

# Rechtsgeschichte Legal History

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<http://www.rg-rechtsgeschichte.de/rg32>  
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 32 (2024)  
<http://dx.doi.org/10.12946/rg32/236-239>

Rg **32** 2024 236–239

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## Law as Practice: History and Theory Concerning the Empire of Brazil

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fascist colonies (Eritrea, Somalia and Libya, whereas the fascist conquest of Ethiopia was significantly not reclaimed), once again stressing the old myth of a »labouring people's empire« (118, 128–133). The early 1950s witnessed the attempt to forge the ultimate and official narrative of Italy's colonial past via the establishment of the »Committee for the documentation of Italy's work in Africa« (153). The Committee can be considered the swansong of the Italian settler ideology, prior to the emergence of a new historiography which, in the following couple of decades, finally solicited a profound rethinking of this myth.

Ertola discusses the internal inconsistencies in the long-term sameness of the idea of »Greater Italy« (69) by analysing a wide array of sources produced by an extremely diverse group of historical actors across the political spectrum. These include adventurers, statesmen, lobbyists, economists, journalists and geographers belonging to liberal, Catholic, conservative, socialist, nationalist, royalist or republican, fascist or anti-fascist fronts. This book demonstrates that a rhetorical and ideological superstructure always supports colonial rule, even when, like the Italian one in Africa, this rule is characterised by an intrinsically fragile, poorly funded and – despite the colonial myth –

scarcely settled imperial structure (72, 120). Intellectual histories of imperial ideologies are a useful complement to the research of legal historians, as the analysis of legal developments in imperial frameworks cannot disregard the study of underlying colonial cultures and their interplay with metropolitan ideas. More particularly, Ertola's book promises to become a useful instrument for those scholars investigating the legal histories of the Italian Empire. Moreover, the book represents a timely contribution to not only the scholarly but also the public debate by demonstrating how the post-fascist national identity of »Italiani brava gente« is the ultimate development of an intrinsically justificationist colonial culture, one which deceitfully emphasises a self-indulgent myth of humanity, hard labour and proletarian settlement over a reality of violence, conquest and racism (13, 128). For almost a century, Italy's colonial history of military occupation, massive deployment of bombs and chemical warfare, segregationist legislation and concentration camps was removed from its imperial self-narrative. In the 1960s, after the Empire was no more, the country's colonial past was wiped away from its national consciousness altogether (141). ■

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## Law as Practice: History and Theory Concerning the Empire of Brazil\*

This is undoubtedly an unusual book in academic legal literature. For the reasons that I will outline, I consider this most praiseworthy. First, in contrast to current dissertations that tend to have a very specific and specialized focus – a characteristic which is far from being bad in principle, but which has become the rule in academia – this work

presents research and reflection from different established branches of legal knowledge, almost always shown as distinct areas. The reason for this is that it is the fruit of a compilation of texts by José Reinaldo de Lima Lopes, some previously published, others new. Throughout a life dedicated to thinking about the field of law, he has produced

\* JOSÉ REINALDO DE LIMA LOPES, *Cultura giuridica e istituzioni in Brasile tra Otto e Novecento. Saggi sulla storia del pensiero giuridico, delle codificazioni e del processo*, Pisa: Edizioni ETS 2022, 438 p., ISBN 978-88-467-6387-7

arguments characterized above all by thinking about Law – here purposefully using the capital letter. As a reflection of his robust thought, the book has three unifying sections: »Theory, history, and method«, »Legal culture, codes, interpretation«, and »The history of judicial process and justice«.

This brings us to the second reason for the book's high quality. Reading it unveils to us how the diversity of themes is really connected with the author's reflections, as well as promoting an interdisciplinary dialogue, above all between history, law, and economics. The thread that unites them comes from the very conception of law, whose clear exposition is expressed as a fundamental requirement for those who have dedicated themselves to their field, whether theorists (philosophers, historians) or social operators of law. In this sense, it is welcome that the volume starts with the text »Diritto e storia: questioni per una strana disciplina«, in which Lopes outlines his understanding of law as *practical* knowledge that feeds the regulating universe of social relations. This concept informs the entire book. A third element of the exceptional quality of the book is the clear style which characterizes the works of José Reinaldo in Portuguese and which the fine translation by Anna Basevi has preserved well. This style expresses José Reinaldo's – I allow myself to call him like this – mark as an academic teacher developed over years of teaching and guiding students, which I had the opportunity to enjoy during my post-doctoral studies. This book demonstrates clearly why the training of the jurist as above all a thinking being, rather than a simple reproducer of rules, fundamentally requires an education including philosophy and history of law.

As highlighted in Italo Birocchi's insightful preface, José Reinaldo's analysis of Brazil in the 1800s proves to be of utmost relevance, and even of extreme familiarity with European subjects of law, for a public which ranges far beyond Brazil. This is no doubt due to the centrality of a conception of legal culture that links the great problems of the century to the construction of states and constitutional regimes, in their most varied dimensions, through the common production of legal knowledge beyond geographic and political boundaries. Although the epicenter of the references that the book acknowledges as canonical lies in the northern hemisphere, José Reinaldo shows how jurists in Brazil played an effective, and even creative, role

in its reception, »digestion«, and had agency in the production of a national legal culture. This justifies the book's translation into Italian, but it is equally of interest to the Brazilian public, since it brings together in a single volume various studies representing José Reinaldo's central arguments. Furthermore, some of these are previously unpublished.

Obviously, the volume is even more essential for those venturing along the paths of the history of law in Brazil, but not only these. For jurists, it is of interest due to the questions which lead them to see philosophy and history as fundamental for their own education and interaction in the world at present. Those trained as historians, like myself, impelled by the paths of research to study law, the volume enables to modulate our questions about the past through an appropriate reflection on the field of law. For this reason, I will avoid producing a mere summary of the topics of the work; rather, I present the issues José Reinaldo raises, putting his work in dialogue with what we have in common: history.

I will start with José Reinaldo's definition of Law, since it is fundamental for the History that he produces. As a type of practical knowledge, he defines Law as a true »language«, a convention, in which social agents collectively »share« the rules which are valid in each situation, moment, and social space, and whose foundations can be found in the ideas of John Searle, as well as in analytical philosophy. In this sense, historicity is a powerful instrument for the reflection of jurists to produce a *de-* or *re-*centering of the issues involved in each situation and its participants, whether in the past or in the present, since it allows us to rethink debates and solutions in each of the contexts. Thus, the historicity of law interacts with its function of normative and preceptive knowledge, since jurists share(d) a »mode of acting« that is inseparably both a practice and technique, understood as much more than a simple application or manipulation of formulas. The *tradition* in which jurists are immersed forms the common terrain in which they operate, consciously or unconsciously, in the *continuum* (to use José Reinaldo's own words, 46) of the transmission of issues which characterizes law and creates the ties of belonging across generations.

José Reinaldo's clear presentation provides us with the keys to a narrative which historians must bear in mind when, in analyzing the jurists of the past and the culture which created them as such, they conceive instruments of criticism suitable to

the discourse of the field. However, it also confronts us with a question, for which there cannot be an easy answer, regarding those who *observe* and those who *interact* in the production of historical knowledge. José Reinaldo clearly addresses this issue in the chapter in which he proposes to reconstruct the trajectory of the reintroduction of the discipline of history in law faculties in Brazil. Allowing his own personal trajectory to serve as an object of reflection in the chapter's delightful initial pages – which seem highly significant regarding the heuristic operation he carries out – he provides us with an unprecedented reflection on the teaching of law in recent decades. In addition to this, he defends the project of teaching law that finds its most complete form in jurisprudence as a theory of action and practice effectively supported by the history of law. It is in this defense of a »history of law for jurists« that José Reinaldo raises the epistemological debate about the »internal« or »external« point of view, as well as developing his response to overcoming the erroneous dichotomy between institutional history and intellectual history that should be superseded by the conception of the creative aspect of jurisprudential production. Recognizing the sophisticated theoretical construction behind José Reinaldo's analysis, it is worth noting that he tends to valorize the legal knowledge produced, and less the antidotes to an epistemological distance between those who *write* and those who *observe*, who are actually united by tradition. If this is one of the paths for a critical dialogue between a historian like me and his work, it only has been made possible through his work.

Throughout his analyses of the different chapters' themes, there is a perfect coherence of José Reinaldo's ideas. His reconstruction of the main lines of approximation between law and economics since the end of the 18th century highlights, first, the problems of establishing a constructive dialogue between disciplines through the analysis of the jurists who have remained the key scholars cited until the present era. Second, he shows how history can be a useful resource against technocracy. The foundation for the approximation between law and economics lies in the dimension

of political action for each of the fields of knowledge, such as that produced by the liberal model based on the free market and on the atomist view of property, which brought the problem of how to regulate the economy to the fore. Although the chapter reconstructs the debate between important jurists and does not specifically analyze the case of Brazil, it provided us with the key for the organization of a dictionary about the relations between law, economics, and history published in 2021.<sup>1</sup>

In the second part of the book, concerned with modern constitutionalism, codes and interpretation, the experience of the Empire of Brazil comes to the fore. The discussion of the cultural environment of codification opens up space for the discussion of Brazilian jurists not only in relation to their task but also to the characteristics of the newborn science of Brazilian law. It is important to note that after the Brazilian Empire gained independence from Portugal (1822), a Criminal Code and a Code of Criminal Procedure were enacted in 1830 and 1832, respectively, followed two decades later by the Commercial Code (1850). As is always highlighted in the historiography, no civil code was enacted in Brazil until the republican regime in 1916. José Reinaldo contributes to the problematization of this issue and questions if it can be called a mere lacuna in Brazilian legal history. Far from seeing the late enactment of a civil code as a symptom of national backwardness, he demonstrates how, on the one hand, there was a production of jurisprudential knowledge about civil law issues in the Empire by discussing the activities of various jurists; on the other, there was a direct relationship in the overlapping of civil law and commercial law. This seems one of José Reinaldo's most original contributions to the reflection on codification in Brazil.

The chapter dedicated to commercial law presents José Reinaldo's interpretation in detail. In it, he examines the legal debate about the possibility of unifying private law in a single code that would bring together commercial and civil law matters, a not uncommon proposal at the time. However, what is most novel in his analysis is precisely his examination of how the approval of

1 BRUNO AIDAR, ANDRÉA SLEMIAN, JOSÉ REINALDO DE LIMA LOPES (eds.), *Dicionário histórico de conceitos jurídico-econômicos*. Brasil, séculos XVIII–XIX, São Paulo 2020.

the commercial code ended up regulating questions of a civil order, since they were under the aegis of a private legal order which had positioned itself as hegemonic for constitutional regimes since the 19th century. Using the knowledge produced by jurists as a guiding thread reveals the impasses and vicissitudes experienced at the moment – a fundamental operation for a historical analysis. At the same time, however, it poses the question of how to look at these voices from the past. The men who took on themselves the task of constructing a national law were the greatest defenders of the constitutional framework, at the same time as being the most politically conservative. Not only because the construction of a state also signified a narrative task of the intended overcoming of the colonial past; on the ground, it was a coercive operation of imposing law on the local reality of the Empire's multiethnic society – including the maintenance of the slaveholding system and the subalternity of indigenous peoples. No matter how much José Reinaldo does for the understanding of this history, his work allows us to question to what extent the Brazilian Empire's jurists, in the prescriptive operation that belongs to law, did actually break with the past in their social practice, irrespective of their construction of such a narrative within a constitutional framework. Ultimately, what does this framework mean? It is worth evoking here Marc Bloch's classic statement that men change words, but not always habits, and equally that continuities are always part of a choice, never a natural operation, as could be said of tradition itself.

The question about prescriptive creation made by jurists can in part be answered, taking into account that the study of jurisprudence is one of José Reinaldo's main historical interests. Notable here is the chapter dedicated to the legal interpretation of Tulio Ascarelli, an Italian jurist exiled by the fascist regime who lived in Brazil in the 1940s. He lectured at the Faculty of Law of São Paulo and created a school of thought which lasted for several generations. The question is further pursued, and in part resolved, in the final section of the book, which focuses on another dimension to be considered in history: the institutional. Present here are José Reinaldo's important contributions to the understanding of the history of the legal procedures and the courts during the 19th century in Brazil, understanding them as the fruit of a tradition of justice but equally of local conflicts in the nascent Empire. José Reinaldo makes an exquisite

analysis of the creation of the new institutions of justice, centered on the popular jury (*jurado*) and the Supreme Court (*Supremo Tribunal de Justiça*), exploring also various and opposing positions other than those of jurists. The final chapters also deal with, first, the creation of the court of trade in Brazil, reconstructing the history of commercial jurisdiction, examining also the conflicts surrounding the creation of the new institution; and, after this, the history of civil procedures in the 19th century, discussing social-political conditions *vis-à-vis* the administration of justice and the creations of jurists in solving impasses. For José Reinaldo, institutional history and the history of legal thought are inseparable, like two faces of the same coin.

The argument that the knowledge produced by jurists, jurisprudence, continues to be the guideline for their work is clear, whether for theory or for history. The expression of legal culture is used in the classic sense in the title, which skillfully ties together the various chapters. It emphasizes the centrality of the valorization of law as practical knowledge produced by those involved in its (re-)production. From the 19th century onwards, this also included those involved in the construction of states and the foundation of their legitimacy. However, since the final decades of the last century, a broadening of the concept of legal knowledge has been proposed, based on the new perspectives opened up by the critical history of law, legal sociology, and anthropology. These approaches have expanded the range of the participants in the sphere of law – or even different legal orders, in the plural – in addition to their interpreters. It is no coincidence that today one of the possible oppositions to the idea of a legal culture is that of normativities, and even multi-normativities, characterised by the acceptance of other epistemologies that had a recognized legal meaning and legal knowledge. All of this makes sense if we think that, specifically in 19th-century Brazil, the sphere of the state had a limited scope in relation to socio-cultural practices (marked by the presence of the *Casa*, or household, as the traditional legal locus), but also in the route taken by various social agents in their mobilization demanding rights so characteristic of the 1800s. This is not the kind of history José Reinaldo Lopes writes, but his work is extremely important as a basis and inspiration for those who do.

