel., 2, 34.

128 Ibidem, Livre prel., 2, 2, 44–45.

129 »Et pour l'esclavage, quoyqu'il n'y ait point d'esclaves en France, il est necessaire de connoître la nature de cet état.« Ibidem, Livre prel., 2, 2, 44.

130 Pothier (1778), 1, 4, 571. Under the aspect of insurance regulations, see also Pothier's *Traité du contrat d'assurance*, 2, § 2, 28 (»[…] les Negres étant des choses qui sont dans le commerce, & qui sont susceptibles d'estimation […]«), Pothier (1773) 12. On this issue, see Philip-Stephan (2008) 565; Storti (2020) 54 ff.

Pothier's passage clearly expresses the link that united the themes of serfdom, slavery and the legal concept of the person in 18th-century French legal thinking.[131] However, the role of the concept of person changed in Enlightenment thought.

In the entry »Esclave (jurisp.)« in the *Encyclopédie*, Antoine-Gaspard Boucher d'Argis wrote that Roman slaves »n'étoient point mis au rang des personnes, on ne les regardoit que comme des biens«, and mentioned the edict of 1685, according to which »les esclaves sont meubles«.[132] But the loss of centrality of the juridical concept of person is shown by the fact that only two entries in the *Encyclopédie* were dedicated to the term »personne«: one, by Nicholas Beauzée, dealt with the grammatical meaning of the term; the other, anonymous, discussed its theological meaning.[133] In addition, with the abolition of serfdom in the French royal domains in August 1779, one of the terms of reference of the concept of person, and thus one of its functions, had disappeared: shortly after, there no longer was a group whose members' status could be contrasted to that of the overseas slaves on the grounds that, unlike the latter, they were deemed »persona«. Eventually, in the revolutionary constitutions and in the *Code civil* itself, the term »personne« came to occupy a marginal position, while other categories of legal subjects gained in importance, as we shall see in section VI.

In 18th-century Germanophone legal thought, however, the concept of person seems to have retained its importance. Christian Wolff is credited with the famous definition that »homo persona moralis est, quatenus spectatur tamquam subjectum certarum obligationum etque iurium certorum«.[134] In many other works, however, the link between the notion of person and the dual reference to serfs and Roman slaves was retained.

For example, in the popular *Ius controversum civile* (1713), Samuel von Cocceij began his treatment of the title »de statu hominum« by addressing the issue of the comparison between *homines proprii* and slaves (»an homines proprii recte comparentur servis?«), and stated that while the comparison was wrong »quoad personam«, »quoad actiones« it was correct.[135] Nearly thirty years later, in his *Novum Systema iustitiae naturalis et Romanae* (1740), Coccejus again closely linked the notions of person and status,[136] returning to the statement that »servile caput […] nullam personam habere dicitur«.[137]

In Johann Stephan Pütter's *Elementa iuris germanici privati hodierni* (1748), there are two different subdivisions of persons, one into *ordines* (»personae illustres, nobiles, cives, rustici«),[138] the other linked to the different forms of relationships between private individuals (»de societate coniugali«, »paterna«, »tutelari«, »herili«). In the latter, the category of *homines proprii* is discussed at length.[139] In Kreittmayr's notes on the *Codex Maximilianeus Bavaricus Civilis* of 1756, too, the contrast between Roman slaves and »unsere Leibeigene« plays a significant role.[140]

The link with earlier reflections on the concept of person emerges particularly clearly in certain passages by Daniel Nettelbladt. Although there are no direct references to the themes of slavery and serfdom, echoes of Thomasius'[141] and Heinecke's[142] definitions of *persona* are evident. In fact, in the second edition of the *Systema elementare universae iurisprudentiae positivae communis imperii Romano Germanici*, we read that »persona stricte accepta, est homo consideratus cum certo statu«;[143] in the *Systema elementare universae Iurisprudentiae naturalis*, Nettelbladt wrote: »*persona* in sensu generali idem est ac homo. *In sensu speciali*

131 Another example, but less complete, in Serres (1753), 1, 3, 11 ff.

132 Boucher d'Argis (1755) 939 ff., 940–942.

133 Beauzée (1765) 431 ff.

134 Wolff (1750), § 96, 50, on whom see Coing (1962) 65.

135 »Non recte illis comparantur quoad personam: hactenus enim homines proprii liberi sunt, uti quotidiana praxis id testatur […] eos non excludi a communione juris civilis […]. Sed quoad actiones possunt omnino servis aequiparari […].« Cocceji (1753), 1, 1, 5, p. 70.

136 »Status hominum est conditio, per quam persona capax sit jurium, quae ad statum hominum pertinent.« Cocceji (1750), 3, 1, § 106, 57.

137 Ibidem, 3, 1, § 133, 71.

138 Pütter (1748), §§ 133 ff., 36 ff.

139 »De societate herili, sigillatim de hominibus propriis, rusticisque, quorum servilis est conditio«, ibidem, §§ 440 ff., 143 ff.

140 »Daß unsere Leibeigene mit den Römischen *Servis et Mancipiis* in keine Vergleichung kommen, ist jedermann verstanden.« Kreittmayr (1758), 1, 8, 2, 299. See Conrad (1956) 10–12.

141 »Est autem persona in sensu juridico homo consideratus cum statu suo.« Thomasius (1712), 1, 3, p. 13.

142 In the *Elementa iuris civilis secundum ordinem Institutionum*: »persona est homo, cum statu quodam consideratus«. Heinecke (1747), 1, 3, § 75, 19.

143 Nettelbladt (1762), 1, 1, 12, § 142, 93.

vero sub *personae* nomine venit, homo consideratus cum certo statu.«[144] Similar definitions can be read elsewhere in his works.[145]

A very close link to the previous reflections on status and person appears in Julius Friedrich Höpfner's *Theoretisch-praktischer Commentar über die Heineccischen Institutionen* (1783). Here, dealing with the title »de iure personarum«, Höpfner followed Heinecke's reasoning:

> »[W]er keinen bürgerlichen Zustand hat, ist keine Person, sondern wird in die Classe der Sachen gerechnet. Dergleichen sind nach Römischem Rechte die Sclaven *(servi)*. Sie haben keinen einzigen bürgerlichen Zustand, gar keine Rechte im Römischen Staate; daher werden Sie auch nicht als Personen, sondern als Sachen *(res)* angesehen.«[146]

The categories of the *adscriptitii* and the *coloni* also return.[147] There follows a paragraph devoted to modern-day slavery (»von der heutigen Sklaverey«): »wir haben heutzutage« both slaves in the sense of Roman law (»im Sinne des Römischen Rechts«) and »Leibeigene«, as well as free servants and maids (»freye Knechte und Mägde«). »Wahre Sklaven« were Turkish prisoners and »Negersklaven«, who sometimes arrived »aus Holland oder andern Reichen«; in both cases, Roman law applied.[148] The paragraph then goes on to consider the subject of serfdom: »wir haben aber auch in Deutschland Leibeigene«, i. e. individuals who are not free, to whom the lord has a right of ownership[149] (but, of course, Roman law must not be applied to them[150]). The paragraph ends with a brief mention of the subject of domestic servants, who are free in all respects except for their duties of service.[151]

In a similar vein, Christian Friedrich von Glück, in the part of the *Ausführliche Erläuterung der Pandekten* dealing with the title »de statu hominum«, certainly included Roman slaves among things.[152] Moreover, he also immediately followed his discussion of slavery under Roman law[153] with that of the *Leibeigenen,*[154] who, in his view, were quite different from Roman slaves, but not with-

144 »*Status* autem hoc loco est qualitas, secundum quam homines diversis iuribus et obligationibus utuntur.« Nettelbladt (1767), 3, 1, 1, § 43. The passage is quoted in Lipp (1982–1983) 251.

145 »Quodsi nunc homo seu persona in sensu latiori, non simpliciter ut homo, sed cum certo statu consideratur dicitur persona in stricto et proprio, unde persona in hoc sensu est homo cum certo statu consideratus. Strictissimus personae significatus vero ad iurisprudentiam privatam remittendus est, et hic de personis non nisi in sensu generali et strictu agendum.« Nettelbladt (1781), 1, 2, 1, 14, 14–15. On another passage of Nettelbladt, see Hattenhauer, C. (2011) 52 n. On this, see also Cappellini (1990) 110.

146 Höpfner (1798), § 62, 86 (but see also ibidem, 90 n. 15). On Höpfner, see recently Mallinckrodt (2021) 144 ff.

147 »Mit dem *servo colono* hat es folgende Bewandtniß: ein Sklave, den sein Herr auf sein Landgut gesetzt hat, um es zu bauen, heißt *servus adscriptitius*, oder *glebae adscriptus*. Dieser war entweder ein wahrer Sclave, oder er hatte eine Art von unvollkommener Freyheit. Im letzten Fall heißt er *colonus*. […]; kurz, er war ungefähr das, was unsere Leibeigenen sind.« Höpfner (1798), § 69, 97.

148 »Beyde Arten von Sklaven sind nach Römischem Recht zu beurtheilen.« Ibidem, § 70, 97. Of course, the 1798 edition clarified in a note that the Allgemeine Landrecht had abolished slavery (ibidem, § 70, 99): but on this passage, see Mallinckrodt (2021) 146–147.

149 »Diese sind keine freye Leute, sondern leben in der Knechtschaft. Denn der Herr hat auf ihre Person ein Eigenthumsrecht.« Höpfner (1798), § 70, 98.

150 Ibidem, § 97, 112.

151 Ibidem, § 70, 99.

152 »Wer keinen von diesen drey Civil. Ständen hatte, den sahen sie für keine Person an, sondern rechneten ihn zur Classe der Sachen. Dahin gehörten die römischen Sclaven.« Glück (1791), 1, 5, § 113, 54. »Bey allen Veränderungen, die den Zustand der römischen Sclaverey von Zeit zu Zeit betroffen haben […] ist es doch immer Grundsatz des römischen Rechts geblieben, daß Sclaven zwar Menschen, aber keine Personen im Staate sind.« Ibidem, § 119, 129–130. It may be interesting to note that, in the 1800 edition, we also read: »Heut zu tage nehmen wir jedoch nicht mehr an, daß es Menschen gebe, die keine Personen sind, sondern wir nehmen das Wort Person theils für einen Menschen, in Ansehung eines gewissen Zustandes betrachtet, vermöge welchen er gewisse Rechte und Verbindlichkeiten in der bürgerlichen Gesellschaft hat; theils für einen solchen Zustand selbst, von welchen gewisse Rechte und Verbindlichkeiten in der bürgerlichen Gesellschaft abhangen.« Glück (1800), 1, 5, § 113, 61–62.

153 Glück (1791), § 119, 129 ff.

154 »Zustand der teutschen Leibeigenschaft.« Ibidem, § 120, 135 ff.

out some similarities to them.[155] This is followed by paragraphs on domestic servitude[156] and on the condition of peasants.[157]

In sum, four characteristics seem to reappear in these texts: 1) the importance of the notion of person; 2) its theoretical definition as opposed to the concept of the slave as *res* (»Sache«); 3) slaves and serfs being discussed together; 4) the definition of the latter as persons in contrast to the former, who are denoted things.

VI. Codes and persons

In the lexicon of the French revolutionary constitutions, the term ›person‹ appeared intermittently: the 1789 Declaration of Rights, whose title already refers to the two subjects »man« and »citizen«, used the term »personne« only once, in art. 9, preceded by the possessive pronoun linking it to *l'homme*.[158] The same term recurred eight times in the Constitution of 1791 (including twice with reference to the »personne du Roi« and twice as »personne du detenu«); and three times in the Declaration of Rights that preceded the Constitution of 1793 (arts. 8, 13, 18, again with a possessive reference, as in art. 18[159]), though it was entirely absent from the Constitutional Act itself.

The term was again mentioned twice in the Declaration of Rights that preceded the Constitution of 1795 (arts. 10 and 15), and no less than twelve times in the text of that Constitution (nine of these occurred in the title »De la justice correctionelle et criminelle«, arts. 224, 226–230, 237, 253); in the Constitution of 1799, it appeared twelve times.

However, the concept of person in the sense of legal subjecthood seems to have played a marginal role: the constitutional texts of the Revolution were based more on subjects such as the »man«, the »citizen«, sometimes the »Frenchman«, and often collectively »the people«.

The situation apparently differed little when we look at private law. In the first *Projet de Code Civil* presented by Jean-Jacques-Régis de Cambacérès in 1793, the general provisions opening the first book (»de l'ètat des Personnes«) referred to »les citoyens«, »les individus«,[160] »les mineurs« and »les étrangers«;[161] in the second draft, the general provisions of the first book (»Des Personnes«) referred to the French, to citizens and to foreigners,[162] who remained the main subjects even in the roughly corresponding title of the third *Projet*.[163] There was no single, uniform concept of person, nor did it require specific definition: rather, it consisted of a series of categories of legal subjects that formed the actual reference points of the norms.

The *Code civil* thus refrained from furnishing a complete definition of the concept of person, leading Jean-Guillaume Locrè to comment that »dans le *Code* [le mot *personne*] est le synonyme *d'état civil*«.[164] The title dedicated to persons seemed to rest on other, more specifically defined legal subjects: the Frenchmen, individuals, citizens and foreigners who had already featured in Cambacérès' *Projets*.

155 »Darin haben jedoch die Leibeignen der Teutschen mit der Sclaven der Römer eine Aehnlichkeit, daß sie für ihre Person im Eigenthum ihres Herrn sich befinden, und daher von demselben veräussert werden können, und zwar an einigen Orten nur mit den Höfen, worauf sie gesetzt sind, an andern aber auch ohne das Gut.« Ibidem, § 120, 136.

156 »Zustand des heutigen Miethgesindes.« Ibidem, § 121, 144 ff.

157 »Zustand der heutigen Bauern in Teutschland. Begriff von Bauer, Bauergut und Dorf.« Ibidem, § 122, 146 ff.

158 »Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.«

159 »Tout homme peut engager ses services, son temps; mais il ne peut se vendre, ni être vendu; sa personne n'est pas une propriété aliénable. La loi ne reconnaît point de domesticité; il ne peut exister qu'un engagement de soins et de reconnaissance, entre l'homme qui travaille et celui qui l'emploie.«

160 Art. 3: »Il existe dans la nature et par la loi des rapports entre les individus qui composent la société: ces rapport constituent l'état des personnes.« Fenet (1836) 17.

161 Ibidem.

162 Ibidem, 110. For Cambacérès, »trois choses sont nécessaire et suffisent à l'homme en société: être maître de sa personne; avoir des biens pour remplir ses besoins; pouvoir disposer, pour son plus grand intérêt, de sa personne et de ses biens.« Cambacérès (1794) 100.

163 Livre Premier. Des Personnes. Titre I[er]. De l'Etat civil. § 1[er]. Dispositions général. Ibidem, 178–179. See Cambacérès (1796) 141.

164 Locrè (1805) 54. The passage is quoted in Deroussin (2010) 20 and in Niort (2006). On this, see Lefebvre-Teillard (1996) 46 ff. Useful observations can also be found in Wu (2011) 106 ff.

In the Prussian *Allgemeines Landrecht* of 1794, by contrast, the title dedicated to persons began with a definition of the concept.[165] The notion of person also remained central in another product of the natural law tradition, the Austrian *Allgemeine bürgerliche Gesetzbuch* (ABGB). Its celebrated § 16 stated that »Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht, wird in diesen Ländern nicht gestattet.«

Here, once again, slavery and *Leibeigenschaft* were considered together, and explicitly opposed to the condition of person. In his *Commentar* to the ABGB, Franz von Zeiller did, of course, distinguish between slavery and *Leibeigenschaft*, but in his view the latter could come close to the former (»nähert sich, nach Verschiedenheit der zufälligen Modificationen, mehr oder weniger der Sclaverey«). Above all, both are opposed to the condition of person.[166] Von Zeiller did not quote Heinecke in this context, though he had commented on some of the latter's passages on the subject of *homines proprii*.[167] He did, however, take Heinecke's principle that *ex iure Germanicus*, *persona* and *homo* coincided,[168] to its most logical conclusion, though he at the same time turned Heinecke's assertion that *homines proprii* were distinguished from Roman slaves as *personae* and not *res*, on its head: for von Zeiller, even the condition of *homines proprii*, i. e. *Leibeigenschaft*, conflicts with the definition of person.

Arguably, § 16 ABGB and von Zeiller's reflections are the most accomplished products of natural law thought on the concept of person. Historians have strongly emphasised the influence of Kant both on von Zeiller's thinking and on subsequent developments.[169] With regard to the concept of the person, however, legal thought had already entered a new phase by the early 19th century.

Of course, some traces of earlier traditions can be found also in the 19th-century literature. For example, in the 1820 edition of the *Lehrbuch des heutigen römischen Rechts*, Gustav Hugo quoted Heinecke's and Thomasius' definition of *persona* almost verbatim and called it the »customary explanation«, though he did not approve of it: »die sonst gewöhnliche Erklärung von einer Per-

165 1, 1, § 1: »Der Mensch wird, in so fern er gewisse Rechte in der bürgerlichen Gesellschaft genießt, eine Person genannt.« See Conrad (1956) 17 ff.; Hattenhauer, C. (2011) 52 ff.; Hetterich (2016) 83.

166 »[S]o ist jeder Mensch als eine Person zu betrachten, er darf nicht, gleich einer Sache, als Mittel zu beliebigen Zwecken Anderer gebraucht werden. […] Darauf fließt unmittelbar die Vorschrift, daß Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht in diesen Ländern nicht gestattet werde. Die Sclaverey ist ein Verhältniß, worin der Herr als Eigenthümer, der Sclave als dessen eigenthümliche Sache angesehen, folglich der willkürlichen Behandlung des Herrn Preis gegeben wird. Die Leibeigenschaft, wo die Unterthanen, als ein Zugehör zum Grunde geschlagen, bey dem Grunde, ohne Freyheit der Veräußerung desselben, zu verbleiben genöthiget, oder willkürlich auf einen andern Grund versetzt, dem Gutsherrn zu unbestimmten Diensten und der Züchtigung desselben (höchstens mit der unbestimmten Einschränkung, daß sie dem Leben nicht gefährlich sey) überlassen, ja selbst die Kinder dem Stande ihrer Aeltern zu folgen gezwungen werden, nähert sich, nach Verschiedenheit der zufälligen Modificationen, mehr oder weniger der Sclaverey […].« Von Zeiller also pointed out in a note that »das Römische Recht sagt ausdrücklich, daß die Sclaven keine Personen seyn, sondern in die Classe der Sachen gehören […] (§ 2. J. de jure pers. [Inst. 1.3.2] § 4 J. de cap. demin. [Inst. 1.16.4] L. 209 D. de reg. jur. [D. 50.17.209])«. Zeiller (1811), § 16, 103–105. On this, see Laufs (2006) 200. On the concept of person in von Zeiller, see Conrad (1956) 21 ff.; Hattenhauer, C. (2011) 56 ff. On von Zeiller in general, refer to Di Simone (2006), also for additional literature.

167 »In Germania quatuor olim hominum classes: nobiles scilicet, ingenuos, libertos, et servos, postremorum vero conditionem ab illa romanorum diversam fuisse, memorat Tacitus *de mor. Germ.* c. 25. Medio aevo iisdem varia ministeria, potissimum circa agrorum culturam, et ceteras res rusticas iniungebantur, atque corpora eorum dominis erant obnoxia. Unde passim glebaeadscripti, et *homines proprii (Leibeigne)* appellari ceperunt, vindicari porro, atque cum ipso fundo alienari possunt Heinec. *elem. iur. germ.* § 28. Iure austriaco vero possessoribus rerum immobilium obnoxii, *subditi (Unterthanen)* vocantur, ab omni servitute expresse eximuntur, atque de rebus suis tam per actus inter vivos, quam ultimae voluntatis libere disponunt: salvis tamen dominorum iuribus […].« Zeiller (1781), 1.3. § 85, 95.

168 »Personae ergo Germanis sunt omnes, quibus mens, ratione praedita, in corpore humano contigit, id est eaedem, ac homines.« Heinecke (1748), 1, 1, § 20, 9.

169 Coing (1962) 67 ff., 70 ff.; Conrad (1956) 21 ff.; Hattenhauer, H. (2000) 8 ff.; Hattenhauer, C. (2011) 57 ff.; Herbst (2015); Hetterich (2016) 83–87; Mohr (2011).

son: *homo in statu consideratus* ist nicht bloß um Deswillen schlecht.«[170]

Nevertheless, the centrality of the notion of »legal capacity« entailed, among other things, redefining the role of the concept of person. In the *System des Pandekten-Rechts* (1803), Thibaut answered the question of who can be considered a legally capable subject by using the concept of person.[171] Nevertheless, the fundamental concept on which the reasoning was based was that of legal capacity (»Rechtsfähigkeit«).[172]

Indeed, it was in the context of the notion of »natürliche Rechtsfähigkeit« that Savigny stated that »jeder einzelne Mensch, und nur der einzelne Mensch, ist rechtsfähig«.[173] And it is perhaps useful to note that shortly afterwards, in reconstructing the notion of slavery in Roman law, Savigny himself pointed out that the Romans used the term *persona* not to refer to men having legal capacity, but »für jeden einzelnen Menschen ohne Unterschied, namentlich auch für die Sklaven«.[174]

Precisely on the basis of his assumption that every individual was *rechtsfähig,* Savigny structured the chapter devoted to persons »als Träger der Rechtsverhältnisse« in his *System des heutigen Römischen Rechts* along the limits and restrictions of legal capacity. The assertion that each individual had the capacity to hold rights clearly demonstrates that the centrality of the concept of *persona* and the doctrine of status associated with it had been abandoned. But the individual appeared far from constituting a unitary subject: the very link with the notion of legal capacity seems to expose each individual to new forms of fragmentation, to the point that, as one of the recent works devoted to the concept of person and legal capacity in the 19th century put it, one might speak of a »graduated« form of legal capacity (»einer abgestuften Rechtsfähigkeit«).[175]

VII. Conclusions

As noted, the Justinianic sources did not set a clear boundary between the concepts of *persona* and *res*. The same *servus* could be considered and classified as *res* or as *persona*. The clear boundary between the two was drawn by the legal science of the modern period, between the 16th and 18th centuries, as the joint effect of the two phenomena of serfdom and slavery. It thus had two matrices: one estates-based *(ständisch)*, the other colonial.

Already Iberian legal thought, when dealing with the populations of the newly colonised world, tended to resort to the categories of serfdom and to the notion of slavery according to Roman law to

170 »Eine Person heißt Alles, dem für sich selbst ein Rechtsverhältnis zugeschrieben werden kann. Sie ist entweder eine physische, ein einzelner Mensch; oder eine blos juristische (gewöhnlich, aber nicht gut: moralische, gar auch mystische), mehrere Menschen, die im RechtsVerstande [sic] nur wie ein einzeles [sic] Subject angesehen werden. Die sonst gewöhnliche Erklärung […].« Hugo (1820), § 13, 16–17. See also Hugo (1799b), § 9, 10. Perhaps it is also worth recalling the passages written by Hugo on slavery (»die Einschränkung der persönlichen Freyheit […], nach welcher ein Mensch von dem andern als Sache behandelt wird«) and *Leibeigenschaft* in the first volume of the *Lehrbuch eines civilistischen Cursus*: Hugo (1799a), §§ 57b–58, 50–51. An echo of Heinecke's definition can also be found in a work from overseas, published only a few years before the aforementioned edition of Hugo's *Lehrbuch des heutigen Römischen Rechts*: in José María Alvarez' *Instituciones de derecho real de Castilla y de Indias* (1818), we read that »la palabra hombre es de mayor estension que la palabra persona, porque toda persona es hombre, pero no todo hombre es persona. Hombre es todo aquel que tiene alma racional unida al cuerpo humano: y persona es el hombre considerado con algun estado.« Alvarez (1818) 87. See also Cairns (2012) 65.

171 »Wer kann Subject eines Rechts seyn, und zwar sowohl nach der Natur der Sache (natürliche Rechtsfähigkeit), als den Vorschriften des positiven Rechts (bürgerlichen Rechtsfähigkeit)? Derjenige, welcher in irgend einer Rücksicht als Subject eines Rechts betrachtet wird, heißt insofern Person, besonders insofern man ihn als Subject bürgerlicher Rechte betrachtet; Sache dagegen heißt dann alles, was den Gegensatz einer Person ausmacht.« Thibaut (1803), Allgemeiner Teil, § 188, 140–141. The passage is quoted in Coing (1962) 66, Hattenhauer, H. (2000) 9, and Hattenhauer, C. (2011) 60.

172 »Wichtig an der Person war daher nun, dass sie rechtsfähig war. Aus der Person als einem Oberbegriff des gesamten Rechts wurde ein bürgerlich-rechtliches Instrument, mit dessen Hilfe man Rechtsgegenstände befestigen konnte.« Hattenhauer, H. (2000) 10; see Hattenhauer, C. (2011) 60, (2017).

173 Savigny (1840), 2, 2, § 60, 2.

174 Ibidem, § 65, 33, with reference also to D. 50.16.215 (»[…] in persona servi dominium […]«), D. 50.17.22. pr. (»in personam servilem nulla cadit obligatio«), D. 7.1.6.2.

175 Hofer (2016) 119 ff. On this point, see generally Hetterich (2016) 102 ff. (»Nach Savigny ist damit nicht zu sagen: Jeder Mensch hat allgemeine Rechtsfähigkeit, sondern: In jedem Menschen liegt die Möglichkeit allgemeiner Rechtsfähigkeit«, ibidem, 150).

interpret and classify both the condition of the *Indios* and that of the other non-free subjects. Using slavery and serfdom as opposite ends of a spectrum, they sought to define a subject's legal condition by measuring its respective distance from these poles.

When numerous jurists endeavoured to order the different personal conditions known from the *ius hodiernum* into a complete theory of statuses, Roman slaves and European serfs of the early modern period were treated in the same title (»de iure personarum«, »de statu hominum«, »de prima hominum divisione«). It is here that the condition of the Roman slave is progressively reduced to that of *res*, clearly seen as the opposite of the condition of *persona*: the slave is certainly *homo*, but only from the standpoint of natural law; the category fulfils the role of serving as the opposite against which the legal subject – who, from the standpoint of civil law, is *persona* and not *res* – can be defined.

In this way, a category with essentially theoretical outlines was constituted, or at least its existence highlighted: that of the Roman slaves who, although *homines*, were at the same time reducible to the condition of *res*, and thus the mere object of legal relationships in civil law.

However, this concept of the slave was by no means exclusively theoretical: as we have seen in the reflections of some Iberian scholars, Roman slavery was a comparative reference point for the condition of unfree subjects overseas, and Roman law was deemed immediately applicable in matters of slavery by the 1636 *Instructie* of the United Provinces' States General, without, moreover, slaves being openly reduced to the condition of *res*. Finally, Louis XIV's edict of March 1685 explicitly denoted slaves »choses mobiliaires« (Art. 46). As we saw above, Pothier thought that the condition of Roman slaves was directly reflected in contemporary slaves in the colonies: Roman slaves »étaient regardés comme des choses, plutôt que comme des personnes, *ut res, non ut personae erant in dominio heri*«, and »nous avons dans nos Colonies de ces sortes d'esclaves, qui sont les Nègres, dont il se fait un commerce considérable«.[176]

For Pothier and other early modern jurists, then, slaves were *res* in the simple sense of »chose« or, as also seen (e. g. in von Zeiller[177]), »Sache«.

It is perhaps worth noting that this sharp separation between *persona* and *res*, or between person and thing, was elaborated for reasons that appear extraneous to historical-philological reflection on the Justinianic sources, or on Roman law as such. The latter could be directly applicable, as stated in the 1636 *Instructie* of the States General for the United Provinces' territories in Brazil. Generally, however, the function of Roman law appears to have been that of providing a lexicon on the basis of which, even if only by comparison, jurists worked out solutions to the questions arising from the needs of their time.

This therefore seems to be a first possible conclusion:

1) Serfs and slaves defined the concept of person because they constituted its boundary. On one side of the boundary there were persons, on the other *res*: as if, in order for someone to remain a person, someone else had to be a thing. In this way, serfdom and modern slavery together defined the contours of the concept of person, which the legal science of the *Ancien régime* transmitted to that of the 19th century and the contemporary age.

However clear-cut, this boundary was also mobile, since it ran through individuals who, depending on the circumstances and the legal relations in which they found themselves, could be either *personae* or *res*. This was the case of the *homines proprii*: as we have seen, this term was used by most of the abovementioned jurists to define subjects of servile condition who enjoyed »ius connubiorum«, »ius contractuum« and »ius testamentorum«.[178] They constituted a category so ambiguous as to represent a sort of »tertium genus« between freemen and slaves,[179] so much so as to lead early modern jurists to hypothesise the existence of a profoundly different servile condition from that of the Roman slaves.[180] To distinguish the two, *homines proprii* were attributed the

176 Pothier (1778), 1, 4, 571.
177 Zeiller (1811), § 16, 104 n.
178 Stryk (1690), §§ 6–8, pp. 82–84;
Thomasius (1712), 1, 3, 16;
Heinecke (1747), 1, 3, § 85, 21–22.
179 Stryk (1690), 1, 5, § 1, 78–79.
180 Thomasius (1712), 1, 3, 14.

condition of *persona* and, at the same time and for the same reason, Roman slaves the condition of *res*.

But *homines proprii*, while not being slaves, could also be alienated: the fact of being *personae* did not protect them from being, in certain circumstances, mere objects of a legal relationship. They could be considered as persons or as things, depending on different legal relationships under civil law. However, this was also true for slaves *stricto sensu* if one considered their condition from the point of view of the law of nature, or canon law, or more simply their spiritual health.

This leads to the second possible conclusion:

2) The boundary between persons and things elaborated by legal thinkers between the 16th and 18th centuries was clear-cut, but it did not separate different groups; rather, it cut across individuals: it was an internal boundary within individual subjects.

This latter aspect, the result of both the estates-based and the colonial matrices, seems to have persisted in the subsequent stages of legal history: regardless of the qualities of person or thing, the fact that the notion of legal capacity was susceptible to gradations implied the permanence of boundaries within the same individual. However, in the 19th and 20th centuries, these boundaries would be the result of entirely new reasons.

■

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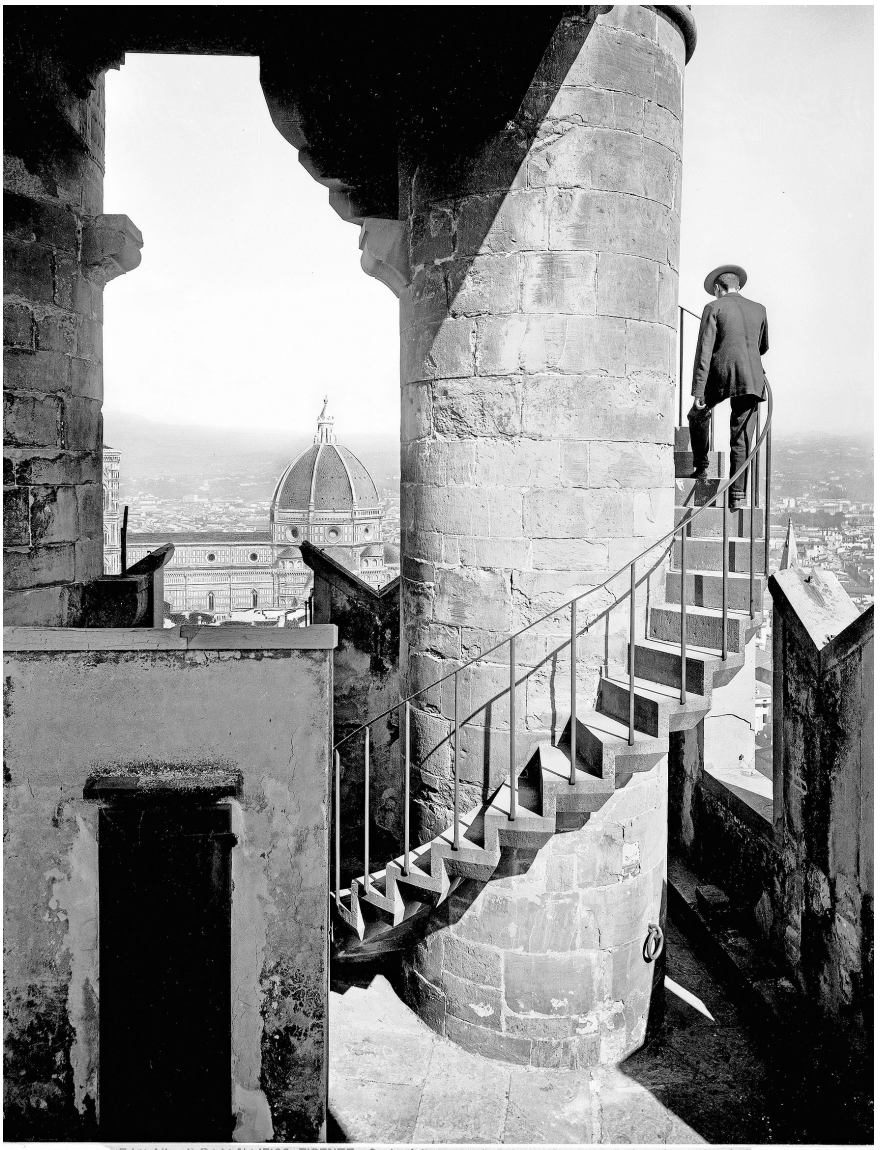
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Enslaved as Outsiders, Enslaved as Property: Understanding Slavery in a Global and Early Modern Context

In his 2014 book *Qu'est-ce que l'esclavage? Une histoire globale*, Olivier Grenouilleau set out to define what slavery was.[1] Insisting that slavery was a status that could indicate a great diversity of conditions, he nonetheless proposed three elements that, according to him, characterized slavery in most periods and locations. The first of these was otherness. Enslaved persons, Grenouilleau argued, did not necessarily begin as external to the group that enslaved them. However, once enslaved, they were deemed outsiders. What being an outsider entailed differed from place to place, from time to time, but it always implied that the enslaved would be denied access to important social, economic, political, and legal benefits. To understand enslavement, therefore, we must begin by asking what was important to society at that time, because only by proceeding in this way will we be able to discover what the enslaved were deprived of.[2]

If otherness was the first factor common to all situations of enslavement, the second element Grenouilleau identified was that, in order to classify the enslaved as outsiders, those who enslaved them had to be in a position of power because only such a position would enable them to operate this re-(or de-)classification. Enslavement, in other words, necessarily involved power inequalities.

The third element in all cases of enslavement was usefulness. The reason those in power engaged in enslaving others was because it was beneficial to them. The advantages could be economic, but they could also include other components such as reproductive, symbolic, military, or religious benefits, to mention but a few examples. Grenouilleau ended his analysis by pointing out that the existence of authorities that sanctioned the transformation of insiders into outsiders was often vital to these processes, because it converted practices into institutions, thus both enabling and legitimizing what had transpired.

Grenouilleau was not the only scholar who sought to understand what slavery was and concluded that, rather than being an institution that transcended space and time, it consisted of a huge variety of dissimilar historical strategies.[3] In his case, as in that of many others, these assertions were fueled by the acute awareness that the study of enslavement has been skewed by the fact that researchers mostly concentrated on the Atlantic Ocean. It is estimated, for example, that approximately 80 % of all studies on enslavement originated in the USA and another 10 % in Brazil.[4] This concentration on the Atlantic, historians have observed, had important consequences on how the field of slavery studies has developed. It has led to what some have identified as a North America-centric myth, which made what transpired in the Unites States the norm, while all other practices were viewed as either complying or failing to comply with this model.[5] This resulted in extreme attention being paid to the plantation economy, as well as to violence, resistance, and racialization. It produced a vision of slavery as a stable and endurable institution and supplied researchers with a fixed epistemology that they also applied to their study of other areas.[6] The

1 Grenouilleau (2014).

2 Peabody (2011b) also stresses that the characteristics that sought to justify otherness could be radically different according to place and time: They could invoke family relations, ethnicity, religion, political adhesion, and so forth. On comparative slavery also see Drescher (2009).

3 Miller (2012) ix–x and 1. On these questions also see Kopytoff / Miers (1977) 3–4 and Batselé (2020) 13–16.

4 Zeuske (2012) 87.

5 Vidal (2021) in a radio interview in Le portail des Outre-mer.

6 Miller (2012) x. Miller argues that the antebellum United States were »the single source of the politicized epistemology of studies of slavery as an institution«. Also see his pages 1–2, 19, 34 and 119–121. On p. 121 Miller calls it »the politicized caricature« of slavery and, on p. 130 he summarizes this model as »a public legal institution protecting private property in people, characterized racially and as excluded from a commercial economy taken as otherwise comprehensive«.

pre-dominance of North American scholarship also led to a-historicization and a-contextualization, homogenizing practices even in the United States, which were never as singular as the model suggested and, furthermore, were in constant evolution.[7] Indeed, even in the United States, we are now told, enslavement as stereotypically presented by many did not emerge before the late 18th and the early 19th century.

Responding to these scholarly developments, historians like Grenouilleau insisted that enslavement was a practice that was adopted by multiple societies in different periods.[8] Rather than an isolated or marginal phenomenon, an exception to the rule (the rule being liberty), enslavement was a widespread occurrence that began in prehistory and continues, according to many, even today. If we do not look at it as it really was, we will fail to understand it properly.

In response to these calls, historians of the Atlantic did acknowledge the pervasiveness of enlavement around the globe and in different periods; at the same time, however, they insisted on the importance, indeed centrality, of Atlantic slavery. Atlantic slavery was crucial, they argued, because of how massive it had been, and because it added a new dimension to enslavement: that of race. Atlantic slavery, in other words, introduced a new system of organization and created new hierarchies to explain why certain people could be enslaved. According to scholars of the Atlantic, it is precisely the centrality of racism, and its legacies at the present, which justified concentering on the Atlantic and making it the model.[9]

Despite these considerations, and following Grenouilleau, I propose to de-center existing narratives by adding new dimensions to already flourishing and fascinating debates. I offer two considerations that may help us rethink slavery both in the *longue durée* and more globally. The first of these questions the paradigm of othering, suggesting that we also consider the mechanisms that enabled ›inside‹. The second questions the assumption that enslaved persons were property, by setting enslavement on a larger canvas and by observing early modern debates regarding both the household and labor.

I. Othering and Insiding

Grenouilleau (as well as numerous other scholars) has pointed out that enslavement was usually tied to othering: Either only outsiders could be enslaved, or those who were enslaved became outsiders by virtue of their enslavement. The stereotypical example mentioned by most was ancient Rome, though multiple other examples are of course possible. In Rome, those who were enslaved lost their membership in both community and family: They became non-citizens and were no longer considered married to their spouses or related to their progeny.

Though othering was certainly central to enslavement, and it is probable that it grew even more central over time, there are nonetheless multiple examples that show how enslavement could also operate on the inverse, transforming outsiders into insiders or at least into insiders in some respects, if not all. Moving away from Atlantic slavery and observing other places and times may be helpful in this regard.

The practices of many indigenous groups in North America are particularly well studied, though the same also holds true for several areas in Africa. Before European presence substantially affected existing modalities, in many indigenous groups enslavement mainly functioned as a mechanism to add rather than deduct members and to absorb rather than reject outsiders.[10] A means to recruit labor, it also served as a system to bolster the population and ensure the survival of kinship groups. Many North American communities bought and sold, captured and freed, or sometimes even killed enslaved persons, yet they also habitually adopted these persons into families and groups. Historians have concluded that adoption to the group was frequently carried out to replace a

7 Miller (2012) 120 and 131–132.

8 This seemed to have also motivated Rossi / Vidal (eds.) (2021) and Miller (2012).

9 Blackburn (1997) highlights some of the innovations that made Atlantic slavery important. For a more recent reiteration see Vergès (2008). Miller (2012) 126–129 responds to these conclusions by stressing that racialization itself was a historical process with enormous variations, and that it became fully operative only in the 19th century.

10 Marchant (1942); Perdue (1979); Donald (1997, 2011); Brooks (2002); Whitehead (2011); Snyder (2010).

missing member, whose name, properties, position, and family relations the enslaved automatically inherited. By way of symbolical sanction, the transformation of the enslaved into members could involve a ceremony in which they were ritually (but not physically) executed and subsequently underwent a social rebirth. The old person they had been might have died, but a new person was created in its place. Historians who have studied these practices concluded that among the indigenous peoples of North America, enslavement functioned as a mechanism for social exchange that enabled groups to trade people with the aim of ensuring both ritual and material reproduction.

Though the literature on indigenous groups in North America mainly centers on the integration of captured males, often defeated warriors, the literature on slavery in Africa before the emergence of the large-scale Atlantic slave trade describes the search for both males (mainly for military and hunting purposes) and females (for workforce and reproduction).[11] It also understood enslavement as a historical strategy for building communities and managing change, and insisted that enslaved persons often became affiliated with groups, which they then helped reproduce. In Africa, historians argued, enslavement formed part of systems of kingship, which transacted in people in a variety of ways (purchase, exchange, war, and captivity). Yet while other social members could rely on what has been called idioms of descent, enslaved persons who were absorbed into the community were imagined as ancestor-less individuals. In a society in which kin was fundamental, although absorbed, the enslaved – and sometimes their offspring – remained relatively marginal and defenseless because they lacked a kin group to protect them. As a result, rather than seeking freedom, as the literature on North America had led us to believe, in Africa enslaved individuals sought bonds and connections that would reduce isolation and vulnerability. This continued to be true even as African polities expanded, as enslavement became militarized as well as commercialized, and as the targeted persons were now obtained through long-range interactions.

Research on indigenous North America and Africa thus indicates several ways by which insiding (rather than othering and outsiding) formed part of the historical experience of enslavement. This begs the question: Could this also have been the case in Europe and its overseas territories?

Historians of North America, of course, have long argued that one of the most important contributions of enslaved females to their enforced new groups or communities was reproduction.[12] They suggested that the owners' desire to increase the number of enslaved persons, as well as the rule that automatically passed status from mother to offspring, had intensified pressure, often accompanied by extreme sexual violence, on female slaves to reproduce. Yet it is possible that here too, making the late 18th and 19th century North American experience the model might have obscured important questions.

Historians of other areas and earlier times have shown that the rule according to which birth followed the womb – that is, the rule that classified children of enslaved women as slaves – was not as general, uncontestable, or absolute as it was once assumed. Rather than an automatic derivative of ancient Roman law, as it was often portrayed, the status of children born to enslaved women was fought over, questioned, and reaffirmed during the early modern period.[13] In 15th- and early-16th-century Valencia, for example, enslaved women who gave birth to a child fathered by their masters were automatically emancipated and their offspring were considered free.[14] We also know that when disagreement arose and the parties appealed to the courts, the main question they debated was how to prove the identity of the father. Formulated as paternity suits *avant-la-lettre*, discussions centered on whether the master recognized this filiation either explicitly or implicitly, for example by celebrating the birth or treating the children as if they were his own. Valencia's records also show that celibate masters, or those who had lost their other progeny, admitted their paternity when they

11 Kopytoff / Miers (1977) and Miller (2012) 90–118.

12 Chalhoub (2015) 168 mentioning the works of Gwyn Campbell, Suzanne Miers, Joseph Miller, Camilia Cowling, Joseph Dorsey, and Jessica Milward. Also see Brown (1996); Morgan (2004) 12–49; Arizia (2020); Machado et al. (2021); Vidal (2019).

13 On the persistent appeal to an ancient Roman law that allegedly was adopted wholesale and then implemented by Europeans see, for example, Machado (2010) 61–62.

14 Blumenthal (2010) and Blumenthal (2009) 174–192, 211–212, 215, 219–221.

came to realize that they would have no other descendants or on their death bed. It was as if they kept these children in ›reserve‹ to be recognized, legitimized, and freed if and when necessary.[15] It is also possible that such men choose to enslave certain females because of their reproductive capacities, separating them from their children as soon as these were born and then raising the children on their own. Apparently, as far as these masters were concerned, pregnancy was a work-related task, a labor like all others that began with conception and ended with birth. I will return to this point later.

Practices in 15th- and 16th-century Valencia also classified as free children of enslaved females who had been conceived with a free man. In these cases, however, though the offspring were born free, the mothers remained in captivity. Court records show that enslaved women were aware of these rules; some explained that they had been advised to argue that they were carrying their master's child or the child of another free man, for precisely these ends. Children of enslaved women also invoked these norms in their freedom suits, demanding recognition as free because of the identity of their fathers. In Valencia, one could argue, rather than the womb, status followed the penis.

In Genoa, 15th-century slaveholders also »saw the reproductive labor of enslaved women as a potential contribution to their lineage«.[16] As happened in Valencia, their preoccupation with ensuring generational transmission led to the wish to incorporate into the family and recognize the children fathered with enslaved women, if and when needed. This was particularly common with owners who were single or whose marriage produced no descendants. Recognition implied freedom as well as rights for the child, but generally not the mother – the laws declared her to remain enslaved, though lawsuits often demonstrated that locals might have considered her free too. As a result, one could argue that in Genoa »slavery passed through the maternal line unless the father decided otherwise«.[17] Genovese fathers of children conceived with an enslaved woman who was owned by another could be forced to pay damages to the master and take care of the child.[18] Meanwhile, Genovese potential owners selected to purchase enslaved women who were more likely to be impregnated and they purchased insurance against the risk of childbirth in case the mother died giving birth. There are multiple indications that the situation in many other northern Italian cities might have been similar.

Though we have only partial information regarding what transpired in Barcelona, there too, the attitude taken by slave masters regarding offspring borne by enslaved women was fundamental to determining their status.[19] Rather than automatically considering these offspring slaves, children who were recognized and / or legitimized by their fathers could be socially integrated. In Majorca, enslaved women who gave birth to a child recognized and supported by the master, and who had been freed, could demand to be paid a pension from his estate in reward for the sexual services they had performed.[20]

Similar practices also existed in the Islamic world and the Ottoman empire, whose authorities and residents participated in the same slave markets as the Europeans did.[21] There, an 11th-century text regarding the purchase of enslaved women took it for granted that they could have been purchased so as to procreate children for the master. What the author was concerned about, as masters in Valencia did, was paternity.[22] At stake for him was how to guarantee that the enslaved women would not be already pregnant when purchased, thus introducing as the master's child a child which had been conceived with another man. This concern expressed preoccupation not so much with ensuring the purity of the master's bloodline, but with status: Enslaved women who conceived children with their masters (identified by the designation »the mother of the child« – *umm walad*) were automatically freed upon the death of their master, and their children were born free and legitimate.[23]

Across the Mediterranean, these practices reproduced contemporary visions which generally held that filiation followed the father, not the mother. Indeed, where the status of the child followed the mother, as in the 13th-century Castilian recompi-

15 I owe this characterization to Debra Blumenthal.
16 Barker (2021) 1.
17 Barker (2021) 4.
18 Barker (2021) 13.
19 Guillén (2010) 169–176.
20 Planas (2024).
21 Barker (2019).
22 Lewis (1982) 142.
23 Schacht (1934); Ali (2010) 111, 113; White (2020) 302–304.

lation of *ius commune*, the so-called *Siete Partidas*, the authors of the collection found it necessary to specify that this was an exception to the general rule according to which children must follow the status and condition of their father.[24] Similar views also permeated Muslim society, where descent passed through the father, not the mother, as did status (and liberty).[25] Even as late as the mid-17th century, it was possible for Hugo Grotius (1583–1645) to argue that the gradually emerging rule which identified status by observing the mother rather than the father was an exception that was justified by probatory difficulties.[26] He thus concluded that, because this rule was »not in satisfactory agreement with the law of nature«, it should be ignored in cases when the identity of the father could be »recognized with sufficient certainty«. This line of reasoning also allowed Grotius to argue that where the law is silent on this question, »the children would not be less likely to follow the condition of the father than that of the mother«.

The question of how to treat children of mixed free and captive parentage, and whether they should inherit the condition of their father or mother, was also raised in Europe's overseas colonies. In 16th-century Portuguese São Tomé and Príncipe, pre-1687 French Caribbean, and 18th- and early 19th-century English Bahamas, for example, enslavers who fathered children with enslaved women often argued that these offspring were (or should be) free; and indeed, many local norms defined them as such. [27] Traces of these debates can even be found in the 1685 infamous French *Code Noir*, which on the one hand set the rule that children of an enslaved women would be considered slaves (art. 13), but which also determined that, if an unmarried slave master who had conceived children with an enslaved female married her, this act, the marriage, should be construed as a formal recognition of this filiation and would have the automatic consequence of freeing both the mother and children as well as legitimizing the offspring (art. 9).[28] In a similar manner, the same code (art. 16) determined that children who were designated by their masters as sole heirs, executors of their will, or tutors of their children, would be held and considered as free, possibly because these moves were understood to include an implied recognition of paternity.

It is therefore fair to say that, leading up to the early 19th century, a great variety of practices and solutions coincided with the rule that gradually identified the children of enslaved women as slaves. Historians who have studied these processes asked why this rule was adopted, where, and through which processes. They pointed out that its consolidation was faster in the Iberian world than in the French colonies, and that some English colonies in the Caribbean might have been the last to adopt it. They also sustained that the eventual primacy of this rule in the colonies possibly had little to do with enslavement per se, and everything to do with larger processes of racialization that dramatically intensified in the 18th and 19th centuries, precisely when this rule regarding the status of children of enslaved mothers became generalized in the Americas.[29]

If we accept these premises, we could argue that, before children of enslaved women automatically became slaves, procreation could have produced additional enslavement, but could also have contributed to the survival of families and kin groups, indeed communities, even in Europe and its overseas colonies. Otherwise, it would be inexplicable why slave masters in Valencia and the Bahamas would insist that the children they fathered with their enslaved females were born free. As a result, like in indigenous North America and Africa, children of enslaved persons were marginalized in multiple ways, but even in Europe and its

24 Siete Partidas (1555 [13th c.]), Partida 4, title 21, law 1 and 2.

25 Joseph (1974) 370.

26 Grotius (1925 [1646]), Book II, chapter 5, XXIX, p. 256–257.

27 Pereira (2022).

28 Code Noir (1735 [1685]); Sarti (2022) 86–87.

29 Recent scholarship on Atlantic slavery demonstrates that the tying of enslavement to race was a gradual process that took centuries to conclude, and which could not be foreseen. While color and origins might always have mattered, comparative research has demonstrated that they came to matter more frequently and more severely *after* rather than *before* enslaved persons were emancipated. According to this vision, it was only after individuals of African descent, stereotyped as former slaves, were granted the rights of members of society that, gradually, those who wished to bar their integration invented new mechanisms to justify their discrimination. Rather than basing their otherness on slavery, they began focusing on race: Fuente / Gross (2020). On these issues also see Gross (2008, 2011) and Cottrol (2001). Also see Miller (2012) 150, who centers on commercialization rather than racialization.

colonies, they could also be admitted to families and groups in others.

Beyond the strategies adopted by communities, kin groups, families, and individuals to ensure their survival was also the question of how long enslaved origin would be remembered. While the literature on colonial and 19th-century North America describes social and legal practices that encouraged, indeed required, recollection, the bibliography on indigenous North America, Africa, and Europe suggests instead the prevalence of oblivion. This is particularly clear in the case of Europe, where historians now habitually investigate the role Europeans played as traders and enslavers but where most still adhere to a very traditional narrative according to which enslavement, which had been common in Europe in antiquity, gradually disappeared from the continent. According to this narrative, by the late Middle Ages, if not earlier, hardly any enslaved persons were present in Europe and, by the early modern period, the few who were did not have African origins. Furthermore, by the early modern period, most European countries adopted a free-soil rule that automatically liberated enslaved persons upon their arrival. According to this traditional narrative, in other words, enslavement was a colonial affair, indeed part of the horrors committed by European overseas.

Horrific it was indeed, but not merely a colonial affair. To take but a single example, historians have demonstrated the pervasiveness of enslaved persons of African origin in early modern Spain, where in some locations they accounted for as much as 10 to 15 % of the local population.[30] Spanish historians have been particularly proactive in studying these questions; however, the same conclusion could be reached regarding other European countries, where the doctrine of »free soil« – the idea that enslaved persons would be freed automatically after they arrived in Europe –, though central to legal and political debates, was never as general and as absolute as these debates pretended it was. Furthermore, even where and when it existed, as late as the 18th century it did not stop locals from continuing to hold many enslaved persons in bondage.[31]

This oblivion to the huge presence of enslaved persons of African descent on European soil, however, is not a new phenomenon. Already in 17th- and repeatedly in 18th- and 19th-century Spain – to return to my first example – many discussants assumed that Spaniards of African descent and enslaved persons only existed in the colonies.[32] How could they make these assumptions when local newspapers continued to advertise the sale of enslaved persons of African descent? While a convincing answer has yet to emerge, one could argue that oblivion was another mechanism of insiding. By relegating slavery either to the Middle Ages, or to the colonies, but never to early modern Europe, contemporaries as well as present-day Europeans went to great pains to imagine a Europe where everyone was free, and everyone belonged, even when this was clearly untrue. Why they chose to do so, and why they succeeded, is another question.

The emphasis on othering and the lack of interest in insiding among historians of enslavement could well be another result of the influence exercised by the scholarship on North America. This scholarship insisted on the convention according to which the enslaved were considered things rather than persons and, as such, could not be absorbed into society in any meaningful way. In the next section, I would like to address these conclusions by asking: If enslaved persons were

30 Stella (2000a); Orsoni-Avila (1997); Parilla Ortíz (2001).

31 On the legend of free soil in France see Peabody (1996); Peabody / Grinberg (2011); Weiss (2011). Also see Sarti (2022). On the presence of this principle in Europe at large see Batselé (2020). On free soil in a longer perspective see, for example, Alsford (2011). On what might have transpired in the Netherlands: Hondius (2011).

32 Debating whether Spaniards of African descent should be citizens, delegates to the first Spanish constituent assembly meeting in Cádiz in 1810 assumed that such individuals only existed in the New World. See for example Argüelles on 9 January 1811, in: Diario de las discusiones y Actas de las Cortes de Cádiz (1811) vol. 2, 323. Such convictions were present as early as the 17th century, when authorities and individuals in both Spain and the Americas explained that, while in Spain purity of blood excluded individuals of Jewish or Muslim descent, in Spanish America (and only there) African blood must also be considered. Indeed, as late as 1720, a litigant in Seville (but not in Spanish America) could argue that despite his African origin his blood was pure because he did not descend from moors, Jews, or heretics: Stella (2000b) 175. On these issues and others also see Herzog (2012).

indeed property, what type of property were they? How can we situate their status in larger and longer conversations regarding both social structures and labor formation?[33] And how would this help us rethink slavery?

II. Social Structures and Enslaved Persons as Property

During the Ancien Régime, wives, children, servants, and enslaved persons were all placed under the jurisdiction *(patria potestas)* of heads of households *(pater familias)*. Though this arrangement had originated in ancient Roman law, its meaning had undergone dramatic transformations in the late Middle Ages and the early modern period.[34] Medieval and early modern scholars believed that the household was the basic social unit in a society with a nested hierarchy, from households to local communities to the state. Households, communities, and states each had their own authorities, which were endowed with the capacity to announce and apply the law, that is, with jurisdiction *(iuris-dictio)*, literally: the ability to tell the law.

The government of the household was delegated to a *pater familias*, usually an adult male. The head of the household had jurisdiction over all members, including the right to dictate and impose norms that encompassed decisions regarding the life, activities, fortune, and properties of all those subjected to him. The *pater familias* could give orders indicating where to live, what to do for a living, and how to behave, and he had a huge discretion in choosing the sanctions and penalties, including physical punishments, in cases of infraction.[35] The authority of heads of households over other members was substantiated through their capacity to hold or release the members, by way of granting or refusing to grant them manumission or emancipation.[36] Those who were released by the *pater familias* were no longer under the duty to obey them and were considered emancipated social members who could enjoy rights and obey duties by virtue of their own decisions. Rather than ›free‹ as we would imagine it today, those emancipated became autonomous.[37]

Though these structures were often stereotyped in the literature as typical of »Roman law countries«, the relegation of family members and servants, as well as enslaved persons, to the domestic sphere and to the jurisdiction of heads of households, who had enormous discretion as to how to manage their affairs, was also obvious in the English colonies, where it had consequences similar to the ones described earlier.[38] There, as in other places, those who left the household entered society, having obtained the power to act on their own volition.

At stake in leaving the household was not freedom but autonomy.[39] Either individuals were free (that is, autonomous or emancipated) or they were under the jurisdiction of someone else who was. This is clearly expressed, for example, in the Castilian 13th-century compilation of *ius commune*,

33 On slavery and its placement in labor history see, for example, Zeuske (2012) 100–101. On the relationship between contract and coerced labor also see Chalhoub (2015) 162, 165, 169–174. Rockman (2008), for example, studies free and enslaved workers of both European and African descent in his quest to reconstruct a labor history where multiple simultaneous and overlapping forms of inequality operated side by side.

34 On slavery in ancient Rome see, for example, Buckland (1908); Dumont (1987); Watson (1987); Gardner (2011). Also see Helmholz (2012).

35 Herzog (2003).

36 Historians of Atlantic slavery mostly distinguished manumission from emancipation. For some, manumission was the granting of liberty while enslavement was legal and emancipation was the act that, following abolition, released all those formerly enslaved. For others, the former was an act that expressed the will of the owner, and the latter depended on declarations by the authorities: Peraza (2016) and Finkelman (2006). For yet another group, the difference was between liberty granted while the owner was alive, and that which was executed after his death, see: Deeds of Emancipation and Manumission.

37 Both terms referenced the submission to the hands of the householder: Manumission literally refers to releasing individuals from the hand that controls them (*manu* being the hand and *mittere* a verb that means to let go, release, terminate). Emancipation also carries the same idea of ending the capture, grasp or the taking by the hand (*ex-manu-capere*, *ex* being the way out, the undoing and *capere* meaning the capture / grasp / taking by the *manu*, the hand). See, for example, https://www.etymonline.com/word/manumission, and https://www.vocabulary.com/dictionary/emancipate, both accessed 10 July 2023.

38 Bush (1993); Morris (1996); Herndon / Murray (eds.) (2009); Walsh (2011); Finkelman (2012). Also see Finkelman (ed.) (1997).

39 Grotius (1925 [1646]), Book II, Chapter 22, XI, p. 551: Liberty is the same as »autonomy«.

the *Siete Partidas*: Liberty was the power that all persons naturally had »to do as they wished«.[40] The 1732 dictionary of the Spanish Royal Academy followed the same rationale when it defined »emancipation« as the act of a father (literally) removing his hand from his son, »allowing him liberty so that he can direct and govern his own affairs«.[41] That freedom meant autonomy was also clear to office holders in some Italian city-states, where the struggle of Lucca against occupation by Pisa, for example, could be formulated as a defense of liberty, liberty being understood as the right to self-government.[42] Similarly, Emer de Vattel, author of a very popular and influential book on the *Law of Nations*, argued in 1758 that according to Natural Law both individuals and nations were born free and independent.[43] For him, this meant that they had the »right to be governed as they think proper« and »according to their own pleasure«. If freedom was autonomy, slavery was defined as the lack of ability to rule oneself. For precisely this reason, »natural slavery«, a condition of permanent enslavement that had already been debated by the ancient Greeks and that was also continuously invoked in medieval and early modern Europe, was understood as applying to persons who were considered unable to govern themselves.[44]

While contemporaries continuously argued that freedom – that is, autonomy – was a natural right, they were also aware that not all members of society were free; in particular, the lack of freedom of servants was considered puzzling. As historians have rightly observed, in the late Middle Ages and the early modern period, servants were not salaried laborers the way we might think of them today. Instead, servants were members of households and subjected to the jurisdiction of a *pater familias*. Placed under the control of masters, they could be forced to remain under their tutelage and serve them even against their will. In many places, leaving the household without permission was a punishable criminal offense.[45] According to a 1639 Maryland law, servants who did leave could be executed. In Virginia, pursuant to a law of 1642, if caught, their time of service would be doubled, and if they had run away twice, they would be branded on the shoulder or cheek.[46] In Pennsylvania, captured runaway servants sometimes were made to wear iron collars with the initials of their masters.[47] Those who wished to leave service therefore had to either secure the consent of their masters or sue for their freedom. Because such was the case, in Barbados, servants were often referred to as »white slaves« and they, too, engaged in fleeing, resisting, rebelling, and forming maroon communities, often in conjuncture with enslaved persons.[48]

How could servants be treated this way? Initially, the response was that servants – who were originally free – relinquished their freedom by agreeing to subject themselves to a master.[49] According to this interpretation, because contracts with servants did not define the specific work they were to perform, servants left this decision to the discretion of others. Contemporaries thus concluded that servants abdicated their own will for the duration of the contract and gave masters absolute control over them. From this point of view, servants and enslaved persons were similar to

40 Siete Partidas (1555 [13th c.]), Partida 4, title 22, law 1. The original version reads: »Libertad es poderío que ha todo ome naturalmente de fazer lo que quesiere solo.«

41 The original version reads: »Sacar el padre al hijo de su poder, dimitirle de su mano y ponerle en libertad, para que él por sí obre, dirija y gobierne sus cosas.«

42 The Standard Bearer of Lucca Appeals to Local Patriotism (1397), transl. by Christine Meek, in: Jansen et al. (eds.) (2011) 74–76.

43 Vattel (2008 [1758]).

44 Batselé (2020) 17–18, 23, 39–40. On its use in the early modern period, see, for example, Pagden (1990) 13–36.

45 English statutes dating from 1349 and 1562–1563 stipulated the obligation to work, as well as to complete the contractual period, defining failure to do so as a criminal offense: Pesante (2009) 294, also see 314–315. On similar limitations placed on servants in France see Sarti (2022), most particularly 68–72. On the ability to read the status of slaves from the treatment of serfs and servants see Peabody (2011a).

46 Smith (1947) 265.

47 Herrick (1926) 231.

48 Beckles (1985) 79–80. On p. 83 the author argues that it was more difficult for fleeing servants to disappear into the crowd than for enslaved persons because the scarcity of free-floating population of European descent in Barbados made them highly visible.

49 Discussions regarding the status of servants are beautifully described in Pesante (2009), whose work has inspired many of my arguments below.

a degree in that neither had a will of their own. The differences between servants and enslaved persons were nonetheless great because in the case of the latter (the enslaved) but not the former (the servant), subordination was both involuntary and permanent.

Servants therefore ceded their will – indeed their freedom to make their own decisions – to their masters. In theory, they did so voluntarily by entering into a service agreement for a limited period. Yet in practice, such was not always the case. Not only were servants not in a position to negotiate the terms of their agreements but, during the early modern period, many actors were willing to assume that servants had agreed to their submission even in the absence of proof. The operating assumption was that servants could not truly refuse the opportunity to earn a living because such refusal would result in having no means to survive and therefore in death. In the case of the destitute, therefore, jurists adopted a fiction according to which, regardless of the existence or absence of proof, since the poor wished to survive, they necessarily agreed to become servants and would continue to do so as long as they lived.[50] Furthermore, in the case of the unemployed poor, refusal to work was also considered a violation of the duty to make oneself socially useful and this, too, legitimized coercion. Here too, parallels were drawn between servants and enslaved persons. Accordingly, servants were confronted with a choice similar to the one faced by enslaved persons, who were often imagined as war captives who, if not for enslavement, would have been killed, death or enslavement being the options victors could have vis-à-vis the vanquished in a so-called ›just war‹.[51] In other words, labor in the form of either servitude or enslavement was portrayed as an alternative preferable to perishing.

Eventually, the predicament of servants led to jurists proposing a revolutionary idea: that we imagine work, that is, the time and energy employed in performing a task, as an object, a thing, that could be rented out or sold. Subsequently, jurists suggested that individuals were renting out their labor when they engaged in short-term and specific labor obligations in exchange for payment, but that they were selling their labor when they agreed to submit themselves to a general obligation to work without a specific job description, that is, when they agreed to become servants.

Though apparently a minor juridical development, the move to conceive work as an object that could be rented out or sold was of huge significance. It enabled jurists to explain (and justify) why servants could be forced to comply with their contracts and be penalized if they did not, as was the case in most European countries and in North America. According to this rationale, if servants had sold their work, it was no longer theirs to own. As a result, they could not take it away from their masters by leaving service without their consent. The same rationale also explained why violations of the agreement by servants were criminal (they had taken away their labor, that is, property that now belonged to the master, their act therefore constituting a theft), but violations of the agreement by masters were considered a civil wrong resulting in the master's financial liability (because the master was seen as owing money in payment for a thing rented or purchased). The same argument – making work an object that had been sold – also allowed contemporaries to explain why masters could have remedies against a third party that injured or detained their servants. Such was the case not because the servants were property of the masters – they never were. What masters had was property in their labor. Yet, an injury or detention that disabled servants from performing labor harmed masters because it limited their property rights to their work. All these practices made sense, as the English jurist William Blackstone (1723–1780) argued in his *Commentaries on the Laws of England* (1765), because by the time of his writing, the common opinion was that masters had property in the service of their servants, »acquired by the contract of hiring, and purchased by giving them wages«.[52]

Not specifying the work to be accomplished was one way for jurists to rationalize their conclusion

50 Batselé (2020) 46 mentions Pufendorf using this presumption.

51 Batselé (2020) 21. See, for example, the reasoning in Grotius (1925 [1646]), Book II, chapter 14, VIII, p. 768.

52 Blackstone (1765), vol. 1, 417. Blackstone (1768) repeats this affirmation in vol. 3, 142.

that servants had sold rather than rented out their work. Another was to interpret the agreement to reside in the household as an indication of the intention to sell to the master not only the work, but also personal freedom. This was the route the English philosopher John Locke (1632–1704) took when he argued, for example, that servants not only agreed to provide certain tasks, but also consented to become servile, that is, they sold both their labor and their subjection. As a result, while they were in service, masters acquired a »general right« not only over the servants' work but also over their obedience and their bodies, since the masters' property could not be protected without safeguarding the person performing these tasks.[53] It is thus not surprising that the Dutchman Grotius concluded that, rather than property rights in persons, masters had a personal right to the slaves' perpetual (lifelong) service, which consisted of a »lasting obligation to labor«.[54] Precisely for that reason, Grotius held servants to be in a state of »imperfect« or »incomplete« servitude.[55] Their servitude was imperfect because, although masters had an absolute right to their services and subjection as they did in the case of enslaved persons, this right was temporary rather than permanent. In other words, even in the case of servants, relations with masters were property relations rather than contractual ones. What masters had were not agreements with other free individuals. Instead, by virtue of these agreements they became property owners. They owned the labor of another person.

To return to the literature on North American slavery: This excursion into early modern legal developments would explain why slaves – and, as a matter of fact, also servants – were considered chattel. Chattel was a category of property particular to the English common law, which had no real parallels elsewhere, and which included all properties that were *not* real estate (that is, chattel was defined negatively rather than positively). Among properties considered chattel during the early modern period were also rights to intangible properties, such as rights to labor, which all masters had with regard to their servants and their slaves. In other words, enslaved persons were classified as chattel not because they were things but because classifying the right to their labor in that fashion made it possible to avoid applying the complex rules regarding real estate transactions to labor, for example, the requirement that transactions had to be done in writing. It also implied that enslaved persons were not tied to the land but that, instead, their work could be sold and bought independently.

The formulation of work relations as property relations (rather than contractual ones, as we tend to think about them today) opened the door to many other important developments. Among other things, it allowed contemporaries to argue that if work was a type of property, then like all other property owners, those who owned work had a right to its fruits. Jurists and theologians who argued as much suggested that those who owned the work that transformed raw material into a final product, for example grapes into wine, should also be the rightful owner of that which had been produced, regardless of the question whether the grapes belonged to them or not.[56] To explain this conclusion, they turned to ancient Roman law but gave it a new spin. Ancient Roman law prescribed that those who had caught wild animals became their rightful owners. Traditionally, the explanation jurists gave was that wild animals belonged to their captors because no one else had a better claim to them. By the time of the Renaissance, however, jurists used the same rule to arrive at a different reasoning. They now argued that wild animals belonged to their captors because of the industry invested in their capture. Accordingly, industry, that is, labor, could serve as a basis for acquiring property, and laborers (or those who owned their labor) could become eligible to enjoy the fruits of their efforts.

By the first half of the 16th century, the notion that work was an object that could be rented out or sold, and the idea that industry, that is labor, was a means to acquire property, were matched together in new and interesting ways. The Spanish jurist Fernando Vázquez de Menchaca (1512–1569) described the appropriation of both goods and land as the consequence of having invested labor or skill.[57] Similar affirmations led Juan de Solórzano

53 Pesante (2009) 319.

54 Grotius (1925 [1646]), Book II, Chapter 5, XXVII, p. 255 and Book III, chapter 14, II.2, p. 762. Also see Olsthoorn/Apeldoorn (2022) 259, 261–262 and 264.

55 Grotius (1925 [1646]), Book II, Chapter 5, XXX, p. 258.

56 Siete Partidas (1555 [13th c.]), Partida 3, title 28, laws 33–35.

57 Brett (1997) 188 and 190.

Pereira (1575–1655), a colonial judge and jurist working in Lima, to conclude in 1647 that land that had never been inhabited, or that had been abandoned by its residents, should be granted to those who occupied it not because it had no other owners, but as a reward for their »industry«, that is, their diligence or ability to perform better than others.[58]

The propositions advanced by Locke in this context are particularly well known, and often presented as a point of departure for a new age (when in fact they were more of a summing-up of previous developments). In his *Two Treatises of Government* (1689), Locke argued that it was unquestionable that laborers owned both their labor and the product that it generated.[59] He did not, however, believe that all laborers had equal rights.[60] Productivity that transformed raw material into a finished artifact gave those performing these tasks a moral as well as a natural right to that which they created.[61] To obtain property, in other words, effort alone was insufficient; it was necessary that a transformation, indeed an »improvement«, had also taken place. If none had, according to Locke, usually because the laborer lacked capacity, then no property rights would have been generated. Locke therefore distinguished between laborers who deserved property rights and those who did not. Among the latter were, according to him, individuals who were forced to work for their survival. Such individuals, he suggested, would normally be unable to achieve property rights because their activities would not lead to improvement – they would normally have neither time to reflect on what they were doing, nor to acquire knowledge that they could implement. Closing the circle, Locke then argued that this right – the right to property – was morally justified because it secured the fruits of labor. Thus, property was not only morally defensible, but also socially and economically beneficial because it motivated humans to improve things in ways that were useful.

If we return to the questions asked by Grenouilleau, who suggested that to understand what the enslaved were deprived of we must first understand what was important to society at a specific time, we could say that the answer was property. Property, Blackstone argued in the mid-18th century, was not an economic situation, but rather a status which masters had by virtue of having property rights in the work (and sometimes the subjection) of others.[62] The »very existence« of servants and enslaved persons, Blackstone explained, was »determined by that lack of property rights which legitimized [subjecting them to] public coercion to work«. Thus, while masters had property in labor, servants only had rights to their wages (rights which, as mentioned earlier, were not considered property rights, but instead a personal obligation of the master), and the enslaved had nothing. To make sure this would remain the case, across Europe, multiple norms prohibited enslaved persons from owning anything.[63] Meanwhile, enslaved persons who did accumulate property despite these rules were either able to purchase their freedom or were presumed free. Such considerations led the German jurist and philosopher Samuel von Pufendorf (1632–1694) to conclude that the differences between the free and the unfree pertained to the realm of both economic and social conditions. While those who were free were protected by the laws of the city, could choose which work to perform, and, most importantly, could have goods in excess of mere subsistence, the unfree only had the right to a basic living, could be forced to engage in any type of work regardless of their will, and (by virtue of belonging to house-

58 Solórzano Pereira (1972 [1648]), Book 1, chapter IX, point 13, vol. 1 at 91. In the 17th century, *industria* was identified as »the diligence and easiness in which one does something with less work than others«: Covarrubias (1995 [1611]) 666.

59 Locke (1980 [1690]), chapter 5, sec. 27: »Every man has a property in his own person […] [T]he labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state nature placed it in, hath by his labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the laborer, no man but he can have a right to what is once joined to, at least where there is enough, and as good left in common for others.« Also see Moller (2019) 198.

60 Pesante (2009) 302–305.

61 Mossoff (2022).

62 Pesante (2009) 319.

63 Blumenthal (2009) 86 and the Siete Partidas (1555 [13th c.]), Partida 4, title 21, law 7.

holds) were subjected to the laws not of the city, but of the *pater familias*.

The question we should therefore ask is not whether enslaved persons were property and therefore could not be integrated into society, but whether they could not be integrated because they had no property; in other words, whether it was not their lack of property that marginalized them most. Indications that such might have been the case can be found in the literature on the US antebellum South as well as on colonial and 19th-century Latin America. In both these regions, according to historians, freedom meant the ability to gain independence from the control and supervision of another person (the head of the household), but no less important was »being able to keep the fruits of one's labor«.[64] To close the circle, with regard to enslaved females, this leads to the question whether the understanding of work as an object that could be rented out or sold did not affect how their reproductive capacities were considered and managed. In 15th- and 16th-century Valencia, as we have seen, masters could purchase enslaved females for the precise goal of procreation and then discard them as soon as their work – this is how they conceived of these women giving birth – had been completed. In such cases, the fruit of the labor, that is the child, was considered to belong to the master (the proprietor of the work), not the mother, and the child was indeed integrated into the masters' family as a free person, while the mother was sent away. Furthermore, in Valencia slave masters could sue other free men who impregnated their enslaved females by accusing them of theft. And if the enslaved female died in labor, the impregnator was obliged to pay the master her worth.[65]

Given all this, is it possible that the profound questioning, and eventually the abolition, of the rule that made children of enslaved women slaves during the 19th century also had something to do – even if remotely – with these developments? Could it be that the children of enslaved women came to be considered free in reward for the labor, indeed, the transformation and improvement, invested by their mothers in pregnancy? In the English language, at least, it was during this period (in the late 16th century and increasingly in the 17th century) that childbirth came to be known also as »labor«, that is, as a procedure synonymous to the effort that, according to Locke, people made when they transformed raw material into an improved final product.[66]

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64 Schafer (2003) xiv. Antillón (1820 [1811]) 11 also refers to emancipation as including individual freedom, the right to self-sufficiency, to exist politically, and to the fruits of one's labor. Also see Dantas / Saba (2024).

65 Blumenthal (2010) 182–183; Blumenthal (2009) 170–172 as well as notes 53 and 54 on p. 170.

66 On the etymology of labor see, for example, https://www.etymonline.com/word/labor, accessed 22 August, 2023. Apparently, this usage had previously been unknown: see, for example, the dictionary of Middle English, https://quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED24509, accessed 22 August, 2023.

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Matilde Cazzola

»There Is in the Great Big Law Too Much Bad Little Law«: The Slavery Abolition Act and Labour Laws in the Post-Emancipation British West Indies*

1. Prologue

This article adopts a long-term and comparative perspective to examine the British West Indies in the wake of the abolition of enslavement as a unique testing ground for the implementation of legal measures aimed, on the one hand, at supporting the establishment and preservation of a free labour market and, on the other, at governing and restricting the dynamics of that market. In fact, lest the formerly enslaved consider themselves emancipated not only from the shackles of slavery but also from the imposition of work, metropolitan and colonial administrators looked for legal »bonds« which, similar to the slave codes of the times of slavery, would force the freedmen to engage in labour.[1] Even the members of the Anti-Slavery Society, in an advertisement published in 1833, stressed »the necessity of substituting, for the present authority of the master, a system of legal constraint, of equal, if not superior vigour«. The arbitrariness of the planters' personal power, they argued, should be replaced by the lawful coercion of an impersonal legal order: »The magistrate, and not the irresponsible owner, must be the judge of what shall constitute offence. We would supersede the private cart-whip, and replace it with the magisterial tread-mill […]. In a word, we would abolish slavery, but we would establish law.«[2] As Nigel Bolland has argued, the process of emancipation »changed the legal framework of social relations« in the British Caribbean without subverting them.[3] This essay provides a comprehensive investigation of this changing framework, which formally restructured the West Indian labour regime while ensuring the persistence of a varied set of »unfreedoms« predicated on racial difference.[4]

The historiography on the process of emancipation in the British West Indies is extensive, making the painful transition of the formerly enslaved from bondage to freedom a meticulously researched topic.[5] By building on previous work, for example, by Mary Turner and Diana Paton,[6] this article aims to contribute to this literature by examining the interconnectedness of the legislative measures regulating labour relations in Britain and the post-abolition Caribbean from a *longue durée* and transnational perspective. By focusing on the legal dimension of emancipation in the West Indies and considering the colonies as part of »a single analytic field« with their metropole,[7] the intention here is not to downplay Caribbean specificities (such as the process of racialisation which accompanied abolition)[8] nor to equate slavery and wage labour (an argument often historically advanced for anti-abolitionist purposes and based on racist premises).[9] Instead, it is proposed that within the imperial framework, different labour systems were frequently underpinned by similar social

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1 Paton (2004) 2.

2 Quoted in New England Anti-Slavery Society (1833) 176; Paton (2004) 55; Scanlan (2019).

3 Bolland (1981) 592–593, 613–615.

4 Cazzola (2021a) 97–125.

5 Sheridan (1961); Green (1983); Engerman (1984); Richardson (ed.) (1987); Green (1991); Craton (1992); Fogel / Engerman (1992); Twaddle (ed.) (1993); Stanley (1998); Drescher (2002); Boehme / Mitchell / Lester (2018); Scanlan (2019); Scanlan (2020); Stanziani (2022).

6 Turner (2004) 303–322; Paton (2004) 58; see also, more recently: Collins (2022).

7 Cooper / Stoler (eds.) (1997) 4; Hall (2002).

8 Holt (1992); Holt (2000); Hall (2002); Paton (2004) 15; Fuente / Gross (2020); Graham (2021).

9 Cunliffe (1979) 1–20; Hanley (2016); Stanziani (2022) 144, 167–172.

concerns, which pushed policy makers to address new problems by looking for previously tested legal solutions within an ancient, established repertoire.[10]

This article reconstructs the legal history of emancipation in the West Indies through the views of its different actors: the exponents of the British political intelligentsia, who, from the Houses of Parliament and the Colonial Office, were committed to introducing abolition; the white planters of the Caribbean and their local legislatures, who instead attempted to postpone and thwart its introduction; and the enslaved of African origin, at one and the same time the ›objects‹ of emancipation and its protagonists, whose voices are often silenced in the sources and therefore more difficult to retrieve. Despite their conflicting interests regarding the existence of a juridical status of enslavement in the Caribbean, the metropolitan and colonial elites shared an underlying preoccupation with labour shortage as well as a belief in the supposed necessity to discipline the formerly enslaved into a poor, hard-working and compliant proletariat – a necessity which was felt in Britain, too. From the perspective of the British Parliament and the Colonial Office, interfering in favour of abolition in the colonies and encouraging the approval of stringent measures in matters of employment (both at home and abroad) was not contradictory as, for it to work as they wished, the ›progressive‹ measure of slavery emancipation had to be accompanied by the introduction of ›conservative‹ norms imposing the coercion to wage labour. Therefore, emancipation from enslavement should not be considered as extending the boundaries of modern liberal society, made up of free and equal individuals, to include the previously excluded manumitted slaves. Rather, what Thomas Holt has called the »problem of freedom« of the post-emancipation Caribbean highlights the hierarchies and inequalities which were constitutive features of that society, and whose existence and continuity were upheld by its key ordering instrument – the law.[11]

2. Part One (1349–1823): Enslaved and Exploited

In his *History of Jamaica* (1774), the Anglo-Jamaican planter and historian Edward Long identified a striking similarity between West Indian slave codes and the regulations concerning serfdom, or villeinage, in medieval England. This legislative affinity led him to conjecture about a process of transatlantic legal transfer:

> The Negroe code of this island appears originally to have copied from the model in use at Barbadoes; and the legislature of this latter island […] resorted to the English *villeinage* laws, from whence they undoubtedly transfused all that severity which characterizes them, and shews the abject slavery which the common people of England formerly laboured under. In the 34th of Edward III, for example, [if] a labourer, or slave, fle[d] from his master's service […] the chief officer of the place was required to deliver him up to his master […]. But the most remarkable badge of servility was imposed, in the 1st of Edward VI, by the statute against vagabonds; which […] inflicts several violent punishments […] to force them to work for their owner […]. The first emigrants to the West-Indies […] carried with them some prejudices in favour of the *villeinage* system, so far as it might seem to coincide with the government of Negroe-labourers.[12]

In his account, not only was Long ignoring the fact that, since the mid-17th century and alongside slave codes, the British West Indies had regulations specifically aimed at governing the service of the convicted and indentured white labourers transported from the metropole.[13] In comparing villeinage, 14th- and 16th-century English statutes and slave codes, he was also juxtaposing different systems. Villeinage was a form of medieval serfdom which tied villeins to the manor and bound them to work for their feudal lord.[14] The extent to which

10 Craven / Hay (1993); Craven / Hay (eds.) (2004) 1–58; Tomlins (2009).
11 Holt (1992) 13–20, 78; Ricciardi (2010) 10–17, 53–80, 141; Connolly (2018).
12 Long (1774), vol. 2, 493–495; see also: Rugemer (2013); Wilson (2021).
13 Beckles (1989); Donoghue / Jennings (eds.) (2016); Handler / Reilly (2017).
14 Simpson (1961) 150–155; Hatcher (1981); Rabin (2011).

the status of villeins resembled that of slaves has been widely debated.[15] In contrast to the Caribbean enslaved, who had no right recognised by law and were equated to chattel (though a peculiar kind of chattel, bearing criminal liability), English villeins, as Dana Rabin and others have argued, did not properly *belong* to their lords.[16] This crucial difference was acknowledged by Long himself in his *Candid Reflections upon the Judgement Lately Awarded by the Court of King's Bench, in Westminster-Hall, on What Is Commonly Called the Negroe-Cause* (1772), a harsh commentary on Lord Mansfield's judgement in the case Somerset v. Stewart (1772), relating to the illegal re-enslavement of an individual who had managed to escape slavery on English soil. Long noted, in fact, that whereas »the law takes no notice of a Negroe«, medieval villeins were theoretically entitled to the writ of *Habeas Corpus*, protected against ill usage at least to some extent, and recognised as the King's subjects. At the same time, however, they were, by custom, »unfree«: they lacked autonomy of movement (if they left the manor without their lord's permission, they could be forcibly reclaimed) and, in the event that they refused to »do service to [their] master«, they could be legally imprisoned.[17] Long remarked on the peculiar legal status of villeins: the right to personal inviolability to which they were entitled in principle was in practice contradicted by the coercive social regime under which they lived and laboured.[18] In other words, as Brian Simpson observes, »*vis-à-vis* their lord« villeins were »unfree«, even though »*vis-à-vis* the rest of the world they were accorded the rights of free men«.[19]

However, Long was mistaken in presenting the 14th- and 16th-century statutes enforcing service and criminalising vagrancy as a development of villeinage. The first English labour legislation was actually passed in the late 1340s as a result of the decline of manorial serfdom. The social disorder caused by the Black Death epidemic, which de facto delivered most villeins from their bondage, prompted the introduction of statutory labour laws.[20] The Ordinance of Labourers (1349) and the Statute of Labourers (1351) of Edward III – confirmed and reinforced by several successive enactments, and systematised by the Statute of Artificers (1562) of Elizabeth I – aimed to ensure both a guaranteed supply of workers and their reliable service in times of labour shortage. These statutes jointly implemented an assortment of norms: they made the departure of labourers before fulfilment of their performance agreement punishable by imprisonment; imposed the formal duty to work on all those who lacked visible, independent means of subsistence; required the hiring of certain categories of workers on a yearly basis; criminalised vagrancy and the collective bargaining of labourers; and mandated wage rates. The purpose of this legislation was to compel labourers to be socially and economically dependent on their masters; its administration was given to Justices of the Peace or other inferior magistrates.[21] These late medieval and early modern statutes were direct antecedents of the »Master and Servant« legislation approved from the mid-18th century onwards. According to Douglas Hay, Simon Deakin and Frank Wilkinson, Master and Servant laws marked a statutory innovation of the 1562 Statute of Artificers in the wake of nascent industrialisation. In 1747, the Regulation of Servants and Apprentices Act, or Master and Servant Act, strengthened the power of justices to force labourers to fulfil contracts.[22] Subsequently, several consecutive measures established new crimes and exacerbated punishment for servants who quit before the end of the agreed term or refused to enter into employment. Absenteeism, misconduct and neglect of duty were penalised and punished by whipping, imprisonment, abatement of wages or forced labour. As argued by several scholars,

15 Rabin (2014) 206–207; Nicolazzo (2020) 213–216; Collins (2022) 64–75, 132–138.
16 Goveia (1969); Watson (1989) 63–82; Finkelman (ed.) (1997); Rabin (2014) 206.
17 Long (1772) 5–6, 11–13; Rabin (2011) 11; Hall (2014) 27–28; Nicolazzo (2020) 227.
18 Seth (2018) 208–240; Cazzola / Ravano (2020) 237–243.
19 Simpson (1961) 148, 151.
20 Hatcher (1981) 38; Aston (ed.) (2006); Bailey (2021).
21 Steinfeld (1991) 22–24; Hay (2004) 59–66.
22 Wallis (2012) 815.

harsher discipline was thought necessary to regulate the working classes' performance of labour in order to ensure the success of the increasingly mechanised English manufacturing system.[23] The core feature of 14th-century statutes – the criminalisation of employment breaches on the part of the labourers – was therefore not only preserved but even enhanced by 18th-century Master and Servant laws.

This long-term continuity in English labour legislation did not go unnoticed by Edward Long. Quoting a passage from the *Considerations of Criminal Law* by Henry Dagge (1772), Long criticised the »legislative barbarity« which still characterised the legal system »at home« as a result of Master and Servant provisions:

> The regulation, discipline, and punishment […] of vagabonds, of labourers, of apprentices, of soldiers, seamen, [and] the workers in coal and saltmines […] favoured much of the antient coercions under which they had lain, and indeed to the present hour have been little more relaxed […]. The penal laws in England were always sanguinary, and still retain this savage complexion; which has given occasion to an ingenious author to assert, that ›they seem rather calculated to keep *slaves* in awe, than to govern *freemen*‹.[24]

Long's remark – ironically coming from a slave-owner – that metropolitan Master and Servant laws were better suited to governing enslaved rather than free labourers highlights what Alessandro Stanziani has referred to as »the blurred boundaries between freedom and unfreedom« which characterised the status of dependent wage workers in England and Britain from the Middle Ages well into the modern period.[25] In fact, there was an invisible thread that, despite historical transformations, linked medieval villeins to early modern servants to early industrial labourers: the coexistence of formal liberty with personal subordination to their masters. Through 14th-century statutes and 18th-century enactments, the peculiar, customary legal status of manorial serfs was extended to ›free‹ labourers, producing a distinctive mixture of private and public law by equating civil breaches of agreement with criminal offences within a harsh disciplinary regime.[26] This combination of civil violations and criminal consequences in labour legislation aimed to respond to the practical problem of how to hold a poor workforce to their agreements to serve other than through fines that, being propertyless, they could not pay. A solution was found in providing masters with a right over the *persons* of the labourers they employed.[27] This principle was articulated by another Jamaican planter in 1831: the only »security the man who has no property can give« the proprietor against breach of contract was a »claim of man over man«, which de facto reduced the former to a »man in debt« or, in other words, to »a slave«.[28]

Therefore, while inaccurate in terms of legal development, Edward Long's juxtaposition of villeinage, late medieval statutes and Master and Servant laws was far from arbitrary. The condition of villeins as simultaneously free subjects of the Crown and unfree dependents of their lords was perpetuated by the combination of »public« freedom and »private« unfreedom of English and British labourers over the centuries, at the same time as »real slavery« was being established in overseas plantations.[29] As has been argued, the late 18th and early 19th centuries witnessed an increase in criminal sanctions in the administration of labour laws. In the face of growing social tensions due to the ideological radicalisation and industrial unrest of the working classes, British high courts became more frequently involved in matters of employment; consequently, discontented and uncompliant workers were subject to a greater number of prosecutions, summary sentences and corporal punishment. This process was aided by the establishment of new prisons and houses of correction.[30] As will be discussed below, when enslavement was abolished in the British colonies in the 1830s, the legal measures which had for

23 Thompson (1963); Hay (2000) 227–264; Deakin / Wilkinson (2005) 59–64; Tucker / Fudge (2020) 458; Stanziani (2022) 104–108.

24 Long (1774), vol. 2, 495–496; see: Dagge (1772) 240.

25 Stanziani (2018) 318.

26 Craven / Hay (1994); Steinfeld (2001); Landau (ed.) (2002); Deakin / Wilkinson (2005) 37.

27 Cocks (2000).

28 Galt (1831), vol. 1, 312.

29 Eltis (1993); Sarti (2018). On the early modern debate within the English judicial system over the legality of slavery not only in the Empire but also in England, see: Brewer (2021).

30 Wiener (1990); Hay (2004) 101–115.

centuries mandated the terms of wage labour in Britain offered a useful model after which to frame employment relations in the Caribbean.[31] Edward Long speculated about a process of legal mirroring and borrowing between metropole and colonies in 1774, one year before what David Eltis has called the »first Emancipation Act« (the Colliers and Salters Act 1775) »set free the Colliers, Coalbearers, and Salters« who lay »in a state of slavery« in Scotland as they had previously been sold along with the collieries they worked in.[32] The legislative emulation of metropolitan norms would inspire imperial legislators in the years following the second, epochal act of emancipation: the Act for the Abolition of Slavery throughout the British Colonies (with the exception of the territories of the East India Company), also known as the Slavery Abolition Act of 1833.

3. Intermezzo (1823–1838): Manumitted and Apprenticed

Notably, the term »emancipation«, widely used among contemporary observers to refer to the abolition of slavery across the British Empire, does not occur once in the text of the 1833 Abolition Act. Instead, its drafters employed »manumission«, a notion drawn from Roman law and referring precisely to the practice of freeing one's bondsmen.[33] *Manumissio* was a unilateral legal act of the owner, carried out on an individual basis, just like the *emancipatio*, the enfranchisement of sons from their filial subordination to *patria potestas*.[34] However, according to Reinhart Koselleck and Karl Martin Graß, in the wake of the French Revolution, and especially from the 1830s onwards, *Emanzipation* became the watchword of political struggles and movements in Europe. Concurrently, it progressively lost its ancient meaning as an individual, legal act and acquired the new, modern connotation of a social and political process, the upheaval of the people aimed at collectively gaining freedom for themselves rather than having it dispensed from above.[35]

The Slavery Abolition Act was passed by the British Parliament during the years which, according to Koselleck and Graß, saw the transition of »emancipation« from act to process. Nonetheless, the abolition of enslavement in the British Empire unfolded as both. On the one hand, it was an act, a legislative enactment granting freedom from above to a mass of workers significantly defined as newly »manumitted«, as if the general freeing of thousands of people in the wake of slavery abolition could be equated with a large-scale implementation of the practice of releasing an individual from bondage while slavery was still lawful.[36] On the other hand, it was a process, triggered by the increasingly occurring revolts of the enslaved across Caribbean plantations, promoted by the British abolitionist movement for decades, and finally unfolding via a set of social measures, in addition to a proliferation of laws passed before and after the 1833 Act and within and outside the British Parliament.[37] In fact, from a legal perspective, turning over 600 000 enslaved people into free labourers necessitated a process of »restructuring« of Caribbean labour legislation within which the Abolition Act represented only one, albeit the most ground-breaking, enactment.[38]

The »ameliorative« attempts to reform the conditions of the enslaved population (and thereby increase its numbers, counteracting the feared consequence of the imminent abolition of the slave trade, namely, a lack of available workforce) commenced in the second half of the 18th century through acts passed by Caribbean legislatures.[39] However, from 1823 onwards – the same year that Parliament passed a new Master and Servant Act which reinforced the coercive character of labour legislation in Britain[40] – the imperial government took the unprecedented step of interfering in colonial employment laws to lay the legal foundation of, and gradually introduce, abolition. The »amelioration« of West Indian slave laws was directed by the permanent counsel to the Colonial Office and later Undersecretary for the Colonies, Sir James Stephen.[41] In Crown Colonies such as Trinidad and Berbice, the progressive ›mitigation‹

31 Turner (2004).
32 Eltis (1993) 210.
33 3 & 4 Will. IV c. 73 (1833) ss. 1, 12, 24, 47, 55; Mouritsen (2016).
34 Gallo (2004); Cavina (2007) 15–28.
35 Grass / Koselleck (1975); Portaleone (2022).
36 Schafer (2003) xxiii; Fuente / Gross (2020) 39–78; Collins (2022) 125–140.
37 Walvin (ed.) (1982); Matthews (2006); Drescher (2009); Zoellner (2020).
38 Turner (1995); Turner (2004).
39 Ward (1988); Ward (1989); Newton (2008).
40 Tucker / Fudge (2020) 459.
41 Knaplund (1953); Green (1974).

of the harsher features of slavery was introduced by two Orders in Council, of March 1824 and November 1831, respectively, which jointly curbed the personal power of planters by appointing »Protectors of Slaves« tasked with regulating flogging, imposing limitations to working hours and defining the mutual obligations between masters and slaves in contractual terms.[42] Representative colonies such as Jamaica and Barbados received a circular despatch from the Colonial Office, outlining the measures that the planter-dominated local assemblies were expected to implement in order to revise the local labour regimes. In these colonies, however, the metropolitan ameliorative project clashed with the non-compliance of slave-owning elites.[43]

To quell the planters' opposition, not only did the 1833 imperial Act set an amount of 20 million pounds to be distributed to former slave-owners to compensate them for their newly lost property in human beings;[44] while abolishing the status of enslavement, the Act also created an intermediate period of »apprenticeship«, during which former slaves were de facto reduced to servitude. This form of post-emancipation labour was based on the metropolitan system of apprenticeship, which had regulated entry into trade in England since the early 15th century until its abolishment in 1814. Apprenticeships in Britain had lasted for seven years, during which time apprentices were required to live in their masters' households and paid only in kind.[45] In the West Indies, apprenticeship – often criticised by apprenticed labourers and those who sympathised with them as an »ordeal« between slavery and freedom – was presented by the legislative architects of abolition as a period of social and moral probation to prepare the formerly enslaved for wage labour.[46] The system aimed at binding them to their respective plantations and »promot[ing] their industry«: both »praedial« (agricultural) and »non-praedial« (domestic) apprentices above six years old were obliged to work on their former masters' estates for 45 hours per week in return for food, shelter and clothing, while wages could only be earned by performing extra labour.[47] Some limitations of corporal punishment were introduced (including exempting women from flogging), and apprentices were granted the right to seek legal redress.[48] In fact, a body of over one hundred stipendiary adjudicators, the »Special Magistrates«, was created in order to supervise relations between planters and apprentices, stripping the former of their personal power over the latter. The magistrates' responsibilities included regularly visiting the estates, assigning constables to different colonial districts, convening courts to adjudicate complaints between the parties, administering fines and corporal punishments, and filing reports.[49] The end of praedial and non-praedial apprenticeships was initially scheduled for 1840 and 1838, respectively; eventually, the system ended for both categories of workers in 1838.

The Abolition Act contained some general guidelines, but the apprentices' specific conditions of employment were left to colonial assemblies to decide. Therefore, direct metropolitan intervention in the details of colonial legislation, which had characterised the »amelioration« phase, was now avoided; in the words of Mary Turner, the Abolition Act was thus framed as an »employers' charter«.[50] To receive the compensation budgeted for former slave-owners, colonial legislatures had to approve their own local Abolition Acts; this led to the enactment of measures with slightly modified terms designed to favour the interest of planters.[51] Even the Special Magistrate for Barbados and St.Vincent, John Colthurst, observed that most colonial assemblies were treating the imperial Act as »waste paper« by passing local laws that de facto »defeat[ed]« its principles.[52] The Acts of Jamaica, Barbados and St.Vincent, for instance, added a

42 Turner (1999a) 6–18; Turner (1999b); Collins (2022) 140–162.
43 Turner (2004) 306–307, 309–311.
44 Hall et al. (2014).
45 Wilson (1965); Steinfeld (1991) 25–26; Hay (2004) 65; Deakin / Wilkinson (2005) 46; Stanziani (2022) 167–168. On the apprenticeship of liberated Africans before slavery emancipation, see: Ford / Parkinson (2021); Anderson (2022).
46 Sewell (1861).
47 3 & 4 Will. IV c. 73 (1833) ss. 4, 11; Burn (1938); Latimer (1964); Wilmot (1984); Cross / Heuman (eds.) (1988); Shelton (1995); Paton (2021).
48 Paton (2004) 83–87; Fleischman et al. (2005) 2010.
49 Eudell (2002) 70–75; Paton (2004) 59–61.
50 Turner (1999a) 18; Turner (2004) 314.
51 Collins (2022) 166–168, 175.
52 Colthurst (1977) 95.

clause enabling planters to »require and compel the immediate and continued service« of their apprentices in the event of unspecified »emergency«.[53] The vagueness and omissions of the imperial Act were also exploited by local legislatures. For example, the Slavery Abolition Act mandated a 45-hour work week but did not define how this working time was to be spread, apart from prescribing Sundays as days of rest.[54] Consequently, a dispute between apprentices and planters arose in Jamaica: whereas the former requested a nine-hour workday with half-days off on Fridays and Saturdays to farm their provision grounds (upon which they had largely subsisted during slavery, and which could be miles away from their plantations), the latter wanted to mandate eight-hour workdays in order to prevent apprentices from having time for themselves outside of and far from the plantations.[55]

The system of apprenticeship prevented labourers from either buying or occupying vacant land,[56] obstructing their access to an independent livelihood. Their freedom of movement was also restricted, as they could move to another colony only with a passport (which could be issued solely with the permission of their former masters). Marronage, that is, fleeing from plantations and joining a community of runaways, remained a crime.[57] In some colonies, apprentices could even be sold and hired out, just like when they had been enslaved.[58] Though there were some local differences, across the West Indies apprenticeship was accompanied by the passing of vagrancy and pass laws, the creation of armed police forces and new prisons and houses of correction, and the introduction of novel forms of punishment.[59] The latter included the treadmill, which had first been implemented and tested in the penitentiary system of the metropole and combined repetitive labour with automatic flogging (to which women were also subject).[60] The 1833 Abolition Act stressed that:

> Proper regulations should be framed and established for the maintenance of order and good discipline amongst the apprenticed labourers, and for ensuring the punctual discharge of the services due by them to their respective employers, and for the prevention and punishment of indolence, […] for the prevention or punishment of vagrancy, […] for the suppression and punishment of any riot or combined resistance […] and for preventing the escape of any such apprenticed labourers […] from the colonies to which they may respectively belong.[61]

As early as 1833–1834, Jamaica, the Bahamas, St. Kitts, and Antigua (whose legislature, in contrast to other colonial assemblies, proclaimed the abolition of enslavement in 1834 without introducing a transitionary period of apprenticeship)[62] approved vagrancy laws which incorporated the traditionally broad and intentionally vague meaning of »vagabonds and other idle and disorderly persons« found in English legislation.[63] In fact, in 1824 the British Parliament had passed a new Vagrancy Act penalising the poor and homeless (by criminalising begging and rough sleeping) as well as all those deemed immoral or potentially threatening to social order and the public peace.[64] After 1834, in the West Indies, the non-white »vagrant« became the post-emancipation equivalent of the fugitive slave.[65] In addition to pieces of legislation preserved from the times of slavery (such as the law prohibiting apprentices from bearing arms),[66] novel solutions were also implemented. Labour bargaining (which had custom-

53 Colonial Office (1835) 273–282, 301–322; Eudell (2002) 51–52.
54 3 & 4 Will. IV c. 73 (1833) s. 21.
55 Eudell (2002) 89–90; Fleischman / Oldroyd / Tyson (2005) 214; Heuman (2023) 235. In theory, according to the Slavery Abolition Act, the cultivation time for the apprentices to till their provision grounds was to be deducted from the 45-hour work week; see: 3 & 4 Will. IV c. 73 (1833) s. 11; Turner (1982) 44–47; Sheridan (1993) 30; Turner (1999a) 19–20.
56 Engerman (1996); Cazzola (2021b).
57 Turner (1999a) 21; on marronage, see: Handler (1997).
58 Fleischman / Oldroyd / Tyson (2005) 210–216.
59 Paton (2004) 61–66.
60 Burn (1938) 170; Holt (1992) 106–108; Paton (2001); Turner (2004) 315–316; Hay (2004) 106; Paton (2004) 96–120.
61 3 & 4 Will. IV c. 73 (1833) s. 16.
62 Lightfoot (2015).
63 Paton (2015) 122–123; Lightfoot (2015) 99, 187–188; Collins (2022) 177, 189–190; Roberts (2023) 203–209.
64 Roberts (2023) 183–184.
65 Nicolazzo (2020) 1–40, 202–236; Rediker et al. (eds.) (2019).
66 McDonald (1996) 335.

arily existed between masters and slaves) was made illegal by criminalising as »combination« the act of three or more apprentices attempting to negotiate working conditions together.[67] The colonies were following in the metropole's footsteps in this, too, as the Combinations of Workmen Act of 1825 had recently outlawed collective bargaining and prohibited strikes and trade unions in Britain.[68] In the Caribbean, some islands also witnessed the proliferation of new laws outlawing minor issues: in 1836, for example, free non-white women in St.Vincent were banned from retailing syrup and sugar, and from running leisure houses.[69] In a circular letter to the Special Magistrates, the Governor of Jamaica, Lord Sligo, stressed the importance of these regulations in post-emancipation societies: even if these laws restrained formal liberty, they appeared to him to be »intimately connected to the great measure«, namely, the Slavery Abolition Act. In fact, Sligo remarked, »a power of coercion« had been »provided by the Law« – *that* law – as an important tool in the government of freedmen.[70]

To the formerly enslaved, apprenticeship proved a judicial as much as a legislative »ordeal«, as most Special Magistrates sympathised with planters.[71] Consistent with the combination of civil violation and criminal offence that characterised metropolitan labour legislation, Special Magistrate for St.Vincent, John Anderson, equated breaches of contract by apprentices with »breaches of the peace«, deserving harsh punishment.[72] The appalling treatment suffered by apprentices was detailed by James Williams, a Jamaican apprenticed labourer who was introduced to the British anti-apprenticeship activist Joseph Sturge in 1837, in his *Narrative of Events since the First of August 1834*. Sturge supplied Williams with the financial means to purchase his freedom, took him to Britain and promoted the publication of his *Narrative*.[73] According to Williams, »since the new law come in«, apprentices were experiencing »a great deal more punishment […] than they did when they was slaves«.[74] Indolence, neglect of duty, insubordination, petty theft, trespass and the departure from one's assigned plantation were punished with imprisonment or detention in a house of correction, hard labour and public works, the treadmill or whipping (meted out by Special Magistrates only, at least officially), in addition to fines and degrading punishments such as hair shaving.[75] However, it was not only the planters who brought apprentices before Special Magistrates: John Colthurst recorded several complaints raised by apprentices against their employers for physical assault, ill-treatment, illegal whipping and withholding of allowances, in addition to more specific charges such as non-praedial apprentices being forced to work as praedials in plantation labour. Although fines were the most common penalty for masters and mistresses, in extremely severe cases Special Magistrates could order the full manumission of ill-treated apprentices.[76] In 1837, the publication of Williams's account forced the new Jamaican Governor, Lionel Smith, to appoint a Commission of Inquiry to investigate the former apprentice's allegations of the maladministration of justice in Jamaica. The evidence collected among apprentices, magistrates, owners and estate managers eventually confirmed Williams's testimony.[77]

Interestingly, the imperial Abolition Act and colonial enactments were known to apprentices, who appear to have been well aware of their legal rights and duties. As Diana Paton has demonstrated, because the law was interpreted and appealed to by parties on both sides of the class and colour line, apprenticeship became a contested field of legal negotiation between employers, the employed and the magistrates appointed to adjudicate between them.[78] For instance, the apprentices knew that according to the Abolition Act, children under six should not work on plantations; most

67 Turner (1999a) 21–25; Turner (2004) 304–305.
68 Craven / Hay (eds.) (2004) 53; Hay (2004) 101–106; Deakin / Wilkinson (2005) 23–24, 59; Bogg / Ewing / Moretta (2020) 362–388.
69 McDonald (1996) 327–335.
70 Eudell (2002) 73.
71 Paton (2004) 67–77; Collins (2022) 169–172.
72 Anderson (2001) 80–91.
73 Taylor (2018) 85–104.
74 Williams (2001) 5.
75 McDonald (1996) 322–335; Williams (2001) 9; Paton (2004) 7, 53–120; Fleischman et al. (2005) 210–216.
76 Colthurst (1977) 55, 70, 91, 242–243; see also: Boa (2001); Collins (2022) 173–174; Heuman (2023) 239–240. Regardless of their treatment, apprentices could purchase full emancipation by buying the rest of their term; see: Morgan (2012) 470.
77 A Report of Evidence Taken at Brown's Town and St. Ann's Bay in the Parish of St. Ann's, under a Commission from His Excellency Sir Lionel Smith (1837), reprinted in Williams (2001) 45–93.
78 Paton (2004) 69–79.

adhered to the letter of the law, categorically refusing to let their offspring perform agricultural labour.[79] Williams' *Narrative* provides further evidence of the post-emancipation conflict around the meaning of the law: Williams himself, when beaten by his former master, warned him, »you can't lick me down, sir, the law does not allow that, and I will go complain to magistrate if you strike me«; he then informed the magistrate that »the old flogging is not well yet«.[80] Another Jamaican apprentice, forced to perform overnight work, complained that »the law« – of which, she stressed, she was as »well aware« as the Special Magistrate – was »not so«.[81] The report of the evidence taken by the Commissioners of Inquiry appointed by Governor Smith included similar testimony: a non-white driver refused to whip an apprentice because »the law would not give me right if I switched any body«; conversely, an overseer did not let a labourer interrupt her work prior to the end of the prescribed workday as, he maintained, »there is no law for that«. However, even though the legal provisions were regularly appealed to by apprentices looking for protection and redress against arbitrary measures, they more frequently reinforced social and racial hierarchies, especially in islands where the proprietors of land and employers of labour still claimed they had »a law of [their] own«, in disregard and defiance of the imperial Act.[82] Overworked on plantations and discriminated against by a judiciary biased in favour of planters, West Indian apprenticed workers saw a contradiction between the Act which had set them free and the labour laws that allowed for their exploitation and maltreatment on a daily basis. More precisely, as recently shown by Gad Heuman, it was the very same letter of the Abolition Act which, by mandating compulsory labour under the terms of the apprenticeship, appeared so distant from the apprentices' own conception of freedom as to make them doubt that that provision had indeed been passed by the British Parliament: as inquired by a group of dismayed Jamaican apprenticed labourers, »is it the King's law? […] Did not the Jamaica house make it?«.[83] As one apprentice told Special Magistrate Colthurst, »Major, we all of us thank King William for the great law, but there is in the big law too much bad little law.«[84]

4. Part Two (1838–1866): Emancipated and Employed

In 1827, the then member of the Anti-Slavery Society and future lawmaker of British India, Thomas Babington Macaulay, commented with concern on the ongoing debates about the forthcoming abolition of enslavement throughout the Empire. In his opinion, those debates were shaping a »new«, grim »philosophy of labour«, according to which, to induce the service of the West Indian workforce after they had been freed, »the only remedy is coercion«.[85] Macaulay wondered if the »argument for coercing« the formerly enslaved of the Caribbean would perhaps eventually turn against »the spinners of Manchester and the grinders of Sheffield?«.[86] Macaulay was a Whig member of the House of Commons when, a few years later, Parliament passed not only the Slavery Abolition Act but also the 1833 Factory Act, which prohibited child labour for those younger than nine years and improved the working conditions of children over that age.[87] However, as Thomas Holt has observed, this was the same Parliament that also enacted the 1834 Poor Law Amendment Act, or New Poor Law, which abolished »outdoor« relief for the »able-bodied« poor and established workhouses for the exploitation of paupers according to the notion of »less eligibility«; aimed at deterring the poor from claiming relief, this principle mandated that conditions within workhouses be worse than those available outside.[88] This was a crucial step in the production – and discipline – of the dependent workforce necessary to industrialise Britain.[89] Crucially, this system of coercion and criminalisation imposed on the metropolitan working classes would serve as the model for legislating for the soon-to-be fully emancipated labourers of the West Indies.

From 1834 to 1838, in anticipation of the forthcoming abolition of apprenticeship, metropolitan authorities kept up pressure on West Indian legis-

79 Vasconcellos (2006); Morgan (2012) 463.
80 Williams (2001) 13, 18.
81 Paton (2004) 78.
82 Williams (2001) 59–64.
83 Heuman (2023) 233.
84 Colthurst (1977) 200; see also: Heuman (2023) 233.
85 Macaulay (1913a) 15; Hall (2012) 201–205.
86 Macaulay (1913b) 6–7.
87 Swartz (2019) 40.
88 Holt (1992) 21, 37; Englander (1998); King et al. (2022).
89 Stanziani (2022) 108–113.

latures to complete the revision of their labour laws and amend existing »imperfections«, namely, those norms preserved unchanged from, or still too evocative of, the times of slavery.[90] Due to the reluctance of Caribbean assemblies to do so, and in the wake of the publication of critical accounts of the abuses of apprenticeship (such as the abolitionists Joseph Sturge and Thomas Harvey's *The West Indies in 1837*) as well as the consequently increased zeal of the British campaign for full emancipation,[91] in April 1838 Parliament passed the Act to Amend the Act for the Abolition of Slavery, which mitigated the terms of apprenticeship. This Act, coupled with the fear of a general rebellion on Caribbean plantations, prompted colonial assemblies to approve abrogative enactments to end the apprenticeship of both praedial and non-praedial workers on 1 August 1838.[92] These measures had an immediate effect in some colonies, such as Jamaica, where most formerly apprenticed labourers refused to go back to work for a month.[93] There, at least, the pessimistic prediction of Special Magistrate John Anderson – namely, that once fully emancipated, the Caribbean workforce would pursue »freedom without industry« – appeared to materialise.[94]

However, Anderson had also envisaged a possible solution: »I fear compulsory labour must always be resorted to among the majority of negroes, if we wd. restrain them from vagabondism.«[95] By criminalising self-sufficient production (which in some of the West Indies was fostered by the availability and fertility of unoccupied soil) as vagrancy, the law could reintroduce the compulsion to dependent labour – theoretically abolished by full emancipation – in a new guise, and help turn the formerly enslaved into a class of perpetual servants even after the end of apprenticeship.[96] In July 1838, Special Magistrate John Colthurst took great pains to explain to apprentices that, from the beginning of August, they would become »free agent[s], only restrained by the law«; in fact, he clarified, as »the restraints of the law of apprenticeship are about to be withdrawn«, there was an »urgent necessity of introducing other and more legitimate restraints«.[97] The abolition of apprenticeship did not require a more indulgent set of labour laws but a more rigorous one. This had also been implicitly suggested by the then Secretary of State for the Colonies, the abolitionist Lord Glenelg, in a despatch sent to West Indian Governors late the previous year:

> The laws which determine […] the mutual rights and duties of employers and servants, […] those which relate to vagrancy, to the maintenance of the poor, [and] to police […] will survive the apprenticeship, but may be found very ill adapted to a state of things in which compulsory labour will be no longer practised. I do not intend to state that this code will in all cases be found to press with undue severity on the emancipated population. In some cases *the objections may be of a different nature*.[98]

In Glenelg's view, »duly severe« Master and Servant regulations, combined with and reinforced by laws against vagrancy and squatting, were required to produce the wage nexus. The Governor of Jamaica, Lionel Smith, echoed Lord Glenelg when he remarked that, »if specific laws have been found desirable for the working classes in all free countries«, those laws had to be even stricter in the West Indies, »where the proprietor is smarting under the loss of absolute control over his slaves«.[99] What Douglas Hay and Paul Craven have called the »medieval genesis« of English labour legislation persisted: in the 19th-century West Indies, as much as in plague-afflicted 14th-century England, labour legislation was »predicated on labour shortage«.[100]

In the summer of 1838, colonial legislatures hurriedly undertook a revision of their labour legislation, and the Colonial Office was overwhelmed by colonial legislative drafts. To thwart these inefficient and hasty amendments, Colonial Secretary Glenelg and Undersecretary Stephen

90 Eudell (2002) 52.
91 Sturge / Harvey (1838).
92 Hall (1953) 24; Gross (1981); Collins (2022) 183–184.
93 Morgan (2012) 470.
94 Anderson (2001) 212.
95 Anderson (2001) 147.
96 Ince (2018) 136–137; Cazzola (2021b).
97 Colthurst (1977) 58–64, 176, 204–206.
98 Glenelg (1837) 4–5. Emphasis added. The »code« referred to was the new set of Master and Servant laws.
99 Smith (1838a) 394.
100 Craven / Hay (eds.) (2004) 33.

drafted a set of ordinances collected under the title of *New Laws Proposed to Meet the New Relations of Society*, which were sent to Crown Colonies as Orders in Council for immediate enactment, and to representative colonies as legislative models.[101] These provisions *inter alia* regulated employment (and, similar to metropolitan regulations, detailed penalties for breach of contract); vagrancy (applicable to the »able-bodied« labourers who did not work but also to practitioners of obeah, which drew elements from African religions and was considered tantamount to sorcery); marriage (which had to take place in a public, Christian service and required meticulous registration); squatting and unauthorised occupation of lands (punishable by imprisonment and hard labour); and the sale of Crown lands (whose price should not drop below a certain amount).[102] By drawing parallels between West Indian provisions and the measures enacted in Britain and other parts of its Empire, the drafters of these orders demonstrated that the same set of social problems, as well as similar legal solutions, interconnected the different parts of the imperial structure. In the collection of *New Laws*, the measures regulating the alienation of West Indian Crown lands were compared to the instructions sent to New South Wales, Van Diemen's Land and Swan River in Australia; the Police Act had been, in Glenelg's words, drafted »with the assistance of the commissioners of metropolitan police«; and, quoting from Poor Law Commissioner John Shaw Lefevre, it was the Irish Poor Law Act (1838) which had served as »the model of the measures to be adopted in the West India colonies«.[103]

Metropolitan and colonial administrators seem to have been eager to stress that the employment laws which from that moment on would govern the service of West Indian labourers were not specific to them but also regulated working conditions in Britain. Lord Glenelg observed that »even in this country the Legislature has found it necessary to interpose between parties standing in th[e] relation […] of master and servant«; no wonder, therefore, that similar laws »form a part of every new code transmitted from the West Indies«, that is, the sets of measures drafted by Caribbean legislatures and sent to London in the summer of 1838.[104] Likewise, commenting on a new vagrancy law to be enacted in Barbados, Undersecretary Stephen clarified that »the definitions of the offences are taken with scarcely any variation from the British statutes, and the powers vested in the Justices of the Peace in England are transferred to the corresponding functionaries in the colony.«[105] It was also deemed important by colonial authorities to make the emancipated cognisant of this affinity between metropolitan and colonial legislation. In a March 1838 proclamation, Governor Smith warned Jamaican apprentices that »in freedom you will have to depend on your own exertions for your livelihood […]. Idle people who will not take employment, but go wandering about the island, will be taken up as vagrants, and punished in the same manner as they are in England.«[106] In his view, former apprentices needed to be told that the harsh measures which regulated their performance of labour were not an aberration to the free labour market but were consistent with the juridical ›liberty‹ of wage workers across the Empire. In July 1838, on the eve of the abolition of apprenticeship, the Governor of St. Vincent, George Tyler – after presenting the »law which gives you freedom« (the 1833 Abolition Act) and the »law for regulating and determining disputes between masters and servants« as intimately related – warned the emancipated that apprenticeship would soon be replaced by a set of »laws which will apply to all, whatever may be their station or colour«:

> When you hire yourselves you cannot leave your place until the time you agreed to serve is completed […] and] should any servant employed depart without leave, […] the master will apply to a magistrate who is authorized by law to adjudge imprisonment with hard labour for such willful breach of contract […]. The lazy and dissolute […] will surely come within the operation of the next law, which is ›an act for the punishment of idle and disorderly persons, rogues, and vagabonds‹ which declares that every person being able to maintain himself or his family by work or labour, and neglecting or

101 Green (1974) 37–39; Phillips (1995) 1368.
102 Glenelg (1838) 348–351, 355–356, 366, 371; Boaz (2017).
103 Glenelg (1838) 372, 386.
104 Glenelg (1838) 343.
105 Stephen (1838) 109; Banton (2004) 291.
106 Smith (1838b) 315.

> refusing to do so; every person found wandering about the high roads […]; every person who shall be found […] cultivating or using or trespassing upon the land of any plantation or estate, or any Crown lands, […] shall be deemed an idle and disorderly person and shall be punished as such by imprisonment and hard labour […]. By the other act – ›for the appointment of police magistrates and a constabulary force‹ – you will learn that gentlemen of respectability are appointed, […] whose duty it will be to see and take care that justice is done by the master to the servant as well as by the servant to the master […]. There is a law which prohibits any person quitting this colony who has anyone here dependent upon him or her for support […]. Remember, the strong arm of the law will punish all that misbehave, while it protects and encourages all those who are industrious and of good conduct.[107]

The four provisions referred to by Tyler were a Master and Servant law, an act to punish vagrancy, a police act and an emigration act. All measures except for the last were disallowed by the Colonial Office because, according to Glenelg, they »would tend to reproduce, in a new form, many of those evils which it was the design of Parliament to bring to a close by the abolition of slavery«.[108] The Jamaican assembly also clashed with metropolitan authorities in another matter of law: in 1838, after the publication of Captain John Pringle's alarming *Report on Prisons in the West Indies*,[109] Parliament applied the Act for the Better Government of Prisons to the colony. The stubborn resistance of the Jamaican assembly to the urgently required reform of the island's prison system (regulated by the Gaols Act of 1834) almost pushed the British government to suspend the colony's Charter for five years.[110]

However, the appointment in 1839 of John Russell, who was more sympathetic towards Caribbean planter elites, as Colonial Secretary eventually provided West Indian assemblies with greater autonomy in the revision of their labour laws.[111] Throughout the 1840s, Jamaica passed, among others, an Act for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, an Act to Organize a General Police and Constabulary Force, an Act to Provide Penitentiaries in This Island, an Act to Authorize the Several Courts of This Island to Inflict Corporal Punishment, and an Act for the More Effective Prevention of Trespasses upon Property.[112] The assembly of Barbados followed in Jamaica's footsteps by approving, over a span of a few years, an Act to Regulate the Hiring of Servants, an Act for the Suppression and Punishment of Vagrancy, an Act for the Government and Better Ordering of the Poor of This Island and the Prevention of Bastardy, a Consolidated Police Act and an Act to Regulate the Emigration of Labourers.[113] Concurrently, vagrancy regulations, pass laws and police, militia and prison acts were enacted across the other West Indies. In addition, apprenticeship was reintroduced in a new form, as indentured labourers from India and China (the so-called »coolies«) started being ›imported‹ in order to depress the wages of the formerly enslaved by producing competition between »indigenous« and »foreign« workers.[114] Moreover, in years when an increasing number of Caribbean labourers were becoming independent cultivators, various *ad hoc* measures were devised to bolster social control over them. Not only did several islands raise the price of Crown lands to impede their purchase, they also increased taxation on necessities in order to reinforce labourers' dependence on cash wages.[115] The Jamaican assembly introduced several customs duties and indirect taxes on goods mainly consumed by the labouring classes. In 1844, a Capitation Tax for road maintenance, also in Jamaica, was criticised by the then Secretary of State for the Colonies, Lord Stanley, as an instrument to coerce wage labour by »producing artificial poverty« among labourers.[116] Meanwhile, in Britain, that same year 1844 witnessed the intro-

107 Tyler (1838) 285–288.
108 Colthurst (1977) 220.
109 Pringle (1838).
110 Holt (1992) 107–108; Paton (2004) 115–120.
111 Green (1974) 41.
112 House of Assembly of Jamaica (1846) i–iv; House of Assembly of Jamaica (1848) i–iii; House of Assembly of Jamaica (1851) iii–viii; Holt (1992) 138, 185; Eudell (2002) 142; Roberts (2023) 207.
113 Phillips (1995) 1370; Newton (2008) 123.
114 Engerman (1996) 312; Kale (1998); Mohapatra (2004); Bischof (2016); Connolly (2018); Sacchi Landriani (2020); Roberts (2023) 207–208.
115 Turner (2004) 325.
116 Quoted in Elgin (1843) 107–109; see also: Holt (1992) 205, 252–257.

duction into the House of Commons of a Bill for Enlarging the Powers of Justices in Determining Complaints between Masters, Servants and Artificers. Outraged working-class leaders compared the draft law to the criminal provisions of »the days of baron and serf« and to the slave codes applied to »negroes in America«. The Bill was withdrawn following vociferous campaigning by Chartists and trade unionists that had included petitions and mass meetings.[117] The ruling and proprietary elites on both sides of the Atlantic felt the economic and social need to keep the working classes poor and disciplined, and framed laws offering convenient formulas and sanctions for this purpose.

In the Caribbean, another strategy adopted for fabricating the »artificial poverty« of workers was the rent / wage system: the homes and provision grounds (to which enslaved people had had free access) were now subject to a rental obligation.[118] This peculiar overlapping of labour and rental agreements (whereby planters were simultaneously employers and landlords, and labourers wage-earners and tenants) made any worker's »breach« of contract a double crime: as a committee of Jamaican estate managers put it in 1839, »squatting on the properties« and »sitting down under a passive refusal to do any sort of work« amounted to offences against both »the right of ownership« and »the just requirements of industry«.[119] In Jamaica, house rents were usually charged *per capita*; they tended to be lower for tenants who worked on the neighbouring plantation than for non-employees, and could even amount to almost half of the ordinary rate of pay.[120] Moreover, as rents were deducted from the weekly salary, it was even easier to curtail wages arbitrarily to punish alleged neglect of duty and insubordination.[121] A copy of an 1838 Jamaican regulation on the »rate of wages« shows the rental and labour restrictions applied to former apprentices: everyone, including children over six, was expected to work on the estates where they lived, in exchange for a wage but receiving neither a food allowance nor medical care; labourers »must, as in England, bear the loss of every day [they are] unable to work« and, if they disagreed with their employers, they had to leave the property, »not to return«. A handwritten side »reservation« commented that the »freeman« thereby appeared to be not only in a »worse condition than an apprentice, but even than when he was a slave«.[122] As stipendiary magistrate Richard Chamberlaine reported, »notices to quit« became an oft-used coercive instrument in the hands of planters to punish refusal to work and demands for higher wages after the end of apprenticeship. Chamberlaine condemned this »suicidal« policy, which in his opinion would sooner or later push former apprentices to desert the plantations and become »independent cultivators«.[123] Chamberlaine was farsighted: as shown by Douglas Hall, disputes over rent led several labourers to abandon their former houses and grounds and resort to peasant farming. This was their »protest against the inequities of freedom«.[124]

The precise form taken by the rent / wage system differed from colony to colony. In Barbados, so-called »conditional tenancy« was established: labourers could occupy accommodation on their employers' estates, provided they worked on plantations five days per week; the penalty for non-compliance was ejection.[125] This was a colonial version of the »tied cottage« in Britain, where occupancy came with the requirement of service to the owner of the property.[126] Colonial Office functionary James Spedding described the Barbadian system in the following terms:

> The great mass of the labourers are tenants at will of their former masters and have no homes but such as belong to them. The manager calls on them to enter into a contract involving heavy duties and small pay and lasting for a long time […]. In case of any kind of failure to fulfil the entire conditions of it, which need not be expressed in writing, […] they are liable […] to be summarily ejected from the estate. Being ejected, they may be brought before the nearest justice as vagrants wandering abroad […] and sentenced to hard labour.[127]

117 Frank (2010) 27, 78.
118 Bolland (1981) 595–596; Roberts (2023) 206.
119 Committee of Jamaican Managers (1839) 91–92.
120 Bolland (1981) 596.
121 Holt (1992) 134–139; Wilmot (1996).
122 Jamaica (1838) 30.
123 Chamberlaine (1839) 60, 66; see also: Gordon (1839) 3–4.
124 Hall (1996) 62; Heuman (2023).
125 Gibbs (1987) 26–33; Turner (2004) 320; Collins (2022) 184–186.
126 Mills (1980) 104–164.
127 Quoted in Taylor (1885), vol. 1, 245.

Spedding's account illustrates the vicious circle of pauperisation, criminalisation and coercion in which the West Indian emancipated were trapped. They were »captives« in a system in which the formal device of free labour, the contract, was imposed on them by their employers and, according to a law passed in Antigua in 1834 and later replicated in other islands, could be made orally or even merely »implied«.[128] In non-plantation colonies such as Belize and the Bahamas, the white elites found other systems to maintain their disciplinary powers over the emancipated. Labour contracts for mahogany workers in the Belizean forests featured wage advances to bind labourers to their employers and stipulated imprisonment in the event of breach.[129] This system was frequently combined with the so-called »truck«, which was also enforced in the Bahamas and had only recently been outlawed in Britain with the Truck Act of 1831. »Truck« denoted a system in which wages were paid not in cash but in the form of credit or tokens that labourers had to use to purchase their supplies from their employers' stores. This practice frequently resulted in a form of debt bondage, as workers were subject to extortionate prices and then bound to pay their employers back through extra labour.[130]

The social conditions of Caribbean labourers were further worsened by the unequal administration of justice.[131] In the late 1830s, Undersecretary Stephen recommended maintaining the system of Special Magistrates established during apprenticeship to check on locally appointed Justices of the Peace and guarantee greater impartiality, but his proposal was rejected.[132] The copies of cases tried at petty sessions in Port Royal, Jamaica, at the beginning of 1839 reported several complaints by labourers against planters and estate managers for double rents levied as a punishment for having worked fewer than five days per week. In the same year in Spanish Town, over one hundred and thirty labourers were convicted for »disorderly conduct«, breach of contract and petty theft in only two months; while several of them were sent to the house of correction to receive hard labour, the maximum penalty their employers faced for mistreatment of workers were fines.[133] A Jamaican stipendiary magistrate denounced these injustices in a letter to the Governor: as most courts at petty sessions were staffed by planters, labourers usually found it difficult even to obtain a hearing; in this manner, he remarked, »the benefit of freedom to the negro will be utterly destroyed«.[134]

5. Conclusion: Constitutional Divergence (1866–1875)

In the early 1840s, however, the »benefit of freedom« was also still fairly unknown to the white working class in Britain, where thousands of labourers continued to be prosecuted under the terms of the Master and Servant provisions every year.[135] In 1865, a new Prison Act was enacted to standardise the British penitentiary system by systematising punishment; the Act, however, still provided for hard labour on the treadmill.[136] In 1867, a revised Master and Servant Act was passed, which, despite partially limiting the criminalisation of the workers' behaviour, nonetheless gave magistrates the power to summarily impose imprisonment for »aggravated« misconduct.[137] The journalist and historian Frederic Harrison's bitter comment was that »the power of enforcing a contract by prison is a miserable remnant of class oppression«.[138] However, an improvement in the conditions of metropolitan workers was on the horizon. In 1871, Parliament legalised trade unions with the Trade Union Act, and in 1875 the Conspiracy and Protection of Property Act lifted the strictest constraints on strike action.[139] Eventually, in that same year, the Employers and Workmen Act abrogated the equalisation of employment breaches by labourers with criminal offences. This marked the end of labour legislation as it had existed in England since the mid-14th century.[140]

As Robert Steinfeld has noted, it was no coincidence that the British Parliament passed the Trade Union Act, the Conspiracy and Protection of Property Act and the Employers and Workmen

128 Bolland (1981) 595, 606–611; Scanlan (2019) 505.
129 Bolland (1981) 601–604.
130 Aspin (1969) 77–78; Johnson (1986).
131 Paton (2004) 156–182.
132 McLaren (2011) 246.
133 Petty sessions (1839a) 326–328; Petty sessions (1839b) 415.
134 Stipendiary Magistrate (1839) 329.
135 Steinfeld (2006) 271; Naidu / Yutchman (2013).
136 28 & 29 Vict. c. 126 (1865) s. 19.
137 Deakin / Wilkinson (2005) 64.
138 Woods (1982) 95.
139 Curthoys (2004) 117–141, 189–207.
140 Hay (2004) 116; Stanziani (2014) 126–127.

Act after the Representation of the People Act 1867 (or Second Reform Act, which extended the suffrage to a portion of the urban male working class) followed by the introduction of the secret ballot in 1872.[141] Whereas those who were on the »servant« side of labour legislation had been traditionally denied the franchise (which had been conceived not as a right but as a privilege indissolubly attached to the possession of property and a resulting condition of social independence),[142] as soon as the representatives of the working classes entered the House of Commons in the wake of the 1868 general election, the reform of employment relations became an item on Parliament's agenda.[143] In the British case, electoral reform was thus a necessary precondition for the repeal of the criminalisation of employment breaches.

In the West Indies, by contrast, the restrictions imposed on the political participation of the non-white working population, followed by the constitutional transformation of the political regimes of most representative colonies, whose elected assemblies were abrogated, prevented the substantial improvement of Caribbean labour laws. In a social context where issues of race and class were tightly intertwined, and yet narratives of racial difference were often instrumentalised by proprietors to distract from class inequality, the electoral requirements for white voters in Caribbean islands with representative institutions had traditionally been few in order to allow whites of all classes to vote. When some of the formerly enslaved began to purchase small landholdings after the end of apprenticeship in 1838, these simple requirements meant that they, too, would be potentially able to access the franchise and, over time, win seats in the local legislatures.[144] This raised the fear that the political systems of several of the West Indies could potentially come to be dominated by a majority of »servants« – something still anathema even in Britain. To prevent the establishment of what Edward Gibbon Wakefield, the theorist of systematic colonisation, envisaged with horror as a »Black democracy«,[145] property qualifications were raised to prevent the emancipated from becoming electors.[146] In Barbados, for example, the so-called »Brown Privilege Bill« (or Act to Remove Certain Restraints and Disabilities Imposed by Law on His Majesty's Free Coloured and Free Black Subjects in This Island) opened political participation to free non-white people in 1831, while simultaneously setting as an electoral requirement their possession of a house worth at least £30 (whereas for whites, the stipulated worth was £10).[147] In Jamaica, where electoral privileges depended on the possession of real property worth only £6, measures were proposed throughout the 1830s and 1840s to raise property, taxpaying and literacy qualifications for the franchise.[148] The two electoral reforms of 1852 (which limited the number of small freeholders registered on voting lists to taxpayers) and 1859 (which imposed a 10-shilling stamp duty on voting) were effective in restricting the numbers of non-white voters.[149] However, the crucial step in this process came in 1866, when, after the Morant Bay Rebellion (itself preceded by the passing of the so-called »Whipping Act«, which reintroduced flogging as a punishment for repeated convictions for larceny), the Jamaican assembly abolished itself with the Act to Alter and Amend the Political Constitution of This Island,[150] turning it into a Crown Colony. The final, permanent method for preventing the traditionally planter-dominated colonial assembly from becoming increasingly populated by non-white members was to have no representative legislature at all.[151] The same constitutional transformation was introduced in the other West Indies in the late 1860s and through the 1870s; only Barbados and the Bahamas retained their old systems.[152]

Meanwhile, the extension of the franchise in Britain was racialised by being presented as a white

141 Hall (2000) 179–233; Steinfeld (2006) 277–283.
142 Macpherson (1962) 107–117, 279–292.
143 Craven / Hay (eds.) (2004) 58.
144 Heuman (1981) 119–131.
145 Wakefield (1849) 190.
146 Wilmot (1982); Holt (1992) 215–342.
147 Phillips (1995) 1357; Newton (2008) 116.
148 Holt (1992) 101, 216–217.
149 Heuman (1981) 130; Holt (1992) 254–258; Phillips (1995) 1358.
150 Gocking (1960); Holt (1992) 303–304; Holt (2000) 36; Paton (2004) 139–140; Paton (2018).
151 On Crown Colony government, see: Murray (1965).
152 Gocking (1960) 128; Lewis (1967); Carvalho / Dippel (2020); Aranha (2022) 15–30; Owolabi (2023) 296.

achievement: in 1866–1867, while some conservatives were hopeful that the »introduction of [… a] recently emancipated antagonistic population into a constituency of old representatives« in the West Indies would sound unconceivable even to »the most sanguine democrat who would be ready to compose the constituency of the House of Commons chiefly of working men«, one of these »sanguine democrats«, the anti-slavery politician John Bright, supported electoral reform on the ground that Britons should not live like »the coolies imported into the West Indies«.[153] The social privilege inscribed in whiteness was presented to the British working classes as a form of compensation for their coercion to wage labour: they were destitute but, thanks to their skin colour, they were entitled to political privileges which were still out of reach for the even more impoverished, non-white labourers of the Caribbean. While racial difference was exploited in Britain to construct a fictitious national unity in years of alarming social tensions, it was also used in the West Indies to refashion the old hierarchies of slave society into the new labour relations between propertied white masters and poor Black servants.[154]

6. Coda: Between Status and Contract

While the broadening of the franchise in Britain, on the one hand, and racist ideas and discourses, on the other, led labour legislation in the metropole and the West Indies to diverge from the 1860s onwards, at the time of slavery emancipation in the mid-1830s the legal provisions regulating the working life and political participation of the labouring classes on both sides of the Atlantic had much in common. From 1834–1838, West Indian labourers were progressively released from their juridical enslavement while simultaneously coerced into service via a varied set of social and legal constraints little different from those imposed on the poorest members of British society. This article has investigated these measures by reassessing the findings of existing scholarship on slavery abolition and post-emancipation labour legislation from a longer-term and transnational perspective, considering the British metropole and its Caribbean colonies as part of a single analytic field. Combining the approach of legal history with the interests of social history – as well as, in the previous section, insights from political and constitutional history – it has privileged continuities over the change from enslavement to freedom. As a result, I have demonstrated that, in the British West Indies, the law was the formal device in the hands of employers – who were also landowners and constituted the majority of electors and members of legislative assemblies – to retain social control over the freedmen even after the latter's transition from chattelisation to British subjecthood. These legal measures, however, were, on the one hand, inspired by metropolitan labour legislation but were also, on the other, reminiscent of slavery, fostering an insidious ambiguity between the status of the enslaved and the contractual condition of free labourers. This ambiguity was criticised by the lawyer, judge and former member of the Imperial Legislative Council of British India, James Fitzjames Stephen, the son of the Colonial Undersecretary. In 1879, while commenting on a draft Master and Servant law to be applied to India, Stephen drew on the distinction between »status« and »contract« theorised by Henry Sumner Maine[155] to argue that the bill for India exhibited »an anachronism dating from the days of slavery«, because it assumed employment relations as »related to status«, similar to the ascribed condition of »master and slave«; however, »inasmuch as the rights and duties of masters and servants depend, in the present day, upon contract, […] the measure ought now to be treated as a branch of the general law of contract«, whereas the bill was, in fact, »a supplement to the Penal Code«.[156]

Here, Stephen highlighted the traditional ambiguity of English labour laws since the mid-14th century: their definition of employment relations as midway between a transaction regulated by

153 Hall (2000) 222, 227.
154 Cazzola (2021a) 147–151.
155 Maine (1861) 170.
156 Stephen (1879) 167. On Maine's views on Master and Servant measures applied to India, see: Stanziani (2022) 264.

private law and a status determined by public law. As Simon Deakin and Frank Wilkinson have observed, industrialisation in Britain was not accompanied by the full contractualisation of labour relations – quite the contrary: the new »contractual theory of employment« and the »old notion of service« coexisted for some time, producing a »conjunction of status and contract« that lasted as long as workplace violations by employees were criminalised.[157] In the late 1870s, the transition from status to contract had only recently begun in Britain, but the West Indies continued to ignore the contractual liberty promised by a free labour market. Upon the abolition of enslavement, the ›new‹ post-emancipation Caribbean societies had come to share the paradoxical features of ›old‹ British society: the hierarchical differentiation of free and equal individuals into masters and servants, and the imposition of the wage nexus by coercive means.[158]

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Christiane Birr

Tradition and Innovation in Knowledge Production: Gregorio López' Commentary on the *Siete Partidas* (1555)

Gregorio López' name is inextricably linked to his edition and commentary on the *Siete Partidas*,[1] and both his contemporaries and later jurists praised him for having added »the eternal explanation«[2] to this centrepiece of medieval Castilian legislation. The technique of commenting authoritative texts was the basis of the scholastic method, as practiced at the Spanish and Portuguese universities in the 16th century. It would be a profound misunderstanding to consider it as nothing more than an exercise in historical analysis. Rather, writing glosses or commenting was a method of making authoritative texts applicable to contemporary problems, circumstances and questions. In the Spanish context, this can be observed whenever problems posed by the developments in the Americas needed to be resolved. As missionaries and political administrators were confronted with new questions created by the American realities, juridical and moral solutions had to be found for which no blueprint existed in the medieval tradition. Commenting and interpreting authoritative texts authored by medieval thinkers was used as an intellectual tool to resolve contemporary problems. A closer reading of López' commentary on the *Siete Partidas* confirms this approach, especially with regard to the presence of the Americas as a topic in the glosses. López himself was actively involved in the American politics of the Castilian crown, initially as an authorised representative of the Council of the Indies and later as a council member. The following analysis traces his work both as an editor and as a commentator of the *Partidas* to examine several examples of how López incorporated new questions into the framework of a medieval authoritative text.[3]

1 Becoming the »Spanish Accursius«: Gregorio López' Education and Career

Gregorio López was born 1490[4] in the village of Puebla de Guadelupe (Cáceres) as the son of a goldsmith.[5] He received his first schooling at the Colegio de Gramática de Guadalupe (1496–1505), which was attached to the Monastery of Guadalupe.[6] Since the school took on no more than thirty pupils, getting one of the spots was quite difficult and required having the right connections.[7] In this case, Gregorio's uncle, Juan de Siruela, was not only a monk there but also embarked on what a later biographer called a brilliant career in Guadelupe with excellent connections to the Castile court.[8]

1 López (1555), 3 vols.
2 Rumeu de Armas (1993/94) 437.
3 This paper is based on a conference presentation given at the 19th Symposium of the German Medievists' Society (19. Symposium des Mediävistenverbandes e.V.) under the general topic of »Norms and Ideals« in Würzburg, 7 March 2023. I would like to thank in particular Isabelle Mandrella, Manuela Bragagnolo and Harald Siems for the discussion of the ideas presented in this paper.
4 His birth year is often given as 1496. For a discussion of how it was determined, see Rumeu de Armas (1993/94) 356 fn. 36, whose dates I follow in this sketch.
5 Rumeu de Armas (1993/94) gives a detailed biographical sketch of López. For older biographical literature, see Martínez Cardos (1960).
6 Rumeu de Armas (1993/94) 361 claims that the Colegio was a famous school at the time operated by the monks. The curriculum comprised mainly grammar, history, logic, metaphysics and, to a lesser extent, mathematics. All subjects were taught in Latin, as one of the aims was to enable the students to read and write in Latin fluently.
7 Martínez Cardos (1960) 70.
8 Fray Juan de Siruela, a brother of Gregorio López' mother: Rumeu de Armas (1993/94) 353; Pérez Martín (2016) 486 sq.; López Nevot (2020) no. 35. Rumeu de Armas (1993/94) 354 offers a short biographical overview of Juan de Siruela's life (ca. 1458–1530) and his »*brillantísima*« career at the Monastery of Guadelupe. Siruela also had a close relation to the Court of the Catholic Kings: In the summer of 1492, after the war of Granada, Ferdinand and Isabela decided to leave their children to be educated at the monastery, choosing Juan de Siruela as their companion and tutor.

Gregorio and the other schoolboys[9] lived at the monastery. They had classes there, assisted in the celebrations of mass, and helped the monks in the administration of the sacraments.[10] In such a close-knit community, Gregorio would have certainly heard stories about the momentous meetings that had taken place there in the 1480s between Christopher Columbus and the Catholic Kings. During their stay at the monastery in April 1492, Isabela and Fernando composed and signed the order to furnish Columbus with the caravels for his proposed journey to the West.[11] After his first voyage, Columbus returned to Guadelupe to fulfil his promise of giving thanks for his safe journey in the monastery's church. And three years later, in 1496, the indigenous persons Columbus had brought to Spain were baptised there.[12] It is very probable that a six-year-old Gregorio took in the spectacle, and the tales of those exotic persons would certainly have echoed through the halls of the monastery's Colegio for many years thereafter. Like Bartolomé de Las Casas, Gregorio López belonged to the generation who learned about the existence of the Indies and their peoples when they were children and continued to harbour this fascination into their adult and professional lives.

At the age of 16, Gregorio left Guadelupe to inscribe himself at the renowned University of Salamanca's law faculty (1506). There is no information about his time at the university other than that he received his first degree in law six years later and finished his university studies with the licentiate (1515).[13]

López' links to the monastery, where his uncle had in the meantime become prior, remained strong. The freshly minted *licentiatus iuris* returned to Guadalupe where he set himself up as *advocatus*, his most important client being the monastery itself.[14] From 1535 onward, he was *oidor* at the *Audiencia y Chancillería de Valladolid*.[15] Both affiliations put him into contact with the Castile court,[16] and so in 1541, he was chosen as one of the members of the famous *Junta de Valladolid*, in front of which Bartolomé de Las Casas presented his *Memorial* against the *encomienda* practice. As a member of the *Junta*, López was one of the authors of the *Leyes Nuevas* of 1542. He was subsequently made a member of the Council of the Indies, not only overseeing the reshaping of the *Casa de Contratación's* rules and regulations for the transport system between Sevilla and the Americas, but also the establishment of the *Real Audiencia* in Lima, the supreme court in the viceroyalty of Peru. After the promulgation of the *Leyes Nuevas*, the Crown ordered López to draw up a list of all indigenous Americans brought as slaves from the Spanish-American territories to Seville. If López found them to have been free persons before being brought to Spain against their will, they were to be set free; Indians who had been brought to Spain without a royal license were to be sent back to America.[17] López complied[18] by devising a regime that turned the American slaves into *criados*. This new status meant that while they were now free persons – no longer to be bought or sold – their labour was still bound to their former owners.[19]

9 Martínez Cardos (1960) 70 names some of the more famous pupils who attended the Guadelupe school in the late 15th and 16th centuries: Pedro de la Vega († 1541), general of the Hieronymites; the Dominican García de Loaysa (1478–1546), archbishop of Seville, president of the Council of the Indies and Grand Inquisitor; and Pablo de Laguna († 1606), president of the Council of the Indies.

10 Martínez Cardos (1960) 70.

11 The text of the Royal Provision requiring two of the caravels from the *vecinos de Palos* can be found transcribed online: https://web.archive.org/web/20091027022740/http://es.geocities.com/julioil/pragmat.html

12 Rumeu de Armas (1993/94) 362.

13 Pérez Martín (2016) 487; López Nevot (2020) no. 35.

14 Pérez Martín (2016) 487; López Nevot (2020) no. 35; Martínez Cardos (1960) 73 sqq.

15 López Nevot (2020) no. 35; Martínez Cardos (1960) 77. López himself refers to this position in his glosses for SP 2.1.12, 2.1.13 and 2.13.13.

16 See Martínez Cardos (1960) 79 for examples of López' professional connections to the Castile court.

17 Martínez Cardos (1960) 87; Mira Caballos (2009) 99; Martínez Cardos (1960) 79 sqq. The text of the instructions for López is provided by Martínez Cardos (1960) 129 sq.: »Que haga un libro de los indios que haya en Sevilla y ponga en él los que sean libres y por éste aviso y los que vinieren de las indias estando allí sin licencia los haga volver luego a su costa«.

18 More in detail: Martínez Cardos (1960) 88 sqq.

19 They still owed their patrons labour and obedience but could no longer be sold: Mira Caballos (2009) 105.

From the 1540s onward, Gregorio López was deeply involved in Spain's colonial undertakings and its reverberations on both sides of the Atlantic.

Today, however, López' name is almost invariably connected with the *Siete Partidas*, the Castilian law code compiled in the 13th century. He is the man behind the magnificent 1555 print edition of the *Partidas*, and it was this edition that received legitimacy by royal decree and was used both on the Iberian Peninsula and in Hispanic America until the 19th century.

2 Editing the *Siete Partidas* in the 16th Century

The *Siete Partidas* were put together in the mid-13th century by order of Alfonso X, king of Castile and Léon, and the work finished in 1265.[20] The issue of authorship remains an open question.[21] To this day, more than 100 manuscript witnesses have survived, redacted in various languages such as Castilian and Catalan.[22]

At the end of the 15th century, the Catholic Kings considered the *Siete Partidas* an instrument for achieving political unity and ordered them to be used in court practice.[23] The *Leyes de Toro* (1505) reaffirmed the practical importance of the *Partidas*: they should be consulted whenever local or special laws like *ordenamientos*, *fueros* or *pragmáticas* were lacking or insufficient to decide any civil or criminal case.[24] That opened the question as to which version of the text from the rich manuscript tradition of these so-called *Pandectas Castellanas*[25] should be invoked. The aim of establishing an official, authorised text during the 14th century was unsuccessful,[26] and jurists complained about corrupt readings of the text.[27] Moreover, the 13th-century »paper originals written in Gothic characters and language« had been transcribed and even translated into the more permanent medium of parchment. This was done using »modern« letters and a modernised language, which was – in the eyes of the renaissance-conscious, humanist jurists – the real reason for the large-scale corruption of the *Partidas*.[28]

Accordingly, Alonso Díaz de Montalvo, one of the crown jurists of the Catholic Kings, worked on various compilations of Castilian legislation. As part of these endeavours, he published the first printed version of the *Partidas* in 1491.[29] He explains his intention in the prologue:[30] 1) to offer an expunged text, free from the *viçios* that had been introduced over the 200 years of copying and

20 Herriot (1951/52) 169.
21 Angelini (2021) 204 sq.
22 Angelini (2021) 205.
23 See Bermúdez de Pedraza (1612) 71: »Pero no se gouerno España por ellas [i. e. the *Partidas*], ni tuuieron fuerça de ley hasta los Reyes Catholicos Don Fernando, y Doña Isabel, que las promulgaron, y mandaron que los pleytos se determinassen por ellas«.
24 López Nevot (2020) no. 1.
25 Puch y Portolés (1829) 7.
26 García-Gallo (1976) 649: »En cualquier caso, la fijación de un texto oficial no fue obstáculo para que los copistas reprodujeran sin criterio selectivo alguno el códice que tenían a su alcance, coincidiera o no con aquél; por ello, en los manuscritos posteriores a 1348 se continúan reproduciendo las distintas redacciones.«
27 Herriott (1951/52) 166.
28 In the words of Francisco de Espinosa († c. 1551), *oídor* at the *Audiencia y Chancillería de Valladolid*, quoted by Maldonado y Fernández del Torco (1942/43) 497: »porque los libros antiguos de pergamino que se trasladaron antiguamente y estan casi en el lenguaje que agora se vsa y de la letra que agora se escriue, avnque los que no han visto otros los tienen por buenos e en la verdad estan viçiososimos, porque faltan en ellos muchas leyes e otras estan duplicadas […] y los originales verdaderos estan en papel de aquel tiempo y en la lengua y letra gotica e aquellos son los que se auian de seguir«. For examples of textual changes between various manuscripts of the *Partidas*, see Herriott (1951/52) 169 sqq.
29 López Nevot (2020) no. 1; Martíndez Cardos (1960) 113.
30 Díaz de Montalvo (1491) prólogo [s.p.]: »y agora porque las dichas leyes delas partidas por viçios delos escriptores no estauan corregidas: y en muchos libros dellas algunas leyes se fallauan viçiosas desando el seruiçio de sus Altezas acorde de conçertar poner y copilar las dichas partidas en vn volumen: segund que ellas estan sabiamente ordenadas declarando por relaçion en suma las leyes y concordanças emiendas y coreçiones de algunas por las dichas leyes nueuas que despues de las dichas siete partidas fueron fechas y ordenadas por los dichos señores Reyes sus progenitores: y por sus Altezas poniendo las dichas adiçiones sobre los titulos y materias conuenientes: y poniendo las remisiones que fazen al caso y a cada vna ley«. Cf. also López Nevot (2020) no. 5.

translating,[31] and 2) to add information about newer legislation that had superseded individual laws of the *Partidas*.[32] This describes a twofold task of restoring Alfonso's original *Partidas* – as faithfully as possible[33] – and supplementing it with more recent information, which would be marked *additiones* to make the temporal layers of the text transparent to the reader (fig. 1).

Though Díaz de Montalvo's work was endorsed by the Catholic Kings,[34] it was never promulgated. This meant that the edition was released with no other endorsement other than Montalvo's own scholarly authority[35] and thus enjoyed only a handful of editions in Sevilla, Venice, Alcalá de Henares, and Lyon. His Latin commentary on the *Partidas* was included only after his death (fig. 2).[36] The Spanish jurists were not impressed with Montalvo's work. From the perspective of juridical practice, Marcos Salón de Paz († ca. 1565), an advocate at the *Chancillería* de Valladolid, reports: »We have often seen that the manuscript books were consulted, and sentences and judgements were based on them, while the printed edition was ignored because it was considered to be full of errors and corruptions.«[37] So the topic of a re-edition of the *Partidas* remained on the agenda.

Lorenzo Galíndez de Carvajal (1472–ca. 1528) was the next scholar to take on this task.[38] He had studied law in Salamanca and later occupied the chair for the *Cátedra de Prima de Leyes* there in 1497, which meant that a young Gregorio López might have followed his lectures.[39] As judge at the *Real Audiencia y Chancillería de Valladolid* and member of the Castilian Crown Council, he was involved in the redaction of the *Leyes de Toro* (1505). Galíndez enjoyed a particularly close relationship with King Ferdinand, who relied on his legal expertise.[40] This privileged position of trust continued with the young Charles I. During the 1520s, he helped Hernán Cortés in his political ambitions to become governor of the newly conquered territories in what was to become New Spain, and following this involvement in American affairs, Galíndez was made a member of the Council of the Indies in 1527.[41] He worked on a recompilation of the Castilian legislation as well as on a re-edition of the *Siete Partidas*, but his work remained unpublished and was almost completely forgotten by 1550.[42]

Francisco de Espinosa († c. 1551), like Galíndez *oídor* at the *Audiencia* de Valladolid,[43] proposed consulting the »paper originals written in Gothic letters and language, and to translate« the *Partidas* contained in them into contemporary Castilian as a means to weed out later corruptions and errors.[44] If he ever actually embarked on this task, the results of his work have been lost.[45]

So by the time Gregorio López began his work on the *Partidas* in the 1530s or 40s (the exact date cannot be precisely determined), the time was simply ripe for them to be re-edited.[46] He took the Montalvo print edition as a starting point, additionally consulting a number of older *Partidas* manuscripts[47] as well as the juridical commentaries of them.[48] López' aim was to refine, summarise and gloss the text,[49] and he opted for a free and more doctrinal wording of the *Partidas*.[50] In the summer of 1553, his work was finished and ready

31 Martínez Cardo (1960) 113. Due to the loss of the Castilian crown's archive, a reconstruction of which manuscripts Díaz de Montalvo used in editing the *Partidas* cannot be carried out; see García-Gallo (1976) 649, who gives a more detailed overview in his articles on parts of the medieval manuscript tradition of the *Partidas*.

32 López Nevot (2020) no. 6.

33 Herriott (1951/52) 166.

34 López Nevot (2020) no. 3.

35 López Nevot (2020) no. 4.

36 First in the 1501 edition printed in Venice: López Nevot (2020) no. 9.

37 The citation is taken from López Nevot (2020) no. 10: »hemos visto muchas veces acudir á los códices manuscritos y sentenciarse y judgarse por ellos los litigios, abandonadas las leyes impresas porque se creian erradas y corrompidas«. Other jurists also harshly criticised Díaz de Montalvo's work, e. g. Francisco de Espinosa († c. 1551); for details cf. López Nevot (2020) no. 30 sqq.

38 For his biography, see Floranes (1852).

39 Martínez Cardos (1960) 72.

40 López Nevot (2020) no. 13 sq.

41 López Nevot (2020) no. 15.

42 López Nevot (2020) no. 15–29.

43 López Nevot (2020) no. 30.

44 Maldonado y Fernández del Torco (1942/43) 498: »conçertar cada libro [de las Partidas] por los oreginales de papel que estan en letra y lengua gotica y que se traslade cada vno dellos en la mesma lengua«; cf. also López Nevot (2020) no. 33.

45 López Nevot (2020) no. 34.

46 López Nevot (2020) no. 36; Pérez Martín (2016) 489; Martínez Cardo (1960) 114 sq.

47 Especially the Codex Silense, which dates from the 14th century: López Nevot [2020] no. 36; García-Gallo (1976) 617 sq.

48 Pérez Martín (2016) 489.

49 López Nevot (2020) no. 36.

50 Ibidem.



Titulo: primero:

estas otras enl titulo q̃ fablare en aq̃lla razõ so bre q̃ es fecha la ley: ↄ estõçevalga como las o tras leyes: ↄel q̃ tal ley fiziere deue catarlo de á te ↄ despues: ↄ desq̃ estas dos cosas bié catare étẽdera luego q̃ es lo de medio.

Ley. xiiii. porque razon los onbres no se pueden escusar del iuyzio de las leyes por dezir que las no sabẽ

¶ Escusar no se puede nigũo delas penas ólas leyes por dzir q̃ las no sabe. ca pues q̃ por ellas se ha de mãtener reçibiẽdo derecho ↄ faziẽdolo razõ es q̃ las sepã ↄ q̃ las leã: o por tomar el en tẽdimiẽto dellas: o por saberlas el mismo biẽ ra zonar en otra manera sin leer. **Adiçion.**

¶ Cõcuerda cõ esta la ley. iiij. ti. vj. li. i. del fue ro delas leyes.

Ley. xv. quales pueden ser escusados por no saber las leyes.

¶ Señaladas sõ las psonas q̃ se pueden escusar de reçebir la pena q̃ las leyes mãdã maguer no las entiẽdã ni las sepã al tiẽpo q̃ yerrã faziẽdo cõtra ellas asi como aq̃llos q̃ fuesẽ locos o des memoriados. ca estos atales no deuẽ reçebir pe na ninguña por lo q̃ ouiesẽ fecho euel tiẽpo dela locura por q̃ erã fuera de seso ↄ de memoria. E e so mismo dezimos del moço q̃ fuese menor ó ca torze años ↄ la moça menor de. xij. avnq̃ puasẽ o podiesẽ llegar afecho de luxuria estos q̃ tal co sa fiziesen escusados seriã dela pena delas leyes por no auer étẽdimiẽto. E si por auẽtura fuesse menores de. x. años ↄ medio ↄ fiziesẽ otro yerro asi como furto o omezillo o falsedad o otro ma lefiçio q̃ldera serã otrosi escusados delas penas q̃ las leyes mãdã por esa misma razon. Otrosy dezimos q̃ los caualleros q̃ bã adefẽder la tier ra ↄ cõquerirla delos enemigos dela fe por ar mas deuẽ ser escusados por no entẽder las leyes. E esto seria si pudiesẽ o menos caballẽ algo delo suyo ãdãdo en iuyzio por razõ de posturas o de pleito q̃ ouiesẽ fecho adaño desi por q̃ ouie sẽ podido algo delo suyo por tiẽpo: po esto se ẽ tiẽde sepẽdo ellos ẽ guerra. Eso mismo dezimos delos aldeanos que labrã la tierra ↄ delos pa stores que guardan los ganados.

Adiçon. Cõcuerda cõ esta ley la ley. iij. ti. xi. li. ij. del fuero de leyes.

Ley. xvi. quales son las virtudes delas leyes.

¶ Las vtudes delas leyes sõ en çinco maneras. La primera es mãdar. la. ij. es vedar. la. iij. cõsen tir. la. iiij. dar pena al q̃ la meresçe. la. v. cõsejar o mostrar fazer biẽ ↄ guardarse del cõtrario. E como q̃er q̃ cada vna delas leyes deste nro li bro no aya todas estas vtudes ayũtadas ẽsi po quiẽ biẽ las q̃siere leer ↄ étẽder fallara q̃ algũa dellas es ay puesta segũ cõuiene ala razõ sobre q̃ es fecha la ley. **Adiçion.**

¶ Enel fuero delas leyes ti. vi. ley. v. se cõtiene q̃ todos los õbres deuẽ saber las leyes por ser mas étẽdidos. ↄ q̃ nigũo alegue otras leyes en iuyzio saluo aq̃llas q̃ acordarẽ cõlas leyes del di cho fuero so pena de quinientos sueldos.

Adiçion. Cõ la q̃l dicha ley cõcuerda la ley q̃ fizo el rey võ Alfonso ẽ alcala q̃ esta enel libro primero delas leyes nueuas. **Adiçion.**

Ley. iiij. en q̃ mãda q̃ las leyes ólos fueros asi ólas leyes reales como municipales q̃ cada vna çibdad villa o lugar ãtigua mẽte tiene seã guar dadas ẽlas cosas q̃ se vsaró ↄ guardaró saluo ẽ aq̃llas q̃ se deuẽ emẽdar ↄ mejorar ↄ ẽlo q̃ sõ cõ tra dios ↄ cõtra razõ ↄ cõtra las leyes delas vi chas ordenãças reales por las q̃les primero se de nẽ librar los pleitos: ↄ si por ellas no se pudie ré librar q̃ se librẽ por los dichos fueros. ↄ si por los dichos fueros no se pudieren librar q̃ se li bré por los libros delas siete ptidas. ↄ q̃ si acae sçiere q̃ ẽlas leyes delas dichas ordenãças o de los fueros o delas dichas ptidas ouiere algũa cõtrariedad q̃ reçerá al rey pa q̃ saga interpe traçiõ declaraçiõ o emienda o ley nueua si fuere neçesario. ↄ si tal duda no pareçiere que toda via seã guardadas las leyes ↄ ordenamiẽtos reales avnq̃ no seã traydas en vso ni costũbre ↄ q̃ seã guardados alos fijos dalgo ↄ asus vasallos el fuero del albedrio po que toda via se leã los libros delos sabios ãtiguos que fizierõ ↄ copi larõ que se leã enlos estudios generales porque aẽ ellos mucha sabiduria puedhosa ↄ porque los onbres seã mas sabidores ↄ alcãçẽ por ello onrras ↄ vinidades. **Adiçion.**

¶ El dicho rey võ alfonso enlas dichas cortes mãdo que las leyes ↄ las dichas ordenãças fue sen guardadas ẽlas tierras dela yglesia ↄ señori os ↄ que las guardẽ ↄ fagã guardar los señores enlos señorios dõde tiene iurediçiõ ↄ que los se ñores ensus lugares lleuen los omezillos ↄ los caloñas segũd el rey los lleua enlos lugares de la corona real segũd se cõtiene enel libro nueuo delas ordenãças ti. iiij. ley. v. **Adiçion.**

¶ El rey võ iuã segũdo enlas cortes q̃ fizo en toro ↄ en madrid: ordeno q̃ las ptes litigantes o sus letrados por escripto o por palabra vis putãdo o en otra manera no puedã alegar opi niõ determinaçiõ dicho ni auctoridad ni glosa de doctor canonista ni legista de aquellos q̃ fuerõ despues de bartulo o de iuã andres ni los doctores que de alli adelãte fueren. ↄ los iuezes no lo cõsentã y el abogado o procurador q̃ lo cõtrario fiziere sea puado perpetua mente de su oficio. ↄ asi mismo el iuez q̃ lo cõsintiere ↄ la parte que lo allegare pierda la causa.

¶ Titulo. ij. Del vso ↄ dela costũbre ↄ del fuero.

Os rayzes sõ aquellas de que na çe el derecho comunal por que se guia ↄ se mãtiene las gentes en iu sticia ↄ en cõcordia ↄ en paz. La primera es ley escripta. la. ij. es costũbre ãtigua que vale tãto como

Fig. 1: Díaz de Montalvo (1491), SP 1.1.16 with four Adiciones.



Fig. 2: Díaz de Montalvo (1542), SP 1.1.16 with Adiciones and Latin glosses.

to be printed by Andreas de Portonariis, the renowned printer and bookseller in Salamanca.[51] But the path to publication was not without its challenges: on the one hand, the print was extremely costly, three volumes in oversized folio with a complex layout of the main text *(Partidas)* and glosses (figs. 3, 4). A contemporary observer notes that the *Cortes de Madrid* asked the Crown to cover the printing costs due to the significant public interest in seeing López' work finally in print to be used in all Castilian courts. But just when financial support was about to be granted, Galíndez de Carvajal's son protested, claiming that the edition prepared by his father should be published instead of López' work. This put a stop to the proceedings, especially as the printer may have feared that with manuscripts and the Montalvo edition around, the market for a costly new edition of the *Siete Partidas* might be too small.[52]

While it is not clear how this dispute was resolved, López' version was eventually printed by Andreas de Portonariis in the summer of 1555[53] (with a starting edition of 1000 copies),[54] whereas Galíndez de Carvajal's work fell into oblivion. Moreover, a royal decree (7 Sept. 1555) authorised López' edition and declared it authoritative, ordering that one copy was to be printed on parchment and kept in the royal archives of Simancas. Should doubt arise in the future about the wording of the *Partidas*, this copy could be consulted to learn *la verdadera letra*, the authentic wording.[55]

Both the López edition and commentary were widely esteemed, and López was referred to as the »Spanish Accursius« who brought the *Siete Partidas* into the Spanish modern age.[56]

3 Gregorio López the Editor

Commenting on the rule in the *Siete Partidas* that all new laws should be recorded in a book (SP 1.1.19), López explains his role as editor: such a book documenting the legislation of a kingdom helps to verify the original wording of a law when the text has deteriorated over the course of many copying and reproduction cycles. For the Digest, this meant consulting the Codex Pisanus, as Bartolus claimed to have done. In his commentary on the Digest, the Italian jurist wrote that he went through the Digests to restore the original text. Following this example, López continues, »my humble person«, *ego homunculus*, did the same for the *Siete Partidas*: their texts were scrambled, he writes, with many sentences or lines missing completely in many of the *leyes*, while in other parts so many words were garbled or misspelled that it was impossible to make sense of the law. So, López explains, in obedience to God and out of love for

51 López Nevot (2020) no. 40.

52 Ibidem; Martínez Cardo (1960) 116.

53 López Nevot (2020) no. 42; Pérez Martín (2016) 489. The third and last volumes were finished on 29 August 1555: López (1555), vol. 3, fol. 112r [sic, 102r]. López had moved to Salamanca to be near Portonariis' workshop and offices as well as to oversee the printing of his work: Martínez Cardo (1960) 116.

54 Thus it was agreed in the contract from 1553 between Andrea de Portonariis and Gregorio López: Guilarte (1945) 671.

55 Cédula real, Sept. 7, 1555, printed in López (1555), vol. 3, s. n. [at the end of SP 7]: »Y por ser esta cosa muy necessaria, e importante a nuestro seruicio, y a la buena determinacion delas causas y negocios de nuestros reynos, por la presente queremos y mandamos que cada y quando en algun tiempo ocurriere alguna duda sobre la letra de las dichas siete partidas, que para saber la verdadera letra, se ocurra al dicho libro que assi mandamos poner impresso en pergamino, en el dicho nuestro Archiuo, como dicho es. Y mandamos a les de nuestro consejo, Presidentes, e Oydores de las nuestras audiencias, Alcaldes de la nuestra casa, corte y chancilleria: assistente, gouernadores, corregidores, alcaldes y otros juezes y justicias qualesquier destos nuestros reynos y señorios, que assi lo guarden y cumplan, y fagan guardar y cumplir, como de suso se contiene, y que contra el tenor dello no vayan, ni passen por manera alguna.« See also López Nevot (2020) no. 42; Martínez Cardo (1960) 116 sq.

56 López Nevot (2020) no. 44.

Primera Partida.

benigniori intellectu, nec potest procedere de similibus ad similia: quia non reperitur ita simile, vnde iudex est dubius, tunc recurrendum est ad Principem. vide ibi per eum, vbi & quid si dubium est positum in opinionibus doctorum, & non est communis opinio, vel illa sit euidenter falsa, vel possit conuinci probabilibus rationibus: videas ibi, & adde ad istam legem Regis Alfonsi in curijs de Alcala, quæ est inserta in ordinationibus Taurinis.

Lex. XV.

¶ Subditi conditoris legum ligantur eius legibus. Item & non subditi ratione contractus, vel delicti in eius territorio facti, ipse tamen conditor eis non ligatur, sed benefacit, si secundum eas viuat. hoc di.

a ¶ *Del señorio.* Adde. l. cunctos populos. & ibi glos. & doctores, C. de summa Trinita. & fide catholica. & l. leges sacratissimæ. C. de legibus. & eo. titu. l. 2.

b ¶ *De otra ley.* vides hic quòd per alias leges nō potest iudicari in istis regnis: & sic non per leges Imperatorum, seu alias leges iuris communis. vide quæ dixi in. l. sexta. tit. 4. part. 3.

c ¶ *Es tenudo de la fazer complir.* Quia parum esset iura condere nisi sint ministri qui ea exequantur. l. 2. §. post originem. ff. de origine iuris. c. vbi periculum. §. præterea. de elect. libro. 6. cap. vnico. §. quoniam. de statu reg. eo. lib.

d ¶ *Postura o yerro.* Contrahentes aut delinquentes ligantur legibus & statutis illius regni, vel loci, vbi contrahunt vel delinquunt, vt hic & in. l. si fundus. ff. de euictio. & in auct. qua in prouincia. C. vbi de cri. agio por. l. saccularij. §. fi. ff. de extra. cri. & tradit. g. in. c. à nobis. de sent. excō. c. fi. de foro cōpet. Et q̄a mate. ista est diffusa: & habet plurimas quæstiones, recurrendum est ad plenè tradita per Bart. Bal Albe. Salice. Iaso. in dict. l. cunctos populos. C. de summa Trinita. & fide catho. vbi latissimè tractatur, tam circa delicta, quàm circa contractus, & vltimas voluntates. & vide quæ dixi in. l. 24. titu. 11. part. 5. Quid autem, si ciuis Salmanticensis habeat possessiones in territorio ciuitatis Segobiæ, & Segobiæ fiat statutum, quòd frumentum extra districtum, non possit exportari, an ligabitur statuto talis forensis, qui ibi habebat possessiones? Albe. in dicta. l. prima. colum. 6. refert Oldrad. tenuisse quòd non. per. l. munerum. §. præterea. ff. de mune. & hono. iuncta. l. prima. ff. ad municipa. nec obstare. l. si pendentes. §. si quid cloacarij. ff. de vsufruct. ibi. Nam solent possessores certam partem fructuum municipio viliori pretio adijcere: quia ibi non dicitur quòd possessor esset forensis: refert tamen Albe. vbi suprà Inno. tenere oppositum in cap. postulasti. de foro competenti. Quod sub verbo fortè dicit Albe. esse verius, & quod ad. §. præterea potest responderi, quòd ibi non dicitur, quòd ciuitas non possit imponere legē rebus quæ sunt in suo territorio, sed dicitur quòd certæ ciuitates habent ex priuilegio, vt pro possessionibus quas alij possident in earum territorio possessores præstent certam quantitatem frumenti. videas de ista quæstione per Cinum in. l. prima. C. que sit longa consuetud. & cum de iure regni interdictum sit populis prohibere istam extractionem frumēti à suis territorijs & permittatur per regnum liberè exportari. vt in. l. 2. & 3. titulo. 9. libro. 6. ordinamenti regij. Procedet quæstio in casu, quo frumentum est necessarium pro ciuibus, quo casu licitè prohiberi posset asportatio. vt in. l. si quis per diuinam. & ibi Ioan. de Platea. C. de aquæductu. libro. 11. Et si ista extractio fieret, quia dominus possessiōū velit alibi in regno vendere, non posset & subijceretur statuto: quia potius teneretur vendere ciuibus iusto pretio quàm alij, per id quod notat Bart. argu. illius. l. in. l. prima. C. de metalla. lib. 11. l. venditor. §. si constat. ff. commu. prædio. Si tamen dominus velit pro suo victu asportare tunc fortè posset. argu. l. præses. C. de seruit. & quod habetur in dicto. §. constat. & quia cum fructus sint iā à solo separati, non iudicātur pars rei, vt ꝓcedat quòd statutum teneat ratione rei sitæ in territorio. argu. l. defuncta. ff. de vsufructu. & in. l. fructꝰ pendentes. ff. de rei vendi. & sic cessant dicta Innocētij in dicto. c. postulasti. & quòd etiā dicit Paulus. de Castro in. l. iubemus nullā nauem. colu. prima. C. de sacrosanct. eccle. & ex quo pro possessione illa contribuit in territorio Segobien si cum cæteris ciuibus, iuxta leges regni frui debet fructibus suis sicut cæteri ciues. l. secundum naturam. ff. de regul. iuris. & cum in ista. l. dicitur. de delinquente, quòd subijcitur statuto loci, vbi delinquit. Limita per glos. in dicto cap. à nobis. el. 1. de sententia excommuni. quando statutum prohibet factum illicitum à iure communi & damnatum: secùs, si illud de iure communi non esset illicitum. vide Baldum in. l. ius ciuile. in fine. ff. de iustitia, & iure. quòd quando statuta inueniunt nouam materiam & formam in delictis, vt de conuiuijs non faciendis, & de non eundo de nocte & similia. Nouitij aduenæ non tenebuntur, quia non sunt de genere delictorum. adde eundem Bald. in. l. prima. ff. de legibus. versiculo. & per hoc soluitur quæstio de aduena. vbi similiter distinguitur, an factum aliàs esset illicitum, vel damnatum, seu inculpatum, & inter pœnas spirituales, & alias: ita respondens ad ea q̄ nōtur in. c. vt animarum. §. statuta. de constitutio. libro sexto. Dixit etiam Bald. in. l. data opera. colum. 6. C. qui accusar. non pos. Quòd quando statuta de nihilo faciunt aliquid, vt cum per statutum inuenitur nouum genus delicti, quòd ad materiam facti. vt quia dicit statutum quòd non possent vendi quædam res, vel quòd tricolæ non possint stare prope tabernam & similia, quæ de iure communi, neque materia, neque forma, neque nomen sit alicuius delicti, tale statutum nō ligat aduenas, neque nouos ciues qui possunt dici Tirones, & excusantur propter iustam ignorantiam.

¶ *Ley. XV. Como dauen obedescer las leyes, y judgarse por ellas.*

TOdos aq̄llos que son del señorio [a] del fazedor de las leyes, sobre que las el pone, son tenudos de las obedescer e guardar, e juzgarse por ellas, e no por otro escrito de otra ley [b] fecha en ninguna manera: e el que la ley faze, es tenudo de la fazer complir. [c] E esso mismo dezimos de los otros que fueren de otro señorio, que fiziessen el pleyto, o postura, o yerro [d] en la tierra dose juzgasse por las leyes: ca maguer sean de otro lugar non pueden ser escusados de estar a mandamiēto dellas: pues que el yerro fiziessen, onde ellas an poder: e avnque sean de otro señorio, non puedē ser escusados de se juzgar por las leyes de aquel señorio, en cuya tierra ouiessen fecho alguna destas cosas. E si porauentura ellos fuessen rebeldes que nō lo quisiessen fazer desu voluntad los juezes e las justicias los deuen constreñir por premia que lo fagan assi como las leyes deste nuestro libro mandan. Otro si dezimos que esta biē al fazedor de las leyes en querer beuir segund las leyes como quier que por premia nō sea tenudo de lo fazer.

¶ *Ley. XVI. Como son todos tenudos de guardar las leyes.*

GVardar deue el rey [e] las leyes como asu honrra e asu fechura, porque recibe poder e razon para fazer justicia. Ca si el no las guardasse vernia cōtra su fecho

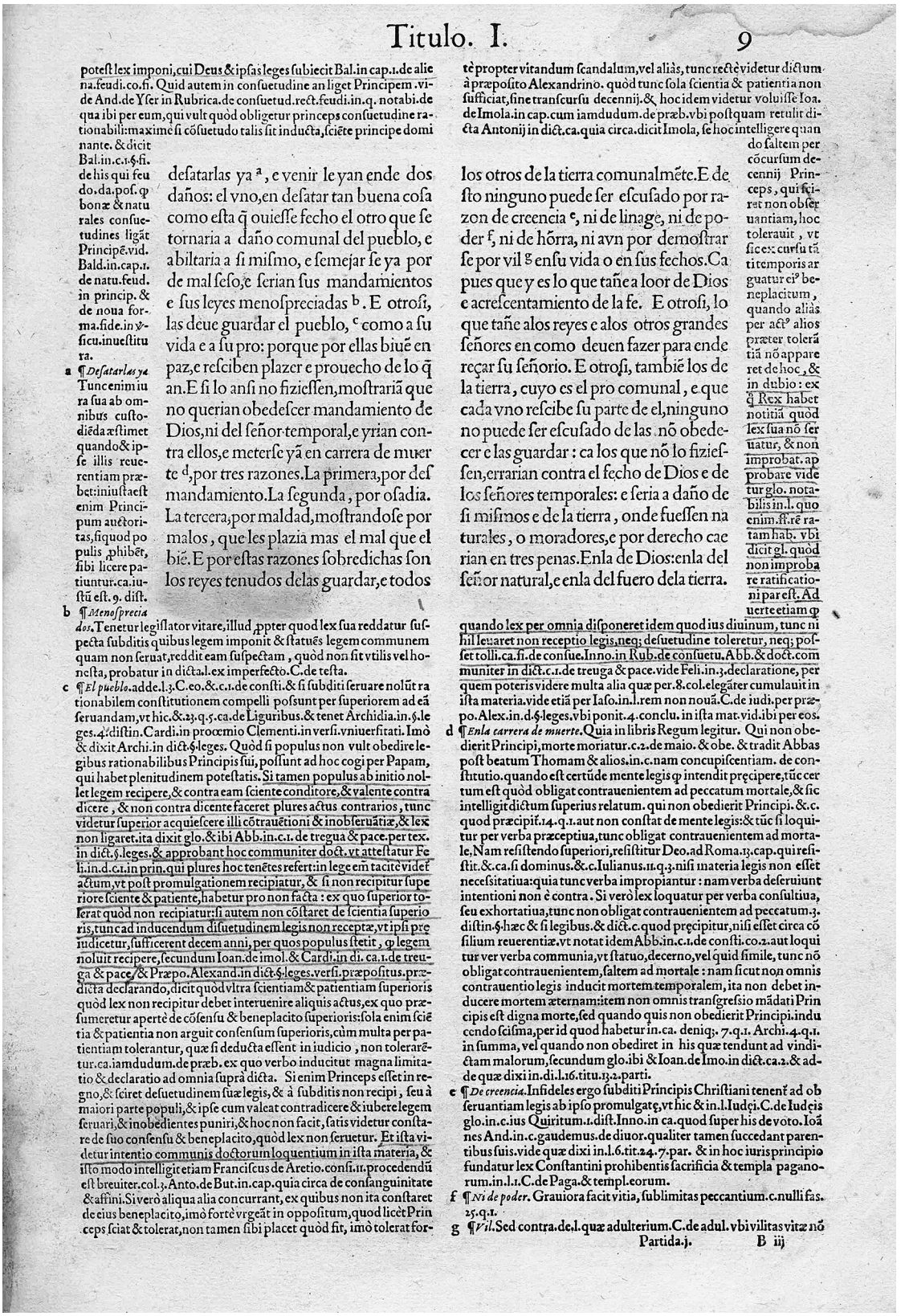
Lex. XVI.

Debet rex seruare legem tanquam facturam suam, & eius honorem custodire, & populus velut suam vitam & tutelam. & omnes de populo ad legum obseruantiam tenentur. hoc. d.

e ¶ *Guardar deue el rey.* Concordat cum. l. digna vox. C. eo. & Insti. quibus modis testa. infirme. in fine. C. de testa. l. ex imperfecto. l. cum multa. C. de bonis quæ lib. & quòd Princeps teneatur ad obseruantiam legis, tradit plenè Albe. in. l. Princeps legibus. ff. eod. probans hoc secundum Theologos & Philosophos diuersimodè, tamen in hoc tenetur legislator & subditi: nam subditi tenētur necessitate coactionis, legislator sola voluntate promotionis boni communis: nullus enim imperat sibi, vel cogit se ipsum. l. penul. ff. de arbit. sic Princeps non ꝓprie dicit sub. l. sed in. l. positus. tantæ ēm cellitudini nō

poteſt

Fig. 3: López (1555) (fol. 8v), SP 1.1.16 Beginning of Ley and glosses



Titulo. I. 9

poteſt lex imponi,cui Deus & ipſas leges ſubiecit Bal.in cap.1.de alie na.feudi.co.fi. Quid autem in conſuetudine an liget Principem .vi de And.de Yſer in Rubrica.de conſuetud.rect.feudi.in.q. notabi.de qua ibi per eum,qui vult quòd obligetur princeps conſuetudine ra tionabili:maximè ſi cõſuetudo talis ſit inducta,ſciẽte principe domi nante. & dicit Bal.in.c.1.§.fi. de his qui feu do.da.poſ.q bonæ & natu rales conſue tudines ligãt Principẽ.vid. Bald.in.cap.1. de natu.feud. in princip. & de noua for ma.fide.in v-ſicu.inueſtitu ra.

desatarlas ya [a], e venir le yan ende dos daños: el vno,en desatar tan buena cosa como esta q̃ ouiesse fecho el otro que se tornaria a daño comunal del pueblo, e abiltaria a si mismo, e semejar se ya por de mal seso,e serian sus mandamientos e sus leyes menospreciadas [b]. E otrosi, las deue guardar el pueblo, [c] como a su vida e a su pro: porque por ellas biuẽ en paz,e resciben plazer e prouecho de lo q̃ an.E si lo ansi no fiziessen,mostrariã que no querian obedescer mandamiento de Dios,ni del señor temporal,e yrian contra ellos,e meterse yã en carrera de muer te [d],por tres razones.La primera,por des mandamiento.La segunda, por osadia. La tercera,por maldad,mostrandose por malos, que les plazia mas el mal que el biẽ.E por estas razones sobredichas son los reyes tenudos delas guardar,e todos los otros de la tierra comunalmẽte.E de sto ninguno puede ser escusado por razon de creencia [e], ni de linage, ni de poder [f], ni de hõrra, ni avn por demostrar se por vil [g] ensu vida o en sus fechos.Ca pues que y es lo que tañe a loor de Dios e acrescentamiento de la fe. E otrosi, lo que tañe alos reyes e alos otros grandes señores en como deuen fazer para ende reçar su señorio. E otrosi, tambiẽ los de la tierra, cuyo es el pro comunal, e que cada vno rescibe su parte de el,ninguno no puede ser escusado de las nõ obedecer e las guardar : ca los que nõ lo fiziessen,errarian contra el fecho de Dios e de los señores temporales: e seria a daño de si mismos e de la tierra, onde fuessen naturales, o moradores,e por derecho caerian en tres penas.Enla de Dios:enla del señor natural,e enla del fuero dela tierra.

a ¶ *Desatarlas ya.* Tunc enim iura ſua ab omnibus cuſtodieda æſtimet quando & ipſe illis reuerentiam præbet:iniuſta eſt enim Principum auctoritas,ſi quod populis ,phibẽt, ſibi licere patiuntur.ca.iuſtũ eſt.9. diſt.

b ¶ *Menoſprecia dos.* Tenetur legiſlator vitare,illud ,ppter quod lex ſua reddatur ſuſpecta ſubditis quibus legem imponit & ſtatuẽs legem communem quam non ſeruat,reddit eam ſuſpectam , quòd non ſit vtilis vel honeſta, probatur in dicta.l.ex imperfecto.C.de teſta.

c ¶ *El pueblo.* adde.l.3.C.eo.&.c.1.de conſti.& ſi ſubditi ſeruare nolũt ra tionabilem conſtitutionem compelli poſsunt per ſuperiorem ad eã ſeruandam,vt hic.&.23.q.5.ca.de Liguribus.& tenet Archidia.in.§.le ges.4.diſtin.Cardi.in prooemio Clementi.in verſi.vniuerſitati. Imò & dixit Archi.in dict.§.leges. Quòd ſi populus non vult obedire legibus rationabilibus Principis ſui, poſſunt ad hoc cogi per Papam, qui habet plenitudinem poteſtatis. Si tamen populus ab initio nollet legem recipere,& contra eam ſciente conditore,& valente contra dicere , & non contra dicente faceret plures actus contrarios , tunc videtur ſuperior acquieſcere illi cõtrauẽtioni & inobſeruãtiæ,& lex non ligaret.ita dixit glo.& ibi Abb.in.c.1. de tregua & pace.per tex. in dict.§.leges.& approbant hoc communiter doct. vt atteſtatur Feli.in.d.c.1.in prin.qui plures hoc tenẽtes refert:in lege em tacitè videt actum,vt poſt promulgationem recipiatur, & ſi non recipitur ſupe riore ſciente & patiente,habetur pro non facta : ex quo ſuperior tolerat quòd non recipiatur:ſi autem non cõſtaret de ſcientia ſuperio ris,tunc ad inducendum diſuetudinem legis non receptæ,vt ipſi pre iudicetur,ſufficerent decem anni, per quos populus ſtetit , q̃ legem noluit recipere,ſecundum Ioan.de imol.& Cardi.in di. ca.1.de treu ga & pace,& Præpo.Alexand.in dict.§.leges.verſi.præpoſitus.præ dicta declarando,dicit quòd vltra ſcientiam& patientiam ſuperioris quòd lex non recipitur debet interuenire aliquis actus,ex quo præ ſumeretur apertè de cõſenſu & beneplacito ſuperioris:ſola enim ſciẽ tia & patientia non arguit conſenſum ſuperioris,cùm multa per pa tientiam tolerantur, quæ ſi deducta eſſent in iudicio , non tolerarẽ tur.ca.iamdudum.de præb. ex quo verbo inducitur magna limita tio & declaratio ad omnia ſuprà dicta. Si enim Princeps eſſet in re gno,& ſciret deſuetudinem ſuæ legis,& à ſubditis non recipi , ſeu à maiori parte populi,& ipſe cum valeat contradicere & iubere legem ſeruari,& inobedientes puniri,& hoc non facit, ſatis videtur conſta re de ſuo conſenſu & beneplacito, quòd lex non ſeruetur. Et iſta vi detur intentio communis doctorum loquentium in iſta materia,& iſto modo intelligit etiam Franciſcus de Aretio.conſi.11.procedendũ eſt breuiter.col.3.Anto.de But.in.cap.quia circa de conſanguinitate & affini.Si verò aliqua alia concurrant, ex quibus non ita conſtaret de eius beneplacito,imò fortè vrgeãt in oppoſitum,quod licèt Prin ceps ſciat & tolerat,non tamen ſibi placet quòd fit, imò tolerat fortè propter vitandum ſcandalum,vel aliàs, tunc rectè videtur dictum à præpoſito Alexandrino. quòd tunc ſola ſcientia & patientia non ſufficiat,ſine tranſcurſu decennij.& hoc idem videtur voluiſſe Ioa. de Imola.in cap.cum iamdudum.de præb.vbi poſtquam retulit dicta Antonij in dict.ca.quia circa.dicit Imola, ſe hoc intelligere quando ſaltem per cõcurſum decennij Princeps , qui ſciret non obſeruantiam, hoc tolerauit , vt ſic ex curſu tẽ temporis ar guatur ei⁹ beneplacitum, quando aliàs per act⁹ alios præter tolerã tiã nõ appare ret de hoc ,& in dubio: ex q̃ Rex habet notitiã quòd lex ſua nõ ſer uatur, & non improbat. ap probare vide tur glo. notabilis in.l. quo enim.ff.rẽ ratam hab. vbi dicit gl. quòd non improba re ratificationi par eſt. Ad uerte etiam q̃ quando lex per omnia diſponeret idem quod ius diuinum, tunc ni hil leuaret non receptio legis,neq; deſuetudine toleretur, neq; poſſet tolli.ca.ſi.de conſue.Inno.in Rub.de conſuetu.Abb.& doct.com muniter in dict.c.1.de treuga & pace.vide Feli.in.3.declaratione, per quem poteris videre multa alia quæ per.8.col.elegãter cumulauit in iſta materia.vide etiã per Iaſo.in.l.rem non nouã.C.de iudi.per præpo.Alex.in.d.§.leges.vbi ponit.4.conclu. in iſta mat.vid.ibi per eos.

d ¶ *Enla carrera de muerte.* Quia in libris Regum legitur. Qui non obedierit Principi,morte moriatur.c.2.de maio. & obe. & tradit Abbas poſt beatum Thomam & alios.in.c.nam concupiſcentiam. de conſtitutio.quando eſt certũde mente legis q̃ intendit præcipere,tũc certum eſt quòd obligat contrauenientem ad peccatum mortale,& ſic intelligit dictum ſuperius relatum. qui non obedierit Principi. &.c. quod præcipit.14.q.1.aut non conſtat de mente legis:& tũc ſi loquitur per verba præceptiua,tunc obligat contrauenientem ad mortale,Nam reſiſtendo ſuperiori,reſiſtitur Deo.ad Roma.13.cap.qui reſiſtit.&.ca.ſi dominus.&.c.Iulianus.11.q.3.niſi materia legis non eſſet neceſsitatiua:quia tunc verba impropiantur : nam verba deſeruiunt intentioni non è contra. Si verò lex loquatur per verba conſultiua, ſeu exhortatiua,tunc non obligat contrauenientem ad peccatum.3. diſtin.§.hæc & ſi legibus.& dict.c.quod præcipitur,niſi eſſet circa cõ filium reuerentiæ.vt notat idem Abb.in.c.1.de conſti.co.2.aut loqui tur ver verba communia,vt ſtatuo,decerno,vel quid ſimile, tunc nõ obligat contrauenientem,ſaltem ad mortale : nam ſicut non omnis contrauentio legis inducit mortem temporalem, ita non debet inducere mortem æternam:item non omnis tranſgreſsio mãdati Principis eſt digna morte,ſed quando quis non obedierit Principi.indu cendo ſciſma,per id quod habetur in.ca. deniq;. 7.q.1. Archi.4.q.1. in ſumma, vel quando non obediret in his quæ tendunt ad vindictam malorum,ſecundum glo.ibi & Ioan.de Imo.in dict.ca.2.& ad de quæ dixi in.d.l.16.titu.13.2.parti.

e ¶ *De creencia.* Infideles ergo ſubditi Principis Chriſtiani tenenť ad ob ſeruantiam legis ab ipſo promulgatę,vt hic & in.l.Iudęi.C.de Iudęis glo.in.c.ius Quiritum.1.diſt.Inno.in ca.quod ſuper his de voto.Ioãnes And.in.c.gaudemus.de diuor.qualiter tamen ſuccedant parentibus ſuis.vide quæ dixi in.l.6.tit.24.7.par. & in hoc iuris principio fundatur lex Conſtantini prohibentis ſacrificia & templa paganorum.in.l.1.C.de Paga.& templ.eorum.

f ¶ *Ni de poder.* Grauiora facit vitia, ſublimitas peccantium.c.nulli fas. 25.q.1.

g ¶ *Vil.* Sed contra.de.l.quæ adulterium.C.de adul. vbi vilitas vitæ nõ

Fig. 4: López (1555) (fol. 9r), SP 1.1.16 Continuation of Ley and glosses

his country, he undertook a fundamental restoration of the *Partidas*:

> »I have worked tirelessly, I have pored over ancient manuscripts containing the *Partidas*, I have consulted learned men and the writings of the older sages[57] from which the *Partidas* were drawn.«[58]

And through this painstaking work, he claims, the true text and splendour of the *Partidas* had been restored. That said, it is important to recognise that this was not the lonely effort of one man trying to produce a workable text of the *Siete Partidas*. López drew on the expertise and opinions of the jurists from the Crown Council. His diligence and the collective effort are both explicitly recognised in the royal decree *(cédula real)*, in which López and his heirs were granted the licence for both the print edition and commentary (Valladolid, 7 September 1555)[59]:

> »[Y]ou have put much effort in [correcting] the many mistakes and errors that can be found in the printed edition [of Montalvo] and in the manuscripts; and you consulted the members of my Council about your work: the councillors viewed it, and in many cases, where the difference between the text versions could have caused a discrepancy in the law, they discussed for many days, and examined the matter and decided upon the right wording, and this is how it is printed now in this work.«[60]

López' aim was not an antiquarian one: he was neither interested in legal history nor in restoring the original wording of the *Partidas* as a historian's exercise.[61] Instead, one can understand his work as a multi-stage approach in search of the »right« text – a version of the *Siete Partidas* that carried the *auctoritas*, i. e. the weight of the original, while at the same time making the »Gothic language«, as Espinosa and other jurists referred to the »the usual combination of popular and learned elements which is characteristic of Alphonsine manuscripts«,[62] more accessible. Therefore, López was not only interested in clearing away the *faltas y errores* of the medieval manuscript tradition, but also in presenting a text that made sense to contemporary jurists. This is also why he discussed probable readings with his fellow jurists on the King's Council: a group of people committed to

57 For example, the glossator Azo (ca. 1170–ca. 1230) is one of those *sapienti antiqui* who were the sources of ideas and regulations expressed in the *Partidas*, cf. Pérez Martín (2016) 491.

58 López (1555), SP 1.1.29 gl. ›En su libro‹ (fol. 9v): »En su libro. ad quem recurri posset pro veritate literae, si alij deprauentur, vt recurritur ad Pandectas, quae sunt Pisis. ad quas fuit recursum per Barto. vt ipse testatur in l. si creditor. §. primo. ff. de distract. pigno. & etiam in l. si vt certo. [Dig. 20.5.7.1] § si duobus. vehiculum. col. quarta. ff. commoda. [Dig. 13.6.5.15] Dicit idem Bart. quod perscrutatus est Pandectas. ego homunculus ita deprauatos reperi in litera libros istos Partitarum, quod in multis locis deficiebant integrae sententiae, & in multis legibus deficiebant plures lineae in ipsa contextura literae multae mendositates: ita quod sensus colligi non poterat: in multis vna litera pro alia, & ob Dei omnipotentis obsequium & amorem Patriae laboraui indefesse antiquissimos Partitarum libros de manu conscriptos reuoluens, cum peritis conferens & dicta sapientum antiquorum, de quibus fuerunt sumpti, consyderans, & quantum potui, veritatem literae detexi, & suo candori restitui nullo humano adiutorio concurrente, vt firmiter credo, cum magis auxilium defecit humanum tanto largius successit diuinum suffragium, a quo cuncta bona procedunt.«

59 Pérez Martín (2016) 490; Martínez Cardo (1960) 119 sq.

60 Cédula real, 7 Sept. 1555, printed in López (1555) vol. 3, s. n. [at the end of SP 7]; see also López Nevot (2020) no. 36: »muchas faltas y errores, assi en los libros impressos de molde [tácita censura a la edición de Montalvo], como en los escritos de mano, […] auiades passado en ello mucho trabajo; y hezistes relacion a los del mi consejo de lo que en esto auiades hecho: los quales lo vieron, y en muchas partes donde la diferencia de la letra podia causar diuersidad en el derecho, por muchos dias lo platicaron, y examinaron, y determinaron la letra que quedasse, conforme a lo qual se ha imprimido la dicha obra. En la qual impression vos el dicho licenciado [Gregorio López] con mi licencia y mandado auiades estado presente, para que la impression no se errasse.«

61 Contrary to Angelini (2021) 209, who claims that López' edition of the *Partidas* »would have contributed to restoring its pureness«. Also contrary to Herriott (1951/52) 169, who claims that »Montalvo, López, and the editors of the Academy edition [1807] all strove to establish a text approaching as nearly as possible the original of Alfonso el Sabio.« This antiquarian interest is not what is described in López (1555), in which emphasis is put on the homogeneity and practicability of the text, preferencing interpretations or versions that would avoid any *diuisidad en el derecho* (cf. Cédula real, 7 Sept. 1555, here in fn. 44).

62 Herriott (1938) 288 with examples of the specificities of Alphonsine (legal) language (288 sq.).

meeting the political and juridical needs of their day and age, including an ever-widening empire on more than one continent.

In 1829, Puch y Portolés critically sums up the results of López' work from an editorial perspective: »in this work we can never be certain if we read the words of King Alfonso the Wise or his commentator Gregorio López«.[63] In 1852, however, Rafael de Floranes claims to have gone through a 14th-century manuscript of the Third Partida containing handwritten marginal annotations by López himself (the writing is »very small and difficult to read«, Floranes reports)[64] without finding major changes López made to the substance of the original.[65] Clarification of this claim, however, would require an in-depth study of the manuscript tradition, the manuscripts López used, and the differences to the printed edition.[66] In any case, the royal decree authorising the printing of López' edition of the *Partidas* also authorised the glosses, and until the middle of the 18th century, no edition of the *Partidas* was printed without López' commentary.[67]

4 Gregorio López the Glossator

4.1 The Technique of Glossating: How to get an old law book to answer new questions?

To the restored text of the *Partidas*, López added an extensive apparatus of glosses and thus used the fundamental method of »text processing«[68] that had been established at European universities since the High Middle Ages. With the exception of the *leyes* written in Castilian in the *Partidas*, the glosses are written in Latin. López wrote all of the glosses, most probably between 1544 and 1553, shortly prior to and during his time at the *Consejo de Indias*.[69] With regards to the structure, López follows the example of the great medieval glossators, producing a gloss apparatus that encompasses the *Siete Partidas* in their entirety.[70] It is decisive for such a gloss apparatus that the glossing not focus only on isolated fragments of the basic text, but rather is carried out throughout the entire text. The boundaries between composing and compiling can be quite fluid, as the producer of a gloss apparatus almost invariably includes earlier glosses in his editing or at least relies heavily on other authors in producing his commentaries. This point is aptly demonstrated by the wealth of citations López makes to medieval and contemporary jurists, canonists and theologians. López' approach to commenting is inspired by the works of commentators like Bartolus de Sassoferrato, whom he cites many times in his own writings. The practical approach of this medieval Italian jurist echoes his own interests and intellectual needs: López' work combines the spirit of jurisprudential doctrine, practical needs and the recognition of a special – political – quality of the text, resulting in a dynamic process of interpretation, adaptation and actualisation.[71]

The length of individual glosses varies greatly. Most of the glosses are very short, just like their medieval models. Some of them, however, approach the length of a small treatise,[72] most famously the so-called *Glossa Magna* (SP 2.23.2 ›acrescentar el pueblo en su fe‹),[73] in which López discusses the justification of Spanish dominion in the Americas in no less than ten folio pages, the majority of which use the small font usually reserved for the margins. Other long glosses treat not only topics of utmost political relevance – e. g. the relationship between the Holy Roman Empire and the Castilian Kingdom – but also topics such as the economic regime of matrimony, primogeniture, *mayorazgos* and inalienable rights were the

63 Puch y Portolés (1829) 27: »en tal obra no podemos darnos por seguros de si leemos al sabio Rey don Alonso, ó á su comentador Gregorio Lopez«.

64 Floranes (1852) 311: »la letra del Sr. Gregorio Lopez, que es muy menuda y difícil de leer«.

65 Ibidem; Martínez Cardo (1960) 119 sq. provides the opinion of a number of Spanish historians about the fidelity of López' edition. A true in-depth study, however, is still lacking.

66 At the University of Valladolid, the long-term project »7 Partidas Digital« is currently working on a critical edition of the *Partidas* text: https://7partidas.hypotheses.org/ (accessed: 15.5.2023).

67 Pérez Martín (2016) 491.

68 Kästle-Lamperter (2016) 114.

69 Pérez Martín (2016) 491. Martínez Cardo (1960) 114 dates the beginning of the work on edition and glosses before 1544.

70 See Kästle-Lamparter (2016) 112.

71 For the glossators, see Kästle-Lamparter (2016) 119. See also Madero (2001) 343 for Baldus used by López.

72 Pérez Martín (2016) 494–531 gives an overview of López' longer glosses and topics treated.

73 López (1555), vol. 2, 2.23.2 ›acrescentar el pueblo en su fe‹ (fol. 79r–83v). Critical edition and Spanish translation of this gloss: Barrero García (2005).

subject of short, original treatises.[74] All in all, the commentary is unevenly distributed amongst the individual passages of the text, following the examples of 14th-century *ius commune* jurisprudence.[75]

Moreover, the system López follows in composing his glosses for each law *(ley)* corresponds to the medieval tradition:[76]

- an introductory gloss summarising the law's content (*introductio* or *casus legum* in the classical glossator tradition),[77]
- explanatory glosses (including philological word explanations, text-critical remarks and genuinely legal explanations),
- allegations (i. e. parallel and contradictory passages from other parts of the *Partidas* or the *Corpus Iuris Civilis*),
- further elaborations taking up a concept or technical term and situating it within the legal, political and economic reality of 16th-century Castile.

The introductory glosses tend to be marked with an asterisk instead of a textual reference, and López uses them as a general introduction to the topic of the following law *(ley)* and its main topic. They seem to serve the didactic purpose of making it easier for 16th-century readers to grasp the content of the medieval law, as well as offer concise introductions to basic legal concepts like »war« *(guerra*, *bellum)*[78] or »just war« *(bellum justum*[79]*)*.[80] In the course of his commentary, López regularly points to corresponding texts in the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici* with their treatment in the *Glossa ordinaria*. He not only cites the doctrines of the principal glossators and commentators, and to a lesser extent those of the canon law authors, but also makes frequent references to Castilian legislation and court decisions.[81] Antonio Pérez Martín counts more than 150 reference works cited by López that he thinks are »first-hand citations« (thus postulating López' possession of an extensive library).[82] He is also convinced that López not only knew of but, in some passages, also followed Alonso Díaz de Montalvo's edition and commentary of the *Siete Partidas*.[83] The common reading of the glosses in Spanish historiography till this day see López elevating the *texto vulgar de las Partidas* to a level befitting the classical and imperial epoch he and his contemporaries lived in, intending to serve the Spanish empire.[84]

The overall character of López' commentary seems to be defined by the longer glosses that translate the concepts of the medieval Castilian legislation into the 16th-century context. López loosens the connection between the main text and the commentary – even more so than the *Glossa ordinaria* had done for the *Corpus Iuris Civilis.*[85] An intensive comparison of *Partidas* with the glosses is called for in each case; when reading the long glosses, however, the *Partidas* are almost

74 Pérez Martín (2016) 492.
75 Cf. Kästle-Lamparter (2016) 33.
76 Pérez Martín (2016) 531.
77 Kästle-Lamparter (2016) 120.
78 López (1555), vol. 2, SP 2.23.1 gl. ›*‹ (fol. 78v): »Bellum est pacis segregatio, quietis remotio, compositorum destructio. & sunt quatuor genera belli iustum, iniustum, ciuile, plusquam ciuile.«
79 The commented text of López (1555), vol. 2, SP 2.23.2 enumerates the reasons for waging war, but without using the technical term in Spanish for the concept of a just war *(bellum iustum)*.
80 López (1555), vol. 2, SP 2.23.2 gl. ›*‹ (fol. 79r): »Bello iusto deus auxiliatur & ingerit tale bellum fit audatior & fortior & amici prouocantur ad iuuamen inimici consternuntur, & iustum bellum est quod fit ob augmentum fidei, & ad destructionem inimicorum illius, & quod fit ob domini sui custodium honorem: & seruitium, & quod fit ob patriae defensionem & purgandum est regnum a malis hominibus. hoc dicit.«
81 Pérez Martín (2016) 531.
82 Ibidem.
83 Ibidem; Pérez Martín (2015) 662.
84 Gibert (2000) 445–448, cited after Pérez Martín (2016) 492: »El derecho real es para G. L. un derecho particular, y él es un tratadista de derecho común. Su singularidad, imposible en la época siguiente, es que ambos términos se hallan fundidos en la época a la que él pertenece, la presidida por el Rey-Emperador. El resumen (latino de las leyes) eleva el texto vulgar de las Partidas a las aspiraciones de una época clásica e imperial. Más que un extracto, la versión en latín es una reelaboración de las Partidas […] Conserva el contenido normativo de las leyes, lo ha limpiado del arcaísmo que en el siglo XVI debía (de) resonar en un escrito del siglo XIII […] De una sencillez de líneas verdaderamente clásica. G. L. intentaba desde el campo de la gramática y el derecho […] servir al Imperio. Las Partidas, que se concibieron en la aspiración de un rey castellano al Imperio germánico, en el siglo XIII, alcanzaron la plenitud de su sentido bajo Carlos V, emperador y rey de Castilla. El derecho sigue al Imperio. Nos imaginamos a aquel hombre del siglo XVI tomando la obra del siglo XIII y encontrándola fértil, jugosa, llena de significación, como una profecía. Con orgullo señala él en la glosa cómo los límites de la corona de Castilla bajo Alfonso X se han ampliado con el dominio de tierras extranjeras (Flandes, Italia) y con el Nuevo Mundo«.
85 Cf. Kästle-Lamparter (2016) 167.

completely out of the picture. For example, when López discusses the justification of Spanish rule and Spanish wars on American soil,[86] the *palabras claves* of the law, ›acrescentar el pueblo en su fe‹, serve only as a hook for a long text that has little to do with interpreting the original law. The text of the law itself, which the gloss is supposed to explain, is no longer necessary for understanding the gloss.

4.2 The Americas in López' Glosses

One field that clearly demonstrates the modernity of López' undertaking is his inclusion of American topics into the glosses. Both the *ius commune* tradition and the 13th-century legislation of the *Partidas* are viewed as opportunities to treat the problems of that time. His experience in drafting the *Leyes Nuevas* and dealing with other American questions influence his interpretation of the *Partidas*,[87] which is evident in various passages of his commentary. Given his intention to produce a workable commented edition of the *Partidas*, adapted to the juridical requirements of his time, this comes as no surprise. The best-known example for the treatment of American topics in the commentary to the *Partidas* is the *Glossa Magna* (SP 2.23.2 ›acrescentar el pueblo en su fe‹) mentioned above.[88] Having the length of a short treatise, Spanish historians have dedicated a fair amount of attention to it as an early juridical position justifying the *conquista* of the America. In 2005, Ana María Barrero García published a critical edition of the gloss alongside a modern Spanish translation.[89] In the text, López does refer to Francisco de Vitoria's *Relectio de Indis*, which the Dominican theologian held in 1539. This is the reason that the traditional reading of the gloss by Spanish historians paint him as »Vitoria's first challenger« *(el primer impugnador de Vitoria)*.[90]

In his commentary on *Partida* 2.23.2,[91] López starts off with a panoramic listing of the various juridical and canonist opinions, including those of Cardinal Cayetano, Hostiensis, Sinibaldus Fliscus (Pope Innocent IV), Oldrado de Ponte, Alfonso de Castro and others. He then turns his attention to Vitoria's contemporary position as found in his (then recent) *relectio*. The Dominican's arguments are carefully examined and the weak points highlighted. Finally, López states his own opinion in nine points: the Catholic Kings have, according to the papal donation, the right of conquest and peaceful dominion of the Americas, including the building of fortresses and encampments as centres of missionary and peaceful political activities. Should the indigenous population kill or forcibly expel the missionaries, a just war can be fought against them. However, neither their rejection of the faith preached to them by the missionaries nor their clinging to »idolatrous« practices are grounds for war, although some canonists would indeed insist on this point and consider this a reason for a just war. According to López, fighting the Indians would only be justified to hinder them from performing human sacrifices or to protect already converted Christians against mistreatment at the hands of their heathen neighbours or chieftains. López thereby rejects Hostiensis' position that every war against all non-Christians is justified as well as the Pope's authority. Regarding this conclusion, Alfonso García-Gallo had claimed that Vitoria's and López's respective approaches to the question should be understood as fundamentally coinciding.[92]

86 López (1555), vol. 2, 2.23.2 ›acrescentar el pueblo en su fe‹ (fol. 79r–83v); Barrero García (2005); cf. above at fn. 73.

87 López Nevot (2020) no. 35: »La experiencia adquirida por Gregorio López en la gestión de los asuntos indianos quedaría reflejada en su glosa a las *Partidas*.«

88 López (1555), vol. 2, 2.23.2 ›acrescentar el pueblo en su fe‹ (fol. 79r–83v); Barrero García (2005). A translation of the entirety of López' Latin glosses to Part. 1 was attempted by Ordovás (1878).

89 Barrero García (2005); cf. the review by Serrano Daura (2008).

90 The title of Riaza's influential text 1932; see Pérez Martín (2016) 488, 492; Rovira Gaspar (2004) 205 sq., 253.

91 López (1555), vol. 2, 2.23.2 ›acrescentar el pueblo en su fe‹ (fol. 79r–83v); Barrero García (2005).

92 García-Gallo (1933) 511 in his review of Riaza (»Con diferencias de detalle, en lo fundamental coincide la forma de enfocar la cuestión en Vitoria y G. López, entre el famoso teólogo y el no menos famoso jurisconsulto«); Serrana Daura (2008) 865.

For the purposes of this article, however, I am more interested in finding other, less well-known passages in which the Americas enter into and influence the commentary of the *Siete Partidas*. More specifically, I want to ask how the increasing knowledge about the Indies and the ever-changing political challenges were incorporated into the structure of a *ius commune*-based commentary, and how was normative knowledge needed by the contemporary jurists developed?[93] Since there is no systematic overview regarding all instances in which López treated topics and concepts related to the Americas, in the following I will look at a handful of glosses where such topics do appear. Finding the following passages involved a certain degree of serendipity, and I look forward to carrying out a more systematic and in-depth search once the complete full-text transcription of the López edition and glosses is available as part of the Frankfurt Salamanca project.[94]

4.2.1 Stretching the Frontiers: SP 1.prologue gl. ›Del Algarbe‹[95]

The first occurrence is found in the comment to the prologue of the first *Partidas*: while the original text describes the territories of the Castilian crown in the 13th century, López comments: »Nowadays the frontiers have been widened and now include other nations and the Indians in the Americas who were unknown at the time when the *Partidas* were written. They live in a world which is new to us, on fertile, delightful, and healthy land.« López claims that Christ had stretched the Castilian frontiers across the ocean and invoked him to bless Charles V so that the king may be able to reign virtuously over all these very different peoples.[96]

4.2.2 A New Patriarch for the Indies: SP 1.5.12 gl. ›otras dos‹[97]

Shortly after this opening passage, the *Siete Partidas* include a passage with an explanation of why there are four patriarchs in the Catholic Church, namely Constantinople, Alexandria, Antiochia and Jerusalem, also detailing their privileges with regard to Rome (SP 1.5.12). Here, López seizes the chance to talk about the establishment of Church structures in the Americas. When a nation newly converts itself to the Catholic faith, he writes, a new *primas* has to be installed among them, provided a sufficient number of new Christians are there. And so the Pope, he continues, has installed a Patriarch of the West Indies *(Patriarcha Indiarum Maris Oceani)*.[98] He makes this reference to the Patriarch of the West Indies at a time when he is preoccupied with the work of Antonio de Fonseca, former bishop of Pamplona and president of the Council of Castile.[99] The patriarchate was conceived as a pure titular see, i. e. only in name and honour, without any jurisdictional or spiritual power.[100] Nevertheless, López puts it with discern-

93 Cf. Duve (2021) 15 on how mundane questions arising from the (theological or juridical) practice inspired the great treatises of Salmantine authors like Domingo de Soto et al. This also holds true for Gregorio López' work on the glosses to the *Siete Partidas*: a multitude of more and less significant questions from his juridical and political practice needed to be answered in an authoritative and reliable manner.

94 Cf. https://www.salamanca.school.

95 López (1555), vol. 1, SP 1.prologue gl. ›Del Algarue‹ (fol. 3r).

96 Ibidem: »Vides limites istos quibus concludebatur Castellae coronae, iam sunt tercentum anni, vides & nunc ita eam ampliatam, vt & subditas habeat barbaras gentes, maris Oceani incognitos vsque ad haec saecula Indos in orbe nobis nouo & incognito de gentes in solo fertili & grato, atque salubri: sit CHRISTO summo honor & gloria & qui propagauit Imperium, det virtutum incrementum Regi nostro quibus regat populos sibi commissos.«

97 López (1555), vol. 1, SP 1.5.12 gl. ›otras dos‹ (fol. 37r).

98 Ibidem.

99 Cf. Méndez Silva (1656) fol. 53v. In 1554, Charles V refers to Antonio de Fonseca as »Patriarca de las Indias, Presidente de Nuestro Consejo«; after Fonseca's death in 1557, however, the titular see remained unoccupied for about 40 years: Ruiz García (1967) 461 sq.

100 King Ferdinand had already asked Pope Leo X in 1513 to create his counsellor Juan de Fonseca patriarch *de las Indias*, which the pope refused. Eleven years later, in 1524, the patriarchate was indeed established by Pope Clement VII, but as a pure titular see from its inception. It is said the pope feared that a patriarch in the Americas, with full spiritual and jurisdictional powers, could lead to a schism.

ible pride in the long tradition of Jerusalem, Constantinople and the other ancient patriarchates of the Catholic Church.

4.2.3 Indians as *Personae Miserabiles*: SP 1.6.48 gl. ›A dezir al Rey‹[101]

Continuing to reflect on the role of the Church, López advocates for an expansion of the political and judicial role of bishops in the Americas compared to their Spanish counterparts. If a provincial judge in Spain fails to deliver justice, the aggrieved party can turn to the king asking for a decision *(parecer)*; in the Americas, the king is effectively out of reach due to the immense distances. For this reason, the king should enable the American bishops to stand in for him and allow them to handle such cases, even if they normally would not be within their ecclesiastical jurisdiction. Only in this way can the interests of socially vulnerable groups, i. e. those in danger of being oppressed by the powerful, be effectively addressed. López refers to the figure of the *personae miserabiles*, socially weak groups in the European *ius commune* tradition like widows, orphans, and the poor. The newly baptised Indians in the overseas territories also belong to this category, as López states explicitly.

This is quite remarkable for the time in which it was written, namely in the 1540s or early 50s. When Thomas Duve studied the adaptation of the *ius commune* category of *personae miserabiles* to the American context, he found that application of the category to Indians happened gradually from the 1570s onward.[102] In his survey of a number of ecclesiastical and secular authors, Duve found that neither the American councils of México and Lima[103] nor authors like Francisco de Vitoria, Alonso de la Vera Cruz, José de Acosta[104] or Juan de Matienzo[105] used this category to describe the Indians.

In fact, Caroline Cunill has shown that the idea of stretching the concept of *persona miserabilis* to include Indians can be pinpointed to a specific moment: in the midst of the struggle over the implementation of the New Laws (*Leyes Nuevas*, 1542), it was first proposed in 1545 by none other than Bartolomé de Las Casas.[106] Acting as the Bishop of Chiapas, and together with the bishops of Nicaragua and Guatemala, Las Casas presented a petition demanding that the royal authorities give jurisdiction over the indigenous population to the ecclesiastical courts. If the civil authorities would not accede to their demand, the three bishops threatened to excommunicate all members of the relevant bodies, including Gregorio López and the entire Council of the Indies.[107] As a consequence of this incident, Las Casas was invited to the Council of the Indies to give a personal account of how and why the Indians should be under ecclesiastical jurisdiction. In his response, Las Casas developed the idea of the Indians as *personae miserabiles*, a juridical category offering a conceptual justification for the intervention of the ecclesiastics in indigenous affairs.[108] What he presented to the councillors was the demand of exclusive jurisdiction of the bishops over the indigenous population, »even if there is no negligence or malice or suspicion of the lay judge«, because those »miserable people [are] oppressed and wronged« and therefore had to be placed under the Church's protection.[109] According to Las Casas, they had to be classified as *personae miserabiles* because they lived in a state of oppression and therefore their vulnerability and helplessness rendered them similar (but not equal) to widows and orphans, the core group constituting the *miserabiles*.[110] This flexible application of the juridical concept aimed at taking the jurisdiction over the entire indigenous population away from the secular courts and the Crown and placing it in the hands of the Church.

López' answer to this maximum demand is found in the gloss. On the one hand, he *does* agree that the indigenous population is in need of great-

101 López (1555), vol. 1, SP 1.6.48 gl. ›A dezir al Rey‹ (fol. 65r). Full transcription of the text, see below: Appendix 1.
102 Duve (2008) 174.
103 Duve (2008) 170 sq.
104 Duve (2008) 171 sq.
105 Duve (2008) 173 sq.
106 Cunill (2011) 232 sq. Cf. Vargas del Carpio (2020) 399 on the probable frustration Las Casas felt regarding the non-compliance with the laws in favour of the freedom of the Indians and the way he found in his new episcopal office the possibility of using ecclesiastical jurisdiction as a new remedy for the Indies.
107 Cunill (2011) 232; Vargas del Carpio (2020) 398.
108 Cunill (2011) 232 sq.
109 Ibidem.
110 Vargas del Carpio (2020) 400.

er protections against unwilling or hostile judges and magistrates. On the other, he is emphatically *against* transferring the jurisdiction over them to the ecclesiastical courts lock, stock and barrel, which would result in the total loss of royal jurisdiction over the indigenous vassals. As a result, López accepts the idea of extending the concept of the *persona miserabilis* to the Americas but with two major caveats. First, he insists on the traditional requisite conditions that only upon the failure on the part of the secular judge to deliver justice is the bishop authorised to move the case to his jurisdiction. Second, López refuses to apply the category of *persona miserabilis* to the entire indigenous population. No reference is made to any miserable living conditions under the *encomienda* regime; instead, the status as neophytes is crucial.[111]

The argument for López' equation of »newly baptised Indian = *persona miserabilis*« stems from a canon of the Third Council of the Lateran under Pope Alexander III. (X 5.6.5 ›Iudaei sive Sarraceni‹). It threatens every Christian who robs a Jew or Muslim of his belongings after his conversion to Christianity with excommunication: persons who have become Christians, the council agrees, must have a better legal status and enjoy greater protections than in their former heathen condition. If the secular judge is slow or unwilling to protect the property of newly baptised persons, the Church can threaten him with excommunication to carry out his duties in a just manner.[112]

This is the basis of López' argument. He does not explicitly cite the *Glossa Ordinaria* to the *Liber Extra*, but it is in line with his opinion: »This has to be understood that in any case, when the secular judge is negligent in doing justice, the Church must involve itself and force him to do it.«[113] So, the medieval canon law here offers López the two elements he needs: the conviction that a new Christian merits special help and protection as well as the characterisation of the Church as the guardian of secular justice, duty-bound to monitor its performance and, if necessary, to intervene. Both elements come together in López' position, triggered by the need to find a solution to the problem posed by the geographical reality of the great distances both to reach and within the American colonies.

4.2.4 Seneca's Prophecy: SP 3.18.77 gl. ›Desde Seuilla fasta la Rochela‹[114]

A more general reference to the presence of Spanish ships and merchants in the Americas can be found in a comment on a *ley* concerning the topic of the contracts of affreightment, which were used between merchants and sea captains for the charter of the ship to transport the merchant's goods *(carta del afletamiento)*.[115] The 13th-century *ley* provides a model text for the drafting of such a contract, citing the route »from Sevilla to La Rochelle« as a typical example. Commenting on this phrasing, López points out that at the time when this *ley* was written, the distances Spanish ships travelled were not nearly as long as contemporary 16th-century trips: »Because in our times we see that the words written by Seneca in his tragedy *Medea* have come true«, namely that »in later years a time will come when Oceanus shall relax his bars and a vast territory shall appear, and Typhis shall discover new worlds, and Thule shall be no longer be the remotest spot on earth«.[116] Seneca's *Medea*

111 López (1555), vol. 1, 1.6.48 gl. ›A dezir al Rey‹: »[…] & saltem in partibus remotissimis, vt sunt terrae firmae, & insulae maris Occeani, vbi sunt Indi de nouo conuersi ad fidem, qui & dicuntur miserabiles personae secundum Innocentium in capitul. iudaei, siue Saraceni. de iude. [X 5.6.5]«.

112 X 5.6.5: »Si qui praeterea Deo inspirante ad fidem se converterint Christianam, a possessionibus suis nullatenus excludantur, quum melioris conditionis ad fidem conversos esse oporteat, quam, antequam fidem susceperint, habebantur. Si autem secus duerit factum, principibus seu potestatibus eorundem locorum iniungimus sub poena excommunicationis, ut portionem hereditatis suae et bonorum suorum ex integro eis faciant exhiberi.«

113 X 5.6.5 gl. ›Excommunicationis‹ (Decretales Gregorii IX 1604, col. 1843): »Arg. quod iudex secularis compelli potest ad iustitiam seruandam. 23. q. 5. administratores [DG c. 23 q. 5 c. 26]. Et hoc videtur facere ratione fidei, quod intromittit se de haereditate, alias non debet. sup. qui fi. sint leg. causam [X 4.17.4]. sed illud intellige in quocunque casu, vbi iudex secularis negligens est facere iustitiam quod ecclesia se intromittere debet, & compellere ipsum.«

114 López (1555), vol. 3, SP 3.18.77 (fol. 109r). Full transcription of the gloss, see below: Appendix 4.

115 López (1555), vol. 3, SP 3.18.77 (fol. 108v sq.): SP 3.18.77: »En que manera deue ser facha la carta del afletamiento de la naue.«

116 López (1555), vol. 3, SP 3.18.77 gl. ›Desde Seuilla fasta la Rochela‹ (fol. 109r).

was translated into Castilian in the 14th century and was also widely read in Latin among the erudite Castilians.[117] But more specifically, López refers here to the so-called »Senecan prophecy«[118] used by Christopher Columbus to describe his role in the »discovery« of the Indies. He also follows Columbus' reading of the text, alluding to Typhis, the helmsman of the Argonauts, rather than to Tethys, goddess of the ocean.[119] Columbus included the citation of Seneca's *Medea* in his »Libro de profecías«,[120] which he started in 1502.[121] The lengthy concoction of biblical citations, snippets from other authoritative authors as well as excerpts from his own logbooks and writings was explicitly written for the Catholic Kings.[122] Thus, it may well have been in the court archives or the holdings of the Council of the Indies that López came across this remarkable collection in which Columbus tried to present his travels as predestined and implicitly foretold by the Bible and ancient authors.[123] López takes up the idea of imbuing Seneca's words with a prophetic quality, but he references this to *Hispania* (not Castile as a political unit) as a nation deemed worthy of finding a way to the farthest corners of the earth and of spreading the Christian faith there – all to the greater glory of the king and for the greater good of the Spanish *res publica*. All in all, this gloss is an aside that does not really contribute information about a doctrinal or practical legal point; instead, it proudly underlines the Castilian and Spanish achievements regarding the Americas.

4.2.5 Morally Dubious Merchants: SP 1.4.25 gl. ›Persona menor‹[124]

Pride regarding the extensive voyages of Spanish ships notwithstanding, López neither trusted the long distances nor the people who travel them. That becomes clear in his commentary on SP 1.4.25, a *ley* about the obligation of confessors to properly evaluate the sins of those entrusted to them by taking into account status, age, economic position and the circumstances of each case. López quotes approvingly the 13th-century canonist Hostiensis to prove that rich people have more opportunities to sin because they have leisure and more possibilities to put their wealth to bad use. Merchants who travel to distant lands, thus are gone for long periods of time, also have ample opportunity to engage in sinful activities, for example, committing adultery (with many foreign women) and causing their wives to enter into adulterous relationships at home, too. As Hostiensis sums it up: everybody knows exactly how much harm travelling merchants cause. López, always wary of merchants who, in his opinion, simply cannot ply their trade without sinning,[125] agrees enthusiastically: this scathing view of long-distance merchants is even more pertinent to contemporary traders

117 About the presence of Seneca's works in Castilian humanist circles from the 14th century onward, cf. Zinato (2021) 258 sqq.

118 Clay (1992).

119 About the two possible readings of the passage, cf. Clay (1992).

120 »Seneca in VII tragetide Medee in choro ›Audax nimium‹. Vernán los tardos años del mundo ciertos tiempos en los cuales el mar Occéano afloxerá los atamentos de las cosas y se abrirá una grande tierra; y um nuebo marinero, como aquel que fue guía de Jasón, que obe nombre Tiphi, descobrirá nuebo mundo y entonçes non será la isla Tille la postrera de las tierras«: citation taken from Clay (1992) 619.

121 The full title reads: »Libro o colección de auctoridades, dichos, sentencias y profecías de la recuperación de la sancta ciudad y del monte de Dios, Sión, y acerca de la invención y conversión de las islas de la India y de todas las gentes y naciones, a nuestros reyes hispanos«, cf. León Azcarate (2006) 78.

122 León Azcarate (2006) 78 sq.

123 León Azcarate (2006) 79.

124 López (1555), vol. 1, SP 1.4.25 (fol. 22r). Full transcription of the text, see below: Appendix 2.

125 Cf. López (1555), vol. 1, SP 1.6.46 pr. (fol. 64v): »Non debet clericus mercatoris officium exercere, quia vix sine peccato exercetur, potest tamen scripturas & alia honesta operari: quibus victum habeat. hoc dicit«.

who cross the ocean to America and return only after extremely long periods of absence. Thus the position of the famous 13th-century canonist is directly applicable: »take note of this to use against the merchants who travel to the regions in the Indies«, López urges his readers.[126]

4.2.6 Marriage in the Indies: SP 1.1.2 gl. ›Casamiento‹[127]

Wives left at home, floundering in their marriages leads us to López' understanding of marriage in the Americas. López discusses what makes a marriage: first of all, it is a part of natural right *(derecho natural)*, shared by humans and animals, which knows only the instinctive desire for mating that cannot be qualified by categories like sin or virtue, good or bad. It is simply a fact of nature and as such ethically neutral. This is why it is impossible to classify the mating of two animals, who only underly natural right, as sinful.

This is, of course, not the end of the story for humans. Not only do they need to take natural law into account but also civil law and the law of nations, which leads to a distinction between licit and illicit intercourse. Only the intercourse aimed at procreation, the raising of children and the passing on of the parents' memory is licit and thus inextricably linked with matrimony. True marriage can only consist in a licit intercourse, and intercourse is only licit within the confines of matrimony. Citing Thomas Aquinas, López describes the complicated institution of matrimony as consisting of no less than four intertwined roots:

- first, matrimony is so indispensable as the basis of raising a family that God created the institution even before the Fall of Man in the union of Adam and Eve in paradise;
- second, God instituted matrimony as a bulwark against the sins of the flesh after the Fall of Man as part of the natural law *(lex naturae)*;
- third, matrimony as a formal recognition of the will of two people to raise a family together has its root in Mosaic law, and
- fourth and finally, Christian marriage is understood as a sacrament representing the union of Christ and Church following the New Law of the New Testament.

After laying out this theoretical toolkit derived from theology, López turns to the actual question he wants to address: »From what we have laid out before, we can now answer the question if among the American Indians who took wives in their state as infidels and heathens existed a true marriage *(verum matrimonium)*?«[128] But why is this even a question? According to López, he had heard that many American peoples were so extremely rude and ignorant *(maxima ruditas & ignorantia)* that they seemed like wild men from the woods *(vt homines siluestres)*. This description recalls a passage from Cicero's *De Inventione*. The Roman orator had claimed that mankind was so wild, uncultured *(silvestres)* and rude at the beginning of time *(a principio seculi)* that no enduring bond between a man and a woman existed and therefore no marriage at all:[129]

> »For there was a time when men wandered at random over the fields, after the fashion of beasts, and supported life on the food of beasts; nor did they do anything by means of the reasoning powers of the mind; but almost every-

126 López (1555), vol. 1, SP 1.4.25 gl. ›Persona menor‹ (fol. 22v). It seems from the citation (»Host. in summa de poeniten. & remissio. charta 8«) that López had not Hostiensis' full *Summa Aurea* in his hands, but rather the so-called *Summa de poenitentia et remissionibus*, which forms part of the fifth book of the *Summa Aurea*.

127 López (1555), vol. 1, SP 1.1.2 gl. ›Casamiento‹ (fol. 4v). Full transcription of the text, see below: Appendix 3.

128 Ibidem: »Ex praedictis posset decidi quaestio an inter indos maris Oceani qui in sua infidelitate & gentilitate accipiebant vxores fuerit verum matrimonium«.

129 Cicero, De Inventione, lib. 1, no. 2: »Ac si volumus huius rei, quae vocatur eloquentia, sive artis sive studii sive exercitationis cuiusdam sive facultatis ab natura profectae considerare principium, reperiemus id ex honestissimis causis natum atque optimis rationibus profectum. Nam fuit quoddam tempus, cum in agris homines passim bestiarum modo vagabantur et sibi victu fero vitam propagabant nec ratione animi quicquam, sed pleraque viribus corporis administrabant, nondum divinae religionis, non humani officii ratio colebatur, nemo nuptias viderat legitimas, non certos quisquam aspexerat liberos, non, ius aequabile quid utilitatis haberet, acceperat. Ita propter errorem atque inscientiam caeca ac temeraria dominatrix animi cupiditas ad se explendam viribus corporis abutebatur, perniciosissimis satellitibus.« Cited from the Latin Library online edition: https://www.thelatinlibrary.com/cicero/inventione1.shtml#2 (visited: Febr. 24, 2023).

> thing by bodily strength. No attention was as yet paid to any considerations of the religious reverence due to the gods, or of the duties which are owed to mankind: no one had ever seen any legitimate marriages, no one had beheld any children whose parentage was indubitable; nor had any one any idea what great advantage there might be in a system of equal law. And so, owing to error and ignorance, cupidity, that blind and rash sovereign of the mind, abused its bodily strength, that most pernicious of servants, for the purpose of gratifying itself.«[130]

No less than the likes of Thomas Aquinas himself had lent his approval to this idea, explicitly stating that Cicero's words could well be applicable to some groups of people. Discussing the question »Whether marriage is natural« (*utrum matrimonium sit naturale*«: Sent. 4 dist. 26 q. 2 art. 1) in his commentary on Peter Lombard's *Sentences*, Aquinas opened his answer with the ultimately rejected view that matrimony is not natural, referring to Cicero's vision of the marriageless wild men of a distant past:

> »Furthermore, what is of natural law is found among people no matter what their state. But marriage has not existed in every state of man, for, as Cicero says in the beginning of his *Rhetoric*: *Men were living in the woods in the beginning, and back then no one knew his own children, nor were there any particular wedding ceremonies in which marriage consisted*. Therefore, it is not natural.«[131]

In the end, Aquinas rejected Cicero's view of an early mankind without marriage as a universally acceptable theory: the Bible tells us about the universal beginning of mankind as God's creation, and the institution of marriage was already present back then. But, the Dominican theologian did not completely refute Cicero's musing about rude and ignorant peoples; instead, he saw a possibility that individual nations or peoples, as a result of their autochthonous origins and cultural development – or lack thereof – might fit this depiction.[132]

Both Cicero and Aquinas, two recognised authorities, seem to agree on the possibility that peoples without natural reason and therefore without matrimony can indeed exist and that such peoples can be recognised by their rude and uncultured ways. And though reports from the Americas arrived painting the indigenous peoples in precisely this way, López does not share this opinion. He debunks this apparent congruity, rejecting Cicero's view outright and Aquinas' to an extent.

To be fair, Thomas Aquinas had already voiced doubts about Cicero's idea *(non autem es verum universaliter)*: »from the beginning of the human race Sacred Scripture reports that there were marriages«.[133] López takes Aquinas' words and uses them to create a *pasticcio* (cf. Table 1), embedding his own opinion within the learned tradition while at the same time moving it forward: first, he rejects the idea that Cicero's musings about primordial humans, their rudeness and lack of matrimony could be accepted as true in any universal sense. To show this he cites Aquinas nearly verbatim. In a second step, he also rejects, although less explicitly, Aquinas' idea that the wild men Cicero describes might actually be observed in existing peoples. If that were indeed the case, those peoples would lack natural reason *(ratio naturalis)* – something that does not match his observations. He writes, »I find very difficult to observe« *(quod reputo difficile ad cognoscendum)* since all peoples are in discernible

130 English translation from https://en.wikisource.org/wiki/On_Invention/Book_1#2.

131 Aquinas, Sent. 4 dist. 26 q. 2 art. 1 obj. 2: »Praeterea, id quod est de jure naturali, invenitur in hominibus secundum quemlibet eorum statum. Sed matrimonium non fuit in quolibet statu hominum: quia, sicut dicit Tullius in principio Rhetor., *homines a principio silvestres erant, et tunc nemo scivit proprios liberos, nec certas nuptias, in quibus matrimonium consistit*. Ergo non est naturale.« Original Latin text and English translation are taken from the online edition: https://aquinas.cc/la/en/~Sent.IV.D26.Q1.A1.7.

132 Aquinas, Sent. 4 dist. 26 q. 2 art. 1 Reply obj. 2: »Ad secundum dicendum, quod verbum Tullii potest esse verum quantum ad aliquam gentem; si tamen accipiatur principium proprium ipsius gentis per quod ab aliis gentibus est distincta, quia non in omnibus perducitur ad effectum hoc ad quod naturalis ratio inclinat: non autem est verum universaliter, quia a principio humani generis sacra Scriptura recitat fuisse conjugia.« Original Latin text and English translation are taken from the online edition: https://aquinas.cc/la/en/~Sent.IV.D26.Q1.A1.7.

133 Aquinas, Sent. 4 dist. 26 q. 2 art. 1 Reply obj. 2: »non autem est verum universaliter, quia a principio humani generis sacra Scriptura recitat fuisse conjugia«; original Latin text and English translation are taken from the online edition: https://aquinas.cc/la/en/~Sent.IV.D26.Q1.A1.7.

AQUINAS, Sent. 4 dist. 26 q. 2 art. 1	LÓPEZ, SP 1.1.2 gl. ›Casamiento‹
Ad secundum dicendum, *quod verbum Tullii potest esse verum quantum ad aliquam gentem; si tamen accipiatur principium proprium* ipsius *gentis per quod ab aliis gentibus est distincta*, quia non in omnibus perducitur ad effectum hoc ad quod naturalis ratio inclinat: *non* autem *est verum universaliter, quia a principio humani generis sacra Scriptura recitat fuisse conjugia*.	Sanctus Thom. 3. parte quaest. 41. artic. 1. supra relato in responso ad secundum *quod verbum Tullij potest esse verum quantum ad aliquam gentem*: *si tamen accipiatur principium proximum* illius *gentis per quod ab alijs gentibus est distincta*, ex quo videtur velle quod si in tali gente deficeret ratio naturalis quae inclinat ad matrimonium cum certae muliere, propter effectus supradictos non esset verum matrimonium, quod reputo difficile ad cognoscendum: quia regulariter in omnibus gentibus matrimonium producitur ad effectum per id ad quod naturalis ratio inclinat, *neque* dictum Tullij *est verum vniuersaliter* cum dicit de principio seculi: *quia sacra scriptura recitat fuisse coniugia a principio humani generis*.

Table 1: Comparison between the texts by Aquinas and López; the passages taken verbatim by López are in italics; underlining signals the core of his own stance against Cicero and Aquinas

possession of *ratio naturalis* and therefore are naturally led to organise their relationships into a *matrimonium verum*.

So, López does underline the working of natural reason in all humans, the indigenous Americans included, implicitly also confirming the common origins of European and American mankind.

4.2.7 Dangerous Climates: SP 2.22.7 gl. ›Biuir‹

In SP 2.22.7,[134] López again finds an opportunity to translate Old World ideas to the Indies, this time about climate, its influence on people and the criminal behaviour of Spaniards towards Indians. The *ley* that López comments on here sets out that people who are employed to work in a certain geographical area have to be *acostumbrados, e guisados al ayre*, that is, accustomed and acclimatised to the climate of a place. If they are not acclimatised and compatible with the climate of the region they are supposed to work in, they cannot stay healthy in the long run *(E si tales no fuessen, non podrian luengo tiempo biuir sanos)*.[135]

In his glosses, López expands at length on the theme of the influence of climate on human character and physiognomy, citing Aristotle, Vegetius' *De re militari*, and Thomas Aquinas.[136] The statement above about people not being able to stay healthy in a foreign climate offers him the opportunity to send a stern reminder to his readers: this passage applies to *encomenderos* and others who compel Indians from the colder regions to move to warmer parts and force them to work there. Many of those Indians have died, López writes, and the Spanish perpetrators have to be punished because they killed them as surely as if they had done it with their own hands.[137]

5 Conclusion

After these impressions of López' work as an editor and commentator of the *Siete Partidas*, let me offer some remarks to conclude. López' intention in editing and commenting the *Siete Partidas* was to create an authoritative, practical foundation for Castilian jurisprudence: a patriotic undertaking as he was undoubtedly a »king's man«.[138] To this end, the edition served the same purpose as the glosses: to produce a useful tool for contemporary lawyers living in the complex world of the 16th century; far from »rethinking what has already been thought«,[139] López' aim is immensely practical. While respecting the original authority of the *Partidas*, he uses the glosses to fill in every conceiv-

134 López (1555), vol. 2, SP 2.22.7 (fol. 78r): »Quales deuen ser los peones, por la tierra, e como deuen ser escogidos y guisados«.

135 Ibidem.

136 López (1555), vol. 2, SP 2.22.7, gl. ›Caliente‹, fol. 78r sq.

137 López (1555), vol. 2, SP 2.22.7, gl. ›Biuir‹, fol. 78v: »Nota contra compellentes indos frigidę regionis transire ad calidas regiones ex quo multi moriuntur sunt enim puniendi quia eos necant«.

138 Charles V certainly had good reason to personally select him as a member of the Council of the Indies after López expelled two former councillors due to irregularities in their office during his visit with the council in 1542; see Martínez Cardos (1960) 84 sq.

139 Hence Erich Genzmer's erroneous old-school opinion, cited after Kästle-Lamparter (2016) 157.

able gap left open in the medieval texts with knowledge both produced in and necessary for this time. The reader is repeatedly and directly addressed (»take note«, *nota*) to explicitly point out how to apply a given *ius commune* concept to a specific American question.

López cites not only juridical authorities in his glosses: Thomas Aquinas and Church fathers are mentioned throughout the text, and Erasmus is quoted several times as well. Among the jurists and canonists, he relies not only on Bartolus and Baldus but also on Sinibaldus Fliscus (Pope Innocent IV, † 1254), Hostiensis († 1271), Andrea de Isernia († 1316), Bartolomé de Saliceto († 1412), Juan de Ímola († 1436), Paulus de Castro († 1441), Panormitanus († 1445), Philip Decius († 1535) and others, thus drawing heavily on the *ius commune*'s Commentarist tradition. Moreover, he also cites contemporaries such as Francisco de Vitoria and Diego de Covarrubias y Leyva. All in all, López aims to base his arguments on a broad and dogmatically sound foundation. By taking the theological arguments into consideration – above all, those of Thomas Aquinas – he shows his intellectual nearness to the authors of the so-called School of Salamanca, with whom he had contact with as a member of the Council of the Indies, and possibly even earlier as a student.

The combination of the authoritative text edition, a profound knowledge of the *ius commune* and a decidedly practical orientation gave López' work the scope and depth it needed to become so influential in the following decades.

In 1612, Francisco Bermúdez de Pedraza explained how to use López' commentary for the study of law: to know law in Spain means to know the *Siete Partidas*, not only because of their local importance but also because, derived almost entirely from the *ius commune*, they open a path to this body of law.[140] To understand the *ius commune* in the Digests and to become acquainted with the various doctrinal controversies, Pedraza proclaimed that Spanish students could do no better than to study López' glosses to the *Siete Partidas*.[141]

At a later point in time, López was harshly criticised for his immersion in the *ius commune* tradition, and he was scolded for not being sufficiently well-versed in *historia y antigüedades de la nación*,[142] that is, neither providing any kind of historical introduction to the *Partidas* nor offering information on their origins, their profile or their textual traditions.[143] It should be pointed out, however, that this critique, typical of 19th-century legal-historical interests, entirely misses the point of López' endeavour.

In the samples of glosses touching on American topics dealt with in this article, López' conception of the West Indies and their peoples comes across as essentially positive: fertile lands with a healthy climate and populated by people with perfectly intact natural reason who are capable – if not always willing – of accepting the Christian faith and of realising basic institutions of human relationships already in their original state. At the same time, he is acutely aware that the indigenous population is in dire need of protection against life-threatening exploitation by unscrupulous Spaniards. Moreover, it also shows that stereotypes of savage peoples circulated since European antiquity do not do justice to the actual indigenous peoples of the Americas and therefore, according to López, are insufficient to serve as the basis of the Castile crown's modern policy. His view is not only in line with the royal policy laid out in Isabela of Castile's testament, but it also echoes the ideas of Francisco de Vitoria and Bartolomé de Las Casas, even if López did not and could not agree with the Dominicans' more radical political demands. The findings suggest that a deeper analysis of the treatment of the Indies in the entirety of López commentary on the *Siete Partidas* can provide further insights into the process by which opinions and politics in the Council of the Indies and at the Castilian court are formed and can take us, to use the words of Daniel Panateri, on an »ocean of new ideas«.[144] Digitalisation and a combination of distant reading analytical tools and close reading will help us to systematically navigate this ocean.

140 Bermúdez de Pedraza (1612) 70 sq.
141 Bermúdez de Pedraza (1612) 161; cf. also López Nevot (2020) no. 45.
142 Puch y Portolés (1829) 25.
143 Puch y Portolés (1829) 26.
144 Panateri (2012) 165 (»un mar de nuevas ideas«).

Appendices:
Transcriptions of Glosses from López (1555)

Appendix 1: SP 1.6.48
gl. ›A dezir al Rey‹ [145]

Concord. cum authentico vt differentes iudices in principio colla. 9. Non ergo episcopus cognoscet de causa data negligentia iudicis secularis: sed rescribit Regi pro quo etiam facit ca. licet ex suscepto. de foro competen. Quid autem si isti essent miserabiles personae habitu & actu vel habitu tantum an si eis iustitia denegetur per iudicem secularem possint adire episcopum ut de causa cognoscat, vel an & tunc recurrendum sit ad Regem, vel proximum superiorum? Inno. in c. significantibus. De offic. deleg. ponit duas opiniones primam, quod tunc quando priores domini renuunt istis miserabilibus personis facere iustitiam, ecclesia seu iudex ecclesiasticus eos possit audire etiam non requisitis superioribus dominis, & sic intelligit Inno. cap. ex tenore de foro competen. & cap. de solatis [sic]. 87. distinct. & hoc ideo ne diu pro iustitia laborent & dicit Innocen. quod etiam dictae personae si habito respectu ad ea quae possident sint pauperes sed magnas haereditates, vel castra petant non venietur ad iudicem ecclesiasticum nisi prius deficiat secularis. postea vero ponit secundam opinionem dicens, quod alij dicunt, quod nunquam pro miserabilibus cognoscet iudex ecclesiasticus: nisi prius eis seculari iudice deficiente, sed si quis per violentiam eis bona auferat tunc defendet eos ecclesia & suis supplicationibus, & beneficijs iuuabit & sic intelligunt isti iura pro istis miserabilibus personis facientia. Primam tamen opinionem videtur firmare Inno. & Docto. communiter ita intelligunt Innocent. vt in illa opinio ne videatur residere: sed aduerte, quod petrus & Abbas antiquus intelligunt. dictum capi. ex tenore vt etiam in vidua requiratur negliegentia etiam superioris iudicis, & ita intelligunt illum text. sed Doctores, magis communiter volunt, quod sufficiat negligentia primi iudicis ne viduae & miserabiles personae cogantur exire ex proprijs locis alibi querentes iustitiam immo plus vult Innocen. quod si persona sit miserabilis habitu & actu vt viduae & pupilli pauperes, vel diuturno morbo fatigati: vel pauperes duntaxat (nam miserabiles dicuntur secundum Ioannem And. super quibus natura mouetur ad miserendum) possit etiam non data negligentia iudicis secularis trahere aduersarium coram iudice ecclesiastico. per textum, a contrario sensu. in dicto capitulo. significantibus vbi idem tenet Abbas capitul. super quibusdam in fine. de verborum significatione Hostien. vero in summa. de foro competenti. versi. expremissis in principio intelligit, quod in petitorio non cognoscat iudex ecclesiasticus nisi in defectum, sed quantum ad possessorium indistincte, vt in capitulo. ex parte. eodem titulo. & quantum ad defensionem, seu tuitionem ne opprimantur a potentioribus: in petitorio vero dicit mero iure ad Reges pertinere. 23. quaestione quinta. capitul. Regum. l. vnica. C. quando impe. inter pu. & vidu. haec tamen difficulter obtinerentur in practica in istis regnis in causis mere prophanis quae sunt de iurisdictione Regis & inter laicos, seu quando laicus conueniretur: aequum tamen videretur, vt in partibus multum remotis vbi de facili non possit adiri Rex, data negligentia iudicum prouinciae permitteretur Episcopis in causis miserabilium personarum procedere qui alias opprimerentur de facili a potentibus a quibus non possent iustitiam consequi & quod Rex ita permitteret & committeret tales causas Episcopis, vt etiam auctoritate Regia in illis procederent facit ad hoc text. in dicta authentica, vt differentes iudices. § si vero. & quod notat Hostien. in capitul. nouit de iudic. Abbas in capitul. licet ex suscepto colum. 5. de foro competenti, & saltem in partibus remotissimis, vt sunt terrae firmae, & insulae maris Occeani, vbi sunt Indi de nouo conuersi ad fidem, qui & dicuntur miserabiles personae secundum Innocentium in capitul. iudaei, siue Saraceni. de iude. permittendum hoc esset Episcopis illarum prouinciarum, confert quod dicit. S. Thom. secunda secundae quaestione. 40. articul. 2. in respon. ad primum cum dicit, quod praelati debent resistere non solum lupis, qui spiritualiter interficiunt gregem: sed etiam raptoribus, & tyrannis, qui corporaliter vexant non autem materialibus armis in propria persona vtendo: sed spiritualibus secundum illus apostoli secunda ad Corinth. cap. 10. arma militiae nostrae non carnalia sunt: sed potentia a Deo, quae quidem sunt salubres admonitiones deuotae orationes: contra pertinaces excommunicationis sententia.

145 López (1555), vol. 1, fol. 65r.

Appendix 2: SP 1.4.25 gl. ›Persona menor‹ [146]

Milites, rustici, mercatores, vel alij de quibus vi. latius per Host. in summa de poeniten. & remissio. charta. 8. vers. cui miles. vers. cui rusticus, & vers. cui mercator. & dicit ibi Host. quod vita rusticorum tutior est, quam quiescentium delitiosorum diuitum, & ociosorum, vnde versus diuitiis vti, res est aduersa saluti. paucos crede bonos, quos beat aeris honos, molities vestis, coitus, gula, cura quietis? & circa mercatores nota signanter cum (narrando in his quae peccant) dicit. Nono transferendose ad regiones remotas & nimiam moram trahentes, & ibi cum diuersis etiam alienis vxoribus adulterium committendo, & suis causam adulterij praebendo, de quibus quot mala proueniant dicit ipse, nemo est qui ignoret, quod tu nota contra mercatores transferentes se in regiones Indiarum Maris Oceani. ibique nimiam moram trahentes. De religiosis autem dic quod in tribus casibus in eodem genere peccati plus peccant quam laici. Primus cum religiosus peccat contra votum religionis, veluti fornicando contra votum continentiae, vel furando contra votum paupertatis, & contra praeceptum decalogi. Secundus cum peccat ex contemptu cum per id sit ingratus diuini beneficij, quo sublimatus est, ad perfectionis statum. Tertius propter scandalum, quia multi ad eius vitam respiciunt, sed si religiosus non ex contemptu, sed ex infirmitate vel ignorantia peccat non contra votum suae religionis, & occulte, & absque scandalo leuius peccat eodem genere peccati quam secularis, nam ex multis bonis qui facit quasi absorbetur peccatum illius si sit leue, & si sit mortale facilius ab illo resurgit propter intentionem quam habet erectam ad deum, quae licet ad horam intercipiatur de facili reparatur, & quia iuuatur etiam a socijs ad resurgendum. Haec sunt ex S. Tho. 2. 2. q. 1. 186. art. fi. & tradit Ioan. And. in c. accusatus. de haere. lib. 6. & nota quod non est iniungendum in poenitentia monacho ieiunium, in speciali propter scandalum fratrum. 20. q. 1. c. monachi. & §. fi. potest tamen puniri in ciborum abstinentia cum & sine scandalo possit comedere magis vel minus, si tamen esset monachus solitarius posset ei indici ieiunium. videas per Hosti. vbi supra charta. 16. co. 1. vers. si sit monachus, & de monachis. ibi etiam videri poteris, de excessibus aliarum personarum.

Appendix 3: SP 1.1.2 gl. ›Casamiento‹ [147]

[fol. 4r] Consensus animorum non est de iure naturali: quia de eo non participant animalia bruta: sed motus ad coitum, & ipsa carnalis commixtio, bene sunt de iure naturali. cum talis motus, & coitus fuerunt ante ius gentium, vel ciuile & de stimulis &instictu naturae praecesserunt. & de eo etiam animalia bruta participant, nec consideratur licitum ab illicito, nec per hoc potest dici, quod ius naturale inducat ad peccatum: quia eo iure quilibet coitus maris, & foeminae erat impunitus, & permissus. neque erat distinctio filiorum legitimorum & spuriorum, vt in authen. quibus modis natura. effi. sui. §. penul. & fina. postea per alia iura fuerunt distincti coitus, & aliqui reputati liciti, alij illiciti, & licitus coitus appellatur matrimonium, ex quo liberi procreantur, & memoria parentum conseruatur. sic Iacobus de Arena. quem sequitur Albericus declarat in dict. § ius naturale. & his dictis, videtur etiam assensisse Baldum ibi. dicit tamen, quod coniunctio illicita potest considerari dupliciter, vno modo quantum ad esse, alio modo quantum ad deformitatem esse. [fol. 4v] Primo modo, copula carnalis est de iure naturali: quia ius & bonum conuertuntur. Secundo modo, non est de iure naturali. Aduerte etiam quod nos: non qualemcunque coitum maris, & foeminae matrimonium appellamus, sed illum qui hominibus licitus est secundum rationem, qua Deus dotauit hominem mediante, scilicet matrimonio, & istud est, quod vult ista litera &. d. §. ius naturale: cum dicit quam nos matrimonium appellamus, vt sit sensus, non quod ipsa maris & foeminae copula sit matrimonium, sed quod sine matrimonio etiam de iure naturali nobis licita non sit, vnde sequitur, nos ideo maris, & foeminae coniunctionem, matrimonium appellare eo, quod aliter quam ex matrimonio nobis licita non sit, & idem vult. S. Tho. 3. parte cum tractat de matrimonio. q. 4. arti. 1. quod matrimonium eo modo dicitur de iure naturali quo natura ad illud inclinat & mediante libero arbitrio completur, quia ratio naturalis ad ipsum inclinat dupliciter quantum, scilicet ad bonum

146 López (1555) vol. 1, fol. 22v.
147 López (1555), vol. 1, SP 1.1.2 gl. ›Casamiento‹ (fol. 4r sq.).

prolis, non solum in generatione verum etiam in procreatione &disciplina cum secundum Philosophum, tria sunt quae a parentibus habemus esse scilicet, & nutrimentum & disciplinam. Secundo quo ad secundarium finem matrimonij qui est mutuum obsequium sibi a coniugibus in rebus domesticis impensum. Apparet ergo iure naturali hominibus illam tantum copulam conuenire: quae ratione, & iure subsistat, qualis est coniugalis, vt eleganter tradit Fortu. in dicto. §. ius naturale, & vult Ioannes Lupi Segouiensis in tracta. de matrimonio. colum. quinta. hoc idem vult Ioannes Fab. in principio institu. si quadru. paupe. feci. dica. dicens, quod cum homo sit ratiomalis a natura quicquid ratio dissuadet est sibi contra naturam. Cum igitur naturalis ratio suedeat foedus coniugij, & caeteros amplexus dissuadeat, non dubium facere hominem contra naturam caeteros sectando, quos ratio naturalis abhorret, & dicit Sanctus Thomas in quarto sententiarum distinct. 26. quod matrimonium prout est in officium, generandi prolem, quae erat necessaria, etiam peccato non extante: institutum fuit a Deo, etiam ante peccatum adae, vt patet Genesis. 2. Crescite & multiplicamini. &c. Sed vt est remedium contra peccatum institutum, fuit post peccatum tempore legis naturae, Secundum vero determinationem personarum contrahentium, institutum fuit in l. Moysi, Secundum vero quod est sacramentum repraesentans coniunctionem Christi, & ecclesiae, institutum est in noua lege, & secundum hoc est sacramentum nouae legis. Ex praedictis posset decidi quaestio an inter indos maris Oceani qui in sua infidelitate & gentilitate accipiebant vxores fuerit verum matrimonium: quia vt audiui in multis gentibus illarum prouinciarum erat maxima ruditas & ignorantia, & erant vt homines siluestres & sicut dicit Tullius in primo rethoricae homines a principio seculi siluestres erant, & tunc nemo sciuit proprias neque certas nuptias in quibus matrimonium consistit, & dicit. Sanctus Thom. 3. parte quaest. 41. artic. 1. supra relato in responso ad secundum quod verbum Tullij potest esse verum quantum ad aliquam gentem: si tamen accipiatur principium proximum illius gentis per quod ab alijs gentibus est distincta, ex quo videtur velle quod si in tali gente deficeret ratio naturalis quae inclinat ad matrimonium cum certa muliere, propter effectus supradictos non esset verum matrimonium, quod reputo difficile ad cognoscendum: quia regulariter in omnibus gentibus matrimonium producitur ad effectum per id ad quod naturalis ratio inclinat, neque dictum Tullij est verum vniuersaliter cum dicit de principio seculi: quia sacra scriptura recitat fuisse coniugia a principio humani generis.

Appendix 4: SP 3.18.77
gl. ›Desde Seuilla fasta la Rochela‹ [148]

Non erat tempore quo leges istae conditae fuerunt, ita spaciosa sicut nunc Hispanica nauegatio, nam temporibus nostris verificatum videmus in Hispania illud Senecae in tragedia Medeae, venient annis secula seris: quibus Occeanus vincula rerum laxet, & ingens pateat tellus: tephisque nouos detegat orbes, neque sit terris vltima Thule. Summo & omnipotenti deo placeat qui nouum orbem Hispaniae dedit Christiana eum religione perpetuis temporibus communire, summa cum felicitate regum nostrorum, & totius nostrae reipublicae vtilitate.

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148 López (1555), vol. 3, 3.18.77 (fol. 109r).

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HISTORICVS
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Tobias Schenk

Knowledge of Production of Normativity at the Imperial Aulic Council. Towards a Procedural Perspective on Early Modern Legal Reasoning*

Prologue: Heinrich von Kleist on glocalisation

ADAM Would you like
The case conducted formally, Your Honour,
Or in accordance with our usual practice here?
WALTER I hope the two aren't mutually exclusive.
We'll have your usual formal practice, please.
ADAM Your Honour's wish is my command. Are you
Ready, Clerk Light?
LIGHT Yes, I'm ready, Your Honour.
ADAM Let justice take her course!
Step forward, plaintiff.

The Broken Jug (1806)[1]

I. Introduction

In large parts of Europe, the 15th and 16th centuries saw the emergence and consolidation of centralised justice, which was exercised by collegially organised institutions such as the Scottish College of Justice, founded in 1532, or the Hogen Raad of the Netherlands, established in 1582. This centralised justice was accompanied by the development of a sequence of courts and was therefore of great importance for the modern state-building process.[2] The Holy Roman Empire participated in this development with the Imperial Chamber Court, founded in 1495 and from 1689 onwards located in the imperial city of Wetzlar, and the Imperial Aulic Council, which was formed in the 16th century from the court councils of the Habsburg emperors Charles V and Ferdinand I and remained tied to the imperial court; for most of its period of existence, it was therefore based in Vienna.[3]

The depiction of these two courts in the historiography has changed fundamentally in recent decades. Until well into the 20th century, numerous German historians, whose works were teleologically focused on the Prussian-dominated foundation of the German empire in 1871, regarded the Holy Roman Empire, which collapsed in 1806, as a pawn of foreign powers and the low point of national development. It was only after the idea of a German state based on military might had been thoroughly discredited by National Socialism that a change in thinking came about.[4] The Holy Roman Empire's low degree of centralised state control now made it appear as a polity structurally incapable of aggression, which could be integrated into the function as a positively connoted countermodel to the contaminated Prussian legacy in the narrative of German traditions underpinning the Federal Republic.

In this paradigm shift, research on the Imperial Chamber Court and the Imperial Aulic Council since the 1960s has played a major role.[5] From the outset, it was based on a consistent combination of basic archival work and university research. Tens of thousands of case files from both courts, held in

* Translated by Michael Kelly, with additional language-editing by Christina Pössel.

1 Kleist (1977) [1806] 26.

2 For an overview on the state of research, see the articles in Godfrey / van Rhee (eds.) (2020).

3 On the current state of research on the imperial courts of justice, see Amend-Traut (2020); Oestmann (2020); Baumann (2021); Amend-Traut et al. (2023). A history of the Imperial Aulic Council that satisfies current scholarly standards remains a desideratum. See: Gschliesser (1942); as an overview: Ortlieb (2019); on the court council of Charles V as a predecessor institution to the Imperial Aulic Council, see Ortlieb (2024).

4 On the reception history of the Holy Roman Empire, see Liebmann (2006); Carl (2010).

5 For overviews, see Coy et al. (eds.) (2010); Wilson (2011); Whaley (2012); Schnettger (2020); Stollberg-Rilinger (2021).

Germany and Austria, have been catalogued according to standardised criteria with the generous support of the DFG (German Research Foundation), the Volkswagen Foundation and the Union of the German Academies of Sciences and Humanities.[6] As part of an interdisciplinary social and constitutional history,[7] this empirical groundwork formed the basis for numerous substantial monographs and source editions. A number of dedicated book series,[8] the *Gesellschaft für Reichskammergerichtsforschung* (Society for Research on the Imperial Chamber Court)[9] and the *Netzwerk Reichsgerichtsbarkeit* (Network Imperial Jurisdiction)[10] provide an infrastructure that has already enabled the productive exchange between several generations of legal scholars and historians. More recently, it has also enabled innovative work on supplications, the use of imperial judicial system by Jews, and on trial records as a source for the history of cartography.[11]

Research into the Imperial Chamber Court and the Imperial Aulic Council can thus be counted as one of the greatest successes of *Europäische Rechtsgeschichte* (European legal history as conceptualised by German scholars in the 1960s). At the same time, however, it also demonstrates the latter's gaps and blind spots, which have recently been pointed out from the perspective of the history of knowledge and global history.[12] In addition, the intensity of research with regard to both courts is currently declining,[13] despite the fact its insights could productively contribute to a number of current debates: while historians identify research into early modern cultures of decision-making as a desideratum,[14] scholars of law are also becoming increasingly aware of their insufficient understanding of collegial decision-making processes. The question of how the legal methodology aimed at forming individual knowledge functions in the sociological context of a court of law has hardly ever been asked, let alone answered.[15] These debates could be brought together under the umbrella of a new approach to renewing research on the imperial central courts in order to contribute to the judicial turn[16] that Dieter Grimm recently advocated with regard to contemporary history.

In order for such a project to succeed, however, research on court practice will have to critically evaluate its premises, many of which still date back to the 1960s and 1970s, and deal with a theoretical deficit in working with trial documents that has now become obvious. For even where no explicit claim for an allegedly specifically German tradition of the rule of law was made with respect to the Imperial Chamber Court and Imperial Aulic Council, the »vehement focus on learned law and the development of a legal system in the strictest sense« of the *Europäische Rechtsgeschichte* was adopted.[17] For example, though it makes little sense in terms of systems theory, the communication space of the Holy Roman Empire has often been equated with a legal system,[18] an approach which inher-

6 On these cataloguing projects, initiated by Bernhard Diestelkamp and Wolfgang Sellert, see Battenberg / Schildt (eds.) (2010); Auer (2017); Schenk (2017).

7 Moraw / Press (1975) is a classic example of this.

8 The series *Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich* with a current total of 78 volumes and the *bibliothek altes Reich* with 41 volumes (as of 30 January 2024) are particularly noteworthy.

9 http://www.reichskammergericht.de (last accessed on 30 January 2024).

10 https://blognetzwerkreichsgerichtsbarkeit.wordpress.com (last accessed on 30 January 2024).

11 On the significance of the files of the Imperial Aulic Council for supplication research, see Ortlieb (2011); Haug-Moritz / Ullmann (eds.) (2015); Hausmann (2016); Zeilinger (2022); on the use of the Imperial Aulic Council by Jews and Jewish communities, see Kasper-Marienberg (2012); Griemert (2015); Siluk (2021); Kasper-Marienberg / Fram (2022); on Imperial Chamber Court records as sources for the history of cartography, see Baumann (2022).

12 See, with additional references, Duve (2012), (2014).

13 Already around ten years ago, there was talk on various occasions that the historiography of the imperial central courts was increasingly losing touch with current research programmes. See Dorfner (2015) 254; Ehrenpreis (2015) 153; Kalipke (2015) 19.

14 See, with additional references, Krischer (2010), (2012); Stollberg-Rilinger (2016); Krischer (2017); Hoffmann-Rehnitz et al. (2018); Hoffmann-Rehnitz et al. (2021); Krischer (2021).

15 As an early modern historian, I am not in a position to have a complete overview of the jurisprudential debate. However, the following contributions seem to me to have interdisciplinary and cross-epochal potential: Fischer (2013); Cohen (2014); Ernst (2016); Häcker / Ernst (eds.) (2020); Fischer (2021); Lübbe-Wolff (2023); and from a sociological and political science perspective Haberler (2014); Kranenpohl (2009), (2010).

16 Grimm (2022) 324.

17 Duve (2014) 24.

18 For example in Aretin (1999) 110; Willoweit (2006).

ently marginalises extrajudicial and infrajudicial practices,[19] and considerably overestimates the significance of legal communication in the context of social conflict regulation.

Not even the ›cultural turn‹ at the turn of the millennium led scholars to break free from this path-dependency. While other disciplines used ethnological approaches to increase complexity through alienation,[20] the historiography of the Imperial Chamber Court and Imperial Aulic Council continued to reduce complexity by interpreting the two institutions narrowly as part of a »complementary imperial state« *(komplementärer Reichsstaat)*[21] and thus viewing early modern legal production through the lens of contemporary jurists' self-description.[22] Conceptually, this brought researchers closer to the very statist positions of the classic Prussian studies that they had once set out to overcome. In this »history, which made the past look like the present«,[23] the Imperial Chamber Court and Imperial Aulic Council continued to be addressed with macro-sociological process concepts such as professionalisation, modernisation and secularisation, which had long since come under criticism elsewhere.[24] Ambiguities, competition and translation processes between different normative regimes, in which international (legal) historical research is interested,[25] on the other hand, were marginalised or even rendered invisible.[26]

The agenda of *Europäische Rechtsgeschichte* was so »very German«[27] that it did not fall on fertile ground even in Austria. In Vienna, where the Imperial Aulic Council had been based for centuries, scholarly interest in the subject remained limited, despite the progress made in cataloguing its files. The Imperial Aulic Council hardly plays a role in more recent empire research,[28] although numerous Habsburg diplomats and statesmen began their careers there. This is perhaps unsurprising if we consider that the premises of this research do not envisage any kind of *glocalisation* of the object of investigation and instead favoured a decontextualised reading of trial files. Contact with research on the imperial court in Vienna was not sought because there was little interest in examining the integration of the Aulic Council's members within the wider interaction system of the imperial court.[29] The »ubiquitous social networks [which] deeply shaped early modern justice«[30] were almost entirely lost from view, as was the »micro-foundation of macro-processes«.[31]

Instead, idealistic positions were upheld that can hardly be reconciled with the results of more

19 On the concept of infrajustice, see Härter (2012), (2021).

20 Reference should be made to the constitutional-historical synthesis by Stollberg-Rilinger (2015); more recently also Neu (2023).

21 On this concept, see Schmidt (1999), (2001), (2011); Whaley (2012); criticism in Schilling (2001); Gräf et al. (2001); Reinhard (2002); Knorring (2015).

22 Close dependence on the publications of contemporary jurists still characterises the explanations in Schmidt (2021); see the critical review by Fimpel (2023).

23 For instance, with respect to similar tendencies in the legal history of Latin American law, see Herzog (2024) 50. She continues: »By going down this road, proponents of this type of history argued for continuity where none existed, and they ignored all that was no longer relevant to the present or was simply too strange or too counterintuitive to digest.«

24 For example in Eisenhardt (2023) 393; compare the fundamental criticism of the ill-considered use of macro-sociological process terms in Joas (2012).

25 The following are just a few examples: Rosen (2006); Karsten / Thiessen (eds.) (2015); Duve (2017); Thiessen (2021); Duve (2022a); Duve / Egío (2023) 160–167.

26 Recently, for example, with regard to the handling of court privileges, it has been stated that the decisions of the Imperial Chamber Court and the Imperial Aulic Council were characterised by a »clear direction« throughout the early modern period: Eisenhardt (2023) 350–352. However, such a conclusion can only be reached if one disregards the financial interests of the court personnel, which were particularly pronounced in the granting of privileges and stood in irresolvable tension to coherent decision-making processes. On this, see Schenk (2024e). The widespread unwillingness to deal with the economic foundations of pre-modern judicial practice has already been criticised from the perspective of legal scholarship by Falk (2000). With regard to the Imperial Aulic Council, this deficit is also noticeable in the broad field of micropolitics. As will be shown in the following, this has contributed significantly to the misinterpretations regarding the Council's procedural autonomy and judicial independence.

27 Duve (2014) 25.

28 This applies, for example, to Judson (2016). See the articles in Wendehorst (2015).

29 Criticism of this can be found in Schenk (2022b).

30 Rosenmüller (2019) 257 with regard to the Spanish judiciary in Mexico. The fact that early modern rule in Europe cannot be understood without knowledge of the underlying clientele and patronage relationships is emphasised by Rohrschneider (2014) 99–244 (using the example of the imperial diet); as well as in an overview by Emich (2020).

31 Emich (2005) 196.

recent studies on Austrian history. For example, it is not clear how the picture painted in German research of a functional and widely respected imperial judiciary can be reconciled with the formation of Austria as one of Europe's ›great powers‹. The Habsburg dominions outgrew the institutions of the Holy Roman Empire in the 18th century (at the latest), and Austrian politics frequently disregarded imperial law.[32] Until now, there has been an obvious lack of sensitivity towards the sources, along with a reluctance to recognise that the Imperial Aulic Council hardly fits into the insufficiently complex narrative of the rule of law that was conceived half a century ago on the basis of the Imperial Chamber Court records.

Statist premises should therefore be abandoned in favour of a glocalisation of the Imperial Aulic Council in the early modern *société des princes.*[33] To this end, first, the micropolitical interdependence between the Aulic Council's personnel and Viennese courtly society would have to be examined. Second, the latter should be conceived as an epistemic community whose »knowledge of normativity«[34] was characterised by the primacy of social stratification. Next, the councillors' »knowledge of production of normativity«[35] – with the help of which the councillors applied legal procedural rules and methodological doctrines in everyday court business – would have to be analysed. It may be assumed that there was a pronounced competition of norms[36] between courtly expectations of compromise and legal claims to rationality.

The global-historical points of reference for such a project are obvious. The geographical spread of collegiate court institutions increased considerably in the context of European expansion. As early as the 17th century, it ranged from the Swedish Court of Appeal in Stockholm to the Paris Parlement and the Audiencias of the Spanish crown in Latin America.[37] Today, collegiate courts exist on all continents and are analysed by legal scholars in a global context.[38] Why should early modern research not be able to do the same? And why should it not be possible in both Europe and the Americas to achieve increases in complexity in empirical work with pre-modern trial documents that would enable a dialogue across epochs?

Does critical justice research on the early modern period not face similar challenges to postcolonial historiography? The latter has been dealing with the interweaving of institutional practices and power relations for some time, and for these purposes developed approaches to reading archival materials that do not merely repeat the self-description of the record-forming organisation.[39] Does Heinrich von Kleist, quoted at the beginning of this article, not lead us to the realisation that the archives of the Imperial Chamber Court and the Imperial Aulic Council, in the past often used for writing an affirmative history of progress, represent the material artefact of a »usual formal practice« that reproduced social inequality even (and especially) when trial files and minutes *(Protokolle)* were silent about it?

In order to deal with such questions, we need innovative approaches to the trial files that have been made accessible to researchers in the course of a number of large-scale projects in recent decades.[40] These fascinating sources must not be consigned to the museum along with *Europäische Rechtsgeschichte*, as they are precisely the font of those empirical surprises that theory-sensitive legal history cannot do without.[41] The files and *Protokolle* of the Imperial Aulic Council, which amount to more than a kilometre of shelves in the Haus, Hof- und Staatsarchiv in Vienna, contain millions of surprises just waiting to be discovered. This does also, and especially, apply to the kind of legal history scholarship that seeks to overcome statist positions. In the context of such an endeavour, which is likely to meet with broad approval among

32 On this blind spot, see Kulenkampff (2005) 1–4; also Walther (2021) 190. Moreover, the formation of Austria as a great power went hand in hand with the genesis of a patriotism that did not relate to the Holy Roman Empire. See Fillafer (2020) 23–66.

33 Bély (1999).

34 Duve (2022a) 6: »Knowledge of normativity includes factual knowledge, consequential knowledge, of course also legal knowledge, practical knowledge, implicit or explicit knowledge etc.«

35 Duve (2021) 58–59.

36 On the concept of the competition of norms, see Karsten / Thiessen (eds.) (2015).

37 See Duve / Egío (2023) for an overview.

38 Comparisons between civil and common law courts have proven to be particularly interesting from an analytical point of view. See Cohen (2014); Häcker / Ernst (2020); Lübbe-Wolff (2023).

39 Chakrabarty (2002) 12–16.

40 See also Schenk (2024b).

41 Forst / Günther (2021) 10.

historians, it would be difficult for legal historians to avoid an external description[42] of *their own* normative regime. After all, how could insufficiently complex ideas about the evolution of *Juristenrecht* (law produced by legal experts) be overcome without a sociology of the production of law?[43] The correct and important criticism of the lacunae in the classic »histories of institutional juridical practice«[44] must lead to descriptions of the state, justice and legal knowledge that are more tolerant of ambiguity.[45]

The Imperial Aulic Council offers legal historians ideal starting conditions to prove that with the help of global and knowledge-historical theories, significant increases in complexity are actually possible in supposedly well-ordered fields of legal-historical research. The Council left behind an abundance of artefacts, not only in Vienna but also scattered across large parts of Central Europe, which can be used for an external description as long as one is prepared to be surprised by this early modern community of practice.[46]

This article is an invitation to confront these artefacts with new questions. In the following, I will first present some empirical observations on the creation of law at the Imperial Aulic Council that are diametrically opposed to the prevailing narrative of the rule of law in Germany. Based on these discrepancies, I will then, in a second step, discuss the selective use of sources and the corresponding underdetermined concept of practice in the existing research on the imperial central courts, before going on to present theory-sensitive perspectives on the production of law by a collegiate court in the early modern period. In particular, the focus will be on intersections between projects in the history of knowledge and historical organisational research based on a pragmatic combination of systems theory and practice theory.[47] And because theory and empiricism should inspire each other, in a third step I will link these perspectives with current developments in basic archival work and present the Imperial Aulic Council's various types of *Protokolle*, which we plan to make easily accessible to researchers as part of a Digital Humanities project currently in preparation. The *Protokolle* are particularly important for procedural studies as they record some of the key phases of the decision-making process that do not appear in the trial files. In order to adequately describe record keeping at the imperial court, however, we must first take a look at the community of practice that produced them.

II. Imperial Aulic Councillor Georg Christian von Knorr, Secretary of State Johann Christoph von Bartenstein and their Knowledge of the Production of Normativity

In the second half of the 1730s, the Republic of Genoa intervened with the Imperial Aulic Council as the supreme feudal court of the Holy Roman Empire[48] against plans by the Imperial Palace to cede Genoese imperial fiefs to the King of Sardinia in order to settle the Polish War of Succession.[49] The Imperial Aulic Councillor Georg Christian von Knorr (1691–1762),[50] who was appointed rapporteur in the proceedings, informed the Genoese envoy in advance of the evidence he required to be able to draw up a statement in support of the Genoese claims and then obtain a collegial opinion from the Council's plenum for submission to

42 See Kieserling (2004); Luhmann (2018) 347–368 on the self- and external description *(Selbst- und Fremdbeschreibung)* of social systems.

43 On this desideratum, see Boulanger (2019), (2020); see also the plea for a sociology of law »with even more law« in Schulz-Schaeffer (2004).

44 Duve (2021) 49.

45 Because if you banish grand narratives to the museum, you have to explain what is to succeed them. See also Hoffmann-Rehnitz et al. (2021) 41; Füssel (2021) 134–163 on perspectives on structures and processes in the history of knowledge. On the »return of the *longue durée*« in global history, see Conrad (2016) 148; see also Blackbourn (2023) XXV.

46 On »epistemic communities« and »communities of practice«, see Duve (2022a) 6.

47 I am building on the following articles: Schenk (2022a), (2022b), (2023b), (2024a); on the potential of systems theory for legal history, see the early work by Teubner (1989); Fögen (2002), (2003a), (2003b); Jansen (2019); on the connection between systems theory and regime theory, see Duve (2022a) 8.

48 See Schenk (2014) on the areas of activity of the Imperial Aulic Council under feudal law.

49 For a detailed account, see Schnettger (2006) 539–545.

50 Brief, partly incorrect biographical information in Gschliesser (1942) 405–406. For more details, see Schenk (2024a).

Emperor Charles VI *(Votum ad Imperatorem)*.[51] At the envoy's request, the imperial palace set up an informal deputation in which Knorr's report was edited under the direction of State Secretary Johann Christoph von Bartenstein (1689–1767)[52] before it was put to the vote in the Imperial Aulic Council, approved without amendment and noted by the secretary in the minutes of the meeting *(Resolutionsprotokolle)*.

These events contradicted the formal requirements for judicial proceedings contained in the Imperial Aulic Council's ordinances and the imperial electoral capitulation in every respect. The oral contacts between Knorr and the Genoese envoy, which directly influenced the presentation of the case in Knorr's statement, violated the Aulic Council's maxim that all communication had to be written as well as the rapporteur's duty to maintain secrecy vis-à-vis the parties.[53] The establishment of a deputation before the case was brought before the full session of the Imperial Aulic Council undermined the plenary principle and reduced the role of the adjudicating body to formalising an informal decision made elsewhere.[54] From the perspective of organisational sociology and procedural theory, the Imperial Aulic Council thus appears as a highly complex system of productive and representational practices of decision-making that constantly alternated between formal showcases and informal back stages.[55]

From an analytical point of view, the actors we encounter at the imperial court are no less interesting. Although the rapporteur Knorr had been a member of the Imperial Aulic Council since 1731, he was not a lawyer by training but a Lutheran theologian. In 1712, this highly talented son of a Swabian braidmaker completed his doctorate at the university of Jena with a dissertation on the origin of evil and eventually entered the service of Duke Ludwig Rudolf von Braunschweig-Wolfenbüttel (1671–1735), Charles VI's father-in-law, as a librarian. The duke sent Knorr to Vienna as a legation councillor in 1731, where the emperor immediately appointed him to the Imperial Aulic Council. He was soon acting as rapporteur in dozens of proceedings, including trials as important to imperial politics as the Mecklenburg estates conflict. Not only the representative of Hanover but also other parties visited Knorr's country estate close to Vienna because of his excellent contacts with the Empress.

Although an industrious autodidact who left behind a specialist library with more than 5200 volumes when he died,[56] Knorr received help in acquiring expert legal knowledge from his later father-in-law Bartenstein,[57] a doctor *utriusque iuris* who rose to become the *éminence grise* of Austrian foreign policy in the 1730s as recording secretary of the Privy Conference and state secretary of the Austrian Court Chancellery.[58] Bartenstein was convinced that the imperial palace needed the support of large imperial estates such as Electoral Hanover and Brandenburg-Prussia to diplomatically secure the Pragmatic Sanction. This house law *(Hausgesetz)* published by Charles VI in 1713 established the indivisibility and inseparability of the Habsburg hereditary kingdoms, provided for a uniform order of succession and formed the basis for the succession of Charles's daughter Maria Theresia to the throne in 1740. Looking back on the 1730s in 1762, Bartenstein wrote that he had done what had to be done to prevent the downfall of the House of Habsburg.[59]

The Imperial Aulic Council was not unaffected by the political arrangements of the teetering imperial house. In return for the support provided at the imperial diet, Berlin and Hanover (or rather, London)[60] expected concessions in various lawsuits against the two elector-kings Frederick William I (1688–1740) and George II (1683–1760)

51 On these collegial reports, see Schenk (2021).

52 On Bartenstein see Arneth (1871); Braubach (1953).

53 See Sellert (1973) 132–137 on the principle of written form; Schenk (2023b) 66–72 on the rapporteurs' duty of secrecy.

54 See Kirchheimer (1965) 22–24 on political justice in the modern age.

55 On the theoretical framework, see Luhmann (1995); Tacke / Drepper (2018); Stollberg-Rilinger / Krischer (eds.) (2010); Emich (2011).

56 See the three-volume auction catalogue: Anonymous (1762). On Knorr's bibliophilia, see also the letter from Friedrich Heinrich von Seckendorff to Johann Christoph Gottsched dated 30 October 1749 in Döring / Rudersdorf (eds.) (2021) 56.

57 After converting to Catholicism, Knorr married Bartenstein's stepdaughter in 1738. See Braubach (1939) 52.

58 On the history of the chancellery, see Göbl / Hochedlinger (2019).

59 Arneth (1871) 123.

60 Since 1714, the Electorate of Brunswick-Lüneburg and the Kingdom of Great Britain had been linked in personal union. See the articles in Asch (ed.) (2014).

pending in Vienna. *De facto*, this amounted to discreetly delaying proceedings and coercing weaker parties into forced settlements.[61] For this, Bartenstein needed ambiguity-tolerant followers like Knorr in the Imperial Aulic Council (of which he himself was not a member), who as rapporteurs were prepared to steer trials in the politically desired direction.

Among the members of the Imperial Aulic Council, these practices led to heated debates, in which pragmatic »statesmen« sidelined juristic »pedants«, though this is not apparent from the *Resolutionsprotokolle*. However, in 1740, after the death of Charles VI, Imperial Aulic Councillor Johann Christoph Burkhardt von der Klee (1697–1761) dared to inform the Elector of Mainz in an anonymous report[62] that, in many proceedings, the role of the supreme imperial court had been reduced to that of an acclamation body, merely giving *post hoc* validation to decisions already taken by informal deputations. However, during the weak Wittelsbach empire of Charles VII (1742–1745), the judicial reform that this whistleblower hoped for was out of the question.

In the second half of the 1740s, observers as diverse as the Göttingen public lawyer Johann Stephan Pütter (1725–1807) and the Prussian king Frederick II (1712–1786) still counted Knorr among the most important Imperial Aulic Councillors.[63] The meteoric rise of this excellent networker from humble beginnings to influential player on the imperial stage occurred at the same time as the erosion of formalised official channels; contemporaries opined that the court presidents no longer had any influence whatsoever at the imperial court.[64] In 1789, Friedrich Karl von Moser (1723–1798), who himself served on the Imperial Aulic Council from 1767 to 1770 and contributed a number of important works to *Reichspublizistik* (the Holy Roman Empire's public law scholarship), publicly ridiculed the former Council President Ferdinand von Harrach (1708–1778; in office 1751–1778) as a yes-man.[65] In Vienna, according to Moser, the court played with the blindfold of Lady Justice like the wind with a weather vane.[66]

The practices to which Moser was alluding are illustrated by a fiscal trial that took place in the 1770s concerning the estates of the counts of Schönburg in Saxony.[67] As part of a deputation investigating the case chaired by the imperial vice-chancellor, the president of the Imperial Aulic Council, various hand-picked Imperial Aulic Councillors and representatives of the Austrian Court Chancellery already agreed on the decision that was then to be taken by the Imperial Aulic Council in plenum. All members of the deputation scrupulously concealed the political background to the trial in the Imperial Aulic Council's documents. Even adherence to the usual procedural deadlines was discussed and arranged in advance in order to avoid the case appearing as a suspicious rush job. Bartenstein's son Joseph, who had joined the Imperial Aulic Council in 1750, was involved in all of this. In his career, he served as rapporteur in countless trials and rose to become the Council's vice-president in 1792.

III. A plea for historical organisation studies from the perspectives of global history and the history of knowledge

The deputations that dealt with cases before they reached the Imperial Aulic Council plenum, their membership and their influence on various trials, have hardly received scholarly attention so far; in fact, they barely feature in the literature on

61 See, for example, the case study of the *Ritterschaften* (noble corporations) of the Duchy of Magdeburg and the Principality of Halberstadt in Schenk (2013); for the relations between Austria and Prussia, see also Schenk (2020a).

62 The report, which I plan to edit, can be found in: Österreichisches Staatsarchiv, Abteilung Haus-, Hof- und Staatsarchiv (hereinafter: ÖStA HHStA), MEA, Reichshofrat, K. 10a, No. 1.

63 In retrospect in his autobiography: Pütter (1798) 158. Frederick II wrote in 1746: »Sous Bartenstein travaillaient deux hommes plus obscurs que lui encore, l'un se nommait Knorr et l'autre Weber, ce triumvirat gouverna l'état.« Quoted from: Frédéric II. (1879) [1746] 164.

64 Both the Prussian envoy Maximilian von Fürst and the Imperial Aulic Councillor Heinrich Christian von Senckenberg independently attested to the lack of authority of the Imperial Aulic Council's president. See Fürst's report in Ranke (1875) 15; Senckenberg's expert report of 1766 in: ÖStA HHStA, RK, Verfassungsakten, RHR, K. 19, fol. 678–686.

65 Moser (1789) 369–370.

66 Mohl (1846) 375.

67 Kordel (2021) 61–63.

the Aulic Council. Monographs and more general surveys on the 18th-century Council published within the last two decades argue that it was characterised by »strict impartiality«[68] because the imperial palace endeavoured »to achieve settlements based on justice, rather than on politics«.[69] The *Vota ad Imperatorem* are regarded as an indication of »how thoroughly the Aulic Council discussed its draft decisions«,[70] while the fact that the emperors hardly ever contradicted the legal opinion presented to them is seen as evidence of the high esteem in which the Aulic Council's legal expertise was held at the imperial court.[71]

These views are all the more remarkable given that there is no shortage of references to the existence of the deputations in the sources. Their history goes back at least as far as the 17th century,[72] but their existence was far from uncontroversial. Around 1740, the *Reichspublizist* Johann Jacob Moser (1701–1785) wrote an expert opinion (which has been available in a modern edition since 1973) in which he explicitly stated that in recent years, the Imperial Aulic Council had in »almost all important matters« had to approve the decisions of informal circles in which representatives of the Austrian Court Chancellery set the tone.[73] The imperial estates took up the issue and in 1742 wrote an explicit ban on deputations into Charles VII's electoral capitulation.[74] Contemporary legal literature also repeatedly emphasised that in politically sensitive matters, the Imperial Aulic Council was sometimes only consulted »pro forma«[75] by the imperial palace. Occasionally, this was even done with explicit reference to the proceedings concerned and by naming the ›grey eminences‹ in the background.[76]

Given the availability of printed primary source material (including modern critical editions on these issues), it is difficult to avoid the conclusion that many researchers have avoided a consistent examination of the empirical evidence that would have called into question the traditional image of the Imperial Chamber Court and the Imperial Aulic Council as representing a German tradition of the rule of law. Even the large-scale archival cataloguing projects, which represent a significant legal historical contribution to the study of the Holy Roman Empire, could not act as a corrective in *this* respect, as their conceptualisation uncritically transferred the understanding of judicial decision-making as intellectualised, anonymous and disembodied that is part of the self-description of the modern legal system (at least in the area of civil law)[77] to historical analysis.

The archival cataloguing projects for the files of both the Imperial Chamber Court and the Imperial Aulic Council have so far focused exclusively on the trial records. While these are of great value to historians due to the evidence they contain (charters, inventories, maps, plans, etc.), reading them without taking into account the context of the files does not enable us to conduct procedural analyses of early modern trials. As already Anselm von Feuerbach (1775–1833) pointed out, trial records are »acts of the court, but they show nothing more than – themselves. How they came into being, what lies behind them, what preceded them, what happened or did not happen in the background when they were made: no more of this appears in them than they themselves thought it good to report. The actual action of the court has passed unobserved; what remains is a mere result, from which it is far from certain that the manner in which it acted can be inferred.«[78]

In contrast to Feuerbach, today's researchers are often insufficiently aware of the fact that the

68 Whaley (2012), vol. 2, 63.
69 Whaley (2012), vol. 2, 65. Westphal (2002) 442–443; Westphal (2005) 251; Erwin (2009) 200; Schnettger (2020) 218–219 also speak of a comparatively high degree of decision-making autonomy on the part of the Imperial Aulic Council, with varying degrees of nuance.
70 Sellert (2018) 91.
71 Petry (2011) 40.
72 Evidence in Schenk (2022a) 104.
73 Sellert (1973) 420.
74 Burgdorf (2015) 448.
75 Mohl (1789) 319; see also Buders (1751) 241; Selchow (1778) 289–290; Zang (1790) 126–127; Senckenberg (1799) 25–26.
76 For example, Gaspari (1790) 204 with regard to the drawing up of a *Votum ad Imperatorem* in the dispute over the expulsion of the Salzburg Protestants (1732).
77 For comparisons with self-descriptions of judiciaries in common-law systems, see Lepsius (2016); Häcker / Ernst (eds.) (2020).
78 Feuerbach (1821) 100.

creation of court records not only served to produce decisions, but also to present them.[79] This is because there is a lack not only of a reflective concept of practice but also of basic research on filing practices *(Aktenkunde)* that would provide a methodological basis for dealing with the case files of the Imperial Chamber Court and the Imperial Aulic Council.[80] As a result, historians who rely solely on the trial records not only ignore the informal, backstage interactions underlying the courts' work, but even disregard important phases of its formal proceedings that are recorded only in the *Protokolle*, not in the files. In view of all this, it is not surprising that numerous legal-historical works on »court practice« have hardly progressed beyond the uncritical reproduction of the courts' own narratives of its cases.

Nor would more than a self-description emerge when applying such a traditional approach to the files of those Imperial Aulic Council proceedings whose outcome, as we know from other sources, was more or less decided in advance by an informal deputation. Even for cases that led to bitter disputes not only within the Imperial Aulic Council but also at the imperial diet, which contributed significantly to the erosion of trust in the imperial judiciary,[81] research of this kind is barely able to penetrate the façades of rationality and consensus that the Aulic Council constructed with the help of its files and *Protokolle*. This state of affairs is highly unsatisfactory not only from the perspective of historical research but also for legal scholars. It means that at present, amidst tens of thousands of files, it is almost impossible to determine whether or not a trial was conducted according to the authoritative contemporary standards. The related auxiliary disciplines (esp. the *Aktenkunde*) are insufficiently developed, and the concept of practice too impractical for judicial decision-making to be observed at the micro level with the precision that would be necessary to deconstruct grand narratives.

Calling for more theory in this situation is therefore by no means aimed at abandoning supposedly proven legal-historical approaches in favour of postmodern arbitrariness. Rather, legal historians must first develop methods for empirical work in order to be able to dissect early modern trial documents *lege artis*. Simply put, we currently lack the »tools to understand what was happening, often behind the scenes«.[82] As a historian, one wishes for more, not less, legal expertise in the interdisciplinary analysis of judicial decisions. This wish, however, is linked to the expectation that this expertise will incorporate into its analyses the emergence and exploitation of legal knowledge that the self-description of jurisprudence rendered invisible.[83]

What a concept of practice would have to achieve can be illustrated using the example of the deputations. Their activities blatantly violated the Imperial Aulic Council regulations and the imperial electoral capitulation, but they were not intended to replace legal with political communication. Rather, deputations enabled the imperial palace to reduce contingency in advance of the deliberations in the plenary session of the Council and to discreetly assert political expectations of compromise. The deputations' members carrying out this work of mediating between the palace and the adjudicating body were drawn from various institutions of the imperial court and linked by ties of friendship and family relationships. All had some degree of legal literacy – either expert legal knowledge, or legal literacy acquired autodidactically or on-the-job.[84]

The transfer of the decision-making process from the Imperial Aulic Council's plenum to a deputation thus did not in any way diminished the importance of legal knowledge. However, it did

79 However, on symbolic information processing, see Krischer (2010) 55; Krischer (2017) 73. Falk (2023) deconstructs rationality myths with a view to the written procedure for sending files to law faculties.

80 Vismann (2011) 27 already emphasised that legal scholarship has not developed a systematic methodology for the analysis of court records beyond the rules of evidence. Schenk (2023c) discusses this in detail with regard to early modern collegiate courts.

81 In his expert opinion written in 1740, Imperial Aulic Councillor Burkhardt reports that in the preceding years, imperial estates had attempted to defend themselves against arbitrary decisions of deputations by appealing to the imperial diet (see note 62). The links between the deputations and appeals *(Rekurse)* to the imperial diet were also established by Zang (1790) 126–127. In general, the appeals remain insufficiently researched. See in particular Härter (1993); Sydow (2003).

82 Duve / Herzog (2024) 14.

83 From the perspective of legal philosophy, an insightful account is provided by Somek (2006); regarding lawyers, see also Pistor (2023).

84 On the concept of legal literacy, see Korpiola (ed.) (2019).

place this knowledge in a context saturated with power, in which the lead responsibility no longer lay with the Aulic Council but with lawyers from the Austrian Court Chancellery or the State Chancellery.[85] Against the background of the processes of differentiation between the political and legal sphere that had already begun, courtly power could not suddenly inscribe itself into the *Verfahrensgeschichte* (›process narrative‹)[86] constructed in files and *Protokolle*. It needed a medium for this, and this medium was the ›reporting technique‹ *(Relationstechnik)*[87] of hand-picked rapporteurs, who also linked the adjudicating body and the deputation in terms of personnel. In such proceedings, the plenum of the Imperial Aulic Council, under pressure to agree with the decision previously made, did not serve as a deliberative but rather as a formalising body. This concealed dissent behind the façade of *Protokolle* that only recorded the outcome, and produced collegial decisions that could be presented to the emperor for signature without fear of arousing imperial displeasure, because the palace's interests were already reflected in their contents as a result of the court officials' participation in the deputations.

When analysing these subtle mechanisms of translation, formalisation and invisibilisation,[88] it is not productive to see them as pathologies: we are not dealing with individual dispositions but with epoch-specific practices that were reproduced over a period of around 200 years. Only a concept of practice that views formal and informal structures as complementary components of one and the same social system can usefully produce insights here. Such a concept is offered by organisational sociology, which is aware that the formalisation of behavioural expectations necessarily goes hand in hand with »usable illegality«[89] and the »organization of hypocrisy«.[90] Otherwise, organisations would hardly be able to meet the contradictory demands with which they are confronted. After all, doing everything ›by the book‹ is known not as a recipe for success in the trials of everyday life but rather as a method of obstruction.[91]

Since the law aims to be formal,[92] the analysis of informal structures in studies of court practice has a particularly productive potential for disrupting common assumptions regarding the rule of law.[93] Sociologically informed organisational research is currently being tried in many areas[94] and has already found its way into research on the Holy Roman Empire's central courts.[95] And it is precisely the Imperial Aulic Council which represents an ideal object of study for this form of research, because it strikingly demonstrates the absurdity of classical modernity's insufficiently complex narratives of progress. Since 1495, the Holy Roman Empire had had a central court of justice – the Imperial Chamber Court – which was geographically separate from the imperial court and had highly formalised procedural law and professionalised assessors.[96] However, the Imperial Aulic Council, which was tied to the imperial court, attracted more and more cases from the end of the 16th century onwards, until its caseload finally exceeded that of the Imperial Chamber Court after

85 The State Chancellery emerged from the foreign policy department of the Austrian Court Chancellery in 1742. See Hochedlinger (2019).

86 *Verfahrensgeschichte* is a term coined by Niklas Luhman to describe the narrative developed in the course of a court case, which also legitimises its outcome. See Luhmann (2019) 43–46.

87 The early modern literature providing advice for judges on how to handle files also offers material for innovative studies in the history of knowledge. Until the 19th century, the object was referred to as *Referierkunst* (›the art of reporting‹). For example in Klüber (1808). On the widespread genre of early modern how-to books on all manner of *artes*, see Daston (2023) 55, 51: »True science attained demonstrative certainty; an art achieved at least regularity in most cases; a mere craft was haphazard.«; »To formalize craft knowledge into rules was to give it voice and dignity but not remove it from the workshop.«

88 Of course, these mechanisms occasionally failed. In the 1690s, for example, the awarding of the ninth electoral dignity to Brunswick-Lüneburg led to serious friction between the Imperial Aulic Council and Emperor Leopold I. See now Kampmann (2023). However, such events are particularly noteworthy because they did *not* represent the usual situation, which was clearly characterised by (formal) consensus.

89 Luhmann (1995) 304–314.

90 Brunsson (2011).

91 Daston (2023) 33.

92 Fish (2011).

93 Collin (2022) 332.

94 See Emich (2010); Neumann (2020), (2021); Jakobs (2021); Neumann et al. (2025).

95 Schwarting (2020a); see the detailed discussion by Collin (2022); see also Schwarting (2020b).

96 Edition of the *Reichskammergerichtsordnung* (Imperial Chamber Court Ordinance) of 1555 in Laufs (1976); cf. Dick (1981). Jahns (2003/2011) provides a fundamental overview of the assessors.

1648.[97] In contrast to the Imperial Chamber Court, the Aulic Council made do with »procedural snippets«[98] instead of a fully developed procedural law. Its body of judges, divided between a bench of noblemen and a bench of scholars in a manner typical of the time, became increasingly aristocratic due to the appointment of nobles from Austria and Bohemia.[99] Thus, although qualified jurists and ›legal literates‹ sat on both benches of the Aulic Council at all times during its existence, the average Imperial Aulic Councillor in 1730 had a lower degree of professionalisation than the average assessor of the Imperial Chamber Court in 1530.

This highly ambiguous development points to Luhmann's insight that the differentiation of the modern legal system was by no means straightforward but rather characterised by the regression of structures whose imposition on influential elites had turned out to be too risky for the as yet little developed state.[100] The shift in emphasis from the Imperial Chamber Court to the Imperial Aulic Council, already noted by contemporaries, was one such regression that made the manifold encroachments on the elite's privileges by the increasing functional differentiation and organised jurisdiction bearable for a society still characterised by the primacy of stratification.

The consensus community[101] of the Holy Roman Empire, primarily formed of the emperor and princes, reproduced itself as a »culture of presence«.[102] The creation of normativity thus required not only legal expertise but also communication amongst the nobility (e. g. at imperial diets) to be carried into all corners of the Empire.[103] As the seat of the ruler and the hub of a network of envoys (which intensified after 1648), Vienna proved very attractive to numerous noble families and thus offered a much more favourable infrastructure for such communication processes than the Imperial Chamber Court in Speyer or Wetzlar.[104] At the imperial court, where nearly all the major imperial estates were represented in one form or another, expectations of compromise – typical of legal communication in interaction systems[105] – could be discreetly realised. The Holy Roman Empire lacked the means of power to push through independent judicial decisions reached entirely within the constraints of formal court procedure against the major estates' opposition.[106]

Until now, research has hardly dealt with the fact that in the 18th century, the pioneering role in the differentiation of law passed from the imperial level to the ›fiscal military states‹[107] of Prussia and Austria. These states initiated reforms of their judicial systems based on their ability to enforce their elites' compliance. At the same time, they used sustained criticism of corruption to put pressure on the micropolitical entanglements between elite society and judges that had characterised judicial decision-making for centuries.[108] This path remained closed to the Holy Roman Empire which, in Hegel's much-quoted phrase, was a »state in thought« *(Gedankenstaat)* and not a state in reality.[109] Thus the Josephinian reform of imperial justice, which had been modelled on the Prussian system in many respects, came to a standstill in the

97 Quantifying information on the volume of business can be found in Schenk (2022a) 84–91.

98 Sellert (1995) 830. Sellert (1973) is seminal reading regarding the procedural law of the Imperial Aulic Council. The ordinances of the Imperial Aulic Council were edited by Sellert (1980/1990); an edition of the *Gemeine Bescheide* (General notices) is provided by Oestmann (2017).

99 On this, see Schenk (2023b) 50–66, with additional sources and references.

100 Luhmann (2015a) 27.

101 On the research concept of consensual rule in the pre-modern era, see Schneidmüller (2000).

102 Stollberg-Rilinger (2015) 4.

103 The integrative achievements of the Diet of Regensburg for the Holy Roman Empire also consisted less in the production of binding political decisions than in the provision of information and communication services. See Friedrich (2007).

104 Reference should be made to the excellent theoretical and empirical studies by Pečar (2003) and Hengerer (2004).

105 Luhmann (2015b) 71.

106 Luhmann (2008) 172.

107 On the concept of the fiscal military state Storrs (ed.) (2009); Godsey / Mata (eds.) (2022).

108 Schenk (2020b) 200–220; Schenk (2023a). In the *longue durée*, connections between these reforms and the bourgeoisification of court personnel and a fundamental change in patronage cultures become visible. See Straubel (2010); Bernsee (2017); Engels (2014) for an introduction to historical corruption research; and Rosenmüller (2019) with regard to the early modern judiciary. Some reflections on the comparison of Latin America and the Holy Roman Empire are found in Schenk (2020c).

109 Hegel (2004) [1801] 37.

1760s and 1770s.[110] At the operational level of the judicial production of law, the increasing differentiation of law as a system reproducing itself through communication[111] thus corresponded less and less with formal structural links between the judiciary and politics that could have taken this differentiation into account.

The omnipresent reference to the juridification *(Verrechtlichung)* of political-social conflicts in the Holy Roman Empire,[112] together with an understanding of negotiation processes that ignores the sociological scholarship on their societal costs,[113] has obscured historians' view of the conflicts of norms arising from the renunciation of authoritative conflict resolution. This is all the more striking as these were absolutely evident to contemporaries, particularly in the context of the enlightened 18th-century zeitgeist's striving for disambiguation.[114] In order to accommodate political expectations that contradicted the – already highly developed – representational constraints of judicial procedure, the imperial central courts, dependent as they were on the consent of the major imperial estates, responded by informalising court practice.[115] This phenomenon has so far escaped legal historians' attention because the latter have limited themselves to anachronistic terms such as *Machtspruch* (sovereign intervention) or *Kabinettsjustiz* (›cabinet justice‹) to frame political interventions in the legal system.[116] Not finding evidence of either in the trial records, they conclude that the Imperial Aulic Council had a high degree of autonomy.[117] This approach is based on an intellectualised understanding of practice in which the Imperial Aulic Councillors themselves do not appear at all. Researchers who followed this understanding thus also deemed it unnecessary to deal with the councillors' private correspondence, in which, however, one can find talk of the Council producing »ius incertum«[118] and following the unspoken expectation of the imperial palace to conduct proceedings »in dubio semper pro domino« as late as the 1790s.

The practices with which this *ius incertum* was created were legal practices and therefore require legal-historical analysis. Whether in Vienna, Wetzlar or Mexico City: »political, economic, and social circumstances cannot simply be seen as ›external‹ influences. They need to be integrated into a legal historical analysis and analysed as part of the knowledge of normativity people had at their disposal when they were producing law.«[119] Where the failure of positivist concepts of the past, burdened with the task of legitimising a narrative of progress, is so apparent, research on judicial decision-making for the 21st century should be conducted with the help of approaches from the history of knowledge, not least to show that the jurists' willingness to deconstruct grand narratives does not spare their own normative regime.

As emphasised above, research on the Imperial Aulic Councillors' knowledge of the production of normativity would have to describe juridical practice as a courtly practice. At the same time Viennese court society should be conceptualised as an epistemic community through which expectations for compromise found their way into the Council's proceedings. This was even – or rather, especially – the case when these expectations ran counter to the judicial system's claims to rationality. From this perspective, the councillors no longer appear as standard-bearers of modernisation but as holders of expert knowledge that linked the legal system and its courtly context and was anchored in the »jurisdictional culture of a profoundly corporative society«.[120]

110 See Aretin (1997); Denzler (2016).
111 See most recently Jansen (2019).
112 See also the criticism of the concept of juridification in Duve (2021) 54.
113 Traditionally, large parts of German-language research tend to favour arbitration over judgement as a positive instrument of conflict regulation because the former aims for consensus. There is rarely a serious discussion of the social costs associated with the renunciation of authoritative state decisions. Insightful reflections on this can be found in Kamp (2016) 151.
114 Thiessen (2021) 321–364.
115 This applies not only to the Imperial Aulic Council but also to the Imperial Chamber Court, as illustrated by the growing importance of so-called extrajudicial proceedings *(Extrajudizialverfahren)*, which as yet remain largely unexplored. See Stodolkowitz (2023).
116 See already Willoweit (2016) 177–178 for insicisve criticism.
117 There is even talk of »independence« with regard to the period around 1800 in Erwin (2009) 201.
118 This and the following quote come from the private correspondence of the Imperial Aulic Councillor Count Friedrich Ludwig Christian zu Solms-Laubach. Quoted from Prössler (1957) 25, 29–30.
119 Duve (2024) 70.
120 Duve (2012) 13.

For research approaches that actually seek to link theory and empiricism, the Imperial Aulic Council boasts a wealth of sources by no means limited to the official procedural history kept in the Haus-, Hof- und Staatsarchiv in Vienna. Due to the high proportion of imperial estates among those bringing cases before the Aulic Council as well as its location at the hub of a European network of envoys, material artefacts relating to trials before the Aulic Council can be found in countless archives across Europe.[121] In addition, several state and aristocratic archives in Germany and Austria hold papers of former Imperial Aulic Councillors still awaiting scholarly attention, although already 19th-century historians pointed out the »very remarkable«[122] correspondence they contain. The latter deals precisely with the translation processes that are of interest to the international legal-historical theory discussion today. While elsewhere the analysis of »normative practices of (behind) juridical practice«[123] is confronted with sometimes considerable source problems,[124] with regard to the Imperial Aulic Council scholars could draw on the full range of material to reach the microlevel of decision-making that must be explored in order to deconstruct the grand narrative.[125]

Of course, this can only succeed on the condition that the material artefacts of informal communication are not played off against the legal communication in the files and *Protokolle*. In order to make intertextualities and translation processes between different normative regimes describable, a sociology of legal knowledge production must understand informality and formality as complementary phenomena. Under the umbrella of interdisciplinary judicial research, it therefore makes sense to combine impulses from the history of knowledge with the methodological rigour of organisational research based on systems theory, which never loses sight of the operational structures of the court organisation that reproduces itself through decisions.

But what does this mean in concrete terms? In the previous section, we have already familiarised ourselves with deputations as »relatively stable historical arrangements in which the translation of knowledge of normativity«[126] took place. These circles formed an »epistemic setting«[127] that could be activated *ad hoc* by the imperial palace, as they were based on the linking of formal and informal structures that were already in place. The Imperial Aulic Council cannot be fully understood as an organised social system if the deputations' role in its translation of normative knowledge is not taken into account. This applies in particular to the *ex ante* logic that emerged from the construction of facts by rapporteurs prior to the deliberation in the adjudicating body and which characterises collegial decision-making in civil law systems to this day.[128] Countless examples could be used to demonstrate that in early modern collegiate courts, the most conflict-laden translation processes between different normative regimes had been completed long before the deliberation in the adjudicating body. It was the rapporteurs' reporting technique *(Relationstechnik)* that produced these translations; their artefacts should therefore be at the centre of any knowledge-historical examination of the normative regime of modern judicial practice.

Around 10 000 to 12 000 of these reports *(Relationen)* have been preserved in the Haus-, Hof- und Staatsarchiv in Vienna.[129] In addition, there are several thousand *Vota ad Imperatorem*, the collegial decisions taken by the Council on the

121 Schenk (2024a) provides detailed information on this.

122 For instance, with regard to the archive of Johann Wilhelm von Wurmbrand-Stuppach in Steyersberg (Lower Austria), see Zwiedineck-Südenhorst (1895) 287. Zwiedineck-Südenhorst (1896) documents the richness of the records there. Numerous other examples could be cited. The pioneering study by Rast (2014), dedicated to a vice-president of the Imperial Aulic Council, illustrates the potential yield of such research.

123 Duve (2017) 94.

124 Most recently Martus / Spoerhase (2023) 28 from a general praxeological perspective; and Decock (2021) 17 with regard to judicial research. With regard to the councillors of the *relação* of Bahia in the 17th and 18th centuries, see Schwartz (1973) XIX: »Five years of searching failed to uncover any personal papers or private correspondence of the magistrates.«

125 Duve (2017) 93 on the importance of the microlevel.

126 Duve (2022b) 6.

127 In the sense of the »structure of conditions within which a specific person or office could ›know something‹«. See Brendecke (2016) 7.

128 For a comparison with the *ex post* deliberations of common law, see Cohen (2014); see also the contributions by legal practitioners in Häcker / Ernst (eds.) (2020).

129 Ortlieb (2023) 351–353.

basis of the rapporteurs' *Relationen*.[130] Remarkably, legal scholars have hardly dealt with these sources to date. There is no monograph on the *Relationen*,[131] while the first and only legal-historical study on the *Vota ad Imperatorem* is almost 50 years old.[132] Regarding procedures, (legal) historians have therefore hardly progressed beyond the level of the literature of the time.[133] But anyone who, following Eugen Ehrlich, wishes to describe courts as both state *and* social institutions[134] can no longer avoid the reporting techniques that formed what we might call the ›operating system‹ of these institutions.

Adopting approaches from the history of knowledge for the study of the Imperial Aulic Council might lead some legal historians to worry that the specialist *proprium* of jurisprudence is lost sight of. Such projects working on the *Relationen* and *Vota*, however, would provide the opportunity to disprove these fears and, through a sociology of early modern legal reporting techniques, would enable us to make visible those translations of normative knowledge that were inscribed in collegial judicial decision-making. The digitisation of the minutes of the Imperial Aulic Council, which is currently being planned, would create the necessary archival infrastructure for such a reinterpretation.

IV. Records in Context: The *Protokolle* of the Imperial Aulic Council as a starting point for procedural analyses of knowledge of the production of normativity

The Viennese Haus-, Hof- und Staatsarchiv's »Reichshofrat« holdings not only include tens of thousands of procedural files but also a wealth of minutes. The full texts of the latter are to be made available to researchers online as part of a German-Austrian Digital Humanities project. This would comprise 197 volumes of *Exhibitenprotokolle* (books recording the submissions received by the Imperial Aulic Council; total period covered: 1579–1806), 13 volumes of *Referentenprotokolle* (documenting the internal distribution of cases, ca. 1690–1806) and 688 volumes of *Resolutionsprotokolle* (minutes recording the results of the Council's plenary sessions, 1544–1805). Making these sources easily accessible will provide ›big data‹ for innovative research questions also beyond the fields of history and law. For example, linguistics researchers could use it to analyse the influences of the Imperial Aulic Council's written records, disseminated via the printed works of *Reichspublizistik*, on the development of Standard High German over a period of around 250 years.[135]

The *Protokolle* are also indispensable for an external description of knowledge of the production of normativity, because they functioned as formalising instances of the trial narrative, the *Verfahrensgeschichte*. Epistemic settings such as the deputations did not negate these instances, but rather made use of their »strict order«[136] in order to conceal the micropolitical ›contamination‹ of the production of the Council's judgements. Formality therefore also unfolded its power in the social spaces of negotiations in advance of the plenary adjudication. The deputations were the sites of highly ambiguous translation processes between different normative regimes, which then found their way into the *Resolutionsprotokolle* via the rapporteurs. As a social practice, early modern legal reasoning took the form of »semi-official business« that required minutes in order to make decisions recognisable as such and to differentiate judicial proceedings from its courtly environment – the imperial palace, characterised by oral, face-to-face communication, of which the Imperial Aulic Councillors were also part.[137] The formalisation processes that could be observed everywhere in the early modern judiciary and administration did not

130 See Schenk (2021) 252–254.
131 Ranieri (2009) provides at least a formal overview; for an analysis of *Relationen* from the perspective of interdisciplinary judicial history, see Schenk (2023b).
132 Leyers (1976).
133 See the contemporary collections of *Vota ad Imperatorem* in Moser (1752–1769); Bergsträsser (1792–1795).
134 Ehrlich (2022) [1913] 149.
135 See Burgdorf (2023); also Braun (ed.) (2011); Schenk (2024c).
136 This and the following quote: Kafka (2019) [1926] 85.
137 Schlögl (2014) 263–278 is fundamental in this regard. With good reason, systems theory does not assign personnel to the organisation itself but to its environment: Luhmann (1995) 25.

cause communication between patrons and clients to dry up, but rather led to its migration into informal contact systems.[138]

In order to open up historical organisational research to impulses from the history of knowledge, it is therefore necessary to consistently relate the *Protokolle* to the relevant trial files. This would enable us to develop a procedural understanding of the formal organisation of the Council's trials, which can then be applied to the interpretation of the material artefacts of process-related informal communication. The judicial knowledge of the production of normativity cannot be analysed by observing only some practices; it requires a sustained examination of those decisions through which the court reproduced itself as a social system. From this theoretical premise follows the necessity of the empirical work to adopt the approach of »records in context«.[139] The particularly favourable archival starting conditions enable this context to be made visible for the decisions of the Imperial Aulic Council. In the following, I will briefly outline the associated perspectives.[140]

The narrative of a *Verfahrensgeschichte* began with the entry of a written pleading in the so-called *Exhibitenprotokoll*, as there were no oral hearings in the proceedings of the Imperial Aulic Council. *Quod non est in actis non est in mundo:* anything not contained in the *Exhibitenprotokoll* did not find its way into the file and was therefore not recognised. The volumes of *Exhibitenprotokolle* therefore form the basis for the kind of trial statistics currently being increasingly called for in international research.[141] Taken individually, the volumes provide information on the status, gender, denomination and regional origin of the users of the justice system. In the context of procedural approaches to the collegial judicial production of law, however, the volumes unfold their true potential only in combination with the *Referentenprotokolle* and the *Resolutionsprotokolle*.

With the help of an AI-supported analysis of the data contained in the three types of *Protokolle*, it would be possible to reveal the »time regime« of the Imperial Aulic Council, which was of decisive importance for *de facto* access or non-access to the law. A direct comparison of the *Exhibitenprotokoll* and the minutes of the plenary sessions *(Resolutionsprotokolle)* would not only reveal striking connections between the procedural time regime and the persons involved on both the parties' and the judges' side. The link between the socio-economic status of the parties and the chances of a case being dealt with quickly (or at all) would also no longer remain hidden. These point to a commodification of the law that has so far been rather nonchalantly disregarded by large parts of legal-historical research.[142] To quote Kafka: »Before the law stands a door-keeper. A man from the country comes to this door-keeper and asks for entry into the law. But the door-keeper says he cannot grant him entry now.«[143] The *Exhibitenprotokolle* tell us about these women and men from the countryside who knocked on the door but never gained entry to the law and thus not into the *Resolutionsprotokolle*.

At 13 volumes, the *Referentenprotokolle*, which were the procedural step immediately following on from the *Exhibitenprotokolle*, are by far the smallest series. Nevertheless, they are of central importance for studies on the knowledge of the production of normativity. As in most other early modern central courts, the Imperial Aulic Council combined the *ex ante* logic of collegial decision-making in civil law with an *ad hoc* allocation of business by the president that was hardly restricted by normative provisions. This monocratic prerogative was all the more important as there was no provision for circulating cases among all the members of the Aulic Council. In addition, in most cases only one rapporteur was appointed,[144] with the result that generally only he had knowledge of the file.

On the basis of the *Referentenprotokolle* – which have hitherto received curiously little attention from legal historians – it is possible to reconstruct the case allocation practice for nearly the entire 18th century at an institution which almost lacked

138 See Strunz (2022) 215–217 on the example of the Prussian administration; also the remarks in Meier (2004), which aim to link systems theory and archival studies.

139 On this new standard of archival description, see Wildi (2023).

140 Schenk (2024a) provides detailed information on the following.

141 Vermeesch (2021) 32; Baumann (2021) 214.

142 For incisive criticism of this, using the example of law faculties, see Falk (2006).

143 Kafka (2015) [1925] 170.

144 A random sample showed that in 77 % of all proceedings received in 1730, no co-rapporteur *(Korreferent)* was appointed. See Schenk (2024a).

any formal procedure for this.[145] For almost all cases, the *Referentenprotokolle* show which councillor was appointed as rapporteur and what subsequent changes in personnel may have occurred in the course of the proceedings. These documents are precisely the material artefacts of the production of law that projects in the history of knowledge require in order to overcome the anonymisation and disembodiment of collegial decision-making in favour of the actor-centred approaches that are essential for an external description. The functioning of the deputations described above makes it clear that the practice of allocating cases can only be understood if framed as a courtly practice. If the imperial palace showed an interest in a trial, the president appointed a rapporteur from among the deputised councillors and reached agreement with the lawyers of the Austrian Court Chancellery or the State Chancellery on the content of the rapporteur's report *(Relation)* before the case was presented to the Aulic Council's plenum for decision. Since Germanophone research working with early modern trial documents has so far hardly gone beyond positivist approaches and, moreover, has traditionally neglected the problems associated with the judicial construction of facts *(Sachverhaltskonstruktion)* raised by the sociology of knowledge in favour of legal source theory,[146] such judicial practices have so far eluded observation.

This shortcoming is all the more serious because the allocation of cases based on interests was not limited to a few particularly controversial cases but presumably represented the rule of early modern justice. Until well into the 18th century, there are countless examples of the Aulic Council's president appointing rapporteurs who were known to have close ties to the defendants or other interested imperial estates, in clear violation of the relevant regulations regarding bias. The parties who benefited from being discreetly favoured in this way included not only members of the imperial clientele such as the Elector of Mainz[147] and other religious princes, but also, depending on the political climate, the elector-kings of Brandenburg-Prussia or Hanover-England. The Aulic Council thus opened up informal channels through which expectations of compromise could be communicated that could not have been openly expressed in formal proceedings.

Scholars of judicial history who do not seek to construct a narrative of a German tradition of the rule of law can accommodate the informal aspects in their understanding of the working of the court by interpreting them as an expression of a micropolitical interdependence between court personnel and the higher echelons of society. In the absence of sufficient imperial means to impose judgments against the more powerful estates' opposition, the Imperial Aulic Council had to rely on cooperation. The already advanced differentiation between politics and law could be ›defused‹ through interaction ›backstage‹. At the imperial diet in Regensburg, the imperial palace secretly signalled its willingness to make concessions to a number of imperial estates involved in Imperial Aulic Council proceedings in return for their ›good behaviour‹ in imperial politics.[148] Berlin's agents, on the other hand, met with rapporteurs working on relevant cases over dinner to sound out the prospects of a Prussian-Austrian alliance.[149]

The Imperial Aulic Councillors thus carried out not only judicial duties but also tasks which we would nowadays associate with diplomacy. Rapporteurs were faced with informal expectations that they conduct their cases with »ambiguity tolerance«,[150] juggling the divergent demands of the legal and courtly normative systems. During the 18th century, a number of councillors who fell short of such expectations fared badly as a result. In 1740, Imperial Aulic Councillor Burkhardt reported that the »statesmen«, who were willing and able to »combine« jurisprudence and politics, were now setting the tone in the Council.[151] Anyone who considered this way of exercising the judicial office as arbitrary (»willkürlich«) was ridiculed as a »pedant« and marginalised. Imperial Aulic Councillor Nikolaus Christoph von Lyncker (1643–1726) had already expressed a similar opin-

145 The only years for which records are not existant are 1739–1744.

146 On this imbalance see Maxin (2021) 5; also a pointed remark by Rosen (2006) 68: »Legal systems create facts in order to treat them as facts.«

147 Numerous examples can be found in Schröcker (1978) 96–103.

148 For more on this example from 1746, see Rohrschneider (2014) 190.

149 In 1717; further details in Schenk (2013) 143.

150 The concept of »ambiguity tolerance« used by Bauer (2011) to analyse Islamic societies was introduced into early modern research by Thiessen (2021) to describe a pragmatic way of dealing with conflicting expectations of behaviour associated with different normative systems.

151 See note 62.

ion in a confidential document in 1712. According to von Lyncker, many of his colleagues were of the opinion that the ability to judge justly was »masculum«[152] and not bound to an »exaggerated erudition«. After all, »quid juris«.

These two artefacts of participant observation bear witness to fierce disputes within the body of Imperial Aulic Councillors of which researchers have to date hardly taken any notice. However, these were not simply the result of competing patronage networks tussling with each other. Rather, the ›pedants'‹ critique of corruption[153] was part of their demands for disambiguation, that is, the separation of the political from the judicial sphere. The micropolitical contamination of the *Relationstechnik* was thus a logical target. However, since not consensus but power was required for the dismantling of the pervasive systems of close contacts between councillors and parties that ›pedants‹ like Lyncker and Burkhardt demanded, the ›statesmen‹ in the Imperial Aulic Council won out. The *Referentenprotokolle* reveal what effects their victory had on the practice of the Imperial Aulic Council.

These *Protokolle* contain a number of trials for which – again in clear violation of the Imperial Aulic Council regulations – a new rapporteur was appointed if the first proved to be a ›pedant‹ with insufficient ambiguity tolerance regarding courtly norms and expectations. Particularly when this occurred in *Untertanenprozesse* (cases in which subjects brought cases against their ruler) we can observe the proceedings taking a marked turn in favour of the defendant sovereign after the change of personnel.[154] Incidentally, the context of the knowledge of production of normativity also includes the fact that the ›statesmen‹ among the Imperial Aulic Councillors not only served as rapporteurs for hundreds of cases but also went on to enjoy stellar careers and rose to become vice-presidents of the Aulic Council, imperial vice-chancellors and commissioners (Konkommissare) of the imperial diet. Actor-centred procedural approaches to legal reasoning that encompass such contexts do not favour any romanticisation of premodern negotiations of norms that are still sometimes seen as precursors of the rule of law.[155] Translation processes between politics and law based on the symbolically generalised media of success – power and money –[156] are generally speaking not aesthetically pleasing, and this also applied to the Imperial Aulic Council.

As already mentioned, it is not least the wealth of extant material that makes the Imperial Aulic Council such an excellent model system for the procedural analysis of knowledge of the production of normativity.[157] First, the *Referentenprotokolle* make it possible to adopt the actor-centred perspective necessary for an external description of the formal *Verfahrensgeschichte* narrated in the documents of the formal procedure – the trial files, *Resolutionsprotokolle* (minutes of Council's plenary meetings), *Relationen* (the rapporteurs' reports) and *Vota* (the Council's submissions to the emperor). Second, the documents relating to the trials produced by the parties in dispute – distributed across dozens of archives – in combination with numerous other sources (such as contemporary journalism), enable the observation of process-related *informal* communication. In these records in context, contact systems around the rapporteurs based on the »law of meeting again«[158] become visible in which the translation between conflicting regimes of normativity took place. The analysis of the cases of the Imperial Aulic Council could thus be used to overcome the »mystification of decision as an internal mental occurrence«[159] that is inherent in the concept of *richterliche Kognition* (judicial cognition) in Ger-

152 This and the following quote: ÖStA HHStA, RK, Verfassungsakten, RHR, K. 3, Konv. 2, no. 2, not foliated.

153 Here I follow the argumentation of Thiessen (2021) 324–332, according to which criticism of corruption has played a major role in the differentiation of fields of action since the 18th century. The fact that the field of jurisdiction played a pioneering role here can be observed not only in Europe but also in Latin America. See Rosenmüller (2019).

154 Trossbach (1985) 484 on the basis of Hessian examples.

155 For example, Dohmen et al. (2019) 15.

156 On the term Luhmann (2021) 316–396.

157 For an application of this model to Prussian justice in the 17th and 18th centuries, see Schenk (2023d).

158 Luhmann's concept of the *Gesetz des Wiedersehens* describes social contacts that will be repeated in the foreseeable future. See Luhmann (2019) 75–81.

159 Luhmann (2018) 196.

man jurisprudence, to be replaced with a description of empirically observable practices.

With regard to communication between the Imperial Aulic Council and the parties, it is important to emphasise that the »maxim of written form« *(Schriftlichkeitsmaxime)* represented an organisation of hypocrisy at its very best.[160] For while the imperial palace shielded the Aulic Council's body of judges from the risks associated with face-to-face communication by expressly dispensing with oral procedural elements, in the same breath it instructed them (orally, of course) to grant audiences to parties and their representatives in their private residences. This informal expectation of behaviour[161] was directed above all at the respective rapporteurs, whose key position in the *ex ante* logic of collegial decision-making was known to every litigant. In 1739, a senator of the City of Frankfurt summarised this knowledge in the following way, referring to the Apostle Paul (1 Corinthians 13): »If we speak in the tongues of men or of angels, but do not have the love (*scilicet* of the rapporteur), we are only a resounding gong or a clanging cymbal.«[162]

The conviction that the rapporteur dominated the adjudicating plenum due to his exclusive knowledge of the case file was so deeply ingrained in the contemporary use of justice that society would never have accepted a ›truly‹ written procedure. Thus, as countless sources attest, behind the façade of written communication at a distance, the reporting technique of the *usus modernus* was reproduced as a »domestic practice«.[163] This included the rapporteur's interaction with the parties or their lawyers and solicitors *(Sollicitanten)* which was not only not part of the Aulic Council's procedural law, it was even expressly prohibited in order to prevent corruption. Nevertheless, throughout the early modern period, those who could not afford to employ a *Sollicitant* to act in their stead travelled to the imperial court to pursue their cases at the Aulic Council, often staying in Vienna in precarious social conditions for months and years at a time. At the end of the 18th century, the jurist Karl Friedrich Häberlin estimated that the associated income of the Viennese hospitality industry amounted to 300 000 Reichstaler per year.[164]

Early modern use of the justice system was thus accompanied by migration processes on a scale that was visible in the cityscape and thus undeniable. The self-description of contemporary jurisprudence explained the presence of so many litigants, which stood in contradiction to the Aulic Council's procedural law, with reference to insufficient staffing. The courts, so the explanation went, were forced to devote their resources only to those proceedings in which the parties expressed their interest continuously and in person.[165] Researchers have often uncritically repeated this exculpatory reference to insufficient resources, without taking into account the fact that the Imperial Aulic Council did not have a periodic reporting system until after the middle of the 18th century and thus lacked information on the cases still pending.[166] As in other places, it was left to the parties to put pressure on the court personnel to settle the case by using their physical presence as well as what Luhmann called symbolically generalised media of success (power, money), exerting pressure that the legal organisation itself did not generate, unless the case happened to be of interest to the imperial palace or the upper echelons of the Aulic Council.

But that was not all. In the private home of the rapporteur, the parties sought above all the legal hearing (in the literal sense) that the court as a collegiate body denied them. The documents of the parties throughout the centuries contain countless examples of an informal oral presentation of facts having taken place, often accompanied by the

160 Schenk (2022a) 50–63; Schenk (2023b) 72–80.

161 This expectation was shared both by the ruler and the parties, and could also be found in a similar form at numerous other royal and princely courts in early modern Europe and Latin America. This applies to courts as diverse as Madrid, Wolfenbüttel and Quito. See Brendecke (2014) 139; Bei der Wieden et al. (eds.) (2020) 16; Herzog (2004) 190–191.

162 »Wenn wir mit Menschen- und mit Engel-Zungen reden könnten und hätten die Liebe (scilicet des Hrn. Referenten) nicht, so sind wir ein tönendes Erz und eine klingende Schelle.« Quoted from Kriegk (1874) 44. Knowledge of the decisive role of *Referenten* found its way into literature in the 1770s through Wieland (2012) [1774–1780] 248. In his satirical novel, a town court always follows the rapporteur's recommendation. The example highlights the intersections between approaches to judicial decision-making in the history of knowledge and the law and literature movement. On the latter, see Posner (2009).

163 Ludwig (2015) provides an instructive case study from the field of territorial justice.

164 Häberlin (1793) 706.

165 Schenk (2023b) 80–85.

166 Schenk (2023a).

handing over of a specially printed statement *(species facti)* that was, however, not intended for the trial's files.[167] While large parts of legal history still cling to rationality myths of judicial decisions based on files, the facts of the case at the Imperial Aulic Council were *de facto* constructed on the basis of an opaque constellation of media consisting of both the written and the oral. Behind closed doors, contemporary legal experts were fully aware of this problem of informal factual statements being included in the collegial decision even if they contradicted the file – which, moreover, most of the assessors would not even have read.[168] In addition, some councillors secretly slipped into the role of advocates, helping selected parties to draft the pleadings that they then discussed and voted on in plenary sessions.[169] The interaction between Imperial Aulic Councillor von Knorr and the Genoese envoy described above was therefore by no means unusual.

The self-description of the functioning of the Aulic Council contained in the official files and the legal discourse was all the less able to deal with these problems of truth because the homes of the rapporteurs were not only the dwelling place of legal expertise but also the arenas of an exchange of gifts that actually ventured into what was considered corruption also at the time.[170] Numerous rapporteurs not only accepted considerable sums of money from the parties in ongoing proceedings, sometimes they actually demanded them – combined with the threat that the file would otherwise simply be left lying around. Concealment practices – such as handovers in the private area of one's own home, transactions via middlemen or wives, or disguising sums as harmless fees – all testify to the awareness of the actors that they were moving in an area that was no longer covered by contemporary ambiguity tolerance.

In the existing historiography, such instances of entanglement of court personnel and society are often not recognised as structural but instead marginalised as regrettable exceptions from the rule.[171] A project employing the approach of historical organisational studies would not go to the opposite extreme by constructing Aulic Council justice as habitually subverted by informal processes. Rather, it would highlight the systemic nature of informal financing mechanisms, which not only relieved the burden on the notoriously cash-strapped rulers, but, like the deputations, also enabled the elites to influence the judicial production of law, because a *Gedankenstaat* such as the Holy Roman Empire could not function without their support. Several imperial princes even – discreetly – paid fixed annual salaries to individual councillors, who were then appointed as rapporteurs by the Aulic Council's president for those trials in which the donors were involved.[172] The president thus played an active role as a patronage manager in these structures and, if necessary, ensured that ambiguity-intolerant councillors (who castigated such practices as corrupt as early as the early 18th century) were silenced.[173] In such a system *type ancien*, judicial knowledge of the production of normativity thus reproduced social inequality by promoting the commodification of law that, within the limits set by imperial interests, functioned according to private entrepreneurial calculations.[174]

If one were to follow these traces consistently, even the *Resolutionsprotokolle* of the Imperial Aulic

167 These printed works, which survive in large numbers, remain mostly unexplored. On this research lacuna with regard to the Imperial Chamber Court, see Oestmann (2021) 378–379; and generally Limbach (2021) 85. See Kasper-Marienberg (2023) on the great significance of printed matter in the context of Jewish use of justice.

168 Imperial Aulic Councillor Burkhardt made a clear statement on this in 1740 in his expert opinion cited in note 62. See also the polemical but knowledgeable report written by the Prussian envoy Maximilian von Fürst around 1750, in Ranke (1875) 15.

169 For an example, see Rast (2014) 316.

170 Schenk (2024d) with numerous sources.

171 Fuchs (2002) 282, for example, speaks of the »human weaknesses of individuals« with regard to the Imperial Chamber Court. The majority of the Imperial Aulic Councillors were also repeatedly ascribed a professional ethos that was above material temptations; see, for example, Sellert (2013) 294.

172 In the 18th century, for example, the Duke of Mecklenburg, the Bishop of Würzburg and the Count of Lippe-Detmold: Hughes (1988) 51–52; Zwiessler (2023) 137; Landesarchiv Nordrhein-Westfalen, Abteilung Ostwestfalen-Lippe, L 7, No. 795.

173 See Schenk (2024d) for relevant examples.

174 Brakensiek (2010) 290 on the epoch-specific nature of this phenomenon.

Council, which record around 30 000 meeting days and 500 000 decisions over a period of 250 years,[175] could be rendered amenable to an external description, because the commercialisation of the *Relationstechnik* pursued by numerous councillors was followed by the commodification of the agenda. There are complaints from the middle of the 18th century that, contrary to the regulations, the Imperial Aulic Council no longer prioritised the trials of the poor and other *miserabiles personae*; instead, its members used their speaking time to promote the cases that brought them the most money.[176] Judicial knowledge of the production of normativity not only served to mobilise the law, but also to demobilise it. Before the law stood a doorkeeper. It was the rapporteur.[177]

V. Conclusion

Although most higher courts around the globe are collegiate, the scholarly debates on collective judging in a comparative perspective[178] show that we know little about how they actually reach their decisions. This desideratum has a deep historical dimension, as collegiate central courts were already developing at the threshold of the modern era and then spread across large parts of the world in the course of European expansion. Researchers speaking of pre-modern collective judging are thus referring to a geographical area that already stretched from Stockholm to Vienna to Mexico City. As a result, they face the challenge of leaving the Procrustean bed of national history and opening up the material artefacts of the early modern judicial production of law to global-historical perspectives.

This also applies to the Holy Roman Empire's two central courts, the Imperial Chamber Court and the Imperial Aulic Council, whose activities have left behind an extensive written legacy in numerous European archives. Over the past decades, legal scholars and historians have made valuable contributions to researching these sources. However, the traditional narrative of these two courts as precursors of the rule of law in Germany is no longer convincing. If early modern trial documents are to be used to make well-founded contributions to a »multidisciplinary social theory«[179] incorporating approaches from global history, one can no longer limit oneself to emphasising the emancipatory content and the pacifying function of judicial practice. Rather, one should work towards a legal history »that deliberately makes visible, within the very structure of its narrative forms, its own repressive strategies and practices«.[180] This can only succeed if we focus not just on this or that judgment in a positivist manner: rather, what is needed are precisely those procedural approaches that have so far been largely lacking.

In this article, I have used the example of the Imperial Aulic Council to argue for combining organisational sociology and the history of knowledge in order to develop a reflective concept of judicial practice. Organisational sociology offers a concept of practice that understands formality and informality as complementary phenomena and can therefore also be applied to the early modern period, which in many respects appears as an era of formalisation.[181] This makes it possible to go beyond the system's self-description to analyse those of its rationalities that a legal history burdened with legitimising tasks neither wanted nor was able to observe.

As shown above, this field of tension between formality and informality can only be explored if we take into account the *ex ante* logic embodied by

175 See Rasche (2015) 232.

176 Schenk (2024a). On the privileging of *miserabiles personae* before the courts of the early modern period, see Duve (2008) 102–137; Cunill (2017); Duve (2024) 61–64.

177 As early as the 18th century, a discursivisation of the written maxim as a cover for the supposed arbitrariness of the rapporteurs began, which in the 19th century fed into the legal-political debate on the orality maxim. Consequently, analysis of this development would also be able to provide empirically founded contributions to a history of the evolution of the knowledge of the production of normativity. Schenk (2022a) 40–49; Schenk (2023b) 92–101.

178 Häcker / Ernst (eds.) (2020).

179 Auer (2018) 51.

180 Chakrabarty (2008) 45. With regard to the lower courts in the Holy Roman Empire, it has already been emphasised that compared to nobles and urban notables, the rural population benefited the least from judicial conflict regulation and perceived it as part of an authoritarian apparatus of oppression. For examples from Hesse, see Brakensiek (2001) 364. However, studies on the Imperial Chamber Court and the Imperial Aulic Council have so far hardly dealt with the idea that we could – at least in part – be dealing with »archives of oppression« (Ginzburg [2023] 17).

181 Stollberg-Rilinger (2013).

rapporteurs, which continues to characterise collegial decision-making in civil law to this day. During the early modern period, it was strengthened by the *ad hoc* distribution of cases to rapporteurs that was barely normatively constrained. Behind the façade of written proceedings, central courts such as the Imperial Aulic Council to a considerable extent communicated with both the ruler and the parties via informal contact systems, in face-to-face meetings in the homes of the individual councillors that left no traces in the trial's files and *Protokolle*. It was thus not only in the Aulic Council's plenary session but above all in the preceding informal communication that the councillors dealt with the challenge of negotiating the coexistence of partially conflicting normativities that characterised the early modern period. And it was in the rapporteur's home that the reports were written that pre-structured the collegial decisions through which the court reproduced itself as a social system.

By penetrating beyond the anonymisation and intellectualisation of decision-making inherent in the collegial principle, an organisational sociological approach makes it possible to increase the complexity of empirical work in the way required by projects in the history of knowledge to deconstruct statist interpretations of court practice at the microlevel. To this end, it makes sense to regard *Relationen* and *Vota* not simply as the result of formal judicial *Relationstechniken*. A more open concept like »knowledge of production of normativity« is much better suited to locating the actions of the actors in a framework that extends beyond contemporary self-descriptions.

Historical court proceedings should no longer be considered as stories »with an objective ending« but as forums »of cultural interaction«,[182] and archives »not as sites of knowledge retrieval but of knowledge production«.[183] What Kathryn Burns noted in her study on writing and power in colonial Peru also applies to the Imperial Aulic Council: »record making was not a straightforward, by-the-book matter. […] The archives [are] marked by the intervention of ›powerful hands‹ – and this much was clearly not just colonial.«[184] Despite this, however, one should not lose sight of the reproduction of law or denounce the early modern court's techniques of justification as mere farce. Instead, the goal is to reveal the conditions of the production of law »that shaped what could be written, […] what competencies were rewarded in archival writing, what stories could be told, and what could not be said«.[185]

This would open up a broad field for legal history, ranging from micropolitics to gift exchange and corruption, enabling researchers to observe the translations and intertextualities necessary for making epoch-specific contributions to a sociology of legal dogmatics. At the same time, such a combination of organisational sociology and the history of knowledge could represent a viable way of placing early modern central courts' production of law in a global historical context. For, despite all local differences, the judicial panels of civil law are first and foremost epistemic communities whose formal organisation shares many characteristics. For example, in the Spanish Council of the Indies, the president »enjoyed vast powers. The Ordenanzas of 1571 authorised him to distribute and assign cases to the councillors as he saw fit. They, in turn, analysed the petitions and documents and elaborated an ›opinion‹.«[186]

Here, too, we find the combination of a construction of facts by rapporteurs in advance of the collegial decision and an *ad hoc* distribution of business, which ensured a pronounced *ex ante* logic in the Imperial Aulic Council's decision-making process and facilitated the discreet translation of courtly norms into legal norms. Also for Hispanic Latin America one can easily find evidence of face-to-face communication between parties and councillors in their private homes.[187] It thus seems likely that central courts are examples of communities of practice that are amenable to glocalisation by current research. They allow us to »take the normative self-description of a community at its word and at the same time grasp the societal practice that addresses it«.[188] The rich archival records of the Imperial Aulic Council offer the best possible empirical starting conditions for this and could be used to develop the programme of *Europäische Rechtsgeschichte* into a legal history of Europe from a global historical perspective.[189] For

182 Herrup (1999) 6.
183 Stoler (2002) 90
184 Burns (2010) 142–143.
185 Stoler (2002) 91.
186 López Valencia (2020) 480.
187 See, for example, Herzog (2007) 190–191; Brendecke (2014) 139.
188 Möllers (2015) 436.
189 See Duve (2012).

whether we are researching normativity in Latin America or in the Holy Roman Empire, the same applies: »the more we go into the archive and learn about our sources and their subjects, the less any simplistic generalization is possible, and the richer our story lines become.«[190]

■

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190 Burns (2010) 147.

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Fig. 1: Imperial Aulic Council meeting under Emperor Leopold I. Illustration from: Johann Christoph von Uffenbach, Tractatus singularis et methodicus de excelsissimo consilio caesareo-imperiali aulico, Frankfurt am Main 1700 (photo: Manfred Huber).

In a manner typical of the time, the Imperial Aulic Council's members were divided into a *Herrenbank* (noblemen's bench; left) and *Gelehrtenbank* (scholars' bench; right). The engraving demonstrates that already 300 years ago, joint deliberation was at the centre of the self-description of collegiate courts as epistemic communities. However, procedural analyses of collective judicial decision-making should not reproduce this view but instead emphasise the pronounced *ex ante* logic resulting from the allocation of cases to individual councillors as rapporteurs. It was they who carried out the most conflict-prone translations between different normative regimes in advance of the case reaching the Council's plenum. Their *Relationstechnik* (reporting technique) was the medium that inscribed these translations into the procedure and at the same time rendered them invisible.

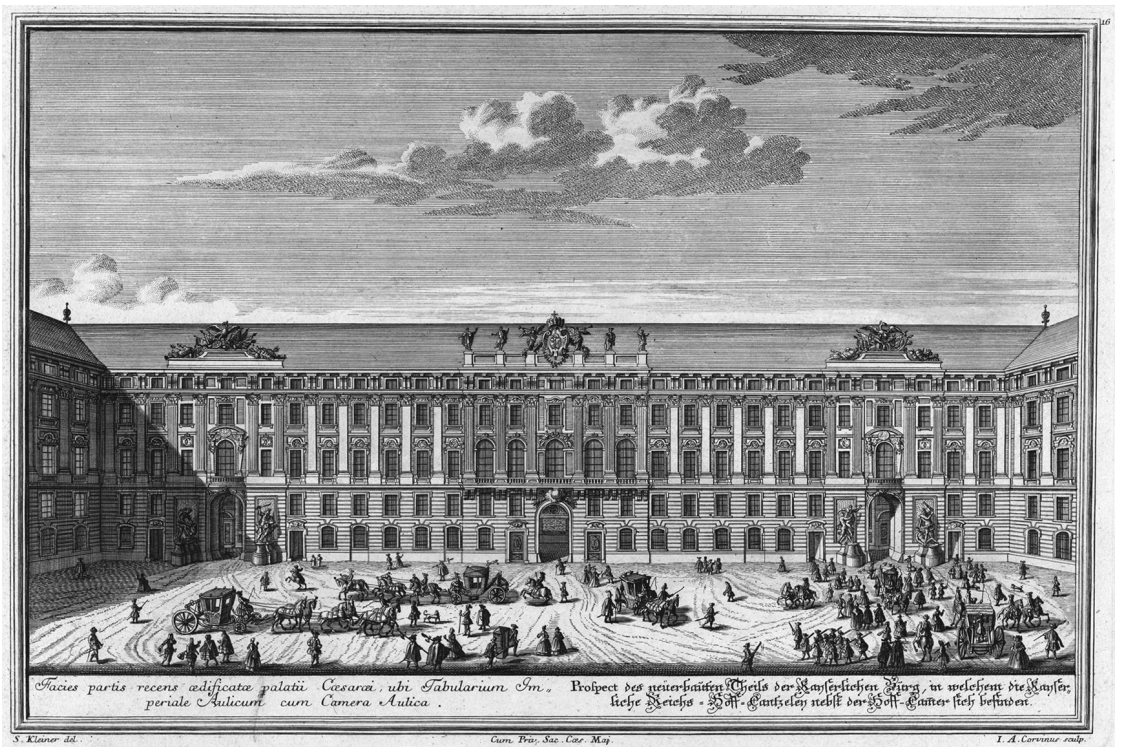


Fig. 2: The Imperial Chancellery Wing of the Vienna Imperial Palace, completed in 1730, which also housed the Imperial Aulic Council until 1806.
Copperplate engraving by Salomon Kleiner, 1733 (Wien Museum, Inv. No. 105443).

The Imperial Aulic Council was not a modern institution, but – like many other central courts of the early modern period – linked to the ruler's court, to which the Imperial Aulic Councillors belonged. It was thus the epistemic community of courtly society that formed the immediate context for the creation and utilisation of the legal knowledge embodied in the Council's records.



Fig. 3: Not a legal expert as such: Imperial Aulic Councillor Hermann von Questenberg with lute.
Copperplate engraving by Andreas Schmutzer, 1728 (Wien Museum, Inv. No. W 5339).

Questenberg, who also distinguished himself as a composer, was one of the many noblemen appointed to the Imperial Aulic Council's *Herrenbank* in the 17th and 18th centuries despite having limited legal knowledge. In 1712, von Questenberg's colleague Nikolaus Christoph von Lyncker accused him of passing the time at plenary sessions reading French novels. Under the spell of the professionalisation narrative, legal history has so far struggled to recognise that the judicial production of law remained dependent on the connections of noblemen like Questenberg.

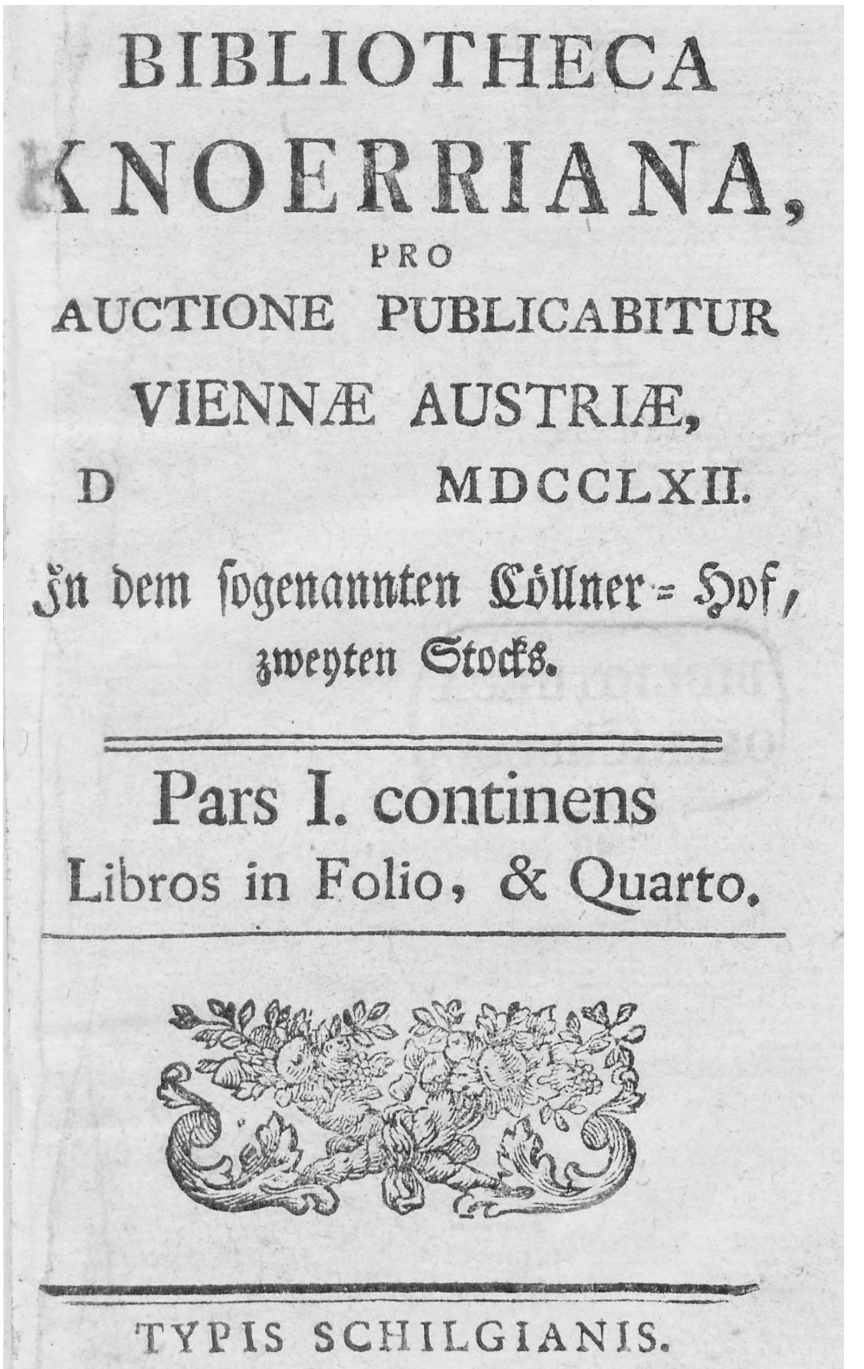

BIBLIOTHECA
KNOERRIANA,
PRO
AUCTIONE PUBLICABITUR
VIENNÆ AUSTRIÆ,
D MDCCLXII.
In dem sogenannten Cöllner-Hof,
zweyten Stocks.
Pars I. continens
Libros in Folio, & Quarto.
TYPIS SCHILGIANIS.

Fig. 4: Bibliotheca Knoerriana pro auctione publicabitur, Vienna 1762 (Berlin State Library – Prussian Cultural Heritage)

While Hermann von Questenberg plucked strings, Georg Christian von Knorr sat over his books, swotting up on law and history. Over the course of his life, the theologian, who was appointed to the Imperial Aulic Council in 1731, amassed a private library of more than 5200 volumes. This three-volume auction catalogue is the material artefact of his self-taught legal literacy, which paved the way to the centre of power for this son of a Swabian braidmaker. Knorr's father-in-law, Dr. utr. jur. Johann Christoph von Bartenstein, the *éminence grise* of Austrian foreign policy under Emperor Charles VI, provided support. At least some of the *Vota ad Imperatorem* of the Imperial Aulic Council, which scholars see as an indication of judicial autonomy and deliberative discussion culture, were de facto drafted in the Austrian Foreign Ministry.


Rechts=gegründete
EXCEPTIONES
Welche
Hr. Hoch = Fürſtl. Durchl.
Herrn
Herzogen
Chriſtian Ludewig
zu
Mecklenburg
bewogen
gegen des
Kayſerl. Reichs = Hoff = Raths
von Knörren
Perſon in Cauſis Mecklenburgicis
Sich zum
Juramento Perhorreſcentiæ
zu
offeriren.
Anno MDCCXXXIX.

Fig. 5: Frontispiece of a printed work by the Duke of Mecklenburg, 1739 (Rostock University Library).

The fact that the imperial palace took advantage of the *ex ante* logic of the Aulic Council's decision-making process by allocating business on the basis of interests did not go unnoticed by the disadvantaged parties. In a pamphlet in 1739, Duke Christian Ludwig of Mecklenburg accused the rapporteur in the case of the so-called »Mecklenburg estates conflict«, the Imperial Aulic Councillor von Knorr, of partiality. The publication belongs into the context of a general critique of corruption aimed at disambiguating the rapporteurs' micropolitical entanglements that began in the 18th century and culminated in the 19th century in the legal-political debate about the maxim of orality.

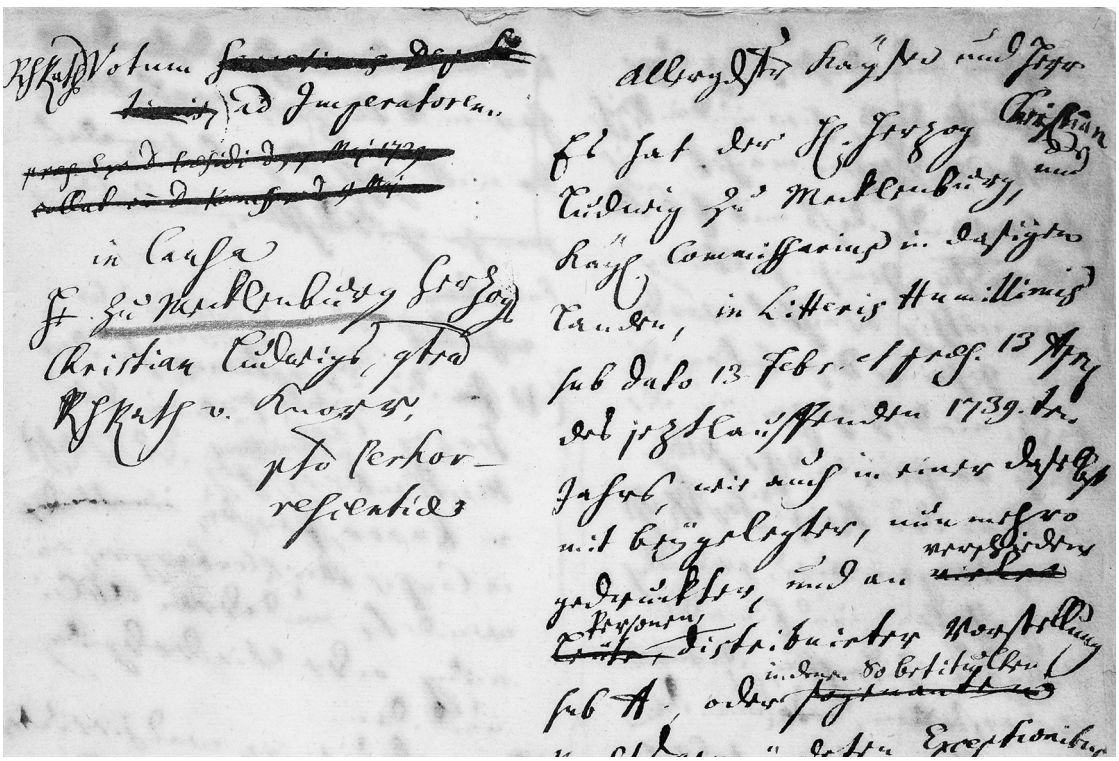


Fig. 6: Intertextuality in the mirror of the Concept of the *Votum ad Imperatorem* of 1 June 1739, in which the Imperial Aulic Council vigorously rejected the accusations of the Duke of Mecklenburg against Imperial Aulic Councillor von Knorr (ÖStA HHStA, RHR, Vota ad Imperatorem, K. 38, No. 17).

At the top left the following words are visible: »Votum secretioris deputationis ad Imperatorem«. This became: »R[eichs]h[of]raths Votum ad Imperatorem«. This draft therefore shows that the *Votum* had already been finalised by an informal deputation on 9 May, i.e. around three weeks before the Council's plenary session, and moreover approved by the Emperor (»placet in toto«). The involvement of the Imperial Aulic Council was thus merely *pro forma*. Such translation practices were legal practices and therefore require legal analysis. History as a discipline cannot do this alone.



Fig. 7: *Resolutionsprotokolle* (minutes recording the plenary session's decisions) of the Imperial Aulic Council in the Haus-, Hof- und Staatsarchiv in Vienna (photo: Tobias Schenk).

»›What did you say? A minute? Drafted in my absence, after the event, by someone who was not even at the discussion. That's not bad. And why a minute, anyway? Was it official business?‹ ›No‹, said the schoolmaster, ›semi-official, the minute too is only semi-official, it was made only because with us there has to be strict order in everything. Anyway, there it is and it does you no honour.‹«
Franz Kafka, The Castle.

Andrew James Harding

The Diffusion of Common Law in the Straits Settlements: »The Six Widows' Case« and the Rout of Custom

Scholarly disagreement about legal transplantation continues to trouble academia.[1] But perhaps it is time to put aside a debate that often seems to be reduced to quibbles regarding the meaning of words such as »rule« and »transplant«, and even »law« itself, in favour of examination of the extraordinary *fact* of legal diffusion.[2] Diffusion continues in ever more complex and extensive ways, whatever reservations may be expressed by legal theorists.[3] It is a decisive criticism of legal transplant theory that neither the adherents of legal transplants nor their opponents take cognisance of what the present author has termed »the real world of legal diffusion«. It is as though a profound understanding of this large and complex matter can be obtained from the comfort of a university library.[4] It is easy to use high-flown expressions to stake out a position, but before we conclude that, for example, legal transplantation is easy (Watson[5]) or impossible (Legrand[6]), an attempt needs to be made to discover the actual facts. And here legal history provides much food for thought and experience to be dissected, as there is an extended record to look at, in which longer-term outcomes can be examined. The diffusion of law is therefore a highly suitable area for fruitful empirical research, hopefully unclouded either by the ideology or the terminological obfuscation that tends to bedevil the subject of legal transplantation.[7]

In this spirit – that of seeking truth from facts in a bottom-up rather than a top-down way – this article offers a study of common law diffusion revolving principally around a famous Singapore case. This case dating from 1911, in common parlance spectacularly named »the Six Widows' case«, but referred to in the law reports as *Re the Estate of Choo Eng Choon, Deceased*,[8] concerned the distribution of the intestate estate of a wealthy Chinese man, Mr Choo, who died in Singapore, on which estate no less than six women claimed a share as having been married to him. The case presents in microcosm several of the difficult issues of law and society arising in the process of diffusion of the common law across the British empire, encountering here, in an Asian context, potential conflict with customary law. These issues still remain in somewhat different manifestations more than 110 years later, and almost 60 years after Singapore became an independent, sovereign republic. Through an understanding of instances such as this, we can perhaps better understand the notion of law in its social context as well as the possibility, limits, and methods of adaptation as part of the process of legal diffusion. The overall conclusion is that, despite these difficulties and problematical contexts, and despite the need for legislation, common law reasoning ultimately did engage successfully with the societal context of the Straits Settlements.

The real interest of these issues and the case study relates to the interface between common law on the one hand and the Asian context on the other. »Asian context« is used here to mean whatever law was previously established prior to the arrival of common law: customary law; religious belief; and simply the social facts pertaining to the various Asian communities coming under British rule, including the very diversity of the societies they formed.

In order the understand the Six Widows' case and its implications, it is necessary first to sketch some historical background, so that we can see how the issues came up in the way they did.

1 Harding (2019).
2 Ibid.
3 Legrand (1997) 111; Humphreys (2010).
4 Harding (2019) 1.
5 Watson (1993).
6 Legrand (1997) 111.
7 Of course, these two areas overlap considerably, but the concept of »legal diffusion« seems to me to go to the root of the matter (how does law change?) in a way that »legal transplants« does not.
8 *Re Estate of Choo Eng Choon, Deceased* [1911] 12 Straits Settlements Law Reports 120.

I. Common Law Reception in Singapore

Sir Thomas Stamford Raffles arrived in Singapore in 1819 to commence the construction of a new British colony, having reached an arrangement with the Sultan of Johor under which the British would establish a trading post on the largely uninhabited island.[9] The colony operated initially under a minimal regulatory legal framework (a situation referred to, in a purely technical way, as »legal chaos«).[10] In 1826 a charter was issued under parliamentary authority by King George IV, which is referred to universally as the Second Charter of Justice.[11] This Charter provided for the establishment of a Court of Judicature for Singapore, Penang and Malacca.[12] These were the three British colonies on the Malay peninsula, from 1826 referred to as the »Straits Settlements«.[13] We can note here that Penang had been ceded to Britain by the Sultan of Kedah in 1786, being essentially at that point uninhabited, while Malacca had had a more complex history, passing from the Malacca rulers to the Portuguese, then the Dutch, and eventually to the British in 1824.

To summarise for present purposes the Charter, an extensive document of 76 pages: in criminal proceedings, the Court was to administer criminal justice as the courts did in England, with due attention given to »the religions and manners of the native inhabitants«. In civil proceedings, the court was to give judgment and pass sentence according to »justice and right« (this phrase had also been used in the First Charter of Justice for Penang in 1807).[14] While the Charter did not explicitly state that English law was to be applied in the Straits Settlements, it was generally assumed to provide authority for some kind of a general reception or application of English law. Local case law, following the landmark 1858 case of *R v Willans* in Penang,[15] had adopted the theory that English law was received via this Charter. »English law« here meant the common law; the principles of equity; and pre-Charter English statutes, so far as they were of general application. The last is of special importance, as we shall see, in the context of the Six Widows' case.

In *R v Willans* the judge, Sir Peter Benson Maxwell, was compelled to set out a justification for the view that the Charter had resulted in a reception of common law in the Straits Settlements. The case revolved around the matter of interpreting the vague term »justice and right«, and Maxwell reached his conclusion according to the following reasoning.

First, the English colonists in Penang had not carried »their laws as their birthright, to their new homes«, as their presence was dependent on the permission of the East India Company.

Secondly, although Penang was part of the Sultanate of Kedah, it was more or less uninhabited and there was therefore no de facto established legal authority.[16] If there had been, it is clear that legislation would have been required to replace it with English law. The Islamic law of Kedah was thus not applicable in Penang, and the judge commented that it seemed »impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its *lex loci*«.[17]

Thirdly, as had been held as long ago as *Calvin's Case* in 1609,[18] »until certain laws are established, the King by himself, and such Judges as he should appoint, should judge the inhabitants and their causes according to *natural equity*, in such sort as Kings in ancient times did with their Kingdoms

9 See, further, Phang (2006); Tan (2005) 27 ff. For a brief history of judicial development in the Straits Settlements, see Wee (1974) 53–55. For a more comprehensive legal history, see Braddell (1931).

10 Wee (1974) 53; Phang (2005) 8. This does not indicate that actual chaos prevailed, but merely that the administration of justice had no clear jurisprudential basis.

11 Phang (2006).

12 Letters Patent Establishing the Court of Judicature at Prince of Wales' Island, Singapore, and Malacca, in the East Indies, dated 27 November 1836.

13 Penang (referred to as Prince of Wales' Island) had been ceded by the Sultan of Kedah in the same way as Singapore had been ceded by the Ruler of Johor. Malacca had been taken over from the Dutch in 1824. Penang and Malacca were folded into the Federation of Malaya in 1948. That Federation became independent in 1957, and in 1963 Singapore joined the federation along with North Borneo (now Sabah) and Sarawak to form Malaysia under the Malaysia Agreement 1963. On 9 August 1965 Singapore left the federation to become an independent republic.

14 Letters Patent Establishing a Court of Judicature in Penang, 25 March 1807.

15 (1858) 3 Kyshe 16.

16 See, further, Gopal (1983) xxv; contra, Phang (1986) civ.

17 (1858) 3 Kyshe 22. Nonetheless, what Maxwell deemed impossible is exactly what occurred in the Malay States a few decades later, as Muslim law was established in those states.

18 (1608) 77 ER 377.

before any certain Municipal laws were given« (emphasis added).

Fourthly, English law was the only »natural equity« known to English sovereigns and English judges; and it fell under the Crown's competence to introduce English law into the Settlement by Charter (as had been held in *Campbell v Hall* in 1774[19]).

Maxwell concluded his excursus on reception as follows:

> [T]he Charter does not declare, totidem verbis, that that law [English law] shall be the territorial law of the Island; but all its leading provisions manifestly require, that justice shall be administered according to it, and it alone. As to Criminal law, its language is too explicit to admit of doubt. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects, administer Criminal Justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England. And I think it equally plain that English law was intended to be applied in Civil Cases also. The Charter directs that the Court shall, in those Cases, »give and pass judgment and sentence according to Justice and Right.« The »Justice and Right«[20] intended, are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. They are, in jurisprudence, mere synonyms for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England. The whole of the Charter appears to me to support this view. It gives the Court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit, without stating or leaving any room for presuming that it was intended that those powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England. The classification of property into »real and personal« of actions or »pleas,« into »real, personal, and mixed,« and the power given to grant Probates and Letters of Administrations,[21] shew that the law of England was alone in contemplation.

What is especially important for the case study is of course how this reasoning was supposed to affect the non-European communities under British rule. Here Maxwell reasoned as follows [the italics are mine]:

> In no part of the Straits' Charters is mention made of any other law than that of England; and the silence is perhaps nowhere more remarkable than in those passages which purport to adapt the administration of justice by an European Court to the peculiar institutions of Asiatic races. Where Ecclesiastical [i. e., family law] jurisdiction is conferred on the Court, it is to be exercised *only so far as the religions, manners and customs of the inhabitants admit*. In the administration of oaths and of Criminal Justice, also, and in framing process for carrying out the orders of the Court, attention is to be had to the religions, manners and usages of the native inhabitants; *but nowhere is it said that their laws are to be attended to*, not even in matters of contract and succession,[22] as in India. Indeed, the provision respecting the framing of process is expressly guarded by the provision that the prescribed adaptation to native opinions and usages shall go only »as far as the same can

19 (1774) 98 ER 1045.

20 There are interesting questions, which I do not attempt to answer here, whether another similar formula – »justice, equity and good conscience«, employed in many British territories, is equivalent to »justice and right«; and why the formula, which one would think a very important issue, differs from case to case. The Magna Carta of 1215, provides: »*nulli rendemus, nulli negabimus aut differemus justitiam vel rectum*«; »justice and right« seems to be taken directly from this. As with »justice and right«, »justice, equity and good conscience« was ultimately interpreted as equivalent to English law: *Waghela Rajsanji v Shekh Masludin* (1887) 14 Ind App 89, 96.

21 In the context of the Six Widows' case, this reference to succession is significant. And see *In the Goods of Lao Leong An, Deceased* (1867) 1 SSLR 1.

22 Again, the reference to succession is significant.

> consist with the due execution of the law and the attainment of substantial justice.« The exclusion of native law is also remarkable in the Clause empowering the establishment of Small debts' Courts. Although it is provided that the jurisdiction of those Courts may be ethnical instead of local, if thought advisable, nothing is said about applying native law to native Cases, but it is merely required that the »administration of justice« shall be adopted, so far as circumstances permit, to »the Religions, Manners and Customs,« of the native inhabitants, while the Rules of Practice are to conform, as nearly as may be to the Rules of the English Courts of Request. It may be said that with respect to at least two classes of Orientals, Mahomedans and Hindoos, their laws are part of their religions, and that the Charter includes the former when it mentions the latter. This might be so, if the Charter were a Mahomedan or Hindoo instrument, but law and religion are too distinct in their nature and to English apprehension, to be treated otherwise than as distinct in the construction of an English Charter.

At one level this judgment takes one's breath away. How exactly did we start with »justice and right« and finish up with English law? How could we seriously conclude, given the express terms of the Charter, which mention English law only in relation to criminal justice, that the law of England was *alone* in contemplation, and that it is *nowhere* said that their (the Asian populations') laws should be attended to?

At another level the judgment raises difficult questions about the precise extent of application of English law, or exceptions thereto, and the reasons therefor. One is put in mind of Frederick Pollock's critique that »bland following of English precedents according to the letter can only have the effect of reducing the estimation of the common law by intelligent Indians to the level of its more technical and less fruitful portions and making those portions appear, if possible, more inscrutable to Indian than they do to English lay suitors«.[23] What, one wonders, were the Asian populations to make of all this?

At yet another level, it might be objected here that it is simply too fussy to discover and analyse jurisprudential justifications for the reception of English law in the Straits, given the pre-eminence of British power and ambition in the region, and the existing de facto situation. Of course, one might say, the British introduced English law – how could it be otherwise?

Yet it is not at all obvious, on reflection, that British rule did entail common law reception, and it could indeed have been otherwise. The First Charter of Justice of 1807, which established the first court in Penang, also directed the court, as we have seen, to »give and pass judgment and sentence according to justice and right«. The first Recorder of Penang, Sir Edmund Stanley, thought (directly contrary, we may note, to Maxwell's judgment) that this Charter secured »to all native subjects the free exercise of their religion, indulges them in all their prejudices, and pays the most *scrupulous attention* to their ancient customs, usages and habits« [again, emphasis added].[24] In a similar vein, the government in London issued this instruction to the first Lieutenant-Governor of Penang in 1801: »The laws of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law, as are of universal application, being founded on the principles of natural justice, shall constitute the rules of decision in the courts.« Note here the order of precedence. The instruction amounts to saying, »first, apply their law, modified by ours so far as it is generally applicable«. Again, this is directly contradicted by Maxwell. In the Malay states the reception of common law was much more limited, much later, and much more gradual, and did not cover matters dealt with by Muslim family law, due to the underlying constitutional fact of indirect rule.[25] A general reception of English law in Malaya was enacted only in 1937.[26]

Moreover, in the immediately neighbouring territory, the Dutch East Indies, the approach adopted was entirely the opposite of Maxwell's theory and more in line with Stanley's. This ap-

23 Pollock (1912) 92.

24 Speech explaining the 1807 Charter upon its proclamation at the opening of the new court: Braddell (1931) 70–71.

25 Harding (2021) ch. 1.

26 Civil Law Enactment 1937 (FMS), s. 2.

proach was based on the concept of »law populations«[27] – in other words the very application of »native law to native cases«, and »attention to« the laws of the inhabitants, that Maxwell *rejected* in *R v Willans*. Dutch policy classified the inhabitants in three different ways.

i) »Natives«, i. e., Indonesians, were governed, according to their location, by no less than 19 different varieties of *adat* (customary law), as identified by Cornelis van Vollenhoven's *adatrecht* school in Leiden.[28]
ii) Those approximated to the Dutch themselves, who came under the civil code (i. e., those Indonesians who adopted a Western or urban lifestyle, or those who came from countries with a civil code similar to the Dutch, such as Germans or Japanese, or its common law equivalent, such as British and Americans).[29]
iii) »Foreign orientals«, who were dealt with according to their own law. Thus Chinese were dealt with under Chinese custom, and Arabs under Islamic law. If the Six Widows' case had been decided in the Dutch East Indies at a similar date, it would have been dealt with under Chinese customary law.[30] As we shall see, this was not possible in the Straits Settlements.

I have presented the distinction between the British and Dutch theories perhaps more sharply than a consideration of development over a longer span of time would warrant. The distinction does not mean that common-law theory always precluded decisions according to the law of the parties involved; in fact, it had, for example, recognised polygamy amongst Muslims and Hindus since the 18th century.[31] And Muslim personal law was applied to Muslims in the Straits Settlements, as we shall see. Nor does it mean that Dutch legal policy precluded applying some laws to everyone irrespective of the »manners and religions« of the inhabitants: the Dutch gradually brought more and more people under the Dutch code, and everyone under the criminal code.[32] The Chinese were brought under the Dutch civil code for marriage purposes as early as 1925.

Nonetheless, the assumption that common law was somehow naturally the general law of the Straits Settlements is a strikingly different starting point from the Dutch assumption that application of their own law was restricted to Europeans or their legal equivalents. To put the distinction very crudely, Dutch legal policy expressly recognised legal pluralism, whereas British legal policy expressly did not. Why this distinction came about is an interesting question lying far beyond the scope of this paper. But it was in general part of British policy and the ideology of empire that living under British justice was a boon.[33]

A further possibility was to regard »justice and right« as referring to due execution of the existing law. While it was true that »existing law« would be hard to discover in Singapore and Penang, given the prevailing legal standards of the time that, as Maxwell explained, distinguished law from religion, Malacca had been under Dutch law until the latter was summarily replaced by English law. The interpretation suggested here was actually rejected in the earlier case of *Rodyk v Williamson*.[34]

Whatever the arguments, Maxwell's judgment ensured in effect that from 1826 until the present day, Singapore[35] has been under the aegis of the common law, and despite many differences from English law as it now stands (actually fewer, one

27 Lev (1985). It should be understood here that the law-populations approach, while seeming more emollient than common-law reception in allowing each community its »own« law, is nonetheless open to the criticism that it entrenched an ethnic hierarchy. The common law, despite its lack (as it turned out) of scrupulous attention to the laws and customs of the Asian populations, at least had the merit of applying the law equally, or in principle equally, to all residents of the Straits Settlements. It should also be understood that the statements in the text were true as at 1911, but also the position also changed over time.
28 Bedner (2021); see, further, Harding (2002) 35.
29 Lev (1965).
30 Coppel (1999).
31 *Scrimshire v Scrimshire* (1752) 2 Hag Con 395.
32 Cribb (2020).
33 Lino (2018).
34 Noted in: *In the Goods of Abdullah* 2 Ky Ec 8. The judgment, dated 1834, has not survived, but it seems Sir Benjamin Malkin (the judge also in *Abdullah*) applied English law rather than Dutch law to the widow of a Dutchman who died intestate in Malacca after it came under British control, holding that the 1826 Charter had received English law in Malacca.
35 Penang and Malacca became part of the Federation of Malaya in 1948; the common law continues to be applicable there under the terms of the Civil Law Act 1956 (Federation of Malaya), as with the rest of Malaysia.

might say, than in the case of the United States), Singapore can be legitimately referred to, and regards itself, as a member of the common-law family.

Finally, under this section, it is relevant to inquire how seriously the English judges took the »scrupulous attention« issue in terms of modifying the application of English law. After all, Maxwell himself (modifying somewhat his stance in *R v Willans*) stated in a later case:

> In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mohomedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them.[36]

Yet repeatedly when it came down to cases invoking these very ideas, the judges refused to show the kind of flexibility that we will see, in a rare glimpse, in the Six Widows' case itself. It lies beyond the scope of this article to examine these cases in any detail, but a couple of examples will suffice. In the very case just cited Maxwell refused to allow charitable status to a bequest for Chinese ancestor worship, which would have exempted it from the English rule against perpetuities.[37] This was on the basis that ancestor-worship contained no element of public benefit or religion, there being no invocation of a deity. From the perspective of Chinese culture and belief, the decision is oppressive in adopting a very English view of what constitutes religious belief, and the rule against perpetuities thereby attracted, is surely, to use Pollock's term, just about the most »inscrutable« rule that English law ever invented.

In another case[38] the judge held that the word »child« used in the Chinese-language will of a Chinese man who at the time had only children adopted under Chinese custom, and who had no subsequent natural children, meant »natural, legitimate child«. In order to reach this quite bizarre result the judge was compelled to point out that »the deceased being 57 years of age and his wife at that time 42 years, one cannot exclude the possibility of a child being born to them being in the contemplation of the testator when he made his will and this even though at that time they had been married for 20 years without issue«. It is hard to imagine a clearer case of Pollock's »bland following of English precedents«.

The conclusion one is forced to is that the »scrupulous attention« argument was never taken seriously, even in matters that did not impact in the slightest on land and commercial issues, which presumably propelled the reception of English law in the first place. A general reception of English law, however, could surely only be justified by taking seriously, in the family and succession context, the ostensible intention of modifying English law where it would act oppressively or cause hardship.

II. The Six Widows' Case

In light of all these arguments and facts of legal history, we can now look in detail at the case itself. *Re Estate of Choo Eng Choon, Deceased*[39] is a decision of the Supreme Court of the Straits Settlements, affirmed on appeal by the appeal division of that court in 1911.

Mr Choo was a banking comprador (a typical profession for Straits Chinese who became wealthy, comparable to contemporary foreign-investment consultants), who died intestate in Singapore, leaving a large estate. Six women came forward to claim that they were his widows, and so entitled to a share of the estate under the Statute of Distribution, an English statute passed as long ago as 1670. This statute had already been held to be applicable in the Straits Settlements,[40] as one of the statutes of general application forming part of the corpus of common law in 1826 (as described

36 *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 216, 221.

37 See, further, Chung (2014).

38 *Re Lam Ciee Tong (Deceased)* (1949) Malayan Law Journal 1.

39 *Re Estate of Choo Eng Choon* [1911] 12 Straits Settlements Law Reports 120.

40 *In the Goods of Lao Leong An, Deceased*, (1867) 1 SSLR 1. See above n. 21 in which Muslim polygamy had been recognised and the wives' share determined under the statute.

above). The statute provided that a third of a male intestate's estate should go to his wife. The problem was that the statute, passed on the assumption of a monogamous Christian marriage system, clearly envisaged a single wife; but wealthy Chinese men like Mr Choo often had several wives, as was allowed by Chinese custom.

The registrar at first instance decided that one of the women was the deceased's principal wife *(tsai)* and three others were inferior or secondary wives *(tsip)*, while the remaining two women were judged not to have been married to Mr Choo at all (one went through no ceremony and the other went through a ceremony for a primary wife, but that marriage was thereby bigamous). The distinction between primary and secondary wives is a well-attested aspect of Chinese customary law, in which the primary wife has far higher status than secondary wives.[41] The decision was appealed on the ground that polygamy is not recognised in Chinese customary law, and should not be recognised in any event by the court.

Chinese law being foreign law in a British court, its ascertainment was a matter of fact, not law, and therefore subject to potentially conflicting evidence.[42] The appellants sought to challenge an earlier case of 1867, in which Maxwell himself had granted to a secondary wife a share in the intestate estate of a Chinese man.[43] The court accordingly heard conflicting expert testimony on Chinese law, notably from the Chinese Consul-General to Singapore, who asserted that polygamy was *not* permitted under Chinese law, and that »secondary wives« were concubines taken informally. As we shall see, conflicting legal opinion on Chinese marriages was an issue that virtually drove the courts in the Straits Settlements to distraction. On appeal the Chief Justice recognised polygamy and the status of secondary wives as a matter of Chinese custom, but it will be recalled from the discussion of *R v Willans* above that the prevailing system of law did not engage with legal pluralism, and according to precedents the case had to be decided according to English law. There remained, however, the possibility of moderating the effect of English law on the parties, as was also stated in *R v Willans* and in the 1826 Charter. While English law had long recognised polygamy in cases of foreign parties who adhered to a polygamous marriage system,[44] the problem was that it did not recognise a status lying somewhere between a wife and a mere concubine – a woman was, under the Statute of Distribution, either a wife or not a wife.[45] Accordingly, the four women in question were all regarded as wives under the applicable law, but there was no obvious means of distinguishing, in monetary terms at least, between a primary wife and a secondary wife. As Acting Chief Justice Law put it, »legally their position more nearly resembles that of a wife where polygamy is allowed than it resembles anything else«.[46] The four women were thus awarded equal shares in the »wife's« one third of the estate. On further appeal, a bench of three judges decided (by two to one, with a dissenting judgment[47]) to uphold the Acting Chief Justice's decision.

The case highlights the many possibilities presented by the interface of common law and Asian context as discussed earlier. One comment on the outcome by Professor Leong Wai Kum is that it represents neither common law nor Chinese law, but is an odd species of Eurasian law.[48] Kenneth Wee offers a similar view. Citing the fact that the case also decided that a man could not take on a second primary wife, but there was no limit on him taking secondary wives, which was inconsistent with equal treatment, he concludes that »it was, on the whole, a queer marriage of Chinese

41 Wee (1974) 66.
42 12 Straits Settlements Law Reports 120, 152.
43 *Re Goods of Lao Leong An, Deceased* (1867) 1 SSLR 1. See above n. 21.
44 See above n. 31.
45 It will be noticed however (see above, and the text to n. 50 below) that the registrar had in fact recognised the intermediate status of secondary wives with his finding of bigamy in relation to an attempted second marriage to a primary wife.
46 12 Straits Settlements Law Reports 120, 148.
47 The dissent by Sercombe-Smith J is almost unbelievable in its obtuseness. He held that »unions contracted by Chinese British-born subjects domiciled within the Straits Settlements are governed by the English common law, and a marriage to be valid at common law must be celebrated in the presence of an episcopally ordained clergyman. Unless a Chinese British born subject so domiciled is married according to the common law his marriage is invalid and the issue illegitimate. Further, the Chinese are polygamous: the courts here cannot recognise polygamy«. These statements are also incorrect statements of common law.
48 Leong (1999).

and English law concepts. […] Even when pre-existing standards of the Chinese community and not of English tradition were recognised, they had to be hammered into common law form, for the judges were extremely suspicious of foreign jural concepts.«[49]

Granted that the legal pluralism approach was not, on all the precedents, open to the court, it is nonetheless interesting to speculate how the matter might have turned out under a »law-populations« approach. As we have seen, this approach would justify treating the matter simply as one of Chinese customary law – native law for native cases. While it might seem more in accordance with justice and perhaps the legitimate expectation of the Chinese community to allow Chinese custom, rather than English law, to operate in cases involving Chinese parties (in family and succession matters at least), the social reality might in fact suggest otherwise. Under Chinese customary law none of the women would have been entitled to any share of the estate, because such law simply did not recognise female property rights in the first place. Kenneth Wee summarises Chinese customary law in the following terms:

> Under Chinese law and custom (again, with local variations) the property of a deceased went to his sons in equal shares (with the eldest son getting a larger share to aid him in the duty of performing family ancestral rituals). The widows were entitled to be maintained so long as they remained widows. Unmarried daughters were also entitled to be maintained by their brothers, and to a dowry when they married. Married daughters were entitled to nothing.[50]

As Acting Chief Justice Law in the Six Widows' case said: »[t]he result [sc. of disallowing the claims of the secondary wives] I think will be that in the eye of the law here the women merely declared concubines will have no legal rights at all to maintenance or any provision, that they may be turned adrift to starve and that their children may be regarded by the law as bastards«.

In fact, the situation of Chinese women and girls in Singapore was dire enough for the government to establish a Chinese Protectorate primarily for their protection.[51] The fact is that many women and girls were trafficked for prostitution or to become concubines, and lived (and often died young) in appalling conditions in Singapore's Chinatown district.[52] And the taking on of »secondary wives« did not necessarily conform with the customary notion, as many Chinese will have left a primary wife in China and kept a local woman as in effect another primary wife and head of his household.[53] Thus the court's decision, while inevitably open to various objections along the lines of creating monstrosity, had at least the merit of affording some subsistence to women who would otherwise likely be at the mercy of forces beyond their control. The three secondary wives of Mr Choo would certainly not have had any subsistence but for the court's decision, and this probably explains their resort to the culturally unfavoured route of litigation in a foreigner's court.[54]

We can also ask, how relevant is it that Mr Choo, like all other inhabitants of Singapore, could have made a will if he had wanted to? This possibility was essentially not open to him under Chinese custom.[55] We will never know what his expectations were, but presumably as a prominent and wealthy Chinese dealing with foreigners he would have been aware in general terms of the consequences of making and not making a will. But if we consider the application of Chinese customary law as a mercy, we should note that the lack of female property rights could not on the

49 Wee (1974) 77.
50 Wee (1974) 70.
51 Turnbull (2009) 101–102.
52 Foo (2020).
53 Wee (1974) 78. Wee goes so far as to say that »the court's elevation of the *tsip* to the status of an English wife, far from being a bad interpretation of Chinese customary law was in fact a progressive incorporation of new Chinese custom.«
54 A larger question, beyond the scope of this paper, is what Chinese attitudes were towards litigation. Confucianism was very much against litigation, and culturally it is not likely that »washing family dirty linen in public« would have been approved of, but even the foreigners' court had its attractions when it provided a real possibility of redress in extremis. The Straits Law Reports actually contain many Chinese family cases.
55 Wee (1974) 70–71.

assumption of application of Chinese customary law be rectified by will. Advocates of legal pluralism need therefore to consider that bringing the Chinese under English law had some advantages as well as disadvantages, while recognising Chinese custom seems simply to create many disadvantages, other than the fact of its familiarity to the Chinese.

We could of course answer the dilemma by asking what outcome would have had the support of most of the Chinese community in Singapore. As we shall see, Chinese customary marriage and other social practices exhibited a high degree of diversity, and there is no reason to assume that the Chinese community had a single opinion on the merits of Chinese customs. We can only judge by the findings of the Chinese Marriage Committee, established in 1925 (its report is discussed in the next section), which appear to indicate a widespread belief that the government should not interfere in Chinese marriage matters, which were best settled by the Chinese people themselves. At least that seems to have been the view of educated Chinese males. We do also know that numbers of middle-class females demanded legal equality with their European counterparts.[56] It is likely, however, that numbers of wealthy men like Mr Choo himself would have preferred to maintain their traditional privileges; and such men were powerful. They were on nodding terms with the British governor, some even sitting on the legislative council and (as in the case of the Chinese Marriage Committee) government committees. There is of course some force in the argument that the Chinese were in some sense *entitled*, whatever their views might have been, to being dealt with under Chinese custom. After all, Maxwell's statement that »nowhere is it said that their laws are to be attended to« was not thought to be true of Muslims. Their law was fully operated in family and succession cases, and nobody seems to have argued that that should not be the case. However, it is fair to ask, why did the common law allow plenary effect to Muslim law but not to Chinese law? What exactly was the point of this?

In his judgment in the Six Widows' case, Acting Chief Justice Law addresses the position in some detail, and implies that the position should be (at common law, at least) no different.

> Then we have several cases which seem to me to show that polygamous marriages amongst Mohamedans were recognized before the Mohamedan Marriage Ordinance of 1880, though perhaps it is not always clear whether such marriages were recognized in virtue of the passages of the Letters Patent or whether such marriages were recognized on the principles laid down by Sir Benson Maxwell in *Regina v Willans*, which I understand to be, that the law of England will here *ex comitate* or *ex debito justitiae* recognize polygamous marriages when such are valid according to the religions or usages of the parties, be they Mohamedans, Chinese or others […].[57]

The answer to this, given the legislation of 1880 referred to Acting Chief Justice Law, is, again, beyond the scope of this article. But it would appear to lie in the fact that almost all Malays were Muslim, and the Straits Settlements were seen as originally Malay territory, whereas the Chinese were migrants who, by some unspoken premise, must have been attracted to the colony, leaving their ancestral villages behind, and therefore were to expect in general terms to be governed by (indeed to have the benefit of) English law. But if this was so, it does not feature in the case law. Rather, it is argued that on a comparative basis the approach should be similar across British (and even French) colonies.[58]

III. Chinese Marriages: Empirical Difficulties

The legal-policy difficulties involved in the Six Widows' case are further and amply illustrated by

56 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 27.

57 12 Straits Settlement Law Reports 159–160.

58 On this, see Wee (1974) 75, who also points out that the courts in Hong Kong leant much more in favour of Chinese custom. Acting Chief Justice Law even indulges in comparative law to point out that the »neighbouring« Frenchy colony of Cochin-China recognised Chinese marriages as polygamous (at 150, and again at 163). To fail to recognise these marriages would, he argues, »inflict on the Chinese community hardships from which I think they appear to be free in the French Colony and in China, hardships which I think in view of the several passages of the Letters Patent to which I have referred, if on no other grounds, it certainly was never contemplated that they would have to undergo«.

the debate about Chinese marriages. The difficulty in ascertaining the law was an issue that featured prominently in the case itself, which was one of several that encouraged the judges to seek assistance from the government in creating a measure of certainty around marriage laws. Chief Justice Murison's reaction to the evidence in a 1926 case is a typical judicial response of the time:

> Before leaving the question of the so-called usual and essential ceremonies for the wedding of a principal wife, I would like to observe that the whole matter is most unsatisfactory and vague. There seems to be no real and final authority at all as to what are the actual essentials of the marriage: A consideration of various textbooks – Van Mollendorf and Jamieson – and a number of decided cases leads me to the conclusion that these ceremonies differ in different parts of China and again differ here in Singapore. The expert witness Mr Stirling [official Protector of Chinese] was quite vague as to the essentials, so are Van Mollendorff and Jamieson and the expert witnesses.[59]

As a result of such concerns, in 1925 the government established a Chinese Marriage Committee to

> report on the customs, rites and ceremonies, relating to marriages observed by the Chinese residents in the Straits Settlements, and to submit, if thought desirable, proposals as to what forms of ceremonies should constitute a valid marriage and as to the registration of such marriages.[60]

The Committee was the first Straits Settlements government committee to include »Chinese ladies« (three of them), and had also eleven Chinese men, and was chaired by the Acting Secretary for Chinese Affairs, the only non-Chinese member of the Committee.

The Committee interviewed a number of Chinese witnesses from five dialect groups (referred to as »tribes«), from the three colonies, both those born in the Straits and those born in China. The Committee's initiating statement that the matter was extremely complex[61] is highly convincing. In addition to the diversity already indicated, practices in China varied not just from province to province but from district to district; and there were 35 provinces during that tumultuous period of the early Chinese republic. A new form of monogamous marriage by certification was emerging in China. In addition, Chinese marriage practice was changing over both time and geography, and many Chinese had lived in the Straits Settlements for generations. Some (called the »Baba« Chinese) had even lost the ability to speak Chinese, conversing in a mixture of English and Malay.[62] Opinion varied over whether divorce should be allowed (Straits-born Chinese were more in favour of it than those born in China), as well as over what grounds of divorce should be allowed (custom virtually prevented divorce). Interestingly enough, one pressure group called the Chinese Ladies of Penang, as well as Chinese ladies generally who had been educated in English schools, were in favour of monogamy and registration, and allowing divorce as a means of preventing concubinage. So were »a limited number of Chinese gentlemen of advanced views«. Yet the Straits Chinese British Association and most male respondents were against registration and strong views were expressed that the government should not interfere in Chinese marriages. The Committee considered that legislated direct registration of marriages would be ignored by Chinese people.[63]

The Committee reported in 1926 with some rather complex proposals for legislating the registration of Chinese marriages (principally »modern« marriages, but with provision for »old« marriages too).[64] However, they were unable to answer the question as to the requirements for a valid marriage:

> We have found it impossible to submit proposals for legislation as to what forms or ceremonies should constitute a valid marriage, because the evidence disclosed the fact that there are no essentials for marriages in the old style

59 *Woon Kai Chiang v Yeo Pak Wee* [1926] 1 Straits Settlements Law Reports 27, 33. See, further, Freedman (1962).
60 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 2.
61 Ibid., para. 13.
62 Chia (1980).
63 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 42.
64 Ibid., para. 58 ff.

> common to all the Districts of South China or to the locally born descendants of emigrants from those Districts, while the new form of marriage does not require any particular form.[65]

It may also be, as Kenneth Wee suggests, that the common resort to community mediation of family disputes also tended to prevent the emergence of any clarity in the customs themselves,[66] adding to official frustration; although if this was so, it was not mentioned by the Committee.

To make matters even more complicated there was naturally an emerging trend of intermarriage between dialect groups, and even between Chinese and non-Chinese.[67] As a result, the courts had little alternative to reducing the legal requirements for a Chinese marriage, and by extension, all marriages other than Muslim marriages, to the lowest common denominator, which was merely intention, or consent.[68] Obviously, such a standard was both vague and highly fact-based.[69] Relevant evidence might be performance of certain ceremonies, public recognition, cohabitation, and producing and raising children together. This standard had perhaps the single advantage that it was applicable to the broad range of marriage practices evident in the population. But it was neither efficient nor predictable in terms of legal certainty. The strong implication was that marriage registration was the only answer.

IV. Legislation and the Rout of Custom

While it is as difficult now as it was then to formulate a reasoned response to the issue of identifying a Chinese marriage, the issue can be finessed by considering longer-term preferences and outcomes. The report of the Chinese Marriage Committee actually supports such an approach, emphasizing the emergent notion of a »modern marriage«. On this matter the position, as it eventually turned out, but only 35 years later, became clear. In 1958 Singapore became a self-governing colony. In 1959 the first elections on a general franchise including women were held, the People's Action Party under Lee Kuan Yew sweeping to an impressive victory, partly on a platform of addressing women's rights: women were by now a highly significant work force.[70] The PAP fulfilled its promise by introducing a bill for a Women's Charter in parliament in 1960, which was passed into law in 1961. This law resolved the position on marriage law with a high degree of consensus and radical reform.[71] Henceforth, marriage, except for Muslims, would be monogamous and only legally recognised via registration. Principles of genuine consent, equal divorce grounds, including no-fault divorce, fair division of matrimonial property and custody of children, and ages of majority, applied. One female legislator, Chan Choy Siong, set out the grievance and its remedy in stark terms, which seem to nail the issue once and for all:

> Men take women as pieces of merchandise. The inhuman feudalistic system has deprived women of their rights. In a semi-colonial and semi-feudalistic society, the tragedy of women was very common. Men could have three or four spouses. Men are considered honourable, but women are considered mean. It was common in those days to regard having one more female in a Chinese family as being very despicable. Women in our society are like pieces of meat put on the table for men to slice. […] The previous evil custom will vanish with the coming into operation of this Charter.[72]

As a result of this development, from this point Singapore marriage law resembled English law almost exactly. In view of the agonising over

65 Ibid., para. 69.
66 Wee (1974) 77; Lee (1988).
67 See *Isaac Penhas v Tan Soo Eng* [1953] AC 304, where the Privy Council held that a Jewish man could contract a monogamous marriage with a Chinese woman.
68 Leong (1999); Wee (1974) 79.
69 It might be said that these descriptions would not be untypical of the common law in any event.
70 Tan (2016).
71 Leong (2008).
72 Singapore, Legislative Assembly. Debates: Official Report, vol. 12, 6. April 1960, col. 442–444. The customs abolished by the Charter of course included those of other groups than the Chinese, but not Muslims. See, further, Freedman (1968). And for Muslims, see Nizam bin Abbas (2012); as the author points out at 164, the Muslim law exception was carved out by statute in 1880, but he offers no explanation as to why this exception was made, merely commenting that »the continued evolution of Islamic law in a secular country like Singapore is very much dependent on the mutual respect the Muslims and the non-Muslim community have for each other« (187).

customary marriages, legal pluralism and the common law, this is quite ironical. The Women's Charter was enacted just three years after self-government and just two years before the achievement of independence from Britain, as Singapore joined Malaysia in 1963, and just four years before it left that federation on 9 August 1965, to become a fully independent sovereign republic.

Of course, the rout of custom[73] could not be achieved so easily. While registration is the legal test of marriage, the law does not of course prevent couples from observing whatever customary ceremonies are desired – they simply have no legal consequences. In this sense the law achieves the best of both (ancient and modern) worlds. For example, there is evidence that couples often register their marriage in order to get on the housing list, and are only known to be married when they get to the top of the list, moving into a new apartment, and going through applicable customary processes.[74] And of course, the law was only prospective, meaning that the courts would still have to consider customary marriages for many years to come.

V. Contract and the Fate of English Law

Having outlined the resolution of the problem of Chinese marriages, we can now address the broader question of whether in other contexts too the common law system has encountered problems when interfacing with the Asian contexts discussed in this article.

With this in mind we can move to commercial contexts, in which English law was the subject of continuing and unmodified reception. This section therefore presents a further brief case study, inspired by an article by Professor Mindy Chen-Wishart, published in 2014, which explores the issues of legal transplantation of the common law, Confucian values, and undue influence in the law of contract in Singapore relating to family guarantees.[75] This study addresses similar issues to the Six Widows' case, in the sense that in the judicial reasoning process the common law reveals flexibility at the precise interface between common law and the Asian context.

Professor Chen-Wishart travelled from Oxford to Singapore to teach the law of contract. Her assumption was that the law of contract in Singapore was more or less identical to English law, and that local cases could simply, if necessary, be substituted for English ones. This was not only because of the general reception of English law as described above, but because from 1878 to 1993 there was a *continuing reception*[76] of English mercantile law. That is to say that in Singapore a mercantile contract case would, by statute, be decided in exactly the same manner as it would be in England at the relevant date. This continuing reception was ended only by the passing of the Application of English Law Act in 1993,[77] a measure that was in essence designed to address the legal implications of the United Kingdom joining the European Union, in the light of a danger of European law being applicable to Singapore, as it were by accident resulting from the coincidence of continuing reception of English law and the European Communities Act 1972 (UK).

In English law there is a concept of undue influence, under which, if a person obtains a guarantee of a loan, the relationship between the borrower and the guarantor may be such that undue influence over the latter by the former may be found to vitiate the guarantee. Professor Chen-Wishart discovered, looking at English and Singapore cases on undue influence, a paradox that, while the Singapore judges ostensibly followed English cases, the actual outcomes, in terms of application of law to the facts, were unexpected given the English law background. What the cases seemed to reveal was a reluctance on the part of the judges to find undue influence in cases where a borrower's family member had acted as guarantor for a bank loan. The judges referred to consider-

73 As Freedman (1968) has called it.
74 Tan (1999).
75 Chen-Wishart (2014).
76 Phang (2005) 12, uses a distinction between »general« and »specific« reception. See also Phang / Soon (1985).
77 Phang (2005) 12 ff.

ations (such as that the father was acting in the broad interests of the family) that militated *against* a finding of undue influence. This tendency, she found, was attributable to the implicit application of Confucian values to the given fact situations.

Her conclusion is a positive one. The way in which the judges used Confucianism was simply part of a well-known phenomenon, namely the adaptation of transplanted law to social circumstances. The conclusion is plausible, as we can find a tendency for judges in Singapore to use Confucian values in applying common law principles to local fact situations in other contexts too. For example, in England it is considered that in relation to defamation by politicians, they are expected to have a thick skin, as severe criticism is part of the political process in a thriving democracy.[78] In Singapore, on the other hand, the judges have expressly used the Confucian concept of the *junzi* (the upright Confucian gentleman) to explain why it is important for Singapore politicians to be able to protect their reputations, especially when prevailing political ideology is firmly against corruption, mendacity, and failure to protect public interests over private ones.[79]

This study adds to our narrative in an important way. It illustrates the fact that judicial reasoning under common law principles can be an important factor in the adaptation of law to society – even after two hundred years of adaptation.

VI. Conclusions

The lack of attention of colonial judges to the local context did not serve to enhance the reputation of the common law in Singapore. A far better policy might well have been to trade off pluralism in personal law matters such as marriage for certainty in transactional matters such as contracts, and such policy would have been entirely consistent both with the 1826 Charter and the clear preferences of society.

Having said that, it does not appear that the decision in the Six Widows' case is obviously wrong. Unlike some more rigidly common-law oriented decisions noted above it recognised Chinese polygamy in a way that paid attention to social needs. The criticism that it did not pay careful attention to Chinese custom, which was clearly a declining asset, is not quite made out. When Singapore had the opportunity to make its own decisions on marriage and divorce law, it opted to modernise the law, as did many other jurisdictions at a similar period, and it did so along English lines. In this way the Chinese Marriage Committee was around forty years ahead of its time.

The case studies presented here lead to a conclusion that, despite the general lack of attention of colonial judges to the local context, the common law has successfully transplanted to Singapore. As former Supreme Court judge and law professor Andrew Phang states, »English law is the foundation of the Singapore legal system«.[80] After two hundred years of common law in Singapore there is no sign that the undoubted social prevalence and persistence of Asian societal norms presents a danger to the common law inheritance. It is of course true that in some areas Singapore law diverges greatly from that of England. Examples include the minimal application of judicial review; the abolition of jury trial; the adoption of the Torrens system for registration of land rights in preference to English law; and no doubt many other issues.[81] Yet what is striking is not the degree of divergence but the degree of continuing exhibition of typical common law tropes. I refer here to institutions (courts, legal profession, legal education); substantive law (even family law, as explained here); and legal methods (the doctrine of precedent, judicial reasoning, modes of advocacy). In fact, Singapore is not only a fully subscribed member of the common-law family, but contributes to continuing development of the common law, as in a 2017 case which recognises the depri-

78 Phang (2005) 19 ff.
79 Sim (2011) 324–325.
80 Phang (2005) 7.
81 Phang (2005) 7 mentions a number of these.

vation of genetic affinity as ahead of damages at common law.[82] Critical to this success has been the role of the judiciary in making astute use of common law techniques of interpretation, as in the undue influence cases.

Whether something similar can be said of the diffusion of common law in other Asian jurisdictions is of course a matter for further investigation.

■

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82 See, e. g., *ACB v Thomson Medical Pte Ltd* [2017] 1 Singapore Law Reports 918.

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EQUAL JUSTICE UNDER LAW



Paola Revilla Orías, Pablo Quisbert Condori

Kintal sut'i: Preservación, transmisión y usos de saberes normativos en ayllus y comunidades (Charcas, Bolivia, siglos XVI–XXI)*

I. Introducción

Las sociedades se han venido organizando sobre la base de sistemas normativos que, buscando legitimar cierto orden, imponen supuestos que no son necesariamente asimilados, integrados y compartidos por todos en contextos de profunda diversidad cultural. De esta manera, traslucen las relaciones de poder imperantes en cada contexto. Más aún, cierta mirada monolítica a la norma ha llevado a algunos legisladores e historiadores del derecho a mostrarse reticentes a aceptar la realidad de confluencia de diferentes regímenes normativos en un mismo escenario. El análisis de la complejidad implícita a esta realidad es, sin embargo, fundamental para garantizar el trato equitativo en la vida en común.

A la luz de hallazgos antropológicos y de material de archivo, el presente ensayo propone la aproximación a saberes normativos que forman parte del acervo documental que han guardado y utilizado ayllus y comunidades en Bolivia a lo largo del tiempo, para defender derechos vulnerados sobre la propiedad de la tierra y la integridad de la población. Haremos un acercamiento histórico de larga duración a esta problemática, a la luz de diferentes ordenamientos estatales (incaico, colonial, republicano). Mostraremos cómo se encuentran, intersectan y tensionan en ciertos momentos múltiples saberes normativos que pueden o no reposar en la letra escrita y que se dejan sentir en las prácticas cotidianas. Sin ánimo de esencializarlos, exploraremos las condiciones de producción y de renovación de las narrativas de obligatoriedad que hicieron viable el relacionamiento inter-ayllu, y posible el pronunciamiento trans-comunitario ante abusos de diferentes niveles de la autoridad estatal. Invitamos al historiador a descentrar la mirada a la norma desde parámetros discursivos que se quieren únicos o hegemónicos, en su afán regulador de sentidos desde la cúpula legisladora del gobierno de turno. Proponemos que estas no son sino voluntades ampliamente desbordadas por la complejidad transformadora de las relaciones sociales a todo nivel.

Empezamos introduciendo al lector en las particularidades del espacio en que se encuentran los documentos de comunidad, en las razones por las que son conservados y en las formas de su preservación. En este andar reflexivo será necesario reconsiderar la noción convencional de archivo. Luego, haremos un repaso breve del relacionamiento entre ayllus, comunidades y gobiernos de turno dentro del entramado estatal entre los siglos XVI y XXI, atendiendo a la violenta asimetría de dependencia que lo caracterizó en diferentes momentos de la historia común.[1] Así, podremos entender mejor el contenido de algunos escritos. La mirada se detendrá enseguida en el análisis del hábito de los comunarios de copiar documentos bajo parámetros propios, a modo de resguardar y transmitir ciertas memorias. Nos detendremos en el tratamiento particular dado a las referencias temporales en la narrativa, y a los móviles de transmisión y uso de ciertos saberes normativos. Ante la evidencia, al final de estas páginas el lector

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1 Entendiendo asimetría de dependencia como el control de un actor o institución sobre otro que le brinda ciertos beneficios dentro de un mismo entramado relacional, en el que no le es posible cambiar su situación por el tipo de vínculo que se ha tejido. Ver, por ejemplo: Winnebeck et al. (2021).

podrá responder si es siquiera posible abordar la historia del derecho en Bolivia, sin asumir la complejidad de estos conocimientos normativos intrincados.

II. Nociones de archivo a contrapunto

La palabra archivo remite a la idea de documentación almacenada por personas, familias, colectividades, pero también deja pensar en la institución y en el propio edificio que preserva el material. Desde muy temprano en el siglo XVI en Europa se fue consolidando la noción de archivo de Estado, que pasaría a asimilarse a la de archivo nacional en el XIX.[2] En los que también son conocidos como archivos generales, se buscó poner toda la documentación generada por las instituciones que se constituyeron dentro de los marcos de las diferentes jurisdicciones políticas. Es más, la organización interna de los archivos y el correlato de la historia escrita ha ido de la mano de la consolidación de la disciplina histórica y de la profesionalización de historiadores y archivistas de los Estados independientes, en su mirada a los procesos de construcción política de los Estados-nacionales en Latinoamérica.

Bolivia cuenta con un repositorio nacional desde 1883, en el que fue almacenada la documentación pública de la Real Audiencia de Charcas (siglos XVI–XVIII), la que fueron produciendo sus instituciones desde que se constituyó en Estado independiente en 1825; asimismo cuenta con algunas colecciones privadas.[3] El Archivo y Biblioteca Nacionales de Bolivia (ABNB) está en la ciudad de Sucre. A su vez, algunos departamentos, municipios e instituciones diversas administran sus archivos históricos y de gestión. Además, existen otros que obedecen a lógicas propias de selección, preservación y uso de los documentos que resguardan.

Cientos de ayllus, comunidades y pueblos cuyos orígenes remontan en ocasiones al periodo prehispánico, al colonial o que son de creación más reciente, forman parte del Estado boliviano.[4] A lo largo del tiempo, estos grupos de población de culturas diversas se han visto en la necesidad de pronunciarse por canales legales y en ocasiones de resistencia armada, en contra del aumento de tasas y servicios impuestos al colectivo, así como en defensa de los derechos sobre las tierras trabajadas en el territorio habitado. Conscientes de la importancia de contar con el respaldo suficiente para sostener sus demandas, los pobladores guardan documentos en archivos propios. Se han referido a ellos antropólogos e historiadores como Tristan Platt en Macha, Roger Rasnake en territorio yura y Vincent Nicolas en Tinquipaya, Potosí; asimismo, Denise Arnold en Qaqachaka, Oruro y Máximo Pacheco en la región yampara de Chuquisaca.[5] La noticia viene además del uso que hacen de este material los comunarios hasta el presente, en sus gestiones frente a diferentes instituciones del Estado, y en las referencias que dejan en sus investigaciones.[6] Son datos de gran valía, porque ponen en evidencia formas particulares de resguardo de memoria histórica.[7]

Poner en relación la noticia sobre estos archivos permite notar que los documentos resguardados son de naturaleza diversa, aunque predominan aquellos vinculados a los asuntos sobre tierras,

2 Los Reyes Católicos fueron pioneros en ordenar la concentración y organización de la documentación generada en las instituciones del imperio español, decisión que respaldaron Carlos V y Felipe II.

3 Ley del 18 de octubre de 1883 promulgada durante el gobierno de Narciso Campero. Las transferencias se vieron interrumpidas desde 1898 tras el conflicto armado entre Sucre y La Paz. Tras gestiones precisas, algunas instituciones enviaron su documentación en lo sucesivo. La legislación boliviana señala que, tras 35 años, y cuando los documentos pierden sus valores primarios, deben ser transferidos a un repositorio histórico.

4 Entiéndase por ayllu la unidad socioeconómica y política de origen prehispánico, cuyos miembros están vinculados por parentesco y que, establecida en un territorio dado, aprovecha colectivamente de sus recursos. Ver, por ejemplo, Platt (1982).

5 Platt / Molina (2018); Nicolas (2012, 2015); Arnold (2018); Rasnake (1989).

6 Un ejemplo de las nuevas generaciones de comunarios investigadores en la región yampara es Vargas / Ugarte (2019). Ver también el texto fundamental de comunarios de la Comisión de historiadores de la marka qaqachaca (2021).

7 San Pedro de Macha es una localidad con alrededor de 20 000 habitantes, que se encuentra en Chayanta, a 150 kms. de la ciudad de Potosí. Tinquipaya es un municipio de la provincia Tomás Frías, cercano a Chayanta, con alrededor de 27 000 pobladores. La región o *marka* Qaqachaka está conformada por veinte comunidades que agrupan a seis ayllus menores del municipio de Challapata, al sur de departamento de Oruro. Reúne alrededor de 1600 familias. Sobre el pasado prehispánico de estas comunidades quechua y aymara hablantes ver Platt et al. (2006) y Pacheco (1994).

territorio y obligaciones fiscales. Existen legajos de expedientes judiciales, títulos, contratos, entre otros. Sin embargo, no todo es documentación escrita en papel. Diferentes objetos, entre ellos »soportes de memoria« con función ritual, de raigambre prehispánica y que continuaron circulando en el periodo colonial y republicano como *qhipus*, textiles, fetos disecados de llama y cerámicas, también son parte del acervo que se ha decidido guardar.[8] La elección de objetos en los archivos de comunidad no es aleatoria. Obedece al deseo de preservar aquello que enuncia un pasado y que, de conocerse en sus claves contextuales, permite la mejor gestión del presente.

Los custodios de estas memorias no son necesariamente archivistas ni historiadores en sentido estricto. Se trata de personas con la legitimidad para detentar y proteger los documentos del común.[9] Puede ser un curaca, cacique o *jilaqata* o sus descendientes, aunque no siempre ni necesariamente una autoridad política.[10] Tristan Platt vio por primera vez el archivo de Macha en 1971, y volvió a verlo el año 2013, cuando don Gregorio, hijo del curaca don Agustín Carvajal, lo había heredado. Denise Arnold refiere por su parte que, en Qaqachaka, don Franco Quispe, descendiente del linaje Inca Maraza, era quien preservaba los documentos históricos de la comunidad. En cuanto a Tinquipaya, Vincent Nicolas documenta que los caciques guardaban »memorias« de los »mojones« (límites territoriales) de cada parcialidad.[11] Esta documentación habría movido a que las autoridades coloniales les entregasen títulos en papel sellado que, algunos, guardan hasta hoy.

Tampoco ha sido necesario que los detentores de esta documentación sepan leer y escribir. Cuando los ayllus y las comunidades han necesitado hacer uso de ella, han buscado el apoyo de escribanos bilingües (aymara / quechua-castellano). El curaca don Agustín Carvajal acudió a la ayuda de *musus* (jóvenes), según cuenta Platt. Se dice además que caciques como el apoderado Santos Marka T'ula, de las primeras décadas del siglo XX, memorizaron el contenido de los documentos que luego dictaban a los escribanos que los asistían en sus trajines urbanos.[12] Estas personas contaban con la legitimidad necesaria para usar el material de archivo en la reivindicación de derechos del ayllu o de la comunidad como colectividad.

Cabe mencionar también que la documentación de distinto volumen que compone estos archivos se encuentra en las viviendas de sus detentores asignados, entre sus enseres, y no en recintos especialmente creados para hacer de archivo. Suelen ser conservados en cajas de cartón y cajones de distinto tamaño, en bolsos de cuero de oveja o en *q'ipis* (bultos), dejando pensar en la itinerancia que en ocasiones les acompaña.[13]

Estos archivos no deben ser entendidos solo como un repositorio de fuentes.[14] Íntimamente compenetrados con su entorno –que les influye y al que influyen–, los documentos son gestionados como fuente de poder más allá de la letra, como ancestros protectores –según propone Nicolas– que merecen atenciones especiales.[15] Así, se les hace *ch'allas* (libaciones) cada cierto tiempo, a modo de mostrar respeto y garantizar ritualmente un buen porvenir a la comunidad. De hecho, no se

8 Sobre algunos materiales como »soportes de memoria« ver el trabajo de Martínez (2005).

9 Sobre archivos que no son individuales ni familiares, pero de comunidad ver también Crespo (2020) 191.

10 De hecho, en Qaqachaca el archivo no se encuentra bajo la responsabilidad de una sola persona. Varias familias guardan documentos que utiliza el ayllu o la comunidad cuando lo juzgan conveniente. Ver detalle de la tabla inserta en: Comisión de historiadores de la marka qaqachaca (2021) 241.

11 Platt / Molina (2018) 41; Arnold (2018) 34; Nicolas (2015) 99. Entiéndase parcialidad como un espacio habitado determinado, sea este *hanan* (arriba) o *urin* (abajo) dentro de la lógica de partición y complementariedad dual andina. Ver Bouysse-Cassagne et al. (1987).

12 Entiéndase por caciques apoderados a las autoridades de ayllus, comunidades y *markas* que se movilizaron a fines del siglo XIX en Bolivia para pronunciarse contra diferentes atropellos a sus colectividades, principalmente en lo que va del avance de las haciendas y los derechos sobre las tierras comunes. Ver Condori Chura / Ticona (1992). Sobre Santos Marka T'ula, ver: Taller de Historia Oral Andina (1984).

13 Ver una hipótesis interesante de Xochitl Inostroza al establecer un paralelo entre los bolsos de cuero de oveja y el concepto de »libro becerro« colonial. Inostroza (2020) 161–162.

14 Platt / Molina (2018) 29.

15 Nicolas (2015) 340. Este autor refiere que los llaman »machu papeles«, aludiendo a »persona« y no a »cosa vieja«. Advierte que la expresión aymara »awil achach papila« tendría un sentido similar.



Imagen 1: Marcelino Mamani y familia *ch'allando* documentos en Tinquipaya Foto: Vincent Nicolas

los puede sacar de donde reposan sin cuidados rituales, concretamente un brindis con alcohol o aspersiones con sangre de animales, por lo que algunos documentos tienen las primeras hojas manchadas.[16]

La evidencia de estas prácticas muestra no solo la necesidad de estudiar los múltiples sentidos que puede tener no solo la noción de archivo, sino la pluralidad de significados y usos dados a los documentos dentro de cada contexto específico en Bolivia. A su vez, hay que entender que los ayllus, comunidades y markas tienen larga experiencia en la acumulación de archivos propios con especialistas (no solo letrados) al servicio de intereses comunes. Más aún, los datos recabados son altamente reveladores del sagaz desenvolvimiento de estos grupos con la norma escrita, en algunos casos desde el siglo XVI; pero además, ellos revelan formas propias de referir al derecho y de transmitir saberes normativos que perviven hasta hoy. Esto se hace más evidente cuando se analiza el contenido de los escritos que presentan los comunarios ante los tribunales de justicia, retomando pero también produciendo conocimientos normativos diversos que traducen a las autoridades del Estado central con el fin de sustentar sus reivindicaciones.[17] Contextualicemos un poco la relación entre comunarios y distintos niveles de autoridad de los gobiernos de turno en la larga duración del relacionamiento dentro del Estado.

III. Acuerdos asimétricos y violencia del relacionamiento

La relación entre comunarios y autoridades del Estado central ha ido cambiando a lo largo del tiempo. Los modos de relacionamiento dependieron de los parámetros estipulados por el orden político dentro del que tuvieron que interactuar como colectivo, fuesen estos los del incario, de la Monarquía católica española, República liberal o del Estado Plurinacional. Esta dinámica ha movido a que, hasta el día de hoy, las comunidades sean

16 Arnold (2018) 34.

17 A propósito de diversidad de regímenes normativos, y de traducción y producción de conocimiento normativo ver Duve (2022).

pensadas, incluso por la historiografía, de modo erróneo, casi como ajenas al Estado, cuando en realidad lo integran y van moldeando, aunque en una innegable asimetría de dependencia en el vínculo.

Los movimientos poblacionales que llevaron adelante los incas en el siglo XV y los españoles más adelante como estrategias de control del territorio y de su población, cambiaron la dinámica regional de la que fuera la confederación Qaraqara-Charka en el centro sur andino, sobre el que se establecería la Real Audiencia de Charcas.[18] La reorganización durante la administración del virrey Francisco de Toledo en el siglo XVI, dentro de la lógica de separación de la población en las llamadas dos repúblicas (de españoles y de indios), llevó a la reducción de población de los ayllus en »pueblos de indios« y comunidades, lo que trajo como consecuencia la consolidación de una nueva territorialidad andina colonial.[19] A esta sucedieron visitas y revisitas para contar la población, pero también de venta y composición de tierras, en las que los representantes de la Corona, entregaron –más bien cabría decir, vendieron– títulos escritos a los caciques, quienes a su turno también realizaron este tipo de transacciones.[20] Esta dinámica administrativa no vino sin profundos cambios en la manera de entender los vínculos comunes y de recrearlos en lo sucesivo dentro del Estado monárquico.

La República boliviana de corte liberal intentó disolver la comunidad como unidad político-administrativa para favorecer el modelo de ciudadano-propietario individual de la tierra. Esto queda plasmado en el decreto de Simón Bolívar dado el 8 de abril de 1824 en Trujillo. No obstante, el congreso boliviano, por ley de 20 de septiembre de 1826 declaró esta disposición en suspenso, y el ejercicio de las autoridades reconocidas en ayllus y comunidades se mantuvo activo. Las arcas del Estado siguieron percibiendo las llamadas contribuciones indigenales.[21] De hecho, la tributación fungió de garantía, como puntualiza Marta Irurozqui, para que las comunidades pudiesen gozar de ciertas prerrogativas en la administración del territorio de comunidad.[22]

El mayor atentado del siglo XIX contra ayllus y comunidades como unidades políticas llegó con el gobierno de Mariano Melgarejo (1864–1871). El decreto del 20 de marzo de 1866 determinó que, si los indígenas no presentaban títulos de propiedad dentro de los sesenta días de notificados, las tierras podían ser subastadas por el Estado. A pesar de los fuertes pronunciamientos de los pobladores que terminaron sacando a Melgarejo del poder, la ley de Ex-vinculación del 5 de octubre de 1874 y la del 1 de octubre 1880 buscaron disolver la comunidad apostando a la entrega de títulos individuales.[23] Las llamadas revisitas de tierras de origen no fueron sino la puerta a la expropiación de tierras de comunidad en favor de las haciendas, que además siguieron absorbiendo mano de obra.[24] La resistencia a estas políticas arbitrarias en el terreno y frente a los tribunales se dejó sentir por parte de los afectados. En algunos lugares, las comunidades tuvieron éxito impidiendo la exvinculación, como en Tinquipaya, pero hubo regiones donde muchas desaparecieron, como en Chuquisaca. La defensa legal de los derechos sobre las tierras de comunidad ha sido una constante de litigio desde que fue instalada la Audiencia de Charcas hacia 1560 hasta el presente en Bolivia.

18 Platt et al. (2006). Ver además Rivera (ed.) (2014) y Barnadas (1989).

19 Ver Jurado (2004). El espacio del pueblo de indios como constructo social obedecía a la planificación que detalló Juan de Matienzo, oidor de la audiencia de Charcas, en su *Gobierno del Perú* en 1567: Matienzo (1967) 49. Teresa Gisbert señala que la iniciativa tuvo un impulso inicial de la Iglesia, que buscaba así tener un mayor control sobre la población indígena durante su evangelización. Gisbert / Mesa (1997) 194. El trazado seguía el modelo de damero con que se organizaron las villas españolas.

20 Entiéndase por composición de tierras el proceso administrativo colonial de reconocimiento y entrega de títulos, mediando un pago, así como la repartición de los sobrantes y, muchas veces, adjudicación por parte de la Corona.

21 El tributo, abolido durante las Cortes de Cádiz (1810–1814), fue restituido durante el gobierno de Andrés de Santa Cruz (1826–1836). Ver Sánchez-Albornoz (1986).

22 Irurozqui (2014) 93. Ver también Antezana (1992).

23 En este contexto, en algunos lugares se puso en marcha la estrategia del pedido de títulos proindiviso para mantener el vínculo comunitario. La titulación individual movió a que, una vez realizado el trámite, muchas veces los propietarios, voluntariamente o bajo distintas formas de coerción y engaño, vendiesen su tierra al hacendado, deviniendo sus colonos.

24 Esto fue en paralelo a un proceso de aumento acelerado de forasteros y de disminución de originarios en los ayllus. Al respecto, ver Klein (1995).



Imagen 2: Comunarios en sala del ABNB, julio de 2015 Foto: Paola Revilla

Ahora bien, desde su creación, en la letra el Estado republicano no reconocía la figura del cacique como autoridad basada en cierto linaje, por lo que los comunarios debían actuar a través de apoderados generales ante las instituciones. Sus gestiones se incrementaron hacia 1880 y continuarían con fuerza desde inicios del siglo XX, mediante la acción de los caciques y de sus delegados.[25] Para demostrar la arbitrariedad de los avasallamientos de tierras de comunidad, algunos de los caciques apoderados presentaron –y presentan hasta hoy– títulos coloniales de composición.

A pesar del reconocimiento de las tierras de comunidad por parte del gobierno que llevó adelante la Revolución de 1952, la Reforma Agraria de 1953 priorizó la titulación individual, bajo el modelo de ciudadano campesino sindicalizado que buscó consolidar.[26] En la década de los años 90 del siglo XX, y dentro de una lectura multiculturalista de la realidad boliviana, se reconoció la diversidad y derechos políticos de las que, desde la Constitución de 1994 (art. 171), pasaron a ser llamadas Tierras Comunitarias de Origen (TCO) en toda la extensión del país. Desde entonces, los pronunciamientos comunales ante la justicia reivindicarían no solo derechos sobre tierras y territorio, sino la cultura compartida.

Actualmente, el Estado boliviano definido como plurinacional, intercultural y comunitario dice reconocer y proteger, en el marco de la Ley, los derechos y la libre determinación de las »naciones y pueblos indígena-originario campesinos«.[27] Declara además respetar el modelo administrativo basado en la estructura del ayllu para el aprovechamiento de los recursos naturales y el ejercicio sociopolítico y jurídico, según los valores, creencias, costumbres y lenguas de cada territorio.[28] Algunas comunidades buscan de hecho ser reconocidas como naciones para gozar de los beneficios que da este estatuto jurídico en el espacio legal en el que deben interactuar. En este escenario, los litigios sobre linderos entre comunidades, o por tierras con propietarios de haciendas, continúan. Los comunarios o sus apoderados no dudan en visitar repo-

25 Sobre la acción de los apoderados generales y de los caciques apoderados ver: Taller de Historia Oral Andina (1984).

26 Ticona (2004); Pacheco / Hernáiz (2000).

27 Constitución Política del Estado, título 1, capítulo 1, artículos 2 y 3. El concepto de nación hace referencia no solo al territorio sino a las particularidades identitarias de comunidades cuyas raíces remontarían al periodo prehispánico. Su validación jurídica se debió en gran medida a la presión creciente del discurso de diferentes movimientos indianistas e indigenistas desde la década de los años 70. Ver Pacheco / Hernáiz (2000).

28 Buscando ceñirse al Convenio 169 de la OIT del 27 de octubre de 1989.

sitorios urbanos, además de usar escritos que guardan en los archivos de comunidad. Algunos de estos documentos ameritan una mirada más detenida por las claves que revelan su circulación y contenido.

IV. Para repensar la noción de copia en el uso de los materiales

En 1920, tras un largo proceso de trámites ante distintas instituciones y autoridades, Santos Marka T'ula, cacique del ayllu Jilata en Sicasica, La Paz, entregó los expedientes que llevaba consigo al entonces Archivo General de la Nación en Sucre.[29] Entre estos documentos figuran testimonios de abusos a los trabajadores y alegatos en defensa de la propiedad comunal de tierras y de linderos, dirigidos a la Honorable Cámara de Diputados, al Ministerio de Gobierno y al Arzobispado.[30] Presentados entre 1919 y 1933, algunos escritos son transcripciones de otros, contemporáneos o de fechas anteriores, del siglo XIX y del periodo colonial. Vincent Nicolas constata la práctica –al menos desde 1883– de copiar documentos en las comunidades, así como de pedir copias al archivo nacional, de textos de los que tenían noticia que estaban en algún expediente judicial seguido previamente.[31] Sacar copias mecanografiadas o fotostáticas de los documentos y legalizarlas ante notario no solo es frecuente, sino un requisito para algunos trámites en Bolivia, independientemente de que se presente o no el documento original.[32]

A inicios del siglo XIX, como desde mucho antes, las transcripciones a mano eran una forma de preservar el contenido de la documentación frente a la posibilidad de que los originales se traspapelasen o, incluso, perdiesen. Entre los papeles de Marka T'ula figura un escrito dirigido en 1929 al entonces ministro de gobierno que refiere: »tenemos [los caciques] tantos papeles en tantas oficinas en la Excelentísima Corte desde el año 1924 y en todas las oficinas no hay forma que nos devuelvan«.[33] El ocultamiento y pérdida de papeles presentados, e incluso el cambio del contenido por parte de autoridades del corregimiento y de las subprefecturas, parece haber sido frecuente. La intención bien pudo haber sido el evitar que se conozcan ciertos detalles de su administración.[34]

Transcribir permitía también hacer frente a la violencia de la sustracción de documentos de comunidad. Nicolás Cachi, sirviente del corregidor de Curahuara de Pacajes, La Paz, a inicios del siglo XX, recuerda que cuando Marka T'ula fue apresado por presentar quejas ante las exacciones a los comunarios, se le arrebataron »los títulos y la protocolización en tres cuerpos«.[35] Perder papeles o »hacer perder papeles« –como se dice hasta hoy en el lenguaje coloquial– era un tema serio. Por un lado, frente a los comunarios: »las autoridades no nos atienden ni pagando y que los comunarios a nosotros [los caciques] nos exigen los papeles«.[36] Por otro lado, frente a los tribunales, tener títulos hacía la diferencia, aunque estos hubiesen emanado de procesos de expropiaciones. Los caciques dejan ver su indignación: »y ahora nos dicen que nosotros nos hemos descuidado totalmente de dichos papeles que daba un paso a los goces de propiedad«; »nos dicen que ellos son los titulados«; »[y nos dicen que] sus papeles y archivos no valen nada de los caciques«.[37] La última frase remite a la idea de títulos que habrían dejado de tener valor frente a transacciones posteriores a la promulgación de leyes de exvinculación del gobierno de

29 ABNB: ROA-PS-86. 3.1, 3.2, 3.3, 3.4, 3.5. La visita de autoridades delegadas al ABNB se ha mantenido constante a lo largo del tiempo.

30 Los documentos que dejó Marka T'ula han sido transcritos y publicados en: Archivo y Biblioteca Nacionales de Bolivia (ed.) (2019).

31 Así también, en 1885, el comunario Sebastián Aguilar solicitaba al Prefecto de La Paz se le franquee testimonio del »Libro Real de Composiciones y ventas de terrenos hechas por el capitán don Francisco Antonio de la Masueca Alvarado, en el que se registran varias partidas de oblación hechas para la Corona de España«. Archivo de La Paz (ALP): Expedientes Prefectura (EP), caja 98, documento 69.

32 Esto lleva a que, por ejemplo, en el Archivo de La Paz, se aclare a los comunarios que acuden regularmente para pedir copias y certificaciones de documentos, que estas no son legalizaciones.

33 ABNB: ROA-PS-86. 3.2, f. 4v.

34 Respecto a los cambios »maliciosos«, ver ABNB: ROA-PS-86. 3.1, fs. 6–10.

35 ABNB: ROA-PS-86. 3.1, f. 3v. Algo similar recuerda Julián Ugarte el año 2019 sobre lo que le decían sus mayores en la segunda mitad del siglo XX: »nuestros documentos nos desnudaron todo nos quitaron los militares, de algunos está ocultado en las montañas, de algunos está guardado en nuestras casas […]«. Vargas / Ugarte (2019) 96.

36 ABNB: ROA-PS-86. 3.2, f. 2.

37 ABNB: ROA-PS-86. 3.3, f. 4v. Escrito de mayo de 1918. ABNB: ROA-PS-86. 3.3, f. 5. ABNB: ROA-PS-86. 3.2, f. 2v.

Melgarejo. A esta realidad remiten también expresiones como: »nos explotan a los comunarios ya ocultando los escritos con decretos superiores […] tratando de enredarnos entre comunarios«.[38]

Ahora bien, las copias realizadas a mano no siguen necesariamente los mismos procedimientos ni persiguen los mismos fines que las de un paleógrafo profesional. Frank Salomon notó que en Tupicocha, Perú, León Modesto Rojas –el comunario con el que hizo el ejercicio de transcribir un documento colonial– buscó copiar lo más exactamente posible todo atributo gráfico que apareciera en el papel, como si toda grafía fuera significativa para denotar su autoridad. Esta práctica es reveladora de la idea de las transcripciones como producción de facsímiles del original.[39]

Podría sorprender además que la importancia conferida al documento no coincida con su contenido. Así, lo que en ocasiones se preserva y presenta ante las autoridades como garantía de los derechos sobre el territorio no es necesariamente un título de composición, sino escritos que citan disposiciones virreinales sobre las obligaciones de la mita, pago de tasas, abusos de autoridades delegadas o sobre linderos.[40] La presentación de pruebas escritas sigue pues parámetros propios de gestión de las memorias de ayllus y comunidades, sin que esto signifique que su uso sea menos legítimo. El valor del documento radica, retomando a Nicolas, en que este se constituye en la forma de demostrar los servicios prestados al Estado, colonial o republicano, y la garantía para que se respeten sus derechos en el presente de la demanda.[41]

Otra característica de algunos de estos documentos es que son concebidos para circular, para que su contenido sea divulgado en el ayllu, entre comunidades y ante las autoridades de las urbes.[42] Legalizados ante notario o no, estas transcripciones funcionan como traslados –término propio al lenguaje jurídico– del original. Un texto entre los que figuran en la documentación de Marka T'ula es muy elocuente sobre esta dinámica (ver anexo). Se trata de un alegato en defensa de la propiedad de las tierras, del lugar de los linderos y del trato a la población que pudo haber sido parte, en algún momento, de un texto más amplio de pedido de revisita de tierras. El cacique lo presenta transcrito al menos en tres ocasiones, en escritos entre 1919 y 1933.[43] Hacia 1971, Tristan Platt encontró un texto muy parecido en sus referencias en el archivo del curacazgo de Macha y lo transcribió a máquina.[44] Años después, Denise Arnold da cuenta de haber encontrado uno similar en Qaqachaca y los comunarios refieren a su contenido en el año 2021 cuando la »Comisión de Historiadores de la Marka« publica junto al ABNB la »Memoria Qaqachaca«.[45] Por su parte, Vincent Nicolas lo encuentra en el archivo de Tinquipaya.[46] Para este autor, el texto anónimo puede ser de autoría colectiva y haber sido redactado entre 1880 y 1884, desde cuando vendría circulando mediante traslados, en *q'epis*, por diferentes espacios, más allá de los linderos del ayllu en que fue concebido. Que caciques de diferentes regiones hayan usado transcripciones de este documento o de partes de él, lo que indica la autoridad que su contenido había ganado con los años a nivel trans-comunitario. De hecho, estos archivos permiten constatar que no se hacían copias solo de documentos de la región que los guardaba. El saber que se produce y comparte es pues, en este sentido, altamente performativo.

El actuar de los representantes de las comunidades en conjunto no es poco frecuente, no solo para sentar quejas y pedidos ante las instituciones del Estado, sino para un mejor manejo interno del saber normativo, en un espectro amplio e integra-

38 Escrito de julio de 1919 firmado por dieciséis caciques. ABNB: ROA-PS-86. 3.1, f. 6.

39 Salomon (2001) 73.

40 Esto se ha verificado en el trabajo de campo. Es una forma distinta con que la comunidad concibe las pruebas escritas sobre el pasado, en el actuar jurídico. Ver Nicolas (2012) 501; Salomon (2001) 70–71; Glave (1990) 836.

41 Nicolas (2012) 501.

42 Los traslados de documentación sobre temas de comunidad son frecuentes desde el siglo XVI, por disposición de las propias autoridades coloniales, lo que sin duda ha movido a que la práctica se instale desde entonces.

43 Ver los escritos del 13 de agosto de 1919, del 28 de enero de 1933, del 25 de junio de 1932 y del 21 de septiembre de 1933. ABNB: ROA-PS-86. 3.3, fs. 5v, 15–15v, 17v–18 y 27v–28 respectivamente. Tristan Platt, Vincent Nicolas y Denise Arnold lo encuentran además entre los documentos de las comunidades visitadas.

44 Platt / Molina (2018) 300.

45 Arnold (2018) 118. Comisión de historiadores de la marka qaqachaca (2021) 126. Fundamental ha sido la iniciativa del ABNB desde el año 2019, para motivar a los comunarios a contar sus memorias orales y publicarlas, respetando la sintaxis de vertiente quechua y aymara y formas de expresión utilizadas en el relato oral.

46 Nicolas (2012) 504.

do.[47] Sin ir muy lejos, Platt refiere que el archivo de Macha reúne documentación de veinticinco cabildos y de cinco ayllus.[48] Así también, cerca de treinta y cinco caciques firman los escritos que lleva Marka T'ula, fundamentales para la memoria del movimiento de caciques apoderados de inicios del siglo XX. El contenido, circularía por el Norte de Potosí, Oruro, La Paz, Chuquisaca y por todos los caminos andados por los apoderados, en representación de ayllus que les han delegado la tarea.[49] Por noticia del ABNB sabemos que Jaime Mendoza describió en *La Prensa* en 1931 su paso por Sucre en estos términos: »Desde La Paz vinieron a Sucre a pie en muchos días llevando en el clásico ›quepi‹ apenas algo de comer, pero eso sí unos voluminosos expedientes«.[50] La dinámica de los también llamados »cargatítulos« o *purirantes* (castellanización del quechua para decir: caminantes), siguió vigente en lo sucesivo.[51]

Volviendo al contenido de las transcripciones, es importante decir que no existe una versión única. Estas conllevan diferencias que hacen eco de añadidos e intervenciones contemporáneas o posteriores. Es la huella de la memoria oral y de la mirada desde el presente que interviene en la producción del texto. Leandro Condori, que fuera escribano de Marka T'ula, conversando con Esteban Ticona le comentó sobre su actividad en los años 20: »yo leía los textos y luego los explicaba. Cuando era necesario incluía algunas palabras de los títulos antiguos«.[52] Luis Miguel Glave ya se percató de este detalle. De hecho, refiere que muchas transcripciones eran lecturas radicalmente distintas sobre un patrón conocido.[53] Los tópicos habrían sido usados como recursos discursivos adaptables, lo que habría permitido la circulación efectiva del conocimiento en diferentes contextos. La memoria afincada en el papel es, en este sentido, producto de un entrelazamiento de elementos de saberes prehispánicos, coloniales y republicanos. A nivel del idioma, el uso del quechua junto al castellano y al aimara puede alcanzar giros expresivos y sintácticos que dificultan la lectura, pero no hacen que el documento sea menos autorizado.

La traducción de este conocimiento »híbrido«, devenido propio, común, en tanto ha ido tomando cuerpo con el reconocimiento efectivo por parte de sus productores colectivos, adquiriría entonces una complejidad particular. Desentrañarlo obliga a reflexionar en clave multi-normativa, atendiendo a su concepción teórica y usos prácticos dentro del lenguaje histórico interpretativo.[54] Con una intuición similar desde la antropología histórica, Platt propone que tanto los documentos como los archivos de comunidad deben ser entendidos no solo como repositorios de fuentes que remiten a »una imagen ›verosímil‹ del pasado« sino como »artefactos culturales diversos«, dentro de un contexto que influye sobre el modo de leerlos y de transcribirlos.[55]

Un gesto clave es detenerse en el estudio de algunos referentes que se repiten en las transcripciones y que, como ya se percató Nicolas, forman parte del conocimiento que manejan varias comunidades a través de sus apoderados y que retoman sus escribanos.[56] La inspiración puede venir de fuentes escritas o no codificadas en la letra. Da la impresión de que su aparición fuera indispensable para detonar la rememoración y para transmitir un mensaje. No cabe duda de su alta capacidad de evocación de saberes normativos culturalmente intrincados, compartidos, sobre diferentes asuntos tocantes a la comunidad; y de su eficacia para circular sincrónica y diacrónicamente.

47 Entendiendo saber normativo como conocimiento aceptado por la colectividad, con cualidad de obligatoriedad. Duve (2020) 111 y Duve (2022) 5, 30.

48 Platt / Molina (2018) 48.

49 Otras figuras como los caciques Dionisio Paxipati y Feliciano Condori habrían sido también facultados mediante nombramiento protocolizado para seguir las causas ante la justicia nacional. Se suman personas a las que se les encargó seguir con los trámites como Leandro Condori, escribano, que firma en varios escritos de estos legajos. Así también, Andrés Choquechambi de la comunidad de Pujri, a quien los caciques quieren a su lado, porque »los procuradores nos exigen plata y los abogados por cada vez que necesitamos y no podemos terminar nuestros asuntos«. ABNB: ROA-PS-86. 3.2, f. 5. Ver Condori Chura / Ticona (1992).

50 Archivo y Biblioteca Nacionales de Bolivia (ed.) (2019) 10.

51 Aún joven a mediados del siglo xx, Julián Ugarte, comunario de la región yampara, refiere haber participado del movimiento de los que llama *ñawpa purirantes* (antiguos caminantes). Vargas / Ugarte (2019) 94–95.

52 Condori Chura / Ticona (1992) 79.

53 Glave (1990) 836. A este respecto ver también: Mannheim (2015).

54 Sobre multinormatividad e hibridaciones revisar Duve (2020) 110. Ver también Herzog (2015).

55 Platt / Molina (2018) 29.

56 Nicolas (2015) 333.

V. Sobre miradas alternativas al pasado

El contenido del alegato en defensa de la propiedad de las tierras, del lugar de los linderos y del trato a la población al que se ha hecho referencia antes, que aparece de forma recurrente entre los papeles de Santos Marka T'ula y de algunas comunidades en el presente, lleva a hacer constataciones importantes.[57] Una de las más relevantes tiene que ver con la forma de concebir y de expresar la temporalidad en la demanda interpuesta ante las autoridades bolivianas.

En el texto, las referencias al pasado pueden aparecer como menciones a siglos enteros: »nos dieron nuestros títulos de fecha 1400 y el 1500, 1600 y 1700«.[58] Así, la antigüedad reluce como argumento del derecho comunal sobre las tierras, desde »el tiempo del Inca«, y en aquellos »de la Corona Real de España«.[59] Estas afirmaciones vienen entrelazadas con referencias al »tiempo inmemorial«, en que los »abuelos antepasados« habrían recibido los títulos.[60] En algunas versiones suelen introducirse elementos de actualidad, como ha notado Denise Arnold, en un discurrir de la narrativa en clave »multitemporal« de lo que se rememora, pero que, además, se vive.[61] Ahora bien, la antigüedad de la memoria no necesariamente coincide con la del soporte y esto no debe causar extrañeza. La autoridad de algunos documentos –y la calidad de prueba que no querrían darle algunos juristas por falta de evidencias puntuales– está anclada en su poder de evocación.

En cuanto a las menciones a personajes históricos, estas aluden a la coyuntura de cambio de autoridad que simbolizan y a sus implicancias, más que a la persona en sí. Así, la mención al Inca Huayna Cápac refleja la memoria de la contundente política de restructuración que llevó adelante, y de sus desplazamientos hacia Charcas poco antes de la llegada de los españoles. La del virrey Toledo remite a la Visita General y posteriores composiciones de tierra a lo largo del siglo XVII. Como hito de cambio de régimen aparece Simón Bolívar. Ya en contexto republicano, la referencia a Melgarejo va de la mano de los decretos de exvinculación; la de Agustín Morales a la ley de anulación de venta de tierras de origen de julio de 1871 y la de los gobiernos siguientes, concretamente al de Tomás Frías y Narciso Campero, a las leyes contra cuyas resultas litigaron los caciques.

El lector apegado a la linealidad de la narrativa histórica podría sentirse frustrado ante la falta de cierto »orden« cronológico en la exposición de las referencias. Quien hace el relato para que quede sentado por escrito, puede aludir a un decreto del siglo XVIII para luego retroceder al XVI y pasar a hacer referencia a leyes del siglo XIX.[62] Esto no le quita coherencia al discurso histórico, solo muestra una forma de exposición distinta de los hechos, muy vinculada a los vaivenes de la memoria oral. Puede pasar también que se mencione el año 1400 como referencia colonial o que el »tiempo inmemorial« sea asimilado al pasado incaico. Poco parecen importar aquí la »inexactitud« que conllevan estas expresiones. Estamos ante formas distintas de recordar, cuyos sentidos no necesariamente reposan sobre la precisión del dato, sino sobre el significado que su mención tiene para la comunidad.

La fuerza del alegato yace en la memoria transmitida de derechos reconocidos desde otrora, cuya legalidad se asienta por escrito en los títulos otorgados por la Corona española en el periodo colonial y que han sido reivindicados en diferentes momentos a lo largo de los siglos XIX y XX. Esto hace que los apoderados soliciten enfáticamente: »si ellos [los nuevos propietarios] tienen títulos que consten en el término de 30 días y sean iguales al

57 Sobre el texto en cuestión ver referencia de la nota 43.

58 Escrito de enero de 1933. ABNB: ROA-PS-86. 3.3, f. 15v y f. 20v. La amplitud en las referencias temporales puede verse también en documentación anterior, como en la solicitud que los comunarios Mariano Cutile y Julián Chambi presentaron en 1885 al Prefecto de La Paz, al pedir un testimonio de: »las escrituras antiguas referentes a la venta y composición de los terrenos de Chocasivi y Yayiri […] oblados en dinero [usual] y corriente por nuestros antecesores en los años mil setecientos al visitador don Juan Brabo de Rivero«. ALP: EP, caja 98, documento 72.

59 Escrito de agosto de 1919. ABNB: ROA-PS-86. 3.3, f. 5.

60 Escrito de abril de 1933. ABNB: ROA-PS-86. 3.3, f. 20v.

61 Arnold (2018) 119.

62 La complejidad es aún más rica porque las fechas aparecen hilvanadas con la del escrito original y las del día en que se hicieron las transcripciones.

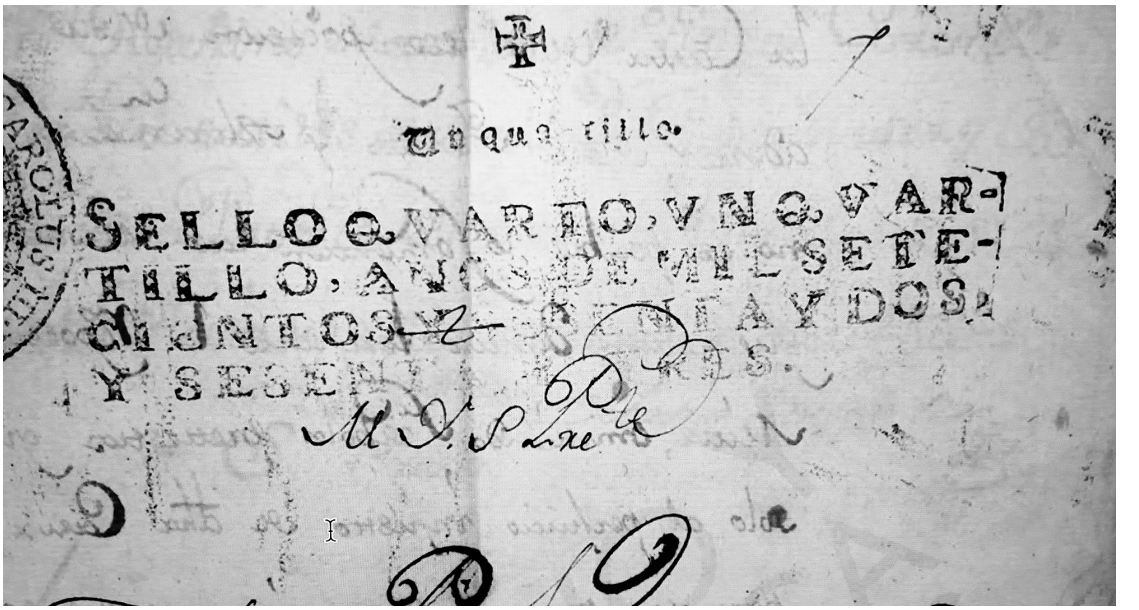


Imagen 3: Detalle de sello en escrito colonial del ABNB, siglo XVIII Foto: Paola Revilla

que acompañamos«.[63] Detrás de esta demanda yace la consciencia de la arbitrariedad de »las ventas que se efectuaron bajo el gobierno del General Mariano Melgarejo«.[64] La indignación se sostiene además en la indiferencia ante los pagos previos que las comunidades habrían hecho por las tierras durante las composiciones coloniales.[65] De hecho, este alegato es posiblemente la transcripción parcial del escrito de venta de tierras que daba lugar al título por composición, transcrito de modo casi facsimilar. De ahí que se anote, por ejemplo, en el escrito de junio de 1932: »un cuartillo años de mil setecientos treinta y seis y treinta y ocho […]«, seguido del nombre del escribano ante quien se formalizó la transacción.[66] El »cuartillo« vendría a ser la copia exacta de lo que decía el sello colonial sobre el papel, el que había interferido con el texto manuscrito.

Otro motivo de molestia claramente expresado es el poco respeto a la ley de anulación de venta de tierras de 1871 y, sobre todo, el deseo de parar un proceso en marcha y de recibir »títulos limpios«.[67] El objetivo no sería sino »servir al estado [del que son parte] y cumplir todas las obligaciones es el que nos toca a cada comunidades«.[68] La legitimidad del pedido de justicia no reposaría únicamente en los papeles, sino en la autoridad que le concedería un rito de juramento de raigambre de tiempos de la monarquía católica, que se repite de forma recurrente en varios escritos: »sobre ara [altar] de piedra y cruz alta«, junto a la mención a la »Gloria Patria«, en alusión a la expresión latina trinitaria: *Gloria*

63 Escrito de agosto de 1919. ABNB: ROA-PS-86. 3.3, f. 5. Esta increpación puede ser la huella de la violencia del corto tiempo que se les dio a las comunidades para presentar sus títulos en contexto de ex vinculaciones. Ver: Ley del 28 de septiembre de 1868.

64 Escrito de junio de 1932. ABNB: ROA-PS-86. 3.3, f. 17v.

65 El escrito de agosto de 1919 refiere que los títulos de 1648 habrían llevado al pago de: »quientisno pesos oro« frente al juez visitador. ABNB: ROA-PS-86. 3.3, f. 5v. El de junio de 1932 alude a un pago de »cinco Tupos de oros« por las tierras al alcalde de primer voto, en Potosí y ante notario. Otro pago habría sido hecho por los indios principales de San Pedro de Achacachi (La Paz). ABNB: ROA-PS-86. 3.3, fs. 16v y 17v. El texto transcrito por Platt habla de: »cinco millones de oro comprado y más mil quinientos pesos de oro romaneado«. Platt / Molina (2018) 300.

66 Escrito de junio de 1932. ABNB: ROA-PS-86. 3.3, f. 17v.

67 Escrito de abril de 1933. ABNB: ROA-PS-86. 3.3, f. 24v.

68 ABNB: ROA-PS-86. 3.3, f. 15v.

Patri (Gloria al Padre)[69]. Y es que en esta narrativa jurídica, los actores políticos de la historia incaica, colonial y republicana comparten escena con personajes de la religión católica como Jesucristo, el Espíritu Santo e incluso los míticos Adán y Eva.[70]

Los caciques apoderados presentaron sus escritos al arzobispo en 1933, como »creyentes Católicos romanos y Virtudes«, dando como razón que desde »la antigüedad co[n]sta que el señor arzobispo nos ha atendido«.[71] Así, los trajines de los comunarios seguían haciendo eco de conductas de tiempos de la monarquía católica, a pesar de los afanes de secularización del Estado liberal, en particular, durante la república boliviana temprana.

Un elemento central de la argumentación es la referencia al castigo para quienes no respeten disposiciones específicas. Los títulos habrían sido recibidos bajo juramento de no arrendar ni vender (»ni arindarin ni venteran«) ni pasar los límites de las comunidades, bajo pena de »*un quintal azote*«, en alusión a cien azotes.[72] Esta expresión da lugar a que en 1971, el curaca Agustín Carvajal le haya dicho a Tristan Platt que el documento se llamaba *Kintal sut'i*, en una quechuización de la expresión.[73] Se aclara que la multa sería de »1500 pesos de oro para la arca real cámara y la fricción [prisión] de 12 años a la cárcel« para los comunarios, y »quinientos pesos de plata ensayada para la Real Cámara de impuestos« en el caso de los caciques.[74] La amenaza punitiva deja entrever la fuerza del condicionamiento de un saber normativo de antigua raigambre cuya mantención habría permitido evitar disputas de linderos entre ayllus y comunidades. Este conocimiento fue transmitido por los caciques apoderados a las autoridades del Estado a las que acudieron durante los siglos XVIII, XIX y XX.

No se menciona la fecha de la disposición escrita sobre la que reposa este saber, salvo un escrito que señala la »antigua ley« en referencia a una real provisión que habría sido aprobada »en la ciudad de los Reyes del Perú« en sesión de cabildo del 22 de agosto de 1642. Más allá de la evidencia jurídica y considerando que la historia legal no se reduce a ella, consta en estos escritos que estos conocimientos estaban siendo retomados en el presente reivindicativo. Así, en 1933 se solicitó la difusión más amplia de este contenido por bando y durante la misa parroquial: »en cada cantón a los indígenas explicándoles en su idioma cuatro Domingos sucesivos«.[75] Una razón práctica movía este pedido así como el uso de otros conocimientos normativos. De hecho, en los escritos de Marka T'ula relacionados con los ayllus de Ilata y Chua, figura que se organizaban mediante el *Ajacahuíaj* aimara para el respeto de los linderos »hasta que la justicia ordinaria establezca la línea divisoria definitiva«.[76]

Estudiar el ejercicio de la normativa constitucional de época no basta para entender estas dinámicas. Resulta altamente insuficiente en cuestión de tierras. Como los propios caciques señalan en 1933, sobre los títulos otorgados por los revisitadores en la segunda mitad del siglo XIX:

> »esos títulos son tan imperfectos e irregulares como los mismos planos por cuanto designan límites supuestos número hectáreas meramente calculativas para cada originario y agregados y una renta supuesta lo que necesariamente ha

69 Recuérdese la doxología: »Gloria Patri, et Filio, et Spiritui Sancto. Sicut erat in principio, et nunc, et semper, et in sæcula sæculorum. Amén«, que solía ser parte de los rezos y cantos gregorianos en Charcas que glorifican el vínculo entre Padre e Hijo en el Espíritu Santo según el Nuevo Testamento.

70 Nicolas (2015) 323 y 329.

71 En referencia al arzobispo como institución y no como persona. La antigüedad puede remitir al periodo colonial o al siglo XIX. Carta del arzobispo de septiembre de 1933 y respuesta posterior de esta autoridad. ABNB: ROA-PS-86. 3.3, f. 28 y ss. Conociendo el límite de sus atribuciones en escenario republicano, este remitió los papeles a las autoridades seculares, solicitando fuesen atendidos.

72 El quintal, equivalente a 100 libras castellanas (casi 50 kilos), forma parte hasta hoy de las medidas usadas en los mercados bolivianos. ABNB: ROA-PS-86. 3.3, f. 15v. En otra transcripción la referencia es más bien a: »ciento cuarenta azotes«. Escrito de agosto de 1919. ABNB: ROA-PS-86. 3.3, f. 5v.

73 El temido azote, castigo llegado con los españoles, se quedó como atributo de autoridad del cacique hasta el presente, bajo la forma del látigo llamado chicote o *quinsacharaña* (látigo de tres puntas) en regiones aimaras.

74 La referencia al tiempo en prisión es menor en otros escritos. Arbitrariedad altamente infamante para la autoridad de los caciques, la cárcel fue un castigo frecuente cuando no enteraban la tasa de los tributarios.

75 Escrito de abril de 1933. ABNB: ROA-PS-86. 3.3, f. 23v.

76 ABNB: ROA-PS-86. 3.4, f. 18.

> originado confusión […] [antes] tenían sus sayañas perfectamente compartidas en diversos lugares con demarcaciones conocidas y respetadas por sus colindantes«.[77]

El pasado aquí aludido es el periodo incaico y el de las últimas décadas del siglo XVI, posterior a la llegada de Toledo, cuando, como puntualiza Arnold, los españoles debieron reconocer especificidades de organización de los ayllus. A la vez, estos debieron »cumplir […] con las exigencias demandadas para lograr el nuevo estatus jurídico«.[78]

Pero claro, el camino de reivindicación del derecho sobre las tierras de comunidad no solo fue recorrido en el papel, y su memoria no remite únicamente a los escritos sino a la lucha armada. En ambos casos, las acciones llevadas adelante por los comunarios se vieron interferidas por prejuicios de la mirada racializante. Esta, intersectó con la censura y con el ejercicio de violencia simbólica y concreta hacia los comunarios. Los caciques escriben al ministro de Hacienda en 1933: »desde Don libertador Simón Bolívar 4 de junio de 1825 hasta hoy no hemos encontrado ninguna libertad, en territorio de la República […] sufrimientos, arrestos, cárceles y otros castigos por causa del papel especial«.[79] Esto llevó a la vinculación del movimiento de apoderados con otras causas, y así persiste en la memoria de comunarios en el presente. Para Julián Ugarte, por ejemplo: »del camino, de Santos Marka T'ula, Zárate Willka, nosotros los purirantes eramos y estamos hasta ahora, el ayllu está consagrado en ese camino«.[80] Como se puede deducir de estas palabras, el recuerdo de los trajines de antaño tiene sus propias claves en el presente. El purirante no solo andaría el camino real sino el simbólico, aquel que lo vincularía con memorias de momentos y personajes de pronunciamientos colectivos anteriores o contemporáneos.[81] Se menciona concretamente a Pablo Zárate Willca (1850–1905), del ayllu Collana en Sicasica, La Paz, quien encabezó el pronunciamiento armado en defensa de las tierras de comunidad. Así también a Avelino Siñani (1881–1941) quien en los años treinta junto a Elizardo Pérez (1892–1980) defendió el derecho a la educación de niños del área rural, según el modelo pedagógico de la Escuela Ayllu-Warisata.

Estas vinculaciones –concretas o supuestas– llevaron a que los comunarios fueran muchas veces perseguidos y reprimidos en sus actividades. Incluso, como señaló Feliciano Maraza en 1933, »alegando que son comunistas todos los originarios y que al presente no entendemos«.[82] Varios elementos de la narración dejan pensar también en la influencia, ya en el siglo XX, del indianismo, del evangelismo y del bahaísmo, que imprimieron nuevos horizontes al movimiento de caciques.[83] Estos actores políticos se aproximaron a los comunarios con una sensibilidad e intereses distintos al de la institucionalidad nacionalizante del Estado, que no dejaba de mostrar negligencia, cuando no franca violencia frente a las reivindicaciones de los comunarios.

No cabe duda que hubo desventaja en la argumentación de los apoderados en los tribunales. Los juristas liberales no solo concedían poca importancia a los saberes normativos preservados y recreados por las comunidades sobre el pasado común, incaico y colonial. Sencillamente ignoraban cómo aproximarse a ellos. Tildándolos de costumbres y tradiciones circunscritas a lo local, quedaron en segundo plano frente al monopolio de sentido de la ley constitucional.[84] Son más bien los comunarios quienes han venido haciendo un costoso esfuerzo de traducción de memorias de saberes

77 Escrito del 17 de abril de 1933 dirigido al ministro de hacienda. ABNB: ROA-PS-86. 3.3, f. 25v.

78 Arnold (2018) 80.

79 ABNB: ROA-PS-86. 3.3, f. 22.

80 Vargas / Ugarte (2019) 110. La lucha de Wilca sería instrumentalizada por los intereses de las oligarquías bolivianas en pugna por el control del gobierno, concretamente por José Manuel Pando (1899–1904).

81 A este respecto ver el estudio fundamental de Abercrombie (2006).

82 Escrito de enero de 1933. ABNB: ROA-PS-86. 3.3, f. 8v.

83 Julián Ugarte recuerda: »antes todos los Purirantes éramos evangelios«. Vargas / Ugarte (2019) 111. El análisis de estas influencias excedería el propósito del presente texto.

84 Hasta el día de hoy, el énfasis en la formación de los juristas bolivianos está puesto en la preparación en derecho romano y derecho liberal. Las claves del ejercicio normativo en el periodo colonial han quedado ensombrecidas. Estudiadas por algunos historiadores, no son analizadas desde la multinormatividad intrincada que caracteriza al contexto regional en larga duración, y que permitiría una mejor comprensión de los modos de relacionamiento de la población en el presente.

normativos a las autoridades estatales, a partir de los documentos que guardan y de ciertas prácticas que preservan.[85] Esto poco o nada tiene que ver con un ejercicio de visibilización de conocimientos abstractos, anquilosados en un pasado remoto. Se ha hecho referencia a las actualizaciones que atraviesan las transcripciones documentales. Los discursos, que no son menos relevantes por no venir de instituciones estatales, señalan qué se decide qué recordar y qué olvidar en el proceso de preservación y producción de normatividad desde las necesidades del presente.[86]

Los saberes normativos a los que se hace referencia son entonces fruto del ensamblaje de múltiples herencias, de raigambre prehispánica, colonial y republicana; y de la puesta en acción de mecanismos etnogenésicos vinculados a las demandas. Décadas atrás, Thomas Abercrombie y Frank Salomon, siguiendo a John Comaroff, ya habían interpretado esta dinámica como una estrategia para recrear vínculos con los ancestros, y que, dicho sea de paso, no necesariamente reposan en un lazo de parentesco.[87] Se trataría más bien de »transformaciones«, como las llama Arnold, posibles gracias al hábil manejo de saberes recibidos de distinta fuente, para legitimar la presencia y el papel del grupo dentro una entidad mayor –el Estado–, de la que son parte y agentes colectivos transformadores.[88]

VI. Conclusiones

Las páginas precedentes permiten constatar la necesidad de abrir el campo de reflexión a distintas formas de preservar, transmitir y usar saberes normativos diversos y culturalmente intrincados en contextos específicos. Los archivos de ayllus y de comunidades en Bolivia dan cuenta de criterios propios de selección, almacenamiento y uso del material guardado. La noción de repositorio de fuentes resulta estrecha para un material al que se le confiere estatus de autoridad por la memoria que contiene, pero además de ancestro vivo al que se le deben ciertos rituales. Yace en la comunidad para la



Imagen 4: El apoderado Miguel Apaza con documentos Detalle de plano de linderos de 1864 ALP: EP

defensa legal ante arbitrariedades sufridas por la población y frente a la vulneración de derechos relacionada con la propiedad, uso y demarcación de tierras. Su contenido no siempre es el de un título de propiedad ni tampoco se trata necesariamente de un original, sino de una transcripción a mano o mecanografiada. En el caso del alegato del *kintal sut'i*, retoma ciertos elementos de un escrito de venta de tierras por composición del periodo colonial con recortes y añadidos posteriores. El documento no conoce las convenciones del relato cronológico lineal y puede resultar en ocasiones confuso e improbable, pero no pierde por tanto autoridad ni utilidad para los comunarios.

La dinámica de los caciques poderdantes y apoderados de principios del siglo XX deja entrever la fuerte legitimidad que conocieron algunos de estos saberes acumulados para organizar pronunciamientos judiciales colectivos, a nivel trans-comunitario. Así también, para gestionar problemas de linderos entre comunidades, allí donde los

85 Esta sería una muestra de la necesidad de descentralizar la mirada al derecho como unidad sistemática, y de aceptar que el »absolutismo jurídico de la modernidad«, nunca fue una realidad. Paolo Grossi citado en Duve (2022) 12.

86 Vincent Nicolas ha hecho referencia, por ejemplo, a la parte borrada del traslado del decreto del virrey Conde de Monclova de 1692 sobre obligación de tributación, en transcripciones posteriores. Nicolas (2015) 321. Ver también Glave (1990) 846.

87 Salomon (2001); Abercrombie (2006). Sobre las formas de controlar el pasado »útil« desde la reivindicación de una autenticidad no necesariamente étnica, ver también Rappaport (1997).

88 Arnold (2018) 81.

delegados de las instituciones de justicia nacional eran muchas veces los grandes ausentes, cuando no fungían de aliados de un proyecto avasallador como en el siglo XIX. La transmisión y uso de estos saberes no reposa únicamente en la letra, lo que garantiza su pervivencia y actualización de contenidos que tienen mucho que decir sobre el modo de organizarse y pensarse de ayllus y comunidades hasta el día de hoy. Sin embargo, estas narrativas se ven en franca desventaja –cuando no son desechadas– frente a la mirada del jurista acostumbrado a ciertas convenciones. Pierde así la comunidad, pero pierde también el Estado en su comprensión de sí mismo. La tarea del historiador del derecho deviene indispensable.

No deja de ser estremecedor, al revisar estos documentos, el esfuerzo material, físico y psíquico de los apoderados en sus trajines, para explicar por escrito lo que se sabe, la memoria que se heredó, pero de la que no siempre quedan pruebas. Este material es huella de los abuelos de ayllus y comunidades, en su innegable capacidad de adaptación y negociación dentro de nuevos órdenes normativos impuestos, con no poca violencia, en cada cambio de régimen dentro del Estado. La Cámara de Diputados de Bolivia atendió en 1924 el pedido de los *purirantes* de revisita de los terrenos de origen, pero la de Senadores rechazó el proyecto de ley el 24 de noviembre de ese mismo año bajo el argumento del retroceso en el camino a la modernidad.[89]

Anexo: Transcripción de una de las menciones del documento analizado[90]

[f. 15] Nuestros títulos consagrados y juramentados, que dadan [datan] de cuatro siglo[s] y cinco siglos que los origenales [originales] es que el expediente principal se halla ensa [en esa] Honorable Cámara que en el títulos fino general con la[s] garantías firmado en Lima, en doce fojas arancil [arancel] y consagrados, mapa y planos respecteva [respectiva], de cada Pueblos de nuestros pueblos, que sobre estos títulos salga la reseta [receta] general el rejestro [registro] en nombre de Gloria Patria de estar de la raza indígenas que forma una de sus clase[s] sociales. Solo que nos vemos sumedo [sumidos] en la igual el no ray ya[91], que en con mise fracción [conmiseración] y pedimos nos atiendan en justicia, como en la justicia, como en la antiguidad [antigüedad] consta que el señor Arso ovispo [Arzobispo], nos ha atendido y como somos creyentes Católicos rumanos [romanos] y vertudes [virtudes], hemos pedido sobre los [las] cinco llagas de nuestor [nuestro] Señor Jesucristo que nos digo [dejó]: el testamento de la Santa Tierra y para dar cuenta a Dios Espíritu Santo que nos digo [dejó] el testamento de esta Santa Tierra, herencias y para dar cuenta a Dios Espíritu Santo que nos digo [dejó]; a todos los cristianos porque somos hermanos de un[a] sangre y creemos en la relejión [religión]. En vesta [vista] de todos estos reclamos y razones pidimos [pedimos] a hesa [esa] señor justicia que nos atiendan para todos los [las] comunidades, a todos porque somos hermanos de un[a] sangre y resmos[92] y además de esta, tres hermanos en él reconocidos Dios Espritu [Espíritu] Santos el primer hermanos un mayor y megro [negro] y primer de hermana estendidas[93] de las muntanas [montañas]; y el segundo hermano indios de indias [Indias] estendidas altiplanos de puna valle: y el tercero de hermanos Balanco [blanco] mistisos [mestizos] y raza mistisos [mestizos] blancos estendidas[94] y buenos lugar de España; En por cada Propietarios que nos digo [dejó] el testamento a todos porque somos hermanos un[a] sangre y cremos [creemos], y que se resuelva la revesita [revisita] general y regestro [registro] en nombre Gloria Patria, de tierras para todos los propietarios, lo que deciamos [deseamos] acreditar por medio del certifica [certificado] que acompañamos que algún día se llevará a cavo [cabo] la reveseda [revisita] general, el regestros [registro] en

89 El argumento fue que volver al »sistema de ayllos y de comunidades, sería retroceder en el camino« dentro de la voluntad declarada de: »colocar al indio al nivel del ciudadano« siguiendo la »tendencia moderna«. Los pedidos de los comunarios fueron interpretados por las autoridades gubernamentales como: »socialismo hábilmente combinado con el comunismo, tal cual ejercieron durante el Imperio incaico y la dominación española«. Ver a este respecto »Proyecto de ley, que determina se practique la revisita de tierras de origen«. En: Cámara de senadores (1924) 422–429.

90 ABNB: ROA-PS-86. 3.3, fs. 15 y 15v. La transcripción es literal; respeta la sintaxis y la puntuación del documento. Se aclaran solo algunas palabras y se coloca el plural donde se ha considerado pertinente.

91 En »el no ray ya« posiblemente »ignorancia«.

92 En »resmos« posiblemente »creemos«.

93 En »estendidas« posiblemente »extendidas«.

94 Idem.

nombre de Gloria Patria de [f. 15v] las tierras se [si] las altas autoridades tienen a bien de declarar y se [si] conbiene [conviene], darán en amparo de la desgraciada raza indígenas que sufren tan fatales consecuencias en tantos siglos desde que nos tieron [dieron] nuestro[s] títulos de fecha 1400 y el 1500, 1600 y 1700 que bajo de juramentos hemos recibido ni arindarin [arrendaren] ni venteran [vendieran] ni pasaren sus límites serán condenados y serán con multados de 1500 de oro muluta [multa] y el castigo a los que ventieren [vendieren], o pasaren sus límites serán condenados a sufren [sufrir] un quintal azote de sumando la multa de 1500 pesos de oro multa para la [el] arca real cámara y la prección [prisión] de 12 años a la cárcel; a la fecha nosotros pidemos [pedimos] la reveseta [revisita] general el regestro [registro] que hemos pidido [pedido] en nombre de Gloria Patria de tierras para poseir [poseer] títulos limpios arancel consagrados y el amparo de nuestras propiedades y para server [servir] al estado [Estado] y complir [cumplir] todas las obligaciones es el que nos toca cada comunidades es el único fin por el que persestimos [persistimos]: en peder [pedir] la reveseta [revisita] general rejestro [registro] en nombre de Gloria Patria de tierras que hace tantos años sufren de la raza indígena en todas partes sufrin [sufren] y que nosotros pedimos que bajo de juramento de declaración sobre ara de pedra [piedra] y cruz alta que bajo de juramento declaremos con este hermano a todos porque somos hermanos de un[a] sangre y cremos [creemos], que estos [estas] leyes están aprobado [aprobadas] por Simón Bolvar [Bolívar] y 2[95] año edad jeuven [joven] nistesos [mestizo] desde el tiempo el [él] con los títulos levertad [libertad] que bajo de juramento que nos digo [dejó] en el año de 1900 del día jueves a las dos de la tarde para bien archivadas en limas [Lima] de sus nietos de sangre: y bien limpios leyes generales arancel consagrados hasta seguidos 200 años ternenados [terminados] y juicios tin [fin] copia etc.

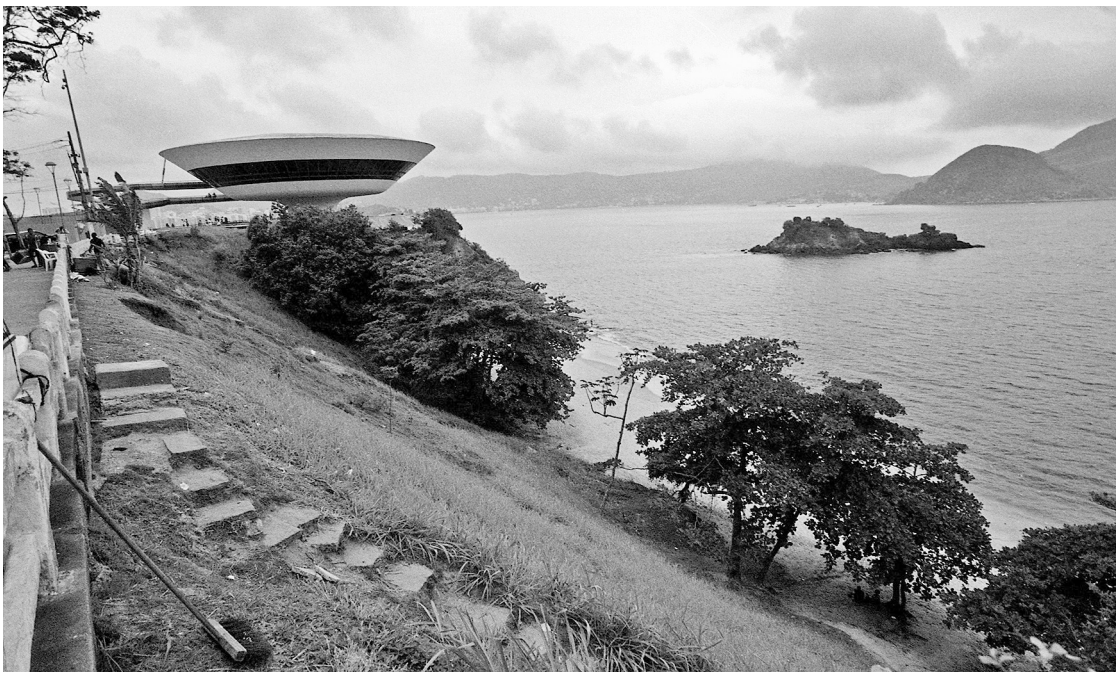
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95 Grafía ilegible, quizás 5 después de 2, en alusión a 1825.

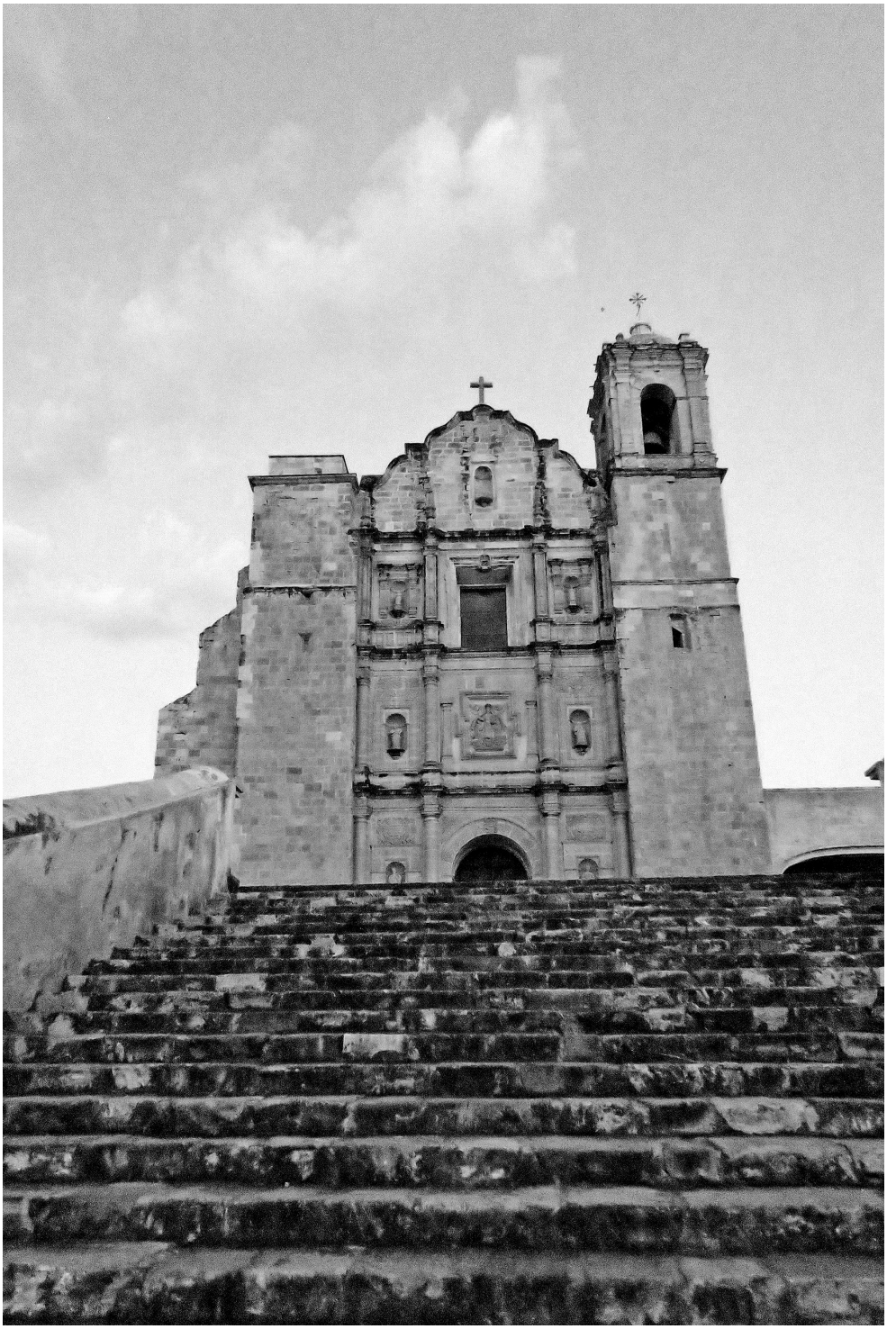
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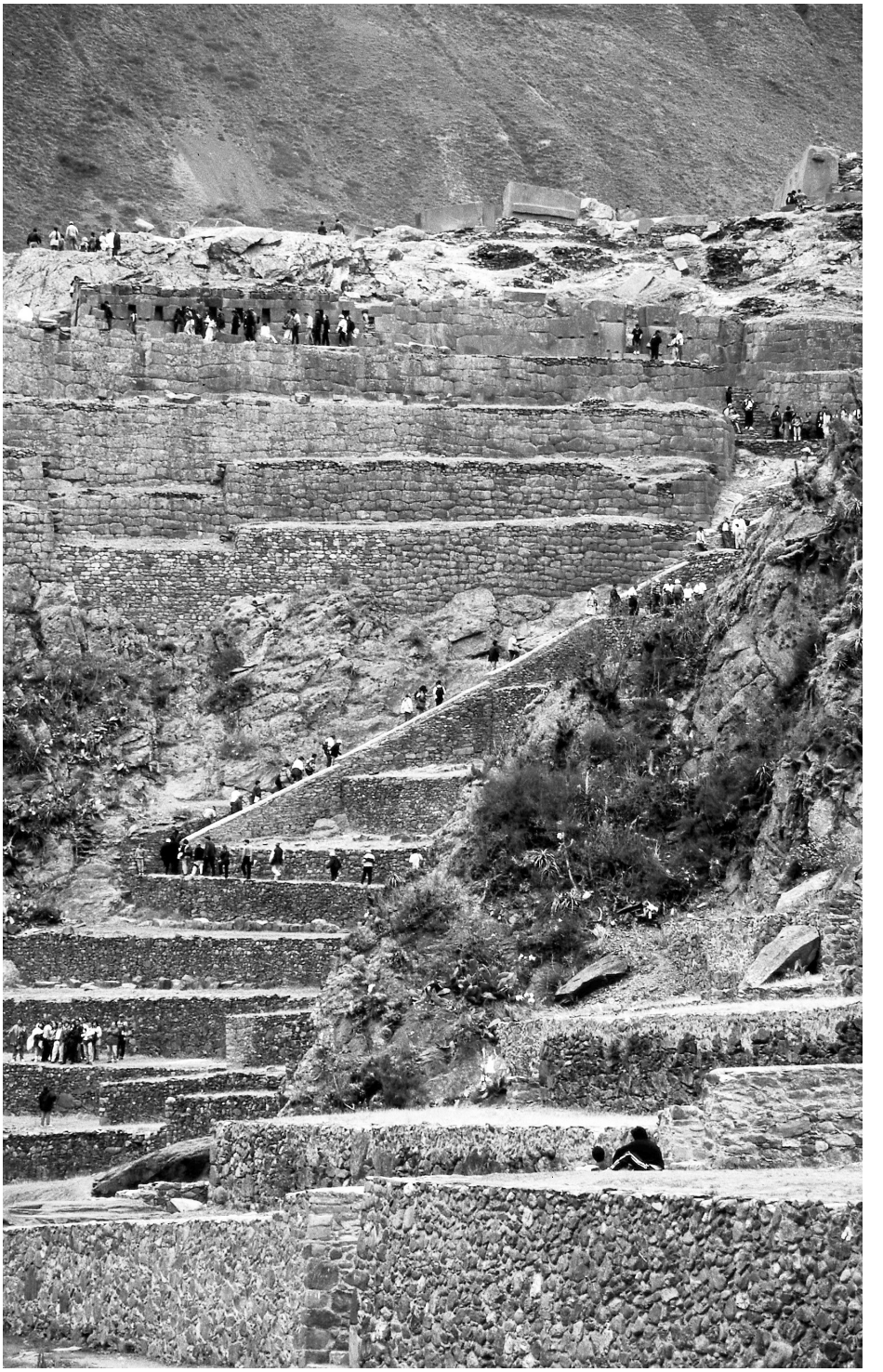



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Kritik critique

Wolfgang Ernst

Von Pontius zu Pilatus und zurück*

I. Eine sinnvolle Besprechung, die über den Inhalt des Werkes unterrichten will, kann unmöglich dessen vorrangige Eigenschaft wiedergeben, nämlich die schillernde, assoziative Bewegung durch den unermesslichen Reichtum an Produkten unserer Geistesgeschichte, die sich in irgendeiner Weise auf den Prozess Jesu beziehen oder beziehen lassen. Leichtfüßig überspringt David Lloyd Dusenbury alle Zeit- und Fachgrenzen. Spätantike Religionsgeschichte, islamische und rabbinische Jesus-Deutungen, Renaissance-Dichtung und deutsche Theologie historisch-kritischer Richtung, Nietzsches *Ecce Homo*, die Lebensgeschichte Robert Eislers und Giorgio Agambens *Pilato e Gesú*[1] (die Aufzählung ist mitnichten erschöpfend) – aus allem schlägt der Verfasser inspirierende Gedanken.

Das Werk hat eine zentrale These, die mit unterschiedlicher Stringenz in einem Durchgang durch geistesgeschichtliche Episoden erhärtet werden soll. Dusenbury will, um eine Wendung Stephan Kuttners zu gebrauchen, etwas beweisen: In den Erzählungen vom Prozess Jesu ist der Prozess der Säkularisierung angelegt, der die weitere Geschichte bestimmend geprägt hat, und zwar Staats- und Rechtsgeschichte, politische Geschichte, Religions- und Literaturgeschichte gleichermaßen. Die Überlieferung des Prozesses Jesu wird gleichsam zum archimedischen Punkt, von dem man ausgehen muss, will man die Geschichte der westlichen Zivilisation, insoweit sie durch die Säkularisierung geprägt ist, enträtseln. Das Jesus zugeschriebene Dictum, sein Reich sei nicht von dieser Welt, steht wie ein Motto am Ausgangspunkt.

Für den römischen Prozess Jesu hat man von jeher zweierlei erwogen:[2] (1) Pilatus ist korrekt nach römischem Recht vorgegangen. In diesem Fall handelt es sich bei dem Angeklagten um einen Straftäter, gegen den das rechtlich gebotene Strafurteil verhängt wurde; an ihm wurde es korrekt vollstreckt. In diesem Fall liegt die »geschichtliche Verantwortung« für den Kreuzigungstod bei der römischen Rechtsordnung. Pilatus erscheint als »unschuldig«. Oder: (2) Pilatus hat ein Unrechtsurteil erlassen. Wenn Pilatus sich nicht rechtstreu verhielt, erscheint es möglich (wenngleich nicht zwingend), dass er sich durch die Führung der Juden hat instrumentalisieren lassen. Hier setzt ein zentrales Argument des christlichen Antisemitismus an: »Die Juden haben unseren Heiland gekreuzigt.«

Die Prüfung, welche dieser Möglichkeiten die größere Wahrscheinlichkeit für sich hat, leitet über zu einer Mehrzahl von Fragen zweiter Ordnung, beginnend bei der Zuständigkeit des Gerichts und dem einschlägigen Straftatbestand mit der für ihn vorgesehenen Strafe, über die Beweislage, die rechtliche Möglichkeit eines eventuellen Schuldbekenntnisses des Angeklagten einschließend, hin zu Fragen der eingehaltenen oder verletzten Ordnung des Strafprozesses, bis zur Fällung des Urteils und dessen Exekution. Kommt man zum Schluss, dass es sich um ein Justizunrecht handelt, folgt als Thema die subjektive Schuld des Pilatus.

Es steht auf einem anderen Blatt, dass sich für diese zahlreichen, miteinander verknüpften Fragen möglicherweise überhaupt keine geschichtswissenschaftlich haltbaren Antworten finden lassen, weil als Quellengrundlage fast ausschließlich Tendenzliteratur zur Verfügung steht. Aus theologischer Sicht kann sich schließlich auch ein Unrecht in den göttlichen »Heilsplan« einfügen, wodurch sich dessen Bewertung nochmals verdrehen mag. Was sich weitaus sicherer nachvollziehen lässt, ist die Behandlung dieses Fragenkomplexes vor allem in der christlich-westlichen Geistesgeschichte. Vorwiegend im Bereich der Rezeptionsgeschichte bewegt sich dann auch das besprochene Werk. Es geht Dusenbury um das Weiterwirken von Pilatus' Gestalt und Handeln in der Geschichte, und dies

* David Lloyd Dusenbury, The Innocence of Pontius Pilate. How the Roman Trial of Jesus Shaped History, London: Hurst & Company 2021, xxvi, 411 p., ISBN 978-0-19-760279-9

1 Mit Agamben hat Dusenbury sich bereits zuvor auseinandergesetzt: The Judgment of Pontius Pilate: A Critique of Giorgio Agamben, in: Journal of Law and Religion 32 (2017) 340–365.

2 Romanistische Leseempfehlung: Aldo Schiavone, Pontius Pilate, Deciphering a Memory, New York 2017; das italienische Original erschien 2016 unter dem Titel: Ponzio Pilato. Un Enigma tra storia e memoria, Turin 2016; zuletzt Martin Pennitz, Plausibilitätserwägungen zum Prozess Jesu, in: FS Gernot Kocher zum 75. Geburtstag, hg. von Borut Holcman, Markus Steppan, Maribor 2017, 305–323, hier 306 ff.

führt zu allen möglichen Spiegelungen und Neubewertungen in der ganzen Breite des Geisteslebens – Wissenschaft, Glauben und Poesie umgreifend. Der Verfasser betont den rechtlichen Charakter des zugrundeliegenden Geschehens, und so kommen zahlreiche Autoren aus der juristischen Literaturgeschichte in den Blick. Der Rezensent kann die glitzernde Intellektualität des Werkes weder nachahmen noch vermitteln und setzt stattdessen den vorgefundenen Inhalt in einen nüchternen Bericht um. Das Werk als solches ist eigentlich unrezensierbar.

II. Beginnend mit den antiken Quellen sind heilsgeschichtliche Aufladung und historisch vielleicht brauchbare Informationen ineinander verwoben. So ist der Einbezug von frühen Pilatuslegenden konsequent.[3] Dusenbury mischt sodann pointillistische Beobachtungen zum neuen Testament, zur Patristik, zur jüdischen und arabischen Sicht auf den Prozess Jesu. Sie sollen hier nicht berichtet werden, ebenso wenig wie seine Auswertung der literarischen Produkte, in denen Dichter die Passionsgeschichte ver- und umgearbeitet haben. Festgehalten sei lediglich, dass der Verfasser eine Traditionslinie von Autoren findet, die Pilatus ein korrektes Vorgehen attestiert haben, wofür er vor allem Augustinus, Dante und Marsilius von Padua nennt. Ein historisch-kritischer Zugriff auf das vermutete geschichtliche Geschehen setzt im Wesentlichen im Humanismus ein und verstärkt sich in der Frühaufklärung.

Dusenbury findet in Grotius' *Annotationes in Novum Testamentum*[4] die Wendung *kalē homologia (bona confessio)*: In der Erläuterung von Joh. 18,37, wo Jesus sich als König bezeichnet, ist ein Hinweis auf 1 Tim. 6,13 angebracht, wo vom guten Bekenntnis (vielleicht eher: Glaubensbekenntnis?) die Rede ist. Ob Grotius damit sagen wollte, man habe es mit einer strafprozessual gültigen *confessio* zu tun gehabt? Man fragt sich hier, warum Dusenbury nicht Grotius' ausführliche Kommentierungen des Prozessverlaufs in den anderen Evangelien heranzieht. Er verwertet lediglich noch Passagen aus der englischen Übersetzung der Tragödie, in der Grotius die Passionsgeschichte verarbeitet hat.[5] Bei gründlicher Auswertung der beachtlichen Quellenbasis, über die man mit den *Annotationes* verfügt, könnte man Grotius' Sicht auf den Prozess Jesu vermutlich verlässlich rekonstruieren.

Dusenbury weist in seinem Narrativ Thomas Hobbes einen besonderen Platz zu. Was den Prozess betrifft, sieht Hobbes Pilatus ein Justizunrecht begehen, indem er Jesus trotz angenommener Unschuld verurteile. Hobbes habe für seine Trennung von weltlicher und geistlicher Sphäre zur Unterstützung darauf verwiesen, dass Jesus im Verhör jeglicher weltlichen Macht entsagt habe – und zwar restlos. In den Händen von Hobbes wird die Passionsgeschichte, wie Dusenbury ihn liest, zu einem Motor der religiösen Toleranz: »[T]he modern logic of tolerance is linked to the early modern readings of the Roman trial of Jesus« (204). Der römischen Kirche seiner Zeit hielt Hobbes vor, dass sie die Zurückweisung weltlicher Gewalt im Pilatusverhör nicht beherzige. Der Verfasser sieht Pufendorf in den Spuren von Hobbes, jedenfalls insoweit Jesu Einlassung vor Pilatus durch eine Selbstbescheidung geistlicher Gewalt entsprochen werden müsse. Er wird durch einen Appendix bei Pufendorf noch auf eine andere Schrift aufmerksam, Adrian Houytoyns *Politica Contracta Generalis* (1681), die er aber nicht mehr auf seine These hin überprüft.

Die Darstellung kulminiert in der Betrachtung von Schriften von und aus der Zeit des Thomasius. Weil es bei Dusenbury etwas durcheinander geht, sei hier versucht, die Abfolge klarzustellen: Thomasius selbst verteidigte am 25.11.1675 in Leipzig seine Dissertation *De iniusto Pontii Pilati judicio*, gedruckt 1724 in Leipzig. Die detailreiche Schrift, nach Max Fleischmann durch die »üblichen Formalien bescheidener Anfängerschaft« charakterisiert,[6] ist abwägend, und obwohl das Urteil als Unrechtsurteil herauskommt, wird das Vorgehen des Pilatus nicht nur negativ beurteilt (§ 49):

3 Zu ihnen Alexander Demandt, Hände in Unschuld. Pontius Pilatus in der Geschichte, Köln 1999; als Materialsammlung jetzt unverzichtbar David Chapman / Eckhard Schnabel, The Trial and Crucifixion of Jesus. Texts and Commentary, Tübingen 2015.

4 Zu diesem Werk s. Dirk van Miert, Grotius's *Annotationes* on the Bible (1619–1645), in: ders., The Emancipation of Biblical Philology in the Dutch Republic, 1590–1670, Oxford 2018, 133–169.

5 Tragoedia Christus patiens, Lugdunum Batavorum 1608.

6 Max Fleischmann (Hg.), Christian Thomasius. Leben und Lebenswerk, Halle 1931, 13.

Excedere autem videntur illi, qui omnes fere Pilati actiones perstringunt, cum tamen fatendum sit, in hoc judicio uti multa sunt summe vituperanda, ita quoque multa laudanda esse et quae boni judices imitentur.

Es scheinen aber diejenigen zu übertreiben, die fast alle Handlungen des Pilatus tadeln, wobei einzuräumen ist, dass in diesem Urteil Vieles höchst verwerflich ist, so ist doch auch Vieles zu loben, woran sich gute Richter ein Beispiel nehmen können.

Mit Thomasius' Disputation stehen zwei weitere Veröffentlichungen im Zusammenhang. Ein gewisser Johannes Steller war offenbar ein Jahr vor Thomasius' Disputation in Dresden examiniert worden und hatte Pilatus rundum verteidigt.[7] Thomasius setzte sich eingehend mit dessen Thesen auseinander,[8] was in der 1737 erfolgten Neuveröffentlichung seiner Disputatio nachzulesen ist. Dusenbury weist noch auf die Intervention des Theologen Daniel Hartnack hin.[9] Soweit der Rezensent sehen kann, wird mit diesem Schriftenkomplex der Anfang gemacht für eine historisch-kritische Aufarbeitung des auf den Prozess bezüglichen Materials. Aus der weiteren Erforschung und intellektuellen Verwendung der Prozessgeschichte hat der Verfasser noch viele Beobachtungen eingeflochten. Die chronologisch orientierte Darstellung endet aber mit Steller.

III. Der Band versteht sich als Beitrag zur Säkularisierungsgeschichte. Im Prozess Jesu, so wie ihn die Überlieferung schildere, stecke im Kern bereits der Gedanke der Säkularisierung, der sich in den späteren Zuwendungen zur Prozessgeschichte, deren Deutungen und Umdichtungen immer wieder und immer stärker bemerkbar gemacht habe. Dusenbury wertet die Pilatus-Episode gleichsam zu »dem« Motor der Säkularisierung westlicher Gesellschaften auf. Der Prozess der Säkularisierung wird heute als komplexes Forschungsfeld begriffen, in dem unterschiedliche Faktoren und Prozesse von verschiedensten Fachdisziplinen erforscht werden.[10] *The Innocence of Pontius Pilate* nimmt auf diese Forschungen keinen rechten Bezug. Die verschiedenen Entwicklungen im Verhältnis von Staat und Kirche[11] und die »Verweltlichung« unseres intellektuellen Habitats werden nach meinem Eindruck in eins geworfen.

Zunächst geht es dem Verfasser um die Begriffsgeschichte von *saeculum*.[12] Dazu schaut er auf D. 33.10.3 (Paul. 4 ad Sab.), wo Julius Paulus gelegentlich der Auslegung des Begriffs *supellex* – Mobiliar wird vermacht – von der Strenge der Vorzeiten *(severitas saeculi)* spricht. Für Dusenbury ist dieser Befund bedeutsam: »[T]he interest of this point is not only historical; it has contemporary relevance.« (122). Die Digesten seien nämlich »one of the defining law-books of European history«. In den Jesus zugeschriebenen Aussagen begegnet, im übersetzten Neuen Testament, *hoc saeculum*, und der Begriff wird auch vom Apostel Paulus benutzt, wobei eine Zeit, aber auch ein neues aufkommendes Zeitalter angesprochen zu sein scheint. Unter christlichen Schriftstellern identifiziert Dusenbury Orderic Vitalis als den ersten, der den Begriff in annähernd heutigem Sinne einer Entgegensetzung von weltlich/vergänglich einerseits, geistlich/überzeitlich andererseits verstanden hat. Spätere Vorkommen von *saecularisatio* kommen in seinen Blick. Im Deutschland des 17. Jahrhunderts sieht der Verfasser die Entwicklung der Säkularisationsidee mit der Neudeutung der Pilatus-Episode zusammentreffen. Er findet diesen Befund »eye-

7 Zu Stellers Schrift *Pilatus defensus* s. bereits Christoph G. Paulus, Der Prozess Jesu – aus römisch rechtlicher Perspektive, Berlin 2016, 35; hierzu kritisch Detlef Liebs, in: ZRG Rom. Abt. 135 (2018) 743–748.

8 Der Rezensent ist sich hinsichtlich der Einzelheiten der Veröffentlichungsgeschichte nicht sicher.

9 Seine Streitschrift erschien 1676 unter dem *nom de guerre* Daniel Maphanafus zusammen mit den Texten Stellers und Thomasius' (hier schon auf Steller antwortend) als *Pilatus defensus*.

10 S. nur José Casanova, s.v. »Secularization«, in: Neil J. Smelser, Paul B. Baltes (Hg.), International Encyclopedia of the Social and Behavioural Sciences, Oxford 2001, 13786–13791; Werner Conze et al., Säkularisation, Säkularisierung, in: Otto Brunner et al. (Hg.), Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, Bd. 5 (1984), 789–829; Detlef Pollack, s.v. »Säkularisierung«, in: ders. et al. (Hg.), Handbuch Religionssoziologie, Wiesbaden 2018, 303–327.

11 Leseempfehlung: Martin Heckel, Säkularisierung. Staatskirchenrechtliche Aspekte einer umstrittenen Kategorie, in: ZRG Kan. Abt. 97 (1980) 1–191, wieder abgedruckt in: ders., Gesammelte Schriften. Staat – Kirche – Recht – Geschichte, hg. von Klaus Schlaich, Bd. II, Tübingen 1989, 773–911.

12 Leseempfehlung: Hermann Lübbe, Säkularisierung – Geschichte eines ideenpolitischen Begriffs, Freiburg 1965.

catching« (229). Hier, wie an anderen Stellen, wird mit einer ungefähren Gleichzeitigkeit eine intellektuelle Abhängigkeit mehr insinuiert als nachgewiesen. Inwieweit das vorliegende Werk den erreichten Stand der Säkularisationsforschung bereichern oder in irgendeiner Weise beeinflussen kann, vermag der Rezensent nicht zu sagen.

IV. Das ganze Buch hindurch gibt Dusenbury süffige Erläuterungen betreffend die *dramatis personae*, fast alle präsentiert als Schlüsselgestalten der Geistesgeschichte, wenngleich bisweilen erst durch ihn wieder ans Licht geholt (Pufendorf »now a niche figure in intellectual history«?). Überhaupt wird in dem stellenweise etwas prätentiösen Werk an Superlativen nicht gespart. Der Verfasser hat eine überwältigende Menge von Sekundärliteratur konsultiert: alles »kommt vor«. Die 18 Abbildungen (Titelblätter, daneben z. B. ein zeitgenössisches Kupferstichporträt Pufendorfs) erscheinen weithin belanglos.

Es ist nicht zu bestreiten, dass sich im Prozess Jesu – aber auch schon in zahlreichen der ihm zugeschriebenen Aussagen (»Gebt dem Kaiser etc.«, »Mein Reich ist nicht von dieser Welt«) – eine grundlegende Entgegensetzung des Spirituellen (»Reich Gottes«) und des Weltlichen spürbar wird und dass dieses zentrale Element des Neuen Testaments nachhaltig weitergewirkt hat. Die auf Jesu Prozessgeschichte bezogenen intellektuellen Produkte aus zwei Jahrtausenden gäben noch Material für eine vielbändige Enzyklopädie, selbst nachdem Dusenbury so Vieles abgegrast hat. Die Pilatus-Episode gehört zu den Gründungslegenden der westlichen Zivilisation in ihrem christlichen Element und ist zu einem immer wieder aufgesuchten Orientierungspunkt für die stets neue Justierung unseres Rechtsverständnisses geworden. Die These des Verfassers, in der Pilatus-Geschichte und ihrer Überlieferung sei der archimedische Punkt zu sehen, von dem aus sich Weltliches und Geistliches – bis hin zur neuzeitlichen Verstaatlichung von Kirchengut – auseinanderhebeln ließ, ist in dieser Einseitigkeit überzogen. Das Beste, was wir von diesem Werk haben, ist die Ermunterung, die juristische Rezeptionsgeschichte des Prozesses Jesu zu schreiben: Es fehlt uns die »Geschichte der Prozess Jesu-Forschung«.

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Serdar Kurnaz

Reinheit und Recht in abrahamitischen Rechtstraditionen*

In seinem jüngsten, im Open Access verfügbaren Werk *Law Beyond Israel* knüpft Holger Zellentin (Universität Tübingen) an seine bisherige vergleichende Forschung zu jüdischen, christlichen und frühislamischen bzw. koranischen Rechtskulturen an. Das Buch bringt dabei drei bereits publizierte Schriften Zellentins zusammen,[1] die überarbeitet und von einer Einleitung, einem weiteren Kapitel 4 und einem Ausblick umrahmt sind. Es zielt darauf ab, die Entwicklung, die Interaktion und den Wandel der Rechtstraditionen innerhalb des Judentums, Christentums und Islams bzw. von der hebräischen Bibel bis zum Koran nachzuzeichnen. Der Schwerpunkt liegt auf der Frage, wie sich Gesetze und Rechtskonzepte über den spezifischen Kontext Israels hinaus entwickelt haben und inter-

* Holger M. Zellentin, Law Beyond Israel. From the Bible to the Qur'an, Oxford: Oxford University Press 2022, 366 p., ISBN 978-0-19-967557-9

1 Holger Zellentin, Judeo-Christian Legal Culture and the Qurʾān: The Case of Ritual Slaughter and the Consumption of Animal Blood, in: Francisco del Río Sánchez (Hg.), Jewish Christianity and the Origins of Islam, Turnhout 2018, 117–159 in Kapitel 1; Gentile Purity Law from the Bible to the Qurʾān: The Case of Sexual Purity and Illicit Intercourse, in: Holger Zellentin (ed.), The Qurʾān's Reformation of Judaism and Christianity: Return to the Origins, New York 2019, 115–215 in Kapitel 2; Law in the Medinan Qurʾān: The Case of Biblical Incest Law and Its Qurʾanic Re-Iteration, in: Nicolai Sinai (ed.), Unlocking the Medinan Qurʾan, Leiden 2022, 315–389 in Kapitel 3.

pretiert wurden. Dabei geht es Zellentin nicht darum zu zeigen, was der Koran vom Judentum und Christentum übernommen hat, sondern zu untersuchen, auf welche Weise diese verschiedenen religiösen Traditionen miteinander im Dialog standen und wie deren Interaktion als rechtskultureller Kontext des Koran, den er als Text der Spätantike versteht, für das bessere Verständnis der juristischen Anordnungen im Koran fruchtbar gemacht werden kann.

Dies unternimmt Zellentin anhand von Fallbeispielen zu Reinheitsgesetzen und -vorstellungen für Nicht-Juden *(gentiles)*, die die gemeinsame Klammer der Kapitel darstellen. Die einzelnen Kapitel zeichnen die Entwicklungslinie in ausgewählten Fallstudien an Gesetzen, die den Bewohnern des Heiligen Landes gegeben wurden, den rabbinischen Noah-Gesetzen, dem Aposteldekret und dem Koran nach. Dabei versucht der Autor, die vielfältigen Traditionen innerhalb von Judentum und Christentum zu berücksichtigen. So zeigt er an verschiedenen Stellen, dass der Koran etwa der syrischen Tradition oder der expansiven Deutung des Aposteldekrets innerhalb des Christentums näher ist als anderen christlichen Traditionen. Sein Anliegen ist es, die Beständigkeit eines prägnanten Rechtskorpus zu veranschaulichen und gleichzeitig die dynamische Entwicklung dieses Korpus in sich ständig verändernden kulturellen, sprachlichen und theologischen Kontexten aufzuzeigen.

Methodisch unterscheidet Zellentin in den Fallstudien zwischen »verbotener Unreinheit« *(prohibited impurity)* und »regulierter Unreinheit« *(regulated impurity)*: eine Unterscheidung, die allen drei Traditionen gemeinsam ist. Die verbotene Unreinheit beschreibt Handlungen, deren Vollzug als moralisches Fehlverhalten und Sünde gilt, wie etwa Ehebruch, Unzucht und Götzendienst. Die regulierte Unreinheit dagegen bezieht sich auf einen Zustand der Unreinheit, der nicht vermieden werden kann, es aber erlaubt, den Reinheitszustand wiederherzustellen. Eine solche Handlung ist weder moralisch verwerflich noch eine Sünde; dazu gehören etwa Menstruation, Toilettengang oder Geschlechtsverkehr.

Der Autor analysiert die religiösen Texte nach konzeptionellen, exegetischen, formalen, erzählerischen und lexikalischen Gesichtspunkten. Besonders hervorzuheben ist, dass er Recht als Literatur versteht. Denn Rechtstexte, insbesondere solche zu Reinheitsvorschriften, seien nicht nur Vorschriften, sondern auch literarische Kompositionen, die durch Erzählungen, Symbolik und rhetorische Mittel Bedeutung vermittelten. Diese literarische Herangehensweise an das Recht ermöglicht eine umfassendere Interpretation von Rechtstexten und offenbart das komplexe Zusammenspiel zwischen Rechtsnormen, kulturellen Werten und narrativen Rahmenbedingungen innerhalb religiöser Traditionen.

Mit einer äußerst bemerkenswerten Detailtreue und besonderen Kenntnis der religiösen Traditionen der Spätantike gelingt es Zellentin, die Interdependenz und den Austausch der jüdischen, christlichen und koranischen Reinheitsvorschriften und -vorstellungen nachzuzeichnen, ohne dabei voreilig auf ›Übernahmen‹, ›Fehldeutungen‹ oder ›Originalität‹ abzuzielen. Er folgt deutlich, auch seiner eigenen Aussage entsprechend, dem Trend in der Koranforschung, den Koran stärker mit christlichen Traditionen zu verbinden und im Dialog zu sehen. Dennoch betont er in seinem Buch an vielen Stellen, dass auch der arabische Kontext für den Koran ausschlaggebend gewesen sei. Dazu gehört etwa das Verbot der Ehe zwischen Milchgeschwistern: eine Verwandtschaftsbeziehung, die dadurch entsteht, dass ein Junge und Mädchen von derselben Mutter gestillt werden, sodass sie beide als Geschwister gelten und die Ehe zwischen ihnen verboten ist. Die Reaktionen des Koran auf seine eigene Umgebung versteht er entsprechend als eine Art Fortschreibung der abrahamitischen Tradition und auch als Bestätigung des Selbstverständnisses des Korans, die vorherigen Offenbarungsschriften zu bestätigen, sie zu korrigieren, arabisch zu sein und auch eigene Wege zu gehen. Das gehe nicht nur aus den Parallelen zwischen den Traditionen, sondern auch aus den Unterschieden und jeweils eigenen Wegen hervor.

Zellentin stellt schlussfolgernd die Notwendigkeit fest, die Beobachtungen über Reinheitsvorschriften auf weitere Felder des (religiösen) Rechts zu erweitern. Seine Darstellungen zum Strafrecht in einem kurzen Unterkapitel von Kapitel 4 sind ein erster Versuch, jedoch wirkt dieses Unterkapitel im Vergleich zum Rest des Buches wie ein Fremdkörper und wird den bisherigen Maßstäben der Analyse nicht gerecht. Ferner sind, wie Zellentin selbst betont, weitere Traditionen (wie die aksumitische [abbesinische] und noch stärker die altarabische) einzubeziehen. So haben zuletzt einige Studien gezeigt, dass die junge islamische Gemeinde, die im Austausch mit anderen religiösen Grup-

pierungen insbesondere der abrahamitischen Tradition gestanden habe, innerhalb der mesopotamischen sowie altarabischen Rechtskulturen verortet werden könne. Zudem sollten die islamischen Überlieferungen berücksichtigt werden, da diese wichtige Informationen zum Umfeld des Korans und der altarabischen Tradition liefern könnten. In seiner Publikation hat Zellentin diese Überlieferungen allerdings nicht behandelt. Sie einzubeziehen wäre jedoch hilfreich gewesen, zumal der Verfasser sein Werk auf bereits veröffentlichten Studien aufbaut. Damit hätte er dazu beitragen können, die Methodendiskussion zur Historizität dieser Überlieferungen voranzubringen und die mannigfachen Informationen aufzuarbeiten. Ausreichend wäre in diesem Falle der Fokus auf Überlieferungswerke aus den ersten drei Jahrhunderten der muslimischen Zeitrechnung des Typs *Muṣannaf, Musnad, Ǧāmiʿ* und *Sunan*[2] gewesen, zudem auf koranexegetische Texte und Rechtswerke aus dieser frühen Zeit, die insgesamt überschaubar sind.

Das Buch ist durchweg klar strukturiert und, bis auf die intensiven detailtreuen Ausführungen, insofern ›lesendenfreundlich‹, als Zellentin mit dem strukturierten Aufbau jedes Kapitels und den zahlreichen Zusammenfassungen wichtiger Beobachtungen hilft, den roten Faden zu behalten. Hilfreich sind auch die übersichtlichen Tabellen in den Kapiteln sowie die Karte am Anfang des Buches. Ein – wenn auch kleines – Manko ist die fehlende weitere Untergliederung der Unterkapitel, die zu einem noch klareren Aufbau beigetragen hätte. So erscheinen die einzelnen Unterkapitel durchweg als zu lang. Unklar bleibt zudem, wieso nicht alle in den Fußnoten angegebenen Referenzen im Literaturverzeichnis vorkommen: Es fehlt dort eine erhebliche Anzahl an zitierten Werken, auch aus dem neuen Kapitel 4.

Summa summarum bietet das besprochene Werk wichtige Einsichten in die dialogische Entwicklung der rechtlichen Vorschriften im Koran, die sich mit Reinheitsvorschriften befassen. All diejenigen, die zu christlichen Traditionen und jüdischen Vorstellungen zu Reinheitsgeboten sowie zur Entwicklung von Reinheitsgeboten im Koran im Besonderen und zum islamischen Recht im Allgemeinen forschen, werden in diesem Buch eine wertvolle Studie finden. Es bleibt abzuwarten, wie auch die historisch-kritische (theologische) Koranexegese und die islamrechtlich-theologische sowie die islamwissenschaftliche Forschung auf Zellentins Analysen und Ergebnisse reagieren werden.

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2 Dabei handelt es sich um Überlieferungswerke unterschiedlicher inhaltlicher Gewichtung, die entweder nur Überlieferungen vom Propheten oder solche der ersten drei Generationen beinhalten.

Orazio Condorelli

»Nel recinto di san Pietro«? A proposito di nuovi studi sulla rinuncia pontificia*

Prima dell'11 febbraio 2013 la rinuncia del papa al suo ufficio era un tema sostanzialmente »confinato« nell'ambito delle discussioni specialistiche riguardanti la storia della Chiesa o le elaborazioni teoriche dei canonisti in margine al can. 332 § 2 del vigente *Codex Iuris Canonici* (= can. 44 § 2 del *Codex Canonum Orientalium Ecclesiarum*). Con la rinuncia di Benedetto XVI – allorché una situazione non inedita ma comunque eccezionale si è nuovamente concretizzata – il tema è stato improvvisamente proiettato nell'agone mediatico, che ha dato la più ampia risonanza a un evento portatore di difficili e serie conseguenze nella vita ecclesiale, oltre che rilevante sotto il profilo canonistico ed ecclesiolo-

* Amedeo Feniello, Mario Prignano (a cura di), Papa, non più papa. La rinuncia pontificia nella storia e nel diritto canonico, Roma: Viella 2022 (La storia 105), 191 p., ISBN 979-12-5469-191-5

gico. La comprensibile fioritura di studi storici, canonistici e teologici sul tema della rinuncia pontificia è stata in questo modo alimentata da una positiva interazione con la più competente pubblicistica »vaticanista«, la quale si è giovata della particolare propensione del pontefice uscente e del suo successore a mantenere un vivo e continuo dialogo con i giornalisti. Tale situazione ha creato una moltiplicazione di materiali sui quali costruire la riflessione sui fatti e sulla loro connotazione ecclesiologica e canonistica, riflessione che supera lo stretto nucleo genetico – l'atto di rinuncia pontificia –, per estendersi agli atti, ai fatti e alle parole di Joseph Ratzinger nel successivo decennio di convivenza col successore papa Francesco. Il libro in esame riflette tale contesto, poiché è il frutto della collaborazione di studiosi di diversa estrazione e di giornalisti specializzati, e raccoglie saggi e interventi scritti prima della scomparsa di Joseph Ratzinger (31 dicembre 2022). In questo senso il libro rivela anche le ambiguità e le incertezze di una situazione prolungatasi per parecchi anni dopo l'atto di rinuncia. L'espressione »Papa, non più papa«, scelta come titolo del volume, è controbilanciata da quanto leggiamo nell'introduzione dei curatori – lo storico Amedeo Feniello e il giornalista Mario Prignano –, dove si parla di »coesistenza pacifica di due papi« (10).

Il libro raccoglie sette contributi, che attraverso due millenni giungono agli eventi recenti e alle prospettive *de iure condendo*, e si conclude con un'appendice che raccoglie le testimonianze e le riflessioni di due giornalisti.

Il saggio di Roberto Rusconi, La rinuncia pontificia nella storia della Chiesa (13–27), costruisce la cornice entro cui sono compresi i successivi contributi. Adottando una prospettiva di lunga durata, l'Autore ripercorre rapidamente vicende più o meno oscure del primo millennio, per transitare nel secondo millennio con la rinuncia di Celestino V e le convulse vicende dello Scisma d'Occidente, durante il quale rinunce si intrecciano con deposizioni. La storia del Novecento presenta diversi casi in cui i pontefici valutarono l'ipotesi di rinunciare all'ufficio o per ragioni politico-militari (Pio XII durante l'occupazione tedesca di Roma) o, più frequentemente, per gravi ragioni di salute (Giovanni XXIII, Paolo VI, Giovanni Paolo II). Si tratta di situazioni in cui la rinuncia rimase allo stato di ipotesi, ma che rappresentano l'anticamera della vicenda che ha dato occasione a un dibattito ormai più che decennale.

I successivi contributi si pongono nella prospettiva di approfondimento di singoli casi o particolari periodi storici.

Il saggio di Paolo Golinelli, L'abdicazione – »gran rifiuto« – di Celestino V (p. 29–40), si sofferma sul caso meglio noto e studiato di rinuncia papale, quello che più di ogni altro presenta elementi di analogia con la rinuncia di Benedetto XVI. Pietro del Morrone, eletto il 5 luglio 1294, rinunciò al pontificato dopo pochi mesi, il 13 dicembre dello stesso anno, nel desiderio di ritornare alla vita monastica e aprendo così la via all'elezione del cardinale Benedetto Caetani. Fu Bonifacio VIII, papa legislatore, a inserire nel suo *Liber Sextus* (1298: lib. I, tit. *de renunciatione*, cap. 1) la costituzione *Quoniam aliqui curiosi*, con cui reiterava la disposizione che Celestino V aveva promulgato, in accordo col collegio dei cardinali, al fine di predisporre le condizioni canoniche per la propria rinuncia (i verbi sono *renunciare*, *resignare*). La costituzione individuava nella *insufficientia* la causa primaria, ma non esclusiva, che potesse offrire una giustificazione morale all'atto di rinuncia: »maxime quum se insufficientem agnoscit ad regendam universalem ecclesiam et summi pontificatus onera supportanda«. A Celestino V forse intendeva riferirsi Dante Alighieri quando collocò nell'antinferno »colui / che fece per viltade il gran rifiuto« (Inferno III.59–60): questa è l'opinione più diffusa, che però incontra obiezioni in coloro che ipotizzano trattarsi di Ponzio Pilato. Golinelli, aderendo con convinzione all'opinione tradizionale, interpreta la parola dantesca »viltade« non già nel senso di viltà o codardia, ma nel senso di inadeguatezza a governare la Chiesa, che nel caso Pietro del Morrone sarebbe derivata dalle sue umili origini contadine.

Le intricatissime vicende dello scisma di Occidente – alle quali è dedicato il saggio di Johannes Grohe, »Quondam Papa«. La rinuncia al tempo dello scisma d'Occidente (p. 41–57) – mostrano come la Chiesa abbia potuto ricucire la divisione durata parecchi decenni attraverso un complesso intreccio di rinunce e deposizioni orchestrate dal concilio di Costanza. Il concilio si costituì come organo rappresentante la Chiesa cattolica militante e si proclamò titolare della suprema potestà in ciò che riguarda la fede, l'estirpazione dello scisma e la riforma *in capite et in membris* (decreto *Haec sancta*, 1415). Un tentativo di risoluzione conciliare dello scisma era già stato compiuto dal concilio di Pisa (1409) che, dopo aver deposto Benedetto XIII e

Gregorio XII, elesse Alessandro V, così creando una terza obbedienza accanto a quelle romana e avignonese. Gregorio XII compì un atto di buona volontà e rinunciò al pontificato. Il concilio di Costanza, avendo posto le basi canoniche della decisione, condannò gli altri due contendenti perché il loro pertinace rifiuto di chiudere lo scisma li aveva resi eretici in quanto negatori dell'unità della Chiesa. Il concilio pertanto depose Giovanni XXIII (successore di Alessandro V dell'obbedienza pisana) e Benedetto XIII (dell'obbedienza avignonese), il quale comunque continuò a considerarsi papa legittimo ed ebbe un successore, Clemente VIII, che avrebbe rinunciato alle sue pretese solo nel 1429. Si aprì così la via per l'elezione di Martino V (1417). Ma furono le stesse dottrine conciliari a dare nuova occasione di scisma, allorché il concilio di Basilea, entrato in conflitto con Eugenio IV che voleva trasferire l'assemblea a Ferrara, depose il pontefice come eretico ed elesse al suo posto Felice V (1439), che avrebbe rinunciato al suo (preteso) pontificato dieci anni dopo. Mai come in queste pluridecennali vicende si mostra evidente il nodo canonico sotteso ai conflitti in questione: ossia che la fine di un pontificato per ragioni diverse dalla morte naturale è condizionata o dalla libera volontà di un pontefice (o sedicente tale) di rinunciare all'ufficio, o dalla necessità di risolvere gravissimi problemi ecclesiali attraverso atti di giurisdizione (nei casi ricordati: deposizioni) di incerta compatibilità col principio canonico *prima sedes a nemine iudicatur*.[1]

Vi sono fili ben visibili che collegano la storia passata con le vicende contemporanee, come nota Valerio Gigliotti nel saggio su Pietro del Morrone e Joseph Ratzinger: diritto e teologia tra storia e contemporaneità (59–88). Per l'Autore – che al tema della rinuncia ha dedicato una monografia nel 2013[2] – ritornare su Pietro del Morrone / Celestino V è un passo obbligato in ragione degli elementi che permettono di accostare la sua rinuncia a quella di Benedetto XVI. Dal punto di vista formale esse sono state manifestate con *declarationes* di fronte al collegio dei cardinali, ma anche per gli aspetti sostanziali le due rinunce hanno evidenti tratti comuni. La circostanza offre all'Autore l'occasione per esaminare il tema delle cause legittimanti la *renunciatio* all'ufficio episcopale come emergono dalla legislazione canonica e dalla dottrina dei decretisti e dei decretalisti. Esse erano individuate nella *debilitas corporis*, nel *defectus scientiae*, nella coscienza di aver commesso un crimine, nell'irregolarità, nell'*odium plebis*, nell'aver generato scandalo nella comunità dei fedeli, ma anche nel desiderio di abbracciare la vita religiosa *(zelus melioris vitae)*. Se nel caso dei vescovi l'accertamento di tali cause era affidato alla cognizione del superiore ecclesiastico, questo non è possibile nel caso della rinuncia papale. Nel caso del sommo pontefice, l'eventuale insussistenza di tali cause è sottratta al giudizio di qualsiasi autorità umana: l'assenza di una causa, che legittimi la rinuncia per il *bonum Ecclesiae*, rimane un peccato riservato al giudizio di Dio. L'analisi prelude all'interpretazione del giudizio di Dante sulla rinuncia celestiniana: »viltade« è da intendere come inadeguatezza, corrispondente almeno alla causa canonica della *insufficientia (defectus scientiae)*, a cui nel caso di Celestino V si aggiungeva lo *zelus melioris vitae*. La critica di Dante era indirizzata più alle conseguenze *lato sensu* di politica ecclesiastica delle decisioni di Celestino, che aveva aperto la via all'elezione di Bonifacio VIII (73). Anche Benedetto XVI ha sentito il bisogno di motivare la propria rinuncia con riferimento al peso della vecchiaia e alla debolezza fisica, che non gli avrebbero consentito di esercitare il modo adeguato il ministero petrino.[3] Pertanto la sua rinuncia era asseritamente motivata per il bene della Chiesa, come avrebbe sottolineato il successivo 27 febbraio:[4] sì in aderenza alla tradizione che aveva individuato nella *insufficientia* una causa canonica della rinuncia, ma

1 Orazio Condorelli, Il papa deposto tra storia e diritto, in: Ephemerides Iuris Canonici, nuova serie, 56,1 (2016), 5–30; idem, Antonio da Budrio e le dottrine conciliari al tempo del concilio di Pisa, in: Rivista Internazionale di Diritto Comune 27 (2016), 79–157.

2 Oltre a diversi altri lavori ricordati nelle note del saggio: Valerio Gigliotti, La tiara deposta. La rinuncia al papato nella storia del diritto e della Chiesa, Firenze 2013.

3 Benedetto XVI, Declaratio, datata 10 febbraio 2013, ma pronunciata nel concistoro del giorno successivo, in: Acta Apostolicae Sedis 105,3 (2013), 239–240.

4 Benedetto XVI, Udienza generale, Piazza San Pietro, mercoledì 27 febbraio 2013; https://www.vatican.va/content/benedict-xvi/it/audiences/2013/documents/hf_ben-xvi_aud_20130227.html.

in un mutato quadro normativo, poiché l'attuale can. 332 § 2 non menziona qualsivoglia causa che legittimi la rinuncia pontificia.[5]

Nella conclusione della *declaratio* Benedetto XVI manifestava l'impegno di voler continuare a servire la Chiesa con la preghiera (»Quod ad me attinet etiam in futuro vita orationi dedicata Sanctae Ecclesiae Dei toto ex corde servire velim«): affermazione misurata e adeguata al contesto della necessaria sobrietà confacente all'atto di rinuncia. Tuttavia nell'udienza generale del successivo 27 febbraio 2013 Benedetto XVI pronunciò un'affermazione che ha giustamente suscitato gli interrogativi e le elucubrazioni degli interpreti. L'elezione papale – afferma Benedetto XVI – genera un impegno »per sempre«, nel senso che »non c'è più un ritornare nel privato. La mia decisione di rinunciare all'esercizio attivo del ministero, non revoca questo […] Non porto più la potestà dell'officio per il governo della Chiesa, ma nel servizio della preghiera resto, per così dire, nel recinto di san Pietro«. Non si è trattato solo di parole, perché queste affermazioni furono seguite da fatti come la decisione di essere chiamato »Papa emerito« e »Sua Santità«, di continuare a indossare la talare bianca semplice, ma soprattutto di continuare a partecipare attivamente alla vita ecclesiale e sociale con la singolarissima autorevolezza di colui che, oltre a essere »Papa emerito«, era anche teologo di altissimo valore e prestigio. Una situazione veramente eccezionale che si è protratta per un decennio. Da questi fatti prende le mosse il saggio di Roberto Regoli, La novità del papato emerito. Unicità storica o inizio di nuovi tempi? (89–110), il quale nota che »il modo di parlare e di procedere di Ratzinger sembra […] un mistero continuo e suscita molte domande« (100). L'Autore è consapevole che una parte della scienza canonistica ha preso le distanze da alcune conseguenze che potrebbero trarsi da questi fatti (tornerò più avanti sul tema): non è certo un caso, ma risponde a una diffusa rappresentazione, che il decennio di Ratzinger dopo la rinuncia sia stato definito come un »papato-ombra«.[6] Nondimeno, a suo avviso si tratterebbe di una »rinuncia creativa«, che imporrebbe all'osservatore di »partire dalla realtà che accade e non da mere dottrine giuridiche; e contemporaneamente bisogna prendere in considerazione le ricezione dei fatti e degli eventi da parte del corpo ecclesiale nel suo insieme e nel tempo« (104).

Su questi fatti, letti alla luce della tradizione canonica, si innesta la limpida analisi condotta da Gianfranco Ghirlanda, La rinuncia al suo munus da parte del Romano pontefice: il canone 332 (111–133). La normativa canonica sulla cessazione dall'ufficio papale è estremamente scarna. L'unica ipotesi canonizzata è quella della rinuncia, per la cui validità il can. 332 § 2 CIC (= can. 44 § 2 CCEO) esige solo che sia fatta liberamente *(libere)* e manifestata in modo adeguato *(rite)*, mentre non richiede che sia accettata da chicchessia, poiché il Sommo Pontefice non ha superiore. Ancora più scarna era la disposizione del CIC 1917 (can. 221), il quale si limitava a precisare che non era prevista l'accettazione dei cardinali o di qualsivoglia altro soggetto ecclesiastico. La normativa vigente, pertanto, dispone solo sull'ipotesi della rinuncia, rinvia a una legislazione speciale per la sede vacante (per morte o rinuncia) e per la sede totalmente impedita (can. 335 CIC = can. 47 CCEO), omette di disporre (allineandosi a una tradizione canonicamente silente per quanto dottrinariamente loquace) sulle ulteriori due ipotesi di totale infermità mentale e di notoria apostasia, eresia o scisma. Sull'ipotesi della totale infermità mentale, o di un Papa che, pur avendo irreversibilmente perso la coscienza, sia mantenuto in vita attraverso trattamenti tecnologico-sanitari, Ghirlanda (creato cardinale nel concistoro del 27 agosto 2022) ritiene che vi sia spazio e opportunità per una legislazione speciale tuttora mancante. L'ipotesi del papa eretico è quella che nella storia ha fatto scorrere fiumi d'inchiostro, si è concretizzata in epoca conciliarista con le deposizioni a cui sopra ho accennato, ma presenta l'insormontabile difficoltà che anche una sentenza dichiarativa implica l'esercizio di una *iurisdictio supra papam* contro il principio canonico *prima sedes a nemine iudicatur* (oggi formalizzato al can. 1404 CIC = 1058 CCEO). Sul caso di Benedetto XVI, che ha suscitato le questioni sopra discusse, l'Autore enuncia il suo giudizio chiaro e da condividere: »È evidente che il papa che ha rinunciato non è più papa, quindi non ha più alcuna potestà

5 Il che, ovviamente, non significa che il diritto non debba tenere in considerazione la giustizia dell'atto di rinuncia pontificia, per quanto esso sia insindacabile: Fernando Puig, La rinuncia di Benedetto XVI all'ufficio primaziale come atto giuridico, in: Ius Ecclesiae 25 (2013), 798–897.

6 Massimo Franco, Il monastero. Benedetto XVI, nove anni di papato-ombra, Milano 2022.

nella Chiesa e non può più immettersi in alcun affare di governo« (129); precisando che per questa ragione il titolo di papa emerito è equivoco e generatore di confusione (130). Rimangono da interpretare i modi in cui Benedetto XVI ha parlato della propria rinuncia. Sul punto Ghirlanda, tornando al discorso del 27 febbraio 2013, rileva che »nella visione di Benedetto del ministero petrino non si ha una identificazione tra *munus* e *officium*, per cui, rinunciato all'*officium* e alla potestà che esso comporta, resterebbe il *munus*«: *munus* che permarrebbe non già nell'esercizio della potestà ma »in patiendo et orando«, come è affermato nella *Declaratio* dell'11 febbraio 2013 (131). L'Autore interpreta queste affermazioni come manifestazione della visione ecclesiologica ratzingeriana della non distinzione tra *potestas ordinis* e *potestas iurisdictionis*, in quanto le due potestà procederebbero unitariamente dalla consacrazione episcopale (come affermato dal Concilio Vaticano II al n. 21 della costituzione *Lumen gentium*, che però deve essere intepretato alla luce della *Nota explicativa praevia*, n. 2).[7] Inoltre le affermazioni di Benedetto XVI sarebbero da leggere sul filo della teoria di Karl Rahner, il quale avanzò l'ipotesi »che il primato sia il grado supremo del sacramento dell'ordine, per cui l'ordinazione relativa del papa per la sede primaziale sarebbe un'ordinazione episcopale specifica« e l'elezione seguita dall'accettazione conferirebbe perfino un carattere indelebile al primato (132). Ma – osserva giustamente Ghirlanda – »la natura sacramentale del Primato è estranea a tutta la tradizione teologica« (132 nota 58), e una siffatta opinione teologica renderebbe incomprensibile (e impossibile) la rinuncia all'ufficio: in pratica, il papa non perderebbe mai il primato anche se vi rinunciasse.[8] Se così fosse, ogni rinuncia papale seguita da una successiva elezione produrrebbe una Chiesa bicipite. Insomma, per comprendere la rinuncia, alla luce della tradizione canonica e della realtà ontologica dell'ordine episcopale e dell'ufficio petrino, è impossibile prescindere dalla distinzione tra *potestas ordinis* (indelebile) e *potestas iurisdictionis*, che il Sommo Pontefice perde con la rinuncia (per lasciare da parte ogni valutazione sull'ipotesi del papa eretico o scismatico, e pur prendendo atto che in alcuni momenti della vita della Chiesa abbiamo assistito alla deposizione di papi). Come Agostino Trionfo († 1328) aveva icasticamente affermato parlando appunto della rinuncia papale, »papatus est nomen iurisdictionis, et non ordinis«.[9] La distinzione fra *potestas ordinis* e *potestas iurisdictionis* è maturata nella »coscienza pratica« della Chiesa del primo Millennio, è stata elaborata scientificamente dalla dottrina canonistica a partire dal secolo XII, è e rimane uno strumento indispensabile per comprendere le relazioni tra consacrazione episcopale, missione canonica, cessazione dall'ufficio,[10] nonché per inquadrare canonicamente il tema della cooperazione dei laici

7 Gianfranco Ghirlanda, »Hierarchica communio«. Significato della formula nella »Lumen Gentium«, Roma 1980; Orazio Condorelli, Principio elettivo, consenso, rappresentanza: itinerari canonistici su elezioni episcopali, provvisioni papali e dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII–XV), Roma 2003, 186–198.

8 Sul tema cfr. le convergenti considerazioni di Carlo Fantappiè, Sacramento e / o giurisdizione: la rinuncia papale e il papa emerito, in: idem, Ecclesiologia e canonistica, Venezia 2015, 359–398, in particolare 386–398.

9 Augustini Triumphi, Anconitani catholici doctoris Summa de potestate ecclesiastica edita anno Domini mcccxx, Romae: Ex Typographia Georgii Ferrarii 1584, Quaestio quarta, De Papae renunciatione, articulus II, Utrum papa posset renunciare Papatui, si papatus esset nomen ordinis, et non iurisdictionis, p. 41a; Michael Wilks, Papa est nomen iurisdictionis: Augustinus Triumphus and the Papal Vicariate of Christ, in: The Journal of Theological Studies 8,2 (1957), 256–271.

10 Alfons M. Stickler, La bipartición de la potestad eclesiástica en su perspectiva histórica, in: Ius Canonicum 15, fasc. 29 (1975), 45–75; idem, Origine e natura della *sacra potestas*, in: Sandro Gherro (a cura di), Studi sul primo libro del Codex Iuris Canonici, Padova 1993, 73–90; Orazio Condorelli, La distinzione tra potestà di ordine e potestà di giurisdizione nella tradizione canonica bizantina, in: Giuseppe D'Angelo (a cura di), Rigore e curiosità. Scritti in memoria di Maria Cristina Folliero, I, Torino 2018, 241–271; Roberto Interlandi, Potestà sacramentale e potestà di governo nel primo Millennio. Esercizio di esse e loro distinzione, Roma 2016. Con riferimento al caso della rinuncia papale Geraldina Boni, Sopra una rinuncia. La decisione di Papa Benedetto XVI e il diritto, Bologna 2015, 12–29.

alla funzione di governo nella Chiesa.[11] Da questo discende – conclude Ghirlanda – la necessità di leggere le affermazioni teologiche alla luce della tradizione canonica e canonistica, per evitare fraintendimenti che possano condizionare la vita della Chiesa. Pertanto le affermazioni di Benedetto XVI sono da apprezzare e accogliere per il loro »forte valore spirituale, direi mistico«, ma non »come affermazioni strettamente dottrinali di carattere ecclesiologico e tanto meno canonico« (133). Pertanto – aggiungo io –, occorre ridimensionare l'asserita »creatività« della rinuncia di Benedetto XVI.

Il saggio finale di Geraldina Boni si proietta verso Prospettive de iure condendo (135–166). L'Autrice – che per parte sua ha studiato il tema della rinuncia in una monografia del 2015 –[12] presenta e introduce il lavoro di un gruppo di ricerca che ha prodotto due progetti di costituzione apostolica, il primo »Sulla Sede romana totalmente impedita«, il secondo »Sulla situazione canonica del Vescovo di Roma che ha rinunciato al suo ufficio«. Il lavoro del gruppo di ricerca muove dalla convinzione che sia opportuno provvedere legislativamente non solo su questa seconda situazione – tema di particolare rilevanza quando il tempo della convivenza tra l'ex-papa e il nuovo papa sia particolarmente prolungato, come nel decennio in cui Joseph Ratzinger è stato »papa emerito« –, ma anche sulla situazione estremamente difficile e delicata in cui la sede romana sia totalmente impedita. Sullo sfondo delle diverse ipotesi in cui questa situazione potrebbe verificarsi, si staglia il caso di una inabilità prolungata o anche perpetua e irreversibile che renda il Romano Pontefice incapace di esercitare il proprio ufficio: ipotesi che nei nostri tempi si presenta particolarmente grave per le possibilità, acquisite dalla scienza medica e dalle tecniche sanitarie, di mantenere in vita per un tempo indefinito persone prive della capacità di intendere e di agire. È di tutta evidenza che una situazione di tal genere sarebbe fortemente critica nella vita della Chiesa, perché *de facto* e per tempi ipoteticamente molto lunghi il Romano Pontefice sarebbe incapace di esercitare le sue funzioni.

Una regolamentazione canonica delle due differenti situazioni sarebbe un'assoluta novità nella tradizione della Chiesa, anche se il progetto sulla sede romana totalmente impedita si insinua nelle maglie del codice canonico, che al can. 335 (= CCEO can. 47) per l'ipotesi della sede romana vacante o totalmente impedita si limita a dettare il tradizionale »nihil innovetur«, rinviando alle leggi speciali prodotte per siffatte situazioni. Se una legge speciale che disciplina la sede vacante c'è – la costituzione *Universi Dominici Gregis* di Giovanni Paolo II (1996), con le modifiche apportate da Benedetto XVI nel 2007 e nel 2013 –, una legge speciale sulla sede romana impedita non è mai esistita.

Il primo progetto di costituzione apostolica è dotato di un ampio preambolo esplicativo e si articola in un Capitolo I su »La sede romana totalmente e temporaneamente impedita«; un Capitolo II su »La sede romana totalmente impedita

11 CIC can. 129 § 2 (cfr. CCEO can. 979 § 2); can. 1421 § 2 (cfr. CCEO can. 1087 § 2); can. 1673 § 2 (come modificato dal motu proprio *Mitis Iudex Dominus Iesus*, sulla riforma del processo canonico per le cause di dichiarazione di nullità del matrimonio nel Codice di Diritto Canonico, 15 agosto 2015) (cfr. CCEO can. 1359 § 3, come modificato dal motu proprio *Mitis et Misericors Iesus*, sulla riforma del processo canonico per le cause di dichiarazione di nullità del matrimonio nel Codice dei Canoni delle Chiese Orientali, 15 agosto 2015). Sul tema è recentemente intervenuta la costituzione apostolica *Praedicate Evangelium* sulla Curia Romana e il suo servizio alla Chiesa e al Mondo, 19 marzo 2022. In particolare si vedano i *Principi e criteri per il servizio della Curia Romana*, n. 5, »*Indole vicaria della Curia Romana*: Ogni Istituzione curiale compie la propria missione in virtù della potestà ricevuta dal Romano Pontefice in nome del quale opera con potestà vicaria nell'esercizio del suo munus primaziale. Per tale ragione qualunque fedele può presiedere un Dicastero o un Organismo, attesa la peculiare competenza, potestà di governo e funzione di quest'ultimi«. Sulle possibilità aperte alla partecipazione dei laici nell'esercizio della funzione di governo, in forza del principio che »la potestà di governo nella Chiesa non viene dal sacramento dell'Ordine, ma dalla missione canonica«, si veda l'intervento del Prof. Gianfranco Ghirlanda, S.I. nella conferenza stampa di presentazione della costituzione apostolica »Praedicate Evangelium«, 21.03.2022, in particolare il n. 1 sul Ruolo dei laici e carattere vicario della Curia, https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2022/03/21/0192/00417.html (ultimo accesso 26.04.2024).

12 Geraldina Boni, Sopra una rinuncia, cit. (n. 10). Sul tema della rinuncia, dopo l'opera qui recensita, sono apparsi i due seguenti volumi: Beatrice Serra (a cura di), La rinuncia all'ufficio petrino. Itinerari dottrinali a dieci anni dalla *Declaratio* di Benedetto XVI, Napoli 2023; Sebastian Marx, Episcopus emeritus Ecclesiae Romanae. Eine kanonistische und rechtshistorische Untersuchung des päpstlichen Amtsverzichts unter besonderer Berücksichtigung der Verzichtsleistung Papst Benedikts XVI, Berlin 2023.

per incapacità certa, permanente e incurabile del Romano Pontefice«; un Capitolo III su »La consulta medica«; un Capitolo IV di »Disposizioni finali«, per un totale di ventuno articoli.

Il secondo progetto di costituzione apostolica, »Sulla situazione canonica del Vescovo di Roma che ha rinunciato al suo ufficio«, è anch'esso introdotto da un preambolo e consta di sette articoli.

È necessario precisare che il testo pubblicato sul volume qui recensito presenta una versione datata agosto 2021. Il testo dei due progetti è stato successivamente presentato in un convegno italiano nell'ottobre 2022, nei cui atti è pubblicata una versione, che accoglie alcune modifiche e integrazioni, datata marzo 2023.[13] Sul sito web del gruppo di ricerca si legge una versione aggiornata al 21 aprile 2023.[14]

Non è mio compito procedere all'analisi delle proposte di costituzione apostolica. Mi limito solo a qualche rapida considerazione di carattere generale, in superficie. Quanto al progetto sulla sede romana impedita, il preambolo (n. 6) richiama giustamente la prudenza quale movente che indurrebbe a far sì che nell'ipotesi di sede romana totalmente impedita per incapacità permanente della persona del Romano Pontefice si producano i medesimi effetti che il diritto prevede per l'ipotesi di sede vacante (autorevole dottrina canonica aveva affermato il principio che *amentia aequivalet morti*). Questa prudenza, che renderebbe opportuno un intervento legislativo sul tema, nella storia è stata però controbilanciata da una diversa considerazione (anch'essa frutto di valutazione prudenziale), che in siffatte situazioni ha indotto la Chiesa a confidare nella Provvidenza e nel soffio dello Spirito Santo piuttosto che nell'intervento umano (come fino ad oggi attesta l'assenza di qualsivoglia disciplina specifica).[15] Sta di fatto che la disciplina della sede vacante presuppone la mancanza di un papa, per morte o rinuncia, mentre la disciplina della sede impedita presuppone l'esistenza di un papa nell'esercizio (per quanto impedito) delle sue funzioni. Le procedure delineate dalla legge sono inevitabilmente molto complesse, coinvolgono la partecipazione di diversi soggetti singoli e collegiali – il Collegio dei Cardinali convocato dal Decano o da altro cardinale a suo nome, la Consulta medica che emette le perizie –, sono scandite secondo termini temporali e prevedono decisioni da prendere con maggioranze determinate, per tacer di tanti altri aspetti della catena dei molteplici adempimenti.

La natura meramente declaratoria della decisione che la sede romana è impedita per incapacità totale e permanente del Romano Pontefice è senza dubbio cosa assolutamente diversa da un giudizio di rimozione o deposizione. L'affermazione che la cessazione dall'ufficio opera *ipso iure* (preambolo, n. 6), tuttavia, non cancella il fatto che l'oggetto della dichiarazione è pur sempre la persona che ricopre l'ufficio di Romano Pontefice, il che è comunque materia toccata dal principio canonico *prima sedes a nemine iudicatur*. Inoltre, l'esperienza delle cose umane insegna che in ciascun anello di una lunga e complessa catena procedurale potrebbe annidarsi un ostacolo, e che da ciascun momento della procedura potrebbe scaturire una contro-

13 Si tratta del Convegno svoltosi nell'Università di Torino dal 3 al 4 ottobre 2022, organizzato di concerto con l'Associazione dei docenti universitari della disciplina giuridica del fenomeno religioso (Adec): Ilaria Zuanazzi, Maria C. Ruscazio, Valerio Gigliotti (a cura di), La sinodalità nell'attività normativa della Chiesa. Il contributo della scienza canonistica alla formazione di proposte di legge, Modena 2023. Tutta la seconda parte del volume riguarda le proposte di costituzione apostolica in oggetto. In particolare si vedano i contributi di Antonio Viana, Presentazione della Proposta di legge sulla sede romana totalmente impedita, 149–160; Giuseppe Comotti, Presentazione della Proposta di legge sulla situazione canonica del Vescovo di Roma che ha rinunciato al suo ufficio, 175–193.

14 Gruppo di ricerca – Sede romana totalmente impedita e *status* giuridico del Vescovo di Roma che ha rinunciato, https://www.progettocanonicosederomana.com/ ultima consultazione 25.04.2024. Per una presentazione del lavoro del gruppo di ricerca si vedano Thierry Sol, Gruppo di ricerca, Sede romana totalmente impedita e status giuridico del Vescovo di Roma che ha rinunciato, in: Ius Ecclesiae 33,2 (2021), 695–697; Antonio Viana, Epilogo. Breve relazione su un'iniziativa della canonistica (2020–2023), in: Zuanazzi et al. (a cura di), La sinodalità nell'attività normativa della Chiesa, cit. (n. 13), 471–482.

15 Con questo non intendo sostenere che »la Provvidenza Divina non permetterà mai che la persona del Santo Padre possa soffrire un'incapacità che lo separi permanentemente dal governo della Chiesa«, come pure hanno ritenuto alcuni autori che adottarono un »approccio provvidenzialista« alla questione: sul tema Viana, Presentazione della Proposta di legge sulla sede romana totalmente impedita, cit. (n. 13), 152–153.

versia. Per siffatte controversie – che potrebbero minare alla base la credibilità e l'accettazione stessa della dichiarazione da parte dei fedeli – non vi è un giudice predeterminabile o predeterminato (e infatti il progetto tace sul punto): lo stesso Collegio cardinalizio come giudice *in re propria*? un concilio ecumenico (non si sa da chi convocato e comunque privo del suo *caput*)? I tanti problemi trattati nei precedenti saggi del volume qui recensito (deposizioni, rinunce, pluralità di papi) sono stati risolti nella storia e dalla storia con soluzioni che sfuggono alla astratta razionalità degli schemi canonici o da questi di distaccano apertamente.

Le mie considerazioni, comunque, non intendono sminuire l'apprezzabilissimo valore ecclesiale, oltre che scientifico, del lavoro di un gruppo di ricerca che ha operato nell'intento di collaborare per il *bonum commune Ecclesiae* al fine di predisporre una soluzione accettabile per alcuni problemi che potrebbero verificarsi con frequenza nell'immediato futuro. Altrettanto lodevole è l'intento che ha mosso il gruppo nella redazione del secondo progetto di costituzione apostolica, diretto a regolare la situazione canonica del Vescovo di Roma che ha rinunciato al suo ufficio. In realtà il progetto tocca, a monte, lo stesso atto di rinuncia, disciplinandolo nei quattro paragrafi dell'art. 1, il quale amplia e precisa diversi aspetti ora implicati nella scarna formulazione dell'attuale can. 335 (= CCEO can. 44 § 2). Sulla linea delle considerazioni svolte più sopra a margine del saggio di Gianfranco Ghirlanda, penso sia altamente utile, per sgombrare ogni dubbio sulle implicazioni dell'atto di rinuncia, l'affermazione di carattere dottrinale contenuta nell'art. 1 § 2 del progetto: »La rinuncia del Romano Pontefice si riferisce al suo ufficio e a tutte le potestà, ministeri, incarichi, diritti, privilegi, facoltà, grazie, titoli e insegne, anche quelle meramente onorifiche, inerenti all'ufficio stesso«. Non mi soffermo sui dettagli del progetto, le cui norme »vogliono essere specialmente rispettose della dignità personale di chi ha occupato la cattedra di San Pietro« (preambolo, n. 5). Segnalo, in particolare, l'art. 2 § 1, secondo il quale, »una volta che la rinuncia abbia sortito effetto, il rinunciante assume il titolo di Vescovo emerito di Roma«. Questa scelta, a mio avviso, non dissipa le perplessità o le critiche suscitate dall'uso del titolo di »papa emerito«, a causa della equivalenza delle due denominazioni: il vescovo di Roma è papa e Romano Pontefice, e viceversa non può esistere un papa o Romano Pontefice che non sia Vescovo di Roma.[16]

La Postfazione del volume si apre con la testimonianza di Cristiana Caricato, 11 febbraio 2013 (169–178), che ripercorre i frenetici processi di comunicazione mediatica della rinuncia di Benedetto XVI, irradiatisi dalla Sala Stampa della Santa Sede. Il saggio conclusivo di Massimo Franco, La rinuncia prossima ventura (179–185), si addentra nei meandri del »papato-ombra«, evidenziando come Joseph Ratzinger abbia »assunto un ruolo inedito: defilato, discreto, ma cruciale« (181), entro un orizzonte ecclesiale polarizzato sui due fronti dei »ratzingeriani« e dei »bergogliani«, nel quale Benedetto è stato visto come »una sorta di custode teologico di un Francesco che gli avversari descrivono intrappolato nell'agenda del progressismo di alcuni vescovi tedeschi e sudamericani« (183). Il nodo irrisolto è se la rinuncia di Benedetto XVI rimarrà un atto isolato oppure fornirà l'esempio di un nuovo modo di concepire l'esercizio dell'ufficio papale.

Il volume presenta una raccolta utile e ben costruita di saggi, tematicamente variati, che coprono la bimillenaria storia della Chiesa negli aspetti complementari della ricostruzione storica e dell'analisi canonistica, con utili prospettive di orientamento. L'opera scaturisce dalla recente esperienza, la quale mostra come sul tema della rinuncia pontificia convergano linee di interesse che non rimangono rinchiuse nei recinti accademici tra le curiosità storiche o teoriche, ma più in generale interpellano la partecipe riflessione degli studiosi e delle varie componenti ecclesiali su situazioni che incidono profondamente nella vita della Chiesa cattolica.

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16 In questo senso già Carlo Fantappiè, Né Papa né Vescovo emerito di Roma. Sul titolo del Papa che rinuncia, in: Zuanazzi et al. (a cura di), La sinodalità nell'attività normativa della Chiesa, cit. (n. 13), 335–349, il quale propone di »definire il Papa che rinuncia ›già Papa‹, seguìto dal nome prescelto al momento dell'elezione (come accadde per Celestino V che fu definito ›olim papa‹)« (348); nonché Ghirlanda nel contributo contenuto del volume qui recensito (130).

Caspar Ehlers

Unter dem Schutzschirm der epistemischen Kutte*

In seiner von Andreas Bihrer betreuten Kieler Dissertation wendet sich Stephan Bruhn mit einer außergewöhnlichen Fragestellung einem komplexen Thema zu. Er kombiniert nämlich verschiedene moderne Ansätze mit intensiver Quellenrecherche, um Entstehung und Effekte der titelgebenden »Wertegemeinschaften« zu eruieren. Mit anderen Worten, er geht über die reine Netzwerkanalyse hinaus, indem er die verbindenden Inhalte der Diskurse der Angehörigen solcher Gruppen in den Blick nimmt. Und dies über den beeindruckenden Zeitrahmen von zwei Jahrhunderten in einem nicht gerade kleinen und für seine Übersichtlichkeit bekanntem Raum.

Er klassifiziert zwei Kernpunkte, die »Alfredianischen Reformen« (Teil II, 71–290) und die »›Benediktinischen‹ Reformen« (Teil III, 291–500) seit etwa dem Jahr 940. Eine methodische Einführung (Teil I, 17–70) sowie ein ergebnisorientierter Ausblick auch auf weitere Forschungsfragen (Teil IV, 501–554) umrahmen diese umfangreichen Untersuchungsfelder, Quellen- und Literaturverzeichnisse sowie ein Index schließen den Band ab. Den vergleichenden Wertekanon für beide Schwerpunkte definiert Bruhn anhand der folgenden elf Kriterien, die in den zwei entsprechenden Teilen gleichermaßen katalogartig untersucht werden: Gehorsam, Gerechtigkeit, Bußfertigkeit, Frömmigkeit, Keuschheit, Soziabilität, Demut, Freigiebigkeit, Gnade, Agonalität und Produktivität.

Bevor wir uns jedoch diesen Vergleichen zuwenden, interessiert besonders die Definition der »Wertegemeinschaften«, zumal diese auch für Fragestellungen des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie von großem Interesse sind, wo ja »Epistemische Gemeinschaften« eine Rolle spielen.

Anhand eines bislang unbeachtet gebliebenen Zitates aus der um 996 entstandenen Lebensbeschreibung des heiligen Æthelwold († 984) aus der Feder von Wulfstan Cantor, das einen Traum des Abtes Dunstan von Canterbury († 988) und dessen Auslegung beschreibt, führt Stephan Bruhn in sein Thema ein. In der Vision sah der Abt einen Baum, der statt Früchten Kutten trug und an dessen Wipfel eine noch größere Kutte zu sehen war, die den Baum gleichsam überschirmte. Diese nämliche Kutte sei diejenige Æthelwolds, erfährt der Träumende, eines derzeitigen Mönches aus seinem Kloster, der aber eines Tages die Kirche Britanniens geistlich führen werde (17–21). In der Tat war Æthelwold zum Zeitpunkt der Niederschrift der Quelle zwar schon über zehn Jahre tot, aber als Abt und dann als Bischof von Winchester hatte er Bemerkenswertes für die Reform des frühen angelsächsischen Mönchtums erreicht, was von Wulfstan posthum gewürdigt wird. Bruhn geht von diesem Bild des überschirmten Baumes aus und erkennt darin folgerichtig ein Symbol für die Vernetzung der reformwilligen Kleriker; allerdings nicht als Früchte desselben Baumes, sondern als unter dem Schutze der tatsächlichen Person Æthelwolds stehend.

Im Anschluss daran führt der Verfasser in die Erforschung von Gruppen durch die jüngere Mediävistik als Sozialgeschichte ein (21–29) und bescheinigt ihr das Defizit, stets das Politische in den Vordergrund gerückt zu haben (29 f.). Die Erforschung der mittelalterlichen Hagiographie und von Visionen beurteilt er unter dem Aspekt der Diskursgeschichte (32–40), deren mangelnde »analytische Aussagekraft« und deren Verlust des »geschichtswissenschaftlichen Potentials« er als Folge fehlender Tiefenschärfe aufgrund zu starker Auffächerung bewertet, die zu dem schwachen Er-

* Stephan Bruhn, Reformer als Wertegemeinschaften. Zur diskursiven Formierung einer sozialen Gruppe im spätangelsächsischen England (ca. 850–1050) (Mittelalterforschungen 68), Ostfildern: Thorbecke 2022, 607 S., ISBN 978-3-7995-4389-7

gebnis führten, »dass letztlich alles mit allem zusammenhängt« (40).

Voraussehbare Resultate dieser Art möchte Bruhn methodisch vermeiden, indem er sich auf ein Quellenkorpus (die Heiligenviten) beschränkt und eine epistemische Gruppe (die Reformer) in einer Region und einem umgrenzten Zeitraum untersucht (41–56). Diese Voraussetzungen führen ihn zu dem thematisch zentralen Aspekt, den er unter der Überschrift »Der Eingang in die Heilsgemeinschaft als einendes Ziel, oder: Soziale Gruppen als Wertegemeinschaften« behandelt (57–66), wobei er der »positiven Inklusion« eine »negativ definierte Exklusion« als »zentrale Kategorien« für die Gruppenzugehörigkeit an die Seite stellt (56), mit anderen Worten: Es reichte nicht, ein Mönch zu sein, um der Werte und Normen teilenden Gemeinschaft anzugehören. Dementsprechend wird Æthelwolds Führungsrolle schon in der Vision nicht über sein institutionelles Abbatiat begründet, sondern aus seiner intellektuellen, religiösen und persönlichen Autorität, eine »gemeinsame Wertorientierung« als »eigentliches Proprium« seines Kreises zu erschaffen (57 f.).

Mit diesen beiden Begriffen – Werte und Normen – setzt sich Bruhn auseinander, indem er die Funktion von Normen in der Forschung über Gesellschafts- und Rechtsgeschichte kurz umreißt, auf die »Diffusität des modernen Begriffsgebrauchs« eingeht und als Mangel hervorhebt, dass durch mehr oder weniger moderne Fragestellungen mit heutigen Begriffen die Werte und Normen ferner Zeiten nur mittelbar erfasst werden können, beziehungsweise ausgeblendet werden (58–63). »Werte an sich« (Barbara Stollberg-Rilinger) seien durch Quellenanalyse nicht zu greifen, wohl aber die »Kommunikation mit Werten und über Werte« (63 f.). Eine Zusammenfassung der auch hier einflussreichen Thesen von Hans Joas zum Verhältnis Werte-Normen beschließt dieses Kapitel und leitet zu der Darstellung der »Methodischen Leitlinien« über (65–68), die die Kriterien für die vorgenommenen Einschränkungen auf ein bestimmtes Gefüge aus Zeit, Raum und Menschen sowie die oben referierten methodischen Ansätze plausibel macht.

Teil IV fasst Bruhns Ergebnisse und die sich daraus ergebenden Perspektiven zusammen: Nicht die Einführung der *Regularis Concordia* oder der Benediktregel seien als Hinweise auf Reformbestrebungen einer Wertegemeinschaft zu klassifizieren, sondern die anstrengenden Bemühungen einzelner Akteursgruppen, durch eigenes Handeln gegen Widerstände Missstände zu beheben (509 f.). Dieses Verhalten sei durch die im Untersuchungszeitraum entstandenen Lebensbeschreibungen erkennbar. Mittels der dem Vergleich zugrunde gelegten »Checkliste« seiner elf Kriterien in Verbindung mit der Frage nach Inklusion und Exklusion versuchte Bruhn, die Wertediskurse aus seinem umfangreichen Quellenkorpus zu extrahieren, was ihn vor große Herausforderung stellte (513). Nicht der Begriff der Norm, sondern der des Normenbruchs erwies sich dabei als tauglich (314 f.). So folgert der Verfasser als ein Ergebnis seiner Studien, dass »Werte an sich« dem Zugriff des Historikers entzogen seien, weil sie platterdings nicht existieren (516 f.).

Ein Satz aus dem zweiten Kapitel des vierten Abschnitts scheint dem Rezensenten von besonderer Wichtigkeit: »Statt eine stark formalisierte Gruppe nach den in ihr greifbaren Wertevorstellungen zu befragen oder die soziale Signifikanz lediglich eines Verhaltensideals auf Basis eines möglichst breit gestreuten Quellenkorpus zu ermitteln, wurde die gemeinschaftsbildende Relation unterschiedlicher Ideale im Rahmen eines spezifischen Kommunikationszusammenhanges – der reformorientierten Vitenproduktion im spätangelsächsischen England – untersucht« (518). Durch diesen »mikrodiachronen« (518) Zugriff sei es nunmehr gelungen, für »die unterschiedlichen Ansätze und Zugriffe, welche innerhalb der mediävistischen Erforschung normativer Ordnungen verfolgt werden« und dabei »häufig unverbunden nebeneinander« stehen, neue Blickwinkel für die historische Werteforschung (nicht nur zu Reformkontexten, CE) zu eröffnen (519 f.). Da sich weder die Wertegemeinschaften noch die Autoren der Heiligenviten nur an eine klerikale Adressatengruppe richteten, sondern auch explizit Laien – mithin die ganze Welt – einzuschließen versuchten (520–529), ist in der Tat die Möglichkeit einer derartigen methodischen Fokuserweiterung der Forschung gegeben.

Der zweite Teil des Buches zu den frühen angelsächsischen Reformen wertet allein den zeitgenössischen Bericht über die Taten König Alfreds († 899) aus der Feder des im Jahre 893 schreibenden walisischen Mönches und Bischofs Asser *(De rebus gestis Ælfredi)* aus, der zum engen Umfeld des Königs gehörte (88) – einer Wertegemeinschaft ohne Frage. Insofern handelt es sich weniger um eine Vita als um »Res Gestae« (89–91, 94–97). Bruhn interpretiert sie als »reformorientierte

Selbstvergewisserung« (71–228, Zitat 97) und entwickelt an ihr seine elf Kriterien.

In Teil III, in dessen Zeithorizont die Produktion der Heiligenviten fällt, wird deren Zustandekommen im »reformorientierten Milieu« untersucht (dazu der Katalog 307–344). Bruhn geht es um Querbezüge sowie um den zeitgenössischen Diskurs über die genannten elf Kriterien innerhalb des Korpus. Insgesamt werden gemäß den Kriterien des Verfassers sieben Viten ausgewertet, was hier nicht einzeln nachvollzogen werden kann. Was auch dem Leser auffiel, fasst der Verfasser folgendermaßen zusammen: »Die Vorstellung der einzelnen Texte hat dabei ergeben, dass personelle und institutionelle Netzwerke aufgrund der vielfach deutlich später einsetzenden handschriftlichen Überlieferung der Viten sowie der häufig nicht gesicherten Identität ihrer Autoren nur bedingt tauglich sind, die Produktion und Rezeption der Werke zu verorten« (344). Daher muss Bruhn in der Regel vermuten, dass sich die Vitenschreiber an kleinere Gruppen der entschlossenen Reformer richtete, an Konvente oder eben Wertegemeinschaften, auch wenn die Verbreitung ihrer Schriften nur minimal oder recht umfangreich ausgefallen ist. Bemerkenswert ist allemal, dass sich angelsächsische Protagonisten der Reform in mehreren Fällen an Autoren aus dem Westfrankenreich mit der Bitte wandten, Viten anzufertigen beziehungsweise zu überarbeiten: Lantfred und Abbo von Fleury, der anonyme Verfasser B. der Vita Dunstans sowie Adelard (310 f., 314–318, 326 und 331 f.).

Derartige Netzwerke sowie die »intertextuelle Perspektivierung der Werke« und deren »Diskurszusammenhang« werfen Schlaglichter auf die Wertegemeinschaften, auch wenn »Erkenntnistheoretische Ansprüche […] mit diesen Identifikationen indes nicht verbunden beziehungsweise [nur] hypothetisch formuliert« werden könnten (344).

Das Buch von Stephan Bruhn bietet scharfsichtige Einblicke in die während der beiden Reformphasen der angelsächsischen Kirche entstandenen Vitenliteratur, was vor allem mittels der »deep lecture« der Quellen, ihres Verhältnisses zueinander und innerhalb des gewählten gattungsspezifischen Korpus sowie den vergleichenden Analysen mittels der elf Kriterien erreicht worden ist. Inwieweit die dafür entwickelte Methode der Suche nach den Wertegemeinschaften im Sinne einer Identifizierung von Akteuren beziehungsweise deren Wirkungen als epistemische Gruppen tragfähige Ergebnisse dazu liefert, wurde vom Verfasser in angenehm aufrichtiger Weise selbst ab und an hinterfragt. Da sich auch der Rezensent mit derartigen epistemologischen Fragen beschäftigt, weiß er um diese Schwierigkeiten. Wie es sich Stephan Bruhn in seinem Teil IV wünscht, sollten weitere Forschungen von seinem Buch inspiriert sein. ■

Peter Oestmann

Das tintenklecksende Säkulum*

Die grundlegenden Unterschiede zwischen einem mündlichen und einem schriftlichen Gerichtsverfahren gehören zu den klassischen Themen der Rechtsgeschichte. Die Ablösung des ungelehrten mündlichen Prozesses durch das sprichwörtliche »Quod non est in actis non est in mundo« ist als solche gut bekannt. Auch das Frankfurter Max-Planck-Institut hat hierzu bereits einen Band mit dem schönen Titel »Als die Welt in die Akten kam« vorgelegt.[1] Das »Netzwerk Reichsgerichtsbarkeit« wendet sich in der »bibliothek altes Reich« abermals dem Gegenstand zu. Wie

* Josef Bongartz, Alexander Denzler, Carolin Katzer, Stefan Andreas Stodolkowitz (Hg.), Feder und Recht. Schriftlichkeit und Gerichtswesen in der Vormoderne (bibliothek altes Reich, Bd. 39), Berlin / Boston: De Gruyter 2023, ISBN 978-3-11-107730-7

1 Susanne Lepsius, Thomas Wetzstein (Hg.), Als die Welt in die Akten kam. Prozeßschriftgut im europäischen Mittelalter, Frankfurt am Main 2007.

die Herausgeber zu Recht betonen, lassen sich in der Vormoderne schriftliche oder mündliche Gerichtsverfahren in ihrer Reinform nur selten festmachen (12–13). In der Tat: Zum einen gab es Protokollbücher mündlicher Verhandlungen, zum anderen oftmals mündliche Rezesse bei der Übergabe anwaltlicher Schriftsätze an die Richterbank. Hier muss man freilich genau im Blick behalten, wovon der jeweilige Verfahrenstyp im Kern abhängt. So betont etwa Eva Ortlieb durchaus zutreffend, dass die Mitglieder des Reichshofrats ihre schriftlichen Relationen im Kollegium verlasen und diskutierten (362–363). Dennoch handelt es sich zumindest aus rechtshistorischer Sicht nicht um ein gemischt schriftlich-mündliches Verfahren. Entscheidend für die Einordnung sind nämlich die sog. Prozesshandlungen der Parteien, nicht die internen Beratungen des Gerichts. Je klarer man also die Frage zuspitzt, desto leichter fallen die Antworten.

Die Herausgeber, zwei Historiker und zwei Juristen, bieten in ihrer umfangreichen Einleitung zwölf Thesen zur vormodernen Mündlichkeit und Schriftlichkeit und versuchen auf diese Weise, Kohärenz zu stiften. Der Sache nach handelt es sich teilweise um knappe Zuspitzungen des Forschungsstandes, teilweise um Vermutungen, manchmal auch um Schwulst: »Die Schreiber selektierten daher im Rahmen des institutionellen Kontexts die relevanten Lautfolgen, Erzählschilderungen und Handlungen der Akteure, generierten so deren gerichtspragmatischen Sinn und verliehen ihm Dauerhaftigkeit« (21, übernommen von Maria Weber ebd. 147). Insgesamt 15 Einzelbeiträge, hervorgegangen aus einer Tagung von 2019, spannen den Bogen vom späten Mittelalter zur frühen Neuzeit mit einem gewissen Schwerpunkt auf der höchsten Gerichtsbarkeit im Alten Reich.

Mit jeweils rund 50 Druckseiten beanspruchen die beiden ersten Aufsätze besonderes Augenmerk. Eberhard Isenmann schöpft aus seiner riesigen Quellenkenntnis und beschreibt das Konsilienwesen spätmittelalterlicher Ratsjuristen. Den heutigen Rechtshistorikern schreibt er ins Stammbuch, sich bei Fragen nach der Rezeption und dem gemeinen Recht nicht vorschnell mit formal-methodischen Punkten zu begnügen, sondern endlich auch auf die Rechtsinhalte einzugehen (56–57). Dazu zählt etwa eine zeitgenössische Lehre vom kaiserlichen Absolutismus (71, 73, 85). Wenig quellenkritisch übernimmt Isenmann allerdings die Kritik gelehrter Juristen an der angeblich unzulänglichen älteren Laiengerichtsbarkeit.

Ulrich Falk hingegen beschreibt die Eigentümlichkeiten des rein schriftlichen Aktenversendungsverfahrens. Sein Beitrag weist die Überlegungen der Herausgeber zur angeblich besonderen Objektivität des schriftlichen Verfahrens und zum Verzicht auf Anwaltsrhetorik zurück, weil auch die geschriebenen Stellungnahmen der Advokaten und Prokuratoren den Zwecken ihrer Mandanten dienen sollten und keineswegs um Unparteilichkeit bemüht waren (94, 129). Mit Belegen aus dem frühen 19. Jahrhundert beschreibt Falk beißend die fabrikmäßige Urteilsproduktion der Juristenfakultäten für ihre Kundschaft (105). Gelehrte wie Gustav Hugo und andere beklagten damals die Vernachlässigung der Zivilrechtswissenschaft durch die universitären Praktiker an den Spruchkollegien. Hier muss man freilich quellenkritisch bleiben und darf die zeitgenössischen Äußerungen aus dem Umfeld der historischen Rechtsschule nicht als rechtshistorische Befunde für die frühe Neuzeit ansehen. Unter einem gänzlich verschiedenen Wissenschaftsideal sahen die Dienstpflichten 1720 eben anders aus als 1820. Zutreffend macht Falk auf die unüberwindbaren Grenzen der Gründlichkeit aufmerksam, die sich jedem Referenten boten. Wenn der strenge Schriftbetrieb regalmeterweise Akten produzierte, wer sollte dies alles dann für eine einzelne Entscheidung durcharbeiten (125)? Falls auf der anderen Seite unterinstanzliche Akten fehlten oder sogar verlorengegangen waren, standen zeitgenössische Obergerichte vor nahezu unlösbaren Erkenntnisproblemen, wie Stefan Stodolkowitz eindrücklich zeigt (282–283).

Tobias Schenk plädiert am Beispiel der reichshofrätlichen Quellen für eine genetische Aktenkunde. Damit lassen sich die Aktenüberlieferung und die überkommenen Protokollserien miteinander verbinden. Auf diese Weise geraten die Entstehungsbedingungen der Akten stärker ins Visier, und damit kann man wenigstens erahnen, an welchen möglicherweise wesentlichen Weichenstellungen die Prozessakten schweigen. Ob man hier von politisch motivierter Rechtsbeugung im großen Stil ausgehen sollte (333), erscheint hierbei als bloße Geschmacksfrage. Denn dass die Auswahl der Referenten, verzerrte Zusammenfassungen des Streitstandes, zweifelhafte Zurückweisungen von Schriftsätzen und anderes die gewünschten Ergeb-

nisse herbeiführen konnten, ist insgesamt gut belegt. Mit einem sehr schönen Zitat von Feuerbach betont Schenk, Prozessakten zeigten nichts weiter als sich selbst und ließen die gerichtlichen Handlungen als solche gerade im Dunkeln (319). Das stimmt sicherlich. Doch wirkt es riskant, wenn Schenk deswegen ausdrücklich überzeitlich argumentiert und das Reichskammergericht wie den Bundesgerichtshof über einen Leisten schlägt. Der entscheidende Einfluss von Geschäftsverteilungsfragen und damit die Schlüsselrolle frühneuzeitlicher Gerichtspräsidenten ist zweifellos wichtig. Unklar bleibt jedoch, ob es nicht eine große Zahl von Normalfällen jenseits politischer oder wirtschaftlicher Bedeutung gab, die genau deswegen dem jeweiligen Ränkespiel ein stückweit entzogen waren. Deswegen bleibt die Verortung in Zeit und Raum unerlässlich.

Interdisziplinäre Verständnishürden zeigen sich innerhalb des Bandes mehrfach, so etwa wenn Untertanen als Mitwirkende an behördlicher Schriftlichkeit erscheinen, weil ein großer Teil von Reichshofratsprozessen durch Supplikationen eingeleitet wurde (Thomas Schreiber, 367). Wenn an solchen Stellen jeder Hinweis auf Instanzenzüge und Rechtsmittel fehlt, ist das schade. Auf der anderen Seite firmieren spätmittelalterliche Oberhöfe verfehlt als zweite Instanz, in den Fußnoten begleitet durch das längst überholte Lehrbuch von Mitteis / Lieberich (Heike Hawicks, 157). Inwieweit die Sprüche der Oberhöfe als »Relikte oraler Rechtsweisung« anzusehen sind (165), erscheint überdies zweifelhaft, und die mittelalterliche Bevölkerung sollte man auch lieber nicht als Bürger bezeichnen (175). Die zeitgenössische Rückbindung an angebliche Vorväter reicht dafür jedenfalls nicht aus. Die schroffe Gegenüberstellung von schriftlichen Aushandlungsprozessen und den realen Verhältnissen vor Ort (Carolin Katzer, 262) wirkt ohnehin überzeichnet. Historische Wirklichkeit ist eben fast ausschließlich schriftlich vermittelt greifbar, so misslich dies im Einzelfall auch wirken mag. Überzeugend sind einige Tiefbohrungen wie etwa von Daniel Kaune, der spätmittelalterliche Urteilsbücher aus Basel als Beleg für die alltägliche Schriftlichkeit vor Gericht deutet und sogar nachweist, wie einzelne Streitgegenstände einzelnen Buchserien zugeordnet waren (189). An solchen Stellen gelingt die Verknüpfung von Lokalstudien mit größeren Fragen sehr gut. Ein Beispiel aus der historischen Kartographie unterstreicht zudem den Zusammenhang von Bild und Text bei Beweisfragen um streitige Grenzen (Dorothea Hutterer).

Ein Gesamturteil ist wie immer bei Sammelbänden schwierig, gerade angesichts zweier kaum einschlägiger Beiträge am Ende des Buches. In der Verdichtung von Bekanntem, Erschließung von Neuem und den Leitüberlegungen als Orientierung bietet der Band aber insgesamt eine anregende Mischung, die über die bisherigen Zugänge vielfach hinausgeht.

■

Marian Füssel

Experten gesucht*

Juristen gelten neben Medizinern in der historischen Erforschung der Emergenz von Expertenkulturen in Mittelalter und Früher Neuzeit als prototypische Gruppe. Alle Eigenschaften von Experten, wie deren Anrufung, Inszenierung, Fachsprache oder Kritik lassen sich geradezu idealtypisch am vormodernen Juristenstand verfolgen. Grund genug, der Sache in einem Band mit Schwerpunkt auf der höchsten Reichsgerichtsbarkeit im 16. und 17. Jahrhundert empirisch weiter nachzugehen.

* Anette Baumann (Hg.), Juristen als Experten? Eine Untersuchung zu Wissensbeständen und Diskursen der Juristen im 16. und 17. Jahrhundert (bibliothek altes Reich 40), Berlin / Boston: De Gruyter 2023, viii + 299 S., ISBN 978-3-11-107012-4

Anette Baumann ebnet in ihrer Einleitung analytisch den Weg zur wissenssoziologischen Rekonstruktion von juristischen Wissensbeständen und Expertenrollen. Doch Sammelbände – und auch solche von RechtshistorikerInnen – sind regelmäßig mit dem Konflikt zwischen Disziplin und Eigensinn ihrer BeiträgerInnen konfrontiert. Nicht nur stehen extrem lange Beiträge neben extrem kurzen, sondern auch solche, die sich auf das Rahmenthema einlassen, neben solchen, die den Weg aus der Komfortzone des eigenen Ansatzes scheuen. Im Fall dieses Bandes lassen sich die Beiträge in drei Kategorien einteilen: Aufsätze, die ganz oder weitgehend auf Forschungen zu Expertenkulturen verzichten, solche, die genuin juristischer Expertise nachspüren, und solche, die sich einem disziplinübergreifenden »Crossover« bzw. Wettbewerb von fachlichen Expertisen widmen.

Am Beginn steht ein 86-seitiger Mammutbeitrag von Tobias Schenk mit dem kurzen Titel *Vom* dominus referens *zum Berichterstatter.* Schenk schöpft reichlich aus dem theoretischen Werkzeugkasten von Organisationssoziologie, Systemtheorie, Praxeologie und in etwas geringerem Umfang aus Wissensgeschichte und Wissenssoziologie, um der »Intellektualisierung und Entkörperlichung« (66; 72) vieler traditioneller, rechtsgeschichtlicher Forschungen vehement entgegenzuarbeiten. Im Zentrum steht der Wandel von Dichotomien wie Mündlichkeit und Schriftlichkeit sowie Einzelrichter und Kollegium, anhand dessen Rekonstruktion Schenk eine konsequente Historisierung von Entscheidungsprozessen am Reichshofrat gelingt. Einziges Rezeptionshemmnis bleibt, dass Schenk sich dem barock ausladenden Argumentationsumfang einer Reichshofratsakte verdächtig nähert.

Kaum Gebrauch von der Rollenkategorie des Experten machen die beiden Beiträge zur frühneuzeitlichen Konsilienpraxis von Sabine Holtz zur Universität Tübingen und Alain Wijffels zu den burgundisch-habsburgischen Niederlanden. Beide betonen in unterschiedlicher Weise hingegen die Rolle des Gutachtens für die Stabilisierung und Verrechtlichung von Herrschaft und Regierung. In die gleiche Kategorie der Experten-Abstinenz fällt auch der gelehrte Beitrag Cornel Zwierleins über den Straßburger Frühkameralisten Georg Obrecht (1547–1612). Ihm attestiert Zwierlein einen hohen Praxisbezug, unter anderem gegenüber der Gerichtspraxis, in seiner eigenen akademischen Ausbildungspraxis wie seinen politisch-militärischen Konzepten. Dass Obrecht damit oft in der Rolle des Experten agierte, ist evident, wird aber analytisch nicht des Problematisierens für wert erachtet.

Die Kategorie der Crossover-Expertise jenseits der engeren Profession verfolgen die drei Beiträge von Horst Carl, Wim Decock und David von Mayenburg. Carl geht der Rolle von *Juristen als Landfriedensexperten* und damit »Sicherheitsexperten« ein und verknüpft überzeugend Expertiseforschung und historische Sicherheitsforschung. Bei Wim Decock stehen nicht Juristen selbst im Mittelpunkt, sondern Angehörige des Jesuitenordens mit juristischer und ökonomischer Expertise, genauer gesagt *ein* prominenter Angehöriger, Leonardus Lessius (1554–1623). Decock verbleibt jedoch weitgehend bei einer ideengeschichtlichen Rekonstruktion der Inhalte, während man gerne mehr über Praktiken des konkreten »doing expertise« erfahren hätte. Das leistet David von Mayenburg in Ansätzen mit seiner Rekonstruktion von *Juristen als Pestexperten*, wenn er herausarbeitet, wie es Juristen gelang, den den Medizinern zugeschriebenen »Kompetenzvorsprung« allmählich aufzuholen, indem sie sich als »aktive Vertreter einer auf Empirie und Vernunft basierenden Problemlösungsstrategie« inszenierten (191).

Eine interessante Perspektive entwirft der Kunsthistoriker Stephan Brakensiek, indem er am Beispiel der Kunst- und Wunderkammern danach fragt, ob »Juristen in den von ihnen zusammengebrachten Sammlungen Expertenwissen generieren konnten« (236). Eine Antwort bleibt der Beitrag jedoch schuldig, der sich dann vielmehr den allgemeinen Entwicklungstendenzen frühmoderner Sammlungsepistemologie zuwendet. Der Leser erhält einen kompakten Überblick über die Sammlungsstrategien im Wandel von Repräsentation der »Welt in der Stube« zur Systematik empirischer Wissenschaft, erfährt jedoch wenig darüber, welche Rolle Juristen dabei spielten. So wäre es denkbar, dass das Sammeln mehr einer Statusdemonstration des Experten diente als einer objektbasierten Wissensgenerierung. Sammlungsbezug weist auch der Beitrag von Armin Schlechter über die »Provenienzen, Nutzergruppen und Verbreitungsgebiete« der *Werke von Speyrer Reichskammergerichts-Juristen« in der Pfälzischen Landesbibliothek und in der Bibliothek des Gymnasiums am Kaiserdom in Speyer* auf.

Es handelt sich durchweg um informative Beiträge, die mit dem Untertitel *Wissensbestände und Diskurse* auch eine ganz treffende Klammer erhal-

ten, die Kategorie des Experten kommt indes nur sehr verhalten heuristisch oder deutend zum Einsatz. Die positive Seite von Sammelband-Devianz zeigt indes der Beitrag von Schenk auf, der aus dem Band in mehrfacher Hinsicht heraussticht. Und damit ist nicht primär gemeint, dass er viermal so lang ist wie die anderen Beiträge, sondern konsequent theoriegeleitet (wissens-)soziologisch argumentiert, gleichzeitig empirisch einen gewichtigen Beitrag zur Forschung leistet und den Mut hat, mit eingefahrenen Narrativen und Denkstilen kritisch ins Gericht zu gehen. Gerade die Wissensgeschichte lädt als historische Wissenssoziologie eigentlich zu theoriegeleiteter Arbeit förmlich ein, wenn sie nicht als moderner Deckmantel für ältere ideen- und wissenschaftsgeschichtliche Zugänge dient. Anette Baumann setzt mit dem Band einen innovativen Impuls, dem weitere empirische Resonanz in Geschichte und Rechtsgeschichte zu wünschen ist. ■

Karl Härter

Gerichtsprivilegien vor Gericht*

Privilegien als spezifische Ausprägung rechtlicher Normativität, die einzelnen Begünstigten eine Sonderberechtigung oder Befreiung verleihen, gehören noch immer zu den Themen mit rechtshistorischem Forschungspotential. Dies gilt insbesondere für die Gerichtsprivilegien, die Grundlagen und Kernfragen der vormodernen Gerichtsverfassung regelten. Die Studie des emeritierten Rechtshistorikers Ulrich Eisenhardt zu den kaiserlichen Gerichtsprivilegien im Heiligen Römischen Reich deutscher Nation mit seiner Vielfalt an höchsten, territorialen, kommunalen, niederen, weltlichen, geistlichen, zivilen und Strafgerichten mit unterschiedlichen Inhabern der Gerichtsgewalt und Zuständigkeiten füllt daher eine Forschungslücke. Sie bietet erstmals eine umfassende Darstellung der verschiedenen Gerichtsprivilegien und ihrer Erteilung durch Kaiser / Könige, ihrer Adressaten, Regelungsgegenstände und Normen und untersucht epochenübergreifend deren Bedeutung in und für die Gerichtspraxis. Anhand der Rechtsprechung der Höchstgerichte des Alten Reiches – königliches Hofgericht und Kammergericht im Mittelalter, Reichskammergericht und Reichshofrat in der Frühen Neuzeit – arbeitet Eisenhardt die um Gerichtsprivilegien entstehenden Konflikte, ihre Bedeutung als Entscheidungsgrundlage und damit ihre Funktionen im Hinblick auf die Entwicklung von Gerichtswesen und Recht heraus.

Vorgehensweise, Methodik und Darstellung sind dem anspruchsvollen Forschungsvorhaben angemessen, das sich in drei Hauptteile gliedert: 1) Gerichtsprivilegien und Gerichtsverfassung im Mittelalter, 2) Gerichtsprivilegien und Rechtsprechung in der Neuzeit, 3) Wirkungen der Gerichtsprivilegien, die jeweils einen systematischen, profunden Überblick über die Gerichtsverfassung im Reich sowie über die verschiedenen Formen der Gerichtsprivilegien, ihre Funktionen und langfristige Entwicklungen bieten. Daran schließen sich nach den jeweiligen Gerichtsprivilegien gegliederte Analysen der Rechtsprechung des königlichen Hofgerichts und des königlichen Kammergerichts bzw. von Reichskammergericht und Reichshofrat an. Bei der Rechtsprechungsanalyse geht Eisenhardt methodisch geschickt vor, nutzt die vorhandenen Editionen, Regestenwerke und Datenbanken, aber auch Akten einzelner Fälle und verbindet quantitative Erhebungen mit der Analyse einzelner exemplarischer Fälle.

Auf dieser breiten Quellenbasis gelingt eine durchdringende Analyse der verschiedenen For-

* Ulrich Eisenhardt, Kaiserliche Gerichtsprivilegien. Ihre Bedeutung für die Entwicklung der Rechtspflege im Alten Reich (Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 78), Wien / Köln: Böhlau 2023, 442 S., ISBN 978-3-4-12-52857-7

men von Gerichtsprivilegien, die Eisenhardt systematisch differenzierend herausarbeitet: Das *privilegium fori* des Klerus, das *privilegium de non evocando* (Befreiung von kaiserlicher Gerichtsbarkeit), Exemtionsprivilegien, Gerichtsstandsprivilegien und das *privilegium de non appellando* (Befreiung von Appellationen an die Reichsgerichte) regelten Zuständigkeiten von Gerichten, befreiten von fremder Gerichtsbarkeit, beschränkten Appellationen an fremde / höhere Gerichte, begründeten ausschließliche / partikulare Gerichtsstände und regelten Verhältnisse unterschiedlicher Gerichtsbarkeiten zueinander und zur Reichsgerichtsbarkeit. Die Vielfalt der Gerichtsprivilegien führte aber auch zu Privilegienverletzungen, Überschneidungen, Eingriffen, Kollisionen und Jurisdiktionskonflikten. Normativ sehr unterschiedliche Gerichtsprivilegien regulierten einerseits gerichtliche Vielfalt, erzeugten aber andererseits auch justizielle Diversität, da sie spezifische Adressaten, Gerichte, Gerichtsgewalten, Verfahren oder Gegenstände befreiten, berechtigten oder ausschlossen und allgemein verbindliche Regeln erst als Folge von Konflikten ausgehandelt werden mussten.

Nur gelegentlich verliert sich die detaillierte, alle Aspekte beleuchtende Darstellungsweise in speziellen Einzelheiten oder führt zu textlichen Redundanzen. Da Eisenhardt zahlreiche Zusammenfassungen einschaltet, in denen er die Ergebnisse einordnet und mit Bezug auf die Forschung diskutiert, bleiben Überblick und Kohärenz jedoch immer gewahrt. Die Ergebnisse sind reichhaltig: Eisenhardt beleuchtet die jeweiligen Akteure (Privilegieninhaber, Kläger / Beklagte, Kaiser, Reichsstände usw.), arbeitet sowohl allgemeine Konfliktkonstellationen als auch spezifische Probleme der jeweiligen Gerichtsprivilegien heraus, bezieht das Reichsrecht als Rechtsquelle und Entscheidungsgrundlage mit ein und macht so die Relevanz der Gerichtsprivilegien in der juridischen Praxis der Reichsgerichte als auch hinsichtlich der allgemeinen politisch-rechtlichen Auswirkungen auf allen Ebenen des Alten Reiches deutlich. Zentrale Bedeutung kommt dabei dem *privilegium fori*, den von fremder Gerichtsbarkeit befreienden Gerichtsstandsprivilegien und den Appellationsprivilegien zu. Die wesentlichen damit zusammenhängenden und in den Reichsgerichten bearbeiteten Konflikte kreisen um das Spannungsverhältnis und die Abgrenzung zwischen geistlicher und weltlicher Gerichtsbarkeit sowie zwischen territorialer Gerichtsbarkeit und Reichsjustiz. Die Regulierung dieser vielfältige Konstellationen annehmenden Grundkonflikte wirkte sich sowohl auf die Weiterentwicklung der partikularen territorialen Gerichtsverfassungen (z. B. bezüglich Zuständigkeitsregeln, Verfahren, Instanzenzug, Zugang) als auch auf die allgemeine Rechtsentwicklung aus. Einerseits schufen Gerichtsprivilegien für einzelne Reichsmitglieder einen gewissen Freiraum zur eigenständigen Entwicklung partikularen Rechts, führten aber auch – wie Eisenhardt differenzierend hervorhebt – auf der Ebene des Reiches zu einer Verdichtung der Einzelfallregelungen zu Rechtsnormen, die wiederum ein gewisses Maß an Einheitlichkeit gewährleisteten.

Um Spannungsverhältnis und Entwicklungsprozesse zwischen Gerichtsprivilegien und allgemeinem Recht zu interpretieren, verwendet Eisenhardt allerdings einen veralteten Gesetzesbegriff: Alle im Verhältnis zu Privilegien stehenden allgemeinen Rechtsquellen und reichsrechtlichen Normen werden als »Gesetze« qualifiziert, vom Deutschenspiegel bis zu den kaiserlichen Wahlkapitulationen oder den Westfälischen Friedensverträgen. Zwar verweist der Autor darauf, dass es sich nicht um Gesetze im heutigen Sinn handle und vormoderne Gesetze auf der Gesetzgebungsgewalt des Königtums beruhen würden (317 f.). Dennoch setzt er ohne weitere Diskussion und Berücksichtigung der einschlägigen Forschungsliteratur die komplexe Multinormativität des Reichsrechts mit (Reichs-)Gesetz gleich. Die im Kontext der Gerichtsprivilegien entstehenden reichsrechtlichen Normen waren aber nicht nur kaiserliche Gesetze, sondern Teil eines auf Beratungs- und Aushandlungsprozessen beruhenden, einen Vereinbarungs- und Vertragscharakter aufweisenden Reichsrechts, das sich nur bedingt mit dem Gesetzesbegriff beschreiben lässt. Letztlich würden damit das Wirkungsverhältnis und die Entwicklung vom Gerichtsprivileg zu allgemeineren Rechtsnormen auf die Dichotomie Privileg – Gesetz reduziert. Die reichhaltigen empirischen Ergebnisse der Studie machen gerade deutlich, dass Gerichtsprivilegien in einem pluralem Rechtsspektrum situiert waren und in diesem unterschiedliche Formen von Normativität beeinflussten, zur Weiterentwicklung beitrugen, aber auch in Konkurrenz traten und kollidierten.

Mit seiner quellengesättigten, die Analyse von Normen und Gerichtspraxis verbindenden Studie zeigt Eisenhardt folglich eindrucksvoll, dass Gerichtsprivilegien nicht nur für die juridische wie

politische Praxis eine große Rolle spielten, sondern das komplexe Justizsystem des Alten Reiches rechtlich-politisch organisierten und über die juridische Bearbeitung von Konflikten weiterentwickelten. Gerichtsprivilegien waren mehr als disparate Einzelakte und ein wesentliches Element eines pluralen Rechtssystems, das sowohl die Ausformung partikularer Gerichtsbarkeiten und unabhängiger Jurisdiktionen auf der Ebene einzelner Reichsmitglieder als auch gemeinsame Grundnormen und Konfliktregulierung durch die überwölbenden Instanzen des Reiches – Reichsgerichte und Kaiser – ermöglichte. Damit förderten sie die langfristige Ausformung eines formalen Gerichtswesens – und somit von Landesherrschaft und vormoderner Territorialstaatlichkeit –, stießen Reformen an, ermöglichten Zugang zu Justiz und mehr Rechtssicherheit. Insofern demonstriert die Studie von Eisenhardt exemplarisch, dass Gerichtsprivilegien eine lohnenswerte Thematik sind, um normativen und justiziellen Pluralismus in vormodernen Imperien weiter zu erforschen.

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Leo J. Garofalo

Repensar la historia de la conquista en los Andes*

El mérito principal de esta elaborada historia de la lucha entre los incas y españoles es que el autor ofrece una narrativa accesible y orientada a los lectores no especializados del siglo XXI, a la vez que evita caer en las explicaciones fáciles y equivocadas de interpretaciones pasadas, pero todavía de moda. Allí describe la conquista europea del imperio incaico como un proceso y sitúa su texto en un contexto histórico que abarca ambos lados del Atlántico, como debe ser en nuestro actual momento académico cuando estamos reconociendo cada año más las múltiples redes sociales, económicas y culturales que llegaron a entretejer sociedades en las Américas, Eurasia y África. El defecto principal del libro es que busca encontrar similitud entre conceptos de un apocalipsis en sociedades andinas y aquellos presentes en la Europa contemporánea, lo cual resulta sumamente interesante, pero más sugerente que convincente.

Al inicio de este voluminoso tomo de 571 páginas, en una sección titulada »El moderno mito de Cajamarca« *(The Modern Myth of Cajamarca)*, R. Alan Covey pone en duda los métodos y cuestionables argumentos del científico Jared Diamond. Diamond argumenta que la conquista del Perú fue un punto de transformación en la historia humana y lo reduce al choque entre dos visiones del mundo –dos maneras de ser totalmente incompatibles– representado por la captura del Inca Atahualpa en Cajamarca (21).

Covey advierte que es distorsionada la visión de Diamond sobre la captura del Inca Atahualpa porque »the portrayal of Cajamarca in *Guns, Germs, and Steel* shares many of the values that nineteenth-century writers wove into their own versions of the story, albeit without the emphasis on an innate racial superiority« (22). Aunque cuestionadas, la inevitabilidad de una derrota indígena y la incompatibilidad de las sociedades indígenas en general con el mundo moderno aún son muy difundidas y forman parte de nuestros esquemas mentales. Con su estudio, Covey pone en evidencia que nada fue inevitable en los Andes y que las sociedades indígenas tenían mucho en común con Europa. Esta observación es muy necesaria en un contexto académico y popular donde »[t]his image has proven to be powerfully accesible for millions of readers, as well as academic writers, who have cited *Guns, Germs, and Steel* in more than 10,000 articles and books« (23).

* R. Alan Covey, Inca Apocalypse. The Spanish Conquest and the Transformation of the Andean World, New York: Oxford University Press 2020, xix + 571 p., ISBN 978-0-19-029912-5

En el resto de este libro, Covey no ofrece una síntesis rigorosa de los estudios relevantes en disciplinas como la arqueología y la historia, sino una síntesis de una selección limitada de la historiografía y las fuentes primarias impresas. Guiado por su interés en trazar un paralelo entre el pensamiento apocalíptico andino e ibérico y las creencias en un destino predeterminado entre dos sociedades fundadoras de imperios en dos continentes distintos, Sudamérica y la Eurasia, el autor se pregunta: ¿qué sucede cuando dos grupos se encuentran y luchan entre ellos por el poder y la supremacía entre 1530 y 1650?

La historia que Covey quiere relatar es una de varias posibles interpretaciones. Su línea narrativa pasa por un período de altos niveles de violencia y destrucción, pero también de negociación, acomodación y persuasión, y concluye con la creación de nuevas maneras de organizar la sociedad en el mundo andino, como promete el título. Así mismo, presenta una manera particular de reexaminar los eventos de la invasión y dominación europea y la historia de estos eventos, y lo sitúa en un *longue durée* que corre desde el surgimiento del *Tawantinsuyu* y el creciente dominio de Castilla hasta un terremoto devastador en Cusco en el año 1650, que el autor emplea como un punto final y cataclismo. Sin embargo, su interpretación de tantas décadas de historia carece de diálogo sostenido con otros estudios que consideran temas distintos y otros factores relevantes para comprender este período histórico. En consecuencia, su libro no logra identificar para sus lectores las líneas de análisis principales de una vasta historiografía que les permitiría entender su argumento.

Aportando una amplia experiencia en la arqueología andina y la formación del estado inca, donde es un reconocido experto, Covey prioriza las dinámicas estrategias de imposición imperial. Esto da soporte a su narrativa de cómo el mundo andino cambió a lo largo de 120 años, pero sin olvidarse del legado imperial de los incas o separarse de los poderes sobrenaturales del paisaje andino. También señala que conceptos, lugares y reliquias tenían poder, tanto en los Andes, como en la Península Ibérica. En este sentido, el autor toca un tema reconocido por José María Arguedas, quien argumentó sobre algunas conceptualizaciones fundamentales que existían entre los campesinos andinos y españoles. Más tarde, William A. Christian subraya algo similar en sus estudios sobre las prácticas cristianas en la España rural del siglo XVI.

Covey explica que las similitudes entre creencias y prácticas no se limitan a campesinos, sino que también gobernaban las acciones de los emperadores y sacerdotes. Dos ejemplos: primero Covey cree que el concepto de *Pachacuti* sirve para analizar a Felipe II y su afán por construir el Escorial, coleccionar las reliquias y combatir a los protestantes. Segundo, él hace hincapié en la larga tradición de lealtad que la nobleza inca del Cusco le tenía a la figura del Inca como rey y después al monarca en España.

El autor menciona características que beneficiaron la extensión y la legitimidad imperial y espiritual de los reyes en Castilla y los incas en el Cusco colonial. Por ejemplo, para los españoles, »[t]he spiritual conquest of Cuzco was a significant advance, considering the Inca capital's former concentration of *huacas* and specialists« (497). En los linajes incas del Cusco, »Inca noblemen would continue to choreograph a unique cultural place for themselves […] throughout the colonial period, marching in the garb of their imperial ancestors to celebrate the triumph of Christianity« (496). También identifica la influencia de la »fe« y la »profecía«, y argumenta que estos dan forma a los pensamientos y acciones de las élites incas en los Andes y de los Habsburgo en Iberia. Es así que entiende que las historias incas de sus ancestros y el simbolismo de su conquista y conversión en súbditos leales y católicos fortaleció el poder de los descendientes de ambos grupos en Iberia y Cusco. Por ejemplo, leemos, »[l]ike the Inca title, the line of Coyas also became entwined with the Spanish nobility, although it established a legacy that would last until the final years of colonial rule in Peru« (501). Aunque esta discusión es fascinante y estimulante, no convence, porque intenta establecer demasiadas conexiones, abarca un periodo demasiado extenso y compara lugares muy lejanos. Por ello, algunas de las conclusiones suenan forzadas o dependen de comparaciones superficiales.

En un epílogo corto, para subrayar la importancia de la figura del Inca y sobre los rebeldes contra el dominio español, el autor se apoya en casos estudiados por Cecilia Méndez, David Cahill, David Garrett, Charles Walker y John Rowe, entre otros. En esto, el autor repite una línea de análisis establecida por el historiador peruano Alberto Flores Galindo.

A lo largo del texto, Covey incluye docenas de reproducciones de imágenes en blanco y negro sobre la conquista, la conversión y las élites cus-

queñas tomadas de la crónica de Felipe Guaman Poma de Ayala en la Royal Danish Library, la colección de la John Carter Brown Library, la crónica de Martín de Murúa en el Instituto Getty y el Museo de Arte de Lima. Las imágenes seleccionadas no son analizadas de una manera profunda, ni situadas dentro de una marca historiográfica específica (la historia del arte, por ejemplo). En consecuencia, no contribuyen de manera significativa al argumento del libro. Lo que es una oportunidad perdida.

Otra omisión mucho más significante es la falta de atención dedicada a la dinámica historia de los aspectos legales de esta época. Las prácticas implementadas por el Virrey Francisco de Toledo, los períodos de visitas oficiales y las composiciones de tierras son solo tres de los aspectos más sobresalientes que no se pueden ignorar cuando se investiga este período en los Andes, considerando además la compleja historia que los unía a Iberia. Por ejemplo, las reducciones de Toledo buscaban la reubicación de un millón de personas indígenas en el Perú, y si bien es cierto que llevó a cambios en la red de comunidades, la resistencia andina fortaleció otros aspectos de la posición de las comunidades indígenas en la sociedad colonial, como el papel protagónico de los caciques o *kurakas*. Integrar en su análisis el desarrollo de la normatividad legal en los Andes, o reconocer que aquello ofrece un enfoque analítico y distinto a lo escogido por el autor, habría hecho de *Inca Apocalypse* un libro más riguroso y más útil para los historiadores.

En conclusión, es un libro apto para un público académico no especializado pero curioso acerca de este periodo en los Andes y algunos de los paralelos sugerentes en la Europa de los Habsburgo.

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Pilar Mejía

Sacrificios y devociones: creación de imágenes sagradas y normatividades visuales*

La repetición de motivos en la iconografía de la temprana edad moderna a ambos lados del Atlántico es analizada desde la historia del arte como parte del surgimiento de una cultura visual global. ¿Cómo se generan convenciones visuales? ¿Cómo adquiere una imagen el carácter de sacralidad? ¿Qué rol juega allí el espectador? ¿Cómo se encuentra lo universal con lo local? ¿Cómo pudieron incidir estas imágenes, en tanto representaciones del otro, en los procesos de evangelización? ¿Qué tipo de medios y soportes materiales contribuyeron a la circulación global de las imágenes? Las dos publicaciones que acá reseñamos nos acercan a estas cuestiones analizando motivos diferentes: las representaciones del sacrificio y los retratos sagrados.

La primera publicación es producto de una conferencia en la Villa I Tati (The Harvard University Center for Italian Renaissance Studies in Florence). Su editora, Maria Berbara, aclara desde la introducción que la compilación busca ofrecer una perspectiva comparada sobre la conceptualizacion y representación del sacrificio, tanto a partir de elementos que desbordaban la imaginación de los europeos en América, como de la crisis del cristianismo en Europa durante la Reforma. Rituales antropofágicos y debates sobre la transubstancialización en la misa incidieron en las estrategias sobre qué personas podían ser convertidas. Reuniendo 13 contribuciones de diversas perspectivas, el volumen se divide en 4 temáticas: el sacrificio en sociedades americanas antes de la conversión, la materialidad del sacrificio, las representaciones del otro y el sacrificio como martirio o heroismo.

Thomas Cummins inicia el libro haciendo un recorrido por diferentes representaciones del sacri-

* Maria Berbara (ed.), Sacrifice and Conversion in the Early Modern Atlantic World (I Tatti Research Series 3), Cambridge (MA): Harvard University Press 2022, 378 p., ISBN 978-06-7427-880-6; Adam Jasienski, Praying to Portraits: Audience, Identity, and Inquisition in the Early Modern Hispanic World, University Park (PA): Pennsylvania State University Press 2023, 216 p., ISBN 978-0-271-09344-4

ficio: desde la cultura prehispánica Moche, las diferentes representaciones mesoamericanas y andinas que contrastaban con las de los misioneros, hasta el análisis del apéndice del Códice Florentino sobre la creación de nuevas imágenes aztecas y cristianas del sacrificio. Emilie Carreón Blaine analiza cómo los aztecas cambiaron sus representaciones del sacrificio a través del proceso de evangelización, integrando modelos europeos que hacían énfasis en la sangre roja y la violencia del sacrificio. Patrick Thomas Hajovsky analiza las mismas representaciones aztecas del corazón y la sangre en el sacrificio humano, pero en relación a la terminología náhuatl y a las nuevas formas del lenguaje misionero de la conversión.

Sobre la materialidad del sacrificio, Anselm Schubert muestra los debates doctrinales que se daban al no poder sustituir el trigo y el vino con elementos indígenas y observa un nuevo espacio que se abre a través del arte y las formas de piedad popular, donde se representa la cercanía entre el sacramento de la eucaristía y las prácticas del canibalismo ritual americano. Byron Ellsworth Hamann explica, por su parte, cómo las diferencias y similitudes entre las prácticas teofágicas, a través de la hostia cristiana y la masa azteca, fueron reescritas en el códice Florentino para erradicar la idolatría y volverlas prácticas lícitas cristianas.

En la sección dedicada a la representación del otro, Paolo Vignolo analiza la representación del Nuevo Mundo como »mancha verde« o lado oscuro marginal del mapa de Juan de la Cosa que rompe con la imagen del mundo bíblico. Philippe Canguilhem analiza desde la música los mecanismos de conversión cristiana y de adaptación del lenguaje musical europeo a las costumbres locales, abriendo espacio a un mundo mestizo. Jens Baumgarten analiza la transferencia de significados a través de San Benito de Palermo, un santo de origen africano no muy conocido en Europa, cuyas representaciones adquirieron gran importancia en Brasil en medio de la presencia holandesa en los territorios Tupi-Guarani. Adam Jasienski cierra esta sección explorando diferentes expresiones del asco en relación a la representación de la violencia sacrificial en imágenes sagradas; las manifestaciones del asco y el sufrimiento podían significar desde formas de santidad hasta ejercicios para alcanzar la salvación espiritual.

En la última sección del libro, Margit Kern analiza procesos de traducción religiosa en contextos asimétricos; ella argumenta que las narrativas sobre el sacrificio humano prehispánico representando al otro como bárbaro y horripilante se usan para estabilizar la imagen propia de lo civilizado. A través de un análisis de libros impresos en Rio de Janeiro, Maria Berbara explica la creación de un repertorio de imágenes para representar tanto a caníbales americanos como a mártires europeos. Según lo muestra, la producción de »fórmulas visuales« válidas en ambos mundos pasaba por la circulación de imágenes impresas y debates paralelos sobre el sufrimiento, el sacrificio, la eucaristía y las prácticas antropofágicas; con ello, la migración de motivos contribuyó no solo a la construcción de la alteridad americana sino también a la representación del martirio europeo. En esa misma dirección, Carmen Fernández Salvador retoma la idea de una »cultura visual común« a partir de la circulación de imágenes impresas en libros que se usaban y yuxtaponían para explicar no solo las diferencias entre Europa y el Nuevo Mundo, sino también las diferencias internas entre católicos y protestantes en Europa. La imprenta permitió circular en los tratados jurídicos imágenes de sacrificios y de martirios para transferirlas a otros medios y así acomodarse a las necesidades de los espectadores locales. Particularmente, las imágenes de violencia barbárica sirvieron de »dispositivos nemotécnicos« para que artistas y mecenas católicos mostraran los martirios de protestantes similares a las de »caníbales« americanos. Por último, Patricia Zalamea termina el libro con un ejemplo sobre el cambio de significado en la iconografía del cacique de Sogamoso, que fue interpretado desde los conceptos cristianos como sacrificio e idolatría indígena, y después en el siglo XIX fue romantizado por los criollos como parte de su identidad y proyecto político nacionalista.

La segunda publicación es el resultado de la investigación doctoral de uno de los autores que participó también en el libro colectivo sobre el sacrificio recién comentado. En su monografía, el historiador del arte Adam Jasienski explica las distintas maneras en que los retratos podían volverse objetos de devoción o contemplación religiosa. Su argumento central es que esta constante transformación ocurrió a través del uso y producción de »retratos a lo divino«, »verdaderos retratos« y »retratos repintados«, que desde el siglo XV hasta el XIX generaron devociones y traspasaron los controles eclesiásticos. Debido a su potencialidad, mutabilidad y flexibilidad, los retratos deben

ser también analizados como pinturas religiosas. De hecho, la creación de imágenes sagradas se produce a través de la mutación de los retratos, sus alteraciones en los usos por parte de los devotos y las actualizaciones iconográficas de los artistas.

El primer capítulo trata sobre los »retratos a lo divino« o aquellas imágenes muy comunes en las que los artistas lograban representar a sus mecenas y otros personajes como figuras sagradas. Se trata de retratos con referencias religiosas específicas que permitían reconocer al retratado como una figura conocida. Esto, explica Jasienski, era una forma de multiplicar las referencias, tanto sobre el retratado vivo como sobre la figura santa, lo cual le permitía al observador tener más informaciones y así poder enfocar sus plegarias. La ubicuidad de esta forma de retratos a ambos lados del Atlántico implicó también una rápida respuesta eclesiástica sobre el peligro de los mensajes ambiguos y la proliferación de cultos populares. Los tratados de pintura advertían, por su parte, la importancia de no retratar como santos a aquellos que no habían sido aún canonizados.

La respuesta postridentina fue la proliferación de retratos de santos canonizados o retratos »verdaderos« de santos, cuya apariencia y fisionomía eran bien conocidas. Estos retratos, tratados en el segundo capítulo, aseguraban la veracidad del retratado a través de la similitud y la intencionalidad del santo, más allá de la imaginación del artista. Ofrecían además algo único: lo que se veía y experimentara sería algo »real«. Los retratos de santos resultaron ser muy parecidos entre ellos y lograban convencer a sus espectadores de la veracidad del retrato. Con la creación de un corpus de retratos se generaba también una lógica de las imágenes »en serie« que construían sus propias convenciones. A medida en que el corpus crecía incontrolablemente aparecían también las »perversiones«, en contextos sagrados y seculares, que debieron ser examinadas a lo largo de abundantes procesos inquisitoriales. Los retratos iban, por tanto, mutando hasta ser suficientemente confiables y »verdaderos«. Su veracidad dependía de una autoridad religiosa o secular, de una tradición artística o de las experiencias subjetivas de los devotos. Algunos artistas producían »retratos autorizados«, incluso antes de que la figura fuera santa.

El tercer capítulo se ocupa de las transformaciones que ocurrían en los »retratos repintados« para volverse sagrados. Bastaba con agregarle al retrato unos mínimos marcadores iconográficos (halos o inscripciones) para alinearlos con un estándar de santidad que tuviera »efectos espirituales« y potenciales usos para sus observadores. Si bien repintar y reusar imágenes es algo propio de la pintura, Jasienski nos muestra cómo intervienen en la producción de nuevas imágenes los mecenas y nuevos dueños de los cuadros, así como los usos que le daban los diferentes públicos a lo largo de Hispanoamérica.

El cuarto capítulo se ocupa de retratos de carácter secular que podían volverse retratos sagrados, como por ejemplo los retratos de los Habsburgo, cuya devoción y culto no fue sancionado. Allí se muestra la permeabilidad entre lo secular y lo religioso, a través de la práctica recurrente de arrodillarse y rezar ante los retratos, como si se tratara de imágenes sagradas. Esta potencialidad de los retratos y sus diferentes cultos resultaba ser una práctica que parecía imposible de controlar para la iglesia católica.

Finalmente, el libro termina con una reflexión sobre la necesidad de abandonar preconcepciones sobre los géneros artísticos para poder comprender tanto la producción de imágenes sagradas, como el rol que ejercía el control eclesiástico sobre lo visual. A través de procesos inquisitoriales, decretos, tratados de pintura, sermones, manuales de teología y de medicina, se buscó definir las imágenes para tratar de examinarlas a pesar de su propia mutabilidad. Los retratos sagrados, por su parte, se reproducían serialmente a través de parecidos fisionómicos, los cuales se rehacían y reusaban en diferentes contextos culturales mientras experimentaban la diversificación de sus usos y espectadores.

Si bien las dos publicaciones analizan motivos diferentes –las representaciones de retratos sagrados y las de sacrificios humanos–, las dos se ocupan de los procesos de creación de representaciones sagradas y sus »fórmulas visuales«. A partir de la flexibilidad propia de la imagen, los controles eclesiásticos y los usos multifacéticos de lo visual, se desprenden hipótesis transversales sobre las prácticas no verbalizadas en las que surgía una »cultura visual«, a partir de la interacción entre públicos, autoridades eclesiásticas, mecenas y artistas locales. Esto resulta de gran importancia para una comprensión desde la historia del derecho de la producción normativa, la cual ocurría en buena medida a través de imágenes religiosas y normas morales.

Ambas publicaciones destacan una amplia geografía y cronología de conexiones tanto a lo largo de los diferentes territorios hispanoamericanos, como también en relación a tradiciones italianas y a las imágenes del mundo protestante en Francia, Alemania y Paises Bajos. Desde esta perspectiva global, los estudios desde la historia del arte colindan con aquellos desde la historia del derecho, al establecer relaciones sobre los variados usos de las imágenes sagradas, el importante rol de diferentes espectadores de las imágenes, los medios de circulación de las imágenes religiosas, los debates teológicos y controles eclesiásticos, así como las similitudes, apariencias e interpretaciones de los motivos visuales. Desde la historia del derecho, sus aportes resultan claves para seguir explorando la dimensión estética de los procesos de traducción cultural, particularmente sobre la producción de normas morales que fueron reproducidas a través de imágenes pictóricas y objetos sagrados. Un diálogo productivo con la historia del derecho y su acervo de fuentes tradicionales (como legislaciones pontificias y reales, doctrina jurídica, costumbres de los tribunales y documentos de archivo) permitiría así seguir avanzando hacia la comprensión de las formas en que se crean convenciones y estándares visuales, los repertorios de imágenes disponibles para una cosmovisión religiosa, así como el protagonismo de diferentes comunidades en la cultura visual de la temprana edad moderna en Hispanoamérica.

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Ana Isabel Soler Otte

»The Lawyers' Tales«: episteme moderna, casuística y narratividad*

Este volumen de Brill se hace eco de los primeros resultados del proyecto de investigación »Kasuistik in der frühneuzeitlichen Literatur Spaniens« (FWF P 32297, finalizado en 2023). Su coordinadora Marlen Bidwell-Steiner cuenta con la colaboración de Michael Scham, experto en estudios cervantinos, para saldar una deuda pendiente con los historiadores de la literatura: explorar el impacto de la epistemología casuística en los géneros narrativos del Siglo de Oro español. Investigadores afines al *Law and Literature Movement* y, en general, juristas con sensibilidad literaria disfrutarán con esta colección de artículos que destaca por la sutileza de sus análisis y el virtuoso manejo de recursos retóricos en un complejo entramado de múltiples registros irónicos.

La propuesta de los editores se basa en la hipótesis de que los debates jurídicos y teológicos sobre casos controvertidos de honor en la temprana Edad Moderna desarrollaron un verdadero estilo de pensamiento, el casuismo, que desencadenó un fuerte impulso ficcional y constituyó así una condición previa decisiva para el éxito de la novela europea. Si bien el propósito de esta compilación es primariamente literario, su lectura puede ser provechosa para historiadores y teóricos del derecho por la transdisciplinariedad del fenómeno estudiado.

En la introducción, Bidwell-Steiner y Scham describen el marco general en el que se sitúan las diferentes contribuciones, a la vez que señalan el punto de convergencia y el escenario en el que se mueven los análisis realizados: la configuración del sujeto moderno mediante el ejercicio del razonamiento casuístico, siguiendo los trabajos de Ginzburg, Jonsen y Toulmin, en la línea del »Inward-Turn« (Kahler). Inmerso en un programa de confesionalización católica alentado por el espíritu barroco de la contrarreforma y en los amplios espacios del imperialismo colonial, se perfila un sujeto autónomo con rasgos de mayor consciencia, responsabilidad e interioridad.

* Marlen Bidwell-Steiner, Michael Scham (eds.), Casuistry and Early Modern Spanish Literature, Brill: Leiden / Boston 2023, VI + 205 p., ISBN: 978-90-04-50681-7

En estas coordenadas socio-culturales el casuismo experimentará un auge notable: de la práctica penitencial de resolución de casos de conciencia pasará a configurar la *forma mentis* de educadores, consejeros y políticos, activos en el campo de la teología, economía, derecho y ciencia. Bidwell-Steiner y Scham describen allí la episteme casuística dentro de los parámetros del razonamiento *ad utramque partem* y la argumentación probable basada en circunstancias contingentes y abiertas al futuro. El razonamiento casuístico se nutrirá de actitudes como el escepticismo y la duda sistemática, de inspiración renacentista, ante proposiciones con pretensión absoluta de verdad. Esta convicción de la gradualidad de la certeza y la incertidumbre del saber legitimarán el probabilismo, que respeta la deliberación individual y hace primar una opinión minoritaria frente a la comúnmente aceptada por la mayoría. Su contrapunto, el tutiorismo, que propone la obligatoriedad de la argumentación más segura, es presentado como un relicto medieval. Los trabajos sobre el probabilismo de Schüssler podrían aportar nuevas perspectivas sobre la gestión de la autoridad y pluralidad de opiniones y la libertad de elección en un disenso razonable.

Bidwell-Steiner destaca cómo los avances técnicos de la imprenta favorecerán la divulgación de nuevas estructuras argumentativas propias del casuismo, en concreto el recurso al hexámetro jesuítico elaborado para escrutinio de la conciencia en la confesión y difundido a nivel de usuario lego (20, 121). En tensión por el dilema planteado entre norma y excepción, las historias propuestas por los casos de conciencia se esforzarán por captar la singularidad de la experiencia vivida. Las narrativas ejemplaristas medievales, concebidas para edificar al lector con modelos de seguimiento de leyes y preceptos, se verán saturadas por una multiplicidad de posibles soluciones que amplían el horizonte de la agencia ética del sujeto moderno. La poiética casuística, sin abandonar el teatro, se abrirá a la prosa narrativa con sus exigencias de verosimilitud y cohesión narrativa neoaristotélicas, explotando el recurso a intrahistorias y transgresiones ficcionales (con abundantes disparidades diegéticas y metalepsias) como vía de acceso al variadísimo sustrato psicológico y de comportamiento humano, sometido a escrutinio en puntos de honra y engaño, amor y muerte, crimen y penalización.

En su sugerente contribución sobre *La Celestina*, Bidwell-Steiner consigue realizar uno de sus propósitos investigadores precisamente con su propuesta acerca del proceso de narrativización de la confesión: al aplicar esa técnica del escrutinio de conciencia a los soliloquios de los protagonistas de la obra atribuida a Fernando de Rojas, logra presentarlos como una distorsión irónica de esa práctica, a la vez que se destaca una responsabilidad individual retadora de convenciones culturales. Así, muestra cómo la imaginación literaria, alimentada por la casuística, pudo contribuir a forjar la identidad del sujeto moderno.

Esos rasgos identitarios se repiten en las variadas obras literarias analizadas en este volumen. Edward Friedman investiga el probabilismo de los planteamientos éticos en uno de los personajes prototípicos del género picaresco, el *Lazarillo de Tormes*. Por su parte, David Mañero destaca la veta irrisoria de la »rumiación« ética y sus afanes moralizantes en la protagonista de la parodia *La pícara Justina*. En cambio, el análisis de David Álvarez subjetivizaría no ya a los personajes sino al autor, al presentar el proceso de escritura de Mateo Alemán, interpelado por el caso de plagio del apócrifo *Guzmán de Alfarache*, como un ejercicio de aplicación del método casuístico a la creación literaria.

Más allá de la novela picaresca, el razonamiento casuístico fecunda otros géneros narrativos, como revela el estudio de Anita Traninger sobre la novela bizantina de Reinoso, *Historia de los amores de Clareo y Florisea, y de los trabajos de Ysea*. Reinoso desafía los roles de género tradicionales con la narradora y protagonista de su novela, una mujer inmersa en experiencias de desplazamiento y destitución. Especial interés despierta la contribución de Mechthild Albert,[1] que explora la casuística como hábito mental en las *novellae* del Siglo de

1 Tomo en préstamo su sugestivo título »The Lawyers' Tales« para esta reseña; con este Albert alude a la figura del »Man of Law« de las *Canterbury Tales*, escritas por Geoffrey Chaucer a finales del s. XIV (cf. 136).

Oro español y encuentra dos usos contrapuestos: uno más de tipo didáctico y pragmático en un contexto jurídico-secular, frente al literario-dramático en el contexto religioso-teológico de los casos de conciencia.

Michael Scham contrasta la agencia de Sancho Panza como gobernador de Barataria con la tradición de los *specula principorum* y la evalúa positivamente en clave de conocimiento sapiencial o sentido común y autoconocimiento. El filón que se abre en *El Quijote* sobre la figura del príncipe (por extensión, de toda autoridad) y sus virtudes, hubiera permitido abundar en la semántica histórica de conceptos como justicia, *arbitrium*, *aequitas* y *ratio* en un régimen de cohabitación de *jurisdictio* y casuismo.

Con su aportación sobre Bartolomé de las Casas y la toma de conciencia de la subjetividad indígena, Cárdenas Bunsen destaca la dimensión colonial del casuismo en el Siglo de Oro, por lo demás, ausente en el resto del libro. Este se cierra con una contribución de Kallendorf, que abunda en casos de confesiones en el teatro, obviando la referencia a la novela. Allí retoma un hilo introducido en su obra pionera sobre estudios de casuística en la comedia, *Conscience on Stage* (2007), donde esta hispanista encuentra en la *dilatio* y la *amplificatio* un recurso por el que se introduciría la narratividad en los casos de consciencia.

Los trabajos recogidos en este libro exploran la episteme casuística y la narratividad, sobre todo en el campo de la moral y del derecho canónico; quedaría pendiente ampliar la investigación a la práctica de otras normatividades de la temprana modernidad hispana. En la línea incoada por Albert (137, 145) se podría indagar cómo se introdujo la narratividad en la praxis casuística procesal y penal. También interesaría rastrear cómo se perfiló la conciencia del jurista que operaba »para descargo de la conciencia real«, en una cultura jurisdiccional en la que los *iura propria* y el *ius commune* interactuaban en diferentes órdenes de prelación. Si bien el *ius commune* en la variante del *mos italicum* tardío seguía siendo la »gramática del jurista«, como los *corpora iuris* habían acusado la crítica humanista de historicidad y contingencia, su validez ya no se justificaba *ratione imperii*, sino *imperio rationis*. Para seguir rastreando ese imperio de la razón resultarían imprescindibles autores como Garriga, Beck Varela y Agüero o Lorente y Vallejo, que han trabajado con profundidad los conceptos clave de la cultura del derecho común, así como las obras de Tau Anzoátegui y Hespanha para los espacios del imperio colonial hispano.

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Adrian Masters

Regímenes tributarios y casta en Hispanoamérica*

Este ambicioso y admirable libro emprende una gran tarea. Compara la evolución de categorías fiscales en Michoacán y Cajamarca entre aproximadamente 1450 y 1850, sobre todo mediante peticiones de cambio de estatus tributarios y las respuestas que estos generaron por parte de los oficiales. Presta cuidadosa atención a los límites conceptuales entre un sinfín de categorías tributarias, incluyendo términos que asociamos con los famosos cuadros de castas (mestizos, mulatos, mixtos, etc.) y muchos otros que hemos estudiado muy poco. Además traza las complejas evoluciones históricas de estos regímenes tributarios en dos regiones tan similares como diferentes. Albiez-Wieck contextualiza cómo los arreglos prehispánicos en los dominios tarascos e incas llegaron a influir los

* Sarah Albiez-Wieck, Taxing Difference in Peru and New Spain (16th–19th Century). Fiscal Petitions Negotiating Social Differences and Belonging, Leiden / Boston: Brill 2022, XIV + 382 p., ISBN 978-90-04-52163-6

posteriores arreglos bajo el dominio español, cómo se transformaron en las épocas austriacas y borbónicas del virreinato, y la evolución del tributo después de la independencia. Como los lectores apreciarán, Albiez-Wieck se ha propuesto un doble reto regional –michoacano y cajamarquino– multiplicado por cuatro épocas.

Naturalmente, esta empresa precisa de una considerable base documental. Si bien las peticiones de cambio de estatus tributarios no son muchísimas –son unas 229 (195 para Perú, 34 para Nueva España)–, ella suma a este monto un sinfín de documentos adicionales. Entre ellos encontramos decretos reales, mandamientos de los virreyes, textos del llamado *derecho indiano*, informes de justicias locales, registros y padrones parroquiales, memoriales, pleitos, y probanzas de méritos. Son doce archivos los que mina Albiez-Wieck. Cabe notar que el libro emplea una forma de citar estos manuscritos que resulta difícil de consultar (quizá una decisión más bien de carácter editorial).

Taxing Difference consta de ocho partes, una introducción, seis capítulos, y una corta conclusión. El primer capítulo presenta el contexto sociohistórico tanto para Michoacán como para Cajamarca, rastreando estructuras prehispánicas y dando una visión general de la situación demográfica-espacial en el virreinato. El segundo aborda la legislación y la práctica tributaria tanto en las Indias en general como en Michoacán y Cajamarca en particular. También introduce la problemática de tributar a quienes poseían estatus de migrantes *(forasteros)* enfatizando que, si bien muchos no eran migrantes propiamente dichos, estos podrían ser también descendientes de forasteros. Los siguientes tres capítulos se enfocan en las peticiones de cambio de estatus tributario y sus evoluciones entre las épocas austriaca y borbónica. El tercero rastrea cómo cientos de hombres –y algunas mujeres– pidieron cambios de sus estatus ante sus respectivas autoridades. El cuarto se enfoca en casos de índole migratoria. El quinto explora casos de personas vistas en la época como ›mixtas‹. El sexto capítulo prosigue a describir las transformaciones de la temprana época liberal, periodo dinámico para la categorización fiscal tanto en México como en Perú, sobre todo a través de peticiones de mujeres.

Sin pretender presentar de manera exhaustiva todos los argumentos y conclusiones que ofrece este complejo texto, resaltaré aquí algunas que me parecían particularmente dignas de reflexión. Posiblemente el aporte más importante del libro para los historiadores en general es su reconocimiento que, a nivel global, regímenes de diferencia humana (clase, género, edad, etc.) han sido fuertemente entrelazados con arreglos tributarios. Asimismo la autora subraya que existen pocos estudios en general sobre el tema del tributo en el imperio español, mucho menos de índole comparativa y de *longue durée*. Ella también reflexiona sobre la insuficiencia de las ubicuas visiones historiográficas del ›sistema de castas‹ y las ›dos repúblicas‹ para explicar los complejos arreglos tributarios del imperio. Fijando su mirada más concretamente en Perú y México, ella subraya algunos cambios importantes que surgen con el paso del tiempo. Entre ellos, la autora observa una gradual transición de estatus tributarios: de impuestos determinados por las asociaciones personales de cada vasallo a impuestos determinados territorialmente. Esta última forma se hace más visible empezando en los 1630s y es implementada sobre todo en los 1730s debido a las presiones fiscales de los Borbones. También resalta notables diferencias regionales. En contraste con Michoacán, en Cajamarca existía una mayor diversidad de categorías, menos presión sobre afrodescendientes, más migración y estructuras tributarias prehispánicas más duraderas, por ejemplo, el concepto de la *guaranga* como bloque tributario que dura hasta el siglo XIX. Mientras tanto, en Michoacán rige una administración a menudo más inflexible, sobre todo en la época borbónica, y que exige tributo más sistemáticamente.

En *Taxing Difference*, la autora logra analizar muchos fenómenos complejos, entre ellos ›raza‹, género, historia de las mujeres y el desarrollo de un aparato tributario ›estatal‹. Trata de una manera delicada y sofisticada el tema de ›raza‹, utilizando más bien conceptos de la época como *fuero*, *naturaleza* y sobre todo *calidad*. Otro aspecto admirable del libro es su rechazo al concepto de *mestizaje*, un significante flotante tan ubicuo como naíf en la historiografía. La autora sustenta cuidadosamente sus reflexiones en las categorías de la época, especialmente en lo *›mixto‹*.

El libro también se deleita con la complexidad y el desorden. Esto es un aporte importante a una literatura que muchas veces peca de simplista. Se podría decir (no sin riesgo de generalizar, claro) que existen dos grandes tendencias en las investigaciones sobre regímenes virreinales de diferencia humana. A un extremo del espectro encontramos los ›simplificadores‹: autores que emplean una

sociología elegante y escueta para describir la diferencia humana. Aquí se habla de clase explotada y explotadora, de las ›repúblicas de indios y españoles‹, la trinidad de indios, españoles y negros, del ›sistema‹ de castas. Esta visión reina sobre todo en disciplinas no-históricas como la sociología de tendencia estructuralista, los estudios decoloniales y la historia del arte. Por el otro lado nos encontramos con otro grupo que denomino los ›pluralizantes‹: investigadores cuyo enfoque reconoce y encarece las complejidades locales, contingencias, coincidencias, ambigüedades y contradicciones. Los pluralizantes reconocen que factores, lejos de crear un sistema simple y organizado, produjeron mil micro-regímenes de diferencia humana en moción constante. Los pluralizantes suelen apegarse al terreno de los archivos y a la historia social. El presente estudio claramente pertenece al campo pluralizante. Comparte en momentos algunos de los inconvenientes endémicos de esta perspectiva: cadenas de datos hiper-localizados, abundancias de categorías indeterminadas, pequeños y grandes misterios sin resolver. Por ejemplo, introduce y resalta muchas categorías tributarias poco o nada conocidas, como los *caciques* y *ayllu de forasteros*, los *alcabaleros*, los *yanaconas del rey*, los *mixtos quinteros*, los *hispanoamericanos*, los *indios españoles* y muchísimas más. En algunos casos los documentos no permiten siempre entender con certeza cómo emergieron ni qué rol jugaban en la vida diaria. Pero así fueron aquellas sociedades – complejas y envueltas en un papeleo muchas veces opaco. Debido a su atención admirable al detalle y a la textura de la vida cotidiana, es innegable que el libro –como casi todos los textos pluralizantes– es por momentos de difícil comprensión. Por fortuna el texto ofrece un glosario, si bien éste carece de algunas de las categorías más exóticas.

Otra tendencia común, tanto entre los simplificadores y los pluralizantes, es establecer una nítida y absoluta dicotomía entre gobernados y gobernantes, asignando a estos últimos planes claros y sistemáticos. Hasta los pluralizantes tienden a argüir que los monarcas sí soñaban desde los primeros años después de la conquista con implementar un sistema racional de castas (o de las dos repúblicas, etc.) pero que fallaron en su intento ante las realidades locales. En algunos momentos el presente libro cae en esta trampa, pero por lo general lo evita con éxito, notando correctamente la tendencia más bien titubante de muchos oficiales (sobre todo durante la época austriaca).

Taxing Difference es un valioso e impresionante aporte a la literatura. Gracias a su panorámica introducción, resultará relevante para quienes estudian migración y tributo en la época moderna, inclusive más allá de las Américas. Será de gran interés para cualquier estudioso de la sociedad virreinal, así como para quienes estudian la época prehispánica y la historia nacional temprana. Sobre todo, lo será para quienes estudian regímenes de diferencia humana –raza, género y relaciones socioeconómicas– y el mal-llamado ›mestizaje‹. Para quienes nos dedicamos al estudio de las peticiones, es también de gran interés. Debido a su considerable complejidad, tal vez sea dificultoso para algunos lectores casuales y estudiantes de pregrado. Sería muy deseable una eventual traducción al español, pues sin duda despertará un amplio interés en México, Perú, España y más allá.

■

Carlos Petit

Ots Capdequí – Biografía intelectual y profesional de un jurista americanista*

Creo que una de las mejores inversiones de nuestro siempre escaso tiempo profesional –un tiempo que pertenece a ese »mundo sin remitentes, sin destinatarios y sin carteros« sobre el que alertó Pedro Salinas en un texto aquí recogido[1]– debe emplearse en leer la biografía que Mauricio Valiente dedica a José María Ots Capdequí (1893–1975). No cuesta esfuerzo probar esta afirmación, pues los méritos de la obra saltan a la vista desde una primera y ligerísima consulta.

Quien abra este libro se encuentra, en primer lugar, con una edición hermosa por tipos y composición. Sin caer en recursos artificiales, la casa Renacimiento se ha dejado guiar por su amor a la letra impresa y otorga a la biografía de Ots la dignidad que merece el contenido. Pero no se trata solamente de un tomo formalmente impecable. Mauricio Valiente ha procedido, mediante un ejercicio acertado de escritura,[2] a desarrollar el objeto de investigación con gran riqueza de fuentes y excelentes resultados.

Pues las fuentes utilizadas son, en segundo lugar, otro motivo que reclama la lectura del especialista. Correspondencia privada, diarios manuscritos, documentación preservada en toda clase de archivos públicos de España y América –de Colombia, lugar de un »amargo exilio« (1939–1953), en particular– permiten a Valiente, quien utiliza además una amplia bibliografía, culminar su propósito biográfico.[3]

En cierta ocasión desconfié de tal empeño. Una vida pasada no es un objeto historiográfico cualquiera; la tentación de anudar relaciones afectivas con el biografiado parece demasiado fuerte, si es que éste no acaba convertido en mero reflejo de los deseos, las aspiraciones, en suma, de la imagen que tiene de sí mismo el propio biógrafo. La profesión de Mauricio Valiente ha sorteado sin embargo ambos riesgos; la documentación acumulada ha logrado el resto. Obtenemos un retrato sereno y minucioso de un intelectual formado en la tradición del krausismo, discípulo de Rafael Altamira y comprometido con la República; un ciudadano español –su figura se agranda cuando leemos las torcidas acusaciones de colegas tan oscuros como Carmelo Viñas, José María Zumalacárregui o Mariano Puidgollers (487–493)– que se sumó en 1924 a la empresa del *Anuario de Historia del Derecho Español* añadiendo lustre y contenido jurídico a la revista –cosa de historiadores para historiadores– con sus estudios sobre la historia institucional americana y sus lecturas y traducciones de la literatura alemana con mayor presencia en España.

Ahora bien, parece indiscutible que la minuciosa reconstrucción de la vida –profesional y personal– del ilustre profesor es la tercera y principal razón para tomar este libro en nuestras manos. Ahí se contiene la formación de un joven académico de nítido perfil científico; con el precedente del maestro Altamira, Ots Capdequí y sus compañeros de

* Mauricio Valiente Ots, José María Ots Capdequí. El americanista de la Segunda República, Sevilla: Renacimiento 2022, 634 p., ISBN 978-84-19231-95-6

1 Las premonitorias expresiones pertenecen a un ensayo de Salinas que Ots hizo publicar en Colombia, citado en apertura de la obra (9). »¿Un universo en el que todo se dijera a secas –continuaba el poeta– en fórmulas abreviadas, de prisa y corriendo, sin arte ni gracia? […] Yo sitúo semejante mundo en los avernos«.

2 Cosa bien diferente serán las preferencias de estilo (pienso en el uso del potencial con valor de pasado) o la existencia –inevitable– de *errata*: cf. 84 (*se* por *me*), etc. Cosas de nuestro infernal »mundo de telegramas« (cf. Salinas, de nuevo); esto es, de procesadores automáticos de textos que proponen caprichos sintácticos o arrastran *pentimenti* del autor no siempre corregidos sobre las pruebas de imprenta.

3 Por desgracia Valiente ha sido demasiado discreto al presentar las fuentes documentales, por más que nos ofrezca un jugoso apéndice (551–580). Cf. al menos 629–631 de »Siglas y abreviaturas«, pálida representación de los fondos estudiados; la sentida nota de agradecimientos añade alguna precisión (633–634).

generación (los Galo Sánchez, Manuel Torres López, Luis García de Valdeavellano, por citar unos ejemplos) fueron los pioneros de la historia del derecho entendida como *disciplina* universitaria (25 ss.).[4] Las páginas de Valiente describen también la constante vocación de Ots por el estudio del derecho indiano (del derecho español en América y del propiamente indiano, a tenor de su eficaz expresión), una rara especialidad en el panorama literario del primer cuarto de siglo: si el recordado Rafael Altamira (1866–1951) aún era, como americanista, un hombre de la cátedra más que de la pluma –sin perjuicio de su apreciable obra de historiador generalista– otro reconocido experto, el argentino Ricardo Levene (1885–1959), continuaba centrado en los estudios sociológicos e histórico-políticos cuando Ots Capdequí había comenzado su especialización histórico-jurídica (1917); que empezase por el estudio de figuras y problemas de derecho privado (la condición de la mujer, la familia, sobre todo: la propiedad de la tierra) obedecía a su íntima condición de jurista, lo que le permitió explorar experiencias poco frecuentadas por historiadores y sociólogos. La relación bibliográfica que cierra la biografía (581–587) muestra la coherencia de una dedicación constante que sólo interrumpen unos pocos trabajos de naturaleza historiográfica.

Antes de salir a un triste, aunque fructífero y comprometido exilio, Ots destacó en Oviedo y, sobre todo, en Sevilla.[5] Allí participó en el nacimiento de instituciones que fomentaron los estudios americanistas (Centro de Estudios de Historia de América, Instituto Hispano-Cubano), con las que siguió vinculado tras su traslado a la Universidad de Valencia (1931). Fiel a la República, responsable, como jefe de la Sección de Universidades tras el golpe de Estado militar –lo que sin duda le granjeó profundas enemistades entre sus colegas reaccionarios– (218 ss.), colaboró en lo que pudo con las instituciones legítimas, convirtiéndose en uno más entre tantos represaliados. A diferencia de la mayoría, acogida por el gobierno de Lázaro Cárdenas en México,[6] Ots recaló en Colombia (315 ss.), el país americano donde desarrolló tanto su actividad intelectual como su militancia política – aun en la convulsa vida oficial que le costó la vida del *leader* liberal Jorge Eliecer Gaitán (1948); de todo ello da cuenta Valiente con uso extenso de documentación colombiana. Demasiadas responsabilidades democráticas, causa de una larga postergación tras regresar a la España de Franco en 1953, gracias a la política moderadamente abierta del ministro Joaquín Ruiz Giménez (463 ss.). Los testimonios inéditos de la correspondencia (Juan de Mata Carriazo, Javier Malagón y otros) permiten documentar esos años de espera hasta la reintegración –tardía– en la facultad de Derecho de Valencia. No sabía yo que Alfonso Otero Varela, catedrático de Santiago (y yerno de Carl Schmitt), fue el único colega de especialidad que rehusó firmar el escrito de los historiadores del derecho españoles en petición de la vuelta de José María Ots a la cátedra valenciana (1961). Tampoco me sorprende.

En realidad, gracias al autor no sólo recuperamos la figura del »americanista de la II República«, que dice Valiente; también conocemos los sinsabores propios de un intelectual transterrado a causa de la persecución política, las miserias de la cotidianeidad académica, la mano generosa tendida por ciertos compañeros de profesión. Soy consciente de que estas líneas apenas ofrecen un reflejo de la riqueza del libro presente. Si sirven para dar noticia de la publicación y, sobre todo, para estimular la lectura el propósito estará cumplido.

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4 Una disciplina, como otras, aún abierta a catedráticos de viejo estilo, esto es, situados fuera del momento científico que representó Ots (Rafael Acosta, Salvador Minguijón, José Manuel Segura, Tomás Gómez Piñán).

5 Sabemos que el personaje obtuvo en 1921 la cátedra de Barcelona tras unas oposiciones de las que Galo Sánchez, por entonces catedrático de Oviedo (había logrado en 1919 la plaza de Murcia), se retiró inexplicablemente en el último ejercicio; que Sánchez prefería Barcelona a la cátedra asturiana lo prueba que, apenas unos días después, permutase con Ots las cátedras que ocupaban. Intrigante situación que no aborda Valiente (cf. 56–57), algo más, en mi opinión, que una anécdota pasajera: revela una estrecha relación con el único jurista discípulo directo de Eduardo de Hinojosa, lo que explica la vinculación de Ots al grupo del *Anuario* a pesar de encontrarse fuera de la ›escuela‹ (y de contar con la enemistad de Ramos Loscertales, otro de los fundadores).

6 Pero no conoce Valiente un libro importante que permite seguir la pista de los exiliados: Elizabeth Martínez Chávez, España en el recuerdo, México en la esperanza. Juristas republicanos del exilio mexicano, Madrid 2020. Como ahora Valiente, la obra de Martínez combina con rigor los documentos españoles con los mexicanos, rara y difícil estrategia aunque imprescindible para conocer los detalles vitales y profesionales de aquellas dolorosas experiencias.

Karla L. Escobar H.

Otras historias posibles del derecho*

> But sometimes when you think you are hunting down the past
> … the past is hunting you
>
> Rebecca Hall

La historia gráfica de la historiadora y abogada estadounidense Rebecca Hall, ilustrada por Hugo Martínez, salió a la luz en el 2021 con una importante acogida tanto en el mercado estadounidense, como en otras latitudes, siendo traducida al francés, alemán, turco, japonés y próximamente al español. La profusa difusión de su obra no solamente logra captar audiencias diversas interesadas por las historias que en la obra se relatan, sino también atrae la mirada del público académico debido a los debates metodológicos sobre los que se sustenta. Ambas dimensiones de la obra hacen que sirva como un excelente recurso no sólo para la enseñanza de la historia en general, sino para la enseñanza de una historia crítica del derecho en particular, ya que acerca problemas teórico-metodológicos del quehacer histórico de la forma sencilla y clara que ofrece el medio del cómic.

Como su título lo indica, el libro relata diferentes historias de revueltas lideradas por mujeres esclavizadas en el siglo XVIII en el marco de la trata trasatlántica. Inicia su relato en la ciudad de Nueva York, pasa por Londres y termina en el Reino de Dahomey. Los relatos están fundados en la revisión de casos judiciales, prensa, archivos parlamentarios y marítimos, así como de algunos de los debates historiográficos de finales del siglo XX en la literatura académica estadounidense en relación con la historia de las rebeliones de esclavos y el papel de las mujeres en ellas.

La metodología de la autora va de lo micro a lo macro. Inicia con dos procesos: el primero es el caso de una revuelta de 1712, la cual, si bien aparecía reseñada en la literatura estadounidense sobre revueltas de esclavos, no daba cuenta de la participación femenina en la misma; el segundo es un caso de 1708, con el cual la investigadora se encuentra en medio del proceso de investigación. Luego de pasar por su propia historia familiar, Hall prosigue a abordar desde allí la historia de una revuelta de esclavizados en la embarcación *Unity*, de vuelta en el siglo XVIII. Estas historias son contextualizadas en los marcos legales sobre las que se produjeron; tal contextualización se convierte en parte de la narrativa que relata el propio proceso de investigación y la propia historia de vida de la investigadora.

El abordaje de estos relatos se hace a partir de dos líneas de tiempo – la del pasado y la del presente – las cuales se entremezlcan de forma permanente dando cuenta de la complejidad y múltiples capas sobre las que se construyen los relatos históricos. Las historias que se plantean en este ir y venir entre pasado y presente plantean varios retos metodológicos, los cuales son relevantes para los historiadores del derecho y sobre los que quiero hacer énfasis en esta reseña. Estos conciernen: las fuentes, la medialidad, la posicionalidad y la imaginación histórica.

Con respecto a las fuentes: el trabajo de Hall destaca dos problemas que considero claves para aquellos que nos dedicamos a hacer historias de las prácticas jurídicas entre sectores subalternizados. Por un lado, en un diálogo entre lo gráfico y lo escrito, la autora discute el ya conocido difícil acceso a las fuentes históricas que dan cuenta de las vidas de los miembros de estos sectores, bien sea por la relativa escasez documental, bien sea por el desinterés historiográfico que ha mantenido las historias de estos sujetos escondidas durante décadas en los archivos, así como también se han mantenido veladas sus apariciones en la documentación encontrada. Por otro lado, la autora aborda la discusión sobre los sesgos a partir de los cuales

* Rebecca Hall, Wake. The Hidden History of Women-Led Slave Revolts. Illustrated by Hugo Martínez, New York: Simon & Schuster 2022, 224 p., ISBN 978-1-9821-1519-7

los y las historiadoras hacemos interpretaciones sobre nuestras fuentes y cómo incluir el análisis de esos sesgos en la formulación de problemas históricos. Como lo señala Hall en varias ocasiones, estos sesgos interpretativos de los historiadores frente a los documentos es lo que no sólo habría obnubilado la participación de las mujeres en revueltas antiesclavistas, sino que, además, sería responsable de crear al interior de la historiografía tradicional estadounidense la idea según la cual la resistencia a la esclavitud habría sido débil en el país. Esta idea, que – según la autora – ha llegado incluso a arraigarse dentro del imaginario popular de la población afro-estadounidense, surge de la historiografía del siglo XX y ha servido de fundamento del racismo estructural en la actualidad. Es más, la autora muestra cómo esta idea permitió desvirtuar la discusión sobre la desigualdad racial en Estados Unidos, al ligarla a una supuesta »cultura de la pobreza« que desbalanceaba los roles de género y no a los constreñimientos estructurales que la población afro-descendiente debía navegar.

Es importante tener en cuenta que, a partir de un uso simplista del concepto de »cultura«, este tipo de lecturas escencializantes sobre los obstáculos a los que se enfrentaban los sectores subalternizados a lo largo del siglo XX sustentó teóricamente una buena parte de las políticas públicas a lo largo de todo el continente. La reflexión que propone la autora es relevante para debatir cómo interpretaciones históricas – que la mayoría de las veces se reclamaban neutrales y objetivas hace relativamente poco tiempo – contenían marcados sesgos que se han venido reproduciendo como afirmaciones verdaderas, no sólo a nivel historiográfico sino como base teórica para diseñar políticas públicas.

Con respecto a la medialidad: las puestas en escena que se crean en el cómic abren la puerta para hablar de otros debates. Quiero destacar, por ejemplo, las escenas en las que se muestran los diferentes tipos de constreñimientos que tuvo la investigadora en relación con el acceso a las fuentes documentales: la voluntad de los funcionarios para dejarla consultar ciertas fuentes, los limites procedimentales, el racismo y otros tipos de discriminación que entorpecieron el acceso a la documentación tanto en archivos públicos como en privados. Este tipo de situaciones que se presentan en la práctica diaria de la investigación histórica, al estar fundadas en lo cotidiano, tienden a quedar por fuera de los manuales de metodología de la investigación y, por tal motivo, sobre ellos poco se reflexiona en las aulas. La lectura en clase del cómic de Hall y Martínez, puede abrir oportunidades de discusión sobre estas temáticas y ayudarnos a diseñar protocolos de acceso más exitosos.

Esto nos lleva al tercer eje: la posicionalidad en la creación de argumentos históricos. Considero que este aspecto es abordado magistralmente por Hall y Martínez. En el cómic no solo se plasma el proceso de investigación para darle estructura a la historia. Antes bien, la forma en la que se construye el hilo narrativo ofrece una nueva idea de »objetividad« histórica. Ella está lejos de construirse a partir de negar la posición del autor y asumir una supuesta neutralidad. Por el contrario, Hall tiene el cuidado de detallar el lugar desde el que habla y hace evidente las relaciones de poder cotidianas sobre las que se construye el conocimiento que produce. Esta reflexión sobre la posicionalidad le permite al lector hacer una lectura mucho más crítica, tanto a nivel interno como externo, de la documentación utilizada por la autora. Esta negación de la neutralidad permite aproximarnos a un nuevo paradigma de la objetividad histórica que debe ser incluida con urgencia en las narrativas de la historia del derecho, las cuales siguen siendo historias de hombres blancos, basadas en documentos escritos e investigados principalmente por hombres blancos que se reclaman neutrales, objetivos y veraces.

Este paradigma de objetividad fundado en la reflexión sobre la propia posicionalidad está fortalecido a partir del medio. Y es que el cómic no funciona acá como un simple »medio de divulgación« para nuevas audiencias. Por el contrario, el uso de este formato le permite a Hall no sólo construir diferentes argumentos sobre el quehacer de los historiadores hoy, sino también proponer nuevas experiencias narrativas fundadas en la investigación histórica. Este ejercicio de creación es participativo con el lector. La mezcla entre imagen, texto y espacios en blanco entre viñeta y viñeta le permite al lector nombrar aquello que ve según sus propios conocimientos, permitiendo así las múltiples lecturas. Un ejemplo clave son los relatos donde se presencia la dificultad de la investigadora para acceder a ciertos documentos, el desdén de algunos funcionarios, los diálogos, etc. Para los lectores familiarizados con las mal llamadas »micro-agresiones« racistas, no dudamos en nombrar en nuestra mente la interacción como tal, pero seguramente otros la leerán de manera distinta.

Esta libertad de interpretación nos aboca al diálogo, nos lleva al presente y abre puertas para iniciar una gran palestra de discusiones. Estas discusiones no son sólo relevantes en el contexto de formación profesional, sino como espacio para la construcción de ciudadanías plurales.

La reflexión sobre la posicionalidad crea además un vínculo profundo con sus lectores. La historia ajena se vuelve rápidamente la propia y le habla a nuestra propia experiencia como investigadores. El abordaje de la posicionalidad en la obra habla de los propios retos de la investigación, pero también habla de cómo el silencio se convierte en una fuente y una pregunta que dirige la investigación.

Por último: la imaginación histórica. A pesar de que este tema tiende a verse soslayado en la disciplina, resulta ser fundamental aquí. El uso de la imaginación histórica se encuentra en la obra de Hall y Martínez no sólo en los espacios donde los historiadores hoy reconocemos que existe (la elección de la pregunta de investigación y la búsqueda de las fuentes, las formas en que construimos nuestras bases de datos, buscamos los documentos y los contrastamos, construimos relatos, conectamos unos eventos con otros y hacemos críticas a la literatura, etc.). Ella se usa también para crear otros escenarios posibles. Si bien este ejercicio imaginativo lo hacemos a menudo en el mero de acto de formular una hipótesis, en el cómic esto se lleva a cabo en dos ámbitos que considero claves para pensar nuevas narrativas en la disciplina. En primer lugar, en el acto de visualizar: la imaginación histórica permite crear escenarios sobre los que los documentos usualmente no dan referencias. Si bien nuestras investigaciones se nutren de documentos muy ricos en información, estas usualmente están desprovistas de datos que permitan directamente visualizar los espacios en los que se desarrollan los eventos que aparecen en los documentos. En la producción de cómics o vídeos, este ejercicio de contextualización/creación va de la mano de un ejercicio de investigación paralela en otra documentación: ¿Cómo vestían?, ¿cómo se reunían?, ¿qué comían?, ¿qué escenarios eran cotidianos? Es el ejercicio de imaginación a partir de la investigación el que permite visualizar el pasado y añadir capas de complejidad a la imagen siempre parcial del mismo. Es justo allí, en ese ejercicio de imaginación, que la ficcionalidad del documento jurídico se revela.

Por otro lado, Hall va más allá e imagina escenarios posibles para llenar los vacíos que la documentación inevitablemente nos deja. En su relato los personajes tienen nombres (no son mujer No. 1 u hombre No. 2); ellos tienen vidas, emociones, facciones, usan determinados ropajes, viven en espacios específicos. Todos estos elementos, aunque producto de la imaginación, no salen de la nada; ellos surgen de la misma investigación a partir de preguntas concretas sobre la vida cotidiana y de responderlas con las herramientas adquiridas en la academia.

Tomar con seriedad estos procesos de creación a partir de la investigación debe ser el primer paso para re-pensar el quehacer actual de los y las historiadoras. En el relato de Hall, la investigación rigurosa y la imaginación van de la mano y crean una narrativa que adquiere significados poderosos para sus lectores. Este habla de resiliencia, de ancestralidad, de pensar la comunidad. Tal historia que le habla a un mundo real es una tarea a la que debemos apuntarle hoy.

■

Bruno Lima

The Still Raveled Legal History of Modern Abolition*

Unraveling Abolition. Legal Culture and Slave Emancipation is the latest book by Edgardo Pérez Morales, a professor of history at the National University of Colombia and author of the acclaimed *No Limits To Their Sway. Cartagena's Privateers and the Masterless Caribbean in the Age of Revolutions* (Vanderbilt University Press 2018). Following a similar approach to his previous book, *Unraveling Abolition* explores the struggles for freedom by subaltern agents during the tumultuous decades preceding Colombia's independence (1819). This time, however, the author expands the geographical scope of his analysis beyond the port city of Cartagena and its commercial connections with the Caribbean Sea, the Gulf of Mexico, and the southern United States, reaching into the interior of the former New Kingdom of Granada, specifically the gold-mining regions of Popayán and Antioquia. By expanding the geographical area of analysis to include more interior regions, the author is better able to observe the various local anti-colonial and anti-slavery struggles that redefined ideas of citizenship, freedom, and political belonging, leading to the founding of new countries, including Colombia, in the early 19th century.

To investigate violent social conflicts on the periphery of the global economy during the Age of Revolutions, Pérez Morales chooses the tools of Italian microhistory – »I draw theoretical inspiration from Carlo Ginzburg« (170) – and defines his central locus of analysis: the law, accurately considered by the author both as the ideas, principles, and theories, as well as social practices of multiple people and groups. At the same time, the author closely examines anti-slavery ideas from 18th-century European modern philosophy and local disputes between masters and slaves in a New World Spanish colony. More than examining legal ideas in the abstract or analyzing isolated concrete cases, Pérez Morales attempts to connect both forms of legal knowledge production in a single »site of observation«, namely the »judicial forum« (5). According to him, the judicial forum »understands litigation, claims-making, and even criminal trials as instances of cultural exchanges« where »people proposed, debated, and co-constructed ideas about slavery, freedom, justice, and political belonging« (5). Indeed, the author's definition is illuminating and enriches research in legal history – even contributing to the much-needed enhancement of a theory of legal history. Many researchers dealing with past legal struggles in various arenas and instances may find in this concept an organizing axis for their respective studies.

Divided into six short chapters, the book begins with the intriguing question – which also serves as the title of chapter 1 – »Raynal in the New Kingdom?« Although the author does not substantiate with primary sources the direct influence of the French Enlightenment philosopher Guillaume Raynal on the ideas of the Comunero rebels of 1781, whose revolt functions as a paradigmatic political event for Pérez Morales, the chapter's title question illustrates the phenomenon of the circulation of republican ideas and the echoes of the French and Haitian revolutions in Cartagena, Antioquia, and Popayán. Even if the influence of Abbot Raynal – or Pufendorf, Grotius, and Montesquieu – is not clearly seen in the 1781 rebel movement, the author's intellectual effort moves in the right direction by attempting to *glocalize* the ideas of an era in a specific local context.

In the second chapter, »Landscapes of Slavery, Rumors of Freedom«, Pérez Morales successfully undertakes the challenging task of presenting readers with a detailed and nuanced picture of slavery in the former New Kingdom of Granada. Drawing

* Edgardo Pérez Morales, Unraveling Abolition. Legal Culture and Slave Emancipation in Colombia. Cambridge: Cambridge University Press 2022, xiv + 242 p., ISBN 978-1-108-83152-9

interesting parallels between the demographics, economies, and civil societies of each studied jurisdiction, he explores distinctions in legal statuses between slaves and former slaves and analyzes their expectations of freedom and rights during those pre-revolutionary times. However, as the chapter title suggests, the author has little more than rumors to examine a »slave's culture of expectation« (37). Although the cases analyzed hold undeniable historical significance, especially the discussion around collective testamentary manumission in La Honda, they do not seem to provide a solid basis for extracting general patterns of social behaviors and legal tactics of the enslaved – much less to categorically affirm what they believed, discussed, expected, or dreamed of.

Chapters 3, 4, and 5 adopt a different format: each centers on a single jurisdiction and is situated within the same revolutionary period that transformed the former colonies into independent republics. Additionally, each examines a specific legal issue. Chapter 3, »Popayán: Prudent Legislation«, primarily analyzes the proposal for the gradual abolition of slavery in the newly inaugurated parliament of Popayán; Chapter 4, »Cartagena: Equality and Natural Law«, deals with the semantics of natural law in the local constitutional process; and Chapter 5, »Antioquia: Free Womb, Captive Slaves«, studies the free womb law as an anti-slavery measure of the new republic. Finally, Chapter 6, »An Exegesis of Liberty«, articulates the revolutionary experiences of Popayán, Cartagena, and Antioquia to discuss central categories of modern political semantics, such as political belonging, equality, liberty, and republic, and revisits the foundations of the state of Colombia.

Although Pérez Morales mostly deals with social conflicts and debates specific to parliamentary or party politics, he strives to interpret them as strictly legal conflicts. At times, this approach works well – particularly due to the versatility of the judicial forum concept – but it often seems to fail. The more Pérez Morales moves away from politics and shifts towards law, the more difficulties he seems to encounter. He often seems to be in slippery territory where it is difficult not to falter, and apparently stumbles when he takes for granted i) political rhetoric jargon devoid of normative force as binding normative acts (e. g., 30–32); ii) generic references by litigants or judges to fragments of natural law as the ultimate basis for their petitions or legal decisions (e. g., 85–86); iii) social rumors with little legal substance and minimal documentary evidence (e. g., 52–55); iv) oblique inferences by lawyers to legal doctrines as original theoretical formulations (e. g., 105–106); and v) common sense statements as seemingly universal and binding legal principles (e. g., 147–148).

There are countless examples of slips for each of the points listed above, and it would be counterproductive to detail them in this short space. Perhaps the narratives about the lawyer Félix José Restrepo encompass most of these tendencies. As a guiding character who spans the entire book, Restrepo appears in many passages, representing a model of a deeply erudite and idealistic man. His political speeches filled with metaphors are often taken as groundbreaking legal propositions, and his supposed anti-slavery moral sentiment was readily accepted as a kind of modern natural law philosophy (e. g., 59–67). Although the book thus has some quirks that weaken it from the perspective of legal history, it is still an important read. It synthesizes, like few others, the immense challenges social historians face when analyzing extraordinarily complex legal phenomena and shows how the current historiography of slavery often fails to recognize that the normative answers to a freedom claim in a Spanish colony were likely much closer to the *Siete Partidas* than to a fake Pufendorf.

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Marjorie Carvalho de Souza

Casas de »coacción«: trabajo esclavo y el origen de la penitenciaría en Brasil*

Si la historia de la codificación civil (no promulgada) en el Brasil del siglo XIX está notablemente marcada por una difícil reconciliación con su población esclava, la temprana codificación penal (1830) de la recién independizada nación no sufrió el mismo embarazo. Este primer hito en la modernización penal de Brasil no sólo abarcaba ampliamente los delitos cometidos por esclavos, sino que también les reservaba penas específicas. Regímenes punitivos paralelos para libres y esclavos permitieron el encierro, en un mismo código, de modernos principios liberales de humanización y uniformización de las penas, como la generalización de la »prisión con trabajo«, junto a los antiguos castigos corporales e infamantes más típicos del antiguo régimen.

Este paralelismo legislativo, si bien impidió que la población esclava quedara completamente excluida de la historia de la codificación penal, de todos modos le reservó la conocida posición de símbolo del atraso incompatible con las prácticas penales modernas. Al fin y al cabo, el abandono de los castigos físicos en favor de la disciplina moderna del silencio y el confinamiento, encarnada en la prisión, no era más que un corolario de la creciente valorización del trabajo asalariado libre. Lo que esta narrativa tradicional –y eminentemente eurocéntrica– *no* nos dice es que esclavitud y prisión no eran realidades mutuamente excluyentes en el Atlántico esclavista; y que las prisiones –no sólo en Brasil– nacieron apuntando con determinación hacia la población esclava y empleando abundantemente esa mano de obra para construir los muros donde estaban destinados a habitar.

Policing Freedom revisa y refuta aquella narrativa tradicional, enfatizando el protagonismo de la esclavitud en el nacimiento y consolidación de las modernas prisiones en Brasil, al evidenciar que la implementación del modelo penitenciario coincide con el apogeo de la dependencia brasileña del trabajo esclavo. Movilizando un amplio arsenal de fuentes –que incluye fotografías de condenados, listas de presos, informes de jefes de policía, listas de trabajadores contratados, peticiones de libertad–, Martine Jean penetra en los muros de la *Casa de Correção-Casa de Detenção* de Rio de Janeiro y revela cómo los trabajadores esclavizados, sus descendientes y quienes continuamente llegaban del tráfico ilegal constituyeron gran parte de los primeros habitantes de la institución pionera en su género en Brasil, al mismo tiempo que fueron encargados de construirla.

Sin descuidar a los idealizadores del proyecto (con particular atención a la asociación que lo ideó –poco recordada por la historiografía–, la *Sociedade Defensora da Ordem do Rio de Janeiro*) y a los trabajadores empleados, el libro examina las diversas etapas de la construcción entre 1834 y 1850. Así prueba que la intersección entre la expansión de la esclavitud en el sureste cafetalero, el apogeo del tráfico ilegal y la implementación de la penitenciaría no fue solo una coincidencia cronológica. La reforma de la justicia criminal, y por consiguiente de la libertad como su opuesto, en los primeros años después de la Independencia también apuntaba al confinamiento de los brazos esclavos. En el agitado primer veintenio posindependencia, marcado por una intensa inestabilidad política e insurrecciones esclavas, la ansiedad liberal por mantener el orden pasaba necesariamente por la disciplina y el confinamiento, sin mencionar la explotación de la mano de obra de individuos condenados, por su incapacidad jurídica, a no convertirse en ciudadanos, mucho menos en »dóciles y reformados« por el sistema penal.

Construida después de la entrada en vigor del tratado anglo-brasileño (1826) y de la ley nacional (1831) que declaraban ilegal el tráfico y conferían a

* Martine Jean, Policing Freedom. Illegal Enslavement, Labor, and Citizenship in Nineteenth-Century Brazil, Cambridge: Cambridge University Press 2023, XVII + 347 p., ISBN 978-1-009-28911-5

los africanos aprehendidos el derecho a la libertad, ya en el año 1834 la *Casa de Correção* se convierte en la responsable de administrar a los africanos encontrados a bordo de los barcos aprehendidos por el comercio ilegal de esclavos. La necesidad misma de mano de obra para la construcción, así como las tecnologías de registro, control y legibilidad que adoptaba por vocación penal, resultaban lo más idóneo para administrar a un grupo potencialmente subversivo precisamente por su derecho a la libertad en una sociedad esclavista. Con la demanda interna de trabajo compulsorio y los instrumentos eficaces de control, la prisión se convertía en el punto de paso ideal para la »preparación« de estos sujetos para la libertad. A la inversa, estos sujetos sirvieron como un laboratorio de ensayo y población de prueba de la eficacia del discurso disciplinario como productor de una clase trabajadora libre y moralizada.

Como el grupo mejor documentado del libro, y de los archivos de la prisión, Martine Jean es particularmente eficaz en entrelazar pedazos de biografía de africanos libres (eligiendo uno en particular para el epílogo-síntesis del libro) con las vicisitudes de la política nacional y con las dinámicas sociales y jurídicas que atravesaron el Atlántico desde las primeras prohibiciones del tráfico hasta la definitiva abolición de la esclavitud. La autora es hábil en situar su período de trabajo compulsorio en la *Casa de Correção* como un mero eslabón intermedio en la cadena de encarcelamientos a los que estaban condenados. Precedido por el aprisionamiento en los barcos del tráfico, el confinamiento eufemizado de »aprendizaje« en la prisión a menudo era seguido por el regreso a sus muros bajo acusación de vagabundaje o delincuencia. Trayectorias acusadas de desvío que más parecían seguir una línea programada desde el desembarque.

Aunque el libro reserve una atención particular a los africanos libres, definiendo la prisión como un »microcosmos cosmopolita« (147), la autora restituye también el mosaico de orígenes raciales y subjetividades jurídicas que componían el paisaje social del Brasil del siglo XIX. Las generosas listas proporcionadas en tablas al interior del libro y en el apéndice revelan una población carcelaria heterogénea que incluía presos libres (brasileños y extranjeros), esclavos detenidos (a petición de sus amos o recogidos en las calles por la policía) y africanos libres desde los primeros años. Aunque muchos de ellos trabajaron en la construcción del propio edificio hasta 1850, antes y después de esa fecha también se les unieron esclavos alquilados y artesanos libres asalariados. Si, por un lado, esta estrecha coexistencia reforzaba las jerarquías existentes (los portugueses ocupaban a menudo los puestos de dirección, mientras que los esclavos y los africanos libres se alojaban en compartimentos contiguos), por otro, a menudo esta contribuía a borrar las divisiones legales de status. La autora documenta, por ejemplo, cómo los trabajadores esclavizados contratados como artesanos a sueldo llegaron a actuar como instructores de los presos libres en los diversos talleres vocacionales de la prisión, enseñando oficios que iban desde la zapatería hasta la sastrería y la encuadernación (171).

Igualmente plurales y multifacéticas fueron las funciones desempeñadas por la prisión misma que nunca se redujo al papel de mera »penitenciaría para sujetos legalmente libres condenados a ›prisión con trabajo‹«, ni siquiera después del Decreto de 678 de julio de 1850 que la definió expresamente de este modo. En primer lugar, el *Calabouço*, el pabellón donde vivían los esclavos encarcelados, continuaría formando parte de sus instalaciones. En segundo lugar, seguía siendo un sitio de construcción, en lo cual se formaban obreros en talleres para este efecto; pero no sólo, sino también en carpintería, librería, serrería, hojalatería, y cuya producción incluso trabajaba por encargo. En tercer lugar, aún después de 1850, el presidio mantuvo el mencionado papel de administración de africanos libres, funcionando como centro de depósito, control y distribución. Y esto más aún, cuando la ley a la que se atribuye el éxito definitivo de la extinción de la trata, la Ley nº 581, de 4 de septiembre de 1850, propuesta por nada menos que el entonces Director de la *Casa de Correção*, Eusébio de Queiroz, ya no preveía la reexportación a África (sólo eventualmente »a un punto fuera del Imperio, donde pareciese más conveniente al Gobierno«) y prohibía expresamente la concesión de sus servicios a particulares. Más que nunca, la *Casa de Correção* se convirtió entonces en el punto de reparto de »mano de obra bajo la tutela del Gobierno«.

Completa el cuadro multivocacional de la institución otro establecimiento breve pero igualmente ilustrativo que funcionó en su seno entre 1857 y 1865 y al que la autora dedica otro capítulo entero: el *Instituto de Menores e Artesãos*. Creado originalmente para educar a los hijos de las africanas liberadas que vivían en la *Casa de Correção*, también

comenzó a admitir a delincuentes juveniles y a inscribir a niños pobres como bajo el manto de la asistencia y la caridad. Precisamente este alcance, percibido más tarde como incompatible con la naturaleza penal de la institución, fue en cierta medida responsable de su corta vida, pero su mera existencia en cualquier caso es ilustrativa de su carácter moralizante sobre las clases pobres inculcándoles la disciplina para el trabajo. Al no haber sido nunca sólo una prisión, la *Casa de Correção* funcionó como espejo de las ideologías predominantes en el mundo atlántico y de su diversidad jurídica y racial.

Con estos méritos y envergadura, el libro resulta una lectura esencial para los estudiosos interesados en el nexo entre pena y trabajo en la experiencia jurídica brasileña del siglo XIX, aun cuando no integre –como sería oportuno– la historiografía ya existente sobre las tres leyes de arrendamiento de servicios promulgadas durante el Imperio. Unánimes en prever la pena de prisión en caso de incumplimiento de los contratos laborales, los debates parlamentarios en torno a ellas guardan relación con las discusiones tratadas por la autora, pero permanecen al margen de los temas que el libro mismo confronta. Sin embargo, este volumen, como pocos, es capaz de restituir la complejidad y la pluralidad de la clase obrera en el siglo XIX y la centralidad de la población esclava en episodios de la historia jurídica brasileña, a la cual las narrativas tradicionales tienden a oscurecer. Al mismo tiempo, es capaz de relativizar la abolición de la esclavitud como punto de inflexión en la historia, señalando cómo un sistema penal responsable –hasta hoy– de producir puniciones racializadas fue madurado durante el inicio del siglo XIX, profundamente arraigado en el proceso de construcción de la nación poscolonial, en el escenario de lucha por la abolición de la trata y en la expansión de la esclavitud en Brasil. Si la categoría de »esclavo« desapareció de los archivos carcelarios después de 1888, el sistema penitenciario brasileño no perdió su vocación primaria de disciplinar racialmente a los individuos »indóciles« entre los pobres, especialmente los afrodescendientes, que se atreviesen a violar los términos –desde luego decimonónicos– de la libertad.

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Edward Jones Corredera

Free to Build an Empire*

This book provides a clear-eyed exploration of two of the most intensely discussed historical topics of our age: humanitarianism and the slave trade. This is a study of how the 19th-century British Empire deployed moral discourses in strategic, self-interested, and soul-searching ways in order to develop an »antislavery state«, an »antislavery diplomacy« and, finally, an »antislavery world system«.

This book puts forth three main arguments: the first modern humanitarian form of governance emerged from the administration of liberated peoples in Sierra Leone. Second, compassionate models of governance legitimated the pursuit of British imperial and corporate interests. Third, on the back of this moral vision, Britain pursued the end of slavery and a monopoly on the legal and commercial definition of »free« labour: liberated slaves were free to build, defend and expand the empire. The first two chapters show how, in the early 19th-century, Sierra Leone was transformed into an experiment in humanitarian and extractive governance. Chapters three, four and five draw on a comparative perspective to study the application of this model in the British Atlantic world. The last two chapters study the migration of liberated slaves

* Maeve Ryan, Humanitarian Governance and the British Antislavery World System, New Haven (CT): Yale University Press 2022, XIII + 309 p., ISBN 978-0-300-25139-5

and their role in the development of humanitarian governance in the broader Atlantic world.

Ryan slowly but surely navigates the potentially tempestuous discussion around the meaning of humanitarianism. Current understandings of humanitarianism, we are told, share one particular trait with 19th-century abolitionism: the idea that power can be used without consent to improve the lives of the worst-off. Ryan refuses to draw a direct causal connection between abolitionist ethics and current definitions of humanitarianism; instead, Ryan settles on the concept of »humanitarian governance« to describe the lasting impact of the relationship between imperial ambitions and compassion for others. This model of governance, the author explains, continues to shape today's humanitarianism: a paternalised, often racialised vision of power informs global forms of intervention, development and aid.

One of the most interesting aspects of the first half of the book is the author's exploration of the many ways in which medicine, religion, and political and administrative incentives informed conflicting ideas of care and humanity. Ryan carefully traces the British civilising goals behind administrative reforms in the management of Sierra Leone in the face of epidemics and an influx of refugees. The book offers a short but brilliant exploration of the 19th-century redefinition of the refugee in Europe and the Atlantic world. Beyond the racial hierarchy embedded in European approaches to political exiles, refugees and liberated peoples, the British public saw European exiles as the drivers of their emancipation. Liberated slaves were, by contrast, not agents of their destiny. Rather, they were the object of British compassion: British society acted as the harbinger of moral reform. Nineteenth-century confessional praise and condemnation of the treatment of convicts in British prisons, as Ryan shows, informed changing attitudes towards the class status and the labour rights that were afforded to »liberated Africans«.

The middle chapters explore how liberated slaves navigated a global system of trade that relied on slave or unfree labour by hopscotching across Britain's »archipelago«. This migration facilitated the construction of what Ryan describes as Britain's »antislavery state«. British elites saw their task as redeeming liberated slaves by turning them into devoted and loyal subjects and guardians of the empire. This model of an »antislavery state« lay the ground for Britain's »antislavery diplomacy«.

During treaty negotiations, British diplomats subjected their counterparts to intense questioning about how their governments envisioned the implementation of legal protections for liberated slaves. This was, in Ryan's reading, a way to gain leverage over friends and foes by stipulating specific terms which British officials could enquire about in subsequent trade disputes. The British government then harnessed the statistical information drawn from these discussions to map out the risks and possibilities generated by these new laws and the migration flows they may create. This information empire deployed its vast chorographic and migratory knowledge to project its power and articulate its paternalistic moral authority to criticise and coerce other countries into reform. As Ryan notes, Henry John Temple, Lord Palmerston, who shaped British foreign policy over three decades, wrote to foreign ambassadors to address the plight of specific enslaved or unfairly liberated individuals.

The final chapters of this book focus on the organisation of new labour practices for the »liberated Africans« in Britain's humanitarian »archipelago«: the creation of apprenticeships and the rise of military recruitment in these communities allowed Britain to constrain and regulate their rights. Ryan carefully studies how contemporaries discussed what constituted a humane or inhumane form of exploitation of children, women and men. In a particularly insightful section based on a number of primary sources, including a series of official interviews of liberated Africans carried out in the 1820s, Ryan explores how childhood or the household economy could shape one's experience of these reforms. The book, on the whole, gives a comprehensive overview of the public debates, the diplomatic strategies and the labour practices that amounted to a British »antislavery world system«.

This book generates clear and insightful answers about the specific topics it addresses – and creates plenty of questions for scholars interested in the comparative study of humanitarianism. Indeed, the epilogue's analysis of the similarities and the differences between the British Empire and today's United Nation skips over an important point of comparison and a crucial stepping stone in the study of the rise of humanitarianism and empire: the rise of the United States' own civilising world system. The 19th-century USA – an emerging empire that closely emulated Britain – developed its own paternalism towards Central America that

harnessed the civilising vision of Manifest Destiny to bolster the rise of filibusterism in the region. Representatives in this nascent empire debated whether to make Texas into a state for the liberated slaves who populated the East Coast. Some worried, however, that the annexation of Texas would allow Catholic immigrants, who were depicted as lazy and backward, to tarnish the nation's Protestant work ethic. Since many of today's humanitarian institutions emerged from US efforts to coordinate aid, and to bolster the moral vision behind their interventions around the world, a comparative study of how the United States assumed the mantle of the world's moral police that, in the view of many Britons, once belonged to its empire, would be an enriching piece of research.

Secondly – as Mark Mazower's book *The Greek Revolution* has recently shown – the British and American dispute over the establishment of a favourable definition of the concept of intervention was an important theme in the foreign policy of both of these empires. Given the continued and controversial use of this term in the 21st century, policymakers and historians would benefit from further research on this topic. More broadly, those concerned with the history of ideas and international law may consider the ties between this study of humanitarianism and recent interpretations that show that international law was seen as a gentle civiliser of nations.

Finally, in the context of British history, one may use this study to reconsider the relationship between this model of humanitarian governance and the historiographical concept of informal empire, which has recently elicited some debate. The study of the territorial and religious borders of compassion, to wit, the relationship between race and the exclusionary nature of charity on the basis of Protestant and Catholic differences, or the relationship between humanitarianism and philanthropy, are areas that would benefit from further research.

The fact that this book generates insights that can contribute to such a wide array of debates is a testament to the vigour, clarity and creativity behind its ideas. On the whole, this book is an exemplary work on the origins of legal reform and the moral challenges of its implementation. From a comparative perspective, it is perhaps the best single historical study of the 19th-century geopolitical uses and abuses of humanitarian reform. ■

Michael Lobban

Indirect Rule in West Africa and the Paradoxes of Secular Imperialism*

In March 1903, having conquered the Sokoto caliphate and incorporated it into the Protectorate of Northern Nigeria, Sir Frederick Lugard issued a declaration guaranteeing that his government would »in no way interfere with the Mohammedan religion«. By the end of the 19th century, British imperial policy was firmly committed to the notion that the secular power had to be neutral in matters of religion, a policy first announced by Queen Victoria in her 1858 proclamation to the people of India. However, as Rabiat Akande shows in her important new book, *Entangled Domains: Empire, Law and Religion in Northern Nigeria*, there was something of a paradox in this system of imperial secularism. In Nigeria, under the stewardship of Lugard, the commitment to religious neutrality was accompanied by a system of indirect rule. This policy of governing through local elites

* Rabiat Akande, Entangled Domains. Empire, Law and Religion in Northern Nigeria, Cambridge: Cambridge University Press 2023, X + 317 p., ISBN 978-1-00-905210-8

using indigenous institutions required the secular government to govern through Islamic institutions and Islamic law and led it to exclude Christian missionaries whose presence might both destabilise public order and antagonise the local rulers who were essential to colonial governance. This led in turn to complaints from missionaries that the colonial authorities were not in fact neutral in matters of religion, and were failing to respect the right to religious freedom.

It was not only Christian missionaries who regarded British assertions of a commitment to secularity as hollow. Historians and scholars of Islamic law have also portrayed British rule as perpetuating a pre-colonial theocracy leading to the reification of Islamic institutions. In fact, as this book shows, the story was much more complex. To begin with, Akande argues that the colonial government was far from neutral when it came to matters of religion. The colonial state itself defined what constituted religious difference and in so doing drew far sharper lines of religious difference than had existed in pre-colonial times. The various groups of non-Muslims in the region – some of whom had jurisdictional privileges recognized in Islamic law in pre-colonial times – were redefined in colonial terms as the singular group denominated »Pagan«, to be contrasted with »Muslim«. Colonial rule therefore accentuated differences between Muslims and non-Muslims and created a hierarchy between them which was much more pronounced than had previously been the case. Within the Muslim community, the imperial co-option of the caliphate institutions also created a distinction between those »good« Muslims who were affiliated to the Masu Sarauta elites through whom the British ruled and their political and theological opponents, who were classified not as religious minorities but as dissenting sects.

Indirect rule also had a transformative effect on Islamic institutions. Rather than freezing precolonial Islamic institutions, colonial law redefined Islamic law itself. As Akande argues, a British form of Islamic law was created by a transformative use of *siyasa*, the discretionary power of the ruler in judicial matters. Traditionally exercised for the public good, in accordance with the Shari'a, in the colonial era *siyasa* governance was loosened from the constitutional boundaries set by the Shari'a – as espoused in jurists' exposition in the *fiqh* – to encompass a much wider range of regulation. This was used initially to expand the power of the emirs, particularly over the *alkalai* (judge-jurists) so that they could implement the instructions of colonial administrators. It was used later to increase the power of the state to reform the law, particularly under the Governorship of Donald Cameron, who was much less committed to the Lugardian model of indirect rule. Akande shows that the passing of the 1958 penal code was the culmination of this process of making a »British Islamic law«. By the 1950s, colonial officials and their advisers regarded Islamic criminal law as backward and wished to implement a more modern code. Islamic law was to be removed from public law and confined to matters of personal law. The new criminal code was based on the Sudan Penal Code, which itself followed the model of the Indian Penal Code. The implementation of this code was portrayed by the British as a legitimate exercise of *siyasa* jurisdiction, exercised not by the emirs (whose powers were by now diminished) but through the central state apparatus. The Colonial Office took care in preparing the ground for the acceptance of the code by Muslim elites by organising study tours in which eminent judges from Libya, Sudan and Pakistan confirmed that such a code could be both modern and Islamic. As Akande explains, this project vested lawmaking power in the legislature: rather than Shari'a legitimating *siyasa*, *siyasa* was used to legitimate the law as compliant with Shari'a, as the state took it on itself to define what was Islamic.

The reforms implemented by the colonial state as essential precursors to independence reflected changing notions of secularism. While being properly Islamic, the new penal code was portrayed as suitable for a secular state, applying equally to all without favouring any group. It was accompanied by the constitutionalisation of the right to religious liberty, which had been called for by Christian groups. They had long thought of the nature of government in Northern Nigeria as being a form of Muslim sub-imperialism supported by the colonial power and they sought to use their non-Muslim identity to make political claims. One manifestation of this was the failed campaign in the mid-1950s to create a separate Middle Belt state. Another was the campaign of Protestant Christians for the recognition of a right of religious liberty, which would include a right to proselytise, which resulted in a provision in the 1960 Independence constitution which recognised a person's right »to manifest and propagate his religion«.

The last chapter looks beyond independence to the debates at the 1977 Constitutional Conference over whether there should be a Federal Shari'a Court of Appeal with jurisdiction over Muslim personal law. The pre-independence reforms had left a Northern Region Shari'a Court of Appeal to deal with such matters, but when Nigeria was divided into component states in 1967 each state was left with its own highest court to deal with such matters. The 1977 proposal aimed to create a court to harmonise decisions across state Shari'a courts of appeal. However, the proposal reopened debates about the nature of secularism. The Muslim proponents of the court saw it as an effort to counter the secularism left by the colonial state, which they regarded as privileging Christians. Christians opposed the proposal which they saw as an attack on the state's separation from all religions. In this process, the rhetorical position of the different parties shifted. Christians who had in the early twentieth century denounced the ideology of British imperial secularism as a ruse to favour their religious rivals and made loud appeals to be accorded the right to religious liberty now sought to defend secularism and denounced Muslim arguments in favour of religious liberty as attempts to »Islamicize Nigeria«. In response, Muslims denounced secularism, which they associated with a colonial ruler who had supplanted Shari'a law.

This book offers a fascinating study of the nature of indirect rule in Nigeria, and of the impact of the »secular« state on religion. It makes an important contribution to our understanding of the nature of imperial rule in West Africa. It also sheds important light on the aims and impact of secularism, demonstrating that rather than the secular state standing above the religious fray, the »secular« and »religious« remained constantly entangled in complex ways.

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Karolyne Mendes Mendonça Moreira

Empowering Voices: African Agencies in Northern Mozambique*

In *Casaco que se despe pelas costas*, Fernanda Thomaz guides readers through the intricate web of relationships between diverse African communities in Northern Mozambique, particularly in Cabo Delgado, and the Portuguese judicial system from 1890 to 1940. The book sheds light on African agency in the face of colonial imposition, meticulously reconstructing the various interactions and legal frameworks on the ground.

The author explains (11) that the title of the book derives from an ancient proverb of the Macua communities, which translates as follows: »The *milando*, resolved by whites in the administration, is like the coat that comes off at the back.« (»Ekunya, ekasakó; enrureliwa ottulí.«). *Milando* was the generic term used by the Portuguese to designate the process of resolving conflicts between Africans, usually conducted by local leaders within their own villages. However, with the advent of colonial justice, *milandos* were also conducted by Portuguese authorities. The ironic manner in which Africans referred to the administration's handling of the *milandos*, likening it to shedding a disposable garment, serves as a poignant indicator of African protagonism in the daily redefinition of law. In this sense, the main objective of the book is to portray the ways in which Africans reinterpreted, translated and (re)acted within the colonial world, navigating the constraints imposed by established power structures.

The primary documents on which Thomaz' analysis is based comprise 165 criminal lawsuits

* Fernanda Thomaz, Casaco que se despe pelas costas. História do colonialismo, justiça e agências africanas em Moçambique, Juiz de Fora: Editora UFJF 2022, 225 p., ISBN 978-65-89512-48-6

related to cases of homicide, rape, assault, and abuse of authority, among others, located in the Historical Archive of Mozambique. These records, produced during the implementation, construction and consolidation of the administrative structures of colonial power, are fundamental to the analysis of African agency in a context of intense domination.

In addition to archival sources, Thomaz draws on ethnographic accounts, newspapers, colonial administration reports, and interviews with local people. This wide and varied range of sources, especially local ones, enables a nuanced exploration of the manifold legal frameworks existing in the region, beyond those officially recognised by the Portuguese legal system. The use of interviews in this research is particularly noteworthy. Although not the most significant sources of analysis, they are essential for complementing the court cases.

The book is organised in two parts. In the first section, entitled »Colonial justice: between domination and custom«, the author analyses the social history of justice in Mozambique. The focus is on detailing the structure of the colonial justice system and examining how the dynamics of power relations influenced conflict resolutions. To this end, the author describes the functioning of the *Juízo de Direito* (court of first instance that judged all conflicts in the territory), demonstrates the changes that occurred with the creation of the *Tribunal Privativo dos Indígenas* (court that began to specifically judge only conflicts between Africans) in 1930, and concludes with the debates surrounding the creation of a specific penal code for Africans. This section also includes an analysis of the role that the construction of a racialised colonial penal doctrine played in the exploitation of African labour.

In the second part, entitled »Colonial relations and African agencies«, the author unravels the quarrels and daily practices of African men and women in the district of Cabo Delgado. Here, colonial justice is the backdrop for stories of African agency that demonstrate how people understood, made use of, and resisted the legal apparatus. In this part, the ancient legal, economic and socio-cultural aspects of the different peoples who occupied the territory – notably the Macuas, Macondes, Muanis and Ajauas – are explored. Thus, law is not just understood as a set of state-referenced norms and rules. For the author, law arises from the concreteness of everyday life and its various instruments for ordering society.

The author's analysis transcends simplistic interpretations that reduce African actions to a dichotomy between resistance and collaboration. In her work, Thomaz demonstrates that relations of subjection and coercion assumed multiple configurations, forms and intensities. On the one hand, she highlights that the administrators' lack of familiarity with the powers and values of the colonised peoples often served as a loophole for African litigants and advisors to present information according to their interests in colonial courts. On the other hand, she points out that the very fact that Africans made use of colonial justice also reinforced and legitimised their domination over the territory.

The book includes a series of examples that demonstrate the complexities of this interplay. In detailing the judicial structure, the author sheds light on local African chiefs who, in many cases, took on the role of advisors to the colonial judges, particularly in the *Tribunal Privativo dos Indígenas*. This position, which gave them a place as informants about the so-called local »uses and customs«, gave them immense power in certain situations. After all, by taking advantage of the colonisers' ignorance, they could circumvent certain judicial procedures and even define the outcome of a sentence. However, it is important to mention that the integration of these chiefs into the colonial system took place in a subordinate way, within the established power limits. In several cases, as the author also demonstrates, the opinions of these advisors were not recognised and the claims brought by Africans to colonial judges were not accepted. Therefore, the work avoids analyses that portray those who dominated and, above all, those who were dominated in a monolithic way.

This does not mean, however, that the author has denied the value of resistance as a concept or as a historical phenomenon; quite the contrary. Analysing the agency of those »underneath«, based on the idea of resistance as a concept and as a practice, remains fundamental to promoting innovative interpretations of the experiences of those who have been denied a voice during their lives.

In this sense, *Casaco que se despe pelas costas* is an essential work for the study of the justice system and African agencies in the history of Mozambique.

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Priyasha Saksena

The Influence of Mughal Law on the Creation of the British Colonial State in India*

In this insightful monograph, Robert Travers traces how the English East India Company (EIC or the Company) adapted the legal and administrative practices of the Mughal empire to establish the basic structures of the colonial state in late 18th-century South Asia. More specifically, Travers focuses »on the way the Company built its new state by co-opting and transforming late Mughal practices of administering justice to petitioning subjects« (6). By reconstituting Mughal law amidst a series of tense and unequal exchanges with South Asian experts and interlocutors, the EIC was able to build the basis of an entirely new system of colonial legal order, including the rhetoric of the British »rule of law« in contrast with the »despotic« Mughal past (26–27).

The book's focus is on the Mughal province of Bengal, over which the EIC acquired a *diwani* (right of revenue collection) following a military conquest in 1765. The first two chapters provide the background within which to examine the establishment of the colonial state. Chapter 1 of the book examines late Mughal notions of justice and administration to provide the historical context for the EIC appropriation of these ideals to create the colonial order. There was, Travers argues, a close link between fiscal centralisation and judicial state-formation, with the levy of taxes and the grant of justice (particularly in revenue and land disputes) considered to be key to rulership in the late Mughal period (47). Travers contends that the EIC also established fiscal and judicial structures along the same lines, linking legal centralisation with efforts to stabilise tax revenues by subjecting local authorities to greater control, but simultaneously claiming that English law would provide protection to subjects that had only been provided »arbitrary« justice by »despotic« governments (63). Chapter 2 examines the legal and political reforms undertaken by Warren Hastings in 1772 to argue that they drew on the so-called Mughal »ancient constitution« but created a judicial system that extended the Company's claims to adjudicate all civil disputes as the *diwan*, while relegating the *nizamat* courts to the sphere of criminal law (78). In addition to the new law courts, the khalsa (a reconstituted version of the head revenue *kachahri*) was also developed as an important system for the adjudication of disputes (91). With the establishment of a permanent Superintendent of the Khalsa Records, the khalsa was transformed into an investigative body that managed enquiries into political controversial disputes (104–105).

The next three chapters form the heart of the book's argument, with Travers focusing on specific case studies to cement his argument that Mughal legal practices were recast during the process of the formation of the Company state. In chapter 3, Travers examines records of the judicial investigations conducted by the khalsa Superintendent in two complex inheritance cases to demonstrate that officials and litigants deployed arguments from a wealth of sources, including the *dharmashastra* (Sanskrit ethical and jurisprudential writings), *shari'a* (Islamic law), local custom, Mughal deeds of entitlement, and Persian agreements between parties (115). Although British officials reached their conclusions based on this maze of factors, they also expressed discontent at the uncertain nature of the rulings, reinforcing ideas of civilisational difference and leading to efforts to subject *zamindars* (tax-paying intermediaries) to a more rigid and state-centred version of property rights (116). Travers notes that the quest for »final« judicial decrees formed the backdrop within which the Permanent Settlement was introduced, fixing the tax demands and revenues of Bengal in perpetuity (160–161). Chapter 4 focuses on conflicts

* Robert Travers, Empires of Complaints: Mughal Law and the Making of British India, 1765–1793, Cambridge: Cambridge University Press 2022, XIV + 280 p., ISBN 978-1-009-12338-9

among *banians* (commercial agents engaged in revenue farming), creditors and *zamindars* to explore the »plural and hybrid forms of legality underpinning the emergent fiscal order of early Company rule«, including Persianate documentation, EIC written regulations and court proceedings (166). Travers traces how the Company castigated the corrupting influence of *banians* while claiming to uphold the »ancient« rights of the *zamindars* and demonstrates how this strategy was designed to secure land as a marketable commodity, ultimately securing EIC revenues (203). Chapter 5, perhaps the most fascinating in the book, recasts the *Siyar-ul-muta'akhkhirin*, Ghulam Husain Khan Tabataba'i's Persian-language history of the decline of the Mughals and the rise of regional states and the Company as »a kind of petition of appeal, a form of legal self-representation, designed both to defend Ghulam Husain's family landholdings *(jagir)* as a form of hereditary property and more broadly to persuade the Company to restore the once-great Mughal system of *intizam*, or proper order, including Mughal practices of responsive and consultative rulership« (209). Drawing on Mughal practices of legal entitlement, Ghulam Husain sought the Company's intervention to secure his family's rights while also lamenting that the Company had lost sight of »Mughal traditions of public audience involving the conciliation of established elites and tax-paying subjects« (211). By connecting his own travails with the wider issues faced by fellow South Asian inhabitants, Ghulam Husain provided an incisive critique of Company governance as well as possible ideas for reform that included a return to Mughal forms of public audience (227–228). Although Ghulam Husain relied on Mughal entitlements to further his claims (and to argue for the political reform of Company governance), his situation also revealed the manner in which the EIC first appropriated Mughal practices and then transformed them into state-made written regulations (238).

In the concluding chapter, Travers builds on his narrative to provide an alternative view of Lord Cornwallis' reforms (particularly the Permanent Settlement), which have generally been characterised as a decisive moment of Anglicisation in India and the subjection of governance to the »rule of law« (241–243). Travers argues instead that the system established by Cornwallis »represented the culmination of this decades-long process of imperial co-option, whereby British authorities had gradually expropriated and recast a late Mughal system of taxation and justice for its own ends« (244). By presenting reforms »as a seismic shift from despotism to law«, Cornwallis managed to cast the earlier petitioning of Indian subjects »as a pathological consequence of despotic governance« rather than »evidence of a culture of rights or sense of justice«, and thereby also negated »the entanglements of Company justice with a prior history of Mughal and *nawabi* justice, and the role of Indian officials and litigants in shaping official norms with their own conceptions of justice and legal order« (260–261).

The book is richly detailed and is based on extensive archival research, relying on both English- and Persian-language sources. It reveals the intricate links between law and political economy in early modern South Asia and how they shaped each other and in turn shaped the colonial state. By focusing on the nuanced legal arguments adopted by litigants and the complex efforts of British officials to make sense of them, Travers is successfully able to provide an alternative history of the Permanent Settlement that goes beyond the focus on intellectual influences that have been key to existing scholarship. The book is also a particularly critical addition to the literature on law during the transition between the Mughal and British empires, a relatively under-studied period in the otherwise rich world of South Asian legal history. There is also a tantalising glimpse into parallels between Bengal and other parts of early modern South Asia when Travers discusses Ghulam Husain's combined petition and historical narrative with similar texts produced in western and southern India, but this remains all too brief and could have been developed further in other chapters. Nevertheless, the book is an enriching and essential read for all scholars interested in South Asian legal history but also more broadly in the history of modern South Asia.

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Julie Rocheton

Droits personnels, divorce et démocratie*

Après plus d'une décennie de recherche sur le sujet, Saumya Saxena a rendu public les résultats de ses travaux doctoraux et postdoctoraux à travers la publication d'un ouvrage intitulé *Divorce and Democracy: A History of Personal Law in Post-Independence India*. Cette étude aborde l'histoire des droits personnels dans l'Inde post-indépendance et leurs complexités. Elle développe ainsi le droit comme élément de dialogue entre les divers acteurs étatiques, mais également entre le peuple et l'état.

En étudiant, dans cette Inde post-coloniale, la trajectoire du droit du mariage et du divorce des communautés hindoues, musulmanes et chrétiennes, l'auteure explore, à travers ce prisme, l'interaction entre le droit, la religion, la famille, les droits des minorités et le genre dans la politique indienne. En parallèle, l'ouvrage appréhende les débats sur la codification du droit privé dans une perspective historique pour mettre en lumière la place de l'intervention de l'Etat dans le droit de la famille, tout en questionnant l'imbroglio entre la religion et l'État. L'institution du divorce est ici présentée comme entremêlée au concept de démocratie. En effet, l'idée démocratique et l'institution du divorce apparaissent toutes deux telles des catalyseurs, donnant voix aux opinions dissidentes tout en ayant pour objectif de protéger les plus faibles; ce sont également des marqueurs importants pour les structures de pouvoir.

Cette étude s'appuie sur un corpus varié de sources historico-juridiques, comprenant débats législatifs, jurisprudences, manifestes politiques, rapports de presse, documents gouvernementaux, correspondances officielles, ainsi que des entretiens avec différents intervenants. L'ouvrage est organisé chronologiquement avec un focus par type d'archives dans chaque chapitre. L'analyse historique de l'auteure impressionne par l'exhaustivité de ses sources.

Le premier chapitre, qui traite de la période 1946 à 1956, repose principalement sur l'étude des débats législatifs. L'auteure y analyse l'évolution du rapport entre le droit et la religion au cours de la transition d'un État-nation nouvellement indépendant, à un État autrefois colonisé. Ainsi, les travaux de l'Assemblée constituante suggèrent que c'est à travers les débats sur le droit personnel que la doctrine de la laïcité a commencé d'être remodelée; mais ils démontrent aussi que le prisme de la question du droit personnel a permis un débat public sur la religion dans l'univers juridique. En abordant le rôle de la religion dans la sphère domestique par le biais des lois personnelles, l'État naissant est entré dans une relation intime avec le citoyen.

Le deuxième chapitre aborde, la période de 1957 à 1969 et les développements consécutifs à l'adoption de l'Hindu Marriage Act, ainsi que les divers rapports de comités relatifs au droit du mariage chrétien et musulman. L'État, désirant définir et encadrer officiellement certains principes religieux, entreprend différentes tentatives et projets de codification ou de rédaction de la mosaïque des droits personnels. Par ce mouvement législatif, l'État a cherché à combler le fossé entre lui et la société.

Le troisième chapitre, couvrant la période de 1967 à 1979, se focalise sur l'émergence des mouvements sociaux en explorant leurs interactions avec les institutions étatiques. Dans cette optique, il accorde une attention particulière aux réformes du droit personnel musulman et examine les réactions qui en résultent, notamment de la part de l'orthodoxie religieuse; ce chapitre démontre ainsi que les débats ont atteint un point critique durant les années 1970. Les actions entreprises par les femmes, sorties d'une interprétation purement politique, mais considérées sous l'angle d'une défense de leurs droits, mettent en exergue l'alliance entre les mouvements sociaux et le pouvoir judiciaire. Ce chapitre illustre par ailleurs comment les efforts des mouvements sociaux, en conjonction avec des événements tels que l'état d'urgence, ont

* Saumya Saxena, Divorce and Democracy: A History of Personal Law in Post-Independence India, Cambridge: Cambridge University Press 2022, 350 p., ISBN 978-1-10849-834-0

contribué à intégrer la laïcité dans le cadre constitutionnel de manière significative.

Le quatrième chapitre, englobant la période de 1980 à 1992, se concentre sur la jurisprudence en analysant deux affaires emblématiques, à savoir le divorce Shah Bano et l'affaire de Roop Kanwar Sati. En plus de ces exemples judiciaires, la loi de 1986 sur les femmes musulmanes et leurs protections en cas de divorce souligne les imperfections inhérentes au droit personnel codifié. La question de la laïcité resurgit également, cette fois-ci en tant qu'instrument utilisé par l'État pour étendre son contrôle sur les citoyens, tout en octroyant davantage de pouvoir à certains groupes, tels que les femmes, afin de contester certains aspects de la religion codifiée. Cette dynamique complexe entre laïcité, État et droits des femmes sert de toile de fond à l'analyse des affaires judiciaires, démontrant ainsi l'évolution des relations entre la religion, la justice et la gouvernance au cours de cette période spécifique.

Le cinquième chapitre, couvrant la période de 1992 à 2000, met l'accent sur l'engagement de la Cour suprême quant aux questions de laïcité, de religion, de pratiques religieuses et des droits des femmes. La jurisprudence, en particulier, offre un éclairage sur la manière dont les femmes ont lutté pour obtenir une interprétation du droit personnel favorable à leur genre. Ainsi, les tribunaux se positionnent comme une institution libérale au sein de l'État. Une série de jugements significatifs a permis de définir le sécularisme et d'interpréter certains textes hindous et coraniques. Ces décisions judiciaires ont joué un rôle essentiel dans l'évolution des normes juridiques et sociales, contribuant à façonner la compréhension de la laïcité et à promouvoir les droits des femmes au sein du cadre juridique. Ce chapitre met en lumière la dynamique complexe entre la justice, la laïcité et la quête d'égalité des sexes.

Le sixième et dernier chapitre propose enfin une analyse de la période allant des années 2000 à nos jours, il s'attache à dépeindre l'engouement autour de la question des droits personnels dans le débat public. Ce chapitre s'appuie sur des récits oraux et une série d'entretiens menés entre 2012 et 2019 avec les principaux acteurs du débat. Ces entretiens mettent en lumière le rôle et l'influence des acteurs non étatiques sur la question des droits personnels, ainsi que leurs définitions et leur place au sein de l'État. En examinant cette période plus récente, le chapitre explore la manière dont les dynamiques sociétales, les mouvements citoyens et les acteurs de la société civile ont contribué à redéfinir et influencer les discours sur le sujet.

Le cœur de cet ouvrage sur le divorce repose sur le dialogue entre citoyens et État tout en sortant de ce clivage binaire. En effet, il retrace également les échanges entre les différentes institutions étatiques ainsi que tous les acteurs qui, à un moment donné, y ont participé. L'ouvrage met en exergue comment l'institution du divorce a été négociée, renégociée, et a pris une nouvelle signification au fil du temps. L'État indien s'est préoccupé de cette institution tout en protégeant le droit conjugal. Le divorce à travers le droit personnel a donc joué un rôle clé dans la définition de la place de la religion et de la laïcité au sein de la démocratie indienne. En ajoutant à la religion l'État, ce mélange a créé plus d'autorité en promulguant des lois, mais également plus d'ambiguïté et d'instabilité, le droit devenant mobile et interprétable par les cours de justice.

Au cours de la dernière décennie, ce débat a perdu de son élan et pris fin en raison d'un gouvernement qui n'adhère plus véritablement à cette idée. Dans l'Inde post-indépendance, cette discussion sur les droits personnels fondés sur la religion a pris toute son ampleur, mais l'auteure conclut son ouvrage avec une certaine dose de cynisme. Elle constate que si cette conversation sur les droits personnels et le divorce a été formatrice pour la démocratie indienne, elle n'est aujourd'hui plus aussi robuste qu'elle l'a été historiquement. Elle nous amène à se demander quel futur pour la démocratie et le divorce en Inde?

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Reeju Ray

Migrant Histories in the Period of Decolonisation*

Boats in a Storm by Kalyani Ramnath is a historical account of decolonisation in former imperial colonies of South and South East Asia with a careful focus on its impact on migrant communities. The Second World War and shifts from imperial to nation states brought about new geographic and juridical transformations. Changing territorial and jurisdictional boundaries produced an extensive archive of legal cases that provide insight into the lived experiences of migrants. The book records changes and interconnections in legal orders and migration beginning with the Japanese occupation of Burma in 1942 during the Second World War. The book traces the history of this transformative period across two interrelated registers. First, Ramnath examines the emergence of new legal structures that defined the shift from an imperial to a national order. Second, the impact of these changes is assessed through the legal entanglements in which migrants living and moving across different imperial colonies in South and South East Asia found themselves. The period after the end of the Second World War in 1945 and decolonisation from British, French and Dutch rule in South and South East Asia has largely been studied from the vantage point of new national histories or the diplomatic relations between the new nation states in Asia and Africa. *Boats in a Storm* offers a new reading of the legal archive by showcasing how the lives of ordinary migrants embroiled in legal battles were entwined with the end of Empire and new nation-building projects. The crucial period under study, bookended by the years 1942 and 1962, offers important insights into continuing concerns around new citizenship and refugee policies in the present day.

In 1942, the Japanese military occupation of the British colonies of Burma and Malaya and the threat to Ceylon propelled the displacement of hundreds of thousands of migrants across South and South East Asia. The case studies examined by Ramnath showcase the impact of physical displacement on different sets of migrant workers. Migrants affected by the war ranged from affluent upper-caste firm owners, businessmen and small-scale traders, to workers in plantations, factories and mines. From 1942 onwards, new laws and bureaucratic orders were put in place in the different colonies to track and record the movement of people across India, Burma, Malaya and Ceylon. The emerging regulatory frameworks attempted to divide migrants based on their physical location during the war, which determined their legal status. Further classifications based on caste, gender, linguistic, ethnic, political and class positions were made to determine belonging and nationality. Tax liabilities, property ownership, money remittances between colonies and debt repayment were frequent subjects of legal disputes involving migrants. In the immediate aftermath of the war, new restrictions on migrant money remittances, new income tax laws based on resident status, and regulations on property ownership for foreigners profoundly affected the lives of migrants. By 1960, citizenship and travel across erstwhile colonies and the new nations states were monitored and closely guarded.

The Bay of Bengal and Indian Ocean, which for centuries connected the economic, social and political histories of the region, were reconstituted as an oceanic buffer of new laws of migration. Yet, the many legal cases, petitions and disputes resulting from new regulatory frameworks and restrictions betray the fragility of the newly imposed borders, legal categories, and geographies. Migrant histories captured in the case files that Ramnath has studied demonstrate the difficulties of defining people solely through their newly imposed national belonging. The stories expose the fragmentary nature of belonging. Ramnath brilliantly foregrounds the inability of legal frameworks to fully capture the identities, histories and future possibil-

* Kalyani Ramnath, Boats in a Storm: Law, Migration, and Decolonization in South and Southeast Asia, 1942–1962, Stanford (CA): Stanford University Press 2023, XVII + 284 p., ISBN 978-1-5036-3298-1

ities of various migrant communities. For instance, Ramnath shows that the migrant as a legal category was in flux throughout this period of study.

The argument in the book unfolds through the exploration of the legal archive produced due to the changing and new juridical order during this period. Legal cases not only demonstrate the scope of these changes and the establishment of a new order in emerging nation states during the period of decolonisation. They also help us to trace the histories of ordinary people caught in the storm of war and decolonisation. Their claims on jurisdiction in cases filed in courts across the colonies show the complicated notions of belonging, nationality and citizenship of different migrant communities. For instance, due to restrictions placed on war-time currency called ›banana money‹ and its eventual demonitisation, Chettiar firms based in Burma and Malaya lost their wealth and working-class creditors their meagre savings. The regulatory policies on taxation and property solidified jurisdictional boundaries between the new nation states such as Burma and India. Leading up to the independence of Malaysia in 1957, debt recovery cases were filed by Chettiar firms in Madras, London and the Malaysian courts. They show that claims to jurisdiction or citizenship were often based on efforts to avoid tax liabilities. Political connections and histories of belonging were linked to economic attachments.

Ramnath traces the sharpening of fears of »illegal immigrants« during the period of war and decolonisation. In the British colony of Ceylon (present-day Sri Lanka), distinctions between Indian and Ceylon Tamils appear in the political discourse to identify foreign migrants. Colonial census reports contained these ethnic categories, which in reality were blurry racial designations. With independence from colonial rule, new citizenship laws not only affected the mobility of migrants between India and Ceylon, but many residents were also deemed stateless due to their citizenship claims being rejected. Ramnath points out the irony that so-called illegal and undocumented migrants produced large amounts documentation to support their claims, which were deemed by the courts to be either insufficient, fabricated or wrong. Ethnic identities compounded by religious difference became a source of ascertaining belonging and citizenship in Sri Lanka. Ramnath recounts a question raised by Ceylonese politicians: »Could a Tamil-speaking migrant Muslim be a loyal Ceylonese minority citizen?«

Citizenship applications were initially decided on the whim of adjudicating officers until more standard procedures were put in place in the 1950s. Despite the increase in regulations and policing of »illegal migration«, the movement of migrants could not be contained. The new immigration regimes set up by India, Ceylon, Burma and Malaysia could not stop poverty-induced displacement nor the influx of migrants looking for economic opportunities outside their national jurisdictions. Further, Ramnath identifies early signs of the Cold War in cases related to the detention, deportation and rejection of citizenship claims of allegedly communist migrants. Habeas Corpus applications filed by detainees in India contain details on existing ideas of loyalty and political belonging in the early years of Indian independence. In a famous case examined in the book, laws for public safety were used against alleged communist migrants who were detained in Madras and had to prove their political loyalty to the new Indian nation state. Such legal cases offer a glimpse into the intertwined notions of territory and political loyalty, as well as global geopolitical shifts during the period of decolonisation.

While the book identifies 1942 as a watershed marking major shifts in the juridical and geographical reordering of colonies, the processes of building new national boundaries, nationalities and citizenship were set in motion in previous decades in various iterations of anti-colonial national imaginings. For instance, contours of belonging, indigeneity and nation states were being formulated in British India from the late 19th century. The forces of decolonisation already in motion were given an impetus by the economic and political pressures brought about by the Second World War. The legal archives examined by Ramnath intervene in existing scholarship on this period by capturing the histories of ordinary people caught in a storm of changing territorial and jurisdictional boundaries. The displacement of migrant workers in the colonies of British India, Burma, Malaya and Ceylon was deeply connected to the movement of capital. As such, the migrants' political allegiance and their social location came under scrutiny of the imperial and later national governments in these places.

The second section of the book draws attention to national and international debates on questions

of citizenship during the period under study. These debates reveal the contours of shifting jurisdictional and political boundaries from imperial to new national states and its impact of migrants whose livelihoods, families and businesses were spread across multiple new nations. After independence, India prohibited dual citizenship due to the large-scale communal and territorial clashes with Pakistan. Similarly, Burma and Ceylon prohibited dual nationality. Migrant workers in Ceylon discussed possibilities for dual citizenship for workers in India and Ceylon. However, the jurisdictional and territorial boundaries of the new nation states were solidified by laws of citizenship that prohibited any crossovers. The definition of citizenship in all these new nations solidified and sharpened distinctions between different groups coded as majority versus minority, indigenous versus migrant, insider versus outsider. These markers impacted people's ability to establish a livelihood, led to the loss of rights to land and property, and often resulted in deportation orders where people became stateless. Rehabilitation policies were introduced for returning migrants which labelled people as refugees, evacuees or repatriates with increased policing and surveillance of those registered as such. The Ministry of Rehabilitation in India was introduced in 1948 to deal with the large exodus of people from neighbouring Pakistan. The same legal framework and relief programme was extended for returning migrants from Burma and Sri Lanka. During this time, the earlier cases related to taxation regimes or debt recovery appear less in the records, whereas citizenship-related cases increased. The book's concluding chapter shows how repatriation and resettlement policies in post-colonial India were intertwined with developmental strategies. Such strategies included the housing and employment of incoming migrants in specific regions and sectors. This was accompanied by political organising around race, ethnicity, religion and class. Ramnath eloquently points out that »in the context of decolonization's modernizing tendencies, an appeal to what appeared to be ›ancient‹ and ›timeless‹ was critical« (206). In the new nation states of South and South East Asia, religious, caste, and ethnic identities were central to developmental, legal and political projects.

■

Matilde Cazzola

The Ideology of Greater Italy: Absolving the Guilt of Empire*

The Italian context still appears characterised by a puzzling gulf between an excellent, growing scholarship on the history of Italian colonialism in Northern and Eastern Africa, on the one hand, and a collective consciousness which promotes crypto-negationist ideas of Italians as humane colonisers and of the Italian Empire in Africa as a benevolent domination, on the other. In view of such problematic public memory, which is impervious to the results of specialist literature, the new book by Emanuele Ertola – which reconstructs the origins of that memory in the ideology supporting the process of Italian empire-building – is a much needed one. The work sheds light on the *fil rouge* which, amid historical ruptures and major changes, connected the colonialist aspirations in the aftermath of the unification of Italy in the early 1860s with the rampant imperialism of the fascist regime, as well as the first colonial conquests of the pre-fascist Kingdom of Italy with the post-fascist imperial nostalgia of the Italian Republic. From their very beginnings, Italian imperialist ambitions and achievements have been informed by an incredibly long-lasting notion. This notion has not

* Emanuele Ertola, Il colonialismo degli italiani: Storia di un'ideologia, Roma: Carocci 2022, 191 p., ISBN 978-88-290-1505-4

only managed to survive major transitions – from the pre- to the post-unification era, from the monarchical to the republican phase, and from liberalism to authoritarianism to democracy – but was also not shaken by the ideological challenges potentially represented by catastrophic military defeats during both colonial campaigns and two world wars, as well as freedom movements such as the 19th-century Risorgimento and the Italian Resistance during World War II.

This notion is, as Ertola convincingly demonstrates, the distinctively Italian version of the ideology of settler colonialism, a European-born and globally employed intellectual pattern which predicates the neo-Malthusian link between the internal social problems of a superabundant population and resulting pauperism, unemployment and social tensions, and the external solution to these issues, identified in mass emigration and the systematic settlement of colonial territories (10). On the one hand, this Italian colonialist ideology adopted some of the notions already part of the »myth« of settlerism invented by other nations, first and foremost imperial Britain. These include the impulse to establish new societies, at once ›daughters‹ and ›sisters‹ of the mother-country; the concealment of violent conquest under the guise of a seemingly peaceful colonising process; and the representation of conquered territories as de facto vacant, to the detriment of the non-white and non-European colonised. Italian imperialists appropriated this transnational ideology and translated it into a peculiarly national jargon, whose ebbs and flows throughout a century of imperial history are tracked by Ertola.

The originality of Italy's take on settlerism coincided with a powerfully justificationist narrative. Whereas, as Ertola remarks, the settler colonial ideology, in its standard formulation, sought to optimistically present the phenomenon of emigration as an act of hope rather than despair (16), its Italian variant stressed the urgent, almost desperate necessity of the nation to find an outlet for its emigrant and labouring population. As early as the 1860s, the newly-Italian political and intellectual elites began to present emigration as a response to class struggle and an alternative to social reform, and the settlement of a colonial empire as its inescapable outcome. If relocated to the territories of the Italian Empire, in fact, emigrants would no longer be lost to the nation, and the country's population drain would be turned from a factor of weakness into a means of expansion and therefore a resource. Moreover, by stressing the poverty and industry of Italian emigrants, the conquest and colonisation of the empire represented not a »safety valve« to an overcrowded and criminal population but rather a well-deserved opportunity of relocation to an honest and hard-working proletariat (21). From this perspective, the empire was presented as conquered *for* the people, and imperialism as the natural consequence of an unavoidable process of settlement. Whereas the British Empire, this colonial myth went, entailed rapine and exploitation, the Italian one, being motivated not by thirst for riches but by an almost humanitarian necessity, was socially plebeian and morally benevolent (145). In addition, the entire country was to be described as a »proletarian nation«, and its colonial possessions the stakes of its successful class struggle against other European capitalist powers (90). What Ertola reconstructs is, therefore, a self-absolving, passive-aggressive colonial ideology, that, from its very beginnings, managed to successfully erase the violence of conquest and domination from its narrative.

The book begins at the second half of the 19th century, when, »as ›colonial‹ was the feature characterising all modern European powers«, the new country was also expected to rush into the conquest of the »Oltremare« as part of its own process of unification (19). Although the first imperial outposts in Eritrea were acquired in the early 1880s in light of commercial and political considerations, the enterprise appears to have already been informed by the rhetoric of settlerism (34). The continuity between nation-building and empire-building was emphasised during the Italian invasion of Libya in 1911, which coincided with the 50th anniversary of unification (86). The settler colonial ideology was then powerfully exploited by the fascist regime, which conceived of the African colonies, on the one hand, as a spur to demographic increase (101–104) and, on the other, as a laboratory of experimentation of their desired totalitarian society, peopled by a socially selected and »racially pure« population and subject to a pervasive, centralised and bureaucratic government (118–119). The anti-fascist Italian Republic appears, in turn, to have been affected by a surprising continuity with the colonialist aspirations of the regime. Having been deprived of its African Empire in the aftermath of World War II, Italy unsuccessfully demanded the restitution of its pre-

fascist colonies (Eritrea, Somalia and Libya, whereas the fascist conquest of Ethiopia was significantly not reclaimed), once again stressing the old myth of a »labouring people's empire« (118, 128–133). The early 1950s witnessed the attempt to forge the ultimate and official narrative of Italy's colonial past via the establishment of the »Committee for the documentation of Italy's work in Africa« (153). The Committee can be considered the swansong of the Italian settler ideology, prior to the emergence of a new historiography which, in the following couple of decades, finally solicited a profound rethinking of this myth.

Ertola discusses the internal inconsistencies in the long-term sameness of the idea of »Greater Italy« (69) by analysing a wide array of sources produced by an extremely diverse group of historical actors across the political spectrum. These include adventurers, statesmen, lobbyists, economists, journalists and geographers belonging to liberal, Catholic, conservative, socialist, nationalist, royalist or republican, fascist or anti-fascist fronts. This book demonstrates that a rhetorical and ideological superstructure always supports colonial rule, even when, like the Italian one in Africa, this rule is characterised by an intrinsically fragile, poorly funded and – despite the colonial myth – scarcely settled imperial structure (72, 120). Intellectual histories of imperial ideologies are a useful complement to the research of legal historians, as the analysis of legal developments in imperial frameworks cannot disregard the study of underlying colonial cultures and their interplay with metropolitan ideas. More particularly, Ertola's book promises to become a useful instrument for those scholars investigating the legal histories of the Italian Empire. Moreover, the book represents a timely contribution to not only the scholarly but also the public debate by demonstrating how the post-fascist national identity of »Italiani brava gente« is the ultimate development of an intrinsically justificationist colonial culture, one which deceitfully emphasises a self-indulgent myth of humanity, hard labour and proletarian settlement over a reality of violence, conquest and racism (13, 128). For almost a century, Italy's colonial history of military occupation, massive deployment of bombs and chemical warfare, segregationist legislation and concentration camps was removed from its imperial self-narrative. In the 1960s, after the Empire was no more, the country's colonial past was wiped away from its national consciousness altogether (141). ■

Andréa Slemian

Law as Practice: History and Theory Concerning the Empire of Brazil*

This is undoubtedly an unusual book in academic legal literature. For the reasons that I will outline, I consider this most praiseworthy. First, in contrast to current dissertations that tend to have a very specific and specialized focus – a characteristic which is far from being bad in principle, but which has become the rule in academia – this work presents research and reflection from different established branches of legal knowledge, almost always shown as distinct areas. The reason for this is that it is the fruit of a compilation of texts by José Reinaldo de Lima Lopes, some previously published, others new. Throughout a life dedicated to thinking about the field of law, he has produced

* José Reinaldo de Lima Lopes, Cultura giuridica e istituzioni in Brasile tra Otto e Novecento. Saggi sulla storia del pensiero giuridico, delle codificazioni e del processo, Pisa: Edizioni ETS 2022, 438 p., ISBN 978-88-467-6387-7

arguments characterized above all by thinking about Law – here purposefully using the capital letter. As a reflection of his robust thought, the book has three unifying sections: »Theory, history, and method«, »Legal culture, codes, interpretation«, and »The history of judicial process and justice«.

This brings us to the second reason for the book's high quality. Reading it unveils to us how the diversity of themes is really connected with the author's reflections, as well as promoting an interdisciplinary dialogue, above all between history, law, and economics. The thread that unites them comes from the very conception of law, whose clear exposition is expressed as a fundamental requirement for those who have dedicated themselves to their field, whether theorists (philosophers, historians) or social operators of law. In this sense, it is welcome that the volume starts with the text »Diritto e storia: questioni per una strana disciplina«, in which Lopes outlines his understanding of law as *practical* knowledge that feeds the regulating universe of social relations. This concept informs the entire book. A third element of the exceptional quality of the book is the clear style which characterizes the works of José Reinaldo in Portuguese and which the fine translation by Anna Basevi has preserved well. This style expresses José Reinaldo's – I allow myself to call him like this – mark as an academic teacher developed over years of teaching and guiding students, which I had the opportunity to enjoy during my post-doctoral studies. This book demonstrates clearly why the training of the jurist as above all a thinking being, rather than a simple reproducer of rules, fundamentally requires an education including philosophy and history of law.

As highlighted in Italo Birocchi's insightful preface, José Reinaldo's analysis of Brazil in the 1800s proves to be of utmost relevance, and even of extreme familiarity with European subjects of law, for a public which ranges far beyond Brazil. This is no doubt due to the centrality of a conception of legal culture that links the great problems of the century to the construction of states and constitutional regimes, in their most varied dimensions, through the common production of legal knowledge beyond geographic and political boundaries. Although the epicenter of the references that the book acknowledges as canonical lies in the northern hemisphere, José Reinaldo shows how jurists in Brazil played an effective, and even creative, role in its reception, »digestion«, and had agency in the production of a national legal culture. This justifies the book's translation into Italian, but it is equally of interest to the Brazilian public, since it brings together in a single volume various studies representing José Reinaldo's central arguments. Furthermore, some of these are previously unpublished.

Obviously, the volume is even more essential for those venturing along the paths of the history of law in Brazil, but not only these. For jurists, it is of interest due to the questions which lead them to see philosophy and history as fundamental for their own education and interaction in the world at present. Those trained as historians, like myself, impelled by the paths of research to study law, the volume enables to modulate our questions about the past through an appropriate reflection on the field of law. For this reason, I will avoid producing a mere summary of the topics of the work; rather, I present the issues José Reinaldo raises, putting his work in dialogue with what we have in common: history.

I will start with José Reinaldo's definition of Law, since it is fundamental for the History that he produces. As a type of practical knowledge, he defines Law as a true »language«, a convention, in which social agents collectively »share« the rules which are valid in each situation, moment, and social space, and whose foundations can be found in the ideas of John Searle, as well as in analytical philosophy. In this sense, historicity is a powerful instrument for the reflection of jurists to produce a *de-* or *re-*centering of the issues involved in each situation and its participants, whether in the past or in the present, since it allows us to rethink debates and solutions in each of the contexts. Thus, the historicity of law interacts with its function of normative and preceptive knowledge, since jurists share(d) a »mode of acting« that is inseparably both a practice and technique, understood as much more than a simple application or manipulation of formulas. The *tradition* in which jurists are immersed forms the common terrain in which they operate, consciously or unconsciously, in the *continuum* (to use José Reinaldo's own words, 46) of the transmission of issues which characterizes law and creates the ties of belonging across generations.

José Reinaldo's clear presentation provides us with the keys to a narrative which historians must bear in mind when, in analyzing the jurists of the past and the culture which created them as such, they conceive instruments of criticism suitable to

the discourse of the field. However, it also confronts us with a question, for which there cannot be an easy answer, regarding those who *observe* and those who *interact* in the production of historical knowledge. José Reinaldo clearly addresses this issue in the chapter in which he proposes to reconstruct the trajectory of the reintroduction of the discipline of history in law faculties in Brazil. Allowing his own personal trajectory to serve as an object of reflection in the chapter's delightful initial pages – which seem highly significant regarding the heuristic operation he carries out – he provides us with an unprecedented reflection on the teaching of law in recent decades. In addition to this, he defends the project of teaching law that finds its most complete form in jurisprudence as a theory of action and practice effectively supported by the history of law. It is in this defense of a »history of law for jurists« that José Reinaldo raises the epistemological debate about the »internal« or »external« point of view, as well as developing his response to overcoming the erroneous dichotomy between institutional history and intellectual history that should be superseded by the conception of the creative aspect of jurisprudential production. Recognizing the sophisticated theoretical construction behind José Reinaldo's analysis, it is worth noting that he tends to valorize the legal knowledge produced, and less the antidotes to an epistemological distance between those who *write* and those who *observe*, who are actually united by tradition. If this is one of the paths for a critical dialogue between a historian like me and his work, it only has been made possible through his work.

Throughout his analyses of the different chapters' themes, there is a perfect coherence of José Reinaldo's ideas. His reconstruction of the main lines of approximation between law and economics since the end of the 18th century highlights, first, the problems of establishing a constructive dialogue between disciplines through the analysis of the jurists who have remained the key scholars cited until the present era. Second, he shows how history can be a useful resource against technocracy. The foundation for the approximation between law and economics lies in the dimension of political action for each of the fields of knowledge, such as that produced by the liberal model based on the free market and on the atomist view of property, which brought the problem of how to regulate the economy to the fore. Although the chapter reconstructs the debate between important jurists and does not specifically analyze the case of Brazil, it provided us with the key for the organization of a dictionary about the relations between law, economics, and history published in 2021.[1]

In the second part of the book, concerned with modern constitutionalism, codes and interpretation, the experience of the Empire of Brazil comes to the fore. The discussion of the cultural environment of codification opens up space for the discussion of Brazilian jurists not only in relation to their task but also to the characteristics of the newborn science of Brazilian law. It is important to note that after the Brazilian Empire gained independence from Portugal (1822), a Criminal Code and a Code of Criminal Procedure were enacted in 1830 and 1832, respectively, followed two decades later by the Commercial Code (1850). As is always highlighted in the historiography, no civil code was enacted in Brazil until the republican regime in 1916. José Reinaldo contributes to the problematization of this issue and questions if it can be called a mere lacuna in Brazilian legal history. Far from seeing the late enactment of a civil code as a symptom of national backwardness, he demonstrates how, on the one hand, there was a production of jurisprudential knowledge about civil law issues in the Empire by discussing the activities of various jurists; on the other, there was a direct relationship in the overlapping of civil law and commercial law. This seems one of José Reinaldo's most original contributions to the reflection on codification in Brazil.

The chapter dedicated to commercial law presents José Reinaldo's interpretation in detail. In it, he examines the legal debate about the possibility of unifying private law in a single code that would bring together commercial and civil law matters, a not uncommon proposal at the time. However, what is most novel in his analysis is precisely his examination of how the approval of

1 Bruno Aidar, Andréa Slemian, José Reinaldo de Lima Lopes (eds.), Dicionário histórico de conceitos jurídico-econômicos. Brasil, séculos XVIII–XIX, São Paulo 2020.

the commercial code ended up regulating questions of a civil order, since they were under the aegis of a private legal order which had positioned itself as hegemonic for constitutional regimes since the 19th century. Using the knowledge produced by jurists as a guiding thread reveals the impasses and vicissitudes experienced at the moment – a fundamental operation for a historical analysis. At the same time, however, it poses the question of how to look at these voices from the past. The men who took on themselves the task of constructing a national law were the greatest defenders of the constitutional framework, at the same time as being the most politically conservative. Not only because the construction of a state also signified a narrative task of the intended overcoming of the colonial past; on the ground, it was a coercive operation of imposing law on the local reality of the Empire's multiethnic society – including the maintenance of the slaveholding system and the subalternity of indigenous peoples. No matter how much José Reinaldo does for the understanding of this history, his work allows us to question to what extent the Brazilian Empire's jurists, in the prescriptive operation that belongs to law, did actually break with the past in their social practice, irrespective of their construction of such a narrative within a constitutional framework. Ultimately, what does this framework mean? It is worth evoking here Marc Bloch's classic statement that men change words, but not always habits, and equally that continuities are always part of a choice, never a natural operation, as could be said of tradition itself.

The question about prescriptive creation made by jurists can in part be answered, taking into account that the study of jurisprudence is one of Jose Reinaldo's main historical interests. Notable here is the chapter dedicated to the legal interpretation of Tulio Ascarelli, an Italian jurist exiled by the fascist regime who lived in Brazil in the 1940s. He lectured at the Faculty of Law of São Paulo and created a school of thought which lasted for several generations. The question is further pursued, and in part resolved, in the final section of the book, which focuses on another dimension to be considered in history: the institutional. Present here are José Reinaldo's important contributions to the understanding of the history of the legal procedures and the courts during the 19th century in Brazil, understanding them as the fruit of a tradition of justice but equally of local conflicts in the nascent Empire. José Reinaldo makes an exquisite analysis of the creation of the new institutions of justice, centered on the popular jury *(jurado)* and the Supreme Court *(Supremo Tribunal de Justiça)*, exploring also various and opposing positions other than those of jurists. The final chapters also deal with, first, the creation of the court of trade in Brazil, reconstructing the history of commercial jurisdiction, examining also the conflicts surrounding the creation of the new institution; and, after this, the history of civil procedures in the 19th century, discussing social-political conditions *vis-à-vis* the administration of justice and the creations of jurists in solving impasses. For José Reinaldo, institutional history and the history of legal thought are inseparable, like two faces of the same coin.

The argument that the knowledge produced by jurists, jurisprudence, continues to be the guideline for their work is clear, whether for theory or for history. The expression of legal culture is used in the classic sense in the title, which skillfully ties together the various chapters. It emphasizes the centrality of the valorization of law as practical knowledge produced by those involved in its (re-)production. From the 19th century onwards, this also included those involved in the construction of states and the foundation of their legitimacy. However, since the final decades of the last century, a broadening of the concept of legal knowledge has been proposed, based on the new perspectives opened up by the critical history of law, legal sociology, and anthropology. These approaches have expanded the range of the participants in the sphere of law – or even different legal orders, in the plural – in addition to their interpreters. It is no coincidence that today one of the possible oppositions to the idea of a legal culture is that of normativities, and even multinormativities, characterised by the acceptance of other epistemologies that had a recognized legal meaning and legal knowledge. All of this makes sense if we think that, specifically in 19th-century Brazil, the sphere of the state had a limited scope in relation to socio-cultural practices (marked by the presence of the *Casa*, or household, as the traditional legal locus), but also in the route taken by various social agents in their mobilization demanding rights so characteristic of the 1800s. This is not the kind of history José Reinaldo Lopes writes, but his work is extremely important as a basis and inspiration for those who do.

■

Manuel Martínez Neira

Código y periferia*

En octubre de 2023, en Nápoles, Cristina Vano organizó una presentación de la obra reseñada.[1] El acto académico (plagado de ilustres colegas) coincidió con la nominación para el premio Nobel de física de Anne L'Huiller. Las primeras palabras de esta física de nacionalidad francesa tras conocer la noticia fueron: »La ciencia básica debe estar impulsada por la curiosidad«. Esta condición sirve, en mi opinión, para reflexionar sobre la investigación que esconde las muchas páginas de este volumen, pues aunque obviamente no la agota – sin la tenacidad ni el esfuerzo de Petit difícilmente hubiéramos visto su publicación –, sin ella (el ser curioso) no se concibe. En efecto, frente a la imperante producción científica cortoplacista que se mueve fundamentalmente por criterios de carrerismo, aquí se nos plantea otra cosa.

El libro recopila diez trabajos previos, a los que se suman algunos inéditos (el referido al código de Montenegro o los sustanciosos apéndices), que remiten a un largo arco temporal: fueron publicados entre 1995 y 2022, durante más de 25 años. Pero la nueva publicación es algo más que sus piezas singulares, pues esos escritos previos han sido mutilados y modificados para conseguir unidad, evitar repeticiones, hacer remisiones, actualizar bibliografía y puntos de vista que han ido madurando. Las tres partes que lo componen (conceptos, comparación, doctrina) delatan de partida la opción metodológica: es precisamente la segunda, que ocupa casi la mitad de las páginas, la que presta el título al conjunto.

Aunque conocidos, por tanto, espero que ahora, con la visibilidad que otorga un volumen, sirvan para reflexionar de otra manera sobre el fenómeno codificador. Es lo que tienen las periferias (y aquí observo un segundo aspecto, identificado con el adjetivo »otros«): nos ayudan a ver las cosas más allá de los lugares comunes y por encima de ellos, es decir, trascendiéndolos. Y una doble periferia ofrece este libro: la experiencia española, claramente marginal con respecto a los »modelos«; los textos »exóticos« como el portugués o montenegrino. Desde estos territorios »de frontera« podemos, sin duda, replantearnos tantos esquemas docentes que entiendo es lo que esconde el subtítulo: por (o para) una historia de la codificación civil. Hecha esta historia además desde España, en un doble sentido: por un investigador español que trabaja en España; gracias a materiales referidos en su mayoría a la circulación de textos que tienen en el país ibérico su epicentro. Pero el objetivo no es indagar en lo local (entretenerse, diría el autor), sino que lo trasciende para insertarse en una historia de la ciencia que siempre tiene un ámbito supranacional. Y claro, frente a los esquemas didácticos al uso, estas páginas introducen una complejidad que el autor administra con fina ironía: Código inexistente, el Código de Tránsito no es código – son algunos ejemplos. Se llega así, por otros derroteros, a la tesis que hace tiempo propuso Pio Caroni: considerar el código no como entidad autónoma y autorreferencial, sino como un derivado o producto de una sociedad concreta, una sociedad que codifica.[2]

La curiosidad también está presente en el aparato crítico del libro, es decir, en la pluralidad de fuentes utilizadas. Entre ellas sobresale la prensa jurídica, un campo hasta hace poco marginal y que Petit ha adoptado como recurso prioritario poniendo así en valor un instrumento de comunicación de doctrinas jurídicas que se había descuidado. Pero también la correspondencia epistolar. Cartas, periódicos y revistas »jurídicas« le permiten descubrir noticias sobre la codificación civil hasta ahora desconocidas y partir de ellas para una nueva interpretación.

Por ejemplo, aunque el rechazo generalizado (salvo excepciones) al Código civil de 1888 era algo conocido (y de alguna manera inevitable),[3] ahora

* Carlos Petit, Otros códigos. Por una historia de la codificación civil desde España, Madrid: Dykinson 2023, 641 p., ISBN 978-84-1170-074-0

1 Seminari di storia e cultura giuridica. Tredicesima edizione: Otros códigos. Dialoghi di storia delle codificazioni, 11 ottobre 2023.

2 Pio Caroni, Escritos sobre la codificación, Madrid 2012, p. xiii.

3 Como para el caso francés ha recordado Sylvain Bloquet, al documentar la necesidad de un cambio generacional para pasar página de la cultura jurídica previa a la codificación: Sylvain Bloquet, La loi et son interprétation à travers le Code civil (1804–1880), préface de Christophe Jamin, Paris 2017.

podemos entender mejor la singularidad del caso español. Encontramos así a un Rafael Altamira instalado en la dirección general de Enseñanza (1911) donde (ante un foro de maestros) a los tiempos en que se gobernaba desde la *Gaceta* contrapuso una legislación atenta a diversidades locales, según había practicado »el autor del Código civil de Montenegro, que fue recorriendo el país, enterándose de sus necesidades y aspiraciones antes de legislar« (292). Son palabras que registran una nueva etapa histórica, la que se abre cuando, tras la revolución de 1868, el krausismo materializó su rechazo al individualismo mecanicista y cultivó un corporativismo organicista; cuando, desde esta nueva perspectiva, Gumersindo de Azcárate (1885) criticó un parlamento que manifestaba solo los intereses de la clase propietaria con olvido de las cuestiones sociales y las condiciones de vida de los obreros; cuando se recuperó por iniciativa de Adolfo Posada el *Beruf* (1896); cuando Joaquín Costa (1897) promovió una serie de concursos para documentar el derecho consuetudinario y la economía popular, dando inicio así la escuela española de derecho consuetudinario …

Ante la insatisfacción por un Código impuesto y extemporáneo, Petit hace del »Altamira civilista« (563 ss.) un testigo y protagonista de la discusión sobre las fuentes del derecho que recorrió la cultura europea de *fin de siècle*, cuando nuevas manifestaciones del derecho legislado (el Código de Montenegro, 1888; el BGB, 1896; el Código suizo, 1907) y el agotamiento de la exégesis permitieron idear otros recursos interpretativos (566). Por eso, la recuperación de sus artículos (de títulos elocuentes) publicados en *La Justicia*, a partir de noviembre de 1888, supone una ayuda más para esta reflexión: ¿Quién ha hecho el Código?; ¿Vivirá el Código?; Efectos de la prisa; etc.

Precisamente el interés por esos otros códigos (Montenegro, BGB, Suizo) servía para criticar la obra de Alonso Martínez, autor del código español, cuya efigie ilustra la cubierta del volumen. Se hacía por lo tanto una lectura interesada. Por ejemplo, en sus lecciones del doctorado Azcárate profundizaba en la formación del Código alemán, algo »que interesa mucho conocer, para ver de qué forma y con qué detenimiento se ha llevado a efecto la elaboración de este Código y que pudieran haber servido de ejemplo para la formación de nuestro Código«, según leemos en los apuntes de clase (360). Y como contrapunto el desinterés por el Código civil español que Petit documenta a través de las tesis de doctorado defendidas desde su promulgación y hasta la guerra civil (444 ss.). De manera que, en un ejercicio de ironía, puede decirse »que se conoció con mayor rigor el BGB que nuestro castizo Código civil« (446). De ahí la temprana (1897) traducción del BGB al castellano y la »germanización« del derecho privado en la España del cambio de siglo (369), correlativa a esa *peregrinatio germanica* impulsada por la Junta para Ampliación de Estudios e Investigaciones Científicas (la JAE) al tomarse como parámetro para medir el progreso intelectual de los candidatos a la cátedra (373).

Son estos, entre otros, asuntos necesarios para hacer una historia de la codificación civil que trascienda un mero relato lineal de textos publicados en la *Gaceta*. De ahí el interés de Petit por recordarlos frente a la desmemoria del jurista: »La pérdida de memoria nos vino más tarde, con el cierre del ordenamiento civil a cargo de una nueva generación de juristas« (54), la que cristalizó después de la guerra civil española. A esa nueva generación de civilistas se debe el interés por un Código tantas veces modificado, de manera que Petit puede concluir que la aceptación de un »auténtico« Código civil solo puede situarse en el ocaso del franquismo.

El volumen reseñado cierra una trilogía que comenzó en 2019 con *Un Código civil perfecto y bien calculado* y continuó en 2022 con *El Trienio y sus códigos*:[4] el/la lector/a interesado/a tiene en ella el rico fruto de la curiosidad del autor.

■

4 Carlos Petit, Un Código civil perfecto y bien calculado: el proyecto de 1821 en la historia de la codificación, Madrid 2019; idem, El Trienio y sus códigos: estudios, Madrid 2022.

Karolyne Mendes Mendonça Moreira

Countercolonialism and Legal History Through the Lens of a Black Bishop*

A terra dá, a terra quer is the last »offering« that Antônio Bispo dos Santos, better known as Nêgo Bispo, »sows« into the earth. I refer to it as an offering, rather than a book, given the manner in which this text is presented by this cultivator of ancestral wisdom: as seeds, fortresses of power for life's preservation. As he used to say, his words were »germinating« (germinantes).

Nêgo Bispo was born in the Berlengas River Valley, in Brazil. He received his initial education under the tutelage of the oral tradition masters in the Saco-Cortume *Quilombo*, situated in the municipality of São João do Piauí. *Quilombos*, broadly speaking, are self-governing communities of social resistance established by enslaved Black populations during the colonial era. Since the 16th century, numerous *quilombola* communities have emerged, and today, hundreds of them remain in Brazil.

Unlike his ancestors, Bispo was the first of his generation to have access to literacy. He emerged as an intellectual who translated his *quilombola* cosmovision and countercolonial worldview into books, articles, lectures and poems. Renowned for his political action, he actively defended traditional territories, symbols, meanings and ways of life, which he terms »organic« in his writings. He learned to sow words in his daily relationship with nature, the elders and the movements advocating traditional territories. From this rich experience, Bispo developed his philosophical framework. In his theory, the author did not imagine a new world. His writings are based on a concrete world: his *quilombola* world, which engages in a dialogue with other worldviews on an equal footing.

In his most recent book, one can sense the impact of this cosmic perspective and gain an understanding of its influences. Indeed, this reflects the author's desire: that people from academia, members of other epistemic communities, can somehow access his knowledge, feel it and apply it.

The book does not contain scholarly texts, like those an academic might be used to. It comprises writings deeply permeated by his oral and circular cosmovision. Consequently, it is not a linear, schematic guidebook. This piece of writing poetically translates knowledge that has been transmitted orally to him. After all, as Antonio Bispo explains, the *quilombolas* are people of trajectories, not people of theory. They are people of circularity: beginning, middle, and beginning.

The book is structured into six interconnected chapters: »Sowing words«, »Cities and cosmophobia«, »We are sharers«, »Architecture and countercolonialism«, »Colonialism of submission« and »Creating free, planting fenced«. Through his narrative, Bispo establishes a profound critique of the Western colonial world and its humanism, denouncing the disconnections in the relationships we establish with animals, the forest and other beings. According to the author, »despite being creatures of nature, humans detach themselves from nature and seek to become only its creators. Hence their need to synthesize the organic, to see life as raw materials and to turn nature into money.« It is against this way of life that Bispo disruptively refuses even his own humanity. For him, this refusal implies denying belonging to a species that does not recognise itself as an integral part of nature. As a result of this dissociation between humans and nature, according to the author, we have a cosmophobic society, that is, a society incapable of recognising itself as part of a natural whole and of being respectful towards it.

Continuing the reflections established in *Colonização, quilombos: modos e significações* (2015), the quilombola thinker deepens his perspective on decolonial studies, though he does not explicitly engage with existing literature in the field. »Coun-

* Antônio Bispo dos Santos,
A terra dá, a terra quer, São Paulo:
UBU Editoria 2023, 102 p.,
ISBN 978-85-7126-105-1

tercolonization« is the key concept he developed that has sparked debate both inside and outside academia. For the author, the concept seeks to re-signify, in a prominent place, the cultural matrix of the so-called ›traditional‹ peoples, enunciating their forms of resistance. As he explains, coloniality and decoloniality are aimed at those who, to a greater extent, have been inserted into colonial structures (such as academics, for example). Countercolonisation, in turn, is a theory guided by ›traditional‹ peoples' practices, including indigenous and *quilombolas*. It is therefore located within a theoretical and practical debate, offering tools to examine these communities' modes of resistance to colonisation.

Within its countercolonising project, language occupies a prominent place. And in this point, I believe, lies his great contribution to the reflection on possible imaginaries for a countercolonial legal history.

In his work, the author talks about the importance of the act of »naming« as a (counter)colonial strategy. In a very didactic way, Bispo recounts that, from his experience as an ox trainer, he learned very early about the connections between the mastery of language and the process of colonisation. According to the author, »both the trainer and the colonizer begin by deterritorializing the attacked entity, removing it from its cosmology, distancing it from its sacredness, imposing new ways of life on it and giving it another name« (12). During this process, assigning a new language involves an effort to erase the existing memory in order to create another.

The perception of the colonising power of naming led Antônio Bispo to incorporate the coloniser's naming practice and use it as a strategy of countercolonial resistance (in his words, in a *diversal* way). For the author, engaging in a »war of denominations« becomes imperative: the game of countering certain colonial words as a way of weakening them. In essence, the strategy operates as follows: on the one hand, »take the enemy's words that are powerful and […] weaken them« and, on the other, »take our words that are weakened and […] strengthen them« (13).

To better explain it, the author offers an example of the meanings of the denomination of sorcery. If some colonisers call Black religious practices »sorcery«, then Bispo suggests embracing this term and re-signifying it. It should be noted, however, that by »sowing« new words – such as countercolonialism, cosmophobia, *diversal* – the author is not just giving new names to things that already exist, but rather proposing new ideas.

In academia, especially in the field of legal studies, the meaning of concepts matters. But what effects of meaning are provoked in our discipline when certain groups intentionally change them? What testimony does the re-signification of vocabulary proposed by countercolonial thinking give us? Of course, it is not a question of creating something totally new (which would be impossible), but of setting in motion a force in the opposite direction to that of colonisation.

In countercolonialism, the countercolonial subject denies their belonging to humanity and denies the coloniser's language, while at the same time appropriating it. The aim is to weaken the colonial hold on language and to strengthen the living and germinating language of countercolonialism; it is a dispossession of language, or rather, a repossession.

If certain normative practices are not considered relevant to the field of legal history, because the concept of law entails a colonial attribution of a legalistic and state-oriented meaning, then Nêgo Bispo also provides a theoretical-methodological tool for a countercolonial approach to the past.

Ultimately, to denominate means »to imagine«. In recent years, there has been a growing recognition on the part of historians and literary scholars of the need to create spaces of imagination to integrate practices and narratives that have been silenced by official discourses. Nêgo Bispo, therefore, is not alone. Whether through the methodology of »critical fabulation« (Mieke Bal), »counter-history« (Catherine Gallagher and Stephen Greenblatt) or »countercolonialism«, what is being questioned is the violence that still invalidates narratives based on non-dominant epistemic practices.

Unfortunately, Nêgo Bispo died recently. But as long as his germinating words are spread, he will live on. Just as his book is an offering to the earth, this review is a simple praise to the »Black Bishop«.

■

Sebastian M. Spitra

Gestundete Souveränität*

The Life and Death of States von Natasha Wheatley könnte seinen Gegenstand auch in Poesie kleiden. In ihrem ersten Gedichtband aus dem Jahr 1953 fängt die wohl berühmteste österreichische Nachkriegsautorin, Ingeborg Bachmann, im Titelgedicht *Die gestundete Zeit* das zentrale Motiv von Wheatleys Buch zuverlässig ein: Zeitlichkeit. Im Denken über Souveränität und Staatlichkeit wurde Zeit als konstitutives Element von Rechts-, Ideen- und Globalgeschichten zumeist übersehen. Ihre Wichtigkeit lässt sich aber gerade anhand der politischen und juristischen Debatten im späten Habsburgerreich des 19. und 20. Jahrhunderts ablesen. Und auch in den Unabhängigkeitsargumenten der Nachfolgestaaten des Habsburgerreichs gab es unzählige Bezugnahmen auf – beispielsweise – eine böhmische, ungarische oder polnische Souveränität. Zumeist begründet mit dem historischen Staatsrecht der jeweiligen politischen Gebilde, war dieses und die daraus fließende Souveränität zu Lebzeiten der Monarchie, wenn überhaupt, so lediglich gestundet. Deutlich erkennbar wurde sie aber in den Konstitutionalismusdebatten der Monarchie und insbesondere dann wieder zum Ende des Habsburgerreichs durch den Ersten Weltkrieg. Oder im Takt von Bachmann: *Dein Blick spurt im Nebel: / die auf Widerruf gestundete Zeit / wird sichtbar am Horizont.*

Natasha Wheatleys Talent, regionale Studien mit breit angelegten theoretischen Reflexionen über internationale Ordnung in Geschichte und Gegenwart zu verbinden, ist in Fachkreisen inzwischen weithin bekannt. Nicht erst mit der Verleihung des Surrency Prize[1] der *American Society for Legal History* im Jahr 2018 geriet sie in den Fokus einer breiteren Forschungsöffentlichkeit im Bereich der Völkerrechts-, Imperien-, Globalgeschichte und *intellectual history*, sondern sie bewies ihr scharfes Auge für interessante Zugänge zur internationalen Rechtssetzung bereits in früheren Studien zum Mandatssystem des Völkerbunds.[2]

In den letzten Jahren intervenierte sie sehr umsichtig im über ein Jahrzehnt andauernden Methodenstreit der Völkerrechtsgeschichte.[3] Im Mittelpunkt dieser theoretischen Debatte zwischen historisch arbeitenden VölkerrechtlerInnen und *intellectual historians* steht die Frage, wie sehr völkerrechtsgeschichtliche Forschung historisch kontextualisiert werden muss und ab wann man in die Falle des Anachronismus tappt.[4] Wheatley selbst zeigt Verständnis für beide Seiten und plädiert für einen Mittelweg, dessen Essenz sich in einem ihrer pointierten Zitate treffend zum Ausdruck bringen lässt: »To speak of law's capacity to escape context and travel through time is another way of describing its normativity«.[5]

Damit gelangt man bereits mitten in das Argument von *The Life and Death of States*. Denn Wheatley versucht in ihrem Schlusskapitel (255–282) zu zeigen, wie die rechtsdogmatischen

* Natasha Wheatley, The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty, Princeton (NJ): Princeton University Press 2023, XIII + 406 p., ISBN 978-0-691-24407-5

1 Die Auszeichnung bezog sich auf den Artikel: Nathasha Wheatley, Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State, in: Law and History Review 35,3 (2017), 753–787.

2 Natasha Wheatley, The Mandate System as a Style of Reasoning. International Jurisdiction and the Parceling of Imperial Sovereignty in Petitions from Palestine, in: Cyrus Schayegh, Andrew Arsan (eds.), The Routledge Handbook of the History of the Middle East Mandates, London 2015, 106–122; dies., Mandatory Interpretation: Legal Hermeneutics and the New International Order in Arab and Jewish Petitions to the League of Nations, in: Past and Present 227 (2015), 205–248.

3 Zu den zentralen Texten der Debatte zählen u. a.: Anne Orford, On International Legal Method, in: London Review of International Law 1 (2013), 166–197; Andrew Fitzmaurice, Context in the History of International Law, in: Journal of the History of International Law 20 (2018), 5–30; Lauren Benton, Beyond Anachronism: Histories of International Law and Global Legal Politics, in: Journal of the History of International Law 21 (2019), 7–40; Anne Orford, International Law and the Politics of History, Cambridge 2021.

4 Ein Überblick über die Debatte erscheint demnächst in Sebastian M. Spitra, A Short Introduction to Research in the History of International Law: Current State, Contexts and Perspectives, in: Zeitschrift für Neuere Rechtsgeschichte 46 (2024 i. E.).

5 Natasha Wheatley, Law and the Time of Angels: International Law's Method Wars and the Affective Life of the Discipline, in: History and Theory 60,2 (2021), 311–330 (311).

Konzepte zur Staatennachfolge aus ihrem Testfeld Mitteleuropa auf die Dekolonisationsdebatten der 1960er und der folgenden Jahrzehnte vorausstrahlen. Ein Argument, das lediglich juristisch funktionieren kann und zahlreiche komplizierende Aspekte des Kolonialismus in anderen Weltteilen ausblendet. Bevor sie sich jedoch um den Brückenschlag bemüht, betrachtet Wheatley die Debatten um die Konstitutionalisierung des Habsburgerreichs seit der Märzrevolution des Jahres 1848.

Die ersten drei Kapitel wandeln dabei zwischen den historischen Staatsrechten der Länder und der Reichsverfassung, also der Innenperspektive des Habsburgerreichs samt seinen Verfassungskontroversen ab 1848, sowie dem Völkerrecht und damit der Außenperspektive auf die Monarchie vermittelt durch die internationaler Rechtsordnung. Beim Definieren und Festschreiben der einzelnen Teile und Länder des Reichs in den Verfassungen – bis zum Ende des Habsburgerreichs gab es, die nicht in Kraft getretenen Entwürfe miteingerechnet, gut ein halbes Dutzend solcher Verfassungstexte – stellt sich die Frage nach historischen, sprachlichen bzw. ethnischen Grenzziehungen innerhalb des Reichs. Dieses Moment weist einerseits auf Fragen nach der Rechtsnatur der Habsburgermonarchie;[6] andererseits aber genauso auf die völkerrechtliche Stellung seiner Teile und des Reichs als solchen.

Wheatley hält diese spezielle juristische Konstellation ausschlaggebend dafür, dass die Habsburgermonarchie besonders theorieaffine Juristen wie Georg Jellinek und Hans Kelsen hervorbrachte, die zu den maßgeblichen Vertretern des Fachs wurden, indem sie sich um einen neuen theoretischen Zugang zum Staatsrecht bemühten (4). So versucht etwa Jellineks Begriffsprägung »Staatsfragment« genau diesen Zwischenraum oder die »Zwischenstufe« der Souveränität abzubilden, die sich zwischen dem Reich und seinen einzelnen Provinzen befand (104).

Das Spannungsverhältnis zwischen der Innen- und Außendimension wird sich bis zum letzten Kapitel nicht auflösen, aber konstitutiv für die Wahrnehmung der Zeitlichkeit von Staaten und Souveränität sein. Das Ende und die Geburt von neuen Staaten lassen sich für Wheatley nur durch diese zweifache Perspektive verstehen. Im Rhythmus von Bachmann: *Drüben versinkt dir die Geliebte im Sand, / er steigt um ihr wehendes Haar, / er fällt ihr ins Wort, / er befiehlt ihr zu schweigen, / er findet sie sterblich / und willig dem Abschied / nach jeder Umarmung.*

Diese Umarmung der subimperialen, staatlichen und internationalen Rechtssphären löst sich beim Ende der Habsburgermonarchie, und Wheatley erzählt, wie es sich bei den Pariser Friedensverhandlungen sowie zuvor auf Betreiben der Exilregierungen neu zu finden versucht. Dass historische Ansprüche der unterschiedlichen Staaten bei den Verhandlungen in variierendem Ausmaß erfüllt wurden, ist bekannt. So gewann das ehemalige Königreich Böhmen durch die Entstehung der Tschechoslowakischen Republik viele neue Gebiete hinzu, auf die es historische Ansprüche erhob, während Ungarn dieselben Argumente nichts halfen und es große Teile des beanspruchten Staatsgebiets verlor (181–216). Außerdem entstand mit dem Völkerbund eine neue Klammer, welche die Folgestaaten der Habsburgermonarchie zusammenhielt und auch teilweise auf seine Praktiken zur Verwaltung von Vielfalt zurückgriff.[7]

Die Republik Österreich, die ihren zunächst gewählten Namen Deutschösterreich ändern musste, wurde von den Alliierten als Rechtsnachfolgerin der Habsburgermonarchie angesprochen – ein Übergang von Souveränität, dem sich das offizielle und fachjuristische Österreich widersetzte. Diese rechtlichen Entwicklungen wurden jedoch von Hans Kelsen und seinem Wiener Kreis theoretisch begleitet und reflektiert. Er und insbesondere seine Schüler Josef L. Kunz, Alfred Verdross und Fritz Sander bemühten sich nach dem Ersten Weltkrieg um eine Auflösung des bereits erwähnten Spannungsverhältnisses zwischen Innen und Außen. Das Ergebnis war der Monismus der Rechtsordnung, oder, wie es Verdross in einem seiner Buchtitel programmatisch formulierte: Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung.[8] Damit wurde das

6 Zu den Anfängen dieser juristischen Problematik siehe Martin P. Schennach, Austria inventa? Zu den Anfängen der österreichischen Staatsrechtslehre, Frankfurt am Main 2020.

7 Peter Becker, Natasha Wheatley (eds.), Remaking Central Europe. The League of Nations and the Former Habsburg Lands, Oxford 2021.

8 Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung, Tübingen 1923.

Spannungsverhältnis zugunsten der internationalen Rechtsordnung aufgelöst, das staatliche Recht in den größeren »Stufenbau« der Rechtsordnung integriert.

Wheatley bricht ihr Buch jedoch an dieser Stelle in der Zwischenkriegszeit ab, bevor sie zum Sprung in die zweite Hälfte des 20. Jahrhunderts ansetzt. Die Annexion Österreichs durch NS-Deutschland – die juristisch heute als eine Okkupation betrachtet wird – und die Debatten vor und nach dem Zweiten Weltkrieg in den ehemaligen Ländern der Habsburgermonarchie sind kein Gegenstand des Buchs. Ob auch hier Bachmann tongebend war? *Sieh dich nicht um. / Schnür deinen Schuh. / […] / Es kommen härtere Tage.*

Die Parallelen zwischen den rechtlichen Entwicklungen in Mitteleuropa und den Dekolonisationsereignissen nach dem Zweiten Weltkrieg liegen an diesem Punkt aber bereits auf der Hand.[9] In beiden Fällen entstehen Staaten in ein bereits vorhandenes Völkerrecht und eine internationale Ordnung hinein, dennoch sind die zu übernehmenden Rechte und Pflichten unklar. Hier beginnt Wheatleys Buch jedoch ein anderes Register zu ziehen, das vom vorangegangenen abweicht. Anstatt dem oben beschriebenen chronologischen Ablauf und dem regionalen Kontext zu folgen, bemüht sich Wheatley wirkungsgeschichtlich um das Einfangen der mitteleuropäischen Lehren aus dem Ende des Habsburgerreichs für die Dekolonisationsbewegungen in der zweiten Hälfte des 20. Jahrhunderts. Dies ist jedoch nur um den Preis einer sehr einseitigen Darstellung möglich, die zwar ein interessantes Argument hervorbringt, an dessen Überzeugungskraft man aber als Leserin und Leser selbst glauben muss. Es erinnert an vergleichbare Werke (völker)rechtlich orientierter *intellectual history*, die dem Verstehen und der Einordnung juristischer Entwicklungen abstrahierend ideengeschichtlich auf der Spur sind. So beschäftigt sich etwa *King Leopold's Ghostwriter. The Creation of Persons and States in the Nineteenth Century* von Andrew Fitzmaurice mit der Kreierung von (juristischen) Personen auf persönlich-privater, korporativer, kirchlich-öffentlicher sowie völkerrechtlicher Ebene.[10] Mit diesen Personwerdungen verfolgt man im Buch einen roten Faden durch das Leben des englischen Juristen Travers Twiss, das den Zusammenhang zwischen diesen unterschiedlichen Bereichen und Episoden zwar durch eine reichhaltige geschichtliche Kontextualisierung plausibilisiert, nicht aber zu begründen vermag.

Wheatley liefert die Erklärung für dieses Vorgehen jedoch bereits in ihrer Intervention zum völkerrechtlichen Methodenstreit: Die Normativität von Völkerrecht übersteigt zeitliche und geographische Grenzen.[11] Im Abstrahieren von Kontexten und dem Ausfindigmachen von Wiederholungen zeigt sich das genuin rechtliche (und dogmatische) dieser Geschichten. Damit positioniert sie sich mit ihrem Dekolonisierungskapitel im Nahbereich zu Anne Orfords völkerrechtshistorischer Traditionslinie.[12]

Demgegenüber hätte die Einbettung des Habsburgerreichs in die gegenwärtigen de- und postkolonialen Debatten aber durchaus erhellende Einsichten bringen können; insbesondere auch für eine breiter angelegte Kontextualisierung ihres Souveränitätsarguments in den Dekolonisierungsdebatten.[13] Dies wurde von Wheatley aber leider gänzlich vermieden. Dabei ist ihr Buch ansonsten stark kontextgesättigt: So wird vermutet, dass Adolf Merkls räumliche Vorstellung vom »Stufenbau« der Rechtsordnung auf seine Kindheit im bergig bewaldeten Niederösterreich zurückgeführt werden könnte (233). Es wird erzählt, dass sich

9 Siehe auch Natasha Wheatley, Samuel Moyn, Towards a History of the Decolonization of International Law. An Introduction to the Special Issue, in: Journal of the History of International Law 23 (2021), 1–3.

10 Andrew Fitzmaurice, King Leopold's Ghostwriter: The Creation of Persons and States in the Nineteenth Century, Princeton (NJ) 2021.

11 Siehe wieder Wheatley (wie Fn. 5) 311.

12 Als pointierte Einführung in ihren Ansatz siehe Anne Orford, What Is the History of International Law For?, in: Global Intellectual History, special issue (2023), 1–23.

13 Siehe dazu etwa den rezenten Überblick: Dirk Rupnow, Jonathan Singerton, Habsburg Colonial Redux: Reconsidering Colonialism and Postcolonialism in Habsburg / Austrian History, in: Journal of Austrian Studies 56 (2023), 9–20. Wegweisend aber bereits Walter Sauer (Hg.), k. u. k. kolonial. Habsburgermonarchie und europäische Herrschaft in Afrika, Wien 2002; Johannes Feichtinger et al. (Hg.), Habsburg postcolonial. Machtstrukturen und kollektives Gedächtnis, Innsbruck 2003; Walter Sauer, Habsburg Colonial: Austria-Hungary's Role in European Overseas Expansion Reconsidered, in: Austrian Studies 20 (2012), 5–23.

Georg Jellinek während seiner zweimonatigen Hochzeitsreise durch Italien nicht viel aus fixen Reiseplänen machte (93) und angedeutet, dass Freuds Theorie des ödipalen Ursprungs der menschlichen Gesellschaft für Kelsen eine Bestätigung seiner Kritik an modernen Staatstheorien war (176). Trotz dieser umfassenden Bemühung um Kontexte sind manche Regionen wie Böhmen und Ungarn mit ihren historischen Rechtsansprüchen stark überrepräsentiert und andere Teile des Reichs in ihrer Zugehörigkeit zu größeren, später nationalen Einheiten wie Dalmatien oder Galizien kaum vertreten.[14] Zumindest eine Erklärung für dieses Ungleichgewicht hätte man sich beim Lesen gewünscht.

Zum Abschluss zurück zu Bachmann. In ihrer wenige Jahre nach Kriegsende verfassten Dissertation über »Die kritische Aufnahme der Existentialphilosophie Martin Heideggers«[15] hat sie in Wittgensteins Positivismus und dem Wiener Kreis das Instrumentarium gefunden, um die Existenzialphilosophie nach Heidegger zu kritisieren. Wie Heidegger in *Sein und Zeit* die unterschiedlichen Zeitformen diskutierte, um eine grundsätzlichere Analyse des Seins einzuleiten, so führt jedoch auch Bachmann in ihrem Werk *Die gestundete Zeit* eine auf den zwischenhaften Charakter von Zeitlichkeit gerichtete Betrachtung durch. Doch gerade diese künstlerisch-poetische Herangehensweise, im Gegensatz zu einer wissenschaftlichen, rechtfertigt für sie die Auseinandersetzung mit solchen Formen der Zeitlichkeit.[16]

■

Santiago Legarre

El originalismo, en un mar de aciertos y confusiones*

La principal virtud de *Common Good Constitutionalism* es que, mediante este libro, Adrian Vermeule patea el tablero; y se trata de un tablero que necesita ser pateado: el del debate interpretativo dentro del constitucionalismo estadounidense, que hoy pivotea en torno a la idea de »originalismo« *(for and against)*. El principal defecto de la obra, es que patea el tablero demasiado lejos; o en la dirección equivocada.

En la medida en que el originalismo es *original*, se trata de un fenómeno vernáculo y contingente del constitucionalismo estadounidense, no factible de exportación indiscriminada, relacionado directamente con un documento histórico norteamericano del siglo dieciocho. En la medida en que se trata de una teoría interpretativa *incorrecta*, se identifica sustancialmente con el positivismo legal. En la medida en que el originalismo es una teoría interpretativa *correcta*, tiene de verdad lo que tiene de verdad el positivismo legal: el recordatorio de la importancia fundamental del orden jurídico positivo. Vermeule no se hace del todo cargo de lo primero; acierta en identificar lo segundo; y omite advertir en toda su dimensión lo tercero. Su libro es un mar de aciertos y confusiones. Aunque los primeros podrían sobrepasar a los segundos (en la medida en que los aciertos versan acerca de reivindicaciones importantes), las confusiones en la letra chica – y en especial las que versan sobre aspectos históricos – ponen en riesgo el valor global de la empresa acometida.

Toda la obra pivotea sobre la distinción entre *lex* y *ius*, cuyos significados Vermeule estipula no más comenzar. *Lex* es el derecho positivo; *ius* – al que identifica de a ratos con *ius commune* – incluye la justicia, el derecho natural y el derecho de gentes.

14 Zu Dalmatien, siehe zuletzt Johannes Kalwoda, Parteien, Politik und Staatsgewalt in Dalmatien (1900–1918), Wien 2023.

15 Ingeborg Bachmann, Die kritische Aufnahme der Existentialphilosophie Martin Heideggers, Dissertation Universität Wien 1949. Inzwischen erschienen unter gleichem Titel bei Piper: München 1985 und 2022.

16 Joachim Eberhardt, Existentialphilosophie und Existenialismus, in: Monika Albrecht, Dirk Göttsche (Hg.), Bachmann-Handbuch. Leben – Werk – Wirkung, 2. Aufl. Stuttgart 2020, 295–298.

* Adrian Vermeule, Common Good Constitutionalism: Recovering the Classical Legal Tradition, Cambridge: Polity Press 2022, VIII + 241 p., ISBN 978-1-509-54886-6

El error del originalismo consistiría en concentrarse en *lex* y olvidarse de *ius*; el error de las teorías opuestas al originalismo (a las que a veces llama »progresivismo constitucional«) consistiría en olvidarse de *lex* y favorecer otros valores. La visión del autor adolece de un problema terminológico (como tal, menos importante) y de uno conceptual (más importante, pero acaso facilitado por el fracaso terminológico).

En el plano terminológico, las estipulaciones de Vermeule no se corresponden con las definiciones habituales de *lex* y de *ius*. El autor omite considerar que *lex* puede ser tanto ley positiva como natural: la *lex naturalis* constituye un capítulo importante de la fuente iusnaturalista en la que Vermeule abreva. La otra cara de la moneda es igualmente cierta: no todo *ius* es natural: también existe, según la misma tradición, el *ius* positivo. Es cierto que, como señala el autor, la lengua inglesa es menos rica que otras para expresar las realidades de *lex* y *ius*. Mientras que las lenguas romances permiten distinguir más fácilmente entre »ley« y »derecho« (y sus equivalentes italianos, franceses, etc.), en inglés el término »law« reduce el perímetro terminológico. Esto surge claramente del famoso debate de 1972 entre Michel Villey y John Finnis en las páginas de los *Archives de Philosophie du Droit*, ignorado por Vermeule, al igual que toda la obra de Finnis, a quien cita una sola vez y de un modo marginal – a pesar de que Finnis es la persona que más y mejor ha escrito en inglés acerca de todos los temas que le interesan a Vermeule.

La confusión terminológica y la diferencia entre el inglés y las lenguas romances llevan como de la mano al problema conceptual, consistente en una cierta confusión entre moral y derecho. Supongamos que uno dice: »Bueno, Vermeule no llama *lex* y *ius* a lo que la mayoría llama así. Pero aclarados los términos, ¿con qué nos quedamos?«. Pareciera que la elección terminológica llevase al autor a devaluar el derecho positivo y a asignar valor normativo – valor de fuente del derecho – a un *collage* de hechos y valores. Bajo los nombres de derecho natural, justicia y derecho de gentes, no queda claro qué permanece de las determinaciones positivas realizadas en el pasado para guiar el presente – eso que llamamos »derecho«. En un plano descriptivo, es cierto que la idea de derecho positivo en muchos casos se encuentra en decadencia o está pasada de moda, mientras que las filosofías del derecho centradas en el poder, la economía y en valores como la utilidad, gozan de más popularidad. Pero la popularidad no debería ser índice de corrección para quien, como Vermeule, cree en la verdad y el error en materias prácticas. Además, el juicio de Vermeule sobre esta teoría no es uno de popularidad (más aún, él cree que en su país lo popular hoy es el originalismo, y tal vez tenga razón en eso). Su juicio es más bien de valor: es un acierto, sostiene, dejar atrás lo que él llama »positivismo«, a favor de una visión que no esté atada por condicionamientos normativos »rígidos«.

Volvemos con esto a los problemas terminológicos. La palabra »positivismo« padece de un alto grado de confusión, a la cual bastante contribuyó Ronald Dworkin, autor al cual Vermeuele paga tributo encendido en su libro. Pero en cualquier significado que se atribuya a »positivismo«, el *»common good constitutionalism«* defendido en el libro reseñado abdica de lo que Finnis una vez llamó *»the truth in legal positivism«*, en un famoso artículo homónimo: la verdad de que el derecho natural solo puede entenderse por relación al derecho positivo (y viceversa), formulada por Tomás de Aquino en la *Summa Theologiae*, al escribir que el derecho positivo deriva del derecho natural, por conclusión y por determinación. Aunque no cita a los filósofos racionalistas de los siglos XVII y XVIII, como Pufendorf y Wolff, el iusnaturalismo de Vermeule parece por momentos atribuirle a la normatividad del derecho natural unos niveles de definición no muy distintos de los que le atribuían aquellos moralistas ilustrados. Acaso la confusión terminológica haya acarreado también esta consecuencia desafortunada. O será como el huevo y la gallina, y no se podrá identificar bien cuál es la causa y cuál la consecuencia: si el mareo de las ideas explica el desacierto de las elecciones terminológicas o es esta la que lleva a dicho mareo. En definitiva, es probable que haya un poco de las dos cosas.

Como dije al comenzar, el libro tiene numerosos aciertos, entre los cuales debe resaltarse el coraje del autor para afrontar temas espinosos. Esta característica de la obra sobresale cuando ofrece ejemplos y aplicaciones (y en el mismo hecho de que se atreva a ofrecerlos, lo cual es digno de aplauso). Estos ejemplos (casi todos, casos jurisprudenciales estadounidenses) se agradecen, incluso cuando (según el ojo de este lector) fracasan en ocasiones. Porque estas sirven siempre para testear la tesis del autor.

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Mathias Reimann

America's Engagement with Foreign Law. A (Nearly) Comprehensive Account*

The title of David Clark's *American Comparative Law. A History*, suggests an inquiry into how American scholars have studied foreign laws and compared them with their own. The title is deceptively narrow, however, because the book's scope is *a lot* broader than that. It looks not only at *American* scholars in a narrower sense but also at actors who were still British colonial subjects or who were non-citizen refugees from other lands. It focuses not only on *scholars* but includes statesmen, politicians, military leaders as well as governmental and non-governmental institutions. It is not only about *foreign laws* but also about forms of jurisprudence, legal methods and political ideals. And it covers not only the *study and comparison* of legal materials but also their import and export, collection and organization, as well as their use as economic instruments and political agendas. In short, the book is not about »comparative law« in the traditional sense but about how a variety of actors in America have engaged with a variety of non-indigenous legal material in a variety of forms and for a variety of purposes – from the 18th to the early 21st centuries. In other words, the book is a wide-ranging historical account of America's engagement with legal material beyond the United States. If this account is just *nearly* comprehensive, it is because it largely omits the role of foreign legal sources in actual practice, i. e., its treatment by the American bench and bar which is, of course, a huge subject that deserves an analysis in its own right.

The first of the book's eight chapters is sui generis – it is not part of the main narrative but rather something like an introduction which consists of a variety of elements. Among them is a 22-page overview of American »historiography« which chronicles how American legal history was written between the 1770s and the early 2000s, introducing the most prominent protagonists, some of the important works, and the leading paradigms as they changed over time. This discourse connects at best loosely with the rest of the book. It is, however, valuable in its own right for those interested in the development of American historiography – as may be true for many readers of this Journal.

The core of the book consists of the seven remaining chapters. In chronological order, they each focus on a distinct era, from colonial times to the present. It is a truism in (legal and other) historiography that periodization is a dubious business. Yet, Clark's divisions make sense because each era was characterized by distinct themes and styles of dealing with non-indigenous legal materials. As a result, Clark's march through history is also a review of the many ways in which American jurists and institutions have dealt with a panoply of foreign legal systems and ideas.

It is often assumed that colonial America was governed by the common law because that was what the early settlers brought with them from England. Clark's chapter on »British Colonization in North America« (45–83) shows that matters were not nearly so simple. In fact, colonial Americans came from a variety of European countries and lived in a world of not only religious (and sometimes linguistic) but also legal pluralism (60–65) in which not only continental but also Scottish law played a significant role. According to many scholars, English common law became more dominant, however, as the 18th century wore on (»Anglicization thesis«, 65–66).

When Clark turns to the »Legal Foundations for the New Republic: 1776–1791« (85–144), the predominant theme is the foreign influence on the creation of a political and constitutional structure after independence. In this wide-ranging chapter, Clark shows that the »founding fathers« like John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, James Madison, and James Wilson (most of whom were lawyers) looked far beyond English

* David Scott Clark, American Comparative Law. A History, New York (NY): Oxford University Press 2022, 560 p., ISBN 978-0-19-536992-2

law and history. Foreign models guided them with regard to the Constitution's republican and democratic nature (Greek city states and the Roman Republic); the separation of powers (Montesquieu, contemporary Britain), the federal structure of the country (the Holy Roman Empire, the United Netherlands, Switzerland), and ideas of »liberty« (in the continental and British Enlightenment literature). As a result, the making of the US Constitution was a process of extensive discussion of, and substantial borrowing (»transplantation«) from, foreign material.

In the so-called »Formative Era« of American law between the foundation of the Republic and the Civil War, i. e., the 1790s through the 1860s (154–221), attention shifted from the grand constitutional questions (considered largely settled, with the notable exception of the issue of slavery) mainly to the building of an American private law in its own right. In this endeavor, continental European civil law again came to the fore, especially when it provided solutions for newly arising problems of a nation fast expanding westward. In addition, the elite of the legal profession often looked to Roman law as a model of a rational and sophisticated system from which the common law had much to learn.

By the end of the Civil War (1865), the work of building an American legal system was largely done. In the closing decades of the 19th century, American jurisprudence fell under the spell of the Historical School and the concomitant idea of »Learned Law« (223–272). The dominant model now became German legal science (227–228). The conception of law as a »science« also entailed the institutionalization of its study in university-affiliated law schools which were substantially modeled after the ideals of the German university, and which rose to dominance under Harvard's leadership between the 1870s and World War I (228–245). Historical Jurisprudence also was an important factor in the renewed debate about (private law) codification in the 1880s, when quasi-Savignian arguments helped to defeat the project of a civil code in New York – which was, however, adopted in several other (mainly western) states, including California (245–251).

The first half of the new, 20th, century then brought the »Modern Development« of what came to be known as »comparative law« (273–347). In Clark's once again sweeping account one can identify four developments that characterized this period. One was the institutionalization of comparative law as a distinct enterprise and academic discipline. A second major development was the growing involvement of American comparative law scholars on the international level. In particular Roscoe Pound and John Wigmore (320–332) played leading roles in the activities of the International Academy of Comparative Law (founded in 1924); and American jurists more generally participated in the Academy's World Congresses (1932, 1937) in key functions and large numbers. A third important factor was the arrival of the emigrant jurists who came as Jewish refugees from Nazi Germany in the 1930s. While many did not find a firm foothold in the United States, several rose to academic prominence and catalyzed comparative legal studies in crucial ways (331–333, 343–354). It is important to remember, however, that, at the time, they were far from universally welcome. As Clark properly reminds us, antisemitism was quite rampant in some American quarters, including at some law faculties (326–331). Finally, the first half of the 20th century saw a shift from importing legal ideas (mainly from Europe) to exporting them (inter alia to the newly acquired Philippines and to post-1911 republican China) – a process that would accelerate in the wake of the United States' ascent to the leading world power after 1945.

The decades between World War II and the end of the Cold War (1945–1990) were characterized by »Postwar Legal Transplants and Growth of the Academic Discipline« (349–449). Of the many themes pursued by Clark, three are what one might call success stories. One was the post-World War II export of American constitutional credos and concepts to the defeated nations, especially Germany and Japan (and, in addition, Korea) which marked the beginning of the global influence of US constitutionalism that has persisted well into our century (349–379). The second is the further institutionalization of comparative law through modern academic organizations, especially the American Association for the Comparative Study of Law (founded in 1951) which, eventually renamed the American Society of Comparative Law, remains the foremost American platform for the discipline on the academic level (384–392). The third successful enterprise was the establishment of comparative law as an academic subject in American law schools – with its own courses, casebooks, specialized journals, and conferences; at the same time, many law schools developed

special degree (LLM) programs for foreign students (402–418). There was also, however, a significant failure: American attempts to export free market ideas and human rights values to developing countries, known as »Law and Development«, were undertaken without a sufficient understanding of indigenous conditions and were soon recognized as largely unsuccessful (421–428, 441–446).

The final chapter chronicles the developments since the end of the Cold War, aptly characterized by Clark as »Between Globalization and Nationalism«. The period started with virtually unbridled belief in rapid globalization which was almost ubiquitously conceived as a blessing. In this environment, comparative law seemed more relevant than ever; notably, however, the erstwhile focus on legal unification gave way to a growing emphasis on cultural differences and legal pluralism (456–467). American law schools and law firms now operated increasingly in a global context while American constitutionalism and especially judicial review vied for adoption in many parts of the world. Yet, as Clark's critical analysis illustrates, this, second, »Law and Development« agenda – now attempting to bring the blessings of American-style rule of law and free market principles to other countries (especially in Eastern Europe) – was again marred by insufficient understanding of the cultural, political and economic differences; as a result, its success was limited – and at times lacking (487–489, 496–504). As Clark properly notes, since the second decade of the 21st century, enthusiasm for internationalization and globalization has significantly declined. Nationalism has been on the rise once again and authoritarianism has staged a disconcerting comeback in many countries (including some in the West). The new assertiveness of Islamic culture, China's rise to power and Russia's aggressive neo-imperialism have entailed a re-fragmentation of the global order which creates new challenges for comparative law.

A summary cannot even begin to capture the scope and detail of Clark's account. The work sweeps so broadly, pursues so many sub-themes, and explores so many contexts that its richness is almost overwhelming.

As indicated by the English saying that one can »lose sight of the forest for the trees«, it is one thing to look at details but quite another to look at the whole picture. Clark's *American Comparative Law* focuses largely on the trees, but pays little attention to the forest.

To be clear, there is nothing wrong with looking at lots of individual trees; attention to detail is necessary to keep the account well-grounded and informative. The book's persistent focus on factual, biographical, literary and institutional facts, makes it an impressive storehouse of information. As such, it has its strengths and weaknesses. Its main strengths are the diligent collection and helpful organization of material: Clark proffers an almost exhaustive assemblage of everything one might want to know about the topic, and he organizes the vast and diverse material in ways that makes it digestible and intelligible; this is no small accomplishment. The book's main weaknesses as an account of information are occasional indulgence in too much detail and redundancy: some of the particulars provided seem too minute to be of general interest (e. g., the list of all the activities and names of officeholders of the American Society of Comparative Law, 467–479), and on some occasions, the same or similar information is provided more than once, albeit in slightly different contexts (e. g., on John Adams, 72–83, 187–188). More streamlining would have rendered the text more concise as well as more readable.

The main limitation of the book is that it pays little attention to the forest as a whole. After the exhaustive, and at times exhausting, rendition of particular information about a myriad facts and developments, the reader must wish for a conclusion that sums up what it all means at the end of the day. Yet, there is no such conclusion – the book ends more or less abruptly when it reaches the present. Clark does not look back to provide some broader perspectives. This is regrettable, because such perspectives are not hard to come by. For example, Clark's narrative teaches us that for three centuries, American jurists and institutions have engaged with foreign legal material in a myriad different ways that go far beyond »comparative law« as commonly understood; that the mode and intensity of this engagement has largely depended on the changing intellectual environments, social needs and political situations; that in the first half of this period, the emphasis was on importing legal matter from other countries while since the early 20th century, the emphasis has been on exporting American ideas to foreign lands; that some of the imports and exports were successes, others failures; and, perhaps most importantly, that

in light of all this engagement with foreign law, the popular view of the American legal landscape as parochial is, at least in historical perspective, plainly wrong. Even if Clark trusted the reader to draw such conclusions for him- or herself, it would have been useful to provide them in a final chapter – at least for the benefit of those who are not interested in all the minutiae but in its essence.

The principal value of Clark's book is not that it presents large amounts of new information (though it does its fair share of that) but that it pulls together the extensive knowledge produced by previous scholarship (including Clark's own), puts it in chronological order, and summarizes it in readable form. This makes *American Comparative Law* the definitive historical account of the American engagement with foreign legal matter. From now on, those interested in the topic no longer have to resort to hundreds of scattered sources but can, at least for starters, rely on one handy volume.

Nor is the book's principal value that it proffers an entirely new perspective on, or interpretation of, the subject; such is not its objective. In American legal academia, where novelty and originality are prized above almost all else, this may impair the book's recognition as a significant work. In most of the rest of the world, where painstaking collection, reliable rendition, and careful organization of important information is recognized as an accomplishment in its own right and appreciated for its utility, the book will be greatly valued. Few will read it from beginning to end, but many will use it as an essential reference tool. As such, the book is a must in every even moderately comprehensive comparative law library. ■

Thomas Simon

Eine Verfassungsgeschichte literarisch illustriert*

Vorzustellen ist eine Neuerscheinung auf dem nicht gerade dünn besetzten Themenfeld der »Deutschen Verfassungsgeschichte«. So lautet auch der schlichte Titel dieses Buches; der eindeutige Schwerpunkt, aber auch die großen Stärken des Werks liegen in der Darstellung des 19. und 20. Jahrhunderts.

Es ist in den Worten des Verfassers eine geradezu »Kopernikanische Wende« (§ 12), die sich in der zweiten Hälfte des 18. Jahrhunderts in der Verfassungsentwicklung vollzogen habe und die es rechtfertige, an der Schwelle zur Moderne in der Darstellung der neuzeitlichen Verfassungsgeschichte einen Schnitt zu setzen. Denn damals tauchen zwei grundstürzend neue Ideen auf: »die Idee der geschriebenen Verfassung« und ein vollkommen neues »Konzept der Herrschaftsbegründung«. Sie tragen bis heute »unser staats- und verfassungsrechtliches Weltbild«. Weit über drei Viertel des Buches sind daher der modernen Verfassungsgeschichte des 19. und 20. Jahrhunderts gewidmet. In der Tat erscheint es angesichts einer solch tiefen Zäsur im politischen Denken und in der Entwicklung des Verfassungsbegriffs plausibel, den Schwerpunkt der Darstellung auf die Epoche der »geschriebenen Verfassungen« zu setzen, wie sie in der zweiten Hälfte des 18. Jahrhunderts auftauchen.

Dennoch möchte Stefan Korioth die früheren Epochen »zumindest knapp behandeln«. Ihnen ist Teil 2 und 3 gewidmet. Diese sind nicht chronologisch gereiht, vielmehr wird in Teil 2 zunächst die Geschichte des Alten Reiches von der fränkischen Zeit an bis zu seinem Ende 1806 erzählt, im 3. Teil hingegen die Entstehung und Entwicklung des deutschen Territorialstaats vom Spätmittelalter bis zum Ende des 18. Jahrhunderts. Für einen bloßen Überblick ist das Werk auch in diesen Teilen durchaus gelungen: Der Autor skizziert die Verwurzelung des Alten Reichs in der spätantiken Welt, und zumindest im Groben seine Struktur im Mittelalter und der Frühen Neuzeit; auch die Wendepunkte in der Entwicklung seiner »Verfassung« (im materiellen, faktischen Sinne)

* Stefan Korioth, Deutsche Verfassungsgeschichte, Tübingen: Mohr Siebeck 2023, XXVIII + 490 S., ISBN 978-3-16-162069-0

werden behandelt. In Teil 3 werden die Entstehung des institutionellen Flächenstaates sowie Ständestaat und Absolutismus in den Territorien des Reichs besprochen. Das vermittelt einen soliden Überblick. Den Begriff der »Verfassung«, der bei der Beschreibung des Reichs und der frühneuzeitlichen Territorialstaaten üblicherweise zugrunde gelegt wird, vor allem die fundamentalen Unterschiede zum modernen Verfassungsbegriff, hätte man freilich deutlicher herausarbeiten können.

Seine Stärken zeigt das Buch ab dem 4. Teil, mit dem die Darstellung der verfassungsgeschichtlichen Moderne eröffnet wird, will heißen: die Ära der geschriebenen Verfassungen im Sinne eines auch formellen Verfassungsbegriffs. Demgemäß setzt der 4. Teil mit einem straffen Überblick über die beiden wahrhaft epochalen Revolutionen am Ende des 18. Jahrhunderts in Nordamerika und Frankreich ein, in deren Verlauf jener, vom Ideengut des Vernunftrechts und der englischen und französischen Aufklärung getragene Typ einer »geschriebenen Verfassung« auftaucht. Deren philosophischen und ideengeschichtlichen Grundlagen (»Staatstheorie im 18. Jahrhundert«; § 11) schildert der Autor noch in dem vorangehenden 3. Teil, wobei diese Verortung nicht so recht überzeugt, denn Locke, Montesquieu und Rousseau haben mit dem deutschen Territorialstaat der Frühen Neuzeit nicht sehr viel zu tun. Das hätte man besser zusammen mit § 12 (Die Idee der geschriebenen Verfassung) und § 13 (Die Gründung der USA und die Französische Revolution) in den 4. Teil genommen, denn es stellt ja auch die ideelle Grundlage des deutschen Konstitutionalismus dar, dem Teil 4 gewidmet ist. Dann hätte deutlicher hervortreten können, in welchen Punkten sich die Idee der modernen »geschriebenen Verfassung« aus dem Gedankengut der Aufklärung und des Vernunftrechts speist; diesen Zusammenhang hätte man m. E. klarer herausarbeiten können.

Der »westlichen«, in Nordamerika und Frankreich hervortretenden Verfassungsidee stellt Korioth sodann das Konzept des deutschen Konstitutionalismus und dessen Verwirklichung in der Verfassungsgesetzgebung gegenüber: zuerst in den deutschen Einzelstaaten (4. Teil), sodann mit der Reichsverfassung 1849 und der Verfassung des Deutschen Reiches von 1871 »auf gesamtdeutscher Ebene« (5. Teil). »Die Verfassungsentwicklung im Kaiserreich« wird unter drei Aspekten geschildert: Neben der »Verhältnisbestimmung von Staat und Kirche« im Zuge des sog. »Kulturkampfs« wird die rasche Integration und rechtliche Vereinheitlichung des Deutschen Reiches als eines »bündischen Bundesstaats« (»Festigung und Institutionalisierung des Reichs«) dargestellt, also die sog. »zweite Reichsgründung« auf der Basis einer entsprechenden Gesetzgebung wie etwa den Reichsjustizgesetzen. Drittens werden die »Veränderungen des politischen Systems im Miteinander und Gegeneinander von Reichstag und ›Reichsleitung‹« behandelt; hier sieht der Autor Ansätze zur »Parlamentarisierung der Reichsleitung« (230). Dementsprechend konstatiert er in der Reichsverfassung 1871 bereits den »Ausklang des Monarchischen Prinzips« (211) und begründet das nicht zuletzt damit, dass dem Kaiser im Gegensatz zu den frühkonstitutionellen Verfassungen kein Vetorecht bei der Gesetzgebung mehr zugekommen sei. Bei dieser Schlussfolgerung übersieht der Autor allerdings, dass es in der Verfassung 1871, welche das Reich als einen Monarchenbund konstituierte, die im Bundesrat vereinigten Monarchen waren, denen die vollziehende Gewalt und damit auch das absolute Vetorecht zukommen sollte. Das Erfordernis der Zustimmung des Bundesrats zu den vom Reichstag verabschiedeten Gesetzen war nichts anderes als ein kollektives absolutes Vetorecht aller am Monarchenbund beteiligten Fürsten, so dass es in diesem Punkt jedenfalls prinzipiell auch in der Reichsverfassung 1871 noch beim »Monarchischen Prinzip« verblieb.

Die beiden Teile zum Konstitutionalismus im »langen 19. Jahrhundert« (4. und 5. Teil) schließen mit dem »Ende der Monarchien« in Deutschland und der kurz zuvor erfolgten (und daher folgenlos gebliebenen) »Parlamentarisierung des Reiches«, vor allem aber mit dem sehr schnellen Anwachsen des Interventionsstaates zur Bewältigung der Kriegswirtschaft seit 1914. Verbunden war das mit einer Art »Teilabdankung« des Reichstags: Mit dem Gesetz über »die Ermächtigung des Bundesrats zu wirtschaftlichen Maßnahmen im Falle kriegerischer Ereignisse«, wurde der vollziehenden Gewalt (also formal dem Bundesrat!) eine weitreichende Kompetenz zur Verordnungsgebung »zur Abhilfe wirtschaftlicher Schädigungen« übertragen (236). Mehr als 800 Verordnungen ergingen während des Krieges auf dieser Grundlage, um Staat und Gesellschaft einer möglichst »schnell agierenden Steuerung« zu unterwerfen.

Nahezu die Hälfte des Buches ist im 6. Teil zusammengefasst, in dem der Zeitraum »Vom Ende des Ersten Weltkriegs bis zur Gegenwart«

behandelt wird. Gerade hier zeigt das Werk seine größten Stärken, denn hier löst Stefan Korioth sein methodisches Ideal einer Verbindung von Rechts- und Geschichtswissenschaft in wirklich gekonnter Weise ein. Das Resultat ist eine außerordentlich spannend zu lesende »Neueste Verfassungsgeschichte« bzw. »Verfassungszeitgeschichte«, die am Schluss unmittelbar an die wichtigsten verfassungsrechtlichen und -politischen Probleme und Diskussionspunkte im Deutschland der ersten Jahrzehnte nach dem Jahr 2000 anknüpft.

Der 6. Teil beginnt mit dem Umbruch im November 1918 und dem Weg zur »Weimarer Verfassung«, der ersten republikanischen Verfassung Deutschlands auf der Grundlage der Volkssouveränität (253). Bei der Analyse der Weimarer Verfassung (253 ff.) liest man besonders gespannt die Passagen zum Reichspräsidenten und dessen Kompetenzen in Art. 48 WRV, »nach dem unglücklichen Ende der Republik die am meisten erörterte und häufig für ihr Scheitern maßgeblich verantwortlich gemachte Vorschrift der Reichsverfassung«, wie der Verfasser betont (267). Die Notstandsbefugnisse des Reichspräsidenten macht er demgemäß zum Gegenstand eines eigenen Kapitels, in dem er auch die berühmte Auseinandersetzung zwischen Carl Schmitt und Hans Kelsen aufgreift, wer »der Hüter der Verfassung« sein sollte (266 ff.), der Reichspräsident oder der »zum justizförmigen Schutz der Verfassung« eingerichtete Staatsgerichtshof. Er zeigt die verfassungspolitischen Motive für den starken Reichspräsidenten: Das war vorrangig das Bemühen, einen »Parlamentsabsolutismus« zu vermeiden, indem man eine »zweite Linie unmittelbarer demokratischer Legitimation« schafft, »neben derjenigen, die von der Wahl zum Reichstag ausging« (267). In einem eigenen Abschnitt greift Korioth die heftig umstrittene Frage auf, inwieweit sich »Konstruktionsfehler« der Weimarer Verfassung ausmachen lassen, die zu ihrem letztendlichen Scheitern beigetragen haben könnten (317 f.); er wendet sich dezidiert gegen die nach dem Krieg lange Zeit herrschende und auch vom Parlamentarischen Rat 1948/49 bei der Ausarbeitung des Grundgesetzes zugrunde gelegte These, dass »inhaltliche Mängel der Verfassung wesentlich für ihr Scheitern verantwortlich gewesen seien«. Die Weimarer Verfassung war »konsequent demokratisch« und »insbesondere in ihrem Grundrechtsteil modern und zukunftsweisend«, aber »sie setzte eine Gesellschaft voraus, die eine solche Verfassung als Rahmen der Entfaltung nutzen würde und sich von der Verfassung in Form bringen ließ« (317 f.). Der Verfasser sucht diese These mit der Gegenfrage zu untermauern: »Was änderte sich heute, wenn anstelle des Grundgesetzes die Weimarer Verfassung gälte?« Mangelte es unserer gegenwärtigen Gesellschaft, so seine Antwort, in gleicher Weise an den »vorrechtlichen Fundamenten des Rechtsstaates und der Demokratie«, dann »müsste auch die Erfolgsgeschichte des Grundgesetzes zu Ende gehen« (ebd.).

Auch das »nationalsozialistische Regime« (§ 23) mit der es prägenden totalitären »Durchdringung von Staat und Gesellschaft« und die Verfassungsgeschichte der »Bonner Republik« wie auch der DDR wird in einem Stil dargestellt, der weit über eine reine Normengeschichte hinausgeht; diese wird vielmehr in einer höchst anschaulichen Weise in den zeitgenössischen politik- und sozialgeschichtlichen Kontext eingebettet. Die Darstellung gewinnt nicht zuletzt auch dadurch ungemein an Anschaulichkeit, dass der Autor literarische Quellen einfügt. Für ein »Lehrbuch der Verfassungsgeschichte« ist das ungewöhnlich, aber diese Texte sagen dem Leser teilweise erheblich mehr als jede Bebilderung. Teils kommen hier Zeitzeugen zu Wort, etwa der notorische Tagebuchschreiber Harry Graf Kessler, teils werden Passagen aus fiktionalen Texten eingebaut, in denen die Stimmung und das jeweilige Zeitgefühl einer Epoche in besonders verdichteter Weise zum Ausdruck kommt, wie etwa »das Gefühl, daß eine Epoche sich endigte« in den Augusttagen des Jahres 1914 beim Komponisten Adrian Leverkühn im »Dr. Faustus« von Thomas Mann.

Auf diese Weise zieht Stefan Korioth den Faden seiner Verfassungszeitgeschichte durch bis in das 21. Jahrhundert, schließend mit einem umfangreichen Teil zu den »Verfassungsentwicklungen« im wiedervereinigten Deutschland seit 1990 (§ 27); hier werden einige der wichtigsten Debatten um die Reichweite der Grundrechte in den Jahrzehnten nach der Wiedervereinigung dargestellt, neben dem Asylrecht die teils massiven Einschränkungen »grundrechtlicher Freiheit« durch »zahlreiche Gesetze zum Schutz vor organisierter Kriminalität und internationalem Terrorismus«, ganz zum Schluss »die staatlichen Maßnahmen zur Abwehr von Gesundheitsgefahren im Zuge der Covid-19-Pandemie« (417).

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Thomas Simon

Verfassungshistoriographie zwischen Geschichts- und Rechtswissenschaft*

In dem zu besprechenden Aufsatzband geht es um »die Entwicklung einer gegenstandsorientierten Historik«, nämlich »um die Analyse der Bedingungen, unter denen Verfassungsgeschichten plausibel erzählt werden können« (76). So sucht Tim Neu am Schluss seines Beitrags (»Inszenierte, vielfältige und vielzeitige Gefüge – Bausteine einer Theorie der Verfassungsgeschichte«) die thematische Ausrichtung des Tagungsbandes zusammenzufassen. »Historik« ist ihm eine »Theorie in der Geschichtswissenschaft«, »ein Mittel, das helfen soll, bessere und überzeugendere empirische Geschichten zu erzählen«.

In der »Einführung« (»Verfassungshistoriographie zwischen Geschichtswissenschaft, Philosophie und Rechtsdogmatik«) fächern die beiden Herausgeber das Themenfeld der insgesamt 15 Beiträge weiter auf: Im Mittelpunkt steht die Verortung der Verfassungsgeschichtsschreibung zwischen Rechts- und Geschichtswissenschaft. Ist die Verfassungsgeschichte eher als ein Teil der Geschichtswissenschaft und damit als »eine dezidiert deskriptiv arbeitende Disziplin« oder als Teilgebiet der Rechtswissenschaft anzusehen, »mit der Folge, dass sie teilhat an den normativen Fragen und Lösungsmethoden dieser Disziplin«? Ist sie als Teil der Geschichtswissenschaft zu betrachten, dann müssten wohl auch die diversen, in rascher Abfolge sich einander ablösenden methodologischen »turns« der Historiographie stärkeren Eingang in die Verfassungsgeschichte finden. Der letzte Schrei diesbezüglich war bekanntlich der »cultural turn«, der das Augenmerk der Historiker sehr stark auf die »Verfassungspraktiken« gelenkt hat, insbesondere auf »die prozedurale, kommunikative Grundierung jeder historischen Faktizität«, wie es die Herausgeber ausdrücken. Für sie stellt sich hier die Frage, inwieweit »die besondere Textualität des Verfassungsrechts und damit das Spezifikum der modernen Verfassungsgeschichte« einem »kulturelle[n] Zugriff aus einer kulturtheoretischen Beobachterperspektive« entgegensteht (22).

Meines Erachtens müsste hier viel stärker zwischen der älteren und der modernen Verfassungsgeschichte unterschieden werden, denn beide haben doch einen sehr unterschiedlichen Untersuchungsgegenstand und verfügen über sehr unterschiedliche Quellen: Nur die moderne Geschichte der *geschriebenen Verfassungen* hat die »besondere Textualität« ihrer Quellen zu berücksichtigen. Sie stehen in einem einheitlichen Traditionszusammenhang »fortschreitende[r] Herausbildung herrschaftsbegrenzender und freiheitssichernder Ordnungen« (19). Es ist insofern kein Zufall, dass die Geschichte der geschriebenen Verfassungen eine Domäne der Verfassungsjuristen ist, denn sie haben es auch bei den historischen Verfassungen durchgehend mit einem Normengefüge zu tun, das einen ausgeprägten gemeinsamen Nenner mit jener Verfassung aufweist, die sozusagen »ihr täglich' Brot« ist. Die »Verfassung« des Alten Reiches hingegen – und gleiches gilt durchgehend für das Jus Publicum der Territorien – wurde überwiegend bestimmt durch das Herkommen, das nur punktuell verdichtet war durch die sog. »Fundamentalgesetze«. Das »Herkommen« wiederum entstand bekanntlich im Zuge langfristig geübter »Verfassungspraxis«, die bestimmt war durch »prozedurale, kommunikative Grundierung«, um noch einmal eine Formel der Herausgeber aufzunehmen. Hier befindet sich der moderne Jurist auf ungewohntem Gelände, und hier steht er auch in größerer Konkurrenz mit den Historikern, die die viel stärker von Praxis und Faktizität geprägte Normenordnung der Vormoderne durchaus auch als *ihre* Domäne betrachten können.

* Ino Augsberg, Michael W. Müller (Hg.), Theorie der Verfassungsgeschichte. Geschichtswissenschaft – Philosophie – Rechtsdogmatik, Tübingen: Mohr Siebeck 2023, X + 225 S., ISBN 978-3-16-162198-7

Vier Autoren fassen nun allerdings zunächst das Verhältnis der neuesten Geschichte zur Verfassungsgeschichte ins Auge und fragen nach dem Beitrag der Zeitgeschichte zur Verfassungsgeschichte; drei dieser Beiträge sind auf Deutschland, einer ist auf die USA bezogen. Alle Autoren sehen bei der neueren und neuesten Geschichte nur geringes Interesse für die Verfassungsgeschichte. Es fehle den Vertretern der Zeitgeschichte »an Sensibilität für die politische und soziale Relevanz der Verfassung und für die eigenständige Bedeutung ihrer Auslegung und Anwendung« (Dieter Grimm, »Verfassungsgeschichte und Geschichtswissenschaft«, 42). Verfassungsgeschichte, jedenfalls als »Geschichte materiellen Verfassungsrechts«, stehe »in der Zeitgeschichte aktuell nicht hoch im Kurs«, deutlich im Gegensatz zu den Historikern der Vormoderne (Gabriele Metzler, »Zeitgeschichtliche Beobachtungen von Staat und Verfassung«). Die Historikerin Metzler erklärt das vor allem auch mit einer Interessenverlagerung der Zeitgeschichte weg vom Staat hin zur Sozial- und Gesellschaftsgeschichte (44–47). Ähnlich argumentiert Anna-Bettina Kaiser (»Szenen einer Ehe – Verfassungshistoriographie zwischen Geschichts- und Rechtwissenschaft«): »Die Beziehung zwischen Geschichts- und Rechtswissenschaft« sei »zerrüttet, das gemeinsame Projekt Verfassungsgeschichte zum Zankapfel geworden«. Das habe nicht zuletzt »die teilweise positive Neubewertung der Weimarer Reichsverfassung durch die juristische Verfassungsgeschichte im Jubiläumsjahr 2019« sichtbar gemacht (79). Besonders lesenswert ist schließlich der Beitrag von Justin Collings hierzu (»Was nützt Verfassungsgeschichte – und wem?«), der sich schon durch seine erfrischend klare Sprache abhebt (was man leider nicht durchgehend von den übrigen Beiträgen sagen kann, die teilweise doch recht »hermetisch« daherkommen). Auch für die »US-amerikanische Historikerzunft« konstatiert Collings das »Verschwinden der Verfassungsgeschichte« (168); nicht zuletzt ist das für ihn eine Folge der »sich stets wandelnden akademischen Moden«. Traditionell sei die Verfassungsgeschichte in den USA »Nationalgeschichte«, häufig in Form »patriotische[r] Erfolgsgeschichte«. Das aber sei für die Berufshistoriker wenig anziehend, da das glatte »Gegenteil von avantgardistisch« – und wer ist als Wissenschaftler schon gerne mit der Nachhut unterwegs? Umgekehrt aber betrieben »die US-amerikanischen *Juristen* des 21. Jahrhunderts Verfassungsgeschichte wie nie zuvor« – ein Umstand, den Collings mit dem Vordringen des »Originalism« erklärt, einer Art subjektiver Auslegungsmethode in der amerikanischen Verfassungsinterpretation, die »die Bedeutung eines Verfassungstextes in seinem ursprünglichen Sinngehalt« sucht (169), und eben dieser wird durch die Verfassungsgeschichte erschlossen. Die Verfassungsgeschichte spielt hier also eine ähnliche Rolle als dogmatische Hilfswissenschaft wie einst die Rechtsgeschichte im Zivilrecht.

Bei der Lektüre der teils sehr ambitionierten Beiträge kommen dem Leser leise Zweifel, die vielleicht auch die beiden Herausgeber gespürt haben. Es fällt jedenfalls auf, wenn sie »eine regelrechte ›Theorieaversion‹ innerhalb der Verfassungsgeschichte« beobachten (11), und daraus – freilich etwas versteckt in einer Fußnote (Fn. 45) – »produktiv gewendet den Vorschlag ableiten, statt immer weiteren ›Meta-tisierungen‹ der Perspektive im Sinn einer Geschichte der Geschichte des Verfassungsrechts, Theorie der Theorie etc. auch einfach wieder etwas zu *machen*, das heißt *selbst* wieder am Material zu arbeiten«. Wie darf man das verstehen? Sollte man sich vielleicht nicht zu lange mit Methodologie und Theorie aufhalten, statt dessen zum Quellen-»Material« zurückkehren und damit beginnen, Verfassungsgeschichte(n) zu schreiben?

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Christoph Schönberger

Die Erfindung der »Kompetenzen« – ein Sonderweg der deutschen Verfassungsjuristen?*

Kompetenz ist ein spröder juristischer Begriff, der keinerlei Phantasie zu entfachen scheint. Der Leser dieser ambitionierten und gut lesbaren Studie wird eines Besseren belehrt. Im Kern untersucht der Autor die Entstehung der »Kompetenzen« als einer spezifisch deutschen staatsrechtlichen und vor allem: staatsrechtswissenschaftlichen Begrifflichkeit in der zweiten Hälfte des 19. Jahrhunderts am Beispiel von drei ausgewählten Autoren: Karl Twesten, Albert Hänel und Georg Jellinek. Die eingehende Untersuchung dieser Autoren nimmt – nach einer die Fragestellung umreißenden Einleitung und der Darstellung der theoretischen und gesellschaftlichen Ausgangssituation im Gefolge der gescheiterten Revolution von 1848 – den Löwenanteil der Studie ein (53–352). Das letzte Kapitel resümiert das »liberale Paradigma« der Kompetenz, stellt zeitgenössische Kritiker aus der Zeit um 1900 vor (Hugo Preuß, Hans Kelsen, Max Weber) und skizziert abschließend knapp die Problematik der Redeweise von den Kompetenzen für das deutsche Verfassungsrecht der Gegenwart an vier Problemfeldern (Organstreitverfahren, Bundesstaatsrecht, Europarecht, Grenzen des Äußerungsrechts von Regierungsmitgliedern). Nach Anspruch und Aufbau verfährt die Studie also zunächst (wissenschafts-)historisch, dann systematisch (3). Sie fragt im ersten – langen – Schritt, wann und warum man in Deutschland begann, Verfassungen und politische Institutionen in der Sprache von Organ und Kompetenz zu verhandeln, und schließt im zweiten – vergleichsweise kurzen – Schritt die Frage nach der Bedeutung der Kontinuität dieser Sprache im Verfassungsrecht der Gegenwart an.

Die Geschichte, die Christian Neumeier in seinem umfangreichen historischen Teil erzählt, ist genauso einfach wie suggestiv: Ernüchterte Liberale entwickelten die Kategorie der Kompetenzen in der zweiten Hälfte des 19. Jahrhunderts, um den entstehenden ausdifferenzierten Verwaltungsstaat parlamentarisch anleiten und kontrollieren zu können. Indem sie dies nun gerade in der Sprache von Organen und Kompetenzen taten, geriet ihnen indes die seit den atlantischen Verfassungsrevolutionen am Ende des 18. Jahrhunderts entstandene Bedeutung der Verfassung als Ordnung gleicher Freiheit aus dem Blick. Die Kompetenzsemantik bürokratisierte ungewollt die Sprache des Verfassungsrechts mit langfristigen, bis in die Gegenwart reichenden Folgen. In der Sprache des Verfassers: »Die Konstitutionalisierung der Verwaltung schlug in die Bürokratisierung der Verfassung um« (12; 366).

Sehr ansprechend beschreibt der Verfasser dabei zunächst, wie sich Gesellschaft und Herrschaftsapparate im Verlauf des neunzehnten Jahrhunderts zunehmend organisatorisch ausdifferenzierten und damit die vergleichsweise schlichten Grundannahmen des klassischen Konstitutionalismus aus der Zeit um 1800 wesentlich in Frage stellten. Die juristische Kategorienbildung versuchte, mit dieser Ausdifferenzierung Schritt zu halten, indem sie die ältere Semantik natürlicher Freiheitsrechte und des Sozialvertrags mehr und mehr abstreifte und begann, für Gesellschaft und Staat gleichermaßen von Verbänden, Zwecken, Organen und Kompetenzen zu sprechen (50).

Bei dem liberalen Politiker Carl Twesten, dem ersten der drei Helden dieses Buches, wurde »Competenz« zum liberalen politischen Programmbegriff. Mit diesem Schlagwort war zunächst die genaue rechtliche Festlegung der Befugnisse der preußischen Regierung unter der Verfassung von 1850 gemeint. Mit dem Begriff der Kompetenz knüpfte Twesten an eine bereits existierende Terminologie an, die insbesondere für die Zuständigkeitsabgrenzung zwischen Gerichten und Verwaltungsbehörden Verwendung fand. Die Eingrenzung der Befugnisse der Regierung sollte durch

* Christian Neumeier, Kompetenzen. Zur Entstehung des deutschen öffentlichen Rechts, Tübingen: Mohr Siebeck 2022, xii, 464 S., ISBN 978-3-16-160725-7

die Ministerverantwortlichkeit parlamentarisch kontrollierbar werden, diejenige der Verwaltung durch eine gerichtliche Kontrolle. Eine besondere Bedeutung gewann der Kompetenzbegriff zusätzlich in den Debatten um die Gründung des Norddeutschen Bundes im Jahr 1867. Die komplexe Struktur des Bismarck'schen Verfassungsentwurfs warf vielfältige Zweifelsfragen auf, insbesondere zum Verhältnis von Verfassung und Gesetzgebung und zur Frage, auf welchem Weg die Verfassung änderbar sein sollte. Hier plädierten nun die Liberalen wie Twesten für möglichst weitgehende – und durch Verfassungsänderung jederzeit erweiterbare – Gesetzgebungsbefugnisse des Bundes, um dem Norddeutschen Reichstag beispielsweise die Möglichkeit zu geben, das Zivilrecht zu vereinheitlichen. Der Kompetenzbegriff erwies sich als politisch variabel. Hatte er gegenüber der preußischen Regierung auf Eingrenzung von Befugnissen gezielt, so diente er auf Bundes- und wenig später auf Reichsebene nun dazu, einen möglichst umfassenden nationalen Rechtsraum durch die Gesetzgebung des Reichstags zu ermöglichen. Der konservative Rostocker Juraprofessor Hugo Böhlau wandte sich mit einem 1869 erschienenen Pamphlet unter dem kritisch gemeinten Titel »Competenz-Competenz?« dagegen. Im Ergebnis wurde das Problem durch Artikel 78 der Verfassung gelöst, der Verfassungsänderungen im Wege der Gesetzgebung – also durch übereinstimmende Mehrheitsbeschlüsse von Bundesrat und Reichstag – für zulässig erklärte und lediglich im Bundesrat erschwerend 14 Stimmen – und damit faktisch: Preußen – ein Vetorecht gegen jede Verfassungsänderung gab. Auf diesem Weg wurde wenig später im Jahr 1873 durch die »lex Miquel-Lasker« als verfassungsänderndes Gesetz etwa die Reichskompetenz für das Zivilrecht eingeführt. Nunmehr ins Positive gewendet, wurde die »Kompetenz-Kompetenz« wenig später zu einem Schlüsselbegriff der Bundesstaatslehre Albert Hänels.

Albert Hänel war wirkmächtiger Staatsrechtsprofessor und führender linksliberaler Reichstagsabgeordneter zugleich. In der Rekonstruktion Neumeiers waren Kompetenzen für Hänel der Schlüssel zur Herrschaft des Parlaments in einer modernen liberalen Gesellschaft, weil das Parlament über das Gesetz nicht nur die gesellschaftlichen Organisationen einem Regelwerk für ihren Freiheitsgebrauch habe unterwerfen, sondern zugleich auch Regierung und Bürokratien habe instruieren können (358; 111 ff.). Im Einklang mit der bisherigen Sekundärliteratur und sehr differenziert werden dabei im Einzelnen Hänels reichsfreundliche Bundesstaatslehre mit ihrer grundlegenden Kritik der Vorstellung von vertragsmäßigen Elementen der Reichsverfassung, seine Kritik des herrschenden doppelten Gesetzesbegriffs, die auch den Innenbereich der Staatsorganisation wie selbstverständlich für den Zugriff des Gesetzgebers öffnete, und seine Lehre vom Budget als parlamentsfreundliche Theorien erläutert. Freilich kommt in dieser Rekonstruktion etwas zu kurz, dass Gesetzgeber im Deutschen Kaiserreich eben nicht allein der Reichstag war, sondern alle Gesetze nur bei gleichzeitiger Zustimmung von Reichstag und Bundesrat ergehen konnten. Wenn der Verfasser Hänel entgegenhält, das »kompetenzielle Paradigma« habe es nicht zugelassen, die politische Funktion des Gesetzes in einen inneren Zusammenhang mit dem parlamentarischen Verfahren zu bringen (208), so ist das deshalb weniger ein Einwand gegen Hänel als gegen das damalige Verfassungsrecht selbst. Hänel rekonstruierte eben das Verfassungsrecht einer sehr besonderen konstitutionellen Monarchie, nicht dasjenige einer demokratischen Republik. Bei aller Würdigung der parlamentsfreundlichen Tendenzen Hänels hebt der Verfasser insgesamt hervor, durch seine Form der Analyse hätten sich die Kategorien des Verfassungsrechts ins Organisationstheoretische verschoben, und es sei deshalb im Kern nur noch um möglichst effektive Aufgabenerledigung durch alle Organe der öffentlichen Gewalt gegangen (112).

In einer differenzierten Lektüre Georg Jellineks (213 ff.) zeigt Neumeier im Anschluss, wie vor allem im »System der subjektiven öffentlichen Rechte« (1892) eine fundamentale Zweiteilung der normativen Formen des öffentlichen Rechts in subjektive Rechte der Individuen und Kompetenzen der staatlichen Organe konzipiert wurde. Er arbeitet heraus, wie mit einer hochformalisierten Organlehre alles staatliche Handeln als Handeln von Amtswaltern rekonstruiert werden konnte, was insbesondere auch die Monarchen der Einzelstaaten und den Kaiser einschloss – und sich damit gegen zeitgenössisch neu aufflammende neopatrimoniale Tendenzen richtete – und die Bürokratien aus einer bloßen Gehilfenstellung für den jeweiligen Monarchen herauslöste.

Die Ausführungen des Verfassers sind kenntnisreich, differenziert und elegant formuliert. Hübsch trocken heißt es etwa zu Jellinek: »Die Realität der kompetentiellen Arbeitsteilung verdrängte die mo-

narchische Verfassungspoesie« (340). Die drei Einzelstudien werfen indes zugleich die Frage auf, um welches wissenschaftliche Unternehmen es sich dabei eigentlich handelt. Hier liegen beachtliche Bruchstücke einer Dogmengeschichte des Kompetenzbegriffs in der deutschen Staatsrechtswissenschaft der zweiten Hälfte des 19. Jahrhunderts vor. Nach Bekunden des Autors soll die Auswahl der Frage gefolgt sein, ob sich aus ihren Schriften das »Kompetenz-Paradigma« am klarsten habe rekonstruieren lassen (15). Das ist aber ein zirkuläres Argument, wie der Autor selbst einräumt, zumal die Redeweise von Kompetenzen zeitgenössisch rasch auf diffuse Weise ubiquitär wurde (12). Schon bei den drei näher untersuchten Autoren schillerte der Kompetenzbegriff überdies vielfältig zwischen einer allgemeinen Organisationstheorie, der juristischen Rekonstruktion politischer Wahlämter, der rechtsstaatlichen Einhegung des monarchischen Verwaltungsstaats und den spezifischen Verfassungsproblemen föderativer Systeme.

Selbst wenn man nur das eher linksliberale Spektrum der damaligen Staatsrechtslehre hätte berücksichtigen wollen, hätte sich als weiterer wichtiger Autor zumindest Hugo Preuß aufgedrängt, für den die Redeweise von den Kompetenzen ebenfalls eine wichtige Rolle spielte. Dieser wird in der vorliegenden Studie aber nur knapp als einer der vermeintlichen »Kritiker« angeführt (368 ff.), obwohl bereits die kurzen Ausführungen zu Preuß zeigen, dass dieser eine weitere gewichtige Variante des damaligen Kompetenzdiskurses darstellte, die diesen stärker mit demokratischen Leitvorstellungen verband. Erst recht gilt das für Paul Laband, den der Autor nur kurz und abschätzig erwähnt (116), der aber als konservativer Nationalliberaler maßgeblichen Anteil daran hatte, die Redeweise von »Kompetenzen« und »Organen« im staatsrechtlichen Mainstream der Zeit zu verankern. Wissenschaftsgeschichtlich sind die eigenwilligen Auswahlentscheidungen des Autors daher nur begrenzt plausibel, zumal auch die parallele Dogmengeschichte von Begriffen wie »juristische Person«, »Staatsperson« und »Organ« nur nebenbei Berücksichtigung findet. Auch die implizite Sonderwegserzählung des Buches (vgl. etwa 393 f.) ist mangels rechtsvergleichender Einordnung nur begrenzt plausibel, zumal gerade die deutschen Kategorien von »Staatsperson«, »Organ« und »Kompetenz« um 1900 zu äußerst erfolgreichen wissenschaftlichen Exportartikeln in Kontinentaleuropa wurden, etwa in Italien oder Frankreich.

Da der Autor den Kompetenzdiskurs bereits für das Kaiserreich nicht systematisch abschreitet und keinen näheren Versuch unternimmt, die Kontinuität seines »Kompetenz-Paradigmas« durch Einflussstudien für Weimar und die Bundesrepublik zu erhärten, sondern vielmehr die entsprechenden Rezeptionslinien selbst für »begrenzt« erklärt (379, siehe auch 353), hängen auch die Aktualisierungen der Studie (17 ff.; 376 ff.) eigentümlich in der Luft. Sie beruhen letztlich auf der petitio principii, wer heute in der deutschen Verfassungsrechtswissenschaft von Organen und Kompetenzen rede, der handele sich gleichsam automatisch die Perspektive administrativer Aufgabenerledigung ein, eben das »Kompetenz-Paradigma« (379). Es fehlt hier indes an einer systematischen Analyse der Frage nach der Frage, auf die der Kompetenzbegriff die Antwort sein soll. Das gilt erst recht deshalb, weil der Autor nicht ausreichend zwischen der Verwendung des Wortes »Kompetenz« im positiven Recht, in der Rechtsdogmatik oder in einer rechtstheoretischen Begrifflichkeit unterscheidet. Das zeigt sich etwa exemplarisch an der kritischen Behandlung des Organstreitverfahrens vor dem Bundesverfassungsgericht (383 ff.). Hier bleibt offen, wo aus Sicht des Autors eigentlich das Problem liegen soll: im positiven Recht (Grundgesetz, BVerfGG), in dessen spezifischer rechtsdogmatischer Rekonstruktion durch die Staatsrechtswissenschaft und das BVerfG oder auch nur in allgemeinen Beschreibungen des Verfahrens durch das BVerfG und die Kommentarliteratur, in denen immer wieder, wie der Verfasser durchaus zutreffend beobachtet, spätkonstitutionelle Restbestände einer strikten Gewaltenteilung zwischen Parlament und Regierung mitschwingen. Mangels spezifischen Problembefunds führt aber die Einordnung, man sei hier irgendwie noch dem »Kompetenz-Paradigma« verhaftet, nicht wirklich weiter.

Die hier formulierten Einwände und Einzelkritiken mindern den positiven Gesamteindruck dieses Buches nicht. Mit seiner ideenreichen historischen Rekonstruktion der Kompetenzsemantik im deutschen öffentlichen Recht hat Christian Neumeier die Grundlage für jede künftige Beschäftigung mit der Kategorie der Kompetenz geschaffen. Die Redeweise von den Kompetenzen hat durch die vorliegende Studie zwar vielleicht nicht ihre wissenschaftliche Berechtigung eingebüßt, aber doch zumindest ihre unschuldige Selbstverständlichkeit verloren. ■

Brigitte Leucht

Constitution – Which Constitution?*

This book examines the constitutional history of the European Union (EU). According to its author, Frank Schorkopf, Professor of Public Law and European Law at the University of Göttingen, it even presents the »first academic overview of the constitutional history of organised Europe for the second half of the 20th century« (19). Schorkopf chooses the slightly unusual term of »organised Europe« to bring into view developments that otherwise might not be considered in a constitutional history of the EU, including the Council of Europe, its European Convention of Human Rights, and European political cooperation in foreign policy. More difficult to explain is the ambition of writing a constitutional history of the EU in the first place, given that there is no clearly identifiable text qualifying as a constitution. Moreover, attempts to develop and codify a constitution for the EU and its predecessor organisations have failed three times, in 1954, 1984 and 2005. For Schorkopf, however, the possibility of a constitution and the reality of a constitutional discourse beyond these moments of failure provide the point of departure for analysing »the EU's political order« through »a substantive and evolutionary« constitutional lens (19).

The core argument of the book, reflected in its main title – »an undecided power« – is that the EU's political order has left it open if constitutional authority as a specific form of power *remains* with member states or *has moved* to the European level (16). Schorkopf argues that the ambivalence of the EU's political order results from the coexistence of three schools of thought, each of which mobilises their own reading of European integration over time to support their claims. *Constitutionalists* view European integration as the formation of an independent political community based on a constitution that has not yet fully materialised. In contrast, proponents of *intergovernmentalism* regard European integration as executive governance with strictly limited democratic participation; and they underscore supranational administrative cooperation. Most importantly, those in the intergovernmental camp do not share the constitutionalists' emphasis on the desirability of a parliamentary system of government. *Pragmatists*, in turn, take an in-between position and a functional view of European integration that emphasises shared problem solving by a club of sovereign member states on the basis of the treaties. The analysis returns to the three schools of thought throughout, but it does not tie the ideational frameworks of constitutionalism, intergovernmentalism and pragmatism systematically to historical actors and agency.

The book is arranged in three parts, combining a chronological with a thematic approach and starting with the struggle for supranationality in the period 1948–1969. Political historians of European integration will be familiar with the developments covered here, ranging from the 1948 Hague Congress, the Schuman Plan and the initiatives for the European political and defence communities, to the move to horizontal market integration and the early operation of the European communities. At the same time, the text is also well worth reading for political historians, first because it successfully synthesises selected archival sources and recent works on the development of the EU's political order, most of which are scattered in academic journals. Second, Schorkopf introduces a distinctly legal perspective to familiar episodes, presenting them in a compact and accessible way, for example, in chapter 2 on sectoral integration in coal and steel, when he contextualises the debate on the legal nature of the newly established community within wider international law debates (52–53). The final chapter (6) of this part of the book moves from different initiatives aiming at European integration based on international treaties to the European Court of Justice (ECJ). It

* Frank Schorkopf, Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union, 1948–2007, Göttingen: Vandenhoeck & Ruprecht 2023, 381 p., ISBN 978-3-525-30219-4

argues that the ECJ's »Van-Gend-Costa-doctrine« not only established the autonomy of European law vis-à-vis national law but also provided »a new foundational narrative for supranational integration« (121).

The book's second part, on the search for European identity, covers the period from the Hague summit in 1969 to the 1984 European Parliament's (EP) draft treaty establishing the European Union. The 1970s are characterised as a key decade in the constitutional history of the EU, with examples including the establishment of the European Council, the introduction of direct elections to the EP, and the increasing significance attached to protecting fundamental rights, not least in order to enhance the legitimacy of European institutions vis-à-vis European citizens. A separate chapter (11) is devoted to the »community of law«. The term, introduced into the Community by Commission President Walter Hallstein in the 1960s, became a source of inspiration for the ECJ's activism in the 1970s and 80s.

Arguably, the sophistication of depicting the Court's jurisprudence as »upgrading […] to a functional constitutional law for the Communities« (200) is not matched by placing these core legal and constitutional developments in a politico-economic context. The reader does not get a sense, for example, of how the choice for common market creation underpinning the case law was driven by the inability of member state governments to mitigate the impact of recurring crises in the 1970s and Europe's initial »shock of the global«, to reference Niall Ferguson, Erez Manela and Daniel Sargent's book of the same title (2011).

Under the heading »leaping into union«, 1985–2007, the final part of the book charts new territory not previously covered by archive-based approaches to European integration history. This observation applies especially to the post-Maastricht period that culminated in the rejection of the constitutional treaty in referenda in France and the Netherlands in 2005. At the same time, the analysis places the development of leading concepts such as political union, complementarity, coherence, and subsidiarity within a wider temporal framework, which supports the book's argument that »in organised Europe, no idea for integration nor draft text is forgotten« (279) but recycled and repurposed later.

From this perspective, it would have been interesting to discuss how the analysis of the EU's political order through a substantive and evolutionary constitutional lens relates to the notion of »constitutional practice«. This concept was promoted by recent historical scholarship to capture how the ECJ and pro-integrationist lawyers and European institutions and universities deliberately used constitutional terminology to advance European integration. But the concept also functioned as a starting point for revisiting EU constitutionalisation based on empirical research. In the *European Law Journal*, Morten Rasmussen and Dorte Sindbjerg (2018) have argued that member states were reluctant to accept the Court's constitutional practice, at least before the development of the single market from the mid-1980s, and have cast Maastricht as a continuation of a long-standing trend of resisting a European constitution.

Overall, Schorkopf has presented a very readable constitutional history of the EU going beyond doctrinal questions of European law. For historians, the book's added benefit is in introducing legal perspectives into the political development of European integration, be this in the case of the legal nature of the coal and steel community or the analysis of the concept of the community of law. Other examples could be added here. With its focus on European institutions, the work can bridge the gap to those political historians of European integration who are new to its legal dimension. Likewise, the discussion of legal issues in political context has the potential to introduce lawyers to a broader political history of European integration.

■

Jan Schröder

Die Banalität des Rechtslebens*

Lahusens vielgelobte Arbeit – eine von der juristischen Fakultät der Humboldt-Universität zu Berlin angenommene Habilitationsschrift – behandelt das Schicksal der deutschen Justiz in den letzten Kriegs- und den ersten Nachkriegsjahren. Die Hauptfragen sind dabei, ob es irgendwann in dieser Zeit einen »Stillstand der Rechtspflege« (»Iustitium«) und es ob es eine »Stunde Null« gegeben hat. Lahusens Antwort ist, dass der Rechtsbetrieb nie versiegt, dass auch chaotische Verhältnisse irgendwelchen Rechtsregeln unterworfen sind und es keinen rechtsfreien Raum gibt. Dementsprechend verneint er jedenfalls eine völlige Stillegung der Gerichte zwischen 1943 und 1948. Dieses Ergebnis ist nicht selbstverständlich.[1] Lahusen sieht durchaus, dass die Alliierten zeitweise alle Gerichte, und endgültig das Reichsgericht schlossen (z. B. 23, 233 ff., 236, 264 f.), und er bestreitet schon gar nicht den Ausfall vieler einzelner Gerichte vor und nach dem Krieg (vgl. nur 45 zu Rostock, 160 zum Amtsgericht Aachen, weitere z. B. 196 f.). Auch die kurz erwähnte »Universalhemmung« aller Verjährungsfristen seit 1944 (265) spricht nicht unbedingt für einen reibungslosen Fortgang der Rechtspflege. An verschiedenen Stellen bejaht Lahusen sogar selbst einen »Stillstand der Rechtspflege« (19: »Die Rechtspflege stand still«, 234: »Der Stillstand der Rechtspflege im Sommer 1945«, 263: Das Kriegsende erreichte es, »die Rechtspflege stillzustellen«). Aber er meint, eine völlige Lahmlegung der Justiz habe es nie gegeben: »Irgendwo arbeitete immer ein Gericht« (242), »[e]inen Moment, in dem alle deutschen Gerichte gleichzeitig stillgestanden hätten, gab es nicht« (239), zu keiner Zeit finde sich ein »historischer Nullpunkt« (242), eine »Stunde Null« (26, 305). Um das zu beweisen, müsste man allerdings alle Tage zumindest vom 8. Mai bis Ende September 1945 durchgehen und die jeweils aktiven Gerichte benennen. Gelingt das und lässt man das genügen, dann kann man Lahusens These zustimmen. Sie ist aber sozusagen nur das Leitmotiv für das ganze Buch. Denn was Lahusen vor allem zeigen will, ist die Kontinuität des Rechtslebens zwischen Diktatur und Demokratie, die weitgehende Beibehaltung des Justizpersonals (jedenfalls im Westen), des Rechts – soweit es die Alliierten nicht aufhoben – und der alltäglichen Routine des »Dienstbetriebs«. Sehr überraschend ist das allerdings nicht. Gewohnheit und Routine bestimmen nun einmal das Leben der Menschen, und auch der nationalsozialistische Staat hatte, wie wir nicht nur durch Ernst Fraenkel (1941) wissen, eine »normale« Seite. Der Mehrwert von Lahusens Werk kann also nur darin liegen, dass er diese fortwirkende »Normalität« besonders einprägsam und beispielreich vor Augen führt.

Das Buch ist nicht systematisch, zum Beispiel nach Zeiten und Orten, gegliedert, sondern entwirft in sieben Kapiteln und aus verschiedenen Perspektiven ganz unterschiedliche Bilder der deutschen Gerichtsbarkeit in und nach dem Krieg. Zunächst (»Die Freuden der Pflicht: Dienstbetrieb im Endkampf«) geht es um die Bemühungen der Führung, einen kriegsbedingten Rechtsstillstand zu vermeiden. In mindestens einem Fall, dem Angriff auf Rostock im April 1942, gelang das zwar nicht. Aber das feuerte die vorbeugenden und schadensmindernden Maßnahmen nur weiter an. Der Justizdienst wurde zum Kriegsdienst, in dem unter allen Umständen der Fortgang der Rechtspflege gesichert werden musste. — Im zweiten Kapitel erfindet (!) Lahusen ein südwestdeutsches Städtchen »Neustadt am Wassersturz«, in das er Geschehnisse und Personal aus den »Quellenbestände[n] zweier kleiner Gerichte« und anderer verlegt. Man erfährt einiges über die Lage des Ortes, über sein Gericht, über die dort tätigen Juristen (ein Amtsrichter und ein Rechtsanwalt) und deren Nachkriegsschicksal, über eine Reihe von alltäglichen Rechtsfällen und die Auswirkungen des Kriegsendes, welches das Gericht nicht an der Fortführung seiner Arbeit hinderte. All das wird belegt aus fast vierzig Aktenzitaten des »AG

* Benjamin Lahusen, »Der Dienstbetrieb ist nicht gestört«. Die Deutschen und ihre Justiz 1943–1948, München: C. H. Beck 2022, 384 S., ISBN 978-3-406-79026-3

1 Abweichende Meinungen anderer Autoren sieht Uwe Wesel in seiner Rezension von Lahusens Buch in: ZRG Germ. Abt. 140 (2023) 608–612 (609). Aber auch abgesehen davon halte ich Wesels Kritik in vielen Punkten für berechtigt.

Neustadt«, die aber eben fiktiv und in keinem Archiv zu finden sind. Wenn man von einer wissenschaftlichen Arbeit verlangt, dass ihre Aussagen nachprüfbar sind, dann überschreitet Lahusen hier die Grenzen des Erlaubten. — Das dritte Kapitel ist überschrieben »Die Parzellierung des Todes. Das Amtsgericht Auschwitz und die Grundbücher der IG Farben«. In Auschwitz entstand seit 1940 nicht nur das Konzentrationslager der SS, sondern auch ein großes Werk der IG Farben. Dessen Gelände war aber grundbuchmäßig nicht erfasst. Erst nach einem Eingriff von Reichsjustizminister Thierack wurden die entsprechenden Grundbücher angelegt, so dass das Reich dem Unternehmen das benötigte Grundstück 1944 ordnungsgemäß übereignen konnte. Der Zusammenhang dieses Kapitels mit dem kriegs- und nachkriegsbedingten Fortgang der Rechtspflege ist nicht ohne weiteres ersichtlich; immerhin wird noch das weitere Schicksal des grundbuchführenden und nun »überflüssig« (132) gewordenen Amtsgerichts Auschwitz dargestellt. — Einem »durchaus typische[n] Vertreter seiner Art« (141), Hans Keutgen, widmet sich das vierte Kapitel (»Lastenausgleich. Das Sondergericht Aachen und sein letzter Richter«). Lahusen berichtet über Keutgens Karriere und im Zusammenhang damit über die Aachener Justiz im und nach dem Krieg. Das Amtsgericht arbeitete nicht weiter, so dass hier ein Stillstand der Rechtspflege eintrat (160), die anderen Gerichte wurden, zum Teil mehrmals, verlegt, später zurückverlegt. Keutgens Karriere setzte sich nach einer Unterbrechung fort, und zuletzt erhielt er sogar Trennungsentschädigung für die schwierigen Kriegsjahre. — Umfassender schildert das folgende fünfte Kapitel die Auflösung oder Verlegung der Gerichte in der letzten Phase des Krieges 1944/45. Betroffen waren nicht nur die östlichen Gebiete des Reichs, sondern auch die westlichen, und nicht nur das Personal und die Einrichtungsgegenstände zogen um, sondern auch die Akten, vor allem die Personalakten. Wo man befürchten musste, sie könnten in Feindeshand fallen, wurden sie vernichtet. — »Zwischen den Jahren: Der Stillstand der Rechtspflege im Sommer 1945« heißt das sechste Kapitel. Nun wird der Übergang der Justiz in die Nachkriegszeit dargestellt. Die Alliierten schlossen alle Gerichte und eröffneten sie bald wieder, das Reichsgericht verschwand im Oktober 1945 endgültig; aber »[i]rgendwo arbeitete immer ein Gericht, manchmal noch immer und manchmal schon wieder« (242). Das Hauptproblem war die Besetzung der Richterstellen. Während man im Osten die NSDAP-Mitglieder entließ, wurden sie im Westen, soweit keine weiteren erschwerenden Umstände hinzutraten und es nicht um besonders hohe Posten ging, in ihren Ämtern belassen. Auch in der Rechtsprechung, sowohl bei Behandlung der neuen, als auch der »Altfälle« beobachtet Lahusen keinen Aufbruch zu grundsätzlichen Veränderungen. — Im siebten und letzten Kapitel (»Die Abwicklung. Der Krieg und sein langes Ende«) wiederholt der Autor noch einmal seine Grundauffassung, dass Krieg und Kriegsende keinen fundamentalen Umbruch des Rechtslebens bewirkt hätten: der Krieg wird aus der Rechtsordnung verbannt (266). Allerdings bedurfte das Schicksal von unbeendigten Verfahren, die an untergegangenen Gerichten geschwebt hatten, einer Regelung. Sie erfolgte im Osten durch eine Zuständigkeits-»Anordnung« von 1947, im Westen durch ein »Gesetz zur Ergänzung von Zuständigkeiten …« von 1952. — Ein »Epilog« (»Der Traum vom echten Leben«) beschließt das Werk. Nach dem Vorigen nicht überraschend bestreitet Lahusen, dass das »Iustitium« den »Archetyp des modernen Ausnahmezustands« (Giorgio Agamben) darstelle. Immer befinde man sich auf dem Boden des Rechts, einen rechtsfreien Raum gebe es nicht. In all den Katastrophen des NS und den Wirren der frühen Nachkriegszeit dauere »[d]ie Banalität des juristischen Dienstbetriebes« (305) fort.

Das Werk stützt sich auf eine enorme Fülle von Archivmaterial. Aber seine juristische Substanz (immerhin handelt es sich um eine rechtswissenschaftliche Habilitationsleistung) ist schmal. Das liegt auch am Thema, denn es geht ja nicht um die Herausarbeitung irgendwelcher Rechtsregeln und vielleicht sogar ihrer Gründe, sondern vor allem um rechtstatsächliche Feststellungen, namentlich, ob es zwischen 1943 und 1948 eine generelle Stilllegung der deutschen Gerichte gegeben hat. Dazu braucht man nicht viel Rechtsdogmatik und Rechtsgeschichte. Aber Lahusen hätte wenigstens darauf hinweisen sollen, dass der Stillstand der Rechtspflege in § 245 ZPO (von dem er ausgeht) gar nicht der generelle ist, nach dem er fragt, sondern schon die Untätigkeit eines speziellen Gerichts. Die Folgen des »Iustitium« werden unzulänglich beschrieben, wenn es nur heißt: »Was soll man dazu auch sagen? Wenn die Gerichte nicht mehr arbeiten, dann arbeiten sie nicht mehr« (21). Denn mindestens könnte man etwas sagen von

den Fristen-Hemmungen und -Unterbrechungen (§ 203 I a. F. BGB, §§ 245, 249 I ZPO), die durchaus praktische Bedeutung haben.[2] Leichthändig und ungenau sind auch andere Aussagen. So behauptet der Autor, beim Grundstückskauf gingen die Parteien nach der notariellen Beurkundung des Kaufvertrags »zum Grundbuchamt«, um dort die Auflassung zu erklären (110), so soll die Freirechtsbewegung (270 f.) für eine »Auslegung ohne Ziel und ohne Weg, juristisches Handeln ohne Telos und ohne Methode« stehen (aber wenigstens das Ziel einer gerechten Entscheidung eint fast alle Freirechtler!), so wird die Existenz eines »rechtsfreien Raums« verneint, ohne die Gegenmeinungen[3] auch nur anzudeuten (299). Viel befremdlicher ist aber die offene Verachtung, die Lahusen der Jurisprudenz überhaupt entgegenbringt. Sie wird vor allem im vierten Kapitel über den Aachener Juristen Hans Keutgen deutlich. Hier ist zu lesen: Dass Keutgen sein Jurastudium nur in Köln absolvierte, »dürfte durchaus der Weite seines geistigen Horizonts entsprochen haben« (143); »Gründlichkeit und Fleiß ersetzten die fehlende Kreativität, der ausgeprägte Ehrgeiz fand in einem belastbaren (?) Opportunismus sicheren Halt. Kurzum: ein Jurist« (148), und schon vorher grundsätzlich: »Meinungsfreude, Originalität, Brillanz sind in der Welt des Rechts keine tauglichen Währungen« (147). Man fragt sich, ob man den Hochschulort wechseln muss, um nicht geistlos zu erscheinen, ob alle Juristen ehrgeizig und opportunistisch sind und »Kreativität« und »Brillanz« wirklich nur außerhalb des Juristenberufs (den ja auch ein Rechtsprofessor und Volljurist wie Lahusen ausübt) geschätzt werden?

Der Ertrag des Buches liegt denn auch nicht in dem geordneten Beweis seiner Thesen und in der Beantwortung von Rechtsfragen. Es geht dem Autor um Geschichten, um banale, traurige oder groteske Rechtsfälle, den Alltag von Richtern, Staats- und Rechtsanwälten, geglückte oder weniger geglückte Maßnahmen von Behörden, Streitigkeiten zwischen ihnen und was sonst noch die juristische Praxis ausmacht. Die elegante, wortgewaltige und detailreiche (oft leider auch ironisch-besserwisserische) Erzählung ist die eigentliche Stärke des Werkes. Sie erreicht gelegentlich auch literarische Qualität, etwa in der Beschreibung des erfundenen Ortes »Neustadt am Wassersturz«, die an Thomas Manns Schilderung seines fiktiven Großherzogtums in »Königliche Hoheit« erinnert. Man verabschiedet sich mit gemischten Gefühlen von diesem Buch, das kein wirklich juristisches ist, sondern eines über die unverwüstliche Banalität des Rechtslebens.

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Sascha Ziemann

Was für ein Leben*

Philipp Auerbach (1906–1952) ist dem Tod wiederholt entkommen und hat ein Dutzend Leben gelebt. In der Zeit des Nationalsozialismus war er in verschiedenen Lagern und Gefängnissen inhaftiert, darunter in den Konzentrationslagern Auschwitz und Buchenwald sowie in einem Gefängnis der SS in Paris, hatte im Januar 1945 einen Todesmarsch von KZ-Insassen von Auschwitz nach Groß-Rosen überlebt und Zwangsarbeit in einem Steinbruch, hatte Hunger und Krankheiten überstanden. Das erlebte Grauen ließ ihn, den deutschen Juden, jedoch nicht mit seiner Heimat brechen. Anders als viele andere glaubte Auerbach an eine Zukunft der Jüdinnen und Juden in Deutschland. Seinem Biografen Hans-Hermann Klare zufolge, dessen Buch hier vorgestellt werden soll, war Auerbach überzeugt, »die Nazis würden einen nachträglichen Sieg davontragen, sollte jüdisches Leben in Deutschland für alle Zukunft beendet sein« (48). Vorher aber musste hier und jetzt den

2 Siehe z. B. das Urteil des OLG Breslau vom 14.3.1922, in: Juristische Wochenschrift 52 (1923) 190 (verspäteter Einspruch gegen ein Versäumnisurteil während eines Gerichtsstillstandes).

3 Vgl. die differenzierte Untersuchung von Karl Engisch, Der rechtsfreie Raum, in: Zeitschrift für die gesamte Staatswissenschaft 108 (1952) 385–430.

* Hans-Hermann Klare, Auerbach. Eine jüdisch-deutsche Tragödie oder Wie der Antisemitismus den Krieg überlebte, Berlin: Aufbau Verlag 2022, 475 S., ISBN 978-3-351-03896-0

Überlebenden geholfen werden, die zu Tausenden nach Bayern in die amerikanische Besatzungszone gekommen waren. Philipp Auerbach tat sein Bestes als Bayerischer »Staatskommissar für rassisch, religiös und politisch Verfolgte« und Präsident des bayerischen Landesentschädigungsamtes. In diese Position hatte ihn im Jahr 1946 der damalige bayerische Ministerpräsident Wilhelm Hoegner (SPD) auf Empfehlung von Parteigenossen aus Düsseldorf geholt. Auerbach hatte sich im Rheinland einen Namen als Wiedergutmachungsexperte gemacht und gehörte außerdem »zu den bekanntesten und aktivsten Mitliedern« der wieder entstehenden jüdischen Gemeinden in Deutschlands (17).

Die Auerbach-Behörde in München wurde nach dem Krieg zur Anlaufstelle für die Überlebenden des Holocaust, die sich nun als sog. DPs (displaced persons) zu Tausenden im Land der Täter befanden – heimat- und mittellos. Die meisten von ihnen sahen für sich in Deutschland oder ihren anderen Heimatländern keine Zukunft; viele waren nach Bayern in die amerikanische Besatzungszone gekommen, weil hier wie sonst nirgends die realistische Aussicht bestand, eine rettende Passage in die USA oder in den 1948 gegründeten Staat Israel zu erhalten (20 f.). Philipp Auerbach versuchte dem Ansturm Herr zu werden und zu helfen – schnell und unbürokratisch. In seiner fünfjährigen Tätigkeit als Staatskommissar half er etwa 100 000 Jüdinnen und Juden bei der Ausreise aus Bayern. Auerbach verstand sich dabei nicht nur als Anwalt seiner Glaubensgenossen – das war er auch, zumal als Direktoriumsmitglied des neu gegründeten Zentralrats der Juden in Deutschland. Er half auch anderen Opfergruppen des Nationalsozialismus, was ihm in den eigenen Reihen nicht nur Zustimmung einbrachte. So forderte er etwa Entschädigungen nicht nur für jüdische Opfer, sondern auch für Opfergruppen wie Homosexuelle oder Sinti und Roma. Jeder ehemalige KZ-Häftling sollte, so Auerbach, eine Entschädigung von 10 Reichsmark pro erlittenem Hafttag erhalten (251). Für die Finanzierung hatte der einfallsreiche Staatskommissar eine konkrete Idee: das Raubgut der Nazis sollte dafür herangezogen werden. Ein Vorschlag, der ihm beleidigende Zuschriften einbrachte, die nicht selten das antisemitische Zerrbild des rachsüchtigen und gierigen Juden beschworen. Wiedergutmachung freilich bedeutete für Auerbach mehr als nur finanzielle Entschädigung. So schrieb er kurz vor Weihnachten 1947 in einer Veröffentlichung der Vereinigung der Verfolgten des Naziregimes: »Wiedergutmachung heißt nicht Bereicherung! Wiedergutmachung heißt nicht: nach Vermögen streben! Wiedergutmachung heißt: den moralischen Wert des Menschen wieder anzuerkennen, den man uns geraubt. Wiedergutmachung heißt: das zurückgeben, was man uns genommen hat.« (34 f.)

Dass sich Auerbach in seiner Amtsführung zuweilen am Rand der Legalität bewegte, ist in der Rückschau wohl keine unberechtigte Feststellung; genauso richtig ist aber, dass auch die Verhältnisse der von Not und Improvisation geprägten Nachkriegszeit nicht immer die buchstabengetreue Einhaltung der Regeln erlaubten. Ein parlamentarischer Untersuchungsausschuss des Bayerischen Landtages sollte Philipp Auerbach später vollständig rehabilitieren. Der Schlussbericht kam im Januar 1954 zu folgendem Ergebnis: »Solche Aufgaben waren nicht mit normalen Mitteln und auch nicht von Persönlichkeiten zu lösen, die getreu dem Gesetz arbeiteten, der außergewöhnlichen Lage gegenüber jedoch ziemlich hilflos gewesen wären. Mit anderen Worten: Behörden und Beamte im eigentlichen Sinne wären der Schwierigkeiten noch weniger Herr geworden.« (420)

Der Kampf für die Wiedergutmachung der Überlebenden, die sich jeden Morgen aufs Neue vor dem Eingang seiner Behörde drängten, sollte jedoch auch seine Kräfte übersteigen. Wurde der einfallsreiche und in der jüdischen Community gut vernetzte Staatskommissar zunächst sowohl von Seiten der US-Militärregierung in Bayern als auch von der bayerischen Staatsregierung unterstützt, geriet er Anfang der 1950er Jahre zunehmend ins Fadenkreuz von Politik und Justiz. Gerüchte über Unregelmäßigkeiten in der Amtsführung und die unberechtigte Auszahlung mehrerer hundert Tausend DM Wiedergutmachungsgelder hatten die Runde gemacht. Auf Initiative des bayerischen Justizministers Josef Müller (CSU), der sich zu einem einflussreichen Gegenspieler Auerbachs entwickelt hatte, wurde eine staatsanwaltschaftliche Ermittlung in Gang gesetzt. Im Januar 1951 wurde Auerbachs Behörde durchsucht und Auerbach spektakulär in seinem Dienstwagen auf der Autobahn von der Polizei gestoppt und verhaftet. Nach über einjähriger Untersuchungshaft begann im April 1952 das Strafverfahren vor dem LG München I gegen Auerbach und weitere Mitangeklagte, darunter zwei Mitarbeiter und den bayerischen Landesrabbiner Aaron Ohrenstein.

Die Staatsanwaltschaft warf Auerbach unter anderem schwere Amtsunterschlagung, Erpressung, Untreue, Betrug sowie das unberechtigte Führen eines Doktortitels vor. Auerbach sah sich einem Gericht gegenüber, dessen Angehörige alle Mitglieder der NSDAP gewesen waren. Sie waren nach dem Krieg zunächst wegen ihrer Verstrickungen in der NS-Zeit als ungeeignet für den Staatsdienst angesehen worden, wurden aber später rehabilitiert und wieder in den Justizdienst übernommen. Der Vorsitzende Richter Josef Mulzer etwa war ein früherer Oberkriegsgerichtsrat, NSDAP-Mitglied (375) und zudem ein ehemaliger Kanzleikollege des schon erwähnten bayerischen Justizministers Müller.

In der Hauptverhandlung vor Gericht, die von Klare lebendig anhand von Mitschriften der Verfahrensbeteiligten und Zeitungsberichten rekonstruiert wird, kam es zuweilen zur offenen Konfrontation zwischen Auerbach und dem Vorsitzenden Richter Mulzer sowie dem Staatsanwalt Wilhelm Hölper. Alle drei schenkten sich nichts. Als Auerbach einmal bei der Sachverständigenvernehmung eines Wirtschaftsprüfers die Gelegenheit zur Stellungnahme verweigert wurde und in Rage geriet, ließ ihn der Vorsitzende aus dem Sitzungssaal entfernen. Was dann geschah, berichtet Klare unter Rückgriff auf die Süddeutsche Zeitung: »Auerbach erhob sich zornbebend aus seinem Sessel und rief, während er von zwei Polizeibeamten flankiert den Saal verließ: ›Das sind Nazi-Methoden. Diese Nazi-Methoden macht man mit mir nicht, Herr Mulzer!‹ Als der Landgerichtsdirektor ihn als Angeklagten zu einer förmlicheren Anrede anhielt, fügte Auerbach hinzu: ›Jawohl, Herr Vorsitzender und die Herren Nazi-Staatsanwälte‹.« (397)

Der Prozess, der sich zu einem der größten Prozesse in Nachkriegsdeutschland entwickelt hatte, endete nach einer viermonatigen Hauptverhandlung und 62 Verhandlungstagen am 14. August 1952 mit der Verteilung zu einer Freiheitsstrafe von zweieinhalb Jahren. Zwar konnten die Hauptvorwürfe wie etwa die der schweren Amtsunterschlagung nicht aufrechterhalten werden, doch blieb es bei einem Schuldspruch wegen Untreue und Unterschlagung sowie – von Auerbach eingestanden – wegen unberechtigten Führens eines Doktortitels. Auerbach fühlte sich unschuldig verurteilt und in seiner persönlichen Ehre tief verletzt. Und er war auch körperlich am Ende seiner Kräfte; Auerbach litt an Nierensteinen und Bluthochdruck, auch war ein Tumor diagnostiziert worden. Zwei Tage nach der Urteilsverkündung setzte Auerbach seinem Leben, er war gerade einmal 45 Jahre alt, im Krankenzimmer einer Privatklinik selbst ein Ende. »Mein Blut komme auf das Haupt der Meineidigen« waren seine letzten Worte in einem an die Öffentlichkeit gerichteten Abschiedsbrief (415).

Was für ein Leben! Wer einmal mit der Lektüre der eindrücklichen Biografie des früheren stern-Journalisten Hans-Hermann Klare begonnen hat, wird das Buch so schnell nicht wieder aus der Hand legen. Das selbstgewählte Ende des Philipp Auerbach ist zugleich Anfang (Kap. 1) und Ende (Kap. 16) der fesselnd geschriebenen und gut lesbaren Biografie. Dazwischen ein vollgepacktes und packendes Leben eines deutschen Juden aus Hamburg. Die weiteren Kapitel (Kap. 2–15) widmen sich, weitgehend chronologisch, einzelnen Lebensstationen: von der Kindheit im Hamburg des Kaiserreichs, dem ersten politischen Engagement in der Weimarer Republik, über die Emigration 1934 nach Belgien und die Deportation nach Frankreich sowie die Verschleppung und Inhaftierung in die Konzentrationslager Auschwitz und Buchenwald bis hin zum Neuanfang als Wiedergutmachungsexperte in Düsseldorf und München. Die Ausführungen berichten zuweilen Unglaubliches. So erfährt der Leser, wie Auerbach den Chemikalien-Großhandel seines Vaters in Hamburg nutzt, um den Antifaschisten im Spanischen Bürgerkrieg Chemikalien für den Bau von Bomben zukommen zu lassen (101 ff.). Sein chemisches Talent, Auerbach war gelernter Drogist, rettete ihm in den Lagern ein ums andere Mal das Leben, da er es verstand, sich nützlich zu machen. Etwa, indem er aus Tierknochen Kohle als Heilmittel für an Typhus erkrankte Insassen herstellte (198) oder an der Produktion von Desinfektionsmitteln und Seife innerhalb der von der SS beaufsichtigten Abteilung für Schädlingsbekämpfung mitwirkte (165 ff.). Klare betont, dass es Auerbach in allen seinen Aktivitäten während seiner Inhaftierung gelungen sei, »davonzukommen, ohne sich dafür Vorteile auf Kosten anderer Häftlinge« verschafft zu haben (209). Dass Auerbach in der Bundesrepublik Opfer einer politischen Kampagne wurde, ist eine bittere Pointe eines Lebens, das von Klare mit Recht im Untertitel des Buches als »jüdisch-deutsche« Tragödie beschrieben wird. Die »Stunde Null« war keine Tabula rasa. Auch der Antisemitismus hatte überlebt und brach sich

zuweilen unverhohlen Bahn. Die Wiedergutmachungsleistungen gegenüber den NS-Opfern etwa empfanden viele Deutsche als eine ungerechtfertigte Bevorzugung.

Dass Philipp Auerbach in Klares Biografie nicht nur sympathisch und als Heldengestalt beschrieben wird, sondern dass auch die weniger sympathischen Charakterzüge und Widersprüchlichkeiten Auerbachs zur Sprache kommen, wie beispielsweise das großspurige Auftreten, der autokratische Führungsstil oder auch das zuweilen gebrochene Verhältnis zur Wahrheit (unter anderem ein falscher Doktortitel), gibt dem dargestellten Leben eine menschliche Tiefe und ist lobend hervorzuheben. Als kleines Petitum sei gleichwohl das Fehlen eines Personenverzeichnisses angesprochen, das es erlaubt hätte, zielgenau den vielen prominenten und weniger prominenten Persönlichkeiten nachzuspüren, denen Auerbach im Verlauf seines ereignisreichen Lebens begegnet ist.

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Heinz Mohnhaupt

Vom Nutzen der Abweichung – die rechtsproduktive Kraft des Sondervotums*

Seit 1970 ist Richterinnen und Richtern am Bundesverfassungsgericht mit dem »Sondervotum« ein – wie es der Verfasser bezeichnet – »Instrument« im Rahmen ihrer Rechtsprechung gegeben, zusammen mit dem Urteil des kollektiv entscheidenden Senates auch eine abweichende persönliche Meinung der Öffentlichkeit zur Kenntnis zu geben. Das BVerfGG legt in § 30 Abs. I S. 1 fest, dass das BVerfG »in geheimer Beratung« entscheidet. Die maßgebende Bestimmung in § 30 Abs. II S. 1 lautet: »Ein Richter kann seine in der Beratung vertretene abweichende Meinung zu der Entscheidung oder zu deren Begründung in einem Sondervotum niederlegen; das Sondervotum ist der Entscheidung anzuschließen.« Außerdem können die Senate »in ihren Entscheidungen das Stimmenverhältnis mitteilen.« Nach der Geschäftsordnung des BVerfG findet eine namentliche Veröffentlichung von Sondervoten auch in den amtlichen Entscheidungssammlungen des BVerfG statt.

Das Sondervotum individualisiert somit eine Entscheidung innerhalb des Richterkollegiums zu Lasten abgeschlossener Eindeutigkeit und Rechtssicherheit i. S. des historischen Ideals eines »ius certum«; zugleich relativiert die Veröffentlichung den Grundsatz geheimer Beratung des § 43 des DRiGs. Andererseits vermag »potentielle Vieldeutigkeit« eine offene wissenschaftliche Diskussion zu beleben, wie der Autor im Vorwort dieser gründlichen Dissertation hervorhebt. Insofern betrifft diese Publikation auch Aspekte aktueller Fragestellungen, nämlich wie »Normativitätswissen« entsteht bzw. hergestellt wird.[1]

In diesem Sinne untersucht der Autor auf Grund der vorliegenden Rechtsprechungspraxis des Bundesverfassungsgerichts (BVerfG) die Funktionen des Sondervotums im – »staatlich« genannten – »Gesamtgefüge« bzw. Rechtssystem. Ein kurzer Blick auf die Entstehung des Sondervotums in den USA und in Großbritannien zeigt den Modellcharakter der »dissenting« (Abweichung von der Entscheidung des Gerichts) und »concurring opinions« (abweichende Begründung) mit der heutigen Tendenz, den Individualentscheidungen gegenüber dem Kollegialgericht vermehrt Publizität einzuräumen (18). Ein kurzer historischer Rückblick auf die deutsche Entwicklung – beginnend mit »Reformen Karls des Großen« (!) – wirkt wie eine aufgesetzte Pflichtübung ohne echten

* Matthias K. Klatt, Das Sondervotum beim Bundesverfassungsgericht (Veröffentlichungen zum Verfahrensrecht 191), Tübingen: Mohr Siebeck 2023, XIII + 310 S., ISBN 978-3-16-161119-3

1 Cf. das Forschungsfeld »Normativitätserzeugungswissen« am MPI für Rechtsgeschichte und Rechtstheorie: https://www.lhlt.mpg.de/normativitaetserzeugungswissen.

Ertrag, zumal sich diese nur auf ältere Literatur stützt und z. B. die reichen aktuellen Forschungen zu Reichskammergericht und Reichshofrat außer Acht lässt. Rechtsvergleichung ist, so erkenntnisreich sie wäre, bewusst ausgeschlossen.

Der erste Teil der Untersuchung ist den verschiedenen Anläufen und dem Meinungsstreit zur gesetzlichen Einführung des »Sondervotums« seit dem 19. Jh. gewidmet: nämlich den Debatten von 1879 um das Gerichtsverfassungsgesetz, die Gründung des BVerfGs 1951, das Deutsche Richtergesetz 1961, den 47. Deutschen Juristentag 1968 und schließlich die Reform des BVerfGGs von 1970 mit der Einführung des Sondervotums. In einem zweiten Teil untersucht der Autor die Funktionen, die dem Sondervotum nach der Einführung in der Gerichtspraxis zugekommen sind.

Überblickt man die Argumente, so kann man feststellen, dass die genannten Gründe des Pro und Contra innerhalb dieser gut hundert Jahre sich wenig geändert haben – jedoch mit wechselndem politisch motiviertem Schwerpunkt zugunsten des Sondervotums: Sicherung des Beratungs- und Abstimmungsgeheimnisses als »Palladium« richterlicher Unabhängigkeit; Überzeugung der Öffentlichkeit durch Offenlegung aller Entscheidungsgründe; Belebung des Dialogs zwischen »Volk und Richter«; Sondervoten als Ausdruck richterlicher Eitelkeit; Vorteil wissenschaftlicher Fortentwicklung des Rechts; Gefahren für Ansehen und Autorität des Gerichts; parteipolitische Argumentation als Störung des Rechtsfriedens und der Kollegialität innerhalb des Gerichts; Auflockerung der Anonymität des Richterstandes; offener Umgang mit Meinungsverschiedenheiten innerhalb des Kollegialgerichts; Abwehr »fremder« Rechtstradition aus USA und Großbritannien; zusätzliche Arbeitsbelastungen des Gerichts durch Sondervoten; gestärkte Transparenz des offen gelegten gerichtlichen Entscheidungsprozesses; Stärkung richterlicher »Verantwortungsfreude«. Dies sind die oft wiederkehrenden Hauptargumente in den Diskussionen. Erstaunlich modern war 1879 der – chancenlose – Vorschlag von Lasker zum GVG, dass jeder Richter seine von der Mehrheitsentscheidung »abweichende Ansicht bei der Verkündung des Urteils aussprechen und begründen darf« (30–32).

Aus der – keineswegs vollständigen – Aufzählung sind unschwer die Argumentationslinien zwischen Befürwortern und Gegnern des Sondervotums zu erkennen. Sie spiegeln parteipolitische, gesellschaftspolitische und verfassungsrechtliche Positionen wider. Liberale Staatsauffassungen und Forderungen nach Stärkung der Bürgerrechte beflügeln in der Gründungsphase des BVerfGs 1951 die Diskussion um die Einführung des Sondervotums. Namentlich der »Kronjurist« der SPD Adolf Arndt warb differenziert nach Verfahrensarten für die Einführung des Sondervotums. Von konservativer parteipolitischer Seite wurde 1950 eingewandt, dass die junge Bundesrepublik noch kein »in seiner Grundsubstanz absolut gesichertes Staatsleben« repräsentiere »mit der Tradition der Achtung vor dem richterlichen Spruch« (39). Die Erfahrungen des NS-Staates wirkten nach, zumal 1956 noch 79 % der BGH-Richter in der NS-Justiz tätig war. Aber die Bereitschaft zur Offenlegung der Abstimmungsergebnisse nahm zu; ab dem 21. Band der BVerfGE (1967) wurden die Namen der Richter und die Abstimmungsergebnisse mitgeteilt. Ein neues liberales Richterbild wurde unter dem Stichwort »Demokratisierung der Justiz« diskutiert, und »Justizsoziologie« wurde zu einer neuen wissenschaftlichen Disziplin, die zeitgeschichtliche Strömungen aufnimmt. Der 47. Deutsche Juristentag von 1968 reflektiert diese Entwicklung sehr deutlich und votiert für die Einführung des Sondervotums auch an den obersten Bundesgerichten. § 30 BVerfGG von 1970 bildet mit der Einführung des Sondervotums schließlich einen gesetzgeberischen Schlusspunkt in diesem dauerhaft kontroversen Meinungsbildungsprozess. Die Argumente sind jedoch nicht verbraucht und haben – wie der Autor mit Recht betont (5) – in einer rechtspolitischen Diskussion vor dem Hintergrund verfassungsrechtlicher Überzeugungen ihre Bedeutung behalten.

Die vom Autor gebotene empirische Analyse der Urteilspraxis des BVerfGs reicht von 1971 bis 2020. Sie wird gestützt durch statistische Übersichten über Gegenstand und Häufigkeit des Sondervotums sowie seiner Dissenter in den beiden Senaten. Daraus ergibt sich, dass über 80 % der Richterinnen und Richter von der Möglichkeit eines Sondervotums zumindest einmal Gebrauch gemacht haben. Der Autor nennt das Sondervotum sehr bildhaft einen kleinen »Türöffner« in das Beratungszimmer der Senate. Anhand inzwischen berühmter Einzelfälle (Lüth, Mephisto, Kopftuchverbot usw.) wird die weitreichende Funktion des Sondervotums als ein Element der Selbstkontrolle und der Information der Öffentlichkeit sowie über die argumentativen Operationen des Entschei-

dungsprozesses verdeutlicht. Daraus folgt, dass Sondervoten als Rechtserkenntnisquelle für spätere Rechtsprechung, für neue gesetzgeberische Initiativen und den wissenschaftlichen Diskurs von hohem Wert sein können. Gesetzgebung, Rechtsprechung und Rechtswissenschaft stehen in einem engen und wechselseitig einander bedingenden Gesamtzusammenhang. Das Sondervotum ist dafür ein Scharnier im Rechtsquellensystem. Insofern legt Matthias Klatts überzeugende Arbeit die Frage nahe, ob das Sondervotum als »Instrument« rechtsprechender Verfassungsinterpretation nicht auch für die anderen Höchstgerichtsbarkeiten entsprechende Bedeutung haben sollte.

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Ralf Rogowski

The Chequered History of Sociology of Law in West Germany*

The history of German sociology of law is chequered due to discontinuity, and characterised by quite a few ups and downs. The publication under review, the special issue of *Mittelweg 36*, the journal of the prestigious Hamburg Institute of Social Research, contributes to writing this history by focussing on a rare period of »ups« in the 1970s. The editors, Clemens Boehncke, Karlson Preuß and Doris Schweitzer, consider the »long« 1970s as the peak period in the controversy over the relationship of sociology and jurisprudence in Germany. The publication contains a collection of papers that derive from a 2021 conference on the relationship of the social sciences and law and follows on from a previous conference on »disciplinary boundary disputes« between law and sociology.[1]

The portrayal of the resurgence of the subdiscipline of sociology of law in the 1960s and 1970s after a long period of subdued existence is well covered in the publication under review. What is remarkable is the context of this resurgence, which the editors' insightful introduction relates to the student rebellion (revolt) and attempts of an interdisciplinary legal education (reform). It was the period of experimentation with a one-phase legal education (instead of the traditional two-phase model of academic education at university followed by a period of practical training in the courts, administration and law firms) that boosted the sociology of law in Germany.

It is difficult, however, to locate the actual focus of the special issue. It is not a comprehensive account of an important stage in the evolution of the discipline of *Rechtssoziologie*, which originated in the late 19th century and constituted a central part in the development of sociology into a separate academic discipline. The importance of »juridical sociology« in the works of Emile Durkheim, Ferdinand Tönnies and Max Weber has been well researched in a major publication by one of the editors (Schweitzer). Rather, the aim of the special issue is to portray the »struggle« over the relationship of law and sociology, mainly within debates over reforming legal education in West Germany in the period under consideration.

In the first contribution of the special issue, Rüdiger Lautmann investigates »discourses and actions surrounding sociology and jurisprudence«. The focus is on the origins and the demise of the reform of legal education in West Germany. Lautmann is well placed to report on the events since

* Clemens Boehncke, Karlson Preuß, Doris Schweitzer (Hg.), Reform, Revolte, Rechtssoziologie. Zum Verhältnis von Sozialwissenschaft und Jurisprudenz während der langen 1970er-Jahre [Mittelweg 36, 31,5], Hamburg: Hamburger Edition 2022, 128 S., ISBN 978-3-86854-768-9

1 The contributions of the first conference were published in: Zeitschrift für Rechtssoziologie 41,2 (2021).

his writings from this period[2] were most prominent and shaped the sociolegal discourses at the time in decisive ways. He is a true participant observer.

Lautmann analyses in detail events, institutions and main protagonists in the period under investigation. He distinguishes three discourses that emerged in this period and labels them the »reform« discourse of legal education, the »fusion« discourse of law and sociology, and the conservative response and rejection of the reform efforts, which he calls »the discourse of tradition«. He emphasises the importance of two key figures who represented the intellectual discourses surrounding the reform efforts: Rudolf Wiethölter on the »fusion« side and Helmut Schelsky on the »tradition« side.

Lautmann provides insightful information of the rise and demise of the reform of legal education in West Germany. He concludes that as a consequence of that experiment, legal education and legal doctrine in Germany have nowadays become more interdisciplinary, at least at the conceptual level.

Susanne Karoline Paas in her contribution analyses the use of social science literature in legal textbooks. Her title »Sociology in free fall« plays with the double meaning of *Fall* in German, which denotes both a descent or drop and a legal case. Her analysis concentrates on private law textbooks that tried to »sociologise« private or civil law in the wake of the curriculum reforms in the 1970s. In Paas' view, there are two ways of applying sociology in legal education: as providing contextual or background information or actually in solving cases. She is particularly interested in the second approach and comes to the sobering conclusion that, despite well-meaning authors, the actual use of sociological knowledge in the new interdisciplinary textbooks was minimal. Surprisingly, she suggests that sociology of law should change the way it offers sociological information to become useful in legal practice of decision-making rather than criticising the current ways of »solving cases«. In this view, sociology of law remains a mere »auxiliary science« *(Hilfswissenschaft)*.

In the contribution entitled »Delimitation: which legal science from which sociology?«, Joachim Rückert reflects on his experience as a member of the law faculty at the University of Hannover. This law school was founded in 1974 as an ambitious experiment integrating sociology and other social sciences as part of legal education. The Hannover faculty was deliberately staffed by social scientists alongside reform-minded lawyers. Rückert spent ten years there from 1984 to 1993, which was, of course, the period after the experiment of one-phase legal education had already been abandoned. Rückert is interested in the cooperation of lawyers and social scientists and concludes that it was characterised by »delimitation«, not on the surface but underlying their collaboration. Rückert, a legal historian, sees the reason for this in what he calls the different »normativities« guiding lawyers and social scientists. These were formed in normative disputes over long historical periods, leading sociologists and lawyers to develop different understandings of the normative underpinnings of society. However, this account rather reveals the author's own difficulties with sociology, and the historical account does contribute little if anything to understanding the history of the sociology of law as a separate discipline.

Patrick Wöhrle, in »Sociology of law without law, without sociology and with ›too much‹ law«, focusses on two prominent sociologists, Helmut Schelsky and Niklas Luhmann, and their understanding of law in modern society in their writings of the long 1970s. Wöhrle argues that in demanding in his later, increasingly polemic work »more law« from sociologists, Schelsky remained abstract in his contribution to the sociology of law, which is also full of contradictions. Luhmann, by contrast, offers for Wöhrle a more convincing way of combining legal doctrine and sociological analysis in form of a functional method. However, Luhmann's understanding of law as conditional programming is too narrow for him in understanding legal practice.

In the final contribution, Berthold Vogel reassesses a key research project in the resurgence of sociology of law in West Germany, Wolfgang Kaupen's 1969 empirical study of German judges, *Die Hüter von Recht und Ordnung*. He analyses Kaupen's findings in light of current judicial re-

2 Rüdiger Lautmann, Soziologie vor den Toren der Jurisprudenz, Stuttgart 1971; idem, Justiz – die stille Gewalt, Frankfurt am Main 1972.

search. Kaupen's portrayal of the typical post-war German judge being the son of a Catholic civil servant with a rural background *(katholischer Beamtensohn vom Lande)* is challenged by findings from a recent study of lower court judges in Lower Saxony. Judges nowadays come from a variety of backgrounds and do rarely cling to an authoritarian state ideology. The author emphasises the changes in the institutional infrastructure of courts and pleads for current judicial research to enlarge its scope to include other judicial personnel beyond judges.

In addition to the main contributions, we find in the special issue shorter interventions by Ulrike Schultz, Eva Kocher, Stefan Machura and Andreas Fischer-Lescano. They comment on the period of the 1970s from today's perspective. Their own approaches differ widely, ranging from feminism and legal pluralism to critical systems theory. However, they unite in indicating the continued blindness and shortcomings of German legal education when it comes to integrating the social sciences.

Overall, the publication demonstrates convincingly that the subdiscipline of sociology of law became primarily a »juridical project« in the 1970s, carried out in West German law schools. Its development was supported by efforts to reform legal education that were, however, doomed and came to end in 1984, not because of internal difficulties among social scientists and lawyers in the new faculties, but due to massive political resistance from both the legal profession and conservative politicians.

What is not well covered in this portrayal of the upsurge of the sociology of law during the 1970s is the development of empirical research. This includes the transformation in research interests from judicial behaviour research *(Richtersoziologie)* to litigation research *(Verfahrenssoziologie)*. To grasp this change, the focus in analysing the history of sociology of law must switch to the rich landscape of research carried out in research institutions outside universities. This should include, for example, socio-legal research undertaken by Erhard Blankenburg and his team, including Blankenburg's role in creating the German Journal of Law and Society *(Zeitschrift für Rechtssoziologie)* in the period under investigation, which was a major boost in developing the sociology of law in West Germany.

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Jan-Henrik Meyer

Die übersehenen Experten – zur Rolle von Juristen in der Europäischen Union*

Experten haben kein gutes Image, nicht erst seitdem der damalige britische Justizminister Michael Gove im Juni 2016 während der Brexit-Referendums-Kampagne äußerte, die Briten hätten »genug von Experten«, und zwar insbesondere von solchen, deren Voraussagen sich im Nachhinein als unzutreffend herausstellten. Kritik an Experten, die die Fähigkeit für sich in Anspruch nehmen, sachlich-rational auf der Basis höheren, oft technischen Wissens zu beraten und die objektiv bestmögliche Entscheidung zu empfehlen, kennzeichnet die politische Debatte spätestens seit den 1970er Jahren. So kritisierten soziale Bewegungen diesseits und jenseits des Atlantiks die Dominanz von technokratischen Experten-Entscheidungen – z. B. bzgl. der Atomkraft – und forderten stattdessen mehr demokratische Teilhabe.

Experten sind trotz allem aus dem politischen Prozess nicht wegzudenken, gerade auch im Rahmen der Produktion und Ausgestaltung europäischer Politik in der Europäischen Union (EU). Auf EU-Ebene ist die Verwendung des Expertenbegriffs

* Emilia Korkea-aho, Päivi Leino-Sandberg (eds.), Law, Legal Expertise and EU Policy-Making, Cambridge: Cambridge University Press 2022, IX + 325 p., ISBN 978-1-108-83012-6

dabei sehr offen: »Nationale Experten« sind auch Fachleute und Beamte aus der Verwaltung der Mitgliedsstaaten, aus Landes- und Bundesministerien, die sich im Ratsgebäude mit ihren europäischen Partnern zur Diskussion und Aushandlung von Gesetzesvorlagen treffen. Politische Soziologie und Politikwissenschaft, Science und Technology Studies (STS), EU- und Wissenschaftsgeschichte haben vielfältige Forschung zu Expertise in der nationalen, europäischen und internationalen Politik vorgelegt. Dabei standen bisher vor allem technische Experten aus Ingenieurs-, Natur- und Wirtschaftswissenschaft im Vordergrund.

Die Rolle von Juristen als Experten ist dagegen bis heute wenig untersucht. Diese Lücke versucht der Band »Law, Legal Expertise and EU-Policy-Making«, den die beiden finnischen Jura-Professorinnen Emilia Korkea-aho und Päivi Leino-Sandberg herausgegeben haben, zu schließen. Sie fügen dabei ihre eigene EU-Politik-Expertise – bei Korkea-aho zu Lobbying und der Rolle von Nichtregierungsorganisationen (NGOs) und von Leino-Sandberg zu EU-Institutionen wie dem Europäischen Parlament (EP)[1] – auf produktive Art und Weise zusammen. Für diesen sehr gelungenen Band haben die Herausgeberinnen 14 internationale Expertinnen und Experten, vor allem aus Jura und Soziologie, gewinnen können. Die Beiträge zeigen, aus welcher Vielzahl von konzeptionellen und empirischen Perspektiven man auf die Rolle juristischer Expertise im EU-Politikprozess blicken kann. Dies reicht von Anu Bradfords Blick auf die internationalen Konsequenzen europäischer Politik bis hin zu einem Interview mit dem im deutschsprachigen Raum inzwischen recht prominenten *Verfassungsblog*-Gründer Maximilian Steinbeis, der ein neues Expertenforum bzw. Online-Experten-Medium betreibt, in dem EU-Recht eine zentrale Rolle hat und zu dessen Popularisierung der *Verfassungsblog* zweifelsohne beiträgt.

Der Band ist keine Buchbindersynthese, sondern verfolgt Leitkonzepte und -fragen, die die Herausgeberinnen in ihrer Einleitung entwickeln und die von den Beiträgen aufgenommen werden.

Startpunkt der Untersuchung ist die Frage, warum juristische Expertise bisher von der Forschung weitgehend übersehen wurde. Während sich juristische Forschung und Praxis schon lange mit den Herausforderungen des Umgangs mit technisch-wissenschaftlicher Expertise beschäftigt habe, sei die Reflexion der eigenen Expertise außerhalb des Gesichtsfelds geblieben. Zu diesem blinden Fleck habe sicher auch beigetragen, dass es Teil der juristischen Selbstbeschreibung und des professionellen Ethos' sei, »›technisch‹, ›unparteiisch‹, ›unpolitisch‹« (5), zu sein. Bisher hatte vor allem die Rechtssoziologie einen kritischeren Blick auf solche professionellen Mythen geworfen. Forschungen zur Rolle von juristischer Expertise in der Politikgestaltung *(policy-making)* gebe es vor allem für die USA. Die Situation in Europa sei trotz der großen Bedeutung von Jura-Experten z. B. im für die Akzeptanz des EU-Rechts, dessen Vorrang und dessen konstitutionelle Natur höchst einflussreichen »Integration durch Recht«-Projekt der 1980er Jahre bisher weitgehend unerforscht geblieben. Vor diesem Hintergrund baut der Band auf der vor allem in Frankreich sehr starken Rechtssoziologie auf. Es überrascht allerdings, dass die in den letzten zehn bis 15 Jahren von Kopenhagen ausgehende, in mehreren Projekten verstärkte rechtshistorische Forschung hier keine Erwähnung findet. Diese zeigt u. a. auf, wie EU-Rechtsexperten aus dem Juristischen Dienst der Kommission, ihrer Zeitschriften und Vereinigungen EU-Recht und die Idee von dessen Vorrang und besonderer Natur popularisiert haben.[2]

Als Projekt zwischen Jura und Rechtssoziologie soll der Band nicht so sehr die Rolle juristischer Expertise im Hinblick auf die großen, prinzipiellen Fragen der Integration, sondern ihre Bedeutung in der konkreten Alltagspolitik untersuchen. Hier stellen sich die oben bereits angerissenen Herausforderungen, die auch für Rechtsexperten gelten: Die Widersprüche zwischen Expertise und Demokratie und gleichzeitig die Notwendigkeit von Expertise für die Politikgestaltung führten dazu, *policy-making* und die demokratische politische Konfliktdimension *(politics)* voneinander zu trennen. Dabei sei – so die Herausgeberinnen – das zunehmende Misstrauen gegenüber Experten nicht nur ein politisches Problem. Es wurde auch

1 Siehe auch Päivi Leino-Sandberg, The Politics of Legal Expertise in EU Policymaking, Cambridge 2021.

2 Morten Rasmussen, Towards a Legal History of European Law, in: European Papers 6,2 (2021), 923–932; Rebekka Byberg, A Miscellaneous Network: The History of FIDE 1961–94, in: American Journal of Legal History 57,2 (2017), 142–165.

zum Problem rechtstaatlichen demokratischen Regierens (»constitutional democratic governance«, 8). Vor diesem Hintergrund stellt sich die Frage, wie und wo sich juristische Expertise im Hinblick auf ihre Rolle zwischen *policy-making* und *politics* verortet, d. h. wie politisch sie sich selbst sieht bzw. gesehen wird. Neben dieser Dichotomie schlagen die beiden Herausgeberinnen eine analytische Unterscheidung zwischen »interner« und »externer« juristischer Expertise vor. Interne juristische Expertise soll dabei die in staatlichen und europäischen Institutionen tätigen und mit *policy-making* betrauten Juristen bezeichnen. Externe juristische Expertise findet sich in NGOs, Lobby-Verbänden, Kanzleien und Universitäten.

Auch methodisch sind die Beiträge sehr vielfältig, einige sind stärker empirisch und basierend auf Interviews verbunden mit der Absicht, Verhaltensmuster in unterschiedlichen Kontexten herauszuarbeiten, andere eher normativ.

Vier Leitfragen ziehen sich durch die Beiträge: 1. Wer sind die Rechtsexperten (legal experts)? 2. Wie »rahmen« *(frame)*, formen und gestalten *(shape)* sie Probleme *(issues)*, mit denen sie sich im Prozess der Politikgestaltung auseinandersetzen? 3. Wie interagieren sie mit anderen Rechtsexperten, mit denen sie ggf. im Wettbewerb stehen, in Situationen, in denen es zur Vermischung verschiedener Rechtsexpertise kommt? Und schließlich: 4. Inwiefern unterscheiden sich Rechtsexperten von anderen Personen, die Politikexpertise bereitstellen?

Das Buch ist in drei Teile gegliedert. Der erste Teil beschäftigt sich mit theoretischen und konzeptionellen Fragen. So zeigt Martti Koskienniemi am Beispiel des internationalen Rechts, wie sich Rechtsexpertise konzeptionalisieren lässt und welche Aspekte hiervon auch für das Europarecht instruktiv wären. Mittels eines Framing-Ansatzes analysiert Martin Windsor, wie Juristen-Experten Probleme auswählen, hervorheben, deuten und Lösungsmöglichkeiten aufzeigen. Sich dieser Effekte bewusst zu sein, hilft juristischer Selbstreflexion. Gleichzeitig ermöglicht es den strategischen Einsatz solcher Effekte in der Praxis. Die prominenten Rechtssoziologen Antoine Vauchez und Pierre France übertragen eine französische Debatte über die Neoliberalisierung des Rechts in den EU-Kontext. Sie untersuchen, inwieweit privatwirtschaftlich organisierte und orientierte Rechtsexperten wie Großkanzleien und Anwälte Gesetzgebung vorbereiten und damit als keineswegs unabhängige Mittler zwischen Mitgliedsstaaten, EU-Institutionen, Interessenverbänden und Marktakteuren auftreten. Der EU-Verbraucherrechtsexperte Hans Micklitz reflektiert in seinem Beitrag über den Zusammenhang zwischen Rechtsexpertise und Rechtsprofession und warnt vor einer drohenden De-Professionalisierung des Rechts im europäischen Verwaltungsstaat.

Teil Zwei beschäftigt sich mit der Rolle von Rechtsexpertise von innen. Welchen Erwartungen an ihre Expertise und welchen praktischen Herausforderungen sich Juristen gegenüber sehen, die für das Europäische Parlament tätig sind, zeigt Herausgeberin Leino-Sandberg auf. Auch in nationalen Ministerien, wie insbesondere der von Brexit-Krisen geschüttelten britischen Regierung, mussten EU-Rechtsxperten zwischen parteipolitischen Anforderungen und rechtlichen Möglichkeiten jonglieren. Welche Rolle EU-Rechtsexperten in Drittländern spielen, die von europäischen Regeln, dem »Brussels effect«, betroffen sind, und wie diese versuchen, auf die EU zurückzuwirken, demonstriert Anu Bradford. Fernanda Nicola und Chris Kimura diskutieren die Rolle juristischer Handelsexpertise im Kontext sich zunehmend politisierender und medial diskutierter internationaler Handelspolitik und -abkommen, für die die Kommission zuständig ist.

Der dritte Teil zeigt die Perspektive externer EU-Rechtsexpertise. Dazu gehört die in der Literatur zum Lobbying oft erwähnte, aber wenig untersuchte Rolle von Juristen als Lobbyisten. Wie sich die zentrale Rolle von Anwälten und Kanzleien als Lobbyisten der Privatwirtschaft ausgehend vom Wettbewerbsrecht und unter Beteiligung amerikanischer Kanzleien herausgebildet und strukturiert hat, zeigt Lola Avril. Die Ausstattung Brüsseler NGOs mit juristischer Expertise – hier am Beispiel von Umwelt- und Menschenrechtsorganisationen – ist dagegen eher prekär und die Flexibilitätsanforderungen sind besonders herausfordernd für die dort tätigen Juristinnen und Juristen, wie Herausgeberin Korkea-aho aufzeigt. Ähnliches berichten Maria Lee und Carolyn Abbot über die Rolle von Jura-Expertise im Umweltrecht im Gefolge des Brexits in Großbritannien. Hier ging es nicht nur um die Verteidigung, sondern auch um die Anpassung des Umweltrechts an die neuen administrativ-rechtlichen Strukturen. Die diffuse, wenig sichtbare Vermittlung von Rechtsexpertise aus der akademischen Welt in den politischen und den öffentlichen Raum diskutieren die beiden

letzten Beiträge. Durch Lehre und Forschung, vor allem aber auch durch Forschungsaufträge und Projekte, wird wissenschaftliche Expertise in Politik eingespeist. Ihre Wirkung ist schwer und – im Fall der Lehre – höchstens langfristig nachzuweisen. Wie ein Internet-Forum wie der *Verfassungsblog* über den experten- und allgemein-öffentlichen Raum in die europapolitische und -rechtliche Debatte einwirkt, welche Grenzen und Möglichkeiten bestehen, und wie nicht nur Strukturen, sondern auch Personen hier vermitteln, macht das Interview mit Forumsherausgeber Steinbeis deutlich.

Im Schlusskapitel, das den Band und die Leitfragen noch einmal systematisch zusammenführt, arbeiten Korkea-aho und Leino-Sandberg heraus, was wir über EU-Rechtsexpertise lernen können. Das Feld erweist sich als extrem vielgestaltig. Interne und externe Experten wechseln die Position. Zum Experten wird man nicht nur durch formales juristisches, sondern auch durch Erfahrungswissen; soziale und relationale Faktoren sind oft wichtiger als Staatsexamina. Die Herausgeberinnen schlussfolgern, dass EU-rechtliche Expertise sich kaum von anderen Formen von Expertise unterscheide: Nicht zuletzt müssten auch juristische Experten ihre Anpassungsfähigkeit und Problemlösungsfähigkeit unter Beweis stellen, um in EU *politics* und *policy-making* erfolgreich zu sein.

Bücher sprechen vor allem durch Worte. Dieser Band soll aber auch durch sein sehr schönes Umschlagbild von Katia Tukiainen eine normative Zukunftsbotschaft weitergeben (15): Statt alter weißer Männer in grauen Anzügen, den bisherigen prototypischen Experten, soll das farbenfrohe Bild von Mädchen, die auf ein Meer aus Flaggen blicken, eine Zukunftsvision rechtlicher Expertise geben, die viel bunter und vielfältiger und somit vielleicht auch demokratischer sein könnte. ■

Paulien Broens

Gendering the Hallways of International Law Through Intersectional Portraits and Life Stories*

In academia, international law is commonly perceived to be rooted in its ›founding fathers‹ – of whom Hugo Grotius is most famous – through which a white, male and elitist image of the discipline's history has been continuously generated and perpetuated. Immi Tallgren's edited volume titled *Portraits of Women in International Law. New Names and Forgotten Faces?* seeks to confront this male-biased representation and to remove the gendered blind spot by *inserting* stories of women's contributions into the history of international law. It is not her objective to rewrite the history in itself, but to disrupt the so far dominant gendered, racialized and classed imagery by adding onto it through *diversifying* and *creating* an inclusive, gendered and shared narrative. The discipline – through this holistic endeavour – is opened up to become defined in the broadest of terms as an intellectual tradition and social practice, to which not only lawyers have contributed, but also individuals who imagined, developed and contested international law.

The book explicitly calls for the reader to visualise it as a gallery or as the hallways of an exhibition on international law, with 42 portraits in it. Each portrait is represented by visual imagery and offers narrative potential that is then explored by the contributors. The book is structured in parts designed to reflect the architectural wings of the exhibition; for example, »The Winter Garden of Abolition and Resistance: Women against Slavery, Racism and Imperialism«, »The Breakers of the Glass Ceiling: The ›First and Only‹ in International Institutions«, »The Hall of Diversity of Feminist

* Immi Tallgren (ed.), Portraits of Women in International Law. New Names and Forgotten Faces?, Oxford: Oxford University Press 2023, xxxvi + 521 p., ISBN 978-0-19-886845-3

Activism in International Law« and »The Roof-Top Gallery of Diplomacy and International Relations«. Each chapter offers a biographical portrait of an individual – or a group of individuals – who have contributed to the history of international law in their respective capacities as activists, professors of law, wives, feminists, philosophers and so on. As the subtitle »New Names and Forgotten Faces« implies, some of these women were never perceived as contributors to international law (or did not consider themselves to be) but were remembered for other contributions, some were previously recognised as contributing to the discipline but have been forgotten over time, and some were explicitly acknowledged as part of the international law scene. These portraits aim not only to address the gendered blind spot in international law, but also to provide intersectional approaches which include gender, race, colonialism, sexuality and other forms of differences. The exhibition format implies gaps – storage units containing portraits not on display – and a continuance, a never-ending curation by any visitors who might feel like someone is missing or something should be restructured. Tallgren calls for readers to engage with the work and perceive it as on-going. Thus, the image of the exhibition as an unfinished gallery of hallways with portraits divided into various wings functions as the organising principle of the book.

This edited volume was created as part of Tallgren's research project »End of International Law (As We Know It)? ›Women‹ and the Construction of Another International Order« funded by the Kone Foundation, at the Erik Castén Institute of International Law and Human Rights of the University of Helsinki, where she is a Senior Researcher. It brings together over fifty contributors from across continents and is the outcome of various online collaborations between 2020 and 2021, at the height of the COVID-19 pandemic.

The premises of the book might initially instigate scepticism in the reader, for a number of reasons. The visual use of portraiture or the symbolic use of the exhibition, the attempt to resolve the women's question of ›Where are the women?‹, the apparent use of ›women‹ as a comprehensible category and its male-female binary implications – all these seem outdated and remind us predominantly of the 1970s' push for more interest to be paid to the status of women. However, Tallgren acknowledges these aspects in her introductory chapter »Re-curating the Portrait Gallery of International Law: The Objectives, Process, and Floorplan of the Exhibition« where she states that the outdated starting points of the work function as a call for attention or a manifesto to address how the waves of critical questioning and revision on sex and gender have not yet managed to reach the histories of international law. Furthermore, in the actual work it becomes clear that the category of ›women‹ is *not* represented or defined in a homogenised, essentialised or universal manner, and there are no attempts to trace an overall history of women's involvement in international law or to depict these women as having a joint or shared history.

Nonetheless, Tallgren also claims that this re-curation project per definition challenges essentialism and implies a diversity of understanding and descriptions of sex and gender, through which it would be impossible – according to her – to see the male and female binaries as foundational to the work. But this argument is less convincing. Whilst there is no representation of a homogenised idea of ›women‹, for the predominant part of the volume (apart from a few exceptions such as the chapter on Thomas Baty) women's achievements are formulated in binary relations to those of men as their husbands, colleagues and contemporaries. Thus, whilst her argument might be true for the overarching work, within the chapters the binary is not always broken. Additionally, there seems to be an at times redundant focus on feminism. Suzanne Bastid, for example, is described as »an emblem of progress for women's access to the legal professions, but was she a feminist?« (230); which the chapter authors answer by stating that she conformed to the heteronormative expectations for married women and mothers as she was cooking daily meals, whilst on the other hand she was working ambitiously, travelling abroad and using help for household chores. One cannot help but question whether these arguments are actually useful for the narrative, and to which extent they are based on Western definitions of feminism.

With a captivating premise and unique structure – but a sometimes overwhelming amount of historical and biographical information and detail –, the differentiated perspectives on women as subjects, agents and creators of international law provoke us to challenge our perspectives on how we define international law and who we perceive to have contributed to its fabric.

■


SCALINATA
DELLA TRINITÀ
DEI MONTI
LEVI'S







Marginalien marginalia

Erk Volkmar Heyen

Zur Inszenierung des Rechts in der Malerei des späten 19. Jahrhunderts. Treppen als Schauplätze geschlechtsspezifischer Verherrlichung und Verurteilung

Fragt man Juristen nach Visualisierungen des Rechts, pflegen ihnen zunächst die allegorische Figuration der weiblichen Justitia und die auf männliche Richter und Anwälte ausgerichteten Karikaturen eines Honoré Daumier einzufallen, also hauptsächlich zum einen Plastiken, die Gerichtsgebäude schmücken, und zum anderen gerichtssatirische Graphiken. In Hinblick auf Gemälde kommen Antworten, wenn überhaupt, nur zögerlich, auch wenn die Existenz einer entwickelten Rechtsikonographie[1] nicht unbekannt ist und für Buchgeschenke im Kollegenkreis durchaus genutzt wird.

Im Folgenden sei der Horizont der Aufmerksamkeit etwas geweitet, und zwar anhand solcher Gemälde, die eine Treppe als Schauplatz in den Blick rücken.[2] Die auf ihr dargebotenen Inszenierungen betreffen zwei Politikfelder, deren Rechtsstrukturen gegen Ende des 19. Jahrhunderts in Europa einem starken Wandlungsdruck ausgesetzt waren, dabei aber unterschiedliche geschlechtsspezifische Konstellationen erkennen lassen: das nationale Politikfeld und das soziale.

Während in nationalpolitisch ausgerichteten Inszenierungen die Stellung von Frauen gegenüber Männern gleichen Standes als nachgeordnet in Erscheinung tritt (I.), wird sie in sozialer Hinsicht weitaus differenzierter wahrgenommen. Zur Veranschaulichung seien zunächst Bilder vorgestellt, deren Maler sich offensichtlich an den schönen Seiten weiblichen Lebens haben erfreuen wollen (II.), sodann aber und sehr viel eindringlicher ein dessen Schattenseiten thematisierendes Frühwerk von Giovanni Segantini (III.–VI.). Durch die Verbindung von ästhetischen und rechtspolitischen Aspekten hebt sich die Darstellung von dem dazu bisher veröffentlichten kunsthistorischen Schrifttum ab. Sie beschreibt die im Entstehungsprozess des Bildes wirksamen Motive und Maßstäbe und erschließt dabei – auch dies ein neuer Aspekt – Treppenbilder anderer Künstler, die Segantini kannte und von denen er sich anregen lassen, aber auch absetzen konnte.

I. Männliche Dominanz in zwei nationalpolitischen Inszenierungen (Hayez, Gérôme)

Begonnen sei mit einem Historienbild von 1867. Aus Sorge um den 1861 gegründeten italienischen Nationalstaat macht es auf ein Freiheitserbe aufmerksam, das es aus Sicht des Malers zu bewahren und fortzuentwickeln gilt. Die Rede ist von Francesco Hayez (1791–1882) – einem Protagonisten der italienischen Romantik – und seinem Alterswerk »Die letzten Augenblicke des Dogen Marino Faliero auf der sog. *scala del piombo*« (Abb. 1),[3] das er umgehend der Mailänder *Pinacoteca di Brera* stiftete und so jenem Kunstmuseum der Stadt, an dessen *Accademia di Belli Arti* er selbst unterrichtete. Das Bild wurde bereits 1867 von der Mailänder *Pinacoteca di Brera* erworben und bildet seitdem ein Referenzwerk für den Freiheitssinn des neuen italienischen Staates und die italienische Malerei dieser Zeit.

Wie schon der Titel erkennen lässt, kommt hier ein höchst außergewöhnliches Ereignis aus der Geschichte der Republik Venedig zur Darstellung: die Hinrichtung eines Dogen wegen Hochverrats, vollzogen im April 1355 am Fuß jener Treppe vor der Waffenkammer seines Palastes, die Ende des 15. Jahrhunderts zur heutigen *Scala dei Giganti* umgestaltet werden sollte. Dieses Ereignis war

1 Siehe dazu Kocher (1992), mit ausführlichen Nachweisen deutschsprachiger Literatur, und Behrmann (2020), ebenfalls mit reichhaltigen, aber auf englischsprachige Literatur ausgerichteten Hinweisen.

2 Zur Treppe als einer der ästhetischen Grundformen der Visualisierung öffentlicher Verwaltung siehe Heyen (2023). Die Treppe erscheint dort nicht als Schauplatz, sondern als Laufbahn.

3 Siehe dazu den Bildkommentar von Lissoni (2015). Zur Entwicklung der Historienmalerei von Hayez siehe Watts (2021) 76 ff. (zum Faliero-Bild 122 ff.).



Abb. 1: Francesco Hayez, »Gli ultimi momenti del doge Marino Faliero sulla scala detta del piombo / Die letzten Augenblicke des Dogen Marino Faliero auf der sog. scala del piombo«, 1867, Öl auf Leinwand, 238 x 192 cm. Mailand, Pinacoteca di Brera. Aus: Lissoni (2015) 309

bereits 1826 von Eugène Delacroix, in einem von ihm selbst zeit seines Lebens geschätzten Jugendwerk, ins Bild gesetzt worden.[4] Vermittelt wurde das Ereignis jeweils durch eine 1820/21 verfasste – auf den Bühnen freilich nicht erfolgreiche – Tragödie von Lord Byron, der sich ja auch für den Freiheitskampf der Griechen gegen die osmanische Herrschaft begeisterte. Man sieht daran, dass die nationalpolitischen Inszenierungen des 19. Jahrhunderts voneinander wissen und sich in der künstlerischen Auffassung inspirieren können.

In Begleitung dreier Mitglieder des als Gericht tätigen *Consiglio dei Dieci*, auf deren Anordnung hin Faliero bereits seine Amtskleidung und Ehrenzeichen hat ablegen und Dienern übergeben müssen und ihm erneut das Urteil verlesen wird, nähert er sich dem am Richtblock wartenden Scharfrichter. Vom oberen Ende der Treppe her beobachten zahlreiche Personen diese Szene, darunter aber nur eine einzige Frau: die Ehefrau des Verurteilten, die vor dem Vorsitzenden des *Consiglio* auf die Knie gefallen ist und um Gnade fleht (Abb. 2). Ihre Behandlung in einem Verleumdungsprozess hatte Faliero empört und ihn dazu getrieben, sich mit seinen aristokratischen Standesgenossen zu überwerfen, ihre Herrschaft als Tyrannei anzuprangern und eine stärkere Berücksichtigung der Interessen des einfachen Volks anzumahnen, insbesondere ihm mehr Freiheit zuzugestehen.

Das zweite hier vor Augen zu führende Bild ähnelt dem ersten darin, dass auch für seinen Aufbau eine Treppe bestimmend ist. Alles wirkt von unten nach oben gerichtet, wo die Herrschaft beanspruchende Instanz in Erscheinung tritt, in diesem Fall aber – anders als in der Republik Venedig – ein auf erhabene Weise absolute Herrschaft beanspruchender König (Abb. 3). Thematisiert wird dabei keine formal gefasste Rechtsprechung, keine Anklage und Verurteilung, erst recht



Abb. 2: Ausschnitt von Abb. 1

keine Hinrichtung, sondern das Gegenteil: ein rechtlich informeller Gunsterweis. Das Bild wurde 1878 von Jean-Léon Gérôme (1824–1904) gemalt und trägt den Titel »Empfang des *Grand* Condé durch Louis XIV. (Versailles, 1674)«.[5]

Während der junge König, inmitten eines festlich gestimmten Hofgefolges, bereits zur Mitte einer prunkvollen Treppe seines Schlosses hinabgestiegen ist und sich dort, zusammen mit dem Kronprinzen sowie dem einflussreichen Bischof Bossuet, zum Empfang bereit gemacht hat, nähert sich ihm von unten – als siegreicher Feldherr durch Kränze, Fahnen und Soldaten willkommen geheißen – der *Prince* de Condé, selbstbewusst und doch, wie es sich bei Hofe gehört, mit tiefer Verbeugung die Stufen hinaufsteigend.[6]

Hier erscheint die nationalpolitische Zielsetzung des Bildes weniger sinnfällig, und so fragt

4 Anders als Hayez zeigt Delacroix den Augenblick nach und nicht vor der Hinrichtung. In der zeitgenössischen Kritik umstritten, hat es im Gegensatz zum Bild von Hayez auch in der kunsthistorischen Literatur beachtliche Aufmerksamkeit erhalten. Aus der jüngeren deutschsprachigen Literatur siehe Geimer (2006), mit bemerkenswerten Überlegungen auch zur Treppe, die hier in auffälliger Weise in großem Umfang frei bleibt.

5 Siehe dazu den Bildkommentar von Laurence Des Cars in ders. et al. (eds.) (2010) 148 und 150, sowie – ebenfalls breit auf das Gesamtwerk Gérômes eingehend – Eberle (2017) 325. Zur näheren Einschätzung von Gérômes Historienmalerei siehe auch Germer (2000) 173 ff. (178 nennt sie »allegorisierte Geschichte«) und House (2008) 275 f.

6 In einem bereits 1873 gemalten Historienbild – »Die graue Eminenz«, Farbabbildung in Des Cars et al. (eds.) (2010) 149 – hat sich Gérôme schon einmal einer Schautreppe bedient, um Machtausübung zu veranschaulichen: Der Beichtvater und Berater des Kardinals Richelieu kommt lesend die Haupttreppe des *Palais Royal* herunter, ohne die Höflinge, die ihm ehrerbietig begegnen oder auf ihn bewundernd zurückschauen, der Beachtung für würdig zu befinden.



Abb. 3: Jean-Léon Gérôme, »La Réception du Grand Condé par Louis XIV à Versailles, 1674 / Empfang des Grand Condé durch Ludwig XIV. in Versailles, 1674«, 1878, Öl auf Leinwand, 96,5 x 137,7 cm. Paris, Musée d'Orsay. Aus: Des Cars et al. (eds.) (2010) 151

man sich: Warum greift ein französischer Maler zu Beginn der erst nach viel Leid und Mühsal durchgesetzten III. Republik ein solches Thema auf? Um das Bild in seiner Demonstration eines vom Recht zwar gestützten, aber nicht vollständig geklärten Machtgefälles richtig zu verstehen, muss man sich zunächst die innen- und außenpolitische Lage Frankreichs nach dem Ende des Dreißigjährigen Krieges vergegenwärtigen.

Der Krieg hatte das Land wirtschaftlich und finanziell stark belastet. Als 1643, nach dem Tod von Louis XIII., Kardinal Mazarin die Regierungsgeschäfte übernahm und sich bemühte, den vorgefundenen Schuldenberg durch Steuererhöhungen abzutragen, führte diese Politik zu landesweiten Spannungen, die 1648–1653 in der *Fronde* ihren für die Einheit und Ordnung des Landes gefährlichsten Ausdruck fanden. Condé war einer der Anführer dieser gewaltbereiten Protestbewegung – ein für Mazarin gefährlicher Umstand, da Condé nicht nur dem königlichen Geschlecht der Bourbonen angehörte, sondern, wiewohl noch jung an Jahren, bereits als Heerführer Anerkennung erfahren hatte. Noch bedenklicher freilich war, dass Condé ab 1653 für einige Jahre seine militärische Erfahrung in den Niederlanden auf der Seite Spaniens gegen Mazarin und die französische Krone eingesetzt hatte. Gleichwohl war er nach dem sog. Pyrenäenfrieden von 1659 wieder in französische Dienste übernommen worden. So kam es, dass er in dem 1672 begonnenen Krieg gegen die holländischen Generalstaaten als Feldherr eingesetzt wurde und 1674 einen Sieg errang, von dessen Feier im Schloss von Versailles Gérômes Bild berichtet.

Verschwiegen wird dabei allerdings, dass dieser Sieg zweifelhaft und wenigstens kein entscheidender war, der Krieg gegen die Generalstaaten vielmehr noch bis 1678 andauerte und der im Jahr darauf geschlossene Frieden von Nimwegen deren Grenzen unberührt ließ. Damit aber hatte Louis XIV., der seit 1661, nach dem Tod Mazarins, die Regierungsgeschäfte persönlich führte, in seiner Politik der territorialen Ausdehnung Frankreichs einen erheblichen Rückschlag erlitten. Diese Politik zielte auf die Schwächung der Herrschafts- und

Einflussräume der Habsburger und bediente sich dazu erb- und familienrechtlicher Argumente, die unter dem Stich- und Schlagwort *réunion* die Ausdehnung als Wiedervereinigung zusammengehöriger Teile erscheinen lassen sollten.

Diese außenpolitische Zielsetzung ging einher mit einer innenpolitischen, nämlich den Staat im Sinne eines monarchischen Absolutismus ganz und gar auf die Person des Königs auszurichten. Dazu gehörte vor allem die landesweite Kontrolle von Polizei und Finanzen mittels einer tiefgreifenden Zentralisierung der Verwaltung. Darüber hinaus zeigte sie sich aber auch in einer ebenfalls auf Vereinheitlichung ausgerichteten Konfessionspolitik, nämlich in der Stärkung eines landeseigenen, gallikanischen, nicht mehr vorrangig dem Papst verpflichteten Katholizismus, in der Schwächung des Jansenismus – einer sich am Kirchenvater Augustinus orientierenden und auch vom Philosophen Pascal unterstützten katholischen Reformströmung – und in der Bekämpfung des Protestantismus, die 1685 in dem Widerruf des Edikts von Nantes und den sich daran anschließenden Hugenottenverfolgungen gipfelte.

Dieser harten Seite des politischen Handelns von Louis XIV. stand eine andere gegenüber, die gefälliger anmutet, aber auch über eigene Zwänge verfügte. Sie diente der Verherrlichung des Königs durch Propaganda und Legende. Dazu gehörten die Rede vom »Sonnenkönig«, seine Präsentation als Apollon im Schloss und Park von Versailles, das glanzvolle Leben am Hofe und die ständige Fertigung von Gedenkmünzen und Gedenkstichen, die dem königlichen Handeln in Krieg und Frieden Ausstrahlung *(rayonnement)* verleihen sollten.[7] Auch schon der Empfang des siegreichen Condé in Versailles 1674 – die Erweiterungs- und Umbauten des Schlosses waren noch nicht beendet – ist Ausdruck dieser Politik.

Wenn hier auf all dies – die von Gérôme dargestellte Zeit – ausführlich eingegangen wird, so um verständlich werden zu lassen, was das Bild seiner eigenen Zeit – gewissermaßen der darstellenden Zeit – mitzuteilen hat. Warum also ruft ein Maler zweihundert Jahre später einen Sieg in Erinnerung, wenn dieser Sieg nur ein vorläufiger und zweifelhafter war? Man wird den Grund dafür in der politischen Lage seines Landes Ende der 1870er Jahre suchen müssen und auch finden dürfen. Frankreich hatte 1870/71 unter Napoléon III. den Krieg gegen Preußen und seine deutschen Verbündeten verloren. Im Spiegelsaal des Schlosses von Versailles hatten der preußische König Wilhelm I. und sein Kanzler Bismarck das Deutsche Reich ausgerufen. Elsass und Lothringen – Gebiete also, die Louis XIV. Frankreich einverleibt hatte – wurden als »Reichsland« annektiert. Das *Second Empire* ging unter, und in Paris brach ein Bürgerkrieg aus,[8] aus dem sich das neue Frankreich, die Dritte Republik, nur unter großen Mühen wieder erhob.

Gérômes Bild repräsentiert ein Stück Erinnerungsarbeit, das sich in den Dienst der Bewältigung zeitgenössischer politischer – nicht zuletzt rechtspolitischer – Herausforderungen stellt, insbesondere solche der Modernisierung des Landes angesichts des Aufstiegs eines von Preußen geführten Deutschen Reichs, der Frankreich schockierte. Es richtet den Blick auf eine Zeit, in der Frankreich selbst eine Vorrangstellung in Europa erlangt hatte. Aber dies geschieht nicht vorrangig in Wehmut, sondern zur Aufmunterung und in Verbindung mit dem Hinweis, dass sich eine wesentliche Verbesserung der Lage nur erwarten lässt, wenn man – dem Beispiel der Versöhnung zwischen Louis XIV. und Condé folgend – nach schwerwiegenden innenpolitischen Konflikten um der gemeinsamen Zukunft willen wieder zu nationaler Geschlossenheit zurückfindet.

Dass Gérôme offensichtlich Wert darauf legt, an eine politische Versöhnung zu erinnern und ihrer Darstellung besonders festlichen Glanz zu verleihen, entspricht durchaus dem tradierten französischen Staatsverständnis. Bereits der gegenwärtig vor allem als Theoretiker der Staatssouveränität in Erinnerung gehaltene Jean Bodin hat sich – im letzten Kapitel seiner 1583 erschienenen *Six livres de la République* – für eine »justice harmonique« eingesetzt,[9] d. h. für eine Auffassung von Gerechtigkeit und Justiz, die gerade in kritischer Zeit auf

7 Davon vermittelt einen Eindruck das 1689 gemalte Bild »Der Magistrat der Stadt Paris in der Beratung über ein Fest zu Ehren von Louis XIV.« von Nicolas de Largillierre; siehe Heyen (2013) 105 ff.

8 Noch im selben Jahr malte Ernest Meissonier ein Bild, »Les Tuileries en ruines, mai 1871«. Es verbindet die Erschütterung über die Zerstörung des alten Königsschlosses, das hier ohne seine Fenster und Treppen gezeigt wird, mit Zukunftshoffnung; siehe Heyen (2013) 41 f.

9 Siehe dazu Damler (2016) 210 ff.

Verständnis und Verständigung zielt und insoweit Souveränität und Harmonie auf eine normativ pragmatische Weise miteinander zu verbinden sucht; anders ausgedrückt: die Gnade vor Recht ergehen lässt, nicht um dieses zu missachten, sondern um es vor einer gefährlichen Überspannung seines Geltungsanspruchs zu schützen, indem sie – nach einer Unterscheidung des Aristoteles – die »ausgleichende«, unerbittlich rechnende Gerechtigkeit zugunsten einer nach Würdigkeit großzügig »austeilenden« Gerechtigkeit zurücktreten lässt.

Freilich, bei einem solchen Rückgriff auf das *Ancien Régime* kann es nicht überraschen, dass die Stellung der Frau in Gérômes Bild nur wieder als nachgeordnet wirkt: Frauen gehören zur königlichen Familie oder zur höfischen Gesellschaft (Abb. 4), sie verleihen Glanz, sind auf vielerlei Weise unverzichtbar, treten aber nicht als nationalpolitisch relevante Entscheidungsträger in Erscheinung. Man wird noch bis ins 20. Jahrhundert hinein warten müssen, bis sich daran etwas ändert.



Abb. 4: Ausschnitt von Abb. 3

II. Einige Variationen sozialpolitisch wirksamer Inszenierung des Weiblichen

In sozialpolitischer Hinsicht kündigen sich die Veränderungen in der künstlerischen Wahrnehmung von Frauen schon früher an. Anfangs waren sie im Zusammenhang mit der Visualisierung biblischer und anderer antiker Erzählungen aufgetreten, sodann in Porträts politisch oder ökonomisch bedeutender Familien sowie in Nonnenbildnissen, schließlich aber auch in Alltagsszenen der weniger begüterten oder gar verarmten Bevölkerung, beim Wasserholen am Brunnen, bei der Hausarbeit und im Umgang mit Kindern, also in sog. Genrebildern.

Hieran lässt sich mit einem Werk anschließen, das als Genrebild zu bezeichnen freilich dem innovativen Charakter seiner Thematik und Präsentation – der auf Gleichberechtigung zielenden Herausstellung weiblicher Arbeitskräfte in einer vorwiegend von Männern bestimmten industriellen Arbeitswelt – nicht gerecht würde: »Grubenarbeiterin an einem Schacht des Borinage«, 1882 entstanden aus der Hand des wallonischen Malers und Bildhauers Constantin Meunier (1831–1905).[10] Es zeigt eine junge Frau auf den Treppenstufen des Eingangs einer Schachtanlage mit einer Grubenlampe in der Hand. Ihre alltäglich zu erfüllende Aufgabe bestand darin, Kohleloren zu füllen und zu bewegen, – eine schwere und auf Dauer gesundheitsschädliche Arbeit.

Die harte Arbeitswelt des Kohleabbaugebiets Borinage war zuvor auch schon Vincent van Gogh aufgefallen. Ende der 1870er Jahre war er aus den Niederlanden dorthin gezogen, um den Bergarbeitern und ihren Familien Bibelstunden zu geben und seelsorgerlich beizustehen. Die erbärmlichen Lebensverhältnisse empörten ihn aber dermaßen, dass sich sein ernüchterter Glaube dem ererbten dogmatischen Christentum seines Elternhauses zunehmend entfremdete und ihn bewog, das sich vor seinen Augen vollziehende Elend aufzuzeichnen und Maler zu werden.

10 Farbabbildung in Caspers (Red.) (1998) 55 unter dem Titel »Hiercheuse à la fosse au Borinage«. Zur Frauenarbeit im belgischen Kohlebergbau siehe Penn Hilden (1993) 107 ff.

Meunier verzichtet hier aber auf die Schilderung von Anstrengung und Entbehrung, um stattdessen geradezu denkmalartig Würde und Selbstbewusstsein einer jungen Arbeiterin hervorzuheben. Er lässt Brust und Kopf die Arbeitstreppe überragen und setzt sie ins helle Licht des Himmels. Das Rot des Kopftuchs in einem ansonsten farbarmen Bild mag man im Sinne des auch von Meunier vertretenen, bei ihm aber christlich grundierten Sozialismus deuten.[11]

Im Vergleich damit herrschte im seinerzeit ökonomisch weniger entwickelten Italien eine deutlich traditionellere Motivwahl, gerade auch hinsichtlich der Darstellung von Frauen, deren Aufgaben vor allem in der Familie gesehen wurden, in Haus und Hof, und damit in einer ganz anders orientierten Welt. Kennzeichnend dafür ist ein Werk von Francesco Paolo Michetti (1851–1929). Es entstand 1877 und ist unter verschiedenen Titeln bekannt geworden. Das Museum, das es derzeit besitzt und ausstellt, nennt es »Mammina«, in Anspielung auf die herzerfrischende Mütterlichkeit, die es zum Ausdruck bringt. Die Titelvariation erklärt sich aus der Nähe des Bilds zu einem größeren Werk des Malers aus demselben Jahr, das sofort große Aufmerksamkeit fand und ihn weithin bekannt machte. Es zeigt, wie eine Fronleichnamsprozession das Portal des Doms in Chieti, einer Stadt in den Abruzzen, durchschreitet und die breite Freitreppe hinabzuziehen beginnt.[12] »Mammina« entnimmt dieser großen Szenerie einen Ausschnitt, ohne dabei aber weniger ausgearbeitet zu sein als das Hauptwerk.

Das Bild überrascht durch sein südliches, geradezu in die Augen springendes Temperament. Farbenfroh lässt es überall das Licht pulsieren, besonders im Baldachin, in den Lampions und schwebenden Blüten. Die Malweise ist flüssig und großzügig, teilweise geradezu rauschhaft, wodurch das Katholische der Szenerie einen bacchantischen Zug erhält. Was der Maler beobachtet hat, wird emotional durchdrungen und aufgemischt.

Vor dem Hintergrund der im Domportal erscheinenden, von einem Zug nackter kleiner Kinder angeführten Prozession schreitet auf einem schmalen, aber festlichen Teppich eine junge, kräftige und freudig strahlende Mutter mit zwei ebenso kräftig und lebhaft anmutenden, wonniglich nackten Kleinkindern auf den Armen die Treppe herunter; links steigt Weihrauch auf, rechts folgt eine junge Nonne mit Kruzifix, Kerze und Gebetbuch, während, etwas zurückgesetzt und vor einem übergroßen Heiligenbildnis, ein Mädchen unbeschwert tanzt – drei Weisen jungen weiblichen Lebens also, aber auch eine allegorische Überhöhung, insofern sich Mutterliebe und Liebe zu Christus in der Darstellung zu einer natürlichen Instinkt und religiöse Tugend übergreifenden Caritas verbinden. Aufgrund der in ihrer Kleidung vorherrschenden Farben der italienischen Trikolore (Grün-Weiß-Rot) mag man zudem in der jungen Mutter eine Verkörperung des noch jungen italienischen Nationalstaats sehen.[13]

Ein Vierteljahrhundert später präsentiert Gaetano Bellei (1857–1922) unter dem Titel »Windstoß« eine ganz andere Sichtweise.[14] Vor dem sommerlich grünen Hintergrund eines Parks lässt er eine junge Frau die Stufen einer breiten Steintreppe mit geschwungener Brüstung hinabsteigen, auch sie dem Bildbetrachter zugewandt und lachend, aber aus ganz anderem Grund, hat sie doch gerade ihren kleinen Sonnenschirm loslassen müssen, um das im Wind sich blähende Kleid zusammen- und den Hut festhalten zu können. Die Treppe wirkt hier

11 Deutlicher wird die politische Stellungnahme in einem um die Jahrhundertwende entstandenen Gemälde von Jules Adler, das unter dem Titel »La grève au Creusot« – siehe Heyen (2013) 116 f. – einen Arbeiterstreik in der burgundischen Schwerindustrie ins Bild setzt. Gezeigt wird ein langer, Nationalfahnen tragender Menschenzug, angeführt von einer Frau, in deren Trikolore sich das nationale Rot zum Rot der Arbeiterbewegung steigert.

12 Farbabbildung unter dem Titel »La processione del Corpus Domini a Chieti« in Strinati / Benzi (a cura di) (1999) 71, mit einem Kommentar von Anna Maria Damigella (197 f.), und, besonders groß, in Benzi / Berardi et al. (2018) 68 f.; siehe dazu die ausführliche Besprechung von Zimmermann (2006) 313 ff. und die Wiedergabe zeitgenössischer Beurteilungen in Di Tizio (2007) 54 ff.

13 Ganz anders fällt die Darstellung des Mutterglücks in einem um 1874 entstandenen Werk von Luigi Busi (1837–1884) aus: »Gioie materne«; Farbabbildung in Dotti (a cura di) (2020) 121 (120 ausführliche Würdigung durch Stella Ingino). Es zeigt ein glückliches junges Ehepaar mit Säugling inmitten eines großzügig ausgestatteten bürgerlichen Wohnzimmers – ein Sujet, dessen gefällige Gestaltung dem Maler Anerkennung und lebhafte Nachfrage einbrachte.

14 Farbabbildung unter dem Titel »Colpo di vento« (ca. 1902) in Bosi (2020) 77 (76 ausführliche Würdigung durch Beatrice Balzarini).

als Schauplatz noch jugendlich schwungvoller, gänzlich unbekümmerter Frische und modisch herausgeputzter Koketterie, wie es die *Belle Époque* nahegelegt haben mag, mit neckischem Halstuch, die Unterarme in langen weißen Handschuhen, in einem fein gewirkten Kleid und darauf farblich abgestimmtem Schuhen. Die besonderen stofflichen Qualitäten herauszuarbeiten, hat dem Maler sichtlich Freude bereitet.

Zwischen diese beiden Werke von Michetti und Bellei ist eines zu stellen, das deren bei aller sonstigen Gegensätzlichkeit gleichermaßen ungetrübtes Frauenbild in Frage stellt, nicht indem es wie Meunier auf neuartige spannungsreiche Arbeitswelten aufmerksam macht, sondern indem es Bruchlinien traditionsbestimmten Lebens aufzeigt. Mit ihm gilt es sich nun auseinanderzusetzen.

III. Segantinis verdeckte Variation: junge Schwangere und alter Priester

Es geht hier um das Werk eines Künstlers, der zur Entstehungszeit, Mitte der 1880er Jahre, noch seinen Weg suchte: Giovanni Segantini (1858–1899). Die große Anerkennung, die er danach erfahren hat, gilt hauptsächlich Gemälden, die maltechnisch vom *divisionismo* – der Aufspaltung der Farben in Spektraltöne – geprägt und thematisch einer zurückgezogen lebenden Alpenwelt gewidmet sind. Doch gibt es anfangs auch solche, die in einer traditionelleren Malweise den architektonischen und sozialen Formen kirchlichen Lebens Ausdruck geben. Das bei weitem bekannteste davon trägt den Titel »Zur Frühmesse«.

In seinen Maßen ungewöhnlich, sehr breit und aufgrund der Rahmung nach oben hin leicht gewölbt, zieht es den Blick unweigerlich auf eine Steintreppe, deren Darstellung mehr als die Hälfte der Bildfläche beansprucht. Der auf den Austritt, die oberste Stufe, folgende Weg wird nicht gezeigt. Dadurch verselbständigt sich die Treppe auf überraschende Weise. Während sie auf ihrer untersten Stufe, dem Antritt, die maximale Bildbreite einnimmt, verengt sie sich zudem, bedingt durch das begleitende wuchtige Mauerwerk ihrer Wangen, nach oben hin so stark, dass die dem Austritt unmittelbar folgende Öffnung zum Himmel wie eine Befreiung wirkt. Aber dieser kosmische Himmel hat den Raum jenseits der Oberkante des Austritts, die als Horizontlinie figuriert, nicht für sich allein. Denn hier schließt sich linkerhand eine gemauerte Brüstung an, die zu einer spätbarocken Kirche mit prächtigem Portal führt. Wenngleich der Weg dorthin nicht einzusehen ist, so deuten ihn die Zierfelder der Brüstung doch an; sie nehmen den regelmäßigen Rhythmus der Treppenstufen auf und verleihen ihm dabei einen anspruchsvolleren und vornehmeren Ton. Während der Weg zum natürlichen, kosmischen Himmel einfach und frei erscheint, wirkt der Weg zur Kirche verstellt und wie ein Nebenweg. Wenigstens gibt es zu denken, dass die Kirche an den äußersten linken Rand der Bildfläche platziert wird und nur mit einem kleinen Ausschnitt ihrer Fassade zu sehen ist.

In diese architektonisch aufgebaute Spannung setzt Segantini nun einen einzelnen, die Treppenstufen ersteigenden Menschen ein. Es handelt sich dabei jedoch nicht um eine fromme Frau, wie man vielleicht auch erwarten könnte, sondern um einen Priester (Abb. 5).[15] Ein die gesellschaftliche Stellung von Frauen berührender Gehalt ist also gar nicht zu erkennen – nicht mehr, muss man jedoch sogleich hinzufügen. Denn was wir hier vor uns haben, ist eine Art Palimpsest: eine auf Sparsamkeit des Materialverbrauchs bedachte Ersetzung einer ursprünglichen Bilddaussage durch eine andere. Segantini hat, wie immer schon bekannt gewesen ist, die nur in einer Photographie überlieferte Erstfassung dieses Gemäldes übermalt, zwar nur verhältnismäßig wenig, aber gerade hinsichtlich des hier besonders interessierenden Treppengeschehens.

Nicht dieses Geschehen also, sondern die Treppe selbst bildet, wie ja auch schon die Größenverhältnisse vermuten lassen, das Fundament der Bildfindung. Sie darf daher bei der Bilddeutung nicht unbeachtet bleiben. So stellt sich zunächst die Frage, was den Maler zu einer solchen Motiv-

15 Der von Segantini selbst gewählte Titel des Bildes, »A messa prima«, wird in der deutschsprachigen Literatur ganz überwiegend einfach mit »Frühmesse« übersetzt. Es geht hier jedoch nicht um die Frühmesse als solche, die ja auch gar nicht gezeigt wird, sondern um die im italienischen »a« ausgedrückte Stunde der Frühmesse, welche die Stunde des anbrechenden Tages ist. Besser ist daher, wenngleich nicht ganz eindeutig, die Übersetzung »Zur Frühmesse«, die Segantini (2018) 88 verwendet und die ich hier übernehme.



Abb. 5: Giovanni Segantini, »A messa prima / Zur Frühmesse«, 1884/86, Öl auf Leinwand, 108 x 211 cm. St. Moritz, Segantini-Museum St. Moritz (Dauerleihgabe der Otto Fischbacher Giovanni Segantini Stiftung). Aus: Stutzer / Wäspe (Hg.) (1999) Tafel 46

wahl veranlasst hat, eine Frage, die auf seine Ausbildungsjahre an der Kunstakademie in Mailand, der *Reale Accademia di Belle Arti* im *Palazzo di Brera*, verweist.

Segantini hatte in dieser Zeit bereits mehrere Bilder mit kirchenbezogener Thematik gemalt, fühlte sich aber in seiner Kunstauffassung und Maltechnik noch nicht ausgereift, auch wenn 1883 auf der Weltausstellung in Amsterdam sein Werk »Ave Maria bei der Überfahrt« – heutzutage, freilich in einer etwas anderen, späteren Fassung, eines seiner bekanntesten – bereits mit einer Goldmedaille ausgezeichnet worden war.

Rat fand er bei seinem finanziellen Förderer und künstlerischen Mentor, dem Mailänder Kunsthändler Vittore Grubicy De Dragon. Dieser machte ihn Ende des genannten Jahres auf die realistische Malerei der Haager Schule aufmerksam. Zu deren Vertretern zählte Anton Mauve, der sich thematisch, wie andere dieser Schule auch, dem Leben der Bauern und Fischer zuwandte, aber in helleren Farben malte und damit 1881/82 bereits Vincent van Gogh, seinen deutlich jüngeren Vetter, nachhaltig beeindruckt und auch beeinflusst hatte. Mauve brachte das in die Oberflächen der Gegenstände eingedrungene und von ihnen zurückgeworfene Licht zur Anschauung, nicht nur das Licht in den Wolken, auch das Licht in den Gräsern der Wiesen und in den Fellen der Schafe, in Sand und Schlick, Eis und Schnee, und entsprechend variationsreich fallen seine Weißtöne aus.

Segantini war beeindruckt[16] und machte sich daran, seine Malerei neu auszurichten. Dazu nahm er aber anders als Mauve nicht Natur, sondern Architektur in den Blick, und zwar die Treppenanlage vor der Kirche von Veduggio, einem kleinen Ort in der nördlich von Mailand gelegenen Brianza, wo er mit seiner Familie lebte. Sie bildet den Ausgangspunkt unseres Gemäldes.

In der Tat gelingt die Darstellung der Treppe – die Erfassung der farblichen Nuancen in den verwitternden Stein- und Putzflächen, die zu einer deutlichen Aufhellung und Verfeinerung von Segantinis Palette führte[17] – mit einer erstaunlichen und bewundernswürdigen Intensität.[18] Es fällt allerdings auf, dass Segantini die Zuordnung von Treppe und Kirche verändert hat. Während er sich hinsichtlich Treppe und Brüstung an die

16 So Grubicy in einem Brief aus späteren Jahren, im italienischen Original zitiert bei Kaufmann (2006) 166 (Anm. 1089).

17 Schon für Servaes (1902) 33 ff. (überschrieben »Die Poesie von Raum und Licht«) beginnt damit im Werk Segantinis ein neues Kapitel. Habe es bisher an einer »eindringlichen analytischen Naturauffassung« gemangelt, sei es nun um die »korrekte Wiedergabe des Beobachteten« gegangen.

18 Einen Eindruck davon vermittelt die große farbige Detailabbildung in Quinsac (1982) 420. Von einer »überrealen Evidenz des Materiellen« spricht Wäspe (1999) 112.

örtlichen Gegebenheiten hält, ist die Randständigkeit der Kirche das Ergebnis einer freien Bildgestaltung (in Veduggio führt die gezeigte Treppe gerade auf die Kirche zu[19]), ebenso der besondere Blickwinkel auf die Treppe, der sie unten in die Breite zieht, dadurch monumentalisiert und dynamisiert.

Da die Art der Inszenierung der Treppe den Blick des Bildbetrachters von unten nach oben wandern lässt, darf man wohl annehmen, dass sich Segantini den Bewegungsimpuls der figurativen Ergänzung anfangs so vorgestellt hat, wie es die Zweitfassung zeigt, also ebenfalls von unten nach oben gerichtet und damit auf den frei geräumten Horizont hinausweisend. Überraschenderweise hat der Maler in der Erstfassung[20] aber etwas anderes verwirklicht, und dies obwohl auch sie schon die gewölbte Rahmung aufweist und damit den Eindruck einer zwar nicht kirchen-, aber naturfrommen Himmelsöffnung unterstützt.

Anstelle eines alten aufsteigenden Priesters zeigt sie eine junge schwangere Frau, die mit einem Gebetsbuch in den Händen und von einem Hund begleitet die Treppe hinabsteigt, während ihr von oben – dort, wo Treppe und Brüstung aufeinandertreffen – drei wohlbeleibte Mönche nachschauen (Abb. 6). Für diese Fassung sind mehrere Bildtitel bekannt, die hier zusammengezogen werden: »La penitente – Non assolta / Die Beichtende – Ohne Absolution«.[21] Sie geben zu verstehen, dass der Schwangerschaft keine Eheschließung vorausging und der jungen Frau deswegen bei der Beichte die Absolution verweigert worden ist, und haben dazu geführt, dass den Gesichtszügen der Mönche, obwohl sie nicht gut zu erkennen sind, Hohn und Spott abgelesen werden.[22] Segantini macht die Kirchentreppe damit zum Schauplatz einer Verurteilung.

Immerhin jedoch hat er die junge Schwangere nicht so dargestellt, als sei sie an der Verweigerung der Absolution zerbrochen. Es gibt keine Geste der Verzweiflung, im Gegenteil, ihre Haltung strahlt Würde, Lebenswillen und Selbstvertrauen aus. Der Hund an ihrer Seite mag in gewisser Weise als Gegenbild zu den Mönchen figurieren, als Beispiel einer naturgegeben verlässlichen Zuwendung, auch und gerade in Zeiten menschlicher Not.



Abb. 6: Giovanni Segantini, »La penitente – Non assolta / Die Beichtende – Ohne Absolution«, 1884/85 [Ausschnitt einer Photographie der Vorfassung von »A messa prima«]. Aus: Quinsac (1982) 423

Um zu verstehen, wie es zu einer solchen figurativen Ergänzung kommen konnte, obwohl sie zu der von Segantini bereits vorgenommenen Bildstrukturierung – der Verrückung der Kirchenfassade zugunsten einer Freiräumung des Horizonts – nicht recht passt, empfiehlt sich zum einen (IV.) die Vergegenwärtigung thematisch verwandter Treppenbilder, die der Maler während seiner Ausbildungszeit in der *Pinacoteca di Brera* kennengelernt hatte, und zum anderen (V.) die Beleuchtung seiner kirchen- und frauenpolitischen Haltung, die darüber entschied, ob und gegebenenfalls in welcher Hinsicht diese Bilder ihm für die Lösung seines Problems Anregung zu geben vermochten.

19 Eine Photographie von Treppe und Kirche in Veduggio findet sich in Segantini (2018) 87, aber auch schon in Bonifazi et al. (2000) 55 und Quinsac (1982) 419.

20 Die in der Literatur anzutreffende Datierung ist nicht ganz einheitlich (Segantini selbst hat die Bilder nicht datiert). Laut Quinsac (1982) 419 entstand die 1885 in Turin öffentlich ausgestellte Erstfassung 1884–1885, die Zweitfassung 1885–1886. Ich folge ihr mit einer kleinen Änderung: Bei der Datierung der Zweitfassung sollte zum Ausdruck kommen, dass es sich um eine teilweise Übermalung der Erstfassung handelt. Folglich wird hier deren Entstehungszeitraum einbezogen, was im Ergebnis 1884–1886 bedeutet und mit Stutzer / Wäspe (Hg.) (1999) Tafel 46 übereinstimmt.

21 Segantini (2018) 87 nennt als Titel »Üble Nachrede«, wohl in Übersetzung des ebenfalls anzutreffenden italienischen Titels »I commenti maligni« (siehe Quinsac [1982] 419).

22 So Quinsac (1990b) 102, aber auch Wäspe (1999) 112. Schon Servaes (1902) 35 sieht eine »Gruppe hechelnder Mönche«.

IV. Segantinis Mailänder Anregungen (Hayez, Carpaccio, Raffael, Zandomeneghi)

Thematisch verwandt ist zunächst das bereits besprochene hochpolitische Gemälde von Hayez (Abb. 1). Daneben fallen in der *Pinacoteca di Brera* drei Treppenbilder wesentlich religiösen, kirchlichen Charakters ins Auge, in denen nicht Männer, sondern Frauen die entscheidende Rolle spielen.

Die beiden ältesten, schon aus dem sehr frühen 16. Jahrhundert stammend, betreffen die Jungfrau Maria. Das erste, gemalt von Vittore Carpaccio (1465/67–1525/26), zeigt sie als junges Mädchen bei einem treppauf gerichteten, dem Hohepriester zustrebenden Tempelgang, der freilich nicht frontal, sondern von der Seite aus in den Blick gerückt wird.[23] Das zweite, gemalt von Raffaello Sanzio (1483–1520), hat die Vermählung Marias mit Joseph vor dem Hohepriester zum Thema.[24]

Raffaels Bild (Abb. 7) ist hier insofern besonders bemerkenswert, als es eine starke Horizontorientierung aufweist, den Tempel dabei aber nicht an den Rand rückt, wie Segantini mit der Kirche verfährt, sondern zentral auf den Horizont setzt, so dass es den Blick zunächst über einen treppenartig gestuften Weg auf den Tempel lenkt und erst anschließend in die Weite eines offenen Himmels schweifen lässt. Unterstützt wird diese Gewichtsverschiebung dadurch, dass zwar beide Bilder oben gewölbt sind, bei Raffael die Wölbung indes von der Kuppel des Tempels getragen zu sein scheint, während Segantini der Kirche diese Funktion entschieden verweigert und das Himmelszelt selbst weit schwingend und selbsttragend erscheinen lässt.

Es kontrastiert aber nicht nur der Bildaufbau, es kontrastiert auch der soziale, religiöse und rechtliche Kontext. Raffael zeigt, wie der Hohepriester dem Zusammenleben von Maria und Joseph ein neues, religiös wie rechtlich tragfähiges Fundament stiftet, indem er in einer Harmonie ausstrahlenden Zeremonie Joseph – demütig barfuß erscheinend – den Ehering über den Finger Marias streifen lässt.[25] Die Evangelien des Neuen Testaments wissen davon zwar nichts, wohl aber die »Legenda aurea« des Genueser Erzbischofs Jacopo da Varazze, eine um 1270 entstandene lateinische Sammlung von Marien- und Heiligenlegenden, die seitdem in zahlreichen volkssprachlichen Varianten Verbreitung gefunden hatte.

Vor ihrem Hintergrund lässt sich verstehen, wer in Raffaels Bild Maria und Joseph begleitet:[26] Es sind zum einen vier, wohl unter der Aufsicht einer älteren Frau stehende Mädchen, die wie Maria im Tempel gedient haben und dies durch besondere Kleidungsstoffe zum Ausdruck bringen, zum anderen fünf Männer, die wie Joseph um Maria geworben und dies durch einen Stock zu erkennen gegeben haben. Da Maria sich inzwischen für Joseph entschieden hat, zeigt sich am Ende seines Stocks eine zarte Blüte. Zwei der anderen Männer haben dies bereits bemerkt und daraufhin ihren Stock übers Knie bzw. mit den Händen gebrochen, um so ihren Rückzug aus der Bewerbung kundzutun.

Das dritte der religiösen, kirchlichen Gemälde, das Segantini angeregt haben könnte, verdankt sich Federico Zandomeneghi (1841–1917), entstand 1872 und weist ebenfalls ein betont breites Format auf (Abb. 8). Es öffnet sich der sozialen Wirklichkeit seiner eigenen Zeit und gibt ihr einen christlichen Rahmen, doch nicht im selbstgewissen hohen Ton Raffaels, sondern auf eine eher unauffällige, hintergründig wirkende Weise, wie auch im neutral formulierten Titel »Römische Impressionen« zum Ausdruck kommt. Gezeigt wird nämlich, wie sich an einem trüben Wintertag bedürftige Frauen und Kinder auf den breiten Stufen einer Klostertreppe[27] versammelt haben, um von

23 Kleine Farbabbildung unter dem Titel »Presentazione della Vergine al Tempio« in Lauber (2012) 165 (166 f. große Farbabbildung eines Ausschnitts).

24 Farbabbildung unter dem Titel »Sposalizio della Vergine« in Lauber (2012) 275. Pfisterer (2019) 34 übersetzt mit »Verlobung Mariens (Sposalizio)« und nennt den Ring einen »Verlöbnisring«. »Verlobung« scheint mir ein irreführender Ausdruck zu sein, da er im Deutschen für eine zwar ernsthaft ausgesprochene, aber rechtlich unverbindlich bleibende Heiratsabsicht steht. Der Unverbindlichkeit widerspricht jedoch Raffaels Darstellung. Angemessener ist daher der Ausdruck »Vermählung«, der dem in englischsprachigen Bildkommentaren benutzten Ausdruck »marriage« entspricht.

25 Siehe ausführlich Giorgi (2020) 36 ff., mit sehr guten farbigen Detailabbildungen.

26 Siehe ebd. 47 und 48. Bemerkenswert ist außerdem, dass im Hintergrund rechts ein Bettler Almosen empfängt; siehe ebd. 51.

27 Die lokale Zuordnung schwankt. *San Gregorio al Celio* heißt es im Bildkommentar von Farese Sperken (1994) 695–697. Dagegen soll es sich laut Arrigoni / Maderna (a cura di) (2010) 490 um den *convento di Aracoeli* handeln.



Abb. 7: Raffaelo Sanzio, »Sposalizio della Vergine / Die Vermählung der Jungfrau Maria«, 1504, Öl auf Holz, 170 x 118 cm. Mailand, Pinacoteca di Brera. Aus: Pfisterer (2019) 34



Abb. 8: Federico Zandomeneghi, »Impressioni di Roma / Römische Impressionen«, 1872, Öl auf Leinwand, 78 x 167 cm. Mailand, Pinacoteca di Brera. Aus: Arrigoni / Maderna (a cura di) (2010) 490

einem fürsorglichen Mönch eine warme Suppe zu empfangen.[28]

Zusammenfassend betrachtet lassen sich die genannten Werke, die sämtlich auf die eine oder andere Weise auch rechtliche Dimensionen aufweisen, wie folgt einander zuordnen: Mit Hayez verbindet Segantinis Erstfassung der Aspekt männlicher Verurteilung auf einer frontal präsentierten Treppe; mit Carpaccio der Aspekt priesterlich begleiteter weiblicher Frömmigkeit; mit Raffael der Aspekt eines priesterlich gegründeten Zusammenlebens von Mann und Frau und einer Inszenierung solcher Gründung anhand einer frontal präsentierten komplexen Konstellation von natürlichem Horizont und religiöser Architektur; mit Zandomeneghi schließlich der Aspekt kirchlicher Sozialverantwortung.[29]

Doch münden die Anregungen dieser Vor-Bilder bei Segantini in ein hauptsächlich negatives Ergebnis, nämlich in die scharfe Kritik am kirchlichen Umgang mit nicht-ehelicher Schwangerschaft, wenn auch gepaart mit einer aufmunternden und insoweit positiven Herausstellung der Schwangeren selbst. Und so stellt sich die Frage: Woher kommt diese kritische Einstellung, und wie verhält sie sich zum zeitgenössischen Familienrecht Italiens, also dem Land, zu dem sich Segantini – ungeachtet seiner Geburt im damals noch österreichischen Trentino – zeit seines Lebens zugehörig fühlte?[30]

V. Segantinis Mutterbild, italienisches Eherecht, Familienstrukturen im Alpenraum

Obwohl Segantini durchaus bereit war, in seiner Malerei kirchennahe Themen aufzugreifen, stand er dem Katholizismus kritisch gegenüber.[31] Er lebte mit seiner Frau in keiner eherechtlich aner-

28 Später, nunmehr in Paris lebend, wird der Maler diese Thematik nicht mehr aufgreifen und vor allem durch Bildnisse bekannt und geschätzt werden, die Mädchen und Frauen fernab aller Sozialkritik lesend oder schauend zeigen, still und in ruhigen Farben gefasst. Siehe Bosi (2022) mit den Farbabbildungen Nr. 11 ff. und Dotti (a cura di) (2020) 83, 143 ff., 181.

29 Auch Michettis Bild könnte Segantini beim Entwurf seines Treppenbilds gekannt haben, und zwar durch den Ende 1881 unter dem Titel »La festa dei bambini« erfolgten Abdruck einer graphischen Variante in der Zeitschrift »L'Illustrazione Italiana«; Abbildung in Zimmermann (2006) 314, der ihren Titel auch für das große Ölbild verwendet. Wenn Servaes (1902) 35 sein Urteil, die Erstfassung sei ein »Missgriff«, u. a. damit begründet, die Szene erinnere »zu sehr an ein bekanntes Bild von Michetti«, so wird er wohl dieses Treppenbild vom Fronleichnamsfest gemeint haben.

30 Die italienische Staatsangehörigkeit hat Segantini nie erwerben können; zu den Gründen siehe Quinsac (1990c) 225, 226, 228, 234.

31 Zu Segantinis Verhältnis zur Religion und seinen religionsbezogenen Bildern siehe Quinsac (1990a) und Frehner (1999) 17 ff.

kannten Verbindung und lehnte es ab, die gemeinsamen vier Kinder nach katholischer Lehrauffassung religiös zu erziehen.[32] Dabei sah er die Mutterschaft – gleichgültig, ob nun innerhalb oder außerhalb einer ehelichen Bindung, und überhaupt unabhängig von staatlichen und kirchlichen Reglementierungen – als etwas der Frau von Natur aus Aufgegebenes an. Besonders deutlich zeigen dies manche unter symbolistischem Einfluss stehende Gemälde aus den 1890er Jahren, die sich zwar zum Teil in die christliche Bildtradition der »Madonna mit Kind« stellen (wie 1894 »L'angelo della vita / Der Engel des Lebens«, wo eine junge Mutter mit ihrem Kind in das Geäst eines Baumes eingesetzt wird[33]), aber andererseits auch auf eine nicht-christliche Literatur beziehen, in der jene Frauen in die Kritik geraten, die sich der Mutterschaft verweigern oder sie vernachlässigen.[34]

Mit seiner Kritik am Einfluss der Römisch-Katholischen Kirche auf die italienischen Familienverhältnisse stand Segantini nicht allein. Das Familienrecht des neuen Staates, des *Regno d'Italia*, war höchst umstritten, insbesondere hinsichtlich der anstehenden Säkularisierung des Eheschließungs- und Ehescheidungsrechts.[35] Mit dem 1865 verabschiedeten und zum folgenden Jahr in Kraft getretenen *codice civile*, der unter starkem Einfluss des französischen *code civil* stand, wurde überall die Zivilehe *(matrimonio civile)* eingeführt und somit die kirchliche Trauung in ihrer Bedeutung gegenüber der standesamtlichen Eheschließung zurückgedrängt, nicht zuletzt um auch Nichtkatholiken eine zivilrechtlich wirksame Ehe zu ermöglichen.[36] Versuche jedoch, die Zivilehe nunmehr obligatorisch der kirchlichen Trauung vorangehen zu lassen und auch eine Ehescheidung zu ermöglichen, scheiterten und dies ungeachtet langjähriger heftiger Debatten zwischen den Verfechtern eines »Stato laico« und ihren traditionsorientierten Gegnern, die man der Verteidigung einer »clerocrazia« beschuldigte. Die Auseinandersetzungen sollten noch über Jahrzehnte verbissen weitergeführt werden, so dass man hier wie im Deutschen Reich von einem »Kulturkampf« gesprochen hat.[37]

Die tatsächlichen Familienverhältnisse – die Stellung von Mann, Frau und Kindern zueinander, die Aufgabenverteilung und Bestimmungsmöglichkeiten – änderten sich ohnehin nur langsam und zudem regional variabel. Wie in anderen europäischen Ländern dieser Zeit, bestanden große Unterschiede zwischen Stadt und Land, also beispielsweise zwischen einer sich industrialisierenden Großstadt wie Mailand und dem traditionsorientierten ländlichen Sizilien.

Diese Unterschiede betreffen auch den Umgang mit vorehelichen Schwangerschaften.[38] Als maßgeblich dafür erwiesen sich neben religiös-morali-

32 Anders als Frehner (1999) 17 meint, ließ er aber nicht alle ungetauft. Getauft wurden zwei, freilich aus besonderen Gründen; siehe Segantini (2018) 79, 81.

33 Farbabbildung bei Quinsac (1990a) 57.

34 Wie in »Le cattive madri / Die bösen Mütter« und »Il castigo delle lussuriose / Die Strafe der Wollüstigen«, auf deren besonderen literarischen Hintergrund Quinsac (1990a) 52 ff. und Frehner (1999) 31 ff. näher eingehen. Für eine ausführliche Analyse mit kritischer Aufarbeitung bisheriger Interpretationen siehe Zimmermann (2006) 105–146, besonders 110 ff., wobei 139 ff. auch die soziale Problematik unehelicher Mutterschaft beleuchten.

35 Reiche Quellen- und Literaturhinweise bei Ranieri (1982) 338–341. Einen griffigen Überblick zur Verbesserung der Rechtsstellung der Frau mit Gesetzesauszügen bietet Bellomo (1970) 104 ff.; in welchem Umfang politisch wirkende Frauen selbst zu dieser Verbesserung beigetragen haben, veranschaulicht Sarogni (1995).

36 Grundlegend zur Entwicklung des italienischen Familienrechts Ungari (2002), insbesondere 151 ff. (Kap. V: »Il Codice Pisanelli«), 181 ff. Zum damals herrschenden Familienbild und Familienleben siehe Vecchio (1994). Ferrari / Zanotti (1993) bieten eine differenzierte Beschreibung der tatsächlichen ökonomischen und sozialen Basis des Familienrechts. Über die weitere Entwicklung der Beziehungen zwischen Staat und Kirche in verwaltungshistorischer Perspektive unterrichtet Ferrari (2002).

37 Zur Motivation und Ausformung des in Italien vor allem im liberalen Bürgertum verbreiteten Laizismus und Antiklerikalismus in der zweiten Hälfte des 19. Jahrhunderts siehe den Überblick von Verucci (1993); ausführlicher und grundlegend Verucci (1996) 179 ff. (Abschnitt III, »La sinistra laica: il movimento del libero pensiero«). Siehe auch Borutta (2011) 326 ff. (»Kulturkampf als Säkularisierung in Italien«). Durch das Konkordat von 1929 zwischen Italien und dem Vatikan wurde die scharfe Trennung zwischen kirchlichem und staatlichem Eherecht wieder aufgehoben und eine auch zivilrechtlich wirksame kanonische Ehe eingeführt (»Konkordatsehe«), die freilich zivilrechtliche Wirkung erst nach obligatorischer Eintragung ins Standesamtsregister erfuhr.

38 Wegweisend Mitterauer (1983), eine Studie mit dem Schwerpunkt auf Österreich im 18./19. Jahrhundert, die aber in ihrer rechtliche Faktoren berücksichtigenden Verbindung von Demographie, Sozialanthropologie und Sozialgeschichte auch Italien einbezieht. Zu einem vergleichbaren Blick auf Preußen siehe Harms-Ziegler (1997).

schen und rechtlichen Bindungen die faktischen Strukturen der Arbeitsorganisation, also ob und auf welche Weise Frauen familienwirtschaftlich eingebunden waren oder aber außerhalb ihrer ursprünglichen Familie Arbeit aufgenommen hatten und auf welche Geschlechterverhältnisse sie dabei stießen. Es ist naheliegend, dass sich die Verhaltenserwartungen des ländlichen Herkunftsortes und des städtischen Arbeitsortes unterschieden und zueinander in Spannung gerieten.

Um mit den belastenden Folgen ungewollter Schwangerschaften besser fertig zu werden, gab es in größeren Städten Findelhäuser, meist in kirchlicher, klösterlicher oder kommunaler Hand, wie z. B. schon seit dem 15./16. Jahrhundert in Mailand. Solchen Findelhäusern konnten auch ehelich geborene Kinder anvertraut werden, um ihren Müttern bis zum Ende der Stillzeit oder für die ersten, pflegeaufwändigen Jahre die Arbeitsaufnahme (insbesondere in einer Fabrik) zu erlauben oder zu erleichtern, so dass sie in ihre Familie zurückkehrten, sobald sie dieser als Arbeitskraft wieder nützlich erschienen.[39]

Es ist also wohl eher nicht so, dass sich Segantini um eine unverheiratete junge schwangere Frau, wie er sie seinem Bild einfügte, in Veduggio hätte ernsthaft sorgen müssen, wenigstens soweit es ihre soziale Einbettung und Unterstützung betrifft. Seine Kritik zielt daher wesentlich auf die in seinen Augen reine Negativität der anscheinend erwartbaren kirchlichen Verurteilung.

Deren Inszenierung erfolgt nach dem Vorbild von Hayez anhand eines Treppenabstiegs, aber im Gegensatz dazu nicht in Verbindung mit einer Verherrlichung der säkularen Rechtsordnung eines Gemeinwesens und deren Verteidigung, sondern in Verbindung mit der Verurteilung eines moralischen Aspekts seitens einer eigentlich nur subsidiären, nämlich bloß kirchlichen Ordnung, deren Tragweite er hinsichtlich ihrer Legitimität grundsätzlich in Frage stellt.

Durch die Übermalung dieser Erstfassung seines Bildes hat Segantini zwar offenkundig auf eine dermaßen scharfe Akzentuierung seiner Kritik verzichtet. Bedeutet dies aber, dass er sie in der Zweitfassung gänzlich aufgegeben hat?

VI. Zurück zu Segantinis »Frühmesse«

Vergegenwärtigen wir uns noch einmal die Haltung des Priesters bei seinem Treppengang (Abb. 3). Anders als die lebensbejahend schreitende junge Frau wird der alte gebeugte, sein Leben zölibatär verbringende Priester als eine von seiner Soutane und damit wesentlich institutionell bestimmte Rückenfigur gezeigt. Er geht zögerlich, seine Kleidung wirkt abgetragen, und der Eindruck, den er macht, lässt die Architektur noch etwas brüchiger erscheinen. Ein aufgeschlagenes Mess- oder Gebetsbuch hinter dem Rücken mit ineinander gelegten Händen tragend, den Blick gesenkt, hält er müde oder nachdenklich inne. Kopf und Oberkörper ragen bereits in den Himmel hinein, während Unterleib, Arme und Beine noch den verwitternden, ausgetretenen und ausgebesserten Treppenstufen verhaftet sind.

Diese Scheidung wirkt zunächst ganz natürlich, erweckt dann aber doch den Eindruck einer Ambivalenz in der Orientierung: einerseits in Richtung auf den sich im Morgendunst erfrischenden kosmischen Himmel, an dem der Mond verblasst, um den Strahlen der Sonne zu weichen, andererseits in Richtung auf die Anforderungen, welche die Katholische Kirche an einen Priester stellt. Dabei kommt diesen Anforderungen anscheinend ein Übergewicht zu, denn die mittig zum Treppenaustritt platzierte Gestalt des Priesters richtet sich nicht zum Himmel auf, sondern neigt sich zur Brüstung und zum Kirchenportal hin, und sein großes Ohr, wie auch die Fingerstellung, ähnelt der Form seiner Kopfbedeckung, so als hätte der amtliche Habitus vom Körper Besitz ergriffen.

Man hat gemeint, diese Zweitfassung des Gemäldes zur Erstfassung in einen scharfen Gegensatz setzen zu können. Auffällig sind insofern die Kommentare von Annie-Paule Quinsac, die sich um das Werk Segantinis große Verdienste erwor-

39 Zur Entwicklung in Mailand siehe Pellegrini (1973) und Hunecke (1987). Über vergleichbare Verhältnisse in Wien und Basel informieren Pawlowsky (2001) bzw. Orth (2022), eine Studie, die auch Literatur zum weiteren Alpenraum erschließt und für die 1860/70er Jahre anhand von Ehegerichtsprotokollen eindrücklich vor Augen führt, wie eine Großstadt aus dem sie umgebenden ländlichen Raum (hier Baden) in großem Umfang weibliche Arbeitskräfte anzieht, ihnen aber eine Verehelichung bei unzureichendem Vermögen rechtlich verwehrt, ohne dadurch verhindern zu können, dass eine auf ein gegenseitiges Versprechen hin faktisch gelebte Ehe auch ohne Trauschein einen tragfähigen Familiengrund liefert.

ben hat. 1990 sieht sie zwischen beiden Fassungen einen »dramatischen Gegensatz«; in ihrer Sicht »überwindet« der Maler »die kirchenfeindliche Einstellung« der Erstfassung; sie hebt die »implizite Religiosität« des Bildes hervor, »die es der Genremalerei enthebt und den mystischen Pantheismus ankündigt, der von den symbolistischen Werken der letzten Lebensjahre ausgeht«; in ihrer Sicht »evoziert« der Maler nicht nur »die besinnliche Stimmung, die die frühmorgendliche Atmosphäre in dem […] Priester auslöst«, sondern auch »ein Seelenbündnis zwischen der Natur als Trösterin und dem Menschen«.[40]

In einem weiteren Text aus demselben Jahr schreibt sie, Segantini habe »den einzigen bildnerischen Beweis für seinen Antiklerikalismus« gelöscht und »durch eine ernsthafte Devotionsszene ersetzt«, eine Veränderung, die »seine Ambivalenz dem Katholizismus gegenüber« verrate »und mehr noch, seine Gewissensbisse in bezug auf eine vielleicht zu hartherzige Verurteilung jener religiösen Tradition, die an der Wurzel seiner eigenen italienischen Kultur lag und die er, trotz allem, für alle jene als wichtig erachtete, die nicht wie der Künstler oder der Dichter zur geistigen Elite gehörten.«[41]

Andere halten die institutionelle Kirchenkritik für aufgegeben. So Wäspe:[42] »Die Kritik, die sich ursprünglich gegen die Institution Kirche beziehungsweise gegen die Unzulänglichkeit ihrer Vertreter wandte, wird zur individuellen Problematik, stellvertretend dargestellt im persönlichen Schicksal des Geistlichen. Die monumentale Treppe mit all ihren Verletzungen erscheint als Symbol des zurückgelegten Lebensweges, dessen Mühsal sich im morgendlichen Aufstieg des Priesters unmittelbar verbildlicht.« Und so auch Stutzer, der den Grund für den Motivwechsel darin sieht, dass für Segantini »das erzählerische Moment der ersten Fassung zu dominant und zu trivial ausgefallen ist – notabene für einen Künstler, der nach bestechenden, symbolischen Bildfindungen strebte und deshalb zunehmend danach trachtete, auf narrative Elemente möglichst zu verzichten.«[43]

Mir erscheinen solche scharfen Kontrastierungen übertrieben, weil auf diese Weise der Konstanz der Bildstruktur zuwenig und dem Austausch der Bilderzählung zuviel Gewicht beigemessen wird und damit das sich gegen die Katholische Kirche wendende rechtspolitische Grundmotiv, das Segantini in beiden Bildfassungen bewegt hat, vernachlässigt wird.[44]

Zwar ist es zweifellos richtig, dass sich Art und Maß der Kirchenkritik in den beiden Bildfassungen deutlich unterscheiden: Was in der Erstfassung an Kritik pointiert, ja polemisch zum Ausdruck kommt, wird in der Zweitfassung in den Ausdruck einer Orientierungsambivalenz zurückgenommen und auf diese Weise sublimiert (Äußerungen Segantinis dazu sind nicht überliefert). Aber ein kirchenkritisches Moment bleibt doch erhalten. Angesichts eines morgendlichen, von einem gänzlich freien Horizont bestimmten Himmels wirkt der pflichtgemäße, aber zögerliche Treppengang des Priesters als eine Fleiß- und Fügsamkeitsmetapher, die fragwürdig geworden ist.

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40 Quinsac (1990b).

41 Quinsac (1990a) 47 f.; Quinsac (2002) 23 hingegen betont die tiefe Einsamkeit (»profonda solitudine«) des Priesters, deren Ausdruck darauf hinzuweisen scheine, dass die Antwort auf die wesentlichen Fragen des Lebens nicht von den amtlichen Religionen kommen könne (»come a significare che la risposta ai quesiti essenziali della vita non può venire dalle religioni ufficiali«).

42 Wäspe (1999) 112.

43 Stutzer (2016) 86.

44 Zu einfach insoweit Hofstetter (1985) 270, der aus seiner Deutung der Kirchentreppe als »Himmelstreppe« meint folgern zu können, dass Segantini den Himmel und nicht die Kirche als »das eigentliche Ziel« des Priesters angegeben habe. Der Ausdruck »Himmelstreppe« findet sich auch bei Bonifazi et al. (2000) 55; ebd. 72 spricht hinsichtlich Segantinis »Gottesvorstellung« von einer »Synthese aus katholischer Tradition und pantheistischem Gedankengut«.

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Aufgang zum Grabmal

Paul W. Kahn

The Multicultural State: Progress or Tragedy?*

Just about the time that Daniel Bonilla's narrative of recent constitutional development in Latin America begins – the mid to late 1980s – I began my career as a law professor. Alongside constitutional law, I found myself teaching international law. One of the contentious topics in that field was the right of self-determination. Who can make such a claim and what does it entail: autonomy or statehood? Is the right free-standing or remedial?

These legal questions were pushed forward both by political developments and by a new theoretical literature on multiculturalism. My view, then, was that international law could take no position on the central issue in these debates – the place of cultural minorities in the distribution of political power within the state. It could not do so because there was no correct answer embedded in political practice, and there was no common political morality with respect to this issue upon which to draw. Some states imagined themselves as »melting pots«, aiming for a single, national political culture, while other states thought of themselves as alliances among diverse communities that pre-existed the state. The former tended toward centralization of power. To the extent that they decentralized, the subunits were defined politically, not culturally. The fifty American states are not cultural or ethnic communities. Multicultural states, on the other hand, were skeptical of centralization. They tolerated centralized power as a device for coordination among distinct communities that were defined prior to and apart from their politics.

I thought of this as the difference between the United States and Canada, or the difference between what had been the French and the British approaches to empire. The pressing practical issue in the 1980s, however, concerned state formation after decolonization. The colonial legacy included political boundaries drawn without substantial regard for the geography of indigenous communities. Was the post-colonial state committed to a kind of erasure of political differences among indigenous communities or was its state building project to reflect its multi-national character?

Reading Daniel's essay, I realized that the ground has shifted over the last few decades. There has been a moral, if not a legal, victory for one side in this debate – the multicultural side. Daniel's story is about the progressive development of South American constitutionalism from a post-colonial regime of nationalist monoculturalism, to multiculturalism within a liberal frame, to plurinationalism or interculturalism. The endpoint rejects the idea of a single people united in a political culture, imposing a single order of law upon themselves. The state, instead, becomes a site for dialogue among autonomous, self-governing communities. While Daniel speaks of a continuing commitment to a singular or absolute sovereignty even in the plurinational state, it is hard to know what that means beyond a commitment to stable borders – especially given the second half of his chapter, which describes the increasingly porous nature of sovereignty.

Daniel sees the increasing, political embrace of cultural difference over the last four decades as progress toward a proper endpoint – a movement from illegitimacy to legitimacy. The monocultural state suppressed the diverse political and cultural claims of indigenous and African-American groups. The emerging plurinational state would give these diverse groups »their due« by recognizing them as autonomous sources of law. The state becomes a site of constant exchange and negotiation among these internal nations.

One wonders where, in this model, is the power to decide. Daniel's description is full of the language of discourse, interaction, and learning, but there is little on the moment of decision. A state,

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however, is a power in the world by virtue of its decisions. The power does not exist in the abstract, but only in its use – including the carrying into effect of decisions. Inevitably decisions have unequal consequences. What actually holds the state together at the moment of decision? I'm not sure a plurinational state is actually a state; it may be the problem to be addressed through state formation. Think for example of Lebanon.

Thinking about the political from the perspective of the decision, I realized that where Daniel sees progress, I see tragedy. Daniel might be right in describing the new forms of state order as remedies for pathologies in the exercise of power by earlier state formations. We should not, however, read those pathologies through the lens of the remedy. When a car crashes, we might encourage the passengers to take a train. The failure of the car, however, was not that it was not a train. The failure of the unitary state was not that it was not a multicultural state. It was, rather, the failure of the modern political project.

Daniel is describing a turn to a post-modern, political project. I want to linger for a few minutes on the nature of the modern state-building project and what was lost with its failure. Daniel and I have quite different understandings of the nature of that project. I see the nation following the state; he sees the state following the nation. Both views are well represented in the tradition of state construction. The American and French experiences stand on one side; the German and Italian, on the other. I suspect that Daniel is attracted to the latter view, in part, because he approaches the problem from the perspective of the multicultural remedy. I am attracted to the former because it rests on a radical idea of freedom – an idea I believe to be at the heart of modernity.

What was the nature of the modern state-building project of which both the United States and Latin American states were products? These were settler states; they were also revolutionary states. They broke the bonds of political authority, in pursuit of an idea of self-creation. Political order might depend upon civil society, but it was not to be a mirror of society. Rather, the state-building project affirmed the autonomy of the political. The state was an artificial, not a natural, order. It was something to be designed by reason and enacted by the will. The political project, accordingly, expressed the Enlightenment belief that a free will was one that could form itself under the direction of reason. Hobbes and Kant are equal founders of this tradition.

To think that political order could be a project of reason required a turn away from God as well as from every other traditional source of order. That turning was an act of liberation. Every political claim had to be justified to the »opinion of mankind«, meaning it had to defend itself through an appeal to reason. This thought, famously embodied in the founding documents of the United States, was at least as important historically as the invention of the steam engine. Failed political projects could now be replaced. Indeed, there was a moral demand that they be replaced by something new. For these reasons, the modern political age was characterized by repeated efforts at constitutional construction.

The modern state is distinctly a product of theory. We don't have modern states until we have modern political theory. This too is remarkable: the practical equivalent of the discovery of Pluto on the basis of theory. The famous frontispiece of Hobbes' *Leviathan* symbolizes this ambition of state creation *ex nihilo*. Deploying reason, a community could bring itself into history as a force in the world. Compare this to state construction through royal marriages. The very meaning of history changes. It becomes the self-narrative of a collective, transgenerational agent that is the people.

This modern, political project was both new and grand. It promised liberation from multiple forms of subordination. Citizens would give the law to themselves. Belief in this state expressed the possibility of freedom and order: ordered liberty. This was a vision of politics commensurate with the belief in science and education that characterized modernity.

The key ideas of this modern political project remained stable for some 300 years: human rights expressing the dignity of a citizen capable of self-government, law as the construct of reason, and elections as the means for the selection of political representatives. Liberal theory tends to think this is enough, but it is not. Missing from it is a robust idea of representation of the popular sovereign. Only this could turn the universal project of reason into the project of a particular community. Absent this moment of representation, the project has no home. It is as moveable and as transient as a copy of *Leviathan*. This element of representation was the counterforce to a natural tendency of the other

elements (human rights, reason, and elections) to move toward larger and larger political configurations. To be modern was to want to live in a political community that understood itself as committed to realizing in and for itself the three elements of the liberal, democratic state.

There were, of course, a million problems with this political program, beginning with the belief that not all people were »capable« of being full citizens. They were not yet modern: that is, they were still uncivilized. At its origins, the modern state excluded women and minorities. As a project of colonization, it excluded majorities, as the colonizers claimed to be the civilized. The project also imagined citizens as rational agents, but of course real people respond – for good and bad reasons – to many unreasonable claims. Those claims can range from personal interests to group advantage. The political project was a grand idea, but it was crippled from the start by its reliance on real people. This problem had already been identified by Plato: the just state requires at its foundation the sort of person that only arrives with its success.

Every institution faces a conflict between its ideals and the actual practices that inform its behavior. For this reason, every institution is in constant need of reform. Beyond a certain point, reform seems impossible and we abandon the project as a bad idea. Was the modern state a bad idea? I don't think so. More importantly, I don't think there was a choice. It represented the political expression of the modern project. We cannot choose not to live in our historical moment. This does not mean we have to be neutral in our attitude toward this historical formation. I think the modern political project was a truly great idea. If we are bound to a political life, I would choose to be bound to a state that thought of politics as a project of self-creation under the guidance of reason. In ordinary discourse, we call that project »freedom«.

How did we move from a competition between political visions in the 1980s to the triumph of multiculturalism today? This shift is only one manifestation of the assault on modernity with which we are familiar in both its academic and popular forms. What I described as pathologies become essential attributes. The frame of reference shifts from reason to power: who has it and who does not? We dismiss reason as rationalization and consider individual motives; we examine the actual distribution of wealth and power among competing groups. We develop accounts of structural injustices, of individual biases, of social hierarchies that perpetuate themselves under the guise of reason. Whose reason, we ask? We identify groups that suffer from exclusion even as they perform necessary labor for the community. We find that the project of modernity never penetrated deeply into society, as families and communities protect their own against even the just claims of others. Politically, these multiple critiques translate into a deep resentment of elites. The anger at elites, then, informs an attack on the political institutions they occupy. This combination of critique and mobilization has caused political disruption everywhere.

Those of us who think both that much of the critique is correct and that the rejection of the modernist project is a tragedy are in a difficult position. I really do not know if the modernist project is salvageable. We, too, must live within the historical moment in which we find ourselves. The issue is not whether we can imagine more robust forms of human rights, reason, and electoral accountability. Europe has been experimenting in this direction. The difficulty is whether we can find an identity – a representation of the self – in that political formation. Whose project is it? One answer to that question was given by Brexit; another is given in the political developments that Daniel recounts.

Daniel describes a double movement – a sort of pincer movement – attacking the classical concept of the unified, modern state from within and from without. At stake in these attacks was the nature of the intergenerational collective subject whose project was the state. That concept of self-creation seems increasingly anachronistic. No state can live in our historical moment without massive, legal coordination with others. The power of decision moves toward transnational institutions, draining state sovereignty of importance.

There is nothing new in recognizing that as transnational governance grows, so do centrifugal forces within the state. Transfer of power away from the nation weakens the claim of the state in the face of more local claims on identity. Sometimes there is a counter-reaction, reclaiming state power as in Brexit. More often, we simply live with a weaker sense of politics as the site of identity and freedom. The wealthy become cosmopolitans; the less well-off turn inward to ethnic and cultural identity.

These moves seem tragic to me, both for what has been lost and for the dangers they raise. Transnational governance has not penetrated citizen identity; its claims of rationality ground bureaucracy, not freedom. Its success depends upon a depoliticized world. A depoliticized world opens a space for a multicultural state. Both developments imagine a politics in which decision is not necessary. Politics without decision can indeed be endless conversation. This is the condition under which new forms of politics can emerge that reclaim the power to decide. Today, those forms are likely to be populist and violent. This is a problem not just in Latin America, but everywhere.

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S. 41 Fratelli Alinari, Staircase of the tower of Arnolfo in Palazzo Vecchio and view of the Cathedral, Florence (ca. 1900).
Photograph © Alinari Archives, Florence,
https://www.alinari.it/it/dettaglio/ACA-F-017100

S. 57 Frances Benjamin Johnston, Students at Work on a House Built Largely by Them, Building a Stairway of the Treasurer's Residence. Hampton, Virginia (1899 or 1900).
Photograph (platinum print), Library of Congress, Washington, D.C.,
https://www.loc.gov/item/00652583/

S. 80 Edmund Burne-Jones, The Golden Stair (1897).
Oil painting, Tate Britain, London,
https://www.tate.org.uk/art/artworks/burne-jones-the-golden-stairs-n04005

S. 107 Biblioteca Ambrosiana, Milano, Italy (2019).
Fotografie © Otto Danwerth

S. 159 Supreme Court Building, Washington, D.C., USA (2018).
United States Capitol, Washington, D.C., USA (2018).
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S. 177 Museo de Arte Contemporânea, Niterói, Brazil (2014).
Cemetery, La Paz, Bolivia (1998).
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S. 178 Cholula, Mesoamerican pyramid, Mexico (2017).
Teotihuacán, Mesoamerican archaeological site, Mexico (2011).
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S. 179 Colonial church, Oaxaca, Mexico (2017).
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S. 180 Ollantaytambo, Inka archaeological site, Peru (1997).
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S. 276 Spanish Steps, Piazza di Spagna, Rome, Italy (2017).
Fotografie © Otto Danwerth

S. 277 Frederick H. Evans, »A Sea of Steps«, Wells Cathedral, Stairs to Chapter House and Bridge to Vicar's Close (1903).
Gelatin silver print, Philadelphia Museum of Art,
From the Collection of Dorothy Norman, 1970-31-24,
https://philamuseum.org/collection/object/66293

S. 278 Staircase, Jüdisches Museum Frankfurt am Main (2021).
Staircase, Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main (2016).
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S. 298 Kew Gardens, Temperate House, London (2023).
Fotografie © Otto Danwerth

S. 299 Kōzaburō Tamamura, 711 Stone Steps at Nikko, Japan (1893).
Photograph, Museum für Kunst und Gewerbe, Hamburg,
https://sammlungonline.mkg-hamburg.de/de/object/711-Stone-Steps-at-Nikko/P1984.446/dc00039927

S. 304 Jakob Philipp Hackert, Die Grotte des heiligen Franziskus auf dem Monte Verna (1801).
Öl auf Leinwand, Städel Museum, Frankfurt am Main,
staedelmuseum.de/go/ds/1648

S. 311 Oskar Schlemmer, Bauhaustreppe (1931–1932).
Bleistift und Aquarell auf Velinpapier, Städel Museum, Frankfurt am Main,
staedelmuseum.de/go/ds/17910z

S. 312 Martin Engelbrecht (Verleger), Alexander Gläßer (Stecher),
Bernhard Christoph Ankermann (Entwerfer), Treppen, Blatt 1, o. J. (18. Jh.).
Kupferstich auf Papier, Museum für Kunst und Gewerbe, Hamburg,
https://sammlungonline.mkg-hamburg.de/de/object/Treppen/O1911.243/dc00102864

S. 313 Domenicus Fietta, Treppengeländer, Blatt 2 aus einer Folge von Gittern (1790–99).
Kupferstich auf Papier, Museum für Kunst und Gewerbe, Hamburg,
https://sammlungonline.mkg-hamburg.de/de/object/Treppengeländer-Blatt-2-aus-einer-Folge-von-Gittern/O2014.116/dc00106850

S. 314 Max Planck Institute for European Legal History, Frankfurt am Main (2021).
Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main (2021).
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S. 324 Escalators at Woodley Park Station, Washington, D.C., USA (2018).
Fotografie © Otto Danwerth

Carlo Bersani

Persona, *Homo*, *Res*: Building a Boundary in Early Modern European Legal Thought

According to Roman law the same human being, the *servus*, can be understood as *res mancipi* or as *persona*, being part of the different kinds of persons described in Justinian's *Institutiones*. But in the third decade of the 18th century, it would be written that »Certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur« (Heinecke). How and why did this distinction become so precise, and the boundary between the two concepts so impassable? Underlying this distinction is the joint action of two phenomena: serfdom and slavery in the modern age. Serfs and slaves define the concept of person because they constitute its boundary: on one side of the boundary there are persons, on the other *res*. Indeed, slavery and serfdom are at the basis of the legal concept of *persona*, which was transmitted from the ancient regime to 19th-century legal thinking. Comparing the many possible legal conditions between *persona* and *res*, legal thought established a moving boundary, located within individuals, making them sometimes the subject, sometimes the object of legal relationships. The mobility of this boundary, its uncertainty, its susceptibility to being the subject of continuous gradations, would be passed down to the concept of legal capacity.

Keywords: persona, serfdom, slavery

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Tamar Herzog

Enslaved as Outsiders, Enslaved as Property: Understanding Slavery in a Global and Early Modern Context

This text seeks to de-center existing narratives regarding enslavement, which traditionally focus on how it was practiced in North America, and instead to observe it in the *longue durée* and more globally. It asks about the various roles enslaved persons played in different times and geographical locations, paying particular attention to the ways by which they contributed to the reproduction of families, kin groups and communities. It also questions the assumption that slaves were property by setting enslavement on a larger canvas and by observing early modern debates regarding both the household and labor relations.

Keywords: slavery, property, otherness, servants, chattel

■

Matilde Cazzola

»There Is in the Great Big Law Too Much Bad Little Law«: The Slavery Abolition Act and Labour Laws in the Post-Emancipation British West Indies

Upon the abolition of slavery across the British Empire in 1833–1834, the British Caribbean had to revise their labour laws in accordance with, and in a way conducive to, the transition from enslaved to free labour. To do so, they drew on English labour legislation, which, since the mid-14th century, had regulated employment relations by equating civil breaches of agreement by servants with criminal offences punishable by imprisonment. After the establishment of the system of »apprenticeship« in

1834, and even after its abolition in 1838, the emancipated of the British West Indies became increasingly aware that the combination of civil violations and criminal consequences inherent to this labour legislation produced a coexistence between their formal liberty and personal subordination to their employers, who were also their former masters. By turning the formerly enslaved into a mass of servants and enforcing their duty to work, the new Caribbean labour laws maintained the hierarchies of slave society in the new society of theoretically free and equal individuals along the colour line.

Keywords: enslavement, emancipation, labour laws, West Indies, Caribbean, British Empire

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Christiane Birr

Tradition and Innovation in Knowledge Production: Gregorio López' Commentary on the *Siete Partidas* (1555)

Gregorio López' name is inextricably linked to his edition and commentary on the *Siete Partidas*, and both his contemporaries and later jurists praised him for having added »the eternal explanation« to this centrepiece of medieval Castilian legislation. The technique of commenting on authoritative texts was the basis of the scholastic method as practiced at the Spanish and Portuguese universities in the 16th century. Writing glosses or commenting was a method of making authoritative texts applicable to contemporary problems, circumstances and questions. In the Spanish context, this can be observed particularly whenever problems posed by the developments in the Americas needed to be resolved. Although the medieval tradition obviously had not discussed these issues, commenting on and interpreting authoritative texts by medieval thinkers was used as an intellectual tool to develop answers to contemporary problems. A closer reading of López' commentary on the *Siete Partidas* confirms the use of this technique, especially with regard to the presence of the Americas as a topic in the glosses. The following analysis traces López' work both as an editor and as a commentator of the *Partidas* to examine several examples of how he incorporated new questions into the framework of a medieval authoritative text.

Keywords: School of Salamanca, production of knowledge, Gregorio López, Siete Partidas, glosses

■

Tobias Schenk

Knowledge of Production of Normativity at the Imperial Aulic Council. Towards a Procedural Perspective on Early Modern Legal Reasoning

Global and knowledge-historical perspectives represent a productive challenge to the statist positions which still characterise much of legal history – positions whose deficiencies have become increasingly clear in recent times. This also applies to research on the Holy Roman Empire, which dominated the map of Central Europe until 1806. This empire had two central courts, the Imperial Chamber Court (Reichskammergericht) and the Imperial Aulic Council (Reichshofrat), which have been the subject of intensive study in German legal history since the 1960s. In order to utilise the rich yields of this research in terms of global history, German historians will have to stop reconstructing the history of the Imperial Chamber Court and Imperial Aulic Council teleologically as develop-

mental steps towards the rule of law in the modern state. The process categories frequently used in the literature on the Holy Roman Empire, such as juridification, rationalisation and professionalisation, prove to be insufficient to adequately describe knowledge of the production of normativity. What is needed is a sociology of the judicial production of norms that sees the practices of the judges in constant interaction with social normativity regimes. Using the example of the Imperial Aulic Council, the article demonstrates how organisational and social analysis can be linked successfully.

Keywords: collective judging, legal reasoning, early modern period, Holy Roman Empire, Imperial Aulic Council

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Andrew James Harding

The Diffusion of Common Law in the Straits Settlements: »The Six Widows' Case« and the Rout of Custom

This article uses a 1911 case from Singapore (»the Six Widows' case«) to discuss the issues arising from the introduction of common law into the Straits Settlements. It examines the reasoning behind the introduction of common law, and how common law dealt with its interface within the Asian context, specifically with regard to Chinese customary law. It discusses what was at stake in this case, alternative approaches, and the debates the case led to regarding Chinese marriages and family law more generally. The addition of a case study on undue influence in the law of contract leads to the conclusion that judicial reasoning, common-law style, is in general adequate to bridge the gap between law and society.

Keywords: legal transplants, common law, Chinese customary law, British Straits Settlements, polygamy

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Paola Revilla Orías, Pablo Quisbert Condori

Kintal sut'i: Preservación, transmisión y usos de saberes normativos en ayllus y comunidades (Charcas, Bolivia, siglos XVI–XXI)

Based on documentary evidence from *ayllus* and community archives in Bolivia, the authors of this essay reflect on the preservation, transmission and use of particular normative knowledges in the long period between the 16th and 21st centuries. They point out that some of the *memorias* of these *ayllus*, transmitted orally or in writing, formed not only the basis for collective pronouncements against the arbitrariness of authorities and governments in power but also for an effective inter-*ayllu* and trans-community organisation of the territory. They propose that it is fundamental to approach this knowledge from a social and anthropological history of law that does justice to the particularity, complexity and internal tensions of the narratives used by the actors involved.

Keywords: community, archive, normative knowledge, apoderados, Bolivia

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Erk Volkmar Heyen

Zur Inszenierung des Rechts in der Malerei des späten 19. Jahrhunderts. Treppen als Schauplätze geschlechtsspezifischer Verherrlichung und Verurteilung

The article begins by analysing two paintings by Francesco Hayez and Jean-Léon Gérôme, which pursue a national political interest and show women in a supporting role only. In paintings addressing socio-political themes, however, the depiction of women was much more differentiated. Particular attention is paid to an early work by Giovanni Segantini. In its first version, it shows a young, unmarried pregnant woman who has been refused absolution after confession, a scene which the work's second version replaces with an old priest going to morning mass. The history of the creation and interpretation of both versions is presented as well as the staircase paintings that Segantini had become familiar with in the Pinacoteca di Brera in Milan and thus might have inspired his first version: in addition to the painting by Hayez, these include in particular those by Raffaello Sanzi and Federico Zandomeneghi. The article demonstrates that Segantini's criticism of the Catholic church continues in the second version although disguised, and relates this criticism to the development of family law.

Keywords: Visualization of law, status of women, stairs, Gérôme, Segantini

■

Paul W. Kahn

The Multicultural State: Progress or Tragedy?

This essay is a short response to Daniel Bonilla Maldonado's contribution, »Beyond the State: Can State Law Survive in the Twenty-First Century?« to the recently published *Cambridge History of Latin American Law in Global Perspective*. While Bonilla sees progress in the movement from the centralized nation-state to the multicultural state, my essay argues for an appreciation of the values that motivated the creation of the unified state as a single constitutional order in the post-colonial period. This effort may have failed, but with that failure went a distinct and valuable idea of freedom.

Keywords: modernity, freedom, nation-state, multiculturalism

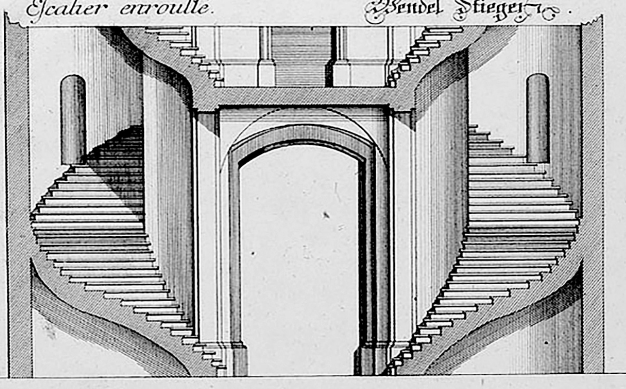
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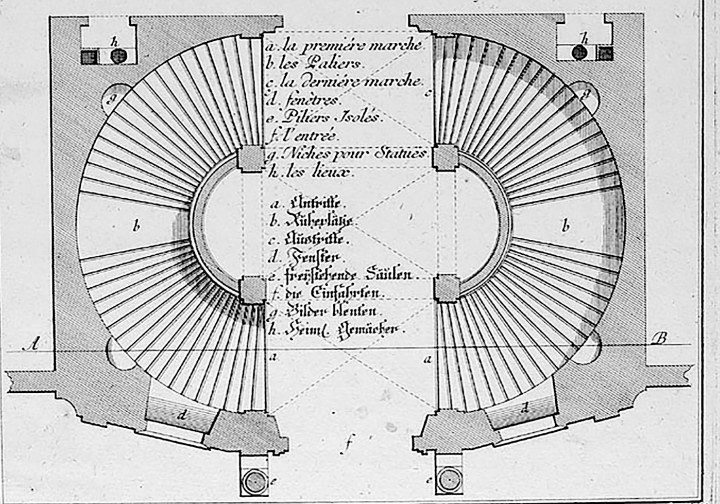
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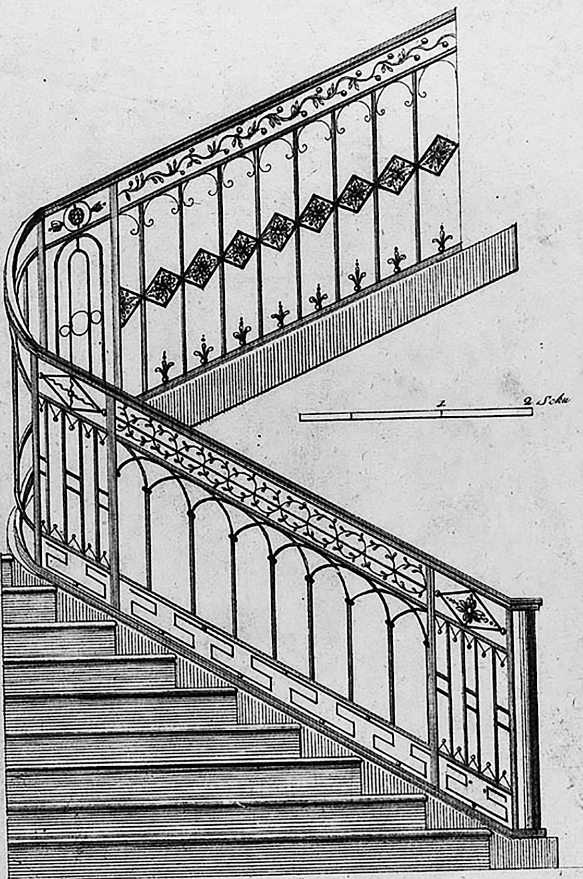
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