

THOMAS DUVE (ED.)

Entanglements in Legal History: Conceptual Approaches



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Entanglements in Legal History: Conceptual Approaches



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Introduction

Entanglements in Legal History. Introductory Remarks

For decades, jurists all over the world have been witnessing the dynamic growth of ‘Transnational Law’.¹ Seemingly new kinds of normative orders are emerging, independent from, or in the shadow of, state and international law. Topics such as ‘Global Constitutionalism’, ‘Global Legal Pluralism’, or ‘Regulatory Hybridization’ are being intensely discussed among growing numbers of scholars of Transnational Law, sometimes under the rubric of ‘General Jurisprudence’.² Global communication has enhanced a dynamic process of hybridization, translation, reproduction of normative options under very different local conditions.

Legal historians cannot ignore this development.³ Instead, their professional experience should lead them to engage in these debates. In large part, legal historical research is dedicated to times and spaces in which the notion of the ‘modern state’ did not exist, or to historical situations of limited statehood. In Europe, for instance, generations of research on the reception of Roman and Canon law in the Middle Ages offer valuable insights into the complex processes of appropriation and reproduction of normative options in the European Middle Ages and in the Early Modern period, and the role different authorities and actors played in this. Research on these periods transports us to worlds very different from the ‘Modern World’ that Christopher A. Bayly invokes and which has shaped our understanding of

1 On Transnational Law see ZUMBANSEN (2012); COTTERELL (2012); on the challenges for legal scholarship SIEBER (2010), AMSTUTZ (2013), for legal education MENKEL-MEADOW (2011).

2 For example on ‘global constitutionalism’ PETERS/ARMINGEON (2009); PAULUS (2009); COHEN (2012); TAMANAHA (2001); TWINING (2009); BERMAN (2012); KJAER (2013).

3 See from the perspective of legal history DUVE (2014). For recent manifestations of the necessity of a historical approach to these questions see for example BRUNKHORST (2012); GLENN (2013); FASSBENDER/PETERS (2012); KOSKENNIEMI (2014).

normative orders and generated a shared vocabulary to express our world-views⁴ – but which might be coming to an end. In a similar vein, legal history dedicated to the 19th and 20th centuries has paid considerable attention to the ‘reception’ of European law in non-European areas, in particular, to the transfer and dissemination of expert-knowledge and ‘European’ ideas outside of Europe. Thus, Legal History may nearly always have harboured a ‘transnational’ dimension in the broad sense of the word,⁵ especially in consideration of histories before and after the spread of nationalism in Europe. Our work has addressed a wide array of questions relating to the ‘transfer’, ‘transplantation’ or ‘translation’ of normativity. It has almost always had to confront the challenge of describing and analyzing processes of normative reproduction in rapidly changing historical settings, not similar, but neither that different from those we are observing today. The globalization of law, and of legal thought, is not a new phenomenon.⁶ Thus, Legal History should be able to make a contribution to the growing reflection on how different normative orders emerge, interact, develop.

The conceptual underpinnings of some traditions of Legal History, however, have not developed at the same pace as it is the case in other fields of study. The gaps and cracks are all the more glaring when this discipline is compared to Global Studies, to Global or Transnational History in particular, which is characterized by intense discussions on methods and concepts of research. It seems that European Legal History has not paid much attention to these discussions,⁷ neither did, for example, the scholarship on ‘*Derecho indiano*’, which studies legal history of the overseas territories of the Spanish monarchy in the Early Modern period. Important works in central and classical fields of legal historical research, like the History of Constitutionalism or Human Rights, and their insistence on the need to generate global perspectives and methods necessary for reconstructing interconnections and interdependencies, have not had a significant

4 BAYLY (2004).

5 See on this term and its use for histories even before the ‘age of nationalism’ SAUNIER (2009); YUN-CASALILLA (2007); for a critical perspective on ‘early globalization’ see EMMER (2003); in this volume, FERNÁNDEZ CASTRO dedicates some thoughts on this problem.

6 KENNEDY (2006).

7 See for example, CAIRNS (2012); IBBETSON (2013) as well as the contributions in SORDI (2013). For a recent critical survey and reflection on this see DUVE (2012); COSTA (2013).

impact on mainstream legal historical scholarship of continental Europe.⁸ The same applies, in part, to discourses generated within Legal Theory and Comparative Law.⁹

Due to this situation, it seemed important to engage in a survey of the concepts employed in transnational legal history today. What are the methods and theories legal historians are using to reconstruct historical processes of interaction of different normative orders? Why are they using these concepts and not others? What are the individual strengths and weaknesses of these methodological tools?

The aim of this volume is to present some specific responses to these questions as well as to offer some examples for methodologies which can serve for analyzing the dynamics of historical normative orders, especially those constituted as a result of intense cross-border communication processes. We requested legal historians to analytically apprehend the law as it ‘moved’, so to speak, in full awareness that the metaphor of ‘movement’ bore the risk of affirming the fallacy of essentialism and underestimating the conditioning and destabilizing factors within an entangled process of exchange, communication and reproduction. Still, our aim was not to focus so much on theory, or on prescribing specific methodologies for undertaking transnational legal history. Instead, in this volume, we turn our attention to how transnational legal histories are effectively being written in every-day-research. Similarly, our intention was also not to limit our discussion to one privileged concept. On the contrary, guided by the belief that there is not one key concept appropriate for all legal historical research, we asked for a critical assessment of our research traditions that would juxtapose the strengths and the weaknesses of new approaches to ‘entangled legal histories’.

Thus, the first section of this volume, ‘Traditions of Transnational Legal History’, revisits specific achievements and shortcomings of legal historical research against the backdrop of postcolonial and global studies. Reflections

8 See, for example, the important works of CLAVERO (2005), ARMITAGE (2007), MOYN (2010), THORNHILL (2011); obviously, there are fields like the History of International Law which has forcefully opened for postcolonial readings of history – see the survey in VEC (2011) – and there is a discourse on ‘Global Legal History’ emerging, see LETTO VANAMO (2011), DUVE (2012), or as an impressive example of how entangled legal histories can be written PETIT (2007).

9 See on this recently the excellent survey of SECKELMANN (2013).

on our own disciplinary traditions that reveal the path-dependencies include critical accounts of the tradition of ‘European Legal History’, ‘Codification history’, the emergence of ‘Hindu Law’, and methodological aspects of Comparative Law.

The four articles in the second section, ‘Empires and Law’, showcase how entangled legal histories forged in imperial spaces, for instance, through treaties concluded in the ancient Roman Empire’s spheres of influence, can be analyzed as a process of ‘narrative transculturation’. The manner in which transnational institutions adjudicated merchant-disputes within the Early Modern Spanish Empire and, after the decline of this empire, how normative frameworks were constructed in multilingual spaces are analyzed as processes of ‘diffusion and hybridization’. Finally, we highlight the so-called ‘craftsmen of transfer’ and the bureaucrats that took practical comparative law as the basis for designing German colonial law. Studies included in this volume only selectively shine a spotlight on a large field, but we were glad to be able to introduce at least one study on antiquity, one on the Early Modern period and two on the imperial world in the 19th and early 20th century.

In the third section, ‘Analyzing transnational law and legal scholarship in 19th and early 20th century’, we present seven case studies to reflect upon how entangled legal histories can most effectively be analyzed. The discussions range from civil law codifications in Latin America as ‘receptions’ or ‘normative transfers’ and entangled histories of constitutionalism as ‘translations’ and ‘legal transfers’ to the formation of transnational legal orders in 19th century International Law, the International Law on State Bankruptcies, and the impact of transnational legal scholarship on criminology. All articles engage in methodological reflections and discussions about their concrete application in legal historical research.

Entanglements

Discussions of the methods of transnational – or global – scholarship in some parts of humanities, cultural studies and social science, especially in the domain of historiography, have been on the rise in recent decades.¹⁰ The terrain is too vast and complex to summarize here, but suffice it so say that

10 See on this the surveys of HOPKINS (2002); DARWIN (2009); SACHSENMAIER (2011); DE JONG (2011); IRIYE (2013); MIDDELL (2013).

one of the main concerns of this debate is to engage in critical explorations fully conscious of the pitfalls of Eurocentric or Western approaches to historical realities. The question we are constantly at pains to ask is this: How do we stop projecting our own categories and concepts on to realities different from the ones these categories and concepts have emerged from?¹¹

Obviously, this is not a new issue. Some scholars, however, especially from the field of Transnational or Global History, felt that the methodological devices employed by traditional historiography, its comparative methods as well as the more recent histories of transfer, were not really adequately developed to escape this fallacy. In many cases, even so-called transnational histories had failed to effectually cross the border with a coherent transnational perspective, and instead sought national or regional (mostly 'European') paradigms, categories, and concepts as their valid point of departure. New approaches to transnational history were proposed, emphasizing the ineradicable interconnectedness of histories not only of neighboring countries and regions, but also of remote global areas. Drawing on postcolonial debates, scholars started to insist on the necessity of analyzing not only the mutual interconnectedness of colonial centers and their peripheries, but to supplement research with a constant critical assessment of the analytical categories being used, as much in Europe and the Western world as in non-western areas where these concepts had been adopted. The main claim is that categories, periodization, epistemic foundations of our scholarship would have to be reconsidered and a self-conscious, reflexive scholarship was the only way to overcome our epistemic positionality, at least partially, in a sort of a dialectic movement between the images of ourselves and the others. This debate also drew attention to some essentialist visions underlying transnational history scholarship. Without aspiring to a homogeneous terminology or a single 'school of thought', some global historians have been employing the image of 'entanglement' or 'entangled histories' (in German '*Verflechtung*') as the label that aptly described their claims. We thought that this is a useful terminology, namely to transform the matrix of inquiry. Because, just as the illustration of this book's cover shows: entangled situations do not offer the luxury of a single point of departure. But this is just what historical work on transnational

11 DIRLIK (2002); DE BAETS (2007); KOSKENNIEMI (2011b). See on this in this volume especially the contributions by Srikantan, Lindner/Kroppenberg, Heimbeck, Kemme.

legal histories is about: Complex intertwined networks, with no beginning and no end, and a difficulty to fix the own point of departure.¹²

Traditions

Transnational scholarship is contingent upon a high degree of self-reflexivity. In that spirit, the four contributions in the first section perform a critical review of scholarly traditions.¹³ They bring together perspectives and frames of reference from historiographical discourses inspired by global history, debates in Comparative Law and Postcolonial Studies in ways that are meaningful for our purposes.

The first article, ‘European Legal History’ (Duve), concentrates on perhaps the most established field of transnational legal historical scholarship. It offers a brief account of the historical circumstances under which this field of study was first formulated in order to analyze some of the underlying assumptions of the concept of ‘European Legal History’, as created after World War II by prominent European writers and thinkers, mostly of German origin. In fact, these foundations can be traced back to Max Weber or Arnold Toynbee. A ‘classical’ Eurocentric vision on legal history that was then propounded drove a conceptual wedge between Europe and the rest of the world. From this perspective, territories beyond Europe were perceived merely as recipients of legal diffusion, where legal systems that had already attained maturity in Europe still seemed to be in their infancy. The methods employed for generating a new transnational legal historiography basically derived from a very German concept of law that privileged learned law and its contribution to the formation of codified systems. At the same time, trapped within a world that shaped their notion of possibilities and constraints, legal historians of that generation starkly underestimated the wide range of transnational actors involved in the reproduction of these European models, so that legal historical scholarship did not get beyond what is sometimes called a diffusionist model of ‘recep-

12 See on this SUBRAHMANYAM (1997); GRUZINSKI (2001); WERNER/ZIMMERMANN (2006); GOULD (2007) as well as the surveys in HAUPT (2001); HAUPT/KOCKA (2009); WELSKOPP (2010); DAVIS (2011). See also Donlan in this volume.

13 See on these aspects also some of the contributions in Rg 22 (2014), especially SAKRANI (2014), KOSKENNIEMI (2014).

tion'.¹⁴ The emergent complex and fluid legal spaces produced by the 'craftsmen of transfer' that orchestrate the assimilation and transformation of models remained undocumented. This article proposes a 'decentered' analysis, which involves opening up the analytical categories in use as a way to counter this tradition.

The article by Inge Kroppenberg and Nikolaus Lindner is dedicated to what they call a 'core' issue of modern legal history, namely codification, which Franz Wieacker claims is a 'delightful possession of the peoples of modern Europe'. Kroppenberg and Lindner show the impact of the Weberian paradigm on the standard narrative of European legal history and the shortcomings that paradigm produced. They argue that the underlying structural functionalism of the concept of 'codification', as it was developed by Weber and adopted by Neo-Weberian legal historians, inevitably leads to a biased vision of legal history, which can only be overcome by adopting a 'culturalist' approach, in effect through a cultural analysis of law. Taking Switzerland as an example, they show how collective identities and the nation-building process were shaped and produced through codes and how that codification history had to be rewritten from a different perspective. They offer a list of theses that constitutes a tentative framework for engaging with modern legal history as well as codification history from a global perspective.

Another critical analysis on the influence of Weberian thought on the writing of transnational legal history is offered by Geetanjali Srikantan in her article on the construction of Hindu Law. The category of 'Hindu law' since the mid-19th century, when British colonial administration came to develop a body of law, has henceforth shaped the image of the Indian legal system. Subsequently, and based on occidentalist perspectives, the 'secular' and the 'religious' symbolized two structuring principles for what could be regarded as law and what did not make the cut. In the end, Europe's image of India mirrored its own categories more than it explained Hindu law. In the same, or even slightly more radical, way that Kroppenberg/Lindner criticized functionalism, Srikantan holds that functionalist approaches by themselves cannot evade the influence of our biased perceptions. Instead,

14 Obviously, this is precisely not what is being addressed when Sean Donlan uses the concept of 'diffusion' in this volume or in DONLAN (2015).

she suggests an analysis within the framework of Edward Said's 'Orientalism' to understand European experiences of non-Western cultures as a first step in reevaluating existing forms of knowledge.

George Rodrigo Bandeira Galindo initially situates his analysis in Post-colonial Studies, described as a 'geographical inquiry into historical experience' (E. Said) and also draws on Comparative Law's structural dependency on space as an organizing principle of research. Yet, the point Bandeira Galindo makes is not so much about the importance of space, but the need to be more aware of the temporal dimension of legal transplants. Drawing on Reinhard Koselleck's theory of history, he proposes viewing legal transplants as attempts to fill the gap between experience and expectation in the legal field. Yet, historical reconstructions of the underlying expectations that were guiding the actors become an essential way to understand legal transplants, at least in the Western world and in those areas where 'modernity' emerged. Ideas of 'progress' as well as the attempted 'prognoses' for legal transplants seem to be especially promising fields of research where Comparative Law needs a more thorough (legal) historical foundation. The ensuing sections provide some striking examples of the fruitfulness of this perspective.

Empires and Law

'Empire' has emerged as an important analytical framework for breaking up national historiographies and understanding the larger spaces of governance since the 1990s. Comparisons between the various empires abound: ancient, early modern and modern. Studies generally highlight the centrality of law in the construction of empires as well as the significance of both formal and informal empires as spaces of communication, fundamental for the evolution of law.¹⁵ Four studies in this section list different aspects of the relationship between law and empire, as well as the different ways of analyzing legal empires.

15 See on this from a general perspective ALLSEN (2011); ELLIOTT (2006); DUINDAM/HARRIES/HUMFRESS/HURVITS (2013); BURBANK/COOPER (2010), DUARA (2011); from the perspective of legal history see, for example, ROSS (2008); KOSKENNIEMI (2011a); BENTON (2010); BENTON (2012); BENTON/ROSS (2013); HESPANHA (2013); KIRKBY/COLEBORNE (2001).

Emiliano J. Buis' article on the influence of the Greek treaties on Roman 'International Law' is not just a case study on legal communication within the sphere of influence of an empire that for a long time has served as the paramount example of European Empires. He also proposes 'narrative transculturation' as the theoretical framework to understand the complex interaction within these imperial structures. In a series of small case studies, he shows how Romans adapted the Greek tradition of treaties, pursuing their own political goals even while employing the traditional political language of that time. 'Transculturation', as defined by the Cuban jurist and anthropologist Fernando Ortíz, allows him to analyze the process of hybridization of various identities in the creation of 'a single and complex society based on the adaptation of colliding (or complementary) perspectives'. Angel Ramas' modification of this idea of 'transculturation', leading to the concept of a 'narrative transculturation', developed in the 1970s within the context of an emergent post-colonial critique, helps him to depict the strategies of adaptation within asymmetrical political and cultural structures. Drawing on this concept, Buis sheds new light on how Roman practices of signing treaties in the Greek world, essentially by appropriating the vocabulary and the models of vanquished, allowed the Romans to establish higher authority within these political spaces. Thus, Buis demonstrates the fruitfulness of the application of 'Southern Theory' (Raewynn Connell) to established fields of research and historiographical discourses dominated by European paradigms.

As Buis has shown, two Latin American intellectuals, Fernando Ortíz and Angel Ramas, made significant contributions to the methodological toolbox for writing histories of entangled worlds emerging from asymmetrical encounters. This might be, in a way, a late intellectual consequence of the global dimensions of the Early Modern Spanish Empire. In her contribution to this volume, Ana Belem Fernández Castro offers an inside perspective into this Spanish Empire, as she puts it, an 'empire built on law'. Within the multi-layered constitution of this 'composite monarchy', she focuses on the beginnings of what she denominates as 'transnational' institution of governance and justice: the House of Trade (*Casa de Contratación de las Indias*), founded a few years after the expansion towards the Indies. Drawing on archival sources of the jurisdictional activity of this House of Trade, she shows that this institution was not only 'transnational' because of the multiplicity of nations that formed a part of the Spanish monarchy and

participated with their capital in the trade, but also because the House of Trade served, notwithstanding an explicit legislation to the contrary, even merchants that were not citizens of Castile. Thus, judicial practices embedded in a local culture affected merchants in different parts of the world. Emergent forms of world trade thus contributed to a diffusion of European juridical practices far beyond the borders of the continent.

The decline and the subsequent implosion of this same Spanish Empire not only paved the way to the independence movements of early 19th century's and the formation of new national legal orders; the third section depicts three case studies on the transnational framing of the national legal orders that emerged as a result (Andrés Santos; Parise; Zimmermann). The fragmentation of the Empire was also part of a long lasting process of political and territorial rearrangement between old and new European and new American powers, resulting in an interweaving of legal systems. Due to this, Spanish West Florida, an area Seán Patrick Donlan analyzes in his article, had been French, British, Spanish and American by the advent of the 19th century. While its population was largely Anglophone during that period, its laws were a variant of Spanish colonial law. In a similar vein, the neighboring American Territory of Orleans's population was largely Francophone, but subject to what he calls 'a gumbo of continental and Anglo-American ingredients'. In both territories, Donlan points out, "the diffusion – direct and indirect, formal and informal, ongoing and sporadic – of the various laws and norms of natives and newcomers created intricate legal and normative hybrids". It is this hybridity he works out in detail, illustrating vividly that hybridity is a product of "a perpetual blending process generated by the ongoing, multidirectional diffusion of laws and norms".

The profound transformations in early 19th century political history, including imperialist expansion on an unseen scale and the consolidation of European nation-states, were the prerequisites for the centralization and systematization of law we observe in 19th century Europe. Yet, 'juridical modernity' also brought about a proliferation of colonial laws in those empires that had not disappeared from the world map. Still, the process of centralization and systematization of national legal orders did not necessarily lead to a widening gap between national colonial legal regimes now completely detached from each other, as it has sometimes appeared. On the contrary, as Jakob Zollmann shows in his survey on German colonial law-making in late 19th and early 20th century, the formation of these

colonial regimes can only be understood as a product of a mutual process of learning and observation. They might even be exemplary for what ‘entangled histories’ mean. Zollmann shows the high degree of attentiveness German colonial bureaucrats displayed towards the methods of other more established and experienced colonial powers than the German later-colonizers. In a sort of ‘comparative law as a natural practice’, these bureaucrats, the ‘craftsmen of transfer’, contributed to the reproduction and adaptation of legislation and juridical practices developed by other colonial powers, leading to “a legal-argumentative and legally-practical entanglement of the colonial empires prior to First World War”. Zollmann points to the very beginnings of the creation of German colonial administration and law, designed with close attention to the experiences of Great Britain. For the crucial aspects of legislation, he shifts his focus to the status of the ‘natives’ and a separate criminal law for these peoples in the German colonies. Somewhat surprisingly, he states in conclusion: “Based on the source analysis presented here, it is shown that one cannot argue for significantly differing national colonial legal systems”.

Analyzing transnational law and legal scholarship in 19th and early 20th century

Processes of mutual observation, imitation, and translations as well as a remarkable activity in the sense of ‘comparative law as a natural practice’ can also be observed in the studies on the formation of national or international normative orders emerging in the 19th and early 20th century. As the German Global Historian Jürgen Osterhammel put it, it was the period of the ‘Transformation of the World’.¹⁶

From the legal historian’s point of view, this was also the period when national and transnational legal orders were both being simultaneously constituted through an intensification of international communication, which was the driver of global knowledge creation in the field of law.¹⁷ Within Europe, but not least in the Americas, we can observe an intensification of legislative activity, which had to take into account local,

16 OSTERHAMMEL (2009).

17 See on the mechanisms of ‘Global Knowledge Creation’ especially RENN (2014) as well as WENDT/RENN (2012).

indigenous and colonial heritages on the basis of which nation states were founded and normative frameworks were created for societies facing important changes in their economic, social and political systems. Lindner and Kroppenberg already offer an introduction to these processes in the first section, Donlan presents a case study on this world of law making in the second section, and Zollmann shows the need to design new colonial laws within the emergent German colonial setting in Africa. In many of the recently independent areas, like Latin America, jurists and politicians were confronted with significant responsibilities and little preparation. Relatively small groups had suddenly been raised to the status of a functional elite who had to demonstrate their versatility in politics, economy, and diplomacy. Thus, comparing oneself against, and learning from, other nation-states was sheer necessity. This ‘transformation of the world’ became possible due to widespread migrations among elite groups as a result of revolutions and political turmoil on the one hand and the rapidly changing possibilities in the face of technical innovations and brisk information flow on the other hand. The necessity of establishing national legal orders as well as opening the borders of areas previously closed to foreign influences for a long time, like Japan and China, intensified the transnational communication about law-making, through mutual observation, travel, diplomacy, exchange of objects, information or books.¹⁸

In this section, four articles are dedicated to legal histories that can be written within this context of the formation of national legal orders (Andrés Santos; Parise; Zimmermann; Delbecke). Two are case studies on the formation of early International Law (Kemme; Heimbeck) and one concentrates on the emergent transnational scholarly community at the beginning of the 20th century (Pifferi). All of them revisit specific case studies, in particular to show how these histories can be written.

In the first contribution, Francisco J. Andrés Santos focuses on the nearly classical topic of the ‘reception’ of the French *Code Civil* in Latin America and questions the heuristic value of this concept, which was established on

18 See on these processes also FIOCCHI/KELLER (2014); HALPERIN (2014); ZHANG (2014); LI (2014); ZACHMANN (2014); ZAFFARONI (2014). The processes of knowledge creation within transnational scholarly communities and between the ‘craftsmen of transfer’ is also increasingly debated under the label of ‘global intellectual history’, see on this now WENDT/RENN (2012); RENN (2014); RENN/HYMAN (2012).

the basis of a specific European historical situation. He does this as a way to reconstruct what happened in 19th century Latin America. Andrés Santos underlines the importance of understanding Latin American codification within the complex and heterogeneous political situation, from which the recently independent States had just emerged. French codes certainly offered greater benefits from the linguistic, technical, and juridical point of view. The admiration some Latin American leaders felt for Napoleon Bonaparte, a general cultural preference for France and the huge prestige of its early codifications made it nearly natural to consider the French codes as a ‘model’. Thus, there were some early projects, which seem to be mere translations, whereas the so-called ‘second wave’ of codifications in the second half of the 19th century brought more genuine efforts to create a normative framework that could function in the societies they were made for, in fact drawing consciously on pre-existing legal orders. This fusion of traditions rooted in the Spanish imperial past and the fact that even the French Civil Code was drawing on the same set of traditions, despite the revolutionary milieu, leads Andrés Santos to question the applicability of the traditional concept of ‘reception’ to what happened in 19th century Latin America.

In the next article, Agustín Parise takes a closer look at the acts of comparing, translating and adopting normative options for the codification of civil law in the Americas. He does so by concentrating on an important tool for 19th century’s American ‘craftsmen of transfer’: the so-called ‘libraries of the civil code’. These reference works gave access to texts that legislators had been citing in their codifications, which in turn provided the jurists with a better understanding of the motivation of the legislators in formulating their arguments. It was also easier to confirm the authority of the texts by citing their sources, or the reference points to which the legislators resorted and which provided them with historical legitimacy. Introducing and comparing two examples – Charles-Chamilly de Lorimier’s *Bibliothèque du Code Civil de la Province de Québec*, published in Montreal in 1873, and Luis V. Varela’s *Concordancias y Fundamentos del Código Civil Argentino*, published in Buenos Aires from 1873 on – Parise shows similarities and differences in the organization of juridical knowledge in the Northern and Southern extremes of the Americas. The comparative view reveals how the positivist attitude towards law, eclectic practices, and, not least, restricted access to media made these reference works a valuable tool

for jurists; they opened the door to a context-detached *bricolage* of European and Latin American pieces for building national codes, a process described by Parise using the concept of ‘legal transfer’.

Eduardo Zimmermann’s paper continues these reflections on the Latin American legal culture in times of independence, focusing on Argentine law making, its transnational context in the field of Constitutional law. He goes a step further to emphasize the importance of local conditions for reformulating laws that were allegedly ‘imported’. In his case study on the reception and adaptation of U.S. constitutional doctrine and jurisprudence, facilitated by Argentine jurists in the second half of the 19th century, he draws on an impressive and detailed panoramic view of translations and textbooks used and produced in this period, highlighting how the emerging “language of liberal constitutionalism [...] gradually produced a novel constitutional culture, a mixture of the original model and the many adaptations and interpretations produced by its local translators”. Guided by the conviction that exchange is not a linear, but a complex, process of knowledge creation brought into being by international networks, communication processes as well as local conditions, Zimmermann recreates the world in which these U.S. models were being read, interpreted and transformed. He does so by analyzing how U.S. institutions came to be perceived by the Argentine political elite in the nineteenth century, the role of translations and translators, printers and booksellers, and the local articulation of a new constitutional vocabulary. In his concluding remarks, he emphasizes the importance of these local conditions for the establishment of political semantics: “The ‘spirit’ within the interpretations presented in all the translations and textbooks produced by Argentine jurists was eminently local and gave birth to a constitutional culture nourished by a ‘global legal entanglement’, in which the new texts reflected a unique mixture of original, foreign texts and local interpretations.” One of the most important conditioning moments for this emerging constitutional culture was politics, and the filters it established. Yet, at the same time, the political language of liberal republicanism, which the translators had created, determined the scope of what was politically possible in these turbulent times. In conclusion, Zimmermann declares that studying Latin American constitutionalism as a part of global knowledge creation in the field of constitutional law not only helps to denationalize the perspective on the history of each country, but it also means reconsidering some fundamentals of the history of constitutionalism, which

projects the image of the Latin American elite as ‘failed importers’ of European and US constitutionalism.

The way that global perspectives can change our vision on constitutional history is also the question that Bram Delbecke raises at the beginning of his article on the Belgian constitution of 1831 and its connected history with French constitutional development. He rightly advocates that global perspectives should not leave out the ‘old continental history’. Moreover, he proposes that the study of constitutions must not be limited exclusively to what is common to most constitutions, but must also emphasize differences. The distinct treatment of ‘political offence’ developed in France and incorporated into the Belgian constitution is one such case. Delbecke’s detailed reconstruction of the local context of the transfer of this institution enables him to show the concrete motivations of those actors who were responsible for including the special treatment of political offences into the constitution. But it also helps him to underscore the fact that this cannot be attributed only to personal experiences and contingent circumstances. A more fundamental development was at play, which becomes visible in this transfer: the articulation of a clear distinction between civil society and political institutions. This idea was introduced into the Belgian constitution by a young group of the bourgeois elite in Belgium who – as Delbecke insists – were acting within the asymmetrical setting of a relatively small country, in the periphery of the French cultural and legal empire.

Whereas the first four papers in this section were dedicated to more classical fields – the history of civil and constitutional law – Lea Heimbeck looks at a normative order that emerged in the late 19th century: international insolvency law. Heimbeck shows that for a long time, international lawyers and governments “dealt with a debtor state’s bankruptcy on a case-by-case basis using legal, military or political tools to solve the situation in the easiest way”, an even easier task considering that generally the debtor states were non-European nations and the creditors were European actors. Three case studies (on Egypt, Ottoman Empire, and Venezuela) illustrate the considerable increase in the number of actors involved in these bankruptcy cases during the late 19th century, resulting in the growing complexity of normative spheres: “national legal systems [...], self regulatory regimes [...] and public international law” were intertwined. This flexible system privileged powerful nations, which for a long time were not interested in establishing a more coherent legal framework. From the

purposes of this volume, it is important to note that the ‘legal silence’ was mirrored in a blind spot in legal history. Thus, Heimbeck shows to what extent our ideas about international law still continue to shape our historical research and it is not surprising that neither national legal historians nor the History of International Law is dedicated to this field. Hence, in a way, historiography continues to perpetuate unjust situations of the past. As Heimbeck concludes, we need a – global – legal history not restricted to a state-centered perspective on (international) law and open to the experiences of non-Europe, in order to overcome these blind spots in International Law.

Overcoming state-centered traditions of the History of International law is also the starting point for Clara Kemme’s detailed and extensive contribution, titled ‘Entanglements in eighteenth and nineteenth century India’. In her reconstruction of the interaction between the British East India Company and Indian rulers, Kemme not only opens a rich field which traditional narratives of the History of International Law usually do not consider. She also shows the change in the political logics from the period when East India Company amassed regional power in India to the point when the subcontinent was eventually brought under the direct administrative rule of the British Crown in the mid 19th century. This saw a slow but steady marginalization of the Indian states from international law. The central tool for this exemplary process for the universalization of European juridical practices, and thus the ‘Europeanization of International Law’, were the treaties with Indian rulers. Due to some pre-existing commonalities and the increasing readiness of Indian rulers to adopt European international law, step-by-step these rulers not only gave up the fight for their political independence, but soon also ceded so much of what the European international law deemed constitutive for sovereignty that they finally lost their legal status. For Kemme, this process cannot be understood without focusing on the entangled history of the Indian state system with early imperial intervention through the East India Company, acting in a state-like manner. It was this long interaction that made possible the subsequent strengthening of British control over India. Thus, Kemme concludes that not “so much a comparison of normative orders will help us to put the history of European international law in global historical perspective, rather the tracing of entanglements will provide more adequate tools to do so”. Just as with other case studies presented in this volume, as in Eduardo Zimmermann’s

contribution, we can see that writing legal history in a global perspective needs a thorough dedication to local practices.

This tension between globalizing models and local translations is also the backdrop for Michele Pifferi's study on 'Global Criminology and National Tradition' in the field of Criminal law at the beginning of the 20th century, which concludes this section. Pifferi takes his starting point from one of the most forceful international movements in legal scholarship at the end of the 19th and early 20th century: the wave that sought to establish criminology as a scientific method. Pifferi proposes that "the fundamental tenets of criminological science shared a global dimension (at least in the Western World) because they were grounded on the idea of a universal scientific and progressive knowledge but were differently applied in the concrete legal systems". Notwithstanding the important question of whether we really can assume the existence of a 'global dimension (at least in the Western World)' – as I would suggest not to do – and what 'applied' means, Pifferi convincingly shows how the different mindsets, but also the constitutional law and traditions of legal thought, contributed to a process of differentiation and the formation of national peculiarities in this field, especially during the first decades of the 20th century. Concentrating on one significant example, namely the discussion about the principle of indeterminateness, he reconstructs how the claims resulting from this debate impacted on the fundamental ideas about the division of powers, the weight of the principle of *nulla poena sine lege*, as well as on the role of the judiciary and the administration. Once again, a case study of the transnational dimension of law ends with a plea for local perspectives on global histories, and for the need to be aware of the translations these transnationally circulating ideas and models underwent, once they began to be put into action. There is a general need to generate increased awareness of these processes. But the urgency just might be greater in a world of globalizing normative orders in which 'Transnational Law' is increasingly significant.

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Convention of German Legal Historians (39. *Deutscher Rechtshistorikertag*) held in Lucerne, Switzerland, in September 2012. They responded to our invitation in a call for papers published in 2011¹⁹ and were collected and prepared for publication during the course of 2013. I am very grateful to the organizers of the *Deutscher Rechtshistorikertag*, especially to Michele Luminati, for offering a space for these deliberations in the context of this important event for European legal historical communities.

I am very happy that this set of articles, centered on the question of how to write transnational legal histories, can be published as the first volume of the new book series, 'Global Perspectives on Legal History', edited at the *Max Planck Institute for European Legal History* in Frankfurt. This new series, available in electronic format in open-access (<http://global.rg.mpg.de>) as well as in printed form (in print-on-demand via the usual channels of distribution), pursues the same goal that underlay the concept of the two conferences in Frankfurt and Lucerne: to stimulate researchers to introduce global perspectives in their research on legal history.

The collection of these articles might show that this endeavor, seemingly utopian, already has a lot of scholarship to build upon. Significant research and a forceful discourse on methodology does exist, providing the foundation for developing the analytical tools we need. What is necessary is, not least, an institutional framework that helps us to exchange and connect this knowledge, created by historians and legal scholars all over the world, within the national institutional settings. The book series, which this volume begins, might be a humble contribution to this goal.

Nicole Pasakarnis and Karl-Heinz Lingens have, as always, vitally contributed to the organization of these events and to the publication of the articles collected. My gratitude goes to both of them and also to the entire publication department at the *Max Planck Institute for European Legal History*.

19 http://www.rg.mpg.de/de/aktuelles/mitteilungen/i18318_1.cfm.

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Traditions of Transnational Legal History

European Legal History – Concepts, Methods, Challenges*

For decades, we have learned from authors like Helmut Coing, Franz Wieacker, Harold Berman, Peter Stein, Manlio Bellomo, Paolo Prodi, – to name but a few – that one of Europe’s major cultural achievements is its law, its unique legal culture. In Italian, Paolo Grossi’s synthesis of European legal history is not incidentally called: *L’Europa del diritto*. The same concept of a ‘legal tradition’, the belief in the ongoing character of law, its capacity for growth over generations and centuries are seen as something uniquely Western. ‘Europe’, as it is emphasized today not least in intercultural dialogue, or ‘the West’ have produced a wide range of cultural achievements that spread around the world – the rule of law, human rights, the differentiation between the realms of law and religion, codification techniques, etc.¹ We promote these values, and we seek to enforce them worldwide by a range of usually non-military methods.

Yet, this historical self-reassurance has come under considerable pressure – not least through Global History, Postcolonial Studies, or Critical Legal Studies. Many participants in the intensive debates have argued that Europe cannot be understood in and of itself, as had been tried for a long time. European history, it is said, had not only been a history of freedom, equality,

* I have presented some initial thoughts on these questions in an extensive article published in German in the journal in *Rechtsgeschichte – Legal History (Rg)* in 2012, see DUVE (2012). In a subsequent working paper, I have summed up and developed my arguments further and tried to sharpen some aspects, see DUVE (2013). The working paper has been taken into account by some of the participants of a Colloquium ‘European Legal History – Global Perspectives’, held at the Max-Planck-Institute of European Legal History in September, 2013; see especially ASCHERI (2014); MODÉER (2014), MCCARTHY (2014). In the working paper DUVE (2013), I announced in n. 2 a definite version to be published, including some of the results of the conference; this article is the announced version. For further references on many of the topics touched upon in this brief article, see DUVE (2012).

¹ See on this COING (1968); WIEACKER (1967), (1985), (1995); BERMAN (1983); STEIN (1999); BELLOMO (2005); PRODI (2003); GROSSI (2009).

and fraternity, as many like to present it. But it was also a history of violence, oppression, exploitation, and disfranchisement of entire continents by European colonial rulers of formal or informal imperialism. Many things regarded as cultural achievements and extended into the world at large had ultimately been, so it is being said, only the attempt at universalizing European interests based on hegemonic ambition. The issue today should therefore no longer be an identificatory search for purported European values, but rather emancipation from one's own Eurocentric traditions, including analytical Eurocentrism. Europe, according to one of the most often cited watchwords, should be 'provincialized', its role in the world criticized and re-dimensioned. We should, as one author put it, not keep on writing our history as if 'good things are of Europe and bad things merely happen there'. We have to recognize also the 'darker sides' of the European legacy, and be more aware in our historical research that Europe would not be what it was and is without its colonial past, without its central role in the world and without the mechanisms of formal or informal domination established not least by law. Moreover, World History as well as our own would be written differently if we would not still be attached to European or national historiographical concepts and paradigms. Thus, global perspectives on European history are demanded, for the sake of historical justice, for the sake of a better historiography, and not least as a precondition for a global dialogue on justice.²

Even if we might not agree with all of these demands: The discipline of 'European Legal History' has to consider these challenges. We have to make a certain effort to deliberate on fundamental questions about how we want to write European Legal History. Questions need to be asked like: How do we define Europe? Why do we make a categorical distinction between 'Europe' and 'Non-Europe'? Does non-European (legal) history play a role in our texts and analysis? How can we integrate 'global perspectives' in a 'European Legal History'? What could be the methods of a European legal history in a global perspective? – The challenge is even bigger when we consider that our methods of analysing transnational legal history have been developed within this intellectual framework, heavily criticised today. Can we still use concepts, and methods, grounded in the conviction that Europe

2 See on this DIRLIK (2002), MAZOWER (2005), DE BAETS (2007), DARWIN (2009), SACHSENMAIER (2011), BORGOLTE (2012), IRIYE (2013).

was a unique legal space, characterized by a basic homogeneity, and clearly different from other areas? How did this vision, and its underlying assumptions, influence our historical reconstruction of ‘entangled histories’ within Europe, and between European and non-European areas, states, regions?

In this paper, I want to give a brief and critical introduction into the research traditions of European legal history, its foundational assumptions, and its methodological shortcomings. I am drawing on previous work, centred around the question whether and how a European legal history can be conceived today. I do so, because I believe that we need to develop our methods within a critical assessment of our traditions, and the path-dependencies resulting from our own discipline’s history.

Three questions are at the centre of the following considerations: Which conception of Europe does ‘European Legal History’ hold; is it still valid for us today – and how can this tradition be combined with global perspectives on history, especially which conceptual and methodological tools would we need for a ‘Legal history in a global perspective’?³

I shall proceed in six steps, combining a retrospective and prospective approach. First, I want to reconstruct the self-perception of the discipline of ‘European Legal History’ and ask for the concept of Europe that is underlying its research today (1). Due to the lack of deliberations on these conceptual questions in contemporary scholarship, I shall try to outline some important moments in the history of the formation of the discipline in post-war Europe (2) and ask for some of the intellectual foundations on which our concept of Europe has been based until today. In other words: I am dedicating myself in these parts to the history of legal historiography on Europe in an attempt to better understand the traditions, or path-dependencies, that guide our steps until today (3).

Having done so, I will look at some of the problems and analytical shortcomings of this tradition. I do not do so because everything that had been done would have been wrong; obviously, this is not the case. On the contrary, in our research, we are building on the important achievements of former generations of legal historians which, by the way, have envisioned a transnational history long before most general historical scholarship have discussed on ‘Transnational History’. But it is perhaps even due to this very

3 See on this the introduction to this volume and the contributions in *Rechtsgeschichte – Legal History* 22 (2014) as well as LETTO-VANAMO (2011); CAIRNS (2012); DUVE (2014).

strong founding fathers and their concepts that we need to deliberate on where we can build on their work and where we should better not follow their paths. As a result of this survey, I state a still very powerful binary vision of ‘European’ and ‘Non-European’ legal histories and a need for renovation of methodological tools. Thus, we need to try to develop a methodologically reflected transnational history of law which is open for global perspectives and which is dedicating itself to Europe as a global region, as one important legal space, with open borders and many overlapping areas, and as a cultural reference for the world – but not as a preconceived spatial framework for research (4). Following these deliberations, in the final steps I shall present some ideas on how a regional focus on Europe and global perspectives can be combined. I add some brief comments on what could be important starting points for such a legal history of Europe in a transnational or global perspective, developed from a reflexive positionality. At least two of these starting points are intimately related to ‘entanglements in legal history’: the intention to consider legal history as a constant diachronic and synchronic process of ‘translation’, and the need to reflect upon the way we are conceiving our ‘legal spaces’ (5; 6).

1. The concept of ‘Europe’ in European Legal History

To begin with, let us look at the concept of ‘Europe’ in European legal history. How does the discipline define its subject, the ‘*European*’ legal history? The survey raises some answers (a), but more questions (b).

a) Obviously, historians and other scholars from humanities have written entire libraries about the formation of Europe, the ‘birth’ of Europe, the rise and fall of the Occident, often seen as Europe and its north-Atlantic extensions, the West, and what Europe ‘really’ is. Still, none of these deliberations have lead to a definition, or even a certain consensus on how to define ‘Europe’ by certain characteristics.⁴ Because even if within this broad literature, some authors still regard Europe as the embodiment

4 A survey with further references in SCHMALE (2010a), (2010b), see also ASBACH (2007), (2011), OSTERHAMMEL (2004); HIERY (2007), JAEGER (2011). In the broader context of Global History, see CONRAD/RANDERIA (2002); CONRAD/ECKERT (2007).

of certain values and traditions, continuing to adhere to a more or less essentialist idea of Europe, the vast majority of more recent scholarship employs precisely the opposite approach: For them, ‘Europe’ is nothing but the result of a constant process of self-definition, mainly derived from the encounter with a Non-European, mostly ‘non-civilized’ world during the European expansion, and more forcefully in 18th and 19th centuries. Thus, and due to the intense migrations and historical entanglements between European peripheries and their adjunct areas, the historical *Gestalt* of Europe dissolves. Consequently, research is being done on what has been called the ‘Europeanization of Europe’, i. e. the complex processes of identity-building, constructing institutional or symbolic frameworks, a discourse on being – or not – ‘good Europeans’ and what makes us different from others. In this context, attention has been paid, not least, to the meta-narratives which helped to create European unity, for example through the fusion of Roman and Jewish-Christian traditions in the late antique world, and the constant references to this ‘legacy’ in later periods. To put it briefly: Whereas for a long time ‘Europe’ seemed to be a historical ‘reality’, nowadays Europe has become, for most western scholars, an open space with flexible borders and pronounced processes of cultural exchange with other regions. It is seen as a cultural reference point for those living in or outside of Europe, a reference being used innocently by some and strategically by others.

However, the picture is different when looking at the more recent literature on European Legal History.⁵ Here we barely find any consideration of the problems of defining Europe, or about the constructivist nature of this concept, and its function as a cultural reference point. In most presentations, ‘Europe’ is simply presumed, usually implicitly, often by reference to its alleged birth in the Middle Ages, and at times by allusion to its contemporary political makeup. Europe, so the widely read *European Legal History* (*Europäische Rechtsgeschichte*) by German legal historian Hans Hattenhauer states, is “*not a geographic, but a historically evolved concept.*”⁶ The lack of a conceptual framework for ‘European’ legal history is rarely expressed as openly as by Uwe Wesel: “*Europe is a geographic space with cultural and political specificity. As regards geography, we can for the time being start with*

5 HATTENHAUER (1997), (2004); SCHLOSSER (2012); BELLOMO (2005); GROSSI (2009); WESEL (2005), (2010); WIEACKER (1967), (1985).

6 HATTENHAUER (2004), n. 2339.

the present”, he writes laconically in his *History of Law in Europe (Geschichte des Rechts in Europa)*.⁷ This way of defining the space of research is close to what some observers call the ‘Container-concept’ of European history: Just put inside what fits in a predefined space, leaving aside and cutting off ties with what does not fit in.

Obviously, there are references to Europe’s flexible borders, to the many grey areas in the picture we are painting, and even warnings against employing essentialist conceptions of Europe. Some, like A.M. Hespanha, speak of the ‘European legal culture’, an approach that dissolves the description of certain characteristics from their geographical space.⁸ Paolo Grossi begins his book *L’Europa del diritto* (2007) with some clarifying remarks on false understandings of Europe, and then concentrates on describing how the geographically defined space ‘Europe’ was transformed into an area of emergence of legal concepts and practices that later were to become a cultural reference. But despite these views, it seems as if in a more general discourse on ‘European Legal Culture’, territorially defined spaces are imposing their suggestive force on our images of Europe.

When looked at in more detail, it becomes clear that, in factual terms, a genuinely ‘*European*’ legal history is not – and cannot be – written in a single book. Instead, today we have many legal histories within the space called Europe. In a certain way, the ‘Europe’ of the books is the stage on which different scenes of the history of law of the western continent are presented. This is already the case given the regional confinement of the books: At some point after the first chapters on Antiquity and the Middle Ages, the perspective usually narrows down to a national level. Many regions are left out: England, Eastern Europe, Scandinavia, Southern, and South-Eastern Europe, they all appear to be ‘special cases’. The work usually focuses on the regions already presented in Franz Wieacker’s famed image of the torch,⁹ i. e. Italy, Belgium, the Netherlands, France, Germany, by the way more or less the same circumscription of the territories we find in Savigny’s *History of roman law in the Middle Ages*.

This concentration on a core is all too understandable – to proceed otherwise would be simply impossible in a single work. Only a few authors,

7 WESEL (2010), 3, 11–12.

8 HESPANHA (2002)

9 WIEACKER (1967), 169.

such as A. M. Hespanha, state explicitly that they are writing a history of ‘*Europa Continental Centro-Occidental*’. And the temptation to declare the few scenes presented as ‘European’ and hence somehow representative after all is always present. In the end usually some cultural achievements remain which are proven for a core region and characterized as typically ‘European’, not least because they form the basis of our contemporary system and thought.

In addition to these general outlines, there are some structural characterizations of ‘European legal history’. Recourse is, for example, often taken to ‘unity and diversity’ as a characteristic feature of European legal history – precisely the *in varietate concordia* is the official motto of the EU. This interplay of unity and diversity in legal history, so characteristic for Europe, has generated, as Reinhard Zimmermann states, “*a scholarly education based on the same sources which permit a rational cross-border discussion and let the different forms of ius commune appear as variations on one and the same theme.*”¹⁰

b) Of course, all this is correct. And no one would deny that over centuries there has been an intense communication within the space that we call ‘Europe’; no one would deny that this intense communication and a series of other factors lead to great cultural achievements, a depth in reasoning about right and wrong and the formation of a stabilized society by rules and institutions, etc. We should and we will keep on doing research on this and often end up doing legal history within the core spaces of the formation of what is being called ‘European legal culture’.

However, the problem is not so much the unavoidable and sometimes very productive reductionism of such arguments about ‘the characteristics’ of European law. The real problem is that most definitions, like many other descriptions, do not achieve what one would expect of a definition: which is to not simply state what *belongs* to the entity analyzed, but also what *does not* belong to it. In other words: Can we not also apply many of the observations made with regard to Europe to other regions – ‘unity and diversity’, ‘a rational cross-border discussion’, ‘variations on one and the same theme’? And do all parts of Europe really fit the bill to the same degree? Is there not a closer proximity between some parts of Europe and ‘Non-Europe’ as

10 ZIMMERMANN (2002), 252–253.

between different European regions, for example due to confessional differences, or colonial relationships? And can we really understand 'Europe' as a legal space without considering the imperial dimensions which went far beyond the borders of the continent?

Apart from this, turning to the reference to Europe as the continent that brought us all the cultural and legal achievements, we would have to ask whether it is really fair to draw a purely positive balance, as we usually do. Didn't we proclaim freedom and equality in our realms, and practice racism and discrimination in other parts of our empires? Didn't we pay the bills for our cultural achievements with what we took from those we regarded as 'uncivilized'? Has the same Europe as a continent of freedom not also been the continent of mass-murdering, world-wars, colonialism? Can we separate one from another, cultural achievements from incredible cruelties? -

For these and many other reasons, it must be of special interest to open us for the interaction between imperial centres in Europe and their peripheries. We need to learn more about what once has been called by German Historian W. Reinhard the 'dialectical disappearance of Europe in its expansion'.¹¹ Many important studies have been published in the last years on these phenomena of reproduction, transplant, adaptation of normativity designed in some places in Western Europe or in the Empires of Western Europe on a global scale.¹² Today, there can be no doubt that a closed concept of Europe as a physical space cannot be maintained as a fruitful analytical category. If we understand that 'Europe' has to be seen as a cultural reference point, the use of this reference will not be restricted to a certain geographical area, less in the age of European expansion. On the contrary, it was important especially outside of Europe.

Yet despite these queries, the specificity of Europe and hence also the possibility of demarcating it from other spaces is generally taken as a given by many legal historians. Consequently, there are still many texts which create the impression that things must evidently be different outside of Europe. In some accounts of European legal history, non-European areas therefore only exist as the 'other' – as a sphere of influence, diffusion or *Wirkungsgeschichte*, as a space for the reception of European legal thought, as

11 REINHARD (2010), 41.

12 See on this the contributions in Rg 22 (2014); for a more systematic perspective, see for example SECKELMANN (2013); AMSTUTZ (2013).

an example for the ‘not-yet’. This perspective also keeps yielding formulations to the effect that ‘European law’ had “*spread*” across the globe, that Roman law had “*conquered*” the world – a semantics likely to be employed quite innocently, but which does not only hide sometimes cruel realities, but, from the analytical point of view, reinforces the image of the unity of a European legal culture by juxtaposing ‘in-’ and ‘outside’. In addition, as regards the inside, many differences within Europe are eliminated by internal differentiations (like ‘core’ and ‘periphery’; exceptions, peculiarities, etc.). These differentiations stabilize the binary vision between ‘Europe’ or ‘the West’ – and the rest. The same happens, when the reception of ‘the’ European law is asserted, although usually the norms appropriated originated in Germany, France or Italy. One consequence of this postulation of ‘Europe’ and its juxtaposition to ‘Non-Europe’ are statements like those presented some years ago in a prestigious *Journal of Comparative Private Law*, under the heading ‘*Europe also includes Latin America!*’.¹³ In this text, all regions that had been in contact with the Code Civil or other European civil codes were considered a part of the ‘European Legal Families’. If we take a look at the intense transformation which law and legal thought have experienced while being reproduced in different contexts, for example in Latin America after the independencies, we can easily see that these definitions do not help us any further.¹⁴

That diffusionist statements about the ‘Europeanization of the World’ might not be politically correct today, is the least relevant objection to be levelled against them. What is more problematic is that they express a widespread analytical impotence as regards the global interconnections, entanglements and translation processes in the field of law and other forms of normativity. This is impotence not only detrimental for our own field, the legal historical research. But it is also a serious default, given that we are living in a world whose key feature in the field of law could precisely be the process of global reproduction of normative options with all the associated phenomena of ‘hybridizations’. Thus, the key target of a transnationally renewed *General Jurisprudence* could and should be to deliberate on how this process can be analyzed and, eventually, even be shaped. Legal historians

13 BUCHER (2004).

14 See on this for the American case especially Donlan, Parise, Andrés Santos and Zimmermann in this volume.

who have presented so many detailed studies of ‘reception’ and subsequently also of ‘transfer’ and ‘transplant’, could and should actually be experts for these synchronic and diachronic processes of translation of normative thought, of legal practices and institutions into different cultural contexts. We should be able to give an important contribution to these reflections. We should be those who succeed in bridging the often disconnected discourses between (transnational) legal scholarship on the one hand and social and cultural studies which have accumulated an enormous amount of expertise on analytical tools in this field on the other.¹⁵ But is this what we really are: experts for the analysis of synchronic and diachronic processes of (cultural) translations in the field of normativity?

2. The *European movement* of the post-war period

We are not, at least until now. But why is this so? – Let us step back for a moment and ask ourselves why the concept of a ‘European legal history’ as a closed concept, assuming the congruence of its space with the physical space of the Western European Continent could establish itself so successfully, despite its apparent problems.

Of course, we are used to accept the existence of certain disciplines. But it might be helpful to ask why it was ‘Europe’ that emerged as the main analytical framework of a transnational legal history in the continental tradition. Why, for example, didn’t the European empires write the transnational legal histories of their imperial regions? Or: Why do we have a ‘European’ legal history and not, for example, one of trading regions? Or: one of linguistic or confessional areas? What is the criterion for organizing our legal historical scholarship within a territory denominated ‘Europe’? – A short review of the discipline’s history may give us an answer and permit us to recognize our path-dependency in this regard. Many stages on this path are well known, so I will highlight just a few key points.¹⁶

Looking at the self-description of the discipline, we arrive quickly at a book published in 1947 by the Roman law scholar Paul Koschaker: “*Europa*

15 See on this the introductory article in this volume as well as DUVE (2014).

16 For a more comprehensive outline, see DUVE (2012).

und das römische Recht” (Europe and the Roman Law).¹⁷ Until today, it is seen as an important starting point for the formation of the discipline. It highlighted the founding role of Roman law for European legal culture, thus establishing a transnational discourse, contrasting it to the national, Germanic discourses of the past decades, in which some of the main actors of the legal historical European movement themselves had actively participated. Roman law which had been a subject of legal research and education for centuries was now presented to be an “*exponent of European culture*”. When writing about ‘Roman Law’, like practically all legal historians of his time, Koschaker was thinking of private law. Inspired by Rome this private law had “*supplied a not inconsiderable building stone in the construction of the entity [...] we call Europe today*”. In Koschaker’s analysis, which is strongly guided by Savigny, we very clearly find Europe as an entity formed by legal history – and simultaneously one that forms law.

Koschaker’s 1947 assessment – an attempt at a fresh start which was not entirely unproblematic for a number of reasons¹⁸ – found strong resonance in post-war Europe; the *Gedächtnisschrift L’Europa e il Diritto Romano* published in his honour in 1954 demonstrates this impressively. Only a few critical voices were heard, one of them by the Spanish legal philosopher and Roman Law scholar Alvaro D’Ors who criticized the ‘Germanism’ of this concept and advocated for a Christian universal law.¹⁹ In subsequent years, intense research began into the history of law in Europe, based mainly on the works by writers from Germany and Italy. Many of them participated in the project *Ius Romanum Medii Aevi* (IRMAE) under the direction of Erich Genzmer, who in turn referred to precursors from the interwar period, for example Emil Seckel and others. Nearly all prestigious legal historians of that time were part of this project, also the young Franz Wieacker and Helmut Coing, disciple of the coordinator of the project, Erich Genzmer. In this ‘New Savigny’, called like this by Genzmer, in his introduction to the project, referring to Savigny’s *History of the Roman Law during the Middle Ages*, it was attempted to carry forward legal history research in the spirit of Savigny, while also placing it in a decidedly European context: “*Savigny was certainly a good European, but limited by his conception of the emergence of law*

17 KOSCHAKER (1947).

18 See the earlier book KOSCHAKER (1938); on Koschaker also GIARO (2001).

19 D’ORS (1954).

from the 'Volksgeist' (popular spirit). Since then, we have clearly recognised the need to investigate history, including legal history, in European perspective," Erich Genzmer wrote in the introductory volume of this European project in 1961.²⁰

Today we understand more clearly that there was a strong national imprint on this 'European' movement of post-war decades. In the field of legal history it can be clearly derived from a remark by Erich Genzmer, continuing the just cited phrase. There he concluded, quoting one of the big authorities of his time, Ernst Robert Curtius, who had published a highly influential work on the European Literature in the middle ages (*Europäische Literatur und lateinisches Mittelalter*, 1948): "To borrow a phrase from E. R. Curtius: No modern national history can be comprehensible unless viewed as a partial process of European history". In other words: The European perspective was needed to better understand national history, and the latter continued to be the dominant and guiding perspective. Just as for Curtius and Genzmer, for the post-war generation of jurists, Europe was the *transnational* framework into which, now that political nationalisms had collapsed, legal historians placed their national legal history, associated in many ways with the ideas of *Abendland*, dating from the interwar period and thereafter.²¹

This very complex heritage now fused with the political European movement, itself a response to the immediate past that drew heavily on law. Because despite its economic motives, its political intentions as well as its cultural hopes, many politicians and actors of the European integration process posited law to a very special degree as the key bearer of European unification. Convinced Europeans like Walter Hallstein, first President of the EEC Commission (and a good friend of the Max-Planck-Institute's founder Helmut Coing), regarded law as a central instrument of their political project. Europe was even defined as a 'community of law' (*Rechtsgemeinschaft*) and the new European law, itself a 'culture product', should lend expression to a cultural unity which was assumed to have something like a historical 'existence'. Following this perspective, it was the EU that became the definite form of this long-evolving formation of a European identity, blocked by nationalism for more than 150 years. The "unity of the continent", Hallstein wrote in 1969, had "never entirely expired during a

20 GENZMER (1961).

21 See on this environment DINGEL (2010).

thousand years”, describing European integration as “*an organic process which translates a structural unity already existing in nuce in culture, economics and political consciousness for a long time into a definitive political form*”.²² Law thereby was by no means considered as a technical, dry, or instrumental matter – as one might tend to expect today. The language employed by Hallstein and his contemporaries, makes it clear that there were greater dimensions at stake: “*The community is a creation [‘Schöpfung’] of law. That is the decidedly new development which marks it out from previous attempts to unite Europe. The method employed is neither violence nor subjection but a spiritual, a cultural force: law. The majesty of law is to create what blood and iron could not achieve for centuries.*”²³

These sentences about Europe resonate – apart from many other things – with a lot of German history; but that is not our subject here. Neither is the history of the European integration process, and the policy of uniting Europe through private law. All this would require a more in-depth analysis. However, I would like to return to the history of the discipline and summarize five aspects which appear to me especially important to its further development:

a) The first refers to the gradual **shift in the time horizon** of legal history research that had taken place.

Since the aim was to understand one’s respective *national histories* through a European perspective, scholars felt the need to extend the research program of the *New Savigny* to the threshold of the emergence of ‘national’ laws. We can see this from the same IRMAE project, where a fifth section was added to Savigny’s original program: „*The influences of Roman law and its science on canon law and national law until the end of the 15th century.*” Later works by Helmut Coing and many other scholars of his own and subsequent generations (for example, Raoul van Caenegem, Peter Stein, Manlio Bellomo, Reinhard Zimmermann, Randall Lesaffer, to cite but a few) extended the studies successively up to the period of codification, i. e. the heyday of juridical nationalism and beyond.

This had several important consequences. One is that the development presented was, indeed, in a way teleological – from the origins of learned

22 HALLSTEIN (1969), 14.

23 HALLSTEIN (1969), 33.

law to the nation, and then Europe. In other words: having started and concentrated their work on medieval legal history, Europeans extended the time period of their observations, covering the modern era until the nineteenth century legal systems of Europe.

b) A second and related observation refers to the **unchanged territorial scope**. In contrast to the gradual shift in the temporal framework, the spatial dimension remained stable. This also had important consequences: European expansion, which began to influence dramatically European history since the end of the fifteenth century and made Europe a world economic and political centre for centuries, as well as the associated changes in the conditions of communication and their impact on law, remained entirely unconsidered in this European legal history. The history of European law, reaching until the nineteenth century, was still being written in the same spatial framework that had been drawn by Savigny for the Middle Ages. Even if it was extended to non-European areas, as in the case of Reinhard Zimmermann and his intense work on *Mixed Jurisdictions*, or Sandro Schipani, on Latin America, it followed a preconception of somehow divided areas whose systems were colliding and focused on the presence or transformations of learned law and its products in other areas of the world.

c) Thirdly, the perspective of all scholarship was geared towards **unity and uniformity**, if only due to the circumstances of the time – we refer only to Hallstein’s statement. It was unity and uniformity which one believed had existed at some point and had then been lost – and that had now to be regained by European unification. Thus, legal historical research was not so much interested in the divergences but rather in the convergences, and the factors that caused and stimulated this convergence. European Legal History became, at least in its beginnings, a history of unification and harmonization of law, later a history of how divergences could be integrated.

d) Fourthly, the choice of Savigny’s program as the starting point for European Legal History implied the takeover of what subsequent generations considered to be (or made out of, or selected from) Historical School’s **concept of law**.

This is not the place to judge on whether, how and to what extent Savigny’s concept of law was transformed by later scholarship and how this related to

later 19th century state-building and positivism. Because at the time of the formation of the discipline after WW II, referring to ‘Savigny’s legacy’ automatically meant to concentrate on learned law from the secular realm. This permitted writing legal history from the 12th to the 19th century as a history of something like a ‘scientification’, a ‘transformation of law through science’ (*‘Verwissenschaftlichung’*). In this path, scholars from the field of legal history privileged civil law, written law and law of the jurists. Thus, they concentrated on one very important, but still just *one* part of the normative universe that we can observe in history. Due to this, European Legal History was conceived by many legal scholars as a history of dogmatic innovations, institutions and ideas in the geographical (and also, for some: cultural) core of the continent. In a certain contrast to what Savigny had always demanded, not too much attention was paid to the cultural backgrounds of this law, its use in practice, its implementation, and its relation and interaction with other forms of normative thought and practices. There was hardly any attention being paid to normativity stemming from the realm of religion, whose marginalization in our legal historical perspective is another consequence of the overwhelming influence of (later) 19th centuries’ intellectual legacy.

This might seem stunning, because if there is one special feature of Historical School’s thought it might be seen in its deep understanding of the evolutionary character of law. Founding fathers of sociological jurisprudence like the actually highly reappraised Eugen Ehrlich are deeply indebted with Historical School’s thought, despite of their heavy criticism on Savigny. Sociological jurisprudence at the beginning of 20th century drew heavily on legal history. But due to the complex history of differentiation in legal science around 1900 there turned out to be a divide between those scholars who paid attention to law as part of a broader social phenomena on one hand and those who concentrated on the history of institutions and juridical dogmatic, on the other. Without being too schematic, scholars favouring the former merged to the new sociology of law whereas European legal history is a fruit from the latter branch, leading away from sociological, cultural and evolutionary perspectives.

By the way, since late 19th century, even many canon lawyers had adopted a number of the patterns established in Historical School and its subsequent transformations, such as the finally emerging positivist concept of law, the nearly exclusive concentration on medieval sources, the marginalizing of moral theology, the leaving aside of symbolic dimensions and other forms of

normativity, considering them ‘non-juridical’ and thus not worth studying. Notwithstanding the object of their research, the ‘Catholic’ Canon Law that claimed universality and had virtually global dimensions, the vast majority of legal historians dedicated to history of Canon Law also shared the general indifference towards non-European areas, underestimating their importance for the history of Canon Law and normative thought and practices. There was no sensibility towards the necessity of defining analytical concepts and themes of interest for a history of Canon Law as part of a broad field of religious normativity and not from a purely European point of view.

e) Fifth, European legal history emerged from a tradition built on the Historical School with its concentration on the **dogmatic of civil law** and its later transformation to a constructive jurisprudence that was directed towards working on a civil code. This observation seems obvious, but the fact is never the less remarkable, because it directed the efforts of later scholars towards civil law dogmatic, institutions, codifications. It made us concentrate on one aspect of legal history, marginalizing other fields as history of public law, criminal law, etc.

3. Methodological foundations of European legal history: Weber and Toynbee?

However, it would be simplistic to explain the concentration of European legal history on the continent simply by the path-dependence of a scientific community which started from a (too) narrow concept of law, circumscribed to a too narrow territory, proceeded teleologically through the centuries to the nation state and then ended up in the European integration, supplemented by a habitual Eurocentrism, perhaps also some political opportunism in the years of starting the political project of European integration.

There is also a methodological and theoretical background for shaping ‘Europe’ as a somehow autonomous field of study. Let me just point out two of the presumably most influential ‘founding fathers’ of European legal history as a discipline, Helmut Coing and Franz Wieacker, both of German origin. Both had, indeed, considered their concept of a European (Coing) or ‘European-occidental’ (Wieacker) legal history very thoroughly.

a) This applies, first of all, to Franz Wieacker. In his highly influential work *History of Private Law in Europe (Privatrechtsgeschichte der Neuzeit, 1952, 2nd ed. 1967)*, translated into more than ten languages, we can see clearly how Wieacker had internalized basic methodological and historical assumptions of Max Weber. If we compare the ‘types of legal thought’ in Weber – “*practical, empirical, casuistic and close to life*” versus “*theoretical, systematic, generalising, abstract*” – we find in them, indeed, a basic pattern of Wieacker’s historic narrative. We even find the tragic element, deriving from the loss of proximity of law to life already during the late imperial period of Roman law and then the increasingly strong permeation of law by rationally trained specialized expertise, in an impressive parallel in both authors. This does not astonish, considering the strong influence from the same authors in the field of legal history that both, Weber and Wieacker, had been processing: Weber in the intense legal historical work of his early years and his reception of Hermann Kantorowicz or Fritz Pringsheim; and Wieacker, as a young scholar working on fields very much related to Max Weber’s initial research, reading Weber much earlier and more intensively than many of his contemporaries, and subjected to the same intellectual influences coming from the field of Roman law as Weber.

Wieacker’s concept of Europe very clearly expresses this influence of Weber’s thought about the Occident. For Wieacker, Europe was the bearer of a comprehensive rationalization process which distinguished this continent from other world regions categorically – in, indeed, a tragic manner. In a key passage of his second edition (which was massively de-Germanized compared to the first edition in this point), we find a panorama that could also have been written by Weber: “*The glossators first learned from the great Roman jurists the art not to decide the vital conflicts of human life under the spell of irrational life habits or violence, but by intellectual discussion of the autonomous juridical problem and under a general rule derived from it. This new tenet of the jurist juridified and rationalised public life in Europe for ever; it ensured that, of all cultures in the world, Europe’s became the only legalistic one. By finding a rational principle which replaced the violent settlement of human conflicts at least within states, jurisprudence created one of the essential preconditions for the growth of material culture, especially the art of administration, the rational economic society and even the technical domination of nature in the modern era.*”²⁴

24 WIEACKER (1995), 45.

Many years later Wieacker stressed three features as characteristic of the “*European-occidental*” legal culture in a lecture in Helsinki: personalism, legalism, intellectualism – themselves to be explained, as he stated, by three “*European*” phenomena. Precisely by their “*continuous interaction*” they constitute the specific character of ‘occidental’ legal culture.²⁵ Wieacker therefore defines Europe – in entirely Weberian mould – by an ensemble of ideal types which is juxtaposed consciously and categorically to other cultures. In Wieacker, as in Weber, we therefore find a construction based on many premises of a cultural unity demarcated sharply from others and largely contiguous with a geographic territory in whose centre Europe is located. Consequently, much of the criticism about the Weberian Occidentalism can and should be applied to Wieacker’s construction of ‘Europe’ as an ideal type that (as so often also in Weber) shifted from an ideal type to more ‘essentialist’ ways of being.

To sum up: Through Wieacker there was a strong impact of Weberian thought – or of the schools of thought which nurtured Weber and Wieacker – on the conceptual framework of European Legal history. Wieacker’s conviction that it was the same ‘rationalization’ of law which had led to the tragic loss of proximity of law to life made him place the history of learned law into the centre of the picture he painted of European legal history. In a way, it was precisely his profound understanding of the indissolubility of law from society and life, and his despair about the lost connection between law and life in the occidental tradition that made him write his legal history as a legal history of learned law.²⁶

b) The second conceptualization of a European legal history, which is perhaps even more closely associated internationally with the idea of ‘European Legal History’, is that by Helmut Coing, founding director of the Max Planck Institute for European Legal History in Frankfurt am Main. It is very different from the Wieacker-Weberian concept, but lead to some similar consequences. Less concentrated on the history of learned law as a

25 WIEACKER (1985), 185–189.

26 On Wieacker see the contribution of KROPFENBERG/LINDNER in this volume as well as the contributions in BEHREND/SCHUMANN (2010), especially DILCHER (2010). Recently, WINKLER (2014) has worked out in depth the motives and influences on Wieacker.

way of conceiving law, Coing wrote a history of institutions and dogmatic as the results of this particular European way of conceiving law.²⁷

The defining experience for Coing was probably his reading of the already named Ernst Robert Curtius, to whom Coing's mentor Genzmer had referred in the introduction to IRMAE. Curtius' *'Europäische Literatur und lateinisches Mittelalter'* (European Literature and the Late Middle Ages) which he had already started to write in 1932 shattered by the "self-surrender of German culture" and which was printed in 1948, had impressed Coing for a range of reasons. It may thus also have been the reading of Curtius that suggested to Coing the reading of Arnold Toynbee who became pivotal to Coing's foundation of European private law history. For Curtius, Toynbee's theory of history – "the greatest achievement in historical thought of our time"²⁸ – was the conceptual foundation of his history of literature, and in a review of Curtius, Coing wrote that it was urgently to be desired that a legal history could at some point be placed beside his history of literature.²⁹

Fifteen years later, the time had arrived and in 1967 Coing published a programmatic opening essay in the Institute's new journal *Ius Commune* entitled: *Die europäische Privatrechtsgeschichte der neueren Zeit als einheitliches Forschungsgebiet* (European Private Law History of the Modern Era as a Uniform Field of Study).³⁰ In this article, Coing took Toynbee's criteria for an "intelligible field of study" and examined whether the History of Private Law in Europe fulfilled Toynbee's criteria. The result was positive, also because Coing defined *intelligible fields of study* as those areas of historical development which are 'largely intelligible in and out of itself'. In the end, what Coing called an *'einheitliches Forschungsgebiet'* in the title of his programmatic article, was nothing but an *'intelligible field of study'*.

Toynbee's definition was especially convincing to Coing, due to his own legal philosophical beliefs. Because Coing had a distinct conviction in natural law-tradition that made him hope to be able to recognize through historical work certain universal values, a metaphysical background underlying also Toynbee's cultural morphology. In the case of Coing, this ontological foundation might also have had certain consequences for the

27 See on this extensively DUVE (2012).

28 CURTIUS (1963 [1948]), 16.

29 COING (1982 [1952]).

30 COING (1967).

lack of attention to the spatial dimension of legal history: Because if you believe in the existence of ‘universals’, they might be more visible in some parts of the world than others, but they will, sooner or later, appear everywhere; and if you wish to have something like a privileged observatory, you just have to take a look at the learned law.

For our purpose, it might be sufficient to highlight, with a certain generalization, that if Wieacker took Weber as his methodological starting point, for Coing it was his (by the way: very peculiar, and only partial) reading of Toynbee. Both theoretical foundations made them see Europe as a space that had created a legal culture categorically different from the rest of the world. Obviously, Weber and Toynbee were not the only theoretical fundaments European legal historical scholarship relied upon, and it has to be asked how big the differences were between what Wieacker and Coing read and what Weber and Toynbee meant; still, both proved to be influential for two highly influential authors, whose works are still being read and translated all over the world.

4. Problems, analytical costs and wasted opportunities

Let us now return to the present. Can we still build on this tradition, its methodological foundations and the concepts established on their grounds?

I believe we cannot. Without being able to address all objections to these conceptions of a ‘European-occidental’ or ‘European’ legal history, or to relate the entire discipline’s history here, I wish to comment on some problems and costs of having simply continued along this path, initiated after WW II by Coing and Wieacker together with European colleagues and their respective schools.

a) The gradual shift in the time horizon without modifications of the spatial dimension (see on this 2a, b) and the preconception that Europe could be understood in and out of itself (see on this 3) has led, first of all, to a **spatial framework of research which is simply inadequate** for many epochs and many subject matters of research in the legal history of Europe; not for all of them – but for many.

There are, of course, many research questions which might be dealt with sufficiently within the local, national, or even regional European space. Still,

many of them could benefit in some way or the other from global perspectives, integrating comparative approaches or concepts stemming from other research traditions. But this is not the point here. Because obviously there are many fields of research for which it is simply impossible to lack perspectives that transcend Europe, or might even be ‘global’.

Let us just think of the early modern empires and their non-European territories.³¹ They were of eminent importance to the development of cultural formations within the whole world. They transcend, cross and dissect the boundaries of Europe. Looking, for example, at the Spanish monarchy, we can find far greater legal historical proximity between Mexico, Madrid, and Manila in many fields than, let us say, between Madrid and Merseburg. European legal history, however, treats Madrid virtually as a European periphery. If we add the Portuguese crown which laid a network across the coastal regions of four continents with its trading posts, the intermeshing of European and non-European regions becomes even clearer – right up to the fact that confounds all categories, namely that, following Napoleon’s assault on Portugal, the Portuguese crown transferred its political centre to what later became the empire of Brazil.

But even leaving aside this historical episode, continuous cultural translation processes took place in all trade centres and along trade and sea route lines. The ‘printing revolution’ and the changes in communication techniques, migration and all other factors that transformed the modern world, lead to a dramatic change in the material conditions of judging, lawmaking or exercising legal scholarship and profession all over the world: Normative thought and practices from one part of Europe were now imitated, reproduced or newly created under very different conditions in many parts of the world; conditions which were at times perhaps even more similar to those in a city in Europe than to those in, for example, rural regions on the same continent.

Or take as an example the normative thought developed within the School of Salamanca. Obviously, this intellectual movement and its huge impact on later European legal history could not be understood without its global dimensions. Today we understand, not least because of M. Koskeniemi’s work, that critical questions have to be asked about, for example, the

31 See on this the contributions in this volume and, for example, HESPANHA (2013), BENTON/ROSS (2013).

role the School of Salamanca played in the establishment of the world-order, and how later traditions of international law built on these foundations.³²

In brief: If we want to reconstruct the legal history of certain European regions, or even intellectual movements that influenced Europe as a whole, we cannot do so without taking account of the imperial territories of European monarchies, and we cannot do so without looking at later ‘informal imperialism’ either. We cannot ignore the changing significance of space for scholarship, due to the transformations in the conditions for communication in ‘modern’ world, expanding the realm of ‘European’ law beyond the continent, and making it possible to chose ‘Europe’ as a cultural reference even far beyond the borders of the continent.

b) A priori determination of space (3) and the paradigmatic idea of ‘unity’ and ‘uniformity’ (2c), however, not only yield a territory that is inappropriate in a number of aspects for historical research. It also **distracts us from the fundamental question of how we should actually define legal spaces**, or in other words how we can map today’s and the past’s world of law.

Again, even a cursory look at early modern empires shows that it may indeed not be useful to abide by territorial concepts of space in our research, usually even guided by the ordering of the world into homogenous areas which originate in the world of the fictitious authority of nation states. Would other frames of reference, like point grids, for example of *global cities*, settlement centres, and mission stations, or even networks with nodes in the harbour and trading cities perhaps not be more adequate frameworks for research? Do we have to concentrate on secular civil law to (re)construct our traditions? Or could other frames of reference which are no longer defined by territory but by types guide our research? Our ‘container-concept’ of legal history in Europe saves us from asking ourselves these productive questions – by the way questions which might be seen as pivotal for today’s general jurisprudence concentrated on law in a diverse and global world.

c) Continued adherence to the narrow concept of law later generations isolated from the German Historical School’s initially very broad theories

32 KOSKENNIEMI (2001), (2011).

about law (2d) leads to a **reductionist concept of law** and makes us exclude a whole range of normative dimensions in our own history.

The focus on secular learned law and ultimately on the history of legal scholarship has turned out to marginalize and finally exclude all other forms of normativities from our historiography. Just think of the overwhelming importance of Moral Theology, as a normative order that might have been much more forceful in certain historical settings than any kind of ‘state law’; or of other modes of normativity that tended to guide people’s perceptions of right and wrong, good and bad. We have cut these non-judicial spheres off from our legal historian’s world view for a long time.

This is bad for our own historiographical work, because we have reconstructed only a small part of the normative universe, taking it as a whole. But it also impedes us fruitful comparison with other regions. Because if we take the special concept of law as secular learned law and its later products (codifications) as a starting point for legal historical studies, we obviously can only state that this specialty of certain European legal histories might not be found to the same extent in other legal cultures. This is not really a remarkable finding: Outside, the world is different. We will perhaps see their ‘diffusion’ in other areas, but would not really understand too much about their real significance because we often lack knowledge about the normative universe these parts of the law were integrated. But these other spheres often are basically non-judicial, or at least not ‘secular-learned-law’. Thus, we are not used to analyzing them, do not even consider them as relevant, and leave them out. The result is a disproportionate picture of ‘reception’ of ‘European law’ all over the world, which sometimes has been reinforced by non-European legal historians keen to discover and perhaps even emphasize ‘European’ elements in their own legal traditions, due to the positive connotation this gave to their own history in a time when being part of ‘European legal culture’ was presented as being part of the ‘civilized nations’.

Overcoming this narrow concept of law and searching for a conceptual framework that permits us to compare legal histories not from the European categories, but from a shared *tertium comparationis*, would not only render comparative studies more fruitful. More attention for the non-judicial or non-learned secular-law world is also interesting for another reason: European legal history offers a lot of insights into the complex constellations between different layers of normativity, stemming from secular and religious authorities, a key issue in today’s scholarship. But this heritage of normative

pluralism has not been sufficiently introduced into the general debates on our historical past. If there is one important message in Postcolonial studies, or Global History, for Legal history, it lies in this emancipation from the nationally or regionally bound analytical categories which constrain our research.

d) The narrow concept of law we adopted as the underlying concept of European legal history, the focus on unity (2c, d) and the assumptions underlying this (3) also mean that we construct a **distorted image of European legal history** by looking at factors about whose real historical importance we know little about. Take the often discussed ‘circulation of juridical knowledge’ as an example. It is, of course, important to know which institutions of learned law tradition existed in which laws, and which books circulated. This has given and will give us important insights into the formation of different legal spaces within Europe. We should not weaken in our efforts to know about this. But we also have to ask whether the knowledge stored in them – usually ‘expert knowledge’ – was really activated. By whom, when and in which way? In which context, and interplay with other normative orders?

e) The concentration on Europe – and perhaps also the strong ‘German’ imprint on European Legal History – (3) as well as the reductionist concept of law (2c) and the concentration on civil law and dogmatic jurisprudence (2e) lead to a certain **intellectual isolationism** because they made us loose connection with the ongoing debates on Postcolonial perspectives of European history and enshrined us in Eurocentric perspectives.

This has cut us off from innovative methodological debates. For a long time, we have reconstructed our discipline’s histories without taking into account the functionality of law for early modern or modern imperialism. It also endangers us to construct our ideas of Europe on ideas about non-European worlds which are outdated and do not respond to the results of advanced scholarship. It prevents us from applying fruitful analytical categories taken from the debates going on in other areas, and reinforces Eurocentric perspectives with all their intellectual constraints and political costs. The certain isolation from these discourses might be especially strong in the case of German scholarly traditions, due to the fact that German legal historical tradition has never been very much exposed to the necessity of

dealing with Germany's colonial past. Italian, Portuguese, Spanish and other legal histories have integrated these perspectives into their national historiographies, yet this did not have too many consequences on a 'European' level.

f) The predetermination of a largely closed space focused on the continent, the concentration on similarities and uniformity and on dogmatic jurisprudence, leaving aside the reflection on the evolution of law (3, 2d, e) also **divert us from legal theoretical discourses on how to construct legitimacy** in a world marked by globalization.

Let us think of the intensive debates about the historical process of the universalization of norms, as a means of European interests, and the subsequent 'Europeanization of the world' which is being discussed intensely, especially in intercultural dialogue. Today, legal theory is intensely debating the existence of a 'universal code of legality', about historically formed 'levels of law', about processes of sedimentation in a multi-levelled world of law. But are these views on the preconditions of the emergence of a 'global law' convincing? Can we speak of processes of 'sedimentation'? What ideas of historical communication about law lie beyond these models? – If we confine our work to the history of law on the continent, and do not enter into reconstructing the processes of global communication about normativity, we will not be able to participate in these discourses.

g) The predetermination of a largely closed space focused on the continent, the concentration on similarities and on uniformity, the diffusionist tendencies, some underlying philosophical ideas about universals and the exclusive concentration on dogmatic (2d, 3) **distract us from searching for adequate methods for reconstructing intercultural encounters or global knowledge creation in the field of normativity**. How do we capture and analyze them?

History of science has given us important insights into the mechanism of 'global knowledge creation' which could be fruitfully applied or adapted to the field of legal scholarship and the transmission of juridical knowledge.³³ Today, many jurists attempt to understand the processes of the emergence of normative orders by mechanisms of reproduction, normative

33 RENN (2014).

entanglements, hybridization, *métissage* etc.³⁴ Legal historians find here a rich field for research and also an important task of contributing to the basic research in law, if they were willing to engage in a research that privileges these perspectives, working towards an epistemology of law in the process of global cultural translation. Again: To do so, we have to open the field of observation, and obviously, seek a well-balanced interdisciplinary approach that does not consider ‘law’ as something categorically different from other fields of cultural production, but as one *modus* of normativity.

h) Finally, the tradition of European legal history has tended to reduce the legacy of Historical School to its functionality for the dogmatic of Civil law, its history and institutions, and their results in the codification movements of 19th and 20th century, **losing the connection with the meta-discourse on the evolution of law** (see 2e).

But in this fundamental reasoning on the evolution of normativity is an important heritage of Historical School and subsequent jurisprudence, like sociology of law. Obviously, reflection on why the law became the way it was had been continued also by those who worked on European legal history. But as far as I can see, most of them limited themselves to explaining the historicity of law and the possibility of drawing normative conclusions from empirical studies relying on their respective legal philosophical convictions, stemming from natural law traditions, phenomenology, neo-kantianism, etc. During large parts of 20th century, most legal historians were simply convinced that ‘somehow’ time had an impact on the emergence of good solutions for practical juridical problems, but did not work on the theory why this might be the case. They wrote on the *Volksgeist* and what Savigny might have meant with this, but very few legal historical scholars working in the field of European legal history have entered into a ‘meta-discourse’ on how to think about ‘evolution of law’ once the underlying ontological beliefs of Historical School and many of its followers were shattered. In a way, Helmut Coing did so in his legal-philosophical work, but he is merely applying his natural-law philosophy. Some of those who gave incentives to this meta-discourse – such as ‘early’ Uwe Wesel, or former Frankfurt Max-Planck-Institute’s director Marie Theres Fögen – were even passionately

34 See on this especially Donlan in this volume; also DONLAN (2015), AMSTUTZ (2013).

opposed to what had become the leading tendencies of ‘European legal history’. Unfortunately, the result has not been a constructive debate, but merely a closure of European legal history towards these postulates, and vice versa. Today, we are facing the necessity and also the possibility of entering into a more calm reflection on the logics of historical transformation.

5. Legal spaces, multinormativity, translation and conflict – starting points for a European legal history in a global perspective

This leads me to the question on how we can respond to this situation of great challenges and opportunities for legal historical research outlined above – and the parallel need for methodological and conceptual innovations.

I advocate for a *Legal History in a Global Perspective* which does not deny its positionality, which should cultivate regional expertise and traditions and has to be carried out in structures that respect disciplinary logics. It does not have to be *European*, but it will need its starting point in a certain area which would, in our case, naturally be Europe (a). This (*European*) *Legal History in a Global Perspective* should reflect on some basic categories of its method. It could do so by reflecting on some core questions, as starting points. These starting points are, obviously, not exhaustive and deliberately chosen to counterbalance some shortcomings of our research tradition analysed above. They are not ‘groundbreaking’ new, either. On the contrary, they address central preoccupations of current debates in social science, cultural studies, and transnational jurisprudence. Thus, they may help to integrate legal historian’s research into the interdisciplinary and virtually global discourse on normativity that is emerging, linking legal historical research with other disciplines’ knowledge, stimulating interdisciplinary exchange and creating channels of communication (b).

a) In view of the high analytical costs and the lost opportunities outlined above, we have to leave the path of *a priori* presumption of a geographic area for our transnational research. Instead, we should seek to develop a legal history oriented towards (in the widest sense) transnational spaces, which can also result in the determination of respectively flexible, even fluid legal areas. The potential area of such a legal history would and should ultimately be global.

But, to prevent a common misunderstanding: This does *not* imply to write a Universal or World history of law. This would be something completely different. ‘Global perspectives’ mean to envision a legal history that is able to establish new perspectives, either through opening for different analytical concepts or by fusing them with the own tradition, by tracing worldwide entanglements or by designing comparative frameworks which can shed light on unexpected parallel historical evolutions.

Obviously, there are some fields where ‘global perspectives’ are indispensable and others where they might not be so fruitful. Definitely, the history of early modern empires, the Catholic Church and their normative ideas and practices, or phenomena like, for example, the School of Salamanca are fields that need to integrate global perspectives. Not less the history of the ‘Europeanization of Europe’, the history of international law, the history of globalization of law, the history of labour law, the history of industrial law, the history of commercial law, the formation of scholarly communities and their practices, the history of codification in 19th century ... All these can benefit from or cannot be written without global perspectives. Still, this is only a random selection of potential topics, some of them now being studied more forcefully.

Such a legal history in global perspective will always need to have, as a basic condition, a clearly disciplinary framework. Without this, it cannot respond to the disciplinary logics, resulting in a loss of quality. Interdisciplinary communication needs disciplinary knowledge, and we should insist on this. At the same time, a European legal history in global perspective will rely heavily on research carried out in area studies, like those on ‘Latin America’, ‘Africa’, or ‘Asia’. These Area Studies and the regional specialization of disciplines like ‘European Legal History’ are indispensable for studying a region worthwhile to be studied as such, for example as the result of a historical process of regional integration, like in the case of Europe. Regional expertise is also necessary as an institutional framework for producing the essential historical, philological or other expertise and providing it to those who do comparative or global research. Regional expertise thus creates the preconditions for a fruitful disciplinary, but also for transnational, transregional or even ‘global’ research. It also contributes to cultivating certain research traditions stemming from the specific cultural background. The latter seems a very important point to me: In an age of globalization of research, and of a certain tendency to impose and adopt Anglo-American

scholarly practices, it is ever more important to preserve and cultivate different canons and concepts, to safeguard and promote epistemic plurality.

To sum up: We need reflexive positionality, disciplinary frameworks, scholarly expertise on areas, and open-mindedness for global perspectives. What we do not need – and this has been the case for too long – is intellectual isolationism.

b) But what are the concepts we need to reflect upon? – Four aspects seem of special importance to me.

(1) A first and crucial starting point is to gain more clarity about the problem of the formation of ‘Legal Spaces’.

These have to be the result, not the constraint of our research.³⁵ Legal spaces can thereby only be dimensioned by reference to the respective historical phenomenon and must accordingly be designed flexibly. They may – as in the case of the Spanish monarchy, for example – be bound to imperial regions. But they may also – as in the case of Canon Law and the normative thought of moral theological provenance in early modern period – extend across political borders. No less complex are legal spaces which did not form because of imperial interconnection, but through a specific, often coincidental or temporary exchange – for example in the field of certain trading networks which generate rules for the traffic of goods, or of discourse communities which are observable in Europe in the nineteenth and twentieth century, between southern European and Latin American countries or in other regions. It should be a particularly important task for legal history research to reflect on this formation of legal spaces connected with increasingly intensive communication processes, investigate different area concepts and make them productive for legal history. By doing so, we cannot only acquire greater knowledge about specific historical formations, but also about the increasingly important regionalization processes of normativity, about appropriation and imitation and about the integration of local and non-local normativity. These are fundamental concerns also for contemporary jurisprudence.

(2) A second starting point is that we need critical reflection on the concept of ‘law’ that we are employing in order to structure our analysis. As

35 See on this SACHSENMAIER (2010a), (2010b); BENDA-BECKMANN/BENDA-BECKMANN (2009b), BAVINCK (2009).

mentioned above, it is quite useless to compare legal traditions taking our own past's concepts and applying them to other areas, leading us to the conclusion that outside world is different. We need 'transcultural' analytical concepts of normativity. '**Multinormativity**' could serve as an appropriate term for these attempts at understanding law in the environment of other *modes* of normativity not structured by our idea of law.

How can we generate this 'transcultural' or even 'transepochal' conceptual framework? We will find it neither in a religious, philosophical nor in a juridical definition, nor in endless debates about 'the' concept of law in certain historical periods. What we need is an empirical approach that is not developed from the perspective of (western, learned or whatever) law, but apt for intercultural communication on normativity.³⁶

In recent studies on transnational law, there has been a growing sensibility for the necessity of giving up the ultimately law-focused epistemological mechanism still at work. The need to do so has been pointed out for a long time by ethnology and sociology. Since decades, different ways of approaching legal pluralism are being debated with a wide array of suggestions on how to create categories. Several recent attempts at empirical-phenomenological and non-conclusive descriptions in the field of normativity, characterized by a certain distance from 'legal pluralism' seem especially inspiring.

(3) Looking at transnational contexts, we need a methodology which permits us to better understand and reconstruct the processes of (re)production of normativity. We need this not only for global historical perspectives in imperial areas but also for purely local legal history studies in any location. I suggest opening us for the method discussed and developed under the label of '**Cultural Translation**'.³⁷

In transnational legal scholarship, processes of appropriation and acculturation of normativity in areas different from those where the normativity generated have usually been discussed as 'reception', 'transplants' or 'transfers'. These three terms have considerable premises and are usually also polysemous. Above all, they are not operational: They promise explanations, but only provide descriptions. They also have lost nearly completely contact

36 See on this broad field TWINING (2009), TAMANAHA (2010); BERMAN (2009), (2012); DONLAN (2015).

37 See on this concept BURKE (2007), (2009a), (2009b), (2012); BASSNETT (1998).

with the professional analysis of comparable processes in cultural studies. In the intense debates on cultural transfer during recent decades a number of approaches were developed that could prove to be very fruitful for legal history. At the moment, there is even an inflation of concepts: hybridity, *métissage*, appropriation, to name but a few. But the name is less important than the heuristic potential, and few of them will survive.

For legal history in the early modern and modern period, the concepts discussed under the heading of Cultural translation could be especially helpful. Even if one might be mistrusting the fashionable discourses promoting these perspectives, and even if one does not wish to regard all cultural production directly as a translation problem, it should be evident that, due to the linguistic constitution of our subject 'normativity', a professional approach is indispensable which takes the findings of linguistic and cultural studies seriously. This approach must even play a central role where the investigation of transcultural contexts is concerned. Looking at lawmaking, judging, or writing law books as a mode of translation (independently from the fact whether there is a translation from one language into the other, or whether it is just a translation by the person who is acting within the same language system) compels us to pay special attention to social practices, to knowledge and the concrete conditions of these translation processes. The analysis necessarily leads to the pragmatic and, above all, institutional contexts as well as to the mediality in which 'law' as a system of meaning is materialized. Thus, to focus on law as translation helps us to counterbalance the historical priority given to the 'object' of reception and to the 'sender'. Furthermore it replaces this sender-centrism by privileging the local conditions in the 'receiving' culture, i.e. the conditions of recreation of potentially global juridical knowledge under local conditions ('globalizations'). And it forces us to open our analysis to those methods that have been developed in cultural anthropology, linguistics, cultural studies and social sciences to understand the pragmatic contexts of human modes of producing meaningful symbols. Because obviously, 'Cultural Translation' is not limited to lingual translation.

(4) This leads us directly to the fourth point: Whenever possible, we should privilege a legal history that focuses on local practice, especially on **Conflict**.

There are many good reasons for this: First, we would try to counterbalance the longstanding privileging of normative options, always tending

to forget their selection in practice. Second, we would try to counterbalance the longstanding privileging of learned law, and be more aware of commonplace legal knowledge, trying to understand how categories of learned law formed the minds, ideas, concepts and practices, but look on them through the eyes of practice. Third, different procedures of conflict resolution often produce sources reaching far into everyday local life and provide us with the opportunity to observe the available normative options and their activation. Looking at conflicts thereby gives us the opportunity of discovering the *living law* and at the same time draws our attention to extra-legal framings, especially important for the formation of law, to the accumulated knowledge of the communication community, their implicit understandings, i. e. to many factors that have been identified as crucial elements for an analysis of law in sociological and legal anthropology, or in culturally sensitive legal theory.

6. Conclusion

To summarize, I believe that European legal history needs to deliberate on the way we construct the spatial framework for our research without denying our positionality. In a way, we need to de-Germanize research traditions, freeing ourselves in some aspects from constraints imposed by the tradition, heavily influenced by German authors and still following the paths of a scholarship whose intellectual categories are formed by patterns stemming from medievalist's concepts on legal history. Emancipating ourselves from these bonds also means distancing us from the idea that Europe is an evident spatial framework for our research. It is not ('Legal Spaces').

Within this endeavour we need to maintain disciplinary identities and their institutional frameworks, logics, revenue-systems etc. At the same time, we have to open for intra- and interdisciplinary discourse, introducing productive analytical tools into our research and starting a joint reflection on some basic categories of transnational jurisprudence. In this context, we need to find concepts and a vocabulary to address normative plurality ('Multinormativity'), we need to understand the communication about law as a continuous processes of cultural translation ('Translation') and it would be important to choose concrete conflicts as a starting point, whenever possible ('Conflict'). In the best case, we end up with a legal history that

combines local studies in different areas, analyzes them with concepts and a vocabulary apt for intercultural communication and tries to integrate its results into a global dialogue on normativity. Again, this does not mean to study everything and everywhere. Good ‘Global history’ is by no means *total* history, but the combination of local histories, open for global perspectives.

None of that is groundbreaking new. ‘Global perspectives’ have been introduced in legal history without naming it like this before. Still, writing legal history in a global perspective implies a certain change of habits, reflection on method and theory, and solid work on sources with the corresponding skills and knowledge in different areas. There is no Global History without local histories, and it might even prove that opening for global perspectives even strengthens the local dimension. Putting this in practice, we might make a humble contribution to the emerging field of Transnational General Jurisprudence, to fundamental studies on law, to Global History, and, not least, to a legal history focusing on Europe as a global region, with its treasure of juridical experiences to be salvaged. Because even if ‘Europe’ might be a cultural reference point, the normative orders that emerged in this space of communication were reality, as theory or as practice. This historical reality influences our way of conceiving normativity until today and might even offer important insights into the evolution of law for the globalized world. It might even be important for the emerging legal scholarship on Transnational law, deeply in need of tools for better understanding the entangled normative orders.

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Coding the Nation. Codification History from a (Post-)Global Perspective*

The term “code” derives from “caudex,” which was simultaneously the trunk of a tree and a set of laws. It is one of several terms clustering around the idea of power being resident in a sacred tree; the Roland, at the center of the traditional village. A code, then, is etymologically and functionally the trunk around which a settlement arranges itself.

Pat Pinnell¹

I. Introduction

Codification history, a “core issue of modern legal history,”² has been around for several decades. During this time, its main subject, the legal code, has lived through many different, and often slightly contradictory, definitions. During the early days of the emerging discipline, Franz Wieacker sometimes referred to it as a “delightful possession of the peoples of modern Europe,”³

“[a] unique, hard-won and hard-to-defend, creation of legal civilization on the Western and Central European mainland, and only there. One of the most characteristic formations of the European spirit, which displays its social and individualist character most distinctly.”⁴

Wieacker’s view of modern law and its codes was obviously highly idealistic, and as such has long enjoyed a “monopoly-like position in the methodology of legal history,”⁵ especially in Germany. His faith in an objective order of

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1 Quoted after DUANY (2004).

2 CARONI (1991) 249. Unless stated otherwise, all translations are ours.

3 WIEACKER (1954) 34.

4 Ibid.

5 SENN (1982) 77.

law, whose elements and concepts could be brought to light and even offered to the world for future use by historically adept jurists, (whom he strongly preferred to historians, even those with legal training), owed much to the hermeneutical theory of Emilio Betti, who, in 1955, had presented a famous book on the topic.⁶

Besides being idealistic, Wieacker's concept of codification had an equally positivist side, as it required the

“submission of the judge and the fellows of the law under a complete system of norms, rising consistently from singular legal rules and institutes to the highest concepts and principles.”⁷

This system had been established in the 19th century by “the most advanced and self-confident class”⁸ of its time, the bourgeoisie (*bürgertum*), with its keen interest in science, economics and *kultur*. The law of this society was general, abstract and rational, with a strong focus on property and obligations, rooted in Roman law and in the idea of the enlightened subject, as it had emerged in the contractualist theories from the 18th century.⁹ It goes without saying that the other legal and political institutions of this particular society were equally rational. They were grouped around a strong power centre, which was not mindlessly authoritarian, but relatively benign. Contrary to many other systems of governance of the day, it was a *rechtsstaat*, whose purpose was not so much to maintain and defend an abstract constitutional order, but to provide what was owed to each one of its male and – albeit to a lesser extent – its female citizens. In order to do this, and to be able to defend the *kultur* of the nation, the state of a *rechtsstaat* had to be exceedingly powerful, both in terms of the rationalism of its structures and its military might. Thus, maintaining the law in its most rational and advanced form, the code was tantamount to maintaining the state, which in turn protected the cultural heritage of the nation. This eminently

6 BETTI (1955). Cf. SENN (1982) 76–90; WESEL (1974) 348–50.

7 WIEACKER (1954) 34.

8 WIEACKER (1954) 46.

9 WIEACKER (1967) 301–311. In the German-speaking countries, Wieacker's book, whose first edition dates from 1952, became the foundation stone of a whole new academic sub-discipline. To this day, *Privatrechtsgeschichte der Neuzeit* is taught at many universities throughout Germany, Switzerland, and Austria. Here, we have used the translated version, cf. WIEACKER (1995) 239–248. For Wieacker's Weberian “inspiration” cf. WEBER (1978) 866 et passim.

civilizing mission promoted a corps of academically trained jurists, the *juristenstand*, to act as the structural centre of society.

This, of course, derives from Max Weber, whose

“overwhelmingly [...] sober institutional-sociological account of how the spread of Roman law followed the rise to prominence of professionally trained jurists”¹⁰

inspired not only Wieacker, whose work has been deemed “unthinkable”¹¹ without Weber’s influence, but so many other legal historians, that it has enjoyed virtual “hegemony”¹² ever since, having “received an enormous amount of acclaim among American legal scholars during recent decades”¹³ and “dominat[ing] in European legal history”¹⁴ even today. Even after Wieacker’s idealist method of *privatrechtsgeschichte* had gradually made way for socio-historical approaches during the 1970s, central parts of neo-Weberian *rechtssoziologie* remained in place and continued to play a pivotal role in scholarly accounts.¹⁵ Principal among these was the structural link between modern law and the state. Because law and the code were viewed as meaning virtually the same, democratic legislation and judge-made law *praeter codificationem* were equally perceived as unsettling disturbances of the legal order, which was ultimately threatened by “decodification.”¹⁶

Thus, modern legal history ended up with two different strains of neo-Weberism.¹⁷ Both were modernist and functionalist, with one a little less relentlessly so, but still holding on to the theory of rational formalism, while the structural-functionalist ‘Parsonian’ strain consigned the codification to some distant past, like, in the case of Natalino Irti, to Stefan Zweig’s *welt von gestern*.¹⁸ Both had their deficiencies: While the former strain lacked insight into the self-reproductive and, in Weberian terms, deeply irrational workings of modern law, the latter appeared to misperceive codification and

10 WHITMAN (1996) 1850.

11 HENNIS (1998) L44.

12 LEDFORD (2002) 385.

13 BERMAN (1985) 758.

14 WHITMAN (1996) 1850.

15 For recent examples cf. KESPER-BIERMANN (2009), and JANSEN (2010), the former being an account of the emergence of the German power state (*machtstaat*) through the unification of its criminal laws, the latter a tour de force on the codificational genius of *rechtswissenschaft*, both German and foreign, through the ages.

16 IRTI (1979) 21 et passim.

17 BERMAN (1987) 762s.

18 IRTI (1979) 21: “mondo di ieri,” a quotation from Stefan Zweig.

re-codification as, in fact, an eminently vital and global phenomenon. Far from being obsolete – a relic from the “world of safety”¹⁹ of yore, a victim of the “acceleration of history,”²⁰ a thing which “no longer occurs,”²¹ a mere transitory phenomenon of the distant past, a “kodifikationszeit,”²² which has long died out, as structural functionalism and systems theory would have it – legal codification today is alive and well.²³ Now the question arises as to how codification history and legal theory can come to terms with this fact without having recourse to the idealist, historicist and neo-positivist positions of the past.

II. The ‘standard view’ and its discontents

According to the neo-Weberian “standard view”²⁴ of codification history, as Damiano Canale called it, modern codes are thought to have originated in Europe during the second half of the 18th century. They presumably occurred in “waves”²⁵ – an expression coined by Franz Wieacker – first bringing up the Prussian *Allgemeines Landrecht für die Preussischen Staaten*, the Austrian *Allgemeines Bürgerliches Gesetzbuch* and the French *Code civil*, sometimes also called the *Code Napoléon*. A second wave, at the turn of the 20th century, is said to have brought on the more scientifically refined, and particularly liberal German *Bürgerliche Gesetzbuch*, and the Swiss *Zivilgesetzbuch*. The standard view maintains that during the whole of the 19th century legal codification spread throughout Europe in step with the emerging nation state, serving two main functions as the basic tool of the trade for legal professionals, and as the embodiment of a “definite conception of the nature of law and the social function of regulation by law.”²⁶

The code, as it is usually treated in legal history, is a Weberian ideal type.²⁷ Its main conceptual features are simplicity, self-consistency, and complete-

19 IRTI (1979) 23.

20 IRTI (1979) 26.

21 LUHMANN (1995) 327 s., n. 59.

22 BRUPBACHER (2009) 179 et passim.

23 Cf. the examples cited in ZIMMERMANN (1995) 103 et passim or more recently WEISS (2000) 454 and SCHMIDT (2009) 145 s.

24 CANALE (2009) 135.

25 WIEACKER (1995) 257 et passim.

26 CANALE (2009) 135.

27 WEISS (2000) 455.

ness, with the alleged aim of making legal procedures more accessible and of improving the predictability of legal decisions. Its ultimate goal is the production of legal certainty. The normative source of the code is a strange mixture of sovereign legislation and legal science (*rechtswissenschaft*),²⁸ with the codes of the first wave rooted in the former, the more advanced codes of the second wave increasingly based on the latter. *Rechtswissenschaft*, of course, meant the historical school with its method of finding the ‘true’ law of the nation and fitting it into a system. The code is also seen as a paragon of legal positivism, which overrides all other sources of law in the same territory – the so-called codification principle.²⁹ Finally, it is said to establish the principles of equality and freedom, features, which according to the standard view, make the codes of the first wave precursors of constitutional orders, while those of the second wave act as the embodiment of bourgeois rule.³⁰ On the whole, the history of the code is generally painted as one of progressive enlightenment, the “historical process that led Europe to constitutionalism, democracy, and the rule of law.”³¹ Its focus is on civil codes, which are presented according to an ascending order of rationality, freedom and economic liberty. Codification of the criminal law, while clearly a side issue, is handled along the same lines as overcoming dark practices and ending up with enlightened procedures.³² Historical instances of codification are thus consistently treated either as corroborations of a larger narrative of civilization through self-referential, rational law. Otherwise, they tend to be ignored, which, until recently, has led to the considerable history of colonial codes being almost completely left out.³³

28 The *gesetz*, “that hermaphroditical character (*zwittergestalt*) of both being and knowledge, squeezing itself between law and science, covering both with its pernicious effects”, as notoriously stated by Julius Hermann von Kirchmann as early as 1847, KIRCHMANN (1847) 14.

29 DRONKE (1900) 703.

30 WIEACKER (1954) 46. Cf. also WIEACKER (1953) 10 s. This assertion can be traced back to MARX (1960) 201 s.

31 CANALE (2009) 141.

32 Cf., e.g., SCHRÖDER (1991), 420 or more recently LUMINATI (2010). For a critique of accounts of progress in the history of penal law SCHAUER (2006) 358 et passim.

33 Cf., however, NAUCKE (1989) or more recently BENTON (2002) 240 s. et passim; MARTONE (2002); HUSSAIN (2003) 55–68; LIKHOVSKI (2006) 52 s. et passim; JEAN-BAPTISTE (2008) or KOLSKY (2010).

Besides the notion of uniform modernity, the Weberian paradigm in legal history suffers from a second defect, as it construes a universal concept – the code – from a particular and historically limited set of historical observations. Both the concept of formal rationalization inherent in the code and the notion of the power state (*machtstaat*) are intrinsically connected with German legal history and the foundation of Germany as a nation-state in the second half of the 19th century. While it is certainly true that, as Damiano Canale points out,

“[a] phenomenon of the past, such as the modern codification of law, will accordingly take on historical sense only if it has ‘universal meaning,’ that is, if it can be conceived as the ‘adequate cause’ of our present beliefs, desires, values, and conceptual schemes.”³⁴

it is equally important to notice that

“on this conception of historical knowledge, we wind up ascribing to the [...] codification the very sense that justifies our present idea of law and legal order, while any source or document from the past that fails to reflect our present view of what law is and what it ought to be will lose all ‘historical interest’ and be consigned to oblivion. In short, on this methodological approach to the history of law, history itself runs the risk of becoming a means by which to justify the present and mis-conceive or otherwise be ignorant of the past.”³⁵

Thus, the Weber paradigm, by equating codification with the structure of modern law itself, makes it difficult to explain historical phenomena such as deliberate non-codification, or the persistence or even renaissance of codificational order in the face of its structural demise allegedly occurring today. Equally difficult to assess are cases of arrested codificational development, which, according to the paradigm, must necessarily be interpreted as failures to modernize, an explanation much too narrow for the complex and manifold issues regularly involved.

These deficiencies have long been perceived among legal historians. Harold Berman has attacked central aspects of Weberism,³⁶ while still basically subscribing to the theory of rationalization.³⁷ Experts in the history

34 CANALE (2009) 143 s.

35 CANALE (2009) 144.

36 Cf., e.g., BERMAN (1985) 11–12, 337–38, 399–402, 539–41, 550–52 et passim; BERMAN (1987) 758–70; BERMAN/REID JR. (2000) 223, 234–37.

37 Cf., e.g., BERMAN (1985) 178 s.: “It was not transcendence as such, and not immanence as such, that was linked with the rationalization and systematization of law and legality

of codification – Bruno Oppetit,³⁸ Csaba Varga,³⁹ Pio Caroni⁴⁰ – have expressed similar doubts and mixed opinions. As a result, codification as a central concept of modern legal history has become blurred. Contemporary reference books term it as a “polymorphic historical phenomenon”⁴¹ or a “complex reality subjected to continuous historical change, and therefore

in the West, but rather incarnation, which was understood as the process by which the transcendent becomes immanent.”

- 38 OPPEIT (1998) 61: “Faut-il aller plus loin et considérer que la codification, en se généralisant, marque le terme du processus de rationalisation du droit? Aurait-on atteint ici aussi ce qu’on a appelé la “fin de l’Histoire,” entendue évidemment non pas au sens événementiel, mais comme achèvement du processus évolutif des institutions des sociétés humaines? [...] C’est assez dire que la modernité peut être vécue différemment selon les époques et les pays et que la codification n’obéit pas à un déterminisme inéluctable. Elle exprime un droit en devenir, non un stade ultime et figé de son évolution; elle est donc exposée à des alternances d’essor et de recul, et ce d’autant plus qu’elle est tributaire du contexte général et qu’elle doit composer avec un certain nombre de données contraires à son épanouissement.”
- 39 VARGA (1991) 274: “Just as the appearance of the product as a power mastering and threatening the producer (i.e., the phenomenon of alienation) was the focal problem for Marx, for Weber this role was played by rationalization, i.e., the circumstance that the structures purporting to be the extension of liberty became independent and were turned into a power restricting this very liberty itself. The influence of Weber’s age on his notion of rationality is to be found primarily in the absolutizing, even hypertrophical, significance assigned to its notional sphere.”
- 40 CARONI (1991) 269: “Dem begriffsjuristischen Formalismus verhaftet, den die deutsche Pandektistik zum Inbegriff einer streng wissenschaftlichen Methode emporstilisiert hatte, hat dieses Modell während Generationen junge Juristen dazu erzogen, sich auf das rein Rechtliche zu konzentrieren und aus ihrem Tätigkeitsbereich Ausserrechtliches (wie z. B. das Sittliche, das Wirtschaftliche, das Politische usw.) zu verbannen. Es propagierte Abstraktion, weil es in ihr eine wichtige Voraussetzung für die Objektivität und Neutralität der Rechtswissenschaft erblickte. Und weil es davon überzeugt war, dass eine rein begriffsjuristische Anwendung oder Kombination abstrakter gesetzlicher Normen schon deswegen wirklich und gerecht sei, wenn sie den Gesetzen der formalen Logik entspreche. So kam es, dass sich die Juristen während Jahrzehnten nur noch für ihre Begriffe interessiert und all das gezielt und selbstsicher vernachlässigt haben, was sie in ihren Überzeugungen hätte verunsichern können. Dass sie die ‘Rechtssoziologie’ von Max Weber, die bereits zwischen 1911 und 1913 niedergeschrieben worden war und erstmals eine viel differenziertere und nicht zuletzt entmystifizierende Sicht der Kodifikationsgeschichte vermittelte, nicht zur Kenntnis nahmen, kann man ihnen demnach gar nicht übelnehmen.”
- 41 KROPFENBERG (2012) 1918.

not easily reduced to a common denominator,”⁴² while experts in the field of codification history ominously call it “an open question in legal history and legal philosophy,”⁴³ “unclear and polysemous,”⁴⁴ or “a neutral form, an instrument to bring about a transformation of the structure and content of the law,”⁴⁵ which “has persistently been in flux over the last 200 years,”⁴⁶ its “way [...] leading up to the present, from simplicity to turbulence,”⁴⁷ having “run through four millennia of legal history in very different forms,” and therefore covering “extremely varied and diverse realities.”⁴⁸

The increasing lack of conceptual clarity regarding codification in legal history today is a direct consequence of many legal historians’ (often unacknowledged) adherence to a set of neo-Weberian beliefs, viz. the equivalence of modern law and the positive *gesetz*,⁴⁹ the exclusive focus on functions and structures of power and knowledge, paired with disregard for non-normative manifestations as not being ‘legally meaningful,’ rationalization (and, equally, structural differentiation) as synonyms of uniform modernization and progress, or the notion that the ancient concepts of justice and genealogy or narratives of unity and community have somehow completely lost their legal meanings over the course of the past 300 years.

In order to overcome the neo-Weberian impasse, these beliefs must be challenged, modified and amended. Eventually, they should be supplemented with theoretical guidance which enables us to view codifications as more than command hierarchies designed to stabilize power structures or exercises in jurisprudential brilliance. If they were merely antiquated and essentially failed attempts at producing modern law – then why are they still in existence?

42 CARONI (2007) 855.

43 CANALE (2009) 136.

44 WEISS (2000) 449.

45 VARGA (1991) 14.

46 WEISS (2000) 470.

47 CAPPELLINI/SORDI (2002b) VII: “La strada dei codici è dunque la strada che conduce al presente: la strada che dalla semplicità conduce alla turbolenza.”

48 OPPETIT (1998) 19: “Le terme de ‘code’ recouvre des réalités extrêmement variées et diversifiées, comme on l’a vu: la codification parcourt quatre millénaires d’histoire juridique sous des formes très différentes.”

49 Cf. the incisive critique in BERKOWITZ (2010) 155–157 et passim.

III. The culture of codification

The answer to this question, in our view, lies in the fact that modern law is not so much a normative order, much less a universal one, as a belief system whose rules “do not just regulate behavior, [but] construe it,”⁵⁰ as Clifford Geertz maintained, its

“imaginative, or constructive, or interpretive power [being] rooted in the collective resources of culture rather than in the separate capacities of individuals.”⁵¹

This makes law, “even so technocratized a variety as our own” – this again from Geertz –

“in a word, constructive; in another, constitutive; in a third, formational. A notion, however derived, that adjudication consists in a willed disciplining of wills, a dutiful systematization of duties, or an harmonious harmonizing of behaviors – or that it consists in articulating public values tacitly resident in precedents, statutes, and constitutions – contributes to a definition of a style of social existence (a culture, shall we say?) in the same way that the idea that virtue is the glory of man, that money makes the world go round, or that above the forest of parakeets a parakeet of parakeets prevails do. They are, such notions, part of what order means; visions of community, not echoes of it.”⁵²

Rationality, calculability and ‘structurality’ may well be aspects of a certain type of law, as they are certainly typical for certain notions of the political, but they do not define law. From this it becomes equally evident that structural functionalism of all sorts, including Weberian *rechtssoziologie*, do not offer ‘objective’ or ‘value-neutral’ insight into the workings of law, neither for the past nor the present, but an overly rationalistic, eurocentrically (or ‘occidentally’) limited and politically biased one.⁵³ It is, after all, due to his highly idiosyncratic and one-sided appreciation of the tradition of the social contract, Weber bases his concept of formal rationality exclusively on individualism, which effectively turns the entirety of modern law into an exercise in liberalism.⁵⁴ According to Weber, liberalism is the ‘natural’ political order for modern law to thrive in, because it is the only system which allows for its individualist rationalization.⁵⁵ Consequently, structural

50 GEERTZ (1983) 215.

51 Ibid.

52 GEERTZ (1983) 218.

53 MARCUSE (1965) 161 et passim.

54 WEBER (1978) 868–870 and the incisive critique in BERMAN/REID (2000) 234–237.

55 WEBER (1978) 871–873. For a critique, cf. MARCUSE (1965) 178 s. et passim.

functionalism treats one particular set of policies as the default political order of modern society.⁵⁶ With certain reservations, this even applies to Niklas Luhmann's highly refined theory of social systems, where law is conceived as the stabilizing force not of institutions, but of normative expectations.⁵⁷ In the course of fulfilling its sole societal function, the production and re-production of legal certainty, law operates according to a specific kind of 'meaning' (*sinn*), the symbolically generalized communication medium of 'law' (*recht*),⁵⁸ which is related to the political medium of 'power' (*macht, rechtsmacht*).⁵⁹ For the legal system to be bound to operate and evolve meaningfully implies that what is not meaningful according to its own internal standards will not be treated as law.⁶⁰ By exerting such a 'diktat of the meaningful' – *sinnzwang*, as Friedrich Balke called it⁶¹ – the legal system continuously confirms the societally – economically, politically, scientifically, mass medially – normalized, generically liberalist continuum, moving forever towards a receding horizon of uniform modernity, offering neither disruption nor an alternative.⁶² Just like Weberism and structural functionalism, systems theory thus treats the question of the political as a foregone conclusion. It would be "simply grotesque"⁶³ to think otherwise – which is, obviously, an eminently political statement in itself.⁶⁴

These preliminary, albeit tacit decisions in favour of the economic, political and cultural model of a mythical West, year of construction c. 1964, have produced a legal history with a very limited and narrow perspective of law and codification. It has proved especially unhelpful in treating colonial and post-colonial experiences as well as all kinds of legal 'transfers,' as it blocks out the imaginative and cultural in search of material structures and agendas. In our view, therefore, a useful theoretical framework must oppose the view that other dimensions of society somehow precede or even dominate law, or that it can only thrive in a liberal setting, or that it has to be rational or meaningful by definition or else not be at all.

56 PARSONS (1965) 62 s. For a critique, cf. STAPELFELDT (2005) 166 s. et passim.

57 LUHMANN (1995) 131; LUHMANN (2006) 451.

58 LUHMANN (1995) 35.

59 LUHMANN (1988) 95 s.

60 LUHMANN (1995) 192 s.

61 BALKE (1999).

62 STAPELFELDT (2006) 224–226.

63 WELZEL (1975) 348.

64 VOEGELIN (2009) 234.

It must, in other words, open up the narrow constraints of methodological-individualist functionalism and become a way of viewing law as a symbolic form, a matrix as well as a place of memory of the political. Law, thus, is seen as a “set of spectacles” – this quote is from Ulrich Haltern – for

“[w]hoever looks through [them], looks at the political from a very specific point of view. The law invests the observed with a specific and particular meaning. Before it gives form to the political, it shapes our imagination of the political. Thus, law is a form of imagination, whose power does not lie in objectifiable facts, but in its ability to stabilize the political imagination.”⁶⁵

As Haltern maintains, the idea of modern law as a matrix relates to ‘the political’ – *le politique, das Politische* – as opposed to politics and political institutions, which play a major role in contemporary social and political philosophy.⁶⁶ Taken as theoretical guidance for modern legal history, some of its aspects may also be used to elucidate the cultural meaning of codification.

As an opposite concept to structuralism and functionalism, the political shifts the focus from the ‘solid’ forms of legal institutions, their scientific meaning and social impact to different aggregate states of law. ‘Liquid’ law, as we may call it, is, for instance, what Gottfried Wilhelm Leibniz had in mind when he proposed a just order extrapolated and codified from the laws of nature. To teach the science of natural law, he maintained, is to convey the laws of the best of all communities, while teaching positive law means adjusting the existing laws to the laws of the best of all communities.⁶⁷ Leibniz’ code, therefore, is not a mere *gesetz*, but, in deploying a comprehensive vision of society, harks back to elementary questions of the political.⁶⁸ It constitutes society as a whole as well as being constituted by it.

The social and political constitutivity of codes in the Age of Reason is the subject of a recent work by Damiano Canale. Against the Weberian account prevailing in much of modern legal history, he treats codification not as a uniform concept along the lines of rational and individualist economism,

65 HALTERN (2005) 17 s.

66 For a recent overview over various approaches to the ‘political’ cf. MARCHART (2010), BEDORF/RÖTTGERS (2010), and BRÖCKLING/FEUSTEL (2010).

67 LEIBNIZ (1948) 614: “Scientiam Juris naturalis docere est tradere leges optimæ Reipublicæ. Scientiam Juris arbitrariii docere, est leges receptas cum legibus optimæ Reipublicæ conferre.”

68 CASSIRER (1902) 449 s.

but – quoting Jean-Étienne-Marie Portalis – “as a means by which ‘to rebuild the social edifice from the beginning’ [...] once the modern state has been founded and become effective.”⁶⁹ Accordingly, he looks at the Prussian Landrecht, the French Code civil and the Austrian Allgemeine Bürgerliche Gesetzbuch as “three different blueprints for this edifice, that is, three different ways of building and organizing society through the law[.]”⁷⁰

This concept may also be applied to 19th century history, again with the French civil code as the main example and imaginary point of origin of a new societal order, characterized by universal equality and inclusion along the lines of citizenship, presented by Portalis to the legislative corps of the Republic on 13 March, 1804:

“Today, uniform legislation has made all the absurdities and dangers disappear; civil order has cemented the political order. We will no longer be Provençal, Bretons, Alsations, but French. *Names have a greater influence on the thoughts and actions of men than one might think.* Uniformity is not only established in the relationship that must exist between the different parts of the state; it is also established in the relationship that must exist between individuals. Previously, the humiliating distinctions that the political law had introduced between persons had also inserted themselves into civil law [...] All these traces of barbarism are now erased; the law is the common mother of all citizens, it provides equal protection to all.”⁷¹

Indeed, by calling Provençals and Alsations French and every citizen a child of ‘the law,’ the code does not so much “cement” a pre-existing political order, but rather conceives a completely new one, the “imagined community”⁷² of the modern nation. According to contemporary approaches to nationalism, legal codes indeed do constitute nations, which are sometimes defined as – this is from Anthony Smith –

69 CANALE (2009) 148.

70 Ibid. 148.

71 Jean-Étienne-Marie Portalis as quoted in FENET (1827) cii (emphasis added): “Aujourd’hui, une législation uniforme fait disparaître toutes les absurdités et les dangers; l’ordre civil vient cimenter l’ordre politique. Nous ne serons plus Provençaux, Bretons, Alsaciens, mais Français. *Les noms ont une plus grande influence que l’on ne croit sur les pensées et les actions des hommes.* L’uniformité n’est pas seulement établie dans les rapports qui doivent exister entre les différentes portions de l’Etat; elle est encore établie dans les rapports qui doivent exister entre les individus. Autrefois, les distinctions humiliantes que le droit politique avait introduites entre les personnes, s’étaient glissées jusque dans le droit civil. [...] Toutes ces traces de barbarie sont effacées; la loi est la mère commune des citoyens, elle accorde une égale protection à tous.”

72 ANDERSON (2006).

“a large, territorially bounded group sharing a common culture and division of labour, and a common code of legal rights and duties.”⁷³

The cultural meaning of codes, thus, lies much less in their normativity than in their formativity; they tell ‘us,’ who ‘we’ are.⁷⁴ Accordingly, in a culturalist framework, they must “be transformed from documents to monuments,”⁷⁵ to borrow from Michel Foucault’s concepts of archive and archaeology. The methodological approach to the culture of codification is thus not hermeneutical, but based on a mixture of the socio-historical with the history of ideas.⁷⁶

Such an approach, again, does not offer any insight into the ‘truth’ of law, the code and its history, simply because such a thing does not exist. It does, however, offer a set of theoretical and methodological means of dealing with the constitutive and constituted nature and the apparent contingency of modern law. Codification may thus be construed either as an act of exception or interruption of political order,⁷⁷ which brings to mind Prost de Royer’s notion of the code as a “complete recasting”⁷⁸ (*refonte absolue*) of legislation or Voltaire’s famous advice “to burn the laws, and make new ones,”⁷⁹ or as a delineation between friend and foe, establishing a state of Schmittian hegemony.⁸⁰ Alternatively, the idea of codification may be seen as a normative resource, suitable for the valuation and evaluation of actual politics,⁸¹ or as a mixture of all the above, a hotbed for imagined sociality, which has translated itself, over the past 200 years, into various forms of nationalism and other forms of collective identity. Such an approach to modern law and the code, it must be noted, is something entirely different from all sorts of *volksgeist* doctrines, as it does not look for ‘roots’ or beginnings of law, but for the conditions for its emergence with respect to different concepts of community. This makes the study of “invented

73 SMITH (1999) 48.

74 ASSMANN (2005) 142 s.

75 FOUCAULT (1969) 15.

76 FOUCAULT (2001) 498.

77 A view of the political developed namely by Jacques Rancière, cf., e. g., CELIKATES (2006)

78 PROST DE ROYER (1781) c.

79 VOLTAIRE (1771) 353: “Voulez-vous avoir de bonnes loix? brûlez les vôtres & faites-en de nouvelles.”

80 SCHMITT (1963). Cf. also RÖTTGERS (2010) 40 et passim.

81 BEDORF (2010) 16–19.

traditions,”⁸² “imagined communities”⁸³ and “myths and memories of the nation”⁸⁴ essential to our understanding of modern law.

IV. Coding the nation

So, what might a history of codification look like which focuses on the different roles codes play in the shaping of collective identity, nations and nationalism? In recent years, a number of studies have been conducted on this subject, with accounts of hybridity from colonial and post-colonial settings, but also from regions of the European periphery. Accounts of disputes over codification are especially interesting, because this is where differing “visions of community” are most fervently discussed. Often, the issues concern the codification or non-codification of certain parts of the law, with supporters of the code taking on the role of modernizers and its detractors promoting the status quo. Well-documented examples include Great Britain,⁸⁵ the USA,⁸⁶ and Germany,⁸⁷ less well-known hail from American Indian Nations,⁸⁸ Australia and Canada,⁸⁹ Cambodia and Indonesia,⁹⁰ Chile,⁹¹ China,⁹² Colombia,⁹³ Greece,⁹⁴ India,⁹⁵ Israel,⁹⁶ Japan,⁹⁷ Kenya,⁹⁸ Montenegro⁹⁹ or Turkey.¹⁰⁰ In continental Europe, following the French example, support for codification was often identified with fervent

82 Cf. HOBBSAWM (1992).

83 Cf. ANDERSON (2006).

84 Cf. SMITH (1999).

85 TEUBNER (1974); more recently FARMER (2000a); FARMER (2000b); WEISS (2000) 475–488.

86 COOK (1981); SUBRIN (1988); BÖRNER (2001); more recently MASFERRER (2008).

87 BERMAN (1994); BECCHI (1999); KROPPENBERG (2008).

88 COOTER/FIKENTSCHER (2008).

89 WRIGHT (2007); WRIGHT (2008).

90 DONOVAN (1997).

91 MIROW (2001).

92 LIANG (2002).

93 ROJAS (1950).

94 TSOUKALA (2010).

95 MENSKI (2008); HERRENSCHMIDT (2009).

96 KEDAR (2007a); KEDAR (2007b).

97 EPP (1967); most recently SOKOLOWSKI (2010).

98 SHADLE (1999).

99 PETIT (1998).

100 METIN/GELBAL (2008).

nationalism. Sometimes, however, nationalist movements grouped around the idea of non-codification, as was the case in Catalonia, where a nationalist elite of lawyers and public intellectuals made non-codification a symbol of national identity and thus, according to Siobhan Harty, ‘invented’ the Catalan nation.¹⁰¹ In other places, codification was seen not so much as a device for societal modernization by inclusion, but as a strategy for establishing self-rule and cultural hegemony. This was the case in Estonia, where the cultural reference to Roman law was used to fend off Russian domination.¹⁰²

Switzerland, a codificational late-comer, is a very interesting case.¹⁰³ Here, a proper national codification movement only started 20 years after the modern federal state was founded in 1848,¹⁰⁴ with the Code of Obligations entering into force in 1883,¹⁰⁵ the Civil Code in 1912,¹⁰⁶ the Criminal Code, very belatedly, in 1942¹⁰⁷ – and, finally, the codes of civil and criminal procedure on 1 January 2011.¹⁰⁸ Swiss codification history thus has the Weber script backwards, rejecting the chronological precedence of criminal and procedural law codes over those of civil law due to their supposed simplicity and basic necessity in organizing the power state.¹⁰⁹ Equally, the Swiss Civil Code contradicts the standard view, in that it is, especially in comparison to its rival, the German BGB, pitifully unscientific and irrational.¹¹⁰ As is well known, Franz Wieacker,¹¹¹ like many Swiss

101 HARTY (2002a). Cf. also HARTY (2002b); JACOBSON (2002a); JACOBSON (2002b); LEDFORD (2002); UMBACH (2005).

102 SIIMETS-GROSS (2011). Cf. also KULL (2000); LUTS-SOOTAK (2000); LUTS-SOOTAK (2006); LUTS-SOOTAK (2008); LUTS-SOOTAK (2010).

103 The following is adapted from Nikolaus Linder’s forthcoming book on ‘Kodifikation als nationale Selbstthematization. Strafrecht und Zivilrecht in der Schweiz um 1900.’

104 It is usually said to have started at the Swiss Bar Association’s annual meeting in 1868, cf. Kaiser (1868). Cf. also the allocution by Carl Sailer in the following year, SAILER (1869). A few years before Walther Munzinger had published his first drafts for a Swiss law of obligations, MUNZINGER (1865), cf. also FASEL (2003).

105 Bundesgesetz über das Obligationenrecht vom 14 Brachmonat 1881 [= AS 5 635].

106 Schweizerisches Zivilgesetzbuch vom 10 Dezember 1907 [= AS 24 233].

107 Schweizerisches Strafgesetzbuch vom 21 Dezember 1937 [= AS 54 757].

108 Schweizerische Zivilprozessordnung vom 19 Dezember 2008 [= AS 2010 1739]; Schweizerische Strafprozessordnung vom 5 Oktober 2007 [= AS 2010 1881].

109 WEBER (1978) 840.

110 Cf. the dismissive remark in WEBER (1978) 886 s.

111 WIEACKER (1953) 6 s.; WIEACKER (1954) 46 s.; WIEACKER (1995) 387–392.

scholars,¹¹² has explained these characteristics with Switzerland's supposedly age-old democratic institutions and the simple and folk-like mentality of the Swiss as "pious, noble farmers" (*frumme edle puren*), a national autostereotype dating back to early modern times.¹¹³

However, things were not as clear from the outset. When Federal Councillor Eduard Müller, in June 1885, suggested unifying criminal law to fend off "anarchist machinations in Switzerland"¹¹⁴ (*anarchistische umtriebe in der Schweiz*), it was generally agreed that this would be a relatively short and unproblematic venture. Omitting all historical trappings and relying on the theoretical groundwork laid by Franz von Liszt, the new code was supposed to be a means of protecting the institutions of the state and of curing the "community of the people"¹¹⁵ – the corresponding term in German was *volksgemeinschaft* – from the "social disease"¹¹⁶ of crime. A most visible part of this disease were "anarchist crimes",¹¹⁷ although, up to that date, no acts of violence had ever been committed by anarchists inside the Swiss borders. It was only much later, in September 1898, that the first (and only) such attack, the murder of Empress Elizabeth of Austria in Geneva, occurred.

Accordingly, Carl Stooss, a criminal law professor and high judge from Berne who was commissioned by the federal government to deliver a draught code, used the Federal Criminal Act (*Bundesstrafgesetz*) of 1853¹¹⁸ as a model. This law, he maintained, was perfectly well suited, as it had been conceived according to the established rules of scientific legislation, i.e., it contained a general part (*allgemeiner teil*), and comprised mainly criminal offences against the state.¹¹⁹ Thus, the draught code which was eventually published in 1893, although a complete, modern and scientific criminal code was perceived by many as overly top-down and intent on institutions of

112 Cf., e. g., EGGER (1908) 43–45; EGGER (1911) XIII; TUOR (1912) 12–14; EGGER (1913) 36 s.

113 OCHSENBEIN (1979), cf. also SUTER (1999) 495 et passim; SUTER (2001) 85 et passim; MARCHAL (2004) 268 et passim.

114 Cf. MÜLLER (1885).

115 WIDMER (1992) 81, 710–11 et passim.

116 STOOSS (1894a) 12 s.

117 Cf., e. g., STOOSS (1894b) 269–73.

118 Bundesgesetz über das Bundesstrafrecht der schweizerischen Eidgenossenschaft vom 4. Hornung 1853 [= AS III 404]

119 STOOSS (1888) 121 s. et passim.

the state. Previously, Stooss and his colleagues had designed a draught for a Federal Act regarding Crimes against Public Security in the Territory of Switzerland (*Bundesgesetz betreffend Verbrechen gegen die öffentliche Sicherheit im Gebiete der Eidgenossenschaft*) which was so extreme in its approach that it did not even make it beyond the administrative commission charged with its review. It only entered into force in a much attenuated form four years later, now labelled the Anarchist Act (*Anarchistengesetz*), and was promptly criticized for its ineffectiveness. Thus, the project of a criminal code became associated with unitarist power of the central government, modernist approaches to crime, and, above all, with regulating the arcane and sinister business of anarchism, which was generally treated as a synonym for leftist activities of foreigners on Swiss soil.

Shortly before Stooss received his mandate, Eugen Huber had been entrusted with a similar mission in the field of civil law: to compare all existing legal arrangements in Switzerland and, based thereon, to develop a draught code for the Confederation. Contrary to Stooss, Huber did not limit himself to a comparatist account, but in his seminal work on the topic, developed an integral history of Swiss private law, which harked back to the Early Middle Ages.¹²⁰ There, he maintained, in the laws of the Germanic tribes living in the territory of what was only later to become Switzerland, the country's history had really begun. The common ancestry, Huber believed, not only explained the overarching similarities in the laws of the Swiss cantons, but also created a primeval and indestructible bond of solidarity between the different parts of the country, which formerly had been inhabited by French-speaking Burgundians and German-speaking Alemanni.¹²¹ Switzerland, according to Huber, was thus much older than the ancient legend of the *Rütli* oath implied; moreover, it was not based on a legal transaction, but was, in fact, a community linked by blood ties, rooted in a distant past, removed from the political turmoil of later periods, and much less, the present day.

The community at the centre of Huber's vision of legal order was neither the state, and most definitely not the central state and its institutions, nor the bourgeois family. What he had in mind was a form of extended and modular family which transcended the two, the model for which he found

120 HUBER (1886) 35–37.

121 HUBER (1893) 18–39 et passim.

in the writings of the great Swiss novelist Jeremias Gotthelf.¹²² Set in the rural landscape of the Bernese Emmental, Gotthelf's novels – with titles like *Money and Soul* (*geld und geist*) or *Zeitgeist and Bernese Spirit* (*zeitgeist und bernergeist*) – depict a timeless world of becoming and passing away under the eyes of a benevolent and merciful God. Here, the conflicts and discontinuities of modernity are contrasted with natural solidarity in stable and seemingly everlasting communities. This concept of family and generic solidarity pervaded Huber's draught code, it was present in his law of persons, family law, law of succession and many other areas of law.

V. Trajectories of nationalism

The chronological precedence of the *Zivilgesetzbuch* over the Swiss penal code and the very special kind of codification dispute which preceded it has long been a conundrum in Swiss legal history. Stefan Holenstein, in his seminal work on Emil Zürcher, Carl Stooss' lifelong friend and collaborator, gave ten reasons as to why the seemingly trivial criminal law took so much longer to codify than the more complex and diverse civil law.¹²³ Among these reasons he listed strong federalist opposition to the unification, cultural markers such as the death penalty, which the reformers, against fierce opposition from the more conservative cantons, wished to abolish, personal, strategic and tactical shortcomings on the part of Carl Stooss in his contest against Eugen Huber as well as his excessive willingness to compromise, poor political leadership in favour of the criminal code and, finally, a strong resistance from the quarters of professional jurists, academic or otherwise. While these reasons appear, at least in part, worth considering, they mostly recur to either the personalities of the people involved – the 'strong' and 'resourceful' Huber versus the 'feeble' and 'clumsy' Stooss – or to institutional fortuities, namely weak political and scientific support. The cultural differences between the two projects appear more promising as a reason. Federalism, however, would seem to run against both projects, as both were planning to substitute the current law of the cantons by federal

122 HUBER (1962). On Huber's 'legal Gotthelfism' cf. LAUENER (2011) 38–41 et passim; on issues of Bernese collective identity with respect to Gotthelf cf. VON GREYERZ (1953) 212–20 et passim.

123 HOLENSTEIN (1996) 432–37.

code law. This leaves us with the question of the death penalty, whose planned abolition was indeed a major obstacle to the unification of criminal law in Switzerland.¹²⁴ But was this the real reason?

A culturalist approach, which regards the question of codification from the angle of its relationship with different notions and perceptions of community, arrives at a different answer. It would focus on the diverging approaches Stooss and Huber took with regard to Switzerland as a nation in the sense of a discursive product, or in the words of Ernest Renan, an “everyday plebiscite”¹²⁵ (*plébiscite de tous les jours*), an ever-changing, socially construed form.

The methodological impulse, here, comes from Oliver Zimmer, who, based on the work of Anthony Smith, identified an ethnic-symbolist trajectory of Swiss nationalism over the past 250 years.¹²⁶ According to Zimmer, Switzerland between 1880 and 1914, evolved into a “modern mass nation,”¹²⁷ a process which altered the prevailing form of the nation in fundamental ways. While in the final decades of the 18th century Swiss nationalism had been the notion of an enlightened elite and in the early years of the federal state had become the project of the ruling party of liberal-radicals with the nation as a unitary, politically integrated *demos* (women and Jews being consistently excluded), the ensuing years saw the rise of yet another breed of nationalism. During the 1880s and 1890s, Swiss nationalism acquired an unprecedented ethnic quality, which was accompanied by a strong interest in national history and culture, but also saw an increasing number of what one might call ‘border incidents.’¹²⁸ During those years, the number of expulsions of foreign ‘anarchists’ and other politically dubious persons rose to unprecedented heights, while the domestic left saw its loyalty towards the nation routinely and severely questioned.¹²⁹ The first constitutional initiative in 1893 – a means of direct democratic participation which had been introduced in 1891 – introduced a ban on kosher slaughter.¹³⁰

124 Cf. also CARONI (2008) 72.

125 RENAN (1882) 27.

126 ZIMMER (2003).

127 ZIMMER (2003) 163 et passim.

128 The concept of border drawing in Swiss nation building is discussed in ARGAST (2007) 79–102.

129 WIDMER (1992) 631.

130 KRAUTHAMMER (2000).

In the same year, a major eruption of xenophobic violence against construction workers from Italy occurred in Berne, followed by the so-called Italian riots (*Italienerkrawall*) three years later in Zurich, which lasted three days and cost a number of lives.¹³¹ When, under the impression of these events and even more disturbing news about anarchist attacks from France and Italy, the *Anarchistengesetz* was about to be enacted in 1894, the good citizens of the small village of Leimbach in the Canton Aargau, sent the following petition to the federal government:

“Mr. President of the Confederation! Esteemed Federal Councillors! The undersigned Swiss citizens are highly concerned and indignant about the fact that, as has occurred occasionally in recent times and does so even today, foreigners and suchlike people who have scarcely made themselves at home here are allowed to abuse Swiss soil for their wild agitation and goading of misguided people. We appreciate fully everything that you have done in order to purify the fatherland from unclean foreign elements. However, as the evil has put down even deeper roots, we beseech you to ensure that the competent authorities throughout Switzerland enforce with severity the laws against agitators and rabble-rousers, foreign and domestic, especially in cases of insurrection or incitement to commit crimes. Indeed, we wish and expect the supreme authorities of the Confederation, through the enactment of the proposed Anarchist Act, to enable forceful measures in the fight against the enemies of every order and every state.”¹³²

However, the Anarchist Act in fact achieved the exact opposite of what the citizens of Leimbach had asked their government to do. Instead of providing a means of making short shrift of all sorts of nasty foreigners, anarchists and other troublemakers, it actually gave them their day in court. In several landmark cases over the extradition of Italian anarchists in the 1890s, the Swiss Federal Tribunal consistently ruled that writing provocative articles, editing anarchist newspapers and speaking in favour of anarchism did not constitute extraditable crimes.¹³³ Defendants were regularly acquitted, a legal outcome which was not welcomed by criminal policy officials, prosecutors and much of the media. What took place, therefore, was a decisive change of mood with regard to the treatment of foreigners who were believed to be a public order threat. Instead of treating them according to criminal law,

131 SKINNER (2000). Cf. also FRITZSCHE (1981); LOOSER (1986); STAUFFER (1993)

132 “An den hohen Bundesrath der Schweiz. Eidgenossenschaft in Bern,” dated 11 April 1894. BAR [Swiss Federal Archive], E 21(-) -/ 1681.

133 SWISS FEDERAL TRIBUNAL (1891) [= BGE 17 I 450]; SWISS FEDERAL TRIBUNAL (1900) [= BGE 26 I 227]; SWISS FEDERAL TRIBUNAL (1901) [= BGE 27 I 72].

which would have required its reform and codification, police action followed by immediate deportation became the measure of choice.¹³⁴ After the fatal attack on Empress Elizabeth in 1898 and the international conference in Rome which was held in its wake,¹³⁵ this practice became the definitive standard procedure in such cases. By this time, the idea of a Swiss criminal code was already doomed. Its final demise was brought on by the advent of the German code, the *Bürgerliches Gesetzbuch*, a direct threat to the national legal order, as Eugen Huber and others¹³⁶ warned:

“Those who stubbornly adhere to nothing but ancient rules will become negligent and lazy. Other countries do not think this way; they constantly strive to improve their conditions. Beware of the day of reckoning! Even the loneliest mountain valleys will be penetrated by industry, railways, trade. If the Federal Government does not intervene, there will be nothing left for us, eventually, but to accept a new legal regime from abroad. Whoever wishes to preserve the character of his people, therefore, must vigorously stand up for the unification of Swiss law.”¹³⁷

As these short remarks illustrate, the two draught codes offered two completely different versions of the nation. While Carl Stooss’ project adopted the old top-down model of the nation as politically integrated *demos*, Eugen Huber offered a new way to integrate the mass nation as *ethnos*.¹³⁸ The deciding point, however, was that Huber’s model was based on the closed form of the extended family, while Stooss’ plan was based on the notion of the existential otherness of the anarchist, a figure treated by international and criminal lawyers alike as the proverbial *hostis communis*

134 GRUNER (1988) 258–263. Cf. also the list of expulsions compiled in LANGHARD (1903) 472–479.

135 On the Rome conference in 1898 and the increased international cooperation in its wake cf. HERREN (2000) 268–271.

136 Cf., e. g., also HILTY (1894) 485–486.

137 Quoted after WARTENWEILER (1932) 103 s.: “Wer sich nur an die althergebrachten Ordnungen hält, steht in Gefahr, der Bequemlichkeit und Faulheit zu verfallen. Andere Länder aber denken nicht so; sie arbeiten unablässig an der Besserung ihrer Verhältnisse. Kommt einmal der Tag der Abrechnung, dann wehe uns! Auch in die einsamsten Gebirgstäler dringen Industrie, Schienenwege, Handel. Greift der Bund nicht ein, dann werden wir schließlich die neue Rechtsordnung vom Ausland annehmen müssen. Darum hat gerade der kräftig für das einheitliche Schweizerrecht einzustehen, welcher die Eigenart seines Volkes bewahren will.”

138 The concepts of *ethnos* and *demos* were first introduced by Emerich Francis, cf. FRANCIS (1965). Cf. further LEPSIUS (2009b), LEPSIUS (2009c), and RICHTER (1996) 56 s. With regard to Switzerland cf. ERNST (1994), and ARGAST (2007) 82 et passim.

omnium or *hostis generis humani* of antiquity.¹³⁹ As such, the anarchist was not a figure of simple alterity, but an ‘abject,’ to use Julia Kristeva’s term, the thought of which was so dreadful and abhorrent that it could under no circumstances be considered as an identity-establishing device.¹⁴⁰ The choice, which was eventually made in the years after 1898, to proceed with the codification of civil law at the expense of criminal law, was thus not simply one of legal areas, but of what the Swiss as a nation wanted to become: a relatively open community with the ability to face and to absorb, through legislation, even alien and foreign elements; or a closely integrated, outwardly closed solidary group which dealt with strangers not in terms of law, but with the policies and procedures of an “immigration police state,”¹⁴¹ as the historian Erich Gruner has drastically called it. By deciding in favour of Eugen Huber’s project, Switzerland chose the latter option, thereby turning towards a trajectory of nationalism, which, through two world wars, and more recently the ascent of the largest European right-wing party in proportion to its population, has become ever fiercer and more exclusionist.

VI. Cultural legal history

This short outline had two objectives: to promote a ‘culturalist’ approach to modern legal and codification history in order to overcome the limitations of the current paradigm, and to give an impression of how such a concept could be set to work. It draws heavily on a number of studies which have appeared in recent years, which often place codification in a decidedly non-European and non-*rechtswissenschaft* context.¹⁴²

At the end of this lecture, we would like to present a number of theses which form a tentative framework for the study of modern legal history and, especially, of codification history, from a global perspective. They are intended, to quote Paul W. Kahn, to move scholarship “toward thick description of the world of meaning that is the rule of law.”¹⁴³

139 Cf., e. g., GENTILI (1877) 22: “Piratis, et praedonibus nulla manent iura: qui omnia iura violant.” After 1880, this concept was applied to ‘anarchists,’ the generic ‘enemies of the state’ of the period.

140 KRISTEVA (1982) 7 s. et passim. Cf. also DOUGLAS (1986) 55–57.

141 GRUNER (1988) 215.

142 Cf. *supra*, footnotes 84 to 101.

143 KAHN (1999) 91.

1. Modern Law is autonomous and indeterminate. It does not serve specific ends like the efficient or just distribution of resources or the allocation of political power.

2. It is not in itself a product of rational design; in Paul W. Kahn's words, it

“was not constructed according to a systematic plan and it exhibits no single, rational order. That reason operates within the legal order – as it surely does – should not be taken to mean that the set of meanings expressed in law's rule is itself a product of systematic rationality.”¹⁴⁴

Codification, therefore, can be explained with sufficiency, but not with necessity as a result of economic or political influences or as a work of jurisprudential genius.¹⁴⁵ The fact that codification is said to make law stable, rational and calculable, and is commonly treated as a means to do so, is something different from it actually achieving this.

3. Modern law is a way of imagining the political. For this reason, codes should not be seen as imperfect attempts at achieving self-referential closure, much less as “the product of someone's or some community's effort to be something, which has been only partially achieved,”¹⁴⁶ but as coherent imaginations of societal order, or, to quote Clifford Geertz again, “visions of community.”¹⁴⁷

4. The study of modern law and codification, therefore, should not proceed from assumptions of methodological individualism, but from the community “in its appearance as a single, historical subject,”¹⁴⁸ as Paul W. Kahn maintains:

“We do not first experience a unitary, historical actor that is the nation and then observe law as one of its qualities. From an internal perspective – i.e., from the perspective of the citizen – the historical unity of this community is, in large part, the rule of law as practice and belief. Of course, we also look to a shared history of political events that contribute to our sense of community identity.”¹⁴⁹

In this sense, the code may be regarded as *the nation of the law*.

5. This makes it equally clear that the history of modern law cannot be understood as a process of uniform modernity, much less as an idea of

144 KAHN (1999) 98.

145 Cf. CARONI (2002) 20; CARONI (2008) 73 s., and STOLLEIS (2007).

146 KAHN (1999) 92.

147 Cf. *supra* n. 52.

148 KAHN (1999) 112.

149 KAHN (1999) 113.

enlightened progress. It should be treated as a highly complex and pluriform history of invented traditions and imagined communities: “The law is not merely ongoing; it has a history. It tells a story.”¹⁵⁰

6. Institutions constitute but “the wax in which law’s rule acknowledges, coopts, and suppresses [...] alternative forms of apprehending the meaning of self, community, and history.”¹⁵¹ In the political and historical imaginations lies the key to the understanding of codification as a form of legal modernity. “A cultural study of law,” therefore

“cannot narrowly limit itself to ‘legal’ phenomena. There is no such subset of experience. If we want to study what it means to live under the rule of law, then we must be prepared to examine the entire reach of our experience in the modern state.”¹⁵²

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150 BERMAN (1985) 9.

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Towards New Conceptual Approaches in Legal History: Rethinking “Hindu Law” through Weber’s Sociology of Religion

Introduction: Law, History, Culture and the Problem of Comparison

There appears to be a need to develop new approaches to the history of law in a comparative and global context. Such a need arises from dissatisfaction with current approaches that do not allow for conceptual clarity in cross cultural and global contexts. Some of these problems have been pointed out by Robert Gordon (1984) who observes that there are certain fixed notions around which the writing of the history of law revolves around. This involves a singular conception of the relationship of law to historical change based on the idea that the natural and proper evolution of a progressive society is towards the type of liberal capitalism seen in the Western world and that it is law’s function to aid such evolution.¹

Gordon is particularly critical of what he calls legal functionalism. He remarks that this functionalism operates in an evolutionary context. He characterises five kinds of propositions that make up this functionalism. The first is the view that law and society are separated from each other. This leads to questions about the relationship of law to society and the autonomy of law. The second is that all societies have universal needs which involve developing along the appropriate social path. The third is that there is a predetermined evolutionary path and the fourth is that legal systems should be described and explained in terms of functional responsiveness to social needs. The fifth, which draws from the others, is that the legal system adapts to changing social needs. He also speaks of variations to this dominant tradition of studying legal history which, among others, involves the use of

1 GORDON (1984) 59.

social theory such as Marxism which relates the fulfilment of social needs to forms of domination. He adds that even if functionalism is rejected as an approach, some of the other modes of study that are adopted, such as disengagement or the reiteration of the autonomy of law or understanding law as legitimating ideology, also prove to be unsatisfactory. Gordon's aim in critiquing functionalism and the dominant tradition is an attempt to show the usefulness of critical historiography (inspired by the field of critical legal studies) in providing a new basis for the study of legal history. Critical historiography seeks to move beyond the evolutionary functionalist approach which sees uniformity in social processes, such processes being labelled as "modernisation".² In making the set of critiques that he sees as partial, Gordon seeks to outline the mode and manner through which legal history could be studied. A possible way is to understand how law is constitutive of social relations and the multiple trajectories of development that can be used to explain social events.

Gordon's attempt to provide a new way of studying the history of law needs to be read with a similar appraisal of comparative law and its methodology by Guenter Frankenberg (1985). Frankenberg argues³ that comparative law's faith in objectivity allows culturally biased perspectives to be represented as neutral and that this is inconsistent with its goals. There is a lack of discussion on theory and method in comparative legal scholarship. He also identifies functionalism as being one of the problems that hinder the study of legal cultures. The comparative functionalists have a prior understanding of the nature of a legal system which lets them identify similar problems in a manner that can produce similar results. Frankenberg further suggests⁴ that this form of functionalism also entertains a vision of social development which is evolutionary in nature, i.e. that law adapts to social needs and develops through interaction with its environment. Such a perspective marginalises legal ideas in the realm of consciousness paying attention only to the formal aspects of the law, such as the decisions and actions of courts and legislatures. Neutrality becomes a stance to use terminology that will identify universal problems. Frankenberg concludes that one can re-imagine comparative legal studies by re-examining the

2 GORDON (1984) 71.

3 FRANKENBERG (1985) 411.

4 FRANKENBERG (1985) 438–439.

relationships that arise from the use of legal concepts and categories (an illustration of the same would be terms within property law such as “tenant” or “lease” and the social phenomena that one identifies with these terms).

What are the possibilities for such re-imagination? In order to do so one needs to analyse the current conceptual frameworks that are prevalent in comparative law, such as legal transplants, transfers, borrowings and diffusion. As David Nelken (2001) argues, these metaphors also use a functionalist model which sees law as part of an interdependent whole and the language of legal adaptation merely indicates functionalist survival. Nelken further argues that there needs to be more research done on societies which are the objects of legal transfer as part of the new agenda on comparative legal studies.

In order to begin this new agenda one needs to examine the current debates on forms of legal transfer. Alan Watson’s work on legal transplants has been significant in the theorisation on legal transfers and has faced criticism of two kinds. The first criticism is that legal transplants are “impossible” and that legal rules cannot travel as they are cultural forms and they are inscribed in words which convey a variety of meanings across different cultures (Legrand 2001). The second criticism, which comes from Roger Cotterrell (2001), is far more damaging as it focuses on Watson’s argument that law does not necessarily reflect a society’s needs and concerns and that there is no connection between law and society.

Legrand’s criticism is problematic for its suggestion that legal transplants are non-determinant in nature, i.e. that the legal institution or system of law has no influence in the culture that hosts it. He does not go into this question although in his later work (Legrand 2003) he has sought to clarify the position by reiterating the features of such incommensurability by showing how the identification of similarities is essential to doing comparative law. However, the comparativist can never understand the native’s legal experience in the manner that the native himself can. Even if there is semantic commonality, cultures can be incommensurable.⁵

Cotterrell’s criticism focuses on Watson and Ewald’s interrogation of the relationship between comparative law and legal sociology stating that their position of there being no mirror theories of law and society (law is not a mirror of social, political and economic forces) does not take into account

5 LEGRAND (2003) 254.

the complexity of Western social theories (such as Marx, Weber etc.) about law. Cotterrell comments that Watson's claims emphasise that laws frame social institutions. This ignores the fact that these institutions (particularly forms of property holding) have limited value by themselves and can only be understood by an empirical inquiry into patterns of social organisation. This also shows a particular ambiguity in Watson's theses, his insistence that law is part of culture and his emphasis on positive rules.

Cotterrell maintains that:

A legal transplant will not be considered significant (or perhaps as occurring at all) unless law can be shown to have effects on relevant aspects of social life in the recipient society. The success of the transplant will be judged by whether or not it has the effects intended, which were the reason for it. Similarly, where law is seen as an expression or aspect of culture in the sense of shared traditions, values or beliefs (either of lawyers, of society generally or of some part of it), a legal transplant will be considered successful only if it proves consistent with these matters of culture in the recipient environment or reshapes them in conformity with the cultural pre-suppositions of the transplanted law.⁶

In order to understand legal borrowing Cotterrell argues that legal traditions need to be understood in the context of the specific legal communities whose conditions of existence should be studied. Cotterrell proposes that the legal borrowings be studied in the context of four types of community which are instrumental community, traditional community, community of belief, and affective community. The focus on instrumental community explains the effects of certain borrowings, such as the adaptation of continental principles of good faith in contract to a British context, through the comparison of the different structures of economic organisations in the German and British contexts.⁷

It is noteworthy that Cotterrell and other critics of Alan Watson do not take into account that Watson's theses mainly applied to European societies. Watson himself makes a qualification in his discussion on codification stating that his classification of codes in the context of the gap between law and society does not apply to codes in conquered territories such as India.⁸ Therefore, the key question that emerges in the re-imagination of

6 COTTERRELL (2001) 79.

7 TEUBNER (1998) however suggests that this is a legal irritant rather than a legal transplant because of the transformations and events that it triggers.

8 WATSON (2001) 136.

comparative legal studies and the writing of the history of law is the question of law in non-Western cultures. This becomes more significant in light of Watson's statement that a legal rule can only be known through its history. How does one write a history of non-Western law and what are the concepts that one uses to do so? How does one escape the functionalism that appears to be inherent in comparative legal studies in the West and how does one formulate an agenda for comparison?

In this context, Cotterrell's remarks on the conditions of legal transplantation in the host culture become relevant. In his formulation on the nature of community he mentions that when laws are transplanted, "the transplant is likely to be linked in the perceptions of the transplanters with patterns of social relations they associate with the law".⁹ This raises the question of what can constitute a community and its social relations and how the viewpoint of the transplanting culture may differ from that of the host culture. This leads to a broader query. What is the mode of inquiry into non-Western law and how does one analyse it conceptually? Such a mode of inquiry has to necessarily engage with "conceptual histories."¹⁰ One needs to understand the concepts behind the writing of such a history and whether such concepts can be articulated in non-Western cultures. This goes beyond legal transplantation as it analyses the concepts inherent within a culture and does not restrict itself to law.

Edward Said's landmark work *Orientalism* points out that there is a particular way of speaking about the East that is characteristic of Western discourse. This way of speaking embodies a conceptual framework that is applied to understand non-Western cultures. Such a conceptual framework finds itself in colonialism and the systems and categories that it uses. Said describes it as a kind of intellectual power; a library or archive of information which was bound by a family of ideas and a set of values which explained it as a phenomenon.¹¹ Thus, the history of law in India has to be understood in the context of the legal system that colonialism created and the concepts and categories that were used in creating it. Therefore, concepts such as "religion," society and "community" have to be interrogated in order to understand how they operate in a milieu that is different from the West.

9 COTTERRELL (2001) 83.

10 I borrow this term from KOSELLECK (2002).

11 SAID (2001) 41–42.

In order to undertake this enquiry one needs to undertake an archaeology of colonial discourse. As Foucault (1972) suggests archaeology cannot be based on causality. Discourse about any particular object cannot be based on the existence of the object but the interplay of rules that make the appearance of the object possible. One requires an understanding of the conditions that allow for the emergence of these objects, concepts and thematic choices and the rules of formation that dictate their coexistence, maintenance, modification and disappearance.

This paper seeks to make an enquiry into how the history of law in India can be studied through the illustration of the British colonial encounter with “Hindu law” due to the importance that this category itself has received from legal historians. Its objective is to outline the theoretical framework by which such a study takes place, and the categories that are relevant for its analysis. It begins by looking at the framework through which legal histories of India have been undertaken. Such a framework has been understood as a movement of custom to codification or the secularisation of religious law, legal historians stressing the arrival of modernity through colonialism. In this context the paper shows how such a framework can be formulated only within the background of Western social theory using the specific instance of Hindu Law. It uses Max Weber’s sociology of religion in order to understand this framework and shows how there are inconsistencies in his account. It shows how the assumptions in his account have been shared by others, such as the British colonial administrators. It then tries to look at the logic behind these inconsistencies which are related to the European experience of “religion” in India. These inconsistencies have a certain pattern and can be used to frame certain questions for the study of Hindu law as a historical category. This necessarily involves a comparative perspective as Western theories and concepts must be interrogated for their influence on the making of Indian legal systems. In doing so, it sets an agenda for the study of Hindu law and provides for a new approach by which legal history can borrow from comparative law and not by merely understanding borrowings as legal transplantation.

Understanding the Framework Behind Legal Histories of India: The Secularisation of Religious Law Through the Movement From Custom to Codification

Legal histories of India often focus on the colonial legal system and its metamorphosis into the modern Indian legal system. Such a process is often understood as a movement from customary law to codification inherently suggesting that British colonialism brought about a process of secularisation. A standard textbook story of Indian legal history (Jain 2009) begins with the East India Company being granted a zamindari (a form of land ownership) by the Mughal emperor which involved dispute settlement as a responsibility. These responsibilities involved the setting up of judicial institutions and various courts such as Mayor's Court, the Court of Appeals, the Court of Request and the Court of Quarter Sessions.

A prominent feature of the judicial proceedings (Bhattacharyya-Panda 2008) was their reliance on arbitrators who possessed knowledge of local norms and practices. These were the pundits who were considered the expounders of the Hindu scriptures and the maulvis who were the experts on Islamic religious texts. The British had to rely on these arbitrators as they did not have any knowledge of indigenous law. In order to lessen their reliance on their arbitrators the British administrators embarked on a project of identifying "Hindu law" in certain religious texts known as the Dharma-sastras.¹²

This perception of the law of the Hindus compelled Warren Hastings, the Governor General of that period to appoint a team of eleven pundits to compile a code on Hindu law in 1772. The Dharmasastras were characterised by the British into two kinds of literature. The original Dharmasastras, which were believed to have their origin in the Vedas, were the *Manu smriti*, the *Yagnavalkya smriti*, the *Narada smriti*, the *Visnu smriti* and others. This tradition was developed and maintained through centuries by Tikas and Nibandhas. The Tikas provided explanations of the Smritis whereas the Nibandhas were discourses that were assembled by classifying a large number of texts and extracting the rules of dharma from authoritative texts.

12 An account of the difficulties of the colonial administrators in identifying the laws of the Hindus is provided by BHATTACHARYYA-PANDA (2008).

Thus, *Vivadarnavasetu*, also known as “A bridge on the ocean of disputes,” was compiled in Sanskrit on the basis of selected legal materials from these texts. It was then translated into Persian and then into English under the title of *A Code of Gentoo Laws* by Nathaniel Halhed.

One of the key figures in this enterprise of understanding Hindu law was William Jones, the famous Orientalist who was a judge in the Calcutta High Court. The result of his collaborations with various Hindu pundits yielded another treatise, *Vivada-bhangarnava* or “Ocean of resolutions of disputes,” by Jagannatha Tarkapancana, which was translated by Jones’s successor H.T. Colebrooke. Many other commentaries on Hindu law, including those by British authors such as Francis MacNaughten and Thomas Strange followed. Two main schools of law were identified: the Mitakshara and the Dayabhaga. By the 1860s the British had developed a body of Hindu law and had done away with the practice of having pundits or maulvis interpret this law. Certain spheres of life were also deemed to be outside the realm of religion which led to civil and criminal legislation such as the Indian Penal Code 1869, and the Transfer of Property Act 1882, being enacted.

This narrative of colonial legal history forms the basis for the historical analysis of how various social phenomena has been understood in legal terms. An illustration of the same is Radhika Singha’s account of the legal discourse around sati that finally led to its abolition. Singha makes the claim that the abolition of sati had to do with placing public authority at a transcendental level so that “public parley between the juridical claims of the state and those made on the citation of religious belief was to be curbed”.¹³ She comments that the government was compelled to abolish sati as it was not an imperative religious duty due to them finding it impossible to prevent its abuses. Its abolition allowed for secular legal categories, such as homicide, to become applicable. However, the application of these secular legal categories did not show the commitment to universalism and the rule of law which should have come with legal codification. This was noticeable in the category of “voluntary homicide with consent” which was included in the Indian Penal Code and was meant to cover “voluntary religious suicide.” Singha seems to suggest that a certain secularisation of religious norms took place through codification which attempted to subsume religion.

13 SINGHA (1998) 115.

In different ways other scholars of legal history, such as Elizabeth Kolsky (2010) and Mithi Mukherjee (2010), also stress the incompleteness of codification.¹⁴ Kolsky provides us an account of how codification did not bring about the equality promised by the rule of law but instead institutionalised race-based privileges for Europeans. Colonial law thus served to entrench racial and cultural difference providing the colonial state with mechanisms of regulation and control.¹⁵

Mukherjee (2010) highlights the contradictions in this process by showing how justice as equity in the figure of the monarch became the key idea in colonial governance. She argues that this category of justice was the foundational basis of the Indian Constitution unlike constitutions in the West which were based on freedom and individual rights. She then shows how the political philosophies of both Locke and Rousseau (the former being grounded in the idea of the general will and the latter in the primacy of the individual and private property) did not find place in the making of the Indian Constitution. She also shows how certain discourses, such as Gandhi's idea of transcendental freedom, were marginalised in this process.

The main question that emerges from these studies is the subsuming of religion as a category. There has been acceptance of the fact that sacred texts constitute the source of law without understanding the rationale that as religious texts they reflected the practices of the people. Whereas scholars such as Mukherjee have highlighted how certain Indic categories have been marginalised, the trend has been to understand how modernity as a discourse has overrode traditional social forms. This implicitly accepts the religious and the secular as categories. In emphasising on the powers appropriated by the colonial state (Singha 1998) and its forms of governance one is compelled to accept the narrative on secularisation and that colonial law brought about secular processes and secular ways of thinking. Another

14 There are also others who emphasise the integrity of the process, such as Eric STOKES (1989) who shows that codification had utilitarian influences. Such an argument, however, does not deal with the cultural consequences of such codification. Stokes instead chooses to emphasise the importance of a moral theory.

15 SINGHA (1998), in her analysis of colonial penal law, elaborates on this process by arguing that this reflected certain moral dilemmas of the colonisers in categorising Indian society (such as reconceptualising family relationships in the context of norms about the stability of the household). It also helped assert the state's position as the only source of legitimate violence.

aspect of this narrative is that certain religious laws governing family and community relationships survived in this process of codification and remain to be “secularised”.¹⁶

There have been some studies regarding the claims of various religious communities in the context of the categories brought about by colonialism. Shodhan (2002) makes an important analysis of how the Khoja community was forced to represent its beliefs as Islamic through colonial legal processes. Sarkar (1993) and Mani (1998) show how community mobilisation took place around social practices such as child marriage and sati (bride burning). However, there is no interrogation by them as to how such practices could be perceived by the colonisers as religious. This is despite a large body of work of challenging religion as a cultural universal in religious studies and that the concept of religion is analytically redundant due to its Christian theological basis (Balagangadhara 1994; Asad 1993; Fitzgerald 2000). In this context I look at Max Weber’s theory on the sociology of religion to understand the framework by which practices are seen as religious.

Hinduism as “Religion”: A Critical Examination of Weber’s Sociology of Religion

Max Weber’s contribution to the sociology of religion has been highly influential in contemporary debates on religion and secularization. His characterisation of secular rationalisation as the “disenchantment of the world” is a prominent theme in current scholarship.¹⁷ Weber identifies social modernisation as a manifestation of such rationalisation, law being the means of organising the capitalist economy and the modern state, these elements being constitutive of the rationalisation of society. Rationalisation is also used to designate the autonomy of law and morality. Weber explains rationalisation¹⁸ as the institutionalisation of purposive-rational action, seeing it as a process and not as an end. Rationalisation begins with the overcoming of magical beliefs and the setting in of disenchantment. Such

16 This concern is reflected in contemporary constitutional law wherein the Directive Principles in the Constitution of India mandate the enactment of a uniform civil code doing away with personal laws for different religious communities.

17 This is particularly reflected in the work of Charles TAYLOR (2007).

18 Weber identifies different kinds of rationalization but relates all of them to the emergence of capitalism.

rationalisation is achieved to the extent that belief in such magical thinking is overcome. Such a process arises from the Judeo-Christian world where the pagan enchanted world had to be overcome and faith had to be reposed in God as the maker and sustainer of the world. Such a process of disenchantment freed modern structures of consciousness, reason no longer being universal but split into a number of value spheres. Therefore, rationality was something left to the individual to pursue and not to existing social orders.

In his work on the emergence of capitalism, Weber (1930) argues that the nature of the rationality that allows modern capitalism to emerge is peculiar to the Occident and is absent in other cultures such as India and China. Whereas the impulse to acquire and gain wealth has been common to all cultures, modern capitalism is dependent on the forms of rationality that have arisen in the West. This includes legal rationality, as capitalism required rational legal structures in the form of calculable legal systems which allowed certainty of calculation. This meant that legal systems had to possess a level of systemisation and coherence which was absent in law in other cultures, law in India being an example of such a lack of consistency.

Weber's conclusions about law in India are related to his understanding of the sociology of religion. He comments that Indian law had developed forms which could have served capitalistic purposes but modern capitalism did not develop till English rule and that it was adopted without any indigenous beginnings.¹⁹ According to Weber, the social structure of the Hindu religion must be analyzed to provide an answer. In this context he focuses on the caste system and the roles of various social groups. The basis for his argument lies in his identification of the sacred texts of the Hindus as the Vedas. The acknowledgement of the Hindu tradition resting upon the interpretation of the Vedas meant acceptance of the paramount position of the Brahmins. Caste, "that is the ritual rights and duties that it gives and imposes, and the position of the Brahmins, is the fundamental institution of Hinduism."²⁰

In describing the Indian social order Weber provides a lengthy account of the position of the four castes which are the Brahman, the Kshatriya, the Vaishya and the Shudra. He stresses that these groups engaged in certain prescribed, exclusive activities which implemented their styles of life as status

19 WEBER (1958) 4.

20 WEBER (1958) 29.

groups.²¹ For the Brahmins it was the study of the Vedas and asceticism, the Kshatriyas had the task of political rule, the Vaishyas were agriculturalists and traders and the Shudras performed menial services. However, what was essential to the maintenance of social position was the central position of the Brahmins. Social rank was determined in reference to Brahmins. The principle of status and commensality in the context of social interaction was extremely complicated, spanning a range of social relations which involved dining with other communities, acceptance of food from other communities (including the food preparation by other communities). Restrictions were also based on ritually forbidden sexual intercourse between different caste groups. In respect to all these matters the Brahmins were “always at the top in such connections”.²²

Weber specifies a number of criteria to determine social rank, such as avoidance of eating meat (particularly beef) and individual traits regarding the selling of products. Such complexity of rank led him to the conclusion that the expression “church” was inapplicable. With respect to the intricacy of rank, the Brahmins were the final authorities. For him “Brahmanical and caste power resulted from the inviolability of all sacred law which was believed to ward off evil enchantment.”²³

Weber’s perception that magical elements appeared in the law contributed to his impression that Indian law was underdeveloped.²⁴ He emphasises the connection between law and the social structure of Indian society, i.e. the caste system. He comments that the features of the caste system are elaborately described in the law books, the law itself prescribing the lifestyles of different social groups. The law holds that those who did not wear the holy belt (a reference to the sacred thread of the Brahmins) were degraded unless they acquired the same. They also recognised typical patterns of conduct for different age groups which only held true for the Brahmins.²⁵

The position of the Brahmins was a specialised development from the guild of magicians into a hereditary caste with status claims.²⁶ This ascend-

21 WEBER (1958) 56.

22 WEBER (1958) 43.

23 WEBER (1958) 48.

24 Weber comments that the legal literature of the Middle Ages in India is impoverished and formalistic, the law of evidence being magical and irrational (1958, 52).

25 WEBER (1958) 58.

26 WEBER (1958) 58.

ency to power by the Brahmins was connected to magic overriding all other spheres and due to the giving of gifts for ritual services. This led to “evil enchantment” as the Brahmins would avenge the denial of gifts through intentional ritualistic errors or curses. This ascendancy was consolidated by principles, for example a judge must never adjudicate in favour of a non-Brahman against a Brahman; the respect due to a Brahmin being higher than that of a king.²⁷ In contrast, the law books enjoin the Shudra to dutiful service and only if he could not find such service, did he have to take up an occupation or trade.²⁸

Weber’s analysis of the caste system leads him to conclude that caste had negative effects on the economy. Such an order, according to him, was essentially anti-rational. Although it may be assumed that ritualism by caste may have made the large scale development of enterprises impossible, the real reason for the lack of development of capitalism in the Western sense was:

A ritual law in which every change of occupation, every change in work technique, may result in ritual degradation is certainly not capable of giving birth to economic and technical revolutions from within itself, or even of facilitating the first germination of capitalism in its midst.²⁹

According to Weber, Hinduism is characterised by a fear of innovation. Due to the emphasis on following custom there is no scope to introduce new practices. The emphasis placed on caste loyalty meant an adherence to traditional roles and the duties that befit one’s caste rank. This stifled individual ability to aspire to any advances or novelties in one’s life. The caste system “is a product of consistent Brahmanical thought”.³⁰ “Ancient Indian conditions”³¹ ensured that tribes and foreigners were absorbed into this system, occupational specialisation becoming hereditary status. There was no system of accepting individuals into trades, a sense of market participation or an idea of citizenship. Such phenomena had failed to develop and if they did, they were crushed by caste prohibitions.³²

Further, Weber comments that there was no universally valid ethic but only ethics that rested on status of a private and social kind, except for a few

27 WEBER (1958) 60.

28 WEBER (1958) 94.

29 WEBER (1958) 112.

30 WEBER (1958) 130.

31 WEBER (1958) 130.

32 WEBER (1958) 131.

absolute prohibitions universally prohibited such as the killing of cows. It was the doctrine of karma or rebirth that determined one's status based on past births which explained the caste organisation and the order of divine, human and animal beings.³³ Therefore, it provided for the co-existence of different ethical codes for different social groups which could be in conflict. Thus, "there could be a vocational dharma for prostitutes, robbers and thieves as well as for Brahmans and kings." A conception of original sin could not therefore exist in this social order as there could only be a ritual offense against the particular dharma of a caste.

Weber then draws further conclusions about the absence of Western political concepts in India. The organisation of society in India did not display any "natural order of man" and there was no "natural law," only some form of positive law which was status compartmentalised. This did not allow for any form of "natural equality".³⁴ The consequences of such a social order were that there was no scope for social criticism and rationalistic thought which could lead to the idea of human rights. Since karma or the doctrine of rebirth conditioned all lives there could be no common rights or common duties, only status-conditioned dharma was recognised. The concepts of "state," "citizen" or "subject" did not appear. In further examining Indian ethics Weber comments that concepts in Christianity, such as sin and conscience, do not find place in Indian ethics. The devaluation of life was based not on evil but the transitory nature of the world.

Weber's theory of the Hindu religion with a rigid hierarchy of the four castes and a Brahmin priesthood which controls this hierarchy shows inconsistencies at certain places. He admits that the grouping of castes into Brahman, Kshatriya, Vaishya and Shudra are not equally true throughout India. In analysing data from the 1901 Census of India,³⁵ Weber notes that there are several gradations in caste³⁶ and shows that such a structure and hierarchy cannot be maintained. The confusing nature of the structure is reflected in his characterisation of how such a hierarchy could be maintained. In identifying upper castes the criteria was based on various practices,

33 WEBER (1958) 144.

34 WEBER (1958) 144.

35 There is no detailed analysis of the problems that the Census posed by Weber, particularly in the context of the gradations of caste. For contemporary scholarship on this issue, see DIRKS (2001).

36 WEBER (1958) 45.

such as widow celibacy, child marriage, ancestral sacrifice and social interaction with other castes. However, in the case of lower castes the differentiation was based on whether Brahmans could serve them or castes other than Brahmans were still willing to do so.³⁷ However, castes of a lower rank raised higher demands than castes of a higher standing, which showed that the standing of the caste was not an indication of the extent to which it could follow socially restrictive practices. Further one could not establish a list of castes according to rank. This was due to differences in rank, from place to place, castes being universally diffused and some castes being locally represented. Therefore, the problem that arose for the census workers was as to which unit could be considered a caste as it was rarely the case that one found complete commensalism – only the sub-castes were predominantly endogamous and had a unified regime of regulation.

This data leads Weber to remark that the rank order of castes was contested and subject to change and that castes of questionable rank tried to stabilise their position by making false claims of superior rank. Although he mentions that the question of rank was only arbitrated by Brahmans, he acknowledges that kings, although advised by Brahmans had tremendous power to make decisions regarding the ordering of caste ranks. Such decisions could include personally expelling entire castes and individuals, including Brahmans. Weber also mentions that there was a particular period in Indian history where the Shudras could obtain political power.³⁸

Such a finding, however, seems contrary to the assertion that the hierarchy was determined and enforced by Brahmans, questions of social hierarchy and authority being much more complex. For instance he also mentions that the authority of Brahmans could vary considerably

... from unconditional submission to the contesting of his authority. Some castes do contest the authority of the Brahman, but in practice, this means merely that the Brahman is disdainfully rejected as a priest, that his judgement in controversial questions of ritual is not recognised as authoritative, and that his advice is never sought.³⁹

37 This shows that there is a preconceived framework by which one approaches the caste system which perceives various practices by Brahmins as being related to the hierarchy of caste itself, particularly social interaction between caste groups.

38 WEBER (1958) 88.

39 WEBER (1958) 29.

The complex structure of the social system was reflected in social events such as members of a group called the Sutars in Bombay (who were village carpenters) developing priests of their own and discontinuing commensalism with the other members of the group.⁴⁰ The identification of caste with Hinduism was also not completely accurate as it was not necessary that every caste is necessarily a Hindu caste and that there are castes among the Muslims and the Buddhists and that the Indian Christians are also compelled to recognise caste.⁴¹ Although Weber makes these observations he fails to analyse it in the context of the conclusions that he has drawn about the caste system.

Another important discrepancy lies in Weber's identification and description of the sacred texts of the Hindus as the Vedas. He mentions that there is no trace in the Vedas of the structure and core of the fundamental ideas of Hinduism, such as the transmigration of souls and the doctrine of rebirth.⁴² Despite commenting that the Vedas are not the source of insight into the content of Hinduism or its early historical forms,⁴³ Weber still persists in identifying the sacred texts of the Hindus as being the Vedas.

It appears surprising that Weber retains the idea of a Hindu religion with a cohesive caste system, and a Brahman priesthood, despite evidence to the contrary. However, he is not alone in doing so, such a conception of India being unanimous across European society, including British colonial administrators in India in the eighteenth century. Weber's perception that the legal norms of different social groups were found in the sacred texts, and his assumption that religious texts were also sacred texts, was also shared by the British. As mentioned earlier, the British embarked on an entire project of codifying "the Hindu law" that they found in the sacred texts.

In Bengal, British officials such as Craffton, Holwell and Bolts identified the indigenous rules of governance to be in the dharma sastra, the holy texts which were monopolised by the Brahmins. Craffton (1770) clearly identifies the source and origin of these laws:

The Bramins say, that Brumma, their lawgiver, left them a book, called the Vidam, which contains all his doctrines and institutions. Some say the original language in

40 WEBER (1958) 97.

41 WEBER (1958) 29.

42 WEBER (1958) 28.

43 WEBER (1958) 28.

which it was wrote in is lost, and that at present they only possess a comment thereon, called the Shastah which is wrote in the Sanscrit language, now a dead language, and known only to the Bramins who study it.⁴⁴

Scrafton then remarks that the Brahmins have distorted the doctrines of the founder laid down in these sacred texts and exceeded the rest in their abuse of power. He makes the observation that these texts show no consistency and although the Hindus have acknowledged the Vedas:

... they have greatly varied in the corruptions of it: and hence different images are worshipped in different parts; and the first simple truth of an omnipotent Being is lost in the absurd worship of a multitude of images, which, at first were only symbols to represent his various attributes.⁴⁵

This narrative of sacred legal texts was carried forward by Holwell (1765) who confirms that:

... it appears therefore that they date the birth of the tenets and doctrines of the Shastah, from the expulsion of the angelic beings from the heavenly regions; that those tenets were reduced into a written body of laws, four thousand eight hundred and sixty six years ago, and then by God's permission were promulgated and preached to the inhabitants of Indostan.⁴⁶

Holwell also confirms that there has been some corruption in the text, different versions being in circulation. Like his contemporaries he has no doubt that the Brahmins are responsible for leading Indian society into a state of degradation:⁴⁷

... the Goseyns⁴⁸ and the Bramins having tasted the sweets of priestly power by the first of these Bhades,⁴⁹ determined to enlarge, and establish it, by the promulgation of the last; for in this the exterior modes of worship were so multiplied, and such a numerous train of new divinities created, which the people never before had heard or dreamed of, and both the one and other were so enveloped by the Goseyns and Bramins in darkness ...⁵⁰

44 SCRAFTON (1770) 4.

45 SCRAFTON (1770) 5.

46 HOLWELL (1765) 22.

47 BOLTS (1772) also identifies the sacred texts of the Hindus to be the Vedas and also focuses on the role of the Brahmins as custodians of these texts. According to Bolts knowledge of these texts lay exclusively with the Brahmins due to their understanding of Sanskrit and were a closely guarded secret not to be revealed to any other caste.

48 A title given to a Brahmin priest.

49 Another word for the Shastra.

50 HOLWELL (1765) 16.

What could be the reason for this standard narrative across Europe despite the fact that there were factual inconsistencies that could have changed it? In order to understand this we need to use the frame of Orientalism which is the mode that the West uses to describe non-Western cultures. Such a framework yields the insight that the descriptions of a “Hindu religion,” “Vedas as sacred books” and the “Brahman priesthood” are related to the conceptual framework that the West uses to understand religion. The West’s idea of religion in India is related to what it perceives as religion within its own culture. Therefore, the conceptual framework that allows Europe to experience and perceive “religion” in India must be investigated. One also needs to investigate the inconsistencies in the discourse around “Hindu law.” A greater study of these inconsistencies allows us to pose certain questions on an alternative way of studying Hindu law outside the European conceptual framework.

Assessing the European Experience of Religion: An Agenda for the Study of Hindu Law

In an essay on the centrality of the Brahmin priesthood within European representations of India, Raf Gelders (2009) argues that colonial discourse uses Hinduism as a category of analysis to classify an assortment of traditions.⁵¹ The figure of the Brahman is central to the European perception of an ancient religion based on monotheism and the sacred scriptures being corrupted by forms of idolatry.⁵² Gelders suggests that this image of the Brahmin is due to two modes of representation that developed in Europe. The first image was a pre-Renaissance representation wherein the Brahmin traditions were seen as proto-Christian expression. The second image was that of the Brahmin as the cunning priest in Reformation literature.

Gelders demonstrates through an analysis of various ethnographic works how these two images were juxtaposed to produce the current description of Hinduism as a religion. In the medieval period the *Collatio Alexandri cum Dindimo*, a fictional exchange of letters between Alexander and Dindimus the leader of the Brahmin ascetics, became popular being quoted by the French historian and preacher Jacques de Vitry, the Archbishop of Canter-

51 A more elaborate explanation of Gelders’s argument is provided in his 2010 doctoral thesis.

52 GELDERS (2009) 564.

bury John of Salisbury, and other theologians. They were known as the “Brachmanes,” their religion being explained in terms of the vision of the Christian God. However, the stereotype of the Brahmin as “proto-Christian” was exemplified in the fictional travel report of the Middle Ages known as the *Voyages de Jehan de Mandeville Chevalier*, which became the most influential due to its wide distribution and translation. In this work the exemplary behaviour of the Brahmin was contrasted with prevalent shortcomings:

The Brahmins are not given to theft, murder, or adultery, and they live “as that they were religious men.” Because they are teeming with good qualities, they never suffer tempests, famines, or any other tribulations, “as we be, many times, amongst us, for our sins.”⁵³

What was the reason for this focus on the righteousness of the Brahmin? Gelders traces this to the transition in scholarship exemplified by Johannes Boemus who in 1520 published his work *Omnium Gentium Mores* (the customs of all nations) which outlined the benefits of learning the rites, mores and manners of all peoples in the world. The reason for this is that humankind has fallen astray from worshipping the Christian God having succumbed to the Devil which has made them worship idols and images instead of God. In his ethnographic study the “Brachmanes” were central, being the models in faith for the Christian community. The Brahmins were thus thought to exemplify the good morals and faith in the Biblical God.⁵⁴

However, a second image of the cunning and manipulative Brahmin arose on the encounter with India in the sixteenth and seventeenth centuries which moved to another extreme of representing a defective Christianity in the East. The ethnographic text that played a key role was Ludovico di Varthema’s *Itinariano*, released in 1510, based on his visit to Calicut in India. Varthema mentions in his narrative that the king of Calicut was an idolator (despite his belief in the Biblical God) who worshipped the image of a monstrous demon that he called “deumo” (most likely Narasimha the man-lion incarnation of Vishnu the god in Hindu mythology). The image of the “Calicut Devil” was multiplied through distribution, translations, and other ethnographic works and was prominent in the theological controversies of the Reformation period.

53 GELDERS (2009) 570.

54 GELDERS (2009) 571.

Gelders argues that the Brahmin protagonist was transformed to suit Protestant debates. The Brahmin ascetic who took part in the debates with Alexander was seen as shunning the avarice and greed of the Catholic Church who had claimed exclusive access to the Word of God and added new creeds and rites thus corrupting the message of God. The Protestant theologians constantly sought to compare the practices of the Catholic Church to pagan Rome stressing how the message of Christ has been distorted into the worship of human saints and crucifixes. In order to show how Roman Catholic Christianity and the idolatry caused by the devil were the same, the second representation of the Brahmin as a cunning priest emerged.⁵⁵

Gelders further argues that these modes of representation were embedded in colonial discourse in India and colonial administrators, such as Holwell or Scrafton, were effectively able to use this frame in order to formulate the idea of an ancient Indian religion and a corrupt Brahmin priesthood. He concludes by saying that it is important to understand such descriptions as not merely being a product of colonialism but rooted in Christian theological debates.

How does one study “Hindu law” if the “Hindu religion” is a product of the European experience of the Orient? In India today, the Hindu religion is constitutionally recognised and protected with the freedom to practise and propagate one’s beliefs and practices and set up institutions for religious and charitable purposes.⁵⁶ The colonial conception of how community or society in India is constituted in the context of the caste system, the nature of law and the structure of the family has had profound influences on post-colonial legislation and judge made law which rely on colonial precedent. Various enactments, such as the Hindu Succession Act 1956, the Hindu Marriage Act 1955 etc., are enforced relying on the colonial conception of what should constitute a Hindu religion. Cases and judgements on the Hindu joint family rely on the schools of Hindu law, i.e. the Mitakshara and the Dayabhaga which were the product of the colonial codification process. However, the description and classification of social phenomena as belonging to Hinduism or a “Hindu religion” does not mean that the Indian

55 In making this argument Gelders examines a wider range of ethnographic sources in the Low Countries, other parts of the continent and England.

56 This is granted under Article 25 of the Constitution of India.

conception of such a social phenomena is the same as the colonial conception.

What is the usefulness of understanding how Hindu law has become a category historically? As we have seen, such a category is important as it allows legal historians to be able to make their claims of the process of secularisation by colonial law. This means that Hindu law and secular law are understood as two separate legal transplants. This makes it unclear *as to what is* being transplanted. There is no clarity *as to what are the changes* that colonialism brought about except for a dissonance with indigenous categories (Mukherjee 2010), a reconceptualisation of social relationships (Singha 1998), and actions caused by their racist psychology (Kolsky 2010).⁵⁷

If one wishes to gain greater clarity on the nature of the changes that colonialism brought about, it becomes important to analyse the European experience of Indian society and its conceptual framework which generates a number of systems and categories. We have already noticed that Weber's description of the Hindu religion is subject to certain constraints, such as the need to identify sacred scriptures and Brahmin priests as custodians. Furthermore, that these constraints are also visible in the vision of the British colonial administrators in India. Raf Gelders's account allows us to discover the conceptual framework behind these constraints which are internal theological debates in Christian Europe.

In arriving at the conceptual framework that determines European attitudes towards Indian society, one needs to unearth the various categories and concepts that allows the description of an entity called "Hindu law" and how it shapes our descriptions of social phenomena. In order to do so, I propose using the inconsistencies in the European accounts to arrive at an analysis. We have already seen in the case of Weber that there were inconsistencies in his account of a unified Hindu religion and caste system. Most British administrators were unconcerned that reality in India did not match their pre-conditioned ideas. However, there were exceptions, such as James Henry Nelson, a Madras High Court Judge in the late nineteenth century who questioned the existing consensus on legal knowledge about India.

57 The specific positions of these legal historians is described in the second section of this paper which deals with how the history of law in India is perceived as being a movement from custom to codification.

In a detailed study on the various difficulties faced by the Madras High Court's administration of Hindu law Nelson (1877) mentions how the customs and practices of various social groups whose practices are inconsistent with Hinduism had to be recognised. He also mentions that the Austinian notion of law wherein the non-Muhammadan social groups have agreed to accept and have been compelled to guide themselves by an aggregate of positive laws or rules set to them by a sovereign or other person having power over them is absent in India. Therefore, the idea of a "law giver" and primary law texts akin to the Institutes of Justinian was incorrect.

If I am rightly informed, there is not a trace of the existence of a set of positive laws such as the twelve tables of Rome, the Code of Draco, or the commandments of the Jews: but on the contrary we have the evidence of Megasthenes, and of Strabo (quoting Nearchus), to the fact that in old times there were no written laws in India.⁵⁸

In this context Nelson dismisses the identification of a law-giver called Manu who had set laws for the Hindus through the law text called Manu Smriti by Orientalists such as William Jones⁵⁹ on the ground that there is evidence lacking that a man called Manu actually lived and had set laws that intended to govern all Hindus. Nelson also raises questions about the nature of caste in India and the status of Brahmins in being the key interlocutors in interpreting and upholding the Code of Manu. In his letter to Justice Innes (1882) he states that the Brahmins of South India have developed their own peculiar customs and practices and therefore one should not apply the law applicable to Brahmins in the North to them. Nelson also remarks that the groups considered to be Shudra may have their own scriptures propounded by their own Gurus and priests and may not avail of Brahmanic assistance in performing ceremonies and religious services. He arrives at the conclusion that:

There is not, and so far as appears never has been, a Hindu nation or people, in the proper sense of the term: and it would be idle to attempt to discover by research a body of positive laws based in the general consciousness of such a nation or people.⁶⁰

58 NELSON (1877) 4.

59 As mentioned earlier in this paper, William Jones played a major role in the translation of the Dharmasastras.

60 NELSON (1877) 11.

Nelson comments that there are various contradictions and inconsistencies in the Manu Smrithi itself and that these contradictions would lead one to conclude that such a commentary did not lay down legal principles to be followed but were merely recommendatory in nature.⁶¹ An example was the practice of *niyoga* or *levirate* wherein the manner of following the custom is laid down in an elaborate manner but was condemned in absolute terms. He criticises the functionalism present in the legal scholars of the colonial period claiming that they sought “to discover the existence of analogies between Sanskrit concepts and those of ancient Rome and modern Germany”.⁶² He lays down fifteen false principles that have characterised the state of Hindu law as enforced by the courts. These include (1) the existence of various schools of law which governed different parts of India (such as the Andhra country, the Dravida country etc., (2) the application of Hindu law to all Hindus and (3) the Hindu family is a state of union and is undivided.

In claiming that the Code of Manu did not apply to all Hindus (if it could be considered law) Nelson poses relevant questions such as when and in what circumstances were the Dharmasastras composed? Do Buddhism, Jainism and Brahmanism have any impact on the religious beliefs and practices of the people of South India? To what extent do Muhammadans in the Madras province follow the practices of non-Brahmin castes? What kind of powers do Gurus and caste heads exercise?⁶³

Nelson further argues that the notion of property within the family was not the corporate form of the joint Hindu family described by the colonisers. Property was held individually and women could also inherit in certain cases. He comments that words do not exist in the Dravidian languages for English legal phrases such as “joint family” “coparcenary” and “co heirs”. He maintains that these meet the requirements of the High Court but do not express the social life of South India. He also asserts that when division in the context of the Tamil word “*pangu*” (share) is mentioned, it refers to village land and not family property.⁶⁴

In order to resolve these issues, Nelson recommended that there be an inquiry into the usages and customs of the Indian castes without using

61 NELSON (1887) 56.

62 NELSON (1882) 10.

63 NELSON (1882) 16.

64 NELSON (1887) 170–171.

concepts from existing Hindu law and that a set of practical rules should be in place instead of a manual of Hindu law. An effort should be made to ascertain the role of Gurus and caste heads in the context of authority to interpret customs.

In showing the flaws in the colonial account and a way of going forward, Nelson has set an agenda for the study of Hindu law. However, he does not comment on the manner by which such an agenda could be carried out. As we have seen a certain Orientalist framework pervades European discourse on law in India. There is a perception that religion is essential to the discovery of law in India as religious texts were also considered to be legal texts. The authorities to interpret these texts are the Brahmins. In challenging this framework, how can one ensure that one is doing so outside an Orientalist framework? How would it be possible to understand the practices or customs of another culture if the concept or idea of practice itself in Western legal culture is used to understand practice in India?

Historians of law have chosen to examine religious and secular law as two separate legal transplants, the secular coming into being due to the process of modernisation initiated by colonialism. However, our findings indicate that the European perception that law is to be found within religion itself indicates that the domain of the secular requires the idea of religion.⁶⁵ In identifying certain practices as “religious” and as others as “secular,” a separate regulatory domain of secular law emerges. Such a domain can only exist in the presence of “religion” which is a category that British colonial administrators sought to bring into being through their identification of scriptures, priesthood etc. As we have seen, this category did not have any resonance with indigenous perceptions. Therefore, in locating and inquiring about practice one needs to recognise this dialectic.

The formation of Hindu law has to be considered in this light. In proceeding with Nelson’s suggestion that there must be an inquiry into practices and customs of different social groups one needs to understand practice outside Western legal norms which stipulate fixed standards and forms of authority to interpret practice. In examining social relationships, categories that come from Christian theological debates, such as the idea of a

65 Some of these questions are addressed by Charles TAYLOR (2007) who suggests that secularity is evidence of how religion transforms itself into new forms of belief. For a more comprehensive account of how religion secularises itself see BALAGANGADHARA (1994).

Brahmin priesthood, need to be rejected. One needs to re-examine the conflicts and dynamics of practice in order to determine social relationships. Nelson's observations about the joint family as a construct to meet British colonial judicial standards are important in the context of rethinking the nature of community in India. The colonial perception about the corporate nature of the joint family comes from certain ideas around the relationship between property and society which remain to be investigated. Such an investigation has to bear in mind the conceptions of community that have evolved in Europe and the manner in which that has influenced conceptions of community in India.

Conclusion

In trying to formulate new conceptual approaches to the study of legal history in global and comparative perspectives one is faced with the problem of functionalism. In order to overcome functionalism a far more radical approach is required than what is available within the methods and terminology available in comparative law, such as legal transplants, transfers and diffusion. In order to generate more productive explanations the frame of Orientalism or the manner in which the West looks at other cultures being drawn from debates in religious studies and cultural studies is adopted to resolve the problem. Max Weber's scholarship on the sociology of Indian religions is analysed to demonstrate the frame and its contents. One discovers that the idea of a Hindu religion with sacred scriptures and a Brahmin priesthood can be found not just in Weber but across all sections of European society. In interrogating the frame by which Europeans experience India, one discovers that that this is a product of categories and debates internal to Christianity. The inconsistencies in this account are investigated in order to arrive at a new agenda for the study of Hindu law.

It needs to be recognised that colonial discourse remains very firmly entrenched in post-colonial legal structures and the re-examination of categories poses a great challenge to historians of law. Therefore, the importance of using Orientalism as a frame for understanding European experience of non-Western cultures becomes even more significant in light of its potential to rethink existing forms of knowledge.

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Legal Transplants between Time and Space

1. Introduction: Situating Legal Transplants

The concept of legal transplants has been a main focus of the comparative lawyers' craft in recent years. Alan Watson, who is credited with coining the term, holds that legal transplants are an essential part of a strange paradox exhibited by law. On the one hand, each group of people has a unique set of laws that is a sign of their identity; however, such uniqueness has not suppressed the occurrence of legal transplants, which "have been common since the earliest recorded history." In Watson's words, legal transplants mean "the moving of a rule or a system of law from one country to another, or from one people to another."¹

Movement is, thus, what characterizes the idea of a legal transplant, a rule, institution or knowledge identified in a social group is transported to another. For Watson, the idea of the movement "of a rule or a system of law" is essentially linked to legal development. While he admits that legal development by any means can be understood only by taking into consideration "the parameters of legal thinking" of a given community, such parameters "almost always include a propensity to look at some, but by no means all, other systems, and hence a tendency to borrow from these, but not from others."²

Watson's version of legal transplants is characterized by a spatial dimension. Legal movement from one localized place to another, such as a state or community, occurs frequently and, in turn, propels another movement: the development or evolution of specific legal rules or a legal system.³ Watson's

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1 WATSON (1993) 21.

2 WATSON (1993) 112.

3 Advancing the metaphor, he states: "A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or

critics seem to have realized – if not entirely, at least in part – the spatial implications of legal transplants. Pierre Legrand exhibits such understanding in his proposition of the complete impossibility of legal transplants.

To Legrand, Watson’s ideas on the subject lead to a view of law decontextualized from its social and cultural contexts. A rule or a legal system cannot exist apart from its given meaning, and such meaning can be found only in the specific context in which the rule or legal system operates. For Legrand, “[i]n any sense of the term, ‘legal transplants,’ therefore, cannot happen. No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule.”⁴ Hence, Legrand summarizes his case: “Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.”⁵

By criticizing the impossibility of the movement or traveling implied by legal transplants, Legrand only emphasizes the spatial dimension of Watson’s original proposition. At one point, Legrand accuses Watson of being drawn into “mechanical analogies.” Correctly, Legrand deploys the term “mechanical” to show that legal transplants lead to a detachment of the “constituents” (law, for example) from the “social totalities.”⁶ Nevertheless, “mechanical” here does not only influence the quality of Watson’s analogy; it also implies that the analogy follows the laws of mechanics, which have an important spatial component.

Moreover, it is important to note that Legrand’s critique is also essentially space-oriented. Instead of stressing movement as a factor in legal borrowing, however, he overstates the role and even the necessity of stasis. In his appeal for comparatists to look at the unique aspects of legal systems and to connect those peculiarities with specific attributes of the laws and overall legal system, Legrand evokes, as does Watson, the idea of space. Situationality is essential, “[b]ecause insensitivity to questions of cultural heterogeneity fails

institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.” WATSON (1993) 27.

4 LEGRAND (1997) 120.

5 LEGRAND (1997) 114.

6 LEGRAND (1997) 122.

to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other.”⁷ Such a static perspective on what constitutes legal systems – and the traditions behind them – is why some commentators, although in agreement with Legrand’s stress on the centrality of issues related to *différend* in comparative legal studies, have not completely followed his critique of Watson. Inevitably, traditions have a certain degree of hybridism; their boundaries are constantly renegotiated.⁸ Moreover, it is fair to contend, just like Teubner, that the spaces in which such renegotiation takes place are not national societies, but a global one: “[t]he transfer of legal institutions (...) is a direct contact between legal orders within one global legal discourse.”⁹

Other approaches to the concept of legal transplants also have a spatial dimension. The post-colonial perspective in comparative legal studies is an eloquent expression of orientation toward space. The post-colonial critique departs from the fundamental premise that the “Euro-American World” still sets the agenda of comparative legal studies in the ways of seeing, speaking, and feeling. Who is invisible or not, who determines those that must speak or be silent, and who downplays the suffering of colonized people is one located in the “Euro-American World.”¹⁰ The post-colonial critique’s vocabulary divides the world spatially. The categories of North and South, First and Third Worlds, and Euro-American and Extra-Euro-American Worlds constitute the imagination of post-colonial scholars and propel them to ask for change in the field of comparative legal studies. Issues related to space are traditionally of the utmost importance for post-colonialism, as evidenced by Edward Said’s description of his work as “a kind of geographical inquiry into historical experience.”¹¹

Similarly, the extremely influential functionalist heritage in comparative law clearly emerged from the conflict of laws doctrines, which inherently involve issues of space. As rightly pointed out by Michele Graziadei, Ernst Rabel’s concern about the issue of characterization in the conflict of laws led him to rely on the comparative method. If legal systems are different and initially appear so different that they cannot be compared, the only way to

7 LEGRAND (1997) 123.

8 NELKEN (2003) 445–446. See also, *inter alia*, GILLESPIE (2008) 669–673.

9 TEUBNER (1998) 16.

10 BAXI (2003) 50.

11 SAID (1993) 7.

bring them into a fruitful comparison is to focus on the similarity of their factual circumstances. Therefore, “[c]omparative law must concentrate on isolating the fact from which legal consequences follow, quite irrespective of the way they are looked at, or categorized, in any legal system.”¹² Rabel’s turn to a functionalist approach to solve problems arising from the application of legal rules and institutions in a multitude of different spaces, characterized as states or, at least, distinctive legal systems, is symptomatic of the space-oriented perspective of the functionalist method and its heritage.

A great number of perspectives and traditions in comparative legal studies center their analyses on the presupposition that legal transplants rest fundamentally upon a spatial dimension: Rules or arguments originally existent in a single space, be it a state or any other group ruled by law, become applicable, for several different reasons, in another discrete space. Even such diverse approaches to the topic agree that legal systems are inevitably porous to outside influences (even Legrand does not deny that) and are to a degree dependent upon a number of factors, such as power, culture, or society. The outside element to be transplanted is often associated with a foreign legal system or one organized beyond the boundaries of the nation-state. Beyond the illustration of transplants, current comparative legal literature uses an abundant variety of similar metaphors that implicate the idea of movement. For example, metaphors of diffusion, borrowing, circulation, cross-fertilization, migration, transmission, transfer, and reception connote the idea that a person or idea is moving.¹³ It is irrefutable that the world is spatially divided and that legal systems rest on the common acceptance of the necessity of specific spaces, even cyberspace, to exist in order for rules to be applied. We cannot simply disregard the importance of

12 GRAZIADEI (2003) 105–106.

13 For those and other similar terms, see PERJU (2012) 5. For the author, four of the terms above have a “greater staying power”: transplants, borrowing, circulation and migration. My aim is not to establish what terminology is the best, but to state that they all connote the idea of movement. Sometimes, such connotation takes place in a stronger way, as Günter Frankenberg suggests in the case of “migration” and “transfer” (the former more than the latter), but the idea of movement is there. Frankenberg (and many others) puts too much emphasis on the terminological debate. For him, they “are not ‘only words’ but signifiers of rather different theoretical approaches and interpretations.” FRANKENBERG (2010) 566, 570. I do not intend to take sides on such debate. At this stage, it is sufficient to say that there is a connection between the idea of movement and that of transplant and its competing metaphors.

space and the number of entities organized according to the idea that spatial divisions produce social consequences.¹⁴

In addition, however, there is another dimension, apparently neglected by most comparatists, that strongly affects the way legal transplants (or any other concept grounded on the idea of movement) operate: time. The attempt to transplant a rule or argument from one legal system to another involves an expectation that someone wants to be fulfilled in the future. To employ two terms disseminated by Reinhart Koselleck, a legal transplant can be viewed as a collection of *experiences* that happened in one legal system and are *expected* to be realized in the future in a different legal system. Therefore, legal transplants are not devoid of a sense of the future; as expectations, they try to anticipate the future and, consequently, change it.

In this article, I will argue that in addition to a spatial dimension, legal transplants have a temporal dimension, materialized as transplants are fueled by experiences and expectations and try to bridge the gap between them. In a broader perspective, this article aims to bring comparatists and legal historians closer together. This effort might seem outdated, since comparatists are often enthusiasts of the study of history. Watson, for example, attributes a great importance to history and was a legal historian himself. Nevertheless, comparatists, and I would add jurists in general, pay scant regard to issues related to the theory and the philosophy of history. History is important because it supplies good narratives on which comparative law discourses can rely; in other words, it provides the elements necessary to apply or to destroy legal authority. This article claims that history – understood as historical science or historiography – can provide methods and insights to better understand legal transplants.¹⁵ The categories of experi-

14 As a matter of fact, space has duly been considered in an emerging literature on legal pluralism and legal transplants. For a general picture, see VON BENDA-BECKMANN/VON BENDA-BECKMANN/GRIFFITHS (2009) 1–29. Some take the spatial turn in legal studies so seriously to the point of arguing that modern legal systems are invariably mixed, what demands a complete reconceptualization of territoriality. For Donlan, for example, “[t]he uniqueness of mixed jurisdictions is thus no longer the fact of their hybridity, but their particular mix and character.” DONLAN (2011) 29. Even if such argument may sound exaggerated, it seems undisputable that we must look more thoroughly to the spatial implications of the relationship between legal systems.

15 The opposite is also true, although this is not the main concern of this article. On the subject, especially on the identification of at least three important contributions of

ence and expectation, as formulated by Koselleck, are good examples of how an encounter between comparative law and the theory and philosophy of history can be productive.

The piece is divided into two parts. In the first, I will briefly present Koselleck's ideas about the categories of experience and expectation and show how they are essential to understanding any historical argument in modern times (*Neuzeit*). I will then demonstrate the importance of treating the temporal dimension of legal transplants by showing how concepts such as progress and prognoses affect the operation of legal transplants. Some short concluding remarks will then be presented.

2. Adding Time: Experience and Expectation

Koselleck's contributions to the development of the theory of historical science have been recognized as outstanding. His reflections on the emergence of modern history have opened new ways to think about issues neglected by professional historians reluctant to engage in theoretical discussions: the scientific cognitive categories which historians, since the advent of modern times, have employed in their craft.

These scientific cognitive categories can also be found at work in other professions, where they are equally neglected by the majority of experts. In the case of lawyers, bridges with historians must be kept open at all times. It is almost a truism that lawyers need history to find their own identity. Historical arguments are useful not only to give authority to a legal argument, but also to destroy or question the authority received from past generations.¹⁶ Therefore, in their constant engagement with the past, lawyers must investigate these categories. In this paper, I will focus on a small number of them, namely experience and expectation.

Modern people do not see history as merely an accumulation of past experiences, but also as the likelihood of changing the future. History as

comparative law (and the comparative method as well) to legal history, see GRAZIADEI (1999) 530.

16 The search for authority (or its destruction) is on the basis of Robert Gordon's taxonomy of the three uses of the past by lawyers: static, dynamic (concerned with looking for authority), and critical (focused on the destruction or the questioning of authority). See GORDON (1996) 124–26.

magistra vitae is not possible anymore, because the future is conceived as open for human beings to build upon. In Koselleck's thought, past and future are connected through the categories of "space of experience" and "horizon of expectation." These concepts are, for him, so essential "that they indicate an anthropological condition without which history is neither possible nor conceivable." Far from being opposing categories, these ideas simply cannot exist apart from each other.¹⁷

Understanding how history is conceived and articulated in different arguments inevitably leads to a realization of the inherent relationship between experience and expectation. As Koselleck defines it, "Experience is present past, whose events have been incorporated and can be remembered. Within experience, a rational reworking is included, together with unconscious modes of conduct that do not have to be present in awareness. There is also an element of alien experience contained and preserved in experience conveyed by generations or institutions." Expectation is defined in the following terms: "At once person-specific and interpersonal, expectation also takes place in the today; it is the future made present; it directs itself to the not-yet, to the non-experienced, to that which is to be revealed. Hope and fear, wishes and desires, cares and rational analysis, receptive display and curiosity: all enter into expectation and constitute it."¹⁸

Koselleck discusses experience in terms of space, because this concept has a clear spatial dimension. Experience is not a monolithic entity, but rather an assemblage of several layers of time put together simultaneously in the present. It cannot be organized in terms of before and after. In Koselleck's words, "Chronologically, all experience leaps over time; experience does not create continuity in the sense of an additive preparation of the past."¹⁹

On the other hand, expectation is described in terms of horizons, because "the horizon is that line behind which a new space of experience will open, but which cannot yet be seen." The future, explains Koselleck, cannot be experienced, so it cannot be integrated into a single space.²⁰ As one commentator succinctly puts it, "The scope of our vision as we look at the open

17 KOSELLECK (2004) 257. Those categories may be retraced to two authors that deeply influenced Koselleck's thinking: Martin Heidegger and Hans-Georg Gadamer. On this, see OLSEN (2012) 220–226.

18 KOSELLECK (2004) 259.

19 KOSELLECK (2004) 260.

20 KOSELLECK (2004) 260–261.

horizon at sea becomes synonymous with a sense of future as open and unlimited, inciting us to conceive beyond what we can actually see.”²¹

Experience and expectation cannot exist apart, but as distinctive cognitive categories, they do not supersede each other. Out of the difference between experience and expectation emerges what can be called historical times, a concept that is more than the mere passing of chronological time, but expands to include a dimension “tied to social and political units of action, to the particular acting and suffering of human beings, and to their institutions and organizations.”²² If such a subjective dimension constitutes historical times, the term must be used in the plural, since it is felt in multiple ways by different human beings. More importantly, the ways in which different historical times can fill the gap between experience and expectation are uncountable.

One of Koselleck’s main hypotheses about the relationship between experience and expectation is that modernity is characterized by an increasing gap between these cognitive categories.²³ Previously, concepts such as progress played a crucial role in filling that gap. Progress promises to create a continuous bridge between the past (experience) and the future (expectation), and its effects can be measured only by reference to events in the past; in order to be a better time, the present must be compared to previous experiences. Furthermore, progress provides a solid foundation for the idea that what is expected in the present can (or will) be accomplished in the future. Although the critique of progress is widespread in modern times, social and political language have developed concepts similar to progress; words such as republicanism and constitutionalism evoke the idea of movement. As Koselleck himself points out, “Republicanism was, therefore, a concept of movement which did for political action what ‘progress’ promised to do for the whole of history. The old concept of ‘republic,’ which had previously indicated a condition, became a *telos*, and was at the same time rendered into a concept of movement by means of the suffix ‘ism.’ It served the purpose of theoretically anticipating future historical movement and practically influencing it.”²⁴ Concepts such as moderniza-

21 PICKERING (2004) 272.

22 KOSELLECK (2002c) 110.

23 KOSELLECK (2004) 263.

24 KOSELLECK (2004) 273.

tion or even development, frequently employed today, carry in themselves the idea of movement, the mediation of what was experienced and what is expected. In other words, these concepts have a temporal structure that is simultaneously grounded on the past and oriented to the future.

I argue that the concept of legal transplants, especially due to its characteristic of movement and strong reliance on similar concepts (including the aforementioned ideas of modernization and development, but also good governance, globalization, and others), is an attempt to fill the gap between experience and expectations in the legal field. What many comparatists have failed to see is that such movement has not only spatial implications, but also temporal implications. A rule or institution that is transplanted from one space to another carries at its core many expectations waiting to be fulfilled in the receiving legal system.

Among comparatists, one of the few exceptions who attempts to realize the temporal dimension of transplants is David Nelken – albeit with no direct reference to Koselleck. He lucidly stresses, “Law can ‘belong’ not only to other places, but also to the past, to a previous social and economic order, to tradition and to history, as much as to the present. Or it can aim at the future, acting as an index of desired social, political, and economic change, of what society would like to become (or should like to become).”²⁵ Nelken then makes his argument even clearer: “Legal transplants are frequently – perhaps predominantly – geared to fitting an imagined future. Most legal transfers are imposed, invited, or otherwise adopted because the society, or at least some groups or elites within that society, seek to use law for the purposes of change. The goal is not to fit law to what exists but to reshape what exists through the introduction of something different.”²⁶ Nelken does not develop his argument further, but instead, uses his claims about the relationship between legal transplants and imagined futures to issue a call for a research agenda that should be advanced by comparatists. Despite that limitation, his argument is powerful and promising, because it opens new ways to study transplants beyond the relationship between law and society (to which comparatists inescapably refer, epitomized by the debate between Watson and Legrand) to reach the very structure of the act of legal transplantation.

25 NELKEN (2003) 451.

26 NELKEN (2003) 457.

While I agree with Nelkin, his perspective must be broadened by recourse to the category of expectation. He contends that legal transplants are “predominantly” suitable to “fitting an imagined future.” Expectations deal not only with imagined futures, in Nelken’s sense of a planned future, but they also encompass elements like probabilities, fear or chance. Expectations belong to the domain of the not-yet, something that cannot be completely rationalized or planned. I complement Nelken’s insight by arguing that legal transplants *always* (at least since the coming of modernity and in relation to those affected by it) carry with them expectations and, consequently, a future-oriented perspective, because expectations can be found in the very structure of legal transplants. Current typologies of legal transplants (or, I insist, other similar concepts grounded on the idea of movement) do not interfere with such a conclusion. Take, for example, Jonathan Miller’s oft-cited division of transplants into four types: (1) cost-saving; (2) externally-dictated; (3) entrepreneurial; (4) legitimacy-generating. It deals with motivations in the act of transplanting rules, institutions or decisions from one legal system to another. Someone is involved in legal transplantation because: it costs less than “to think up an original solution” (1); “a foreign individual, entity or government” imposed it as a condition for something – a loan or political autonomy, for instance (2); “individuals and groups (...) reap benefits from investing their energy in learning and encouraging local adoption of foreign legal model” (3); a foreign model is seen as a way to enhance legitimacy in a given legal system – as in the case of fulfilling the task of a “source of prestige” (4).²⁷ Those different intentions found in transplants do not interfere in their orientation towards expectations. If we are in accordance with the existence of such types, they only tell us that expectations come from different realms. Some are legitimate, external to the individuals’ free will, altruistic, but some are not. They explain the decision taken by someone to transplant a legal model (where both the donor and the receiver may fulfill different roles), but not how the idea of transplanting itself works.²⁸

Linking legal transplants to expectations and, consequently, sustaining they have a future-oriented dimension may sound like too much of a

27 MILLER (2003) 845, 847, 849–50, 854–855.

28 That is why Miller states that “[w]hat the four typologies share (...) is a focus on the persons responsible for bringing the transplant about.” MILLER (2003) 872.

Eurocentric statement. After all, one may argue, the idea of history (and modernity) has emerged in a very limited part of the globe. Peoples “without history,” in other words, those “societies where myths are the predominant mode of organizing experiences of the past,”²⁹ do not necessarily have a historical consciousness; or they may not feel the need to articulate the idea of time in terms of a relationship between experience and expectation. In fact, for them, past, present and future can be intertwined, rather than separated, categories.

This is a very powerful argument. Peoples “without history” challenge the very idea of history as the only way of “constructing the past.”³⁰ Their existence demands historians to face their own past and think about different possibilities of conceiving time.

However, my point is not to argue there are no alternative manners to think about the past (and the future too), but that, following Koselleck, a specific way to conceive the past emerged with modernity and it affected the idea of legal transplants. It is possible that legal transplants occurred in the past – or some that still occur in the present – remain outside the realm of modernity and its consequences (although the power and the impact of the colonial encounter cannot be underestimated).

In sum, my hypotheses may not explain every single legal transplant in the past, in the present or even in the future, but it is an explanation of transplants that were and are affected by the advent of modernity. And modernity was not only imposed to “others”; sometimes, it influenced societies through processes of conversation and conflict.³¹

In line with this, the assumption that legal transplants also have a temporal dimension, since they project an expected future influenced by “foreign experiences,” can draw the literature’s attention to important issues neglected by comparative lawyers but often studied by legal historians. Progress and prognoses are only two of them.

29 NANDY (1998) 162.

30 NANDY (1998) 166.

31 See KLEIN (2011) 111.

3. Legal Transplants and Progress

The concept of progress is extremely difficult to grasp. From the conceptual history perspective, employing the concept of progress makes sense only if it is directed toward the past, to its different uses throughout the years. Despite its variations in time, aspects of this concept remain constant. Progress means “a clear objective determination of direction,” and the most influential variations of progress are “tied to standards of value, progress towards something which is subjectively better.”³²

Starting in the nineteenth century, progress became what would be nowadays called an ideology. In contrast to Kant or Hegel who linked progress with ideals such as freedom, progress became identified by a deficit: regression, or decay. The future projected by others is considered fundamentally flawed if it does not fit into what an adversary considers to be progressive. Progress has acquired a relational character and increasingly fulfills the task of creating and maintaining a dichotomy between opposing poles such as right and wrong, good and evil, and civilized and uncivilized nations.³³

Despite the criticism of progress, especially in the twentieth century,³⁴ as an ideology, it still influences legal discourse and the theory and practice of legal transplants. There is a long tradition of comparative legal studies that are grounded on the assumption that law progresses. Henry Maine and Max Weber are two prominent examples. Maine’s paradigm of change in law follows the narrative of status relationships as a less evolved way to regulate society to the embodiment of rights and duties in the shape of “anonymous and individualized” contracts. The same evolutionary pattern is identified in many law and development proposals that attribute a great importance to the law of contracts. On the part of Weber, progress in law is “clearly oriented toward formal rationality.” He shows a clear antipathy towards legal systems that have not achieved the level of organization based on formal rationality.³⁵

The study of the concept of progress can enhance the legal transplants research agenda in at least two ways: by emphasizing that ideology matters

32 FAUL (1985) 13.

33 See GALINDO (2010) 137–170.

34 For a good summary of those criticisms, see TAGUIEFF (2006).

35 RILES (2005) 4–14.

in any transplantation process and by refiguring otherness in comparative legal studies. In an important article, the Italian comparatist Michele Graziadei draws attention to the fact that by helping to forge consensus or resistance to transplants, ideology “transforms power into influence” and acts as “an interface between individual practice and collective action.” Graziadei advocates making the study of ideology central to comparative legal studies to encourage a micro-perspective in contrast to the grand totalizations common in the field.³⁶

The powerful ideology of progress does not necessarily lead to domination through a given legal transplant. Progress has been a significant force in national liberation movements and in policies that emphasize local, rather than foreign, solutions to problems. If captured by individuals rather than used as a tool to shape society, progress is an important element of subjective historical times and still functions as a bridge between experiences and expectations. Essentially, it provides a way to control the future through ideas.

In addition, the study of progress can assist legal comparatists in realizing that this concept helped create the sense of otherness and primitiveness that still influences comparative law, especially when faced with Extra-Euro-American legal systems. To prove the need for a certain legal transplant, a legal system must be imagined as imperfect, less evolved, or primitive. In order for one to say that a legal order is primitive, there must be a reference, structure, or set of rules for the purposes of comparison. The mold of another legal system often fulfills such a role perfectly. However, a future imagined in this manner builds upon the experiences provided by the legal system perceived as more evolved and, therefore, serving as a framework in the process of transplantation.

The study of the concept of primitiveness, fully informed by the ideology of progress, can even create a new beginning for comparative legal studies. As Steven Wilf beautifully puts it, “most discussions of legal transplants, however, rely upon a remarkably botanical turn of phrase. Law is transferred from one place to another – it takes seed, is grounded in the needs of another society, perhaps even grafted to existing legal norms, and ultimately becomes either a successful transplant or withers away. ... Legal transplants are part of a system of international exchange. Legal primitivism, however,

36 GRAZIADEI (2009) 738–740.

challenges this straightforward model of encounters. It was closer to the mounted specimen of an exotic species than a living plant. It was a pastiche of legal materials imported for the very purpose of cabining, setting aside, and distinguishing from contemporary law.”³⁷

Structural adjustment programs are good examples of the difficulties, or the impossibility, that international financial institutions face in dealing with otherness and can be seen only through the lens of “good governance.” And such a situation brings us to another issue: that of prognoses.

4. Legal Transplants and Prognoses

Related to the concept of progress is that of prognoses. The idea that the future is an open space leads modern human beings to make predictions and plan for the years or centuries to come. Anticipating the future has serious implications for power relations. Prognoses can take the shape of pure wishful thinking or be a call or even an ultimatum for action. Koselleck provides two examples of such prognoses in the inter-war years: Hitler’s prediction about the invasion of Czechoslovakia and Churchill’s call for action in Danzig and in the Polish Corridor. Those two prognoses were more than wishful thinking; they were based on the capacity of Germany and the allies to provoke or avoid a result. In other words, they wanted to mold the future.³⁸

Focusing on such prognoses that are based on imposition can didactically emphasize the complexity of legal transplants, especially if seen from the point of view of the receivers. Conditionalities imposed by international financial institutions in “structural adjustment programmes” resemble the prognoses described by Koselleck that, in the final iteration, mean that a person is compelled to act. The imposition of conditionalities is associated with the idea of good governance that must be followed by specific states that accept the adjustments. Good governance “involves the creation of a government which is, among other things, democratic, open, accountable, and transparent, and which respects and fosters human rights and the rule of law.”³⁹ That being said, the agenda of good governance contained in those

37 WILF (2009) 508.

38 KOSELLECK (2002c) 141–143.

39 ANGHIE (2005) 248.

adjustment programs, as is widely known, have deep impacts on states' internal affairs, ranging from reductions in government spending to economical liberalization requiring subsidy cuts or privatization. In practice, such good governance agendas have created insurmountable burdens for states that, for one reason or another, were compelled to turn to international financial institutions and consequently became bound by conditionalities. For example, despite being theoretically in accordance with human rights standards – after all, human rights are an important component of good governance – structural adjustment policies quite often “undermine, if not violate, important economic and social rights.”⁴⁰ Conditionalities in adjustment programs act not only as tools to achieve current political objectives, but they also aim to affect time itself by controlling societies, as well as legal systems, and direct them to a pre-determined and anticipated future that will promote and realize the idea of good governance. Political action, therefore, happens now and has an anticipatory function that is capable of tying together present and future generations. That work is exactly what Koselleck assigned to historical times, a deeply subjective perspective on time that goes beyond chronology.

The International Monetary Fund has approved specific guidelines on conditionalities. In an eleven-page document, the principles of conditionality are deployed using vocabulary that makes explicit the contractual philosophy behind their application to those seeking resources from the fund. The fifth principle makes the temporal-political dimension of conditionalities clear: “A member’s request to use Fund resources will be approved only if the Fund is satisfied that the member’s program is consistent with the Fund’s provisions and policies and that it will be carried out, and in particular that the member is sufficiently committed to implement the program.”⁴¹ Several words denote the temporal dimension: “program,” “provisions and policies,” “carried out,” and “implement.” Fundamentally, access to the fund’s resources is restricted to those able to prove that there is a convergence between a member’s projection of the future and the fund’s own projection of the future.

The prognostic character of a legal transplant might seem irrelevant. What is so special about saying that political action is projected toward the

40 ANGHIE (2005) 260.

41 INTERNATIONAL MONETARY FUND (2002).

future? The concept of prognoses can however shed some light on the way comparative lawyers use the vocabulary of legal change, which is relatively frequent in the legal transplants literature. Quite often, legal change is used in a too abstract manner, with no consideration of its prospective implications for society. That neglect arises in the case of Watson, for whom legal change sometimes seems to be an end in itself. His definition of the task of comparative law demonstrates such an “abstraction bias” and a lack of concern about the future social consequences of changes in law. In Watson’s words, “in the first place, Comparative Law is Legal History concerned with the relationship between systems. ... In the second instance, I suggest that Comparative Law is about the nature of law, and especially about the nature of legal development.”⁴² Moreover, by using concepts such as legal systems’ “sophistication,” “maturity,” “modernity” or “evolution”⁴³ in a poorly problematized way, Watson tends to generally disregard the role of the future in legal transplants (and also seems to lean towards a defense of progress in law). Therefore, to avoid such abstraction, the relationship between legal transplants and prognoses must become an important field of research for comparative lawyers.

5. Conclusions

Legal historians can offer a crucial contribution to the debate on legal transplants if they convince comparative lawyers that, besides a spatial dimension, a transplant also implies a specific conception of time that encompasses both the space of experiences and the horizon of expectations. Legal transplants not only transpose legal rules and arguments from one place to another; they fundamentally try to change the future.

As a matter of fact, legal transplants are deeply influenced by what Koselleck called historical times, a very subjective (sometimes irrational or emotional) perception of how time flows. The plea to emphasize the study of legal transplants through the lenses of historical times seems to have its counterpart in a tendency found in comparative legal studies to stress the role of individual actors in the transplantation process.⁴⁴ An inquiry into

42 WATSON (1993) 6–7.

43 See, for instance, WATSON (1987) 537, 550–551.

44 RILES (2005) 41–45.

such role may show not only that individual perceptions on several issues vary, but also that they have different perceptions on how time flows.

Because I argue legal transplants try to fill the gap between experience and expectation, they place themselves in a mined camp, full of tensions. Some comparatists tend to overlook such tension by emphasizing more the similarities than the differences among legal systems. I think Günther Teubner's ideas about legal irritants provide a good way to uncover such tensions and implicitly emphasize the temporal dimension comparatists should be aware of. In Teubner's words: "Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."⁴⁵ Irritants cannot be domesticated not only because a rule or institution was displaced, but also because time itself cannot be domesticated. We can only expect a legal transfer will "work" in another legal system, but we cannot say for sure. That is why Koselleck refers to prognoses as a "difficult art." However, even with its inherent difficulty, modern people insist on prognosticating because of their inclination towards the control of time.

The relationship between experience and expectation is not only tense, but sometimes unbalanced. For Koselleck, moderns tend to put a lot of stress on the expectation dimension when the amount of experience is scarce. This is the price that must be paid for an open future, free from the burdens of traditions. The same may happen with transplants. Sometimes, the trust in a transplant is so thick that it overshadows the experience a foreign legal system had with a rule or institution; contextualization is erased or, at least, forgotten. As Frankenberg puts: "For the constitutional elites and their experts, when going about the reassembling of the imported items, must operate without knowing the original master plan or its meaning and may, at best, rely on fairly unreliable, abstract instruction manuals provided by global constitutionalism."⁴⁶

Progress and prognoses are good examples of the temporal implications of legal transplants. On the one hand, the sense of otherness that influences

45 TEUBNER (1998) 12.

46 FRANKENBERG (2010) 575.

much of the comparative legal field has a strong relationship to the idea of amelioration contained in the ideology of progress. On the other hand, different agents establish prognoses through the means of legal transplants and imposition of a given behavior on the receiver, as in structural adjustment programs.

Engagement with the concept of legal transplants is necessary for the field of comparative legal studies to enhance legal change and to excavate the causes and consequences of stasis in law. Recognizing the influence of temporal and spatial structures in the process of transplantation can open new paths for research and builds stepping stones to the ultimate – but often forgotten – aim of law: the realization of justice.

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Empires and Law

Ancient Entanglements: The Influence of Greek Treaties in Roman ‘International Law’ under the Framework of Narrative Transculturation

I. Introduction¹

The influence of Greek culture in Rome has been widely accepted in almost every single aspect of social life. Nevertheless, from a traditional legal point of view there seems to be very little contact between the two civilizations. In fact, legal historians have been reluctant to find possible interactions and have rather suggested that it was only with the Romans that a strong and systematic legal corpus could be built, something which had been unknown to the Greek spirit. I have always been amazed by this conviction, which blatantly contradicts what I consider to be one of the most outstanding features of the growing power of Rome: the permanent Roman intention to rely on Greek precedents in almost every social aspect of life and civic organization (architecture, sculpture, literature, religion, politics, *inter alia multa*), in order to “translate” and adapt new forms and structures in accordance with their own *Weltanschauung* and their own interests.²

What is more, those who have been willing to acknowledge some kind of interaction tend to justify their view on the existence of ancient testimonies dealing with a Roman embassy sent to some Greek *póleis* (apparently decided through a *plebiscitum* in 454 BC) to study their legislation with

1 This paper has been prepared under the scope of the research projects DCT1007 and DCT1210, which I have been supervising at the University of Buenos Aires Law School. A Spanish version of some parts of this article has been already published, as a work in progress, in: *Lecciones y Ensayos* 89 (2011) 73–117.

2 This also had to be the case for the law, especially if we consider that the Greek territory was incorporated under Roman power after the creation of the province of Macedonia in 146 BC as a consequence of Lucius Mummius’ destruction of Corinth. From that year onwards, Greece was subject to Roman political control and therefore Rome came into close contact with the way in which the different *póleis* were administered and regulated.

the aim of becoming inspired by them.³ According to other sources, the return of the embassy facilitated the work of the *decemviri* and the preparation of the XII Tables. This narration is, of course, heavily criticized from a historical perspective and the argument put forward by these authors has been therefore rejected.

My purpose in this paper is to overcome this debate by suggesting a new theoretical framework in order to understand the complex interaction of Greek law and the Roman legal system. Far from relying on mythical tales on possible influences, I intend to apply the concept of “narrative transculturation,” which I believe to be a convenient and original perspective (traditionally excluded from studies concerning legal history) to deal with the above-mentioned problem.

For this paper I take into consideration some case studies from the Roman world. In particular, I will show how Rome adapted the Greek tradition of treaties and used them to its own advantage. In particular, the examples of the treaties signed with Maronea or the *koinón* of the Lycians, among others, can unveil the Roman practice of approaching Greek *póleis* by means of a series of written conventional instruments typical to Hellenic interstate relations. However, this practice of apparent *synallágmata* only hides a real inequality of power. In terms of international law, an interpretation of the epigraphical sources from the perspective of “narrative transculturation” might help to understand the political strategies employed by Rome when referring to Greek legal categories as a means of reinforcing its imperial hegemony throughout the Mediterranean.

3 This is mentioned by Livius (*AUC* 3.31.8), who explains that the ambassadors were sent to Athens in search of Solon’s laws: “*missi legati Athenas Sp. Postumius Albus, A. Manlius, P. Sulpicius Camerinus iussique inclitas leges Solonis describere et aliarum Graecarum civitatum instituta, mores iuraque noscere.*” Cf. Dionysus of Halicarnassus (*Ant. Rom.* 10.57.5) and Zonaras (7.18). Other sources suggest that the expedition was in fact sent to southern Italy (*Magna Graecia*).

II. An ancient “international law” and narrative transculturation

International legal history was mostly ignored for many centuries⁴ and has only shown signs of recovering as a discipline in the last decades.⁵ And even if this is the situation now, historical questions dealing with the international law system in pre-modern times have been frequently disregarded. Very few voices have dealt with the legal aspects of interstate relations before the Christian era, and nevertheless, it seems a well-established fact today that classical Antiquity was well aware of the specific functionality and the relative importance of signing treaties. An heterogeneous set of rules (or, perhaps even better, some sets of rules) had been agreed and arranged in order to regulate the behavior of the autonomous and politically organized communities all around the Mediterranean world between the VI and I centuries BC.⁶

- 4 At the beginning of last century, OPPENHEIM (1908) 316 complained that “the history of international law is certainly the most neglected province of it.”
- 5 In this context, I refer to the seminal works of authors such as REDSLOB (1923), NUSSBAUM (1947) or VERZIJL (1968–1998) – whose monumental eleven-volume work, written over a period of 24 years, was completed by HEERE and OFFERHAUS 1998 – who have constructed the necessary bases to build a true theorization of international law from a diachronical perspective. Among the contemporary contributions focusing on the history of international law, it is possible to mention, mainly, the excellent studies of GREWE (1984), KOSKENNIEMI (2002) and the works of TRUYOL Y SIERRA (1998), LAGHMANI (2003), GAURIER (2005) and RENAUT (2007), *inter alia*. For an overall vision of the new approaches to the history of international law, see HUECK (2001). From antagonistic viewpoints, both KOSKENNIEMI (2004) and LESAFFER (2007) agree that the end of the Cold War generated a moment of transition which facilitated the search for new historical inquiries. On the promising future of these new tendencies, cf. BANDEIRA GALINDO (2005).
- 6 In this sense, in the face of the traditional denying theory of LAURENT (1850–1851), who considered that it was impossible to speak of a normative system in force to regulate the relations between the different primitive peoples, we follow the contrary arguments held by PHILLIPSON (1911), RUIZ MORENO (1946), BICKERMAN (1950) and, more recently, BEDERMAN (2001), all of whom recognize certain international law institutions in force in the Graeco-Roman world. Regarding the specific Roman situation, see the classical works of BAVIERA (1898) and ZIEGLER (1972), as well as the recent treatment carried out in ZACK (2001). Certainly, as CATALANO (1965) asserts, it is a *sui generis* system, whose similarities with the current norms may be carefully examined. Contrary to our position, ECKSTEIN (2006) believes that a “multi-polar anarchy,” which lacked an international law and was characterized by fluid power balances, existed in the Mediterranean interstate system. This is the anarchy which was, almost contemporaneously, rejected by LOW (2007) 77–128 when affirming the existence of a Hellenic interstate law with, in our view, substantial irrefutable evidence.

The existence of written documents, mostly subscribed under the scope of religious considerations⁷ and some of which have been preserved in inscriptions or by means of indirect methods of transmission, was considered to be necessary among Greek cities in order to control the action of allies or potential enemies. Roman practice drew on this precedent and showed a complex development of the practice of signing treaties with a clear political intention: to ensure by all possible means the supremacy of the *urbs* on conquered regions. But the question remains whether these agreements were intended to clarify – or rather to hide – the latent inequality of an interstate system characterized by violent invasions and territorial conquest.

How can we study this Greek influence in Roman international policy? As I will explore in the following pages, the adaptation of Greek traditional interstate models by Rome to its own convenience can be efficiently examined through the lens of “narrative transculturation.” The theoretical basis for this concept comes, of course, from anthropology. Fernando Ortiz, a Cuban anthropologist, coined the term “transculturation” with a negative perspective to explain the impact of Spanish colonialism on indigenous peoples in terms of ‘culture’ as opposed to ‘race.’⁸ The term, which encompasses a struggle for a sense of identity – typical to subjugated peoples – was created as an opposite to the universal concept of “acculturation,” which is conceived as the loss of a particular culture in front of other (foreign) cultural phenomena. Since law can be created in the coexistence of different legal traditions, I believe that speaking of “transculturation” becomes useful if transplanted to the legal discussion because it implies a hybridization of two identities, a creation of a single and complex society based on the adaptation of colliding (or complementary) perspectives.

As an addition to this, in a famous book on Latin-American literature during modernism, Angel Rama used the expression “narrative transculturation” as a way of explaining how European literary traditions were adjusted to the realities of the New World.⁹ When he talks about this

7 “In reviewing the practice of the people of ancient times, we see that faith to covenants was in some way their watchword, religious rites being the cardinal feature of their conclusion, although they may, at times, have deviated from the strict observance of their treaty obligations” (ION [1911] 268).

8 ORTIZ (1940). On the concept of “transculturation” in his work, see DÍAZ QUIÑONES (1999), SANTI (2002), and ROJAS (2004).

9 RAMA (2007).

“narrative” aspect of transculturation, he explains how Latin-American authors managed to absorb the European models with the aim of using them to their own ends, with the purpose of consolidating a “discourse,” an efficient narrative that is nurtured and inspired by its precedents but achieves a new personal dimension with the intention of resisting and confronting with its roots.¹⁰ In legal history – and this will be examined in the next sections of the paper – it is possible to perceive how Roman *ius gentium* managed to preserve its own basis and its own structure while adapting in its political discourse some preexisting Greek legal formulae.

III. Greek treaties and equality

In Greek antiquity the *pólis* emerged as a city-state – an institutional entity which had control over a certain cultivated territory (*khóra*), possessed a population of citizens composed by adult free men and regulated life under the exercise of power by governmental organs situated in the fortified center of the city (*ásty*).¹¹ *Póleis* were clearly independent: concepts such as *autono-*

10 In my opinion, this theoretical framework of “narrative transculturation” is useful, especially if compared to other possible ways of explaining the phenomenon of entanglements in legal history. Despite its scholarly tradition, for instance, a term such as “reception” implies a perspective focussing on one of the two parties of the legal historical relationship, i.e. the “receiving” party. “Transfer”, as another possibility, has a morphem “trans-”, which of course implies a movement from one place/side to another one, but the second part of the word relates to the latin verb *fero*, which means “move, take, carry”, which again pays an unwanted (or not necessary) reference to the action of one of the parties performing the action. As far as the word “transplant” is concerned – which reminds of a medical language – it needs to be performed by a third party. My impression so far is that “transculturation” implies a more neutral concept and can be sustained on more objective grounds: attention can be paid to the specific fact of moving a legal tradition from one place to another without any preconception on the quality or characteristics of the subjects involved in the process.

11 On the notion of the *pólis* as a state, in a broad or in a restrictive sense, the discussions have been very extensive and this is not the place to reproduce them. Suffice it to say, in the realm of international relations, it is clear that these cities behaved as true subjects, capable of acquiring rights and obligations. This international legal personality, however, has not been enough to generate uniformity within the critic regarding the “state” character of the *poleis*. Bearing in mind that today the main characteristics identifying statehood are population, territory and government, I do not believe it appropriate to deny that such conditions were present in the Hellenic cities of the classical period, which constituted both a political community and an urban center. The members of the famous *Copenhagen*

mía or *eleuthería* (freedom), frequent in ancient texts,¹² constitute a preliminary version of what would later on be understood as sovereignty.¹³

The acknowledgment of independence in each *pólis* explains the creation of a notion of formal equality among them. The sources insist on this balance between city-states which are independent and do not depend on each other. In Euripides' *Phoenissae*, for instance, a tragedy represented in Athens in the late V century BC, Jocasta describes the value of justice and the need to honor equality (*isótes*) among friends (*phílous ... phílois*), city-states (*póleis ... pólesi*) and allies (*symmákhous ... symmákhous*) (vv. 535–538).¹⁴ It is significant here that equality is thought to be a landmark of personal relations that can be transferred to the public arena of international relations.¹⁵

At the interstate dimension, some authors have identified a general principle on the prohibition of offending “equals” (*mè adikeîn tous homotous*).¹⁶ From this perspective, the appeal to equality – as it will be explained –

Polis Center have often insisted upon this; its founder holds, in fact, that in the Greek world the three elements of the city-state appear in some way but in a different hierarchy from what we would observe in Antiquity: first, the community of citizens, then, the political institutions, and, finally, the physical space (HANSEN [1993] 7–9).

- 12 Together with the adjective *autónomos*, it is frequent to find the use of terms to reinforce the independence of the *póleis* such as *autópolis* (applicable to the possibility to individually decide a certain foreign policy), *autotelés* (fiscal autonomy) or *autódikos* (judicial independence). Some emphatic expressions, such as *eleútheroi te kai autónomoi* (“free and independent,” Thucydides, 3.10.5) or *eleutherotáte* (“very free,” Thucydides, 6.89.6; 7.69.2), underscore that the independence is presented as one of the essential characteristics of the cities, even protected by customary inter-Hellenic law. Cf. TÉNÉKIDÈS (1954) 17–19.
- 13 GIOVANNINI (2007) 98.
- 14 The Greek terms cited here and in every case, appear transliterated; the original accents in our alphabet are respected. The corresponding translations of the Greek and Latin texts mentioned here are personal.
- 15 Indeed, this is the only way to understand the distinction made in the text among persons, cities and “allies” in combat. Some authors even indicate that already in the Greek world, an image of natural equality was introduced, based on a sacred law and on a progressive incorporation into the law of peoples of equality as a logical consequence of the fictional analogy created between natural persons and international secondary subjects or legal persons. The frequent appearance of corporal or material metaphors to name organizations created by men finds its source in ancient testimonies and was developed in detail during the Middle Ages, as stated by DICKINSON (1917).
- 16 Thucydides, 1.42. Already GLOTZ (1915) 98 mentions the importance of equality among city-states by asserting that “entre Grecs, le droit des gens se fondait sur les principes du respect qu'on se doit *entre égaux* ...” (italics added).

becomes useful to overcome the difficulty of practically dealing with the unfair distinction between dominant and subordinate city-states.

The Greeks themselves managed to identify the existence of great and small cities, the former exercising authority, the latter obeying orders.¹⁷ However, these city-states were related to each other under patterns of symmetry, at least if we follow the historical – both literary and epigraphical – sources. When narrating the Peloponnesian War, for example, Thucydides describes the provisions contained in the treaty that was signed in 418 BC between Spartans and Argives (5.77.5–7): the text considers that the city-states located in the Peloponnese, whether big or small (*kai mikràs kai megálas*), will be all independent (*autonómos*) in accordance with their ancient customs (*kattà pátria*).¹⁸ Together with this precedent – which shows the customary nature of the provision, as the text refers to a previous practice – the treaty also provides that, in case of the territory being invaded from outside, the parties to the agreement shall unite to repel the aggression and all allies of Sparta and Argos will stand on equal terms for both of them.¹⁹

The insistence on considering independent both the largest and the smallest city-states – in spite of their notorious differences – should therefore not come as a surprise, at least until the mid IV century.²⁰ We can see *póleis* which are clearly distinct in power and influence signing symmetrical treaties.²¹ It is not unusual, for instance, to find in bilateral conventions a reference to the recognition of sovereignty of all city-states – parties to the

17 AMIT (1973).

18 Cf. also 5.79.1. CALABI (1953) 72 says that, even though it was not a legal distinction, it expressed a relation of superiority linked to the individual “potenza” of some *póleis* in terms of interstate relations. In this sense, it is related to the adjective “first” (*prótos*) which, for example, Thucydides himself uses to identify the “main cities” (*tôn próton póleon*) in 2.8.1.

19 I should point out, following GRAVES in his commentary (1891) *ad loc.*, that these equitable provisions tended, in essence, to limit the strength of the great powers located outside the area of the Peloponnese, mainly Athens. This means that “equality” of the parties is expressly conceived as a counterweight to the real inequality *vis-à-vis* third *póleis*.

20 “City-states varied in size. The extent of their independence differed: some colonies accepted their mother city’s choice of annual magistrates, for instance, and some small cities, while independent, are not likely to have been able to pursue foreign policies distinct from the foreign policy of a large neighbouring city” (MACKECHNIE, 1989) 1.

21 “Treaties between cities of manifestly different strengths were symmetrical” (HUNT [2010] 103).

agreement and third parties – in terms of legal balance. In the context of the Peace of Antalcidas (signed with Persia in 386 BC, where some cities in Asia Minor were released to preserve a better control over Greece), Xenophon states that king Artaxerxes considered the Asian cities to be their own, together with Clazomenae and Cyprus, whereas the rest of the Greek cities – the big and the small ones (*kai mikrās kai megálas*) – would still be independent (*autonómous*).²²

When Pericles had the idea of organizing a Pan-Hellenic congress in mid V century BC with the purpose of restoring those temples that had been destroyed by the Barbarians, to keep the vows made to the gods and to adopt security measures at sea, he summoned all city-states, whether big or small,²³ the failure of the call, perhaps due to the deep differences of criteria among the communities,²⁴ does not preclude the fact that, in his speech, *póleis* were referred to as having the same capacity of negotiating in equal conditions.

Inequality between city-states seems to be frequently denounced as an unfair deal. In 351 BC, a speech by Demosthenes mentions that the Greeks signed two treaties with the Persian king – one of them subscribed by Athens, which was praised by all; the second one by Sparta, which everyone condemned. He criticizes then the inequality among the contracting parties and encourages their formal equalization. According to this orator, rights are defined differently in both conventional instruments: within each city-state, laws grant everyone a common and equal share (*koinèn tèn metousían édosan kai ísen*), independent of whether they are strong or weak (*kai toís asthenésin kai toís iskhyroís*), whereas at the international level the rights are only defined by the powerful against the will of the weak (*hoi kratóuntes horistai toís héttosi gígnontai*).²⁵ Another orator, Isocrates, clearly explains how international treaties should be structured in equalitarian provisions and not in unilateral commands: “We ought to have suppressed asymmetrical provisions and not have allowed them to stand a single day, looking upon them

22 Xenophon, *Hellenika* 5.1.31; Diodorus Siculus, 14.110.3.

23 Plutarch, *Life of Pericles* 17.1. About this proposal for a congress as a precedent of what would become in the IV century BC the Common Peace (*Koinè Eiréne*), cf. HAMPL (1938). GIOVANNINI (2007) 100, n. 50 says that surely the Periclean proposal was actually a belated intervention, following arguments by SEAGER (1969).

24 According to MCGREGOR (1987) 74 the call failed because Sparta did not want to recognize the Athenian leadership as regards religious piety and common policy.

25 Demosthenes, *On the Liberty of the Rhodians* (15), 29.

as commands (*prostágmata*) and not as a treaty (*syntbékas*); for who does not know that a treaty is something which is fair and impartial to both parties (*ísois kai koinós amphotérois ékhsin*), while a command is something which unjustly puts one side at a disadvantage (*tà toús hetérous elattoúnta parà tò díkaion*)?”²⁶ In practice, then, war treaties (concerning alliances or friendship) are placed on the delicate border between a pretended coordination among equals and the unavoidable subordination of subjects to the most powerful. And here language has an essential role to play.²⁷

The first treaty in the Greek world that has been preserved was found in Olympia and dates back to late VI century BC. It refers to an agreement of an offensive alliance between the Eleians and the Heraians in which the provisions on mutual assistance in case of war or any other circumstance are included in perfect equilibrium.²⁸ From this moment onwards, bilateral treaties proclaim in writing that the covenant is agreed and celebrated in balanced terms between the parties.²⁹ This aspect is often revealed in offensive treaties through the inclusion of a clause dealing with the duty for both signatories to have the same friends and enemies.³⁰ In 433 BC, for instance, the Athenians received a proposal from the Corcyraeans to sign an offensive alliance in which they would both need to have “the same enemies and friends” (*toús autoús ekhthrouís kai philous*), but they rejected the

- 26 Isocrates, *Panegyricus*, 176. Cf. the expression *ex epitagmáton* (“on the basis of impositions”) in Andocides, *On the Peace*, 11.
- 27 The groundbreaking book by FERNÁNDEZ NIETO (1975) on war treaties is essential for this issue; ALONSO TRONCOSO (2001) already demonstrated, however, that there is still a need for a systematic study on the agreements of alliance, showing its main characteristics.
- 28 *StV* 110; EFFENTERRE/RUZÉ (1994), n. 52. TÉNÉRIDÈS (1954) 19, n. 3 identifies it as a treaty “sur pied d’égalité.”
- 29 It is the meaning of the expression “*epì toís ísois kai homotoís*” (Xenophon, *Hellenika*, 7.1.13). When he describes the stages of an agreement proposed by the Persian king Cyrus, the historian details that “when they heard the proposal, both parties gave their consent and said that this was the only way in which peace could be effective; and, under those circumstances, they exchanged guarantees of trust (*tà pistá*), and agreed that each party would be independent (*eleuthérous*) from the other, that there would be the right of mutual marriage and work and pasture in the territory of each of them, and that there would be a defensive alliance (*epimakhían ... koinén*) in case anyone insulted one of the parties” (*Cyropaedia*, 3.2.23).
- 30 About this clause, cf. GIOVANNINI (2007) 241–242. The concept of *philia* is fundamental to structure bilateral international relations of reciprocity in the Greek world, as shown by PANESSA (1999), MITCHELL (1997) and LOW (2007) 33–76.

invitation and concluded instead a defensive alliance based upon reciprocal assistance (*tê allélon boetheîn*) in case of attack.³¹ The Corinthians decided as well to keep a previous defensive agreement – centered around the obligation of mutual help, *allélois boetheîn* – and not to sign an offensive treaty with Mantinea and Argos under which the three of them “would fight and make peace with the same peoples” (*toîs autoîs polemeîn kai eirénen ágein*).³² In spite of the repeated mention of the parity among the contracting city-states – which is explicit in all texts – the final determination on the type of alliance (whether offensive or defensive) corresponds in fact to an exclusive decision of the most powerful partner. Language and reality sometimes take different roads.

The greater negotiating power of the most influential *pólis* can be exceptionally noticed in the provisions of certain peace treaties. Some examples show a real hierarchy between the subjects, as is the case with some offensive treaties in which a strong city-state – the war victor, in general – overpowers its weaker counterpart. Sparta was able to enforce its privileged position for the most part of the V century BC: in 403 BC, just to mention one example, Spartans imposed severe conditions against the Athenians in an unequal treaty, forcing them to destroy their walls, to surrender almost all of their fleet and to “have the same friends and enemies as the Spartans” (*tòn autòn ekhthròn kai phílon nomízontas Lakedaimoníois*); they were even obliged to follow the Spartans whenever it was deemed necessary.³³ An analogous obligation to have the same friends and enemies (*tòn autòn ... ekhthròn kai phílon Lakedaimoníois nomízein*) and to follow them as allies is included in the treaty imposed by the Spartans on the Olynthians in 379 BC, taking advantage of the grave famine that had affected them.³⁴ In a similar vein, the

31 Thucydides, 1.44.1 and 1.45.3.

32 Thucydides, 5.48.2. When referring to “defensive alliances,” I am translating the Greek term *epimakhía*, that, for ALONSO TRONCOSO (1989) 166 “entailed a treaty obligation of limited military assistance, this is, confined to the defence of the allied territory.” Interestingly, he often notices that defensive treaties in classical times were written with such an ambiguity that it made them suitable for the justification of aggressive warfare.

33 Xenophon, *Hellenika*, 2.2.20. PISTORIUS (1985) 184–185 identifies the two mentioned provisions, which are typical of this type of treaties, as “Freund-Feind-Klausel” and “Heeresfolgeklausel” respectively. Also BONK (1974) 63–65 examines the content and value of the formulae which established the need to have the same friends and enemies.

34 Xenophon, *Hellenika*, 5.3.26.

Athenians included a parallel clause in the treaties they offered for signature to the Corcyraeans³⁵ or the Thurians:³⁶ in both cases Athens called upon them to have the same enemies and friends as they had (*toùs autoùs ekbthrouòs kai philous toùs Athenaiòis nomízein*).³⁷

The subtle difference in language between those treaties consecrating an equal relationship between the parties and those treaties crystallizing the hegemonic position of only one of them relies on a very light change of the formula, which generates a notorious misbalance when the mutual obligations are left aside. “Having both the same friends and enemies” is totally different from “having the same friends and enemies as X”: to an unaware reader there seems to be a similar syntax that, in fact, shows a very interesting formal mechanism deployed to hide – thanks to an apparently neuter expression – the profound differences existing at the moment of negotiation.

Another example where tensions between independence and subordination in Greek interstate relations are easily noticed is the progressive foundation of international organizations, in which *póleis* participated with a varied degree of interest and commitment. Among these formal organizations we can mention the religious councils (*amphictyonies*) and the military associations – known as *symmakhíai*.³⁸ Greek history shows how the sovereignty of city-states was increasingly engaged during the late V and IV centuries BC with the creation of these federal regimes. A growing opposition between the centrifugal will of unification in supranational structures and the centripetal impulse of resistance towards the preservation of *póleis* as autonomous entities can be easily perceived.³⁹ Even if associations among allied city-states respected and guaranteed the formal equality and independence of each member, they also created a practical foundation

35 Thucydides, 3.75.6.

36 Thucydides, 7.33.6.

37 The situation of the unequal treaty signed by Athens and Botiea is very similar (SIG3 89). Aside from the equitable provisions, two additional obligations prejudicial to the Macedonians were included here: to have the same friends as the Athenians and to not favor the adversaries of Athens with money or by any other means; cf. MARTIN (1940) 373–374.

38 On the legal nature and functioning of these associations, see TAUSEND (1992).

39 BARKER (1927): 509. On the relation between the city and the federal system, between the ancestral laws (*politeía*) and common laws of the federal system, it is interesting to see the testimony given by Xenophon, in which a mind open to new political realities overcoming the strict limits of the city is recognized; cf. BEARZOT (2004).

that ensured the effective supremacy of one of the *pólis* in the group.⁴⁰ Leagues and confederations used to be *de facto* under the guidance of a *hegemón* or leader⁴¹ that was able to decide on the common actions that the organization would take.⁴²

The real inequity, here again, seems hidden under the legal instruments. Aeschines claims that in the Delphic Amphictyony every city-state, the biggest and the smallest ones, only had one vote at the Council (*hékaston éthnos isopséphon gignómenon tò mégiston tói elakhístoi*), when in fact it was evident enough that only some of the *póleis* took the helm on the affairs that were to be discussed.⁴³ An example quoted by Thucydides helps to understand the inherent logic of the distribution of powers in an international scenario during the time of confederations. When in 431 BC, Sparta requested Athens to give autonomy back to its allies,⁴⁴ Athenians replied that Spartans should do the same with their own.⁴⁵ The discussion – initially thought to be related to the recognition of independence of all *póleis*

40 A way to obscure and at the same time highlight the supremacy of a *pólis* in relation to its allies is determined by the inclusion of a “Dualitätsklausel” as, for example, the expression “the Athenians and their allies” (*hoi Athenáioi kai hoi symmakhoi*) in that order; see PISTORIUS (1985) 183. Some authors distinguish between organizations of coordination from those of subordination; cf. BONK (1974) 67–68.

41 VAN WEES (2004) 7, who indicates that this informal position of the *hegemón* was also called *arkhé*, which is usually translated in certain contexts as “empire.” On the *hegemony* as an complex institution from the point of view of international law, see ALONSO TRONCOSO (2003).

42 In these cases, as said before, there is obviously a voluntary limitation of sovereignty, but it must be recognized that there are different types and grades of connection between city-states. A synthetic charter helps TÉNÉΚΙΔÈS (1954) 179 to identify three methods of association, among which the Greek federalism of the time oscilated: he recognizes that there were *confederate associations* (composed by autonomous states), *imperial associations* (in which one *pólis* directed the foreign policy of the group) or *fake confederate associations* (in which one of the associates assumed *de facto* directorial powers, although *de iure* the particular sovereignty of each one was respected). Let me now add to this complex scenario the phenomenon of colonialism; contrary to what is expected, in the Greek world that relation between the metropolis and the colony did not imply a clash between a unique central state and a subjugated people, but a nexus of forces similar to that of political associations, in which both parties of the relation behaved as independent cities. As GRAHAM (1964) 5 states, even though the metropolis had some sort of undefined hegemonic position, “... most Greek colonies were founded to be self-sufficient Greek *poleis* ...”

43 The passage is cited by CALABI (1953) 73.

44 Thucydides, 1.139.3.

45 Thucydides, 1.144.2.

irrespectively of their size – is in fact sustained on less abstract concerns. In the expressions of both Athenians and Spartans, the concept of autonomy is rather employed as a useful argument for every *hegemón* to resist its rival's supremacy.⁴⁶ We are facing, once more, a discourse in favor of the interest of the most powerful city-states.

Texts allow us to infer that, in practice, a *pólis* acting as *hegemón* within a certain organization was granted some particular privileges which were very rarely disputed.⁴⁷ The Athenian regulations show, for instance, that in the case of the Delian League under the leadership of Athens, the less-important allied city-states pushed their judicial independence (their *autodikía*) into the background, so that on many occasions their own citizens were tried by the courts of the main *pólis*.⁴⁸ In the case of Melos, an opposition between the hegemonic strategy and the need to respect the sovereignty of subordinated city-states are visible: whereas Athens proposed the celebration of an alliance treaty unilaterally designed, the Melians wanted to stabilize mutual relations by means of the peace treaty that had to be negotiated jointly between them.⁴⁹

The consolidation of a maritime empire since the mid V century BC – as historians tend to name the regime of expansionist domination of Athens over the islands – accounts for the separation among entities which are politically unequal. The language used, nevertheless, is frequently critical of imperialism⁵⁰ and favors instead a democracy that, under expansionist

46 GIOVANNINI (2007) 102.

47 The consolidation of federations of states did not emerge at that time from multilateral agreements, but essentially from bilateral agreements, most of the times promoted by the *hegemón* looking to increase its number of allies (EHRENBERG [1969] 107, 112).

48 Cf. BALCER (1978) 119–144, who advances the existence of an “Athenian Judicial Decree,” in force until 412 BC, which imposed local justice to the *politai* of allied cities. On the Athenian hegemony in the League, see ALONSO TRONCOSO (2002).

49 MARTIN (1940) 355–356. In this concealment of the imbalance existing under balanced patterns, there is place, however, for mistrust on the part of the less privileged cities: “Interference of some sort in the domestic politics of the allied city was undoubtedly a widely feared consequence of an alliance with a leading state ...” (RYDER, [1965] 24). In the opinion of OSTWALD (1982) and KARAVITES (1982), the *autonomy* functioned in these cases as a guarantee or efficient mechanism for small cities to protect their independence in the face of the political advance of the hegemonic states.

50 Pericles himself, promotor of Athenian hegemony, seems to have confessed that the power exercised by Athens over the allies was in violation of the law; cf. Thucydides 2.60, 2.63, cf. 1.42.

pretensions, is never openly supportive of a superior authority that might destabilize the apparent balance and uncover the real inequalities between the powerful and the weak.⁵¹

IV. Roman treaties in the Hellenized East during the Republican period

The Roman practice of consolidating its imperialistic policy is key to understanding the nature of treaties and the “legal equality” of the signatories. Born as a *pólis* – just like the rest of the Greek city-states – Roman history is interesting in that it shows an evolution towards the search of a *civitas maxima* within the realm of law.⁵² Situated at a crossroad between positive law and religion, treaties (*foedera*) had become an essential normative source since the earliest times of the *urbs*.⁵³ They were solemnly confirmed by an oath sworn by the *collegium* of the fetials,⁵⁴ which constituted the most important way of expressing the Roman interstate law in classical times.⁵⁵ If the testimony of historians is to be followed, it

- 51 At the time there seems to have existed considerable resentment against making evident the supremacy of a city over another one, as rightly indicated by HUNT (2010) 102: “In addition, hegemonic powers bound their subject allies by bilateral treaties or more commonly through a treaty organization such as the Delian League. They tended to emphasize their benefactions to justify their rule over their subject allies. (...) On the other hand, there were various ways that even these obvious superiors tried to obscure their own power. The reason for this obfuscation was the unacceptability of subordinating relationships among status.”
- 52 One is faced with “a general right of intervention of Rome in the politics of its partners, under the pretext of protecting the peace” (TRUYOL Y SERRA [1998] 29).
- 53 FERNÁNDEZ BAQUERO (1998) 156–157.
- 54 Livius, 1.24.4; 30.43.9. The steps destined to the celebration of *foedera* are described by OYARCE YUZZELLI (2006) 122–125. It is necessary to take into account, however, that the Latin word represents a broad semantic field and not every reference to the term entails an “international” dimension of *ius fetiale*, as MÉNDEZ CHANG (2000) clarifies. On the nature of the term “*foedus*,” see MASI (1957).
- 55 In this point, it is necessary to justify the use of the adjective “supranational” which I use throughout this work. Actually, the character of the norms included in the classical treaties signed by Rome in the Eastern world allows us to notice that it tackles the issue of norms placed on top of the domestic legal orders of the Hellenic communities. On the contrary, supranationality is currently not present in the realm of general public international law, but a system stemmed from the consensual will of sovereign states, mainly characterized by coordination on an equal footing; in fact, it might be the case of a quasi-subordination

seems that during the monarchic period a specific vocabulary related to these agreements was put in place (with words such as *foedus*, *amicitia*, *societas*, *indutiae*,⁵⁶ all of them – according to MOMMSEN – based upon the originary form represented by the *hospitium publicum*).⁵⁷

Foedera soon became a frequent strategy to go from the consolidation of regional contacts to the affirmation of Roman presence overseas.⁵⁸ From the internal legal universe, the logic of ‘clientela’ – which were typical of Roman law – went on to become applicable in supranational affairs.⁵⁹ During the period of Rome’s greatest growth, not only were alliance treaties signed with other city-states and neighboring towns, but also with peoples from other regions outside the Latium (*socii*) and with communities that were partially integrated into the Roman political regime, such as Latin allies (*nominis Latini*) and urban organizations, whose nationals had been granted total or partial rights of citizenship (*municipia*) by Rome.⁶⁰

In the course of the progressive enlargement of its scope of influence – consolidated on a political strategy of Romanization by means of the *foedera*⁶¹ – a special reference should be made to the majesty clause (*maiestas*), which has been usually interpreted as a clear expression of the unequal status of the parties to the covenant. This legal clause allowed the Romans to ensure the respect of its own supremacy: the city that accepted the content of the agreement was therefore limited in its practical capacity of action and in its legal competence because of the existence of a duty of obedience and submission to Rome and its allies. This *maiestas* involved the obligation to provide Rome with military forces and field or naval troops upon request.⁶²

reserved for the specific case of powers delegated to the Security Council of the United Nations for the legal use of force.

56 RENAUT (2007) 18–19.

57 Cf. MOMMSEN (1864).

58 FREZZA (1938–1939), PARADISI (1951) and BELLINI (1962).

59 This is one of the main arguments which structured the book by BADIAN (1958).

60 Cf. BARONOWSKI (1988).

61 HARRIS (1971).

62 RAAFLAUB (1991) 576 believes that, contrary to what had happened with the expansion of Athens or Sparta in the V century BC (when they actively interfered in the domestic affairs of their respective allies), the Roman imperial projection was more lasting because it was based on the consolidation of a solid regime of alliances on top of which it rapidly placed itself and where the local autonomies were respected. As we shall see, if in practice the patterns of behaviour differed, it is worth highlighting that in both cases the ways in which

Some scholars consider that the institutional mechanism of promoting and signing unequal agreements was a common praxis for Rome when interacting with the cities in the Italic peninsula during its first centuries as a Republic (the case of the treaty with the Samnites in 354 BC can be recalled in this sense).⁶³ Nevertheless, from the earliest of times the deep disparity of contracting parties was generally concealed behind an apparent – and extremely suspicious – equality. The *foedus Cassianum*, for instance, signed between Rome and the Latin League in 493 BC, provided the basis for the subsequent treaties between Rome and the Italic city-states:⁶⁴ it established a defensive alliance, including mutual assistance and an identical status for both parties.⁶⁵ But this *foedus* should not lead us to think that the relative positions of both parties were similar when the covenant was agreed upon.⁶⁶

Despite their differences, the four treaties celebrated between Rome and Carthage from 509 to 278 BC formalized the bilateral relations through the identification of certain areas of influence for each other on an equal footing, the promise of friendship⁶⁷ and the determination of rights and

supremacy works (and becomes justified), which are hardly ever openly assumed as such, are, however, quite similar.

63 A summary of these treaties celebrated with Italic cities can be found in HEITLAND (1915) 84.

64 Cf. Dionysius of Halicarnassus, 6.952. Perhaps, it is not the only agreement signed between Rome and the Latins; cf. Livius 7.12.7. Cicero (*Pro Balbo* 53) and Livius (2.33.9) also refer to *Foedus Cassianum*; on its subsequent fate and the adhesion to the agreement – in identical terms – of the Hernici (Dionysius of Halicarnassus, 8.69.2) in 486 BC, cf. CORNELL (1995) 299–301.

65 LOMAS (1996) 43.

66 Preceding what would later become Roman supremacy in the III and II centuries BC over less relevant cities, FORSYTHE (2005) 187 holds that in this archaic era, when negotiating with neighboring peoples, “Rome was the main, if not the dominant, member of the coalition.” On the relation of the Roman supremacy over these communities – expressed in the preserved agreements – see PLANCHEREL-BONGARD (1998). On Rome and the agreements celebrated on Italic territory, RICH (2008).

67 In the first treaty, it was established, in the words of Polybius (3.22), that “there will be friendship among the Romans and their allies, and the Carthaginians and their allies.” The second treaty, allegedly from 306 BC, is based upon the text of the first agreement and, in a similar way, also formulated that “there will be friendship among the Romans and their allies, and the Carthaginians, Thurians and the people of Utica” (Polybius, 3.24). The fourth treaty (which the historiographical narration of Polybius presents as the third, 3.25) dates back to 279 BC and “contains the same provisions of the first two,” with some additional norms.

duties for each party and its allies.⁶⁸ However, the growing military and economic power of Rome would break the balance and culminate in the First Punic War.

As soon as Rome decided to expand its authority outside the limits of Italy the contracting modalities were drastically changed. After the First Punic War, they had the Carthaginians sign a treaty (in 241 BC) stipulating some unilateral obligations on them to abandon and evacuate all the territory of Sicily and the islands situated between Sicily and Italy, next to some mutual and reciprocal responsibilities: every party had the formal duty to keep the security of the allies of its counterpart, to abstain – within their respective areas of jurisdiction – from giving orders, building public constructions, hiring mercenaries or receiving the partners of the counterpart as friends.⁶⁹

After the wars against Macedonia, the Romans started to expand their influence to the East and they felt the need to set an appropriate legal basis for their foreign policy.⁷⁰ The desire to increase and spread their power, since the beginning of the II century BC, had led to the will to impose the *ius Romanum* through the signature of numerous treaties of understanding with Greek confederations and independent city-states.⁷¹ They even reached the limits of the civilized world in order to negotiate agreements with the Parthians.⁷²

It is in this context that the relations between Rome and the city-states from the Greek world (during the II and I centuries BC) should be analyzed,⁷³ and this is where the relevance of the paradigm of “cultural transculturation” becomes useful. The number of the treaties between Rome

68 Cf. SERRATI (2006). On the Roman-Carthagenian treaties, see CARY (1919).

69 Polybius, *Histories*, 3.27.4.

70 HEUSS (1933). On the treaties with Tarentum and Rhodes, see CARY (1920). The diplomatic projection to the East clearly follows the logic of Roman intervention in interstate relations in the Greek cities of the continent, as especially happened with the case of the Achaean *koinón* with Sparta, Mycenae and Athens; in this respect, see HARTER-UIBOPUU (1998) 165–195. Thus, for example, on the relations between Roman imperialism and Macedonian communities, for example, see the work of STIER (1957).

71 On this autonomy of the *póleis*, see MILLAR (2002) 224–225. With regard to the debate stemming from the convergence of Roman law and the domestic laws of the East, see BANCALARI MOLINA (2004).

72 On these treaties signed with Parthia, see KEAVENEY (1981) and, more recently, WHEELER (2002).

73 Cf. SCHMITT (1992).

and the eastern Greek cities that have been preserved is smaller than a dozen – additional testimonies should be found in literary sources – and an examination of the texts is essential for a full comprehension of the ways in which Roman diplomacy reproduced the vocabulary and content of the Hellenic tradition of treaty-signing.⁷⁴

Epigraphical evidence provides information on these first agreements signed by Rome and the small Greek communities towards the middle of the II century BC.⁷⁵ With a sole exception, all texts are preserved in the Greek language. Incomplete as they are, they nevertheless provide significant information, since they closely reproduce the expressions and content of the ancient Greek treaties I discussed in our previous section of this paper.⁷⁶

Following the model of parity consecrated in the treaty with the Achaeans,⁷⁷ the treaty celebrated between Rome and Cibyra⁷⁸ – allegedly dated in 188 BC but considered by FERRARY (1990: 224) to have been signed in 167 BC⁷⁹ – included a number of provisions of defensive alliance and friendship (*symmakhía kai philía*), as well as rules concerning the modification of its clauses and, finally, a reference to the need of publication. Similarly, the text agreed with Methymna⁸⁰ – preserved in fragments and of uncertain date – introduced a set of rules of neutrality, some provisions of defensive alliance and the modification clause.⁸¹

74 In opposition, given the fragmentarian character of the preserved texts, we do not often know the complete corpus of the provisions. Nevertheless, as we shall see, the available provisions allow me to conclude that they sought to establish instruments signed on an equal footing.

75 A bibliographical survey of these contacts can be found in BERNHARDT (1998) 36–41. On the significance of these agreements in the legal-diplomatic history of Rome, see SHERWIN-WHITE (1984) 58–70.

76 See BUONO-CORE VARAS (2003), who refers to the Greek expression *synthéke kai bórkoí* that makes reference to the written exchange of the texts and to the required oath (the author clarifies, however, that in Rome the oath was unique and not duplicated, as was the Hellenic case). On the importance of the written nature and the publicity of these agreements preserved epigraphically, cf. MEYER (2004) 96–97.

77 In the opinion of BELIKOV (2003), it is a case of *foedus aequum*.

78 OGIS 762. Recently published under the number 1 in the compilation of epigraphical materials of the region, carried out by CORSTEN (2002) 10–13.

79 GRUEN (1984) 731–733. According to CANALI DE ROSSI (1997) 260, n° 301, the treaty was signed after 129 BC, due to its close similarity with the subsequent treaties cited in the next pages.

80 SIG3 693. Cf. CANALI DE ROSSI (1997) 276, n° 321.

81 On these characteristics shared by all treaties, see the analysis by TÄUBLER (1913).

The only treaty that has been transmitted in Latin – instead of Greek – was concluded with Callatis, a colony of mother-city Heraclea Pontica in the Black Sea.⁸² An important number of monographs and studies have dealt with its main characteristics,⁸³ but still the information that can be obtained on its context is drastically limited due to its fragmentary condition. It is possible, nevertheless, to identify in the text some hints that might suggest that the treaty joins the previous examples, also including some neutrality clauses, rules on defensive alliance, and provisions on modification and publication.⁸⁴

Analogously, and despite the fact that its critical preservation does not allow the drawing of conclusions on its concrete content, the treaty signed with the island of Astypalea in the Dodecanese⁸⁵ apparently included some similar regulations to those provided for in the agreement between Rome and Callatis. In the same vein, the appalling conditions of the transmission of the covenants with Thyreum⁸⁶ and Cnidus⁸⁷ – only the first line survived from the former treaty (“*For the people of the Romans and the people of the Thyrrisenses*”), whereas only a few clauses remain from the latter – has suggested that their content should have been similar to the other contemporary treaties: a first provision of alliance between the signatories, perhaps some rules on neutrality and, in the end, maybe the frequent appeal to the possibility of further modifications.

The most evident example of these *foedera aequa* – i.e., those supranational texts strictly based upon the precise balance of the legal consequences created for both parties⁸⁸ – is the well-known treaty with Maronea (Thrace), found in 1972. The inscription containing the document, dating back to 167

82 Cf. LAMBRINO, S. CRAI 1933, pp. 278–288. Cf. PASSERINI (1935) and MARIN (1948). Given its content, the treaty is frequently related to other treaties signed before, and can be dated back – as far as its signature is concerned – towards the end of the II century BC.

83 AVRAM (1996), (1999b) 2–17 and (1999a) 201–206, n° 1, who has advanced, in light of a comparative philological work, a reconstruction of the Latin text. Moreover, see the work of MATTINGLY (1983).

84 In all these cases, the recognition on the part of Rome of *eleuthería* and *autonomy* as true privileges bestowed upon the other *póleis* with which it related is something that deserves to be considered; cf. GUERBER (2010: 33–77).

85 IG XII. 3.173, RDGE 16; CANALI DE ROSSI (1997) 270, n° 320b. It was signed in 105 BC.

86 SIG3 732. Cf. FREYTAG (2001) 223–231. Specialists have accurately dated in the year 95 BC.

87 It was concluded in 45 BC.; cf. BLÜMEL (1992) n° 33, CANALI DE ROSSI (1997) 381, n° 442.

88 This type of treaties clearly “guaranteed more honourable and favourable terms for the allies ...” (BARONOWSKI [1990] 345).

or 166 BC,⁸⁹ has preserved in its entirety more than thirty lines (10–43) and includes several specific regulations dealing with the obligations and rights typical to this kind of agreement: after the initial statement on the alliance between the parties (*symmakhía*) in parallel constructions (ll. 7–9) and the prohibition of reciprocal war (*pólemos dè mè ésto*, l. 12), the treaty contains two symmetrical neutrality clauses engaging both parties not to allow (in their own territory and in the territory of the cities under their control) the passage of enemies of the counterpart and not to assist them with supplies, weapons or vessels in times of armed conflict (ll. 12–21 and 22–30). Two rules dealing with the conclusion of a defensive alliance continue in the text: each party accepted to offer assistance to the other one if a third party were resolved to attack (ll. 30–33 y 33–36). Just as in the previous examples, the treaty here would end up with a final clause permitting the inclusion or suppression of provisions if both parties agreed to it (ll. 30–41) and a rule demanding the publication of the treaty by both parties (ll. 41–43). It represents, here again, a well-founded discourse.⁹⁰

In this agreement between Roma and Marineia the perfect balance between the two city-states is strictly respected: the same rights and obligations seem to be created for them.⁹¹ In these *foedera aequa* there is a growing distance between the concrete political reality – the greater relative authority of the Romans *vis-à-vis* their counterparts – and a legal fiction that tends to hide the dialectics of domination under a written statement that consecrates a sense of parallelism and sovereign equality.⁹²

89 *SEG* 35 (1985), n° 823 (pp. 218–219). The first edition of the text, with commentary, was made by TRIANTAPHYLLOS (1983). FERRARY (1990) 224, n. 18 examines and discusses the possible dates, contrary to the position adopted by GRUEN (1984) 738–740, who had estimated the date to be the middle of 140 BC.

90 A similar line of thought can involve the treaties comprising the Peace of Westphalia in 1648. I agree with some scholars who consider that the “sovereign equality” of states – now a fundamental principle of international law – is in fact a legal fiction, a myth that has worked well to create a peaceful environment among “equals” and, therefore, to hide the true political inequalities of the modern world. Cf. OSIANDER (2001), BEAULAC (2004).

91 See the analysis of the clauses of the agreement in HATZOPOULOS, LOUKOPOLOU (1987) 101–111 and in STERN (1987).

92 Speaking of the first advances on Italic territory – but in terms easily used to explain all the process of Republican expansionism – AULIARD (2006) 241 states that “la paradoxe apparente de la diplomatie de cette période réside dans l’établissement de quelques traités d’égalité dans un contexte où le rapport des forces est pourtant de plus en plus favorable à Rome...”

However, not every conventional text subscribed between Rome and the Greek city-states reproduced this pattern of symmetry and bilateral stipulations. Polybius (21.32.2–3) and Livius (38.11), for instance, make a reference to the treaty between Rome and Aetolia from 189 BC, where Romans imposed severe conditions and obligations: Aetolians had to respect with royalty the sovereignty and the power of the Roman people (*tèn arkhèn kai tèn dynasteían touù démou tôn Romaíon*), and were also obliged to deny any help to the enemies of the *urbs* (a clause that had no reciprocity whatsoever) or even to have the same enemies that Romans have.⁹³

In this example, which is not isolated and responds to a common landmark in the conventions signed by Rome in the East,⁹⁴ it is possible to identify a very particular language related to control and superiority. Greek words such as “supremacy” (*arkhè*) or “power” (*dynasteía*) are essential to understand the nature of the *foedera iniqua*: in these agreements the primacy of Rome is perceived, for instance, as long as its counterpart is obliged to identify the Roman enemies as their own.⁹⁵

There are other examples on this particular relationship between contracting parties: the treaty with Aphrodisias,⁹⁶ dated back in 39 BC, included a provision that established an exemption in the payment of taxes in favor of

93 On the importance of the majesty clause in this treaty and its implications, cf. NICOLET (1980) 45–46. I do not agree, however, with its view of the principle, which tends to see in the *maiestas* a social materialization of Rome’s national interests in lieu of a political projection of imperialism.

94 Speaking of a citizen of Gades and the problems entailed in dual citizenship for his admission as a Roman, Cicero (*Pro Balbo*, 41) asserts that there will be eternal peace and, also, a clause is included in the agreement which does not always appear in Roman treaties, stating that Gadians must politely defend the supremacy (*maiestas*) of the Roman people, which implies that they were the subordinated party of the treaty. The Ciceronian passage distinguishes, on the one hand, what a treaty should be (*foedus*) signed by old relations, trust or the shared dangers (*officiis vetustate fide periculis foedere coniunctis*) and, on the other hand, a situation of arbitrary imposition of unjust laws (*iniquissimas leges impositas a nobis*).

95 These *foedera iniqua* “limitavano per diritto nella libertà e politica estera e sanzionavano giuridicamente il primato di Roma” (ACCAME [1975] 100). Despite the fact that this expression is clear in its sense, it must be said that it is not a technical term of Roman law, as clarified by DAHLHEIM (1968) 119–121 and, especially, by GRUEN (1984) 14: “The phrase *foedus iniquum* appears but once in the ancient authors and then clearly without technical significance. *Foedus aequum* may be found more often. But it has no stronger claim as a technical term.”

96 REYNOLDS (1982), n. 9. CANALI DE ROSSI (1997) 374, n° 438.

the local population. Aphrodisias was a city situated in the middle of the *imperium* and was forced to respond faithfully to the requests of the metropolis, so perhaps the granting of these economic advantages was an acknowledgment related to a previous behavior of the *pólis* in benefit of the Roman people, as an act of gratefulness. This privilege granted to the Aphrodisian citizens, nevertheless, implied in contrast a complete obedience to Roman power.

Two agreements were celebrated by Rome with Mytilene,⁹⁷ the first one in 46 BC⁹⁸ and the second one in 25 BC. The last one⁹⁹ includes a provision on jurisdiction, two reciprocal sections on neutrality, a bilateral clause of defense in case of aggression and, finally, some declarations confirming the possessions of the Mytilenean people on the island of Lesbos and the continent. It might seem strange that Rome unilaterally recognizes a number of rights of the Mytilene inhabitants, but the Roman respect for the foreign territory is soon compensated in the treaty by a domination clause. The logic persists: behind the granting of rights – whether economic as in Aphrodisias or territorial as in Mytilene – these conventions imply a strong conformity to the authority of the *urbs*. This is precisely what TÄUBLER (1913) called ‘*Myschtypen*,’ bilateral treaties – apparently symmetrical – that, apart from the egalitarian commitments related to the establishment of mutual alliances, present some additional clauses that mark a substantial difference between Rome and the smaller Greek cities.¹⁰⁰ It seems evident that, in each case, conceding advantages to the Eastern city-states covers the real legal intention of consolidating Greek subjection to Roman hegemony.

The treaty signed by Rome and the Lycian confederation in the I century BC, which has been preserved almost in its entirety and published only some years ago,¹⁰¹ can show how Roman imperialism resorted to a diplo-

97 RDGE 26.

98 IG XII. 2.35, SIG³ 764, CANALI DE ROSSI (1997) 378, n° 440.

99 IG XII. 2.36, IGR IV, 34, RDGE 73.

100 FERRARY (1990) 233–234 considers, in fact, that the Roman-Mytilenean treaty is a clear example of ‘*Mischtypus*.’

101 MITCHELL (2005). The treaty was transmitted on a bronze plaque preserved in the Martin Schøyer Collection in London and Oslo, and was only made public in 2003; it represents an agreement signed by Julius Caesar himself on July 24, 46 BC and constitutes, in our opinion, a unique source to understand some of the aspects of the law applicable to the relations between Rome and the independent communities, serving as a true testimony of certain Roman guidelines of ‘supranational’ law.

matic strategy in order to negotiate agreements enforcing its leadership.¹⁰² The provisions contained in the treaty became a useful instrument of territorial expansion. If Rome needed to justify its supremacy in legal terms, it is evident that the language of treaties is crucial.¹⁰³

The first lines of the agreement employ vocabulary which reproduces the ancient Greek treaties in their own terms. Lines 7–10, for instance, resort to a technical referent to the creation of an alliance (*symmakhía*) and the establishment of a mutual peace (*eiréne*).¹⁰⁴ Under this Hellenized background, the Roman-Lycian treaty includes the same clauses which were contained in the treaty with Maronea and other eastern *póleis*: the creation of a defensive coalition (ll. 17–22), the conception of an offensive plan to fight against third city-states (ll. 22–24 and 24–26, respectively) and last the frequent provisions authorizing the modification of the content of the convention (ll. 69–73). Nevertheless, these equilibrated provisions are set next to some new obligations and rights, some of which were originated over the principle of parity (ll. 26–64). The text postulates a balanced interdiction of exports and imports (ll. 26–32), some parallel clauses on jurisdiction (ll. 32–43) and the prohibition of taking sureties (ll. 43–52). Perhaps one of the main aspects of the treaty is that it stands as the first example of a direct source providing information on the implementation of the traditional jurisdiction of Greek communities in front of the Roman federal administration in the East.¹⁰⁵ The agreement also established the

102 I have examined in detailed the content of this treaty in BUIS (2009).

103 On the characteristics and importance of this Confederation, see LARSEN (1957), MORETTI (1962) and JAMESON (1980). On the epigraphical documentation obtained in the area of Lycia, see the edition of the published proceedings in SCHULER (2007). We can say that, despite having been found for centuries under its hegemony, Lycia was the last Hellenistic state to formally join the Roman Empire. In the year 43 AC, under Emperor Claudius, due to internal disturbances and the death of some Roman citizens – as indicated by Dio Cassius and Suetonius, *Claud.* 25.3 – Lycia acquired the status of province, although it is not known with certainty if it did so as an autonomous entity (probably with its capital in Patara) or together with Pamphilia in a joint prefecture. In any case, Lycia was, to the Romans, a sort of cultural and geographical unity, and it was considered as such in the Greek and Latin texts.

104 On the importance of these notions in the world of Greek interstate relations, see BALTRUSCH (1994).

105 Regarding the commercial transfers, if those who transferred prohibited goods to the enemies of Rome or of the Lycian Confederation were discovered *in fraganti*, the agreement expressly established that they had to be taken before the *praetor peregrinus* in Rome

principle of the *forum domicilii*, as it protects the Lycians from possible legal actions brought before the judicial system of the Roman governor. No doubt that this should be taken as a special privilege granted by Rome to the Greek population in Lycia.

This apparent *aequitas*, however, vanishes away when some provisions benefiting one of the two parties are introduced.¹⁰⁶ The treaty contains a unilateral clause confirming some territorial arbitral decisions in favor of the Lycians (ll. 52–64): the Lycian borders were *secured* and *guaranteed* by the law of Caesar.¹⁰⁷ In light of the last expression, the respect of the frontiers of the Lycian *koinón* is immediately compensated by the legal acknowledgment of Roman superiority. This is enforced by l. 9: “*Let the Lycians observe the power and preeminence of the Romans* (τὲν τε εὐξυσίαν καὶ ὑπεροκῆν τὲν Ῥωμαίων) *as is proper in all circumstances.*”

The terms *εὐξυσία* and *ὑπεροκῆ*, emphatically placed at the beginning of the sentence, are able to translate into Greek two Latin concepts of great importance for the Roman political and diplomatic culture: *imperium* and *maiestas*.¹⁰⁸ These are two fundamental notions to explain the consolidation of Rome’s preeminence *vis-à-vis* the city-states taking part in the Lycian confederation, and their inclusion here is not accidental: they are helpful to fracture the normative balance, to transfer the Roman vocabulary on

or before the highest ranking official of the Confederation in case of arrest in Lycia (ll. 28–31); cf. KANTOR (2007) 9–10. The text does not offer any differentiation in the legal treatment between Romans and Lycians, and the principle of *forum delicti* is established as the applicable jurisdiction, contrary to what will happen in the following lines in the case of criminal sanctions. Indeed, when lines 32 to 37 deal with the cases of death penalty, the solution for jurisdiction and competence offered by the agreement holds that, against a Roman, a trial must be carried out in Rome, following Roman law, while a Lycian could only be accused in Lycia, according to the provisions of domestic laws (ll. 34–37). Finally, it is possible to observe in lines 37 to 43 provisions destined to offer a response for other legal controversies which might arise between Roman citizens and Lycians. Indeed, if a Lycian was accused, he could only be brought before a magistrate in Lycia according to the domestic legislation, but if the matter concerned a Roman, any Roman magistrate or promagistrate, whom the parties contacted, must set a court, in a way that the sentences are reached in a safe and just manner.

106 This is why GUERBER (2010) 72, n. 167 concludes that this Roman-Lycian treaty also fits within the hybrid category of the ‘*Myschtypen*.’

107 It was normal to refer to the figure of the Emperor for the solution of provincial frontier conflicts, as explained by BURTON (2000) 213.

108 RDGE. On the concept of *imperium* in Eastern Roma, cf. BERNHARDT (1971).

maiestas to the Greek document, and to strengthen consequently a substantial inequity supporting the absolute primacy of the conquering power.¹⁰⁹ The treaty exhibits then a concrete provision – typical of the *foedera iniqua*¹¹⁰ – that hides behind an apparent *synállagma* and contributes to undermine the initial legal evenness of the first lines of the agreement.

V. Some concluding remarks

When explaining the Roman practice of signing treaties across the Greek world, Kallet-Marx (1995: 191) attributed the initiative of starting negotiations to the Greek city-states, which were looking forward to enjoying the security obtained by the fact of belonging to the circle of the *amici populi Romani*. In his opinion, Greeks also publicized the alliance as an award granted by the powerful metropolis as a result of the royalty and fidelity of the *pólis*. I contend that such an argument only underlines the importance given by the Greeks to the *formula amicorum* and to the benefits that derivated from it, but does not take into account the importance given by the Romans themselves to the signature of *foedera*.¹¹¹

I submit that the main treaties that Rome decided to sign in the eastern provinces towards the end of the Republic display certain characteristics of *foedera aequa*, in so far as they seem to lay down an equality between the parties to the treaty. But at the same time, that parity does not correspond in the real world to the profound differences between Rome – as a hegemonic power – and the small Hellenistic cities.¹¹² GRUEN (1984) explained this

- 109 On *maiestas*, the works by GUNDEL (1963) and GAUDEMET (1964) are of paramount importance. This fundamental principle, which imposed Roman hegemony to the rest, was reflected in the *maiestatem populi Romani comiter conservanto* clause (cf. Cicero, *Pro Balbo* 16.35). It is a concept which, according to BAUMAN (1986) 89–91, lacks any parallel in the treaties signed among Greek cities.
- 110 Referring precisely to the *maiestas* clause, LAURENT (1850) 206 concludes: “Il était impossible de constater plus clairement la supériorité des romains et la dépendance du peuple allié. Les conventions qui contenaient cette clause étaient proprement qualifiées de *traités inégaux*.”
- 111 KALLET-MARX (1995) 196 is clear when stating that, in his opinion, “Rome did not found its empire in the East upon the treaty relationship.”
- 112 This ambiguity in the international relations of Rome with the Eastern *póleis* was already identified by BURTON (2003). Admiration towards the Greek world in no way hindered the conquest of its territories by Rome; in the words of CAPOGROSSI COLOGNESI (2009) 208, “...i circoli più accentuatamente imperialistici erano stati anche più spiccatamente

custom by considering the treaties to be simple acts of courtesy; similarly, FERRARY (1990) determined that the equivalence of the parties was due to the symbolic function of conventions.¹¹³ It must be said, however, that these two interpretations leave aside the implicit legal purpose of treaty signing, as well as the need of Rome to rely on (and benefit from) the long-established tradition of interstate relations in the Mediterranean.

Through the deliberate use of the *par conditio*, the distinction between a *foedus aequum* and a *foedus iniquum* becomes blurred, especially if we notice that there is always a will of imposing a political dominance: even in bilateral clauses there is place for Roman command.

The explicit granting of specific unilateral rights to the counterpart – as perceived in the treaties signed with Aphrodisias, Mytilene and the Lycian *koinón* – is, in fact, a subtle way of creating an appropriate environment for shaping a higher authority and asserting power, of founding *exousía kai hyperokhé*. But this is only possible when the models known to the counterpart are manipulated and their vocabulary is duly appropriated. By employing the traditional Greek treaty schemes (well-known to them since classical times)¹¹⁴ with a new intention, Rome absorbed the model with the aim of achieving its own political goals. This is why the anthropological and legal concept of “narrative transculturation” might provide a significant tool to understand the Roman manipulation of Greek diplomatic instruments. It is not by chance that the Roman texts insist on referring to the contracting parties as “Greek,”¹¹⁵ that they were written in the language of the weak party¹¹⁶ and that they mention the long-recorded vocabulary on independ-

filoellenistici: aperti e interessati alla cultura e ai valori del mondo che essi si apprestavano a sottomettere. Tra l'altro i Romani, a differenza di altre grandi esperienze imperiali proprie dell'età moderna, non erano distorti nel loro approccio alla civiltà ellenistica da quei pregiudizi religiosi e culturali che avrebbero progressivamente scavato fossati insuperabili tra governati e governanti, mirando tutta l'esperienza colonaria moderna.”

113 FERRARY (1990) 225.

114 On this point, we do follow KALLET-MARX (1995) 198, for whom the analyzed treaties are full evidence of “Rome’s unwillingness to revolutionize the institutions of the Hellenic world.” However, whereas this author considers that these agreements were merely symbols of loyalty towards Rome – and in that sense functional to the *imperium* – I choose to emphasise the Roman use of the treaties as sources to assert its own power.

115 On the emphasis in the Roman testimonies about the Greek character of the Asian *koiná*, see FERRARY (2001).

116 VIREECK (1888) concludes that the treaties were translated officially into Greek by Romans in Rome, which shows the political importance granted to the preparation and

ence, sovereignty, autonomy and friendship typical to Greek city-states from the V century BC.¹¹⁷ The Hellenic interstate language is used but, instead of being respected, becomes subverted when transplanted into the Roman landscape.

Rome creates an efficient discourse to interact with the eastern Greek world. Profiting from the experience of its adversaries, Roman treaties create a space of political tension and struggle which is hidden behind the cultural appearance of friendship, alliance, peace and respect for Greek habits in diplomatic affairs. Ancient legal history offers here an example of a normative entanglement which may illuminate the complex relationship between imperial longing and a law ideally based upon equality and balance. Roman legal ‘reception’ of Greek treaties provides us with an interesting example of a narrative that enforces the fiction of equality to justify expansion, a narrative that reproduces the cultural pre-text to find an adequate *pretext*. It is all about transplanting a legal model to a new objective. It is all about re-using well-known mechanisms to give them a new cultural assessment. As a result of a smart legal transculturation, Rome was successful in his purpose of deceiving Greeks in order to find valid grounds and efficient ways to fund in law its growing international supremacy.¹¹⁸

submission of advantageous documents to the counterpart, making them available in the local language.

- 117 The lexicon which the Romans used, both in Latin and in Greek, is useful to rethink old concepts of extensive tradition in Hellenic diplomacy, such as the equivalences *amicitia / philia, societas / symmakhía, libertas / eleuthería*. On the functionality of the significant pairs of terms, cf. BERNHARDT (1998) 11–35.
- 118 JONES (2001) 18 analyzes the Roman monuments in the region and interprets the appropriation of local Greek values by the *urbs* as a part of a complex mechanism destined to the preservation of the memory of the Roman Republic in the Greek cities: “Memory is kept alive by gratitude (notably towards the memory of Lucullus and Pompey); by pride in the services which the cities had performed for Rome; and by a desire to maintain the privileges which Roman imperatores had conferred on cities, on temples, or on corporations like the guild of athletes.” I believe that this cultural policy is explained, not only by the gratitude towards certain characters, but by the pride of the services the cities rendered to Rome or for the desire to maintain the privileges. It is also a way of visually and discursively constructing a space of supremacy and power, according to the diplomatic advances hidden under an interstate “parity.”

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A Transnational Empire Built on Law: The Case of the Commercial Jurisprudence of the House of Trade of Seville (1583–1598)

1. Introduction

The Castilian political culture of the Early Modern period was built upon the figure of the monarch, progressively conceived as the main source of jurisdiction of the kingdom. The king was the head of the social body, a position which had the essential duty of the administration of justice. The justification of the royal institution in Castile – already manifested in the medieval tradition of the *Siete Partidas* – was based on the monarch's duty of keeping the kingdom in peace and justice. The king was a guarantor of the justice of the kingdom, a task that could be verified in practice through different ways: on the one hand, judging, legislating, punishing criminals, and protecting Christianity.¹ On the other hand, he was conciliating the plurality of jurisdictions that resulted from the different corporations that coexisted inside the Hispanic Monarchy.

Power in Castile was naturally distributed among the different corporations that integrated the kingdom. All these corporations recognized the king as the external representation of the unity of the social body, who was in charge of keeping the harmony among the plurality of jurisdictional privileges.² In this manner, in Castile prevailed a contractual conception of the royal power, where the justice assignment of the king was corresponded with his recognition as the main source of jurisdiction in the kingdom by all the members of the social body.³ Still in the 16th century, the recognition of the royal power alludes to a feudal past, in which lord and vassals mutually corresponded with reciprocal obligations; that reciprocity was the core of

1 *Siete Partidas* 2.1.1 and 3.1.3.

2 HESPANHA (1992) 28–31.

3 PIANO MORTARI (1982) 95–112; THOMPSON (1990) 69–98; PRODI (2008) 155–161.

their relationship. The sovereign was neither the exclusive source of jurisdiction in the kingdom nor the owner of the kingdom's wealth; he was only a guarantor and an administrator, a head whose actions affected all the members of the social body.⁴

To satisfy the duty of justice was not an easy mission in the Hispanic Monarchy, especially in the 16th century. To the varied jurisdictions, laws and privileges that coexisted inside the kingdom (i.e., manorial, ecclesiastical, professional, etc.), it was necessary to add the jurisdictions of the territories that had been incorporated into the crown since the Middle Ages. The territorial expansion of the Hispanic Monarchy reached its climax in the 15th century, first with the annexation of the Kingdom of Aragon as a consequence of the marriage of the Catholic Kings; then with the conquest of Granada and the discovery of America in 1492. During the 16th century the expansion continued. The Emperor Charles V received from his father the European possessions of the royal houses of Habsburg and Burgundy. Later, in 1581, his son Philip II was crowned as the King of Portugal and all its colonial possessions.

Steadily, the Iberian Castile was replaced by a kingdom with global dimensions. During the kingship of Philip II, the crown was constituted by heterogeneous communities settled not only in Castile or in Europe, but also in America, Africa and Asia.⁵ How did the king achieve the guarantee of law and justice to all the corporations of the social body in a kingdom with territories spread all over the world? Since the figure of the monarch was not enough to keep in peace the varied jurisdictions of the territories that were part of the crown, it was necessary to provide enough judges and institutions for the administration of justice. The king acted through his magistrates which were an extension of him, forming an inseparable unit.⁶

4 While in the Middle Ages the essence of the royal institution in Castile was founded on its divine origins, the late 16th century was a period of transition from that medieval tradition, to the understanding of the king as a guarantor of social order. This idea is consolidated in the 17th century, as it is shown by the ideas expressed by the jurist Diego de Saavedra Fajardo in 1640. According to Saavedra, the king's power arose from the community's need to have a unique power to keep it in peace. For this reason the prince had the power of the administration of justice; a task that he had to observe in order to preserve his royal position. SAAVEDRA FAJARDO (1819) 216–218.

5 VAN KLEFFENS (1968) 264; SUBRAHMANYAM (2007) 1359–1385.

6 CLAVERO (1996) 27–33; GARCÍA MARÍN (1986) 27–82; ALONSO (2001) 15–42.

In this sense, the institutional peak reached in Castile in the end of the 15th century responds to the huge increase of its dimensions. Each one of the regions incorporated into the Crown had an exclusive institution in charge of its matters.⁷ Obviously, the New World was not an exception. In 1503 the first justice institution for the Indies was founded, the House of Trade of the Indies (*Casa de la Contratación de las Indias*),⁸ followed in 1524 by the Royal and Supreme Council of the Indies (*Real y Supremo Consejo de las Indias*).⁹ Through these institutions and their judges, the Spanish monarchs ruled the overseas lands from the Peninsula. The House and the Council of the Indies were the highest authorities in Indies matters; however, they were settled in Castile. It was necessary to establish in America other institutions that could observe their decisions leading to the creation of the different American audiences.¹⁰

2. The House of Trade of Seville: A transnational institution of government

The immediate years that followed the Columbian discoveries were enough for Europeans to realize the economic and material importance of the Indies. Awareness of the continent's treasures stimulated the development of a commerce in which everybody wanted to participate, causing its exponential growth. The Spanish kings also understood that expeditions to the Indies had become more and more frequent and that the exchange of goods and values required institutional and legal regulation. Thus, in Alcalá de Henares on January 20, 1503, the monarchs ordered the creation of the House of Trade of the Indies in Seville.

7 The Council of Castile had existed since 1385, and in 1494 the Council of Aragon was created. In the 16th century Navarra had its own council as well. The Council of Italy was founded in 1555, and in 1588 one was established in Flanders. Because of the union of the crowns, in 1580 the Council of Portugal was created. MOLAS (1984) 80–114; ALDEA (1980) 189–205; CANET (1999) 565–598.

8 De CARLOS BOUTET (2003); ACOSTA (2003); CERVERA (1997).

9 To this day the most prominent monograph dedicated to the Royal Council of the Indies is that made in the 1930s by SCHÄFER (2003).

10 Throughout the 16th century, the majority of the Indies audiences were created: Santo Domingo, New Spain, Panama, Guatemala, Lima, Santa Fe, New Galicia, Charcas, Quito, Chile and Manila. In the 17th century the audience of Buenos Aires was founded, and in the following century those of Cuzco and Caracas appeared.

On its origins the House was only an institutional mediator in the administration of the commerce with the New World. During the 16th century, the institution progressively became the most important official center of the Castilian commerce and its Atlantic diffusion.¹¹ The consolidation of the commercial routes and the exchange of goods between those lands, propelled the institution in an undeniable international prominence, highlighted in 1569 by the jurist Tomás de Mercado: “The House of Trade of Seville and its businesses are the richest and most famous of the world. The House is like the center of all the merchants of the world, because the truth is that before, Andalusia and Lusitania used to be the end of the world; but discovered the Indies, they became the middle.”¹²

The House emerged as a coordinating institution of the trade with the Indies, a position that included a plurality of powers. The purpose with which the House was created consisted of the establishment of a space that served as a warehouse and account office for trading.¹³ Its main responsibility was the organization of commerce, serving as an authority in charge of the registration of the goods loaded in the merchant ships, and of the people circulating between the New World and the Peninsula. The House of Trade also operated as a tax collector, and its officers received all the consignments of gold and silver that arrived in Spain from America.¹⁴

The House of Trade also had to organize the protection of the *Carrera de Indias*, monitoring the security conditions of the ships and the oceanic trade routes. In this sense, the institution constituted a *chamber of knowledge*¹⁵ which concentrated all the theoretical and practical information obtained from navigation. The House was a scientific center that promoted the development of cosmography, where the pilots of the *Carrera de Indias* had to design maps and elaborate nautical handbooks and treatises. With all this information they depicted the official map of the world called *Padrón Real*.¹⁶

11 GARCÍA-BAQUERO (1992) 348.

12 MERCADO (2008) 38.

13 SERRERA (2003) 50.

14 CERVERA (1997) 65–155.

15 Some historians of science consider that the House of Trade was a chamber of knowledge. This means that the House constituted an authentic scientific center in charge of the collection, analysis, and diffusion of the information coming from the New World in many different fields of science like botany or cosmography. BARRERA (2006) 35–55; CAÑIZARES-ESGUERRA (2006) 19.

16 PÉREZ-MALLAÍNA (1983) 307–317.

Likewise, the House of Trade had jurisdictional power to punish infractions of the norms that regulated the Castilian commercial monopoly over the Indies colonies. This condition converted the House into *the most important court of the Indies established in Castile*, quality that from 1524 onwards had to be shared with the Council of the Indies.

Since its creation, the House had the competence to resolve the civil and criminal disputes that arose from the *Carrera de Indias*,¹⁷ even if the institution was not conceived as a court. The first ordinances of the House of Trade were not considered to be any kind of jurisdiction, circumstance that caused conflicts of competence with other Sevillian tribunals.¹⁸ However, the repeated jurisdictional practice of its officers caused the legal recognition of its competence.¹⁹ In 1583 the House of Trade acquired the category of audience. The growth of commerce with the Indies needed a tribunal in Seville for efficiently settling its problems. In this manner, the ordinances of 1583 gave jurisdictional autonomy to the House in all civil and criminal trials related to the Indies.

Originally, the audience of the House comprised two judges (*letrados*), but in 1596 a third judge was added. From 1583 onwards, the House of Trade and the Council of the Indies were the only peninsular tribunals with legal competence over the Indies: The House with regard to civil and criminal matters, and the Council of the Indies as an appeal court for the lawsuits that concerned more than 600,000 *maravedis*. The trials concerning an inferior amount were settled by the judges of the House in the second instance as well.²⁰

The judges of the House of Trade could judge in any lawsuit coming from the *Carrera de Indias*. As the city of Seville was the only authorized port from which the Indies could be navigated, as well as the compulsory destination on the return to the Peninsula, it was not rare that those who participated in the overseas enterprise, after trading in varied points around the world, presented their lawsuits before the jurisdiction of the House. This was because the institution had direct control over the goods that arrived

17 CUESTA (2001) 36–42; TRUEBA (1988) 21–61; TRUEBA (1982) 93–131.

18 PETIT (2003) 119–130.

19 This jurisdiction was recognized by a royal decree published in Burgos on September 25, 1511, confirmed as well by the ordinances of 1530. CERVERA PERY (1997) 138.

20 SCHÄFER (2003) 152–154; CERVERA (1997) 137–141; HEREDIA (1970) 220.

from the Indies. All the commodities transported in the fleets *had to be deposited in the House of Trade*, increasing the possibilities of the creditors to recover payments with the goods that their debtors received in the fleets.²¹

3. The House of Trade of Seville:

A transnational institution of justice

The House of Trade had administrative and judicial influence in different regions, which immediately alludes to the transnational character of the institution. The use of the term transnational is not accidental, even if the term could be anachronistic to some historians. The term has caused particular discontent among scholars who see in the concept the limits of the nation state.²² They consider that the transnational perspective is only valid to explain interconnected phenomena between nation states, being incorrect when applied to prior historical contexts. Nevertheless, other historians have shown the benefits reported by the transnational approach even in the Early Modern period.²³

Certainly, the national part of the term does not intend to connote the existence of nation states in the modern era. The term needs to be used with certain nuances in mind: Firstly, its etymological root. Nation derives from the Latin *nascere* or *natio*, referring to the persons that are born inside of a concrete community. Secondly, considering nations as *imagined communities*,²⁴ whose members are provided with a collective conscience based on the common cultural links that constitute their identity.

That understanding of the term nation is present in the Castilian sources of the Early Modern period, as it is evidenced by some of the trials of the House of Trade of Seville. For example, in 1584 the public prosecutor of the House denied a Portuguese merchant permission to trade in the Indies because he belonged to a nation different from Castile.²⁵ Only Castilian

21 MARTIRÉ (1997) 229–235.

22 BAYLY (2006) 1441–1464.

23 YUN (2007) 88–98.

24 ANDERSON (2006) 6.

25 “Tratar y contratar en las yndias de su magestad del mar ozeano solo se permyte a los vezinos y originarios destes rreynos y no a los estranxeros de estos como lo es la parte contraria de naçion portuges.” A.G.I., Escribanía 1070 A, f. 1 verso. Arguments of the public prosecutor Busto de Bustamante to deny the legal permission of trading in the Indies to the Portuguese merchant Manuel Correa.

natives – those born within the Castilian nation – were able to trade in the Indies; others were considered as foreigners.²⁶

The novelty of using the transnational approach to analyze the effects that the jurisdiction of the House of Trade had in different nations does not involve the study of the global interactions maintained by the institution with other European or American courts. These kinds of contributions are not new, and they have been already exploited by historiographical trends like the Atlantic history, the history of the empires or the history of commercial relations on a global scale.²⁷

The main contribution of the transnational perspective lies in the study of the local effects of those interconnections in the House of Trade. Indeed, the integration of the local into the transnational is crucial to understanding the transnational projection of the justice administered by the judges of the House.²⁸ Only considering the concrete political, economic and social context in which the House's audience performed its activities will be possible to demonstrate its transnationality.

The transnational approach highlights very well the particularities of the context of the House of Trade of Seville. The prefix *trans* indicates something that goes across or beyond something, in this case, nations, offering a sense of constant movement that recreates the global dimension of the judicial mechanisms of the institution.²⁹ The jurisdictional powers of the House of Trade had practical effects in different nations: On the one hand, the Spanish monarchy was a composite monarchy.³⁰ Politically, the monarchy was a composite of different kingdoms (i.e., Navarra, Aragon, Flanders, Portugal, etc.) that demanded the recognition of their own laws and privileges, despite having the same sovereign in common. On the other hand, the *Carrera de Indias* was an economic enterprise in which many interests like French, Genoese, Portuguese, or English were intervened,³¹

26 HERZOG (2003) 64–68.

27 YUN (2007) 90.

28 YUN (2007) 94–95.

29 The adjective international could be preferred to the transnational one. Nevertheless, this concept shares the same problems of the transnational terminology with regard to the use of the nation for explaining the culture of the Early Modern period. Likewise, the term international has acquired a special meaning that alludes to the diplomatic relations between states, a connotation that the adjective transnational does not have.

30 ELLIOT (1992); ELLIOT (2009) 1–24.

31 VILA (2009) 57–74.

and whose members were deeply involved in commerce with the Indies, as well as the problems this entailed.

The local effects of the transnational jurisdiction of the House of Trade will be shown through its commercial lawsuits in a period that spans the official foundation of the audience in 1583 up to the end of Philip II's kingship in 1598. Lawsuits are preserved in the General Archive of the Indies (*Archivo General de Indias*),³² and they constitute the main analytical instrument to investigate how the jurisdiction of the House of Trade had to be in practice in order to effectively resolve the problems in which many nations were involved. Thus, the main purpose of this paper will be to emphasize the qualities of that jurisdiction and their contribution to the legal maintenance of transnational commerce with the Indies through a specific case: the foreign participation in the *Carrera de Indias*.

4. Trading in the Indies: A Castilian privilege

The Hispanic monarchy organized the economic exploitation of the Indies upon the basis of a monopoly. Such monopoly had two essential characteristics: First, Seville was the only authorized port to trade and navigate in the Indies. Second, only Castilian natives were allowed to trade with the New World.

The structure of the monopoly faced some difficulties in practice. On the one hand, the advantages originally offered by the city of Seville as a unique port were progressively surpassed by a more demanding commerce. The increasing mercantile flows necessitated the opening of other Spanish ports³³ and in the 18th century the accessibility of Cadiz definitely replaced the city of Seville as the most important mercantile center of Andalusia.³⁴ On the other hand, the huge dimensions of the New World prevented Castilians to meet the commercial demands of the colonies all on their own.

The American businesses legally had to be national, an exclusive of Castilian natives.³⁵ The rule was not coherent with the commercial reality

32 The sources that have been used in this paper are the court records of the House of Trade. They are located in the sections *Escribanía de Cámara de Justicia* (files 1069 A to 1074 B) and *Contratación* (files 723 to 746) of the General Archive of the Indies (A.G.I.).

33 PÉREZ (2000) 85–90.

34 GARCÍA-BAQUERO (1988); CRESPO (1996); BERNARD (1955) 253–285.

35 GARCÍA-BAQUERO (1992) 19–53; OLIVA (2004) 15–23; BUSTOS (2010) 41–44.

of the Carrera de Indias, in which many imagined communities intervened. Even the members of kingdoms that in the end of the 16th century were part of the Hispanic composite monarchy were excluded of the privilege (i.e., Sicily, Naples, Flanders or Portugal).³⁶

Notwithstanding, the participation of foreign capitals was already present in the support of the first American exploratory voyages.³⁷ Foreigners introduced themselves into the Carrera de Indias until they became a crucial part of it. In this manner, the urgency of their presence implied important administrative procedures. The principal consequence was the establishment of a formally closed commercial policy that in practice was provided with some legal channels through which foreigners could access the Carrera. Otherwise, neither the Crown nor Castilian merchants could support a solid trade with the Indies. The cost of the commercial adventure was very high and entailed a lot of risks; therefore, alien capitals were indispensable for funding commerce.

Naturalization was one of the alternatives that permitted foreign participation in the Indies' trade. The processes of naturalization consisted of the official confirmation by which a person who was not born in Castile could be considered as Castilian and have the same rights as natives.³⁸ To gain the status of a native it was necessary to observe certain formalities. These changed throughout the colonial period, normally to make them more demanding.³⁹ During the last years of the 16th century, petitioners were asked to live continuously in Castile for more than ten years, married to a Castilian woman, and have enough wealth for self-sufficient trading.⁴⁰

However, naturalization was a complex process, whose requisites could not be satisfied by everybody. Between 1583 and 1598, 27 processes of

36 Since the Hispanic monarchy was a composite monarchy, it could be thought that the natives of kingdoms like Aragon were not authorized to trade with the Indies. Their condition was clarified very soon by the Catholic Kings through a royal decree made on May 30, 1495, by virtue of which the natives of Castile, Aragon, Navarre and the Basque Country received the same rights for trading with the New World. KONETZKE (1945) 276; GARCÍA-BAQUERO (2003) 73–99.

37 The cooperation of Genoese and Florentine interests in the Columbian travels is very well known. A symptom of their presence is the Genoese origins of Francisco Pinelo, the first *factor* of the House of Trade. BERNAL (1992) 99–102; HERZOG (2011) 13–19.

38 HERZOG (2003) 43–118.

39 DOMÍNGUEZ (1959) 227–239; GARCÍA-BAQUERO (2003) 73–99.

40 KONETZKE (1945) 269–299.

naturalization were issued, preserved in the General Archive of the Indies, of which 14 correspond to Portuguese merchants, 6 to Flemish traders, 2 to French merchants, 5 to Italian merchants, and 1 to a Corse trader.⁴¹ Only 17 naturalizations were granted, some of them after annoying lawsuits before the House of Trade and then before the Council of the Indies.⁴² In the disputes concerning naturalizations, the judges of the House always resolved the applications in accordance with the legislation. If the foreign merchant did not fulfill the legal requisites, his petition was rejected by the court. Singleness was the most common reason of defeat.

Even if foreign participation in the Indies' commerce was legally forbidden, it is notable that the judges of the House assiduously settled the disputes in which foreigners were involved, *despite knowing the illegal situation of some merchants* and the evident trade with America revealed by the sources. The paradox can be expressed in the following terms: On the one hand, the judges of the House of Trade were the guarantors of the Spanish commercial monopoly. On the other hand, *they accepted the illegal foreign intervention in the Indies' trade through the resolution of the foreigners' disputes*. A lot of foreign merchants litigated in the House's audience and many of them never received legal permission for trading. The rigidity of the laws intensified illegal commerce as well as the use of mechanisms that concealed foreign access to the *Carrera de Indias*.⁴³ An example is the Portuguese merchant Lanzarote de Sierra, who had already litigated in the House some years before he obtained the Castilian naturalization.⁴⁴

41 DOMÍNGUEZ (1960) 137–163; VILA (2005) 279–296.

42 It was the case of the Genoese merchant Julio Negrón, who started the process of naturalization in the House of Trade on January 9, 1584. In his petition Negrón argued that he had arrived in Seville 22 years ago, where he permanently settled, living there with his family in their own house. These arguments did not convince the judges, who rejected the merchant's request on September 24, 1584. Negrón appealed the judgment of the House's judges before the Council of the Indies, where the naturalization was also rejected, so the Genoese merchant demanded the review of the Council's judgment. Finally, on July 12, 1585, he obtained the Castilian naturalization. A.G.I., Escribanía 1069 A.

43 Smuggling was a very profitable alternative for many merchants, although during the first half of the 17th century the Crown sold naturalizations in order to finance its military expenses. DÍAZ BLANCO (2011) 314–328.

44 Lanzarote de Sierra and his brother, Antonio Rodríguez de Sierra, started the process of naturalization on August 14, 1590, before the House of Trade. On June 1, 1591, the Council of the Indies finally recognized their right to trade in the Indies. A.G.I., Escribanía 1072 A.

It could be supposed that the attitude of the judges of the House in the resolution of the disputes that non-Castilians presented before their jurisdiction was very negative due to the illegal nature of such disputes. However, *the judicial treatment that foreigners received does not seem discriminatory*. The disputes in which foreigners intervened – as plaintiffs or as defendants – *were resolved on the basis of the evidences presented by the parties*. Consequently, the parties that better demonstrated the legitimacy of their pretensions would be the winners.⁴⁵

The magistrates of the House followed the jurisprudential model demanded in their epoch, which implied judging according to the evidence presented by the parties.⁴⁶ The *iurisdictio* of the judges of the House was practiced following this principle, which cannot be understood in merely legal terms, limiting the role of the magistrates to the simple application of laws. The jurisdictional culture had been deeply rooted in the Hispanic Monarchy since medieval times, where judges were public persons whose jurisdictional power and authority was recognized by society to adapt law to the circumstances of the case.⁴⁷

The adaptation of the law to the conditions of the concrete case admitted the non-application of legislation. This was the essential virtue of the Castilian jurisdictional culture, which had as its core the magistrates' faculty of communicating the law. Judges were the decisive element in law production, in charge of the administration of justice through the interpretation and understanding of what was just for the parties.⁴⁸ Judges declared the law, defining the equity of the parties in a trial; that meant the solution of the dispute. It could be said that magistrates were the interpreters of equity, a faculty that authorized them to ponder the most adequate legal instruments to effectively administrate justice.⁴⁹ In this

45 The judgments of the House of Trade are written in a style that suggests that the decision of the judges was the result of the assessment of the evidence presented by the parties. It is very common to find expressions like: "We judge that A did not prove his demand as it was advisable, and that B proved his exceptions"; "we judge that despite the evidence presented by X, we have to condemn him."

46 This idea was expressed by Jerónimo Castillo de Bovadilla: "judging according to the truth, on the basis of the evidences." CASTILLO DE BOVADILLA (1759) 94.

47 GARRIGA (2006) 86; DOMINGO (1987) 142.

48 GARRIGA (2006) 87; D'ORS (1953) 301–330.

49 VALLEJO (2009) 1–13; BRAVO (1991) 111–163.

manner, judges, as equity experts, were capable of identifying iniquity as well. When an instrument of justice like legislation contravened the equity required by the case, judges were able to derogate.⁵⁰

In the case of the Portuguese merchant Lanzarote de Sierra, his assimilation to the Sevillian mercantile culture is evidenced by his lawsuits with other Castilian and foreign merchants as a consequence of the businesses that they had in common. In 1588, Sierra brought a suit against Francisco Friesco, presumably an Italian merchant, because he did not deliver 52 bovine leathers to Seville that one of the Sierra's partners in New Spain had sent him in a ship governed by Friesco. Sierra presented to the judges the contract in which Friesco's obligation was stated. A few weeks later, the judges of the House ordered the seizure of the properties of the defendant, forcing him to pay the debt.⁵¹

In the same year another Portuguese merchant, Gonzalo Pérez, brought a suit against Lanzarote de Sierra and other merchants. Pérez was the owner of a vessel which Sierra used to transport his cargo. A big storm occurred when the ship was coming back to Seville from Santo Domingo. Apparently the ship was very damaged by the storm and to avoid its sinking, it was necessary to throw overboard some merchandises to lighten the load and save the vessel. Gonzalo Pérez wanted that the owners of the goods accept the gross average, paying proportionally the damages of the ship as well as the goods that had to be thrown into the sea. The judges sentenced that all merchants had to pay their correspondent part of the damages. Sierra rejected to pay, so the judges ordered the confiscation of his goods to force the payment.⁵²

Laws were compatibilized with the particularities of the concrete case or even derogated when they contravened justice through the jurisdictional faculty of the judges. *Iurisdictio* implied the transformation of equity, as an objective reality, to a specified reality expressed in clear precepts declared by the judges through their decisions.⁵³ *Iurisdictio* meant specifying the equity of the case as a consequence of the interpretation made by the judges that intended to solve the dispute. Such interpretation was made upon the basis of a cultural context that considered all the members of Castilian society as

50 VALLEJO (2009) 11–13.

51 A.G.I., Contratación 729, number 9.

52 A.G.I., Contratación 729, number 2.

53 VALLEJO (2009) 8; VALLEJO (1992).

part of a bigger unit or social body. If one of the members of the body malfunctioned – in this case, all the persons and economic interests that were involved in the commerce with the Indies – this fact affected the entire body.

It is essential to keep in mind that the jurisdictional power of the magistrates was not reduced to the simple application of general norms to the case. The migratory legislation of Castile was obsolete in the face of dynamism and complexity of the transnational trade. In this manner, the judges of the House of Trade had to administered justice in a commercial context in which foreigners were deeply involved. Solving foreigners' disputes according to the law, where illegal trade was evident, would have meant applying the appropriate sanctions. These penalties could include fines, seizures, or even jail.⁵⁴ Notwithstanding, punishing illegal merchants was not always a good measure for the *Carrera de Indias*. That not only was detrimental to foreign commercial interests, but also to their partners, regardless of their national origins. Hence, *to observe law could cause more damages than benefits*; the decisions of the judges could be according to law, but contrary to justice.

The deep compenetration of Spanish and foreign economic interests was essential to support the *Carrera de Indias*. Only foreign intervention enabled the overcoming of the financial and logistics deficiencies of Castile as the holder of the overseas monopoly. In this regard, the virtues of some foreign communities – such as Genoese and German banking, or the Portuguese control over the slave trade – were very welcomed in Spain.

Castilian merchants were willing to become partners with foreign traders, because of the possibility to share the economic risks of the long distance trade. Moreover, the goods that foreigners sent to Seville from their countries were very appreciated and well paid in the New World.⁵⁵ At the same time, Castilian merchants could be the main opponents to a foreign

54 The case of the Portuguese merchant Francisco Barroso is very illustrative. Since Barroso was trading with the Indies without legal permission, he was imprisoned in the House of Trade's jail. The merchant was condemned to the confiscation of the goods that he was trading, and to the payment of a one-thousand-ducats fine, as well as the expenses of the trial initiated against him by the public prosecutor of the House. A.G.I., Escribanía 1069 B. El fiscal de su majestad con Francisco Barroso, portugués, sobre tratar en Indias.

55 OLIVA (2006) 400.

presence in the Indies trade; principally the prominent merchants of the Consulate of Seville. The members of the Consulate considered that foreign intervention was a menace to their own businesses, due to the progressive power that they were acquiring.⁵⁶

Foreign intervention was likewise necessary for the Castilian kings. The requirement of external resources to support the military commitments of the Spanish monarchy was crucial. During the 16th century, mainly Genoese and German bankers financed the Spanish imperial projects.⁵⁷

But fair judgments were not enough for a transnational trade that needed the effective expression in practice of the justice declared by magistrates. The *Carrera de Indias* also demanded an efficient jurisprudence that could follow the rhythms of transnational trade, capable of offering the legal protection that the mercantile transactions required. Such jurisprudence had to enforce the contracts derived from the Atlantic commerce through low cost procedures. The purpose of the following lines will be to describe the characteristics of the jurisdictional procedures of the House of Trade as they are shown in the sources, in order to determine whether they offered an adequate jurisprudential answer to transnational trade with the Indies.

5. An adequate justice for the *Carrera de Indias*:

The justice administered by the magistrates of the House of Trade

Since the Middle Ages, commercial law had been created in special institutions called merchant guilds or consulates, which emerged as a consequence of the revival of trade experienced in Europe from the 10th century onwards. These institutions developed the necessary attributes to enforce agreements.⁵⁸ The merchants settled in the most important Spanish commercial centers, like Barcelona, Valencia, Burgos or Bilbao, had their own guild or consulate, and Seville was not an exception.⁵⁹ Sevillian traders asked the king for the creation of a summary jurisdiction in which they could resolve their disputes briefly and inexpensively, in order to avoid the delays

56 VILA (1999) 3–34.

57 CARANDE (1987) 255–264; GARCÍA (1997) 204; MARTÍN (2000) 405–423.

58 GRAFE/GELDERBLOM (2010) 477–511; LADERO (1994) 149–174.

59 SMITH (1978); SOUTO (1990) 227–250.

and costs of ordinary justice.⁶⁰ On August 23, 1543, in Valladolid, the Prince Philip ordered the foundation of the Consulate of Seville.⁶¹

The essence of the commercial law created by the consulates consisted of two elements: Its sources were the usages of commerce and the resolution of disputes was based on arbitration.⁶² Nevertheless, the benefits of the commercial law created within consulates were a privilege of its members. The majority of the Indies traders were not members of the consulate despite requiring a summary jurisdiction, too. Some foreign communities founded their own consulates, but it still was a privilege reserved for its members.⁶³

Besides the consular jurisdiction, all Castilian and foreign merchants were under the jurisdictional power of the House of Trade in all civil and criminal matters related to the *Carrera de Indias*. This fact was very convenient in practice. Due to the lack of a consulate, merchants could take profit from the *jurisdictional offer* of Seville, especially from the House of Trade. However, *this fact contradicts the image of the Castilian administration of justice* in the late 16th century. The malfunctioning of royal tribunals would have caused merchants who did not have the consulate's privilege to refrain from presenting their lawsuits in royal courts. The uncertainty of the royal justice – its delays and expenses – was opposite to litigants' needs, increasing the use of *more trustable solutions* like arbitration.

But arbitration had its own defects; the most significant was the arbiters' impossibility to enforce their judgments, requiring the coercive intervention of royal courts.⁶⁴ Apparently, the outlook of the Spanish administration of justice was deplorable. Not only royal courts were considered as an example of inoperativeness, but also private mechanisms for resolving disputes were unreliable. Moreover, the jurisdiction of the consulate was not as effective in practice as it was in theory. Even if the procedure of the consulate was based on arbitration, it progressively adopted the formalities of the ordinary justice.

60 The Castilian administration of justice was always the object of the litigants' critics, not only because of the abundant and confusing legislation, but also because of the interpretative labor of the judges, who used to be accused of judging arbitrarily. KAGAN (1991) 146–155.

61 HEREDIA (1970) 219; FAIRÉN (1969) 1293–1318.

62 GALGANO (1993) 38; CORONAS (1994) 251–279.

63 During the 16th century there existed different national consulates in Seville like the Genoese, French, Hanseatic and Flemish. LÓPEZ BERNAL (2004) 189; DOMÍNGUEZ (1960) 45; LÓPEZ MARTÍN (2006) 435–440; MONTOJO (1992) 47–66.

64 GACTO (1971) 128–153; CORONAS (1979) 108–124; FAIRÉN (2006) 517–518.

In spite of this defencelessness situation, the high litigation rate in royal tribunals should be taken into account. Some historians have already pointed out the litigious tendency of the Castilian society,⁶⁵ but *the presence of Spanish and foreign merchants litigating in the House of Trade, including members of the Consulate of Seville is quite surprising*.⁶⁶ From 1543 onwards, the House of Trade *legally lost* its powers “to settle all the debates and differences among merchants and their partners, masters and boatswains, caulk men and sailors, and other persons, regarding the companies that they have had or have among themselves in the Indies, and also about the contracts of affreightment (...), insurances (...), and all the contracts that they had made (...). And they can resolve the lawsuits as it is done by the Consulate of Burgos.”⁶⁷ Yet, in practice the House of Trade resolved commercial disputes: Between 1583 and 1598, preserved in the archive are 349 lawsuits between merchants; 236 lawsuits correspond to debt claims, 33 to corporate dissolutions, 32 are related to gross average, 33 related to contracts of affreightment, and 15 are about insolvency proceedings.⁶⁸

The high number of mercantile controversies settled within the House of Trade indicates that the judges of the House attributed themselves a certain commercial jurisdiction which legally did not have. This fact can be only understood in light of the *jurisdictional culture existent in the Hispanic Monarchy of the Early Modern period*. Explaining this phenomenon as a simple *overlapping of jurisdictions* does not justify the fact that the judges of the

65 KAGAN (1991) 21–27.

66 That is the case of the merchant Pedro Aguilar de la Sal, who was an important member of the Consulate of Seville in the last decade of the 16th century. VILA (2002) 139–191. Despite having the privilege of the consulate, Pedro Aguilar de la Sal assiduously litigated in the House of Trade as it is shown by the sources. A.G.I., Contratación 736 B, number 4. Autos presentados en 1593 por Juan Bernaldo, maestre, con Pedro de Aguilar de la Sal y Juan Bautista de Molina sobre satisfacción de fletes; A.G.I., Contratación 741, número 11. Autos presentados en 1596 por Pedro de Aguilar de la Sal, vecino de Sevilla, contra Cristóbal Coello, dueño y maestre de nao, sobre cobranza de una partida de reales que le trajo registrados; A.G.I., Contratación 746, número 14. Proceso presentado en 1598 por Pedro Aguilar de la Sal, vecino de Sevilla, con Jerónimo de Zamora, maestre, sobre el importe de una partida de jengibre, que no le entregó, y el valor de 16 cueros, resto de mayor partida, que igualmente le traía registrada.

67 Quoted by CERVERA (1997) 138.

68 These lawsuits are located in the section *Contratación* of the General Archive of the Indies, file 723 to 746.

House had the habitual power to settle disputes that legally were the competence of the Consulate of Seville.⁶⁹

The delimitation of competences in the Hispanic Monarchy was not definitive or strict. The jurisdictional practice of the House's magistrates included not only the civil and criminal matters that legislation considered part of its competence, but also commercial matters that legally corresponded to the jurisdiction of the Consulate. The limits of the jurisdictional practice were casuistic and the existence of a specialized jurisdiction in mercantile matters responded, indeed, to procedural criteria.⁷⁰ Actually, the definition of the competence was a problem that emerged when it affected the interests of one of the parties.⁷¹

Normally, the creation of a special jurisdiction resulted from *the need of having a suitable court that optimized the course of the processes*. Thus, the mercantile jurisdiction of the consulate responded, according to its ordinances, to the need of having agile judicial solutions, formulated by experts in the usages of trade. Despite the jurisdictional offer of the Consulate, many times *merchants tried to resolve their disputes in the House of Trade*. The ordinary utilization of the House as a commercial court could be interpreted as a symptom of the *trust that merchants had in the judges' decisions* because of *its relative effectiveness in the protection of the patrimonial rights of the litigants*.

69 The fact that the judges of the House of Trade settled mercantile disputes has been explained by historiography as an overlapping of jurisdictions. According to this, it was necessary to define the specific competences of the Sevillian courts, causing the huge amount of legislation that was promulgated all over the 16th century. TRUEBA (1988) 27; DEL VAS (2004) 73–97; CERVERA (1997) 137–141.

70 GARRIGA (2006) 79–80.

71 The circumstances of the case determined the convenience of bringing a suit before one or another tribunal, since the jurisdictional benefits could not be equal for both parties. In the lawsuit that Martin Monte Bernardo brought in 1583 before the House of Trade against the members of the Consulate of Seville, he explicitly said that litigating in the House of Trade was the most convenient official channel for his interests: “lo qual pido por aquella via y forma que mejor aya lugar y me convenga, y lo necesario ynploro e suplico de vuestra magestad.” Clearly, initiating a trial in the House of Trade was not favorable for the Consulate's members. They could advantageously resolve the dispute through their own jurisdiction, being at the same time judge and party. In this sense, the Consulate's representative, Sebastian Navarro, indicated that the case had to be settled within the Consulate, arguing that it was the Consulates' competence: “No se puede acusar por este pleyto hordinario, y assi contradigo todo lo qve pide la parte contraria.” The lawsuit was finally resolved by the judges of the House of Trade. A.G.I., Escribanía 1069 A, folios 7–8.

When merchants brought their lawsuits before the House's judges, they were expecting to receive an adequate jurisprudential answer to their commercial needs. Otherwise, their presence as litigants in the House of Trade is very difficult to explain.

It seems that the House of Trade offered an acceptable justice for merchants. The jurisdiction of the House was not only a privilege, being an accessible court for all the merchants involved in the *Carrera de Indias*, but its audience also administered a justice that had similar procedural characteristics to the consulates' justice. Even if the judges were not experts in the usages of commerce, *litigants presented to the judges the arguments that supported their pretensions*, including usages of commerce, documents, court records, etc., which constituted the basis of the judges' decision.

Furthermore, not all the lawsuits resolved in the House of Trade were expensive due to their delays. In 1360, Sevillian merchants received a special privilege from the King Peter I.⁷² This privileged consisted of a summary procedure called *juicio ejecutivo*, by which all creditors that had demonstrated through an authentic document⁷³ the existence of a pending debt could ask for the seizure of their debtors' properties. Once the seizure was made, judges had to order the auction of the goods confiscated to guarantee the payment. In the *Leyes de Toledo* of 1480, the use of the *juicio ejecutivo* was extended by the Catholic Kings to all the kingdoms of Castile, including later the Indies.⁷⁴

The *juicio ejecutivo* was a very common procedure used by merchants in the House of Trade due to its benefits. 60.5% of the commercial disputes settled in the House between 1583 and 1598 were resolved through the *juicio ejecutivo*. 73% of these trials were finished inside of six months, and only 9% lasted more than one year; but they never exceeded two years. In addition, the *juicio ejecutivo* was not an expensive procedure. The costs of this kind of processes never exceeded 20% of the total amount claimed by creditors. Yet, this percentage does not reflect the costs of a majority of trials. In 76% of the cases, the costs of the trial did not surpass the 3% of the debt's value.

72 SÁNCHEZ (1946) 716–717.

73 According to the laws, during the 16th century the documents that caused the seizing of the debtors' properties were royal decrees, tribunals' judgments, confessions, the recognition of the debt by the debtor before the judge, and the public instruments signed by notaries. MONTERO (1994) 90.

74 SÁNCHEZ (1946) 716–717; LUMBRERAS (1960) 250–251.

Hence, the context of litigation in the House of Trade was not so bad in practice. The benefits of the *juicio ejecutivo* could encourage merchants' litigation in the House. This special procedure, in addition to the written culture that flourished in Castile by the end of the 15th century,⁷⁵ constituted the juncture needed by the *Carrera de Indias*. Almost all merchants tried to protect their businesses with documents, making it easier to pursue the debtor's payment in a court through the *juicio ejecutivo*.

It is necessary to add that the participation of lawyers in the consulate's disputes was forbidden. Their education in law contradicted the simplicity of the consulate's procedure making it more complex and technical.⁷⁶ However, the *juicio ejecutivo* was not complex and rarely required the intervention of lawyers. In the House of Trade the parties had the possibility to consult lawyers for better preparing the arguments of their pretensions. This alternative was very attractive for litigants, especially when lawsuits became complicated, for example, by the appeal of the counterpart.

The participation of lawyers in the lawsuits of the House of Trade was caused by the litigants who wanted to protect their interests trying to guarantee a favorable judgment using the arguments made by legal experts. Normally merchants wrote their own lawsuits. The narrative style of the petitions was very simple, limited to the description of the facts and mentioning the reasons of justice that support the pretension. Even though, documents written by lawyers preserved a simple style, they were likewise limited to the facts, and briefly highlighting the legal arguments that were useful for the litigant.

The *decisions made by the judges of the House of Trade had to be observed*, if their jurisdiction wanted to have a *real impact* in practice. Apart from declaring law, judges were royal officials with special powers to *enforce their judgments*.⁷⁷ The *juicio ejecutivo* was an excellent legal mechanism to pressure debtors. Almost immediately after creditors brought their lawsuits before the magistrates of the House, the judges ordered the seizure of the debtors' properties.⁷⁸ Sometimes the judgment of the tribunal was not even required.

75 HERZOG (1996) 15–16.

76 GACTO (1971) 122–124.

77 DOMINGO (1987) 142.

78 In 77% of the *juicios ejecutivos* developed in the House of Trade, the judges ordered the seizure of the debtors' properties within the first twenty days that followed the presentation of the lawsuit in the court.

Debtors neither wanted to lose their properties, nor pay the expenses of the trial; two conditions that accentuated the agreements between the parties outside the court. Additionally, the threatening effects of the *juicio ejecutivo* could go beyond the seizure and the auction of the debtor's goods. If the debtor did not have enough wealth to pay his debts, creditors could ask for his imprisonment as a form of coercion.⁷⁹

6. Conclusions

The local context in which the practice of the jurisdiction of the House of Trade took place reveals its transnational dimension. To support a transnational enterprise like Atlantic trade, it was necessary to have a transnational jurisprudence that served as a mirror of its historical circumstances.⁸⁰ To this purpose, the labor of the judges as law experts – interpreters of reality who were endowed with enough power to enforce their decisions – was crucial for supporting the commercial enterprise with the Indies.

The Castilian jurisdictional culture, in which the House of Trade was involved, permitted the development of the Atlantic commerce over centuries. This jurisdictional culture is clear in the case of the foreign participation in the Indies trade, as well as in the need of foreigners to have an efficient mercantile legal procedure. The essential characteristic of the jurisdictional culture was the role played by magistrates in the law production. Judges were interpreters of equity able to ponder the adequate instrument of law to formulate a judgment. Such interpretation could imply the derogation in practice of the legal instruments used in the administration of justice when their rules contravened justice, in order to *preserve the equity of the case*.

In the case analyzed here, the real penetration of foreigners in the *Carrera de Indias* caused the jurisprudential attitude of the House of Trade's judges to respond to *reasons of justice that violated legislation*. Judging against foreign merchants according to legislation *would affect the Spanish economic interests as well*. The *Carrera de Indias* was the principal economic source for Castile during the modern age; however, it was an enterprise controlled by national and foreign merchants. In this manner, to effectively protect the transna-

79 TOMÁS Y VALIENTE (1960) 249–490.

80 GROSSI (2007).

tional commerce with the Indies, the jurisprudence of the House had *to correct the limitations of the legal system* creating new law, not applying existent laws, and developing efficient legal procedures with the intention of expressing the equity of the case through their decisions.

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Entangled up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, 1803–1810

Everywhere the Anglo-Americans settle, the lands become productive and progress is rapid.... They build their own cabins, cut down and burn trees, kill the savages or are killed by them, and disappear from the land either by dying or by giving it up. When a score of new colonists have, in that way, gathered in a place, a couple of printers appear, one federalist, the other anti-federalist, then doctors, then lawyers, then adventurers; they drink toasts, they choose a speaker; they constitute themselves a city; they vie with each other in the procreation of children. They vainly advertise vast territories for sale; they attract and cheat as many buyers as possible. They paint inflated pictures as to the size of the population, so as to arrive quickly at a figure of sixty thousand souls, ... and there is then one more star affixed to the pavilion of the United States!

PIERRE CLÉMENT DE LAUSSAT,
Memoirs of My Life (2003 [1803–1804]),
tr. A.-J. PASTWA, 9.

Introduction

“Entangled histories”, as Eliga Gould (citing Jürgen Kocka) noted, examine interconnected societies. [They] are concerned with “mutual influencing,” “reciprocal or asymmetric perceptions,” and the intertwined “process of constituting one another.”¹ Gould contrasts *entangled* histories, perhaps a little unfairly, with merely *comparative* histories. Although there is often little difference in practice between the two, comparative histories might, at least theoretically, ignore important trans-national or trans-territorial movements and influences. In contrast, entangled histories – with *histoire croisée* and other

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¹ GOULD (2007) 766 (citing KOCKA, J (2003)). See Gould’s footnotes on related historiographical approaches and COHEN/O’CONNOR (2004).

relational approaches to historiography – can serve as antidotes to insular, frequently anachronistic nation- and state-centred histories.² Apparently local or internal developments may turn out to be instantiations, whether uniform or unique, of wider regional or even global trends. Communities and their cultures are revealed to be compound hybrids created by the complex diffusion of people, ideas, and institutions. By productively problematizing simpler narratives, such approaches can also be of great significance and utility to historical research on laws and norms.³

This article is a preliminary case study of legal and normative entanglement in Spanish West Florida – which stretched across the Gulf Coast of present-day Louisiana, Mississippi, Alabama, and Florida – between 1803–1810. Between the time of the Louisiana Purchase (1803) and the annexation of Westernmost part of West Florida by the United States (1810), the laws and norms of the Territory criss-crossed in various ways those of Spain and the United States. Indeed, the territory was, in turn, French, British, and Spanish before being annexed, in part, by the Americans. For the period under study here, and decades before, its settlers were largely Anglophone, while its laws were a variant of the Spanish colonial *ius commune*. This fact, “how an alien group ... adapted to living in a Spanish colony with Spanish law ... does not seem to have been a subject of intensive study.”⁴ This text is a small step in that direction.

West Florida had an especially close relationship with the area that would become the new American Territory of Orleans (1805), especially the city of New Orleans. Carved out of the vast Louisiana Territory purchased from France, the Territory of Orleans had its own complex history. Its population was still largely Francophone. In its first decade, its laws were already a gumbo of continental and Anglo-American ingredients. Together, the two territories sat at the precipice of the modern nation-state, of nationalism and popular sovereignty, of legal positivism and legal formalism. In both territories, the diffusion – direct and indirect, formal and informal, ongoing and sporadic – of the various laws and norms of natives and newcomers

2 See, e. g., WERNER / ZIMMERMANN (2006). Cf Ibid., 58 (on intermixing and hybridization).

3 In this paper, *laws* and *norms* refer to legal norms and social norms respectively, the former a subset of the latter. *Legality* and *normativity* refer, in turn, to legal normativity and social normativity.

4 GREENE (2008), 21

created intricate legal and normative hybrids. In both, there were complex and illuminating relationships between law and culture.

It has recently been argued that the ‘experiences [of the American South] need more frequently to be placed into comparative context.’⁵ My own comparative research, on both the past and the present, has attempted to investigate legal and normative mixtures and movements. Joining in particular the study of *mixed legal systems* and *normative* or *legal pluralism*, I’ve sought to place laws within the wider matrix of norms to provide a kind of descriptive, critical and constructive *deep focus* on lived normativity in all of its forms.⁶ I’ve referred to this as a project on ‘*hybridity and diffusion*’, a trans-disciplinary combination of comparative law, legal history, legal philosophy, and the social sciences. Like entangled history, this is perhaps less an heuristic tool than a way of seeing differently, of sensitivity to complexity and change. *Hybridity* here refers in the first place to legal or normative plurality, to complex origins and organization; it also refers to the complex relationship, not infrequently the gap, between expressed principles and actual practices. And while individuals are ultimately the most important, if often unintentional, norm-creators – as articulated by *critical legal pluralists* – my research concentrates on the approximate, but meaningful, aggregative legality and normativity of corporate communities and institutions. Accounts of hybridity are snapshots of a perpetual blending process generated by the ongoing, multidirectional *diffusion* of laws and norms. These mixtures of legal and social norms are always in movement across both space and time, with continuity provided by the weight and inertia of convention, of traditions and practices.⁷ Conducted with care, the result is a far more nuanced picture of lived legal and normative experiences. And it suggests

5 HADDEN/MINTER (2013), 8. On contextualising Louisiana’s legal history, see BILLINGS/FERNANDEZ (2001), who attempt to place it in the wider American context. But cf. DONLAN (2012), criticising the former for being insufficiently comparative. On the wider context, of ‘revolutionary borderlands’ and ‘crossroads of the Atlantic World’, see SMITH/HILTON (2010a) and VIDAL (2014) respectively.

6 *Deep focus*, as used in photography and cinema, establishes clarity in depth through lighting and sustained focus. Unlike ordinary images, it attempts to keep all of the objects in the frame in focus.

7 For my general approach (and citations), see DONLAN (forthcoming) and DONLAN (2011b). For legal history, see DONLAN (2010), DONLAN (2011a), and BROWN/DONLAN (2011).

that the relationship between legal consciousness and culture is, as with individual loyalties and identities, complex and constantly changing.

History and hybridity

As is well-known, the early nineteenth century was an important turning – or tipping – point in Western legal history. It saw the acceleration of the movement from “[m]ulticentric legal orders – those in which the state is one among many legal authorities” to “state-centered legal orders in which the state has at least made, if not sustained, a claim to dominance over other legal authorities.”⁸ The plurality of laws that had characterized Europe for centuries, the myriad jurisdictions and mediating institutions of the old regimes, was slowly giving way. Non-legal normativity was increasingly marginalized by legality. “Law increasingly became the standard by which all forms of disputing were measured.”⁹ While the diffusion of the laws of the Old World into the New World generated new hybridities and entanglements, colonialism was also central to the rise of common legalities. Colonial administration required a *common law*, eg English common law and Equity, the *Customs of Paris*. This development would feed back into the creation of uniform laws in the mother countries, towards legal unity, monism and centralism. All of this was part of an increasing level of criticism of legal inequality and restraints, of crown interference, and of religious influence and intolerance. The focus on legal positivism, on law-making and legal clarity, was linked to both the new powers of the state and demands for popular accountability. Throughout the West there was a gradual shift towards legislation, to clearer and more systematic law, and reforms in criminal law. More generally, the idea of a coherent, holistic *legal system* and a single dominant common law, the rationalization of traditional legal regimes, continued.¹⁰

In continental law, this was expressed in legislation, often codal, and subsequently in exegetical interpretation. Many nineteenth-century codes were attempts to create a set of laws that was authoritative, comprehensive,

8 BENTON (2002) 11. See also BENTON (2009).

9 MANN (1986) 1438.

10 This transition from considerable legal hybridity to greater legal unity also effectively created the modern distinction between *pure* and *mixed* legal traditions. It is, that is, the “hidden temporal dimension” in the categorization of mixed traditions. GLENN (1996) 1.

systematic, and internally harmonious. They were intended to abrogate previous or conflicting law and to unify the legal system into a national common law. While reflecting the laws of the *ancien régime*, both Romanesque and Germanic in origin, this was exemplified in France's *Code Civil* (1804). Modern nationalism and codification marked an important change from Europe's plural, juridical culture. It was a shift from European *iura communia* and local *iura propria* to national law, from persuasive to binding authorities, from open to closed legal systems, and from judges and jurists to legislators. This movement included Anglo-American law as well. Jeremy Bentham and John Austin echoed this concern for legal uniformity and clarity. This was linked, in Britain, to parliamentary supremacy and the rise of statute law. American lawyers were also more receptive to modest codification. If this was especially true in procedural law, codification of private law also occurred. Still more importantly, over the course of the century, in both Britain and the United States, persuasive precedent hardened into binding precedent.¹¹ Legal education and law reporting improved.¹² A clearer appellate hierarchy of courts was established. The archaic writ system was relaxed in favor of general pleading, bringing a new focus on substantive, rather than procedural, law and an attempt to limit judicial subjectivity. Common law and equity were fused and other jurisdictions enveloped by the courts of common law.¹³ If this did not entirely eliminate, in fact, either legal or normative hybridity, “[b]y the end of the nineteenth century law can hardly be thought of except in its formal or professional sense.”¹⁴

The histories of Louisiana and Spanish West Florida, especially the Westernmost part of West Florida, are deeply entangled. In her colonization of the Americas, the Spanish claimed large sections of southeastern North America as early as the sixteenth century as *La Florida*. It did not, however, permanently settle much of the territory. In 1682, Robert de La Salle (1643–87) claimed large sections of North America, west and south of the British

11 Usually referred to as *stare decisis*, where a single judicial decision is binding on the basis of the court's authority alone, rather than persuasive on the basis of equitable interpretation or with the idea that consistent judicial decisions represent a legal *communis opinio*. See EVANS (1991) and STEIN (2003).

12 See DONLAN (2005).

13 I referred to this as “sausage-making” in DONLAN (2010) 290.

14 ARTHURS (1984). See also ARTHURS(1985) and HARTOG (1985).

colonies, for the French. The Perdido – or *lost* – River, now dividing the American states of Alabama and Florida, was eventually agreed to be the boundary between French and Spanish territories. In the vast French *Louisiane*, the most important development was that of the *Île d'Orléans* (the *Isle* of Orleans), or New Orleans, near the mouth of the Mississippi River. The French introduced the *Customs of Paris*, a Romano-Germanic folk-law linked to the site of the French throne, as its common law. A Superior Council had jurisdiction over most matters, both under French direct rule (1712–17, 1731–62) and indirect rule through the Company of the West (1717–32).¹⁵ Inevitably the law in practice, administered by authorities with both military and judicial competences, differed from its application in France. Of course, even in the *ancien régimes*, “[a] high proportion of the innumerable conflicts of everyday life” were not “settled by official proceedings or ... the judicial system”.¹⁶ Both at home and abroad, social regulation was a *métis*, a complex hybrid of legality and normativity. Indeed, it was precisely this period that Voltaire (1694–1778) could complain, of France, that “[a] man that travels in this country changes his law almost as often as he changes his horses.”¹⁷

French “rogue colonialism” ended in 1763 with the *Treaty of Paris* (1763) and the end of the *Seven Years War* (the *French and Indian War*, 1756–63).¹⁸ That war had pitted, among many others, Britain against France and Spain. The Treaty ceded French territories east of the Mississippi, excluding the Isle of Orleans, to Britain. Spain also ceded Florida (presumably all the way to the Mississippi) to Britain in exchange for Cuba, which had been captured by the British during the war. In addition, under the secret *Treaty of Fontainebleau* (1762), French territories west of the Mississippi, including the Isle of Orleans, were formally transferred to Spain.¹⁹ The Treaty, which also obscured long-standing border disputes between France and Spain on *Louisiane*’s western boundary, was only made public in 1764. Actual possession of Louisiana by the Spanish took several years, in part due to

15 JOHNSON (1989). See DART (1919).

16 CASTAN (1983) 219. See also RUFF (2008).

17 ‘Custom – Usages’ AROUET (1901) (no pagination).

18 DAWDY (2008). An historical anthropologist, Dawdy’s discusses *mētis*, *creolization*, and *hybridization* at *Ibid*, 5–6. On the last of these, however, she defines it in its older sense of a complex singularity.

19 See the overview of ‘The Spanish Regime’ in BEERS (2002).

resistance of the French Louisianans. Spanish law was imposed, however, with the French slavery laws of the *Code Noir* (1685), by the Irish-Spanish General Alexandro O'Reilly (1722–94) and his successors.²⁰ Other administrative alterations were made, including the building of a *Cabildo*, the “Spanish-style city government”, in New Orleans.²¹ The population and culture of Spanish *Luisiana* remained, as did much of its judiciary, Franco-phone. This included significant numbers of French-Canadian Acadians who arrived in the aftermath of British victory in the Seven Years War. This continental *ius commune*, rooted in rich Romano-Germanic roots and significantly altered by colonial conditions, created a complex hybrid legality and normativity throughout Louisiana and Florida. During Spanish rule, its formal laws co-existed with other social/legal practices, especially away from the metropole.²²

For its part, Britain subsequently divided Florida. *West Florida* was separated from *East Florida* along the Apalachicola River, to the east of the Perdido and the earlier French-Spanish boundary.²³ The northern boundary was set at the 31st Parallel, but remained fluid and contentious, subsequently extending north (32° 22' north) from the Yazoo River to the Chattahoochee River. It also maintained its own laws. Many Anglophones moved into the Territory during British rule. As the American war (1776–83) approached, this population was primarily loyalist. It rejected, for example, the invitation of the Continental Congress in 1774 to send delegates. During the war, a small force of Americans even attacked in 1778 in the so-called *Willing*

- 20 This was once the subject of debate, but the general consensus is that Spanish law was imposed. SCHMIDT (1841–42). See TUCKER (1933–34); REYNOLDS (1971); CARRIGAN (1972). Note that the Spanish Governor of West Florida from May 1871–November 1782 was Arturo O'Neil y Tyrone (1736–1814).
- 21 DIN (1996b) 143. Note the cases of Jean Baptiste Villard and Julian Jallo – both “free mulattos” – in the Archives of the Spanish Government in West Florida, xvi.173 et seq and xvi.319 et seq. See also PRIESTLEY (1922).
- 22 Some of these customary practices were rooted in earlier French laws. Hans Baade has, for example, investigated the persistence of marriage contracts rooted in the *Custom of Paris*. BAADE (1979). See also Ibid, 58. This “*living law* of Louisiana matrimonial property”, perhaps *praeter legem* rather than *contra legem*, persisted in “notarial jurisprudence”. Ibid, 6. See also YIANNPOULOS (1983) 100 (using *law in action*). Too much made be made, however, of this limited example.
- 23 The capital of the eastern colony remained St Augustine; the capital of the west was Pensacola.

Expedition. More importantly, in 1779–81, the Spanish allies of the Americans successfully invaded the territory from *Luisiana*. Led by its Spanish Governor, Bernardo de Galvez (1746–86), they quickly captured Baton Rouge, Natchez, Mobile, and Pensacola in turn.²⁴ After the war, Britain ceded both Floridas to Spain in the *Treaty of Paris* (1783). West Florida was divided in several districts. The Baton Rouge District was further sub-divided into smaller units, ie Baton Rouge, Feliciana, Saint Helena, and Chifoncté. And in both of the Floridas, Europeans and Africans, free and slave, remained outnumbered by the native population.

Settlement patterns in West Florida were not, however, very different under the Spanish than they had been in the previous two decades of British rule. The Spanish developed the area as a buffer against American expansion. But to so, it found it necessary to continue to encourage Anglo-American settlement. The loyalty of these citizens was rooted in property laws, both of land and slaves.²⁵ As Andrew McMichael puts it,

Spain provided what Britain and the United States could or would not: a centralized government willing to at in residents' interests as long as those residents displayed a reciprocal loyalty. This loyalty was cemented by the Spaniards' willingness to accommodate the Anglo-Americans' quest for the main chance – to obtain and cultivate land through a liberal system of grants. Given that the same processes were at work in the British colonies during the same period suggests that for Americans, including those who migrated to West Florida, land and national loyalty went hand in hand.²⁶

Spanish colonial laws applied, though administered separately from Louisiana and with some local variation.²⁷ For example, in the Natchez District, “English was permitted in the courts, and English local government customs were followed from the beginning of Spanish rule.”²⁸ But the lack of clarity

24 HAARMANN (1996).

25 “Throughout their lives, individuals negotiate complex entanglements of multiple identities and loyalties. Identity is a socially constructed sense of self. All individual human beings function in the world with several (or even many) personal identities.” SMITH / HILTON (2010), 346.

26 McMICHAEL (2008) 16. While McMichael covers the region as a whole, he pays particular attention to the jurisdiction of Baton Rouge. See also CUMMINS (1988).

27 HOLMES (1967).

28 HOLMES (1963) 187. An earlier Anglophone historian had written that “[t]he yoke of [the Spanish] government always sat easy on the neck of the Anglo-Americans, who lived under it, and they still speak of Spanish times, as the golden age.” [INGRAHAM] (1835) 263–264 (cited in HOLMES (1963) 201).

in the boundaries between American and Spanish territories led to persistent disputes, the ‘West Florida Controversy’, between the former allies. As an indication of things to come, in 1791, future American President Thomas Jefferson (1743–1826) wrote George Washington (1731/2–99), then President, that American settlement in Spanish regions might provide “the means of delivering to us peaceably, what may otherwise cost us a war.”²⁹ The *Treaty of San Lorenzo* (*Pinckney’s Treaty* (1795)) eventually established the 31st parallel as the boundary. This required Spain to surrender Natchez. Indeed, in its pattern of Anglophone settlement leading to Spanish loss, “the Natchez district served as a prototype for West Florida, as that region in turn did for Texas and California.”³⁰ In West Florida, Anglophones continued to be attracted to the area on the basis of low taxes, generous land grants, and *de facto* religious tolerance.³¹ Indeed, the last of these was “greater ... than was commonly allowed in the United States.”³²

The essential unity?

In 1800, however, the secret *Treaty of San Ildefonso* formally returned *Louisiana* to France, with Spain retaining both East and West Florida, the capital of the latter moving to Pensacola. This included the former French territory to the West of the Perdido. For its part, the United States hoped to buy both New Orleans and the Floridas and to expand all the way to the Gulf of Mexico. Instead, they found that they were able to obtain, through the *Louisiana Purchase* (1803), the vast Territory of *Louisiane*. The addition of Louisiana doubled the size of the United States. It was a critical component of America’s future expansion. But it was also problematic. Both the Americans and Spanish saw the division of the area as precarious for their respective settlements and interests. “New Orleans without Florida made no sense and would be difficult, perhaps even impossible, to hold.”³³ The

29 JEFFERSON (1861) 2 April 1791. “I wish a hundred thousand of our inhabitants would accept the invitation.” Ibid. Note, however, that “Jefferson also feared that settlers within the United States’ own limits were capable of transferring their allegiance in other, less welcome directions, including to the crown of Spain.” GOULD (2007) 781.

30 COX (1918) 41.

31 HOLMES (1973).

32 Ibid., 259.

33 DARGO (2009) 6.

‘essential unity’ of Louisiana and West Florida was severed.³⁴ Boundary disputes involving the Floridas, as well as western Louisiana, would continue for two decades. The Spanish claimed, and they were almost certainly correct in claiming, that West Florida was not ceded to France in the *Treaty of San Ildefonso*. It had also understood that France would not cede Louisiana to a rival. But the curiously-worded Third Article of the *Treaty of San Ildefonso* created a hostage to fortune that extended the ‘West Florida Question’. The Article read:

His Catholic Majesty promises and engages in his part, to retrocede to the French Republic the colony of province of Louisiana with the same extent that it now has in the hands of Spain, *that it had when France possessed it*; and such as it should be after the treaty subsequently entered into between Spain and other states.³⁵

The French had, of course, held both Louisiana and what became West Florida between the Mississippi and the Perdido Rivers. The Spanish, having received that area, along with East Florida, from the British saw things differently. For their part, the United States claimed that the Purchase included all French territory prior to 1763.³⁶ This included considerable territory at the west edge of *Louisiane*, leading to the creation of a large neutral area (1806) between Spain and the United States in which settlement was prohibited.

The Spanish had continued to govern in *Louisiane* until the arrival of French Governor Pierre Clément de Laussat (1756–1835) in 1803, shortly before transferring it to the United States after the Louisiana Purchase. In the brief period of French rule, Laussat eliminated existing judicial structures but left the existing laws unaltered.³⁷ While Laussat respected the

34 Cox (1918) 3.

35 Italics added. The *Treaty of San Ildefonso* is available at <http://www.napoleon-series.org/research/government/diplomatic/cildefonso.html>. See also Cox (1918) 82.

36 Jefferson himself later wrote an essay on the subject of ‘The Limits and Bounds of Louisiana’. JEFFERSON (1817). This question, with respect to land titles, would subsequently arise in the American courts. In *Foster and Elam v. Nelson*, the Supreme Court simply accepted the decision of the other branches of government, ie “a question ... respecting the boundaries of nations, is ... more a political than a legal question”. 27 US 253, 1829 WL 3115 (U.S.La.) 39. That decision followed that in the Louisiana case of *Newcombe v. Skipwith*, 1 *Martin’s Reports* 151. Fulwar Skipwith was the ‘Governor’ of the briefly independent ‘State of Florida’. See also BURNS (1928) 568–569 (listing five additional cases) and BURNS (1932).

37 LEVASSEUR (1996) 608. See MOREAU LISLET/CARLETON (1820) xxi.

Americans, and indeed continued to live in the territory for the next few months, he also wrote that

Everywhere the Anglo-Americans settle, the lands become productive and progress is rapid. There is a special class among them engaged in the occupation of penetrating all unsettled districts for fifty leagues ahead of the oncoming populations.... They build their own cabins, cut down and burn trees, kill the savages or are killed by them, and disappear from the land either by dying or by giving it up. When a score of new colonists have, in that way, gathered in a place, a couple of printer appear, one federalist, the other anti-federalist, then doctors, then lawyers, then adventurers; they drink toasts, they choose a speaker; they constitute themselves a city; they vie with each other in the procreation of children. They vainly advertise vast territories for sale; they attract and cheat as many buyers as possible. They paint inflated pictures as to the size of the population, so as to arrive quickly at a figure of sixty thousand souls, ... and there is then one more star affixed to the pavilion of the United States!³⁸

When the Americans gained control of *Louisiane*, they divided it into two regions. The *Territory of Orleans* was largely the modern state of Louisiana minus West Florida between the Mississippi and Pearl rivers. The remaining *District of Louisiana* spread across the continent. It had always, however, been thinly populated. There Anglophone settlers would relatively easily envelop the existing French-speaking population. Its laws were as easily altered, at least on the surface.³⁹

In any event, American control of the Orleans Territory brought its existing common laws in contact with Anglo-American laws, especially the dominant laws of the courts of common law.⁴⁰ Governor William CC Claiborne (c1772–5-1817) sought, with President Jefferson, to navigate this meeting of legal traditions.⁴¹ By an Act of Congress in March of 1804, the Americans initially maintained the established laws where they were not inconsistent with the Act itself. Over the course of the decade after the Louisiana Purchase, however, a sectional *mixed jurisdiction* of continental private or civil law, Anglo-American criminal law, and American public law would be established. This encounter has long been characterized as a “clash of legal traditions”, most notably in George Dargo’s *Jefferson’s Louisiana*. But even Dargo has recently suggested a more subtle complexity and continuity

38 DE LAUSSAT (2003) 9.

39 ARNOLD (1985).

40 See PALMER (1999) and PALMER (2005).

41 See BROWN (1956).

in Louisiana's laws.⁴² "Hybridity", he wrote, "produced a rich interaction – call it conflict, contestation, or negotiation – from within the mix of languages, cultures and legal traditions that the Americans found in their first true colony."⁴³ The diffusion of the various laws and norms of natives and newcomers – voluntary, involuntary, or indifferent – created an intricate legal and normative hybrid. This gentler, more complex and accommodating analysis serves us better than the stark imagery of a 'clash'. Indeed, both the continental and Anglo-American laws of the nineteenth century differ in significant respects from their common modern forms. The former was, for example, still dominated by the flexible methods of the *ius commune* and pre-modern digests that acted as restatements of the law; the latter had not yet adopted a binding system of *stare decisis*.⁴⁴ As Robert A. Pascal put it, the law of the Orleans Territory was, in contrast to that of contemporary France,

a law, or legal system, much closer in thought and method to the Anglo-American law of the time. The Romanist-Spanish law certainly contained much more legislation than the Anglo-American, but the opinions of the commentators on the Roman and Spanish legislation occupied a position similar to those of the judges in Anglo American law.⁴⁵

Legal positivism was not yet dominant. The formalism of, for example, the French exegetical school hadn't yet secured a preeminent position even in France.⁴⁶ The legal and normative hybridity of Spanish West Florida was, as we'll see, a still more subtle affair.⁴⁷

42 See DARGO (2010). First published in 1975 and revisited in 2010, Dargo's work remains the classic work on the founding of Louisiana's mixed jurisdiction. The idea that the meeting of the two legal traditions was confrontational is, however, much more long-lived. See, e.g., BROWN (1957). That view has also been challenged in recent years. Richard H. Kilbourne, Jr, for example, stressed continuity as well as a constructive role for Jefferson and Claiborne in the creation of Louisiana's legal hybridity. See KILBOURNE (2008).

43 DARGO (2009) 30. Dargo specifically cites 'post-colonial' scholar Homi K. Bhabha at *Ibid.*, 29–30. I was not aware of this as I began to employ the term. Cf the discussion of "middle ground", based on WHITE (1991) in DRUMMOND (2005) 906–910.

44 For a brief, critical discussion of the *New Louisiana Legal History*, see DONLAN (2012, suggesting that, as a programme, this approach is too inattentive to comparative legal history).

45 PASCAL (1984) 353.

46 See KILBOURNE (2008) xvii and 42.

47 Other ongoing debates in Louisiana legal history include:

- (i) the status – ie, digest or modern code – of the 1808 redaction
- (ii) the character – whether French or Spanish – of the *Digest* and the role of the 1808 redactors

In the Territory of Orleans, Spanish private law continued in practice.⁴⁸ Not long after taking up the position as the first judge of the Superior Court of the Territory, New Yorker John B Prevost (1766–1825) confirmed that the *common law* of the territory, *rather than the law of the Anglo-American courts of common law*, was still the law in force.⁴⁹ In any event, the substance of this Orleanian law could be difficult to locate. In this context, the Legislative Council of the Territory authorized redaction as early as 1805. In addition, in 1806, they met and created a bill entitled ‘An Act declaring the laws which continue to be inforce [sic] in the Territory of Orleans, and authors which may be recurred to as authorities with the same’. This included:

1. The *Recopilación de Castilla* (1567 and 1777);
2. The *Autos Acordados* (1745);
3. *Las Siete Partidas* (the law of the Seven Parts drafted 1256–1263 under Alfonso the Wise but not promulgated as law until 1343);
4. The *Fuero Real* of Castile (1254, also under Alfonso the Wise);
5. The *Recopilación de Leyes de los Reynos de las Indias* (1661);
6. The *Leyes de Toro* (1505);
7. The Royal Orders and Decrees which had formally been applied to Louisiana, all as aided by the authority of reputable commentators admitted in the courts of Justice.⁵⁰

These Spanish laws were supplemented by the *corpus iuris civilis*, “particularly as interpreted by the French commentator [Jean] Domat”.⁵¹ And commercial law, as laid out in the bill, was already a hybrid of general Spanish laws and specific Anglo-American doctrine. The bill read that

(iii) the significance of the ‘De La Vergne volume’ of the 1808 *Digest*
 (iv) the character – whether continental or Anglo-American – of its jurisprudence
 (v) the general character – whether natural law-oriented or positivist – of Louisiana law
 On (i)–(ii), (iv)–(v), see KILBOURNE (2008); on (i)–(ii), see also DARGO (2010). On (iii), see CAIRNS (2009). For a similar list of debates, cf BILLINGS (1983) 195.

48 RABALAIS (1982), especially 1504–05. See also VAZQUEZ (1982).

49 F.L. Gonzales, Senior translator of the Archives of the Spanish Government in West Florida, noted there, after a document from the Orleans Territory bearing the signature of Moreau-Lislet, that this “saved the Civil Law for Louisiana.” xvii.78.

50 FELIÚ/KIM-PRIETO/MIGUEL (2011) 11. Late in the article, the authors more accurately date the *Recopilación de Leyes de los Reynos de las Indias* to 1680. The original text of the bill also referred to both *habeus corpus* and trial by jury, “the two most important principles of the judiciary system of the common law” and to numerous laws relating to commerce. It’s available in CARTER (1940).

51 FELIÚ/KIM-PRIETO/MIGUEL (2011) 11.

in matters of commerce the ordinance of Bilbao [1757] is that which has full authority ... [and] wherever it is not sufficiently explicit, recourse may be had to the roman laws; to Beawes *lex mercatoria*, to Park on insurance, to the treatise of the insurances by Emorigon, and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.⁵²

While Anglo-American common law would have fared worse, this hodge-podge of laws, many unavailable in either French or Spanish, may have frightened Claiborne.⁵³ Whatever the cause, he vetoed the bill. This led to the much-quoted *Manifesto* issued by the Legislative Council in defense of their established private law.⁵⁴ Written in an impassioned style, the *Manifesto* likely had mixed motives: the stability of property and politics and the possibility of expediting statehood, as well as a genuine concern about the substance of the law and the culture to which it was attached. If the true motivations of the advocates of the common laws of Orleans and England cannot easily be divined, some amount of low-grade anxiety clearly existed.

In any event, the legislature subsequently decided to redact its private law, the Governor assented, and the *Digest of the Civil Laws now in force in the territory of Orleans* was promulgated in 1808. The completed text, prepared by Louis Casimir Elisabeth Moreau-Lislet (1766–1832) and James Brown, immigrants from Saint-Domingue (present-day Haiti) and Kentucky respectively, would certainly have impressed the Governor more than the 1806 miscellany. Prepared in French and only later translated (rather poorly) into English, it drew much of its text from recent French materials, including both the *Code Civil* (1804) and its *projet* (1800).⁵⁵ But this Francophone form

52 In CARTER (1940).

53 The complexity of English doctrine and jurisprudence (judicial decisions), including the absence of the modern doctrine of binding precedent, made knowledge of it difficult. Bentham wrote that “we are told that we have *rights* given to us, and we are bid to be grateful for those rights: we are told that we have *duties* prescribed to us, and we are bid to the punctual in the fulfillment of all those duties.... Hearing this, we would *really* be grateful for these same *rights*, if we knew *what* they were, and were able to avail ourselves of them: but, to avail ourselves of rights, of which we have no knowledge, being in the nature of things impossible, we are utterly unable to learn – for what, as well as to whom, to pay the so-called-for tribute of our gratitude.” BENTHAM (1829).

54 See DARGO (2010) 236–7. See the Manifesto, in French and English, in CARTER (1940) 643–657.

55 Cf. François Xavier Martin (1762–1846), who later wrote that “[a]lthough the Napoleon Code was promulgated in 1804, no copy of it had as yet reached New Orleans; and the gentlemen availed themselves of the project [sic] of that work, the arrangement of which

appears largely consistent with the existing substantive law of the Territory.⁵⁶ More a restatement rather than a modern code, it was neither merely doctrine nor declaratory. There was no wholesale abrogation of laws, but those that contradicted the *Digest* were annulled.⁵⁷ In addition, the sources of law resemble those of the *projet* rather than those in the *Code Civil*. For example, Article 1 – in Chapter One, ‘Of Law and Customs’– read, in English, that “[l]aw is a solemn expression of Legislative will, upon a subject of general interest and interior regulation.”⁵⁸ But Article 21, in Chapter IV on ‘the Application and Construction of Laws’ also added that

[i]n civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent.⁵⁹

The *Digest* was thus theoretically open where the *Code Civil* was, in theory, closed.⁶⁰ Once again, we might suspect mixed and even contradictory

they adopted, and mutatis mutandis, literally transcribed a considerable portion of it.” MARTIN (1827) 291.

- 56 See TRAHAN (2002–2003) 1036–7. The principal advocate of this view is Robert Pascal, who called the *Digest*, “a Spanish girl in a French dress”. PASCAL (1998) 303. Pascal was one of the antagonists, with Rodolfo Batiza, in the most heated debates of Louisiana legal history. The former, a Francophone Louisianan, argued that the *Digest* was substantially Spanish, the latter, a Mexican jurist resident in Louisiana, that it was French. See especially BATIZA (1971) and PASCAL (1972). Forty years ago, this was described as a “tournament of scholars” in SWEENEY (1972). See also YIANNPOULOS (1983) 100–103 and LEVASSEUR/FELIÚ (2008). It’s essential to note that a detailed examination of substantive law, both in books and in action, would need to be undertaken to confirm this. This has been suggested by, among others, Vernon Palmer in PALMER (2003b). In addition, the French form may have led those more familiar with French than Spanish to approach the *Digest* differently; this is obviously the story for Anglophones judges throughout Louisiana legal history.
- 57 Cf. YIANNPOULOS (1983) 102. On modern views of codification in continental private law, especially the French, see BERGEL (1988).
- 58 *Digest of 1808*, Book I, Title I. The *Digest* is available online through the *Center for Civil Law Studies* of the Paul M Hebert Law Center of Louisiana State University (<http://www.law.lsu.edu/index.cfm?geaux=digestof1808.home&v=en&t=005&u=005#005>). Article 3 noted that “[c]ustoms result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence acquired the force of a tacit and common consent.” *Ibid*.
- 59 *Ibid*. See TÊTE (1973). As Tête noted, the *projet* was also close to the approach suggested by Jean-Étienne-Marie Portalis (1746–1807), one of the four redactors of the *Code Civil*. See also LEVASSEUR (1969).
- 60 Vernon Palmer has argued that the designation of the redaction was changed from a *Code* (understood by the drafters in the new French style) to *Digest* (akin to the older, still

motives, not only between Anglophone and Francophones, but between the different legal actors and branches of government involved in the codification process.⁶¹ And if the hyper-positivism of the exegetical school is not embraced, the *Digest* nevertheless appears as a substantial shift towards positive laws in contrast to either the rule of jurist's doctrine or judge-made law. Indeed, this is all the more remarkable given that the local community had had little legislative experience under its earlier common law. Over time, beyond the period examined here, the French form may have led inevitably, if imperceptibly, to reception of French substance, a process accelerated by the subsequent codification of the 1820s.⁶² The same process would later occur through English, not least through a number of 'false friends' between English and French.

The jurisprudence of the courts, both before and after the *Digest*, also showed continuity with the law before the arrival of the Americans.⁶³ At least in private law. There was little novelty in the *Digest*. The radical positivism of the *Code Civil* was almost entirely absent. But the Territory would also develop a unique, modern sectional mix of laws and legal institutions, the latter bearing the imprint of Anglo-American structures. The local substantive private laws were filtered through hybrid Anglo-Spanish procedures. The Practice Act of 1805 drew on both legal traditions.⁶⁴ If its content was more liberal than its American analogues, the breadth of its provisions left considerable discretion to the courts. These courts were also quickly administered by Anglophone judges untrained in the *ius commune*, on the basis of the arguments of ever-larger numbers of Anglophone advocates.⁶⁵ In the decades ahead, Louisiana's legal procedures would become increasingly Anglicized. And, as early as 1805–6, criminal law was relatively easily converted to that of Anglo-American

common meaning of 'code') at the last minute, perhaps reflecting an anxiety about adopting the new French approach. They – the legislature and the Bar? – were defending their "acquired legal culture" and "preferred the freedom of the open spaces and fluid, plural sources of Spanish, French, and Common law." PALMER (2011) 34, 33.

61 Rodolfo Sacco's 'legal formants' approach might be useful in this analysis. See SACCO (1991a) and SACCO (1991b).

62 PALMER (2003a). See also PARISE (2012).

63 KILBOURNE (2008) chapters 2–3 and TRAHAN (2002–2003) 1038–45.

64 TUCKER (1932–33).

65 See FERNANDEZ (2001), especially chapter 2. See also GASPARD (1987) and LAMBERT (1992).

common law.⁶⁶ Trial by jury and *habeus corpus* were also received. A brief redaction of the Anglo-American law of crimes, authored by James Workman (d1832) on the basis of Federal legislation, was established for the Territory. This was supplemented by an official commentary: Lewis Kerr's *An exposition of the criminal laws of the territory of Orleans* (1806). That work would remain an important legal text for the following half-century.⁶⁷ Both Workman and Kerr were Irishman trained in the common law. Criminal procedures were immediately and thoroughly anglicized. Commercial law, it should be added, would change more slowly, but would, over time, align more closely to wider American laws. Three decades later, Alexis de Tocqueville (1805–59) would write that “[t]he two legal systems face each other there and are slowly amalgamating, as the peoples are also doing.”⁶⁸

Throughout this period, the laws of West Florida continued largely unchanged. As a result, they began to differ from those of the Orleans Territory where Anglo-American law was explicitly received. But the two territories were entangled in a number of other respects. American arrivals had continued to supplement earlier British settlements. Anglophones established in New Orleans also owned extensive properties in West Florida, especially that area between the Mississippi and Pearl Rivers. Many of those of both sides of the border sought to use their knowledge of the territories and their connections in both to further their interests. Some went further. As in other parts of the borderlands, some resorted to violence.⁶⁹ In the same year as the Louisiana Purchase, a minor revolt was led by the adventurer Reuben Kemper (1770–1826).⁷⁰ It was quickly extinguished by the French Governor of Spain's Baton Rouge District, Carlos Louis Boucher de Grand-Pré (?–1809) and the local Anglo-Spanish militia, but appears to have involved a number of important Anglophone Orleanians. This was part of a much larger pattern of frontier filibustering.⁷¹ The most important attempt involved former Vice-President of the United States, Aaron Burr (1756–1836):

66 Cf. LÓPEZ-LÁZARO (2002). In a number of articles, John Langbein has explored the relatively recent origins of Anglo-American criminal law. See, e. g., LANGBEIN (1978).

67 BILLINGS (1991). See BILLINGS (1997).

68 DE TOCQUEVILLE (1969) 271n2. He also suggested that the French might look to Louisiana's experience with the jury. *Ibid.*

69 See CUSICK (2011).

70 McMICHAEL (2002). See generally COX (1918).

71 From 1776–1814, for example, there were no less than seven filibustering attempts in the period in West Florida alone. McMICHAEL (2008) 79.

Burr planned to use the conflict as a lever for prying the western states from the Union, as an occasion for liberating all of the Spanish provinces, or as an excuse for the invasion of Mexico. No one, not even Burr, knew for sure which it would be.⁷²

He was unsuccessful, not least because of the second thoughts of his co-conspirator, General James Wilkinson (1757–1825), the commander of the American Army, who revealed the conspiracy to protect his own position. Both were linked to many of the new Anglophone elites of the Orleans Territory.⁷³ Wilkinson escaped prosecution. The event led to numerous arrests and trials, as well as an attempt to suspend *habeus corpus*.⁷⁴

A number of other critics of Spanish rule, many of them Irish, were involved. For example, before drafting the criminal law of the Orleans Territory and becoming a judge in the ‘County of Orleans’ (1805–7), Workman had recently written a play (1804) critical of Spanish law there.⁷⁵ With Kerr, the writer of the commentary on this criminal law, Workman was unsuccessfully prosecuted for his role in the conspiracy. Both were linked to the *Mexican Association* of New Orleans, whose members wished to invade Mexico and to seize it from the Spanish.⁷⁶ The creator of that society was another Irishman, Daniel Clark (1766–1813). Clark was an American consular agent in New Orleans, an associate of Jefferson, and a land speculator with considerable property in West Florida.⁷⁷ A delegate of the new Territory to Washington, he was later a member of its Legislative Council. There appear to be numerous links to Kemper, Wilkinson, and Fulwar Skipwith (1765–1839), the Governor of the short-lived ‘State of [West] Florida’.⁷⁸ Clark was also an enemy of Claiborne. He fought a duel with the Governor in 1807 in the disputed Spanish territory, wounding Claiborne in the leg.⁷⁹ More generally, the failure of the Kemper revolt and

72 DARGO (2010) 90.

73 See the links between Wilkinson, Edward Livingston, Clark, and Juan Ventura Morales (1756–1819), intendant of West Florida. ABERNATHY (1998) 280–281.

74 DARGO (2010) 97–98 et seq.

75 The Irish-born, London-trained Workman had emigrated to the United States just after the turn of the century. He wrote the play before moving to Louisiana. WATSON (1970).

76 Unlike Clark, both Workman and Kerr were allies of Claiborne.

77 URBAN ALEXANDER (2010). Clark counselled Jefferson “that the boundaries claimed by the Spanish were valid and that West Florida was firmly a Spanish possession.” McMICHAEL (2008) 59. See *Ibid.*, 58 et seq. See also Clark’s letter to Jefferson (8 September 1803) on Louisiana law, included in CARTER (1940).

78 See also WATSON (1970) 258 and McMICHAEL (2010).

79 CARRIGAN (1972) 225. Indeed, dueling, an extra-legal normative order rooted in concepts

the Burr Conspiracy seemed to question the loyalty of, respectively, West Florida's Anglophones and the Orleans *Creoles*. But the security of property may have been far more important than loyalties to cultures and legal traditions.⁸⁰

The widespread belief in Anglo-exceptionalism, in law and beyond, is well-known and long-lived. Accounts of continental laws have long suffered from a legal variant of *la leyenda negra*, the *black legend* of Anglophone historiography that painted Spanish colonialism as inherently tyrannical, corrupt and inefficient.⁸¹ As often as not, this scholarship conveys the unexamined prejudices of its proponents. Contemporary historians have been somewhat kinder to the laws of the Spanish in North America. In discussing the legal culture of northern New Spain – i. e., Texas and New Mexico – Charles Cutter underscored the general equity of Spanish colonial law, the *derecho indiano*. He argued, too, that it “often served as a legitimate expression of popular values”.⁸² Writing on crime and justice in Spanish Louisiana, Derek Kerr has written that “charges of corruption and inefficiency in the Spanish Courts are more a product of black legend historians than of actual court practice”.⁸³ And McMichael has written, in the context of West Florida, that:

The Spanish concept of *derecho vulgar*, or the local interpretations and variations on Iberian and New World law, certainly had more impact on locals. Judges needed to distinguish between *ley*, or written law, and *derecho*, what might loosely be termed ‘justice.’ *Derecho* could be found in a mixture and meeting of written law, the experience of judges, customs, and local community sensibilities. Local customs and customary laws were possibly more relevant to the everyday life of West Floridians, because customary laws derived from loyal practice – practices that eventually gained the force of law.⁸⁴

of personal honour, was common in New Orleans; it is usually, however, attributed to its Creoles.

80 For Louisiana and West Florida respectively, see KILBOURNE (2008) 10 and McMICHAEL (2008) 99.

81 WEBER (1992) 6–7.

82 CUTTER (1995), 43.

83 KERR (1993) 198. Kerr’s study included West Florida. WC Davis has written that “[d]espite a few American complaints, in 1804 justice in West Florida was more equitable than in most places.” DAVIS (2011) 17. On Spanish law in the region, see also DART (1929); DART (1925); PORTEOUS (1934).

84 McMICHAEL (2008) 38. See *Ibid.*, 85.

For most of the inhabitants of West Florida, such *low justice* was more significant than all of the volumes of the *ius commune*. Of course, such discretionary justice, adjudicated on the basis of unwritten community norms, was unique neither for the period or the Spanish tradition. Stuart Banner suggests, for example, something similar for the Francophone residents of Upper Louisiana.⁸⁵

Law was no less complex in West Florida, especially among its minor judicial officers, the *alcades* and *syndics*.⁸⁶ These elected, mediatory and largely discretionary magistrates typically lacked legal training. They had little access, too, to the wide variety of Spain's municipal and colonial laws or juristic doctrine. Their duties, as laid out by the colonial Governor of West Florida, Vincente Folch (1754–1829) in 1804 were extensive, in general comparable to American and English justices of the peace.⁸⁷ Magistrates were to keep records on residents, to monitor settlement and travel, slavery, and Indian trade.⁸⁸ They were to assist the militia, maintain roads, monitor timber harvests, oversee taverns and similar institutions, and even regulate emigration. Their mission could also be expressed in more impressive language. The judge, that is,

ought to be just, disinterested and impartial. The Laws or Ordinances, whether Civil, Criminal or Municipal have for their object individual security, the preservation of property, the defence of the poor against the influence of the rich man, and to support the weak from the oppression of the powerful, to protect innocence against the attacks of calumny, and that no individual of the society be maltreated or injured with impunity by another, and lastly to punish the wicked.⁸⁹

It is a more complex question, of course, whether these principles – and in this form they are little more than principles – were applied in practice. What can only be hinted at here is the significance of those who occupied

85 BANNER (1996) 53. He suggested the importance of “norms that had received no written expression ... before the disputes arose.” Ibid. Adjudication occurred “according to an intuitive sense of justice shared by the community, or at least by a large enough fraction of the community, to make the decision reasonable.” Ibid. Anglophones were the more positivistic of the two communities. See also BANNER (2000) and ARNOLD (1983).

86 KAHLE (1951).

87 Cf., e. g., MORGAN/RUSHTON (2003).

88 [FOLCH] (1926). The regulations, including an oath of allegiance, appear to have been in English. Folch was Governor from 1796–1811.

89 Ibid., 409–410.

the position of *alcades* or *sydico*. Like the population as a whole, these elected lower magistrates tended to be, at least west of the Pearl River, Anglophones. Indeed, ordinary adjudication may have reflected Anglo-American laws *as customs* tolerated, explicitly or implicitly, under Spanish laws. The existing records for the jurisdiction of Baton Rouge show complex adjudication and administration on sales, successions, slaves, and crimes.⁹⁰

Links between law and culture are easy to exaggerate. It is true, of course, that the Creoles of Orleans defended their civil or private laws against the imposition, real or imagined, of Anglo-American laws. But they did so not merely on the basis of culture, but in continuity with the thousands of existing contracts and property titles that then existed. And faced with governance by others, they insisted, not surprisingly, on being given powers of law-making and self-government. But they appear to have had little objection to, or difficulty with, Anglo-American criminal and constitutional laws. With West Florida, the truth seems similarly complex. West Floridian loyalties, as in other times and places, seem more rooted in property than patriotism. This is not to say that culture is irrelevant. There were real, meaningful differences in legal consciousness across communities. In Mexican California between 1821–46, for example, David Langum has suggested another ‘clash of legal traditions’ between Spanish law and Anglophone settlers.⁹¹ This meant different conceptions of the state and the judiciary, as well as matters like property in marital regimes and successions.

Closer to Feliciana, Susan Brooks Sundberg has explored the position of women in Orleans, West Florida, and the Mississippi Territory.⁹² The first was culturally French with continental private laws; the last was culturally Anglophone with Anglo-American laws. In between, in West Florida, especially in West Feliciana, was a culture that was largely Anglophone with Spanish laws. Her work suggests that women fared best in Orleans and worst in Mississippi. And ‘West Feliciana ... demonstrates the encroachment of Anglo common law principles among male testators. These Anglo will writers often sought to circumvent the law, by reducing women’s share of marital property.’⁹³ Another unique hybrid, here of Anglo norms and

90 Archives of the Spanish Government in West Florida.

91 LANGUM (1989). See also REID (1980).

92 See BROOKS SUNDBERG (2012) and BROOKS SUNDBERG (2001).

93 BROOKS SUNDBERG (2012), 195.

Spanish laws, was created. But in both Orleans and West Florida, the relationship between law and culture was complex.

The 'State of Florida'

The events that saw the westernmost portion of Spanish West Florida, between the Mississippi and the Pearl Rivers, first briefly independent and then annexed by the United States, are too complex to relate in any detail here. They are important, however, in filling in the legal and normative picture of the region. The causes of the change were global as well as local. First, earlier American attempts in 1805–6 to buy the Floridas had been unsuccessful.⁹⁴ Spain had tightened its laws on property ownership and sales after the Kemper affair. Since 1807, the Americans had established an embargo, directed against Great Britain, that prohibited Americans from visiting foreign ports and *vice versa*. This had a crippling effect on West Florida. In addition, Napoleon had already disposed the Spanish King, Ferdinand VII (1784–1833) and placed his older brother, Joseph-Napoleon Bonaparte, on the throne as Joseph I (1808). Throughout the Spanish colonies, *juntas* were created (in present-day Peru, Venezuela, Columbia, Chile, and Mexico) to rule in the name of the deposed king. There was also considerable fear of French sympathizers in Orleans and, in West Florida, a significant number of Saint-Domingue refugees arrived by way of Cuba. Grand-Pré, the Governor of the Baton Rouge District, was also recalled to Havana and died shortly afterwards. Once a law student himself, Grand-Pré was a long-time resident of the region and was much-loved. His loss may have made West Floridians still more anxious about the security of their property.⁹⁵ All of this was exacerbated by the fear of French invasion or American annexation without security in property as well as American machinations. This was true of both Claiborne and David Holmes (1769–1832), the Governor of the Mississippi Territory and future Governor of the state, who began to agitate for annexation. And the West Floridians, or

94 EGAN (1969). The American Congress had voted to provide money for the purchase of West Florida. By the following year, this was no longer possible. See DAVIS (2011) 106.

95 See generally McMICHAEL (2008) 149. For other recent works, see HYDE (2004–2005) and the special issue of the *Florida Historical Quarterly* (2011). Cf. ABERNATHY (1998); FAVROT (1895); KENDALL (1934a); KENDALL (1934b); KENDALL (1934c).

rather the Felicians of the westernmost part of West Florida around Baton Rouge and Bayou Sara, had begun to meet even before the departure of Grand-Pré.

As in other Spanish colonies, the Felicians petitioned the new Spanish Governor, the French-born Carlos de Hault de Lassus (Delassus, 1767–1843) to hold a convention to secure the peace.⁹⁶ He agreed. In their meetings, beginning in the summer of 1810, “they attempted to work out some system by which they could retain the Spanish officials and preserve their allegiance to Spain, but still have their own legislative body for the protection of their liberties.”⁹⁷ A brief, proposed ordinance appeared in the *Natchez Chronicle* on 17 July. It noted the vacuum created by the deposition of the Ferdinand and devolution of power to the people of West Florida. In addition to guaranteeing contracts already made, it also stated, in Article 1, that

The laws, usages and custom heretofore observed in the administration of justice, and in determining the right of property, shall remain in full force, as long as the situation of the country will allow, until altered or abolished in the manner hereafter provided.⁹⁸

When the convention began a week later, on 25 July 1810, their members were all from the west of the Pearl River. The center of gravity was, however, very clearly with those members from Bayou Sara and Baton Rouge along the Mississippi at the westernmost edge of the Territory. The conventioners immediately attended to questions of judicial organization. They focused on the establishment of courts competent to give final judgment, presumably without appeal beyond West Florida. Indeed, they curiously argued that this was true of both criminal cases as well as “cases of law and equity.”⁹⁹ In addition, the only member with a Spanish surname, Manuel López, made a motion to consider “appointing a Counsellor well acquainted with the Laws of Castille and the Indies”.¹⁰⁰ They also gave special attention to questions of

96 KENDALL (1934a) 85–86.

97 PADGETT (1938b). They suggested that they wanted “to make as little innovation as possible in the existing laws of the country and to obtain the approbation of superior authorities.” ‘The Convention to De Lassus’ (22 July 1810) in *Ibid.*, 705. The journals of the Convention, as well as the Florida House and Senate are in *Ibid.* The Convention materials are also in CARTER (1940).

98 In ARTHUR (1935) 46.

99 *Ibid.*, 50–51 (from the Convention, 26 July 1810).

100 ‘The Journal of the Revolutionary Convention’ (27 July 1810) in PADGETT (1938b) 693. He also objected to the degree of powers claimed by the Convention. PADGETT (1938b)

land titles and to the organization of the militia. Throughout, the conventioners pledged their loyalty to Spanish rule. De Lassus consented.¹⁰¹

Within a month, the Convention had proposed an elaborate ‘Ordinance for the Publick Safety, and for the Better Administration of Justice with within the Jurisdiction of Baton-Rouge, in West Florida.’¹⁰² De Lassus eventually approved, though Lopez noted his objections. The Third Article established a “superior court of the jurisdiction of Baton Rouge, in West-Florida” consisting of the Governor and three judges, one each from the Baton Rouge, New Feliciana and St Helena and St Ferdinand Districts.¹⁰³ The court could decide its cases, and those taken on appeal, with finality.¹⁰⁴ As López had requested, a counselor “learned in the laws of Castile and the Indies” was also to be employed.¹⁰⁵ Three civil commandants were also to be selected, one each for the three judicial districts.¹⁰⁶ More surprisingly, the district courts that were established included a jury for criminal matters (as the Orleans Territory had already accepted). The courts:

shall have original jurisdiction in all cases, civil and criminal ... not within the jurisdiction of any single alcalde; but in all trials of criminal cases they shall order six free-holders of the vicinity to come and hear the testimony in open court, and to declare upon oath their conviction as to the guilt or innocence of the party accused, who shall be immediately discharged if the said declaration be ‘not guilty.’¹⁰⁷

There was provision, too, for alcaldes, eight each for the three districts.¹⁰⁸ And while the Ordinance stated that established procedures would continue,

702–703. The Convention also created a proposal on the “better administration of justice within the jurisdiction of Baton Rouge”.

101 See the discussion of American, loyalist, and independent factions in HYDE (2010), 265–267.

102 In ARTHUR (1935) 69–88.

103 *Ibid.*, 77 (Section 2).

104 See *Ibid.*, 77 (Section 1).

105 *Ibid.*, 78 (Section 7).

106 These officers would reside in the district “and in all civil cases shall have and exercise the powers and perform the duties heretofore ... together with those of a notary publick”. *Ibid.*, 78 (Section 10). See also *Ibid.*, 78 (Section 11).

107 *Ibid.*, 79 (Section 13).

108 These would “be elected by the people ... [and] shall have final jurisdiction in civil cases in which the amount of the matter in dispute does not exceed fifty dollars, and who shall have in all other respects the same powers and emoluments, and perform the same duties as have heretofore been assigned to similar officers under this government.” *Ibid.*, 80 (Section 20). See *Ibid.*, 81 (Section 23).

two sections appear to bear the imprint of Anglo-American law.¹⁰⁹ Section 25 read that

in all criminal prosecutions, the accused shall have the privilege of a speedy and public trial, in which he shall be confronted with and allowed to examine all the witnesses against him, and to produce testimony in his defence. He shall also have compulsory process to procure the attendance of witnesses if required, and shall in no case be compelled to give testimony against himself.¹¹⁰

Section 26 is similar and allowed the process and records to be in Spanish or English.¹¹¹ With Section 27, courts had the power to appoint an interpreter.¹¹² Whatever the motives of the conventioners or the Governor, the result was that Spanish structures had, at least formally, received aspects of the common law.¹¹³ Within days, the Convention had proposed appointments to the positions established in the Ordinance. With some minor adjustments, the Governor consented.

As this was happening, however, the Americans, from President James Madison (1751–1836) on down, began to press settlements across the Floridas to rebel. The President “was implementing a new kind of foreign policy for the United States, a sort of passive imperialism aimed at gaining territory with the least exposure by inciting the inhabitants themselves to take the risk.”¹¹⁴ Governor Holmes, in particular, seems to have shown considerable encouragement to the growing sense of among Felicians that their future rulers would be American rather than Spanish. Delassus did all he could to maintain his rule. By his actions, he hoped that “this territory will be saved for His Catholic Majesty, and if possible will be freed from the

109 The procedures were largely consistent with those “heretofore established and practiced”. *Ibid.*, 81 (Section 24).

110 *Ibid.*, 81 (Section 25).

111 “[A]s may best suit the convenience of the parties concerned, and .. all witnesses may be examined by both parties on all points relative to the matter in controversy.” *Ibid.*, 81 (Section 26).

112 *Ibid.*, 81 (Section 27).

113 It might be a bit exaggerated to say that “Spain still ruled, but the courts were re-established as close to the US model as Spanish law allowed; a land office was to be opened, a new militia regime inaugurated, alien immigration regulated, deserters from armies friendly to Spain prohibited, and a printing press established.” DAVIS (2011) 169.

114 *Ibid.*, 132. Cf. SCALLIONS (2011), whose use of primary sources enriches, while not altering, McMichael’s account. Nor does it establish that West Florida was “an independent nation progressing to a viable republic ...”. *Ibid.*, 220.

horrors of anarchism”.¹¹⁵ By September, the rhetoric of the Convention had altered considerably. They declared Delassus “unworthy of their confidence”.¹¹⁶ They also decided to contact the Americans to state their “wish ... that the said Territory may be recognized and protected by them as an integral part of the United States.”¹¹⁷ Fearful of Spanish seizure of their land and of a force of Spanish regulars being raised by Folch and supplemented – or so they believed – by Choctaws and slaves, the Felicians could prevaricate no longer. By late September, the Felicians had taken the Spanish Fort at Baton Rouge.¹¹⁸ Among the few killed and injured was Louis de Grand-Pré (c1787–1810), the son of the former Spanish Governor, who died. A *Declaration of Independence* was also shortly issued.¹¹⁹

The rebellion was only a qualified success. It never extended in fact beyond the Pearl River. It was not unanimous even to the West of the Pearl. Ironically, the delegates of the Convention found it necessary to chastise the loyalty of those that disagreed with them.¹²⁰ One of the conventioners loyal to Spain was killed trying to escape. Indeed,

[a]t this point more than half of the delegates (perhaps smelling a rat), including three of the five from Baton Rouge and all the delegates from the eastern districts, resigned their seats in protest. This allowed the remaining delegates to pass the declaration.¹²¹

A mutiny also occurred at the Fort, though it was quickly repressed. A campaign to seize the Territory west of the Pearl River, especially Mobile, was unsuccessful. It was led by, of all people, Reuben Kemper, in league with local filibusters including the *Mobile Society*. Not surprisingly perhaps, Kemper did little to help the situation, either militarily or diplomatically. Meanwhile, the remaining rump of the Convention wrote the American Secretary of State stating that if the United States sought to annex them, they claimed admission “as an independent State, or as a Territory of the United States, with permission to establish our own form of Government, or to be

115 Archives of the Spanish Government in West Florida, xviii.80 (21 August 1810).

116 PADGETT (1938b) 717.

117 Ibid., 717–718. They wrote Governor Holmes in an appeal to their “mother country”. Ibid.

118 See ‘Colonel Philemon Thomas to the Convention (24 September 1810)’ in Ibid., 719 et seq.

119 HYDE (2004–2005). See STERKX/THOMPSON (1961) and PADGETT (1938b) 725–726.

120 ‘Convention to Philemon Thomas (30 September 1810)’ in PADGETT (1938b) 730. See PADGETT (1938b) on Kneeland, Jones, and Brown at 737–740.

121 McMICHAEL (2008) 164.

united with one of the neighboring Territories, or a part of one of them in such manner as to form a state.”¹²² In this last instance, they preferred being joined to the Orleans Territory.¹²³ “[A]nd they lost no time in focusing on the ever-present issue of land.”¹²⁴

In the interim, the Convention approved a Constitution on 27 October for what it referred to as the “State of Florida”.¹²⁵ It borrowed heavily from the Federal and Kentucky (1799) constitutions.¹²⁶ Maintaining their current laws, they provided for the establishment of a “Supreme Court, and inferior Courts”, “*Habeus Corpus* as defined by the Common Law of England”, and “the introduction of trial by jury”.¹²⁷ Its provisions on criminal law were especially close to the Federal ‘Bill of Rights’. With respect to land titles, Article 4, Section 1 gave the ‘General Assembly’ power over public lands. Article 4, Section 2 read that:

Every actual settler who now inhabits and cultivates a tract of land within the Commonwealth for which he has obtained no complete title, and which has not been legally granted to any other person, shall be entitled to such quantity including his improvement, as has usually been granted to settlers according to the laws[,] usages and customs of the Spanish government: proved the forms proscribed by law respecting the registering [?] and surveying thereof be complied with in due time: And no actual settler as aforesaid shall be deprived of a tract so inhabited and cultivated by him, in consequence of an claim hereafter brought by any person of which the said inhabitant has not now or heretofore notified.¹²⁸

The Constitution anticipated, too, the inclusion of Mobile. Had they known how little progress Kemper was making, they might have left this out.

For ‘Governor’, the Convention selected Fulmar Skipwith, a distant relative of Jefferson and a former American diplomat who had been involved in the negotiation of the Louisiana Purchase. He hadn’t been in the Territory

122 PADGETT (1938b) 743. See *Ibid.*, 741–744.

123 *Ibid.*, 743.

124 DAVIS (2011) 199.

125 See generally PADGETT (1937). In *Ibid.*, the text ends in the middle of Article 7. The original handwritten text is also included in BICE (2004).

126 The latter was also used as the basis of Louisiana’s first state Constitution in 1812. The Governor of the State of Florida was to be selected by the legislature, the process also chosen in the Louisiana Constitution of 1812. See DAVIS (2011) 207–8.

127 Article 3; Section 1, 3, 3 in PADGETT (1937) 890–891. Other writs, juries (both Grand and Petit), and Justices of the Peace, were mentioned, as was ‘real property’ (rather than ‘immovables’) and freeholders.

128 Article 4; Section 2 in PADGETT (1937) 891. See also Article 4; Section 3 in *Ibid.*

very long.¹²⁹ In his gubernatorial address, Skipwith noted, among other things, improvements in the administration of justice, especially the finality of the judgments of the courts. He noted the importance of the militia. Then, in an extraordinary passage, he said that “the blood which flows in our veins, like the tributary streams which form and sustain the father of rivers, encircling our delightful country, will return if not impeded, to the heart of our parent country.”¹³⁰ In the context, these sentiments seem to reflect a careful and cultured self-interest more than self-identity and culture. And on the same day that the Constitution had been approved, American President Madison issued a proclamation annexing West Florida, extending to the Perdido River (rather than the Apalachicola River to its east). The Americans, including Governors Claiborne and Holmes, arrived some weeks later to take control of the area. Indeed, the Felicians only acquiesced under protest over several days, shocked that they were unable to enter the union on their own terms.¹³¹ Skipwith was particularly unhappy with the behavior of the Americans. The seventy-nine days of the nominal independence of the ‘State of Florida’ was over. Its future was now in American hands.¹³²

After establishing control, at least west of Mobile, the Americans designated the whole the *County of Feliciana*.¹³³ Mobile would only be captured in 1813, during the *War of 1812* (1812–15); the area was added to the Mississippi Territory.¹³⁴ With control of the new county, the Americans had to decide what to do with it.¹³⁵ The Felicians again suggested unification with Orleans and the American state that would soon be created by it. Skipwith himself noted that “this arrangement would give to the State so formed a majority of American over [the] French Population.”¹³⁶ Rumors

129 He appears to have been in favor of annexation. He would be very unhappy, however, about the manner in which this actually occurred. Note the resolution “of the 23 to establ[ish] a court of Admiralty” at PADGETT (1938b) 773.

130 PADGETT (1938a) 127.

131 Including the charge of a “violation of the Law of nations”. PADGETT (1938b) 764.

132 See generally Stagg (2013).

133 Within the county were parishes, including from west to east, Feliciana, East Baton Rouge, Saint Helena, Saint Tammany, Viloxi, and Pascagoula. Saint Tammany Parish was bizarrely named by Claiborne after a Delaware Indian Chief, Tamanend (c1628–98).

134 MURDOCH (1964).

135 See MARKS (1971).

136 ‘Skipwith to Madison (5 December 1810)’ in PADGETT (1938a) 144. See *Ibid.*, 130. Skipwith stressed, too, the need for clarity with respect towards existing land grants. ‘Skipwith

that the area west of the Pearl River would be attached to Mississippi, led to a brief, minor revival in 1811. Later that year, John Ballinger argued that the County “forms a political family living in the same neighbourhood whose laws, Usages & Customs are the same, and bound by such ties as would produce harmony and cooperation in all its members.”¹³⁷ He accepted the possibility of severing the area west of the Pearl River. A subsequent ‘Memorial to Congress from Inhabitants of Feliciana County’ of the following year similarly stated that “[o]ur laws & customs respecting the descent of property, and other important subjects, having been similar, our union with them will be easy and natural”.¹³⁸ There was an interesting continuity, too, in the choices Claiborne made for the judges in the new County. John Rhea had served as an alcade in Spanish West Florida and was President of the Felician Convention. Dr Andrew Steele was a lawyer, a Secretary at the Convention, and had been chosen as a judge of the ‘State of Florida’. And, as Rose Meyers writes, “Claiborne’s actions were characterized by patience and sincere friendship for the West Floridians. From his letters, one gets the feeling that he was more in sympathy with the Anglo-American element in West Florida than with the Creole element in New Orleans.”¹³⁹

The following year, a convention was held to prepare a Constitution for statehood for the Orleans Territory. No representatives of *Feliciana* were present. The Constitution of what became the State of Louisiana was based on the 1799 Constitution of Kentucky, though translated into French. Indeed,

to John Graham’ (14 January 1811) in *Ibid.*, 167. Skipwith also complained about his portrayal in the press as a land speculator. *Ibid.*, 165–166. This is attributed, in part, to his co-ownership of land with the ubiquitous Clark. See also ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 177. He would continue to challenge the American account of the annexation for years. ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 173–174. See his historical account of West Florida in *Ibid.*, 172–173. He expressed frustration that annexation prevented the Floridian capture of the whole of the Territory. ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 175. He was later chosen to be included in the Orleans’ legislature, but rejected the offer as the Florida Parishes were not yet included in the Territory.

137 Ballinger to the Secretary of State (26 December 1811) in CARTER (1940) 967. A similar letter noted that West Florida, at least west of the Perdido River, “is of right already a part of Louisiana – that it has heretofore been governed by the same Laws – suffice it to say that, on this single circumstance, will chiefly depend the future Character of this State.” Secretary Robertson to the Secretary of State (2 January 1812) in *Ibid.*, 975.

138 (17 March 2012) in *Ibid.*, 1008.

139 MEYERS (1976) 129–30.

Of comfort to Gallic interests was a section that continued existing territorial laws and prohibited the legislative from adopting new statutes by general reference. Americans and Creoles alike warmed to another condition mandating the judges to base their decisions in writing on specific reasons and particular legislative enactments. These latter restrictions were seen as hedges against limitless intrusions of common law into Louisiana jurisprudence and bridles on judicial power.¹⁴⁰

Louisiana was admitted to the Union in 1812, though still with some confusion on its Western border.¹⁴¹ Shortly afterwards, the area between the Mississippi and the Pearl Rivers was added.¹⁴² Problems would continue in what is now called the *Florida Parishes*, not least in the administration of justice and in land claims. The latter continued for decades, as did the sense of the area as a “distinctive region”, an “ambiguous portion of the state”.¹⁴³ Assuming that Spanish claims were recognized this would still have meant that its laws were virtually the same as those of the former Orleans Territory, with the exception of Spanish legislation made between 1803–10. They would eventually occupy both of the former Florida territories. Spain eventually ceded the remaining Florida territories in the *Adams-Onís Treaty* (1819). When the Florida Territory was organized in 1822, it consisted of most of East Florida and a small portion of the former West Florida. This ‘State of Florida’ was very different than the first.¹⁴⁴

Conclusion

This is a first sketch of legal and normative entanglement in Spanish West Florida between 1803–1810.¹⁴⁵ Its hybrid laws and norms were created by the diffusion of different European populations and traditions into the

140 BILLINGS (1993a) 17. See also BILLINGS (1993b).

141 BROOKS (1940) 30.

142 See the materials in PADGETT (1938a) 191–201. The population of the Orleans Territory was 76,556 in 1810. GRONER (1947–48) 372. The population of West Florida – not the Florida Parishes – was estimated at 15000–20000 at that time. Note, too, that the population of the Orleans Territory had been only 55,534 in 1806. CARTER (1940) 923.

143 HYDE (1996) 22. See *Ibid.*, 4.

144 See PADGETT (1942).

145 Much remains to be done. Traditional legal sources, eg the Spanish judicial and administrative archives, must be supplemented by more novel sources, eg newspapers, private correspondence, diaries, etc. Both are scattered across continents. Additional research should, however, permit a still deeper description of the lived legalities and normativities, both in principle and in practice, of this time and place.

Territory over the previous century. The result was that the laws and principles of the Spanish colonial *ius commune* criss-crossed with the norms and practices of West Florida's Anglophone settlers, including its low magistrates. This only began to unravel with threats from beyond the borders of the Territory. The French war in Europe was important, particularly by leaving American expansion closer to home unchecked. In their minor rebellion and brief, nominal independence, the Floridians injected some Anglo-American legal elements into their Constitution and laws. But they appeared less anxious about their laws than their properties. Indeed, throughout the period, the laws, lives, and land ownership of the Floridians were also deeply intertwined with those of Francophone Orleanians and the ever-larger number of Americans, including lawyers and judges, there. In both territories, there was a struggle to balance the legal and normative desires of the population with changing economic, political, and social realities. Understanding the entangled histories of West Florida and the Territory of Orleans can tell us much about the wider entanglement of Western laws and norms and about continuity and change in a critical transition period for the modern nation-state and common laws.

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German Colonial Law and Comparative Law, 1884–1919

Introduction. Colonial Comparisons and Comparative Law

The German colonial empire arose out of a comparison; out of a comparison the end of this colonial empire was justified.

Since the 1840s, “colonial striving” (*koloniale Projektmacherei*) had not subsided in Germany’s bourgeois circles. Referring to other European states and their overseas possessions as well as the riches which they derived therefrom, and their growing position of power in the world, was part of the argumentative repertoire of colonial enthusiasts. With the 1871 founding of the nation-state, “colonial abstinence” appeared less and less “coherent”, “conceivable or, even, in accordance with reason”, since even smaller states like Portugal, Spain or Holland actively pursued colonial politics.¹ Aside from the economic, social-Darwinistic or social-imperial justifications, these (envious) comparisons always played a role whenever it came to promoting or justifying German colonial possessions.² The exit point for these comparisons was the “perception ... of an own deficit in comparison to nations ..., which were estimated to be more successful”. “The comparison then led to the attempt to imitate an admired example”.³ Thus the attempt began to create a “German India” in Africa, a “German Hong Kong” in China. Such comparisons expressed the hope for geo-political and colonial parity as a German “world power” which, indeed, had yet to be achieved.

On account of this imitative constellation, the literary scientist Russel A. Berman has described German colonialism as “secondary”. Missionary zeal

1 GRÜNDER (2004) 22, 25.

2 See, instead of many: KÖPEN (1905) 237 et seq.; FRIEDRICHSMEYER/LENNOX/ZANTOP (1998) 8 et seq.

3 OSTERHAMMEL (2003) 463 – who has promulgated the rule: “No transfer without prior perception of difference.”

did not play the primary role. “Rather, the primary motivation to establish an overseas empire was parity with other colonial powers, specifically the competition but also the imitation of Great Britain. ... [T]he German colonial discourse possessed an imitative, epigonic character.”⁴ Specifically in this German self-reflection, which saw itself as being “forced to take second place”, lay the foundation of something like a German colonial “Sonderweg”.⁵ This path has, to be fair, been discussed in recent years with reference to the application of force in the colonies and potential continuities into the time of National Socialism. Next to many other objections to this “historical-teleology” it has, however, been stated that, in the colonial context, the “European, trans-national dimensions”, the “complex entanglements of reciprocal influences, of transfer of ideas and politics between states and their agents” ought to be analysed.⁶ The initially described contemporary German comparison with older colonial nations and the orientation toward these suggest this definitively. From these comparisons ensued results which tendentially confirm similarities amongst the colonial powers – from every-day colonial administration through to acts of violence. According to the state of research, “much speaks in favour of the fact that, during time of High Imperialism, the differences amongst the European colonial powers overall took a back seat to their commonalities. The reciprocal attentiveness for the methods of the respectively other colonial powers serves as evidence of this.”⁷ Insofar as this was concerned, there was progressively less reason to “ignore the colonial knowledge of other states in the legal and administrative areas”,⁸ given the fact that German “legislation [had] always, to a lesser or greater extent, attempted to learn from historical and foreign experiences”.⁹

This article will discuss the German attentiveness to the colonial law of other powers and its role as an exemplar for the German legislature and

4 BERMAN (2003) 28.

5 KUNDRUS (2003b) 9.

6 KUNDRUS (2006) 83 et seq.; cf. GERWARTH/MALINOWSKI (2007).

7 LAAK (2004b) 257.

8 SIPPEL (2001) 354.

9 DÖLLE (1960) 23. The author refers to the discussions surrounding the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*), design patent law, the Insolvency Law (*Konkursordnung*), the German Civil Procedure Code (ZPO) and the German Civil Code (BGB).

administration, i.e., colonial comparative law. In this vein, by way of introduction (I.), the context for the transferring, entangling and comparing of laws will be discussed. Subsequently (II.–V.), with reference to four colonial law fields and (VI.) “comparative law” voyages, the German reception of provisions of foreign law but also deviations from these “examples” shall be analysed. Moreover (VII.), the contemporary ‘method’ of colonial comparative law will be briefly discussed prior to, by way of conclusion, investigating the relationship of comparison and difference in German colonial law.

I. Colonial Law in the Context of Transfer, Entanglement and Legal Comparison

Comparison – not as an historical method (historical comparatism), but rather as the object of historical analysis of law and legal systems¹⁰ – takes the contemporary investigation of “foreign” codifications, norms, institutions and procedures as an occasion to demonstrate the reciprocal (legal) transfer between colonial powers and, finally, their entanglement. Taking as an example German colonial law, we shall historically present and analyse “applied comparative law”. The goal of this, i.e. of applied comparative law, is to find the “appropriate solution for this or another specific problem”. It is not only relevant in a legal-sociological sense to emphasise that the applied “comparatist is often [under] a compulsion to act: driven by the vital question whether and how, in a particular point, the valid law ... should be changed, he must come up with concrete proposals in a limited time-frame”.¹¹ These characteristics of empirical and decision-making structures, the urgency of time and the underlying power relationships are not only to be taken into account vis-à-vis the legislative processes as such. In this context it should be emphasised: “Comparatists [even those in the non-academic field] ... are participant observers.”¹²

If historians today emphasise the transfers between nations and regions, the task follows herefrom, by way of a critical source analysis, to investigate

10 Cf. HUG (1932); critically on the possibility of a history of comparative law: FRANKENBERG (1985) 426; MICHAELS (2002).

11 ZWEIGERT/KÖTZ (1996) 12.

12 FRANKENBERG (1985) 441.

those ‘craftsmen of transfer’ who, in media and institutions, compared, transferred and entangled. In a certain way, the legal comparison analysed in the ministries and colonial offices is a part of the entangled history (*histoire croisée / verflochtene Geschichte*) of, as it may be, Germany and France.¹³ Thus, Helmut Coing showed “how modern property law in both countries was created on the basis of a mutual exchange of ideas”.¹⁴ A decisive difference was, however, that on account of the object of comparison (“colonial law”), a third category always played a role, namely that of the “colonial other”, whose distorted picture as an African “savage” had to be first *comparatively* created within and with the discussed norms¹⁵ and who, nevertheless, acted and reacted independently. At the same time, the transfer analysis cannot be content with confirming “successful” adoptions. It must also take into account resistance and change.¹⁶

Beginning with the assumption that “the study of colonialism is by nature comparative or cross-national”,¹⁷ the necessity of crossing imperial borders in order to achieve a better understanding of colonialism and imperialism has been rightly described as a “commonplace of modern imperial historiography”. Whilst important comparative studies exist in the natural sciences and also in reference to the ideologies of (colonial) rule,¹⁸ colonial comparison of laws has hitherto only been given limited academic attention. Indeed, for a long while colonial legal history remained “a relatively untouched field”.¹⁹ This may also be on account of the rise of post-colonial and trans-national questions which has caused the framework of the nation-state, with which law is generally connected, to lose its importance for historical analysis. Indeed, this framework remains irreplaceable for legislation and individual legal systems.²⁰ Nonetheless, even here, influences, processes and discourses can be discovered which reach beyond national borders.

13 ZIMMERMANN et al. (1999); cf. ARNDT et al. (2011).

14 COING (1978) 168.

15 NUZZO (2011) 211.

16 HAUPT/KOCKA (2004) 32.

17 FINALDI (2005) 245.

18 STUCHTEY (2005) 20 with additional references; cf. LEONHARD/VON HIRSCHHAUSEN (2011).

19 MACKENZIE (2001).

20 HAUPT/KOCKA (2004) 35; cf. SIPPEL (2005).

Whilst the “discipline of history, since historicism ... has been largely reserved vis-à-vis comparisons”,²¹ “legal history has traditionally been closely connected to comparative law”.²² Moreover, in the second half of the nineteenth century, applied “legislative comparative law” was an established procedure (although comparative law, as an academic discipline, had only gradually begun to receive recognition).²³ The history of “comparative law as the basis of legislation”²⁴ has been addressed repeatedly in an inter-European context and “important early forms of comparative law” exist which go back far further than the 19th century.²⁵ Among jurists, there developed a recognition that the “experiences of other peoples provide an indispensable reservoir for every true legal reform”.²⁶

The Rostock public law scholar Friedrich Bernhöft explained the advantages of a “general [i.e., going beyond state borders] methodological instruction of law [*Gesetzeskunde*]”: “Regarding that which the legislature should seek out, regardless of which form that for which is striven shall achieve, the extant laws and experiences give reliable reference points for this which have been made with their determinations. One does not need to experiment, since the experiment has already been conducted by others, and its result is available.”²⁷ For the French judge R. de la Grasserie, the “advantage” of comparative law lay “in the completion of all legislation”. “All foreign laws can be regarded as a great experimental field. ... Each new law is an attempt, limited to a small space, from which other peoples can derive benefit.”²⁸ Further, the French comparatists Raymond Saleilles and Edouard Lambert argued: “Both assigned to comparative law the function of contributing toward the finding of the ‘right law’.”²⁹ Legal harmonisation, even in questions of detail – e.g., in colonial law – would here lead to a

21 HAUPT/KOCKA (1996) 23, who derive this reticence from the necessity of “selection, abstraction and absolutism from the context”; in the same vein: HAUPT/KOCKA (2004) 25.

22 MICHAELS (2002) 110; cf. CONSTANTINESCO (1971) 142: “Vergleichung und Rechtsgeschichte, die häufig miteinander verwechselt werden”; UTERMARK (2005) 55–118.

23 ZWEIGERT/KÖTZ (1996) 49–52; KUNZE (2004) 19–23; 33–37.

24 COING (1978) 161; cf. STOLLEIS (1998); SCHWENZER (2008) 71–76.

25 SCHERNER (1978) 135.

26 CONSTANTINESCO (1971) 137.

27 BERNHÖFT (1895) 8; regarding Bernhöft cf. ZWEIGERT/KÖTZ (1996) 57.

28 DE LA GRASSERIE (1904) 347; cf. COING (1978) 161; 178.

29 SANDROCK (1966) 18.

provisional function of legal comparison.³⁰ “Comparatists have done their work in a variety of spirits, reaching from noble humanism to straightforward instrumentalism.”³¹

One of the most politically and academically influential German public law theorists in the second half of the 19th century, Rudolf von Gneist, concerned himself from the start of his legal career with comparative law and did so on an historical basis.³² Even his famous “English Studies [were undertaken] in the tradition of the Historical School”.³³ Finally, following Gneist’s analyses of English “self-government” and its progressive development in Prussian self-administrative law (*Selbstverwaltung*), comparative law achieved effective political influence in German constitutional development.³⁴ It had always been his goal “to derive practical benefits for Prussia and Germany from the English experience”.³⁵ The officials in the ministries of Berlin thought and acted similarly with their “comparative law enquiries”.³⁶ Thus, in 1884, during the reform of capital markets law, they assigned an appendix to their motives which represented “foreign stock market law in its development”.³⁷ Even “overall German criminal law jurisprudence [had been] conquered by the comparative method”.³⁸

This tradition of comparative law as a natural practice in the ministries of Berlin made it only more likely that existing colonial regimes would be examined when it came to the “fresh” (*am grünen Tisch*)³⁹ development of a German colonial system. The German administration recognised that foreign colonial legislation could provide significant direction for its own regulatory activity. “Comparatists” – in the case described here – were German colonial bureaucrats, whether it be in the Berlin “headquarters” (Colonial Department of the Foreign Office or, after 1907, the Reich

30 Cf. MICHAELS (2002) 101; 104; regarding the intention of “universal law”, see to begin with Eduard Gans cf. HUG (1932) 1055 et seq.

31 FRANKENBERG (1985) 426.

32 GNEIST (1845).

33 HAHN (1995) 59.

34 GNEIST (1863).

35 HAHN (1995) 58.

36 STOLLEIS (1998) 13.

37 COING (1978) 174; cf. STOLLEIS (1992) 437: “Public law is taking its place ... in the general expansion of legal-scientific perspectives to include other legal cultures.”

38 Cf. CONSTANTINESCO (1971) 141.

39 Cf. POGGE VON STRANDMANN (2009).

Colonial Office) or in the African colonies. The objects of their comparison were existing institutions and structures which they considered typical or unusual, but also processes, problematic topics but also practical modes of operation or discourses in light of the *situation coloniale*.

In the following, in light of a series of concrete examples from the everyday administration of German colonial bureaucrats, the “attentiveness to the methods of the respective other colonial powers” will be investigated. The analysis of their legal-comparative mode of operation demonstrates, on the one hand, the diversity of legal topics for which reference was made to foreign examples. On the other hand, in this manner, a legal-argumentative and legally practical entanglement of the colonial empires prior to the First World War emerges. Without the examples and the influence of other colonial states, the German variant would be unthinkable. The German example is also useful because, on account of the late entry into the ranks of the colonial powers, German bureaucrats could assume that virtually all of the “colonial questions” with which they were confronted had already been subject to a legal-technical solution elsewhere which it would be wise to consult. A complete “reinvention” of colonial law was not necessary; even if only in exceptional situations, such as during the German acquisition of the formerly Spanish Caroline and Marianas Islands in 1899, where colonial law regulations were already in force on the ground, whose implementation could be perpetuated, inter alia, by the German administration.⁴⁰

II. The Creation of German Colonial State Law out of Comparative Law?

The discussion surrounding the necessity of “imitating” the successful imperial examples was not purely a propaganda instrument in the hands of colonial agitators. Subsequent to the dismissal of his concerns regarding colonies in 1884 which occurred, inter alia, due to tactical considerations vis-à-vis the election, even Reich Chancellor Otto von Bismarck made it clear that he would orientate himself toward the older colonial powers, but foremost toward Great Britain, in power-political and administrative-technical terms. When the British government caused difficulties in 1884 during the annexation of what later became “German Southwest Africa” (GSWA),

40 Cf. SACK (2001) 326.

the Chancellor accused it of “egoism” and “insulting [German] national feeling”. “The ‘quod licet Jovi etc. [- non licet bovi]’ cannot be applied to Germany.” The quote shows that, on the German side, the desire for prestige stood behind the efforts to attain equal rights under international law: in light of the elections, the Reich administration needed to ensure that it did not appear like the “ox” next to the “Jupiter” of London.⁴¹

Before the Reichstag, then, Bismarck briefly declared that he did not desire formal “colonies” but rather areas which stood under German “protection” (*Schutzgebiete*, protectorates). They ought to be administered “in the style of the English Royal Charters”.⁴² However, these administrative plans, i.e., of “commercial sovereignty under protection” of the state, soon were revealed to be illusory – as in most of the other European colonies. Privately financed “protection charter” companies were nothing more than “[a] relic from a past [mercantile] age”.⁴³ They were neither willing nor capable of “administering” the areas in Africa or along the Southern Pacific. However, this did not change the fact that, following the late 1880s, the emergent German state colonial administration borrowed from the examples of the older colonial powers. Regarding both the organisation and administration of German possessions from Berlin and the colonial practices on the ground, making comparisons across borders became the rule.

In this way, it happened that comparative law stood at the beginning of German colonial state law (*Kolonialstaatsrecht*). Reich Chancellor Bismarck directed the German representations abroad, even during the Berlin Congo Conference in 1884/5, to report to him regarding the colonial legal systems of their host countries. He wanted to orientate himself regarding their possibilities and problems and, in light of these examples, be able to draft a structure for German colonial law. The British model was of particular interest to him. However, the Reich Chancellor showed his dissatisfaction with the report by Legation Councillor von Frantzius, which was not entirely cohesive, regarding British colonial law. He was unable to enable

41 Bismarck an Münster am 1.6.1884, in: LEPSIUS/MENDELSSOHN/TIMME (1922), Nr. 743: 61; CANIS (2004) 217 et seq.

42 SBRT 5. L.P., 4. Sess., Vol. 2, 42. Session dated 26.6.1884, p. 1062; cf. SCHILDTKNECHT (2000) 58–62; LAAK (2004b) 106–108; WAGNER (2002).

43 YOUNG (1994) 103; cf. SPEITKAMP (2005) 30–35. 1884/85 German “Protectorates” were “established” in: German East Africa, Cameroon, German South-West Africa, Togo, New Guinea; later included: Samoa and Tsingdao.

him [i.e., Bismarck] to understand the relationship of regulatory and statute law as the prerogative of the Queen or Parliament: “The English system is not clear to me.” The explanation: “The English settlers bring their home law with them” was answered by Bismarck with the question, “The whole of English legislation, but the natives? Expulsions? Freedom of movement?” Of particular importance to the Reich Chancellor was the royal prerogative to issue regulations for the British colonies. The assertion that “the legislative right over all colonies [belongs] to the British Parliament” was met with the comment: “That isn’t correct.”⁴⁴

Even in the following, comparative law opinions were prepared in the Foreign Office and in the Reich Justice Office for the promulgation of the *Schutzgebietsgesetz* (i.e., “Protectorate Law”, or SGG). They, however, reduced the complexity of British colonial law to the message that crown colonies were governed via Orders of Council (translated into *Regierungsverordnung*). The SGG, which entered into force in 1886, was orientated toward the imperial system of regulations (*Verordnungen*), which Bismarck preferred, and as such was only distortedly orientated toward the “most chief colonial powers”. He, and the Reich administration, chiefly did not want to turn the “Protectorates” into a “parliamentary parade-ground”.⁴⁵ Thus, pursuant to Sec. 1 SGG, the Kaiser had, on account of his “protective authority [*Schutzgewalt*]”, control over the legislature, the executive as well as the judiciary.⁴⁶ His privileges were limited pursuant to Sec. 2 SGG in the areas of civil and criminal law and court procedure law, which conformed with the Consular Judiciary Law (*Konsulargerichtsbarkeitgesetz*) of 1879 and which, in its turn, referred to the relevant Reich laws. Hence, for Europeans in these areas, the laws valid in the Reich were also valid in the Protectorates. In other legal areas, “namely in the field of administration, the Kaiser has unlimited legislative power”. In everyday colonial administration, the power

44 Bundesarchiv Berlin BAB R 3001/5273, “AA betr. das staatsrechtliche Verhältnis der Kolonien der hauptsächlichsten Kolonialmächte zum Mutterlande”, 23.2.1885 (GLR v. Frantzius – mit Randbemerkungen S.D. des RK v. Bismarck); regarding the (critical) modus operandi of Bismarck cf. MORSEY (1957) 277–284.

45 Thus Bismarck’s dismissive margin note regarding the 1882 proposal to purchase Formosa for Germany, cited in: PFLANZE (1998) 372; GROHMANN (2001) 81 et seq.

46 Section 1 SGG: “Protective authority in the German Protectorates is exercised by the Kaiser in the name of the Reich.” “Die Schutzgewalt in den deutschen Schutzgebieten übt der Kaiser im Namen des Reiches aus.”

to issue regulations (*Verordnungen*) pursuant to Sec. 3 SGG, which also encompassed “regulating the legal relationships of the natives”, became decisive.⁴⁷ This was expanded in revisions (1888; 1900) in such a manner that the Reich Chancellor and the governors received regulatory power which they, in turn, could delegate.⁴⁸

With the characterisation of a “dictatorship of the Kaiser”⁴⁹ in the colonies, this state law construct has not been adequately analysed in historical terms. Not the monarch but, rather, the bureaucrat was the all-determining figure of colonial rule. Even Hannah Arendt, in connection with “Race and Bureaucracy”, determined that in the imperialist age, the “systematic oppression via regulations, which we call bureaucracy” had become the characteristic attribute of colonial rule. In the colonies, she saw the administration as standing in place of a government, of “regulations standing in place of the law”. As an example, Arendt named the “régime des décrets” which had been introduced in Algeria by the French and which was analogous to “the same ‘government by reports’ which had originally defined British rule in India”.⁵⁰ But she could have just as aptly referred to the German “pyramid of delegated regulatory power”⁵¹ from the Kaiser to the colonial district officer. Bismarck’s orientation toward the British model of colonial rule of rule by regulation (as it had been presented to him) contributed to the bureaucratic regulatory pyramid becoming the defining characteristic of German colonial state law. As with its counterparts, the German colonial state remained “a government of administrative decrees by the governor, his council and his apparatus”. A separation of the executive and legislative as well as an independent judiciary were, “de facto”, not present.⁵²

47 MEYER (1891) 503.

48 Regulation of the Reich Chancellor dated 25.12. 1900; for all Protectorates 27.9.1903 – Right of delegation in § 6. The “Instruktion für die Bezirkshauptleute [in DSWA]” dated 1.5.1900 in: LEUTWEIN (1907) 553–557.

49 SIPPEL (2001): 355 et seq.; cf. MÜNSTERMANN (1911).

50 ARENDT (1958) 285.

51 HAUSEN (1970) 24.

52 OSTERHAMMEL (2003) 64; cf. SPEITKAMP (2005) 42.

III. The “Competency Law for all Protectorates”

In the “General Act of the Berlin Conference” (1885) the Signatory Powers recognised, in Sec. 35 “the obligation to insure the establishment of authority in the regions occupied by them”. They ought to be capable of “protect[ing] existing rights”. The legal and factual gestalt of the “authority” remained at the disposal of the colonial powers.⁵³ In everyday German administration, the absence of separation of powers in the SGG and the generally phrased colonial regulatory competency caused the creation of numerous ambiguities which led to “disputes”. The governor of Samoa, Wilhelm Solf, discussed a “condition of insecurity in distinguishing competencies”. He considered this to be “unsustainable in the long term” and suggested, in 1906, “to pass a law in which the competency of the Kaiser, the Reich Chancellor, the Colonial Office, the Governor and his subordinate administrative organs is determined once and for all”.⁵⁴ In the following year he continued to urge such a legal regulation of the “rights and obligations” of the various colonial instances, whereby he included in this the “legislative entities”.⁵⁵

However, the Colonial State Secretaries Bernhard Dernburg and Friedrich von Lindequist did not address the matter. The officials and Reich administration [i.e., those responsible for introducing such legislation] were intimidated by the complexity of a legal regulation. It was not until 1912 that the Reichstag placed the topic on its agenda by way of a resolution.⁵⁶ This was triggered by complaints about the costs of colonial administration and the high number of bureaucrats in the colonies. With respect to an overview of the laws regarding competency, the parliamentarians hoped to achieve a simplification of the administration and an increase in the degree of reliance on colonial self-government which, in the end, would lead to a reduction in costs. They knew well that by passing a law, the co-determination right of Parliament in colonial matters would be extended beyond budgetary authority, and so a majority petitioned the Reich Chancellor to

53 General-Akte der Berliner Konferenz, 26.2.1885 (RGBl. 1885, Nr. 23: 215–246): Article 35: “l’existence d’une autorité suffisante pour faire respecter les droits acquis”.

54 BAB R 1001/5595, p. 3, “Kompetenzgesetz für die Schutzgebiete”, Vermerk Solf, 22.2.1906.

55 BAB R 1001/5595, p. 6, Solf to AA, KA, 21.5.1907 “gesetzgebende Körperschaften”.

56 Application by Gothein and Gen., 23. Session of the Commission for the Reich, 25.4.1912.

prepare “a general competency law for all Protectorates under consideration of the individuality of the specific areas”.⁵⁷

The officials in the Reich Colonial Office who were subsequently entrusted with the matter were not persuaded of the necessity of a “uniform competency law”. The director of Department A2 thought it would be “not appropriate”. He drew attention to the fact that the “English and French ... addressed these questions also colony-by-colony, not uniformly”. Department A3 was concerned about the fundamental structure of the Bismarckian colonial constitution. Indeed, a uniform law would imply that its “changes would require the consent of the Reichstag”. Such a situation could “in no case” be suffered to occur. Department A1 also held there to be “no occasion to surrender the principle of the Kaiser’s protective authority [*Schutzgewalt*]”. Rather than a general colonial competency law, it was suggested that the governments be mandated with the collection of all organisational and competency regulations in their respective colonies.

Wilhelm Solf, who had been elevated to Colonial State Secretary in December 1911, declared his consent with this proposal at the beginning of 1913. He was open about the fact that he, as well, desired to “weaken the impact of this resolution”. His goal was not an expansion of the rights of the Reichstag at the expense of the Kaiser’s right to issue regulations, but rather a “compilation of the administrative proceeding and a description of the competencies of the various instances”. Solf, always ready to “learn from the British coloniser, to view him as the older and more experienced one”,⁵⁸ therefore provided his officials with a copy of the “Regulations of Her Majesty’s Colonial Service” (1911) as an “example” (*Vorbild*). With 403 paragraphs and roughly 100 pages, the “Regulations” provided a summary of the competency regulations for the British Empire. “Something like this ought to be created for the Protectorates.”⁵⁹ It served colonial comparative law that British colonial law, similarly to its European Continental counterparts, was increasingly being codified. This simplified reception by German officials. Indeed, even prior to the Paris Comparative Law Congress of 1900,

57 BAB R 1001/5595, p. 12, Vermerk zum Antrag der Budgetkommission, RT-Drucksache Nr. 385, 3.9.1912.

58 Vietsch (1961) 103 et seq.; 127: Solf considered “Germany as the junior partner of England ... and [determined] the German role in the world in this manner.”

59 BAB R 1001/5595, pp. 44–48, Vermerke KompetenzG, Ref. A1, A2, A3, A6, A10, StS Solf, 28.1.1913.

“the premise [was acknowledged] that only that which is comparable – i.e., similar – is possible to compare”. Hence, the limitation expressed in academia, namely that comparisons were limited to “statute law and, by and large, the legal systems of the European Continent”,⁶⁰ did not apply to colonial law.

In a long decree which summarised the discussion, the six German governors were tasked in August 1913 by the Reich Colonial Office to present a table of the competency regulations in their colonies within a year’s timeframe. With the explanation that the “English colonial administration” had created “an exemplar”, Solf also sent them copies of the ‘Regulations’. These offered a “true template and summary of administrative procedures ... Something similar ought to be appropriate for the German Protectorates”. Thus, it was the wish of the Secretary of State that “every Protectorate should receive its own constitution [*Verfassung*]”, which would not be understood in the spirit of “German law”, but rather of the “English constitution. (That is, roughly, a general administrative regulation.)” The Reich Colonial Office rejected using the Prussian Competency Law (*Zuständigkeitsgesetz*) of 1883 as a “template” or to go down the “path of imperial legislation” with a colonial “Competency Law”. It was intended not to limit the Kaiser’s power of regulation; furthermore also the “easy ability to adjust [the administration of the Protectorates] ought to remain intact”.⁶¹ The governors in Dar-es-Salaam (German East Africa) and Buea (Cameroon) declared in May and July 1914 that it would not be possible for their bureaucrats, on account of time constraints, to prepare the table. Shortly thereafter, the matter “resolved” itself due to the outbreak of the First World War.⁶²

60 ZWEIGERT/KÖTZ (1996) 58; similarly: SCHWENZER (2008) 75.

61 BAB R 1001/5595, pp. 133–46, RKA to Gouv Daressalam, Windhuk, Buea, Lomé, Rabaul, Apia, 30.8.1913.

62 BAB R 1001/5595, p. 162, Gouv Daressalam to RKA, 17.5.14; p. 165 Gouv Buea to RKA, 7.7.14; Memorandum RKA, 11.8.14.

IV. Colonial “Native Status” in a Comparative Law Perspective

The fact of the many commonalities in the organisational structures of the colonial states has been explained, variously, as the result of similar policies: “everywhere the organization and reorganization of the colonial state was a response to a central and overriding dilemma: the native question”.⁶³ However else the various colonial systems answered this “native question”, the definition of those it concerned remained fundamental, i.e., who would be considered “a native”? The colonial goal was definitiveness. This appeared necessary in order to create a binary code of “savage vs. civilised”, without which colonial discourse and colonial law could not exist. However, this question was easier to answer theoretically than practically. It was based on a negation: the “native” was “savage” because he was not “civilised”. “Such an utterly antithetical being could not be brought within the replete realm of civilization ... the savage, in short, was denied a participative legal personality.”⁶⁴ A legal definition of this “savage” was missing in German law for a good reason.⁶⁵ There existed German citizenship,⁶⁶ but it was not the intention of the ministerial officers to create the “legal term of being a Protectorate citizen”.⁶⁷ With the declaration that “natives” (in contrast to a German Reich citizen) “belonged to the coloured races inhabiting the German Protectorates, including mixed individuals”, legal definitiveness was avoided. Skin colour was just as little a compulsive indicator as the fact of having been born in a colony. This is shown by reference to Afro-Americans or “Goanese and Parsi” as well as “non-Mohammedan Syrians” in German East Africa who, qua governmental regulation, were not qualified as “natives”.⁶⁸

The status of given individuals could be disputed either because a European-African marriage had issued a child or because an African woman had married a European man. The political intent in the German colonies, post 1900, was aimed increasingly at considering “mixed marriages” and “mixed offspring” to be “undesired” and to stop, if not criminalise, sexual

63 MAMDANI (1996) 16; cf. BERNHÖFT (1897).

64 Cf. FITZPATRICK (2001) 20.

65 BAB R 1001/5580, p. 3, Notiz betr. Fall Baumann, StS Solf, Meyer-Gerhard, 21.4.1913.

66 GOSEWINKEL (2004); GOSEWINKEL (2001).

67 BAB R 1001/5578, p. 21, AA, Notiz zu Bl. 18, RMA an AA, 17.12.1901.

68 BAB R 1001/5583, p. 48, RKA to AA, 15.7.1913.

contact between settlers and African women. In 1905, in German Southwest Africa, the prohibition of so called “mixed marriages” was issued.⁶⁹ The debate over this was part of an internationally recognisable tendency to more stringently separate the colonial rulers from the colonised, and this was to be legally reinforced.⁷⁰ Thus, it should be emphasised that “the regulations [in German Southwest Africa] regarding racial segregation were orientated toward the patterns tested in colonial practice in Algeria, Rhodesia and the South African provinces of Natal and Transvaal”.⁷¹ Increasingly, due to the discriminatory “Native Law” which, starting in 1907, instituted obligations to work and carry a passport, it became – in German Southwest Africa as well – desirable for the affected children and wives to attain a European citizenship and thus be considered “white”.

In addition, colonial bureaucrats were faced with the “difficulty” that for certain couples, “barriers” were crossed relating not only to skin color but also to citizenships. The rules of private international law were, in practice, not always unambiguous. Thus, the bureaucrats in German Southwest Africa repeatedly had to deal with the question as to whether legitimate children of Prussian or Saxon citizens whose mothers had issued from marriages with British citizens with so-called “bastard-women” could attain German citizenship via patrilineal descent. This was even of importance for the British administration. From Cape Town, it observed closely the legal development in the neighbouring German colony. Several hundred British citizens had settled there. They had, mostly coming from the Cape Colony, settled there even prior to the German occupation of Nama and Hereroland. When the Territorial Council (*Landesrat*), the organ of self-government of German Southwest Africa,⁷² in 1912 passed a resolution requesting that the governor officially recognise the “mixed marriages” concluded up until 1905 – under the proviso that the married couple would, in the estimation of the responsible district deputy, “present white mannerisms”⁷³ in raising children and in their “moral” habits – the British government intervened.

69 Cf. HARTMANN (2004); HARTMANN (2007).

70 Cf. GOSEWINKEL (2004) 244 et seq.; KUNDRUS (2003c) 220; regarding the Italian case: NUZZO (2011) 217, “to discourage the interracial union”.

71 SIPPEL (2001) 354.

72 On the translation of German colonial terminology see RIDLEY (1996) xv.

73 KUNDRUS (2003c) 276.

It considered it “desirable that no British subject who had the status of a white man when the Protectorate was taken over by the German Government should be reduced to the status of a native”. The same ought to also apply to his legitimate children, over whose legal status no German district deputy ought to decide. In the British Empire, debates had begun at the time in relation to “imperial citizenship”,⁷⁴ and questions regarding status, “race” and belonging to the Empire were not going to be made more difficult by conflict with German laws. The Reich Colonial Office in Berlin had to concede that, pursuant to British marriage law, “mixed marriage” was permissible and thus “would lead to acquisition of British citizenship for natives [and their children]”. Given this ancestry, the “status rights of a white” would, “also now continue to be recognised” for a Briton.⁷⁵

From this, it followed for German bureaucrats that “foreign citizens [here the British woman Agnes Bowe] ... [are] not natives in the sense of the Protectorate Law [SGG], even when they are coloured”. By way of marriage with a German, these individuals could acquire Reich citizenship.⁷⁶ In other cases, the admission of the binding legality of a marriage trumped the political intention to prevent “mixed race individuals” (*Mischlinge*) with German citizenship. Secretary of State Solf, who in 1912 opened the so-called “mixed marriage” debate in the Reichstag by referring to the “ill effects of mixed marriages” in nations which “have conducted colonial politics longer than us” and warned the Parliamentarians regarding “wooly-haired grandchildren”,⁷⁷ conducted his administrative practices less ideologically than his statements would lead one to expect.⁷⁸ In 1913, he declared as valid the marriage of Prussian citizen Friedrich W. Krabbenhöft, concluded 1881 in Keetmanshoop, with the British woman Lucie Forbes. The “condition that Mrs. Krabbenhöft is descended on her mother’s side from bastards of the Cape Colony” was “of no influence on the validity of the marriage” and “the transfer of citizenship to his wife and his children”. In this estimation, Solf was followed by the Reich Justice Office and the legal

74 Cf. GORMAN (2006) 8 et seq.; 50 et seq.

75 BAB R 1001/5585, p. 4, RKA to Gouverneur Windhuk; p. 3, RKA an AA, 11.12.1912.

76 BAB R 1001/5585, p. 6, RKA to Gouverneur Windhuk, 5.7.13 (Marriage of Farmer Schubert with Agnes Bowe).

77 Stenographische Berichte des Reichstag, 53. Sitzg., 13. L.P. 2. Mai 1912: 1648 (C).

78 Cf. GOSEWINKEL (2004) 247.

department of the Foreign Office.⁷⁹ In the case of Mrs. Windelberg, a similar decision was made; she had married a German pursuant to English law in 1907 in Rietfontein, British Betschuanaland. Even here it was irrelevant that Mrs. Windelberg “has the appearance of a mulatto [*Mischlingin*]”. She and her children had, pursuant to Sec. 5 of the Citizenship Law of 1870, acquired the husband’s or, as it may be, father’s citizenship at marriage or birth.⁸⁰

In this discourse, “‘being white’ was separated from the white body by jurists by way of the introduction of a supplementary category of citizenship”.⁸¹ Aside from the legal supplementary category, the cultural component of “being white” also applied. In this sense, questions regarding conduct of life were relevant, as well as capabilities and knowledge. Thus, the decision of the Windhoek Superior Court to declare itself as not competent regarding the criminal procedure against the examined engineer (*Diplom-Ingenieur*) Baumann, on account of his “possessing a mixture of coloured blood”, and to transfer him to the native jurisdiction was regarded by Solf as “very dubious”. Although he considered the courts – in the absence of a legal definition – as being competent to determine “who is a native”, they nevertheless ought to do this “with reference to language usage”.⁸² This, however, the Superior Court obviously had not done. It would not have occurred to anybody in German Southwest Africa to describe Baumann, who had studied in Germany and served there in the military, as a “native” on account of one of his four great grandmothers.

With this investigation of specific cases, which also referenced cultural “attributes” of the individual, the German colonial administration did not – as it knew – stand alone. Imperial discourses were defined by “the common conflation of ‘race’ and ‘culture’”.⁸³ For example, the bureaucrats in the Reich Colonial Office had at their disposal a circular of the Governor General of Madagascar in which he clarified the treatment of the legal status of “enfants métis” of European fathers on the island. In this matter, children

79 BAB R 1001/5583, p. 65, RKA to AA, 18.7.13; p. 67, RJA an RKA, 7.8.1913; p. 68, AA an RKA, 20.8.1913.

80 BAB R 1001/5578, Bl. 32, RKA to Gouv Windhuk; Bl. 33, RKA to Strafanstalt Lüneburg, 17.5.1913; cf. BRAUN (1912).

81 KUNDRUS (2003c) 276; *ibid*: 273 on the case of Willy Krabenhöf, son of Friedrich Wilhelm and Lucie.

82 BAB R 1001/5580, p. 3, Notiz betr. Fall Baumann, StS Solf, Meyer-Gerhard, 21.4.1913.

83 GORMAN (2006) 9.

were at stake who had been recognised by their fathers and entered into the birth registry, which was a possibility that, as of 1905, no longer existed in German Southwest Africa. The question as to whether the parents were married appeared to play no role. The Governor General expressly did not wish to touch upon the question regarding the legal clarification of French citizenship, which belonged to the courts. His concern was the factual, administrative assessment of these children, whom he wished to be viewed “comme Français qui, vivant avec leur père Français sous son toit ou se comportant comme Français dans les actes ordinaires de la vie sociale”. “Native law” should not be applied to them, as would have otherwise been the case upon completion of the sixteenth year of life (tax obligations and work duty [*prestation*]). He encouraged all administrators to apply all regulations benevolently in favour of these “young people”.⁸⁴

By way of direct comparison of the French and German regulations it is apparent that French bureaucrats, in contrast to their German colleagues, did not need the “supplemental construct” of citizenship. It was sufficient to be descended from a European father and to live in a European manner in order to ensure the administrative acceptance of “not quite white” Frenchmen. Legal arguments were largely absent in the Madagascan directive. Instead, “benevolence” was the measure of an investigation of the child’s lifestyle. German bureaucrats, on the other hand, made it clear that “native law” would only then not be applied in the event that the legal conditions for this were satisfied. “Benevolence” was as little desired as a cultural ‘progression’ from “native” to coloured citizen. One is justified in interpreting the squiggly line at the margin of this French passage in the German file as an indication of critical surprise. Furthermore, the introduction of a fourth colonial inhabitant category, next to German citizens, foreigners and “natives”, namely of “the assimilated”, was – as legalised in Portuguese and Italian colonies⁸⁵ – not foreseen. Colonial citizenship law was assigned such relevance that Berlin bureaucrats, in the fullness of time, considered it to be part of their basic ministerial toolkit. Substantive changes by other powers in this field of law were regularly reported to the other Reich offices.⁸⁶

84 BAB R 1001/5578, p. 34, Abschrift: La Quinzaine Coloniale, 25.4.1913: 287 (“Le statut légal des enfants métis reconnus”).

85 Nuzzo (2011) 213 et seq.

86 BAB R 1001/5578, p. 28, Deutsche Botschaft Paris an AA, 3.6.1912, “z.K. RAI, RJA, RKA”.

The ideological justifications of all these categorisations of “native status” were a result of imperialism, which is to be characterised as a Pan-European ideology.⁸⁷ Ideologically, as well, the “differences of the European colonial powers as a whole were subordinate to their commonalities”.⁸⁸ In this way, adherents of the German Conservative Party were inspired by British arguments. In this sense, not only methods of rule, colonial structures and regulations but also “English anthropological theories of evolution” were read and adapted by German colonial bureaucrats. The arguments regarding the legitimisation of colonial rule were, therefore, similar: “many statements of German colonial jurists and officers of the colonial forces expressed views similar to the English idea of the rule of the more educated and civilized elements within a society”.⁸⁹ As in Great Britain, but perhaps to an even greater extent, after 1900, a legitimisation of colonial rule on the basis of racial arguments gained traction. It justified power over Africans not by reference to certain capabilities and aristocratic hierarchies, but because of belonging to a specific “race”.⁹⁰

V. Comparative Law due to Political Pressure

The Reform of German “Native Criminal Law” 1895/96

The criminal jurisdiction over Africans was one of the central elements of colonial rule. The guiding legitimising idea of bringing order to chaos was persuasive to contemporaries especially because – ostensibly in the context of this civilising mission – reference was primarily made to the law. Nevertheless, the practical execution of this ‘law’ frequently showed the less civilised side of colonial rule: “[I]t was law which combined exuberant violence with contained order.”⁹¹ Since the start of colonial administration, colonial criminal law was, therefore, disputed; in Germany, it soon became an emotionally charged topic.

87 WALKENHORST (2007) 318 et seq.; 332.

88 LAAK (2004b) 257.

89 FRIEDEBURG (2001) 380; 386.

90 FRIEDEBURG (2001) 396: “But it must be remembered [that] the term ‘race’ remained, both in England and Germany, very often tied to assumptions about education, social class and civilization that must not be mistaken for a biologically-minded racism.”

91 FITZPATRICK (2001) 20.

Pursuant to the “Protectorate Agreements” between the German Reich and the individual “tribes” and, as it may be, their “chiefs” (as in the source language), conflicts between Africans were to be regulated according to their traditional law. In this capacity, the German colonial state acted similarly to its European counterparts,⁹² knowing well that “the treaty can still be disregarded when some higher imperative of civilization supervenes”.⁹³ If a European were involved, the disputed question would either be settled exclusively by a Reich court or by drafting African rapporteurs. For criminal matters pertaining to Africans, the district deputy was responsible as “native judge”. The grounds for punishment were derived from a – not further explicated – mixture of analogous application of the Reich Penal Code and the customary law considered applicable in the respective region. The German colonial criminal law for Africans was characterised in practice by its lack of uniformity, even by its arbitrariness. Despotism and brutality were the consequences.⁹⁴

Colonial Director Paul Kayser, in 1895, was compelled to introduce reforms when a series of brutal beatings became known in Germany. The media and the Reichstag then began discussing the lack of rights of Africans. These beatings had been glorified as “court proceedings” although they had ended in death and had been committed by colonial bureaucrats, namely Wehlan and Leist in Cameroon and Carl Peters in German East Africa. Kayser requested the Colonial Council (*Kolonialrat*), a panel of experts of the Colonial Department (Foreign Office), to discuss the question as to whether a general reform of colonial criminal law and court procedure law would be recommended for the “natives”. He also requested a position paper from the governors/territorial commanders in the Protectorates. In this process, it became apparent that – in the absence of other rules – they had borrowed directly from the criminal law of a British colony. In Togo, floggings were issued and executed “pursuant to Secs. 78, 82, 172 through 174, 178 of the [1892] Criminal Code Ordinance valid in the neighboring Gold Coast colony”. The territorial commander (*Landeshauptmann*) appeared content with this. In the event of German criminal regulations in his protectorate, he suggested that the provisions of the ordinance regarding floggings be added

92 NUZZO (2011) 214.

93 FITZPATRICK (2001) 21.

94 Cf. SCHAPER (2007); FEIJÓ (2012).

directly to the text. A partial translation into German was already available.⁹⁵ The votes in favour of “abolishing floggings” in the colonies were in the minority. For this as well, the examples of other states were taken into account. The Colonial Council came to the conclusion that “it is not necessary as yet to uniformly regulate the details of the material [of “native criminal law”] in all the Protectorates”.⁹⁶

There was no earnest attempt to create binding and precise norms. It was convenient in this sense that no adequate expertise existed in the colonies in order to prepare existing law pursuant to German standards for a codification process.⁹⁷ The “men on the ground” were to be given, if anything, legal guidelines which would comfort critics in Germany. ‘Africa’ was envisioned as an area in a permanent state of emergency. On account of this “civilisational” difference, it appeared difficult to imagine that legal protections against the colonial administration would be comparable to those in the home country.⁹⁸

In the course of the hectic political debate, the reference to “older” colonial powers was designed to comfort and provide clarification. The Colonial Department urged a survey of the German representations in Paris, London and The Hague at their respective governments. However, it became apparent that the “problems of comparative law ... [lie] in the access to information regarding foreign legal systems”.⁹⁹ Indeed, this survey only brought about partial clarity vis-à-vis the foreign “native criminal laws”. Unclear competencies and nebulous formulations characterised these colonial laws, as well.

Ambassador Count Münster had, meanwhile, conversationally discovered in Paris that “special regulations regarding criminal procedures against natives have not been issued”. It is, however, a principle that “world-views of the races and tribes are, insofar as possible, to be taken into consideration. Floggings are to be avoided as much as possible”. Later, Münster summarised French Foreign Minister Berthelot to the effect that “the criminal law

95 BAB R 1001/5561, p. 11, Kolonialrath, IV. Sitzungsperiode 1895/96: 5 (appendix 7).

96 BAB R 1001/5561, p. 22, Kolonialrath, IV. Sitzungsperiode 1895/96: 2 et seq., Protokoll, 11.6.1895.

97 Cf. KNOLL (2001).

98 Cf. NUZZO: (2011) 209 et seq.; SCHAPER (2012) 128–143.

99 MICHAELS (2002) 114; regarding the (cognitive) challenges of comparative law cf. FRANKENBERG (1985) 413 et seq.

applicable in the home country is effective in all colonies”. Pursuant to the review of the decrees sent alongside, the officials at the Colonial Department did not accept this verdict “to the full extent”. They pointed at individual regulations pursuant to which the “criminal acts committed by natives are to be judged according to a modified criminal code”. In fact, the “supplementary material” that the embassy acquired thereupon foresaw a significant enhancement of criminal penalties for Asians in “Cochinchine”.¹⁰⁰

The envoy in The Hague reported that a particular criminal law “only exists for natives in the Dutch East Indies”, whereas in Surinam and Curaçao the same law applies to all. Floggings did not exist “anywhere”, however the death penalty, “compulsory work in chains” and without chains, gaol and fines did. A new version of criminal law for the Dutch Indies was being prepared. Ambassador Count Hatzfeld received from British Foreign Minister Salisbury a memorandum prepared in the Colonial Office regarding the criminal law of the “natives” in the British colonies as well as a copy of the “Natal Native Code”.¹⁰¹ The Colonial Office held the view that, in general, “in the British Colonies natives and Europeans are subject to the same laws and are amenable to the same courts” for such crimes as are universally recognised as “*mala in se*”. However, the “chiefs” in certain South African colonies continued, as before, to exercise limited criminal law authority. Modes of conduct such as polygamy, which were based in tradition, were not punished. However, in accordance to the local situation, “police matters” contained certain provisions specifically for “natives”, e. g., passport laws, and upon violations “some slight penalty would be inflicted”. Her Majesty’s Government emphasised that it did “not view [the] creation [of distinct offences] with favour when proposed by their local [colonial] Officers”. As a punishment for disobedience toward the directions of the governor, in Natal, the confiscation of cattle had proved itself useful.¹⁰² With respect to this format of informational dissemination, which ought to have served “comparative law”, the difficulty of procuring useful statements from the interviewees was apparent. Unencumbered by any diplomatic restraint,

100 BAB R 1001/5561, p. 19, Botschafter Münster, Paris to AA, 22.10.1895; p. 25 et seq., 6.1.96; p. 63 et seq. AA to Botschafter Münster, Paris, 17.4.96; p. 98 et seq., Botschafter Münster, Paris to AA, 22.4.96 (Décrète 28.2.87).

101 BAB R 1001/5561, p. 21, Gesandtschaft Den Haag to AA, 29.10.1895.

102 BAB R 1001/5561, p. 35 et seq., Grf. Hatzfeld to AA, 7.1.1896; p. 38, Memorandum Colonial Office, 4.1.1896.

however, the Attorney General of Natal summarised the criminal laws of his colony more than ten years later before the Assembly in the following manner: “We have a law for the Kaffir in this colony, and the law is to flog him and to flog him severely.” As in the German colonies, the settlers massively resisted any efforts by the colonial administration to restrict or even eliminate corporal punishment.¹⁰³

This lack of ability on the part of the government to execute its will could not, however, be admitted by any colonial administration. At the start of 1896, while the German Colonial Department was occupied with investigating the uninformative documents regarding foreign colonial criminal law, the outrage regarding excesses of colonial violence in the German colonies grew ever more heated. The Prussian Ministry of Justice declared that it could not push for prosecution against Peters, Leist and Wehlan since the sections of the Reich Criminal Code, which punished using extortion to procure testimony, could not find application due to lack of a legal provision of “court proceedings for natives”. Faced with the urgency of the matter Colonial Director Kayser admitted to the territorial commanders in Togo and Cameroon that he could not anticipate the timing of a regulation on “native criminal law”. However, the application of corporal punishment “in accordance with discretion” must, he said, stop. Until further notice, all he could do was request them to do everything “for the sake of protecting the natives” in order to avoid additional “unpleasant occurrences”.¹⁰⁴

In February 1896, finally, the Kaiser authorised the Reich Chancellor by way of a regulation “to regulate the court procedure regarding the natives of the African Protectorates”, which was done two days afterwards via an executive order. In this, the Chancellor prohibited “all measures other than those set forth in the German procedural codes” designed to extract confessions.¹⁰⁵ Two weeks later August Bebel gave his famous speech before the Reichstag, which caused considerable commotion, regarding the brutal rule of Peters in German East Africa. This had given rise to the nickname “Lynching Peters” (*Hänge-Peters*) for the once-celebrated “colonial pioneer”.¹⁰⁶ Once again, Colonial Director Kayser was put under

103 Zit. in: PETÉ/DEVENISH (2005) 4.

104 BAB R 1001/5561, p. 42 et seq., Kola to Dr. Seitz (Kamerun); Köhler (Togo), 15.1.1896.

105 BAB R 1001/5561, p. 52, VO v. 25.2.1896; RKVerf v. 27.2.1896.

106 Cf. PERRAS (2004) 227; BAER/SCHRÖTER (2001) 90.

immense pressure which did not relent until after his resignation six months later.¹⁰⁷

On 22 April, 1896, the promised Reich Chancellor executive order regarding the “Exercise of Criminal Jurisdiction and Disciplinary Authority vis-à-vis the Natives”. Its goal was to bindingly set forth responsibilities and forms of punishments. Similarly to the list of the German consul in the Hague regarding the permissible punishments, § 2 provided a table which, however, included floggings. Furthermore, fines, gaol, compulsive labour and the death penalty could be imposed. Partially, passages were copied verbatim from the above-named translation of the Criminal Code Ordinance of the Gold Coast (1892) for the purpose of executing floggings. Thus, women were exempted (§ 4) and youths not yet 16 years old could only be subject (§ 5) to “lashes” (“whipping” rather than “flogging”).¹⁰⁸ Hence it is said that “it was characteristic for German colonial rule that flogging was made into a science. In instructions, not only was the procedure for executing criminal punishments set forth in minute detail, but also the type and size of the punishment instruments”.¹⁰⁹ It must, however, not be overlooked that this executive order as well only apparently set forth precise norms. Vital formulations were kept vague and invited pseudo-legalised violence. The question of the law materially applicable to Africans under German rule remained insufficiently answered. In this way, Africans were – upon application by their employers – to be punished “on account of continued violation of their obligations and sluggishness, on account of stubbornness ... as well as other significant violations of the service or employment relationship for disciplinary purposes with corporal punishment and ... with chain-ganging (*Kettenhaft*) for no longer than 14 days”. What, however, was “sluggishness”? What was punishment “for disciplinary purposes”? Who made these decisions? Generally, the station representative, often a non-commissioned officer of the small military outpost would, as the *Tägliche Rundschau* remarked with great concern.¹¹⁰

A related, but as yet unanswered question involves colonial jurisprudence and its relationship to comparative law. For German legal practice, it has

107 Kayser an Eulenburg, 4.9.1896, in: Eulenburg, 1983 III, Nr. 1263, S. 1737 f.; LAAK (2005) 73.

108 BAB R 1001/5561, p. 59, RKVerf v. 22.4.1896, for East-Africa, Cameroon and Togo.

109 SIPPEL (2001) 365.

110 BAB R 1001/5561, p. 110, *Tägliche Rundschau*, 5.5.1896.

been largely determined that one “[must] seek out examples in which the judges, for their decisions, make reference to foreign law in the one or the other sense”.¹¹¹ Also, comparative law considerations of German colonial courts are, as yet, to be investigated. Not only the use of foreign jurisprudence to support the viewpoint in one’s own verdict was at stake. Often, the courts in Buea, Windhoek or Dar-es-Salaam were responsible for judging fact patterns connected to international law and were obliged to deal with conflict of laws.

VI. ‘Comparative Law’ Journeys of German Colonial Bureaucrats

The orientation of German colonial bureaucrats toward the norms of older colonial powers has already been discussed with reference to a few examples which may serve as a basis for extrapolation: thus, bureaucrats in Windhoek, when drafting executive orders and regulations for German Southwest Africa, routinely drew inspiration from rules in neighbouring Cape Colony. In this case, they directly appealed to the German consul-general or the Capetown authorities.¹¹² Even peculiarities of tax law or the definition of “spiritual drinks” was not resolved without a glance over the Oranje River.¹¹³ The German settlers, as well, frequently emphasised “parallels in other settler colonies” as a means of justification. Thus, “legal provisions made in South Africa, Algeria, the southern and northern states of the United States, Australia and even the Austro-Hungarian controlled Balkans influenced the regulations in Southwest Africa”.¹¹⁴

Moreover, the comparison was not limited to the issuance of regulations. For an investigation of the “education of colonial officials”, author M. Beneke drew upon a wide collection of materials regarding the relevant educational institutions in England, France and Holland.¹¹⁵ Furthermore, the

111 DÖLLE (1960) 33 et seq. for French references made by the Reichsgericht in matters of estate law (RGZ 51, 166).

112 National Archives of Namibia NAN GLU 313, Gen F III, Vol. 1, Bl. 120, Gouverneur Windhoek to Bezirksgericht Lüderitzbucht, 2.2.08.

113 Cf. NAN ZBU 1657, S II g 4, p. 111, Consul General of Cape Town to Governor Windhoek, 2.3.08; p. 119 et seq., *Transvaal Government Gazette*.

114 BLEY (1968) 313; regarding the adoption of Nigerian “recipes” for Cameroon, see WIRZ (1972) 189.

115 BENEKE (1894).

orientation was not one that remained limited to texts. Rather, personal exchanges with colonial bureaucrats of other colonial powers were conducted. Thus, Legate Jacobs of the Reich Colonial Office travelled to London and Paris in order to acquire “new knowledge of colonial legal and administrative systems for implementation in our own overseas territories”.¹¹⁶ Direct observation on the ground was also sought out.

The journeys of Colonial Secretary Bernhard Dernburg in Africa provide ample witness of this. Following his visit to German East Africa in 1907, later, in May 1908, he went back to London with his friend Walther Rathenau where he, inter alia, met with former Colonial State Secretary Winston Churchill prior to setting out for Cape Town, Durban, Johannesburg and Bulawayo before he made his way to German Southwest Africa. His companion, Oskar Bongard, a journalist and former colonial bureaucrat, justified their route thus: “Since we have similar conditions in German Southwest Africa, it would be foolishness to not make use of the experiences of the Boers and English. Down there, at that very place, one can see what must be done by us but also, almost as frequently, the way it ought not to be done.” Thus, millions in “tuition” (*Lehrgehd*) could be saved.¹¹⁷

Settlement Commissioner Paul Rohrbach expressed similar views vis-à-vis Dernburg’s predecessor Oskar Stübel as he spoke about “an already planned” journey through South Africa. Indeed, “without their experience, as I recognise repeatedly, a truly secure and – even temporarily – conclusive verdict regarding our settlement matters in Southwest Africa would not be possible”.¹¹⁸ That, in this context, not just settlement but also rulership techniques vis-à-vis Africans were involved appeared to be self-explanatory. As late 1909, the anthropologist Thilenius wrote about the “substantially more advanced” British and French colonies: their experiences were “to be usefully applied to the future development of the German [colonies]”.¹¹⁹ Accordingly, Oskar Bongard suggested – after his trip with Dernburg – the

116 SIPPEL (2001) 354.

117 BONGARD (1909) 4; although he warned against – in relation to the question of communal self-administration – an “eager aping of British-South African organisation which contradicts our national lifestyle” (121); on the journey cf. SCHÖLZEL (2006) 76–118; LINDNER (2011) 137–150.

118 SächsHStA 12829, Nachlass Stübel Nr. 10, p. 31, Rohrbach an Stübel, 6.2.05.

119 BAB R 3001/5255, Hamburgisches Kolonialinstitut. Bericht über das erste Studienjahr WS 1908/09; SS 1909, Hamburg 1909, p. 18.

application of the British rulership technique of “indirect rule”, as used in Rhodesia, to German areas as well.¹²⁰

These journeys were not exceptional. Even lower ranked colonial officers were dispatched on comparative law journeys. From Togo, district officer Rudolf Asmis visited “Nigeria, the Gold Coast and French West Africa in order to find out how, over there, certain administrative and legal questions were handled”.¹²¹ Asmis, at the same time, contributed to comparative law and ethnological research regarding African laws. Thus, starting in 1911, he published his investigations in the *Zeitschrift für vergleichende Rechtswissenschaft* (Journal for Comparative Law) regarding the “Tribal Laws of the District Atakpame”.¹²² The Deputy Governor of German Southwest Africa, Oskar Hintrager, drove to the South African Union and Australia in 1914, on official business, in order to investigate the settlement situation under similar natural-environmental conditions.¹²³ In 1912, in the registry of the Reich Colonial Office for “Legal Matters”, a file was created for the “Issuance of Funding for the Study of Foreign Colonial and Legal Relationships”. However, up until the outbreak of the First World War, only the research trips of two theology professors, Mirbt (Göttingen) and Schmidlin (Münster) to the German colonies and to South Africa were partially financed.¹²⁴

One of these comparative trips has, incidentally, made its way into world literature. In 1909, Councillor to the Reich Colonial Office Robert Heindl had been sent on a journey during which he was supposed to gain an understanding of the penal colonies in the Pacific. Their existence had excited the imaginations of certain “criminal law reformers” in Germany. Heindl’s journey, regarding which he published a comprehensive report in 1914,¹²⁵ was discussed in the media such that, in Prague, it even came to Franz Kafka’s attention. It is likely that the journey provided the historic background for the story, “In the Penal Colony”, which takes place in French New Caledonia.¹²⁶ Kafka described “the Penal Colony” as a dystopia of a

120 BONGARD (1909) 52 et seq.; 127.

121 SIPPEL (2001) 354.

122 ASMIS (1911); cf. KNOLL (2001) 253 et seq.; SCHAPER (2012) 236–245; 251.

123 HINTRAGER (1955).

124 BAB R 1001/5592 (files regarding the issuance of funds for the study of foreign colonial and legal relationships), p. 2, Übersicht Studienreisen.

125 HEINDL (1914); cf. KUNDRUS (2003c) 104–108.

126 MÜLLER-SEIDEL (1986).

morally debased special zone. However, the story (completed October 1914) is not as surreal as it has, since then, appeared to numerous interpreters.¹²⁷ The factual report about a visitor to a penal colony who is supposed to evaluate its legal system contains much that would appear well known to an historian of colonial criminal law. Kafka shows thus that the procedural and moral deformations of the colonial system of justice were also familiar to contemporary critics. In the case of Kafka, everything is orientated toward a machine which cuts the penalty out of the criminal's very body. The claim to discovery of the truth through due process is juxtaposed with a radical reversal of the 'course of law'. One case is "as easy as the next". "Guilt is always beyond a doubt", states the officer who grants himself both legislative and judicial powers. A court procedure appears superfluous. The criminal is never informed of the verdict, which is issued without a hearing. The colonial officer is not only everything, he also can do everything – like the former commandant in the "Penal Colony": "soldier, judge, constructor, chemist, architect". For him, a generally valid law ("Guilt is always beyond a doubt"), a generally valid verdict (the death penalty) and a generally valid execution apparatus are all that is required. The de-individualised case law of the penal colony is complete – and it is absurd.¹²⁸ However, the hyperbole should not obscure the fact that the selection of the topic, as well as its presentation, represented Kafka connecting with the contemporary discourse which also contained voices critical of colonialism.¹²⁹

VII. Regarding the 'Method' of Colonial Comparative Law

Civil law professor Ernst Zittelmann considered comparative law advantageous also because it "evoked criticism [*kritikerweckend*]". By comparison, paths leading toward other solutions were analysed, it caused "doubts ...

127 Cf. Kurt Tucholsky in *der Weltbühne* (1920) regarding 'In der Strafkolonie': "You need not ask what the point of it is. It has no point. Perhaps the book does not even belong in this time, and it certainly does not move us forward. It has no problems and knows no doubts or questions. It is completely innocuous. Innocuous like Kleist." Cited in: WAGENBACH (2002) 135.

128 KAFKA (1994); cf. regarding the background of court metaphors: GRÖZINGER (1994).

129 Cf. ALBERT/DISSELNKRÖTTER (2002); regarding colonial criticism: STUCHTEY (2010); SCHWARZ (1999).

regarding whether the current solutions in one's own law were the best ones possible".¹³⁰

The connection between comparison and criticism formed, in Germany, as previously described, the basis for colonial-agitation efforts starting in the middle of the 19th century. On the one hand, there were the powerful seafaring nations; on the other hand, there was Germany, excluded from global commerce and prevented from extending its power. However, going forward into the course of the thirty year "real history" of German colonialism, comparative criticism was levelled against German activities in the colonies again and again. This went so far that the Reich Colonial Office itself began making comparisons in order to underscore its own (relative) success. In February 1913, the State Secretary issued a memorandum regarding the "Colonial Administration of the European States", the goal of which was to show that the assertion that the administration of the German colonies was too large and expensive was "groundless" – in the words of the *Norddeutsche Allgemeine Zeitung*, a semi-official mouthpiece.¹³¹

However, in what manner did this comparison occur? Costs, personnel and numbers on the one hand, colonial competencies and jurisdictions on the other hand – which were a field more difficult to measure and compare. Since the second half of the 19th century, comparative law had grown "almost instantaneously in importance". It was the "developmental idea of Hegel" which provided the philosophic foundation "on which basis comparative law was introduced into the science of jurisprudence".¹³² An historian of comparative law is, therefore, well served by remembering that the manner in which foreign law is perceived, i.e., the manner in which comparative law was conducted by colonial bureaucrats, was always (pre-)formed by certain basic assumptions, not the least of which was a developmental hierarchy into which the nations were categorised. In addition to this, subjective prejudices, perspectives, ideals, backgrounds in domestic law and the local political situation had to be taken into account.¹³³

130 ZITTELMANN (1900); cf. ZWEIGERT/KÖTZ (1996) 57 et seq.

131 BAB R 3001/5273, excerpt, NAZ #36, 12.2.14 "haltlos" [SBRT, Anl. XIII/1, Vol. 303, Denkschrift Nr. 1356 32/14, dated 9.2.1914].

132 SANDROCK (1966) 12; cf. HUG (1932) 1055; DÖLLE (1960) 19 et seq.; STOLLEIS (1998) 15 et seq.; 22.

133 Regarding the necessity of the self-reflectivity of comparative law, cf. FRANKENBERG (1985) 443.

The “selection of a solution represents a legal-political decision which can be justified by legal comparison”. Thus, the methodical “question which and how many foreign legal systems ought to be drawn upon for comparison” was formulated in accordance with which foreign “regulations one believed would promote the legislative effort”.¹³⁴ Although the criteria pursuant to which the objects of comparison were selected or, as it may be, the question as to which embassies and legations were to be asked for information was not made explicit, the comparative legal view of German officials was nonetheless primarily directed ‘upwards’, i.e., toward those to whom ‘competency’ was ascribed in solving colonial problems at least as well or better than oneself. Since “only legal systems ... on the same developmental level were considered to be directly comparable”,¹³⁵ in internal German discussions, arguments referencing Great Britain and France played the larger role. The regulations in the Netherlands and Spain were only occasionally consulted. Italy appears in the files of the Reich Colonial Office chiefly in the role of asking questions. The German Reich in part considered itself the successor of the Portuguese colonial empire,¹³⁶ which served as a negative foil. In this mode of reading, the Portuguese *imperio* was not considered to be of equal stature. It was thought of as persisting at a lower developmental level and, insofar as this, appeared irrelevant for purposes of a comparison.

No academic ‘methods’ supported these classifying efforts to create normatively-based hierarchies. Indeed, rather, the methods were based on the aims pursued.¹³⁷ These were derived, first, from the desired goal to do as well as the ‘large’, the ‘old’ colonial powers in legal-political terms and, second, from the argument (which was useful for domestic politics) to authority based on reference to these successful role models. The limits of comparability were, in this context, not well considered. They, however, were obvious in the selective presentation of desired objects of comparison, which encouraged the selection of a specific variant; take, for example, the case of Bismarck, who in 1885 assumed that the regulatory provisions of the SGG were equivalent to British regulatory law for the colonies. Questions

134 SANDROCK (1966) 28 et seq.

135 MICHAELS (2002) 101.

136 Cf. TSCHAPEK (2000); FRIEDRICHSMEYER/LENNOX/ZANTOP (1998) 15.

137 DÖLLE (1960) 22 with additional references; cf. RICHERS (2007) 511; FRANKENBERG (1985) 413 “The ultimate aims of comparative law – to reform and improve the laws, to further justice and to better the lot of humankind”; STONE (1951) 326.

regarding the reasons why a provision in a draft was based on foreign legal material, or not, or what – in comparison to other, foreign law solutions to a (legal) problem – was desirable about this were rarely discussed. Most saliently, the question was posed regarding the transferability of solutions found elsewhere – in their context – to a German fact pattern. Even the translatability of the legal terms did not always appear to be unambiguously possible, which meant that confusion could ensue. Thus, when State Secretary Solf demanded “a constitution” for every “Protectorate”, it was to be understood – as described above – in the “spirit” of the “English constitution” (i.e. as a general set of administrative rules).¹³⁸

Difficulties with colonially intended legislative comparison, which for practitioners did not pertain chiefly to methodical questions but rather to the acquisition of information, were not limited to the German administration. That other colonial powers were interested in the German colonies and their laws has already previously been suggested.¹³⁹ In France and Great Britain in particular, comparative law enjoyed a long tradition. It was “practically” orientated, which included (commercial) law in the colonies.¹⁴⁰ The French Ministry of Justice, for example, had established in 1875 a *Comité de législation étrangère*.¹⁴¹ Nevertheless, it was not always recognisable from where the bureaucrats derived their knowledge of foreign norms. However, the above-discussed “reciprocal attentiveness regarding the methods of the respectively other colonial powers”¹⁴² went so far that the ministries of various states requested information from each other about the legal situation in their respective colonies. Thus, as German bureaucrats requested information from their colleagues in London or Madrid regarding the “state law relationships of natives in the [British or Spanish] colonies to the mother country”,¹⁴³ so too did the Italian Colonial Ministry request the regulations

138 BAB R 1001/5595, p. 133–146, RKA an Gouv Daressalam, Windhuk, Buea, Lomé, Rabaul, Apia, 30.8.13.

139 Cf. LAAK (2004) 132: “The Germans were especially proud of the ‘scientific’ approach to their colonial methods, which were now applied across a broad front, and that this was recognised by colonial competitors prior to 1914.”

140 Cf. HUG (1932) 1060–1066; 1069; BURGE (1837/38).

141 Cf. CONSTANTINESCO (1971) 134.

142 LAAK (2004) 257.

143 BAB R 1001/5578, p. 8, FO to AA, 8.12.1900, p. 12, Ministerio de Estado to Radowitz, 21.3.1901.

in use in the German colonies from the Foreign Office pursuant to which the “natives” in the Protectorates could attain the status of a German citizen. The question was answered with reference to the SGG in its 1900 version.¹⁴⁴ The Italians, who had in particular adapted French colonial law,¹⁴⁵ in 1913 requested information again from the Germans regarding the legal status of “foreign natives” or “native states (in particular Mohammedans)” in the Protectorates.¹⁴⁶ The generosity and thoroughness with which the request was answered appears remarkable. It required three drafts before it could be answered. The questions asked were too basic in order to be given simple answers which, at the same time, would not reveal any of the deficient elements of German colonial law.¹⁴⁷

However, it was indeed not merely the smaller colonial power who asked the larger “catch-up” colonial nation regarding explanations of their colonial regulations. The efforts of Colonial Secretary Solf, an anglophile, led to a “trans-national respect for German colonial methods”, as apparent from an exchange of letters between Solf and Frederick Lugard, the Governor General of Nigeria. “Growing recognition of German colonial achievements” among British commentators has been observed by researchers recently.¹⁴⁸ For example, a British reception of German hunting law in Africa can be discerned.¹⁴⁹

Conclusion: Comparison and Difference in German Colonial Law

In light of the contemporarily emphasised comparability of European colonial systems, German bitterness regarding the Versailles Treaty was especially great in light of the fact that the “renunciation [*Verzicht*]” of colonies (Art. 119) was based on comparison: Germany was supposedly incapable of colonising. It had, it was alleged, oppressed the population.¹⁵⁰

144 BAB R 1001/5578, p. 27, Note Verbale, Chargé d'affaires d'Italie an AA, 12.7.1912; cf. GOSEWINKEL (2004) 252 et seq.

145 NUZZO (2011) 214.

146 BAB R 1001/5583, p. 37, Italienische Botschaft Berlin an Auswärtiges Amt, 7.3.1913.

147 BAB R 1001/5583, p. 38–56, Entwürfe: RKA an AA, 18.6.; 15.7.1913.

148 VIETSCH (1961) 133; cf. LINDNER (2011) 32–42; 65–84 (84) “wachsende Anerkennung”.

149 “[The British] drew heavily on German examples [of colonial game legislation] derived from Africa.” MACKENZIE (2001); cf. HINZ (2001) 342.

150 Cf. ANTONELLI (1921) 59; 73; SCHNEE 1924.

The violence in German Southwest Africa was specifically documented in 1918 in the British “Blue Book”. In this, regulations and decrees of the governor were replicated which were to prove the brutality of German colonial law. In its answer, the “White Book”, “actually an anti-Blue Book”, the German government in 1919 did not attempt a refutation but rather compared British and German practices against “rebels” and “bandits” and argued “that the British committed the same kind of atrocities” in India and other colonies.¹⁵¹ Does this comparison of “colonial performance” contain the core of something “special” in German colonialism which historians have investigated now for decades?¹⁵² The “Blue Book” had, at least, unmistakably produced the connection between law and violence in colonialism. That this was a peculiar (and violent) law was a part of the British argument that the German representatives at Versailles attempted to relativise.

Without a doubt, aside from the above-described transfers and entanglements, peculiarities of German colonial law did exist. But it has been – rightly – emphasised that differing “institutions” can arise “from a joint discussion”.¹⁵³ The differences are to be found less in colonial criminal law and its mode of operation than in other legal sectors. An early commentator on colonial law expressed the presumption that, on account of the German colonial acquisitions being rather recent, “German colonial law would need to assume a very different character [from that of other colonial states] and retain this in light of, if nothing else, the great difference in the times”.¹⁵⁴ Among these differences belonged, e. g., the “unique relationship of the subjection of colonial vis-à-vis consular law ... , which is not to be found in any legal system of another colonial power”.¹⁵⁵ Also, the legal and administrative order in the colonies established on the basis of colonial state law did not occur in accordance with “a prepared plan” which foresaw, e. g., the copying of a British template colony. In the search for role models, frequently the “Prussian model [or that of another German state] was

151 SILVESTER/GEWALD 2003; Reichskolonialamt (1919); HILLEBRECHT (2007) 73–95 (92).

152 “It is difficult to decide where – given the development that SWA has taken – the typical stops and the peculiar begins.” BLEY (1968) 312; see also: BERMAN (1999); KUNDRUS (2011); STEINMETZ (2005).

153 COING (1978) 178.

154 FLEISCHMANN (1891) 171.

155 KÖBNER (1904) 1088; cf. SACK (2001) 48 f.

adopted”.¹⁵⁶ In this, the German colonial administration was no different from that of the other powers, whose “administrative order ... was, primarily, determined by the system [which was] valid in the respective ‘home country’”.¹⁵⁷

Without accounting for the “common roots or interactions of various kinds which ... influenced the respective legal system”,¹⁵⁸ the differences between individual colonial powers have been described again and again. Not only contemporaries but also historians have compared German colonialism in a global context, often with the goal of differentiating it. Hence it was emphasised that the efforts to catch up with others were responsible for German colonialism “having, to a greater extent, in comparison with the established colonial powers, elements of ‘improvisation’ and ‘last-minute panic’ which, in colonial practice, had overtones of arrogance and affected ‘perfectionism’”.¹⁵⁹ The ‘improvisation’ became noticeable in that German administration was made more difficult because it “had, in comparison to other colonial empires, surprisingly limited personnel and equipment assets”.¹⁶⁰ If “historical comparisons” of this kind were considered a “possibility for reviewing” German colonial history,¹⁶¹ then this is indeed accurate. However, from this emerges the challenge to avoid essentialising various “teleologies of rule” as well as schematic narratives¹⁶² without concluding herefrom that comparisons emerge from an apologetic intention or, on the other hand, lead to tautologies which state that different things are ‘different’ and same things are ‘same’.¹⁶³

If one summarises, at this point, the comparisons, transfers, mutual influences, reciprocal effects, alternating or asymmetrical perceptions and power constellations, one comes, in fact, to a global or, at least European, “entangled history” of (German) colonial law.¹⁶⁴ Based on the source

156 SPEITKAMP (2005) 45.

157 SIPPEL (2001) 355.

158 SIPPEL (2001) 351.

159 GRÜNDER (2004) 26 referring to Bade.

160 SIPPEL (2001) 357.

161 BERMAN (2003) 24.

162 Cf., e.g., YOUNG (1994) 99 et seq., who is able to characterise the colonial rulership structures of the British, French, Belgians and Italians with, respectively, one or two sentences.

163 MICHAELS (2002) 108.

164 Cf. CONRAD/RANDERIA (2002).

analysis presented here, it is shown that one cannot argue for significantly differing national colonial legal systems. The institutionalised principles, as well as the basic normative assumptions, were based on the overall European colonial discourse. Common to all European colonial laws was also their legitimising character. In light of the violence and de facto legal vacuum on the part of the colonised, this often crossed into the realm of apologetics when it was desired that the actions of the colonial administrations be given the appearance of legal conformity. It also helped that colonial law was based on a closed world-view consisting of “civilization and chaos” – “insulated, complete and universal”.¹⁶⁵

In spite of the incompleteness and methodological deficiencies of colonial comparative law, these comparative discourses extended from anchoring the colonies in public law to criminal law and beyond, even into the distant realms of individual factual problems such as alcohol licenses. Its perspective across national borders and beyond had become self-evident. Specificity, and/or difference did not appear to be desirable attributes in the overall European colonial (legal) discourse. This would have contradicted the basic assumptions of comparative law: one wanted to benefit from others’ experiences and make reference to the “common ‘storehouse of solutions’”.¹⁶⁶ In light of the “structural and ideological commonalities ... as well as the orientation to colonial patterns of foreign colonial powers”, it is said to be impossible to speak of a “characteristic German colonial and administrative system”.¹⁶⁷ For German colonial law, the same principle applies as it does to German law on the whole: “It is difficult to say what part of it is German.”¹⁶⁸

165 FITZPATRICK (2001) 22.

166 Thus the explanation at the Paris Congress on Comparative Law 1900, zit. in: ZWEIGERT/ KÖTZ (1996) 58.

167 SIPPEL 2001: 354 et seq.; 368 with additional references.

168 GROSSFELD (1996) 2. “German law owes a large debt to foreign influences; they explain the wealth of our legal culture as a mixture of Germanic, Roman, northern Italian, French, Dutch, English and American impulses. Our law developed from ‘borrowing’. It is difficult to say what about it is German.” The history of reception and transfer of European laws in Africa is not concluded with the end of colonialism. Even the post-colonial states exist with a significant colonial inheritance in their codifications, cf. JOIREMAN (2001). Moreover, there was the undeniable tendency to continue the reception of European law by way of comparison for one’s own purposes, cf. GROTE (2001) 19 et seq. with additional references; SACK (2001) 332.

This shows that whosoever wishes to overcome essentialising national and state categories and to place trans-national, multi-polar, global influences and situations into the centre of his research will not be able to avoid analysing concrete examples of such processes in light of the sources. The question regarding (imperial) entanglement in legal history directs the focus by necessity to colonial instruments of rule and their application. It shows, moreover, that even concepts such as “transfer”, “legal transplant”, “hybridisation” or “legal pluralism” must be linked backwards to the political decisions that form the basis for those manifestations which are supposed to describe these terms. The methodical concepts of comparison and of *histoire croisée* are equally necessary for this purpose.¹⁶⁹ In fact, the history of German colonial law shows, e.g., how contemporary comparison became a medium for entangling and, moreover, how a *histoire comparée* can contribute to the illustration of various modes of global entanglement, dependency and transfers. How, then, did British, French, Italian, Portuguese and other colonial bureaucrats compare their empires with the other colonial powers? How did they transfer what and why? A comparative colonial history of global-historical scope must still be written.

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169 Kocka (2003) 44: “It is not necessary to choose between *histoire comparé* and *histoire croisée*. The aim is to combine them.”

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**Analyzing Transnational Law
and Legal Scholarship in the
19th and early 20th Century**

Napoleon in America?

Reflections on the Concept of ‘Legal Reception’ in the Light of the Civil Law Codification in Latin America

I. It is quite common to talk about a process or ‘reception’ of French *Code civil* in Latin America.¹ However, departing from a usual concept of ‘reception’ in the legal historiography as a process of “adoption of foreign cultural elements, when a people accepted predominant portions of a ‘foreign’ legal system voluntarily, without being overwhelmed or subjugated,”² the issue turns out to be quite dubious, if the actual historical development of civil law codification in the Latin American countries is considered.

The election of the concept ‘reception’ to be discussed here is not arbitrary or gratuitous, but it is due to the fact that comparative lawyers have mainly used it to refer to many processes of legal change in very different chronological, cultural and political circumstances throughout the history, with present echoes.³ But it seems to be rather an abuse of a technical term performed in legal history in order to describe a very precise legal phenomenon from a European perspective, what could perhaps be understood then as some kind of ‘Eurocentric’ vision of legal reality, not paying enough attention to the specific demands of other contexts than those which have especially influenced the building of such a methodological devise. The aim of this paper is then to try to specify some limits of this concept from a global perspective of legal phenomena in world history and to what extent it is still possible to go on to use it with any productive meaning.

1 ZWEIGERT/KÖTZ (1998) 113 ff.; RAMOS NÚÑEZ (1997) 132 ff.

2 WIEACKER (1995) 93.

3 See a general scope in HÄBERLE (1992).

II. In effect, in the first years following the independence of the Spanish American countries, in spite of the numerous attempts of legislating radical social changes on the levels of constitutional law, there were no radical changes in the field of private law. This phenomenon is due to different reasons. First of all, constitutional and legislative changes did not take immediate social effect; the constitutional modifications did little to change a reality where some types of people (mainly, Spanish descendents, clerics, especially property owners) were still socially privileged and other social groups (Indians, blacks, married women, the poor) continued to suffer from numerous private law incapacities. In many ways, the political and constitutional rhetoric was incapable of making immediate social change. Secondly, the main sources of private law remained the same, and so the private substantive law from the colonial period continued being in force in the new republics. The colonial sources of private law lived on well into the middle and, in many cases, the end of the nineteenth century. Dramatic changes in private law were not a product of independence, but they took place only during later and more stable periods.⁴

Nevertheless, it was clear that reform of private law could not be delayed or neglected forever. The very notion of the term *independence* meant that the new nations would have to be free of Spanish colonial law, or at least appear to be free of it, and the process of establishing national law was certainly encouraged by desires to create a new nation with its own laws. Actually, if private law did not face immediate change after independence, it was not for lack of direction or ideas. In fact, most constitutions of the new republics indicated the belief that legal reform was close at hand by asserting that the laws in force would remain like that until new laws were enacted by the legislatures. But just in the first years after the independence of the Hispanic American countries the idea of setting the private law of the different states in accordance with the new circumstances emerged,⁵ as

4 MIROW (2004) 103 ff.

5 For instance, the Spanish Constitution of 1812 (art. 258) established: “El Código civil y criminal y el de comercio serán unos mismos para toda la Monarquía, sin perjuicio de las variaciones que, por las particulares circunstancias, podrán hacer las Cortes.” Similar provisions were passed by several Latin American Constitutions after Independence (e. g. art. 87.1 Const. Venezuela 1830; art. 24 Const. Cundinamarca 1811; art. 7.3 Acta de Federación de las Provincias Unidas de la Nueva Granada 1811; art. 196 and 121 Const. Peru 1823; etc.).

much as the surviving colonial legislation still in force was strongly criticized. There was, however, a big difference between proposing to have the law fixed, even with some developed plans, on the one hand, and the actual performance of such a settlement of the law through articulated texts, namely to establish new authoritative legislative bodies able to efficiently replace the precedent colonial legal order, on the other hand. There were actually two possible parties in the different countries:

1) One was prone to settle the national law on the grounds of the present municipal law in force hitherto in the place, namely the Castilian legal heritage (*Derecho privado indiano*) and the recent national pieces of legislation (*Derecho patrio*), and to reshape it according to the canons of the European *scienza della legislazione* and the republican concept of code, as it had been done in some European countries (Prussia, 1794; France, 1804; Austria, 1811). This was due to numerous influences that prodded drafting committees and legislatures toward eventual codification. These included the success and availability of European codes, their qualities as ‘talismans’ (Jonathan Miller), the circulation of Bentham’s works on codification and his individual communications with Latin American leaders, the general cultural pressure of Europe (and especially France) on the newly independent republics, and the Roman foundations of the European codes.

2) The other one was to adopt *en bloc* (or at least to adapt) one of the existing private law codes, namely the European ones. Legislators of some countries found that the process of thoughtfully revising European codes to fit the particular needs and circumstances of the country, as argued by Montesquieu’s *De l’esprit des lois*, was a difficult, time-consuming task, riddled with possible political objections and stalemates, and thus it seemed to be much more profitable to take up a real, effective foreign statutory body.

The first approach had not been put aside as the first steps towards independence were being taken. There were some attempts to promote fully vernacular codes. Thus, for example, in Chile, in 1831, the representative Gabriel J. Torconal proposed that the Parliament make a revision to the medieval code, still in force in Chile and in the rest of Spanish American territories, the *Siete Partidas*, by keeping the substantive legal content of its provisions and getting rid of all its preambles, quotations of the Bible, the Church fathers and ancient authors, and resolving the questions and doubts which had been raised by the interpreters and had arrived at divergent

answers. Torconal expressly rejected the idea of taking up foreign legislations and using other codes as models. In Bolivia, similar concerns were voiced. Likewise, in Mexico, the jurist Juan Rodríguez de San Miguel shared a similar consideration, as he laid down the *Pandectas hispano-mexicanas ó sea código general comprensivo de las leyes generales, útiles y vivas de las Siete Partidas, Recopilación Novísima, la de las Indias, autos y providencias, conocidas por de Montemayor y Beleña, y cédulas posteriores hasta el año 1820*, published in 1839, which was a compilation of rules taken out of the ancient legislation and fragments of the writings of legal doctrine, ordered in a systematic way.

But these attempts to enact the European models provided with the vernacular, traditional and new Spanish American law failed. This plan to codify the national law as much as possible required a social atmosphere that did not yet exist in the new republics. The final period of the independence process mostly gave way to a situation of high instability and turbulence that obviously disturbed the spirits and deprived them of the calm and concentration necessary to analyze and take over the task of designing a newly-coined codification. It was not the right time for this. Moreover, most of the energies and talents were devoted to prioritizing and the urgent task of organizing the government and administration of the new states, even though in some cases there were proposals of codifying private law even before constitutional law.

In these circumstances, the French codes served, above all, as ready and attractive pieces of legislation to be suggested for adoption by the new countries.⁶ They acted as a model, because they showed implicitly that the codification enterprise was possible and feasible, and it was not necessary to carry it out again, because it had been accomplished, and nothing else than borrowing it seemed to be reasonable.

In effect, the Napoleonic codification, and especially the *Code civil*, displayed a lot of advantages for the new American republics. In addition to its technical virtues as a piece of legislation of the modern period and as an outstanding example of legal language, it expressed more generally, and therefore more attractively than its rivals, the ideals of the codification movement throughout the beginnings of the nineteenth century. It was also written in a language that was accessible to the Latin American legislators, in

6 RAMOS NÚÑEZ (1997); GUZMÁN BRITO (2004).

a very clear style, and its internal disposition proved to be very understandable because it was based on the structure of Justinian's *Institutions*, which had become the average civil law manual for most lawyers in Spain and Hispanic America in the eighteenth century.

On the other hand, these codes – and particularly the *Code civil* – embodied the prestige of his author, Napoleon Bonaparte, who was a charismatic figure who fascinated most of the leaders and *caudillos* of the Spanish American Independence. Even before the independence process had begun, the works of the eighteenth century *philosophes*, particularly Voltaire, Rousseau and Montesquieu, were highly influential with the Creole elite, from where the leaders of the Independence emerged, and they were reflected in the strong emphasis placed upon human liberty, republicanism and equality in the basic documents. Those men, when they had to exchange their military activity for a legislative one, namely when they took over the civil government of the territories whose independence they had promoted, thought in many cases about the possibility of directly introducing the French codes *en bloc* to substitute the previous colonial and first republican legislation. Thus, for example, in 1822 the Chilean *Director Supremo* Bernardo O'Higgins asserted in a public address: "Sabéis cuán necesaria es la reformación de las leyes. Ojalá se adopten los cinco códigos celebres, tan dignos de la sabiduría de estos últimos tiempos y que ponen en claro la barbarie de los anteriores." The Chilean ruler suggested, simply, adopting the French codifications. Simón Bolívar⁷ also considered something like that, according to the testimony of his secretary José D. Espinal, written in a letter sent on 31 July 1829 to the Home Minister of the (Gran) Colombia: "El Libertador Presidente está altamente penetrado de la sabiduría con que fue redactado el Código de Napoleón. Cree que pudiera plantearse en [Gran] Colombia con algunas modificaciones relativas a las circunstancias y a la moral del país". In Argentina, the Federal Governor of Buenos Aires, Manuel Dorrego, seemed also enthusiastic about the idea of introducing the French Civil Code "*en su mayor parte*," as he was proposed to do it in 1828 by a counsellor who was a former French judge living in the city. In Ecuador as well, between 1830 and 1833 the Congress ordered that this idea be developed, and in Guatemala a similar proposal was passed by the legislature in 1836.

7 MIROW (2000).

As it can be seen through these testimonies, between the two possibilities to act, either to completely adopt the French codifications (namely, the *Code Napoléon*), maybe with some minor modifications, and to take it just as a model to imitate, but not to copy, the first one was definitely dominant. But these were mainly mere declarations. What was in fact more meaningful were the statutory projects actually enacted under the strong influence of the *Code civil*, still according to the principle of its adoption by the new republics.

In this way, as a first step there was certainly some kind of ‘reception’, or rather transposition, of the law of the *Code civil* into several Spanish American states which carried out their civil law codification in an early, well advanced process with regards to their neighbor countries, such as Dominican Republic (1826/1845), the Mexican state of Oaxaca (1827–29), Bolivia (1830/1845), Peru (1836) or Costa Rica (1841). Let us look at them more closely:

1) *Dominican Republic*.⁸ The Eastern part of the island of Santo Domingo, firstly Spanish, had belonged to France since 1795, and became independent, as a whole island, in 1804. After some circumstances, it became a part of the Republic of Haiti between 1822 and 1844. At such a time, in 1825, Haiti introduced its own civil code, which was just a copy of the French *Code civil*, with some minimal suppressions and modifications, and this became law in force on 1 January 1826. It was therefore the first of the old territories of the Spanish Crown in the Americas to have a civil code in force. When the Eastern part of the island freed itself from Haiti and became the *República Dominicana*, in 1844, the previous Haitian legislation went on to be in force provisionally, the civil code as well, but on 4 July 1845 the Congress of the Republic decided to deprive the Haitian legislation of legal force, and to return to the sources of the Napoleonic codes themselves, but in their 1816 form (meaning, after the *Restauration*): the *Code civil des Français* was then directly in force (even without any Spanish translation) in the Dominican Republic till 1861 (when the country returned shortly to the Spanish sovereignty) and again between 1865 (when the country became independent again) and 1874 (when it finally passed its own civil code). The Dominican Republic is thus the case of the most absolute and full adoption of the French civil code in the Americas.

8 GUZMÁN BRITO (2000) 293 ff.; ID. (2006) 144 ff.

2) *Oaxaca*.⁹ Mexico became fully independent on 27 September 1821. According to the Federal Constitution of 1824, the regions became states, and they had full autonomy to legislate in the field of civil law. This possibility was first taken advantage of by the state of Oaxaca, which stood up because of its federalist spirit (it had declared itself free and sovereign state inside the Mexican federation even before Mexico became properly a Federation). As a sign of its sovereignty, Oaxaca enacted its own civil code (*Código civil para el Gobierno del Estado Libre de Oaxaca*) between 1827 and 1829. It was in force till 1837, just after the abolition of federalism in 1836. This civil code was a quite faithful and literal translation of the *Code Napoléon*, accurately retaining its system and structure with some minor changes such as the deleting of some internal subdivisions of the original text and the merging of their content as well as the abolition of the provisions on divorce in order to adapt the code to the canon law; some matters concerning law of obligations and law of property found nevertheless no development. Some other Mexican states (Zacatecas, Jalisco, Guanajuato) also moved forward with drafts and plans, but without success.

3) *Bolivia*.¹⁰ The independence of the new state (named *Bolivia*) in the territories of the former *Alto Perú* (in the Viceroyalty of Peru) took place in 1825. In 1829, the former general of Simón Bolívar Andrés de Santa Cruz became president of the republic and succeeded with the constitution of a Peruvian-Bolivian Confederation in 1836. In 1829, his Justice Minister Mariano Enrique Calvo organised a Commission of Judges to elaborate a complete civil code, a project which was proposed in October 1830 and, after some modifications, it was promulgated by president Santa Cruz to be in force in 1831. Even though in the decree of Minister Calvo it was said that the new code should be made on the grounds of the law previously in force in the country – meaning the Spanish civil laws –, this provision was not fulfilled (in part because the Minister told the commissioners to finish their task as quickly as possible), and the commissioners elaborated a text modelled upon the *Code civil*: a quite literal translation of the French text – with glaring mistakes – and a similar internal disposition and structure. The commissioners epitomized some of the parts of the original text and added an introduction (*Título preliminar*) full of ideas taken out of the

9 GUZMÁN BRITO (2000) 303 ff.; ID. (2006) 152 ff.

10 GUZMÁN BRITO (2000) 307 ff.; ID. (2006) 155 ff.

traditional Castilian law and canon law, especially to reshape some areas of civil law, such as marriage law and law of succession. Finally, it was a text comprising 1.556 articles (versus 2.281 in the *Code civil*), 476 of which were not directly taken out of the *Code civil* directly. Although this text also moves in the same way as the others, it is not a true adoption of the French code, but rather a quite crude adaptation to the American context. And it is quite meaningful that it is precisely this code that was especially influential in South America in the years that followed. This code was in force till November 1845, even after the fall of Santa Cruz from power; at that time a new code was passed, as part of an attempt to sweep away the work of the former president. The new code (*Código civil boliviano II*) was even more attached to the French model, despite some minor modifications also in the field of marriage and in the law of property, so that it can be said that, in the case of the Bolivian civil code of 1845, it was more an actual adoption than an adaptation of the *Code civil*. Anyway, this second code had a very short life, because of the difficulties in its implementation, and finally, in November 1846 the former code (*Código Santa Cruz*) was re-established and it remained in force till 1976.

4) *Peru*.¹¹ The first attempts to codify Peruvian civil law were close to the Independence movement and were promoted by Simón Bolívar himself, and developed especially by the judge and politician Manuel Lorenzo de Vidaurre, who wrote out and edited a penal code project (1828) and thereafter, in accordance with the Constitution of 1834, a project of civil code (1834–1836), very original, technically deficient and much more based on natural law than on the traditional Roman-Castilian Law. However, it never came into force, because of political circumstances: in 1836, the Bolivian army invaded Peru and *Protector* Santa Cruz imposed the division of the country. He introduced the Bolivian civil code of 1830 in both territories in which Peru was divided (in Sud-Peru in 1836 and in Nor-Peru in 1837). Therefore, the first civil code in Peru was in fact a slightly modified version of the Bolivian code of 1830 (the *Código Santa Cruz*), which, however, remained in force for just a very short time, because the *Protector* later decided to abolish it in the Nor-Peruvian state in August 1838, and in the Sud-Peruvian it disappeared with the dissolution of the Peruvian-Bolivian

11 GUZMÁN BRITO (2000) 315–317, 335; ID. (2006) 161–163, 179–180.

Confederation in January 1839. It was not till 1852 that Peru could have a civil code again, this time a true Peruvian one.

5) *Costa Rica*.¹² The *Emancipación* of Costa Rica (as with the other countries of Central America) took place in 1821, as a consequence of the independence of Mexico. Thereafter, a new independence, this time from Mexico, took place in 1824, in the form of the Federal Republic of Central America. Inside this Republic, Costa Rica proclaimed the so-called *Estado Libre de Costa Rica*, which became totally independent in 1841. In the years in which it was integrated into the Central American Republic, the country witnessed a movement toward codification which promoted the adoption of the ‘civil code’ of Louisiana (which had in fact been a mixture of Spanish and French civil laws under the name of *Digest de la loi civile* since 1808). But this movement did not have any success in the field of civil law until 1841, after the definitive independence of the country, when the dictator Braulio Carrillo promulgated a so-called *Código General de la República de Costa Rica*, a legal text elaborated on the model of the *Allgemeines Landrecht* (ALR) of Prussia, because it included three parts: civil law, penal law and procedure. In the part on civil law (*Materia civil*), it was just a literal reproduction of the Bolivian civil code of 1830 (*Código Santa Cruz*), that is, the version adopted in the Nor-Peruvian state, with a few of minor modifications in content and extension, even though it was not formally recognized, so that it seemed to be the dictator Carrillo who was the real author of this code – a hypothesis that has been totally discredited by the historical research. This “code” prevailed in Costa Rica, with several innovations, until 1888.

As it has been shown, these first codes were rather mere translations of the French Code, mainly as a symbolic transposition of the (formal) fascination of the political and intellectual leaders of the Spanish American independence with the French political and cultural model. This identification becomes, however, fuzzy, if one takes into account that precisely the first example of this type of codification – and, in fact, the actual immediate precedent of the others – is the civil code of Haiti (1825), an unlikely place to talk about a ‘reception’ of the *Code civil*, as this had in fact been law in force in the country even before its political independence. The introduction

12 GUZMÁN BRITO (2000) 317 ff.; ID. (2006) 163 ff.

of the *Code civil* (or something similar) in this country seems to be simply a case of continuing of the previous legal structures.

Should we talk here, therefore, of a ‘reception’ of the French civil code, or rather of a kind of ‘mimicry’ of a purely Latin American process with political resonances?

More precisely, according to the analysis of Alejandro Guzmán Brito,¹³ this initial pre-eminence of the French *Code civil* in the Spanish American republics was probably due to three different, but inter-related facts:

a) At the beginning, there was no easier model to adopt than the French code, because of the language (in contrast to the Prussian or the Austrian codes, which were unintelligible for the Spanish American legislators), but also because of previous traditions, which were obviously more familiar to the Latin American countries in the case of the French model.

b) The urge to have a code quickly was sometimes felt in the new republics for political reasons, normally to get the upper hand in the independence process. For instance, Louisiana felt the need to have a Romanist code just immediately after its incorporation into the United States in 1803 in order to avoid being absorbed by the ‘common law’ area. Oaxaca hurried to enact a civil code inside the Mexican Federation (even before it was proclaimed) as a way of asserting its sovereignty. Similarly the Dominican Republic let a civil code come into force as soon as it left the union with Haiti in 1845, just to escape the dominion of the laws of a hated country, even though the code which was adopted was a foreign one and even in a foreign language.

c) In other cases of the adoption of the *Code civil*, in addition to the previous causes there is a third factor, namely the impatience of rulers with a Napoleonic style, a mixture of authoritarianism and enlightenment: once the decision to replace the ancient legislation with a new statutory body had been made, the quick implementation of such a decision led directly to the *Code civil*, what was a means of demonstrating that there was no other more available and efficient model at their disposal: it was somehow a Northern Star for the codification process in the whole of Latin America. But the ability to get this decision enacted was due to the all-embracing power of such leaders that enable the adoption of this piece of legislation without any higher discussion. That was the case, for example, of the modernizing (but

13 GUZMÁN BRITO (2000) 224–226; ID. (2006) 90–92.

tyrannical) government of Jean Pierre Boyer in Haiti in 1825; or the zeal, not free from some kind of authoritarianism, of the *Protector* Santa Cruz to extend the Bolivian civil code of 1830 to other countries of the continent; or the recovery of the *Code civil des Français*, in its version after 1816, in Costa Rica in 1841, thanks to the keenness of the *progressive* dictator Braulio Carrillo. All these functions were associated with strong characters prone to admire the work and personality of Napoleon Bonaparte, and his devotion to the idea that modernizing the society required solid and fast decisions, which only an authoritarian government was in a condition to successfully carry out.

Neither of these explanations talks about any kind of deep adoption of the model of the *Code civil* in all these Spanish American countries. The explanations for such a phenomenon go quite far removed from the idea of a public conviction at least among the jurists (or the Creole elite) that such a French model was superior to the Castilian-Indiano tradition for those new republics, but only that it was a quicker and perhaps more efficient way of attempting to modernize their societies and to support the independence process, a procedure which finally revealed itself to be a quite a superficial and short-termed program in Spanish American societies.

III. The question seems to be even more complex when the second wave of the Latin American codification is considered, beginning with the second civil code of Peru (1852)¹⁴ and above all the civil codes of Chile (1855) and Argentina (1869). In these codes the French paradigm is present as an external feature, in the codification technique, but this is something which was not exclusive to the French model; indeed this one was actually an application of a technical device designed by the rationalist Natural Law and the *scienza della legislazione* of seventeenth and eighteenth century Europe. But the main point is that these codes – especially the Chilean one – are above all codifications of the traditional Castilian private law of the *Siete Partidas* and the *Derecho indiano* being in force in such territories and even after their *Emancipación* in so much as it had not been altered by the national legislation.

14 GUZMÁN BRITO (2000) 335 ff.; ID. (2006) 175 ff.

In effect, Bello's codification work¹⁵ was a successful mixture of the modern codes of his time, particularly the French *Code civil*¹⁶ (but also some others, though to a lesser extent, e. g. the Peruvian civil code of 1852), and, above all, Roman law (either directly or by the way of the *Siete Partidas* and some other legislative bodies of medieval Spain). Numerous other factors played a role into Bello's construction of the code, including the works of Friedrich Carl von Savigny, the French commentators on the *Code civil*, the writings of Jeremy Bentham on codifications, the works of the Spanish legists and Late Scholastics on private law, and various other European codes and drafts (like the influential Spanish *Proyecto de Código civil de 1851* by Florencio García Goyena). The result was a code which reflected a great step forward for civil law in Chile, but also in the whole of Latin America, as it was adopted in other countries with similar economic, social, and cultural structure.¹⁷

The arrival of Bello's code put an end to one's own country's efforts at codification (with the exception, maybe, of Vélez Sarsfield's Argentinian civil code¹⁸ and the very substantial *Esboço do Código civil* of Augusto Teixeira de Freitas between 1860 and 1867). Actually, in a region where complete and active state control and institutions were impossible, local rulers have also moved to control the aspects of economic and daily life. The interest of *caudillos* and federalism could shape regional and provincial private law as well as the more evident public law (one must remember that Bello's codification work was also made possible because of presidential support during the autocratic regimes in the Portales era in Chile). Thus, over time, independence unsurprisingly led to greater variation in both institutions and rules of private law when compared with the colonial period. With different nations, each building separate legal structures and rules to respond to the needs or demands of their populations, variations in these aspects became inevitable. New possibilities, however, were also present in this variation. As particular countries attempted institutional experimentation or drafted new codes, these aspects of independent legal development became available sources for other countries. Where one country had exerted great effort in

15 GUZMÁN BRITO (1982); ID. (2000) 359 ff.; ID. (2006) 201 ff.; most recently, MORÁN MARTÍN (2011).

16 MIROW (2001).

17 BRAVO LIRA (1981); CASTÁN VÁZQUEZ (1981).

18 PARISE (2011).

designing a code for private law, such a code became a useful starting point for other countries that had structures, populations and economies that were closer to the Latin American context than to their European counterparts. That is one of the main reasons for the success of the Chilean civil code. It served as a model and indispensable source for the entire region. In Ecuador, for example, several codification commissions worked diligently throughout the early 1850s, only to set their work aside in 1855 to make minor revisions to Bello's code, which was quickly adopted. Similarly, Julián Viso's draft civil code for Venezuela, also based on Bello's work, was passed by the legislature in 1862. The Chilean civil code was also adopted at least by El Salvador (1859), Nicaragua (1867), Colombia (1858), Honduras (1880) and Panama (1860).¹⁹

If it is taken into account that these latter and more traditional codes were widely spread and accepted in other Latin American countries at the end of nineteenth and the beginning of twentieth centuries (even in the countries where the French *Code civil* had a strongest influence initially, with the logical exception of Haiti), so that the Latin American civil law acquired a peculiar shape which had led many scholars to refer to a "Latin American private law sub-system" within the Roman (or Roman-Germanic) legal system,²⁰ then the idea of a massive 'reception', in the traditional sense of the word as mentioned above, of the *Code civil* in Latin America must be seriously questioned. The French model was initially accepted (or adapted), but then it was neglected (or, at least, diluted). Different from what happened, for example in the Netherlands, where the French model displaced the traditional 'Roman-Dutch Law', in Latin America an opposite phenomenon took place, namely, that the traditional civil law – linked to the European *ius commune* – expulsed – or, at least, filtered – the imported law taken out of the *Code civil*. One should talk, therefore, at the most, of a 'go and return' reception of French civil law in Latin America.²¹

Notwithstanding there are still two problems when conceptualizing this peculiar 'reception' of the French *Code civil* in Latin America.

First, to which extent are the substantial coincidences between the legal rules of those Latin American and French codes to be explained by the

19 GUZMÁN BRITO (2000) 374–425.

20 See references in SCHIPANI (2005).

21 See also MIROW (2005).

influence of the latter, rather than by the pre-existence of a common model for both of them, founded on the tradition of the European *ius commune*? Can ‘reception’ really be called a process of simple re-formulation of rules which were already in force in the ‘receiving’ territory, according to dogmatic models which are ‘universal’ – or, at least, uniform to the common legal culture? It must be considered that the very *Code civil* was far from being a really revolutionary legal product:²² it did not rebuild the law of property, contract or tort on new and individualistic principles. Indeed, it was drafted in what could be described as the trough between two intellectual waves: the sixteenth to eighteenth century natural law theory and the individualistic will-centred theory of the beginnings of nineteenth century. When Portalis and the drafters of the code were guided by general principles, they used those of the natural lawyers which were already old-fashioned. It was above all a reworking of Roman law, old customs, and ancient maxims. The drafters rejected expressly the republican vision of the code (as a clear and self-sufficient legislative body, where its rules would describe simple, natural relationships based on reason) and the principle of human equality accepted by them did not lead to a complete reshaping of private law itself. In this sense, insofar as its content is considered, the *Code civil* was not a very unfamiliar body to Spanish American lawyers, as the legal language of both of them was somehow common. This was undoubtedly an essential factor that paved the way for the formal acceptance of it in a first step of the codification process after the independence.

And secondly – and probably a deeper question: How is it possible to talk about ‘reception’ of a law in another, previously not existing one, that means, a law which has come into existence precisely as a result of the so-called ‘reception’, among other factors? The civil laws of the Latin American nations were actually built as independent ones (and not as ‘branches’ of a common *Derecho privado indiano*) through the codification process. The assumed influence of the French *Code civil* which could have taken place in such a process of constructing a new legal order was therefore less a ‘receptioned’ ingredient of such laws than a ‘constituent’ part or ‘building’ element of them. The usual concept of ‘reception’ should therefore be banned in the light of this historical development.

22 GORDLEY (1994).

IV. After the precedent argumentation, it seems to be quite clear that the concept of ‘reception’, as it is commonly used by comparative lawyers (or many comparative legal historians) is not adequate for solving certain questions raised by the phenomenon of the performance of civil codification in nineteenth century Latin America, namely as concerns the participation of French civil code and civilian doctrine in such a process. Of course, the substantial contribution of such a piece of European legislation and intellectual product in the construction of the legal building of these new republics is undeniable. But which kind of conceptual tool could be more suitable to aid the understanding of such a contribution, instead of the hackneyed – or, at least, commonly misunderstood – category of ‘reception’? In particular if we depart from a global perspective, distinct from the traditional European one, this category reveals even darker facets: it appears as a very narrow, rigid, culturally burdened concept, incapable of providing any useful explanation of the subject. Should we turn to other usual ideas coined by comparative lawyers in the last decades like ‘legal transfers’ or ‘legal transplants’ (Watson), ‘legal formants’ (Sacco) or a piece or ‘legal acculturation’? Could there really be any advantage when using the accustomed resource of the ‘reception’ as some kind of universal experience? Or should we better try to coin new, more precise terms to describe specific historical events from a global perspective?²³ In sum, could we accept the traditional methodical tools of legal history – most of them built in a national context, not considering the international perspective at all – to explain the global scope of legal developments over time?

These are all questions that must remain open to discussion here because they go far beyond the modest objectives of this paper, which should be content with carrying out some kind of *pars destruens* of the argument. But the reader could perhaps find some more accurate answers after realising the insufficiencies of the traditional proposals, and after comparing these reflections with the rest of the contributions of this issue, which will give some indications concerning similar problems in different spheres, what will surely open minds to new and deeper answers to old problems.

23 About all these concepts, see most recently DUVE (2012).

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Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)

I. Introduction

American nineteenth century civil codes incorporated legal provisions that originated in Europe. The civil codes of Quebec (1866) and Argentina (1871) did not neglect normative transfers, and many of their compounding elements can be traced back to Europe, where they were originally envisioned as a reaction to local needs. Jurists started to study the content and applicability of codes soon after being enacted in American jurisdictions. Those studies evolved into a *culture of the code*, which eventually evolved into a *reverence of the words* of the written law. That approach praised the codes as preferred objects, and elaborations by jurists were deemed to stay within their limits. Jurists could not freely elaborate criticisms on the code's content, nor develop comparisons between its norms and the changing society.¹ According to this extremely positivistic approach judges were

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1 TAU ANZOÁTEGUI (1998) 539.

bound to rule according to code provisions.² The approach pushed jurists to complete their own libraries with European sources, while their interest was mainly limited to books that codifiers included or used to complete their works.³ The identification of exact formal sources was therefore soon started, and this paper addresses the interest that jurists in the Americas initially had for formal sources originated in Europe.

The paper focuses on the work of two jurists who worked towards the identification of formal sources. In the early 1870s, Charles-Chamilly de Lorimier started to work in Quebec on what he called the *library of the civil code* (*bibliothèque du Code Civil*). In that twenty-one-volume work he provided, amongst others, the transcription of authorities used when drafting the Quebec civil code. At that same time, in Argentina, Luis Vicente Varela worked on what he also called the *library of the civil code* (*biblioteca del Código Civil*). In a sixteen-volume *opus*, Varela was able to provide readers with reproductions and Spanish translations of the formal sources that the Argentine drafter used in his code. Scholars across American jurisdictions, though not exclusively through *libraries*, also traced formal sources of local codes. All these works were in line with the statement of Joseph-Marie Portalis, who claimed that comparison with rules of other societies assisted jurists in understanding the rules they needed to explain or apply.⁴

The resulting *libraries* of civil codes acted as mirrors of normative transfers. Mirrors are understood as instruments that “give a true description of something else,”⁵ a notion that has been of common use for titles of books.⁶ Works that *reflect* the law have been welcomed by scholars throughout time. Examples of allusions to law-related mirrors, though not necessarily with the extent that will be given in this paper, are found in the Bible,⁷ the Germanic *Sachsenspiegel*,⁸ the Castilian *Espéculo*,⁹ and, closer in time, in the words of

2 *Id.* at 540.

3 *Id.* at 542.

4 This passage was reproduced in several nineteenth-century works that advocated comparative studies. See, for example, SAINT-JOSEPH (1840) iii.

5 *Mirror, n.*, Oxford English Dictionary Online.

6 *Id.*

7 James 1:22–25, The Holy Bible.

8 For information on the *Sachsenspiegel*, see DOBOZY (1999).

9 The *Espéculo* “aimed to be the mirror of all laws.” (BUNGE [1913] 246). For information on the *Espéculo*, see GARCÍA-GALLO DE DIEGO (1951–1952) and GARCÍA-GALLO DE DIEGO (1976).

Oliver Wendell Holmes.¹⁰ Nineteenth-century *libraries* were able to reflect which, and to what extent, European legal elaborations were transferred to American jurisdictions. The resulting codes became owners of what was transferred, because they forced interaction with local *ethos*. Imported elaborations were absorbed by local legal structures. *Libraries*, acting as mirrors, reflected the original sources used when drafting. Those mirrors served as solutions to entanglements that jurists faced in the Americas when looking behind the text of local codes, when trying to find the origins of their provisions.

Two initial statements are useful. The first relates to *normative transfers*. For the purposes of this paper, they encompass the reception of foreign legislative acts, customs, doctrine, and jurisprudence by a borrowing jurisdiction. Borrowing may be experienced both in an active and a passive way, however. Active borrowing takes place when one seeks a foreign legal elaboration and introduces it to a local legal framework. Passive borrowing takes place when a local legal elaboration is sought after and is introduced into a foreign legal framework.¹¹ The second initial statement relates to the use that codifiers made of sources. Abelardo Levaggi explained that distinction by stating that material sources (also called ideological or indirect) differ from formal sources (also called literal or direct).¹² The first type encompasses doctrines, ideas, or solutions that may be expressed in archaic or modern terminology. The second type encompasses formulas that limit themselves to expressing or simply translating those ideas. For example, in Argentina, material sources could be extracted from the Roman *Corpus Iuris Civilis* and the Castilian *Siete Partidas*. Those ideas were not incorporated to the civil code of Argentina with their original wording, however. They were incorporated with refurbished words, taken many times from contemporary works that served as formal sources. On many occasions, therefore, formal sources “dressed” with modern language the material ideas that were considered universal.¹³

This paper is divided into four parts and an appendix. Firstly, it describes how codification was achieved in the two jurisdictions. It addresses the work

10 Speeches by Oliver Wendell Holmes (1896) 17.

11 PARISE (2010a) 2.

12 LEVAGGI (2005) 181.

13 *Id.*

of the drafters of the civil codes, and highlights which European sources they used. Secondly, it explains who the two jurists that developed the *libraries* were as well as what their social and legal backgrounds and their main contributions to legal science were. Thirdly, it addresses the two *libraries* independently, describing their structure, contents, and impact on the legal community. Fourthly, it describes the legal context in which the *libraries* developed by first comparing the *libraries* with other works on European formal sources and, then, by addressing the development of positivistic approaches to the study and understanding of law. The last part aims to highlight a pan-American evolution of codification and its legal context. The appendix aims to illustrate the contents of the *libraries* and their reception of formal sources.

II. The Enchantment of Nineteenth Century Codification¹⁴

Codification finds its origins in Europe, where it experienced a significant development during the eighteenth and nineteenth centuries.¹⁵ A scientific revolution led the way for codification, originated in Enlightened and Humanistic ideas, and followed by Rationalistic Natural Law theorizing.¹⁶ This revolution advocated a new presentation of laws that replaced existing provisions,¹⁷ while grouping different areas in an organic, systematic,¹⁸ clear, and complete way.¹⁹ In addition, codification suggested the laying out of a plan with terminology and phraseology²⁰ in a single-fabric consolidated way.²¹ Codification then advocated one consolidated body for one consolidated group.

Endeavors on codification spread throughout the Western hemisphere. Europe experienced two seminal codifications in the area of civil law: the drafting of the French Civil Code of 1804 (later called *Code Napoléon*) and

14 The title of this section is drawn from WEISS (2000).

15 See generally, LEVASSEUR (1970) and BERGEL (1988). For a complete study of the previous period, see VANDERLINDEN (1967).

16 LEVAGGI (2001) 185.

17 DÍEZ-PICAZO/GULLÓN (1982) 51.

18 ALESSANDRI RODRIGUEZ/SOMARRIVA UNDURRAGA (1945) 49.

19 CARRÍO (1981) 993.

20 BERGEL (1988) 1084–1085.

21 STONE (1955) 305.

the coming into effect in 1900 of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*). Nineteenth century codification also developed in the Americas, many times building on European sources, though on occasions through cross-pollination of American codes.²²

Comprehensive attempts towards codification were made in the Americas.²³ There was interest in the region for grasping the panorama of civil law legislation in a succinct and comprehensive way.²⁴ There was a demand for the examination of ideas existing in other civilized states that had reached codification.²⁵ By replicating European events, many American jurisdictions replaced their versions of *ius commune* with codified systems of national laws.²⁶ Those enactments took place in the region mainly by the promulgation of civil codes in the period 1825–1916.²⁷

Codification endeavors in Quebec and Argentina share similarities. For example, both jurisdictions enacted civil codes during the second half of the nineteenth century. The codes of both jurisdictions also provided a single fabric for private laws, and provided a single code for a single group. Finally, codifiers in Quebec and Argentina built on European sources, though also on local provisions, and on American codification examples. Codification endeavors in both jurisdictions also reveal certain differences. For example, the code in Argentina repealed prior laws, while its Quebec counterpart preserved continuity of the *ancien* laws. In addition, Argentina had a strong connection with Spain, while Quebec had a strong connection with France and later with England.

22 For example, the Louisiana Code was a source for codifiers in Argentina, New York, and Quebec. In addition, the projected code for New York was influential in Argentina and California. The civil code of Chile provided a third example of cross-pollination, being a blueprint for many codification projects in the Americas. See KNÜTEL (1996), PARISE (2008) 833, and RICHERT/RICHERT (1973).

23 PARISE (2008) 831.

24 Similar claim for clarity was made in France in a nineteenth century work of legislative concordances. See SAINT-JOSEPH (1840) i.

25 STONE (1955) 307, also cited by CAIRNS (1980) 19.

26 BRAVO LIRA (1989) 54.

27 A list of American jurisdictions and the years of effect of their first generation civil codes reads: Louisiana, 1825; Haiti, 1826; Bolivia, 1831; Peru, 1836; Costa Rica, 1841; Dominican Republic, 1844; Chile, 1857; El Salvador, 1860; Panama, 1860; Ecuador, 1861; Venezuela, 1864; Quebec, 1866; Uruguay, 1868; Argentina, 1871; Mexico, 1871; Nicaragua, 1871; Colombia, 1873; Guatemala, 1877; Paraguay, 1877; Saint Lucia, 1879; Honduras, 1880; Cuba, 1889; Puerto Rico, 1889; and Brazil, 1916. See generally MORÉTEAU/PARISE (2009).

A. Quebec²⁸

The colony of Quebec, within New France, was established in 1608 by Samuel de Champlain.²⁹ Colonizers to that region of the *Saint-Laurent* River came mainly from French provinces of the Atlantic coast, and applied different customs.³⁰ Royal enactments of 1663 and 1664 stated that New France would benefit from the laws of France.³¹ Accordingly, French law³² was introduced, and mainly the *Coutume de Paris*³³ was the private law of the territory,³⁴ together with colonial legislation³⁵ and Royal Ordinances that affected daily life in the colony³⁶ and that were registered by the Superior Council.³⁷ Later, and as a result of the Seven-Years War, Britain took control of New France. The territory officially changed sovereignty to the British Crown in 1763, and uncertainty developed around the role of private law³⁸ when the civil and the common law systems coexisted.³⁹ The British Crown advocated the introduction of the common law, though its attempts did not prevail,⁴⁰ and the main receptions of English law took place in public law and in judicial organization.⁴¹ The civil law was restored to the territory by means of the Quebec Act of 1774,⁴² undertaken by the Parliament of Westminster.⁴³ Those private law principles, however, slowly started to interact with courts and legislative activities that introduced a limited amount of concepts from English law: a bijural system started to emerge in Quebec.⁴⁴ This evolution, together with other social changes, demanded a reform of the formal pres-

28 See generally the complete study by BRIERLEY (1968).

29 CAIRNS (1980) 114.

30 *Id.*

31 BRIERLEY/MACDONALD (1993) 7.

32 On French law at the time of transatlantic normative transfers, see BRIERLEY (1994) 105.

33 New France did not apply all dispositions of the *Coutume de Paris*. CAIRNS (1980) 123.

34 TANCELIN (1980) 3.

35 CAIRNS (1980) 123.

36 BRIERLEY/MACDONALD (1993) 10.

37 TANCELIN (1980) 3.

38 BRIERLEY/MACDONALD (1993) 14.

39 CAIRNS (1980) 126.

40 *Id.* at 133.

41 BRIERLEY (1968) 534.

42 On the Quebec Act, see WHITE (1902) 40–41.

43 BRIERLEY/MACDONALD (1993) 16.

44 *Id.* at 17.

entation of the law.⁴⁵ Quebec ultimately became a province of the Canadian Confederation on July 1, 1867,⁴⁶ and a lack of understanding of civil law and its adaptation to the resulting legal environment persisted.⁴⁷

Quebec adopted the *Civil Code of Lower Canada – Code civil du Bas Canada* (Quebec Code) on August 1, 1866.⁴⁸ Codification was expected as a natural and logical development in Quebec because of its antecedents and of the success codification had had in France.⁴⁹ The Quebec Code provided an ordered presentation of private laws.⁵⁰ It had 2,615 articles⁵¹ and was divided into a preliminary title and four books: Book I “Of persons” (*Des personnes*), Book II “Of property, of ownership, and of its different modifications” (*Des biens, de la propriété et de ses différentes modifications*), Book III “Of the acquisition and exercise of rights of property” (*De l’acquisition et de l’exercice des droits de propriété*), and Book IV “Of commercial law” (*Lois commerciales*).⁵² Each book was divided into titles, chapters, sections, and articles.⁵³ The text was therefore able to end the *legal Babel* that had existed,⁵⁴ whilst aiming to assert the private laws of Quebec by referring to an official compilation or doctrinal synthesis.⁵⁵

Codification in Quebec had its distinctiveness.⁵⁶ A Codifying Commission was created by an Act of 1857⁵⁷ and the technical factors of codification were sought for in its work.⁵⁸ Accordingly, the Commission was instructed to transform into a single fabric the laws that related to “Civil Matters and

45 *Id.* at 22.

46 *Id.* at 24.

47 BRIERLEY (1994) 125.

48 See the proclamation of May 26, 1866 by Viscount Monck, available at MCCORD (1870) xlii. See also BRIERLEY/MACDONALD (1993) 24.

49 BRIERLEY (1994) 116.

50 BRIERLEY/MACDONALD (1993) 24.

51 BELLEFEUILLE (1866) 598.

52 *Id.* at lxix–lxxxiv.

53 MCCORD (1870).

54 HOWES (1989a) 109.

55 BRIERLEY (1968) 542.

56 On the political background of the adoption of the Quebec Code, see YOUNG (1994). See also the chronology of codification events in Quebec in BRIERLEY (1968) 581–589.

57 “An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure” (20 Vic. S.C. 1857, ch. 43), reproduced as part of the *Consolidated Statutes of Lower Canada* in MCCORD (1870) xxxiii–xxxvii.

58 BRIERLEY/MACDONALD (1993) 25.

are of a general and permanent character.”⁵⁹ They were then instructed to indicate the authorities they used to fulfill their work, and invited to suggest amendments.⁶⁰ Their work had to reflect a consolidated image of the living elements of the private law as existing in Quebec.⁶¹

The Quebec Code was a single-fabric body. That same fabric blended *ancien* civil law principles with principles shaped by Rationalistic and Liberal values that derived from the Enlightenment.⁶² The Quebec blend included elements of Canon, English, French, and Roman laws and local provisions.⁶³ The ideal of one consolidated body for one group was also present in Quebec because the English minority of the territory had since been integrated into a structured and single-fabric system.⁶⁴

There were, however, some differences with other nineteenth century civil codes. The Quebec Code did not expressly repeal all existing prior law.⁶⁵ This is a significant element for further law interpretation, and a difference with other codes such as the one of Argentina and the *Code Napoléon*.⁶⁶ The Quebec Code was enacted both in French and English, a bilingual aspect that made it similar to the Louisiana Code of 1825, though different from its French counterpart.⁶⁷ A final difference is that the Quebec Code, even when using a single fabric, extended to elements of common law and of commercial law. This reflected a significant difference with other civil codes of its time,⁶⁸ such as the one of Argentina.

The work of the Codifying Commission extended for six years.⁶⁹ Their product was included in eight Reports,⁷⁰ the first completed by May

59 McCORD (1870) xxxiv.

60 BRIERLEY/MACDONALD (1993) 26 and CAIRNS (1980) 132.

61 BRIERLEY/MACDONALD (1993) 27.

62 *Id.* at 35.

63 ARROYO I AMAYUELAS (2003) 272.

64 GALL (1990) 172. See also the preface to the first edition of an 1870 edition of the Quebec Code where it read that “English speaking residents of Lower Canada may now enjoy the satisfaction of at last possessing in their own language the laws by which they are governed.” McCORD (1870) x.

65 See article 2613 Quebec Code. McCORD (1870) 412 and HOWES (1989a) 109.

66 BRIERLEY/MACDONALD (1993) 30.

67 *Id.*

68 *Id.* at 35.

69 BRIERLEY (1968) 526.

70 There were eight Reports, one being supplementary. See Civil Code of Lower Canada: First, Second and Third Reports (1865); Civil Code of Lower Canada: Fourth and Fifth

1862⁷¹ and the last by January 1865.⁷² These followed the order of the work of the Commission and not that of the Quebec Code.⁷³ The Commission was composed of judges that took leave during the drafting period. René-Edouard Caron, Augustin-Norbert Morin, and Charles Dewey Day worked under the chairman of the first.⁷⁴ Day was Anglophone whereas the two first were Francophone.⁷⁵ They had two secretaries skilled in English and French.⁷⁶ One of those secretaries, Joseph-Ubalde Beaudry, replaced Morin when he passed away.⁷⁷ Commissioners stated that their Reports included “accompanying observations [that] are intended to indicate the sources from which the articles submitted have been derived, and to explain when necessary, the reasons upon which they have been adopted.”⁷⁸ The Commissioners undertook a critical examination of local and foreign laws, while they valued tradition, jurisprudential theory, and their intuitive understandings of optimal provisions.⁷⁹

In Quebec “memory was more important than imagination in 1866.”⁸⁰ The sources of the Quebec Code were therefore many and the text reflected the law that had applied in the territory until its enactment.⁸¹ The Reports referred to more than 350 different authorities⁸² and offered a convenient way of determining the sources of each provision.⁸³ Together with an internal memorandum by Caron,⁸⁴ they showed that the Commissioners worked with an array of local and foreign sources (*e. g.*, English law, Roman

Reports (1865); and Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865).

71 TESTARD DE MONTIGNY (1869) 597.

72 BRIERLEY/MACDONALD (1993) 29.

73 TESTARD DE MONTIGNY (1869) 7 (*preface*).

74 BRIERLEY/MACDONALD (1993) 27.

75 CAIRNS (1980) 139.

76 BRIERLEY/MACDONALD (1993) 27.

77 *Id.*

78 Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865) 6.

79 CAIRNS (1987) 709.

80 BRIERLEY/MACDONALD (1993) 35.

81 MIGNAULT (1935) 108 and RICHERT/RICHERT (1973) 506.

82 BRIERLEY (1968) 552.

83 LAWSON (1955) 50.

84 See the breakdown of sources in BRIERLEY/MACDONALD (1993) 28, n. 96.

law, Scots law, US law),⁸⁵ and that French materials were their main quarry.⁸⁶ Commissioners also looked into decisions adopted by local courts,⁸⁷ and did not limit themselves to a single source for their normative transfers.⁸⁸ Their main difficulty was “the care and circumspection required for making a safe and judicious selection.”⁸⁹ They provided a new presentation for old provisions selected from many sources⁹⁰ because the Quebec Code integrated into one single fabric the laws of the territory while not being subversive of prevailing local legal notions.⁹¹ The Commissioners said in their first Report,

[we] have tried to avoid [acknowledged faults], and have sought for the means of doing so in the original sources of legislation on the subject, in the writings of the great jurists of France as well under the modern as the ancient system of her law, and in the careful comparison of these with the innovations which have been introduced by our local legislation and jurisprudence, or have silently grown up from the condition and circumstances of our population.⁹²

B. Argentina

The current territory of Argentina was formerly a possession of the Spanish Crown. Historically, it has been referred to as *Río de la Plata*, due to the name of the main fluvial artery that crosses through the region. In 1516, Juan Díaz de Solís led the first European expedition that arrived to *Río de la Plata*.⁹³ During the nineteenth century, local inhabitants replicated other South-American liberating movements, and independence from Spain was declared on July 9, 1816.⁹⁴

The first attempts towards civil law codification in *Río de la Plata* were undertaken in 1852.⁹⁵ At that time, the head of the executive power delivered

85 CAIRNS (1980) 145.

86 BRIERLEY (1968) 552.

87 KARPACZ (1971) 534.

88 See the study on sources of the Quebec Code in CAIRNS (1980) 699–712.

89 Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865) 216.

90 CAIRNS (1980) 717.

91 BRIERLEY (1968) 574.

92 Civil Code of Lower Canada: First, Second and Third Reports (1865) 6.

93 ROCK (1987) 8.

94 DOMÍNGUEZ (1861) 398–411.

95 LEVAGGI (1987) 265.

a decree ordering the appointment of drafters that would work on the civil, commercial, criminal, and procedural codes.⁹⁶ In addition, the Argentine Constitution indicated that the national legislative branch should deliver civil, commercial, criminal, and mineral codes.⁹⁷ Those first interests in codification were interrupted because the Province of Buenos Aires seceded from the rest of Argentina.⁹⁸ A reunion would have to wait until a constitutional reform took place in 1860.⁹⁹

The completion of a civil code was delayed until the following decade. The *Código Civil de la República Argentina* (Argentine Code)¹⁰⁰ took effect on January 1, 1871.¹⁰¹ Dalmacio Vélez Sarsfield (Vélez) had been appointed to draft the resulting code seven years prior.¹⁰² Throughout his life he served as lawyer, judge, professor, journalist, and government minister.¹⁰³ The Argentine Code had 4,051 articles and was divided into two preliminary titles and four books: Book I “Of persons” (*De las personas*), Book II “Of personal rights in civil relations” (*De los derechos personales en las relaciones civiles*), Book III “Of real rights” (*De los derechos reales*), and Book IV “Of real and personal rights-dispositions in common” (*De los derechos reales y personales – disposiciones communes*).¹⁰⁴ Books were divided into sections, parts, titles, chapters, and articles. In contrast to its Quebec counterpart, the Argentine Code overruled all related prior laws that had developed during the Spanish colonial period and the early independent period (e. g., *Indiano* and *Patrio* laws).¹⁰⁵

The Argentine Code included notes for many of its articles. Those notes are not part of the law, and are intended to inform the reader about the genesis of the thoughts of Vélez.¹⁰⁶ They aid the comprehension of articles, in a similar way as legislative history or *exposé des motifs*.¹⁰⁷ The notes are still

96 *Id.*

97 Section 64, Paragraph 11. Spanish text of the Argentine Constitution of 1853 available at ALBERDI (1858) 204. See also TAU ANZOÁTEGUI (1977b) 319.

98 LEVAGGI (1987) 265.

99 TAU ANZOÁTEGUI (1977b) 340.

100 See MORÉTEAU/PARISE (2009) 1143–1145 and LEVAGGI (1987) 266.

101 LEY 340 (1869) 496–905.

102 LEVAGGI (1987) 265. See also CABRAL TEXO (1920a) 156–178.

103 FRAGA IRIBARNE (2000) 580.

104 See LEY 340 (1869) 496–905.

105 See article 22 Argentine Code, *id.* at 508.

106 MOISSET DE ESPANÉS (1981) 448.

107 LEVAGGI (2005) 209.

useful as an additional element for interpretation of codified provisions,¹⁰⁸ and serve as guides when studying articles.¹⁰⁹ Notes can also be useful for determining the juridical, economic, or philosophical position that inspired the Argentine Code.¹¹⁰ In 1865, Vélez made reference to the existence of notes,

I indicated the concordances between the articles of each title and the current laws and the codes of Europe and America, for an easier and more illustrated discussion of the draft.

On occasions I had the need of including long notes in articles that solved archaic and serious matters that had been under debate by jurists or when it was necessary to legislate in areas of law that needed to be moved from doctrine and turned into law.¹¹¹

The work of Vélez was also a single-fabric body. He had an eclectic approach to law¹¹² and therefore identified materials from many sources. Vélez worked with legislative acts, drafts of codes, codes, and doctrine that served him as guides.¹¹³ As with other drafters, he used the ideas and codes that existed at the time.¹¹⁴ He was especially interested – as were Andrés Bello in Chile, Louis Moreau-Lislet in Louisiana, and Teixeira de Freitas in Brazil – in the jurists and works that theorized on modern law while building upon Roman law principles.¹¹⁵ Finally, Vélez added to those materials the identification of local customs.¹¹⁶

Merits of normative transfers should prevail over originality. This idea was defended by an Argentine periodical as early as 1854.¹¹⁷ Accordingly, codification in Argentina, similarly to that in Quebec and other jurisdictions, did not exclusively pursue formal originality.¹¹⁸ The Argentine codifier was well acquainted with Roman law and Castilian legislation. The archaic nature of those texts encouraged him to look for direct and modern

108 COBAS/ZAGO (1991) 146–147.

109 RIVAROLA (1901) 12.

110 COBAS/ZAGO (1991) 148.

111 VELEZ SANSFIELD (1865) v. See also LEVAGGI (2005) 204 and 310.

112 GUZMÁN BRITO (2000) 453.

113 PARISE (2010b) 40. See also SALVAT (1913) 436.

114 LEVAGGI (2005) 180.

115 *Id.*

116 SALVAT (1950) 132.

117 NAVARRO-VIOLA (1854) 3.

118 LEVAGGI (1992) 262.

models that would reproduce those ideas: the project of a civil code by Teixeira de Freitas for Brazil, the *Code Napoléon*, the *Concordancias, Motivos y Comentarios del Código Civil Español*¹¹⁹ by García Goyena, the civil code of Chile by Andrés Bello,¹²⁰ and the Louisiana Code. Vélez mentions in his code, amongst many other sources, the *Corpus Iuris Civilis*,¹²¹ the *Siete Partidas*,¹²² principles of Canon law,¹²³ the project of a civil code for the State of New York,¹²⁴ the codes of numerous jurisdictions (*e.g.*, Austria,¹²⁵ Haiti¹²⁶), and many doctrinal works (*e.g.*, William Blackstone,¹²⁷ Jean Domat,¹²⁸ James Kent,¹²⁹ Robert Joseph Pothier,¹³⁰ Friedrich Carl von Savigny¹³¹). Even when French authors and the codes that followed the *Code Napoléon* prevail in his notes, Vélez did not limit to follow one stream of thought, and his very diverse sources helped him elaborate an eclectic code.

III. The Men behind the Mirrors

Libraries of civil codes aimed to reflect the normative transfers that took place during the codification period. Two of those resulting mirrors were designed by Charles-Chamilly de Lorimier in Quebec and by Luis Vicente Varela in Argentina. The two jurists lived in opposite ends of the Americas, most probably never interacted, and yet undertook a similar endeavor. Both designers were from the same generation, were born from political immigrants in exile, extended their interests beyond private law and civil code areas, and above all, were very prolific in their scholarly writings. The two designers also were at some point members of the superior courts of their jurisdictions. There is a significant difference between the designers, how-

119 GARCÍA GOYENA (1852).

120 ZORRAQUÍN BECÚ (1976) 350.

121 *E.g.*, note to article 2913 Argentine Code, in LEY 340 (1869) 773.

122 Note to article 455, *id.* at 546.

123 Note to article 14, *id.* at 507.

124 Note to article 2538, *id.* at 741.

125 Note to article 19, *id.* at 508.

126 Note to article 325, *id.* at 536.

127 Note to article 167, *id.* at 524.

128 Note to article 1198, *id.* at 625.

129 Note to article 3136, *id.* at 800.

130 Note to article 1650, *id.* at 663.

131 Note to article 3283, *id.* at 813.

ever. One was involved in ultramontaniam and the other in freemasonry. These impacted politics and daily life during the nineteenth century across different parts of the Americas.

A. Lorimier¹³²

Charles-Chamilly de Lorimier (September 13, 1842 to May 24, 1919) was born in the State of Iowa (USA).¹³³ He belonged to a generation that bridged two centuries during their adult and most prolific part of life. He was born while his parents entered exile after the defeat of the *Patriotes* at the battle of Saint-Eustache in 1837.¹³⁴ His family returned to Montreal soon after exile and his father, Jean-Baptiste, retook the practice of law.¹³⁵

Lorimier would be identified throughout his life with nationalistic¹³⁶ and Catholic ideas in Quebec.¹³⁷ He studied law¹³⁸ at the Jesuit *Collège Sainte-Marie* where his conservative approach to life, law, and religion started to be shaped.¹³⁹ He was admitted to practice law in 1865,¹⁴⁰ one year before the Quebec Code took effect. He was involved with the Bar examination in Montreal and also taught criminal law at the Montreal location of *Université Laval*.¹⁴¹ Lorimier was a member of the judiciary during the last years of his life, when invited to sit at the Quebec Superior Court from 1889 to 1914,¹⁴² and where he rendered opinions both in French and English.¹⁴³ As part of his

132 A complete bibliography of Lorimier is available in the *Dictionary of Canadian Biography/ Dictionnaire biographique du Canada (DCB/DBC)* under the auspices of University of Toronto and Université Laval. See YOUNG, *Lorimier, Charles-Chamilly de*. See also NORMAND/ SAINT-HILAIRE (2002) 307–308.

133 YOUNG, *Lorimier, Charles-Chamilly de*.

134 *Id.*

135 His father was involved in a case that brought an action to rescind a deed of sale and transfer. The court, referring to that case, said: “it is painful to see a fellow-citizen accused of such a monstrous conduct.” *Lemoine v. Lionais*.

136 DICKINSON/ YOUNG (2002) 253.

137 YOUNG (1994) 16.

138 NORMAND/ SAINT-HILAIRE (2002) 307.

139 YOUNG, *Lorimier, Charles-Chamilly de*.

140 *Id.*

141 *Id.*

142 See the survey of Justices of the Superior Court of Quebec in the study by BOUTHILLIER (1977) 494.

143 CRÊTE (1993) 239. See, for example, the English decision in *Palliser v Vipond*.

conservative approach to law he tried to limit the impact that the Canadian Supreme Court had in Quebec.¹⁴⁴ His conservatism was also reflected in his religious views. Lorimier had joined and had been an advocate of ultramontanistism.¹⁴⁵

The designer of the *library* of the Quebec Code was a prolific author. In his time, both in Quebec and Argentina, historians, moralists, poets, and romantics belonged mainly to the judicial *world*.¹⁴⁶ His production includes, amongst others, the *library* in twenty-one volumes, a course book on criminal law,¹⁴⁷ and a text on property law.¹⁴⁸ He also participated with Canadian periodicals. For example, he wrote for the *Revue Canadienne* in the 1870s.¹⁴⁹ Lorimier was also a founding editor of *La Thémis*¹⁵⁰ in 1879, together with, amongst others, THOMAS Loranger and ÉDOUARD de Bellefeuille.¹⁵¹ That journal, created by Eusèbe Senécal,¹⁵² different from others in Canada at that time, also addressed social issues.¹⁵³ He contributed with that journal by writing on criminal law.¹⁵⁴ Lorimier also established with his sons in 1895 the *Revue de jurisprudence*,¹⁵⁵ once he had completed his *library* of the Quebec Code.¹⁵⁶ Those writings of Lorimier were accessible for the local legal community because periodicals in Quebec were published regularly¹⁵⁷ and were welcomed by libraries of Bar associations and courts.¹⁵⁸

144 YOUNG, *Lorimier, Charles-Chamilly de*.

145 NORMAND / SAINT-HILAIRE (2002) 308.

146 VEILLEUX (1993) 122.

147 YOUNG, *Lorimier, Charles-Chamilly de*.

148 NORMAND / SAINT-HILAIRE (2002) 308.

149 NORMAND (1993b) 164.

150 *La Thémis: Revue de Législation, de Droit et de Jurisprudence*.

151 NORMAND (1993b) 182.

152 *Id.*

153 YOUNG, *Lorimier, Charles-Chamilly de*. The journal published its fifth and last volume in 1883. NORMAND (1993b) 182.

154 NORMAND / SAINT-HILAIRE (2002) 307.

155 *La Revue de Jurisprudence ou Recueil de Décisions des Divers Tribunaux de la Province de Québec*.

156 NORMAND (1993b) 182. That publication provided 48 volumes and outlived Lorimier, until 1942. He had transferred the journal to Whiteford and Theoret in 1895, however, soon after it was created. *Id.* at 182 and 175, n. 65.

157 MORIN (2000) 384.

158 NORMAND (1993b) 177.

B. Varela¹⁵⁹

Luis Vicente Varela (May 27, 1845 to December 12, 1911) was born in Montevideo (Uruguay),¹⁶⁰ while his parents entered exile during the government of Juan Manuel de Rosas.¹⁶¹ He returned with his family to Buenos Aires soon after the battle of Caseros in 1852.¹⁶² His father, Florencio, was a lawyer and politician that occupied a prominent role in Argentine history.¹⁶³ Florencio was murdered in Montevideo before the family returned to Argentina,¹⁶⁴ and left his family in a precarious financial situation.¹⁶⁵ Luis Varela kept a life-long connection with Vélez. He found in the Argentine codifier mentorship, worked in his law office,¹⁶⁶ and even published in 1871 one of his works on Public Ecclesiastical law.¹⁶⁷ Varela was also appointed secretary to Vélez while the latter was Minister of the Interior.¹⁶⁸ Vélez had been on good terms with Varela's father too, visiting his home before being exiled to Uruguay.¹⁶⁹

Luis Varela always had an active public life. He was a freemason, being initiated into a lodge in 1868.¹⁷⁰ That same year he completed his law studies at the *Universidad Nacional de Córdoba*.¹⁷¹ Varela occupied several public offices. He was president of the Supreme Court of the Province of Buenos Aires from 1887 to 1889,¹⁷² and moved to the highest court of the country in 1889,¹⁷³ staying in office for ten years.¹⁷⁴ He is remembered for his dissenting vote in *Cullen v. Llerena*.¹⁷⁵ The majority of the court then

159 A complete bibliography is available in CUTOLO (1985) 502–503.

160 *Id.*

161 *Id.*

162 *Id.*

163 About Florencio Varela see, *id.* at 492–496.

164 *Id.* at 496.

165 BERCAITZ (1945) 5.

166 CUTOLO (1985) 503.

167 LEVAGGI (1969) 84–85.

168 CUTOLO (1985) 503.

169 CHÁNETON (1937) Vol. 1 p. 161.

170 LAPPAS (1966) 389.

171 TANZI (2005) 95 and CUTOLO (1985) 503.

172 TANZI (2005) 95.

173 ZAVALÍA (1920) 267–268.

174 HUERTAS (2001) 167.

175 *Cullen, Joaquín M. c. Llerena, Baldomero* (dealing with a decision of the Argentine President to intervene in the Province of Santa Fe). See also MILLER (2003) 879.

used the US decisions in *Georgia v. Stanton*¹⁷⁶ and *Luther v. Borden*¹⁷⁷ to solve the applicability of the political question doctrine.¹⁷⁸ Varela claimed, however, that the doctrine did not apply to a provincial government.¹⁷⁹ He later resigned to the Argentine Supreme Court due to a scandal related to debts with banks that could have led to impeachment.¹⁸⁰

His legal knowledge exceeded private law. Varela explored the developing area of comparative law and looked into normative transfers.¹⁸¹ He was also well read in constitutional and criminal law.¹⁸² He claimed that the US historical background could apply to Argentina.¹⁸³ While in office with the Argentine highest court, he tended towards the imitation of the US constitutional law model, even using terms in English in his opinions.¹⁸⁴ Varela would refer to *The Federalist Papers*¹⁸⁵ and to US Supreme Court decisions,¹⁸⁶ especially those subscribed by Roger B. Taney and Salmon P. Chase.¹⁸⁷ Varela was also involved in law-making. He was House Representative for the Province of Buenos Aires,¹⁸⁸ and participated of the constitutional conventions for that province.¹⁸⁹ Varela additionally projected laws and codes. He helped shape the municipal laws of Buenos Aires,¹⁹⁰ and was appointed to oversee a reform for the provincial Constitution.¹⁹¹ In addition, Varela

176 *Georgia v. Stanton*.

177 *Luther v. Borden*.

178 MILLER (2003) 880.

179 *Id.* at 879–880. For a complete study on the use and abuse of US sources by Varela when elaborating his dissent in *Cullen* see MILLER (1997) 283–299.

180 TANZI (2005) 95. See the detailed explanation of the scandal in MILLER (1997) 316–317. See also COLAUTTI (1991).

181 For example, Varela found comparative studies useful for the development of the public sector in Argentina, and addressed in his work Belgium, Hungary, Spain, Switzerland, the UK, and the US. Varela (1883).

182 CUTOLO (1985) 503.

183 HUERTAS (2001) 400.

184 *Id.* at 391–392.

185 *Id.* at 438.

186 *Id.* at 301.

187 *Id.* at 382.

188 CUTOLO (1985) 503.

189 *I.e.*, 1870–1873 and 1882–1889. CORTABARRÍA (1992a) 34–35 and 75, and CORTABARRÍA (1992b) 108 and 117.

190 CORTABARRÍA (1992a) at 75.

191 *Id.* at 75–76.

drafted the first American¹⁹² Code of Administrative Law Litigation (*contencioso administrativo*),¹⁹³ which took effect in Buenos Aires in 1906.¹⁹⁴ His influential code, similarly to the one by Vélez, included notes¹⁹⁵ for the different articles.¹⁹⁶

The designer of the Argentine *library* was a prolific author. He wrote at least 23 law related works,¹⁹⁷ and his history of the Argentine Constitution¹⁹⁸ motivated a law-review comment in the US, where he was deemed a “well known writer on both the public and private law.”¹⁹⁹ Similar to Lorimier, Varela contributed with periodicals. He wrote for the *Revista de Legislación y Jurisprudencia* of José María Moreno, Juan José Montes de Oca, and Antonio E. Malaver.²⁰⁰ He also wrote for the *Revista de los Tribunales*,²⁰¹ which operated under the direction of Serafín Álvarez and Rafael Calzada.²⁰² Furthermore, Varela undertook the translation of English works into Spanish;²⁰³ and was involved in journalism, working as editor for his family’s newspaper,²⁰⁴ where he defended the codification work of

192 DÍAZ COUSELO (1994) 53.

193 In words of Varela, *contencioso adminturtaivo* includes those causes of action pursued before judicial courts against the public sector once administrative recourses are completed. See *Fiorito Hnos c. Dirección de Vialidad*.

194 See generally, BERCAITZ (1945) 6. Studies analyze the merits of the code: TAWIL (1989), HUTCHINSON (1983), and HUTCHINSON (1989). The code still applies in the province, even when a new code was enacted by Law 12,008 (1999). See CABRAL/MALJAR (2002). On the structure of the code see DÍAZ COUSELO (1994) 76–77.

195 In 2011, the note of Varela to article 29 of the code was cited by the Supreme Court of the Province of Buenos Aires. See *Estojacovich c. Instituto de Previsión Social s/pretenión anulatoria (R.I.L.)*.

196 BERCAITZ (1945) 7.

197 VARELA (1908) iv. See a complete list in CUTOLO (1985) 503.

198 VARELA (1908).

199 DODD (1911) 114.

200 It was initiated in 1869, and 12 volumes were published. CHÁNETON (1937) Vol. 2 p. 443, 445.

201 CUTOLO (1985) 503.

202 It operated from 1881 to 1883. CHÁNETON (1937) Vol. 2 p. 446–447, 449.

203 For example, in 1869, he translated a chapter of the work of John Norton Pomeroy entitled *An Introduction to the Constitutional Law of the United States*. See HUERTAS (2001) 173 and NADELMANN (1959) 212–213.

204 MUZZIO (1920) 420.

Vélez.²⁰⁵ He did not limit his writings to law,²⁰⁶ initiating the crime fiction genre in *Río de la Plata*.²⁰⁷

IV. Libraries of Civil Codes

The *libraries* of civil codes resulted from the efforts of two unique jurists. In the early 1870s, Lorimier and Varela started to envision multi-volume works on the formal sources of the civil codes of their jurisdictions. The purpose, content, structure, and audience of both works were similar. Lorimier and Varela, however, lived approximately 5,700 miles apart, in the far ends of the Americas. There is no indication that either of them had visited their respective countries, nor that they held epistolary contact. Furthermore, there is no indication that their works reached the opposite ends of the Americas during the 1870 s.²⁰⁸

Libraries reproduced the formal sources that drafters of civil codes used. Lorimier provided transcriptions of the exact formal sources mentioned by the Commissioners in their Reports. Varela acted in a similar fashion for Argentina, including the formal sources that Vélez had mentioned in his notes to the Argentine Code. Lorimier was able to complete his work throughout 21 volumes, covering almost all the content of the Quebec Code. The work of Varela, in 16 volumes, was interrupted and covered only one fourth of the Argentine Code. Very few antecedents of the *libraries* can be found. For example, in France immediately after the enactment of the *Code Napoléon*, Julien-Michel Dufour aimed to indicate the sources of the

205 TAU ANZOÁTEGUI (1977b) 336.

206 He wrote plays and dramas. CUTOLO (1985) 503 and MUZZIO (1920) 420.

207 LAGMANOVICH (2001) 35–37 and CORTABARRÍA (1992b) 127.

208 The author if this paper found no indication that the personal papers of Varela and Lorimier have been preserved. He acknowledges that copies of the *libraries* or mere knowledge of their existence may have reached the far ends of the continent in the 1870s, though his research did not reflect those results. There is proof, however, that the work of Lorimier was already in the stacks of the main law library of Buenos Aires in the 1940 s. The library of the Universidad de Buenos Aires held a copy at that time, though the records do not indicate the exact date of entry. The call and registration numbers show that the entry took place during the last decades of the nineteenth century. Further studies of the incomplete catalogue could indicate more conclusive results.

dispositions of that code,²⁰⁹ though his work was less ambitious, and was limited to providing references²¹⁰ and not exclusively transcriptions.²¹¹

Comparative legislation started to gain momentum around the 1850s.²¹² This activity predated the study of comparative law and provided comparisons between the different legislative bodies of different jurisdictions. The *libraries* benefited from this context and used those works as repositories for many formal sources. The leading works in comparative legislation for the Americas were by French and Spanish authors. Fortuné Anthoine de Saint-Joseph produced a work of legislative concordances that circulated in Argentina and Quebec at that time. The French author included in his work a synoptic chart that helped compare the texts of the *Code Napoléon* with the texts of several nineteenth century codes.²¹³ In Spain, Florencio García Goyena directed readers through the text of a Spanish civil code project of 1851 which included a scholarly analysis for each of its articles.²¹⁴ Drafters of civil codes in the Americas regarded those works as comparative-legislation tools. Another work that provided formal sources was completed at that time by Juan Antonio Seoane, also in Spain.²¹⁵ He provided translations and transcriptions of sources²¹⁶ that aimed to complete the *lacunae* that had existed in Spain,²¹⁷ and in the Americas, regarding comparative legislation.

A. Bibliothèque du Code Civil²¹⁸

The Quebec Code provided the legal profession with an indispensable *vademecum* of private law for that part of Canada.²¹⁹ It had been noted, as

209 DUFOUR (1806) 4. See also the reference to the work of Dufour in BATIZA (1982) 478.

210 See, for example, the reference to articles 5 and 14 of Section 2 of the law of September 20, 1792, which is not followed by a transcription. DUFOUR (1806) 153.

211 See for example the transcription of article 30 of the declaration of April 9, 1736. *Id.* at 48 and 49.

212 TAU ANZOÁTEGUI (1977c) 79.

213 SAINT-JOSEPH (1840).

214 GARCÍA GOYENA (1852).

215 Seoane (1861).

216 *Id.* at 754.

217 *Id.* at vii.

218 See generally the complete study by Normand & Saint-Hilaire, which has been of constant reference for the author of this paper (NORMAND / SAINT-HILAIRE [2002]).

219 BELLEFEUILLE (1866) iv.

early as 1832, that in Quebec the law was spread throughout many volumes.²²⁰ In addition, the texts by commentators of the *ancien* French civil law were starting to be scarce, being difficult to obtain copies of their works, together with a shortage of new editions and translations of significant legislative materials.²²¹ Local libraries had incomplete holdings of the *ancien* civil law materials that had been transferred into the Quebec Code,²²² and the importation of books turned out to be an essential way to complete existing collections.²²³ In addition, law books in the 1870s were expensive in the region and complete libraries were limited to the wealthy,²²⁴ or to courts²²⁵ and Bar associations.²²⁶ Lorimier aimed to illustrate with his *library* the formal sources that comprised that *vademecum*,²²⁷ and therefore meet the needs of many practitioners trying to access those materials.²²⁸

The *library* of Lormier was entitled *Bibliothèque du Code Civil de la province de Québec*.²²⁹ It was published in 21 volumes from 1871 to 1890,²³⁰ spanning 16,500 pages, and was one of the earliest editions of the Quebec Code.²³¹ The first volume of the *library* demanded “18 months of research and study,”²³² and, together with two following volumes, was also signed by Charles Albert Vilbon.²³³ The co-author of those first three volumes²³⁴ was

220 DES RIVIÈRES BEAUBIEN (1832).

221 BRIERLEY (1968) 539.

222 BELLEFEUILLE (1871) 876.

223 NORMAND (1993a) 141.

224 BELLEFEUILLE (1871) 876. See also NORMAND/SAINT-HILAIRE (2002) 316.

225 For example, in the 1890s, the library of the Supreme Court of Canada seemed to be well furnished with works on the laws of France and Quebec. MORIN (2000) 349.

226 GALLICHAN (1993) 141–142.

227 Other contemporary editions of the Quebec Code (*e. g.*, Bellefeuille, Sharp) also addressed sources, though did not transcribe them. See HOWES (1989a) 112. See also *infra* V.A.

228 MORIN (2000) 278. Some catalogues and collections testify that practitioners acquired foreign doctrinal works. NORMAND (1993b) 166.

229 LORIMIER/VILBON (1871–1890).

230 Volumes and years of publication were: 1, 1871; 2, 1873; 3, 1874; 4, 1879; 5, 1880; 6, 1881; 7, 1882; 8, 1883; 9, 1883; 10, 1884; 11, 1885; 12, 1885; 13, 1885; 14, 1885; 15, 1886; 16, 1886; 17, 1888; 18, 1889; 19, 1889; 20, 1890; and 21, 1890.

231 KASIRER (2005) 507–508.

232 LORIMIER/VILBON (1871–1890) Vol. 1 p. 15. See also HOWES (1989a) 112.

233 LORIMIER/VILBON (1871–1890) Vol. 1–3 at cover page.

234 A breakdown of authorship of contributions for the first volume indicates that, even when the volume was signed by both authors, Lorimier played a leading role in the drafting of the different sections. See LORIMIER/VILBON (1871–1890) Vol. 1 p. 1–2.

admitted to practice law two years before Lorimier, and there are no indications that he contributed to other law-related publications.²³⁵ The publication of the Quebec *library* was undertaken in Montreal by three different publishers; Eusèbe Senécal (founder of *La Thémis*) was responsible for ten volumes, while *La Minerve* and *Cadieux & Derome* were responsible for three and eight volumes, respectively.²³⁶ Lorimier worked with the holdings of the library of the Bar of Montreal²³⁷ and with those of his friends.²³⁸ The Quebec Code was seen at that time as a “kind of library”²³⁹ itself, and Lorimier therefore provided excerpts of its formal sources. In the words of Lorimier, his work aimed to complete “a small library of our Civil Code” (*petite bibliothèque de notre Code Civil*),²⁴⁰ and accordingly, enable a natural prolongation of it.²⁴¹

The *library* was a work of comparative legislation that reflected the normative transfers that had taken place in Quebec. It linked the law of that part of Canada with the remaining legal universe.²⁴² Lorimier indicated in the introduction to his *library* that “it is our objective to offer for each article the commentaries, developments, and comparative legislation, that a judicious election permits us to transcribe.”²⁴³ His main contribution was the fidelity of the formal sources transcribed²⁴⁴ (e. g., English, French, Roman, US).²⁴⁵ Lorimier defended the notion that modern authors were a reflection of *ancien* writers, and that it was impossible to understand the provisions of the Quebec Code if there was ignorance on the origins of those *ancien* institutions.²⁴⁶ He therefore saw the new text as a summarized and organized way of presenting the *ancien* laws.²⁴⁷ He believed that the European and

235 NORMAND / SAINT-HILAIRE (2002) 308.

236 See generally LORIMIER / VILBON (1871–1890).

237 LORIMIER / VILBON (1871–1890) Vol. 1 p. 14.

238 NORMAND / SAINT-HILAIRE (2002) 324.

239 HOWES (1989b) 140.

240 LORIMIER / VILBON (1871–1890) Vol. 1 p. 13. See also NORMAND / SAINT-HILAIRE (2002) 313.

241 NORMAND / SAINT-HILAIRE (2002) 311.

242 HOWES (1989b) 142.

243 LORIMIER / VILBON (1871–1890) Vol. 1 p. 11.

244 *Id.* at 12. See also NORMAND / SAINT-HILAIRE (2002) 316.

245 LORIMIER / VILBON (1871–1890) Vol. 1 p. 13. See also HOWES (1989a) 112.

246 NORMAND / SAINT-HILAIRE (2002) 312–313.

247 LORIMIER / VILBON (1871–1890) Vol. 1 p. 5. See also NORMAND / SAINT-HILAIRE (2002) 313.

American formal sources he provided should be considered primary sources for modern laws.²⁴⁸

The work of Lorimier followed the structure of the Quebec Code. Articles, both in French and English, were followed by transcriptions of the Commissioner's Reports and of formal sources that naturally prolonged the given framework.²⁴⁹ Lorimier did not correct, however, the contradictions²⁵⁰ or mistakes made by the Commissioners, leaving that task to readers.²⁵¹ The *library* was interrupted at the end of Book III of the Quebec Code;²⁵² excluding the book on commercial law and the final dispositions.²⁵³

An approximation to the content of the *library* is reflected in the wording of its complete title.²⁵⁴ Firstly, the work aimed to reproduce the text of the Quebec Code, both in French and English.²⁵⁵ Secondly, it aimed to transcribe the Commissioner's Reports. Thirdly, the title indicated that it would include transcriptions of authorities to which the Commissioners referred, "together with many other authorities."²⁵⁶ Transcriptions were provided in their original languages²⁵⁷ (*i.e.*, English, French, Latin), though some Latin passages were provided in French with the assistance of existing translations.²⁵⁸ Lorimier followed the original texts and ignored additions included in critical editions.²⁵⁹ Yet, the normative transfer was not only

248 LORIMIER/VILBON (1871–1890) Vol. 1 p. 5. NORMAND/SAINT-HILAIRE (2002) 313.

249 See generally LORIMIER/VILBON (1871–1890) Vol. 1 and NORMAND/SAINT-HILAIRE (2002) 320–325.

250 HOWES (1989b) 139.

251 HOWES (1989a) 112.

252 LORIMIER/VILBON (1871–1890) Vol. 21.

253 See also NORMAND/SAINT-HILAIRE (2002) 324.

254 Complete title: "La bibliothèque du code civil de la province de Québec (ci-devant Bas-Canada): ou Recueil comprenant entre autre matières: 1. Le Texte du Code en Français et en Anglais. 2. Les rapports officiels de MM. les Commissaires chargés de la codification. 3. La citation au long des autorités auxquelles réfèrent ces Messieurs, à l'appui des diverses parties du Code [*Civil*, added since the second volume], ainsi que d'un grand nombre d'autres autorités. 4. Des tables de concordance entre le Code Civil du Bas-Canada et ceux de la France et de la Louisiane."

255 See, for example, the transcription of article 242, *infra* VII.A at 527.

256 LORIMIER/VILBON (1871–1890) Vol. 1 at cover page.

257 See, for example, the texts in French and Latin, *infra* VII.A at 527–528.

258 NORMAND/SAINT-HILAIRE (2002) 323.

259 *Id.* Some scholarly works and court decisions seem to have ignored the fact that Lorimier limited his work to transcriptions (*Id.* at 332–333). For example, even in 2009, Lorimier

reflected in the transcription of European formal sources because the *library* included, for example, numerous references to the Louisiana Code.²⁶⁰ Fourthly, it aimed to provide tables of concordances between the Quebec Code, the *Code Napoléon*, and the Louisiana Code. This last objective was not achieved by the *library*,²⁶¹ though some studies incorrectly indicate the contrary.²⁶² Tables were no rarity at the time comparative legislation developed. They existed in Quebec, and to a similar extent, in other code-related works.²⁶³ The title of the *library* did not reflect its content completely, however. For example, the introduction to the *opus* included valuable reflections on codification. Written in the context of the nineteenth century codification movements, they provided a panorama of codification endeavors in the Americas.²⁶⁴

The use that local scholars, practitioners, and courts made of the *library* helps illustrate its reception and effects. The *library* was deemed very useful for the practice of law because practitioners could easily cite authorities in their petitions, as did judges in their decisions.²⁶⁵ Accordingly, the *library* simplified the practice of law in Quebec.²⁶⁶ In addition, its portable size, conveniently divided into many volumes, made it easy to transport.²⁶⁷ Judges in Quebec had easy access to copies of the *library* because soon after the work was completed, the government bought 100 copies to make them available to magistrates.²⁶⁸ This also may have provided financial support to the enterprise of Lorimier. The book was also promoted by means of catalogues and, towards the beginning of the twentieth century, was seen as a work of erudition.²⁶⁹ For example, a catalogue for the *Exposition Universelle* of 1900

was credited with the authorship of a passage that he had transcribed and acknowledged to Pothier (PARENT [2009] 262).

260 See, for example, the reference to article 233 of the Louisiana Code, *infra* VII.A at 534. RICHERT / RICHERT (1973) 503. The Louisiana Code occupied for Quebec a prominent role as formal and linguistic source, rather than as substantive model. *Id.* at 518.

261 The author of this paper was not able to identify the tables in the hard copies and microfilms he consulted. See also NORMAND / SAINT-HILAIRE (2002) 323.

262 FABRE-SURVEYER (1939) 658–659 and TASCHEREAU (1955) 120.

263 MCCORD (1870) 466–475.

264 LORIMIER / VILBON (1871–1890) Vol. 1 p. 3–15.

265 NORMAND / SAINT-HILAIRE (2002) 325–326.

266 *Id.* at 334.

267 The printing was presented in 16cm × 23.5cm, in 8 (*id.* at 327).

268 *Id.* at 329.

269 *Id.* at 331.

included the *library*, being one of the most expensive books for the Canadian section.²⁷⁰ Lorimier's work was a tool for the identification of useful authorities when interpreting articles of the Quebec Code.²⁷¹ It was cited in scholarly writings,²⁷² court decisions,²⁷³ and bibliographies²⁷⁴ throughout that same century in Canada. For example, a case decided in 1977 by the Supreme Court of Canada read: "The fourth Report [...] gives a list of the authorities on which they relied, and I can do no better than refer to the relevant texts compiled in de Lorimier."²⁷⁵ The *library* was cited in other jurisdictions, even deserving a reference in the seminal work by Marcel Planiol.²⁷⁶ Its impact was anticipated as early as 1871, when it was said that the *library* should be in libraries of "all advocates, notaries, priests, and all educated men that love being aware of the laws that govern their actions."²⁷⁷

B. Biblioteca del Código Civil

The Argentine Code overruled existing prior laws. Its notes, however, attracted an array of European materials that had predated it and that had been

270 *I. e.*, World Fair of Paris. GRANGER/GRANGER (1900) 54.

271 NORMAND/SAINT-HILAIRE (2002) 331.

272 For example, the *library* was very much cited in the proceedings of the 1934 *Journées du droit civil français* that took place in Montreal and included contributions from some of the main scholars of that time (*Le droit civil français: Livre-souvenir des Journées du droit civil français* [1936]). In the 1980s, a book review mentioned that the *library* was a tool for better understanding a critical edition of the code by Paul-A. Crépeau (RUDDEN [1982] 871). Other examples of references to the *library* are found in the 1950s (PAQUET [1959] 85), in the 1960s (COMTOIS [1964] 38–41), in the 1970s (JACOBY [1970] 87–88), and in the 1990s (LARUE [1993] 25).

273 See, for example, the references to the work of Loirmier in *The Township of Ascot v. The County of Compton – The Village of Lennoxville v. the County of Compton*; *Pagnuelo v. Choquette*; *City of Montreal v. Cantin*; *Masson v. Masson*; *Duchaine v. Matamajaw Salmon Club*; *Joseph Pesant v. Charles Robin*; *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*; *Guaranty Trust Co. of New York v. The King*; *Barman v. Villard*; *Tremblay v. Daigle*; *Rocois construction inc. v. Québec ready mix inc.*; and *Première Nation Malécite de Viger (Conseil) v. Crevette du Nord Atlantique inc.* Several examples are also provided by NORMAND/SAINT-HILAIRE (2002) 332.

274 For example, in the 1970s, the *library* was cited in bibliographies on Canadian civil law, both in Canada and the US. See BOULT (1977) 309 and BOULTBEE (1972) 27.

275 *Cargill Grain Co. v. Foundation Co. of Canada Ltd.*

276 PLANIOL/RIPERT (1932) 60.

277 BELLEFEUILLE (1871) 876.

transferred to the Americas by the codifier. Vélez wrote in 1868 that he had aimed to show in his code the “current status of [legal] science, and had therefore grounded the resolutions made in the code with the writings of the best known jurists from all nations.”²⁷⁸ Practitioners, scholars, and courts welcomed European literature that arrived at the time the Argentine Code was adopted. They sought to hold copies of the works cited in the notes of Vélez,²⁷⁹ though privately-owned law libraries rarely had complete collections.²⁸⁰ Such collections required at least 600 expensive volumes, and while some were able to furnish them, others found in the *library* of Varela an affordable option.²⁸¹ In addition, some local courts applied historical interpretations of code provisions. When interpreting, they looked into Castilian, *Indiano*, and National law. For example, the already mentioned Juan José Montes de Oca²⁸² indicated in 1877 that jurists should know legal history.²⁸³ Antonio E. Malaver, who was also involved with the *Revista de Legislación y Jurisprudencia*, looked at *ancien* laws while acting as the Argentine Attorney General.²⁸⁴ He understood that complete derogation was no obstacle for referral to prior laws.²⁸⁵ It was also useful to cite, for example, the work of García Goyena²⁸⁶ because, as mentioned in 1887, the latter *owned* the *ancien* laws that had been common to Argentina and that led the way for the new legislation.²⁸⁷ Scholars would soon comment on the merits and sources of the Argentine Code.

The *library* of Varela was entitled *Concordancias y Fundamentos del Código Civil Argentino*.²⁸⁸ It was published in 16 volumes from 1873 to 1875,²⁸⁹ spanning 6,400 pages, and was deemed the first important work on the new

278 CABRAL TEXO (1920b) 242.

279 CHÁNETON (1937) Vol. 2 p. 372.

280 CASTÁN VÁZQUEZ (2000) 523.

281 CHÁNETON (1937) Vol. 2 372–373.

282 See *supra* note 200 and accompanying text.

283 LEVAGGI (1979) 108.

284 *Id.*

285 *Id.*

286 See *supra* note 214 and accompanying text.

287 LEVAGGI (1979) 109.

288 VARELA (1873–1875).

289 Volumes and years of publication were: 1, 1873; 2, 1873; 3, 1874; 4, 1874; 5, 1874; 6, 1874; 7, 1874; 8, 1874; 9, 1874; 10, 1875; 11, 1875; 12, 1875; 13, 1875; 14, 1875; 15, 1875; and 16, 1875.

private law of Argentina.²⁹⁰ The publication of the Argentine *library* was undertaken in Buenos Aires by *H. y M. Varela*,²⁹¹ the publishing house of Varela's brothers. Varela worked with materials provided by Vélez, most probably from the codifier's private library. Varela said in the introduction to his *library* that "Vélez provided me with some books that are difficult to find even in Europe."²⁹² Two other facts indicate the participation of Vélez in the *library*. Varela cited in his work Castilian formal sources that only appear in the draft of Vélez.²⁹³ Those references to Castilian sources seem to indicate mentorship provided by the codifier. In addition, the work of Varela was interrupted in 1875, the year Vélez died.²⁹⁴ The *library* aimed to turn unnecessary the access to the works mentioned in the code's notes and therefore reproduced the passages referred by Vélez.²⁹⁵ In words of Varela, his *library* "should be called the library of the Argentine Code" (*debiera llamarse la Biblioteca del Código Civil Argentino*).²⁹⁶

The Argentine *library* was a work of comparative legislation. It reflected the normative transfers that had taken place in that part of the Americas by reproducing texts cited by Vélez in his notes. Varela claimed that the notes were the official commentary to the code and that they reflected the latest developments of legal science.²⁹⁷ Identification of transfers could resemble the reconstruction of a tapestry from a canvas: similar solutions could be provided by different sources.²⁹⁸ The content of the notes, as reproduced by Varela, could offer guidance in that reconstruction process.²⁹⁹ Vélez had gone through thousands of pages, while selecting and classifying by means of critical analysis;³⁰⁰ and the *library* mirrored the results of that process. Vélez stated in 1865 that,

290 MORENO (1873) xi.

291 VARELA (1873–1875) Vol. 1 at cover page.

292 *Id.* at 17.

293 CHÁNETON (1937) Vol. 2 p. 375.

294 SALERNO (1969) 316–317.

295 VARELA (1873–1875) Vol. 1 p. 17.

296 *Id.* and TAU ANZOÁTEGUI (1998) 542.

297 VARELA (1873–1875) Vol. 1 p. 9. See also SALERNO (1969) 316.

298 SALERNO (1992) 225.

299 In Argentina, studies of local formal sources waited until the 1920s. See CABRAL TEXO (1919) 18.

300 SALERNO (1992) 225.

I have considered all the codes published in Europe and America, and the comparative legislation of Mr. Seoane. I have used mainly the Spanish Project of Mr. Goyena, the Code of Chile, that much surpasses the European codes and, mainly, the project of a civil code that Mr. Freitas is working on for Brazil, from which I have borrowed many articles.

Regarding the legal doctrines that I believed necessary to convert into laws for the First Book, my main guides have been the German jurists Savigny and Zacharie, the great work of Mr. Serrigny on administrative law of the Roman Empire, and the work of Story, Conflict of Laws.³⁰¹

The *library* of Varela followed the structure of the Argentine Code.³⁰² The comments to the Argentine articles included transcriptions of European and American formal sources. Varela said in the introduction to his *library* that laws never resulted from capricious decisions or from improvisation.³⁰³ He cited Joseph Story, and said in Spanish that “the preamble of a statute is a key to open the mind of the makers.”³⁰⁴ Varela then stated that the preamble of the Argentine Code was no other than the study of the authorities included in its notes.³⁰⁵ Accordingly, it was necessary to determine if the authorities cited had been actually considered by the codifier.³⁰⁶ A comparative and well-reasoned study of the materials used by the codifier would open the mind of the maker.³⁰⁷ In 1875, the *library* was interrupted in article 1260 of the Argentine Code,³⁰⁸ having covered only one fourth of the code. In 1881, the work was continued by Serafín Álvarez³⁰⁹ and Rafael Calzada, editors of the *Revista de los Tribunales*.³¹⁰ They continued publishing the *library*, reaching article 1843 of the Argentine Code,³¹¹ though with a slightly different plan.³¹² Varela was not involved with that new publication and the work also addressed the main decisions of the supreme courts of Argentina and Buenos Aires.³¹³

301 VELEZ SARSFIELD (1865) v.

302 VARELA (1873–1875) Vol. 1 p. 19.

303 *Id.* at 2.

304 *Id.* at 1. Varela was referring to STORY (1833) § 218, 163.

305 VARELA (1873–1875) Vol. 1 p. 1.

306 *Id.* at 8.

307 *Id.*

308 VARELA (1873–1875) Vol. 16 p. 365–382. See also TAU ANZOÁTEGUI (1998) 542.

309 HAYES (2008) 84.

310 CHÁNETON (1937) Vol. 2 p. 375–376.

311 CALZADA/ÁLVAREZ (1881).

312 CHÁNETON (1937) Vol. 2 p. 449.

313 *Id.* at 375–376.

The *library* consisted of mainly four building blocks. Firstly, it included the transcription of articles of the Argentine Code.³¹⁴ This followed the numbering given by Vélez in his draft. Each title, therefore, restarted the numbering of articles. Secondly, it included the transcription of references made by Vélez in his notes, though not always extracted from the same editions used by the codifier.³¹⁵ The transcriptions were translated into Spanish.³¹⁶ Texts originally in English, French, Italian, Latin, and Portuguese would be then easily accessible for Spanish readers.³¹⁷ Thirdly, it reproduced *verbatim* transcriptions of foreign materials that Varela understood as relating to Argentine articles, even when Vélez had omitted references to them in the notes.³¹⁸ For example, even when Vélez had been silent,³¹⁹ Varela indicated that articles 424 and 430 of the Louisiana Code had been sources for article 37 of the Argentine Code.³²⁰ Fourthly, the volumes were enriched by two indexes. One followed the structure of the Argentine Code;³²¹ while the other classified alphabetically the legislation and authors cited according to the areas they addressed.³²² Accordingly, the *library* consisted of transcriptions and translations of materials that Vélez used in his drafting. Had it been completed, the *library* would have been an exhaustive *opus magnum*,³²³ rendering further studies on the sources of the Argentine Code unnecessary.

Scholars, practitioners, and courts made use of the *library*. Varela had aimed to simplify the study and application of the Argentine Code,³²⁴ making research less time consuming.³²⁵ He deemed it unnecessary for practitioners to turn to the original books cited by Vélez because relevant

314 See, for example, the transcription of article III (*i.e.*, 266), *infra* VII.B at 201.

315 CHÁNETON (1937) Vol. 2 p. 376.

316 See, for example, the French and Italian texts in a Spanish translation, *infra* VII.B at 201.

317 VARELA (1873–1875) Vol. 1 p. 20.

318 *Id.* at 17–18. See, for example, the references also to the code of Sardinia, when Vélez only referred to the Castilian *Siete Partidas*, *infra* VII.B at 201.

319 Ley 340 (1869) 510.

320 VARELA (1873–1875) Vol. 2 p. 365–336. Varela said, “arts. 424 and 430 of the Louisiana Code, even when not cited by the Argentine codifier, support the text of article [37],” and he then provided a translation of the Louisiana texts. *Id.* at 37.

321 *Id.* at i–xiv.

322 *Id.* at xv–xxxii.

323 MARTÍNEZ PAZ (2000) 184.

324 VARELA (1873–1875) Vol. 1 p. 14.

325 *Id.* at 18.

parts were transcribed in his *opus*.³²⁶ Even if transcriptions were only of passages of the claimed doctrines, research would very much benefit from an easy examination of formal sources.³²⁷ The *library* was valued by contemporary scholars. For example, during a strong debate between two renowned commentators of the Argentine Code,³²⁸ one of them acknowledged the significant contribution that Varela had achieved with his *library*.³²⁹ Courts also welcomed the *library*, which could be useful when facing the interpretation method followed by the Argentine Supreme Court in some decisions. For example, in 1891, a decision stated that to understand the meaning of a provision the usual practice of the court was to move from Roman to Castilian law and from there to the Argentine Code.³³⁰ The Argentine National Congress and the Buenos Aires Legislature passed laws in which they authorized the buying of 400 and 150 copies of the *library*, respectively.³³¹ These copies were aimed at courts, and provided financial support to the enterprise of Varela. The *library* was cited in court decisions,³³² even in the twenty-first century. For example, in 2002, an appeal court stated the usefulness of the *library* by referring to the ample indications and transcriptions it provided.³³³

V. Looking at Mirrors of the Law

Nineteenth century codification spread through the Americas, reaching Quebec and Argentina. Accordingly, *libraries* developed and were applied within different social and legal contexts. There are significant differences amongst contexts, yet codification endeavors in the Americas reveal certain

326 *Id.* at 17.

327 Moreno (1873) x. That easy access also generated interpretation problems. Some practitioners cited in their petitions passages from those transcriptions, even when the references by the codifier were made to indicate decisions he had not adopted. LEVAGGI (1979) 102.

328 *I. e.*, José Olegario Machado and Baldomero Llerena.

329 MACHADO (1903) 37. Elaborations of full commentaries on the Argentine Code were very time consuming. José Olegario Machado said that from 1893 to 1902 all his energies had been devoted to the drafting of his commentary, a work that required 11 volumes (*Id.* at 1).

330 LEVAGGI (1985) 158.

331 VARELA (1873–1875) Vol. 3 p. 4–5.

332 See, for example, the references to the work of Varela in *Barlett, Esteban s/sucesión testamentaria*; *Christoffersen, Hans*; *Amoruso c. Casella*; *El Fénix c. Pérez de Sanjurjo*; *Guala c. Tebes s/daños y perjuicios*; and *Vázquez c. Bilbao*.

333 *A., A. S.B. c. Estado Nacional*.

similarities. The interest in formal sources, together with the development of positivistic approaches to law, was present in most American jurisdictions that experienced codification. These two aspects reflect – at least for the particular situations mentioned in this paper – a pan-American evolution that took place during the years that followed the enactment of civil codes.

A. European Formal Sources

Scholars in American jurisdictions traced formal sources of their civil codes. There was a pan-American interest in that treasure trove of European formal sources. On occasions, initially the drafters and those tracing formal sources soon after, welcomed the association to the prestige held by transferred elaborations in their jurisdictions of origin. The tracing of sources, however, was not pursued exclusively by means of *libraries* of civil codes. Many times, nineteenth century scholars worked on glossed editions of codes, in which formal sources were only pinpointed. Codifiers, like builders of monuments, benefited by using the best materials provided by the legal science of their time.³³⁴ The annotation or glossing of codes helped identify those materials, and provided motives and resulting concordances. Some nineteenth century codifiers had already incorporated annotations to their drafts (*e.g.*, Argentina, Brazil, Chile, New York, and Uruguay).³³⁵ On the Iberian Peninsula, Spain had provided the already mentioned work by García Goyena, which was considered a seminal glossed edition.³³⁶ He said that each article of the Spanish project would include a reference to corresponding provisions of other legislative works (*concordancias*), motives (*motivos*), and commentaries (*comentarios*).³³⁷ That way, he said, readers would have almost universal knowledge of the legislation on that topic with just a simple glance.³³⁸ That trend to provide glossed editions of codes would soon spread throughout both sides of the Atlantic.

South American jurisdictions provided several examples of glossed editions of codes. In Argentina, Lisandro V. Segovia, Baldomero Llerena, and

334 RODRÍGUEZ (1938) 189.

335 ABÁSULO (2004) 423.

336 GARCÍA GOYENA (1852).

337 PARISE (2008) 841.

338 GARCÍA GOYENA (1852) Vol. 1 p. 9.

José Olegario Machado embarked upon that path.³³⁹ Their focus, as that of other commentators, was for the most part initially on European sources, both legislative and doctrinal.³⁴⁰ The Argentine Code provided an example of reception of foreign laws, which after adaptation were considered local.³⁴¹ In Chile, soon after 1856, the codifier, Andrés Bello, envisioned a glossed edition of his code with notes for each article. Though never completed, his projected edition was to be built on the notes that he had included in his 1853 draft.³⁴² Such a work would have been useful in Chile, where law was taught according to the letter and structure of the local code.³⁴³ In Uruguay, codifiers were also expected to explore an array of legislation and doctrinal works while looking for material sources.³⁴⁴ Their works were then more about selection than creation.³⁴⁵ In the early twentieth century, Rafael Gallinal provided for Uruguay a glossed edition of the local civil code.³⁴⁶ In Uruguay, though in 1851, Eduardo Acevedo, the drafter of a civil code project, also made an early approach to the distinction of formal and material sources that applies to many American codification endeavors. He stated that,

having used for our work writings by French authors [...] it will be questioned why we have not cited them, especially since on occasions we borrowed their words. However, that was necessary because we imposed ourselves to provide a national character to the work, removing all foreign scent that would be reproached. Furthermore, many times an article that had been triggered by reading [the French] Toullier found support on an opinion by [the Spaniard] Sala [...], which, although identical in substance, lacked the fundamentals that made it more acceptable.³⁴⁷

North American jurisdictions also provided examples of glossed editions of codes. In Quebec, for example, glossed editions were also welcomed soon after the code was adopted. Those glosses referred to sources, though they only listed them, while dealing mainly with the reporting of local deci-

339 TAU ANZOÁTEGUI (1977c) 113–114.

340 CABRAL TEXO (1919) 26.

341 ZORRAQUÍN BECÚ (1976) 350 and 359.

342 GUZMÁN BRITO (2005) 66.

343 See *Advertencia*, in LASTARRIA (1864).

344 PEIRANO FACIO (2008) 65.

345 *Id.* at 65.

346 GALLINAL (1911–1912).

347 ACEVEDO/PALOMEQUE (1908) 342. See also GUZMÁN BRITO (2000) 461–462 and MO-RÉTEAU/PARISE (2009) 1146.

sions.³⁴⁸ Thomas McCord, one of the secretaries of the Codifying Commission, worked on an edition that included references to the authorities cited in the Reports together with tables of concordances with the *Code Napoléon* and the *Code de commerce*.³⁴⁹ Those glosses included references for “notaries, clergymen, physicians, merchants, real estate owners, and persons out of Lower Canada.”³⁵⁰ Examples of glossed editions were also provided by US states. Very early during the nineteenth century, in the State of Louisiana, some copies of the Digest of 1808³⁵¹ – the predecessor of the Louisiana Code – included manuscript glosses that related to its different titles and articles.³⁵² Later, the codifiers of the influential Louisiana Code drafted a project including glosses with references to many authorities.³⁵³ In 1838, Wheelock Upton and Needler Jennings published a well circulated edition of the Louisiana Code with glosses.³⁵⁴ They referred to related legislation,³⁵⁵ doctrinal works,³⁵⁶ and court decisions.³⁵⁷ Their work would “fill a void in the libraries of the gentlemen of the Bar”³⁵⁸ and “render unnecessary those laborious researches, the prosecution of which often require extended and thorough knowledge of the annals of jurisprudence.”³⁵⁹ The State of New York also provided the Americas with glosses. David Dudley Field worked on a project of a civil code for that state.³⁶⁰ His 1865 project had notes for two-thirds³⁶¹ of its articles,³⁶² and indicated references to, amongst

348 HOWES (1989b) 139.

349 MCCORD (1870) 466–475.

350 *Id.* at cover page.

351 An Act providing for the promulgation of the Digest of the Civil Laws now in force in the territory of Orleans (1808). The complete English title of the Digest: “A Digest of the Civil Laws Now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present System of Government.” Text available at Digest Online.

352 See the complete study by CAIRNS (2009).

353 See generally LIVINGSTON et al (1823).

354 UPTON/JENNINGS (1838).

355 See the reference to a Louisiana Act of 1828 in the note to article 263 (*id.* at 39).

356 See the reference to the work of Domat in the note to article 263 (*id.* at 39).

357 See the reference to the case *Proctor v. Richardson* in the note to article 301 (*id.* at 44).

358 *Id.* at iii.

359 *Id.*

360 The Civil Code of the State of New York: Reported Complete by the Commissioners of the Code (1865).

361 BATIZA (1986) 803.

362 The project referred to sections and not to articles.

others, related court decisions,³⁶³ revised statutes,³⁶⁴ the *Code Napoléon*,³⁶⁵ and the Louisiana Code.³⁶⁶ Even though the project was never the law of New York,³⁶⁷ its drafts were influential,³⁶⁸ and its provisions about the law of contracts were adopted by several states (*e.g.*, California, Montana).³⁶⁹ Additionally, in the State of California, during the early 1870s, the local Code Commissioners provided in their work annotations that significantly replicated the glosses by Field.³⁷⁰

B. Positivistic Studies

Positivistic approaches to the study and understanding of law gained popularity during the nineteenth century in Europe and the Americas.³⁷¹ Several schools of thought evolved from nineteenth century European positivism. Some of those, and their leading representatives, had a significant impact on the drafting of codes in the Americas. Examples of the latter are: Legal Positivism (*e.g.*, Jeremy Bentham); French Exegetical School (*e.g.*, Jean-Charles Demolombe); and German Historical School, which in part developed into Scientific Positivism (*e.g.*, Savigny), and ultimately into Conceptual Jurisprudence (*e.g.*, Bernhard Windscheid).³⁷² The impact of positivism in the Americas was felt especially during the last decades of the nineteenth century.³⁷³

The French Exegetical School occupied a paramount position in the codification projects in the Americas. In France, soon after the adoption of

363 For example, the note to article 443 of the project read, “Halsey v. Mc. Cormick, 18 N.Y., 147.” *The Civil Code of the State of New York: Reported Complete by the Commissioners of the Code* (1865) 135.

364 For example, the note to article 523 of the project read, “R.S., 758, § 12.” *Id.* at 156.

365 For example, the note to article 444 of the project read, “This and the four sections following are similar to those of the Code Napoleon, art. 559–563.” *Id.* at 135.

366 For example, the note to Chapter 2, Title 3, Part 4, Division 2 of the project read, “The provisions of this chapter, except § 455, are similar to those of the Code Napoleon and the Code of Louisiana.” *Id.* at 136. See also HERMAN (1996) 423.

367 FIELD (1898) 88.

368 Extracts from Notices of David Dudley FIELD (1894) 39.

369 HERMAN (1996) 425.

370 PARMA (1929) 19.

371 See generally BOBBIO (1996).

372 LEVAGGI (2005) 219, DÍAZ COUSELO (2003) 371, and TAU ANZOÁTEGUI (1977c) 105.

373 TAU ANZOÁTEGUI (1977a) 423.

the *Code Napoléon*, scholars and judges interpreted code provisions by closely following their language (literal meaning)³⁷⁴ and in light of their preparatory works (e. g., Pothier, Domat).³⁷⁵ Their interpretations were published as commentaries to the different articles.³⁷⁶ The exegesis was both a way of presenting and of teaching law,³⁷⁷ and Demolombe, regarded as the *prince of exegesis*, advocated, as did other representatives, the supremacy of written codified law.³⁷⁸ Accordingly, articles would be stated individually, with no references to philosophical or historical argumentation.³⁷⁹ Examining history was done, however, when support for a certain interpretation was required or when reconstructing the “pedigree” of a provision.³⁸⁰ The Exegetical School followed the *Code Napoléon* and its representatives were read together with the code,³⁸¹ even motivating translations into vernacular languages.³⁸² Exegesis was therefore well received in the Americas,³⁸³ even in Louisiana, where codifiers seemed to adhere to the school.³⁸⁴ The reconstruction of “pedigree” in European authors took place too, when legislative productions required references to, for example, French, German, or Italian works.³⁸⁵

The exegetical approach limited the creativity of scholars and judges, however.³⁸⁶ In France first, and later in the Americas, the exegetical approach was replaced by interpretations that responded more to social reality.³⁸⁷ François Géný, in France, explored the legislation that had developed outside of the *Code Napoléon*, together with customs, court decisions, and social sciences.³⁸⁸ His Free Scientific Research approach departed from the exegetical interpretation, and gave significant room for

374 SALERNO (1992) 228.

375 YIANNPOULOS (1977) 58.

376 *Id.*

377 PETIT (2001) 69.

378 LEVAGGI (1979) 29.

379 RAMOS NÚÑEZ (1997) 234.

380 *Id.* at 233.

381 DÍAZ COUSELO (2009) 17–18.

382 ARAGONESES (2009) 80.

383 LEVAGGI (1979) 30.

384 YIANNPOULOS (1977) 48.

385 RAMOS NÚÑEZ (1997) 235.

386 RAMOS NÚÑEZ (1996) 10.

387 RAMOS NÚÑEZ (1997) 233.

388 YIANNPOULOS (1977) 58–59.

other sources of law (*e.g.*, customs) that gained weight in civil law jurisdictions.³⁸⁹ Another reaction came mainly from Germany, where the Historical School, and later Scientific Positivism, advocated customs and traditions and the objective interpretation of the law, respectively. Both German and French ideas would react against the supremacy of the letter of the law.³⁹⁰ As the examples in Quebec and Argentina show, the Exegetical School prevailed however in law teaching, in scholarly works, and in court decisions³⁹¹ well into the twentieth century.

The Quebec Code did not immediately trigger exegetical approaches to the law. Shortly after 1866, scholarly writings qualified as mainly historical, philosophical, and non-professional;³⁹² while judges continued to elaborate decisions that did not resemble, in substance and technique, those made in France by the adherents of the Exegetical School.³⁹³ Changes in Quebec took place at the turn of the century and extended until the 1960s.³⁹⁴ In the early twentieth century, the Quebec Code became an untouchable icon.³⁹⁵ Scholarship moved towards a more analytical and exegetical understanding of the code.³⁹⁶ A central place was also occupied by the code in the teaching of law. Its structure welcomed expository and didactic teaching that emphasized its logic and internal coherence.³⁹⁷ Courts were also interested in local interpretations of the Quebec Code, and looked for local identity by exploring diverse sources, mainly the French doctrine, and also the developing local doctrine, and the common law.³⁹⁸ The continuity of *ancien* laws in Quebec invited historical interpretations, however.³⁹⁹ German ideas had also traveled during the nineteenth century to that part of the Americas,⁴⁰⁰ and there was an interest in establishing a civilian conception of sources and methods of interpretation that evolved into a scientific analysis of the text of

389 *Id.* at 48.

390 RAMOS NÚÑEZ (1997) 237.

391 *Id.*

392 MACDONALD (1985) 598. See also HOWES (1989b) 139.

393 BRIERLEY/MACDONALD (1993) 53.

394 MACDONALD (1985) 598, MORIN (2000) 381, and NORMAND (1982) 1014–1015.

395 BRIERLEY/MACDONALD (1993) 46.

396 MACDONALD (1985) 593 and 598. See also HOWES (1989b) 139 and JOBIN (1992) 388.

397 BRIERLEY/MACDONALD (1993) 63.

398 JOBIN (1992) 385–386.

399 BRIERLEY/MACDONALD (1993) 149 and ARROYO I AMAYUELAS (2003) 274.

400 REITER (2004) 447.

the code.⁴⁰¹ In 1907, Frederick Parker Walton⁴⁰² completed a work that responded to that scientific approach of inquiring into the meaning in literary sources, though also through history.⁴⁰³ He provided 12 rules for interpreting the Quebec Code,⁴⁰⁴ and three rules were of special relevance for the value of historical sources.⁴⁰⁵ For example, Rule 11 ended by stating that an article “must be interpreted in the light of its history.”⁴⁰⁶ He indicated that the Reports and the *library* were useful tools,⁴⁰⁷ because “the interpretation of an article of the Code may sometimes require lengthy historical investigation.”⁴⁰⁸

The Argentine Code triggered exegetical approaches to the law. Positivist approaches, mainly those from the Exegetical School,⁴⁰⁹ were present in the works of scholars and judges during the second half of the nineteenth century and extended, though at a slower pace, well into the next century.⁴¹⁰ These tried to identify the intention of the codifier,⁴¹¹ and promoted the study of the letter of the law and its sources.⁴¹² A *culture of the code* developed, and was reflected in scholarly writings and judicial interpretations that turned the code into a repository of legal science⁴¹³ with absolute value.⁴¹⁴ The code was also the central figure in law teaching, together with the work of exegetical scholars.⁴¹⁵ Teaching followed the structure of the code until 1910,⁴¹⁶ and articles were broken down and studied throughout

401 BRIERLEY/MACDONALD (1993) 142.

402 On the work of Walton see also BRIERLEY/MACDONALD (1993) 135–142. Walton made an early use of the term “transplantation of legal systems” (WALTON [1927] 189).

403 BRIERLEY/MACDONALD (1993) 142.

404 WALTON (1980) 85–129.

405 *I.e.*, rules 10, 11, and 12. *Id.* at 115, 116, and 118.

406 The complete text of Rule 11 read, “When the question is not concluded by reference to the decisions here, or, in appropriate cases, by reference to the French commentators, the article must be interpreted in the light of its history.” *Id.* at 116.

407 *Id.* at 116.

408 *Id.* at 118.

409 ESBORRAZ (2007) 34–35 and RAMOS NÚÑEZ (1997) 200.

410 SEOANE (1981) 68.

411 VERNENGO (1977) 77.

412 TAU ANZOÁTEGUI (2011) 72.

413 TAU ANZOÁTEGUI (2007) 19–20.

414 TAU ANZOÁTEGUI (1998) 543–544.

415 MARTÍNEZ PAZ (2000) 350, SALERNO (2004) 149, TAU ANZOÁTEGUI (1977c) 113, SALERNO (1993) 123, and TAU ANZOÁTEGUI (2007) 162.

416 SALERNO (1974) 205.

the years at law school.⁴¹⁷ The legislator's intention was sought in the notes,⁴¹⁸ which opened the way to studies on comparative legislation.⁴¹⁹ Other positivistic approaches, such as the ideas of Savigny⁴²⁰ and Scientific Positivism,⁴²¹ were also welcomed and, though in cases language barriers needed to be bridged, they helped develop an eclectic legal thought.⁴²² The work of scholars was therefore eclectic, reflecting exegetical and scientific approaches.⁴²³ The introduction of Moreno to the *library* also reflects an interest in Scientific Positivism.⁴²⁴ He said in the introduction of that exegetical work that the "civil-legislation reform achieved by codification [in Argentina] had essentially created Scientific law."⁴²⁵ The new century brought criticisms to extreme positivistic approaches, however.⁴²⁶ Social sciences liberated law from the narrow exegetical approach, starting to open the way to more scientific approaches that advocated their inclusion in the study of law.⁴²⁷ These approaches, reflected in, for example, the seminal work of Gény,⁴²⁸ also placed the code in a paramount position, yet, when interpreting provisions, also used doctrine, court decisions, comparative legislation, customs, and other social elements.⁴²⁹

VI. Closing Remarks

Codification in Europe and the Americas provided fertile ground for an exercise of comparative legal history. The exercise aimed to provide a global perspective that would help better understand the current legal culture of Quebec, Argentina, and to some extent, other American jurisdictions that

417 TAU ANZOÁTEGUI (2007) 162 and CHÁNETON (1937) Vol. 2 p. 344.

418 LEVAGGI (2005) 247 and SALERNO (1974) 207.

419 CHÁNETON (1937) Vol. 2 p. 344.

420 LEVAGGI (1979) 78 and TAU ANZOÁTEGUI (1977b) 278.

421 LEVAGGI (1979) 84–85 and TAU ANZOÁTEGUI (1988) 623.

422 TAU ANZOÁTEGUI (1977b) 277 and 282.

423 TAU ANZOÁTEGUI (1977c) 114–115.

424 TAU ANZOÁTEGUI (1977b) 395.

425 Moreno (1873) v. See also, LEVAGGI (2005) 247.

426 TAU ANZOÁTEGUI (1974) 241.

427 TAU ANZOÁTEGUI (2007) 20, TAU ANZOÁTEGUI (2008) 21, and TAU ANZOÁTEGUI (2011) 99.

428 TAU ANZOÁTEGUI (1977c) 141, LEVAGGI (1979) 120, LEVAGGI (2005) 249, and DÍAZ COUSELO (2009) 1–2.

429 TAU ANZOÁTEGUI (1977c) 141.

pursued codification during the nineteenth century. Codification developed within social and legal contexts that were replicated throughout different parts of the Americas. There was a circulation of legal ideas that linked both continents, while also linking jurisdictions within the continents. Different political and social backgrounds provided different scenarios for codification, however. There are common legal bases and temporal parallels amongst jurisdictions, yet each jurisdiction merits its own study.⁴³⁰ This paper focused on the salient similarities between the development and application of *libraries* in Quebec and Argentina: there are differences that ought to be subject to further study.

The paper first addressed the codification processes in Quebec and Argentina. The works of the Codifying Commission and of Vélez were analyzed individually, identifying similarities and differences in their products. It was also shown that European legal elaborations (*e. g.*, legislative acts, doctrine) were used as formal sources in the Americas by drafters of codes, and that some of those European materials reached at the same time the Northern and Southern corners of the American continent.

Bibliographical information on the life and legal production of Lorimier and Varela was provided in the second part of the paper. Lorimier and Varela had striking aspects in common, though the most significant was that they were part of the elite that played leading roles in the shaping of local legal cultures. These two jurists were the men behind the mirrors that reflected the normative transfers from Europe to the Americas. The contents of their *libraries* clearly stated that drafters in the Americas highly regarded European sources.

The paper then focused on the formal aspects of the *libraries* and the impact they had within their legal contexts. These unique scholarly works made access to European sources more expedite and assisted legal operators in their activities. *Libraries* coexisted with glossed editions of codes, however. Both types of works played important roles in the delimitation of the positivistic approaches to law as experienced in each jurisdiction. Finally, the paper also showed that even though 150 years have passed since their publication, the *libraries* are still consulted in both jurisdictions.

The exercise of comparative legal history helped create awareness on the attempt that American jurists made to discover the sources of local

430 TAU ANZOÁTEGUI (2008) 16.

provisions. Those sources had mutated to become part of the local *ethos* even when they could be traced, with the help of the *libraries*, back to Europe. Even when there was interest in producing autonomous codifications, the interest in European sources had a pan-American scope. It must be noted, however, that codification was not limited to normative transfers in the Americas, it also extended to intellectual challenges regarding creation and adaptation.

VII. Appendix: Extracts as Reflections of Transfers

The contents of the *libraries* can be best illustrated by means of extracts randomly selected from their many pages. Articles on *Filial Honor and Respect* provide an example of how *libraries* reproduced formal sources, these being occasionally the same. Article 371⁴³¹ of the *Code Napoléon* is amongst the formal sources for the Quebec and the Argentine articles on *Filial Honor and Respect*. This article reads, in an English translation adopted by the Louisiana Code, that “a child whatever be his age; owes honor and respect to his father and mother.”⁴³² That provision was replicated in the Quebec and Argentine texts. For example, the Quebec Code dealt with *Filial Honor and Respect* in article 242,⁴³³ while its Southern counterpart dealt with it in article 266.⁴³⁴

Lorimier and Varela provided transcriptions of relevant formal sources for the articles of their respective codes. On occasion, those formal sources were traced back to Europe, though not necessarily to the same jurisdiction of origin. The historical legal background helps explain that in numerous instances Vélez looked for precedents in Castilian legal elements; while the Codifying Commission in Quebec looked for precedents in French

431 Code civil des Français, Edition Originale et Seule Officielle (1804) 69.

432 Article 233, Civil Code of the State of Louisiana (1825) 70.

433 Article 242 of the Quebec Code reads in English: A child, whatever may be his age, owes honor and respect to his father and mother. BELLEFEUILLE (1866) 52.

434 Article 266 of the Argentine Code reads in English: Children owe respect and obedience to their parents. They are bound, even if emancipated, to care for their parents in old age, in cases of dementia or sickness, and to provide for their needs in all circumstances of life in which their assistance is indispensable. Other legitimate ascendants have rights to the same cares and assistance. Ley 340 (1869) 532. The article is referred to as III in the work of Varela, following the project presented by Vélez.

elaborations, which could be grounded on Roman law. The example provided by the article on *Filial Honor and Respect* illustrates that both *libraries* included transcriptions of the *Code Napoléon*, the Québécois as part of a final transcription, the Argentine as part of a first transcription. The Quebec *library*, however, also included transcriptions of, amongst others, parts of the *Corpus Iuris Civilis*, and passages from the works of Pothier and Domat.⁴³⁵ The Argentine *library*, different from the one in Quebec, included transcriptions of the codes of Sardinia and Chile, of the work of García Goyena, and of the laws of the Castilian *Siete Partidas*.⁴³⁶ The *libraries* were therefore able to act as mirrors, and efficiently reflect the normative transfers that took place from Europe to the Americas.

435 See *infra* VII.A.

436 *Id.*

LA BIBLIOTHÈQUE
DU
CODE CIVIL
DE LA
PROVINCE DE QUEBEC
(CI DEVANT BAS-CANADA)
OU RECUEIL

COMPRENANT ENTRE AUTRES MATIÈRES :

1. Le Texte du Code en Français et en Anglais.
2. Les rapports officiels de MM. les Commissaires chargés de la codification.
3. La citation au long des autorités auxquelles réfèrent ces Messieurs, à l'appui des diverses parties du Code, ainsi que d'un grand nombre d'autres autorités.
4. Des tables de concordance entre le Code Civil du Bas-Canada et ceux de la France et de la Louisiane.

PAR

CHS. C. de LORIMIER ET CHS. A. VILBON,

AVOCATS.



MONTREAL :

DES PRESSES A VAPEUR DE LA MINERVE NOS. 212 & 214 RUE NOTRE-DAME.

1873

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POR
LUIS V. VARELA
(ABOGADO)

TOMO V

BUENOS AIRES

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[ARTICLE 242.]

TITRE HUITIÈME.

DE LA PUISSANCE PATERNELLE

242. L'enfant, à tout âge, doit honneur et respect à ses père et mère.

TITLE EIGHTH.

OF PATERNAL AUTHORITY.

242. A child, whatever may be his age, owes honor and respect to his father and mother.

* *ff., de obsequiis parentibus,* } Liberto et filio semper ho-
Lib. 37, tit. 15, L. 9. } nestra et sancta persona patris
 ac patroni videri debet.

* *ff., de in jus vocando,* } Parentes naturales in jus vocare
Lib. 2, tit. 4, L. 6. } nemo potest: una est enim omnibus
 parentibus servanda reverentia.

* *Nouvelle. 42, c. 2.* } Si verò contigerit ex prioribus nuptiis
 inculpabilibus filios esse ei, aut nepotes
 fortè, aut ulterius: paternam moxilli accipiant successionem,
 suæ quidem potestatis patris supplicio facti, pascentes autem
 eum, et alia necessaria præbentes. Nam licet legum contemp-
 tor et impius sit, tamen pater est.

* *Pothier, mariage,* } Les enfans sont obligés, d'aimer et
No. 389. } d'honorer leurs père et mère, de leur
 obéir, et de les assister dans leurs besoins, selon leur moyen.

L'obéissance que les enfans doivent à leurs père et mère, est sans bornes, tant que dure la puissance paternelle. Ils doivent pendant ce temps obéir à leurs père et mère dans toutes les choses qu'ils leur commandent pourvu que ce qu'ils leur commandent ne soit pas contraire à la loi de Dieu: mais lorsque les enfans sont sortis de la puissance paternelle, qui finit dans le pays coutumier par la majorité des enfans,

ARTICULO III

Los hijos deben respeto y obediencia á sus padres. Aunque estén emancipados están obligados á cuidarlos en su ancianidad, en el estado de demencia ó enfermedad, y proveer á sus necesidades en todas las circunstancias de la vida, en que le sean indispensables sus auxilios. Tienen derecho á los mismos cuidados y auxilios los demás ascendientes legítimos.

- § I Código Francés.
 II Código Sardo.
 III Código de Chile.
 IV GOYENA. Proyecto de Código para España.
 § V Leyes del tit. 19, partida cuarta.

§ I *Este artículo concuerda con el que lleva el número 371 en el CÓDIGO CIVIL DE LOS FRANCESES, que traducido, es como sigue:*

El hijo á cualquiera edad debe veneracion y respeto á su padre y á su madre.

§ II *Concuerda tambien este artículo con el que, en el CÓDIGO CIVIL DEL REINO DE CERDEÑA, lleva el número 210 que traducimos. Es como sigue:*

Los hijos, en cualquiera edad, estado, condicion, que se encuentren, deben honrar y respetar á sus padres.

§ III *Aunque el Dr. Velez Sarsfield no lo dice, este artículo está tomado de los que en el CÓDIGO CIVIL DE CHILE, llevan los números 219, 220 y 221 que son como siguen:*

Art. 219—Los hijos legítimos deben obediencia y respeto á su padre y su madre; pero estarán especialmente sometidos á su padre.

Art. 220—Aunque la emancipacion dé al hijo el derecho de obrar independientemente, queda siempre obligado ó cuidar de los padres en su ancianidad, en el estado de demencia, y en todos los estados de la vida en que necesitaren sus esfuerzos.

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ou par le mariage qu'ils ont contracté de leur consentement, en ce cas, ils peuvent vivre dans l'indépendance de leurs père et mère, pourvu qu'ils ne s'écartent pas du respect qu'ils leur doivent, et qu'ils aient une complaisance raisonnable pour leur volontés.

* *Pothier, des personnes, } On a mis autrefois en question*
tit. VI, sec. 11. } si, dans le pays coutumier Fran-
 çais, il y avait une puissance paternelle. Quelques auteurs ont avancé qu'il n'y en avait point, on ne peut néanmoins douter qu'il n'y en ait une. La coutume d'Orléans en fait mention expresse dans la rubrique du tit. 9. Elle parle aussi en l'art. 158, d'émancipation ; ce qui suppose une puissance paternelle : mais cette puissance, telle qu'elle a lieu dans le pays coutumier, est entièrement différente de celle que le droit romain accordait aux pères sur leurs enfants, dont le terme et la durée étaient sans bornes, et qui était, *quasi quoddam jus domini*, semblable à celle que les maîtres avaient sur leurs esclaves.

Dans nos pays coutumiers, la puissance paternelle ne consiste que dans deux choses :

1o. Dans le droit que les père et mère ont de gouverner avec autorité la personne et les biens de leurs enfants, jusqu'à ce qu'ils soient en âge de se gouverner eux-mêmes et leurs biens. De ce droit dérive la garde noble et bourgeoise ;

2o. Dans celui qu'ils ont d'exiger de leurs enfants certains devoirs de respect et de reconnaissance.

De la première partie de la puissance paternelle, naît le droit qu'ont les père et mère de retenir leurs enfants auprès d'eux, ou de les envoyer dans tel collège, ou autre endroit où ils jugent à propos de les envoyer pour leur éducation.

De là il suit qu'un enfant soumis à la puissance paternelle, ne peut entrer dans aucun état, se faire novice, faire profession religieuse contre le consentement de ses père et mère,

Art. 221—Tienen derecho al mismo socorro todos los demás ascendientes legítimos, en caso de inasistencia ó de insuficiencia de los inmediatos descendientes.

§ **IV** *Concuerda tambien este artículo con el que lleva el número 143 en el PROYECTO DE CÓDIGO PARA ESPAÑA, del DR. GOYENA, que con el comentario del mismo autor hemos transcrito en el artículo precedente.*

§ **V** *El Codificador Argentino cita como concordantes de su artículo; las leyes del tit. 19, part. 4.ª, que es como siguen:*

Piedad, e debdo natural, deuen mouer a los padres, para criar a los fijos, dandoles, e faziendoles lo que es menester, segund su poder. E esto se deuen mouer a fazer, por debdo natural. Ca si las bestias (*) que non han razonable entendimiento, aman naturalmente, e crian sus fijos, mucho mas lo deuen fazer los omes, que han entendimiento, e sentido, sobre todas las otras cosas. E otrosi los fijos tenudos son naturalmente, de amar, e temer (†) a sus padres, e de fazerles honra, e seruicio, e ayuda, en todas aquellas maneras que lo pudiesen fazer. E pues que, en los dos titulos ante deste, fablamos del poderio que han los padres sobre los fijos, e de las cosas por que se puede toller; queremos aqui decir, de como los padres los deuen criar. E primeramente mostrar que cosa es criança, e que fuerça a. E por quales razones, e en que manera, son tenudos los padres, de la fazer a sus fijos, maguer non quieran. Equales son tenudos de fazer esto. E por que razones se pueden escusar los padres, de los non criar, si non quisieren.

LEY I—Criança, es vno de los mayores bien fechos, que vn home puede fazer a otro, porque todo home se mueue a la fazer con gran amor que ha aquel que cria, quier sea fijo, o otro ome extraño. E esta criança a muy gran fuerça, e señaladamente la que faze el padre al fijo: ca como quier que lo ama naturalmente,

(*) Todos los animales están dotados de ciertos instintos por los que se dirigen á la conservacion de su especie, que dice Aristóteles.

(†) Advertase que no dice por qué derecho natural están obligados los hijos á educar á los padres, porque esta educacion no es de derecho natural, sinó que se induce por la misma razon natural.

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sous la puissance desquels il est. Cela a été jugé contre les Jésuites, au profit de Me. Airault, lieutenant-général d'Angers, par arrêt de 1587 ; contre les Feuillans, par arrêt du 10 Août 1601 ; contre les Capucins, au profit du président Ripault, par arrêt du 24 Mars, 1604. Ces arrêts sont fondés en grande raison. L'état religieux n'est que de conseil évangélique ; or il est évident qu'on ne peut pas pratiquer un conseil évangélique par le violement d'un précepte, tel qu'est celui de l'obéissance à ses parents, qui nous est prescrite par le quatrième commandement de Dieu. D'ailleurs, la profession religieuse, quoique bonne et utile en soi, ne convient pas néanmoins à tout le monde : tous ne sont pas appelés à cet état. Or les père et mère sont présumés être plus en état de juger si leurs enfans sont appelés ou non à cet état, que leurs enfans, qui, n'étant point encore parvenus à la maturité de l'âge, ne sont pas encore capables de juger par eux-mêmes de l'état qui leur convient.

Il faut excepter de notre règle le service du Roi, auquel les enfans de famille peuvent valablement s'engager contre le consentement de leurs père et mère. L'intérêt public l'emporte sur l'intérêt particulier de la puissance paternelle.

Dé la première partie de notre principe, naît aussi le droit d'une correction modérée, qu'ont les père et mère sur leurs enfans. Ce droit de correction, dans la personne du père, va jusqu'à pouvoir, de sa seule autorité, faire enfermer ses enfans dans des maisons de force, quand il n'est pas remarié. Lorsqu'il est remarié, il ne le peut sans ordonnance du juge qui, pour en accorder la permission, doit s'enquérir de la justice des motifs que le père allègue pour faire enfermer ses enfans. La raison est que, quand un père est remarié, on n'a pas tant lieu de présumer de la justice de ses motifs, arrivant assez souvent, comme dit la loi 4, ff. de inoff. testam. que des pères *noveroalibus delinimentis, instigationibusque corrupti, maligné contra sanguinem suum judicium inferunt.*

porquel engendro mucho mas le cresce el amor, por razon de la criança que façe en el. Otrosi el fijo es mas tenuto de amar, e de obedescer al padre, porque el mismo quiso leuar el afan, en criarle, ante que darle a otro.

LEY II—Claras razones, e manifestas son, por que los padres, e las madres, son tenudos de criar a sus fijos. (*) La vna es, mouimiento natural, por que se musuen todas las cosas del mundo a criar, e guardar, lo que nascen dellas. La otra es, por razon de amor que an con ellos naturalmente. La tercera es, porque todos los derechos, temporales (**) e spirituales, se acuerdan en ello. Ela manera en que deuen criar los padres á sus fijos, e darles lo que les fuere menester, maguer non quieran, es esta: que les deuen dar que coman, e que beuan, e que vistan, e que calcen, e lugar do moren, e todas las otras cosas que les fuere menester, sin las quales non pueden los omes beuir. E esto deue cada vno fazer segund la riqueza, e el poder que ouiere; catando todavia la persona daquel que lo deue recibir (†), en que manera le deuen esto fazer. E si alguno contra esto fiziere, el judgador de aquel lugar lo deue apremiar, prendandolo o de otra guisa, de manera que lo cumpla, assi como sobredicho es. Empero dezimos, que de mientra quel padre criare, e proueyere su fijo, si fiziere el fijo alguna debda que non meta en pro del padre, o que la saque sin su mandado, que non es el padre tenuto de la pagar. Otrosi dezimos, que los fijos deuen ayudar á proueer a sus padres (‡), si menester les fuere, pudiendolo ellos fazer; bien assi, como los padres son tenudos á los fijos.

LEY III—Nodrescer, e criar, deuen las madres a sus fijos que fueren menores de tres años (‡‡), e los padres a los que fueren mayores

(*) La carga de alimentar pasa subsidiariamente á los herederos.

(**) Declár. se aqui lo que se llame *alimentos*. El principio de la vida humana se halla en el agua, en el pan, y en el vestido, y en la casa que protege las debilidades. *Ecles*, c 36. v. 23.

(†) Los alimentos se aprecian por la condicion de la persona, á quien se suministran, soldado, rústico ó doctor, jóven ó anciano.

(‡) Si el padre se halla destruido, debe el hijo mandar e alimentos, y aun esto procede quando el padre sea penado por el propio delito.

(‡‡) Esto se entiende segun lo restringe Baldo, de los hijos legítimos y naturales, segun él, si fuesen espúreos sin distincion de edades, e están los padres obligados á mantener á los hijos segun sus facultades.

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Les femmes ont aussi besoin de l'autorité des Juges, pour faire enfermer leurs enfans dans des maisons de force. La faiblesse de leur jugement et le caractère d'emportement, assez ordinaire à ce sexe, empêche qu'on ne puisse compter sur le jugement de la mère, comme sur celui du père. Ce sont les distinctions qu'on trouve dans un arrêt de 1695. V. le t^om. 5, Journ. des Aud.

La puissance paternelle, quant à la première partie finit non seulement par la mort naturelle ou civile du père ou de l'enfant, mais encore par la majorité de l'enfant, par son mariage même avant vingt-cinq ans et par l'émancipation.

Observez que, quoique parmi nous, la puissance paternelle appartienne à la mère comme au père, en quoi notre droit diffère du droit romain, qui ne l'accordait qu'au père, néanmoins la mère ne peut exercer les droits dont nous venons de parler, qu'au défaut du père ; c'est-à-dire, après sa mort, ou dans le cas auquel, pour sa démence, ou son absence, il ne pourrait pas l'exercer. Hors ces cas, la puissance de la mère est exclue par celle du père, la mère étant elle-même sous la puissance de son mari, sans lequel elle ne peut rien faire ; elle n'en peut exercer aucune sur ses enfans, si ce n'est du consentement et sous le bon plaisir de son mari.

La puissance paternelle, quant à la seconde partie, ne peut finir que par la mort naturelle du père ou de ses enfans ; car des enfans ne peuvent jamais être dispensés des devoirs de reconnaissance et de respect, dans lesquels elle consiste.

C'est de la puissance paternelle, considérée quant à cette seconde partie, que dérive l'obligation où sont les enfans de requérir le consentement de leurs père et mère, pour se marier.

* *Domat, Lois civiles, Droit public,* } La première distinction
part. 2, liv. 1, tit. 1, sec. 1, N. 2. } qui assujettit des personnes à d'autres, est celle que fait la naissance entre les parens

desta edad, Empero, si la madre fuesse tan pobre que non los pudiesse criar, el padre es tenuto de darle, la que ouiere menester para criarlos. E si acaesciesse, que se parta el casamiento por alguna razon derecha, aquel por cuya culpa se partió es tenuto de dar, de lo suyo, de que crien los hijos, si fuere rico, quier sean mayores de tres años, o menores, e el otro que no fue en culpa, los deue criar, e auer en guarda. Pero is la madre los ouiesse de guardar, por tal razon como sobredicha es, e se casasse, estonce non los deue auer en guarda: nin es tenuto el padre, de dar a ella ninguna cosa por esta razon: ante deue el rescibir los hijos en guarda, e criarlos, si auiere riqueza con que lo pueda fazer.

LEY IV—Pobredad escusa á las vegadas á los homes, que non fagan algunas cosas, que eran tenudos de fazer de derecho. E porende, maguer diximos en la ley ante desta, que el que era en culpa por que se partió el casamiento, que esse era tenuto de dar al otro de lo suyo, con que criasse sus hijos que ouiesse de so vno raaon y ha por non seria assi. Ca si aquel fuesse pobre, e el otro rico, estonce el que ha de que lo pueda fazer, deue dar de que se crien los hijos. E si el padre, o la madre, fuessen tan pobres (*) que ninguno dellos non ouiesse de que los criar, si el abuelo, ó visabuelo de los mogos, fueren ricos, qualquier delios (†) es tenuto de los criar, por esta razon: porque assi como el fijo es tenuto de proneer á su padre o a su madre, si vinieren á pobreza; o a sus abuelos, e a sus abuelas, e a sus visabuelos, e a sus bisabuelas, que su ñen por la liña derecha, otrosi es tenuto cada vno dellos, de criar a estos mogos sobredichos, si les fuere menester, que descinden, (‡) otrosi por ella.

LEY V—Engendrán los omes hijos, en sus mujeres, legítimos, e

(*) Aprúebase aquí la opinion de Jacobo de Ara y Bartolo, que si alguno tiene abuelo y padre rico, antes ha de prestar los alimentos el padre que el abuelo, más se han de pedir á este, cuando no tenga el padre.

(†) Antes los ascendientes de la línea masculina y subsidiariamente los descendientes de la femenina, por donde no la madre, sino el padre es tá obligado á mantener al hijo, y ella, solo en defecto de este ó de sus ascendientes.

(‡) El hermano está obligado á mantener á su hermano pobre, aunque sea natural.

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et les enfans ; et cette distinction fait une première espèce de gouvernement dans les familles où les enfans doivent l'obéissance à leurs parens qui en sont les chefs.

Honora patrem tuum et gemitus matris tuæ ne obliviscaris : memento quoniam nisi per illos natus non fuisses. *Eccle. 7. 29.*

Filii, obedite parentibus per omnia. *Col. 3. 20.*

* 4 *Pandectes Frs.*, } Lors de la discussion de ce titre, au
p. 317 et suiv. } Conseil, M. Béranger proposa de retrancher cet article, comme n'étant point une disposition législative. M. Bigot-Prémeneu observa avec beaucoup de justesse que cet article contient le principe, dont les autres ne font que développer les conséquences ; et que, d'ailleurs, il deviendra, en beaucoup d'occasions, un point d'appui pour les juges.

En effet, le fondement et la base de la puissance paternelle sont dans cette révérence et ce respect, que la nature... que disons nous ? que la Divinité même impose à l'enfant, envers ses père et mère. C'est elle qui lui a dit : Honore, respecte ton père. N'oublie pas les douleurs de ta mère ; car, sans eux tu n'existerais pas. C'est elle qui lui a commandé l'obéissance envers eux. C'est Dieu, lui-même, qui a promis une longue vie, pour récompense, au fils respectueux. Et cette promesse n'a point été vaine. Les observateurs remarquent que les hommes, qui ont donné l'exemple de la piété filiale, sont aussi, généralement, ceux qui sont parvenus à la vieillesse la plus avancée.

Pourquoi donc ce précepte n'aurait-il pas pris place dans la loi civile, dont il est le fondement et le soutien ? Les pères et mères ne sont-ils pas, sur la terre, les images de Dieu même ? Cette similitude n'est point idéale. On trouve en eux, cet amour inépuisable, qui fait tout pour son objet, et

a las vedadas, en otras que lo non son. E en criar estos fijos, ha departamento. Ca los fijos que nascen de las mujeres, que han los omes de bendicion, tambien los parientes que suben por la liña derecha del padre, como de la madre, son tenudos de los criar. Eso mismo es, de los que nascen de las mujeres, que tienen los omes por amigas manifestamente, como en lugar de mujer: non auendo entre ellos embargo de parentesco, ó de Orden de Religion, o de casamiento. Mas los que nascen de las otras mujeres; assi como de adulterio, o de incesto, ó de otro fornicio, los parientes que suben (*) por la liña derecha, de partes del padre, non son tenudos de los criar, si non quisieren; fueras ende, si lo fizieren por su mesura, mouiendose naturalmente a criarlos, e a fazerles alguna merced, assi como farian a otros estraños, porque non mueran. Mas los parientes que suben por liña derecha de partes de la madre, tambien ella como ellos tenudos son de los criar, si ouieren riquezas con que lo puedan fazer. E esto es, por esta razon, porque la madre siempre es cierta del fijo que nasce della, que es suyo, lo que non es el padre, de los que nascen de tales mujeres:

LEY VI—Comunal derecho es, tambien a los padres, como a los fijos, que el que fiziere algun yerro contra algun dellos; de aquellos por que son llamados los omes, en latin, ingrati; que quier tanto dezir, como ser desconociente, vn ome a otro, del bien que rescibe, o rescibio del: que por tal razon como esta non es tenudo el padre de criar al fijo: nin el fijo, de proueer al padre. E esto seria, como si uno dellos acusasse (†) al otro, e le buscasse atal mal, por quem eresciesse muerte o deshonra, ó perdimiento de lo suyo. Otrosi, quando el fijo ouiesse de lo suyo en que pudiesse biuir; o ouiesse tal menester, por que pudiesse guarescer, vsand^o del, sin mal estança de si: estonce non es tenudo el padre, de pensar del. Eso mismo dezimos del fijo, que deue fazer contra su padre. Otrosi, quando muere alguno, que fuesse

(*) Acaso omite hablar del padre, atendida la equidad del derecho canónico, aunque por el civil ni aun por el padre, habian de ser alimentados.

(†) Lo mismo en les demás causas de ingratitud, por las que el hijo puede ser desheredado.

[ARTICLE 242.]

cependant, éclairé, qui sait se garantir de la faiblesse ; cette bonté inaltérable, qui mesure le châtement, non à la grandeur de la faute, mais à la force du sujet et qui pardonne, même en punissant. Enfin, cette prévoyance, qui caractérise la providence divine.

Dans quel temps était-il plus nécessaire de répéter ce précepte divin, que dans celui où tous les liens de la subordination sont encore relâchés ; où l'on sent la nécessité de rétablir le gouvernement des familles, pour fortifier celui de l'état.

Que dans un temps, où la nouvelle philosophie vient encore semer ses poisons mortels ; où l'on s'érige audacieusement en législateur, pour détruire tous les principes de la législation ; où l'on vient jeter, au sein de la dépravation effrayante des mœurs, de nouveaux sermens de corruption ; enseigner, dogmatiquement, qu'il n'y a ni droit naturel, ni vices, ni vertus ; que ce sont des mots vides de sens, faits pour amuser les enfans ; que les deux seuls principes de la conduite des hommes, sont le plaisir et la peine ; qu'ils ont le droit de faire tout ce qui peut leur procurer l'un, et de repousser tout ce que peut leur faire souffrir l'autre ; et qu'enfin, toute loi est un attentat à la liberté.

Comment peut-on dire de bonne foi, qu'il n'y a point de droit naturel ? Quelle est donc cette voix intérieure, qui me fait sentir, sans que personne me l'ait jamais appris, que l'on ne doit pas m'ôter ce qui m'appartient ; que l'on doit me donner ce qui m'est dû ; que l'on ne doit pas me nuire, comme je ne dois nuire à personne. On demande la définition du droit naturel ? Eh ! n'est-elle pas écrite dans cette maxime : *ne fais pas à autrui, ce que tu ne voudrais pas, qu'on te fit : alteri ne feceris, quod tibi fieri non vis* ? Cette règle n'est-elle pas gravée par la nature même, ou plutôt, par son auteur, dans le cœur de tous les hommes ?

N'est-ce pas d'elle qu'il est surtout vrai de dire avec l'ora-

tenudo de proueer a su padre, e en su testamento estableciesse por su heredero a otro estraño, deseredando á su padre (*) por alguna derecha razon; este heredero atal non es tenudo de proueer al padre del muerto; fueras ende, (†) si veniesse a muy grand pobreza.

LEX VII.—Bazonandose alguno por fijo de otro, e demandando quel criasse, e proueyesse de lo que era menester, podria acaescer que este atal, que negaria que non era su fijo, porque no lo criasse o por auentura dezirlo y a de verdad, que non seria su fijo. E porrende, quando tal dubda acaesciere, el Juez de aquel lugar, de su oficio, deue saber llanamente, e sin alongamiento, non guardando la forma de juyzio que deue ser guardado en los otros pleytos, si es su fijo de aquel por cuyo se razona, o non. E esto deue ser catado por fama de los de aquel lugar, o por qualquier manera otra que lo pueda saber, ó por la jura de aquel que se razona por su fijo. E si fallare por alunas señales, (‡) que es su fijo, deue mandar al otro, que lo cris, e lo prouea. E maguer el Juez mande proueer a este atal, assi como sobredicho es, saluo o finca (‡‡) su derecho a qualquier de las partes, para prouar si es su fijo. ó non.

(*) Nótese mucho esta ley que dispone que tambien el heredero está obligado a dar alimentos al padre ó al hijo cuando viene ó una suma pobreza.

(†) Y si hubiese nietos ú otros obligados por razon de la sangre, á dar alimentos al padre, estará obligado en este caso el heredero estraño? Bartolo se decide por la negativa, á cuya opinion asiento en el caso de esta ley, más que á lo contrario de Alberico, por mas probable.

(‡) No debe dars la sentencia, condenando á dar alimentos inmediatamente que la cuestion se promueve, durante el pleito, á no estar en posesion de la filiacion (Bartolo *in lege si neget, of de libe, agnoz.*)

(‡‡) Si se pronunciasse la no filiacion en el juicio ordinario, no está obligado el padre á los alimentos, ni obstará la sentencia dada en el juicio sumario de alimentos, aunque sea de los atrasados, segun Baldo,

[ARTICLE 242.]

teur romain, *et hæc judices non scripta sed nata lex, quam non didicimus, accepimus, legimus, sed ab ipsâ naturâ hausimus, arripuimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus.*

Il ne faut ni étudier le droit, ni en sonder les profondeurs, il suffit de consulter son propre cœur, pour sentir que l'on doit honorer, respecter ses père et mère, par la raison, que l'on veut être honoré, respecté par ses enfans.

C'est donc avec grande raison, que les jurisconsultes romains ont dit que la puissance paternelle, quant à son origine est du droit naturel. Cette vérité est justifiée par les yeux, autant que par le sentiment. Il ne faut qu'observer les habitudes des animaux, pour dire avec Paul et Ulpien : *et hoc quoque jure, bellæ utuntur.*

Il est donc vrai que, la loi civile ne crée point la puissance paternelle. Elle est établie par la nature, antérieurement à la loi. Celle-ci ne fait qu'en régler les effets, les étendre, ou les restreindre. Quelle base plus respectable et plus solide, pouvait-elle choisir que le commandement du Décalogue? Que pouvait-elle faire de mieux, que de rappeler et de mettre sous les yeux, ce précepte trop oublié? S'il ne maintient pas toujours les enfans, dans les bornes, dont il ne doivent jamais sortir, il servira, comme l'a dit M. Bigot de Préameneu, de règle aux juges, pour les y faire rentrer.

Quels que soient, en effet, les objets de discussion qu'un enfant puisse avoir, avec ses père et mère; quoiqu'il puisse avoir raison, et qu'il lui soit permis d'exercer, contre eux, les droits qui peuvent lui appartenir; il est toujours obligé de conserver, à leur égard, la révérence et le respect, dont la nature, et la loi, lui imposent l'obligation. Cet article servira de règle aux juges, pour discerner les cas où l'enfant s'écartera de ce devoir; et pour l'en punir, même en lui adjugeant ce qui pourra lui être dû.

[ARTICLES 242 ET 243.]

* *Pocquet de Livonnière*, } La puissance paternelle, n'est pas
Règles, p. 30. } inconnue en France, mais elle
 n'est pas à beaucoup près si étendue que chez les Romains.
 La puissance paternelle en France n'emporte aucun domaine
 ni sur la personne ni sur les biens, elle ne consiste qu'en
 obéissance et révérence que les enfans doivent à leurs pères.

Elle est due à la mère comme au père tant qu'il n'y a
 point de division entre eux, mais au père préférablement à
 la mère dans les choses qui ne sont point défendues et sur
 lesquelles ils ne sont point d'accord. *Loysel*, liv. 1, tòm. 1,
 Règ. 37. *D'Argentré*, sur art. 495, de Bretagne, Gl. 1. *Bac-*
quet, de Justice, ch. 21, n. 57.

* *Gin*, } Le vœu de la nature qui identifie les pères et
 p. 220. } les enfans, est un des principes que les juriscon-
 sultes romains se sont efforcés d'inculquer le plus profondé-
 ment dans les esprits. La faiblesse des enfans, dans le pre-
 mier âge, les place sous la dépendance de leurs parens dont
 la nature les destine à être un jour la consolation et le
 soutien.

* *C. L.*, 233 *et* } L'enfant, à tout âge, doit honneur et res-
C. N., 371. } pect à ses père et mère.

VIII. Bibliography

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Translations of the “American Model” in Nineteenth Century Argentina: Constitutional Culture as a Global Legal Entanglement¹

Introduction

In 1908, writing about the possibilities of intellectual cooperation between North and South America, Leo S. Rowe – who taught political science at the University of Pennsylvania and chaired the American Academy of Political and Social Science – stated that the reorganization of South American universities in the nineteenth century was deeply marked by the “period’s dominant French influence” (which was still felt in “higher education’s organization and methods”). Nevertheless, Rowe, who eventually became a key figure in Pan Americanism and Inter-American relations, was optimistic about the possibility of bringing U.S. and South American universities closer, and highlighted the importance of such contacts among intellectuals and men of science to realize the ideal of “international conciliation.”² One of the most important elements that could lead to the resurgence of intellectual cooperation between North and South America, claimed Rowe, was the extensive implementation of the North American constitutional model in many of the new republics. This provided American experts in political science and constitutional law with a new and vast field of study: the opportunity to analyze the operation of similar constitutional systems under completely different conditions and the relationship between constitutional forms and practices.³

1 A previous version was presented at the panel *Entanglements in Legal History: Conceptual Approaches to Global Legal History*, 39 Deutscher Rechtshistorikertag, Lucerne, September 4, 2012.

2 ROWE (1908). On Rowe and Pan Americanism see BARTON CASTLE (2000); on Rowe’s visits to Argentina see SALVATORE (2007).

3 ROWE (1908) 12. Similar observations can be found in ROWE (1921), and in Rowe’s foreword to AMADEO (1943). For a brilliant study on constitutionalism in the Americas, see AGUILAR RIVERA (2000).

Hispanic American *letrados* had been translating and circulating classic works of American constitutionalism since the early nineteenth century. Moreover, between 1820 and 1850, Philadelphia and New Orleans, with their printing presses and commercial networks with Latin American ports, operated as centers for the diffusion of republicanism, through the labors of exiles such as Servando Teresa de Mier, Lorenzo de Vidaurre, Vicente Rocafuerte, and Félix Varela. This process of transnational circulation of ideas produced both an intense feeling of *Americanism*, uniting both sections of the continent in a common struggle; and a *republican pedagogy*, propagating a new political vocabulary and the blueprint for new political institutions and practices. The principles of a common republican ethos spread all over the different sections of the continent. In the United States Henry Clay and Thomas Jefferson before him had spoken of a unified “America,” with shared geopolitical interests and philosophical foundations, different from those of Europe. In the 1840s River Plate provinces, the Rosas regime had enthusiastically promoted such identification, in order to attack the pro-European tendencies of their political rivals.⁴

By the mid-nineteenth century, these tendencies had evolved into a widespread acceptance of American constitutionalism as a model to shape Argentine constitutional culture. Rowe’s observation on the popularity of the U.S. constitution in the region did not seem to grasp the full extent of that influence in the particular case of Argentina. A good measure was provided by an 1877 Argentine Supreme Court decision, which explicitly acknowledged it:

The system of government that rules us today is not our own creation. We found it functioning and tested by long years of experience, and we adopted it. And it has been rightly said that one of the great advantages in having adopted it is that we have come into possession of a whole body of doctrine, practice, and case law which illustrates and completes the fundamental principles of our government and which we can and should utilize in all the constitutional aspects which we have not altered by express provisions of the Constitution.⁵

Thus, the circulation of U.S. constitutional doctrine was seen as an integral part of the establishment of new republican institutions based on the

4 ROJAS (2010) 21, 112, 121; GRANDIN (2012) 80; MYERS (1995).

5 “De la Torre” in *Fallos de la Corte Suprema de Justicia de la Nación* 19 (1877). The now classic reference for this process is MILLER (1997). See also ZIMMERMANN (1998); HUERTAS (2001). For comparisons with the Mexican case see MIROW (2007), and HALE (2000).

adoption of the U.S. model. This provided at the same time the basis for a legal reordering on which to found domestic legitimacy, and a means of achieving recognition as a new actor among modern, progressive, republics.⁶

The issues of constitutional borrowings and legal transplants, and the problems surrounding those practices have been widely discussed in recent years.⁷ This paper does not address the theoretical foundations of such practices. Rather, it explores possible ways of connecting transnational history, in some of its multiple variations, with the cultural history of legal ideas in nineteenth century Argentina, and perhaps, more ambitiously, with a comparative cultural history of law in the Americas.⁸ It does so by taking as a case study the reception and adaptation made by Argentine jurists and lawyers of U.S. constitutional doctrine and jurisprudence in the second half of the nineteenth century, in a remarkable body of translations and textbooks.

In nineteenth century Latin America, lawyers were central actors in the process of adaptation and circulation of transnational forms of social knowledge and professional practices: as statesmen, in the drafting of the first national constitutions and codes, as intellectuals and men of letters, shaping a local public sphere, and lastly, as early participants in the incipient professional market. It is not surprising, therefore, to find local jurists, and the world of the law in general (legislation, jurisprudence, doctrine and legal education, the structure and functioning of judicial institutions) operating as a mechanism of interpretation and mediation between the transnational world of legal knowledge and practices, and local circumstances.⁹ In recent years, there has been an impressive growth in the literature on the development of judicial institutions in Latin America, on the role of lawyers and jurists in the emergence of a public sphere in the new nations, and on the ways in which international circulation of individuals, doctrines and insti-

6 BENTON (2012), 1098: "Patterns of legal reordering inside polities correspond to efforts by emergent states not only to establish legitimacy domestically but also to achieve recognition as legitimate international actors."

7 On borrowings and legal transplants, see, amongst a vast literature, WATSON (2006); HORWITZ (2009); and ROSENKRANTZ (2003), for the Argentine case.

8 For an analysis of the different perspectives in transnational history, see BAYLY (2006); STRUCK/FERRIS/REVEL (2011). For the possibilities of a comparative cultural history of law in the Americas, WEINER (2011); KAHN (1999) for a research agenda on the cultural study of law.

9 On contemporary debates on translation and their relevance for the study of translations in nineteenth century Latin America, see ROJAS (2010) 21–22.

tutions shaped these processes.¹⁰ Similarly, the new history of crime, police and the law has very fruitfully gathered historians and social scientists with new perspectives on the study of law and society, as has the study of the role of judicial institutions in the early twentieth century “social question.”¹¹ All these new fields have successfully incorporated the role of transnational circulation of doctrines and individuals as factors shaping their object of study.

The first globalization of legal thought, observed more recently by Duncan Kennedy, brought forth the rise of “classical legal thought,” between 1850 and 1914, which coincided with the spread of liberalism in the western world, and the arrival of liberal constitutionalism in the new nations of Latin America.¹² In Argentina, this process of reception was visible not only in the drafting of the national constitution and its reform in 1860, in congressional debates, and local jurisprudence and doctrines, but also in the profusion of translations of U.S. constitutional literature that were produced by local jurists with official backing.¹³ This body of translations ranges from collections of state constitutional texts and federal Supreme Court cases, through the *Federalist Papers*, the classic *Commentaries* of Joseph Story, and other well known doctrinal works in constitutional law such as *The Constitution of the United States. Defined and Carefully Annotated*, by George Paschal (1868), and John Pomeroy’s *An Introduction to the Constitutional Law of the United States* (1868). Also translated were works oriented to a discussion of the ideological and philosophical foundations of American institutions, such as *On Civil Liberty and Self Government* (1853), by Francis Lieber; *Considerations upon the Nature and Tendency of Free Institutions* (1848, 1856) by Frederick Grimke; *A Treatise on Government* (1867) by Joel Tiffany; and the 1888 Clodomiro Quiroga’s translation of Andrew Carnegie’s *Triumphant Democracy* (writing an introduction for this text Domingo Sarmiento proudly announced that in terms of progress Argentina was already being touted as “*los yankees de América del Sur*”).¹⁴ By the turn of the century, Julio Carrié had translated two

10 ADELMAN (1999a); BENTON (2002); CUTTER (1995); PALACIO (2004); URIBE (2000); ZIMMERMANN (1999a); MIROW (2004); PEREZ-PERDOMO (2006).

11 AGUIRRE/BUFFINGTON (2000); SALVATORE et al (2001); CAIMARI (2004); SCHJOLDEN (2002); ZIMMERMANN (1995).

12 KENNEDY (2006), 19, 37.

13 For a previous analysis of many of these translations, see NADELMANN (1959).

14 CARNEGIE (1888), xix. See *Table 1* for complete bibliographical references of the original works and the translations consulted.

books by Frank Goodnow on municipalism, introducing some of the topics of the new science of public administration that was transforming public debate on government in the United States.¹⁵

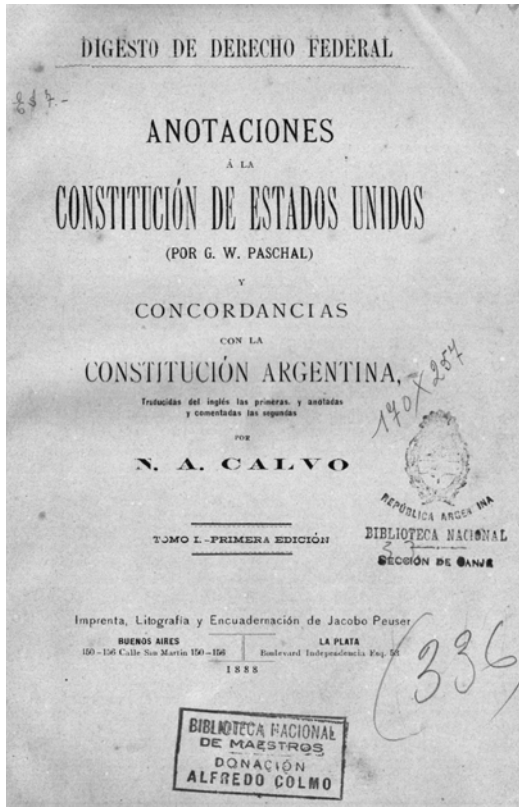


Figure 1: George Paschal's *The Constitution of the United States Defined and Carefully Annotated* (1868) had two different translations, by Nicolás Calvo and by Clodomiro Quiroga. Both aimed at clarifying similarities and differences between the U.S. and the Argentine Constitutions.

15 On public administration in the United States, SKOWRONEK (1982). On municipalism at the turn of the century in Argentina, TERNAVASIO (2006).

Many of the translators also published their own works, or abridged versions of the original translations, and in this they were joined by other jurists and politicians who produced original contributions, with the intention of debating and divulging the new doctrines, thus contributing to the origins of a new constitutional culture. Others combined their work as translators with active participation in the political press of the period (Nicolás Calvo published his first translation of Story's *Commentaries* in the printing presses of his newspaper *La Reforma Pacífica*, and promoted it in its pages).¹⁶ Some of these works were destined for primary and secondary schools (Clodomiro Quiroga, José María Cantilo); others for university courses (Florentino González), and others for local jurists and politicians (Manuel R. García, Florentino González, Bernardo de Irigoyen, Luis Varela).

When we read their own works, and the “paratext” of their translations (prologues, introductions, inscriptions, footnotes, commentaries), we can perceive the willingness of the local jurists to “read” the U.S. institutions at different points in time, according to the particular circumstances of the Argentine context: some defended the need for national unification, others the need to preserve provincial autonomies; there were those who identified the U.S. model not only as a set of political institutions, but as the embodiment of the principles of modernity to be used as a weapon to fight the Hispanic cultural legacy; and others chose to focus on Lincoln and the Reconstruction period as the symbols of the strong national executive that the Latin American nations needed to stave off the threats of provincial *caudillos*. As we shall see, liberal constitutionalism based on the U.S. model could serve the ends of those aiming at greater centralization of power in the national government *and* of those defending provincial autonomy. Thus, the language of liberal constitutionalism in nineteenth century Argentina, gradually produced a novel constitutional culture, a mixture of the original model and the many adaptations and interpretations produced by its local translators. This mixture of the transnational and the local, therefore, revealed a true hybridization of the new political vocabulary of liberal constitutionalism rather than a passive acceptance of a selected model.¹⁷

16 GARCIA (1863); CANTILLO (1866); DE IRIGOYEN (1867); GONZÁLEZ (1869); QUIROGA (1872), QUIROGA (1873); VARELA (1876).

17 Although many of these translators and authors did produce a high level of mixture and hybridity in the vocabulary of liberal constitutionalism as they understood it, many of the

As we know, the traditional “diffusion model” whereby ideas and doctrines (scientific theories, political ideologies, cultural trends) were simply disseminated from the West – Europe and the United States – to the rest of the world has been superseded in recent years by new perspectives on worldwide knowledge creation. It is now recognized that original currents of thought were often profoundly modified in the process of adaptation and the generalization of their new settings. In fact, it has been pointed out that the emergence of hybrid bodies of learning and linked networks of scientists and intellectuals, rather than a one directional transmission of ideas, seems a better way of describing this process.¹⁸

Two consequences arise from this recognition, and both seem relevant to the study of “entanglements in legal history.” One, the history of this transnational process of circulation of ideas is not just a record of how ideas originated in one place and were received in others; on the contrary, history is also being made precisely in the movement between different regions of the world; that is, the process of transition (and translation) is a historical process of knowledge creation.

Secondly, this process of transit, of hybridization of knowledge, is affected by specific social forms: intellectuals, writers, scientists, policy makers and academics, and their international networks, conferences, journals, and books. Therefore, we need to pay particular attention to the social mechanisms of circulation of legal ideas: book translations, professional associations, personal relationships and networks; and to the crucial role played by the government in the dissemination of legal thought on the more general public discourse about state and society.

The following sections will explore, first, the perception of U.S. institutions by nineteenth century Argentina’s political elites and their diffusion into local universities; second, the role of translators, printers and book-sellers as social mechanisms of circulation of those ideas; and third, the ways in which local interpretations adapted the original model to local needs, creating a vocabulary of liberal constitutionalism suited to the particular political context of the country.

institutions themselves, as adopted by political authorities in Argentina (the structure of the federal judiciary, and the adoption of judicial review, for instance) maintained a remarkable level of fidelity to the U.S. original. See MILLER (1997).

18 BAYLY et al. (2006); BAYLY (2004).

The “American Model” and Nineteenth Century Argentine Constitutionalism

The struggle to establish the rule of law as part of the nation building project in nineteenth century Latin America was burdened by the particular historical circumstances in which that process took place. Among those particular historical circumstances, historians have frequently emphasized the legacy of the colonial world, deeply embedded in a hierarchical, centralist, and corporatist ethos, as discussed by Richard Morse, Glen Dealy, Howard Wiarda, Claudio Véliz, and others.¹⁹ The disappearance of effective state power after independence, the centrifugal effects of strong regionalist movements, and economic structural imbalances helped to consolidate the *caudillista* tradition of a strong personalization of power, which frequently led to political instability and the concentration of all the functions of administration, legislation, and judicial power in one person, making impossible the functional differentiation necessary for the process of rationalization of the law.²⁰ Far from being an abstraction evoked to explain all the ills and shortcomings of the new independent nations, the corporatist legacy of the colonial world was in fact present in very concrete collective actors, such as the Army and the Church. This presence was also felt in very concrete social practices, such as Church and military *fueros*, the special jurisdictional privileges enjoyed by the clergy and military officers, which reinforced a system of legal, social and economic stratification, and appeared as wholly incompatible with the ideals of legal equality embraced by liberal nation building.²¹

The topics of the colonial legacies of *caudillismo* and Catholic obscurantism in the region were already present as recurrent tropes for nineteenth century North American intellectuals, and operated as an influential feedback for Latin American liberal *letrados* struggling to rid their countries of Hispanic traditions.²² Just like the project of a massive influx of European

19 MORSE (1954); MORSE (1964); DEALY (1968); WIARDA (1971); WIARDA (1973); VELIZ (1980). On the persistence of cultural explanations in Latin American history and historiography, see ADELMAN (1999b).

20 On *caudillismo* and political order in nineteenth century Latin America see SAFFORD (1992); CHASTEEN (1994); GOLDMAN / SALVATORE (1998).

21 CUTTER (1999); ARNOLD (1999).

22 KAGAN (1996); JAKSIC (2012).

migrants was seen by many as a tool for the social and cultural transformation of a local population deemed deficient for the construction of a modern republic; the adoption of U.S. constitutionalism was taken by many as a panacea for the institutional ills bequeathed by the Hispanic colonial legacy.

There were limits to such an adoption, however, imposed by the local context. The predominance of the Catholic Church on one hand, and nationalist rhetoric on the other, fueled mistrust of Northern influences. As has been rightly pointed out, “the political environment recommended prudence, and prudence was exercised through creative translating and editing.”²³ For others, prudence was dictated by the turbulent past of Argentina, which demanded institutional guarantees of order and authority that the U.S. constitution apparently could not provide. Such was the case of Juan Bautista Alberdi, whose book *Bases* inspired much of the 1853 Argentine constitution, and its peculiar mixture of constitutional sources. The Chilean Constitution of 1833 was the main source adopted by Alberdi to construct a strong national executive and higher degrees of political centralization for Argentina.²⁴

Alberdi’s rival, Domingo Faustino Sarmiento, on the other hand, was a staunch defender of the American Model. After his 1847 visit to the States, where he was inspired by Tocqueville, he became fascinated by the strength of civil society in New England (as recorded in his book *Viajes*); his enthusiasm with the United States as a model for the South American republics was almost unlimited. In 1860, Sarmiento was an active participant in the constitutional convention that reformed the 1853 text, and many of the reforms were inspired by his desire to bring the Argentine constitution closer to the U.S. model. When Sarmiento returned from Argentina to the United States as a diplomatic envoy (1865–1868), his friendship with Horace and Mary Mann and his contacts with the Union political establishment were crucial in cementing his belief in the suitability of the United States as a model for Argentina, whether for the propagation of popular education, or the diffusion of constitutional doctrine. Moreover, the victory of the Union and the period of Reconstruction became for Sarmiento symbols of the reconciliation of liberal republicanism, federalism, and a strong executive,

23 JAKSIC (2012), 5–6.

24 BOTANA (1984); NEGRETTO/AGUILAR RIVERA (2000); ADELMAN (2007); ZIMMERMANN (2011).

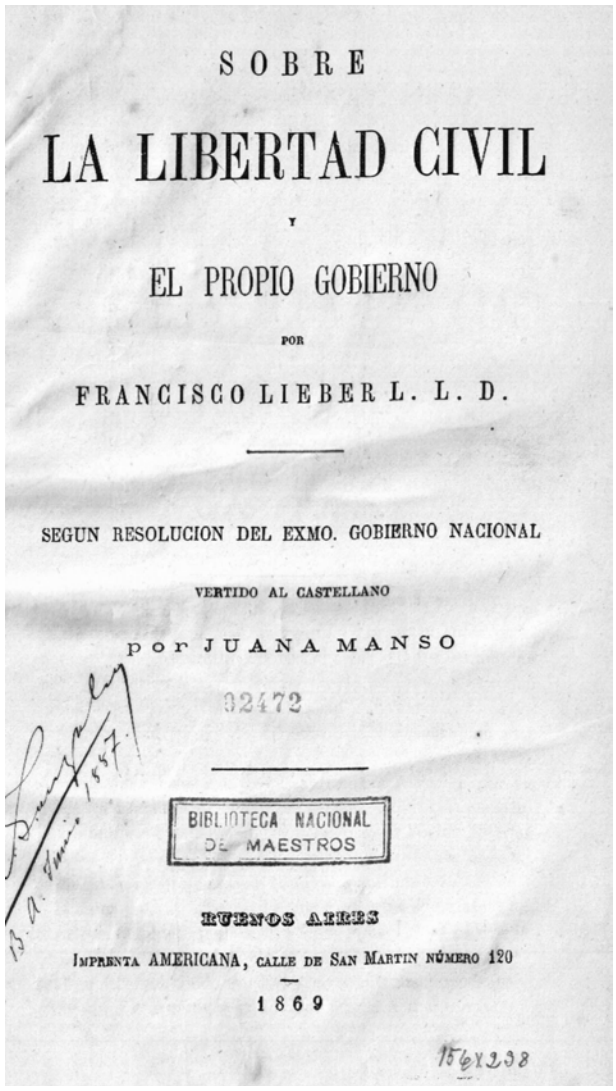


Figure 2: Juana Manso, a close collaborator in President Sarmiento’s educational projects, translated Francis Lieber’s *On Civil Liberty and Self Government*. A second translation of this popular treatise was made by Colombian Florentino González in 1872.

a formula that was to guide his administration as President of Argentina (1868–1874).²⁵

After the sanction of the 1853 Constitution, the debate on the relative influence of the U.S. model raged on. José Benjamín Gorostiaga, one of the drafters of the document, stated that it had been “cast in the mould of the U.S. Constitution, the only existing model of a true federation.” Alberdi and Sarmiento published their own divergent interpretations on the question, but politics and military action would temporarily suspend the discussion, as Buenos Aires seceded from the Argentine Confederation (1854–1860).²⁶ During the separation, the institutions of the American Model – and the pros and cons of judicial review by a federal supreme court in particular – were debated in Paraná (capital of the Argentine Confederation) and the now independent Estado de Buenos Aires.²⁷ With the military triumph of Buenos Aires and reunification of both political entities came the constitutional reform of 1860 (proposed by Buenos Aires, the reforms brought the Argentine Constitution even closer to the U.S. model²⁸), and eventually the ascendance of Bartolomé Mitre to the presidency in 1862. The stage was set for a more aggressive implementation of the U.S. model in Argentina. Congress sanctioned laws setting up a federal judiciary in 1862 and 1863, which closely followed the U.S. Judiciary Act of 1789. President Mitre had sent a special envoy (Manuel R. García), to the U.S., who had very diligently compiled and sent to Buenos Aires all the relevant precedents.²⁹

The special committee in charge of drafting the *Ley 27* (organization of the federal judiciary) recommended a series of measures to facilitate the implementation of the new institutions. Among them were “to popularize the new doctrines” through a series of “translations and compilations” of the more relevant works written in English on the workings of the U.S. model and its relations to Argentine institutions, and to promote in universities and “*academias de jurisprudencia*” the study of this branch of public law.³⁰ Thus,

25 BOTANA (1984); BOTANA (1997); HALPERIN DONGHI et al (eds.) (1994); WEINER (2011).

26 On judicial institutions in the Argentine Confederation, see LANTERI (2010).

27 LEVAGGI (1980); PÉREZ GUILHOU (1983). For other debates in nineteenth century Argentine constitutional culture, ZORRAQUÍN BECÚ (1976); ZORRAQUÍN BECÚ (1988); LEVAGGI (1981); MILLER (1997).

28 MARTIRE (1984); ZIMMERMANN (1989).

29 *Archivo del General Mitre, Presidencia de la República*, XIII (1912), 174–175; “Justicia Federal,” *La Nación Argentina*, February 6, 1863; GARCÍA (1863); ZAVALÍA (1920).

30 *Diario de Sesiones del Senado de la Nación*, September 27, 1862, 426.

the remarkable process of translation and circulation of texts was to be backed from the outset by government support. This was an important difference with the work of exiles in the first half of the nineteenth century. In 1860s Argentina, the government was actively involved in the diffusion of the U.S. model, and university courses as much as judicial courts were to be the recipients of its efforts.

Constitutional Law and the American Model at the University of Buenos Aires

With the arrival of Juan María Gutiérrez as Rector in 1861, a series of curricular changes transformed the structure and content of legal studies at the University of Buenos Aires. Gutiérrez abolished the *Academia de Jurisprudencia*, where candidates had to take three years of professional practice, and widened the curriculum with the introduction of new courses: Roman Law, in 1863; Constitutional Law, in 1868, Legal Medicine, in 1871, and Procedural Law in 1873. Finally, in 1874 the old *Departamento de Jurisprudencia* changed its name into *Facultad de Derecho y Ciencias Sociales*, as it is known today.³¹ The creation of the Chair of Constitutional Law in 1868, which followed the constitutional reform of 1860, and preceded the reform of the constitution of the province of Buenos Aires from 1870 to 1873, stimulated public debate on constitutional matters, and divergent interpretations on the suitability of the American Model to the Argentine context separated students and professors.³²

Colombian Florentino González held the chair between 1868 and 1874. His *Lecciones de Derecho Constitucional*, a summary of his course published in 1869 and 1871, was a clear exposition of the interpretation of the U.S. constitution as a foundational document in political philosophy and constitutional practice which had to be closely followed. During the 1870s González' *Lecciones* were used as an important source for Argentine students of constitutional law at the Buenos Aires Law School.³³ In these lectures González

31 HALPERIN DONGHI (1962) 71–76; CANDIOTI (1920) 114–115, 209; ZIMMERMANN (1999b).

32 On the influence of the U.S. Constitution on the teaching of constitutional theory and history in Argentine universities see CHIARAMONTE/BUCHBINDER (1991); RAVIGNANI (1930); LANFRANCO (1957); MELO (1969); ETCHEPAREBORDA (1973).

33 GONZÁLEZ (1869). References made by contemporaries about González' influence on students at the Buenos Aires Law School in MONTES DE OCA (1877), and PESTALARDO

presented an opposition between two systems of government that were adopted by “the most civilized Christian nations”: constitutional monarchy, which he called “*sistema europeo*,” and “the representative democratic republic,” or “*sistema americano*.”³⁴ Oddly enough, he made no mention of the many precedents that had used such a conceptual scheme: much of the Hispanic American republican thinking of the first half of the nineteenth century emphasized that distinction between Europe and America; in Argentina, Rosas and his publicists had made ample use of the idea of a “Sistema Americano”; and in the United States, Henry Clay’s “American System” combined with the Monroe Doctrine of 1823 to present plan for a united America counterpoised to the European powers.³⁵ Moreover, Joel Tiffany’s *Treatise on Government*, published in 1867 and later translated by Clodomiro Quiroga in 1874, made a similar distinction about the “American Theory” of government.³⁶

Political science and constitutional theory, claimed González, were an empirical science, “una ciencia de observación,” and from the study of the existing forms of government, it was clear that republican government had been most successfully established in the United States. South American constitutional practice, therefore, had to be based on the detailed study of that model. This approach proved to be very influential among his students. González inspired several dissertations on issues of constitutional theory and practice, on the United States model and its relevance to the Argentine situation: Aristóbulo del Valle, “Intervención del gobierno federal en el territorio de los estados”; Carlos Pellegrini, “Estudio sobre derecho electoral”; Roque Suárez, “Sistema federal”; Juan Esteban Martínez, “Gobierno federal”; Antonio Obligado, “La libertad de cultos”; Manuel Porcel de Peralta, “El sufragio”; José M. Cantilo, “Las provincias no pueden legislar en materia de competencia del Congreso Federal,” among others.³⁷

González’ successor at the Chair of Constitutional Law between 1874 and 1884 was José Manuel Estrada. Estrada strongly modified the outlook of the course, elaborating a new interpretation of the historical background of

(1914). For a biographical study of Florentino González, spanning his political activities in Colombia to his exile in Chile in the early 1860s, see TORRES CAICEDO (1868).

34 GONZÁLEZ (1869), 5.

35 ROJAS (2010); MYERS (1995); GRANDIN (2012).

36 TIFFANY (1867) iii; translation in QUIROGA (1874) xiii.

37 CANDIOTI (1920) 141.

the United States and the Argentine constitutions, and of the origins of Argentine federalism. In the latter case, far from being the result of a compact between provinces understood as sovereign entities, the Argentine nation was seen as a legacy of the administrative design of the Spanish colonial world, thus preceding the existence of the provinces, an interpretation that weakened the case for the suitability of the United States model of a federal system for Argentina, and that would prevail in the teaching of constitutional law during the years that followed, continued by Estrada's successors, Lucio V. López and Aristóbulo del Valle.³⁸

A similar process of dissemination and debate of American constitutional doctrine took place among jurists after the sanction of the laws organizing the country's federal judicial institutions. "All our judges and lawyers must be well versed in our federal judicial system, which they cannot apprehend from the mere text of our Constitution without a previous and detailed study of the foremost authors of North American federal law." Thus, in 1863 the newspaper *El Nacional* justified the government's decision to make available in libraries and courts of justice all over the country the most important works on United States constitutional history and theory. "*Tienen que consultar a cada paso a Story*" concluded the newspaper.³⁹ During the following years, an impressive government effort facilitated copies of Story and other classics, such as *The Federalist*, Curtis, Lieber, Kent, and Pomeroy, to the libraries of federal courts.⁴⁰

The list of translations of U.S. constitutional doctrine and jurisprudence sponsored by the national government grew steadily in the following years, and with the translations came an equally impressive number of university dissertations and the first examples of local constitutional commentary dedicated to the discussion of North American precedents for local doctrine and jurisprudence.⁴¹ After almost two decades of that process of translations and diffusion of U.S. constitutional doctrine, Domingo Sarmiento, who had

38 CHIARAMONTE/BUCHBINDER (1991) 6–10.

39 "De la justicia federal," *El Nacional*, January 5, 1863.

40 *Memoria del Ministerio de Justicia, Culto e Instrucción Pública*, 1865, 30, for a list of "libros que se han traído de Norte América para la Biblioteca de la Exma. Corte Suprema de Justicia," including Curtis, Webster, and Story, among others; and *Memoria del Ministerio de Justicia, Culto e Instrucción Pública*, 1880, 24–25, for an inventory of the library of the Corrientes federal judge including, among others, "un tomo del Federalista, un tomo Derecho Constitucional (por Tiffany), un tomo Derecho Constitucional (por Story)."

41 NADELMANN (1959) 204–214.

been one of its most ardent supporters, vainly proclaimed that Argentina was, “among the Spanish speaking peoples (including Spain) the one most dedicated to the systematic study of her political and institutional precedents.” Similar observations on the remarkable abundance of translations and treatises on constitutional matters by the 1880s were made by other prominent jurists, such as Estanislao Zeballos and Joaquín V. González.⁴² As we shall see, in that process of constitutional analysis and reflection that so impressed Sarmiento and others, the “American Model” was subjected to different interpretations. Editors and translators selected from a list of possible “readings” what the U.S. model meant for Argentina at different points in time. But before getting into that, let us explore the world of material practices that made possible the circulation of these works.

“Printed constitutionalism” in the River Plate: jurists, translators and booksellers

It has been suggested – albeit for a different place and period – that the relation between print and political culture, and specifically “the invention of written – and more particularly printed – constitutionalism” was a key moment in the transition from the bourgeois public sphere to national state. Translators, printers and booksellers thus deserve our attention as part of the process of convergence of “print capitalism” advanced by Benedict Anderson and the “printed constitutionalism” analyzed by Michael Warner.⁴³ The concept of “printed constitutionalism” forces us to look not only into the content of constitutional doctrines circulating in the region, but also to consider the social mechanisms that made possible the diffusion and circulation of such doctrines. To treat books not only as texts but also as physical objects resulting from particular economic and cultural practices allows us to integrate certain aspects of social history into the transnational history of constitutionalism in the Americas, and to explore a new way of thinking about the global spread of ideas and the circuits of crosscultural exchange.⁴⁴

42 SARMIENTO (1879); ZEBALLOS (1886) and GONZÁLEZ (1917) 74–75.

43 WARNER (1990). On “print capitalism” and national identity, see also the classic work ANDERSON (1991, 2006). See also ARMITAGE (2007) for the intersection of politics, printing, and the transnational circulation of political ideas.

44 GAMSA (2011); ROJAS (2010).

The diffusion of nineteenth century constitutionalism in Argentina, as part of the nation building process, was notably influenced by the expansion of print and a market for books and translations. The expansion of a reading public has been rightly singled out as the starting point for the modernization of the printing presses and publishing houses in Buenos Aires.⁴⁵ In the early 1860s, when the process of translations began in earnest, Buenos Aires had 14 printing presses. Juan María Gutiérrez, a distinguished member of the Buenos Aires intellectual elite, reporting on the situation of the book industry lamented there were so few entrepreneurs willing to take up this necessary endeavour for the intellectual health of the country. He also pointed out that out of 113 publications in 1863, more than a third had been published with the help of government funding. Gutiérrez also cited the problems he encountered in trying to gather information on the number of imported books that had arrived in Buenos Aires, since there were no official statistics on the matter, and importers were rather reluctant to provide them.⁴⁶

We know little about some of the most important establishments operating in Buenos Aires up to the 1860s – El Progreso, La Tribuna, Imprenta del Plata, Americana, de Mayo, Constitución, Bernheim – or about some of the most active editors and publishers, e. g., Benito Hortelano, Carlos Casavalle, and Pablo Coni. During the next decade, three important new firms entered the scene: Guillermo Kraft (1864), the *Librería Nueva de Jacobo Peuser* (1867), and the *Imprenta Americana de Ángel Estrada* (1871). None of these firms had the characteristics of a modern publishing house that assumes the economic risk of investing in the publication of its titles.⁴⁷ By the 1880s the industry had undergone a process of remarkable modernization, adopting modern technology and combining local production with the printing of many titles abroad. A good number of novels produced by local writers were published by Peuser, Kraft, Biedma, Alsina, Coni, Buffet, La Rápida, and Compañía Sudamericana de Billetes de Banco. By the end of that decade, jurist Joaquín V. González could acclaim the work of publisher Félix Lajouanne for his

45 RIVERA (1998); PRIETO (1988); DE SAGASTIZÁBAL (1995); PASTORMERLO (2006).

46 GUTIÉRREZ (1864), III, 272–294. On bookstores and book importers and the nineteenth century legal culture in Buenos Aires, see also DÍAZ (2001); LEIVA (2005). For a case study on Brazil, RODRIGUES BARBOSA (2010).

47 RIVERA (1998) 19–20.

1888 edition of Clodomiro Quirogas' translation of George Paschal, which started up a collection of translations of constitutional "classics," the *Biblioteca Constitucional Americana*, that amounted to "the beginning of a new era for our constitutional law."⁴⁸

Even though the publishing business was gradually showing signs of expansion, and a new market of readers sustained a moderate demand for local books, local translators still depended heavily on the good will of the authorities to sponsor their work. There were little opportunities for many of these collections to be published by purely private means. Government sponsorship was indispensable, and in turn this facilitated the influence of the authorities and the political establishment on the selection of both the original sources to be translated and the choice of local personalities to do the job. Some of them were journalists and/or owned a newspaper (José María Cantilo, Nicolás Calvo), but all had to negotiate patiently to obtain government subsidies in order to get their work published (prologues to the translations by Calvo, Carrasco Albano, and Cantilo, explicitly recognized this.). Funding usually implied the government purchase of a large number of copies to be distributed in state courts, universities, and schools.⁴⁹

José María Cantilo and Clodomiro Quiroga developed fruitful professional and personal relationships with the liberal political establishment. Cantilo, who was in exile in Montevideo during the Rosas dictatorship, held several positions after Rosas ousting, among others being secretary to Dalmacio Vélez Sarsfield, drafter of the Argentine Civil Code. Clodomiro Quiroga was a close collaborator of president Sarmiento – both being natives of the same province (San Juan). Florentino González was the only figure who seemed to take the place of an outsider, although he had a long track record in the politics of his native Colombia. After being transferred to Chile, he finally arrived in Buenos Aires, in the 1860s, where his credentials were rapidly validated and readily accepted by the city's leaders (this process was facilitated by the publication of a biographical story written by his

48 GONZÁLEZ (1888) 89–117.

49 *Registro Nacional*, vol. 5, 1863–1869, for a September 1863 law authorizing the national executive to buy five hundred copies of José M. Cantilo's translation of Joseph Story, "Esposición de la Constitución de los Estados Unidos, para distribuirla en los establecimientos de educación de la República." Carrasco Albano's 1865 translation of James Kent narrates in its introduction his negotiations with the Ministry of the Interior to obtain proper funding.

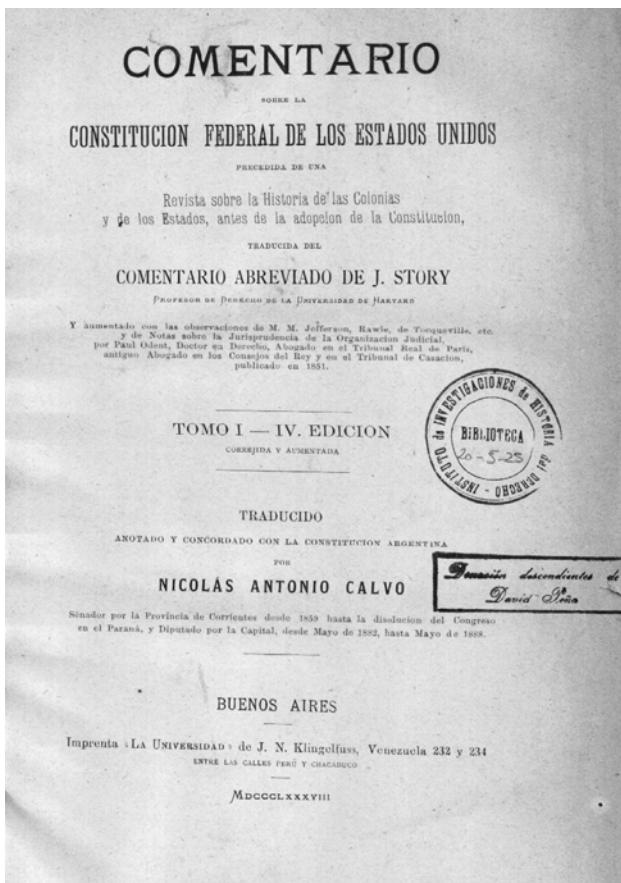


Figure 3: With government funding Nicolás Calvo published several editions of his translation of Story's *Commentaries on the Constitution of the United States*. Most of the translations published in these years received official support.

fellow countryman J. M. Torres Caicedo⁵⁰). As we have seen, in 1868 he was appointed as the first regular professor of the Chair of Constitutional Law at the University of Buenos Aires.

50 *Revista de Buenos Aires*, XVI, 1868, 299–320.

Cantilo and Quiroga complemented their work as translators with the writing of manuals of civics, or basic constitutional law textbooks to be taught in secondary schools: José María Cantilo published in 1866 his *La constitución argentina explicada sencillamente para la instrucción de la juventud*, to complement his translations of Joseph Story; and Clodomiro Quiroga, who translated Story, Paschal, Tiffany and Carnegie, wrote his 1872 *Manual del Ciudadano* with the same purpose. Again, their professional and personal links with the political establishment eased their way to economic aid from the government in order to finance their publications.

Ultimately, this is an indication that these works were far from being purely academic exercises produced by the legal establishment. Nor were they solely thought of as tools for the emerging profession of lawyers and attorneys. Rather, they were part of a concrete political project: to support the experiment of adapting the institutions of liberal constitutionalism in post-Rosas Argentina. As such, they contributed to the construction of a new political vocabulary, attuned to the ideological leanings of the particular brand of liberalism guiding Argentina's political and cultural elites. Let us explore some of the elements of this new political vocabulary advanced by the Argentine jurists and translators.

A conceptual history of the “American Model” in Argentina

The particular brand of liberalism that took hold in 1860s Argentina had three central elements: first, the need to consolidate a national union under the leadership of the Buenos Aires political elite and to combat the threat of sectionalism posed by provincial *caudillos* (including the *autonomista* faction in Buenos Aires). Second, a conception of liberal republicanism, strongly identified with the Philadelphia constitution, seen not only as a synthesis of a political system oriented to the protection of individual rights against state encroachment, but also as a weapon to fight the Hispanic cultural legacy. Finally, the combination of liberal principles with a defense of strong central authority, frequently through the granting of special faculties to the national executive, revealing the traditional tension within political liberalism between the limitation and the strengthening of state authority.⁵¹ Through the 1860s and 1870s, a conceptual history of the “American Model” can be

51 HALE (1989a) 248.

traced in the writings of the Argentine translators and commentators, who successively put forward each of these three elements of the liberal formula, in their interpretations of the U.S. institutions.⁵²

In 1860, Nicolás Calvo thought that the idea of the Constitution as a symbol of national unification was paramount. This is how he presented his translation of Joseph Story's *Commentaries* (or rather his translation of the French version of Story, by Paul Odent).⁵³ In his introduction, Calvo made explicit his intentions. The "great question" facing the country was that of "Argentine unification." Buenos Aires, separated from the rest of the Argentine Confederation since 1853, was torn between those who fought for national conciliation (achieved with the constitutional reform of 1860) and those who wanted to maintain the province's status as a separate, autonomous state. Calvo accused the latter of being an intransigent faction, "the *Dulcamaras* who are devouring our country. (...) An oligarchy of separatists (...) that is going to be unmasked with the translation of Story." Story was the best explanation available of the merits of the Philadelphia constitution, and Calvo offered a passionate argument for the likeness of the Argentine situation with that of the United States at the time of the constitutional ratification. "If we follow their example, our prosperity will be no less than the one enjoyed by that prodigious country," stated in following editions of this work. The American Model of federalism, as explained by Story, and as adopted by the Argentine constitution, was the best recipe for crushing the extreme sectionalism of the *autonomistas* in Buenos Aires, and to show that a federal regime could lay the foundations for national union.

For others, this involved a reconstruction of the country's constitutional history, in order to show that even before the sanction of the national constitution, Argentina was already a *nation*, and not a loose confederacy of provincial quasi-sovereign states, as others had contended. A few years later, José María Cantilo tried to reinforce this view, in his textbook of civics for secondary schools. "Was there an Argentine nation before our constitutional organization? Our union has existed since political emancipation," argued Cantilo without a shadow of a doubt, although, as we have

52 On different approaches to conceptual histories of politics see FARR (1989); ROSANVALLON (2003).

53 CALVO (1860).

seen, this was far from being the only way of understanding the country's past.⁵⁴

Once the unified nation had produced the constitutional reform of 1860 and Congress had sanctioned the organization of federal judicial institutions in 1862 and 1863, the Buenos Aires liberal elite led by President Mitre, Domingo Sarmiento, and Dalmacio Vélez Sarsfield launched their ambitious program of refashioning the country's institutions guided by the principles of a modern liberal republicanism. This program encompassed not only a set of political and judicial institutions, but also a cultural war against the Hispanic colonial legacy. The American Model was also a recipe for emulating the type of society that the Argentine elite perceived in the U.S.: liberal, progressive, embarked on a seemingly endless process of economic expansion, and with a vibrant urban civil society. In his introduction to his translation of Francis Lieber's *On Civil Liberty and Self-Government*, Florentino González presented a radical version of this credo, one he pursued with a sense of mission: "Latin traditions and theories can neither support free institutions nor be a firm foundation to build a republic." By "Latin traditions" he meant mostly two philosophical principles that had inspired the Hispanic presence in America: "in politics, the abdication of individuality among the members of a community, and the subordination of such a community before a Caesar, whether an emperor or a king; in religion, the abdication of human reason before a Pope." Therefore, concluded González, he contributed his translation as a means of "rectifying the many and tragic mistakes that corrupt the political science of public officials in the countries that speak the language of Castile."⁵⁵

For others, French appeared as inadequate as "the language of Castile" when the subject matter was constitutionalism, where the English language seemed to reign supreme:

El inglés es el idioma del derecho constitucional, de la libertad política, de las fórmulas concretas y acabadas, como el francés es el de la crítica, de las especula-

54 CANTILO (1866), 5–6.

55 GONZÁLEZ (1871) 2: "Las tradiciones latinas pueden resumirse en dos capítulos: en política, abdicación del poder individual de los miembros de la comunidad, y del poder social de ésta en un César, llámese emperador o rey; y en religión, abdicación de la razón humana en un Papa." Lieber's book had been previously translated in 1869 by Juana Manso, a close collaborator of President Sarmiento's educational projects. Manso did not write a prologue or introduction to the text.

ciones filosóficas y de las delicadezas del espíritu, y nosotros descuidamos el primero, porque nuestras afinidades de raza y de gustos nos arrastran al segundo irremisiblemente. Ciertamente es más encantador arrullar nuestros oídos con las frases de Saint-Victor, de Taine y de Sainte-Beuve; pero no podemos negar que es más útil para nuestra vida pública, nutrir nuestra inteligencia y educar nuestro corazón para las luchas de la libertad con las páginas majestuosas de Story, de Pomeroy, de Cooley, de Curtis, de Paschal.⁵⁶

Florentino González also translated Frederick Grimke's *Considerations upon the Nature and Tendency of Free Institutions*, emphasizing the importance of political decentralization and narrow limits on the power of the federal government as the best way of securing the individual freedom that the modern republic was grounded on.⁵⁷ Grimke was an important presence in the *Lecciones* González taught at the Universidad de Buenos Aires, a presence that can also be detected in several doctoral dissertations supervised by the Colombian. Some examples include Aristóbulo del Valle's dissertation titled "Intervención del gobierno federal en el territorio de los Estados" (1869) or Antonio Lodola's work on the problem of national codification in a federal regime (1872). This last dissertation made ample use of Grimke, quoting repeatedly the *Considerations* in order to put forward a thesis shared by many: the value of political decentralization within federalism as a means of securing power fragmentation and individual freedom.⁵⁸ But this way of interpreting the American Model, with its radical defense of decentralization and constitutional guarantees of individual freedom, soon clashed with the local need to fortify the faculties of the national executive, challenged by provincial caudillos.

The American Civil War and Reconstruction, and the changing Argentine context, shaken by provincial revolts during the presidencies of Mitre and Sarmiento, offered an opportunity to reinterpret the American Model along different lines. In 1867, Bernardo de Irigoyen published his *Justicia Nacional. Apuntes sobre la jurisdicción de la Corte Suprema*, a brief summary of his polemics with Marcelino Ugarte on whether the federal Supreme Court could hear cases against the provinces. To Ugarte this was another

56 GONZÁLEZ (1888). 98.

57 GONZÁLEZ (1981) 365–381. On the different translations of Grimke in Argentina, GARCÍA BELSUNCE (2009).

58 LODOLA (1872). On González's influence in the period's doctoral dissertations in the Buenos Aires Law School, see CANDIOTI (1920), GARCÍA BELSUNCE (2009).

step towards an endless centralization of power, a process that the ruling *mitristas* had launched with several initiatives: a project to make the whole province of Buenos Aires a federal territory; the refusal by the Minister of the Interior to grant provincial governors the faculty of decreeing the state of siege; new tariffs and export duties sanctioned by Congress; and last but not least, this new doctrine of an expanded jurisdiction of the federal judiciary defended by Irigoyen, that Ugarte considered unconstitutional.⁵⁹ Many of Ugarte's complaints against the federal judiciary faculties over the provinces echoed Vicente Quesada's 1858 arguments against establishing judicial review of provincial legislation by the federal Supreme Court. Quesada had warned, during congressional debates in Paraná, at the time capital of the Argentine Confederation, against creating "a new *Consejo de Indias* disguised as a Supreme Court, with unlimited faculties and unchecked by other powers."⁶⁰ Irigoyen, on the other hand, felt it perfectly natural to adopt this expanded jurisdiction, based on the differences between the federal systems of the American Union and that of the Argentine Federation.

A few years later, Clodomiro Quiroga, one of President Sarmiento's closest collaborators, published a short textbook on civics. In it, Quiroga used a long list of questions and answers on various political issues to explain the operation of constitutional rules, and made clear how far this new, more centralizing, interpretation of the American Model had advanced.⁶¹ At the beginning of this *Manual del Ciudadano*, Quiroga reasserted the predominance of the American Model within Argentine constitutional culture: "The Argentine Republic took its fundamental principles from the United States Constitution (...) Therefore, the United States has provided us with a Constitution and with its jurisprudence (...) Argentina's amendments, aimed at adapting the American Constitution to our traditions and historical background, do not alter the nature of those principles." However, both the original model and the local context appear very different almost two decades after the initial adoption of the Argentine Constitution. Now, it seemed more prudent to recall the more centralizing traits offered by the model, rather than the idea of power fragmentation proposed, for instance, by Grimke and Florentino González. Thus, Quiroga redraws the new

59 DE IRIGOYEN (1867) 4–5.

60 LEVAGGI (1980); PÉREZ GUILHOU (1983); MILLER (1997).

61 QUIROGA (1872); QUIROGA (1873).

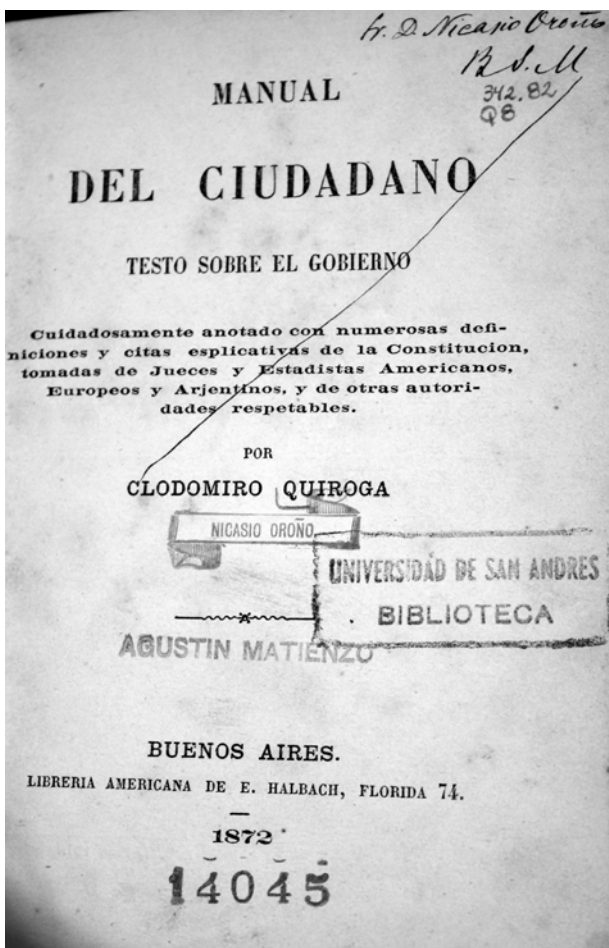


Figure 4: Clodomiro Quiroga complemented his labors as translator with a basic textbook of civics, a *Manual del Ciudadano*, explaining American and Argentine institutions in line with President Sarmiento's centralizing principles.

boundaries for the interpretation of the American Model, condemning the “doctrine of Nullification” and the “theory of State rights” that had been defended by “the school of Calhoun”:

I am of the opinion that the *Constitution has created a government rather than a mere agency or treaty*; a lasting union rather than a league that can be dissolved at the discretion of any Province; a government with limited powers, undoubtedly, but sufficiently empowered to protect, defend and perpetuate our Nation. Under these convictions about principle and public convenience, *provincial outbreaks seeking division and isolation can only be perceived as rebellious and a resistance to legitimate authority, with no apparent cause.* (...) Such is the theory of President Johnson's proclamations, setting aside State governments and appointing new magistracies; such the theory of Congress in passing the Reconstruction laws.⁶²

Years later, Quiroga reiterated his arguments in his translation of George Paschal's *Constitution of the United States*. Paschal's prologue denounced "the heresy of that peculiar school of "State sovereignty," which taught that the States had, in fact, *surrendered* nothing, but had only *delegated* certain powers, in trust, to a common agent: and that any State could, at any time, for any cause, or no cause, resume the delegated powers, and again peaceably take its place among the nations of the earth."⁶³

This interpretation of the evolution experienced by the American Model fitted perfectly into President Sarmiento's goal of reconciling liberal republicanism with the assertion of the national government and of presidential authority in particular. His belief in a "moderate republicanism" had been nourished by the experiences of Lincoln's strong leadership during the American Civil War and the expansion of the American federal government during Reconstruction. Sarmiento's biography of Lincoln highlighted his style of leadership, and his forceful defense of the Constitution. The suspension of *habeas corpus* and the enforcement of martial law during the Civil War were of special interest to Sarmiento, given the context of provincial uprisings in 1860s and 1870s Argentina (and contrasted with his own negative opinions on martial law and state of siege in his 1853 *Comentarios*). This was combined with the "strong government" republicanism synthesized in the Third French Republic (as filtered by Sarmiento's readings of Edouard Laboulaye) to produce a reconciliation of the liberal tradition with the strengthening of national authority over provincial governments, which Sarmiento found particularly suitable for the unstable political context of the 1870s Argentina.⁶⁴

62 QUIROGA (1872) iii–viii.

63 QUIROGA (1888).

64 For instance, D.F. Sarmiento, "Cuestiones de Actualidad," *La Tribuna*, April 23, 1875, Sarmiento, *Vida de Lincoln*, both in SARMIENTO (1953). On the role of Laboulaye's political

It also provided Sarmiento with an opportunity to assimilate the situation of the Argentine interior provinces with the American South during the Reconstruction period, and thus to bring forth again the idea of one greater America sharing common problems, and demanding common policies and institutions. In 1866, speaking at a meeting of teachers and school superintendents in Indianapolis, Sarmiento called for a common educational effort in the American South and in the “farther South,” i.e., the Argentine provinces: “nuestras instituciones son igualmente federales, i tenemos Estados mucho más atrasados en la difusión de la educación i en todo grado de cultura que los más remotos Estados del Sud de esta Unión (...) es vuestra misión extender los beneficios de la educación desde estos centros de luz hasta éste i el otro más remoto Sur, que aún permanecen cubiertos de sombras. Tenemos que pasear la antorcha por toda la América hasta que todo crepúsculo desaparezca.”⁶⁵ Similar considerations were put forward by Mary Mann in her 1868 translation of Sarmiento’s *Facundo or Civilization and Barbarism* (1845), where her concerns about the Union and the South paralleled her interpretations of political conflict in Argentina between the national government and the interior provinces.⁶⁶

thought and the whole political experience of the Third French Republic as a source of inspiration for late nineteenth century Latin American politics, HALE (1989b). For the judicial treatment of the conflictive relations of provincial *caudillos* and the national government, ZIMMERMANN (2010).

65 SARMIENTO (1867) 114–117.

66 JAKSIC (2002), and WEINER (2011) on Sarmiento, Mary Mann and the similarities between Reconstruction and the Argentine situations. GRANDIN (2012) explores the decline and fall of the view of a single, unified America in the United States: “Where Clay and Thomas Jefferson before him had begun to speak of a single, unified ‘America,’ with shared interests different from those of old Europe, ... early Jacksonians, ... began to stress, not for the first time but with particular weight, *South America* as distinct from *North*. This slicing of America in two made it into Webster’s 1828 *American Dictionary*, which divorced north from south at the Darien Gap in Panama, and took place, it should be noted, decades before Spanish Americans began to talk of ‘two Americas,’ one ‘Latin,’ the other ‘Anglo-Saxon.’” Also, SEXTON (2011) for the evolution of the Monroe Doctrine and its changing interpretations in the United States during the nineteenth century. The essays collected in SHEININ (2000) illustrate the complexities involved in the Pan American project.

Conclusions

In their translations and manuals, Argentine jurists made available constitutional models and collections of laws and jurisprudential decisions, but they also mediated between such works and the local contexts, selecting, adapting, reading and interpreting those texts in particular ways, suited to the local circumstances. Recent historiography has emphasized the key role of “mediators” in the transnational circulation of knowledge, and the ways in which lawyers have acted as “cultural intermediaries” in situations of legal pluralism.⁶⁷ Studying the prologues and introductions, footnotes and commentaries to their translations (the “paratext”), and the contents of their manuals, we can appreciate how the work of these “mediators” generated a process of hybridization of knowledge within nineteenth century Argentine constitutional culture.

As specialists in comparative law know full well, “a transplanted rule is not the same thing as it was in its previous home (...) it is rules – not just statutory rules – institutions, legal concepts, and structures that are borrowed, not the ‘spirit’ of a legal system.”⁶⁸ The same could be said about the texts used as sources by our translators. The “spirit” within the interpretations presented in all the translations and textbooks produced by Argentine jurists was eminently local, and contributed to giving birth to a constitutional culture nourished by a “global legal entanglement,” in which the new texts reflected an unique mixture of original, foreign, texts and local interpretations.

I would add two considerations about this process. First, the elaboration of this mixed constitutional culture was not confined to one particular moment; it was a dynamic process that evolved over time in different directions, allowing us to explore the different strands that can be integrated in a conceptual history of the “American Model” in Argentina. As we have seen, this process was deeply affected by one salient feature of Argentine “printed constitutionalism”: the universe of authors, translators, printers, and booksellers which made possible the circulation of constitutional thought was heavily dependent on official economic support. Thus, the vagaries of nineteenth century Argentine politics frequently set the limits of the interpretations put forward by local jurists. In our conceptual history of

67 CHARLE (2004) 197–204; BENTON (2002).

68 WATSON (2006) 2–3.

the American Model, therefore, we have to take into account the diverse political and ideological filters through which American constitutionalism was seen to serve local uses.

But, and this is my second point, if political and economic power could set limits to the universe of interpretations that could be made available, the language of liberal republicanism put forward by these jurists and translators also determined what was politically possible in post-Rosas Argentina. There was no going back to a pre-liberal, charismatic, *caudillo* regime. Optimism in the transforming capacities of a set of political and legal institutions was distilled in a “linguistic constitution of politics”: the establishment and evolution of a language of liberal republicanism in nineteenth century Argentina.⁶⁹ None of the pessimism that had led others with a deterministic belief in the power of old mores and habits to state that “the Spanish of South America (...) are not able to support the democratic republic” deterred our jurists and translators.⁷⁰ On the contrary, Argentine liberal elites were convinced that South American nations and Argentina in particular, could now provide important lessons for the improvement of republican institutions in general, having experienced decades of frustration with their experiments and having ultimately found a successful formula. Sarmiento had insisted on this same point for over two decades: both North and South America had to teach the world the virtues of republican institutions; both North and South America had to develop common policies deriving lessons from their own unique historical experiences.⁷¹

Ultimately, to see the development of a particular Argentine nineteenth century constitutional culture as the result of these global entanglements changes the way in which we study both the nation and its constitutional

69 On the linguistic constitution of politics, FARR (1989) 27, 37, and more generally SKINNER (1988).

70 TOCQUEVILLE (1835), I, 2, 494–495; AGUILAR RIVERA (1999).

71 SARMIENTO (1845): “¿No significa nada para la Historia y la Filosofía, esta eterna lucha de los pueblos hispanoamericanos?”; SARMIENTO (1858): “En América, porque sólo en América el suelo estaba desembarazado de construcciones góticas, pudo levantarse el Gobierno fundado en el consentimiento de los gobernados ...” See also in the same text his demand for common principles, ideas and institutions, for America, “desde el Labrador hasta Tierra del Fuego”; and SARMIENTO (1865): “nos será permitido, con la ciencia del desierto interrogar el suelo, la lengua, la historia y los progresos de la América del Sur, en relación con la del Norte, que no sólo el istmo de Panamá constituye continuación la una de la otra ...” See also FERNÁNDEZ BRAVO (2012).

organization. On the one hand, this may be seen as part of a project of rethinking the nation and its history in a transnational way; to decenter the romantic historiography of nation building as a patriotic saga and to promote global ways of imagining the nation.⁷² On the other, it shows that liberal constitutionalism in the Americas can also be seen as a global creation, in much the same way that the political vocabulary of the Enlightenment has been recently studied:

The philosophical and political vocabulary of the Enlightenment was also a global creation. In many cases, this was a result of the purposeful reformulation of a particular body of thought and practices associated with the 'Enlightenment' in Europe. Thus our attention shifts from the salons in Paris, Berlin, and Naples to the conditions under which cultural elites in Caracas and Valparaíso, in Madras and Cairo, engaged with its claims.⁷³

The new global history, then, also invites us to reflect in a different manner on the role of Latin America in the Atlantic constitutional experiment. In nineteenth century Argentina, debates on the adaptation of the American Model touched upon many of the most fundamental problems in that experiment: sectionalism, centralization and provincial autonomies, division of powers, the tensions between the build up of strong national executives and the preservations of the founding liberal principles. To fully recover the relevance of such an experience, we need "a reorientation of world history and a repositioning of Latin America within it." Such a perspective allows us to move away from "the old characterization of Latin American elites as failed importers of Western constitutionalism," and to perceive the region as "a central example of the complexities of state making."⁷⁴

72 BENDER (2002) and BENDER (2006) show how the effort of rethinking and rewriting the history of the United States from a global perspective, incorporates Latin American history as one of its inputs.

73 CONRAD (2012) 1012. See also BILDER (2005) for an analysis of a "transatlantic constitution" (English laws in the American colonies) that gave rise to a particularly long-lasting legal culture, and ARMITAGE (2007) for the global history of the Declaration of Independence of the United States.

74 BENTON (2004), 426, 429. CAÑIZARES ESGUERRA (2002) 10 comments on some of the obstacles faced by these new approaches: "The unspoken assumption is that Latin Americanists should not be writing the intellectual history of the West, on the one hand, and Europeanists should not be meddling with the 'Third World,' on the other, where only stories of strife and exploitation are worth chronicling (...) the public expects from historians of the region cautionary tales of revolutionary violence and, if socially conscious, stories of cunning peasants resisting treacherous oligarchs."

To study the transnational dimension of liberal constitutionalism in Latin America, therefore – the fusion of the global and the local in the making of a particular constitutional culture and the social mechanisms which facilitated its diffusion – sheds new light on the forces shaping the elite’s legal and political culture at a crucial time in the state building process, and gives us a new perspective on the many and varied links between the region and the world.

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Table 1
Argentine Translations of “the American Model,” 1860–1890

AUTHOR	TITLE	YEAR	TRANSLATED BY	TITLE IN SPANISH	PRINTING PRESS	YEAR
Joseph Story	<i>Commentaries on the Constitution of the United States</i>	1833	Nicolás Calvo	<i>Comentario sobre la Constitución Federal de los Estados Unidos</i>	La “Reforma Pacífica”	1860
Joseph Story	<i>The constitutional class book: being a brief exposition of the constitution of the United States</i>	1834	José María Cantilo	<i>Breve exposición de la constitución de los Estados Unidos para el uso de las escuelas superiores de las clases comunes</i>	Imprenta del Siglo	1863
Joseph Story	<i>Commentaries on the Constitution of the United States (Book III)</i>	1833	José María Cantilo	<i>Poder Judicial de los Estados Unidos de América. Su organización y atribuciones</i>	Imprenta del Siglo	1863
James Kent	<i>Commentaries on American Law</i>	1854	Alejandro Carrasco Albano	<i>Del gobierno y jurisprudencia constitucional de los Estados Unidos</i>	Imprenta de Buenos Aires	1865
George Ticknor Curtis	<i>History of the Origin, Formation, and Adoption of the Constitution of the United States</i>	1854	José María Cantilo	<i>Historia del origen, formación y adopción de la constitución de los Estados Unidos</i>	Imprenta del Siglo	1866
Alexander Hamilton, James Madison, John Jay	<i>The Federalist Papers</i>	1788	José María Cantilo	<i>El Federalista</i>	Imprenta del Siglo	1868

AUTHOR	TITLE	YEAR	TRANSLATED BY	TITLE IN SPANISH	PRINTING PRESS	YEAR
John Norton Pomeroy	<i>An Introduction to the Constitutional Law of the United-States</i>	1868	Luis V. Varela	<i>Poderes Ejecutivos del Gobierno de los Estados-Unidos</i>		1869
Francis Lieber	<i>On Civil Liberty and Self-Government</i>	1853	Juana P. Manso	<i>Sobre la libertad civil y el gobierno propio</i>	Americana	1869
State Constitutions	State Constitutions		Florentino González	<i>Constituciones de algunos estados de la Unión Americana</i>	Imprenta del Siglo	1870
Frederick Grimke	<i>Considerations upon the nature and tendency of free institutions</i>	1856	Florentino González	<i>Naturaleza y tendencia de las instituciones libres</i>	Librería de Rosa y Bouret	1870
Francis Lieber	<i>On Civil Liberty and Self-Government</i>	1853	Florentino González	<i>La libertad civil y el gobierno propio</i>	Librería de Rosa y Bouret	1871
O. M. Wilson	<i>A Digest of Parliamentary Law</i>	1867	Augusto Belín Sarmiento	<i>Digesto de la Ley Parlamentaria</i>	Imprenta de La Tribuna	1877
Joel Tiffany	<i>A Treatise on government</i>	1867	Clodomiro Quiroga	<i>Gobierno y derecho constitucional o sea un examen sobre el origen y límites de la autoridad gubernativa según la Teoría Americana</i>	Imprenta de la Unión	1874
Andrés Carnegie	<i>Triumphant Democracy</i>	1886	Clodomiro Quiroga	<i>La democracia triunfante o sea La Marcha de la República en Cincuenta Años</i>	Félix Lajouane, editor	1888

Table 1
 Argentine Translations of “the American Model,” 1860–1890
 (continued)

AUTHOR	TITLE	YEAR	TRANSLATED BY	TITLE IN SPANISH	PRINTING PRESS	YEAR
Joseph Story	<i>Commentaries on the Constitution of the United States</i>	1833	Nicolás Calvo	<i>Comentario sobre la constitución de los Estados Unidos</i>	Imprenta “La Universidad,” de J.N. Klingelfuss	1888
Luther Stearns Cushing	<i>Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative</i>	1856	Nicolás Calvo	<i>Ley y Práctica de las Asambleas Legislativas de los Estados Unidos de América</i>	Buenos Aires	1886/7
Orlando Bump	<i>Notes of Constitutional Decisions: Being a Digest of the Judicial Interpretations of the Constitution of the United States</i>	1878	Nicolás Calvo	<i>Decisiones constitucionales de los Tribunales Federales de los Estados Unidos</i>	Imprenta y Librería de Mayo	1886, 1887
George W. Paschal	<i>The Constitution of The United States defined and carefully annotated</i>	1868	Nicolás Calvo	<i>Digesto de derecho federal-Anotaciones a La Constitución de los Estados Unidos</i>	J. Peuser	1888-1890
George W. Paschal	<i>The Constitution of the United States defined and carefully annotated</i>	1868	Clodomiro Quiroga	<i>La constitución de los Estados Unidos explicada y anotada</i>	Felix Lajouane, Biblioteca Constitucional Americana	1888
Joseph Story	<i>Commentaries on the conflict of laws</i>	1834	Clodomiro Quiroga	<i>Comentario sobre el conflicto de leyes</i>	Buenos Aires	1891

AUTHOR	TITLE	YEAR	TRANSLATED BY	TITLE IN SPANISH	PRINTING PRESS	YEAR
Thomas M. Cooley	<i>The General Principles of Constitutional Law in the United States of America</i>	1891	Julio Carré	<i>Principios Generales de Derecho Constitucional en los Estados Unidos de América</i>	Jacobo Feuser	1898
Frank J. Goodnow	<i>Municipal Home Rule</i>	1895	Julio Carré	<i>Autonomía Municipal. Estudio sobre su administración</i>	Imprenta de M. Biedma e Hijo	1900
Frank J. Goodnow	<i>Municipal Problems</i>	1897	Julio Carré	<i>Problemas Municipales</i>	Imprenta de M. Biedma e Hijo	1901

Modern Constitutionalism and Legal Transfer: The Political Offence in the French *Charte constitutionnelle* (1830) and the Belgian Constitution (1831)

1. Modern constitutionalism and global legal history

In the historiography of public law and the institutional development of Western regimes, ‘constitutionalism’ is undoubtedly one of the leading concepts, as the idea of tempering regal and governmental powers has been present in the Western legal tradition for a long time. Western legal history has a long tradition of charters safeguarding the fundamental rights and liberties of the people, in which the 1215 Magna Carta is the textbook example. The 1689 Glorious Revolution in England even emphasized like no other before the idea of limited monarchy, as the *Bill of Rights* coined the essence of constitutionalism as an indispensable guarantee for “the true, ancient and indubitable rights and liberties of the people.” However, the adjective ‘modern’ is often added, since numerous scholars use the concept of modern constitutionalism to describe the global transformation of the institutional framework of the Western world during the last quarter of the eighteenth and the first half of the nineteenth century. There is a general agreement amongst scholars on the fact that the 1776 American Revolution marked the beginning of a new epoch. As the former colonies threw off the British yoke, the American revolutionaries advocated a political model that was no longer based on a divine order, but on natural law, stating that only the people themselves could render legitimacy to the institutional framework of a nation state. Hence, they established a complete reversal of the principles supporting constitutionalism. It is without a doubt that the epoch starting with the outbreak of the American Revolution marked a pivotal era in the history of public law. Opinions differ on what event marked the accomplishment of the rise of modern constitutionalism, but there seems to be a general consensus that it must be placed in the mid-nineteenth century,

when various constitutions were promulgated in the aftermath of the 1848 European revolutionary wave. There is a global acceptance that this *Sattelzeit*, as it was labelled by Reinhart Koselleck,¹ can be considered the cradle of modern public law.

Both historians and legal scholars have dealt with the rise of modern constitutionalism, as the drawing up of institutional fundamentals in a supremely ranked text still defines thinking about public law. Constitutionalism has even proven to be the most important element in recent history of public law, since all states, except for the United Kingdom, New Zealand and Israel, currently have a written constitution framing the fundamentals of their institutional framework and of the fundamental rights and liberties of their citizens. Hence, according to Karl Loewenstein, it is “safe to say that the written constitution has become the most common and universally accepted phenomenon of the contemporary state organization.”² Supranational organisations such as the European Union are even working on a constitutional text to enhance their legitimacy and Bruce Ackerman has even launched the concept of ‘world constitutionalism.’³ Since 1776, a large corpus of texts of almost 2000 texts has emerged that can be labelled ‘constitutions’, offering scholars and researchers a vast ocean of sources to dive into.⁴ Hence, one could argue that the rise of modern constitutionalism is one of the pillars of global legal history,⁵ especially when focusing on the history of public law and the way institutional frameworks have developed worldwide.

1 KOSELLECK (1970) XV.

2 LOEWENSTEIN (1961); LOEWENSTEIN (1965).

3 ACKERMAN (1997).

4 In 1954–1963, the Alfred Metzger Verlag published a bibliographical register in four volumes, with bibliographies of all constitutions and constitutional documents that were hitherto known (vol. I: Germany, vol. II: Europe, III: America, IV: Africa – Asia – Australia). See: MENZEL (1954–1963). There has been no systematic updating of this register, although some supplements were published in BRYDE/HECKER (1975) and HECKER (1976). Of course, many constitutional texts can be found nowadays on the internet, e. g. by Wikisource. As a result of the international research project “The Rise of Modern Constitutionalism, 1776–1849” a collection of almost 1500 constitutional documents (including draft bills) of this era has been made available. The project is led by professor Horst Dippel and the texts are available at www.modern-constitutions.de. K.G. Saur Verlag/De Gruyter has published several volumes with the annotated editions in hard copy.

5 CROSSLEY (2007); MAZLISH/BUULTJENS (2004); O'BRIEN (2006).

However, although the concept of modern constitutionalism seems to be globally accepted amongst scholars, the German legal historian Horst Dippel recently wrote that “our knowledge of its history is next to nothing,”⁶ as there is little reflection on its rise as a historical phenomenon. Of course, there is a vast literature on the subject of constitutionalism, as the legal scholars and political scientists have turned it into a research field of its own. The books and articles drawing up typological models of constitutions⁷ or questioning the essence and the meaning of a constitution as a legal or political phenomenon are countless.⁸ However, when it comes to grasping the historical essentials of the 1776–1849 era, things are less clear than one might expect, says Dippel. While he acknowledges that many scholars have already thoroughly dealt with the matter, he stresses that a fresh perspective is needed, since most comparative studies are based upon the concept of the nation state. Therefore, he advocates a new thinking on constitutional history and on its impact on the Western legal tradition, which surpasses the boundaries of national legal history.⁹ To grasp the conceptual foundations of modern constitutionalism as a political and legal phenomenon on itself, he believes new approaches are needed for a better comprehension of modern constitutionalism as a fundamental concept in the global understanding of the history of public law.

Of course, Dippel’s analysis of the existent historiography is rather bluntly formulated, and one cannot ignore the fact that some legal historians have already taken up the challenge of discussing these fundamentals. Most studies deal with the development of modern constitutionalism by describing the worldwide rise of the idea that the legal framework of every state is founded on a set of supreme legal principles that are consecrated in a text which is hierarchically superior to all other legal norms, and which precede every government. In these matters, they generally focus on the ‘classic’ key elements and principles. It is the sum of what are considered the quintessential elements of the public law of a nation, such as popular sovereignty, the different declarations of rights, the idea of limited government, the

6 DIPPEL (2005) 153.

7 WHEARE (1966); BRYCE (1905); LOEWENSTEIN (1965); STRONG (1960); VAN DAMME (1984).

8 SARTORI (1962), MORRIS-JONES (1965), MADDOX (1982), VAN MARSEVEEN/VAN DER TANG (1973); VAN DER TANG (1998).

9 DIPPEL (2005) 153–154 and 167–169.

constitution as supreme law, separation of powers, governmental accountability or judiciary independence.¹⁰ Hence, they present a rather homogeneous, sometimes even monolithic image of constitutionalism in the 1776–1849 era, especially because most studies focus on what ideas were copied from the notorious American and French constitutions. Hence, the historiography of modern constitutionalism seems to be predominantly focused on what all constitutions have in common, a search for the greatest common factors of modern constitutionalism.¹¹

2. Local history, constitutional singularities and the political offence

However, in order to understand the rise of constitutionalism as a part of global legal history, it could be useful to act upon Thomas Duve's *Gebot einer Priorisierung des Lokalen*.¹² His compelling suggestion that in order to contribute to a more global understanding of legal history, one must focus on local legal history, also applies to the history of constitutionalism.¹³ By examining the origins and the development of specific constitutional texts and the particular contexts in which they have originated, the history of the transfer of state models, institutional concepts and their underlying political thought offers several methodological opportunities. Obviously, they enhance their knowledge and the understanding of the particular events which at some point in legal history led to a new constitution. But this approach might be fruitful on a more general level, too. Since constitutionalism has

10 DIPPEL (2005)154–156.

11 DIPPEL (2005) 158. Paradoxically, Dippel has similar suggestions when advocating a new approach. Starting from a brief yet sharp analysis of the 1776 Virginia Declaration of Rights, he discerns ten principles that he considers elementary and that according to him cannot be left out without denying the essence of modern constitutionalism itself. Dippel enumerates: (1) sovereignty of the people, (2) universal principles, (3) human rights, (4) representative government, (5) the constitution as paramount law, (6) separation of powers, (7) limited government, (8) responsibility and accountability of the government, (9) judicial independence and impartiality, (10) the right of the people to reform their own government or the amending power of the people. Hence, in his opinion, this so-called 'constitutional Decalogue' is the great common denominator of all these constitutions, offering some sort of checklist that can be used for the analysis of all subsequent constitutions.

12 DUVE (2012) 5.

13 DUVE (2012) 45–49.

become a pillar of public law worldwide, the study of specific mechanisms of legal transfer can offer broader insights that could facilitate ample reflection on the processes of legal transfer in the field of public law. In the end, this might lead to a more general understanding of the historical development of constitutionalism as a global historical phenomenon, even when focusing on elements in a rather ‘classic’ European context.

From this point of view, it might be interesting to take a look at the singularities of some constitutional texts. While scholars tend to focus on the accordances between constitutional texts in order to grasp the essence of modern constitutionalism, it is important to pay attention to those elements and concepts that are not common to most constitutions. As a consequence, these elements are not considered cornerstones of Western constitutionalism and they generally do not appear in comparative surveys. However, as their peculiarity makes them stand out, they could be considered indicators of a particular approach toward a constitution, or even mark a profound underlying shift or a substantial transformation of political thought. In this regard, this article aims to examine a specific part of the 1776–1849 era, namely the special position that was given to the political offence in the constitutions that were promulgated in the aftermath of the 1830 revolutionary wave.

In 1830, the revolutionary vibe had spread all over Europe, but a new constitutional regime was only established in France and Belgium. After the overthrow of the Bourbon regime, France became a constitutional monarchy with Louis-Philippe of Orléans on the throne. The newly born Belgian nation state established a similar regime after the schism with the Northern Netherlands. A new legal concept was introduced in both constitutional texts: the political offence or the *délit politique*. The French *Charte constitutionnelle* of 14 August 1830 was the first modern constitution to use this concept: its article 69, 1 stated that the French legislator had to ensure that both press offences and political offences could be tried by jury.¹⁴ This phrase inspired the Belgian Constitution of 7 February 1831, whose article 98 stated that a jury had to be sworn in for all criminal matters, as well as for

14 Art. 69, 1 of the *Charte constitutionnelle* stated: “Il sera pourvu successivement par des lois séparées et dans le plus court délai possible aux objets qui suivent: 1. L’application du jury aux délits de la presse et aux délits politiques.” Trial juries were introduced in the French legal system by the French revolutionaries, but their competence had been considerably restricted during the Restoration regime.

political and press offences.¹⁵ The Belgian Constitution even mentioned the political offence in another disposition, when its article 96 stated that in cases of political offences or press offences; proceedings can only be conducted in camera on the basis of a unanimous vote.¹⁶ To avoid the constitutional guarantees remaining hollow phrases through a lack of legislation, the Belgian text even copied the aforementioned French final article and assigned the Belgian legislator with the task of drafting a new press law and a new jury law as soon as possible.¹⁷ It was the National Congress itself who, just before its dissolution, fulfilled this assignment by promulgating a Jury Decree¹⁸ and a Press Decree, a clear indication of its sincere concern for political offenders and press offenders. Both Decrees established several additional guarantees for political offences, such as the abolition of custody for those accused of less serious political offences.¹⁹ On a more symbolic level, the National Congress imposed a rule stating that those accused of a press offence or a political offence did not have to sit on the dock like ordinary criminals, but that they should be given “une place distincte.”²⁰

The specific subject of the political offence is not randomly chosen, since its entry into the constitutions that were born out of the 1830 revolutionary wave was a novelty in the Western constitutional tradition. While several

- 15 Art. 98, nowadays art. 150, of the Belgian Constitution stated: “Le jury est établie en toutes matières criminelles et pour délits politiques et de presse.” Since 1999, the constitution states that a jury will not be sworn in for press offences inspired by racism or xenophobia. Since the jury trial was abolished during the Dutch regime, article 98 BC imposed its restoration in Belgium. While the jury trial was principally reintroduced for press offences and political offences, a jury had to be sworn in for criminal matters as well (referring to *crimes*, the category of the most severe felonies according to the 1810 French *Code pénal*), because several members of the Belgian National Congress considered it an additional guarantee for those at risk of the death penalty.
- 16 Art. 96, nowadays art. 148, of the Belgian constitution, stated: “Les audiences des tribunaux sont publiques, à moins que cette publicité ne soit dangereuse pour l’ordre ou les mœurs, et, dans ce cas, le tribunal le déclare par un jugement. En matière de délits politiques et de presse, le huis-clos ne peut être prononcé qu’à l’unanimité.”
- 17 Art. 139, 1 of the Belgian Constitution (now abolished) stated: “Le Congrès national déclare qu’il est nécessaire de pourvoir, par des lois séparées et dans le plus court délai possible, aux objets suivants: 1 La presse, 2 Le jury.”
- 18 Jury Decree of 19 July 1831 and Press Decree of 20 July 1831. The National Congress was dissolved on 21 July, after King Leopold’s accession to the Belgian throne.
- 19 Art. 8 of the Jury Decree of 19 July 1831; art. 9 of the Press Decree of 20 July 1831.
- 20 Art. 8 Jury Decree.

scholars have dealt with several forms of politically inspired crime, its constitutional protection is often neglected. The lack of attention given to the rise of the political offence as a legal and constitutional concept is rather remarkable, since the 1776–1848 era was an age of revolution and the ideas on the political offence proved to be modelled after the revolutionary experiences of the founding fathers of the new regimes. Hence, the first question is what the true constitutional meaning of the political offence was, why it appeared in these two constitutions and how it was conceived. The second question tends to focus specifically on the process of legal entanglements between France and Belgium in the 1830–31. Why was the political offence and the guarantee of jury trial adopted in the constitution of the newly born Belgian nation state and who supported this? What does it say about the actors supporting this introduction and what possible reflections can this offer on the processes of legal entanglement from a global perspective?

In this regard, a combination of heuristic tools could be useful. To get a better grasp of what the political offence meant to the architects of the French *Charte* and the Belgian Constitution, interesting perspectives are offered by the methodology of Bartolomé Clavero, who has worked on the history of constitutionalism in Latin America. In this regard, Clavero has severely criticized the classic Western approach of modern constitutionalism, especially in his book *Freedom's Law and Indigenous Rights* (2005), as it fails to acknowledge social realities, especially when the rights of indigenous people were concerned. In the first chapter on what he calls the Euro-American constituent moment, an era roughly corresponding to Kosellecks *Sattelzeit*, Clavero advocates a special awareness for textual context, the awareness of the legal historian for what was legally meant by the words used in the constitutional texts:

“The crux of the matter is the historical meaning of the very documents, the constitutional texts, as a way of access to, and not of deviation from, social reality. [...] In working terms, in order to understand constitutions, we must pay attention to law, to specific legal culture, we must turn precisely to documents and literature with legal authority in theory and in practice, to jurisprudence in its broadest sense. To understand constitutional texts, we must pay close attention to other legal texts, which form the first and principal context to make sense out of constitutional texts.”²¹

21 CLAVERO (2005) 54.

Clavero thus makes a particular plea for the study of legal discourse itself, the specific legal context of constitutional texts and the concepts used in these texts. In the case of the political offence and its guarantee of jury trial, this means the retrieval of the legal meaning of the political offence. In this regard, the process of legal entanglement between France and Belgium in 1830–31 comes to the fore: Why was this new constitutional concept copied by the architects of the new Belgian nation state? The process of legal transfer between Paris and Brussels needs further examination. Therefore, one must specifically pay attention to the actors behind the constitution. Their ideological background, their social profile, their *Bildung*, their professional networks, ... they all must be taken into account. Hence, linking the discourse on the political offence to the social background of the Belgian founding fathers should facilitate a better understanding of what lay behind the mechanisms of legal transfer.

3. The political offence, the freedom of the press and public opinion

At first sight, Clavero's approach seems rather unsuitable in the case of the political offence and the development of modern constitutionalism in the aftermath of the 1830 revolutionary wave. Apparently, there was little textual context. Since it was the first time in legal history that the term 'political offence' appeared in a normative legal text, it seems hard to retrieve its original legal meaning. Its entry into the text of the constitution was not even within the aims of the initiators of the revision of the former *Charte constitutionnelle* of 1814. The draft text of article 69 only mentioned the restoration of the jury trial for press offences. It was the intervention of Joseph de Podenas, a magistrate of the Royal Court of Toulouse, in the *Chambre des Députés* that provoked the introduction of political offence in the text of the *Charte*. He argued that slander or seditious appeals that were not expressed by means of the press should be tried by jury as well. He therefore successfully proposed extending the constitutional guarantee of jury trial for political offences.²² However, as the concept was a textual novelty, there was no understanding of its precise legal meaning. Hence, no definition of this particular concept was at hand. This lack of precision was

22 DUVERGIER (1838) 100.

even intended. As the political offence was inextricably bound up with the ever changing nature of modern politics, a fixed definition would not be apt enough to include all possible future events. Therefore, there was great reluctance to impose a definition and its inevitable restrictions: *omnis definitio periculosa*.²³ Hence, when the French law of 8 October 1830 drew up a list of offences that were considered political, this enumeration was certainly not meant to be delimiting. It only listed those offences, for the most part crimes against the internal and external security of the state, whose political nature was considered obvious.²⁴

The Belgian Constitution of 7 February 1831 copied several dispositions from the revised French *Charte*,²⁵ including the guarantee of jury trial for political offences, but the Belgian National Congress did not indicate what was precisely understood by a political offence. It did not provide a definition, nor did it draw up a list of political offences, such as French parliament had done by means of the law of 8 October 1830. The discussions of the Belgian constitutional assembly, were often called ‘vehement’ and ‘excellent’,²⁶ but due to time pressure, this was only the case when it came to a few controversial matters such as the position of the king or the role of the senate.²⁷ There was remarkably little argument in the discussions on the constitutional guarantees for the political offence. Apparently, its legal conception was already sorted out. Hence, the classic sources, such as the minutes of the French parliament or the Belgian National Congress, do not provide much information. Due to this lack of debate in the French *Chambres des Pairs* and the Belgian National Congress, there is only a fragmentary understanding of the constitutional conception of the political offence.²⁸

23 Art. 7 of the law of 8 October 1830 drew up a list of offences that included with the term *délit politique*: the crimes against the internal and the external security of the state, attempts and plots against the king and the royal family, crimes on inciting to civil war (chapters 1 and 2, title 1, book 3 of the Napoleonic criminal code); criticisms, censures and provocations against public authority in religious sermons, unauthorized correspondence with foreign powers on religious matters, illegal associations and meetings (section, 3, paragraph, 2 and, and section 7, chapter 3); and removing or defacing signs of royal authority and carrying, distributing and displaying seditious signs and symbols.

24 INGRAHAM (1979) 122–124.

25 GILISSEN (1967) 38–69.

26 KOSSMANN (1978) 151–160.

27 DE DIJN (2002) 227–245.

28 In addition, the true understanding of the *ratio* behind the restoration of the jury trial in Belgium was reinforced by the nineteenth century nationalist discourse on the construc-

Due to the lack of discussion in both parliamentary assemblies, applying Clavero's approach of a textual context of constitutions seems to be difficult at first sight, especially because the concept of the political offence was new in the Western legal tradition. However, an alternative approach is possible. The political offence appeared to be inextricably bound with the press offence, since all liberal constitutional measures applied to these offences as well. Apparently, both offences were somehow considered to be constitutional twin brothers, two categories that were essentially different from other 'ordinary' criminal matters, as they were specifically designated to be tried by jury. Hence, it is clear that in order to grasp the ratio behind the introduction of the political offence in modern constitutional discourse, one must pay special attention to the freedom of the press. Of course, guaranteeing the freedom of the press was not a constitutional novelty in 1830. One can say with confidence that the freedom of the press was the spearhead of civil liberties as they had been guaranteed since the rise of modern constitutionalism. The 1776 Virginia *Declaration of Rights* already stated that it was "one of the great bulwarks of liberty"²⁹ and the 1789 *Déclaration des Droits de l'Homme et du Citoyen* guaranteed the freedom of speech as "un des droits les plus précieux de l'homme."³⁰ Hence, the protection of writers, pamphleteers and journalists to freely express their views and critiques has been guaranteed in all subsequent constitutional documents, either generally, by safeguarding the freedom of speech, or specifically, by guaranteeing the freedom of the press. However, it is clear that both the French *Charte* and the Belgian Constitution were characterized by the special attention given to the freedom of the press, an issue that was politicised more than ever before. Both constitutions explicitly guaranteed the freedom of the press.³¹ When

tion and legitimization of the Belgian nation state. Scholars failed to acknowledge to the proper French sources, influences and ratios behind the 1831 constitution as they kept on stressing that the Belgian nation state and its people had an own identity – the opposite, especially when it came to the approach to civil liberties.

29 Section 12.

30 Art. XI.

31 Art. 7 *Charte constitutionnelle* (CC); art. 18 Belgian Constitution (nowadays art. 25). Both stated that censorship could never be introduced, expressing the idea that the government could not take any preventive measures. In an additional phrase, the Belgian Constitution stated that no security could be demanded from authors, publishers or printers and it installed a notable exception to the general principles of criminal responsibility: When the author was known and resident in Belgium, neither the publisher, the printer nor the

considering the aforementioned guarantees of the jury trial and the public nature of the court proceedings, it becomes clear that both constitutions safeguarded the freedom of the press on a dual level, by making the distribution of writings as free as possible on the one hand, and by establishing a liberal regime for the prosecution of those accused of abusing the freedom of the press or other civil liberties on the other.³² Apparently, to grasp the essence of the political offence, one must understand the concept of the press offence from a constitutional point of view.

The focus on the freedom of the press and its political understanding is hardly surprising when considering the background of the 1830 French and Belgian revolutions. There had already been severe opposition against Charles X in the spring of 1830 due to his dissolution of the *Chambre des Députés* and the *Garde nationale*, but it was the resistance to the so-called July Ordinances that caused the revolt which eventually put an end to the Bourbon regime. These ordinances, which were administered by the Minister of Foreign Affairs, Jules de Polignac, imposed several restrictions on French journalists, as they explicitly abolished the freedom of the press, reintroduced censorship and imposed an obligatory permission for all printers that could be withdrawn without warning.³³ With the support of some notorious liberals, several journalists of the opposition decided to neglect the ordinances, as they considered them to be a violation of the 1814 *Charte*.³⁴ After the closure of several printing presses and the seizure of several liberal newspapers, rioting started in the streets of Paris, which eventually led to the overthrow of the Bourbon regime and the revision of the *Charte*.³⁵

The French events were remarkably similar to what happened in the United Kingdom of the Netherlands. Since the Vienna Congress had reunited the Netherlands, the Hague regime had been subject to persistent

distributor could be prosecuted. This so-called ‘cascade-like’ responsibility was considered to be an excellent remedy against the ‘private’ censorship of editors, printers and distributors who feared being prosecuted as well.

32 VELAERS (1990) 139.

33 LEDRÉ (1969) 97–99.

34 Art. 8 *Charte* 1814.

35 In the aftermath of the *Trois Glorieuses*, there was considerable debate whether the new Orleanist regime simply needed a reinforcement and a revision of the old 1814 *Charte* or whether a whole new constitution was necessary. Eventually, a modified version of the 1814 *Charte* was promulgated.

critique from the Southern provinces. Although the 1815 Dutch Constitution guaranteed the freedom of the press,³⁶ legal practice was different, especially at the end of the 1820s, when the Dutch Minister of Justice, Cornelis-Felix Van Maanen, who was the Dutch counterpart to Polignac, insisted on taking a hard line on the Southern opposition press. Press law got more and more severe and several leading opposition journalists were prosecuted for criticizing the regime and were severely sentenced by the professional judges.³⁷ When in the summer of 1830 the news spread about the Paris events, this provoked several riots in Brussels. A small group of liberal bourgeoisie successfully managed to turn this commotion into a battle against the Hague government, which eventually led to the independence of the Belgian nation state. Amongst the leaders of the revolutions were several journalists and lawyers, who played an important part in the revolt as well.³⁸

This revolutionary context had a great influence on the understanding of the press offence, and as a consequence, of the political offence as well. In the opinion of most scholars, the entry of the political offence into the constitutional discourse in the aftermath of the revolutionary wave was more a historical than a legal matter.³⁹ Of course, one cannot deny the important role of journalists and lawyers and the impact of the fact that several opposition leaders had been sentenced by professional judges, but this mere interpretation is somewhat one-dimensional, as it fails to explain its constitutional dimension. One must ask why the architects of both nation states considered the political offence a part of the institutional framework, why it was reckoned among the essentials of the political structures that were elaborated and guaranteed in both the French *Charte* and the Belgian constitution.

36 Art. 227 of the 1815 Dutch Constitution.

37 DE BAVAY (1869) 1393–1402.

38 DELBECKE (2009) 138–142.

39 VELAERS (1990) 93.

4. The distinction between civil society and politics

Following Clavero's maxim of focusing on the textual context of constitutions, one needs to answer the question, how the adjective 'political' was embedded in contemporary legal thought, especially considering the fact that the concept *délit politique* was a novelty in a normative legal text. It is thus important to retrieve what it exactly meant in that specific era. Of course, since the Belgian constitutional dispositions on the political offence were modelled after the French *Charte*, one must especially take a close look at the French legal literature of that time. In this regard, the writings of the French Restoration liberals prove to be essential. It was the Italian jurist and philosopher Gaetano Filangieri who launched the concept of the political in the 1780s.⁴⁰ He was the first to discern the "délits contre l'ordre politique" as a distinct criminal category, stressing the political component. Filangieri had been one of the leading thinkers of the Neapolitan Enlightenment, but his intellectual legacy received great attention in France during the 1820s due to the translation of his work by Benjamin Constant, probably the most influential liberal thinker of the Restoration era. Constant also commented on Filangieri's political writings.⁴¹ Apparently, the translated ideas of the latter on the subject of the political offence were very influential, as they echoed in the discourse of various French Restoration liberals of the time. The most striking example is the memorandum of Joseph Simeon, who commented on the text in the *Chambre des Pairs* that eventually became the law of 8 October 1830, in which he expressly mentioned the influence of Filangieri's ideas.⁴² Notwithstanding the fact that their writings and speeches employed several expressions, such as "crime politique," "délit politique" and "délit contre l'ordre politique," which competed for favour during the 1820s,⁴³ it is clear that the 'political' aspect of a certain category of crimes became an issue, as they considered those offences in need of a more lenient criminal approach. Guizot even published a brochure in 1822 in which he advocated the abolition of the death penalty in political matters.⁴⁴

40 DREYFUS (2009) 168–171.

41 CONSTANT (1822).

42 DUVERGIER (1838) 100–105.

43 DREYFUS (2009) 155–163.

44 GUIZOT (1822).

During the Restoration era, the growing awareness of a distinction between crimes that were political, and those that were not, was coherently embedded in the political thought of the leading liberals. Sophie Dreyfus recently pointed out that this political thought was marked by a substantial shift, which was decisive for the conception of the political offence. The distinction between political and non-political crime originated as a consequence of the focus on the distinction between two spheres: the social sphere of the autonomous civil society on the one hand and the political sphere of the institutions on the other. For the Restoration liberals, this distinction was an essential element in their struggle against despotism. They considered it indispensable for safeguarding the liberty of the individual citizen, which was the ultimate goal of each political system. Obviously, they abhorred the absolutist power of the Ancient Regime, but on the other hand they were particularly conscious of the risks of the radical consequences of the Rousseaus *volonté générale* as well. As they had witnessed the excesses of the Jacobin regime and the corruptive effects of direct political participation for every citizen, they feared the recurrence of a society in which the political sphere and civil society coincided. Therefore, they advocated a clear distinction between them. Rather than the immediate participation of every citizen in the political decision making process itself, they preferred a system of parliamentary representation, as it offered the best chances for the individual, offering him the possibility to focus on his own business. Unlike in ancient times, every citizen had to work to earn his living in modern society, making the immediate participation in the administration and the rule of the nation practically infeasible. By delegating political power to a group of professional politicians, the conception of political representation involved the rise of a political class, as parliamentarism was considered indispensable from a socio-economical point of view as well. They ruled, so citizens could focus on their own affairs, while being controlled on a temporary basis by means of elections.⁴⁵ Hence, the establishment of a representative parliamentary democracy was the core of their constitutional discourse.

45 DE SMAELE (2002) 110–112. This idea was put forward by Constant in his famous speech given in the Royal Atheneum in 1819, *De la liberté des anciens comparée à celle des modernes* (1819).

However, as constitutional parliamentarism implied the delegation of political power from civil society to the institutional level of representative institutions, new institutional risks and possible threats to the freedom of the individual originated. In this scheme, it was of great importance that civil society had at all times the possibility to remain in control of what happened on that political level. If not, despotism, tyranny and abuse of power would be inevitable when parliamentary control failed. In the *Ancien Régime*, royal power was counterweighted by the traditional checks and balances attributed to the nobility, but in a post-revolutionary levelled society of equals, a different instrument was needed to avoid despotism. Therefore, the idea of governmental accountability was omnipresent in their ideas. To protect the rights and liberties of the individual against the abuse of the powers that were transferred to the political institutions, several guarantees and mechanisms of institutional protection were advocated by the French Restoration liberals and their ambitious epigones in the Southern provinces of the United Kingdom of the Netherlands.⁴⁶ Within this scheme, checks had to be established on a dual level. It was primarily the duty of the parliament to control the executive powers, which explains their deep concern for ministerial responsibility. However, most liberals argued that these mere intra-institutional guarantees were not sufficient, since the rise of a political class increased the risk of alienation and corruption of the parliamentary representatives. Despite institutional safety valves such as the separation of powers or ministerial responsibility, there was little certitude that they would be adequate enough to protect the people from sheer despotism or tyranny.

In order to safeguard the rights and liberties of the individual against the authorities, a fundamental and indefeasible guarantee outside the institutional framework was needed as well. In this regard, the concept of public opinion played a specific role. When scrolling the numerous publications of the French Restoration liberals, one immediately notices the important role attributed to this notion. A thorough reading reveals how the leading liberal voices were preoccupied with the idea of public opinion as a constitutive element of public law and how they conceived the role and the juridical protection of political offenders and other critics of despotic regimes. The concept of public opinion was a cornerstone of French liberal restoration

46 DE DIJN (2008) 168–169.

thought, as it was profoundly discussed by various thinkers of that time.⁴⁷ Constant, Guizot, Royer-Collard, Rémusat, Chateaubriand, ... they all invoked this notion in their writings, speeches and treatises to stress the need for a permanent extra-institutional corrective on the institutional framework of the nation, in order to avoid the corruption of the regime and the rise of despotism. The preoccupation with the concept of public opinion was clearly present in the liberal discourse in the Southern Netherlands as well. The most important opposition journal, the *Courrier des Pays-bas*, considered it “la règle suprême” of the nation,⁴⁸ or “ce qu’elle a de plus sacré.”⁴⁹

The concept of public opinion was profoundly embedded in the French republican tradition⁵⁰ as it originated in the second half of the eighteenth century, of the political and sociological evolution of the Western world.⁵¹ Since its emergence, the concept of public opinion was represented as the ultimate point of reference for those who governed and reigned. As every political decision had to be assessed and evaluated in light of public opinion, it was considered the alpha and omega of politics. The idea of a superior tribunal, whose judgment on the political decisions was ultimate and final, still reverberated in the debates of the Restoration period.⁵² Antoine de Guérard de Rouilly, a liberal who is nowadays almost forgotten, even wrote a treatise on “la toute puissance de l’opinion.”⁵³ To them, using the concept of public opinion was not just a reference to the democratic roots of political power, but a true political instrument, a fundamental and infeasible guarantee outside of the institutional framework. A vigorous and conscious public opinion was considered the modern, post-revolutionary alternative and a necessary counterbalance to protect the nation from despotism.⁵⁴ Parliamentary representation and public opinion were considered two

47 DE DIJN (2008) 123–128.

48 *Courrier des Pays-bas*, 4 July 1829.

49 *Courrier des Pays-bas*, 21 August 1829.

50 COWANS (2001); JAUME (1992). To give evidence of the bottom-up conception of political power, one can also refer to art. 25 of the Belgian Constitution that stated that “all powers emanate from the nation and they are exercised by the manners laid down in the constitution.” (nowadays art. 34).

51 BAKER (1990); OZOUF (1988) 1–21. Obviously, their writings were inspired by the ideas of Jürgen Habermas and his *Strukturwandel der Öffentlichkeit* (1962).

52 ROSANVALLON (1985); DE DIJN (2008) 167–168.

53 GUÉRARD DE ROUILLY (1820).

54 DE DIJN (2008) 124–125.

subsidiary ‘tribunals.’ The first one functioned within the institutional framework, the second outside of it. When writing on the freedom of the press, Filangieri argued:

“Il existe dans chaque nation un tribunal invisible en quelque sorte, mais dont l’action est continue et plus puissante que celle de la loi, des magistrats, des ministres, et du prince, un tribunal qui, dirigé par de mauvaises lois, peut devenir une source d’abus et d’erreurs de tout genre, mais que les bonnes lois peuvent rendre l’organe de la justice et de la vertu; c’est ce tribunal, dont la puissance est invincible, qui nous montre surtout que la souveraineté est constamment et réellement dans le peuple, et qu’il ne cesse pas de l’exercer, quoique l’autorité immédiate en soit placée dans les mains de plusieurs ou d’un seul, d’un sénat ou d’un roi. Ce tribunal est celui de l’opinion publique.”⁵⁵

The idea was clearly expressed in a piece by the French writer and political thinker François Chateaubriand when he argued that “dans un gouvernement représentatif il y a deux tribunaux : celui des chambres où les intérêts particuliers de la nation sont jugés; celui de la nation même, qui juge en dehors les deux chambres.”⁵⁶

Therefore, it was of great importance that the gap between political institutions and civil society could be bridged at all times and that the vigorous public opinion could express itself freely on what happened in politics. The quotes above indicate that according to the Restoration liberals, the press played a crucial role in these matters, as it gave a common voice to the political interests of the individual citizens. It was the only instrument of resistance left when all institutional safeguards were failing. Journalists were the watchdogs, the protectors of the interests of civil society, since it was their task to evaluate the workings of the institutions and criticize them when necessary. They were considered the gatekeepers of liberal public opinion. As they had to bridge the gap between civil society and political institutions, their task was essentially a matter of two-way communication. Writing articles about politics was not merely a question of evaluating politics and passing this information on to civil society. It was also a matter of reporting on ideas and framing the interests that existed in the society, in order to inform the political class about what moved the citizens. Therefore, as the press was the *porte-parole* of civil society, safeguarding its freedom was of the utmost importance. This idea was widespread among Restoration

55 FILANGIERI (1822) I, 14.

56 *Courrier des Pays-Bas*, 1 January 1829.

liberals and although they differed on the exact elaboration of the freedom of the press and its limits,⁵⁷ both Guizot, Royer-Collard, Rémusat, Chateaubriand and Constant agreed on the principle that the press had to be primarily regarded as “an extra-institutional institution,” a political force that could only be considered in its relationship with political institutions. Constant even clearly stated that public opinion was of vital importance to the effectiveness of constitutionalism and therefore could not exist without the freedom of the press: “Il n’y a point de durée pour une constitution sans opinion publique, et il n’y a point d’opinion publique sans la liberté de la presse.”⁵⁸

It was clear that the protection of the press as means of interaction between public opinion and the political institutions marked a substantial shift in the evolution of modern constitutionalism in the aftermath of the revolutionary wave of 1830. Royer-Collard expressed a similar point of view when he stated that by guaranteeing the freedom of the press, the French Constitution had guaranteed the autonomy of civil society and its individuals: “Ce n’est qu’en fondant la liberté de la presse, comme droit public, que la Charte a véritablement fondé toutes les libertés, et rendu la société à elle-même.”⁵⁹ Since the press offence was the equivalent of the political offence in the constitutions that originated in the aftermath of the 1830 revolutionary wave, concern for the freedom of the press is therefore essential for grasping the legal meaning of the latter. Just like the press offence, the political offence was inextricably bound up with an ascending and democratic conception of political power in the French liberal tradition which contrasted with the imminent absolutist aspirations of the Bourbon dynasty.

5. The press offence, the political offence, the jury trial and public proceedings

In light of Clavero’s suggestion to retrieve the textual context of a constitution, the political conception of the freedom of the press indicates why the political offence was regarded as the constitutional twin brother of the

57 For an overview of these tendencies and their opinion on the freedom of the press, see: JAUME (2012).

58 Quoted in: JAUME (1997) 407.

59 Quoted in: DE DIJN (2008) 127.

press offence and why this particular offence cannot be understood without ample reference to the aforementioned distinction between civil society and political institutions. While the freedom of the press was of great importance for journalists and writers to fulfil their role as the guardians of the interest of civil society, it was not absolute. Freedom of the press could be abused as well. Civil society itself could be harmed by criminal offences such as libel and criminal provocation and therefore, journalists and writers had to respect certain boundaries as well. Their task was to criticize the malfunctioning of the institutions, rather than questioning their legitimacy. Journalist were ought to criticize despotism or abuse of power, but they were not entitled to undermine the authority of the institutions themselves, as this could lead to chaos and disorder. The respect for the institutional framework as it was guaranteed by the constitution had to be respected at all times: the rights of parliament, the authority of the law, the position of the head of state, ... could not be questioned if this was not in accordance with the interests of society and its citizens.

The press offence was thus a *délit d'opinion*, an unlawful critique on a regime. This conception of the press offence was the starting point for a growing focus on the intentions of the perpetrator, and not on the criminal act itself.⁶⁰ This finding is essential for making the link with the political offence, as both press offenders and political offenders were considered idealists who were driven by noble and unselfish motives, striving for a better society. They were essentially different from ordinary criminal offenders, who were considered to act merely out of self-interest. However, unlike the press offender, the political offender did not express his critiques by words, but by deeds. The concept of the political offence did not just emerge in the political debates merely to protect critical expressions that were not fully covered by the freedom of the press, such as seditious speeches. It was meant for revolts, insurrections and other acts of resistance, a very important element in a time where the next revolution seemed to be just waiting to happen.⁶¹ These political offences were not just a breach of the legal order, but they questioned this order itself by attacking it. Press offences and

60 DREYFUS (2009) 456–458.

61 This is clearly noticeable in the French law of 8 October 8, whose art. 7 drew up a list of all offences that were considered ‘political.’ The first category contained all offences mentioned in the first two books of the 1810 criminal code, which penalized all offences against the security of the state.

political offences were clearly related, as they were both considered criminal acts against the constitutional regime. The only way to judge them correctly was by considering the political motives of the offender, rather than by focusing on the criminal acts themselves. Filangieri wrote:

“Les délits politiques sont ceux qui troublent l’ordre déterminé par les lois fondamentales d’un Etat, la distribution des différentes parties du pouvoir, les bornes de chaque autorité, les prérogatives des diverses classes qui composent le corps social, les droits et les devoirs qui naissent de cet ordre.”⁶²

One must therefore stress that the conception of the political offence was inspired by the French Restoration liberals’ emphasis on the autonomy of civil society and its clear distinction from political institutions, as the political offence was precisely an act committed out of dissatisfaction with the regime.

However, the possibility of judicial intervention by the authorities in press and political affairs could lead to abuse of power and despotism.⁶³ Hence, press offenders and political offenders were entitled to due process, which offered the best guarantees. In this matter, the jury trial was considered indispensable. It was repeatedly stated that only “twelve men good and true” could judge in press affairs, and to a greater extent, political affairs. When perusing the liberal discourse of the 1820s, one cannot miss the constant praise for the jury trial. During the Restoration regime, both Benjamin Constant, Pierre-Paul Royer-Collard and Charles de Rémusat had repeatedly stressed the importance of the participation of laymen in press affairs and political affairs. In France, press offences had been tried by jury from 1819 until 1822, and both laws had provoked considerable debate.⁶⁴ Once again, the French ideas on the subject were also omnipresent in the Southern Netherlands. As King William had abolished the participation of

62 Quoted in: DREYFUS (2009) 171.

63 To avoid free debate being disturbed, a double guarantee was advocated. On the one hand, authorities were not allowed to take preventive measures such as censorship or bail, which implied that by no means could action be taken before the writings were actually published. This was of the constitutionalist tradition of Constant, as the elitist liberal tendency of the so-called Doctrinaires of Guizot, Royer-Collard and Rémusat believed that a certain control was allowed in order to protect the citizens from radical views to which they might easily succumb. Constant and his disciples, however, advocated pluralism and discussion as an instrument of legitimate resistance to unjust laws. JAUME (2012) 48–52.

64 For an excellent outline of the discussions on the jury trial in France during the Restoration era: JAUME (1997) 351–405.

laymen in the administration of criminal justice at the birth of the United Kingdom of the Netherlands,⁶⁵ there had been a strong demand for the restoration of the jury trial for fifteen long years, which obviously had been strengthened as the leading opposition journalists had been sentenced by professional judges at the end of the 1820 s.

As press offences and political offences were acts of critique against the institutions and the offenders claimed to have acted out of interest for civil society, it was considered imperative that these were judged in light of public opinion. This can be illustrated by numerous quotes. In January 1830, shortly after proceedings started against Louis De Potter and his fellow insurgents for the publication of his critical *Lettre de Démophile au Roi*, the *Courrier des Pays* had already briefly put why the restoration of the jury trial was essential in press affairs, as it was “le véritable interprète des sentiments et des opinions du pays.”⁶⁶ It is clear that this quote reflected the ideas of the French Restoration liberals on the jury trial.⁶⁷ They reverberated during the sessions of the Belgian National Congress. When the restoration of the jury trial was discussed, Barthélémy de Theux de Meylandt, a leading member of the constitutional assembly, concisely expressed that in order to judge political offences and press offences correctly, “il faut être répandu dans la société, la vie retirée du juge ne lui permettant pas de bien connaître l’opinion.”⁶⁸ This quote reveals that the jury was principally considered a ‘positive’ guarantee, safeguarding a judgment that corresponded as much as possible with the ultimate political benchmark, public opinion. Hence, it was not a mere reaction against the competence of professional judges in controversial cases, as these quotes clearly indicate that popular jurors were regarded as a panel that could offer the most genuine reflection of public opinion. As press offences and political offences were often highly controversial, a fair verdict could only be obtained by testing them against the prevailing ideas and values of the nation. Joseph Raikem, the future Minister of Justice after the promulgation of the Belgian Constitution, said that in

65 The jury trial was introduced in the Southern Netherlands by the French regime, but William’s decree of 6 November 1814 abolished the participation of laymen in the administration of justice.

66 *Courrier des Pays-bas*, 7 January 1830.

67 JAUME (1997).

68 HUYTTENS (1844) 3, 594.

case of a jury trial “la décision sera regardée comme celle de la société même.”⁶⁹ Since political offences and press offences were considered to be judged against the backdrop of public opinion, the judicial system had to be fit enough to take into account its changes, shifts and evolutions. This was by no means an abstract consideration, as the idea had emerged in an age of revolution in which regimes changed quickly and the tumultuous series of political events easily provoked shifts in public opinion. As in the Court of Assizes, the members of the jury were renewed for every session, its composition was the most current and recent reflection of public opinion.

Since the founding fathers of the Belgian nation state were preoccupied with securing a fair trial to those accused of a press offence or a political offence, the constitution offered an additional guarantee. As the restoration of the jury trial was a judicial consequence of the rise of public opinion as a key element of institutional thought, it was obvious that public opinion needed to have access to these trials, even when political offenders and press offenders were tried by jury. This implied that all trials were to be held in public, not only as an expression of the liberal belief in the constructive nature of free debate and the right to a due process, but as a measure to make sure that public opinion could inform itself about the proceedings in the cases of those who claimed to have stood up against despotism. This was evidently inspired by the recent trials against the heads of the opposition in the South, which were often held in camera. Therefore, article 96 of the constitution stated that all court hearings were public, unless such public access endangered morals or the peace. If such was the case, the court had to declare so in a judgement. After the submission of an amendment by de Theux de Meylandt,⁷⁰ it was stated that proceedings could not be conducted in camera on the basis of a majority vote, but when it came to press offences and political offences, this was only possible on the basis of a unanimous vote.⁷¹ Apparently, judging political offences and press offences in light of public opinion was not only a matter of engaging twelve jurors, but also about facilitating public opinion itself to be informed on the proceedings.

69 HUYTTENS (1844) 3, 577.

70 HUYTTENS (1844) 3, 229.

71 Currently art. 148 BC.

6. The political offence and the bourgeoisie in the Southern Netherlands

Since the legal meaning of the political offence indicated a substantial shift in political thought, one must ask what mechanisms lay behind the transfer of this political model from the French *Charte* to the Belgian constitution. It is hardly surprising that the 1830 French liberal revolt led to a constitution that largely incorporated the ideals of French Restoration liberalism, yet it is fascinating to see what mechanisms led to their *adaptatio* by the Belgian constitutional assembly. However, the discussions of the Belgian National Congress are even less revealing on the constitutional conception of the political offence than the minutes of the French parliaments. The words spoken by Jean-Baptiste Nothomb, who was, despite his young age, one of the most influential members of the Belgian National Congress, are very revealing, since he told his colleagues that the discussion on the matter was “guère une question de texte, une difficulté de rédaction.”⁷² Apparently, there had already been great debate in the Southern Netherlands during the years preceding the revolution.⁷³ The ideas of the National Congress on the matter were already clear-cut and no further discussion or explanation was needed. In order to understand this lack of debate, one must bear in mind that among the members of the constitutional assembly, there was a highly influential group of young liberals. It was largely a generation of enthusiastic bourgeoisie, who were generally about 30 years old at the break of the revolution. They had been brilliant law students with a particular interest in French political thought. During the 1820s several leading members of this group combined their career at the bar with political journalism, and most of them had found out to their cost just how far-reaching the repression of the Southern opposition press was.⁷⁴ This common past in the opposition press of the South is of great importance, because the numerous articles they had published in these journals offer detailed insights into their political thought that was lacking in the discussions of the National Congress. When going through these well-written and elaborated texts, one immediately notices the references made to French Restoration liberalism.⁷⁵ Clearly, this

72 HUUTTENS (1844) 1, 651.

73 MARTEEL (2009) 151–205.

74 DELBECKE (2009) 149–150.

75 Ironically, it was King William himself who had somewhat facilitated this intellectual turn

generation was very well read in political theory and contemporary liberalism due to several factors. Ironically, it was King William himself who had somewhat facilitated this intellectual turn towards French political thought.

One of the most decisive elements for the intellectual development of this generation had been King William's reform of higher education at the start of his regime. As going to law school was the most obvious career choice for the young bourgeoisie, the shift in the programmes marked by William had a profound impact on their *Bildung*. In the new universities of Ghent, Leuven and Liège, established in 1817, reading law was no longer exclusively about the study of classic Roman law. There were courses on matters of public law, too, especially on constitutional law, political theory and natural law, which were taught by young foreign professors, such as Jacques-Joseph Haus in Ghent and Leopold Warnkönig in Liège. They were familiar with the writings of contemporary liberal authors such as Jeremy Bentham, Adam Smith, Jean-Baptiste Say and Benjamin Constant and eagerly spread their ideas from the pulpit. Their lessons must have made a great impression on this generation of young students:

“L'indépendance des pouvoirs, la responsabilité ministérielle, les avantages du jury, les effets de la presse libre, l'affranchissement de l'industrie furent enseignés dans la chaire professorale, au pied de laquelle se pressait une jeunesse électrisée par ce genre d'instruction.”⁷⁶

However, being a law student was not only about attending lectures. As they were students, these bourgeois youngsters continued their discussions in bars, pubs and *salons*, striking up long lasting friendships. For instance in Liège, Paul Devaux, Jean-Baptiste Nothomb, Charles Rogier and Joseph Lebeau must have argued several times in the *Café de la Comédie* about the necessity and feasibility of introducing a new liberal regime in the Netherlands. They met in bars, read in *cabinets de lecture*, read pamphlets and journals and discussed books on various political matters. According to his biographer, when reading the debates of the 1789–1791 French *Assemblée Constituante*, Nothomb was reported to have even said ironically “Qui sait si je ne siégerai pas moi-même dans une pareille assemblée?”. After graduation, most of these

towards French political thought, since the first years of his reign were marked by a considerable lenience towards liberals from abroad, especially French journalists and young German professors.

76 Quoted in: RUZETTE (1946) 10.

young liberals joined the bar, a professional milieu in which there was great interest for all things French, a consequence of the Napoleonic legal heritage.⁷⁷ Hence, they kept running into each other in the ins and outs of the courthouses and had plenty of opportunities to continue their political discussions. Even their choice of *patron* was often inspired by their ideology, for instance in the case of the future diplomat and politician Sylvain Van de Weyer, who chose to be a trainee of Pierre-François Van Meenen, an expert in French constitutional law who even had studied in Paris.⁷⁸

The most remarkable milieu in which this young bourgeois elite was engaged after their education was the urban press scene of Brussels and Liège, the two epicentres of Francophile liberalism. Like the reform of legal education, the rise of the political press in the Southern Netherlands had been somewhat a consequence of King William's early liberal attitude, too. After the Napoleonic regime's rigid governmental control on the press, King William had refused to maintain the severe press policy of the former French emperor, nor did he want to immediately establish an official governmental journal. Hence, the Brussels press scene had lay fallow, allowing journalists of all kinds to establish new journals. In this process, the lead had often been taken by several French Bonapartists and republicans who had fled Paris for political reasons. Since then, the political and cultural frame of reference of the Brussels bourgeoisie was modelled after Parisian standards, as these *refugiés* had brought along a lively culture of debate and discussion, with their own journals being modelled after the example of their Parisian counterparts. Obviously, they never lost interest in what happened in their homeland, so they reported thoroughly about the ins and outs of French politics in the Restoration era. Hence, the ideas that were put forward at the time in the Parisian *salons* resounded in Brussels shortly afterwards.⁷⁹

As these young bourgeois lawyers joined the editorial boards of these journals at the end of the 1820s, they found themselves amongst some of the

77 Since the introduction of the Napoleonic codes, legal culture in the Netherlands had been dominated by French law. The Hague regime tried to introduce new codes, but never succeeded in doing so during the 1815–1830 era. Moreover, the domination of French law (and French legal culture) was even emphasized by the fact that there was no copyright law prohibiting making copies, so French law was widely spread, profoundly influencing Belgian legal culture at the time. HEIRBAUT / GIERKENS (2010) 19–28.

78 VERMEERSCH (1981) 512–516.

79 DELBECKE (2009) 151–152.

most acute political philosophers of this generation. The member lists of these boards read like a *who's who* of the contemporary liberal scene in the Southern Netherlands. In Brussels, there were several liberal papers, such as *Le Belge*. However, the most notorious liberal newspaper was without any doubt the *Courrier des Pays-bas*, which has already been quoted several times. This liberal journal once had sought for the support of the Dutch government in its struggle against Catholicism, but since its board of editors was replaced in the summer of 1828, the journal grew into the most authoritative voice of the Southern liberal opposition against William's regime. During the turbulent political events in the years preceding the revolution, when several journalists of the Southern opposition were prosecuted for their critical writings, the opposition increased with each trial and critiques became more fierce, provoking more severe press laws and more trials. This dialectic process of oppression and opposition offered numerous occasions to the journalists to express their political views on several subjects. Going through the successive volumes of opposition journals such as the *Courrier des Pays-bas* and *Le Belge* is highly informative, as the collaborators on these journals had put their views and opinions in numerous long articles, texts and brochures.⁸⁰

According to these articles, the aforementioned liberal 'ascending' conception of the foundations of political power proved to be of great influence in the Southern Netherlands during the 1820 s. The Southern liberals took it as an argument in support of their view on the institutional identity of the United Kingdom of the Netherlands, which was much discussed in those days. Although the so-called 'Dutch amalgam' had had a proper constitution since 1815, there was considerable debate on the nature of the institutions and the position of King William and his government. According to William and his ministers, the United Kingdom of the Netherlands was a classic monarchy, established by God and only tempered by the constitution. This top down interpretation, referring to the political foundations as they had been established during the Ancien Régime, differed greatly from the institutional view of the liberal opposition. Being adherents to the French liberal tradition, they considered the United Kingdom of the Netherlands a proper parliamentary monarchy, established on the grounds of the 1815 Constitution. They abhorred every form of despotism, whether it was

80 VERMEERSCH (1981) 481–495.

enlightened or not. To them, William's royal power was not limited by the constitution, on the contrary, it was founded on it. Louis De Potter formulated this view in a very pointed way in his famous *Lettre de Démophile au Roi*, which led to a severe sentence.⁸¹ It was the central thesis of his famous open letter to King William:

“Vous parle, Sire, de monarchie tempérée par une loi fondamentale! C'est un mensonge odieux et perfide; c'est pis, une absurdité. Une loi fondamentale ne tempère rien, elle fonde: avant elle, rien n'était; depuis elle, tout est légitimement, et ne l'est que par elle, sans elle, rien ne serait; et nous, Sire, nous faisons partie de ce tout; et l'état que nous composons avec vous, et vous même le faites également. Vous n'êtes, Sire, que par la loi fondamentale, et en vertu de la loi fondamentale; votre pouvoir, vos droits, vos prérogatives viennent d'elle et d'elle seule.”⁸²

Hence, as they were profoundly influenced by the political thought of the French Restoration liberals, the idea of a substantial division between the sphere of civil society and the sphere of political institutions was the basis of their ideology, too. Pierre-François Van Meenen, one of the few older people in these circles of liberal youngsters, emphasized in 1816 the importance of “la distinction entre l'ordre civil et l'ordre politique.”⁸³ As a result, the idea of a vigorous public opinion as the benchmark of all political activity, the necessity of safeguarding the freedom of the press, the need for a jury trial in controversial political matters, ... all the elements were present in the discourse of these young liberal bourgeoisie.

While the influence of French Restoration liberalism is obvious and the means by which these ideas were transferred to the Southern Netherlands have been mapped out, the interests of this particular group of young liberals cannot be explained without referring to the social position of this group of “de jeunes avocats, de jeunes journalistes, pleins de zèle pour la liberté [...] qui brûlaient de faire l'essai de leurs théories?”⁸⁴ They all were part of the middle class. They were highly educated and rather affluent, but they had no access to true political power. Although the French revolution had abolished all privileges, political power was still in the hands of the

81 De Potter, who had already been sentenced in 1828 to eighteen months of imprisonment and a 1000 florin fine for criticizing the government, was sentenced to eight years of banishment for plotting against the government.

82 *Courrier des Pays-Bas*, 23 December 1829.

83 MARTEEL (2009) 193–198.

84 GERLACHE (1839).

landed nobility as a consequence of their immense wealth. Restoration liberal thought proved to be a means of breaking through this glass ceiling. The distinction between the political level of the institutions and the extra-institutional level of civil society and its public opinion therefore offered considerable possibilities in that it moved the ultimate core of political power to a sphere to which this intellectual elite actually had access. Hence, by advocating the freedom of the press and stressing the role of the journalist as a political watchdog, this generation was claiming its own political power. There was even more. In their discourse, the idea was imminent that the very best of these journalists could make the change-over from the sphere of civil society to the sphere of political institutions, as they were very well acquainted with what moved public opinion. This was indicated rather clearly by a quote from the writer François-René de Chateaubriand, published in the *Courrier des Pays-bas*:

“Que les ministres soient des hommes de talent; qu’ils sachent mettre de leur part le public, et les bons écrivains entrèrent dans leurs rangs et les journaux les mieux faits et les plus répandues les soutiendront; ils seront cent fois plus forts, car ils marcheront avec l’opinion générale.”⁸⁵

Hence, when the 1830 revolt led to the independence of the Belgian nation state and a new constitution had to be drafted, they used their martyrdom as victims of the oppressive Dutch regime in a very clever way to turn this political model into a constitutional reality. In sum, the entry of the political offence into the constitutional discourse of the Southern Netherlands was not just a result of their struggle against despotism, it was a matter of facilitating the upward social mobility of a small ambitious elite of young bourgeoisie.

7. Conclusion

This article started with a reference to a recent appeal made by Horst Dippel, who has argued that although modern constitutionalism is a frequently invoked concept to describe the transformation of public law in the Western world, there is little understanding about the rise of modern constitutionalism as a political and historical phenomenon. In 1830, as the notion of the political offence first appeared in the modern constitutional discourse, this

85 *Courrier des Pays-bas*, 4 January 1829.

was taken as a starting point for a more in-depth analysis of the French *Charte* and the Belgian constitution, which granted the guarantee of jury trial for political offenders, and according to the Belgian constitution, provided additional guarantees for publicity. By examining its relationship with the press offence, the legal meaning of the political offence was retrieved. Essentially, the political offence was an attack on the political order, inspired by a sense of political distrust of the offender, who considered the institutions to be no longer in accordance with public opinion. As political offences were considered to be essentially different from ordinary criminal offences, they revealed the clear distinction between political institutions and an independent civil society.

The rise of the political offence in the modern constitutional discourse seems to have indicated a shift in the evolution of modern constitutionalism that is most noteworthy. Apparently, in 1830, modern constitutionalism was not only a matter of a supreme law drawing up the essentials of an institutional system in which governmental powers were counterweighted by several other checks and balances and about guaranteeing the classic liberties in order to protect the individual against abuse of power. Besides these classic institutional safeguards, which largely fitted in Montesquieu's scheme of the *trias politica*, the constitutions that emerged out of the 1830 revolutionary wave offered a protection of public opinion as an extra-institutional force, which had to ensure that civil society could never lose its control over political institutions. Granting an advantageous regime to political offenders and press offenders was more than just the introduction of an additional element in the constitutional framing of the struggle against despotism: it marked a profound shift in the political thinking about the nature of this struggle itself. As constitutionalism distinguishes between the laws establishing the state and the laws established by the state, the entry of the political offence into the constitutional text therefore implied its protection in a norm superior to the institutions themselves.

The relationship between the 1830 French *Charte* and the 1831 Belgian Constitution indicated that other countries were highly receptive to these ideas, as they had been put by the leading French Restoration liberals. They were enthusiastically received in the Southern Netherlands, where a small group of young liberals considered them to offer the best arguments for disputing the top-down interpretation of the 1815 Dutch Constitution by the Hague regime. However, this process of legal transfer was inspired by a

particular motivation, as the aim for the embedding of the political offence in the Belgian Constitution was the brainchild of a young and ambitious bourgeois elite. This was a small but influential group, who got in touch with French liberal thought in law school, and subsequently, due to their contacts at the bar and through their press activities. Even though their experiences in the opposition press had enhanced their awareness of the importance of the protection of press offenders, it was the idea of a clear distinction between civil society and political institutions that really moved these youngsters. As the Belgian revolution had had a successful outcome, they managed to gain the political power which they had longed for. Hence, the constitutional embedding of the political offence was the result of a plea for their own upward social mobility.

This case study of Franco-Belgian legal transfer aims to contribute to a better understanding of modern constitutionalism as a part of global history. At first sight however, its global dimension seems to be rather insignificant, since it deals with two countries in the centre of Europe. Obviously, as the political offence appeared in several subsequent European constitutions, the analysis of what happened in 1830–31 could serve as a point of reference for a better understanding of these constitutions.⁸⁶ However, when one aims to leave the classic Eurocentric approaches of legal history behind and tries to understand modern constitutionalism from a more global perspective, one cannot leave the old continental history out. Therefore, even when bearing in mind the European character of this case, it can be viewed within a more global understanding of modern constitutionalism. The entry of the political offence into both the 1830 French *Charte constitutionnelle* and the subsequent 1831 constitution was a clear example of a process of legal transfer from a country with an influential legal culture, France, to a small country

86 The idea of the exceptional position of both political offences and press offences proved to be extremely influential in the aftermath of the next revolutionary wave that moved through Europe. In 1848, when establishing the Second Republic, the new French Constitution once more stated that only political offences and press offences could be tried by jury. The protection of political offenders was even taken to a next level, as the death penalty was abolished in political matters (chapter II, art. 2). Several constitutions, such as the 1837 Spanish Constitution (art. 2), the 1848 Luxemburg Constitution (art. 48, 90, 92), the 1848 *Frankfurter Reichsverfassung* (art. 179 § 2) and the 1848 Sicilian Constitution (art. 84) followed the example and guaranteed the jury trial for political offences or press offences safeguarding as much publicity as possible in political proceedings.

on its periphery, Belgium. There are countless similar phenomena in legal history, especially when the transfer of state models is concerned. The analysis of why and how several groups have used constitutionalism as an instrument to enhance their own social position could therefore offer a fruitful perspective, even for examining similar phenomena outside of Europe. Therefore, even the analysis of legal entanglements within a classic European context could offer informative models that might contribute to a global understanding of modern constitutionalism.

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Discovering Legal Silence: Global Legal History and the Liquidation of State Bankruptcies (1854–1907)

Global legal history offers diverse tools to deal with cross-border issues, e. g., comparative studies, models of cycles or stage models.¹ The way these tools are used differs a lot; the mode, the meaning, and the consequences are analyzed in this volume in depth. To me, their usage seems absolutely plausible when examining an international legal issue. The liquidation of state bankruptcies in the 19th century represents such an international issue. Nonetheless, global legal history has hardly dealt with that problem until today. How can such an absence be explained and what consequences does it have for the science of global legal history?

This phenomenon is seen in light of the liquidation of state bankruptcies during the 19th and early 20th century.² The number of bankruptcies and their impact on foreign citizens had grown enormously since the 1820s.³ This was due to the fact that states started to issue state bonds in other countries; especially British private citizens invested heavily in foreign bonds traded at the stock exchange in London. Interests for such credits were very high; consequently, investors could realize a profit. Their speculative risk was very high, too. Many debtor states did indeed become bankrupt soon after the issuance of state bonds. As an international insolvency regime for states did not exist, actors had to deal with such situations on a case-by-case basis.

Such “liquidations” differed a lot. This was mainly due to the number of involved actors: the debtor state, third states, private investors, creditor protection committees, stock exchanges, and banks. Interested participants formed a heterogeneous group of different legal natures; they were entangled in other words. However, only parts of this group were of a sovereign nature.

1 OSTERHAMMEL (2001) 151.

2 HEIMBECK (2013).

3 REINHART/ROGOFF (2009) 91, Table 6.2.

Even though international law in the 19th century is mainly seen as being state-centered,⁴ the liquidation of state bankruptcies demonstrates that non-state actors played quite a decisive role, too. They were not able to generate norms in public international law themselves, but they were able to influence their governments to generate or to not generate norms. Yet governments could also take decisions contrary to their citizen's interests.

The importance of private actors in such a state-centered legal regime like public international law is probably one reason that led to the fact that global legal history has neglected the liquidation of state bankruptcies. Moreover, the problem of the liquidation of state bankruptcies is placed at the crossroad between law and economy as well as between public and private international law. This unclear allocation might have also led to global legal history's ignorance regarding this issue. Furthermore, even today the "History of International Law" usually does not form a separate subject at universities.⁵ It forms part of legal history or international law and is "only a poor cousin of legal history."⁶ Yet, when the general subject which encompasses the problem of the liquidation of state bankruptcies is still not dealt with in national legal history discourses, it is hardly surprising that an area like global legal history does not deal with the topic as well. Moreover, analyzing the liquidation of state bankruptcies from global legal histories perspectives causes quite practical problems: Firstly, the variety of involved states leads to multiple languages in which sources will be found. Secondly, most past authors who published on single bankruptcies (mostly historians) were usually citizens of one of the European creditor states (Great Britain, France or Germany). Thus, when using historical material as a basis for the application of global legal history, we need to be very careful not to "Europeanize" the units of comparison in how they are chosen. Or – if we choose such units – we have to be aware of that fact.

4 The growing role of individuals in public international law in the 20th century has usually been seen with the rise of the human rights movement. However, in the 19th century, non-state actors increasingly tried to influence public international law, too. They therefore aligned with others to create specific interest groups, e. g., creditor protection committees but also the peace movement. With regard to the liquidation of state bankruptcies, their role should not be underestimated even though it was still short of the power such interest groups gradually received in the 20th century.

5 See VEC (2011).

6 VEC (2011) 29.

However, the question of whether we then especially need to use *global* legal history to analyze historical liquidations of state bankruptcies needs to be affirmed. Because the current lack of application by global legal history's analytical tools can only be seen when using exactly those tools by examining and comparing case studies. It is as important to discover and interpret which issues a legal regime does not cope with as it is to analyze which aspects are dealt with and in what way.⁷

Thus, the lack of an (international) insolvency regime led to a lack of global legal history engaging with the problem and offering analytical tools to analyze the situation or even to introduce problem solving mechanisms. This effect was further strengthened by the fact that the History of International Law – in so far as such a discipline did or does exist – has also hardly dealt with the topic.

Even though private and state actors increasingly had to deal with state bankruptcies, they did not introduce an international insolvency regime. They did not even form single conventions or treaties dealing with formal and, or substantive questions regarding such liquidations until 1907. International lawyers as well as governments rather dealt with a debtor state's bankruptcy on a case-by-case basis using legal, military or political tools to solve the situation in the easiest way.

However, some of the modes actors used to liquidate debt found their way into public international law, e. g., the debt commissions in Egypt and the Ottoman Empire. Yet, global legal history did not even “discover” these legal mechanisms, as the entire question of the liquidation of state bankruptcies had not been dealt with.

In the following three case studies will be examined to show how norms in public international law were both introduced and not introduced and how and why global legal history has not yet provided tools to understand this overwhelming legal silence. Firstly, Egypt (1862–1904) and the Ottoman Empire (1854–1907) will show how single mechanisms of debt liquidations were used by international lawyers to justify the extension of public international law as a legal order. Then, the Venezuelan case will demonstrate how an international treaty establishing a general legal principle was

7 Thomas Duve also emphasized in his thoughts on “European Legal History” or the “History of Europe” and its role in today's history that one problem is that lawyers discussing Europe do not clarify what Europe is or rather what it is not. DUVE (2012) 26.

introduced. Only the comparison of these case studies – that means using a tool provided by global legal history – will demonstrate the reasons exactly why this legal field has not yet engaged with this issue.

This selection of case studies also raises a problem global legal history is often confronted with: the (underlying and often unspoken) territorial conceptions we have. Especially regarding International law in the 19th century, when lawyers were often blamed for being “Eurocentric.”⁸ Yet this problem of arguing from a certain (often) European perspective is not only one which arises in International law but also in global legal history. Regarding the liquidation of state bankruptcies in the 19th century this accusation cannot be avoided: At this time creditor states were from Europe (mainly Great Britain and France) and debtor states were mostly non-European nations.⁹

I. Historical Background and Terminology

The 19th century is said to be a period of globalization, in which people, traditions, languages, goods, and money crossed state borders back and forth.¹⁰ Especially the volume and significance of international financial transactions had grown enormously since the 1820s.¹¹ This was due to several reasons; amongst others, due to industrialization the number of people able and willing to invest money in cross-border transactions had increased enormously. On the other hand, many young republics, especially but not limited to the Latin American ones, needed capital to finance their state building processes. Hence, they emitted state bonds on European financial markets, mainly in London.

However, after only a few years several state bankruptcies followed.¹² Those were often not caused by the sovereign’s prodigality but by border defense costs and military activities as well as by big investments in infrastructure. Such state bankruptcies created severe difficulties for private investors as well as foreign banks, stock exchanges, and their respective

8 See, e.g., ANGHIE (1999); BECKER LORCA (2010).

9 See REINHART/ROGOFF (2009) 91, Table 6.2.

10 See, e.g., OSTERHAMMEL (2009); BAYLY (2009).

11 QUITTNER-BERTOLASI (1936) 603–605.

12 See REINHART/ROGOFF (2009) 91, Table 6.2.

home states as an international insolvency regime did not exist. Therefore, they had to negotiate and try to find acceptable solutions against the backdrop of political, economic and social considerations. Thus, the failure of international financial transactions caused the need for regulation between the said different actors whose legal characters differed fundamentally. Therefore, several normative spheres – not only an international one – were automatically affected. Thus, entanglements on a subjective level (regarding the quantity and quality of involved actors) caused entanglements on an objective level (regarding the different normative spheres).

An analysis of the said plurality of normative spheres presupposes some thoughts about norm creation processes.

The expression “juridification” is neither defined by lawyers, nor by political scientists or sociologists. Terms like normatization, juridification, *Verrechtlichung*, *Normierung* or *Verregelung* are used rather differently.¹³ Regarding the question whether norms in public international law were introduced by and in the context of the liquidation of state bankruptcies, three forms of juridification might be possible: the ratification of international treaties and conventions, the introduction of customary international law, and the acceptance of specific state practice as part of public international law by jurists.

A state is bankrupt if it is not willing or unable (or both) to fulfill its financial obligations towards its creditors.¹⁴ In contrast to private individuals or companies a state’s decision to declare its bankruptcy depends not only on financial but also on social, economic, and political reasons.¹⁵ Yet for foreign private creditors the state’s motive for the decision did not really matter: Even if the debtor state still had financial means at its disposal, it needed them to uphold its administration and its infrastructure to a minimum degree.

As public international law was a legal regime between states¹⁶ (the Holy Sea was an significant exception), the participation of third states was very important. Third states could have been involved in three different ways: they could have granted loans to the debtor state themselves, they could

13 See a brief summary: VOIGT (1980) 16–18.

14 PFLUG-NÜRNBERG (1898) 1.

15 REINHART/ROGOFF (2009) 51.

16 MARTENS/BERGBOHM (1883) 231 et seq.; LISZT (1902) 34–40; OPPENHEIM (1905) 3 et seq.

have guaranteed the debtor state's loans *vis-à-vis* banks or they could have protected their citizens diplomatically. Whether a creditor state protected its subjects diplomatically was a question of its digression.¹⁷ However, forms of such actions varied enormously: sea blockades, trade embargos, the establishment of international debt administrations, (partial) occupation of the debtor state's territory or military attacks were some acts undertaken by creditor states.¹⁸ As an international insolvency regime did not exist, the legality of such measures depended on general norms in public international law, namely the principle of non-intervention.¹⁹

II. International Problems, Multiple Normative Responses and Global Legal History's Neglect

A. Egypt (1862–1904): International Debt Commission

Egypt had been a part of the Ottoman Empire since 1517. In the 19th century Egypt slowly received more sovereign rights. From the early 19th century the Egyptian Khedive undertook financial investments, in order to build canals, streets, irrigation systems and dams.²⁰ In the long run those measures did indeed improve the country's economic and financial situation. However, they first necessitated huge financial investments which were amortized only slowly.

Thus, Egypt's debts grew progressively. In 1862 the Khedive Muhammad Saïd (1854–1863) started to issue bonds on European financial markets. Between 1862 and 1870 Egypt issued new bonds in Europe amounting to £33,204,060. In 1862 state revenues were roughly £3,799,000, and expen-

17 In 1848 Lord Palmerston announced: "I have to inform you, [...] *that it is for the British Government entirely a question of discretion, and by no means a question of international right*, whether they should or should not make this matter the subject of diplomatic negotiation." [original emphasis] FISCHER-WILLIAMS (1929) 268–269.

18 LIPPERT (1929) 924.

19 See, e.g., VEC (2010); BERNER (1860); CARNAZZA-AMARI (1873); ERBER (1931); FLOECKHER (1896); ROLIN-JAEQUEMYS (1876–1877).

20 MANSFIELD (1971) 7. Within ten years the amount of Egyptian exports to Great Britain grew sevenfold: In 1854 it was £3,000,000, in 1858 £8,000,000 and in 1864 £22,000,000. LANDES (1958) 56. See for a detailed description of Muhammad Ali's reform program: ISSAWI (1961) 4–7.

diture £9,089,000.²¹ The debts owed out of the issuance of short-term loans were about £12,000,000 in the same year.²²

When the state's financial situation became more and more tight, the Khedive asked the British government to send a commission to examine the country's administration and make recommendations. As a consequence of the so-called Cave Report, which had exposed massive problems in the country's organization and supervision,²³ the Khedive established an international debt administration in May 1876.²⁴ A commissioner from Great Britain, France, Italy, and Austria-Hungary were members in this body. In 1885 a German and a Russian delegate joined them. Even though the administration's legal basis was under Egyptian law, the body's legal nature was international as the Khedive could only abolish it with the foreign governments' consent.²⁵

The *Caisse de la dette publique d'Égypte* had three functions: It acted as a special representative organ for the foreign creditors, it administered the country's debt service and it controlled the Egyptian financial administration. Therefore, all state revenues were given directly to this international body. The debt administration had then to authorize all payments out of the state budget and had to allow the issuances of new loans.²⁶ The *Caisse* appointed its civil servants and determined its budget autonomously. Yet while the French government (like the Italian and the Austrian one) sent an own representative, the British government refused to become directly involved. Therefore, the British bondholders themselves nominated Sir Evelyn Baring (who later became Lord Cromer) to represent them in the *Caisse*.

In addition to these legal measures, the Khedive had established mixed tribunals which were also in charge of conflicts between foreign investors and the Egyptian state as well as him personally.²⁷ Officially, judgments were only enforceable in the Khedives private estate. However, as the latter had

21 LANDES (1958) 337.

22 LANDES (1958) 131.

23 MCCOAN (1882) Appendix 438–441.

24 Parliamentary Papers, 1876 [C.1484], Correspondence respecting the Finances of Egypt, Lord Lyons to the Earl of Derby; March 23, 1876; Egypt No. 8 1876, No. 24.

25 DEVILLE (1912) 183.

26 POLITIS (1894) 247.

27 Wilhelm Kaufmann emphasized however that this right to sue was unlawful. KAUFMANN (1891) 61–65; see also REYNAUD-LACROZE (1905) 47.

never differentiated between his own and the state's needs, when using the borrowed money,²⁸ the creditors were *de facto* also able to enforce judgments in Egyptian state belongings.

Later on, Great Britain and France forced the Khedive politically to appoint a British and a French minister to the Egyptian state council. This act increased the domestic tensions in Egypt and led to the growth of the national movement. On the other hand, when Ismaïl Pascha tried to modify the state council into a parliament with more direct powers and when he dismissed the two said foreign ministers, the tensions between him and London increased.²⁹ The Khedive was thus in a quandary between his people and the powerful creditor governments. Even though Ismaïl Pascha finally reinstalled the two foreign ministers and assigned them a veto power, his relationship with the British and French government was rather tense. The latter finally persuaded the Ottoman Sultan to depose the Egyptian Khedive from his position; the Sultan installed Ismaïl's son Tewfiq instead. Both the political and the financial situation within the country and regarding the creditor states remained stiff. In spring 1882 the situation finally escalated so that British troops bombarded Alexandria and occupied the country shortly afterwards.

Even after the beginning of the British occupation (and related to that its administration) in Egypt in fall 1882 – which was officially only an indirect one³⁰ – the Egyptian financial situation worsened. Therefore, Great Britain asked the other European creditor states which were represented in the *Caisse* a) to agree to a new loan issued by Egypt and b) to lower the latter's financial obligations regarding all existing foreign loans. However, when the Khedive temporarily suspended the payment, France threatened to sue him before the mixed tribunals.³¹

Thereupon, in March 1885, at a conference in London, Great Britain, France, Austria-Hungary, Germany, Italy, Russia, and the Ottoman Empire

28 WYNNE (1951) 580.

29 ROTHSTEIN (1910) 82 et seq.

30 Parl. Papers, 1887 [C. 5050] [C. 5110], Further Correspondence respecting Sir H. Drummond Wolff's Mission, Convention between Great Britain and Turkey respecting Egypt, Convention between Great Britain and Turkey respecting Egypt; May 22, 1887 (Sir H. Drummond Wolff to the Marquis of Salisbury; May 22, 1887; Egypt No. 7 (1887), Inclosure in No. 88, Artikel V).

31 DÜLFFER (1997) 276–277.

agreed to guarantee an Egyptian loan of £9,000,000 as well as to lower the interest of the existing loans.³² Furthermore, Great Britain was authorized to administer the country on its own. However, if Egypt had not fulfilled its current interest payments by 1887, the said European creditor states would have established a truly international administration which would have controlled Egyptian state finances.³³

Shortly afterwards Great Britain and the Ottoman Empire agreed to send a British and an Ottoman commissioner to Egypt who should survey the political and economic situation. However, the Sultan never ratified the so-called I. Drummond-Wolff Convention (1885).³⁴ In 1887 the Sultan and the British government negotiated the II. Drummond-Wolff Convention³⁵ which stipulated the withdrawal of British troops from Egypt (unless “extraordinary circumstances” made longer British presence necessary). The Sultan did not ratify this convention, either.

In roughly 20 years under the (indirect) administration of Lord Cromer as British Consul-General in Egypt, the state revenues had increased from £9,000,000 in 1883 to £15,682,500 in 1906.³⁶ Because of his successful management of the country, the European creditor states conferred many competences from the international debt administration back to the Egyptian state in 1904.³⁷

- 32 According to article VII of the declaration each guarantor was liable for the entire amount of £315,000 per annum. However, Russia declared explicitly that it understood itself to be liable for only 1/6. Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey, signed in London, March 17/18 1885.
- 33 RICHMOND (1977) 134; MANSFIELD (1971) 99. Lord Cromer announced that such a tendency had materialized during the past years: “National interest tend towards cosmopolitanism, however much national sentiments and aspirations may tend towards exclusive patriotism.” CROMER (1908) 301–302. However, at the same time he doubted that a common international action would be successful: “For all purposes of action, administrative internationalism may be said to tend towards the creation of administrative impotence.” *Idem* 304.
- 34 Convention between Her Britannic Majesty and His Imperial Majesty the Sultan of Turkey, relative to Egyptian Affairs. Signed at Constantinople, October 24, 1885.
- 35 Convention between Great Britain and Turkey respecting Egypt, May 22, 1887; Parl. Papers, 1887 [C. 5050] [C. 5110].
- 36 MANSFIELD (1971) 103. Marlowe enlisted measures taken by Lord Cromer in detail. MARLOWE (1965) 173 et seq.
- 37 REYNAUD-LACROZE (1905) 75; POLITIS (1904); HELD (1925) 629–630. In July 1888, Lord Cromer had established a reserve fund in which all surplus revenues were paid. As soon as the fund contained more than £2,000,000, the surplus was used for the foreign debt

European creditor states became heavily involved in Egypt (the British government a few years after the French one). By manning the international debt commission – which was officially an Egyptian state organ – and having posts in key positions in the country, they did not only influence the Egyptian bankruptcy’s liquidation but they *de facto* carried it out. However, *de iure* they did not introduce norms in public international law by establishing the international debt commission.

The partial development initiated by the Egyptian liquidation, which nevertheless took place in public international law, can be seen only, when also examining the Ottoman state bankruptcy. Comparing both cases – in other words using global legal history’s analytical tools – will show how and in what way international norms were generated or rather were not generated.

B. Ottoman Empire (1854–1907): Transnational Debt Commission

Nearly simultaneously with Egypt her suzerain, the Ottoman Empire, went bankrupt. However, while creditor states were highly involved in the Egyptian debt settlement, they hardly dealt with the Ottoman insolvency.

The Ottoman Empire had started issuing short- and long-term bonds in London and Paris in 1854 to finance the Crimean war.³⁸ Within a very short time the Sublime Porte³⁹ issued many bonds to European private investors and thereby became more and more indebted. The government used the money to defend the large country against external attacks, to maintain the Sultan’s palace and to pay for the state administration. The latter was, however, highly ineffective and huge sums of money were wasted or misapplied. Reform measures, especially the *Hatt-i Hümayûn* (1856), which stipulated the introduction of a state budget and a central financial admin-

service. Without the creditor states’ authorization, the fund could not be used as collateral for Egyptian loans.

38 SUVLA (1966) 99. Until 1854 the Ottoman Empire had not issued any loans abroad but only with domestic Galata bankers. RODKEY (1958); BIRDAL (2010) 25.

39 In a narrow sense the term “Sublime Porte” described the Sultan’s ministers and their areas of competence. Europeans referred to the entire Ottoman government that way though. YASAMEE (1996) 30, footnote 55; BLAISDELL (1929) 1, footnote 1.

istration, had not been successful.⁴⁰ In the late 1850s state revenues were about £6,661,379, state expenditure roughly £6,861,697.⁴¹

Between 1863 and 1876 the Sublime Porte issued bonds on foreign financial markets worth about £200,000,000;⁴² out of the state revenues of £12,000,000 (in 1874) 55 per cent were used to repay foreign credits.⁴³ Despite the continuous money inflow, the financial situation of the state worsened steadily.

Yet it took five years (after the official Ottoman bankruptcy in 1876) until a transnational debt administration was established through a Sultan's firman, the so-called *Mouharrem Decree*, in December 1881.⁴⁴

In the meantime non-state actors as well as creditor governments had undertaken other actions to deal with the Ottoman financial fiasco. Already in 1876 London banks had stopped lending money to the Ottoman Empire.⁴⁵

Moreover, both the British and the French government had banned trade with Ottoman bonds to protect their citizens of financial harm.⁴⁶ Furthermore, the French government had even prohibited the issuance of a particular bond amounting to £16,000,000 at the Paris stock exchange.⁴⁷ However, all in all European governments had hardly intervened to protect their citizens: they did not want to become legally involved, neither on the domestic nor on the international level. The above-mentioned measures were thus not only exceptions but they also did not have a particular effect

40 Rescript of Reform (February 18, 1856), available on <http://www.anayasa.gen.tr/reform.htm>. The *Hatt-i Hümayûn* extended reforms which had been determined by the *Hatt-i Sherif of Gülhane* in 1839. The latter had initiated the so-called *tanzimat* era in the Ottoman Empire. Therefore, the *Hatt-i Hümayûn* is also called "continuation of the human rights declaration of the French revolution," as it stipulated individual's rights. KREISER/NEUMANN (2008) 337.

41 ROUMANI (1927) 15.

42 BIRDAL (2010) 28; CLAY (2000) Appendix. Roumani discussed all loans in detail. ROUMANI (1927) 23–52.

43 MANZENREITER (1975) 99.

44 Parl. Papers, 1911 [Cd.5736], Turkey: Imperial Ottoman Debt; The Decrees of 28 Muharrem, 1299 (December 8 (20), 1881), Turkey No. 1 (1911).

45 FEIS (1961) 18–19.

46 See BIRDAL (2010) 43.

47 This event was called "l'affaire Mirès." PLESSIS (1985) 213–214, footnote 590. KÖSSLER (1981) 43; WYNNE (1951) 398–399.

on the juridification of the liquidation of state bankruptcies. Thus, on other normative levels (not in public international law) actors did indeed create norms.

Meanwhile private European investors had continuously asked their governments' to protect their financial interests diplomatically by establishing an international debt administration in Constantinople which was meant to be comparable to the one in Egypt.⁴⁸ Especially after the Ottoman defeat in the Russian-Ottoman war and the harsh terms of the treaty of San Stefano in March 1878, European creditors complained that the Sublime Porte was no longer able to fulfill its financial obligations. The Sublime Porte did not only have to pay an enormous war indemnity to Russia (£149,095,907), but it also lost large parts of the territory which served as securities to foreign loans. The major European powers – especially Great Britain and France – were strongly opposed to the regulations of the said treaty and thus appointed another international conference where those issues should be discussed. However, their main concerns did not apply to those financial questions but to the maintenance of the fragile *balance of power*.⁴⁹ They were rather afraid that Zarist Russia would gain too much direct political influence in the South East of Europe. Hence, in July 1878 Otto von Bismarck invited European diplomats to the Berlin Conference where they discussed the distribution of the Balkans and the Ottoman war indemnity.

The financial situation of the Ottoman Empire and its obligations to European private investors hardly played a role in the diplomats' negotiations. However, the Italian delegate officially propounded the creation of an international debt administration manned with representatives of the creditor states:

“The Powers represented at the Congress desire to recommend to the Sublime Porte the establishment at Constantinople of a *Financial Commission*, composed of specialists, *named by their respective Governments*, which Commission shall be charged to examine into the complaints of the bondholders of the Ottoman debt,

48 Parl. Papers 1876 [C. 1424], Correspondence respecting the various Ottoman loans, Mr. Corfield to the Earl of Derby; October 9, 1875; Turkey No. 1 (1876), No. 9; Parl. Papers 1876 [C. 1424], Correspondence respecting the various Ottoman loans, Mr. Parnell to the Earl of Derby; October 13, 1875; Turkey No. 1 (1876), No. 19.

49 HEIMBECK (2011).

and to propose the most efficacious means for satisfying them as far as is compatible with the financial situation of the Porte.”⁵⁰

Yet, European governments valued their political aims, especially the stabilization of the *balance of power*, higher than the enforcement of their citizens’ private financial claims. Therefore, they refused to establish an international debt administration.

Hence, private purchasers started direct negotiations with the Sultan regarding Ottoman debt payments.⁵¹ Especially after the latter had signed an agreement with the domestic Galata bankers on bond conversion which was highly detrimental to the European creditors the atmosphere between the latter and the Sublime Porte worsened.⁵² As a consequence, the British government temporarily stationed its fleet off the Ottoman coast.⁵³ Finally, foreign private creditors and the Sultan agreed on the introduction of a debt administration in Constantinople which was implemented by the *Moubarrem Decree*.⁵⁴

Seven delegates were present in the *Conseil d’Administration de la Dette Publique de l’Empire Ottomane*: a British, French, German, Italian, and Austrian representative as well as one of the Ottoman creditors, and one employee of the Ottoman state bank (Banque Impériale Ottoman).⁵⁵ In contrast to the Egyptian debt administration, European national creditor groups nominated their representatives; the administration had thus a transnational legal character. Out of the 5,704 employees of the *Conseil* only 88 were Europeans.⁵⁶ The overwhelming manning by Ottoman employees was supposed to strengthen the administrations acceptance by the population.

The *Conseil* possessed broad competences: It administered the revenues which had been assigned to it by the Sublime Porte and used them to repay

50 Parl. Papers 1878 [C. 2083], Correspondence relating to the Congress of Berlin with the Protocols of the Congress, Lord Odo Russell to the Marquis of Salisbury; July 16, 1878; Turkey No. 39 (1878), No. 40 [emphasis by author].

51 DU VELAY (1903) 412–419.

52 ROUMANI (1927) 104–108.

53 *Ibidem*.

54 The Sultan also reduced the remaining long term loans which amounted to £191,000,000 in 1881 to £106,000,000.

55 National creditor groups claims were composed as follows: Great Britain 29%, France 40%, Belgium 7,2%, Netherlands 7,59%, Germany 4,7%, Italy 2,62%, Austria-Hungary 0,97% and Ottoman creditors 7,93%. KÖSSLER (1981) 53.

56 BIRDAL (2010) 105.

foreign claims; furthermore, it prepared an annual budget. Lastly, the Ottoman Empire could abandon taxes which were used for the foreign debt service only with the *Conseil's* authorization.⁵⁷ The Sublime Porte had appointed a civil servant to control the *Conseil*; however, this employee only had consultative competences.

The work of the *Conseil* was quite successful, not only regarding the debt service it had to fulfill according to the *Mouharrem Decree* but also regarding the Ottoman financial administration and tax system in general.⁵⁸

In contrast to the Egyptian bankruptcy, creditor states were hardly involved in the liquidation of the Ottoman bankruptcy. States did not create any norms in public international law. State practice did not develop.

However, only a decade after the establishment of the debt commissions in Cairo and Constantinople, international lawyers started to mention *both* of them in their textbooks and articles. Jurists did not expound the legal problems connected with such liquidations in the context of state sovereignty and the principle of non-intervention, but they discussed them as examples in their writings on “international commissions.”⁵⁹ They referred to both debt commissions in their explanations on international commissions, even though they differed fundamentally regarding their legal nature, composition and competences.

Such associations had been increasingly established after 1815, when the Central Commission for the Navigation of the Rhine was founded at the *Congress of Vienna*. During the next decades the internationally-manned commissions for the Danube followed as did the International Telecommunication Union or the Universal Postal Union.⁶⁰ In other words, during the course of the 19th century a process of institutionalization had taken place in state practice which was mirrored in public international law's legal doctrine. The number of international treaties in this area (as well as in many others) and their legal character had changed dramatically as treaties started to have an inherent norm creating power.⁶¹ International commissions started to become a slowly recognized institution in public international law.

57 Reynaud-Lacroze discussed the debt administration's competences in detail. REYNAUD-LACROZE (1905) 90.

58 BIRDAL (2010) 8, 106, 174; WUARIN (1912) 423.

59 ULLMANN (1898) 142–143; GAREIS (1901) 144–147; LISZT (1902) 134–138.

60 See, e.g., HERREN (2009) 15–18.

61 VEC (2006) 104–147.

Yet, as public international law was a young legal discipline,⁶² lawyers tried to strengthen it *vis-à-vis* other legal disciplines or even to expand its scope. Therefore, they used the international debt administrations in Egypt and the Ottoman Empire – which differed so fundamentally – as justification narratives⁶³ to legitimize the existence and the usage of international commissions as a legal institute in public international law. This phenomenon of instrumentalization becomes clear when examining major contemporary textbooks.

Famous German international lawyer Franz von Liszt, for example, did not distinguish between both debt administrations when enlisting samples for international commissions:

“Es gehören ferner hierher [zu den ständigen Staatenvertretungen, LH] die Internationalen Kommissionen, die zur Überwachung der Finanzverwaltung einzelner Staaten eingesetzt worden sind.

Die öffentliche Schuld der Türkei wird verwaltet durch eine Kommission, in der England, Deutschland, Frankreich, Österreich, Italien vertreten sind.

Zur Überwachung der ägyptischen Finanzverwaltung [...] wurde bereits 1876 eine Commission de la caisse de la dette publique eingesetzt. Sie erhielt den Charakter eines eigentlichen internationalen Organs durch das Liquidationsgesetz vom 17. Juli 1880.”⁶⁴

The same goes for Emanuel von Ullmann who was a cosmopolitan and defended the ideas and projects discussed on the Hague Conferences by heart:⁶⁵

“Derlei Kommissionen bestehen derzeit [...]

Die Finanzkommissionen zur Wahrung der Interessen der auswärtigen Gläubiger einzelner Staaten.

a) Die internationale Kommission zur Verwaltung der türkischen Staatsschuld, bestehend aus Delegierten folgender Staaten: Deutschland, England, Frankreich, Österreich-Ungarn und Italien.

b) Die internationale Kommission zur Verwaltung der ägyptischen Staatsschuld.”⁶⁶

However, this usage as a justification narrative only becomes clear when comparing both cases. Thus, only such an analytical tool as comparing units

62 Public international law only became a separate legal science at the turn of the century when special chairs at universities were introduced. NUZZO/VEC (2012).

63 See Forst's and Günther's discussion of the term “narrative.” FORST/GÜNTHER (2010) 9.

64 LISZT (1898) 94; LISZT (1902) 137–138.

65 In memoriam: Emanuel von Ullmann (1914) 346.

66 ULLMANN (1908) 236–237.

as provided by global legal history can demonstrate such a normative development in public international law. At the same time, however, the comparison will illustrate that this juridification happened within a vast area of legal avoidance: states and international lawyers hardly formed norms in public international law. They wanted to avoid legally binding themselves now and in the future. The fact that international law hardly existed regarding such an international matter as the liquidation of state bankruptcies led to the fact that global legal history did not analyze this very ‘legal silence.’ Yet, global legal history as a methodological tool reduces its own value by not dealing with such problems of an inherent cross-border nature.

C. Venezuela (1902–1907): Drago-Porter Convention

A major development regarding the liquidation of state bankruptcies was initiated by the Venezuelan insolvency which occurred in 1901. The Venezuelan financial misery had started after the country’s independence in 1821 and the state budget had never recovered since. Due to domestic political tensions during the entire century, as well as a civil war, the respective governments could not follow a coherent economic policy. Moreover, a financial administration including a working tax system did not exist, as did a functioning infrastructure.⁶⁷ The growing export of raw materials did not lastingly support the country’s economy. Even after Venezuela had started issuing bonds on European financial markets in the 1820s, she did not recover financially.

In the beginning of 1901, Venezuelan president Cipriano Castro stated that from then on only Venezuelan courts were allowed to check whether and to what amount financial claims of foreign investors and states existed against Venezuela. Simultaneously, he did not recognize the validity of Venezuela’s financial obligations *vis-à-vis* European private creditors arising out of the issuance of state loans. Furthermore, all diplomatic protests against these determinations were unlawful.⁶⁸

After failed negotiations between European banks, European creditor states and the Venezuelan government, Great Britain, Germany and Italy

67 ZEUSKE (2007) 75–76.

68 FIEBIG-VON HASE (1986) 850. Castro also declined all financial obligations which had arisen before 1899. HERSHEY (1903) 261.

threatened Caracas that they would intervene militarily, if Castro did not change his mind. However, Castro let the ultimatum expire, so that the three above-mentioned countries started to bombard the Venezuelan coast.⁶⁹

Against this backdrop of European military intervention the Argentine secretary of state and international lawyer Luis María Drago had proclaimed that the use of force to collect state debts was unlawful.⁷⁰ Investors had willingly speculated and thus accepted potential financial losses.⁷¹ His note became known as the Drago Doctrine.⁷² The key parts of the doctrine read as follows:

“The collection of loans by military means implies territorial occupation. [...] Such a situation seems obviously at variance with the Monroe Doctrine. [...] The principle which it [Argentina] would like to see recognized is: *That the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.*”⁷³

Drago himself emphasized that his doctrine neither formed part of international law nor constituted an abstract academic principle. He rather wanted to introduce a principle of diplomacy valid *vis-à-vis* South American states.⁷⁴

Furthermore, he asked U.S. president Theodore Roosevelt to support his position because every intervention in Latin America would constitute an unlawful occupation and thus infringe the Monroe Doctrine. Roosevelt declined Drago’s additional request to act as an arbiter and referred the state parties to the newly established Permanent Court of Arbitration in The Hague.

Already in 1901 Roosevelt had summed up the U.S./American position regarding European financial interventions *vis-à-vis* South American states: “We do not guarantee any state against punishment if it misconduct itself, provided that punishment does not take the form of the acquisition of territory by any non-American power.”⁷⁵ This continuation of the Monroe Doctrine became known as Roosevelt Corollary.

69 See detailed background information: BASDEVANT (1904).

70 DRAGO (1903) 601.

71 CALVO (1903) 599.

72 DRAGO (1903) 597–603.

73 DRAGO/NETTLES (1928) 209 [original emphasis]. See a brief explanation on the Monroe Doctrine: GRANT (2008).

74 DRAGO (1907) 709–710.

75 DRAGO (1907) 718.

The Permanent Court of Arbitration only decided that the financial claims of the three intervening creditor states were to be satisfied preferentially to the ones from all other creditor states.⁷⁶ In addition, Venezuelan (domestic) courts adjudicated upon disputes between foreign companies and the Venezuelan state and an American diplomat also decided some inferior issues. Thus, because a special international judicial body regarding disputes arising out of the liquidation of state bankruptcies still did not exist, a plurality of dispute resolution bodies was established.

Drago's essay initiated vivid discussions amongst international lawyers.⁷⁷ His Argentinean colleague Carlos Calvo – who was a well-know public international lawyer, living and practicing in Europe – sent a circular letter to the members of the *Institut de Droit International* asking them for a legal expert opinion about the above mentioned questions.⁷⁸ Those lawyers, amongst others Frédéric Passy, John Westlake, Ludwig von Bar, and Pasquale Fiore, belonged to the elite of this legal field. Even though their conclusions differed in detail, they generally agreed that the principle of state sovereignty was only of a relative nature.⁷⁹ Francis Charmes, on the other hand, emphasized the relative nature of state sovereignty with regard to military intervention to enforce state debts:

“Je ne parle que du droit strict et je conclus que la même conduite ne saurait être appliquée toujours et partout avec un Etat momentanément embarrassé, mais loyal et ordinairement fidèle à ses engagements, l’abstention militaire doit être pratiquée. Avec un autre Etat qui présente les caractères opposés, il est légitime d’employer les seuls moyens efficaces pour se faire rendre justice.”⁸⁰

Pasquale Fiore was even clearer:

“Toutefois, en supposant qu’un gouvernement abuse de sa position vis-à-vis des particuliers [...], il pourra arriver à créer un état de choses qui pourra légitimer l’ingérence collective des autres gouvernements dans le but de faire cesser un état de choses anormal. [...] L’intervention pour protéger le respect des principes de la

76 See ANDERSON (1995) 531; MALLARMÉ (1906) 496–500.

77 In early 1903 Carlos Calvo had send a circular letter to 12 members of the *Institut de Droit International* (Frédéric Passy, G. Moynier, John Westlake, Ludwig von Bar, Manuel Torres Campos, L. J. D. Féraud-Giraud, André Weiss, J.-E. Holland, Karl d'Olivecrona, F. M. C. Asser, Francis Charmes und Pasquale Fiore). CALVO (1903) 597–623.

78 CALVO (1903) 597–623.

79 See, e. g., John Westlake: WESTLAKE (1903) 607. See also MOYNIER (1903) 606.

80 CHARMES (1903) 620.

justice, pour réprimer la violence, pour empêcher la violation du droit commun n'est pas en tout case illicite."⁸¹

However, most of them emphasized that military intervention in such financial disputes was unlawful (Passy) or at least not desirable (Westlake) and that states should refer the disputes to the Permanent Court of Arbitration.⁸²

However, there was common agreement amongst international lawyers that the enforcement of financial claims against debtor states was not recognized as separate justification of such interventions.⁸³

Simultaneously, Latin American governments discussed the lawfulness of forcible interventions to enforce financial claims *vis-à-vis* debtor states at the Pan-American Conferences in 1901/02 and 1906. Again, politicians' ideas and concepts on this issue differed, yet no one recognized a concept of absolute state sovereignty.⁸⁴ However, especially semi-peripheral lawyers supported the introduction of international norms and thereby defending their new status as civilized states.⁸⁵ Yet, in 1906 at the Third Pan-American Conference delegates chose to refer the question to the Second Hague Peace Conference, which took place a year later, to be decided together with (mostly European) creditor states. By explicitly not following Drago's suggestion they wanted to avoid giving the impression that Latin American states were unreliable debtors because such an impression would have heavily impeded the future issuance of state bonds on European financial markets.⁸⁶

European states did not pay much attention to the question of forcible debt enforcement *vis-à-vis* sovereign states.⁸⁷ Yet, especially due to U.S./ American clever diplomacy, the participating states finally adopted the so-called Drago-Porter Convention. This convention, which constituted a milestone regarding the settlement of state bankruptcies, limited the use force to enforce financial claims against debtor states:

81 FIORE (1903) 622.

82 PASSY (1903) 604–605; WESTLAKE (1903) 607–608; WEISS (1903) 615.

83 *See, e.g.*, FERAUD-GIRAUD (1903) 615.

84 BÜCHI (1914) 117.

85 BECKER LORCA (2011) 31, 70.

86 This important concept is called reputation argument. *See, e.g.*, TOMZ (2007).

87 This becomes evident when reading the protocols written by German delegates at the conference.

“The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, only applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any “compromis” from being agreed on, or, after the arbitration, fails to submit the award.”⁸⁸

The expression “contractual claims” in the convention also encompasses debts originating in the issuance of state bonds; those were exactly the kind of debts which formed part of absolute state sovereignty according to Drago. However, the convention still did not stipulate any substantive rules regarding the liquidation of state bankruptcies, nor did it stipulate a detailed formal dispute resolution mechanism. Juridification was thus combined with legal avoidance. This combination in the field of public international law – the introduction of norms and non-norms – led to the fact that global legal history neglected the entire issue.

Neither in the 19th nor in the 20th century historical state bankruptcies were compared with regard to questions in the field of public international law, even though the liquidation of state bankruptcies was an inherently trans- and international subject due to the heterogeneity of involved actors. Yet, while economists started to compare such historical bankruptcies in the 20th century,⁸⁹ lawyers did not do the same. Most of them analyzed a single state bankruptcy in depth by illustrating its historical background in detail.⁹⁰

Single historians like Karl Erich Born formed an exception. After describing the historical events which led to the bankruptcies in Russia, the Ottoman Empire and Serbia, he described the way actors had dealt with them; lastly, Born started his conclusion by saying that he wanted to reconsider the experiences which can be made by comparing all cases.⁹¹ He emphasized the relation between banks and governments as one of a mutual nature. Could Born have stated this hypothesis without using such an analytical tool provided by global legal history? Yes, he could have done so. However, his

88 Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, in: *The American Journal of International Law* 2 (1908) 81–85.

89 *See, e. g.*, SUTER (1988); REINHART/ROGOFF (2009).

90 *See, e. g.*, DU VELAY (1903); BASDEVANT (1904); KAUFMANN (1891a, 1891b); ROUMANI (1927).

91 BORN (1988) 25: “Zum Abschluss möchte ich erörtern, welche über den Einzelfall hinausreichenden Erfahrungen diese Schuldenkrisen vermitteln.”

hypothesis only becomes compelling because he backed it with several examples from state practice.

Even though many of the signatory states expressed reservations (18 out of 39) and the scope of the convention was rather restricted, creditor states restrained from intervening militarily against debtor states ever since. This is mostly due to a changed power distribution in the international community. By the turn of the 20th century the United States had become both a major creditor country and a strong political and military power on the American continent. European creditor states could not interfere in Latin America without risking retaliation actions taken by the U.S. government against them.⁹² While public international law had been Eurocentric before, it started to generate universal institutions around the turn of the century.⁹³ Furthermore, public international lawyer's role changed. They increasingly used examples from state practice to justify specific norms in this legal regime.⁹⁴ According to Arnulf Becker Lorca public international law's transformation around the turn of the century was especially due to Latin American lawyers because they wanted to use public international law to justify and defend their sovereign position in the international state community;⁹⁵ they therefore highly supported juridification in international relations.

III. Conclusion

The increasing issuance of state bonds on international stock exchanges and the oftentimes sooner or later ensuing state bankruptcies caused huge challenges for all involved actors. The number of involved actors grew enormously; additionally, their interests and legal nature differed significantly. As a consequence actors were able to deal with a debtor states financial breakdown through norms on different normative spheres: national legal systems (in the debtor or creditor states), self-regulatory regimes (of banks, creditor protection committees or stock exchanges) and public international

92 Suter and Stamm emphasized that debt liquidations were most beneficial for debtor states when an old hegemony (Great Britain) disappeared and a new one (U.S.A.) arose. SUTER/STAMM (1992) 649.

93 KOSKENNIEMI (2011b).

94 KENNEDY (1997–1998) 104.

95 BECKER LORCA (2011).

law. However, the involved groups were not static but changed against the backdrop of political and economic interests. This continuous change (“Binnendifferenzierung”)⁹⁶ led to a new geography of actor groups. The usage of norms (or the avoidance to introduce norms) happened on several legal levels. Thus, two levels of entanglements were formed and further influenced each other mutually.

Especially in public international law, actors avoided the introduction of an international insolvency regime or at least of some rules regulating such issues. The reasons for such a legal avoidance were manifold: During most of the 19th century international jurists did not recognize the problem of the liquidation of state insolvencies as being part of public international law. Furthermore, German investors and banks were hardly involved in such cross-border transactions until the end of the 19th century. Therefore, German international lawyers – who were very active during the 19th century⁹⁷ – did not bother with that topic. What was most important was the fact that governments wanted to maintain their freedom of action after debtor state’s bankruptcies. They wanted to decide on a case-by-case basis and against the background of political and military developments how to act.

However, this decisive meaning of power politics for the introduction – and non-introduction – of norms in public international law also led to the fact that global legal history has hardly engaged in this issue. Or – to be more precise – it engaged itself by refraining from the issue. Lawyers abstained from analyzing and discussing this topic because they considered it as an economic one. Maybe this is also one of the reasons why global legal history has not discovered the global legal value of the liquidation of state bankruptcies in the past. Power politics caused an overwhelming use of the tool of legal avoidance in public international law. Yet using stage models⁹⁸ or comparing case studies is not that obvious when – at least from a legal point of view – nothing is there to be compared. Yet it is exactly this lack of norms, this legal silence, in this inherently international field like the liquidation of state bankruptcies which can only be analyzed by using global legal histories tools.

96 FISCHER-LESCANO/TEUBNER (2007) 43–45.

97 KOSKENNIEMI (2011a).

98 OSTERHAMMEL (2001) 151.

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The History of European International Law from a Global Perspective: Entanglements in Eighteenth and Nineteenth Century India

1. Introduction

At present, international relations are globally organized according to the principles of international law. The interaction between states is defined by this multilayered legal framework which is generally recognized by the international community as the main applicable system to regulate relations between states. However, it is only since the twentieth century that such a universal normative system has truly organized the relationships between states around the globe. During the nineteenth century international law as it was construed by European and American publicists, asserted that international law applied only to civilized sovereign states that composed the “Family of Nations.”¹ The appropriation of this normative order by non-Europeans led to its universalization at the beginning of the twentieth century.² Although international law theorists today reject nineteenth century positivism, basic conceptions of state, sovereignty and territorial exclusiveness still form the groundwork for the present international law system.³ Yet there are voices which propose a more pluralistic approach to international law which allows space for values which are derived from non-European traditions.⁴

The history of international law has predominantly focused on the history of European international law, leaving out of consideration normative

1 ANGHIE (2005) describes how in the nineteenth century the cultural differences between non-Europeans and Europeans were emphasized to create a closed international society.

2 See BECKER LORCA (2010) for a description of how non-European lawyers from, for example, Japan and Argentina appropriated European international law theory.

3 KOSKENNIEMI (2001) and KENNEDY (1996) describe the evolution of European international law during the nineteenth century.

4 See, for example, the work of Onuma, especially ONUMA (2000).

orders regulating the relations between polities outside Europe or the relations between European states and non-European entities.⁵ While at present international law is accepted as a universal order, the study of its history is often geographically limited to Europe and thus strongly regionalized. The history of international law is seldom studied from a global or transregional perspective, which in the end is in contradiction to its historical outcome. European states already before the twentieth century interacted intensively with non-European polities; however, the norms that dictated these interactions have not yet been sufficiently studied. Were these norms identical or similar to the norms that regulated the relations amongst European states? Were they part of another regional normative system or did these relations create a new kind of normative order? This article will discuss the relations between the British East India Company and Indian rulers from the mid-eighteenth century onward in order to answer these questions. It shows that a global perspective on the history of international law can be fruitful, contributing to a better understanding of the legal organization of international relations in the age of empire outside Europe and highlighting the particularities of nineteenth century European international law. It was the intensification of global relations that led to a regionalization of European international law. In a period when the European Law of Nations became more elaborate and institutionalized and at the same time the Europeans learned more about non-European customs, international lawyers began to emphasize the particularity of European international law. However, it was not uniquely the Europeans that had developed a system regulating inter-state relations. Other world views in different regions also laid down principles of inter-state conduct.⁶ When Europeans set sail to trade in other parts of the world they were confronted with new cultures and different normative orders. In order to be able to achieve their goals they had to find ways to on the one hand protect their own rights as they were accustomed to in their homelands and on the other hand to comply with the rules set by the host authorities. In the sixteenth and seventeenth century,

5 The opinion that international law was an European concept remained commonly accepted by authors like VERZIJL (1955), KUNZ (1955), and RÖLING (1960). More modern authors who do not consider colonialism of significant importance for the shaping of international law are BEDJAOUI (1991) and BRIDGE/BULLEN (2005).

6 ANAND (2006).

unless agreements for extra-territoriality were convened, the Europeans participated in the various regional systems existing in Asia.⁷ However, European international law became increasingly entangled with these regional orders in the eighteenth century and more persistently in the nineteenth century, creating new dynamics and in the case of India a new system for regulating relations between states.

Indeed, in Asia, before European hegemony, the interactions between polities were regulated according to specific world views. The main normative orders which regulated Asian states in their interactions were the Islamic system of international law, the Hindu system of international law and the Chinese tributary system – also named the Confucian system of international law. While the Chinese tributary system was the dominating normative system in East Asia and parts of Southeast Asia, Hinduism and Islam influenced South- and Southeast Asia, sometimes intersecting with each other in the same regions.⁸ Scholars of the history of international relations in Asia have studied the interactions between states in East Asia, describing the central function of China in regional exchange. However, there is less extensive literature on the interactions between states in South and Southeast Asia outside the European colonial system. Although it is known that the Europeans, when they arrived in Asia, did not immediately impose their own legal systems on local societies, but initially participated in the existing regional systems, the process from a participation of Europeans in regional international orders to the imposition of European international (and, in part, municipal) law has not been sufficiently studied. This paper attempts to describe this process for the Indian sub-continent by analyzing how Britain extended its political and legal control over Indian states, and how little by little the Indian international system was rooted out and later substituted by a new regional system. Yet, the Indian system was not immediately substituted with the European Law of Nations. In a period of transition in which the East India Company gradually became the paramount power in India, new norms regulated the relations between Indian rulers and the British authorities in India, which might have been similar to the European Law of Nations but retained a distinct character. It was this system that gave the Europeans the tools to deprive the Indian states of their legal personality

7 ALEXANDROWICZ (1967).

8 FAIRBANK/TÊNG (1941).

in international law. However, the Indian states for a long period continued to regulate the relations amongst themselves according to the Indian international norms.⁹ European international law, finally, only fully applied to India again when it was recognized by the international community as an independent state in 1947.

This paper will hence begin with a brief outlay of the international political system which existed on the Indian sub-continent when the East India Company became a regional political power in India. It will then continue with a depiction of how Indian states were progressively deprived of their legal personality in international law in practice and how this was legitimized by the British government or Company employees on the one hand and the British international lawyers on the other. In this connection, I will take account of how the Indian political system adapted to the changing situation of international relations. Finally, the paper discusses the disadvantage of comparative history for understanding the position of European international law from a global perspective. Juxtaposing theories of various normative orders can be valuable for a history of ideas but less for a global legal history. Rather, in order to unveil how and why European international law became universal, it seems more suitable to trace the entanglements of plural normative orders in certain regions.

2. The Indian international system and the Mughal Empire

The international system which prevailed in India when the British East India Company became a territorial power was a polycentric system of diverse polities. The polities maintained a tributary relationship with each other. From the smallest units, estate holders (*zamindars*) who possessed many but not all attributes of what we would call sovereignty, to large states with a complex administrative system, from self-administering villages and nomadic tribes to a paramount empire, the hierarchy of the suzerain and the vassal trickled down the echelons to create an extremely complex international system. These polities differed significantly in size, population, leadership, administration, and ethnicity. It is difficult to categorize these states

9 My thesis herewith confirms Lauren Benton's argument that the concept of 'legal pluralism' can be an effective heuristical tool to identify "patterns of structuring multiple legal authorities" in colonial history. BENTON (2002).

without falling into arbitrary generalizations. For this reason, only the largest entities, which were indeed recognized to be states even by nineteenth century European criteria, will be looked at in this paper. Cases were chosen as to their degree of interaction as major states with the British. This makes the interpretation of the significant changes in the international system of India in the late eighteenth century and the first half of the nineteenth century more comprehensible.

In European international law the marks of an independent state were that the community constituting it was permanently established for a political end, that it possessed a defined territory, and that it was independent of external control.¹⁰ Also, the sovereign had to be competent to make peace and war and to enter into engagements.¹¹ In India there were several polities that fulfilled these criteria, that is why they will be referred to as Indian states in this article. However, it is the question whether these polities were indeed recognized as sovereign states in the scope of international law by European lawyers and policy makers. The answer will be discussed here.

From the sixteenth century until the British Crown's administrative assumption over India in 1857 the nominal suzerain of the Indian subcontinent was the Mughal Emperor. He was completely independent of any authority and held his title to his territories by conquest and later by right of descent, as his throne had become hereditary. The emperor not only directly ruled his own territories, but also received the allegiance and tribute of other dependent rulers. These vassals were Indian states which were independent to the extent that they could manage their internal affairs but had to give the Mughal Emperor military support in times of war. The emperor would grant revenue rights to a *mansabdar*, the rulers of the most powerful Indian states, thus giving them key positions in the imperial administration. The *mansab* was not hereditary and the emperor could take it away from his vassal. These vassals would then in turn assume the position of suzerain over the smaller states within their region, which were also to swear allegiance, collect taxes and pay tribute. The right to collect taxes was given by each suzerain to his ministers through land grants (*jhagirs*). The recipient of this grant became the *de facto* ruler of the territory and earned his income from its taxes. The

10 HALL (1924) 17.

11 WHEATON (1866) 49.

Mughal Emperor, according to Muslim law, had the right to collect one fifth of the revenues. This system had been introduced by the Muslim rulers in the thirteenth century and was continued by the British until they abolished it in 1851. Although the emperor was Islamic, he maintained the freedom of religion in his empire and he allowed his vassals to remain Hindu.¹²

The tributary relation between the suzerain and the vassal was the basic tether which bound the states to each other. However, the suzerain could also convoke his vassals to make war, to administer justice or to celebrate a festival. Yet, the interactions between the vassals seemed less intense. They had no obligatory habitual relations amongst themselves imposed by their common suzerain. This meant that each vassal state had its own jurisdiction and operated in relative isolation.¹³

By the beginning of the eighteenth century the Mughal Empire had drifted into decline. Torn by problems of succession, disintegration of the administration and invasions from the north it had to give large concessions to its vassals. In particular the Maratha rulers posed a serious threat to the authority of the Mughal Emperor and after multiple wars they essentially took over the administration of most parts of the empire in central and northern India. They received the right to collect taxes in return for protecting the north-western borders from invasion. By the mid-eighteenth century the Mughal territory was thus ruled through the Peshwa, the leader of the Marathas. The Mughal Emperor in Delhi was afraid the Peshwa wanted to replace him and called in help from the ruler of Afghanistan and from the governor of Oude (Awadh), the Nawab, to fight the Marathas. The confrontation resulted in one of the largest battles in history, the third battle of Panipat in 1761. The Marathas were defeated and expelled from northern India. The Afghan Emperor, Ahmad Shah Durrani, before departing, pronounced a royal *firman* (a decree issued by Islamic officials) which called upon the Indian rulers to recognize Shah Alam II as Emperor. It is notable that this *firman* was also sent to the British East India Company.¹⁴ The ruler of Afghanistan furthermore appointed a loyal regent to the Mughal court. However, he himself became preoccupied with rebellious Sikhs and was not able to continue protecting the emperor. It took the Marathas ten years to

12 TUPPER (1893) 130 ff.

13 TUPPER (1893) 238.

14 RAYCHAUDHURI/DATTA (1998).

regain their military strength and by 1771 they had re-conquered the Mughal territories and captured Delhi. The Mughal Emperor again had to accept their protection and thus became a puppet to the Marathas.¹⁵

In the meantime the East India Company had firmly established itself in the regions of Surat, Madras, Bombay and Calcutta for which it had received trading privileges from the Mughal emperors. However, the French had also gained a foothold in India and were determined to take over control in India. The two countries were already rivaling each other over their possessions in North America and the competition was extended to India during the Seven Years' War (1756–1763). British Company troops were able to defeat the French military in several direct confrontations, and Britain came out as the victor of the war. Nevertheless, rivalries in India continued and both countries pursued a policy of forming alliances with the rulers of Indian states, receiving concessions in return for protecting the Indian ruler against usurpers and rebels. French and British forces thus became engaged in local wars which made new confrontations inevitable.

The East India Company had received from Queen Elisabeth in 1600 the right to make peace or war with any Prince who was not Christian and the right of making treaties of peace and defensive alliances.¹⁶ The Company was hence granted sovereignty in specified non-European regions although it remained a trading company, not a sovereign personality. The Regulating Act of 1773 confirmed this right but required the consent and approbation of the Governor-General, who received complete legislative powers. The Governor-General, in turn, was placed under a general obligation to report all transactions relating to the Government to the Council of the Presidency of Fort William in Bengal.¹⁷ The act did not give any power to Parliament but as the financial problems of the Company grew, this changed. Pitt's India Act in 1784 provided for the joint governance of British India by both the Company and the Crown. It introduced a Board of Control which was constituted with two members of the British Cabinet and four of the Secret Committee (the Privy Council) and had control over all of the acts and operations relating to the civil and military matters as well as the Company's revenues. In 1793 the title of the Company to its territorial acquisitions

15 FÖRSTER (1992).

16 LEE-WARNER (1894) 44.

17 LEE-WARNER (1894) 44–45.

“without prejudice to the claims of the publick,” was confirmed. But it also restricted the powers of the supreme Government in India. It was enacted that, “without the express command and authority” of the Court of Directors or the Secret Committee, the Governor-General in Council should not declare war, or enter into any treaty of war or guarantee except in certain specified cases; and the local Governments were forbidden to conclude any treaty unless in pursuance of express orders from London or Calcutta.¹⁸ The sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the territorial acquisitions of the Company was confirmed in Statute 53 Geo. III. Cap. clv. in 1813.¹⁹ In 1833 the East India Company was declared to be “trustees for the Crown of the United Kingdom” and the treaties acquired formal recognition by the British Parliament.²⁰ Thus, until the Acts of 1784 and 1793 the East India Company retained far-reaching independence. After that, the British Government in India still retained its legislative powers and its power to wage war, make peace, and conclude treaties but the British Parliament was the highest authority to report to.

The first territories the British East India Company acquired in India were through support of certain factions in the struggles for the succession of the throne on the one hand in the Carnatic and on the other hand in the Deccan. When its pretenders were installed as Nawab and Nizam respectively after providing military support, the Company received several districts as gratitude for their service and as restitution of the debt accumulated with the Company by the pretenders during the war. The Mughal Emperor, whose position at that time had already been severely weakened, had no choice but to sanction the gift. He regulated it by granting a *firman* confirming the gift.²¹ However, the Company would soon firmly establish itself as the territorial power in India.

In 1756 the Nawab of Bengal died and was succeeded by his grandson Siraj-ud-daulah, who was very suspicious of the European presence in India. When the French and the British prepared for war against each other he

18 LEE-WARNER (1894) 45.

19 LEE-WARNER (1894) 45–46 and WESTLAKE (1914) 197.

20 WESTLAKE (1914) 197.

21 As the Shar'ia, the religious law of Islam, did not fully regulate every aspect of Ottoman social and political life, the Ottoman Sultan created *firman*s. These decrees were collected and applied as traditional bodies of law according to LAPIDUS (2002) 260–261.

ordered them not to strengthen their fortifications any further. The British refused to do so, hence, the young Nawab sent troops to surround the fort of Cossimbazar and besiege Calcutta. Company troops attacked the Nawab's forces, recaptured Calcutta and cornered the Nawab into signing a treaty, which provided for the restoration of the Company's factories as well as former privileges, and the permission to retain the fortification of Calcutta.²²

The commander of the British forces, Captain Robert Clive, decided to continue his campaign and to oust the French presence from Bengal. He attacked the French city of Chandernagar, which further fueled the Nawab's hatred against the British. At the same time however, the Nawab faced dissent at his own court. Siraj-ud-daulah was not popular with his ministers and the British prepared a conspiracy with the paymaster of his army, Mir Jafar. They proposed raising him to the throne of the Nawab in return for his support of the British in the field of battle and financial compensation for the attack on Calcutta. A resident working with the British named Omichund found out about the secret treaty with Mir Jafar and threatened to inform Siraj-ud-daulah unless he was promised 5% on all the treasure to be recovered. Clive thus suggested that two treaties be drawn – the real one on white paper, containing no reference to Omichund and the other on red paper, containing Omichund's desired stipulation, to deceive him. The Members of the Committee signed on both treaties, but Admiral Watson signed only the real one and his signature had to be counterfeited on the fictitious one. Mir Jafar signed both treaties on June 4, 1757.²³ In the nineteenth century the incidence became an example of misrule by the East India Company from critics of British policies in India, because it showed the kind of shaky legal and moral grounds upon which the Company was working, considering that according to European international law, fraud was a reason to declare a treaty *mala fide*.²⁴

The confrontation between the Nawab's troops and the East India Company took place at the infamous battle of Plessey. Due to Mir Jafar's

22 ORME (1861); MALLESON (1885); HARRINGTON (1994).

23 MARSHALL (1987).

24 HALL (1924) wrote that "Freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract. When this occurs therefore; if, for example, in negotiations for a boundary treaty the consent of one of the parties to the adoption of a particular line is determined by the production of a forged map, the agreement is not obligatory upon the deceived party."

support the Nawab lost the war and Mir Jafar was made Nawab of Bengal according to the provisions of the white treaty. The Company acquired large tracts of land between Calcutta and the sea. Mir Jafar was not recognized by the Mughal Emperor who supported his son, Mir Quasim. The two formed a triple alliance together with the Nawab of Oude and attacked the British in the battle of Buxar in 1764. Due to division between the allies the Company troops vanquished the Indian armies. The Mughal Emperor agreed to sign a treaty with the Company that appointed it Dewan (chief revenue officer) of Bengal, Behar and Orissa, and in return his pre-war possessions were returned to him. He also was granted a pension from the Company and had to pay indemnity for the costs the Company had generated during the war. The Nawab of Bengal lost his function of revenue collector but retained the judiciary and police functions, which meant there was a double government in Bengal until 1793 when the Nawab was forced to transfer his rights to the Company. The Nawab of Oude had to pay indemnity, cede territory and accept a British resident at his court.

By these victories the East India Company had established a permanent foothold on the Indian sub-continent and become a territorial power in India. From this very brief account of the ascent of the Company in India we can conclude that its policy was based on treaty alliances, war and causing dissent at the Indian courts. It is furthermore notable that the Company seemed to acknowledge the suzerainty of the Mughal Empire. It participated in the Indian political system by becoming a feudatory of the emperor in Delhi, receiving *firman*s from him and functioning as his prime tax collector in the regions of Bombay, Orissa and Behar. According to Tupper the Nawab of Bengal had forfeited all claim to the title of governor by attacking the British settlements and inflicting torture upon them. Tupper came to the conclusion that during this period there was no law of territorial possession though there were many territorial powers. He reported stories of usurpation, rebellion and aggression and contended that it was not possible for the Company employees to entertain any distinctly conceived theory of public law as regulating the relations between the states with which they were brought in contact. Tupper thought that the English did precisely what the Indian rulers had done before them.²⁵ Notwithstanding, whilst the Com-

25 TUPPER (1893) 21–22 and 24.

pany officials might not have acted upon European international law, they did however act within the framework of the Indian international order.

3. British expansion and the Indian political system

During the eighteenth century the East India Company continued its policy of forming alliances with Indian princes and hence gaining territorial influence in a growing number of districts. When territory was not directly acquired by the Company through conquest or cession by treaty, they made alliances and established protectorates. It was finally the Company which became the biggest threat to the authority of the Mughal Empire. The emperor became a puppet of the British authorities, only nominally retaining absolute sovereignty over his territories. Initially the Company kept up the appearance of being a participant of the Indian system by recognizing the suzerainty of the Delhi emperor. However, as their influence over Indian territory increased both in size and intensity, the political system in India changed. The Company was no longer a trading company which had gained its political power by coincidence; the British officials actually started planning their visions for India. The Indian international system changed significantly when it became custom that the East India Company offered treaties which prevented the Indian treaty partner from having any connection or engagement with other chiefs or states. As a result, by 1858, when the British Crown took over the administration of India from the East India Company and the last Mughal Emperor was officially dethroned, the Indian political system as it had existed in the eighteenth century was now extinct.

The date when the British government became supreme in India and gained the position to actually be able to eliminate the Indian political system and build a new system based on subsidiary alliances had been a subject for discussion amongst nineteenth century British lawyers and colonial administrators. Lord Wellesley, who was Governor-General of India from 1798 to 1805, claimed that the defeat of Mysore in 1799 marked the beginning of British supremacy in India. C. U. Aitchison, who published an extensive collection of treaties with Indian states, thought the campaigns against the Marhatta chiefs in 1803 and Holkar in 1805 to be more significant, as they completely broke up the Mahrattan Confederacy. Sir George Barlow agreed that the Treaty of Bassein was “absolutely necessary for the defeat of these designs that no native state should be left to exist in India which is not under

its [the Company's] absolute control."²⁶ This chapter will reflect on these dates and show how the Indian system fell apart by the examples of the dissolution of the Maratha federation and the annexation of the state of Oudh.

But first we will turn our attention to the state of Mysore.²⁷ After the East India Company had permanently established itself as a territorial power in India it embarked on a policy of expansion. The largest obstacle to becoming the main power on the sub-continent was the state of Mysore. The two parties waged an indecisive war and in 1769 they signed a treaty of alliance and restored the status quo that had existed before the war. The ruler of Mysore however felt that the Company had not upheld the treaty, because it refused to support Mysore in its conflict with the ascending Marathas. Hence a second war occurred. Mysore won several decisive battles and after severe losses the British decided in 1784 to conclude a treaty with the new king, Tipu Sultan. The treaty of Mangalore is said to be the last agreement between an Indian ruler and the East India Company in which the Indian ruler dictated terms to the British. Tipu Sultan was able to claim victory and the British representatives were forced to travel to Mysore territory to sign the treaty of friendship. This treaty was set up according to European custom. Again, the status quo *ante bellum* was restored. Yet, the war had resulted in severe financial issues for the Company. As the British economy was in part dependent on the revenues of the Company, Parliament decided to increase its control over Indian affairs. Pitt's India Act created a Board of Control and directly connected the Supreme Government of India with the British Government.²⁸

Tipu Sultan continued to feel threatened by the British presence in India and in disregard of the treaty attacked a British ally, the state of Travancore, in 1789. The third Anglo-Mysore war ended with a victory for the East India Company and Tipu Sultan had to cede half of his kingdom to it. The Mysore King after that built up his army again and sought alliances with the Ottoman Empire and the French. When the British found out about this, they attacked Mysore again. Tipu Sultan died in battle and in 1799 Mysore

26 As quoted in TUPPER (1893) 32–33.

27 For an innovative account about the history of the kingdom of Mysore and the policies of Tipu Sultan see JASANOFFDAT (2005).

28 TUPPER (1893) 28.

lost its independence. Part of it was annexed by the Company and the remaining territory became a princely state where the British installed a new ruler on the throne, appointed a minister and a British resident to the court, exacted an annual tribute and sent a standing British army to remain on its territory.

Initially, the Governor-General Lord Cornwallis, had during this period executed a policy of non-intervention, abstaining from all interference in the internal concerns of other states in India in order to “regain the confidence and removing the suspicions of surrounding states.”²⁹ Lord Wellesley however promoted a different line. In a dispatch to the resident at Hyderabad on February 4, 1804 he pleaded for a policy of subsidiary alliances in order to preserve tranquility in the Indian peninsula and “to prevent the operation of that relentless spirit of ambition and violence which is the characteristic of every Asiatic government.” According to the general this object “can alone be accomplished by the operation of a general control over the principal states of India established in the hands of a superior power, and exercised with equity and moderation through the medium of alliances contracted with those states on the basis of the security and protection of their respective rights.”³⁰

Based on this policy many treaties with Indian states were concluded which established princely states similar to the princely state of Mysore. Some treaties were concluded following a war but others were signed voluntarily. The Nizam of Hyderabad, for example, ruler of one of the richest regions in India, saw that the East India Company was becoming a key player in Indian affairs and sought the protection of the British. In return for the protection of his borders and a personal annual rent, he permitted the Company to station troops on his territory and send a resident to his court. Hyderabad thus became a protected state. The protected states of India were termed the ‘native states’ by British colonial officers. The term represented “a political community, occupying a territory in India of defined boundaries, and subject to a common and responsible ruler, who has, as a matter of fact, enjoyed and exercised, with the sanction of the British Government, any of the functions and attributes of internal sovereignty.

29 TUPPER (1893) 41.

30 As quoted in TUPPER (1893) 40–41.

The indivisibility of sovereignty, on which Austin insists,³¹ does not belong to the Indian system of sovereign states.”³² The ‘native states’ were excluded from the territories subject to the British constitutional laws. The largest states of India nonetheless usually became ‘native states’ after a display of military power by the East India Company. A very characteristic example of this were the wars with the Maratha states, although there are many other important examples like, for instance, the wars against the Sikh Empire or Burma. The events are quite similar for the wars had similar causes and effects. The defeat of the Maratha Confederacy was however significant because it made the East India Company the paramount power in India.

Submission of the Maratha Confederacy

The Maratha confederation existed of semi-autonomous states which were the vassals of the Peshwa. Their leaders were the Gaekwads of Baroda, the Holkars of Indore, the Scindias of Gwalior and the Bhonsales of Nagpur. The Peshwa, who resided in Poona, died in 1772 and the struggle for succession resulted divisions between the confederates. One contender for the throne sought support from the British and signed an agreement with the Government in Bombay in which he ceded some territories and part of the revenues from Surat and Bharuch districts in return for 2,500 soldiers. The Council in Calcutta did not recognize the treaty and ordered a new treaty to be made with the sitting Peshwa and the former treaty was annulled. The Peshwa

31 The divisibility of sovereignty was introduced by MOSER (1777) 26–31 and became a common principle in the nineteenth century. See, for example, PRADIER-FODÉRIÉ (1885) 176–198 or PHILLIMORE (1854) 100–155. The idea was that a state had international existence if it had the independent capacity to negotiate and to make peace or war with other states. States which did not stand this test were only mediately and in a subordinate degree considered as subjects of European international law and were commonly called semi-sovereign. This concept was used by international lawyers to describe protectorates. Edward Hall précised the concept by separating the internal sovereignty of a state from its external sovereignty. External sovereignty entailed the capacity to negotiate and to make peace or war with other states while internal sovereignty represented the rights and obligations between the sovereign and his people, HALL (1924) 150. Before the nineteenth century however, a state which was deprived of its capacity to negotiate and to make peace or war with other states, was not considered sovereign at all. The concept of semi-sovereignty did not exist then and even in the nineteenth century some lawyers, like John Austin, did not accept it, AUSTIN (1836).

32 LEE-WARNER (1894) 30–32.

however breached the new treaty by granting the French a port on the coast. The British sent a force to Poona and war was fought until 1782 when a peace treaty was signed recognizing the sitting Peshwa as the legitimate ruler. Amongst the Marathas however the throne was still contested. Holkar went to war against the Peshwa and Scindia and defeated them. The Peshwa fled and sought protection from the British who offered him a treaty in which the British promised to reinstall the Peshwa on the throne if he ceded his external sovereignty to the East India Company.³³

The treaty of Bassein, which was concluded on December 31, 1802, allowed British troops to be permanently stationed with the Peshwa. Any territorial districts yielding twenty-six lakh rupees or more were to be ceded to the East India Company. The Peshwa could not enter into any other treaty, declare war or conduct any foreign relations without first consulting the Company. Any territorial claims would be subject to the arbitration of the Company. The Peshwa thus, following Hall's definition, lost his external sovereignty.³⁴ The other Maratha rulers did not agree with the treaty and decided to fight the British. The Second Anglo-Maratha War (1803–1805) ended in the defeat of the Maratha states. Each of them signed a separate treaty of peace and friendship with the Company which was predominantly a treaty of cession. Each Maratha ruler for himself, his heirs and successors, entirely renounced all claim of every description on the territories ceded to the Company. They also agreed never to take and retain in their service any Frenchman, or the subject of any other European or American power (the Government of which may have been at war with the British Government) without the consent of the British Government. The Company engaged on its part, that it would not give aid or countenance to any discontented relations, Rajas, Zumindars, or other subjects of the ruler. Although the content of the treaties was more advantageous for the East India Company, the treaties did convey a certain kind of equality between the signatories. Both parties committed themselves to refrain from interfering with the other's allies or rivals and they agreed that accredited Ministers from each should reside at the Court of the other.³⁵ This kind of reciprocity would

33 BEVERIDGE (1862).

34 HALL (1924) 150.

35 Treaty of peace and friendship concluded with the Raja of Berar on December 17, 1803 and Treaty concluded with Jeswunt Rao Holkar, dated December 24, 1805, in: AITCHISON (1876).

end after the Third Anglo-Maratha War. The British officials however, held that the overlordship of the Peshwa had ended and the Company became the suzerain of the Maratha states after the Second Anglo-Maratha War, because the treaties contained an article in which the Maratha rulers renounced for himself, his heirs and successors, all adherence to the Maratha Confederacy.³⁶

It seems however that the Maratha states in practice still recognized the Peshwa as their suzerain. In the Third Anglo-Maratha War, they maintained a lively contact with the Peshwa, thus breaching the treaty agreements with the Company, which denied them any contact with states other than the British. Holkar and the ruler of Nagpore even decided to fight the British together with the Peshwa. Marquis de Hastings observed that they “displayed and professed obedience to the Peishwah’s summons” and that “the same Maratha tie was as powerful with the Raja of Nagpore.”³⁷ After the war, which ended in the annexation of most of the Peshwa’s territories by the East India Company, Hastings wrote to the Secret Committee that the annexation had been an “absolute moral necessity” because the other Maratha states would always remain loyal to the title of the Peshwa before any loyalty to the Company.³⁸

The Third Anglo-Maratha War started when a minister of the Gaekwar of Baroda was murdered allegedly by a minister of the state of Poona, a trustee of the Peshwa, Trimbuckjee Dainglia. The Gaekwar and the Peshwa had been negotiating the tax revenues of Baroda and the murdered minister had been part of the Gaekwar’s envoy. The British demanded that the Peshwa prosecute Trimbuckjee Dainglia but he was reluctant to arrest his trustee, emphasizing that it was not proven that he had committed the crime. At the same time, to the disliking of the Maratha chiefs, the East India Company had increased its military capacity in their states in order to fight the Pindaries, a large band of robbers who plundered Central India in short but devastating raids at the beginning of the nineteenth century. The Indian

36 AITCHISON (1876).

37 Marquis of Hastings to Court of Directors, February 8, 1818, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting’s Administration (1824) at 203 [British Library, W2290].

38 Marquis of Hastings to Secret Committee, August 21, 1820, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting’s Administration (1824) at 417 [British Library, W2290].

Government had planned to surround the Pindaries, which comprised about 25,000 members, but did not inform the Indian rulers of their plans for the Maratha territories.³⁹

The Peshwa responding to the increased amount of British forces on his territory, also mobilized his army. In these circumstances the British offered the Peshwa a treaty which he had no choice but to submit to. In November 1817 the Peshwa's troops nevertheless attacked the British residency at Poona which marked the beginning of the Third Anglo-Maratha War. The incineration of the residency was conceived by the British to be "contrary to the Law of Nations and the practice of India" and this stance was proclaimed repeatedly in official documents.⁴⁰ It seems that the attack on the residency was used as an excuse to officially wage war against the Peshwa. The Law of Nations in this case served as the legitimization for war, because it explicitly denounced attacks on legations and diplomatic representatives. It is interesting, however, that the attack was considered not only to be contrary to international law but also to the practice in India. The British officials in India hence explicitly separated European international law from the international system which prevailed on the Indian sub-continent.

While war ensued in Poona, the Maratha states of Nagpur and Holkar followed the call of the Peshwa and attacked the British in their territories. The ruler of Nagpur, Appa Saheb, had been solicited by the resident to explain the assemblage of troops which was taking place round Nagpur. Appa Saheb however did not show up and refused to reduce his troops. Hastings later declared that the ruler of Nagpore "with the basest deceit protested his inviolable amity, while he was equipping himself for a profligate outrage to the Law of Nations, in an attack on our accredited Minister at his court."⁴¹ So, here too, the Law of Nations was used to explain an Indian war, in this case with the doctrine of self-defense. Appa Saheb was defeated in 1818 and a treaty of friendship was signed leaving most of the Nagpur territories under British control and installing a puppet ruler on the throne.

39 Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 341 [British Library, W2290].

40 Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 117 [British Library, W2290].

41 Marquis of Hastings to Court of Directors, February 8, 1818, Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 203 [British Library, W2290].

Holkar was defeated in the same month as Nagpore and it also became a vassal of the East India Company by treaty. The British had tried to prevent hostilities by repeatedly offering to set up a treaty of friendship. Holkar however did not agree with the British offer and broke off the negotiations. After his defeat negotiations were again opened and his representatives attempted to alter the terms of the treaty which the British had offered him. The negotiators maintained that the war was provoked not by the Ministers of Holkar, but by a counsel of discontented military leaders, acting against their advice. They promised that Holkar would throw himself upon the protection of the British Government without any engagement, and trust to its bounty. This request was rejected so the Maharaja agreed to sign the treaty if the British would agree with three requests concerning the payment of tribute from the Rajpoot states and certain private territories which were to be ceded. None of these requests were accepted by the British representatives, even though the loss of the private possessions of the Maharaja was a great disgrace for the Holkar family. Only one final request was accepted by the British resident: that an article should be inserted in the treaty, declaring that “the Peishwah and his successors should not be permitted to exercise any sovereign rights or authority over Mulhar Rao Holkar or his heirs.”⁴² For the Company this had been one of the purposes of the treaty anyway, so the resident could easily agree to including such an article. But in the end this example shows that contrary to the treaty of Mangalore between the Sultan of Mysore and the East India Company, from the nineteenth century the Indian rulers were no longer in a position to negotiate treaties on their own terms. Holkar’s army had been completely reduced during the war and the Company’s officers were well aware that they could oblige his unqualified submission to any terms.⁴³

Military superiority thus forced the Maratha states to enter protective alliances with the East India Company. The same went for the Maratha state of Gwalior. Its ruler, Scindia, did not fight with the Peshwa although he by no means sympathized with the British. The large number of Company’s troops on his territory induced him to accept treaty obligations with the

42 Sir J. Malcom to John Adam Esq., Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting’s Administration (1824) at 189 [British Library, W2290].

43 As was noted by Hastings, Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting’s Administration (1824) at 189–190 [British Library, W2290].

British. However, this time it was the Company that tried to get out of its treaty obligations with Scindia. To fight the Pindaries the Company needed support from the Rajpoot chiefs who were vassals to Scindia. Yet, in accordance with the eighth article of a treaty signed in 1805 the Company was bound not to hold any negotiations with those chiefs.⁴⁴ The British officers accused Scindia in order to exert hostile machinations against the Indian government and to support the Pindaries covertly, which was against treaty provisions. With those arguments they forced the ruler to subscribe to a treaty which abrogated the former preclusion. The ruler, being in a financial and militarily weak position, had no choice but to accept its terms.⁴⁵ The treaties with the Maratha states did not entail reciprocal provisions like they did after the Second Anglo-Maratha War. The Maratha rulers now had to accept a subsidiary force on their territory, partly disband their own army, allow a British resident at their court and they were deprived of the right to communicate or engage with other states.⁴⁶

When the Peshwa lost his allies he started to withdraw from Poona and the British troops followed him for months. Several battles took place but finally the Peshwa had to surrender. The British not only dethroned him but conquered his territories and founded a new sovereign for the Raja of Sattara, a Maratha chief that had been imprisoned by the Peshwa prior to the war and was thus willing to subjugate to the British. The annexed territories were incorporated with the Bombay Presidency and the territories won from the Pindaries became the Central provinces. A separate treaty was signed with each of the chiefs of the Rajpoot combining them into one league under the paramount authority of the Indian Government. The Peshwa was to receive an annual subsidy and was expelled from Poona. The defeat of the Peshwa was mourned all over the Maratha Empire as a national defeat.⁴⁷

44 Marquis of Hastings to the Court of Directors, May 19, 1818, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting's Administration (1824) at 281 [British Library, W2290].

45 Papers respecting the Pindary and Maratha Wars. Marquis of Hasting's Administration (1824) at 205 [British Library, W2290].

46 Treaty with Mulhar Rao Holkar, dated January 6, 1818 and Treaty of Defensive Alliance with the Raja of Berar, dated the May 27, 1816, Provisional Treaty with the Raja of Nagpoor, dated January 6, 1818, in: AITCHISON (1876).

47 CHHABRA (2005).

The reluctance of the Maratha rulers to sign a treaty with the East India Company is evidence that the Indian rulers were not yet willing to accept British superiority and its accompanying normative order. When they, however, recognized that they could not defeat the British forces, they accepted the European system and tried to defend their cause through its mechanisms. Holkar as well as the Peshwa negotiated with the Company officials over the terms of the treaties and even proposed their own provisions but they were no longer in a position to impose their terms. Yet, the Indian system continued to regulate the relations between the Indian states and the Peshwa remained the suzerain over the other Maratha rulers. The British on the other hand from now on could impose their view of order on the Indian states. This order was not one of equal states as in Europe, but one of subsidiary alliances. The new Indian international system was defined by protected states acknowledging the suzerainty of the East India Company. The next example, that of the state of Oude, shows how the British used treaties as tools to compromise this Indian system.

The annexation of Oude

The first treaty which compromised Oude's full sovereignty was the treaty concluded after the battle of Buxar in 1764. During the war the East India Company had acquired the territories of Corah and Allahabad from the Mughal. These regions were sold to the Nawab of Oude in 1773 and a new treaty was set up for this purpose. It also appointed a resident to the court of Oude, restricted the number of men the Nawab could entertain in his army and introduced a monthly subsidy that he had to pay to the Company for the maintenance of its forces in his state. The Nawab had agreed to these far reaching provisions in order to secure his territories against future interference from the British. Exclusive to the sum which was to be paid for the cession of Corah and Allahabad, "no more should, on any account, be demanded of him." The treaty stipulated that: "He shall by no means and under no pretense, be liable to any obstructions in the aforesaid countries from the Company and the English chiefs; and, exclusive of the money now stipulated, no mention or requisition shall, by any means, be made to him for anything else on this account." As a matter of fact it was the Nawab himself who had sought an interview with Warren Hastings to discuss a

revision of existing treaties in order to secure his remaining rights as a sovereign.⁴⁸

The Nawabs retained their internal sovereignty as agreed upon in the treaties only for a relatively short period. When John Shore became Governor-General in 1793 demands were made to add to the former monthly subsidy the expense of one European and one native regiment of cavalry. The Nawab refused to pay more but after the arrest of his minister by the British authorities followed by a personal visit of the Governor-General, he was compelled to grant the additional subsidy. When the Nawab died the British Government in India did not want his faction to continue the rule of Oude and in 1798 it installed a contender, Saadat Allie Khan, on the throne who agreed to pay the increased subsidies.⁴⁹ In the same year Lord Wellesley became Governor-General in Calcutta and significantly changed the policy towards Oude. He pressed for the disbandment of the Nawab's regular army and the substitution of an increased number of the Company's regiments to be paid by the Nawab. It was Wellesley's object to "extinguish the Nawab's military power and to gain the exclusive authority, civil and military, over the dominions of Oude together with the full and entire right and title to the revenues thereof."⁵⁰

The two parties started negotiations, which on the British side were conducted by Lieutenant-Colonel William Scott on behalf of the Governor-General. Saadat Allie Khan requested Scott to send a letter from him to Lord Wellesley. In his elaborate letter, the Nawab explained in detail why the East India Company had breached the previous treaty with Oude which had been signed in 1798. First, he emphasized that the force designed for the defense of his dominions had been increased beyond what it had been in any former period and that he had agreed to defray the expense of the augmentation. He pointed out that "in no part of the said article is it written or hinted, that after the lapse of a certain number of years a further permanent augmentation should take place; and to deviate in any degree from the said treaty appears to me unnecessary." Thereafter, the Nawab referred to the second article of the treaty:

48 TAYLOR (1879) 13–17.

49 TAYLOR (1879) 33–35.

50 *Papers presented to the House of Commons relating to East India Affairs* (1806), 31 [British Library, W2998].

“From an inspection of the article we learn that, after the conclusion of the treaty in question, no further augmentation is to be made, excepting in case of necessity; and that the increase is to be proportioned to the emergency, and endure but as long as the necessity exists. An ‘augmentation’ of the troops without existing necessity, and making me answerable for the expense ‘attending the increase,’ is inconsistent with the treaty, and seems inexpedient.”⁵¹

And finally the Nawab addressed a direct plea to the Governor-General. The seventeenth article stipulated that the said Nawab would possess full authority over his household affairs, hereditary dominions, his troops, and his subjects. The British objective to take the management of the Nawab’s army from under his direction undermined his authority in this respect. He therefore asked that Wellesley, in conformity to the treaty, would leave him in possession of the full authority over all those areas mentioned above. He further requested that the Governor-General enjoined Lt.-Colonel Scott to advise and consult with him directly.⁵² The letter demonstrates that the Nawab was fully aware of the consequences the proposed treaty bore for his kingdom and that he used European international law to defend his rights and preserve his internal sovereignty.

Lord Wellesley declined to make any remarks on the letter on the ground that “besides indicating a levity unsuitable to the occasion, it is highly deficient in the respect due from His Excellency to the first British authority in India.” Instead he required Saadat Allie either to resign his princely authority altogether, and accept an annual stipend, or to cede one-half of his territorial possessions by way of indemnity for two bodies of troops previously dispatched to Oude. A draft of a treaty was at the same time forwarded, as well as the instructions to the resident authorizing him that, in the event of the Nawab not consenting to hand over the said provinces to the Company, to take forcible possession of the same. After months of negotiating the treaty was finally signed in 1801. The Nawab agreed to reform his administration and military and ceded the territory with the promise that it would henceforth be released from the subsidy. At the same time he received assurance that he would have an undisturbed authority over the territory left to him. Shortly after the conclusion of the treaty the Nawab

51 TAYLOR (1879) 44.

52 Translation of a memorial, presented on January 11, 1800 to Lieutenant-Colonel William Scott, Resident at Lucknow by H.E. the Nawab Vizier for the Governor-General in TAYLOR (1879) 41.

sent the Governor-General a memorandum which defined the tasks of the British resident compared to those of the ruler or Oude and clearly separated their authorities. Lord Wellesley officially accepted the definitions of the memorandum.⁵³ Part of the state of Oude thus became a vassal to the East India Company, though they continued to be part of the Mughal Empire in name until 1819.

The rulers of Oude continued serving the Company faithfully in the subsequent years, often lending it money which financed several major Indian wars. Many officers praised the Nawab's collaboration. Lord Dalhousie, for example, wrote that: "The rulers of Oude have ever been faithful and true in their adherence to the British power. No wavering friendship has ever been laid to their charge: they have aided us, as best they could, in the hour of our utmost need."⁵⁴ In recognition of their loyalty, Oude was raised to a kingdom in 1819 by the Indian Government. In 1814, when a new Nawab acceded the throne, a treaty was signed recognizing that the former treaties should "be observed and kept till the end of time" but also that the Nawab was to be treated in all public observances as an independent prince. The new Nawab in return wanted to pay tribute to his suzerain, the Governor-General; because he felt that his life and property were at his command. The Company however did not want to participate in an Indian system anymore and accepted the gift only in form of a loan.⁵⁵ The Company had clearly started to impose its own system on the rulers of India, although the tributary system continued to exist amongst the Indian states.

In 1837 the uncle of the Nawab succeeded the ruler following his death, with the support of the East India Company. One of his sons however forcibly took the sovereignty of the kingdom. The Indian Government sent in troops and confined the prince and his mother. The uncle had agreed to accept a treaty dictated by the Indian Government upon accession to the throne.⁵⁶ Together with the treaty of 1801, this treaty is essential for understanding the legal framework upon which the later annexation of Oude rested. In the treaty of 1801 Saadat Allie Khan had agreed to reform his administration and military but it did not stipulate any penalty or

53 TAYLOR (1879) 40.

54 Minute written by Lord Dalhousie on June 18, 1855 as quoted in *Oude Catechism* (1857).

55 WHITE (1838) 8.

56 TAYLOR (1879) 82.

remedy should he not do this. Thus, the treaty of 1837 modified some of the previous provisions. In article 6 of the treaty of 1801 the Nawab had promised that he would establish in his remaining territories such a system of administration, “to be carried into effect by his own officers,” as should be conducive to the prosperity of his own subjects, and be calculated to secure the lives and property of the inhabitants, and that he would always advise and act in conformity to the counsel of the officers of the Company. In 1837 article 7 provided express modification:

“(…) that the King of Oude shall immediately take into consideration, in concert with the British Resident, the best means of remedying the defects in the Police and in the Judicial and Revenue administrations of his dominions; and that if His Majesty should neglect to attend to the advice and counsel of the British Government, and if gross and systematic oppression, anarchy, and misrule should prevail within the Oude dominions, such as seriously to endanger the public tranquility, the British Government reserves to itself the right of appointing its own officers to the management of whatsoever portions of the Oude territory, either to a small or to a great extent, in which such misrule shall have occurred, for so long a period as it may deem necessary, the surplus receipts in such case, after defraying all charges, to be paid into the King’s territory, and a true and faithful account rendered to His Majesty of the receipts and expenditure.”⁵⁷

Article 8 of the treaty further provided “that in case the Governor-General of India, in Council, should be compelled to resort to the exercise of the authority vested in him by article 7 of this treaty, he will endeavor, as far as possible, to maintain (...) the native institutions and forms of administration within the assumed territories, so as to facilitate the restoration of those territories to the Sovereign of Oude when the proper period for such restoration shall arrive.”⁵⁸ And finally the Nawab was allowed to employ such a military establishment as he deemed necessary for the government of his dominions, which annulled the objective of the former treaty to disband his regular army. However, he was obliged to maintain a certain force at his own cost, which was not to be employed in the ordinary collection of revenue.

The treaties of 1801 and 1837 became the legal basis on which the state of Oude was annexed by the East India Company in 1856. But the accusations of misrule were not new. The state of Oude had been publicly discussed for decades in Britain. There was a general interest in the region, which was

⁵⁷ TAYLOR (1879) 194.

⁵⁸ TAYLOR (1879) 194.

considered to be very fertile and prosperous. Oude was described as “the garden, the granary, and the queen-province of India”⁵⁹ and spoke to the imagination of the people in Britain. John Shore, as Governor-General, had already early on accused the Nawab of Oude of gross misrule over his dominions in order to pressure him to cooperate with the Company. Thus, since the close of the eighteenth century reports had circulated about oppression and tyranny in Oude. Misrule in Oude became a publicly discussed subject. This triggered Lord William Bentick in 1831, when he was Governor-General of India, to threaten the Nawab to annex his territories should he not reform his administration.

Finally, in February 1856 the British Government in India decided to act and sent military forces to Oude, which, the King was told, was to serve as a corps of observation against Nepal. The troops however invaded Oude and took the King prisoner. He was offered a treaty which provided for the cession of his territory but the King declined and his dominions were annexed on February 7, 1856. It was said that Wajid Ali Shah refused to sign the treaty, exclaiming in a passionate burst of grief: “Treaties are necessary between equals only: who am I now, that the British Government should enter into treaties with?”⁶⁰ The Company officials issued a proclamation to the people of Oude which declared that the government of the territories of Oude was “henceforth vested, exclusively and forever, in the Honourable East India Company.”⁶¹ It further stated that:

“Fifty years of sad experience have proved that the Treaty of 1801 has wholly failed to secure the happiness and prosperity of Oude, and have conclusively shown that no effectual security can be had for the release of the people of that country from the grievous oppression they have long endured, unless the exclusive administration of the territories of Oude shall be permanently transferred to the British Government. To that end it has been declared, by the special authority and consent of the Honourable the Court of Directors, that the Treaty of 1801, disregarded and violated by each succeeding Sovereign of Oude, is henceforth wholly null and void. (...)”⁶²

The Company presented itself as a protector of the people of India against unjust Indian practices; a humanizing enterprise whose primary concern was civilizing India.⁶³

59 ARNOLD (1865) 329.

60 LUDLOW (1858) 11.

61 WHITE (1838) 9.

62 WHITE (1838) 8.

63 CARTER/HARLOW (2003) 404.

The annexation of Oude led to a public outcry in Britain as well as in India. Sympathizers felt that depriving a sovereign of his rights merely on the grounds of misrule was unjust. They sympathized with Wajid Ali Shah, the dethroned Nawab, because he and his predecessors were known to be polite rulers who had readily collaborated with the East India Company. But more importantly, he himself turned to the public to fight for his cause. Wajid Ali Shah intentioned to go to London himself to petition Queen Victoria, the British Parliament, and the Court of Directors of the India Company, to protest the annexation. When the British authorities blocked him from traveling to London, he dispatched a large delegation officially headed by his mother, the Queen Dowager, supported by his son and proclaimed heir and one of his younger brothers instead.⁶⁴ Wajid Ali Shah furthermore published a lengthy pamphlet in which he contested the accusations formulated by the Indian Government in a report which had been compiled over the years, and in which he argued that the annexation was against the Law of Nations. He described how his predecessors had supported the East India Company, which even bestowed the title of king on his family in recognition of their loyalty. The Company had corresponded with the Nawabs as if they were a sovereign power and Wajid Ali Shah reminded them that it was not lawful to set aside treaties between two nations according to the Law of Nations. He described how the Nawabs had ruled in compliance with the treaties and how they had continuously acted in accordance with the council of the Resident. He had, for example, on the advice of the Resident, reformed the tax system of Oude and introduced a border police, allowing more British forces on his territory than was provided for in the treaty of 1837. The Nawab presented letters from Governor-Generals which praised the rulers of Oude or specific ministers for their friendly collaboration. And finally, he uncovered outright lies put forward by British officials that demonstrated that crime in his state had decreased and was at a lower rate than in the neighboring British dominions.⁶⁵

Wajid Ali Shah ascertained that it was convened by treaty that the kingdom of Oude should be preserved in all its integrity to all the sovereigns and their heirs, whose rights and dignity should be respected and confirmed.

64 Mansra Haider (2008) www.egyankosh.ac.in/handle/123456789/26750.

65 Wajid Ali Shah, *Oude Papers* (1857), [British Library P/W 163–165].

Others pointed out that the treaty of 1837 distinctly set out the course to be taken in case there was misrule in Oude and that this course was not annexation. The treaty expressly gave the British Government in India the authority to appoint its own officers and to assume the management of whatever portions of the Oude territory in which misrule occurred. Hence the misrule which allegedly took place after 1837 happened under British auspice and although they had the tools to intervene, the Company's officers did not.⁶⁶ However, the real question debated was which treaty should be analyzed for the legitimization of annexation. The proclamation to the people of Oude referred to the treaty of 1801 and the treaty of 1837 was considered by some colonial officers to be void.

The Court of Directors had not agreed with the military provisions of the treaty of 1837 and had wholly disallowed it. In April 1838 the Secret Committee conveyed to the Governor-General their directions for the abrogation of the treaty, explicitly ordering him to secure good government to the people of Oude under the stipulation of the treaty of 1801. In July 1839, the King of Oude was informed that he was relieved from maintaining the auxiliary force, and that "certain provisions of the treaty" would not be carried into effect. Yet, he was never told that the whole treaty was entirely abrogated and considered the treaty to be binding. The case was submitted to Sir Travers Twiss, a renowned international lawyer who examined the papers submitted to him on behalf of Wajid Ali Shah.⁶⁷

The treaty was concluded in the name and on behalf of the Governor-General of India, by Lieutenant-Colonel James Low, the Resident at the court of Oude, and ratified by the Governor-General. It was formally referred to as a subsisting treaty in two separate communications from the Governor-General of India to the King of Oude, in the years 1839 and 1847 respectively. Based on these documents it appeared that the treaty of 1837 was a subsisting treaty, binding on the respective parties to it, and according to Twiss the Governor-General would be authorized, "by the law of Nations, under the state of circumstances contemplated by article 7, to take into his own hands the management of the territories of the King of Oude, as Curator, in behalf of the King, his heirs, and successors."⁶⁸ The treaty was

66 *Oude Catechism* (1857).

67 The opinion of Sir Travers Twiss is fully cited in TAYLOR (1879) 192–199.

68 TAYLOR (1879) 196.

also included in a volume of treaties published in 1845 by the authority of the Indian Government.

It appears, however, from a minute of Lord Dalhousie of June 18, 1855, that the Governor-General considered the treaty not to be binding on the British Government, because it had been abrogated by the Court of Directors. Twiss agreed that international law required for treaties to be ratified and if ratification was refused by the competent authority on one side, and the refusal notified to the other side, the act of the minister who concluded the treaty would become null and void. However, the Governor-General was the competent authority and he had ratified the treaty, therefore, Twiss judged that the full requirements of the Law of Nations had been satisfied. Although British municipal law contained in 33 George III., c. 52 limited the power of the Governor-General in declaring war and making treaties of peace and alliance, this did not apply in the case of the treaty of 1837. By the statute the Governor-General was forbidden, except in case of urgent necessity, to declare war or commence hostilities, or to enter into any treaty for making war against any of the Country Princes or States of India, or any treaty for guaranteeing the possession of any Country Prince or State without the command and authority of the Court of Directors, or the Secret Committee, by the authority of the Commissioners for India. The treaty of 1837, however, did not come under either class of treaties, which meant that the Governor-General indeed had possessed the authority to ratify it.⁶⁹

Finally, Twiss emphasized “that it is not competent to the Government of India to apply any other principles of law to establish the annulment of the treaty of 1837 than those which would be applicable to a treaty concluded with a Christian State. Thus, article 9 of the treaty of 1837, which provides ‘that all the other articles and conditions of former treaties between the British Government and the Oude State, which are not affected by the present convention, are to remain in full force and effect,’” was a purely formal article.⁷⁰ He stated that “it would be contrary to the received canons of interpretation to suppose that such article could have the legal effect of constituting an ancient treaty an integral part of a new treaty, or of engrafting on to a new treaty the specific political character which an earlier treaty has had impressed upon it by its own provisions, which remain,

69 LUDLOW (1858) 40.

70 TAYLOR (1879) 199.

proprio vigore, in force.”⁷¹ Thus, Twiss concluded that the Governor-General was not authorized by the Law of Nations to set aside the treaty of 1837 as inoperative, and to look exclusively to the treaty of 1801 as the instrument by which the mutual relations of the East India Company and the rulers of Oude were regulated.

The annexation of Oude was however not reversed and the effort made by Wajid Ali Shah to have his kingdom restored to himself was fruitless. He had to continue his life on a pension, living in exile in Calcutta. The Nawab did not try to alienate his people from the British either, in contrary, directly upon annexation he called upon them to cooperate with the new sovereign. However, the state soon became rebellious and the British had to fight a war to restore order. The rebellion did not directly have to do with the affairs in Oude but was a more general rebellion against British rule in India. It had started as a mutiny by the sepoys in the army but soon spread to other groups in society. Delhi was made the center of opposition but it extended to large parts of the sub-continent, among which also Oude. The upheaval in Oude, was not conducted in the name of any sovereign of Oude but the rebels fought their war in name of the Mughal Emperor, which seems to have been a last attempt to restore the Indian system on the sub-continent. Yet it had the adverse effect. After eight months of fighting the ‘Indian Mutiny’ of 1857 was put down and the Indian system drastically reformed.⁷²

The revolting parties in India had made the Mughal Emperor their symbol of resistance and proclaimed him the sovereign of India. In hindsight it might seem an act of desperation, as Muhammad Bahádur Shah was an old man with no nominal powers and the British political system had been firmly established during the nineteenth century. However, if we consider the states of India to be semi-autonomous states in which the Indian rulers retained internal sovereignty, we have to conclude that the Indian political system had not yet ceased to exist. As we have seen in this chapter, the two political systems continued to exist in parallel. Although the British no longer wished to participate in the Indian system and forced the Indian rulers to gradually accept their European customs and laws in their relations with the East India Company, the Indian tributary system continued to define relations amongst the protected Indian states. Further-

71 LUDLOW (1858) 49.

72 CHANDRA (2009) 140–157.

more, as the story of the Third Anglo-Maratha War proves, even though the suzerainty of Britain was officially recognized according to European international law by the treaties of “perpetual peace and friendship”, it did not automatically put an end to the feudal relations of the Indian states.

The last Mughal Emperor, Muhammad Bahádur Shah, was tried not under European international law but according to the Indian Penal Code, which derived from English criminal law and provided for the punishment of the offence of waging war against the Queen. The third count in the indictment against him was, “that he, being a subject of the British Government in India and not regarding the duty of his allegiance, did, at Delhi, on May 11, 1857, or thereabouts, as a false traitor against the state, proclaim and declare himself the reigning king and sovereign of India” and that he conspired with other traitors to raise, levy, and make insurrection, rebellion, and war against the state. The last remnants of his empire were incorporated into the British dominions. Other Indian rulers who had participated in the rebellion were also dethroned and/or their territory was confiscated. Some of them were even sentenced to death.⁷³

The rebellion led to the formal dissolution of the East India Company. In accordance with the Government of India Act its ruling powers were transferred to the British Crown in 1858. The Crown took on all responsibilities the East India Company had held and statute 21 and 22 Vic. Cap. Cvi., Para 67 enacted that “all treaties made by the said Company shall be binding on Her Majesty.”⁷⁴ The administration of India was reformed and the Indian political system was completely eradicated.

The Treaties

In this brief overview of how Britain became the paramount power in India we have focused on two examples in order to understand how the Indian political system interacted with the European political system. What becomes apparent is the importance of treaty making as a tool for the East India Company to legitimize its increasing control over Indian territories not only towards the British public but maybe even more importantly so, towards the Indian rulers. The way the content of treaties changed between

73 TUPPER (1893) 5–6.

74 LEE-WARNER (1894) 36.

the eighteenth century and the nineteenth century reflects how the Indian international system was gradually pushed to the margins.

In the first period, up to the dissolution of the Maratha Empire, the East India Company participated in the Indian political system as a vassal of the Mughal and assumed the role of a suzerain in a similar fashion as other dominant Indian states did. However, at the same time it introduced its own international system by organizing the majority of its relations with Indian rulers by treaty. The Indian states were treated as equal and independent states. The terms and the forms of negotiation were reciprocal and many treaties evidenced this with phrases of respect. Due attention was, for example, to be paid, in the vent of acquisition, “to the wishes and convenience of the parties”; a representative of each signatory was to reside in the army of the other; and “the representations of the contracting parties to each other shall be duly attended to.” If peace was judged expedient, “it shall be made by mutual consent.”⁷⁵

These general terms changed at the turn of the century. The Company had attained a leading position in India. In general this meant that it required its allies to surrender their rights of negotiation with foreign nations. The treaties usually provided for a subsidiary force to be installed in the Indian state under the Company’s control. The troops provided by the Company were paid for by the states for whose protection against foreign attack they were intended. Security for the payment of the troops was obtained by the cession to the Company of territory yielding the requisite means. Subjects of European powers were furthermore excluded from serving the Indian administration. The Company promised in return not to interfere with the internal affairs of the ally.⁷⁶

At the beginning of the nineteenth century the Indian rulers for a great part lost their external sovereignty but remained in charge of the internal affairs of their state. But over time the East India Company managed to install British Residents who functioned as political advisers at the courts of the Indian rulers. The Indian Government began to interfere increasingly in the internal affairs of Indian States, but interestingly, this was usually not done by treaty but by unilateral actions on behalf of the East India Company. The annexation of Oude is a shrewd example of this but many other Indian

75 As quoted in LEE-WARNER (1894) 85.

76 LEE-WARNER (1894) 86 and 88.

rulers were also deprived of their internal sovereignty over parts of their territory or their whole territory on the grounds of civilizational superiority. Sind and Punjab were annexed for the general interests of the empire and for the welfare of their people. Coorg was annexed to “secure the inhabitants of Coorg the blessing of a just and equitable government.”⁷⁷

Initially treaties represented agreements between equal states similar to how the British officials regarded treaties concluded in Europe. In a later stage however they became a tool to legitimize British interference in the internal affairs of Indian states. In a way the Company officers reemphasized the validity of the treaties concluded with Indian rulers according to the European Law of Nations in order to legitimize their interference towards the Indian ruler. For the colonial officers, treaties concluded in India thus needed to be recognized as existing within the scope of European international law. The opinion of Travers Twiss regarding the annexation of Oude and the validity of the treaty of 1837 confirms this view. The binding force between states was fully recognized by the British Government in India.

Nevertheless, on a more theoretical level, international lawyers diverged in their opinion as to whether treaties concluded with Indian states had the same value as treaties concluded in Europe. William Lee-Warner in his treatise on Indian princes quoted Wheaton to the effect that states are not only bound to each other through treaties but also through a natural law: “The acts of statesmen are no more exempt than humanity itself from the law of nature, which distributes change over the whole of creation. The treaties and engagements of native states cannot be fully understood either without reference to the relations of the parties at the time of their conclusion, or without reference to the relations since established between them.”⁷⁸ Tupper too emphasized that each case should be considered separately by fact and should the circumstances press for it, treaties could be abrogated. Westlake considered treaties concluded in India rather symbolic, because he stated that they were subordinate to other titles of acquisition of territory. Hall had had a similar stance, explaining that:

“(...) the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when

77 LEE-WARNER (1894) 127 and 135.

78 LEE-WARNER (1894) 40.

the interests of the subjects of the native princes are gravely affected. The treaties really amount to little more than statements of limitations which the Imperial Government except in very exceptional circumstances, places on its own action.”⁷⁹

Hall recognized that this was not the original intention of many of the treaties but like Westlake he emphasized the change the British rule in India had undergone which ultimately brought on the necessity of adapting the conditions.

Johann Caspar Bluntschli (1808–1881), a Swiss lawyer who was a founding member of the Institut du Droit International, did not reflect on the legal status of treaties concluded in India. He only defined in more general terms that even entities which were not a sovereign state could be treated as though they were one, and treaties could be signed with them within the scope of international law. Even nomadic tribes were to be persuaded to respect international law and to maintain treaty relations.⁸⁰ This implicitly contains a call upon the members of the international society of nations to apply international law onto other entities and at the same time persuade them to appropriate European international law. As long as the ‘non-civilized’ states acted upon the provisions of European international law, the treaties they signed would also be recognized as being part of that law.

Although Indian treaties were considered to be binding according to European international law by the colonial authorities this did not mean that they thought that the full body of international law applied to Indian states. It was thought that no ‘native state’ could quote the principles of international law against the British Government, because to do so would be to assert the position of equality, which all those principles presuppose.⁸¹ But the treaties which the Indian states had signed with the East India Company had deprived them of that equality. European international law should be treated as a useful guide, as an example of how relations *could* be organized, but it was not binding.

From 1858 onward international law definitively lost its application to the relations between Britain and the Indian states and the relations amongst the Indian states. Although, it seemed difficult to categorize the level of dependency of Indian states on the British as Lee-Warner laid out:

79 HALL (1924) 28.

80 BLUNTSCHLI (1872) 64.

81 TUPPER (1893) 7–8.

“Sir George Campell in his *Modern India* arrives to the conclusion that ‘Nepal alone retains any remains of independence.’ Sir Richard Temple, in his article on India, published in Chambers’s *Encyclopaedia*, observed that ‘some are practically independent sovereigns.’ But when he goes on to show that none of them can make war or alliances, and that the British Government ‘takes a paternal interest in the good government of the states,’ he materially detracts from the title conferred on them. Sir Travers Twiss allows them no shred of independence, and classifies them as ‘protected dependent states.’ Sir Tupper styles them Feudatory states, and cleverly, but, I venture to think, imperfectly, justifies his preference for that popular phrase. (...) Fresh ground is broken by Élisée Reclus in his *Géographie Universelle*. ‘Les princes vassaux’ are, in his opinion, destined to become ‘une grande aristocratie comme celle des lords anglais.’ Sir Henry Maine insists on the fact that sovereignty is divisible, and that the chiefs of India are semi-sovereign, (...) Parliament in 1861 and 1876 used the expression ‘princes and states in alliance with her Majesty’; but in 1889 they were described, by Statute 52 and 53 Vic. Cap. Lxiii, as “under the suzerainty of Her Majesty.”⁸²

It is evident that the Indian rulers had lost so much of their sovereign traits that their states could not be considered independent states and had lost their international legal personality.

As Lee-Warner put it: “No Native state in the interior of India enjoys the full attributes of complete external and internal sovereignty, since to none is left either the power of declaring war or peace, or the right of negotiating agreements with other states; but the sovereignty of Native states is shared between the British Government and the Chiefs in varying degrees.”⁸³

The case of Oude shows how the Indian rulers appropriated European international law in order to defend their position. It also shows that although in theory the British did not accept application of European international law on Indian states, they did fully recognize the validity of the treaties concluded with Indian rulers. They did so, because this enabled them to use the treaties as a tool for increasing their influence over Indian states. After 1858 international law definitely ceased to regulate the relations between states in India, because the Indian rulers had lost to many of the attributes of sovereignty to the British Government.

82 As discussed by LEE-WARNER (1894) in the Preface of his book.

83 LEE-WARNER (1894) 30–32.

4. Legitimization of territorial expansion

Although European territorial expansion was not a very important subject for European international lawyers until the close of the nineteenth century, European international law did provide a couple of doctrines for legitimization of the acquisition of territory. Yet these doctrines were extremely abstract, their vagueness leaving plenty of room for interpretation and the publicists elaborating on them would rarely use contemporary examples of the extension of sovereignty over foreign territories outside Europe.⁸⁴ Nevertheless, there were lawyers, mainly working for the European colonial offices, who attempted to find a legal sanction for the imperial facts of their respective home countries. In studying the correspondence between the colonial office and British representatives in India, we find that legal doctrines existed which were specific for the Indian sub-continent and did not come up in the treatises of the international lawyers.

According to European international law⁸⁵ sovereign states were allowed to occupy land which belonged to no one, also called *terra nullius*. Usually this was defined as uninhabited land, or land where humans did not live permanently and which was not cultivated. Nomads, for example, were not sedentary societies so their territories were considered *terra nullius*. In reality however, many regions of the world were permanently occupied by peoples. Yet they were deprived of the right of sovereignty over their land in European international law theory of the nineteenth century because they were not considered civilized by the Europeans. In their opinion land should be used in the most effective manner and the more civilized states had a better title to foreign lands because they knew how to put the land into effective use. At the same time international lawyers sought to bring order to the relations between the European powers, who had, markedly in the second half of the nineteenth century, gotten into fierce competition over non-European territories. Some were for decades, some even for centuries, nominally in possession of territories by the title of discovery but had not actually assumed control over the land. Rivaling European states could

84 With exception of WESTLAKE (1914), who devoted a whole chapter in his *Chapters on International Law* to India.

85 This description of the titles for the acquisition of territory in European international law is based on the following works: ANGHIE (2005); KOSKENNIEMI (2001); FISCH (1984); GONG (1984).

hence claim that they did not practice effective occupation and that they in turn did have the intention to take effective control. The European possessor of the foreign territory was allowed a certain period of time to assume effective occupation of the land and if no other state laid claim on the territory, the doctrine of acquiescence was recognized. Thus, the doctrine of effective occupation served two purposes: to legitimize the acquisition of territory by European states from non-European entities and to regulate the relations between the European states.

Another title for the acquisition of territory was conquest. European international law theory allowed for territorial acquisitions during wartime. The just war theory of the early modern period, which sanctioned war when it was fought for a just cause or a just reason, lost its relevance at the close of the nineteenth century when positivism had replaced religious morale. Waging war was considered a prerogative of the sovereign, and its initiation was scarcely limited. Positivist lawyers were more interested in making conduct in war more humane and protecting non-combatants than to actually prevent the occurrence of war.

Finally, next to discovery, occupation and conquest, territory could be acquired by cession. This meant that the sovereign of a state was allowed to give or sell a part or all of his territory to a successor state. Express permission was usually given in form of a treaty. Most European colonies were founded on the title of cession. However, it was not always territory which was ceded in treaties. It was also possible to cede parts of the rights inherent to a sovereign. International lawyers from the nineteenth century onward proposed that the sovereignty over a territory could be split into external and internal sovereignty. External sovereignty had to do with the relations between states and contained the right to wage war and make peace, to maintain peaceful relations with other states and to conclude treaties. Internal sovereignty was the right to rule the peoples within the territory of the state. This strict separation between internal and external sovereignty allowed for the establishment of protectorates. Protectorates constituted an agreement in which the protected state ceded its external rights in return for a military alliance.

When we apply these doctrines to the acquisition of sovereignty by the British in India, we see that some of them do not apply. First of all, the Indian sub-continent was relatively densely populated and possessed cities which were larger than their European counterparts. Many states had a high

level of organization and an effective administration based on tax collection. The territories acquired by the Company and the British Crown were thus by no means *terra nullius*. Effective occupation was also not a title which lawyers used to legitimize the European acquisitions in India, as vast regions in India were cultivated effectively and effectively ruled by a common sovereign. Conquest however did take place in India. The British waged many wars on the sub-continent which resulted in the acquisition of territory. The battles of Plessey and Buxar or the Maratha wars are examples of conquest. Nevertheless, cession was the most common manner of acquiring territories. Hundreds of treaties of perpetual peace and friendship were concluded with Indian rulers which brought them under British protection and/or provided for cession of territory.

Thus, some of the general doctrines about the acquisition of territory in European international law theory could be applied to the Indian territories. The British international lawyer John Westlake at the close of the nineteenth century summarized what he thought was the international title of the British *imperium* in India. He ruled out occupation because “India possessed a civilization placing her as far as Europe beyond the reach of any such title.”⁸⁶ He also ruled out cession, for not all princes had signed treaties with the British and “the imperial right is claimed as overriding the letter of the treaties which there are”. Finally, he also ruled out an ordinary case of conquest, because conquest precluded the suppression of the conquered state or if the defeated state was left in existence, cession. As he had already ruled out cession Westlake finally concluded that the “imperial right over the protected states appears to present a peculiar case of conquest, operating by assumption and acquiescence.”⁸⁷

Yet, lawyers who had served the British administration in India came up with supplemental titles for the acquisition of territory. Some of them would confirm European international law theory but others were very specific doctrines suitable for the Indian case. Primarily, they thought that with the imperial grants and the subsequent treaties which were concluded between

86 Bluntschli also explicitly recognized that the Indians had once possessed a high level of civilization: “Bei den civilisirten alten Voelkern Asiens, wie besonders bei den alten Indern mehren und entwickeln sich theilweise die Ansätze und Triebe zu voelkerrechtlicher Rechtsbildung.” BLUNTSCHLI (1872) 10.

87 WESTLAKE (1914) 214.

the Mughal and the East India Company, the Company had become the legal heirs of the Mughal Empire. They felt it gave it the right to rule the whole Indian subcontinent as the Mughals had done before. In a correspondence about the annexation of Oude in 1855, J. P. Grant, Officiating Secretary to the Government of India, placed the right of annexation on the succession of the Mughal Empire and the duty of terminating incorrigible misgovernment in his dominions. Governor-general Dalhousie in his response also claimed that the British government was the successor of the emperors of Delhi.⁸⁸

Second, the Indian states, according to an English colonial administrator, had a “restless spirit of ambition and violence which is characteristic of every Asiatic government” which “rendered the peninsula of India the scene of perpetual warfare, turbulence and disorder.”⁸⁹ According to the statesmen the British had to bring stability, peace and the rule of law to the region. Sir Charles Metcalfe, who was resident at the court of the Nizam and would later become Governor-General, advised his government to capture the city of Bhurtpure, which was followed up on in 1826, because:

“We have by degrees become the paramount state in India. In 1817 it became the established principle of our policy to maintain tranquility among the states of India; (...) and we cannot be indifferent spectators of anarchy therein without ultimately giving up India again to the pillage and confusion from which we then rescued her (...). We are bound, not by any positive engagement to the Bhurtpur state, but by our duty as supreme guardians of tranquility, law and right, to maintain the legal succession of Balwant Singh (...).”⁹⁰

The term ‘paramount power’ was commonly used amongst the colonial administrators and from this status they derived the title to interfere with native affairs and even to take upon themselves sovereign control over territories. They claimed it was their duty, being the paramount power in India, to bring order and tranquility to India, like order and tranquility existed in Europe. This even superseded the provisions of treaty engagements.

Nevertheless, as was discussed above, the East India Company had only become the ‘paramount power’ in India in the early nineteenth century.

88 WESTLAKE (1914) 204.

89 WESTLAKE (1914) 206.

90 TUPPER (1893) 55.

Before that, it had participated in the Indian international system generally according to its customs. Territorial expansion in the eighteenth century was rather legitimized to be self-defense, self-preservation and the participation in the Indian system was explained by a policy of the balance of power. In Europe international law was subordinated to the principle of the balance of power. The European system was to prevent single states from becoming so powerful that they overruled the other states on the continent. Because of the system for the balance of power small states were protected by international law but on the other hand large states had the right to act as a police force for the preservation of the system. In the eighteenth century British policymakers claimed to have introduced a similar system in India.

Lord Cornwallis explained his policy of alliances to be in accordance with the principle of the balance of power. He used the alliance of the East India Company with the Peshwa and the Nizam against Tippu Sultan in 1792 as an example of such a strategy.⁹¹ In the same manner, Lord Wellesley justified in a paper written by him on August 12, 1798, shortly before the war against Tippu Sultan began, his intentions by arguments drawn from international law and contended that “we were entitled by the Law of Nations to reduce the power of Tippoo as an effectual security against his designs.” He stated that it was still an object of the Indian Government to re-establish the balance of power in India as it had existed under the Mughal Emperor prior to his decline. However, the Mysore state was annihilated and became completely dependent on the British Government. Now that the East India Company had become the predominant power in India, the principle of the balance of power no longer applied.⁹²

Other territorial expansion was sanctioned under the title of self-preservation and self-defense. First, it was generally accepted that the East India Company had to be protected against the French. Lord Castlereagh wrote in 1804 that “it has not been a matter of choice but of necessity that our existence in India should pass from that of traders to sovereigns. If we had not, the French would long since have taken the lead in India to our exclusion.”⁹³ Sir George Barlow wrote in 1802 when he was Governor-General in India:

91 TUPPER (1893) 29.

92 TUPPER (1893) 33–34.

93 TUPPER (1893) 32–33.

“With respect to the French, supposing the present questions in Europe not to lead to an immediate rupture, we are now certain that the whole course of their policy has for its object the subversion of the British empire in India, and that at no distant period of time they will put their plans in execution. It is absolutely necessary for the defeat of those designs that no native state should be left to exist in India which is not upheld by the British power or the political conduct of which is not under its absolute control.”⁹⁴

Second, the existence of the Company was threatened by the increased powers of the Maratha Confederacy, which was regarded by the British to be ‘predatory’ and ‘warlike.’⁹⁵ A war against them seemed inevitable if the Company was to maintain its influence in the region. Many wars in India were excused by the British authorities as being wars of self-defense and they often reported on how the enemy had not accepted all the propositions short of war and continued to arm itself as if in preparation for war (like Nagpore during the Third Anglo-Maratha War). The first Burmese war for instance, was described by Sir Charles Metcalfe as “the clearest case of self-defense and violated territory.”⁹⁶

The expansion during the eighteenth century was explained to be rather coincidental, as if territorial expansion was forced upon the East India Company by local circumstances. Although at that time the Europeans already had a clear sense of civilizational superiority, depicting the Indian sovereigns as violent rulers not capable of maintaining order and tranquility amongst each other, civilization was not yet frequently used to sanction British expansion. The notion of progress however did increase in importance with the British officials in the nineteenth century. The example of the annexation of Oude based on the alleged misrule of its Indian ruler clearly demonstrates how they used their perceived civilizational superiority to sanction their interference in the internal affairs of Indian states.

“(…) In India there was, since the downfall of the Moghal empire, not one considerable government of any stability, the government of the Company itself alone excepted. There was no possibility of any lasting quasi international combination for pacific purposes framed on a common assent; and the governments of the several native states had not enough either of administrative and political strength or of public morality to act persistently and for any length of time up to what might be called international obligations. (...) Europe was saved by its civilization from the

94 WESTLAKE (1914) 205.

95 TUPPER (1893) 34.

96 As quoted in TUPPER (1893) 44.

domination of one power of the West; a more advanced civilization was the efficient cause which made one Western power supreme throughout India.”⁹⁷

The doctrines of self-preservation, self-defense and balance of power had legitimized the acquisition of territory by conquest, annexation and cession by the East India Company in the period of its assent. Once it had become the ‘paramount power,’ civilization became the term which sanctioned not only territorial acquisition but also the reduction of the internal sovereign rights of the Indian rulers.

Additionally, due to its paramountcy, the British Government in India was able to introduce the doctrine of lapse. In Hindu law the sovereign had the right to adopt a son in order to secure the succession to his throne. Adoption would either take place in case there was no heir by birth or if this heir was not considered adequate by the ruler to succeed him. The British generally disapproved of this practice. The British Government in India, in certain cases, did not recognize the adopted heir and after the death of the Indian ruler it assumed sovereignty over his territory on the pretext that in the absence of a legal heir, the paramount power held title to the territory. Nevertheless, in a series of dispatches dating from 1834 to 1846, the Court of Directors of the Company permitted adoption but emphasized that it should remain an exception and should never be granted but as a special mark of favor and approbation.⁹⁸ After the Indian Mutiny, from 1861 onward, the Indian Government started to issue *sanads* of adoption to loyal Indian rulers. These patents or grants allowed the sovereign to adopt his heirs.⁹⁹

Finally, a number of protectorates fell to the Indian Government on a voluntary basis. In 1803, for example, a few of the Káthiawár chiefs applied for British protection, and offered, on certain conditions, to cede their estates to the British Government. The offer was not accepted initially until it was deemed strategically necessary in 1807. The supreme authority in Káthiawár, however, was not vested in the British Government alone until the Peshwa’s rights to the Indian peninsula were terminated, and the Gaekwar in 1820 had engaged to send no troops to the province and to make no demands on it except through the British Government. In another example, the Cis-Sutlej chiefs were glad to receive protection from the British in 1809 when the

97 TUPPER (1893) 37.

98 TUPPER (1893) 44.

99 LEE-WARNER (1894) 37.

Mahraja Ranjit Singh claimed the right of sovereignty over the whole Sikh country.¹⁰⁰

European international theory thus stood above the legitimization colonial officers put forward for the expansion of British authority in India. Those titles were based on conquest and cession. But once the separate Indian cases are studied, many other titles were found, mainly relying on self-defense, self-preservation against the intentions of rivals like the French or the Marathas. But above all the higher level of civilization served as explanation for British expansion, especially in the nineteenth century after the Maratha states were defeated in 1818, when the British Government had become the paramount power.

5. Hindu Law, Islamic Law and European International Law

The above description reflects the functioning of the Indian international system in practice. However, this tributary system was embedded in a larger view of how life and the world should be organized. The largest normative orders which affected the Indian sub-continent before European settlement were the Islamic order and the Hindu order, because most Indian rulers adhered to either one of these confessions. In order to assess whether European international law was indeed unique in the way it regulated inter-state conduct – as it was perceived by the Europeans until well into the twentieth century – or whether its characteristics were similar to those of other normative orders (which might be an argument for the existence of a more natural law shared by all peoples) it is tempting to conduct a comparison of these world views. The discussion of the natural universality of international law, however, is a philosophical one and the description and comparison of ideological concepts does not bring us nearer to understanding the historical process of the universalization of European international law. As mentioned above, the Indian normative order was only gradually suppressed after a period of increased entanglement. It was a pragmatic process which was inherently tied to the realities of the balance of power in India and was more determined by politics than ideology. World views changed under the pressure of political reality, and in order to identify and understand these changes it is more useful to trace the entanglements of

100 TUPPER (1893) 49.

normative orders than to compare their theory as it was laid down in scriptures. Because, as we have seen before, even the theory of European international law was not applied in its entirety to ‘non-civilized’ states like the ‘native states’ of India; its norms were adapted for the colonial context. Similarly, Hindus and Muslims had to adapt their norms to the realities of a changing world and in confrontation with a different normative order.

A comparison of European international law to Hindu law or Islamic law is further complicated by linguistic differences. The Islamic world order as well as the Hindu world order had as their objective a peaceful international society which was embodied in a stable political order. What this international order looked like however, differed significantly. Both orders were not so much a body of laws like European international law, but catered more to the notion that there is an ideal way of life which can be reached by fulfilling certain duties. They encompassed not only legal rules but also moral, religious, social and political values. This means that the conduct of rulers or states encompassed only a small part of a larger body of norms. It can thus be difficult for Europeans to interpret and understand these normative orders without pressing onto it a European framework of analysis. Nevertheless, colonial policies were often based on such misinterpretations. The British conducted many translations of Islamic and Hindu texts in order to uncover the plural legal systems existing in India. In a way they admired these legal traditions as examples of written law, in contrast to the oral traditions they had encountered elsewhere. “But in translating Hindu texts and using them as legal codes, the British were distorting Hindu legal judgments.”¹⁰¹ The historian must be careful not to make the same mistakes.

Nevertheless, it remains interesting to see what ideological framework the Indian tributary system was embedded in, in order to better understand its context but also in order to place the history of European international law in a global historical context. Yet, such a comparison can only be a superficial one, as the written sources of the three world views stem from very different eras and thus functioned in different historical contexts. Furthermore, even though a large part of India came to be ruled by Muslim rulers, its Hindu customs were not completely given up. Rather, the rulers integrated into Indian culture and did not fully apply Islamic rules of

101 BENTON (2002) 139.

inter-state conduct to India but preferably adopted the Indian customary rules.¹⁰² It was only Aurangzeb (1618–1707), the last successful Mughal Emperor, who adopted a more orthodox Islamic policy.¹⁰³ Thus, in India the Islamic world view and the Hindu world view merged and became a hybrid form of both ideologies.

Islamic law theory derived from the Qur'an and the *sunna*, which conveyed the exemplary practice of the Prophet Muhammad. From these sources stemmed the norms compiled in the *sharia*, which regulated the behavior of Muslims in their domestic and foreign affairs. Islam divided the world into two parts, namely that of the believers and that of the unbelievers. The territory under Muslim rule was called *dar al-Islam* (abode of Islam) and the territory under the rule of unbelievers was named *daral-harab* (abode of the war). Muslims had the constant duty to convert the *daral-harab* to Islam even if it involved forceful means. This duty was called the *jihad*.¹⁰⁴ Yet, in practice it was not viable to constantly wage war. In order to maintain peaceful relations with unbelievers and to facilitate trade for example, later jurists came with the explanation of the *sulh* which consisted of ways to suspend the *jihad* for a certain period. Muslims were thus allowed to engage in economic and cultural activities in the *dar al-harab* and the people of the book, such as Christian and Jewish people, were allowed to do the same in the *dar al-Islam*. Their life, security and property were protected by the authority of the Muslim ruler. Foreigners rights were sanctioned by the unilateral *ahdname* conferred only by the Muslim ruler, and could be unilaterally revoked whenever the pledge of friendship was construed to be violated.¹⁰⁵

In keeping with Islamic law theory, the ruler of the faithful should be elected by the congregation, and should govern according to the precepts of the Koran. So there was no fixed rule of succession, which led to many problems of succession in the Mughal Empire. The Islamic emperors, like the rajas, were regarded as a sort of ultimate court of appeal all in cases, judicial and others.¹⁰⁶ The *dar al-Islam* was ruled by one highest authority:

102 ANAND (2006) 9.

103 HARMATTA (1994) 318.

104 ONUMA (2000) 18–19.

105 ONUMA (2000) 20.

106 TUPPER (1893) 185.

the Caliph, who did not recognize any superior except the Divine. His governors in the provinces commanded armies, collected taxes, and generally carried out the duties of statecraft. The Caliph's duty was to maintain the unity of the territory of Islam by authorizing such governors to rule as agents of the court.¹⁰⁷

The king also played a central role in the Hindu world view. The term 'Hindu law' is used to denote the moral duties which were described in ancient Sanskrit texts. However, this is a modern term which actually does not fit with a concept that embraces all of life and is synonymous with virtue. As in English the concept of *dharmā*, a religious and legal duty, does not exist, we translate it into law. Dharma is derived from assumed divine revelations (śruti) which were recorded in the Vedas between 1500 and 800 B.C. Authors writing between 600 and 100 B.C. in aphorisms (sutras), and writing books of 'things remembered' (smritis) later interpreted the revelations and molded them into a legal science of dharma (dharmaśāstra). A vast Sanskrit literature of 'things remembered,' commentaries, treatises and digests subsequently "developed a complex system of legal rules building on the foregoing fundamental jurisprudential premises."¹⁰⁸

The Hindu legal system was to be administered by the kings of separate kingdoms who were to be advised by priests. It was the duty of the king to maintain order; he was not considered to be the source of law or the repository of law. He too was subject to the law and fulfilled the role of a judge.¹⁰⁹ The Hindu international system was similar to a *mandala*. Each king saw his kingdom at the center of the circle. The neighbors were all potential enemies and the states bordering those neighbors were all potential friends. This international system of embedded circles of states could be expanded infinitively over all states in the world. The only way to pacify it would be to establish a single sovereign over all. One king would expand his empire by conquering territories and meanwhile spread out the realm within which the law was faithfully observed. Other kings would continue to exist in this system as subsidiary or feudal states, or as members of a sort of confederation.¹¹⁰ The world sovereign had to balance the centrifugal forces

107 KELSAY (2010) 130.

108 FUNK (1996) 172.

109 FUNK (1996) 85.

110 GRAFF (2010) 183.

of the mandala system. If he was able to stabilize the system by creating friendly dependencies and subordinate chiefs then peace would prevail and his kingdom would become prosperous. The peace would be cemented by the exchange of gifts, thus establishing tributary relations. Like in Europe the notion of the balance of power existed. Kautilya, for example, called for states to intervene if another state should grow disproportionately strong in order to uphold the balance in the circular system.¹¹¹

It was the duty of the king to maintain order. Like in the caste system, where every individual was supposed to know his or her place in the system and to carry out the duties that the position required, it was the king's responsibility to correctly identify his state's relative position in international society and act accordingly, pursuing policies of expansion, conciliation or strategic retreat as necessary. It was the task of the king to uphold order in the domestic as well as in the international system.¹¹² Thus, a separation of sovereign rights into internal and external sovereignty like in European international law theory was not possible in the Hindu system. Every king, even though he was a vassal to another king, had the responsibility to pursue the balanced international order as represented by the *mandala*.

The use of force was deemed imperative for the maintenance of order. It was said to prevent the deterioration of order and in some contexts even to be a positive good. To prevent the social order from devolving into a state of nature, the king was obliged to enforce punishments. Force could even create the stable conditions for social and economic growth. In the international context this meant that war was a duty for the princely caste (*ksatriyas*). War became a religious ritual and when the king died in battle he was guaranteed heaven. The preservation of good order was preferable to an increase of prosperity, because without order prosperity was not possible.¹¹³ The use of force was also a necessity in Islamic law and war or *jihad* were indispensable in order to reach a world which was fully under *dar al-Islam*.

However, chivalric codes and complex legal principles similar to European international law governed war in the Hindu order as well as the Islamic order. They all committed to protect civilians from the causes of war. Yet, Hindu and Islamic law did not elaborate as much on measures short of

111 GRAFF (2010) 183.

112 GRAFF (2010) 170.

113 GRAFF (2010) 170–172.

war as European international law theory, because in these normative orders war was a necessity. Nevertheless, the notion that war was a last resort did exist in both orders, and when victory was doubtful, peace should be concluded.¹¹⁴ In Hinduism peace had to be sought by means of conciliation, gifts, or bribery, or by causing dissension among the enemy. If these expedients could not be used, the king should be prepared to fight in such a way as to conquer his enemies. Similarly to European standards, war ought to be declared openly.¹¹⁵

We have seen in the previous chapter how the acquisition of territory was treated in European international law. Hindu law allowed for belligerents to conquer territory from the enemy in the same manner as European international law permitted it. The execution seemed however to be different. In Hindu law the conqueror had special duties towards conquered territories. He was not allowed to conduct vengeance or to destroy the land he had occupied. On the contrary, the victor had the duty to protect the newly conquered land from acts of aggression. He even had to prevent his troops from pursuing the defeated enemy too much. Disposed kings should be treated with honor and all attempts should be made to win over the hearts of the locals, using a mixture of bribery and good governance. The victorious king:

“(…) should give rewards, as promised, to those who deserted the enemy for his cause; he should also offer rewards to them as often as they render help to him (…). He should adopt the same mode of life, the same dress, language, and customs as those of the people. He should follow the people in their faith with which they celebrate their national, religious and congregational festivals or amusements. He should please them by giving gifts, remitting taxes, and providing for their security. He should always hold religious life in high esteem. (…)”¹¹⁶

Thus, unlike European international law Hindu law prescribed the conqueror to integrate into the conquered society and adapt his policy to its customs. He was to restore the status quo which prevailed before the war. The conqueror was not to establish absolute sovereignty or dominion over the newly acquired territory but to bring it under his oversight, restoring order in a manner similar to a federation.¹¹⁷

114 KELSAY (2010) 124.

115 GRAFF (2010) 175–176.

116 As quoted in GRAFF (2010) 180–181.

117 SENGUPTA (1925) 12.

Defeated kings could be restored as feudal lords to the throne. Graff suggests that a treaty could be made with the original rulers if that was the preference of the inhabitants. Medhatithi, a tenth century commentator on Manu, stated that the defeated ruler and the victorious ruler shared their profits and inconveniences: “You must give me an equal share in your treasury, (...) and you must take an equal share in my fortune and misfortune (...) in activity or inactivity, at the proper time, you must personally adhere to me, both with your forces and treasury.”¹¹⁸ These words reflect the relationship between a suzerain and a vassal.

In Islamic law all territories not under Muslim rule were viable for conquest. The conqueror was to levy a special tax on the conquered people called the *fiqb*.¹¹⁹ Indeed, Aurazeb did introduce this tax in India. Additionally, the ruler could establish tributary relationships with the conquered state.¹²⁰

This very brief and superficial overview of the Hindu and Islamic norms for inter-state conduct demonstrates that describing the ideology behind the Indian tributary system is not explanatory for the existence of that same system. Also, it does not reflect the confrontation with the European normative order, because it predates this historical process. In this case it is preferable to trace entanglements in normative orders in order to understand why European international law competed with local norms and subdued them. What we can however derive from this overview is that there was no title in the theory of Hindu law or Islamic law for the acquisition of territory except conquest. Relations between states were mainly defined by war and in time of peace states in theory ruled in isolation or in a tributary relation between suzerains and vassals. Conquered states received a large amount of independence when they accepted the protection of the conqueror. Thus, in theory protectorates like in European international law existed in Hindu and Islamic law, yet they were not so much sanctioned by treaties as by gifts.

118 GRAFF (2010) 182.

119 KELSAY (2010) 128.

120 KELSAY (2010) 122–123.

6. Conclusion

The universalization of European international law was a long process and the Law of Nations was not at once accepted by non-European states. The history of the colonization of India confirms this. It is possible to define several stages in which different systems regulated the relations between states on the Indian sub-continent. In the first stage, at the time when the East India Company was still becoming a territorial power, European international law did not have any application to India. This by no means meant there was no international order on the sub-continent. On the contrary, Hinduism and Islam provided for very clear ideas of the role of sovereigns and how they should interact with each other. From these world views derived a complex network in India which was based on tributary relations. At the head of this network was the Mughal Emperor. He was the one who distributed offices and held the system together. The British East India Company initially participated in the Indian international system. It received *firmans* from the Mughal Emperor and became the empire's tax collector. The relations between the Company and the Indian states were those of equal sovereign states and this permitted the Company to pursue its policy of treaty alliances. The concept of protected states already existed in the Indian international system; the Company only added to it the standard of written treaties.

By the beginning of the nineteenth century, the East India Company became the paramount power in India. This allowed the Company to start imposing its own order on the Indian states. The new policy consisted of subsidiary alliances in which the Indian rulers received protection against their rivals if they in return allowed a British resident at their court and a subsidiary force to be maintained at their own cost within their territory. The force could either be paid with money or by cession of territory. The East India Company promised not to interfere with the internal affairs of the Indian state. The internal sovereignty of the ruler was thus protected.

The Indian rulers accepted the unequal treaties because it provided them protection against further interference of the British. They were fully aware of what the treaty relations entailed and although the treaties were first drafted by British officials and presented by them to the Indian ruler, the Indian rulers did try to negotiate on the terms of the treaty. Notwithstanding the fact that European international law seemed to increasingly regulate the

relations between the East India Company and the Indian rulers, the Indian international system continued to regulate the relations amongst the Indian sovereigns. They also tried to uphold it towards the East India Company, as the wish of the Nawab of Oude to pay tribute to his suzerain, the Governor-General, in 1814 proves, but the Company wished to put an end to these native customs. In this period the British officials did recognize the existence of an Indian legal system and only applied their own legal system where they deemed it necessary. The full body of European international law thus did not apply to Indian states, only those provisions which were convenient for the European hegemony. The Law of Nations did serve as a legitimization for territorial expansion of the East India Company. The treaties concluded with Indian states were recognized as valid treaties in the scope of European international law because they served as tools to sanction interference in Indian affairs, especially towards the Indian rulers.

In the nineteenth century the colonial officials started to use their perceived civilizational superiority more frequently to legitimize the interference in internal affairs of Indian states. This right stood above all other titles and permitted even the breach of treaties. An increased number of states was annexed on civilizational grounds. By that time the Indian rulers had appropriated the new international system and tried to claim their rights through its machinery. The remonstrations of Wajid Ali Shah in connection with the annexation of Oude are evidence of Indian appropriation of European international law.

From 1858 international law no longer had application to Indian states. The rulers had not only lost their right to wage war, make peace and enter into alliances but were also bound to follow up on the advice of the British resident, which compromised the internal sovereignty of the rulers. It was now the laws of the British Government they had to obey. The key symbol of the Indian international system too had disappeared when the last Mughal Emperor was tried in 1858. The treaties had effectively deprived the Indian states of their sovereign rights which were a prerequisite to be recognized as an equal state under European international law.

European international law served as legitimization of British colonial expansion; hence there were multiple titles for the acquisition of territory. The acquisition of territory in India was sanctioned by doctrines of civilizational superiority, conquest and cession. British colonial actors introduced additional titles for the legitimization of the acquisition of territory, the most

important one identifying the British government in India as the legal successor of the Mughal Emperor. International legal treatises looked more at legal practice within Europe than at developments overseas, so their provisions remained very generic.

A normative order is based on an ideology and does not necessarily reflect which ideas are put in practice. The theories for inter-state conduct derived from Islamic and Hindu scriptures predate the hybridization of both in India and the confrontation with the European Law of Nations. Also, it is difficult to identify the Indian international system which regulated tributary relations in India in the seventeenth and eighteenth century in an analysis of the ideology. Not so much a comparison of normative orders will help us to put the history of European international law in global historical perspective, rather the tracing of entanglements will provide more adequate tools to do so. The study of the historical practice is as much suitable for finding similarities and differences in various normative orders as comparative history. Entanglements, however, not only allow for legal pluralism but also provide the means for analyzing the tangible relationships amongst these plural legal systems.

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Global Criminology and National Tradition: The Impact of Reform Movements on Criminal Systems at the Beginning of the 20th Century

I. The global criminological revolution

This article focuses on the international movement towards individualization of punishment between the 1870s and the 1930s as a model to study how legal theories developed in a global scientific dialogue have been differently shaped according to national traditions. Even if interpreted in different ways, the common idea shared by prison reformers, exponents of the new criminological science and a large part of public opinion in Europe, United States and Latin America necessitated a radical change from repression to prevention. The main focus shifted from crime as an abstract entity to criminals as natural, social human beings immersed in a complex network of environmental, social, economic conditions which affected their behavior. Nonetheless, the ‘criminological wave’ between the 1880s and the 1930s was not a uniform international parenthesis, but reflected in its variety the differences between American and European legal cultures and their notion of the principle of legality.

One of the main innovations suggested and experimented by criminologists was the indeterminate sentence, i. e., a notion of punishment fixed neither by the law nor by the judge, but delegated to a board of experts charged to fit the treatment to the individual criminal. Since each delinquent man commits a crime for different reasons, determined by different social, economic, biological, anthropological causes, and since the very purpose of a penalty ought not to be retribution but social security via rehabilitation and prevention, punishment (an old idea to be replaced with the broader notion of treatment) cannot be predetermined by law according to an abstract degree of seriousness of the act or an abstract evaluation of guilt. Nonetheless, the essence of ‘indeterminateness,’ considered the best

mean to individualize punishment, was openly in sharp contrast to the principle of *nulla poena sine lege*. The liberal criminal justice system both in Europe and in the United States was grounded on the ideas of determinateness and fixity of law, limited judicial discretion, and the retributive and deterrent aim of punishment, which were all incompatible with the calls for rehabilitative treatment advocated by radical criminologists as well as by prison reformers. Hence, the more the notion of an indefinite sentence developed, the more it turned out to be an infringement of the classic principle of legality, forcing the doctrine to reshape the rule of law according to the new priorities of penal policy.

Beyond comparative studies, the international criminological congresses, the hybridization of models and the circulation of the means to individualize punishment (indeterminate sentence, conditional release, parole, suspension of sentence, juvenile treatment etc.), the constitutional tenets of the rule of law and the *Rechtsstaat* shaped differently the criminal systems in France, Germany, Italy, United Kingdom, Ibero-American countries and the United States. The different mindset of each legal culture, based on different views of the past and on different theories on the rationale of punishment, assigned the *nulla poena* principle a peculiar value in the legal systems of the Old and New World. However, the enactment of the progressive penological ideal, with its two-faced approach of prevention and rehabilitation, led to different solutions: While the indeterminate sentence was finally held constitutional by the U.S. courts and the doctrine was accepted as compatible with the principle of legality by reason of distinguishing between the criminal trial in the guilty phase and sentencing phase, the European observance of strict legality stressed the ‘jurisdictionalization’ of any measure of safety. Thus, for different reasons the *nulla poena* was not dispensed with in Europe, in the United States and in Latin America, but its historical configuration was changed and its meaning modified.

As recent studies have shown, the rule of law, as a general theory and in criminal justice as well, has never been an invariable concept, but rather a flexible rule assuming different characteristics according to historical institutional balances and political needs.¹ The historicizing analysis of the principle of legality in relation to the influences of the criminological

1 See, e.g., LACEY (2007a); PALOMBELLA (2009a); PALOMBELLA (2009b); COSTA (2002); COSTA (2007).

theories of social defense, dangerousness, and prevention offers the opportunity to investigate how the same concepts have been interpreted in different contexts. The rise of criminology as a scientific method fostered a global reform movement that developed a deep cultural exchange based on translation and comparison,² and affected the project or the enactment of penal codes (called criminological codes, rational penal codes) and the passing of special laws (Prevention of Crime Act, 1908, in the UK; Lois Bérenger, 1885 and 1891, in France). The widespread call for the individualization of punishment in the 20th century was partially changing its scope the more the emphasis of reformers shifted from correctionalism to social control,³ from individual rehabilitation to individual incapacitation, assuming specific features in conformity with national political tenets and with the concrete implementation of the formula.

The aim of the article is to investigate the heritage of these reforms on criminal concepts and the definition given in different contexts to similar institutes such as measure of security or indeterminate punishment: How did scientific criminology impinge upon legal systems? How was the rehabilitative ideal enacted? The analysis is neither a comparative history of criminology nor a history of criminal law reforms or punitive systems at the beginning of the 20th century. Assuming the wider notion of criminalization suggested by Nicola Lacey as a “conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice an criminological studies on the other” and as an idea which “captures the dynamic nature as a set of interlocking practices in which the moment of ‘defining’ and ‘responding to’ crime can rarely be completely distinguished and in which legal and social (extra-legal) construction of crime constantly interact,”⁴ the article studies the criminalization process at the beginning of the 20th century.

Being a complex concept determined by manifold factors, criminalization was inevitably shaped by the different constitutional contexts within which it took place, had an unlike impact on the balance of powers according to the legal culture on which it impinged and was supported or contrasted by

2 PETIT (2007).

3 GARLAND (2001).

4 LACEY (2007b).

varying legitimizing legal discourses. Thus, the investigation of the influences of criminology on criminal laws and criminal codifications discloses a wide range of key issues about the history of criminal law in Western countries, the exploitation of different penal policies and the role of legal reasoning in promoting or contrasting reforms. In so doing, the paper applies the historical analysis of criminal law as pointed out by many legal historians⁵ to the study of the Janus-faced rise of global criminology, based, on the one hand, on common targets and methodology but concretely forged, on the other, in different ways according to the resistance of legal traditions,⁶ the forms of individual guarantees and the perspectives on the role of the legislative, judicial and administrative powers.

Given the momentous impact of the principle of individualization of punishment on both the European and the American criminal systems from the end of the 19th century up to now, the specific focus on the history of the indeterminate sentence is representative of how it has been differently enacted in different countries and also suggests further possible explanations for the reasons behind the comparative variations in the sentencing phase today.⁷

II. Local peculiarities in the history of criminalization

The hypothesis assumed in this paper is that the fundamental tenets of criminological science, shared a global dimension (at least in the Western World) because grounded on the idea of a universal scientific and progressive knowledge but were differently applied in the concrete legal systems, due to the resistance of constitutional balances. By applying to our subject the path-dependency concept of modernization in criminology, i. e., the idea that trajectories of modernity in crime policies are not driven by a single engine but are the complex outcome of different political conditions, traditions, models,⁸ the criminalization process of the 1880s–

5 FARMER (1997); DUBBER (1998); DUBBER (2000); SBRICCOLI (2009).

6 On the mutual advantages for both criminology and legal history given by an historical analysis of criminal law, see, e.g., GODFREY/LAWRENCE/WILLIAMS (2008) 6–23 and LAWRENCE (2012).

7 WHITMAN (2005); TONRY (2010); TONRY (2011).

8 KARSTEDT (2002).

1930s can be construed in terms of the encounter between a globalizing movement and different national peculiarities, and sheds light on the *longue durée* resistance of legal institutional habits in the face of radical reform attempts. If, in other words, the engine of criminology (its scientific-based knowledge) was surely 'global,' its actual impact on criminal law was affected by 'local' factors (national legal frameworks).

At the end of the 19th century criminology surely had a widespread international growth founded on absolute faith in scientific knowledge: because science, unlike law, was exactly the same everywhere, based on the same experimental methodology and arriving at the same outcomes, criminology seemed to be designated to have the same revolutionary impact on all the criminal law systems. As a matter of fact, the unusual international dimension of the criminological debate is unquestionable: the foundation of the International Union of Criminal Law in 1889 and its following congresses and publications, the *Modern Criminal Science Series* translations of European criminologists' works made by the American Institute of Criminal Law and Criminology, the International Congresses of Criminal Anthropology, the International Prison Congresses and the diffusion of specialized journals are signs of the globalizing rise of criminology. This reformative movement of criminal law and penology had an impressive impact on legislations, forcing the enactment of new laws in order to face the problems of recidivism, habitual offenders, juvenile delinquency, reformatory detention in the light of the new leading principles theorized by the Italian positive school of criminal law, such as individualization of punishment, social defense, dangerousness of the offender, special prevention.

Many criminological codes inspired by these principles were drafted or enacted, thanks to the impulse to reform penal policies. Yet the reformatory character of the first phase shifted toward a more conservative exploitation of criminological ideas, hiding repressive aims behind the mask of the most suitable treatment for the criminal. In this process, the European jurists' legal reasoning, willing to defend the *nullum crimen* and *nulla poena* as unavoidable foundations of the *Rechtsstaat*, refused the more subversive idea of rehabilitation and adopted the virtually unlimited repressive scope of the social defense. In some European countries (Italy, Germany) some criminological proposals were modified to reconcile them with the repressive needs of the totalitarian regimes. Some Latin American criminological codes, mostly influenced by the Italian positive school of criminal law, adopted

the dual-track system of punishment and measure of security, based on the twofold notion of criminal liability and dangerousness.⁹

The risk of this eclectic compromise turned out to be a failure of the rehabilitative ideal: The entanglement between American and European doctrines and the search of a theoretical basis by the former, fostered by the wide diffusion of European theories in American culture, seem to have curbed the most revolutionary reforms supported by criminologists. Moreover, after the first emphasis on similarities and affinities in the punitive strategies of European and American countries at the end of the 19th century, the first decades of the 20th century saw the birth of marked peculiarities and different theoretical foundations of criminal law.

Let us turn to tracing some of these constitutional peculiarities in regard to the application of the indeterminateness principle. The proposal of an absolute or relative indeterminate sentence, as recommended by the U.S. prison reformers such as Zebulon Brockway, Warren Spalding, Frederick Howard Wines, called for lessening both the legislature and judiciary's role in determining punishments (its manner as well as its duration) for crimes: because the scope of punishment was rehabilitation of the offender, and because each individual offender ought to have been treated and reformed in different ways according to their character, background and dangerousness, the idea of a fixed, predetermined and uniform penalty was illogical and ineffective. Neither the legislature nor the judiciary had the necessary knowledge and expertise to decide the fittest treatment for the criminal, and the time needed for rehabilitation could not be fixed once and for all at the end of the criminal trial but had to be determined and periodically revised by observing the convict's behavior while serving the sentence. This task was entrusted to a body of experts in criminology and prison discipline, that was an administrative agency.

This system questioned many criminal law tenets. Let us focus on four of them, the doctrine of the separation of powers, the *nulla poena* principle, the role of the judiciary and the 'administrativization' of criminal justice.

9 DE ASUA (1946).

III. The separation of powers

The liberal philosophy of punishment of the Western countries, after Beccaria, Montesquieu and the French revolution, was strictly connected with the idea that the legislature only could fix penalties and that the judiciary, *bouche de la loi*, had the simple duty to apply them mechanically. This framework was a reaction against the arbitrary power of judges in the *Ancien régime* and was considered a fundamental guarantee of individual freedom against possible encroachments of law enforcement and as a bulwark of equality before the law.

This rule was strictly applied in the European penal codes, and in countries such as France or Italy there was a great doctrinal debate on the scale of penalties in order to define the right mathematical proportion between crimes and penalties. In the U.S., where each state and territory had its own criminal code and where penalties were mostly a state rather than a federal competence, the distribution of powers was different: As Wines pointed out, codes with fixed penalties like the French one “accept, on behalf of legislative branch of the government, the responsibility of apportioning punishment to supposed guilt, the majority of our codes throw this responsibility upon the judicial department, but in varying measure.”¹⁰ The outcome of this different approach was that criminal law was unequally applied in the U.S. and that a reform was needed in order to avoid prejudices and discriminations.

Given that the theory of adjustment of penalty to guilt, according to rigid criteria, was a myth, a figment of the imagination, the remedy suggested by Wines was exactly a revision of the doctrine of powers: “of the three coordinate branches of the government, two have attempted to establish and secure penal justice, namely the legislature and the judiciary. Neither had succeeded. Obviously, the only remaining alternative is to impose this duty upon the executive department.”¹¹ Such a claim for a delegation of power to a prison board was therefore justified by the dissatisfaction with the administration of justice and the rise of a new rationale of punishment: the more the basis of punishment shifted from retribution to social self-defense, a wider notion encompassing the redemption of the offenders as well as

10 WINES (1895).

11 WINES (1904).

their incapacitation or neutralization in case of irreformable criminals, the more the strict boundaries between powers were emasculating.

In the U.S. legal culture the movement towards individualized justice and social security policies legitimized the creation of administrative bodies charged with deciding on the duration of detention, kind of treatment, conditional release on parole and final liberation of convicts. The dispute on the constitutionality of the indeterminate sentence laws enacted in many states of the Union finally sanctioned that these kinds of sentences were absolutely consistent with the tripartite genius of the American institutions and did not infringe the separation of powers.¹² The legislative function was filled by providing the sentence which was to be imposed by the judicial branch upon the determination of the guilt of the offender, the judicial branch was entrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense to which the individual was found guilty, and, only “the actual carrying out of the sentence and the application of the various provisions for ameliorating the same [were] administrative in character and properly exercised by an administrative body.”¹³ The discretion of the prison board was considered the most efficient method of individualization and rehabilitation, because it rested on professional criminological skills lacking in both the legislative and the judicial branch. The powers of the board “while neither judicial, legislative, nor executive (...) belong to that great residuum of governmental authority, the police power, to be made effective, as in often case, through administrative agencies” (*Woods v. State*, 130 Tenn. 100, April 1914, p. 114).

It is worth noting how the rehabilitative ideal, strengthened by the belief in the potentiality of science to govern and modify human behaviors by controlling the body as well as the mind of human beings, reshaped the sense of constitutional balances in criminal law. The new priority was not to protect individual life, but to preserve social security, and this change caused a comprehensive rethinking of the traditional rationales of punishment: as Pound stated, “‘unconstitutional’ is ceasing to be a word to conjure with” and “as to State constitution (...) we are likely to see change become quite easy enough in the near future when there is anything which reasonably

12 GATENS (1917); KERR (1921); LINDSEY (1925); PIFFERI (2011).

13 *In re Lee*, 177 Cal. 690, March 8, 1918, Supreme Court of California, p. 693.

demands it".¹⁴ This flexibility with regard to constitutional constraints and separation of powers was not accepted by the European legal culture.

The *Rechtsstaat* was deemed such a fundamental achievement of Enlightenment and of the Revolution, at least for the French influenced nations, that its architecture was to be retained at all costs. The exaltation of abstract formulas in order to defend individual rights was giving way to a social-oriented legal system and an individualized administration of justice, implying the growth of bureaucratic administrative agencies charged with evaluating the different situations on a case by case basis, instead of the judges' duty to apply general rules uniformly. In criminal law this transformation took the form of flexible concepts (e. g., dangerousness, habitual criminal), derogations – not to say violations – of the principle of legality, merger of legislative and executive functions, weakening of the boundaries between justice and administration. The fear that the *Rechtsstaat* would be absorbed into an administrative state (*Verwaltungsstaat*) prompted the European jurists to keep endorsing the tenets of the liberal penal system, to support the centrality of the law as a unavoidable guarantee for individual freedom and to insist upon strict and defined penal rules.¹⁵ Because the core of individualization, and of indeterminateness above all, was a “steady, progressive abdication of the lawmaker in the hands of the judge and of the administrative power,”¹⁶ the great majority of European jurists were very skeptical about the real effect of correctionalism.

The gap separating the American and the European approach to the individualization of punishment was rationalized in terms of different customs and traditions relating to the balance between state and citizens, between power to punish and individual safeguards.¹⁷ The institutional equilibrium was based on the egalitarian premises that, especially in criminal law, neither biases nor differences were tolerated and that the same welfare state that had the duty to guarantee the safety of society also had to be the only legitimate actor to handle crime and punishment. The divestment of state authority in the administration of penal sentences represented one of the major obstacles toward the acceptance of the indeterminate factor in the

14 POUND (1911) XVIII.

15 DROST (1930a); DROST (1930b).

16 RAPOPORT (1904).

17 HARTMANN (1911); INGENIEROS (1913).

Old World, because it was intended as a breaking element of the virtuous balance achieved in the liberal scheme – a balance not only between the retributory, deterrent, and reformatory purposes of punishment, but also between the legislative, judicial, and executive branches. Continental jurists wanted to preserve the “old-fashioned European formula” so that the Old World “was not prepared to go as far as America in this respect.”¹⁸ The unconditioned application of the indefinite sentence was perceived as a distortion of the harmonious principles of public law that tended towards the safeguarding of individual freedom against any arbitrary invasion; the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative power of the pre-revolutionary era.¹⁹

IV. The *nulla poena sine lege* principle

The *nulla poena sine lege* principle was seriously affected by the criminalization of the 19th and 20th centuries, but its transformation was dissimilar in the U.S. and in Europe or in the countries influenced by the European legal system. Given that fixed penalties systems were considered neither useful to reform offenders nor efficient in protecting society against recidivism and habitual criminality, the American reform movement chose to divide the legality principle, retaining on the one hand the *nullum crimen* but abandoning on the other the *nulla poena*. If the definition of a crime was confirmed as a specific inalienable prerogative of legislature, conversely the sentencing phase was delegated to the prison board without any predetermined provisions by law. Legality of punishment was a heritage of the Enlightenment whose legitimacy had been overcome because the new scientific reformatory rationale of punishment prompted the indeterminate sentence. Indefinite penalties were not a violation of any individual right, and were also claimed to be an achievement for the personalized treatment of criminals.

In the U.S. legal system, legality was reshaped by neatly dividing the criminal process into two phases, the guilty one and the sentencing one. If the former was still governed by traditional rules of free will and criminal liability, the latter fell within the competence of a body of experts in

18 RUGGLES BRISE (1911).

19 PRINS (1899).

criminology. The citizens' safety was guaranteed against possible abuse by the judges thanks to the *nullum crimen*, whereas the individualization principle dominated the sentencing phase. Of course this bifurcation had an impact on criminal procedure as well, because the rules of the verdict phase were completely different from the ones of the treatment. Until the late 1920s this scheme was accepted by the American legal culture and upheld as constitutional by the courts. Then the first open criticism of the abolition of *nulla poena* arose, blaming the individualization of punishment for the erosion of the rule of law and stressing that *nullum crimen* and *nulla poena*, as two sides of the same coin, had to be inextricably interwoven because legality of punishment "provides a sieve through which can flow not only humanity and science but also repression and stupidity."²⁰

In Europe, apart from Nazi legislation, and in most of the Latin American countries, the notion of the individualization of punishment had a different impact on *nulla poena*. Most of the codified systems retained the principle as a fundamental tenet, even if mitigated by the possibility of a judicial evaluation of extenuating or aggravating circumstances: the historical argument against any arbitrary power of an administrative body prevailed over the rehabilitative ideal and promoted a more conservative and less experimental sentencing system, at least apparently. Even in the English penal system, where, far from being applied in a formal meaning, *nulla poena* was intended as a prohibition for the judge to invent new punishments or exceed the statutory maximum,²¹ penal policy was only partially struck by the notion of individualization. Above all, the indefinite sentence as proposed by American advocates was refused because "in striking contradiction to the principles that [had] hitherto, at least in Europe, regulated the punishment of crime," namely that for punishment to be effective it should be certain and definite, that the sentence of the court should be the final arbitrament of the case, and that the prerogative of pardon was an essential attribute of sovereignty.²²

What was not accepted in the U.S. indeterminate laws was the delegation of sentencing powers to the administrative branch, because the same reformatory purpose could be reached by the more traditional means of

20 HALL (1937).

21 WILLIAMS (1961).

22 RUGGLES BRISE (1901).

conditional liberation accorded by judiciary.²³ Moreover, in the face of the state duty to guarantee social security stood the criminals' right to be punished: legality of punishment had to be declined also in terms of predictability of an objective penalty, because the unlimited discretion of a public body to treat offenders until their moral reform rested on the very dangerous premise that the state had the duty to uniformly educate the deviant citizens.

From a comparative and historical point of view, the problem of *nulla poena* is not one of abstract observance of the maxim, but of concrete balances of powers and of legal mechanisms suited for protecting the individual against any possible discretionary violation of their rights.²⁴ The great majority of European thinkers, both of common and civil law, feared that the abolition of the *nulla poena*, in its different forms, could lead to the abolition of criminal law itself, with tremendous consequences for political democracy.²⁵

V. The role of the judiciary

Thirdly, criminalization contributed to the modification of the role of the judiciary, although the direction was not the same everywhere. In the U.K., between the mid 1800s and World War I, there were different opinions and conflicts on questions of punishment: complaints about sentencing disparities and the call for curbing judicial discretion were followed by support for individualizing reforms.²⁶ The first movement was inclined to elaborate general rules of sentencing and sentencing standards (and it inspired the creation of the Court of Criminal Appeal in 1907), the second one exhorted the courts to use a wider range of sentencing refinements in order to better match punishment and offenders, especially professional recidivists. As Keith Smith puts it, "by 1914 the vast range of sentencing discretion enjoyed by the courts had been both substantially eroded and enlarged on several different fronts,"²⁷ but, from Du Cane to Ruggles-Brise, a conservative approach prevailed and, even if many reforms were introduced on the basis

23 PESSINA (1912).

24 GRANDE (2004).

25 ANCEL (1936).

26 DE VERE (1911).

27 SMITH (2010).

of criminological science, the rationale of punishment remained essentially retributive and deterrent, the judiciary was never deprived of its traditional authority and the American notion of the indeterminate sentence never applied.

In order to explain this choice, it is worth stressing the different institutional mood and the divergence in constitutional mindset between the U.K. and the U.S.: while American Progressives grounded their reforms on both the lack of public confidence in and the want of respect for the judicial branch, as well as on the great diversity in the states' criminal codes, the discretion of the English judges, never subjected to political pressure by the interested parties as were their elected American colleagues, was historically conceived as one of the most sacred principle of English criminal law.²⁸ Any effort to individualize sentences therefore had to be referred not to the prison boards but to the courts, whose role and duty were to interpret public sentiment about crime. Moreover, instead of neatly separating the guilty phase from the sentencing phase, such as suggested by the American reformers, the target of an individualized punishment could have been better achieved through a "close and intimate relation between the judicial authority that passe[d] the sentence and the prison authority that execute[d] it."²⁹

The rehabilitative movement in the U.S. resulted in a significant contraction of the ordinary prerogatives of judges, justified by their lack of knowledge of behavioral sciences, criminal sociology, criminology etc.: their legal expertise was necessary only in the verdict phase but ended with the conviction, because the sentencing phase was the task of the new administrative board. The struggle against fixed penalties abstractly defined by law did not foster a wider discretion of the judiciary, but the belief that offenders could be effectively treated and reformed only through interdisciplinary scientific knowledge shifted the burden of sentencing to the executive. This was theoretically justified on the premise that science was neither arbitrary nor geographically differentiated, but rooted on an experimental truth always open to new progresses. Inefficiencies and failures of the indeterminate sentence laws were perceived not as a defeat of the principle, but only as temporary faults of the prison commissioners due to their inexperience and

28 RUGGLES BRISE (1899).

29 RUGGLES BRISE (1911) 360.

lack of criminological knowledge: the mechanism was not wrong, yet operators were not adequately educated.³⁰ Discriminations against convicts and the inequality of treatment from state to state, not to say from board to board, were regarded neither as consequences of an unfair sentencing method nor as violations of the equality principle, but rather as the effect of a not yet uniformly spread and not unequivocally developed criminological understanding of the offenders.

Also, in the civil law European countries the role of the judiciary was an issue. As Prins stated, the common belief was that in the 20th century, contrary to the *Ancien Régime*, judges did not disregard individual rights, but had developed a habit of respecting the rights and freedom of citizens.³¹ Legal reasoning was engaged in shaping a new broader judicial function within the boundaries of legality, modifying the prerogatives of the three branches of powers without subverting the *Rechtsstaat* framework. The adherents to the positive school of criminal law interpreted the steady abdication of the legislature in the hands of the judiciary and of the executive as a sign of progress³² and advocated wider judicial discretion, asserting that “Judicial discretion is regaining what it had lost, and rids itself of the unfortunate note as the magistrate gains in science and conscience”.³³ Less radical reformers admitted the need for wider judicial power in order to individualize punishment according to the characteristic of the offender, but were also concerned about the mechanisms to balance and limit any absolute arbitrament.³⁴

Even if it is recognizable that there existed a common trend in reshaping the role of the judiciary due to the impact of the criminalization process, it is likewise undeniable that this trend was not uniform at all: the variations are rationalized only in terms of different traditions, cultural heritage, peculiarities in legal mentality.

30 LINDSEY (1922); WRIGHT (1936).

31 PRINS (1910).

32 LONGHI (1911).

33 DE QUIRÓS (1911) 177.

34 SALEILLES (1898).

VI. Administrativization of sentencing: legal rules and legal standards

As we have seen, one of the most disputed issues of the individualization of punishment and of the indeterminate sentence specifically, was the delegation of sentencing power to an administrative body. Legitimized on the basis of its scientific competence and justified by the need to go beyond an abstract formula and to take into consideration the individual offenders in all their multifaceted characteristics, the prison board clearly brought into question the tenets of the separation of powers and the role of the administrative in the welfare state. It is only one example of creation of new administrative agencies in the 20th century and can be read as part of the broader question concerning a new balance between the legislature and executive in order to better govern the complex social dynamics of industrialized modern societies. Once again the impact of criminology on criminal law tenets of the liberal state framework was different in continental Europe, in the U.S. and in the U.K. because of the different constitutional reaction to the rise of administrative bodies whose prerogatives were taken away from the legislative or the judicial branch. The problem of the legality of administrative power was clearly related to the legitimacy of the prison board: What were the limits of its action? How could the citizen be safeguarded against possible abuse of its power? Were the decisions of the board judicially reviewable? Was the sentencing phase covered by the due process clause? Different answers to these questions brought different attitudes towards the prison boards' role.

The rule of law and the *Rechtsstaat* had divergent notions of both administrative power and legality of administrative action;³⁵ moreover the rule of law was interpreted differently in the U.K. and in the U.S. in terms of the constitutional limits of the legislature. Dicey, as it is known, opposed the English notion of rule of law to the French *droit administratif*, because the continental prerogatives given to administrative power and governmental officials, especially with respect to the administrative tribunals, were inconceivable for the English idea of equal protection of the law and "fundamentally inconsistent with our traditions and customs."³⁶ Similarly the American constitutionalists stressed the equal protection of the law as

35 SORDI (2008).

36 DICEY (1902).

the national creation of a formula that embodied the purely English due process of law and stood as the antipole of the continental *droit administratif*.³⁷ But the 20th century even forced Anglo-American jurisprudence to recognize the rising growth of administrative law and agencies, and to investigate how to regulate them. Pound's remarks on the gradual shift from rules to legal standards in the American legal order suggested a new approach to the topic: in 1919 the Harvard Professor emphasized as mechanical application of strict rules, rigid forms and fixed principles, i.e., the means by which legal systems had sought to attain impartiality and certainty in the administration of justice since the Enlightenment, were no longer suited for regulating a much more complex modern legal system. By framing legal standards the legislature sought to balance flexible rules and the call for individualization of justice with the need of defined limits to discretionary decisions, because standards were "devised to guide the triers of fact or the commission in applying to each unique set of circumstances their common sense resulting from their experience."³⁸

Thus, the problem became how these administrative agencies developed real techniques of individualization, how was their expertise verified and updated to scientific progresses and common sense adjustments, by what kind of legal mechanisms could administrative tribunals and officers be checked since they were not subject to ordinary court review. The danger of arbitrary conduct in the administrative application of legal standards, i.e., the conflict between rule and discretion, was therefore inextricably bound up with constitutional law, but the 'great society' of the 20th century, with its permeating influence of technology, large-scale industry, and progressive urbanization, asked for solutions different from the traditional ones. Felix Frankfurter suggested that safeguards to this necessary 'government by commission' could be achieved by an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure, easy access to public scrutiny, and by an informed and spirited bar.³⁹ These protections for citizens' liberty neither referred to legality nor to judicial decision, but looked at a possible judicial review as a different balance to contrast potential misuse of authority.

37 TAYLOR (1917).

38 POUND (1919).

39 FRANKFURTER (1926–1927).

The sentencing power given to the prison boards was one of the many administrative powers delegated to agencies, and the criteria of their decisions, based on the notions of dangerousness, rehabilitation and social security, were nothing else but legal standards, such as ‘unreasonable rates,’ ‘unfair methods of competition,’ ‘undesirable residents of the United States.’⁴⁰ It is worth noting as Sheldon Glueck, criticizing Enrico Ferri’s Italian criminal code project (1921) because the Italian criminologist proposed the legislative prescription of detailed rules of individualization as a way out of the dilemma of free judicial discretion versus protection of individual liberty, recommended turning to a treatment board. The remedies to safeguard individual rights from the functioning of this administrative body were akin to the ones indicated by Frankfurter: “the definition of broad legal categories of a social-psychiatric nature within which the treatment board will classify individual delinquents; secondly, the safeguarding of individual rights by permitting the defendant to have counsel and witnesses (of fact and opinion), and to examine psychiatric and social reports filed with the tribunal, while at the same time avoiding a technical, litigious procedure, hidebound by strict rules of evidence; thirdly, provision for judicial review of the administrative action of the treatment tribunal when it is alleged to have acted ‘arbitrarily’ or otherwise unlawfully.”⁴¹

The American system of the indeterminate sentence between the 19th and 20th century endorsed the creation of an administrative agency (the prison board) charged with the sentencing phase, in order to fit the treatment to the offenders. The periodical decisions of the board on the dangerousness and rehabilitation of the convicts were final and not reviewable. The legitimacy of this method rested on the commissioners’ technical skills lacking in both the legislature and the judiciary, and the question of checks to this administrative authority was originally eluded because constitutional courts stated that this technique was neither an infringement of the separation of powers nor a violation of the rule of law. Yet, after a first period of experimentation, problems of inefficiency and of unjustified inequality of treatment arose: solutions were sought either through a more rational definition of legal standards and uniform elaboration of the criteria

40 POUND (1914).

41 GLUECK (1928).

for the predictability of treatment,⁴² or through a claim for a return to forms of judicial control such as judicial review of boards' decisions or disposition tribunal.⁴³ Clearly enough, the reaction from administrative justice as the chief agency of individualization was stirred in the 1930s by the fear of what was happening in Germany with the Nazi criminal reforms, but in the 1910s and 20s the main reason was the alarm about the growing administrative absolutism. Once again, a comparison with the European (and European influenced) legal order reveals deep differences and could be useful for explaining different histories in penal policies.

As a matter of fact, European legal systems were much less disposed to abandon the *nulla poena* principle and perceived any administrative discretion about punishment as a dangerous reappearance of old ghosts. The English refusal of the U.S. indeterminate sentence seems to be rationalized in terms of a different political tradition. The role of the judges was never to be removed from the sentencing phase because it represented an undeniable safeguard for the citizen and, in case of the persistent dangerousness of the offender, preventive measures of indefinite duration could be applied only after having served the ordinary penalty (Prevention of Crime Act 1908). In continental legal orders the indeterminate sentence, even if advocated by radical reformers, was never enacted, too. The strong adherence to the principle of legality provoked the attempt to force the reformative rationale of punishment within the boundaries of a stricter respect of the separation of powers: penalties had to be determined by law (especially criminal codes) and applied by the courts. The verdict and sentencing phase were not neatly bifurcated and both the decision and the execution of sentences were judicially decided. The dual-track system, i. e., the possibility to apply measures of security to dangerous criminals after the expiation of the penalty, was the correspondent to the American indeterminate sentence in Europe (Norway 1902, Italy 1930) and in Latin American (Cuban Código de defense social 1936; Uruguayan code 1933; Brazilian Code 1940): security measures could be of indefinite duration, were related to the dangerousness of the offender and aimed at a complete rehabilitation or, in case of irreformable delinquent, at a social neutralization⁴⁴ (Stoos 1930; Rocco 1930). But, according

42 GLUECK/GLUECK (1929).

43 CANTOR (1938).

44 STOOS (1910); STOOS (1930); ROCCO (1930).

to the rigidity of the *Rechtsstaat*, preventive measures of security as well as the conditions of their application were always fixed by law and ‘judicialized,’ even if *de facto* administrative in their nature: they were a sort of hybrid in order to reach the same repressive purpose of the indeterminate sentence (keep dangerous offenders under control) without infringing legality or the distribution of powers.

The discussion of which system provided more effective protections to individual rights is not the subject of this paper. What is worth mentioning is, nonetheless, how a global history of criminology, tending to emphasize the worldwide rise of an individualizing scientific approach to criminals’ behavior and personality, fails to explain the varying impact that criminology had on national legal systems due to historical peculiarities, legal traditions and habits, constitutional contexts. A more complex approach considering neither criminology nor criminal law independently, but trying to analyze historically and comparatively how these two disciplines reciprocally influenced and molded each other, sheds light on the roots of different developments in criminal law policies and offers possible clues to investigate why penal systems are still so different today.

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