

The International National: *Ius Commune* and the fictions of citizenship.

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In this short presentation, I am going to address the question that international law is already formally, politically, and culturally embedded in national laws from a historical perspective. I will show how cultural legal history could unveil the ways in which the formation of national common law—and in particular that that claims to derive from the tradition of *ius commune*—implies the articulation of imperial and ecclesiastical legal models. This articulation, and its presentation as a *common legal core*, is indeed the result of a complex process of exclusions, of which one could highlight some important ones, including, of course, other universalized legal systems (Muslim, Jew), racial issues, gender issues as well as other more subtle ones, like the legalities surrounding citizenship and the legal fictions (*fictiones legum*) that underwrite citizenship in the process of imperial expansion.

1. Legal historians are the ultimate guardians of the Law and the legal discipline. Their task includes the right explanation of how legal things happened in the past, like the emergence and fall of legislations, institutions, or bodies of jurisprudence. In that sense, they are the ones responsible for the activation and deactivation of full archives in history.

This is not their only task. Legal historians are oftentimes lawyers themselves,

and in many countries in Europe and elsewhere (not as much in the US system of higher education, which is interesting in itself) legal history is a central, frequently required course in Law School. Thus, legal scholars are also the ones who diligently order and tell the legal discipline as a historical construct.

And yet, there seems to lie a paradox at the bottom of any legal history. Law, in effect, is always present. Maybe legal historians tackle the conditions of possibility of, let's say, the American Constitution of 1787, but only in the understanding that, while everything happening in 1787 may belong in the past, the constitution itself is present, awake, conscious; its semantics is still intelligible as a present one that rejects the incursion of historical analyses involving phonology, lexicography, etymology, or meaning metabolism. This position is supported by textualist and originalists, but they are not the only ones. As the lexicographer Bryan Garner—who worked closely with the late Justice Antonin Scalia—has argued, in the end the legal words are purely form, and their form is their content. This position is not unlike the psychomechanical *linguistique du signifiant* championed by Gustave Guillaume in the early twentieth century.

Something similar happens with the amendments to the Constitution. They may have a chronology, but it is a chronology of the present, that is, to the present of that inaugural moment of a legal era, that point of departure of a periodization that invokes the urgency of the right now.

We the People is the same *We*, the same *People* despite the 225 odd years lapsed since the founding fathers first wrote those three winged words. Law is durable, so, in a certain way there cannot be legal history but of those legal things that seem to be inactive, that are not in the present, that evoke another *We*, another *People*, and definitely another semantic.

2. Now, how inactive is *past Law*? For how long? Under what circumstances? The answer to these questions is difficult to formulate. But it is important, because legal issues, legal institutions, and effects pertaining to legal thinking keep coming back. They don't come back on their own. Legal historians are frequently responsible for bringing them back; legislators, turned into legal scholars, also do that; lawyers involved in jurisprudential research are also responsible for bringing them back.

I would like to offer the example of the work of one of the most important—perhaps the most important—legal historians, Friedrich Karl von Savigny. In

1814 he published the short treatise *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, a response to a publication by Anton Friedrich Justus Thibaut and part of what is normally known as the debate on codes. Savigny's treatise submits to criticism three features of his legal environment: the legal invasion of the Napoleonic code in some German states, the preeminence of customary law in the German legal landscape, and, as he puts it, the "arrogance" of *iusnaturalism* and natural law altogether in legal reasoning and legal science. According to Savigny, the only successful way out of this triple trap is to find a historical study of jurisprudence that would take care, simultaneously of the legal science, its concepts and principles, the production of legislation, and the generation of jurisprudence. Such kind of science would stop adaptations of foreign legislation and would prevent the consolidation of isolating customs, while fostering the desired unification of Germany better than an all-encompassing, unified legal codification.

Savigny recognizes that this legal commonality of the German nation would not happen in isolation. The legal system he was thinking of would also acknowledge the profound relationship between Germany and Italy, as they shared the tradition of Roman Law. Savigny, indeed, had transformed the study of Roman Law in his treatise on the rights of possession, published in 1804. In his work as a legal historian, that would reach its peak in his lifelong project of a multivolume work on Roman Law, he avoided glossing and commenting Roman Law, as medieval and early modern lawyers did, but rather he worked critically on key institutions —like, for instance, possession and obligations.

Savigny's is a work of reactivation. Not of inspiration or updating, but a clear thesis on how legal history is a history of the legal present —and here it is perhaps convenient to reinvest the noun "history" with one of its original Greek meanings, namely science, or *res gestae*, rather than *narratio rerum gestarum*.

Legal history was conceived as a way to activate dormant legal sciences, in order to achieve a different legal future —a future marked by national unity, and by commonality of laws between nations, and between those nations and the old imperial political entity that supported them. During the WWII, and immediately afterwards, Italian legal scholars grew increasingly concerned with the legal common past, in particular regarding the question of sovereignty. They had to rebuild sovereignty. The polemic between Francesco Calasso, Sergio

Mochi Onory, and Francesco Ercole, later revived in the works of Ennio Cortese and Diego Quaglioni, is a central point of that painful reconstruction. Scholars and lawyers like Paolo Grossi and, especially, Manlio Bellomo—in a book also celebrated in the US— could even affirm a “European common legal past” as the basis for any reconstruction of sovereignty.

For Grossi or Bellomo, this common legal past is medieval *ius commune*, that is, the combination (in unspecified proportions) of roman law, mostly from the Eastern Empire compilations attributed to Justinian, canon law, that is the compilation of ecclesiastical regulations and norms, and *iura propria*, or local legal dispositions, mostly customs. Through German “pandectism,” and the Italian renewed interest in *ius commune*, other nations in Europe and in the Americas, including Spain—much less so France—, found this common legal history to be fruitful in many ways.

I wonder whether it is fruitful in many unexpected ways. It is not a secret that *ius commune* and Roman Law play an important role in contemporary political theory and philosophy—one can simply invoke the name of Giorgio Agamben. It is also not a secret that *ius commune* and Roman Law, along with the trope of the “common legal past of Europe” have been crucial to the construction of the European Union, its expansion, and its founding myths. For instance, after the failure of the European Constitution in 2005, the project of legal union was replaced by the so-called *Treaty of Lisbon*, that includes amendments and corrections to the *Treaty on the European Union*. The first of this amendments reads like this “DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law;” Reading this in the current political climate, new forms of imperialism, islamophobia, and the politics and culture regarding the terrible fate of immigrants and refugees, sure sends a bitter chill down my spine.

Maybe it is important to remember that *ius commune* and its reverberances in countries across the globe is not devoid of three important characteristics that are frequently silenced. First characteristic, it draws from an imperial law, and this imperial law was readapted to foster monarchical sovereignty, and political forms of government that fall under the categories that Stathis Gourgouris has criticized as “the perils of the one.” Second characteristic, it draws from

Christian, and furthermore Catholic regulations, that have transformed procedural law in particular, that is the ways in which the trial, and everything that underwrites and supports it, is conducted. Those procedures include forms of interrogation (torture and all), oaths, regimes of truth, presentation of proof, etc. This second characteristic equally involves the limitation of rights for women, the racialization of religion, or the intertwining of the ecclesiastical and the secular even at the level of the secular procedures (including, for instance, the forms of capital punishment). The third characteristic is that the inclusion of *iura propria* is an unspecified requirement, and that it harnesses local regulations that do not contradict the legal principles contained in imperial and ecclesiastical legal corpora. Because customs and usages are frequently regarded as private (in both legal and political sense), they also tend (and have historically tended) to become practices of exclusion.

One could argue —and I certainly would— that the interactions of these three characteristics in the *ius commune* are the ones that set in motion the fluidity of political theologies, the constant and unbound negotiation between theological concepts and practices and political ones taking place in the realm of the civil. I must immediately make the case that I do not think of political theologies as the projection of one thing (be it the secular or the theological) upon the other, but rather as a non dialectical movement, a critical relationship between the theological (as a discipline) and the political (as a discipline as much as a practice).

3. I would not claim that *ius commune* is a national, let alone international law. I would say, however, that the reactivation of *ius commune* in Europe and elsewhere during the 19th and 20th century, and beyond, is a national business. It was based on nationalistic projects that have never been undone, and that, even when they have been less visible in contemporary politics, have promoted the current rise in nationalistic political stances.

I would even claim something else. The main, dominant elements of *ius commune*, namely imperial legality, and ecclesiastical universalism, recognize that political societies are multiethnic, multireligious, and multilingual, and that they need to be reduced to one single legal system and one single religious doctrine, working under a dominant language in a diglossic regime. For this reason, those legal systems also incorporated legal devices and legal strategies that were

essentially international. I am not even mentioning that the beginnings of acknowledged international law —see now the works of Julie Saada— are founded in *ius commune*.

In other words, the *international* is here embedded in the national, and it is not something that is separated from it. It is the national character of the *ius commune* that begets the international not as an expansion of the national, but rather as a subset of it.

I will just mention an example that pervades legal activity since Roman Law all the way to the *ius commune* —based on the legal device known as *fictio legis*. You all probably know a lot about the *fictio legis*. The device is purely *ius commune*. Although *fictiones legum* were also used in some instances in Jewish law, it seems to have been as a result of the co-production (in David Nirenberg's sense) of Jewish law and Roman law, and it is mostly used in the first centuries of the common era, not before, according to Leib Moscovici. The device was theorized during the Middle Ages, between the 13th and the 14th century, with the purpose, above all, of wondering whether one could make *fictiones* of facts or only of *iura* —that is, whether it was legitimate to change the order of nature, or one had to change only the order of the law. Because during the 13th and the 14th century there is also a redefinition of nature as an institution, as *second nature*, if you will, it became evident that all fictions regarding nature were fictions based on the institution of nature, and therefore fictions of *iura*. This is entirely different to natural law, as recently studied by Annabel Brett; to understand the importance of recent scholarship on Natural Law, see Riccardo Saccenti. Yet, there were lawyers and legal scholars who posited that natural law should always constitute a limit —but that limit was blurred, as, for instance, the fiction of the living person considered dead, the dead one considered alive, or the fiction of the son as a father. These fictions that were useful (*actiones utiles*), and played an important role in society that could not be disturbed by the discourse of natural law.

Fictiones legum have been frequently considered as part of the exception. There is nothing in *ius commune* that considers them as such, as far as I know. Some modern scholars (Ando, Steinberg, Agamben) have located them in the space of exception, or as governing legal exception. Legal exceptions do exist in Roman Law, and they are normally referred to as *edicts*, that modify *leges*. The

combination of a law with all its exceptions and cases defines the *regula iuris*, which is the main concern of medieval and early modern lawyers and legal scholars (Conte).

My position is that *fictiones legum* are not connected to the exception. They are fully in consonance with the direction of the law—they are part of the law. A *fictio legis* is formally very easy. It says that A is as if it were B. That's all. And this is the best way to identify a legal fiction in linguistic terms (Thomas).

One of the manifestations of the *fictio legis* is the fiction of citizenship. Non-citizens are considered as if they were citizens. The *fictio legis* devised for this purpose is complex in Roman Law, as Clifford Ando has studied. This is still a territory to be explored in Medieval and Early Modern *ius commune*, as well as in the different modern avatars of *ius commune*. Indeed, the fiction of citizenship recognizes explicitly, only by its mere existence, that there is an internationalization of the national territory, and that there is a need to address it from a legal action.

One of the theses of Clifford Ando is that the fiction of citizenship worked as a useful device in the process of expansion of the empire. As the borderlines were moving (mostly Eastwards), both the laws and the edicts fell short of resources, but the fiction of citizenship—considering the newly colonized subjects as if they were citizens—allowed the expansion of the jurisdictional powers.

What seems interesting here is that Roman citizens were not considered as if they were citizens, but as citizens *tout court*. The *as if* implies not exceptionality, but rather contingency: their being considered as if they were citizens would grant them citizen status contingent to specific jurisdictional conditions or necessities. But this consideration could also be removed, or not fully implemented. As a general rule, as Ando documents, “Romans did not like non-citizens conducting themselves as Romans” (315). For instance, and this is a very important case, slaves that were freed informally remained slaves at civil law, and yet fictions allowed them to be considered as citizens in order to allow them to bequeath their *pecunia*—because it was frequently bequeathed to their ex-masters.

Medieval law also applied similar rules to slaves. Slaves acquired a natural bond (that is, nature as a second nature, as an institution, that a 13th century Spanish lawyer called “naturality”, to distinguish it from nature itself) towards

their masters. This bond could vanish once the slave was freed, but then, two things would immediately happen. The first one is that the new free person would acquire a new natural bond to the person who freed him or her, thus remaining in many different ways under the ex-master surveillance, even domain; the second is that, even once freed, the new free person, as the lawyer says, would keep “a root of natural bond”, like a shade of having been a slave, a mark that was politically and legally indelible. Although considered as if he or she was a citizen, the new natural bond and the remnants of the old one would make this fiction of citizenship contingent to conditions that would not be common to citizens whose citizenship was not governed by this *fictio*.

James Baldwin criticized that the American slave system did not know what to do with freed slaves—but the fact is that it did, as the system continued enslavement by other means (see Ada DuVernay’s *Thirteenth* to check some of those *other means*).

4. I am not a legal historian. I am interested in the history of law from a non-legal perspective—and yet, I doubt there is such category or perspective as the non-legal, and even less so what François Ost called *l’infrajuridique*. But I least I can say I have no pretension to be able to change a law, to get rid of it, or to reduce it to absurd. As somebody who reads the legal texts in a historical perspective, I am rather concerned with the rhetorical construction of such legal texts, that is with their logic (for, as Aristotle said, rhetoric is the *antistrophe* of dialectic). I am concerned about how this logic has shaped what I have called *legal thinking*, or, in other words, the colonization of lay, non professional discourse with the linguistic tropes and the linguistic tropes (Nietzsche) of the legal professional idiom. I am concerned on how the legal parlance has become a “metaphor we live by” (Lakoff & Johnson), and therefore an unseen metaphor, just a way to speak (Nietzsche).

I am concerned with procedures, concepts, theories, and practices that have become naturalized over time. Historical research can shed light on them and their process of naturalization, thus giving us the opportunity to build a better future. But mind you, I am a simple medievalist, and I know, more or less, my own limitations. At a certain level, this medievalist can try to turn on the light and to give a name to those naturalized issues, but I worry I cannot give any future insight, any solution. Sadly, my work is done when I somehow get to

graze, with the tip of my stretched out fingers, a fragment of the past from the contemporary instant of history that was allotted to me.

But at least, I guess, I am allowed to ask some questions. I am thinking of modern slavery, of the citizenship of those who don't have one, of the strategies of the national state to separate itself from the people who actually live within its borders; I am thinking of the refugees, of those who are forced to become immigrants. This is why one of my questions to the legal history is to what extent the idea of international is still embedded in the concept of the national, and whether from this location, it performs actions that bespeak the activity of *ius commune*, namely that those who are non-national, even when they are citizens, still hold, at the symbolic and cultural, as well as at the political level, the mark of contingency, the mark of the legal fiction.