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## The Legal Patchwork of Empires

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## The Legal Patchwork of Empires\*

*Legal Pluralism and Empires, 1500–1850*, edited by Lauren Benton and Richard J. Ross,<sup>1</sup> can be regarded as the synopsis of a historiographical stream that made pluralism a core feature in the political and legal constitution of empires. At the origin of the interest in the composite nature of empires was an article of a distinguished historian of European empires, John Elliott.<sup>2</sup> Political and legal »composite« bodies have been a recurring theme in the Anglo-Saxon academic tradition since the 1960s, when political anthropology rediscovered non-statist modes of power and law in its reflections on colonial and early post-colonial, legal or political situations (and state-building), or in political bids to overcome the failures and shortcomings of representative democracy. Without making a clear reference to any of the previous debates, John Elliot – a great expert on 17<sup>th</sup> century Spanish monarchy and the concurrent tensions between centripetal and centrifugal models, especially in his reflections on *Monarquía Católica*<sup>3</sup> – was able to »produce« from his historical expertise the model of a »composite monarchy«, which combines the traditional structure of corporative polities with the new centralistic pathos of contemporary political doctrine and praxis.

Since the late 1970s, European historiography has been re-evaluating early modern political and legal models, mostly in Italy, Portugal and Spain. Its main topics converge in a criticism of state-oriented history of polities, now considered anachronistic: the centrality of body and jurisdiction (as a local and relative legal power in concrete cases) in political doctrine, imagery and practice in the formation of medieval and early modern political bodies; the relevance of »oconomia« or the management of the household affairs in the political culture of pre-modernity, erasing the distinction between »public« and »private« in the medieval and early modern age; the critique of a formalistic (positivistic) conception of law that ignores the

multiplicity and the contextual nature of social regulations. Although these views were initially quite unorthodox, they began to gradually be followed by the Iberian and Italian historians and commented upon as a consistent historiographical stream in political and legal history, particularly that of Latin Europe.<sup>4</sup> This model was extended to European »empires« only somewhat later, in spite of its stronger plausibility, especially in the case of early, dispersed and heterogeneous imperial composites, like the Portuguese Empire in the eastern hemisphere. In Latin America, the last decade generated a wave of studies stressing the complexity, ambivalence and plurality of imperial situations, the agency of the local normative spheres, of the colonists or the natives, and the relative openness of the European legal doctrine to different legal orders.

This book, however, derives from a historiographical tradition that is almost independent of the strands of Europe's continental historiography described above, which explains both its major points and its silences.

The aim of the editors was »to produce a volume that studied the provenance, meaning, and implications of legal pluralism across a wide range of early modern empires, in settings as far apart as Peru and New Zealand, and in every century between 1500 and in the middle of the nineteenth century« (ix). However, the earliest and most diverse imperial experience, namely the Portuguese empire in the late 15<sup>th</sup> and 16<sup>th</sup> century, a kaleidoscopic of the entangled and exemplary set of political designs, is absent. If that had been taken into account, the root of many institutional models, thereafter borrowed by other imperial powers and colonial communities, could have been better explained and contextualized: The export of the traditional Iberian municipalities (*concelhos*) to locations overseas, from Madeira and Azores to Malacca and Macao, the revival of feudal models,

\* LAUREN BENTON, RICHARD J. ROSS (eds.), *Legal Pluralism and Empires, 1500–1850*, New York: NYU Press 2013, 323 p., ISBN 978-0-8147-7116-7

1 The volume developed out of a conference on »New Perspectives on Le-

gal Pluralism« organized by Lauren Benton and Richard Ross through the Symposium on Comparative Early Modern Legal History, Center for Renaissance Studies at the Newberry Library in Chicago (2010).

2 ELLIOTT (1992).

3 ELLIOTT (2002)

4 See, e. g., SCHAUB (1995).

such as Portuguese and Spanish captaincies in the Atlantic and in earliest period of South American colonization; the use of the military institutional model of »fortresses«, from North Africa to the Indian Ocean; the diffusion of the commercial pattern of »factories« and »warehouses« from Africa's west coast to the Indian Ocean; the predominantly ecclesiastical framing of colonial expansion (*padroado*) in the remote areas of the »Eastern Empire«, like Japan. Moreover, even Dutch colonialism is not represented, so that only the late West European colonialism, especially of Great Britain, is given proper consideration.

Focusing on the »pluralistic« shape of imperial polities is fully justified. »Empires – as programmatically stated in the initial paragraphs – were legally plural in their core regions as well as in their overseas or distant possessions. Many empires assembled political communities boasting divergent constitutional traditions that uneasily maintained overlapping or clashing royal, ecclesiastical, local, and seigniorial jurisdictions and encompassed a variety of forms and sources of law. Such pluralism grew more complex in the colonies and the far-flung peripheries, as administrators and settlers dealt with indigenous, enslaved, and conquered peoples. The resulting legal orders encompassed multiple zones with unstable relations to one another and to the imperial centers« (n. 1). This assumption, which is rightly deemed to correct »a deeply ingrained view that state law is necessarily central to all legal orders« (4), underpins the grid of core issues concerning the definition of imperial institutional matrix as a pluralistic one.

As Ross and Stern underline in their chapter,<sup>5</sup> pluralistic or corporate polities correspond to the basic medieval and early modern model of organizing communities. In terms of its intrinsic nature, each human polity was deemed endowed with a proper government and the capacity to create law. The accommodation of different communities of uneven importance didn't comply

with a centralized, hierarchical model, rather it responded to a flexible and context-sensitive situation, which arose from the actual and concrete autonomy of each human aggregate. Continental common law fully adopted this model, stressing its rules of construction: natural political autonomy of the parts with respect to the whole, primacy of the local law over the common law, sensitivity of law to social contexts (by promoting consuetudinary law, traditional or »rooted« rights, »local« equity). This explains the antipathy of the established political and legal thought towards any kind of absolutism and voluntarism, as well as the fact that resistance movements were accorded a relatively friendly reception in the traditional *milieux* if they did not reek of excessive individualism or were willing to subvert the corporatist patterns. The obstacles to a centralized legal order were not primarily a problem of communication with overseas dominions, but a question related to the very nature of human polities, as they were seen in the political culture of pre-modern Europe. It is true that »the period [early 17<sup>th</sup> century] witnessed an efflorescence of writings advocating more centralized forms of sovereignty in which, as an ideal type, a state was »sovereign« if its authority was final and absolute, subject to no other human will, and entitled to supervise the institutions and groups contained within it«. <sup>6</sup> However – as the reader is also rightly reminded, »this particular definition of sovereignty arose as a political ideal and guide to constitutional reform rather than as a description of lived experience in early modern Europe« (ibid.). Even in the very level of political and legal reflection, the doctrinal canon was not that of Jean Bodin or Thomas Hobbes, who – along with many other »modern« political thinkers – were listed in the Catholic *index librorum prohibitorum* in Rome, Spain and Portugal, where they were cast outside the intellectual horizon (even of scholars) until the mid-18<sup>th</sup> century. Therefore, the largely dominant legal and political literary repository, at least in the

5 RICHARD J. ROSS (professor of law and history, University of Illinois-Urbana) and PHILIP STERN (professor of Early modern British colonial history, Duke University), *Reconstructing early modern notions of legal pluralism*, 109–143).

6 ROSS and STERN (n. 5) 113.

South, corresponded more to the traditional pluralistic design than to anything else. If we add to this doctrinal panorama a balance of social interests and political dispositives,<sup>7</sup> it would be fair to conclude that »legal pluralism was not the dying remnants of something once more vital but an essential feature of the social organization of politics«.

Another crucial theme, closely related to the pluralistic perspective, is the perception of a fundamentally uneven subjecthood. Political bounds in Empire were non-monotonic. Although this is an intuitive situation in the imperial political bodies (even in the archetypical case of the Roman Empire), the imperial ideology tended to conceal a lack of unity, which had the potential of damaging the imperial magnificent imagery. Unitary empires were far from realized and, historically speaking, were not the final stage of imperialism (see Jane Burbank and Frederik Cooper<sup>8</sup>). Uneven subjecthood did not mean a balanced coexistence of legal and political statutes of different groups; on the contrary, diverse forms of multiple citizenship coexisted, albeit within a hierarchy ranging from groups that propagated the hegemonic culture of the colonizers to those that were dominated by a presumed central logic, be that divine law, principles of natural conviviality, law of nations, moral decency, rational prescriptions, or civilizational criteria). If a unique subjecthood is problematized, the very concept of empire – a theme this volume does not address – becomes vague, although the semantic tradition of the word alludes more to a composite political entity than to a larger territorial extension.

Very impressive, especially in light of the emphasis it gains in the whole theoretical bedrock of

the book and its efficacy in some of the collected essays, is the jurisdictional approach, proposed by Laura Benton.<sup>9</sup> Jurisdiction would be the moment when norms lose their ethereal and virtual nature and become social effects: »The study of jurisdictional politics does not depend on a general definition of ›law.« Nor does it require distinctions between ›state« and ›non state« law. The jurisdictional claims of a wide range of authorities, from a guild or merchant ship captain to a conquistador or trading company, can be analysed without they being defined neatly as public or private. Jurisdictional divides come into focus and matter most to an understanding of legal pluralism when conflicts occur, and so a methodological advantage of the approach is the focus on clusters of conflicts, rather than on elusive and often inconsistently applied rules or norms. This approach invites historical analysis because it becomes possible to analyse structural shifts propelled by the legal strategies of parties to jurisdictional conflicts«. <sup>10</sup> Magistrates, socially endowed with jurisdictional privileges transform the wide constellation of virtual legal norms in actual jurisdictional standards, according to which a specific issue is to be ruled. In the late sixties and seventies, the »jurisdictional« model was deeply explored by the European continental historiography,<sup>11</sup> jurisdiction becoming a guideline to the most innovative legal history.<sup>12</sup> In the jurisdictional model, two choices concerning jurisdiction decided the political outcome. The first, namely the choice of one of the competing jurisdictions by the subjects, was not a free choice, but the wide jurisdictional uncertainty as well as the possibility of changing the circumstances of the relevant case to fix the jurisdiction greatly enhanced the possibility of choosing the most con-

7 »The state was so dependent on provincial magnates, local notables, and corporations that its very operation assumed pluralism and, in certain ways, the expansion of its ambitions further entrenched pluralism. Although some officials such as French *intendants* owed their power to the Crown and served at its pleasure, most did not, from provincial and local estates and feudal lords to guilds and urban corporations. State endeavors commonly succeeded if they worked through rather than against these powerholders, who needed to

be recruited into alliances with the Crown. [...] Over the course of the seventeenth century, Castilian and French monarchs desperate for revenue accelerated the sale of offices and jurisdictions and committed the Crown to their protection«, Ross and STERN (n. 5) 112.

8 JANE BURBANK (professor of history and expert on peasant law, New York University) and FREDERIK COOPER (professor of history of colonization and decolonization, New York University), *Rules of law, politics of Empire*, 279–294.

9 BENTON (2002).

10 LAUREN BENTON and RICHARD P. ROSS, *Empires and legal pluralism: Jurisdiction, sovereignty and political imagination in the Early Modern world*, 1–19, here 6.

11 COSTA (1969); CLAVERO (1977).

12 SCHAUB (2001).

genial court in the specific context (see Linda M. Rupert<sup>13</sup>). The second choice was that of the magistrate, which involved selecting the »locally« enforceable norms (see Lauren Benton and Lisa Ford<sup>14</sup>). Even this choice was not absolutely arbitrary. Continental common law carefully ruled the *arbitrium* of magistrates through precedents, »styles of the court« (*styli curiae*), »rational« precepts (*recta ratio decidendi vel iudicandi*).<sup>15</sup> In any case, the merely probabilistic structure and the epistemological casuistry of jurisprudence (*prudencia*, as opposed to *scientia*) scarcely limited the power bestowed upon the magistrates to configure specific decisions. Also here, »court« (or »jurisdiction«) is a plural entity, which has to be culturally contextualized as the institution recognized by one specific community to regulate social and political conflicts. In this sense, jurisdiction loses its (contemporary, not early modern) public nature and covers »private« institutions like family (household, *casa, casata*) (or corporations (societies, guilds, universities, confraternities).<sup>16</sup> This (»post-Hartian«) reformulation of the concept of jurisdiction allows a broader – and culturally neutral – use of the jurisdictional approach, yet raising a somewhat uncomfortable set of perplexities in defining relevant institutions and levels of analyses.

Jurisdictional approach deepens the understanding of the mechanisms of rule. Several authors insist on the fertile idea of »governing through differentiation«, insisting that differentiation would not weaken rule, but instead ease and expand the government. In a way, they apply the conclusions of Michel Foucault in order to explain the political efficiency of plural and non-statist governments. A political patchwork institutes a model of rule (*governance*) which, through diverse political devices (*dispositives*), can reach every social site through an appropriate process of control (see S. Paul Halliday<sup>17</sup>). Furthermore, power becomes

invisible, inaccessible to the possibility of reification or perception, therefore immune to identification and opposition. Therefore, political pluralism and political liberalism can be described as two strategies for reinforcing rule through dispersion across society and through delegating political decision-making to the lower administrative units (»une politique au ras du sol«, Jacques Revel).

Besides these methodological themes, identified and discussed in the introductory chapter quoted above,<sup>18</sup> the illustrations in the book exemplify the uses of law in colonial policy – either to control or to resist – and are chosen from the British (3 articles), French (1 article), Ottoman (1 article) and Spanish (2 articles) »empires« in their American or Southern Pacific extensions. The Portuguese, Dutch and Russian empires in Brazil, Africa and Asia are not addressed, a shortcoming to be considered in a future development of the project. The methodological awareness and the conceptual discussion generate a comparative perspective, which increases the impact of the argument on ongoing research projects.

The book is organized in chapters, some of which predominantly deal with methodological issues, while others explore specific cases, although always clarifying aspects of the underlying methodological issues.

In their chapter, Richard J. Ross and Philip J. Stern<sup>19</sup> reflect upon the openness of early modern European political culture to pluralism – at least to a »weak« form of pluralism – consisting in the admission of a plural constellation of legal orders by paramount political entities. Authors remind us that at the institutional level, autonomous jurisdictions traditionally shared the European political space and that the advent of the so-called »modern state« (or even »absolutist state«) often still increased the jurisdictional complexity (for example, by increasing the territorial and cultural range of

13 LINDA RUPPERT (professor of early modern Atlantic and Caribbean history, North Carolina-Greensboro), »Seeking the water of baptism: fugitive slaves and imperial jurisdiction in the early modern Caribbean, 199–233.

14 LAUREN BENTON (professor of history and law, at the New York University) and LISA FORD (professor of legal history, University of New South Wales), Magistrates in Empire. Con-

victs, slaves and the remaking of the plural legal order in the British Empire, 173–197.

15 See MECCARELLI (1998).

16 ROSS and STERN (n. 5) 126.

17 PAUL D. HALLIDAY (professor of history and law, University of Virginia, Law's histories. Pluralism, pluralities, diversity, 261–277.

18 LAUREN BENTON and RICHARD P. ROSS (n. 10).

19 See above n. 5.

polities or by integrating the formerly autonomous lower political units). The integration of several former separate Iberian kingdoms into a »Catholic« monarchy was one of the most conspicuous examples. Another history, however, was the transcription of institutional practice at the level of doctrinal narrative. The chapter is concerned with identifying discursive constructs, which created a space for the doctrinal justification of powers out of the range of the newly discovered »sovereignty«, such as the church, municipalities, seigniorial lands, corporations (from guilds to universities), officialdom, foreign communities and a large array of other corporate entities, beginning with patronage networks and households. Ross and Stern rightly emphasize that this »workaday pluralism« did not struggle against a predominantly hostile climate. This statement would have sounded controversial forty years ago, when the established historical narrative firmly adhered to the thesis of a progressive centralization of European monarchies since the late 14<sup>th</sup> century. After a decade or two of discussion, the mood has decisively changed; more and more historians are now ready to accept what the sources emphatically tell about the vast plurality of the jurisdictions and the wider acceptance of this fact by mainstream political and legal cultures. This is evident in early modern southern Europe, where Jean Bodin and the »politicos« were barred, either by way of religious interdictions or by ideological differences, intellectual repugnance or even by virtue of the royal and ecclesiastic censorship. In contrast, the political orthodoxy in Catholic Europe was based on the general opinion of the scholastic theologians, from Vitoria to Molina, or on »traditionalist« encyclopedists, like Domenico Toschi, Agostinho Barbosa or Giovanni de Lucca, whose intellectual dominance was overwhelming. They went on supporting and diffusing a composite model of political constitution and a pluralistic frame for the theory of the sources of law. Although this point – central to the evaluation of the doctrinal situation in Latin metropolises – is not being given its due importance, Ross and Stern list a series of doctrinal contexts that potentially promote legal and politi-

cal pluralism. The first would be a civic version of contractualism, which stressed either the limited and revocable nature of political pact, or the natural origin of the jurisdiction of ordinary offices (*ordinaria iurisdictio*, proper to »les vrais officiers de la république«, to take Charles Loyseau's words), or finally the consensual nature of custom, by which »voluntary« pacts should be revoked. The second argument to refuse a single law was the autonomy of the conscience towards external co-action, implying the existence of a supreme internal rule against which the temporal sovereign was impotent. This thesis was developed in a theory about the relations between civil and ecclesiastical *potestas*, which led to the »natural« separation between the two powers (actually a pretty efficient proto-laicism) and to the condemnation either of religious integrism (religious supremacy over secular matters, pope's *dominium mundi*, crusade or any kind of conversion by force) or of kingly pretensions of domination over religious matters and magistrates. Finally, pluralism was decisively supported by the natural powers of family and household. The central role of *oikonomy* in the shaping of medieval and early modern political culture was decisively stressed in the forties by Otto Brunner – and (in an imperial context) by Gilberto Freyre – and rediscovered in the early 1980s by an active branch of the Italian political historiography<sup>20</sup> that explored the transposition of discourses on the *domestica potestas* (on wife, children, and servants) to the republic, but also the limitations the paterfamilias' jurisdiction was creating for the emergent »higher« jurisdictions – both spiritual or temporal. This focus on the family »ambiance« triggered the attention of contemporary historiography towards the affective context of power (*paterna* or *pastoralis potestas*, *fraterna correctio*) and to the valorization of normative consequences of the states of the soul (or virtues: *amicitia*, *liberalitas*, *gratitude*, *charitas*, *miser cordia*), considered by medieval and early modern culture as sources of rules which also curtailed a unique sovereign order.<sup>21</sup> Although the impact of the individual virtues on law is not addressed in the chapter, it should probably be considered a rele-

20 FRIGO (1985); MOZZARELLI (1988); later rich developments in Italy, Spain and Portugal.

21 Classical: CLAVERO (1991); also HESPAÑHA (1994); CARDIM (1999).



vant source in the future owing to the centrality of private agency in generating the autonomous governance of »civil society«.

In the last section, the book revisits the theoretical issues.

Summing up the previous chapters, Paul D. Halliday<sup>22</sup> stresses the importance of distinguishing between two concepts of legal pluralism. One that regards every norm that enjoys social acceptance as law and the other that tries to isolate a distinct set of norms – »legal« norms – that are state endorsed. This distinction between law and social norms, he notes, is marked by an essentialist concept of law, which is also tied to an essentialist concept of the state. I would add that this approach is typical of the discourses developed within the established legal theory, even when it tries to escape a legalist positivistic approach (as it happens in L. H. Hart's legal theory). In contrast, historians are more ready to eliminate a state-centred reading of political or legal worlds and to accept a broad and theoretically undifferentiated concept of law, thereby expanding pluralism to include further normative constellations, where the cogency of norms is defined not by the state, but by social consciousness.

This inclusive concept of law and of legal pluralism (he proposes the expression »legal plurality«) would be decisive to consistently grasp normativity, even in the post-Westphalian era. In fact, the author stresses the fact that the expansion of the state was only possible because sovereignty generated (recognized) non-sovereign forms of political power through which regulation and control reached the farthest peripheries of the system. This process of extending sovereignty by non-sovereign means can be described without stressing the role of the state in creating new normativity. In fact, as it is shown in a preceding chapter (Philip Stern<sup>23</sup>), the binding character of »non sovereign« legal orders did not derive from the state but from the pervasiveness of social representations of the nature of family, of corporations, of economy. Decentring the state in the justification of the binding

character of norms also has significant consequences for »international« law, as – in this global arena – states are now replaced by a variety of subjects armed with different kinds of regulation and served by jurisdictions with different levels of impact.

Halliday's core methodological proposal thus attempts to radically divert our gaze to a political condition replete with norms that cannot be grasped under legalism or by adopting a strict legal pluralistic stance.

In the last chapter, Jane Burbank and Frederik Cooper<sup>24</sup> reflect on the importance of the legal pluralist approach to the history of empires. Either in political and legal history or in theory of law, legal pluralism was one of the reactions against a merely formalist reading of law, as the will of the state or as the product of the learned tradition of professional lawyers. At a broader level of analyses, legal centralism (or statism) was – as the authors say – a century long habitus of reading political world (see Richard J. Ross and Philip J. Stern<sup>25</sup>), and not only in the imperial dimension of politics. With contemporary imperialism, which grew out of a political culture dominated by statism, pluralism functioned as a political succedaneum for the state in the context of the extreme cultural and political diversity of empires. Actually, pluralism was indispensable to how empires had been functioning since the Roman era, when a unitary law (*ius civile*, since 212) only formally applied to the huge territorial extension of the Roman world and when in fact localities were organized according to the local law, tacitly admitted into the common imperial law under the umbrella of the principle that every city had the natural right to decide upon its regime. What harmonized the plurality of local legal orders was the concept of *iurisdictio*, a limited power to declare the law, not in general, but only within the range of a specific self-defined community. As jurisdictional claims could and did conflict and their limits were not fixed (or adjudicated) by a higher authority, the overlapping of jurisdictions caused tensions between factual powers operating

22 See above n. 17.

23 PHILIP STERN (professor of early modern colonial history in Duke University, USA), »Bundles of hyphens«. Corporations as legal communities in the early modern empire, 21–47.

24 See above n. 8.

25 See above n. 5.

within the empire. At the same time, the merely contextual efficacy of jurisdictions blurred the external frontiers of empires, which could appear or disappear according to the issues locally at stake or the way in which jurisdictions were mobilized when the one or the other party handled specific interests and strategies.

Once adopted, the pluralist stance allows different answers to the classic questions. One question could be: Who made the laws of the empire? In a plural empire, they are made by all polities inhabiting the imperial space. Nevertheless, the mere existence of an empire – *i. e.* the common understanding that there was a whole comprising different parts – introduced the idea that at least some sort of an imperial power had to exist, in the absence of a spontaneous harmony (sympathy) between the composing elements (in one of the versions, the »colonial pact«). The answer to the question opened up a wide array of (theoretical) alternatives. However, as the medieval legal doctrine put it, the law had to be accepted, for which reason its acknowledgement by its addressees was the most important criteria for proclaiming its validity. Only when global imperial issues were at stake, the imperial head could impose its rule independent of the subjects' consent; therefore, it was only at that moment that it really made law. Another question could be: How did the colonial constitution change? Also here, the centre as the guiding star was more the exception than the rule. Colonial constitution changed through a variegated bottom up dynamics: conflicts within the empire at different levels and involving a wider range of interests than those of the dominant centre and the dominated peripheries. Consequently, constitutional evolution was not linear, moving from dispersion and confusion to unity, rationality and universality (or homogeneity) and did not follow a consistent line from ancient to modern empires, organized according to a clear-cut hierarchy of jurisdictions. Therefore, avoiding the assumption that modern states have to be unitary and uniform nation states, we could better understand – it is suggested – the failure of empires and states that excessively enforce the idea of

assimilation and legal unity (like the Austro-Hungarian Empire).

Further illustrations of how pluralism was present in the constitution of the empires are drafted in the remaining texts.

Philip J. Stern's chapter<sup>26</sup> revisits a theme that renewed European political and legal historiography in the 1980s – corporatism as the characteristic feature of political culture of the medieval and the early modern period. Although this corporatist turn is not expressly invoked, Stern's text revisits topics that were central to the efforts made by historians to go beyond the individualistic and contractual gaze inaugurated in the 17<sup>th</sup> century, mainly in central and northern Europe. »Going beyond« means, in this context, going south, toward the Italian and Iberian post-Tridentine social thought that prolonged corporatism to the late 18<sup>th</sup> or even until the 19<sup>th</sup> and 20<sup>th</sup> century (if we refer to the Romanticism or reactionary political attitudes, this is highly meaningful amid criticism of anti-liberalism in Italy, France Spain or Portugal).

Stern stresses – in line with the seminal writings of Pierangelo Schiera, Pietro Costa or Bartolome Clavero<sup>27</sup> – the corporatist model of the European pre-modern society, where the paradigmatic metaphor for political society was that of the body, composed of an intricate constellation of lesser autonomous organs, each one endowed with the power of self-government (jurisdiction, *iurisdictio*), mutually limited and spontaneously harmonized within the whole.

Corporations<sup>28</sup> were seen as social aggregations endowed with a natural jurisdiction to express their natural right of self-rule, for themselves and their members, as well to claim complex rights and authorizations well beyond the rights accorded to an individual, competing with the political power of king and the parliament and decisively complicating the constitutional architecture. Seen through corporatist lens, political bonds were not straightforward and unidirectional top down relations. Legal order did not have just one centre. Individuals were not considered simple and exclusive, so that the (British) modern »state« instead

26 See above n. 23.

27 For an overview, see HESPANHA (2013).

28 *Universitates*: MICHAUD-QUANTIN (1970).



was a composite political entity made of corporate entities, sometimes mutually conflicting or conflicting with the crown. According to Stern, colonial constitution shared this corporatist structure, intensified by the patchwork of corporations (municipalities, republics of natives, trade companies, »feudatories«) through which the colonial enterprise was channelled. In the British case, large, medium and small colonial companies, whether chartered or operating by way of direct pacts with settlers, were conspicuous, as Stern rightly mentions. In the foreground of other empires, like the Portuguese or the Spanish, were instead municipalities, ecclesiastic *collegia* and para-feudal institutions (like Portuguese or Spanish administrative divisions known as captaincies). Stern stresses that even »families«/households – the quotidian site of domestic matters (»oeconomic« rule) – were present in this jurisdictional patchwork. The author alerts against any idyllic vision of corporatism (in this case, colonial corporatism) as a realm of self-government before the heteronomous rule of the state. As other essays in this volume underscore, political pluralism was a rather useful factor for building and developing the imperial political network in distant and still novel situations overseas. However, the more the crown was able to directly organize its colonial dominions, the more uncomfortable the corporative constitution was. Thus empire came to be reframed in the 18<sup>th</sup> and 19<sup>th</sup> centuries, reactivating a forgotten Roman distinction between the public and the private and reducing corporative autonomy to royal concessions.

Helen Dewar<sup>29</sup> accomplishes the additional task of decentring the state in the colonial narrative. It addresses the litigations in empires, more precisely in the North American French empire in early 17<sup>th</sup> century, to show how the pervasive culture of litigation moulded »national« empires. Dewar stresses that the plurality of laws and courts was a structural fact even in early modern France

(as well as in the rest of Western Europe, it must be said). However, extending the metropolitan system of justice to »New France« hurt entrenched interests and provoked an uneven reception and accommodation of an already uneven jurisdictional pattern, always contextualized by a quasi contractual and case-sensitive allegiance to royal justice. The essay's point of departure is the idea that the contours of a concrete jurisdiction (as that of a magistrate, of a corporation, of a company, of a settler's community) are the product of an arrangement between the universal pretensions of royal law and those of local rooted usages or political representations, but also of strategies for handling conflicting political interests in the metropolitan or colonial playing fields. This vantage point, besides allowing a reflection on the crossed influences between state formation and colonial enterprise, looks at state formation from above, considering it as the hazardous outcome of jurisdictional conflicts whose object barely related to any grandiose global political project.

Karen Barkey<sup>30</sup> departs from a more restricted concept of pluralism (a situation in which »[the] sovereign commands different bodies of law for different groups of population and [...] the parallel legal regimes are dependent on the state legal system« (83), that – I would say – leaves unspoken important zones of legal particularism, where a specific law is enforced independent of any »official« consent. Although this »official« legal pluralism corresponds to the explicit legal structure of the Ottoman Empire, aptly described in this chapter, this conceptual perspective seemingly impoverishes the legal patchwork of several »informally« coexisting legal orders. In spite of the characterization of the Ottoman Empire as an example of a centrally coordinated legal pluralism, I dare suppose that »hidden« or unofficial pluralism also existed in the Ottoman Empire. Besides a methodologically proficient analysis, the chapter provides a persuasive case for comparing the Western

29 HELEN DEWAR (historian of French early modern North American colonies, McGill University, Canada), Litigant empire. The role of French courts in establishing colonial sovereignty, 49–79.

30 KAREN BARKEY (professor of sociology and history, Columbia University, USA), Aspects of Legal Pluralism in Ottoman empire, 83–107.

European model of combining the religious and secular laws. As the Western European empire and realms, the Ottoman State was independent from religion, since *shari'a* (Islamic law) and the *ulemas'* body (religious leaders) did not formally control the state. The imperial model was that of the Greek-Byzantine model of empire, where state and religion appeared united, but where religion was in practice an instrument of the state. Actually, religion was, at the same time, a source of political legitimacy and an institutional framework for the enforcement of state administration and state jurisdiction. State servants and state representatives in the peripheries were educated in state funded religious schools (*medreses*). The imperial law (*kanun*, from the Greek *kanon*, rule) was a set of norms, autonomous from Islamic law (*shari'a*), and issued by the sovereign or established at the sovereign's court. Royal judges (*kadi*) were recruited from among the educated elite to administer justice according to both the Sultanic and Islamic law and were highly respected among the imperial officialdom.

This apparently centralized system was made flexible through temporary but renewable pacts (*milet*) through which the right of self-rule was granted to important Jewish and Christian communities. The millet was a semiformal convention between non-Muslim religious groups, by which religious group authorities were recognized by the Ottoman State as the rulers of specific self-regulating communities, provided they recognized the supremacy of the state. Anyway, archival research has established the frequent preference of non-Muslim subjects for the *kadi* court, which would demonstrate either the advantages it offered to escape the tyranny of holistic minorities or the efficiency of the assimilation process through allegiance to imperial institutions, whose social prestige was largely established. The role of *kadi* in the court as an assimilationist device is one of the most interesting points in the chapter, as it also addresses the unifying role of the metropolitan appeal jurisdictions in the outskirts of Empires. The balance between assimilationist and autonomist effects of

pluralism is an underlying concern of the chapter. And rightly so, because this issue is still today critical for evaluating the ›liberating‹ potential of pluralism as a political proposal for legal policy-making. According to K. Barkey, pluralism is politically a rather ambiguous option. Often, oppression is mostly experienced through powers in near proximity, more than through the direct submission to a distant and ›neutral‹ sovereign, confirming a typical medieval concept of liberty – liberty, as the exclusive political allegiance to the king. Other chapters raise, more or less directly, this same question (for example, Brian P. Owensby<sup>31</sup> on the ›Indian‹ policy of Spanish Monarchy or L. Benton and Lisa Ford<sup>32</sup> on the option between local and central of discipline).

Brian P. Owensby's chapter<sup>33</sup> on the ›Indian‹ policy of the Spanish monarchy analyses the transition between two versions of a plural structure of the empire. On the one hand that of the Catholic empire of the Habsburgs, which pursued traditional ideas of governing, and on the other, that of the Bourbons, which was introduced in the late Ancien Regime and only fully prevail later under a liberal legal and economic policy. The chapter is particularly eloquent in its description of the Habsburgian model of imperial rule. As suggested, the Spanish Habsburgs, at home or overseas, adopted the traditional European corporate or ›jurisdictional‹ model of monarchies,<sup>34</sup> so well described since the 1980s in a rich strand of southern European political historiography. The core feature of the model was to reserve for the king the role of balancing a plurality of spheres of power and law (*iurisdictiones*) through his supreme power of harmonizing corporate political bodies and regulating jurisdictional conflicts between them, in order to ensure the common good of the republic. In this model, Indians were represented as corporations, either by their native authorities or by their appointed civil or ecclesiastic ›protectors‹ (*comendadores*, *provisores*, *curatores*, to use an ecumenical Latin terminology). This system was based on the double assumption that the natural leaders of each body (*sanior pars*) duly represented the common

31 BRIAN P. OWENSBY (professor of History, University of Virginia), Between Justice and Economics: ›Indians‹ and reformism in eighteenth-century Spanish imperial thought, 143–171.

32 See above n. 14.

33 See above n. 31.

34 LORENTE / GARRIGA (2007).

interests of its members and that the royal decision did not result from an unbalanced (unfair) weighting of the conflicting interests. When this did not happen, because of the submission of common interests of the *universitas* to the private interests of its representatives or because the king-judge was misinformed (*obreptio*, *subreptio*), good governance, or justice, had failed. This was deemed to be the case in Spanish Empire at the time of the transition from Habsburg to Bourbon dynasty. Indians' grievances concerning misrepresentation and bad government were mirrored in several proposals for political reform, the most meaningful point of which was that of changing the place of natives in the political architecture of Empire corresponding to a new concept of imperial constitution. As economy tended now to be seen as the nerve centre of politics, and was supposed to automatically generate harmonious laws, the political solution to the Empire would be to integrate colonized subjects into the economy – assuring them property, imposing on them taxes that create the need of producing goods for the market and of trading according its laws. Once carried out, this policy would transform Indians into »useful vassals« – producers, consumers and taxpayers – and let the laws of economics generate the best constitution for the Empire. Actually, the transition would not replace pluralism through a political and legal monism; rather the transition would occur just from one type of pluralism – jurisdictional pluralism – to another, very similar to the liberal governance.<sup>35</sup> In this sense, the chapter also exemplifies the liberal proposals of constitutional reform, where a wider governance (and not only for the colonies)<sup>36</sup> replaced the prior pretensions (of absolutism and mercantilism, not of traditional corporative order) of rule through state government.

Lauren Benton and Lisa Ford<sup>37</sup> build their essay on local stories of slaves (in the Caribbean) and convicts (in New South Wales). As they point out, the difference in the formal status among the lower classes needing protection is fairly irrelevant for the geometry of the model. In all the cases, local tyranny can be overruled by setting up central and universal standards and a network of delegate

magistrates, thus building a bridge to peripheral elites and directly taking care of the interests of the »miserable people« (*miserabiles personae*) that already in Middle Ages came under the direct protection of the king.

The studied cases concerned troubles caused to local peripheral communities by the shipment of captives or slaves to several points along the North American Atlantic shore or, later on, to the New South Wales. For the affected peripheries, the threats to the communitarian order and security owing to the shipment of the captives were similar to the unsettling effects of an increase in the number of slaves. For the centre, however, the autonomy claimed by the peripheries to ensure local order and security was the real danger of disorder. Accordingly, the Crown's policy to limit the disciplinary powers accorded to slave masters ran parallel with a concern of an emergent colonial bureaucracy with building and legitimising a common imperial rule in the respective colonial constitution.

The existence of local magistrates, who were more or less lenient towards local elites, certainly contributed to the continuation of slavery, affecting core antislavery policies. However, the main concern of colonial rulers was not slavery but empire, in fact, a new kind of empire, where the ordering pathos of the centre could efficiently reach the peripheries. More than promulgating legislations that would emancipate poorer and more vulnerable segments of the population from parochial forms of tyranny, the key issue was the weakening of local »ordinary« jurisdictions or the promotion of the right to appeal to extraordinary »commissioners« or central courts. This issue was not unknown to the imperial government. In the 17<sup>th</sup> century, the »extraordinary« jurisdiction of Inquisition was used by the Spanish monarchy to gain control of Sicily. Ecclesiastical protectors (e. g., »pais dos cristãos«) used their »domestic« powers to take care of the interests of catechumens against the natural jurisdiction of their pagan community. The »pastoral« power of episcopal general vicar or even the confessor controlled the fulfilment of religious precepts, undercutting the ordinary powers of the *paterfamilias*. Not least, professional

35 FOUCAULT (1976).

36 See PORTILLO (2000).

37 See above n. 14.

crown judges tried to circumvent local justices. A more efficient means of resolution (classified as *imperium, extraordinaria iurisdictio, domestica vel oeconomica potestas*) was granted that allowed ordinary jurisdiction to be bypassed in order to protect the weak from the local despots, but mostly in order to establish universal standards in the peripheries that would forge uniformity in the empire – on the legal and the bureaucratic front.

Linda Ruppert's chapter<sup>38</sup> explores the entanglement of both inter-imperial and intra-imperial jurisdictions concerning slavery, as well as the contradictory political aims they support. The context is the confrontational politics of the Spanish and British Empires in the Caribbean archipelagos during 17<sup>th</sup> and 18<sup>th</sup> centuries, as well as the diverse perspectives of local, royal and ecclesiastic powers regarding the »good regime« of slavery. In the inter-imperial policy, the main conflict was between the British colonial interests of the slave economy in the Caribbean plantation colonies and the religious strategic interests that were deemed to be the inspiration of the Spanish Empire, namely in the Caribbean and neighbouring areas. However this oversimplified picture would get more complex if the inner conflicting interests in both empires were taken into consideration. Actually, on the British side, the colonial elites' views on slave trade and slave economy were not fully supported by the central power, as they increasingly confronted the anti-slavery sensibilities at home. On the Spanish side there were tensions between local planters desiring to preserve or intensify slavery, the royal magistrates who were concerned with local abuses in the disciplining of the slaves, and the Catholic missionaries. In these complex political interplays, slaves saw an opportunity for (limited) jurisdictional shopping.

P. G. McHugh writes a suggestive essay<sup>39</sup> on the obstacles to the development of a full colonial sovereignty in the British Empire. Taking as a case in point the slow and hesitant progress of British

political ascendance in New Zealand, the author analyses the doctrinal and practical context of the substitution of British traditional colonial models for those that would dominate in the late 19<sup>th</sup> century. In the first era of sporadic contacts with the new territories and population, colonial control could be set through the model of »jurisdictional sovereignty«, *i. e.*, through the casuistic empowerment of magistrates with jurisdiction over a certain class of people or acts. Accordingly, colonial domination was punctual, contracted, asymmetric, and contrasting with what would be the colonial sovereignty imagined by colonial and constitutional theorists of the late 19<sup>th</sup> century.<sup>40</sup> Around 1830, with the increasing number of settlers in New Zealand, problems (of abuse over natives, of the acquisition of indigenous land, of colonial taxation) could no longer be handled solely by such dispersed and tiny administrative units. The alternative to building a blunt sovereignty was still unusual, although the bureaucratic seeds of a new conception of colonial rule were being sown, with the advent and development of an autonomous colonial administration. Therefore, a more robust administration needed to be set up to work out something similar to the East Indian experiments that instrumentalized indirect rule. In New Zealand, where the native political organization comprised more than 50 tribes, indirect rule implied building some sort of confederation (the »Confederation of United Tribes«) that could concentrate on native political interlocutors and ease colonial control. Along with the Confederation, the policy of indirect rule also »created a Maori nation«, formally sovereign, subject of international community, worthy of respect from third powers (namely, the French), although dependent on the protection of the British, for whom Maori's sovereignty had no contents. In fact, the clauses of the »international« acts that ruled Maori-British relations allowed almost every kind of colonial intervention in native domestic affairs. This model,

38 See above n. 13.

39 P. G. McHUGH (professor of law and legal history, Univ. Cambridge), »A pretty government!« The »Confederation of United Tribes« and the British's quest for Imperial order in the New Zealand Islands during the 1830s, 233–260.

40 E. g. DICEY (1885).

drafted for an elemental native polity, was to be the model for the British colonial empire in Africa, where it found similarly less segmented political units.

On the whole, the chapter is a proficient analysis of the trends that directed the British colonial constitution, evolving from an atomistic jurisdictional constitution, as a gathering of inconsistent jurisdictions, to a pluralistic one, built on the acknowledgement of native powers and their use as a support for indirect rule and, eventually, to a

general and homogenous sovereignty – never fully achieved – set up through universal regulation and standardized administration. The respective political and doctrinal challenges of each one of the options are very well defined, with the chapter providing a brilliant overview of British colonial constitution from the mid-18<sup>th</sup> to the early 20<sup>th</sup> century. ■

### Bibliography

- BENTON, LAUREN (2002), *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, Cambridge: Cambridge University Press
- CARDIM, PEDRO (1999), *Amor e amizade na cultura política dos sécs. XVI e XVII*, in: *Lusitania sacra*, 2<sup>nd</sup> ser. 11, 21–57
- CLAVERO, BARTOLOMÉ (1977), *Temas de Historia del Derecho: Derecho común*, Sevilla: Universidad de Sevilla, Secretariado de Publicaciones
- CLAVERO, BARTOLOMÉ (1991), *Antidora. Antropologia Catolica de la Economia Moderna*, Milano: Giuffrè
- COSTA, PIETRO (1969), *Semantica del potere politico nel pubblicistica medievale (1100–1433)*, Milano: Giuffrè
- DICEY, A.V. (1885), *Introduction to the study of the law of the constitution*, London: Macmillan
- ELLIOTT, JOHN (1992), *Europe of Composite Monarchies*, in: *Past and Present* 137, Nov., 48–71
- ELLIOTT, JOHN (2002), *Imperial Spain: 1469–1716*, London: Penguin
- FOUCAULT, MICHEL (1976), *Il faut défendre la société*, Paris: Gallimard
- FRIGO, DANIELA (1985), *Il Padre di Famiglia. Governo della Casa e Governo Civile nella tradizione dell'«Economica» tra Cinque e Seicento*, Roma: Bulzoni
- HESPAÑA, A. M. (1994), *La gracia del derecho*, Madrid: Centro de Estudios Constitucionales
- HESPAÑA, A. M. (2013), *La cultura jurídica europea*, 3.ed., Bologna: il Mulino
- LORENTE, MARTA, CARLOS GARRIGA (2007), *Cádiz, 1812. La constitución jurisdiccional*, Madrid: Centro de Estudios Políticos y Constitucionales
- MECCARELLI, MASSIMO (1998), *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milano: Giuffrè
- MICHAUD-QUANTIN, PIERRE (1970), *Universitas. Expressions du mouvement communautaire dans le moyen-âge latin*, Paris: Vrin
- MOZZARELLI, CESARE (1988), *«Familia» del Principe e famiglia aristocratica*, Roma: Bulzoni
- PORTILLO, JOSÉ MARIA (2000), *Revolución de Nación. Orígenes de la cultura constitucional en España, 1780–1812*, Madrid: Boletín Oficial de Estado
- SCHAUB, JEAN-FRÉDÉRIC (1995), *La penisola iberica nei secoli XVI e XVII: la questione dello Stato*, in: *Studi storici* 36, 9–50
- SCHAUB, JEAN-FRÉDÉRIC (2001), *Le Portugal au temps du comte-duc d'Oliveres (1621–1640): Le conflict de jurisdictions comme exercice de la politique*, Madrid: Bibliothèque de la Casa Velázquez