

Rechtsgeschichte Legal History

www.lhlt.mpg.de

<http://www.rg-rechtsgeschichte.de/rg33>
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 33 (2025)
<http://dx.doi.org/10.12946/rg33/218-219>

Rg **33** 2025 218–219

Robert J. Cottrol*

Civil Rights: The Private Law Foundation

* George Washington University Law School, bcottrol@law.gwu.edu



Another characteristic of the book is its focus on a very short period in the long history of British imperial legal policy, the two decades between 1760 and 1780. According to Bursset, this key period shaped the legal history of the empire until its end. The second British Empire, he says, »took legal pluralism for granted but continued to contest its contours« (150). However, if we examine the legal history of places such as 19th-century India, characterized by a cyclical tug-of-war between anglicizers and supporters of legal pluralism, it seems that the policy of legal pluralism continued to be questioned long after 1780.

Quibbles about the actors whose ideas the author decides to focus on and their motivations, or about the temporal framework the author uses to tell their story, should not detract from Bursset's achievement. He himself recognizes that his book discusses only one component of the history of British imperial legal policy, explicitly stating that he only seeks to »supplement, not replace« existing accounts (6). As such, the book is an important addition to existing literature on the legal history of the British Empire, and it undoubtedly will, from now on, be a must-read for anyone interested in this history. ■

Robert J. Cottrol

Civil Rights: The Private Law Foundation*

Dylan Penningroth's *Before the Movement* is a well-done effort to take readers beyond the familiar syllabus concerning the history of race, law and civil rights in the United States. That familiar syllabus focuses on public law. The history of African Americans has in large measure been seen as a history of the struggle against the effort to define through law a separate and distinctly unequal status for Americans of African descent. The Constitution's legal sanction for slavery and Chief Justice Roger Brook Taney's infamous opinion in the Dred Scott case declaring that »[t]he negro has no rights which the white man is bound to respect« are part of this familiar history as are the enactment of the Constitution's 13th, 14th and 15th amendments which were intended to abolish slavery and establish color blind citizenship and voting rights.

The downfall of the Reconstruction era's egalitarian constitutionalism and the establishment of American Apartheid, Jim Crow, with the Supreme Court's sanction in *Plessy vs. Ferguson* is an integral part of this familiar historiography. The struggle against Jim Crow and the landmark case of *Brown vs. Board of Education* and the Civil Rights legis-

lation that followed in its wake in the 1960s are all fundamental parts of the traditional discussion of race and law in the United States.

Penningroth invites us to add additional reading to our syllabus. The history of African American Civil Rights is to be found at least as much, if not more, in areas of private law, particularly property and contract, as in constitutional law and legislative enactments labeled »civil rights«. Penningroth does so by giving us an insightful blend of legal and social history.

Black American contact with the law of property and contract began in slavery with a set of customs and expectations concerning the property that slaves were permitted to possess. Farm animals raised by slaves, produce grown by slaves, extra labor performed by slaves could be traded for money. Unlike their counterparts in the Spanish empire, American slaves had no legally enforceable claims to their property or for their labor. Nonetheless, the custom and expectation in many parts of the South was to honor an agreement made with a slave for goods traded or labor performed. The idea that Black people had contractual and

* DYLAN C. PENNINGROTH, *Before the Movement: The Hidden History of Black Civil Rights*, New York (NY): Liveright Publishing 2023, 496 p., ISBN 978-1-324-09310-7

proprietary rights that were enforceable by law would come later with emancipation and the enactment of the *Civil Rights Act of 1866* which explicitly stated that the newly freed African American population would have the same rights as White people to hold property and to make and enforce contracts.

It was this aspect of the legal revolution in the wake of the Civil War that would survive in the 20th century after the loss of the political and social gains made during Reconstruction. Voting, the possibility of equal education, even the effort at equal access to public accommodations all fell before the onslaught of Jim Crow and disenfranchisement. But the right to hold property and the ability to make binding contracts remained, albeit subject to discriminatory courts and bigoted enforcement.

Black people in the Jim Crow South were, despite the very real prejudices of the day, legal actors and ones to whom the courts had to pay attention. This status depended less on the fairness and benevolence of the White judges and minor court officials who decided their cases and more on the fact that adverse rulings that contradicted prevailing doctrine in the law of contract and particularly property would also leave the rights of White property holders unsettled. Penningroth's discussion of the issue of chain of title and

how a failure to enforce the rights to title of Black property holders would make problematic the rights of subsequent White purchasers is particularly insightful in this regard. The law of property and contract had to have a certain consistency, or it would work for nobody.

Penningroth goes on to show that this ability to use private law played a role in allowing some African Americans to become property holders and that those property rights played an important role in not only sustaining individuals and their families, but also in providing economic support for Black institutions, including Black churches and colleges. Penningroth's discussion of African American use of corporate law, particularly the use of the law of non-profit corporations, is particularly important for understanding not only African American legal history, but business and organizational history as well.

Before the Movement gives us an important history of the role that the ordinary business of private law played in sustaining the lives of a significant number of African Americans, particularly in the South during the Jim Crow era. In doing so, Penningroth has helped to enlarge our understanding of what should be included in the term »civil rights«.



Karoline Marques Machado

Tropical Inequalities*

The historian João Fragoso explores the causes and consequences of social and economic inequalities in *A Sociedade Perfeita: as origens da desigualdade social no Brasil*. He argues that inequality played a central role in shaping Brazilian social organisation between the 16th and 18th centuries, functioning not as a flaw to be corrected but as a foundational principle of the social order. Crucially, the book challenges the notion that inequal-

ity in Brazil was an inevitable legacy of European colonialism, presenting instead the idea that it was an active social construction – moulded by specific political and cultural choices made within the context of the Portuguese pluricontinental monarchy. In that period, inequality was seen as a natural condition, legitimised by divine will, and served to justify the actions of specific historical agents – both individuals described as *peessoas de*

* JOÃO FRAGOSO, *A Sociedade Perfeita: as origens da desigualdade social no Brasil*, São Paulo: Editora Contexto 2024, 352 p., ISBN 978-65-5541-394-6