HISTORICAL PERSPECTIVES
on Property and Land Law

Edited by
Elisabetta Fiocchi Malaspina
and Simona Tarozzi

Historical Perspectives on Property and Land Law

The Figuerola Institute
Programme: Legal History

The Programme "Legal History" of the Figuerola Institute of Social Science History –a part of the Carlos III University of Madrid– is devoted to improve the overall knowledge on the history of law from different points of view –academically, culturally, socially, and institutionally– covering both ancient and modern eras. A number of experts from several countries have participated in the Programme, bringing in their specialized knowledge and dedication to the subject of their expertise.

To give a better visibility of its activities, the Programme has published in its Book Series a number of monographs on the different aspects of its academic discipline.

Publisher:
Carlos III University of Madrid

Book Series:
Legal History

More information at www.uc3m.es/legal_history

Historical Perspectives on Property and Land Law

An Interdisciplinary Dialogue on Methods and Research Approaches

Edited by
Elisabetta Fiocchi Malaspina
and Simona Tarozzi

Dykinson
2019

Historia del derecho, 78
ISSN: 2255-5137

Editorial Dykinson
c/ Meléndez Valdés, 61 – 28015 Madrid
Tlf. (+34) 91 544 28 46
E-mail: info@dykinson.com
http://www.dykinson.com

Preimpresión: TallerOnce

ISBN: 978-84-1324-499-0

Versión electrónica disponible en e-Archivo
http://hdl.handle.net/10016/29290

TABLE OF CONTENT

INTRODUCTION

This volume is the result of the interdisciplinary workshop entitled *Historical Perspectives on Property and Land Law – An interdisciplinary dialogue on methods and research approaches* that took place at the University of Zurich on 11th and 12th April 2019.[1] The dialogue between legal historians, historians, and scholars of Roman and comparative law was established around central themes: property law, transfer and registration of property. Topics that, in every time and place, have played a significant role in the organisation of society, in establishing legal relations, but which have also caused discussions and conflicts.

The interdisciplinary approach enriches scientific research, giving several impulses to academic disciplines, but it is also relevant in searching for different methods and perspectives, which contribute to the examination of legal historical implications in current problems. The era of globalisation has created global interconnections, global circulation of ideas, models and institutions. New technologies enabled by digitalisation, for example electronic registries for property, allow historians, legal historians, and scholars of Roman and comparative law to formulate or reformulate specific legal questions, in order to understand how the past shapes and determines our present.

This volume aims to investigate how legal property regimes, land law and land registration systems are intertwined with economic, social, and political spheres; to analyse the social functions and legal and political implications of various land registration systems in different contexts and how, for example, they operated in a colonial framework; to scrutinise the relations between politics and property, as well as the transformation of the property concept, in its meaning and function.

In this perspective the concept of property (*dominium*) and possession (*possessio*) in Roman law served as starting point for the interdisciplinary discussion in the workshop. Worth mentioning are the difficulties which occurred in the use of modern language: especially with regard to the translation of Latin texts, difficulties arose with the ambiguity of certain definitions.

---

1 We are very grateful to Prof. José Luis Alonso, Prof. Ruth Arnet and Prof. Gisella Bassanelli for their partipation, encouragement and for their fruitful comments during the workshop. Special thanks go to Prof. Gisella Bassanelli for having supported us in pursuing this interdisciplinary project from its beginning.

This is particularly evident in translating Latin expressions into the English language, where literal or respective translation appears to be challenging when referring to concepts of Roman law in the legal language of common law. Moreover, Roman lawyers did not give any definition of *dominium* and *possession*, instead, their case-by-case method privileged rather the examination of concrete problems over theoretical descriptions. This could explain the peculiar lack of clarity in using no Latin words to express Roman law concepts.

Basically, *dominium* diverges from *possessio*, because the latter is not a right, but just a situation. This simple difference is particularly significant in the ways of transferring things. In order to hold a thing, the Roman order required just the condition of using it, without any damage to someone else's right (*bona fides*), whereas to acquire a right over a thing, the same order required the use of prescribed legal ways and the application of specified rules (i.e. *mancipatio* in the case of land situated in Italy and *traditio* in other cases of land purchase). If one of these conditions was not fulfilled, the right of property had not been transferred and one subject had the right, but he did not hold the thing, while another did not have the right, but held the thing.

In late antiquity, ways of transferring things became simpler and preferred solutions granting a right but not *dominium* (i.e. *emphyteusis*), whereas more detailed rules were imposed in the land register system. In the economy of the Roman empire, agricultural lands provided the vast bulk of the revenue of the State. The management of rents, which formed the endowments of the cities and the churches and the incomes of the rentier classes (the senatorial and curial orders), implied careful and scrupulous attention to the land registration system.

The edicts issued by *praefecti praetorio Orientis* during the 5th – 6th century are detailed laws about transfer of immovable property. The chapter by Silvia Schiavo considers five of these edicts and shows how fiscal necessities could push the discipline of land transfer towards a strong request for "solemnity". A combination between ancient and new elements favoured the emergence of a precise system of registration of property transfers. Some of these elements can be recognised in modern legislations, as, for example, in laws enacted in Italy during the 19th century (as the chapter of Alan Sandonà shows).

Paola Bianchi examines fourth-century Egypt, where a land registration system was already known in the Ptolemaic age. She points out in particular

the effects of illegal behaviours, tax fraud and the abandoning of agricultural lands (*agri deserti*) on the late antiquity economy. Bianchi aims to demonstrate the imperial response in the face of evasion, inflation and crisis. This response encouraged the interaction between the Romans and the Goths. Like the Romans, the Goths also dealt with illegal behaviour regarding *patrocinium* in their *Edictum Theodorici*.

Through a comparative perspective the contributors show how some Roman rules are still present in several modern legislations of the long 19th century. Simona Tarozzi aims to point out some similarities between Roman laws of the 4th century regarding the long-standing issue of abandoned lands (*agri deserti*) and Chilean laws of 1866 and 1874 relating to the colonisation of Mapuche's territory.

The Chilean case is examined from a different perspective by Agustin Parise, who focuses his investigation on the Chilean agrarian reform that was enacted during the 20th century. Parise analises the origins of the paradigm of social function of property on both sides of the Atlantic starting from the end of the 19th century. A decisive moment for Chilean legal history was the progressive change of the concept of property from a liberal to a social one, and its implication on legislation. The conceptualisation of the agrarian reform in Chile is examined through its reception in specific law, illustrating how the Chilean normative framework reflects changes in the property paradigm.

Pamela Alejandra Cacciavillani points out that Roman law served as a fundamental source for legislating on the acquisition of real rights in Argentina during the 19th century. From the distinctive features of the study and teaching of Roman law in the Latin American context, her analysis investigates the role of Argentinian Dalmasio Vélez Sarsfield, who was the promoter and creator of the Argentinian civil code. Cacciavillani underlines how Roman law was not only received but also interpreted, selected and adapted for the regulation of land registration, which distanced itself from the consensualist system of property transfer.

A comparative perspective on the modern concepts of land in Latin America is offered by Silvia Bagni's chapter. She explores how the indigenous Andean cosmovision of land and its relationship with nature has recently influenced the national legal systems of some Latin American states. Bagni takes as case studies the constitutions of Ecuador and Bolivia, as well as important judgements of the Constitutional and Supreme Court of Colombia, focusing also on the concept of nature as a legal entity.

Alan Sandonà traces the history of the "*trascrizione*" system in the Kingdom of Italy from the end of the 19th century to the promulgation of the Italian civil code of 1942. His chapter examines how the Italian government, jurists and politicians discussed the attempts to reform the land registration system, proposing its change. The Italian case proves how the historical events that occurred at the end of World War I not only changed the territorial sovereignty of the Italian kingdom, but also had important repercussions and implications on the discussion concerning the reforms of the Italian land register.

On the colonial context, Mariana Dias Paes focused her attention on judicial processes conserved at the National Archive of Angola, concerning a conflict over property rights and possession. After the abolishment of the slave trade and the independence of Brasil, Portugal moved its attention to its African territories, with the aim of establishing a new form of colonialism. The exploitation of land, as well as the establishment of a land registration system, were part of the Portuguese colonial discourse. Dias Paes shows how the introduction of a land registration system in a colonial context operated, changing the dynamics of certain social relations and impacting land conflicts.

Elisabetta Fiocchi Malaspina investigates the mechanisms of land law and land registration systems in African colonial territories between the 19th and 20th centuries, focusing on the relationships between global, international and domestic laws in the imperial expansion and colonial periods. Her chapter examines legal mechanisms of colonial expansion and outlines the discourses between the colonial powers and their implications on the legal concepts of land ownership both in the colonial and the European context.

Addressing questions concerning land law necessarily involves aspects of the intertwined relations between property and politics. In this perspective, the case study of Charles Bartlett on the Kingdom of Sardinia and its politics concerning real property between 1720 and 1848 analyses the political-economic aspects of property and land law. The author investigates different periods throughout which the kingdom regulated property and its administration. On the one hand, the history of corporations offers the possibility of depicting a complete image of the politisation of real property regimes, specifically during the end of the 18th century; on the other hand, the chapter demonstrates that although political forms could be easily changed, this did not occur for real property transfer and its administration.

This volume aims to initiate an open dialogue, a sort of platform, through which the variety and complexity of specific legal phenomena emerge. Ju-

rists, institutions, goverments and states are interwined with each other, in order to create different legal concepts, rules, legislations, edicts, in different times and places, re-defining national, international and colonial contexts.

This dialogue is interdisciplinary and multicultural. The authors come from various countries and their different backgrounds show multifaceted approaches to the same subject, thereby enhancing the perspective of the research. In our own times, the roots of our past are regarded as cumbersome or are sometimes disregarded, but with this interdisciplinary project different research perspectives are presented, through which the past dialogues with the present, in order to understand legal mechanisms today and also to plan for the future.

Elisabetta Fiocchi Malaspina Simona Tarozzi

TRANSFER OF IMMOVABLE PROPERTIES, PUBLICITY AND LAND LAW IN THE AGE OF JUSTINIAN: THE PERSPECTIVE OF THE PRAETORIAN PREFECT

Silvia Schiavo

1. Five edicts, issued by *praefecti praetorio Orientis* in V-VI century, provide stimulating perspectives on transfer of immovable properties, publicity, land law.

The five texts are part of a wider collection of thirty-three edicts (τύποι; in latin *formae*) transmitted through *Cod. Bodl. Roe* 18 and published by K.E. Zachariae in 1843.[1]

The edicts are not in an integral version, but in the form of epitomes. However, they offer an important overview on the normative power of *praefecti praetorio*, with reference to the Eastern prefects.

The praetorian prefect had administrative, fiscal, jurisdictional functions and could also create legal rules, through edicts, although with a significant limit: *edicta* could not be in contrast with the content of imperial constitutions.[2] Besides, the rules given by the *praefecti praetorio* had specific territorial boundaries, as they were in force only in the *praefectura* where they have been adopted.

The edicts issued by the *praefecti praetorio* did not need to be enforced through imperial constitutions. They had a normative value that was independent from a validation of the emperors.[3]

For the age of Justinian (the period we are interested in, as we will explain soon) two well-known imperial constitutions can confirm this circumstance.

In *CJ*. 3,1,16 and *CJ*. 8,40(41),27, issued by Justinian in 531, the emperor mentions *generales formae/generalia edicta* of the Eastern Prefecture. The emperor transposes the rules of the edicts and decides that they have to be

1 Zachariae 1843, p. 227-278. In this article we will discuss some problems already addressed in Schiavo 2018, p. 295-347.

2 See *CJ*. 1,26,2, a constitution issued in 235 by Maximinus Thrax and later accepted in *Codex Iustinianus*. On the problems arising from this constitution, among others, discussion in Zachariae, 1843, p. 242; Pastori 1950-1951, p. 44; Arcaria 1997, p. 301-341; Pietrini 2010, p. 571; Fercia 2012, p. 4; Schiavo 2018, p. 12-18.

3 Goria 2011, p. 5.

applied in all the provinces of the Empire.[4] In Justinian's laws, it is undoubted that the edicts had an autonomous normative value also previously, and that they were not subjected to confirmation of the emperor.[5]

The analysis of the collection in *Cod. Bodl. Roe* 18 allows us to say that the prefects intervened integrating imperial legislation but, sometimes, also dictating norms about matters not directly regulated by emperors. The topics considered in the edicts of this collection were diverse: administrative issues, problems connected with the trial, evidence, documents in general etc.

On occasion, some of the normative solutions adopted by the prefects were took on also by the emperors, probably because particularly effective.[6] The praetorian prefect judged in appeal *vice sacra*. Several cases arrived at his court, therefore he was continuously in contact with significant legal problems and had a strong interaction with practices and uses applied, at local level, within his prefecture.[7]

The edicts dealing with immovable properties are five: *Ed.* 2, issued by Bassus (548); *Ed.* 5,3, by Aerobindus (553); *Ed. 12*, by Eustathius (505-506); *Ed.* 29, by Archelaus (under Justin I) and *Ed.* 33,1, probably by Basilides (another prefect operating under Justin I).

All of them regulate, as we said, two distinct circumstances: the giving of *possessio* due to a judicial sentence and the act of *traditio* on the ground of a contract or a private transaction in general.

Scholars have often been divided on the meaning of these texts and diverging interpretations have been provided also in recent times.

To briefly summarize the discussion, according to a first explanation, the edicts deal with the phenomenon of *agri deserti*. Consequently, the prefects delineate here a mechanism for the assignment of agricultural lands in a state of abandonment (so that they can be again cultivated and the related taxes paid).[8]

For other scholars, this interpretation cannot be accepted: for several reasons, linking this directives to the problem of *agri deserti* is questionable.

4 On *CJ.* 3,1,16, where *edicta* on the problem of *recusatio iudicis* are quoted, see Goria 2000, p. 376-379, p. 384; on *CJ.* 8,40(41),27 *pr.*, recalling edicts dedicated to the problem of *fideiussio iudicio sistendi causa,* Goria 2011, p. 6.

5 See Goria 2011, p. 6; Schiavo 2018, p. 18-23.

6 Observations in Schiavo 2018, p. 357-358.

7 On these profiles see Goria 2011, p. 5.

8 Rotondi 1914-1915, p. 46; De Dominicis 1971, p. 353; Solidoro Maruotti 1989, p. 334, note 278; Bonini 1990, p. 23, note 36.

The edicts regulate a procedure in execution of a sentence, but also the *traditio* of immovable properties, based on a contract: this circumstance has very limited connections with the question of *agri deserti*.[9]

Furthermore, in the same collection two more texts[10] outline a procedure specifically reserved to *agri deserti*, the so-called *adiectio sterilium*, which consists in a forced allocation of lands to be re-cultivated, so that expected tributes can be paid.

On the contrary, the five edicts, characterized by the presence of registration profiles and the massive involvement of the bureaucratic *apparatus*, seem to respond to the need of protection of the current *possessor* or *dominus* of the lands, as well as to fiscal control requirements.

Therefore, they appear to be connected to the problem of certainty about the *possessio* and ownership of lands, also for fiscal reasons.[11] We think it is the correct approach to better understand the content of these edicts.[12]

2. As mentioned above, the edicts of *Cod. Bodl. Roe* 18 regulating the topic of transfer of immovable properties are five.

In this work, however, our attention is drawn specifically towards one of them, *Ed.* 2, issued by Bassus and dating back to Justinian's times (548). In the text, the two situations (the giving of *possessio* on the basis of a sentence, or *traditio* founded on a private transaction) are particularly clear, and this circumstance allows us to make some observations on the problem we are dealing with.[13]

---

9 See Fercia, 2012, p. 10; according to this scholar, *Ed.* 5,5 issued by Aerobindus could be an exception; probably it could deal also with the question of *agri deserti* (see discussion in Schiavo 2018, p. 341-342).

10 *Ed.* 1, which is an epitome of *Nov.* 166, an edict issued by the *praefectus praetorio* Demosthenes, and *Ed.* 24, epitome of *Nov.* 168, another edict issued by the *praefectus praetorio* Zoticus.

11 Among others Schupfer 1905, p. 30; Pugliatti 1957, p. 114; Fercia 2012, p. 7; Voci 1987, p. 61.

12 See Schiavo 2018, p. 297.

13 *Ed.* 12 of Eustathius concerns only the problem of the giving of *possessio* of immovable properties on the ground of a judicial decree; here the prefect introduces the possibility of *interdictum unde vi* against subjects entering an immovable property in the situation of *vacua possessio absentium* without a decree; *Ed.* 29, of Archelaus, deals with the process of issuing a decree of the giving of *possessio; Ed.* 33,1, of Basilides, again with the giving of *possessio* founded on a judicial decree; *Ed.* 5,1, issued by Aerobindus, could

Moreover, we also have the integral version of the edict, *Nov*. 167. It is well known that *Nov*. 166, 167 and 168 are not Justinian's novels, but edicts of *praefecti praetorio*.[14]

First of all, important information on the question comes out from the *praefatio*:

Nov. 167 *praef.* Τὰ μὲν ἄλλα, ὅσα διετυπώθη παρὰ τῶν ἡμετέρων θρόνων, καὶ ἐν κοινοῖς δηλούμενα γράμμασιν ἢ καὶ ἄλλοις γενικοῖς τύποις τῆς ἡμετέρας ἀρχῆς ἢ περὶ τῶν ἐπιχωρίων ἀρχόντων καὶ τάξεων καὶ ὅλως ἀπαιτητῶν διαλεγομένοις, καθ' ὃν αὐτοὺς δέοι τρόπον τοῖς ὑπηκόοις προσφέρεσθαι, ἢ περὶ τῆς τῶν ὑπηκόων αὐτῶν ἐν τοῖς συναλλάγμασιν ὀρθότητος καὶ τῆς περὶ τὰς εὐσεβεῖς εἰσφορὰς εὐγνωμοσύνης, τὴν ἑαυτῶν ἔχειν ἰσχὺν βουλόμεθα καὶ ἐκ τῆς παρούσης ἡμῶν προστάξεως, ἐκεῖνο δὲ σαφέστερον ἔτι προσδιορίσασθαι δεῖν ἔγνωμεν.[15]

Concerning the *praefatio* of the edict, it has to be stressed that Bassus recalls previous interventions of the prefecture, related to several legal fields: local governors, personnel and tax collectors and their relation with subjects; the rectitude of the subjects in the transactions and in the payment of taxes. As it has been observed, it is possible that the topic of the giving of *possessio* could be referred to the problem of rectitude of subjects in transactions.[16]

More in general, this is an important point of the text, because it describes some of the fields in which the praetorian prefects used to issue edicts.[17]

Furthermore, the *praefectus praetorio* states that the previous rules must be kept in force even after the new edict, aimed at better clarifying the already existing regulation. Probably, several problems in application of the antecedent statements were known by the prefect, and he decided to intervene again. In fact, the discipline dictated in *Nov*. 167 contains some obscure aspects: it

concern the question of *agri deserti*. An overview on these *edicta* in Fercia 2012, p. 1-16; Schiavo 2018, p. 295-347.

14 Discussion on this question in Zachariae 1843, p. 246-256.

15 See english translation in Miller, Sarris 2018, p. 1029: "We wish all other regulations of our high offices that are manifested in public documents, or other general directives of our authority-dealing either with how local governors, personnel and tax collectors in general must behave towards the subjects, or with the rectitude of the subjects themselves in their transactions, and their compliance over dutiful taxes- to retain their own force, by our present ordinance as well; but we have realised that there is one point on which we must make an even clearer determination, as follows".

16 See Goria 2011, p. 6.

17 Goria 2011, p. 6.

needed to be integrated with preceding rules, lacking, today, for the scholars.[18].

Bassus refers only to edicts of the *praefectura Orientis* and not to imperial interventions: this circumstance could indicate that the matter we are dealing with was principally regulated by the praetorian prefects, and not by emperors.

The prefect then dictates the new rules, clearly distinguishing between the two situations: the transfer of *possessio* of lands in execution of a provision of the judge, and the *traditio* on the basis of a contract.

Let us see what the rules are for the first case:

Nov. 167,1. Εἰ γάρ τις ἀκινήτου τινὸς ἀντιλαβέσθαι σπουδάζων ἀρχικὰς ψήφους πορίσοιτο, ἐπὶ μὲν τῆς εὐδαίμονος ταύτης πόλεως ἀρχέσει τυχὸν ἡ τάξις τὴν σχολὴν μαρτυροῦσα τῆς τῶν πραγμάτων τούτων νομῆς, εἰ καὶ τῶν γειτόνων ἡ αὐτὴ τάξις λέγει μαθεῖν, ὡς οὐδεὶς τῶν πραγμάτων τούτων ἐπιλέλπηται: ἐπὶ δὲ τῶν ἐν ταῖς ἐπαρχίαις κειμένων ὑπὸ τοῖς τῶν τόπων ἐκδίκοις ὑπομνήματα ἃ παραπλησίως ταὐτὸ τοῦτο πράττονται δεήσει συνίστασθαι, μαρτυρίας μὲν ἔχοντα τῶν γειτόνων. τηνικαῦτα δὲ ἄδειαν παρεχόμεν τοῖς τὰς ψήφους ᾐτηκόσι τὰ πράγματα κατασχεῖν.[19]

If the transfer takes place in Constantinople, the competent office (probably the office of the executors[20]) must declare, according to evidence given by the neighbours, that nobody is currently in the *possessio* of the land.

In the provinces, the involvement of the *defensor civitatis* is necessary: after obtaining the witness of the neighbours about the *vacua possessio* he has to provide for the *confectio gestorum*, for the official documentation attesting the giving of *possessio*.[21]

As in others of the edicts on the same topic, here the role of the neighbours (people living close to the land) is highlighted. They are called to give witness

18 On the obscurity of *Nov*. 167 see Voci 1987, p. 62.

19 See english translation in Miller, Sarris 2018, p. 1029-1030. "Should anyone produce testimonials of an official with the aim of laying claim to an immovable property, in this sovereign city it will perhaps be enough for the office to attest that possession of this property is vacant, as long as the said office also states that it has been informed by neighbours that no-one has taken possession of these properties. For properties situated in the provinces, it will similarly be requisite for records to be drawn up the same effect under the defenders of the locality, also with attestation from neighbours; we then give those who have requested testimonials licence to take the properties in hand".

20 See Schupfer 1905, p. 31.

21 On the *ius actorum conficiendorum* of the *defensor civitatis* see *infra*.

on the fact that the immovable property is not currently in someone's possession: it helps to avoid a conflict between the old and the new *possessor*.

They have a similar function in *Ed*. 12, by Eustathius, dating to Anastasius' times: in this edict, neighbours are involved (with inhabitants and *coloni*) to attest that the land, to be given in execution of a judicial decree, is in a situation of *vacua possessio*. Also *Ed*. 29, issued by the praetorian prefect Archelaus under Justin I, contemplates the presence of neighbours attesting the property is not in someone's *possessio*.[22]

Consequently, a common thread between these *edicta* can be identified. It is important to stress that the involvement of neighbours in the context of transfers of lands was not completely an innovation.

In fact, in postclassical age and in particular in Constantine's legislation (then accepted in the *Codex Theodosianus*) the presence of neighbours was requested for the sale of immovable properties -they had to attest that the seller was the owner-,[23] but also for gift -in this case, *vicinitas* was called to be present at the act of *traditio*.[24]

Neighbours had a strategic role in these constitutions, because of their concrete knowledge of the factual situation: according to some scholars, they were charged with significant functions in order to guarantee publicity and stability in the transactions regarding immovable properties. [25]

The role of neighbours here strongly connected Costantine's provisions with a far past, dating back to the Twelve Tables.[26]

After Constantine's legislation, however, the role of *vicinitas* in this context suffers a strong resizing. In a Novel of Valentinian III, *Nov. Val*. 15,3, and in a constitution issued by Zeno, *CJ*. 8,53(54),31, the function of neighbours is not so strong as in the past: on the contrary, an important position is given

22 Analysis of these edicts in Fercia 2012, p. 1-16; Schiavo 2018, p. 299-319.

23 See *CTh*. 3,1,2; some differences in the version transmitted through *Fr. Vat*. 35,6. On the relation between the two texts see Sargenti 1982, p. 279-305; Sargenti 1983, p. 269-278.

24 Palma 1992, p. 477.

25 Cerami 1991, p. 637; Palma 1992, p. 477; Palma 2009, p. 931-947. The author writes: "I vicini, in quanto consapevoli della realtà di fatto, erano chiamati, dunque, a garantire l'effettività delle situazioni dominicali: in altri termini, la stabilità delle situazioni proprietarie veniva garantita attraverso un rafforzamento della pubblicità".

26 See Palma 2009, p. 939. The author thinks that in Constantine's constitutions the presence of neighbours is requested also for religious purposes, as a sign of christian solidarity.

to the utilization of public documents to ensure publicity of the transfers.[27]

Considering this framework, it is significant that the praetorian prefects recuperate in their edicts a specific role for *vicinitas,* going against the trend developed in the last imperial legislation.[28]

3. Let us now consider the regulation given by Bassus for the second situation:

Nov. 167,1 … καὶ τοῖς μέλλουσι δὲ ἐκ συναλλαγμάτων τινῶν πρᾶγμα λαμβάνειν καὶ νομὴν τοιαύτην ἢ δεσποτείαν ὑπὸ τὴν ἑαυτῶν ποιεῖσθαι κατοχὴν ἀναγκαίας τὰς τῶν ἐκδίκων ἐν ταῖς ἐπαρχίαις μαρτυρίας νομίζομεν, ὥστε ὑπομνημάτων συνισταμένων ὑπ᾽ αὐτοῖς δηλοῦσθαι τὴν παράδοσιν, εἴτε ἐπιστάλματα τύχοι γραφέντα φροντισταῖς εἴτε ἐπισταλμάτων χωρὶς ἡ παράδοσις μέλλοι γίνεσθαι, προσόντος ἐνταῦθα τοῦ καὶ τοὺς γεωργοὺς ἤτοι φροντιστὰς χρῆναι συνομολογεῖν ἐπὶ τῶν ὑπομνημάτων, ὡς τὸν νεώτερον εἰδεῖεν νομέα καὶ δεσπότην καὶ τῇ τοῦ παραδόντος ἀκολουθήσαιεν γνώμῃ τοῦτο αὐτοῖς ἐπιτρέψαντος. ἔνθα δὲ ἂν ἔκδικος μὴ παρῇ, τὸν λαμπρότατον τῆς ἐπαρχίας ἄρχοντα τὰ τοιαῦτα συνιστᾶν ὑπομνήματα προστάττομεν ἢ τὸν ὁσιώτατον τῆς πόλεως ἱερέα, ὑφ᾽ ἣν ἡ κτῆσις ἐστὶν, ὑπὲρ ἧς τὰ τοιαῦτα πράττεται, εἰ πολλῷ τυχὸν ὁ τῆς ἐπαρχίας ἡγούμενος ἀπολείποιτο τῶν τόπων, ἐν οἷς ἡ παράδοσις γίνεται …[29]

---

27 On the question, Palma 2009, p. 942.

28 Also in *Edictum Theodorici* a certain role of neighbours is guaranteed: see *Ed. Theod.* 53. *De traditione vero quam semper in locis secundum leges fieri necesse est, si Magistratus, Defensor aut Quinquennales forte defuerint, ad conficienda introductionum gesta tres sufficiant curiales, dummodo vicinis scientibus impleatur corporalis introductionis effectus*. See on this source Palma, 2009, p. 946, Tarozzi, 2018, p. 177, note 93; p. 295.

29 English translation in Miller, Sarris 2018, p. 1030: "We also consider attestations from the defenders in the provinces to be necessary for those intending to take a property as a result of any kind of agreements, and to put such possession or ownership into their own hands; thus, when records are drawn up under the defenders, the conveyance will be made manifest whether there may perhaps be written instructions, or whether the conveyance may be going to take place without instructions; in that case, the agricultural workers or overseers must additionally assent, on the records, that they know about the new possessor and owner, and have complied with the intention of conveynor, who has told them to do this. Where there is not defender present, we direct that such records are to be drawn up by the Most Distinguished governor of the province, or else, if it happens that the provincial governor is a long way from the area where the conveyance is taking place, by the most holy prelate of the city under which lies the holding for which such transaction is taking place …"

The second situation regulated in *Nov*. 167 is the *traditio* of the immovable properties; as we said, the delivery that takes place on the basis of a contract.

More precisely, here the prefect refers to someone who wishes to acquire *possessio* (νομή) or ownership (δεσποτεία) of the land.

Probably this distinction is to be connected with the existence of different types of sale[30] in Justinian's compilation: a contract of sale that had real effects and a contract of sale that, on the contrary, produced only duties for the seller and for the buyer.[31]

In the provinces, the presence of the *defensor civitati*s is required: he must attest the successful delivery and proceed with the creation of public documentation, through the *confectio actorum* (as in the first case, assignment of *possessio* on the ground of a judicial decree).

After that, the prefect imposes another requirement: the agricultural workers (*coloni)* and the overseers (*curatores*), people who worked for the owner of the land have to declare that they recognize the person receiving the land as the new owner and *possessor*, obeying the intention of the conveyor. Perhaps, this is the most important novelty introduced by the prefect with the edict.[32] The obligation occurs not only if letters (ἐπιστάλματα) are sent to the *curatores,* but also if there are not letters. We think that it is quite an obscure point to explain.

According to an ancient interpretation of *Nov*. 167, advanced by Cujacius and then accepted also by Zachariae, here two different situations are regulated: the case in which the owner of the land does not make the conveyance himself, but appoints through letters his *curatores* to proceed with it, and the case in which the owner himself makes the *traditio*.[33]

---

30 In fact, probably the contract that in most cases justified the *traditio*, the delivery of the land, was the *emptio venditio*. Also the gift could be in the mind of the prefect. See, on this question, Fercia 2012, p. 12. The scholar points out that in Justinian's age gift was a consensual contract with the duty, for the donor, to make *traditio* (Iust. *Inst*. 2,7,2. On this text: Lambertini 2007, p. 2745-2756).

31 For the sale with real effects: *CJ*. 4,21,17, *emptio venditio cum scriptis*. In this case, the subsequent *traditio* has the function of transferring *possessio*. In the other case, when *emptio venditio* produced only obligations, the subsequent *traditio* was needed for the transfer of ownership. See Fercia 2012, p. 12.

32 For this approach see Voci 1987, p. 62; probably the need of the declaration coming from *coloni* and *curatores* is a point through which the prefect tries to clarify the existing discipline (see his aim expressed in the *praefatio* of *Nov*. 167).

33 See Zachariae 1843, p. 254, note 54.

Anyway, the most important aspect is that Bassus requires the presence of the *defensor*, and, in addition, a specific declaration coming from the overseers and the agricultural workers.

Furthermore, it is established that in case of absence of the *defensor civitatis* the involvement of the provincial governor is necessary, for the drawning of records attesting the *traditio*.[34] If the provincial governor is not available, it is possible to ask the bishop for the *confectio actorum*.[35]

The issue on which we would like to focus, as it appears significant for this research, is the problem of the characteristics of the *traditio* in the context of *Nov*. 167.

As several scholars noticed, the edict, in the part relating to the *traditio*, dictates several formal requirements that, on the contrary, we do not find in Justinian's compilation.[36]

On the ground of the principles emerging from *Digesta, Codex* and *Institutiones*, in fact, it seems possible to affirm that the *corporalis traditio* was not imposed in the transfers of immovable properties. Different mechanisms were widely accepted. In particular, ample room was made for the *constitutum possessorium*, which had been deeply opposed in the post-classical age.[37] Moreover, formal requirements as the presence of officials and the *confectio actorum* were not mandatory.[38]

Bassus has a different approach, imposing various profiles of solemnity. In addition to the *corporalis traditio*, in fact, he asks for the essential presence of the *defensor civitatis* who must draw the documents certifying the delivery

34 According to Goria 1995, p. 254, this means that the *defensor civitatis* was not in every city.

35 There are no sources that attribute the *ius actorum conficiendorum* to bishops and ecclesiastical authorities in general. However, *Nov*. 167, together with *CJ*. 1,4,31, shows an involment of the bishop in the *confectio actorum* in substitution of the provincial governor. See also *CJ*. 1,4,26 *pr*.-2 (in which an autonomous power of the bishop is attested). On the question: Tarozzi 2006, p. 254.

36 A part from a constitution dealing with transfer of lands in case of *suffragium, CJ*. 4,3,1. See Gallo 1988, p. 974; Cerami 1991, p. 653.

37 See Fercia 2012, p. 12

38 On the 'silence' of Justinian's compilation on the mechanisms of *traditio* relating immovable properties see Levy 1951, p. 130; Voci 1987, p. 67. According to Gallo 1988, 973-974, Justinian is not interested in profiles related with publicity. Different view in Cerami 1991, p. 651-656.

and the declaration of *coloni* and overseers.[39] From this point of view, it is possible to note a tendency, in the prefect's regulation, to use typical mechanisms of a formal act such as the ancient *mancipatio*.[40]

One could see disharmony between these provisions and what emerges from Justinian's compilation where less solemn principles are indicated. How can we explain this discrepancy?

We agree with scholars who believe that the regulation of the edicts integrated Justinian's system on these particular issues.[41]

According to this approach, Justinian, who did not state anything on the *traditio* of lands, referred tacitly to the rules given by the praetorian prefects; the prefects, among other things, probably took into account local practices and customs.[42] As we said before, in the *praefatio* of *Nov*. 167 Bassus recalled previous edicts of the Eastern Prefecture on the topic, that needed to be clarified. This fact can support the idea that several directives on the question were already been issued.

Concluding the analysis of the second case regulated by Bassus,[43] another question has to be stressed. We saw that the discipline of *traditio* in *Nov*. 167 is quite far from the framework drawn by Justinian's compilation. Are the rules given by the praetorian prefect completely innovative?

Despite the peculiarity of the regulation foreseen by the prefect Bassus, not reflected in the contemporary imperial legislation, it is necessary to highlight some echoes of the previous Constantinian legislation on *donatio*. In *Fr*.

---

39 According to Zachariae 1843, p. 254, note 54, in the case of *traditio* regulated in this part of *Nov*. 167 also neighbours (recalled, as we said, for the case of the judicial decree) were involved. We think this is not clear: attestations coming from neighbours are not expressly indicated by the prefect in this point of the text.

40 In this regard, Bonfante wrote that in the edict of Bassus solemnities are required that are similar to the ones of the ancient *mancipatio*. See Bonfante, 1926, p. 255; more recently, Fercia 2012, p. 12. On aspects of publicity in *mancipatio* see Colorni, 1954, p. 19; Pugliatti, 1957, p. 106, who believes that mechanisms of publicity in a modern sense are present in *mancipatio* only in a minimal way.

41 For this approach see Voci, 1987, p. 67.

42 For Voci 1987, p. 67, Justinian "... rinvia tacitamente alle disposizioni prese dai prefetti del pretorio, ch'è da supporre tenessero conto delle diversità locali".

43 The final part of *Nov*. 167 is dedicated to the *traditio* in Constantinople, and it is a quite obscure regulation: the prefect says that the attestations concerning *traditio* and the executions already made give security to subjecs who received the lands. On this question see Zachariae, 1843, p. 255, note 67.

Vat. 249 (see also *CTh*. 8,12,1) a set of formalities, including the drafting of deeds which had to be inserted in the records of the *iudex* or municipal magistrates were required.[44]

4. As we said in the first paragraph, scholars expressed different stances on the five edicts concerning the giving of *possessio* in execution of a decree and *traditio* on the basis of a private transaction.

We think that the correct approach is the one reconnecting the edicts with the problem of security and publicity in transfers of immovable properties.[45]

The analysis of *Nov*. 167, that covers both the situations recalled, can confirm this view.

As in the past legislation (think about Constantine's regulation in his interventions on sale and gift[46]), the various rules examined seem to meet the needs to create security on the legal situation of lands and on ownership or *possessio*.[47]

The mechanisms through which the goal is pursued are essentially the presence of officials, the drawning of deeds through the process of *confectio actorum*, the involvement, although with different roles, of neighbours (attesting the situation of *vacua possessio*), *coloni*, managers (who have to declare to recognize the person receiving the immovable property as owner and *possessor*).

In particular, the *confectio actorum,* through which deeds are created and recorded in the archives (in the specific case of *Nov*. 167, the *defensor civitatis* ones[48]), from which also copies could be extracted, had a clear and strong function of publicity, as some scholars pointed out.[49]

---

44 On the function of *traditio* in Constantine's legislation on *donatio* see Lambertini 2007, p. 2753, note 19.

45 As pointed out by authors like Fercia 2012, p. 10.

46 See observations advanced in paragraphs 2 and 3.

47 On publicity see Colorni 1954, p. 37-38; Pugliatti 1957, p. 116-120.

48 On *confectio actorum* and *ius actorum conficiendorum* in general, Steinwenter 1915, p. 30; Lévy 1999, p. 311-326; Tarozzi 2006, p. 143-158. On the *confectio actorum* of *defensor civitatis* see, among others, Tarozzi 2006, 143-159. On the archives of *defensor civitatis,* observations in Schiavo 2018, p. 251-253.

49 See Schupfer 1905, p. 30-31; and especially Pugliatti 1957, p. 116 and p. 119. The author stresses that starting from postclassical age the conservation of documents in the *acta* or *gesta* of magistrates had a significant role of publicity: "Storicamente il fenomeno, considerato nella sua precisa portata e senza prevenzioni, ha una importanza considerevo-

Besides, the discipline envisaged by the prefect could be explained also with reference to fiscal necessities, which pushed towards a strong request for solemnity in the transfer of lands. The praetorian prefects had some reasons to intervene in this direction. They supervised the imposition and collection of taxes, and the registration of the acts relating to the *traditio* and to transfer of *possessio* facilitated the correctness of those operations.[50]

In conclusion, by mixing both ancient elements and new ones, the prefect Bassus creates a regulation directed to outlining a precise system of registration of property transfers, system which meets the need for security and, probably, also the need for fiscal control.

Bibliography

Secondary Sources

Arcaria 1997 = F. Arcaria, *Sul potere normativo del prefetto del pretorio,* in *SDHI,* 63, 1997, p. 301-341.

Bonfante, 1926 = P. Bonfante, *Corso di diritto romano,* II, *La proprietà,* II, 1926. Reprint, G. Bonfante, G. Crifò (*ed.*), Milan, 1968

Bonini 1990 = R. Bonini, *Ricerche di diritto giustinianeo,* Milan, 1990.

Cerami 1991 = P. Cerami, *Pubblicità e politica fiscale nel trasferimento della proprietà immobiliare* (*dall'alienatio censualis al regime giustinianeo*), in L. Vacca (*ed.), Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica. Atti del Congresso Internazionale (Pisa, Viareggio, Lucca, 17-21 aprile 1990),* II, Milan, 1991, p. 631-656.

De Dominicis = M. De Dominicis, *Innovazioni bizantine al regime postclassico degli 'agri deserti',* in *Studi in onore di Edoardo Volterra,* IV, Milan, 1971, p. 347-354.

Fercia 2012 = R. Fercia, *Brevi note in tema di efficacia normativa degli editti dei prefetti del pretorio: la disciplina dell'immissione nel possesso tra V e VI secolo,* in *Rivista di Diritto Romano,* 12, 2012, p. 1-16.

Gallo 1988 = F. Gallo, s.v. *Pubblicità* (*diritto romano*), in *Enciclopedia del diritto*, 37, Milan, 1988, p. 966-974.

Goria 1995 = F. Goria, *La giustizia nell'impero romano d'Oriente: organizzazione giudiziaria,* in *La giustizia nell'alto medioevo (secoli V-VIII),* I, Spoleto,

---

le, e davvero è assai difficile poter sostenere fondatamente che esso è estraneo alla storia della pubblicità…". Different stance in Colorni 1954, p. 127-128.

50 Pugliatti, 1957, p. 117, note 510, underlines the strict connection between private and public functions of the *insinuatio apud acta*. Observations in Voci 1987, p. 61.

1995, now in P. Garbarino, A. Trisciuoglio, E. Sciandrello (*ed.*), *Diritto romano d'Oriente. Scritti scelti di Fausto Goria,* Alessandria, 2016, p. 241-312.

Goria 2000 = F. Goria, *Ricusazione del giudice e iudices electi da Costantino a Giustiniano,* in S. Puliatti e A. Sanguinetti (*ed.), Legislazione, cultura giuridica, prassi dell'impero d'Oriente in età giustinianea tra passato e futuro. Atti del Convegno, Modena, 21-22 maggio 1998,* Milan, 2000, now in P. Garbarino, A. Trisciuoglio, E. Sciandrello (*ed.*), *Diritto romano d'Oriente. Scritti scelti di Fausto Goria,* Alessandria, 2016, p. 341-397.

Goria 2011 = F. Goria, *La prefettura del pretorio tardo-antica e la sua attività edittale. Lezione tenuta presso la sede napoletana dell'AST il 24 maggio 2011*, p. 1-7, in www.studitardoantichi.org

Lambertini 2007 = R. Lambertini, *In tema di iusta causa traditionis,* in *Fides Humanitas Ius. Studi in onore di Luigi Labruna,* IV, Naples, 2007, p. 2745-2756.

Levy 1951 = E. Levy, *West Roman Vulgar law. The Law of Property,* Philadelphia, 1951.

Lévy 1999 = J.-P. Lévy, *L'insinuation apud acta des actes privés dans le droit de la preuve au bas-empire,* in *Mélanges Fritz Sturm offerts par ses collégues et ses amis à l'occasion de son soixante- dixième anniversaire,* I, Liège, 1999, p. 311-326.

Miller, Sarris 2018 = D. J.D. Miller, P. Sarris, *The Novels of Justinian: A Complete Annotated English Translation,* Cambridge, 2018.

Palma 1992 = A. Palma, *Donazione e vendita advocata vicinitate,* in *Index,* 20, 1992, p. 477-490.

Palma 2009 = A. Palma, *Ancora in tema di pubblicità e vicinitas,* in *Studi in onore di Remo Martini,* II, Milan, 2009, p. 931-947.

Pastori 1950-1951 = F. Pastori, *I prefetti del pretorio e l'arresto dell'attività giurisprudenziale,* in *Studi Urbinati,* 19, 1950-1951, p. 37-52.

Pietrini 2010 = S. Pietrini, *Una testimonianza sul potere normativo del praefectus praetorio,* in *Studi in onore di Antonino Metro,* 4, Milan, 2010, p. 563-580.

Pugliatti 1957 = S. Pugliatti *La trascrizione,* I.1, *La pubblicità in generale,* Milan, 1957.

Rotondi 1914-1915 = G. Rotondi, *Problemi giuridici in alcuni scolii di Teodoro Balsamone,* in *Atti della Reale Accademia delle Scienze di Torino,* 50, 1914-1915, now in P. De Francisci (*ed.), Scritti giuridici,* III, *Studii vari di diritto romano e attuale,* Milan, 1922, p. 38-59.

Sargenti 1982 = M. Sargenti, *La compravendita nel tardo diritto romano. Indirizzi normativi e realtà sociali (Contributo all'interpretazione di Vat. Fr. 35),* in *Studi in onore di A. Biscardi,* II, Milano, 1982, now in *Studi sul diritto del Tardo Impero,* Padua, 1986, pp. 279-305.

Sargenti 1983 = M. Sargenti, *Contributi alla palingenesi delle costituzioni tardo imperiali*, 1, *Vat. Frag. 35 e CTh. 3,1,2,* in *Atti dell'Accademia Romanistica Costantiniana,* V, Perugia, 1983, now in *Studi sul diritto del Tardo Impero,* Padua, 1986, p. 269-278.

Schiavo 2018 = S. Schiavo, *Ricerche sugli editti dei prefetti del pretorio del Cod. Bodl. Roe 18. Processo e documento*, Naples, 2018.

Schupfer, 1905 = F. Schupfer, *La pubblicità nei trapassi di proprietà secondo il diritto del basso impero specie in relazione alle vendite,* in *RISG,* 39, 1905, p. 1-54.

Solidoro Maruotti 1989 = L. Solidoro Maruotti, *Studio sull'abbandono degli immobili in diritto romano. Storici, giuristi, imperatori,* Naples, 1989.

Steinwenter 1915 = A. Steinwenter, *Beiträge zum öffentlichen Urkundenwesen der Römer*, Graz, 1915.

Tarozzi 2006 = S. Tarozzi, *Ricerche in tema di registrazione e certificazione del documento nel periodo postclassico,* Bologna, 2006.

Tarozzi 2018 = S. Tarozzi, *Norme e prassi. Gestione fondiaria ecclesiastica e innovazioni giuridiche negli atti negoziali ravennati dei secoli V-VIII,* Milan, 2017.

Voci, 1987 = P. Voci, *Tradizione, donazione, vendita da Costantino a Giustiniano*, in *Iura,* 1987, now in P. Voci, *Ultimi studi di diritto romano,* Naples, 2007, p. 1-70.

Zachariae, 1843 = K.E. Zachariae, *Anekdota,* III, Lipsiae, 1843.

L'EVASIONE FISCALE COME PROBLEMA CIRCOLARE NELLE ESPERIENZE STORICHE: ESEMPI DELLA TARDA ANTICHITÀ

Paola Bianchi

1. Premessa

La cd. esperienza giuridica della tarda antichità, dunque il periodo storico compreso tra il quarto e il sesto secolo d. C., conobbe differenti problemi. Tra i principali vi fu quello fiscale, concretizzatosi in crisi economica, inflazione, pressione e conseguente evasione fiscale, che vide protagonisti romani e perfino barbari.[1] Il sistema di *capitatio/iugatio* che caratterizzò tale periodo non prevedeva la distribuzione del peso fiscale sulla effettiva capacità dei contribuenti, dipendendo lo stesso invece dalle necessità statali, che portavano a erogare privilegi o a vessare i sudditi laddove le necessità contingenti o più generali lo richiedessero. La separazione sociale tra *honestiores* ed *humiliores*, il fenomeno del *patrocinium*, il controllo effettuato dalla burocrazia imperiale, la responsabilità dei *decuriones*, la vincolatività alle professioni e alla terra sono tasselli di un complesso quadro normativo, in cui, tra legge e prassi si tenta di mantenere il più possibile saldo e funzionale, anche per far fronte a episodi di invasione esterna, l'assetto economico e fiscale. Il tentativo non si concretizza in un *modus operandi* sistematico bensì in un proliferare legislativo, di tipo alluvionale che porta con sé una serie di conseguenze, positive e negative.

Come recentemente sottolineato, il diritto finanziario attuale non può essere correttamente compreso senza la conoscenza del suo sviluppo storico.[2]

Dunque illustrare qualche esempio storico di come la pressione fiscale avesse agito sui rapporti personali o addirittura inciso sullo sviluppo giuridico di istituti potrà offrire un quadro della circolarità storica di problemi e soluzioni e contribuire ad arricchire il panorama generale del tema scelto in questo lavoro collettaneo.

---

1 Sul rapporto tra romani e barbari sotto il profilo fiscale e specificamente con riguardo all'influenza esercitata nel V sec. su di esso dai *potentes*, mi sia permesso di rinviare a Bianchi 2017, pp. 449-490.

2 Cfr. Fernández de Buján 2015, p. 312; vedi anche Martínez Vela 2016.

Recentemente è stato infatti evidenziato come in caso di abbandono di terreni e, quindi, in caso di mal utilizzo della proprietà, in difformità al suo uso sociale (vedi art. 42 Cost.), essi possano essere espropriati per il bene sociale[3] e proprio a questo riguardo è stato proposto di utilizzare soluzioni che l'imperatore tardo antico adottava in caso di *agri deserti*.[4]

2. *Agri deserti* e la lotta all'evasione fiscale nel IV e V sec. d. C.: le risposte imperiali[5]

Il fenomeno degli *agri deserti* della tarda antichità, e cioè delle terre, pubbliche e private, abbandonate, a causa della improduttività dei terreni o a causa di dissesti finanziari dei proprietari, costituiva uno specchio di problemi sociali ed economici e, di conseguenza, anche di finanza imperiale. In realtà di tratta di fenomeni sociali ricorrenti: soluzioni pratiche per sfuggire ad oneri finanziari non sostenibili, o, come detto da Morelli, "fenomeni sociali che, con o senza soluzione di continuità, si ripetono in epoche diverse";[6] e, a questi fenomeni, lo Stato "reagisce con le stesse misure, o almeno con misure analoghe: misure che, dettate da una politica economica intesa essenzialmente a salvaguardare le entrate del fisco, producono gli stessi effetti negativi".[7]

Gli imperatori reagiscono a tale fenomeno attraverso una serie di leggi miranti a contrastarlo ma non si muovono secondo un piano sistematico: come accennato in premessa, l'insieme della legislazione su questo problema ha carattere alluvionale; con essa si cerca di arginare il fenomeno senza tentare di prevenirlo; gli interventi normativi oscillano tra promesse di esenzioni fiscali per chi si prenda cura dei fondi abbandonati (ad es. nel 365, con CTh. 5,11,8, si prevede, per chi curasse un fondo abbandonato, un'immunità fiscale triennale[8])

---

3 Maddalena 2014, pp. 105 ss.; v. di Fiorentini 2017, pp. 84 ss.

4 Maddalena cita C.11.59.8 e C. 11.59-11 unendo, arbitrariamente come ben messo in luce da Fiorentini 2017, p. 86, due costituzioni: C. 11.59.8 e C. 11.59.7. Di quest'ultima non comprende lo scopo del dettato normativo che non è quello di "riattivare la funzione sociale della proprietà soffocata dall'inerzia del titolare", (così Fiorentini 2017, cit., p. 86) quanto quella, molto più concreta e contingente e, soprattutto, molto più realistica e lontana da ipotesi dogmatiche moderne di proiezione, di recuperare i tributi come l'imperatore stesso afferma esplicitamente.

5 Gli argomenti qui trattati sono ripresi, con modifiche da Bianchi 2018.

6 Morelli 2000, p. 167.

7 Morelli 2000, *ibidem*.

8 CTh. 5.11.8 *[Idem AA. a]a Rufinum P(raefectum) P(raetori)o. Quicumque posside-*

e tentativi, non sempre efficaci, di recuperare quanto perso dal punto di vista fiscale (un anno dopo, nel 366, con CTh. 5.15.20, si permetteva una rateizzazione dei canoni[9]); si impone il vincolo alla terra perfino ai barbari (ad es. nell'aprile del 409 Teodosio II cercò di migliorare la produttività agricola dei confini vincolando i barbari sconfitti alla terra e al lavoro, CTh. 5.6.3[10]).

Guardando più da vicino qualche esempio concreto vediamo la prima costituzione del titolo 11 del V libro del Codice di Teodosio II, come ricostruito da Mommsen, cioè CTh. 5.11.8 di Valentiniano, del 365:

CTh. 5.11.8 [= V,15,8 H.] (365 Aug. 6) Idem AA. ad Rufinum praefectum praetorio. Quicumque possidere loca ex desertis voluerint, triennii immunitate potiantur. Qui vero

---

re loca ex desertis volue[rin]t, trienni immunitate potiantur. … Dat. VIII Id. Aug. Med(iolano) [Val](entini)ano et Valente AA. conss.

9 CTh. 5.15.20 *Idem AA. ad Germanium C(omitem) S(acrarum) L(argitionum). Placuit, ut (enfyteuticorum) fundorum patrimonialiumque possessores, quo voluerint, quo potuerint te(m)pore et quantum habuerint pensionis paratum, dummodo non amplius quam in tribus per singulos annos vicibus, officio rationalis adsignent ac de suscepto ab eode(m) securitatem eodem die pro more percipiant, modo ut intra Ianuariarum iduum diem omnis summa ratiociniis publicis inferatur: gravissimae poenae subdendo officio, si cuiquam quolibet anni tempore, dummodo nequaquam numerum trinae inlationis excedat, solutionem facere gestienti negaverit susceptionis officium vel si moram fecerit in chirografo securitatis edendo….. Dat. XIIII K. Iun. Remis Grat(iano) N. P. et Dagala[ifo conss].*

10 CTh. 5.6.3 *Impp. Honorius et Theodosius AA. A]nthemio P(raefecto) P(raetori)o. Scyras barbaram nationem maximis [Chu]norum, quibus se coniunxerunt, copiis fusis imperio nos[tro] subegimus. Ideoque damus omnibus copiam ex praedicto ge[ner] e hominum agros proprios frequentandi, ita ut omnes [scia]nt susceptos non alio iure quam colonatus apud se futu[ros] nullique licere ex hoc genere colonorum ab eo, cui se[mel] adtributi fuerint, vel fraude aliquem abducere vel [fugie]ntem suscipere, poena proposita, quae recipientes [alien]is censibus adscribtos vel non proprios colonos in[seq] uitur. Opera autem eorum terrarum domini libera [utantur] ac nullus sub acta peraequatione vel censui ****acent nullique liceat velut donatos eos a iure census [in se]rvitutem trahere urbanisve obsequiis addicere, [lice]t intra biennium suscipientibus liceat pro rei frumen[tari]ae angustiis in quibuslibet provinciis transmarinis [tan]tummodo eos retinere et postea in sedes perpetuas [conl]ocare, a partibus Thraciae vel Illyrici habitatione eorum [pen]itus prohibenda et intra quinquennium dumtaxat intra [eius]dem provinciae fines eorum traductione, prout libue[rit, co]ncedenda, iuniorum quoque intra praedictos viginti an[nos p]raebitione cessante. Ita ut per libellos sedem tuam ade[untibus] his qui voluerint per transmarinas provincias eorum [distri]butio fiat. Dat. Prid. Id. April. Const(antin)p(oli) Hon(orio) VIII et Theod(osio) III conss.*

ex desertis nonnihil agrorum sub certa professione perceperunt, si minorem modum professi sunt, quam ratio detentae possessionis postulat, usque ad triennium ex die latae legis in ea tantum possessione permaneant, quam ipsi sponte obtulerunt exacto autem hoc tempore sciant ad integrae iugationis pensitationem se esse cogendos. Itaque qui hoc sibi incommodum iudicarit, e vestigio restituat possessionem, cuius in futurum onera declinat. Dat. VIII Id. Aug. Mediolano Valentiniano et Valente AA. conss.

La legge è indirizzata al prefetto al pretorio Rufino[11] e stabilisce un'immunità fiscale per un triennio per chi volesse possedere e coltivare *agri deserti* (*Quicumque possidere loca ex desertis voluerint, triennii immunitate potiantur*). L'immunità dalla tassazione ordinaria (*pensitatio*), avrebbe permesso una nuova occupazione produttiva dei terreni. Attraverso la concessione di un'immunità fiscale temporanea, viene imposto un possesso di terre assegnate con i relativi oneri fiscali.

L'immunità fiscale di un triennio, era stata già stabilita da altre leggi, come ad es., da Costantino in C. 11.59.1, e prima ancora da Aureliano. La legislazione imperiale mostra dunque, sia pur nella differenza delle soluzioni, una certa continuità al fine di ripopolare terre abbandonate.[12]

Sappiamo poi dalle fonti che un problema connesso a quello degli *agri deserti* riguardava il modo di assegnazione delle terre abbandonate: si offriva, ad es., al proprietario delle terre un tempo adeguato per intervenire e curarle; trascorso questo tempo la terra veniva affidata a coloro che potessero curarla e soprattutto renderla produttiva secondo, ad es., il dettato della legge 12 del titolo 11 del Codice Teodosiano emanata nella *pars Orientis* verso la fine del IV sec. d. C.

CTh. 5.11.12 [= V,15,12 H.] Idem AAA (Valentinianus Theodosius et Arcadius Iust.). (388-392 ...) Tatiano praefecto praetorio Orientis. Qui agros domino cessante desertos vel longe positos vel in finitimis ad privatum pariter publicumque compendium excolere festinat, voluntati suae nostrum noverit adesse responsum: ita tamen, ut, si vacanti ac destituto solo novus cultor insederit ac vetus dominus intra biennium eadem ad s.

Di questo testo abbiamo la corrispondente versione giustinianea più completa, C. 11.59.8:

C. 11.59(58).8 Idem (Valentinianus, Theodosius et Arcadius) AAA. Tatiano p(raefecto) p(retori)o Orientis. Qui agros domino cessante desertos vel longe positos vel in finitimis

11 PLRE I, Rufinus 25, 782 ss.

12 Cfr. Solidoro Maruotti 2014, p. 283; p. 311.

ad privatum pariter publicumque compendium excolere festinat, voluntati suae nostrum noverit adesse responsum: ita tamen, ut, si vacanti ac destituto solo novus cultor insederit ac vetus dominus intra biennium eadem ad suum ius voluerit revocare, restitutis primitus quae expensa constiterit facultatem loci proprii consequatur. nam si biennii fuerit tempus emensum, omni possessionis et dominii carebit iure qui siluit. (a. 388 – 392)

La costituzione è di Teodosio e dell'anno 391/392 secondo Seeck.[13]

Essa stabilisce che in caso di assenza di proprietari di fondi, i fondi stessi dovranno essere attribuiti, a titolo di appartenenza esclusiva, a coloro che se ne fossero occupati. I proprietari dei fondi avrebbero avuto due anni di tempo per evitare tale assegnazione e dunque revocare i diritti di proprietà dei nuovi occupanti attraverso la restituzione delle spese sostenute. Trascorsi inutilmente i due anni i vecchi proprietari avrebbero perso ogni diritto, sia di possesso, sia di proprietà.

Il tempo di due anni citato nella costituzione è particolarmente sottolineato nella versione giustinianea della legge: ovviamente un termine così breve, lontano dai tempi (dieci o venti anni) della *praescriptio longi temporis*, ha suscitato varie interpretazioni inerenti agli effetti giuridici determinati dal tempo sulle situazioni di appartenenza come proprietà e possesso.[14] Ritenendo probabile l'attribuzione del termine di due anni alla cancelleria teodosiana e non esclusivamente a quella giustinianea,[15] la legge assume la connotazione sociale di un intervento volto a dirimere un caso contingente e ottenere al contempo una risoluzione del problema fiscale, proprio facilitando la riscossione dei tributi attraverso un tempo breve.[16]

In una costituzione mutila, del 364 (o 365), di Valentiniano ci si occupa invece di distribuire fondi sterili insieme a quelli produttivi nel territorio italico, tentando la cd. *adiectio sterilium*; fallita l'operazione, i fondi furono sottoposti all'asta affinché fossero sorteggiati nuovi proprietari:

CTh. 5.11.9 [= V,15,9 H.] (364/5 …) Idem AA. ad Mamertinum praefectum praetorio. Per Italiam afanticiae iugerationis onere consistentibus patrimoniis superfuso unum-

13 Seeck 1919, p. 279.

14 Cfr. Rudokvas 2005.

15 Come invece sostiene Tarozzi 2013, p. 19.

16 Fascione 2017 - paper 9 p. 19, nt. 154, colloca la costituzione incompleta del Teodosiano, nell'ambito di una "proprietà diffusa e distribuita" che, in quanto tale, produceva "in concreto, un gettito fiscale maggiore, oltre che – se è lecito pensare che la conduzione ad opera dei privati fosse più accurata di quella pubblica – un prodotto finale maggiore e migliore".

quemque tributarium[17] adiectionem alieni debiti baiulare non dubium est; ideoque deserta iugatio, quae personis caret, hastis subiciatur, ut licitationis competitione futuros dominos sortiatur. ea enim ...

Anche la vendita all'asta, come l'imposizione delle terre sterili, aveva lo scopo dell'imposizione tributaria necessaria al buon andamento dello stato. In questo caso lo scopo viene attuato attraverso le operazioni della *licitatio* che, però, nel caso di *agri deserti*, assumeva regole differenti, come si deduce da CTh. 5.11.8,[18] che, come abbiamo visto,[19] prevedeva un'esenzione fiscale per un triennio.

Nel 386, con una legge attribuibile a Teodosio I benché priva di *inscriptio*[20] e mutila nel testo, se i proprietari di fondi abbandonati non fossero tornati presso le loro terre entro il mese di maggio successivo all'emanazione della costituzione imperiale, gli *agri* sarebbero stati attribuiti a chiunque avesse voluto spontaneamente coltivarle e, chi lo avesse fatto, sarebbe stato considerato proprietario delle terre ed esentato dai canoni precedenti.[21]

Altre due leggi della seconda metà del IV secolo, collocate nel titolo XV del quinto libro del Codice Teodosiano, *De omni agro deserto et quando steriles fertilibus imponantur*, si occupano del recupero dei canoni.

---

17 L'espressione "*tributarius*" indicherebbe il contribuente: Pergami 1998, p. 425.

18 Cfr. Tarozzi 2013, § 18; Ead. 2017, pp. 60 ss., la quale precisa come da due costituzioni, una di Costantino del 321, CTh. 4.13.1 e una di Costanzo, del 360, CTh. 4.13.4, si possono trarre informazioni sulle *licitationes*, "presupponendo che le stesse regole fossero applicate anche nelle vendite all'asta dei fondi sterili".

19 Cfr. *supra* 2.

20 La costituzione è attribuibile a Teodosio I perché *data* a Costantinopoli, come risulta dalla sua *subscriptio*; in O. Seeck, *Regesten*, cit., è collocata nell'anno 386, (precisamente in VIII Kal. Nov.) attribuita a Teodosio e diretta, insieme a CTh. 2. 33. 2; 5. 11.11; 5.14.30; 5.17.2; Iust. XI 51, al prefetto al pretorio Cynegio.

21 CTh. 5.11.11 (V, 15, 11, H.) (386 Sept. 24)

. . . . . .

. . . . . .

. . . . . *ua*****babuntur, diu tracta et iam paene sine debitoribus debi[ta con] donentur; ea tamen ratione servata, ut prius domin[i longi]oribus temporum metis edictis celeberrimis evocen[tur,] quo facilius spe inpunitatis ad avitos lares et propr[ia tec] ta revocentur: ac tum demum, si intra Maium mensem, [quod] spatium dissitis idoneum et volentibus longum est, non ad[vene]rint, quicumque se sponte optulerit, non obligandus [de one]re praeterito pro portione hoc modo possessionis [in fu]turum annonarii canonis vectigal expendat, de iur[e do]minii et perpetuitate securus. Dat. VIII K. Oct. Const(antino)[p(oli)] Hon(orio) N. P. et Enodio conss.*

La prima, CTh. 5.15.14, del 364, mutila,[22] è stata ricostruita utilizzando C. 11.59.3 (ad essere identica è la *subscriptio* mentre il testo è diverso) e va unita a CTh. 12.12.3:[23]

CTh. 5.15.14 (364 Mai. 26) [= V,13,14 H.] ....fundorum obligatione securitatis publicae firmaverunt cautionem, susceptos scilicet semel fundos post emensa inmunitatis spatia inconvulsa a se vectigalium pensione retinendos. Dat. VII K. Iun. divo Ioviano et Varroniano conss.

C. 11.59.3 Impp. Valentinianus, Valens AA. ad Mamertinum pp. Quicumque deserta praedia meruerint sub certa immunitate, ad possessionem impetratorum non prius sinantur accedere, quam vel fideiussoribus idoneis periculo curialium datis vel fundis patrimonii sui maxime utilibus obligatis idonea cautione firmaverunt susceptam a se possessionem nullo detrimento publico relinquendam. D.VII K. Iun. divo Ioviano et Varroniano conss. (a. 364)

Valentiniano e Valente stabiliscono che coloro che avessero ottenuto possessi con esenzione dovevano prestare garanzia (fideiussione) di non abbandonare i fondi: in tal modo essi decretano la responsabilità fiscale per i fondi meno produttivi.[24]

La seconda costituzione del titolo 15 (dell'anno successivo a CTh. 5.15.14) conservata, con testo invariato, nel Codice giustinianeo, CTh. 5.15.20 (=C.11.65.4[25]) appartiene sempre ai Valentiniani, stabilisce pagamenti in tre

22 Cfr. Tarozzi 2017, p. 60 nt. 150, che sottolinea l'importanza di questa costituzione "se posta in relazione con le altre costituzioni del titolo, trasmesse unicamente dal manoscritto *Taurinensis* a II, 2". Tutte le costituzioni, otto, pervenute unicamente da tale ms., si occupano della "gestione dei fondi enfiteutici e ciò lascia presumere che anche la costituzione in questione affronti lo stesso tema".

23 Secondo l'edizione P. Krueger. CTh. 12.12.3 (364 Mai. [?] 30) *Impp. Valentinianus et Valens AA. ad Mamertinum praefectum praetorio. Provinciales desideriorum suorum decreta initio aput acta ordinariorum iudicum prosecuti ad sedis tuae eminentiam mittant, ut impudentior petitio refutetur aut iustior petita commoda consequatur. Si qua autem eiusmodi fuerint, quae magnificentiam tuam probabili cunctatione destringant, super his satis erit consuli scientiam nostram, ita ut cunctas petitiones cum litteris tuis legatorum unus advectet. Dat. III kal. Iun. Serdicae divo Ioviano et Varroniano conss.*

24 Bravo 1978, pp. 59-70, p. 68; See Jones 1964, pp. 812 ss.

25 C. 11.65.4 *Imperatores Valentinianus, Valens AA. ad Germanianum comitem sacrarum largitionum Placuit, ut emphyteuticorum fundorum patrimonialiumque possessores, quo voluerint tempore et quantum habuerint pensionis paratum (dummodo non amplius quam in tribus per singulos annos vicibus) officio rationalis adsignent ac de suscepto ab eodem securitatem eodem die pro more percipiant, modo ut intra ianu-*

rate che i *rationales* dovevano accettare, e stabilisce che gli enfiteuti possono rendere noto il rifiuto dei funzionari di ricevere il pagamento in rate per evitare il cd. *commissum* e cioè la perdita del proprio diritto:[26]

CTh. 5.15.20. (= V, 13, 20 H.) (366 Mai. 19) Idem AA. ad Germanianum c(omitem) s(acrarum) l(argitionum). Placuit, ut (enfyteuticorum) fundorum patrimonialiumque possessores, quo voluerint, quo potuerint te(m)pore et quantum habuerint pensionis paratum, dummodo non amplius quam in tribus per singulos annos vicibus, officio rationalis adsignent ac de suscepto ab eode(m) securitatem eodem die pro more percipiant, modo ut intra Ianuariarum iduum diem omnis summa ratiociniis publicis inferatur: gravissimae poenae subdendo officio, si cuiquam quolibet anni tempore, dummodo nequaquam numerum trinae inlationis excedat, solutionem facere gestienti negaverit susceptionis officium vel si moram fecerit in chirografo securitatis edendo. Super quo possessores apud curatores vel magistratus aut quicumque in locis fuerit, qui conficiendorum actorum habeat potestatem, conveniet contestari, ut (et) de officii insolentia constet, in quod exercenda vindicta es(t, et) his possit esse consultum. Dat. XIIII k. Iun. Remis Grat(iano) n.p. et Dagala [ifo conss].

Lo scopo è lo stesso e cioè riscuotere i canoni enfiteutici favorendo i possessori di fondi enfiteutici o patrimoniali: essi possono pagare nel tempo dell'anno che preferiscono e anche in tre rate al massimo; per gli uffici che non accettano il pagamento in tre rate da parte di tali possessori è prevista una severa pena.

Altre costituzioni, appartenenti al periodo che va dal 364 al 370, trasmesse dal Codice Teodosiano ma non conservate dai compilatori giustinianei, tentano di individuare forme di riscossione del canone enfiteutico su fondi enfiteutici e abbandonati,[27] venendosi ad inserire nella politica fiscale di mantenimento della produttività di fondi pecuniari. Si tratta di CTh. 5.15.15, 16, 17, 18, 19, 21.

---

ariarum iduum diem omnis summa ratiociniis publicis inferatur… D. XIIII k. Iun Remis Gratiano np. et Dagalaifo conss. (a. 366). La versione giustinianea è pressoché identica a quella teodosiana: è solamente omessa l'espressione "*quo potuerint*" presente nella prima frase della legge.

26 Cfr. Voci 1989, p. 50 che rinvia a CTh. 3.30.5 (=C. 5.37.23) CTh.3.30.5 [=Brev. 3.19.3] (333 *Apr.* 18) *Idem A. Felici. pp. Africae. Quoniam per negligentiam seu proditionem tutorum et curatorum possessiones iuris emphyteutici, vitio intercedente commissi, e minorum fortunis avelluntur, placet, ut tutor curatorve, cuius officio manente possessio minoris iuris emphyteutici praerogativam, commissi offensa, perdiderit, tantum de facultatibus propriis, censura imminente, minoribus restituat, quanto rem valere potuisse constabit. Dat. XIV kal. Mai. Constantinopoli, Dalmatio et Zenophilo conss.*

27 Cfr. anche Serrano Madroñal 2016, pp. 399 ss.

Ad es., secondo il disposto della prima costituzione, CTh. 5.15.5,[28] *praedia emphyeutica*, assegnati da imperatori precedenti a senatori o ad altri uomini, non devono subire alcun danno dalla vendita all'asta (se venduti devono essere restituiti), devono rimanere presso gli antichi possessori senza incremento del canone dovuto alla *licitatio*; infine i possessori (o enfiteuti) occupano i terreni in pieno diritto di proprietà (*pleno dominio*). L'assegnazione ai senatori assicurava dunque l'introito del canone[29] e tali assegnazioni offrivano adeguate garanzie a chi occupava le terre.

Nel Codice Teodosiano oltre le costituzioni inserite nei titoli XI e XV ci sono anche molte altre disposizioni inerenti gli *agri deserti* e il recupero dei canoni (ad es., solo per citarne alcune, CTh. 5.14.30 del 386, 11.1.10 e 12 del 365, o 11.1.31 del 412) così come nel Codice giustinianeo, in particolare nel titolo 59 dell'undicesimo libro (titolo che è servito alla ricostruzione del titolo 11 del libro 5 del Codice Teodosiano); lo scopo imperiale è sempre lo stesso: aumentare l'introito fiscale.

Da questo quadro normativo, ovviamente non esaustivo, così ricostruito, possiamo dedurre una linea di tendenza della politica imperiale relativa a terre e a fisco, che riassumo.

A partire da Costantino – ma anche già in precedenza - uno degli scopi pressanti della legislazione imperiale era quello di assicurare la costanza delle entrate fiscali attraverso la vincolatività alle terre,[30] pene per chi si allontanava da esse, incentivazione alla coltivazione dei fondi sterili tramite esenzioni fiscali, coattiva attribuzione della responsabilità delle imposte per i vicani confinanti con fondi abbandonati.[31]

---

28 CTh. 5.15.15 [= V,13,15 H.] (364 Iul. 29). *Idem AA. ad Mamertinum praefectum praetorio. Emphyteutica praedia, quae senatoriae fortunae viris, praeterea variis ita sunt per principes veteres elocata, ut certum vectigal annuum ex his aerario penderetur, cessante licitatione, quae recens statuta est, sciat magnifica auctoritas tua a priscis possessoribus sine incremento licitandi esse retinenda ita, ut quaecumque in commissi fortunam inciderint ac pleno dominio privatis occupationibus retentantur a leontii et sallustii consulatu, ius pristinum rursus adgnoscant. Dat. IIII kal. Aug. Sirmio divo Ioviano et Varroniano conss.*

29 Fascione 2017, p. 19.

30 Fenomeno che riguardò anche i barbari in contatto col mondo romano; in riferimento a questo rammento che nel 409 Teodosio II cercò di migliorare la produttività agricola dei confini vincolando i barbari alla terra e al lavoro: CTh. 5.6.3 (409 Apr. 12) su cui v.di anche *supra* 2. Su questa costituzione cfr. Lovato, 2017, 261 ss., 278 s.

31 Cfr. De Francisci 1946, p. 163: "…e poiché anche lo stato aveva interesse, per motivi

I provvedimenti imperiali si riferiscono a vari ambiti attinenti alla coltivazione delle terre: agli *agri deserti*, comprensivi di fondi sterili e fondi abbandonati e diventati improduttivi,[32] ai fondi enfiteutici e patrimoniali, alle terre concesse in *ius perpetuum*.

Inoltre i provvedimenti inseguono i problemi invece di prevenirli (ad es. CTh. 11.28.12 si riferisce ad una situazione locale che riguarda alcune province dell'Italia suburbicaria come la Campania, il Piceno e la Tuscia); come è evidente l'incertezza manifestata dai legislatori nella scelta tra l'esenzione fiscale per chi curi i fondi improduttivi e la necessità di recuperare gli arretrati fiscali dei fondi abbandonati (ad es. CTh. 5.11.8 del 365 prevedeva un'immunità fiscale triennale per coloro che curassero una terra abbandonata o improduttiva, o C. 11.59.3 del 364 imponeva una garanzia di non abbandonare il fondo per accedere al suo possesso e alle esenzioni fiscali, oppure ancora CTh. 5.15.20, del 366, consentiva una rateizzazione dei canoni, mentre CTh. 5.14.30, del 386, stabiliva che i fondi patrimoniali ceduti dovessero continuare ad essere sottoposti al canone).

L'orientamento costante della politica imperiale relativa alle terre rimane tuttavia sempre quello di rendere sicure le entrate finanziarie con diverse modalità, sia impositive sia attributive di privilegi.

In tale contesto perfino uno strumento come la cd. *praescriptio longissimi temporis* o meglio il termine di quaranta anni,[33] risulta coerente con questa linea politica di recupero di denaro, attribuendo, attraverso la prova di appartenenza espressa dal possesso prolungato, un fondo abbandonato o conteso tra più soggetti, allo scopo di individuare con certezza i soggetti a cui imputare il pagamento delle imposte.

Guardato sotto l'ottica di imposizione del possesso al fine di ottenere vantaggi fiscali pubblici, anche lo strumento del termine di quaranta anni, che permette di valutare come presupposto certo l'appartenenza di terre, mira ad ottenere la trasformazione del gettito fiscale carente e non continuo, in un approvvigionamento finanziario sicuro e continuo.

L'incertezza dei rapporti di proprietà nelle province - specie in Egitto - dovuta all'abbandono delle terre, abbandono a sua volta causato da malattie,

---

fiscali a che i terreni fossero coltivati, così cercò di porre argine all'abbandono sia costringendo i proprietari alla coltivazione (CTh. 11.1.4=C.11.59(58). 2) sia attaccando i coloni alla terra".

32 Tarozzi 2017, p. 55.

33 Come vedremo meglio *infra* 6 ss.

guerre, periodi di anarchia, è stato valutato da un'attenta dottrina come un punto nodale della politica severiana tendente a dare certezza ai rapporti di proprietà e rinsaldare le casse dello stato: uno dei modi fu proprio quello dell'introduzione del rimedio della *longi temporis praescriptio* che permetteva di considerare il perdurare di una situazione di possesso (unita ai requisiti della buona fede e della giusta causa) elemento sufficiente per provare la proprietà e che, in tal modo, fungeva da misura di emergenza temporalmente limitata.[34]

Ora, il quadro del problema che abbiamo fino a questo punto potuto presentare, ricavato da fonti legislative contenute nei codici non è stato tuttavia semplice da ricostruire, essendo nota la frammentarietà del Codice Teodosiano, le cui leggi derivano alcune dal Codice giustinianeo, altre dal *Breviarium*, altre da codici non integri (come, ad. es. il Cod. Reg. Lat. 520) e, in tali casi, non offrono il contenuto originario, bensì un testo manipolato o ridotto.

La ricostruzione dei titoli del Teodosiano è questione molto complessa perché in esso troviamo estratti di costituzioni letteralmente avulsi dai contesti originari e i contenuti originari delle stesse mutano all'interno di una sistematica come quella propria dei Codici.

Il Codice di Giustiniano, d'altro canto, offre un quadro rimaneggiato e, di conseguenza, difficile da ricostruire: un esempio significativo è proprio il titolo 59 del libro 11 che è composto con leggi presenti nel Codice Teodosiano, quasi sempre in altra sede, sovente rimaneggiate nel testo, e con leggi, comprese nell'arco temporale 312 – 437, ma note solo nella versione giustinianea.

I dati normativi che le fonti e legislative costituite dai Codici presentano allo studioso, necessitano pertanto dell'apporto di ulteriori dati rinvenibili, ad esempio, nei documenti della prassi.

Proprio sul problema dell'abbandono delle terre e dei risvolti fiscali possediamo un documento papiraceo egiziano di straordinaria importanza, sia per le informazioni concrete che offre, sia per i dati giuridici che attesta.

L'annoso problema della fuga dai campi – fuga realizzata per sottrarsi all'imposizione finanziaria - si riscontra infatti in una vicenda processuale che vide protagoniste due sorelle, Taesis ed Herais, che, nella prima metà del IV secolo d. C. in Egitto, abbandonarono le terre paterne. Occupiamoci dunque di questo caso.

34 Nörr 1969, pp. 76 s.

3. Collassi economici familiari e mantenimento della proprietà

Un caso esemplare della prassi, pervenutoci attraverso una fonte papiracea, noto nella letteratura romanistica per l'applicazione dell'istituto della cd. *praescriptio longissimi temporis*, testimonia, per la metà del quarto secolo d. C., nel Fayum, un esempio di crisi economica familiare per la quale però la famiglia intestataria di beni terrieri tentò in tutti i modi di mantenere la titolarità delle proprie terre.[35]

Di questa famiglia le fonti ci hanno permesso di conoscere due donne, Taesis ed Herais, che ereditarono dal padre una casa e delle terre. Il padre delle due sorelle era stato un proprietario terriero ligio alla legge e alla tassazione avendo sempre pagato le imposte legate alla sua proprietà. Dopo la sua morte le figlie non riuscirono a sostenere il peso fiscale dei beni ereditati e si diedero alla fuga, secondo quel fenomeno che, come abbiamo visto, era consueto sia in caso di terreni improduttivi sia in caso di incapacità fiscale personale. Proprio l'abbandono di terre per impossibilità di onorare i pesi fiscali, costituisce, il fulcro di tutta la vicenda processuale, anche se questo aspetto non è stato sufficientemente valorizzato dalla dottrina, più attenta al contenuto della legge Costantiniana, ricordata nel verbale di questo processo, altrimenti non pervenuta, e che ha quasi distratto l'attenzione dal legame tra la suddetta legge e la fuga dal fisco.

Il processo si svolge il 17 maggio del 339 di fronte al syndicos dell'Arsinoite. Le parti sono le seguenti: attrici sono le due sorelle, Herais e Taesis contro gli eredi di un tale Atisio, rappresentate da Nilo, marito di Herais e difese dall'avvocato Teodoro. I convenuti sono gli eredi di Atisio difesi da Alessandro. Altra parte presente nel processo è Germano, che rappresenta i contadini di Karanis.

Le sorelle, dopo cinque anni dalla fuga, ritornano nel villaggio per riprendere possesso delle terre, fino ad allora coltivate dai vicani, secondo l'istituto dell'*adlectio sterilium* o *epibolè* che risolveva i casi delle proprietà vacanti (*agri deserti*). Intentano quindi una causa contro i vicani per riottenere le terre ma esse ricevono sia le terre ereditate dal padre, sia altre terre registrate a nome di un tale Atisio. Quindi si rivolgono al *praepositus pagi* perché non

35 Il caso è riportato in un documento papiraceo che ha avuto una storia complessa ed anche una complicata valutazione storiografica. Si tratta di P Col. VII, 175 su cui rinvio a Bianchi 2010, pp. 707 ss.; Bianchi 2009, ora in Bianchi 2012; Bianchi 2018, e bibliografia; De Simone 2012, pp. 737 ss.; De Simone 2013, pp. 27 ss.

intendono pagare imposte relative a terre, consegnate loro dai vicani insieme ai prodotti ottenuti, che esse non ritengono di loro pertinenza. Il *petitum* del nostro processo è dunque la richiesta di non essere perseguitate per oneri finanziari connessi a terre che esse non considerano di loro proprietà (P. Col. VII 175, Col. III. 54 "chiedendo di non essere perseguitate per queste terre… e che ciascuno abbia le proprie terre e di non essere responsabili per le terre altrui"). Questo processo è delegato al *defensor civitatis* che si occupava di cause di questo genere (CTh. 1.29.2[36]).

Tutto il processo si basa su un equivoco, l'equivoco delle terre appartenenti al padre delle due sorelle e di quelle di proprietà invece di un Atisio non conosciuto dalle due donne. Questo equivoco a sua volta si fonda sulla presunta omonimia tra il padre e tale Atisio, omonimia piuttosto probabile e che trova una conferma in altre fonti papiracee (P. Col. VII, 188).

L'avvocato dei convenuti, dopo aver descritto tutta la vicenda, dall'eredità del padre alla fuga delle donne dalle terre a causa degli oneri finanziari, dal ritorno al villaggio e dalla rivendica dei campi e dei loro affitti fino all'idea dell'inganno della suprema corte (Prefetto di Egitto), dopo aver puntualizzato che il *praepositus pagi* non aveva potuto che assegnare le terre abbandonate ai contadini "avendo cura della sicurezza e delle entrate pubbliche", P. Col. VII, 175, 35, cita una legge di Costantino: tale legge avrebbe impedito che i possessori fossero allontanati dalle terre possedute per più di quaranta anni (essa letteralmente stabilisce che il tempo di quaranta anni non rimuove il soggetto dal possesso (II, 28) e dunque avrebbe inchiodato le sorelle alla responsabilità fiscale imputando loro la titolarità di tutti i beni. In P. Col. 175, VII, 72 il giudice dichiara espressamente che le due donne, "in ragione del possesso di lungo tempo", "sono strette a queste terre e paghino per esse le sacri imposte". Recitando la legge dichiara che nel caso di possesso di più di quaranta anni non è necessario indagare il titolo, nel caso invece di presenza

36 CTh. 1.29.2 *Impp. Valentinianus et Valens AA. ad Senecae. Si quis de tenuioribus ac minuscullariis interpellandum te esse crediderit, in minoribus causis acta conficias: scilicet ut, si quando quis vel debitum iustum vel servum qui per fugam fuerit elapsus vel quod ultra delegationem dederit postulaverit vel quodlibet horum tua disceptatione restituas; ceteras vero, quae dignae forensi magnitudine videbuntur, ordinario insinuatio rectori. et cetera. Dat. V K. Iul. Tyr Valentiniano et Valente conss.* In questo provvedimento dei Valentiniani (dunque più tardo rispetto al tempo del processo di Arsione) rivolto al *defensor* Seneca come istruzioni dettagliate sulla sua competenza giurisdizionale egli è il soggetto preposto a cause riguardanti debiti, tassazioni e "reclami per eccessi nella esazione delle tasse".

di giusto titolo deve essere data preferenza alla terra posseduta secondo la prescrizione di dieci o venti anni.

La sentenza del *defensor* si basa su tre elementi: sulla legge costantiniana che prevede che trascorsi più di quaranta anni il possessore non può essere allontanato dalla terra posseduta senza che si debba indagare il titolo; sulle dichiarazioni di Germano di appartenenza delle terre alle donne; sulle dichiarazioni controverse di Nilo su una casa registrata sotto il nome degli stessi campi.

Il *defensor* conclude il processo sintetizzando in modo solenne il contenuto della legge costantiniana (riporto la traduzione latina dei FIRA):

P. Col. VII, 175, IV, 67-68 = FIRA, III 101, III, 49-50:
Cum apud gesta mediocritatis meae deposita sit sacra venerabilisque lex dominorum nostrorum perpetuorum regum, quae distincte iubet iustum initium non requiri si quadraginta annorum spatium transierit aliquo bona possidente.

Le sorelle, dopo aver perso la causa, proposero appello ma sfortunatamente questa parte del papiro non è leggibile e si ferma proprio all'espressione di proposizione di appello "ἐκκαλοῦμαι" pronunziata dall'avvocato delle sorelle, Nilo.

Posta nell'ambito di una esperienza giuridica gravata da problemi fiscali ai quali gli imperatori cercano di porre rimedio, il lasso di tempo di quaranta anni costantiniano si mostra come un rimedio processuale simile alla *praescriptio* formulare perché determina il contenuto dell'eccezione o della domanda processuale in essa inclusa (nel processo di Arsinoe una domanda riconvenzionale autonoma rispetto alla richiesta della parte attrice) indicando al giudice di riconoscere che, nel caso in esame, essendo trascorso un periodo di tempo superiore ai quaranta anni, per il quale non è nemmeno necessario indagare il titolo, la proprietà delle terre spetta alla parte attrice costituita dalle sorelle che avevano abbandonato precedentemente le terre paterne.[37] La vicenda trova conferma, nei suoi aspetti principali, in una legge di Anastasio (C. 7.39.6[38]) e mette in evidenza come la legislazione fiscale abbia inciso

37 Secondo Nörr 1969, pp. 94 ss., il termine *praescriptio* possiede un valore processuale, già dal tempo di Settimio Severo, come testimonierebbe Marciano in D. 48.17.3, e poi un valore sostanziale riferito alla proprietà dei beni: i due significati si mescolerebbero nel tempo e, tra il primo e il secondo, l'elemento comune sarebbe rappresentato dal valore attribuito al tempo.

38 C. 7.39.6 *Imperator Anastasius A. Leontio pp. Comperit nostra serenitas quo-*

sulla prassi fino a modificare la struttura dei diritti reali in modo "occulto" perché conseguenza indiretta di leggi. Il caso processuale di Arsinoe appare alla dottrina maggioritaria un caso anomalo perché il tempo di quaranta anni è infatti impiegato non come eccezione a difesa del convenuto ma dallo stesso convenuto contro la parte attrice. In realtà, a mio parere, tale processo non rivela un caso di applicazione anomala dell'istituto del tempo di quaranta anni perché il suo impiego ad opera di Alessandro, avvocato degli eredi di Atisio, convenuti, contro le due sorelle parte attrice, assomiglia ad una domanda riconvenzionale più che ad una eccezione e tale domanda ha come contenuto l'indicazione del lungo trascorrere del tempo del possesso facente capo alle due sorelle; appare così un'autonoma domanda di accertamento della proprietà, posta dal convenuto contro la parte attrice, conforme agli interessi pubblici rappresentati dalla legislazione fiscale generale, attraverso la quale in sostanza essi attribuiscono alla parte attrice la proprietà delle terre.[39] L'andamento del processo di Arsinoe svela la tendenza pubblicistica dello stesso: sia le donne sia i convenuti mirano a rendere noto il soggetto che deve assumersi l'onere fiscale. Non c'è tanto un dibattito sulla titolarità e appartenenza dei beni sotto un profilo privatistico, quanto una discussione mirata precipuamente ad individuare il soggetto a cui imputare il pagamento delle tasse. Gli interessi del fisco sono al centro della causa.

---

sdam sacratissimam nostrae pietatis constitutionem, quae de annorum quadraginta loquitur praescriptione, ad praeiudicium etiam publicarum functionum solutionis trahere conari et, si quid per tanti vel amplioris temporis lapsum minime vel minus quam oportuerat tributorum nomine solutum est, non posse requiri seu profligari contendere, cum huiusmodo conamen manifestissime sensui propositoque nostrae legis obviare noscatur.

1. Ideoque iubemus eos, qui rem aliquam per continuum annorum quadraginta curriculum sine quadam legitima interpellatione possederunt, de possessione quidem rei seu dominio nequaquam removeri, functiones autem seu civilem canonem vel aliam quandam publicam collationem impositam ei dependere compelli nec huic parti cuiuscumque temporis praescriptionem oppositam admitti.

39 Nörr 1969, p. 92 e nt. 9, sosteneva che il processo di Arsinoe fosse il primo caso noto in cui fosse l'attore a richiamarsi alla *praescriptio*: i convenuti avrebbero attribuito attraverso di essa la proprietà delle terre in oggetto alla parte attrice. La *praescriptio* svelerebbe, in questo caso, a suo avviso, un'efficacia sostanziale. Egli cita anche un caso in cui l'attore usò la prescrizione contro sé stesso: il retore Eliodoro come avvocato degli attori aveva proposto una *paragraphé* davanti a Caracalla in cui era indicato che il suo collega era assente e che pertanto egli stesso era impreparato (Philostr. Vita soph. 2.32.626). L'Autore valuta il processo di Arsinoe come un caso che dimostra che la *praescriptio* poteva essere fatta valere contro il possessore e non solo a suo favore.

La legislazione fiscale produce un cambiamento e un adeguamento forse non pensato dal legislatore ma inevitabile. Costantino, nell'ambito del fenomeno dell'abbandono dei campi, impone il possesso laddove si cerchi di disfarsene per evitare gli oneri economici, al fine di realizzare l'adempimento dei pagamenti dovuti dai proprietari dei fondi, e attua, in tal modo, una trasformazione del possesso e della proprietà.

Costantino, attento a risolvere i problemi delle terre improduttive, impone il possesso su terre possedute per più di quaranta anni. Il lunghissimo possesso, di cui non si può conservare memoria del titolo (non necessario), è una condizione tale da impedire l'allontanamento del soggetto dalle terre, di cui deve continuare a occuparsi assolvendo i debiti connessi. Quindi nell'applicazione del possesso continuato quarantennale nel processo contro gli eredi di Atisio, si può comprendere il valore dell'istituto costantiniano: il possesso vale come titolo e dunque consolida una situazione di fatto già pubblica perché nota ai più.

4. Tassazioni onerose e "sistemi" per aggirarla[40]

Un altro esempio significativo ed esemplificativo di modalità a cavallo tra illegalità e sistemi legali per aggirare le norme, sempre in tema di pressione fiscale e terre, si può trovare in una fonte più tarda del Codice Teodosiano che illustra l'unione tra romani e barbari nell'affrontare il medesimo problema.

Mi riferisco ad un capitolo dell'*Edictum Theodorici*, 43, che accomuna, sotto il profilo dell'istituto del *patrocinium*, prassi peculiare del tardo impero anche se già risalente all'età del Principato,[41] genti barbare a romani.

ET. 43. Nullum debere ad potentem romanum aut barbarum suas actiones transferre.

Nullus ad potentem Romanum aut Barbarum proprias quolibet titulo transferat actiones. Quod si fecerit, iacturam litis iurgator incurrat, et is qui susceperit, medietatem pretii rei aestimatae fisco cogatur inferre. Qua poena teneri praecipimus etiam eos, qui rem in lite positam in huiusmodi crediderint transferendam esse personam; quoniam volumus, ut remota persona potentioris, aequa iurgantes sorte confligant. Litigantibus

40 L'esempio qui riportato è stato già oggetto di studio: Bianchi, 2017.

41 Sul *patrocinium*, processo secondo il quale i contadini diventavano clienti di ricchi proprietari per evitare di pagare le tasse e i cd. patroni diventavano garanti per le tasse non pagate, fonte principale è l'intera rubrica del Codice Teodosiano, 11, 24, *De patrociniis vicorum*; se ne occupa anche il codice di Giustiniano, 11, 54; poi abbiamo varie fonti retoriche, come Libanio e Salviano.

vero post caussae terminum, largiendi quod vicerint, cui voluerint personae, concedimus potestatem.

In questo capitolo viene stabilito il divieto di trasmissione delle azioni a *potentes*, siano essi romani o barbari. Chi contravviene alla norma subisce la perdita della lite (*iactura litis*) e il potente deve versare al fisco metà del valore della *res* oggetto della lite. Inoltre dispone il divieto di trasferimento della *res litigiosa*.

La norma, secondo la *communis opinio*, trae origine da una legge contenuta nel Codice Teodosiano, CTh. 2.13.1:

CTh. 2.13.1 [= Brev.2.13.1] Impp. Honorius et Theodosius AA. Ioanni pf. p. Post alia: si cuiuscumque modi cautiones ad potentum fuerint delatae personas, debiti creditores iactura mulctentur. Aperta enim credentium videtur esse voracitas, qui alios actionum suarum redimunt exactores etc. Dat. V Id. Iul. Ravenna, dd. nn. Honorio XIII. et Theodosius X. AA. coss.

Interpretatio. Qui cautiones exigendas potentibus dederint, omne debitum perdant: quia, ubi potest esse repetitio, potestas ad exigendum non debet a creditoribus invitari.

Il precetto dell'Editto, rispetto alla legge del Codice, si pone sotto il profilo processuale e non sostanziale, occupandosi della fase tra *iurgator* e *potens*, mentre Onorio e Teodosio si rivolgono ad un rapporto di credito; inoltre appare più severa della legge imperiale, disponendo la pena del versamento al fisco della metà del valore della *res litigiosa,*[42] pena non prevista nella costituzione originaria: il problema fiscale aveva evidentemente raggiunto un peso consistente.

Nel capitolo 43, tra gli intenti di Teodorico, predomina quella di arginare i

42 Quest'ultimo divieto trova la sua fonte in D. 4.7.1. *Gaius l. IV ad ed. prov. pr. Omnibus modis proconsul id agit, ne cuius deterior causa fiat ex alieno facto, et cum intellegeret iudiciorum exitum interdum duriorem nobis constitui opposito nobis alio adversario, in eam quoque rem prospexit, ut si quis alienando rem alium nobis adversarium suo loco substituerit idque data opera in fraudem nostram fecerit, tanti nobis in factum actione teneatur, quanti nostra intersit alium adversarium nos non habuisse. 1 Itaque si alterius provinciae hominem aut potentiorem nobis opposuerit adversarium, tenebitur*; ma è anche rintracciabile anche in CTh. 4.5.1 del 331, norma che però non si riferisce specificamente ai *potentes*. CTh. 4.5.1pr. [=Brev.4.5.1pr.*] Imp. Constantinus A. ad provinciales. Post alia: lite pendente illud, quod in controversiam devocatur, in coniunctam personam vel extraneam donationibus vel emptionibus vel quibuslibet aliis contractibus minime transferri oportet, tanquam nihil factum sit lite nihilominus peragenda.*

potentes e le loro sopraffazioni ristabilendo la giustizia, l'onestà e la legalità.[43] Tentando di arginare un fenomeno dilagante e di prevenirne gli abusi, Teodorico prova a stabilire certezza dei rapporti giuridici nel rispetto delle leggi e degli oneri fiscali ed un ritorno alla quiete. In tal senso Cassiodoro lodava il prefetto al pretorio Liberio che, nel primo periodo di governo di Teodorico, avrebbe condotto i barbari *ad quietem* (Cass., *Variae*, II, 15, 3)

Cass. *Variae* II, 15, 3 Venantio V. I. Theodoricus Rex

Praefecturam enim, sollicitudinum omnium nobilissimum pondus, quod vel solum fuisset expedire laudabile, iuncta exercitus nostri cura disposuit, ut nec provinciis ordinatio deesset nec exercitui se provida sollicitudo subtraheret. superavit cuncta infatigabilis et expedita prudentia: traxit mores barbaros ad quietem: in votum nostrum cuncta moderatus est, ut sic accipientibus satisfaceret, ne dantes locum querimoniis invenirent. verum ut de plurimis pauca sufficiant, probavit de se tanta, ut eligeretur eius inexplorata posteritas.

Si veda anche *Variae* I, 18.2 in cui si stabilisce che se un *barbarus preasumptor* abbia occupato un terreno di un romano senza atto di assegnazione (il che fa dedurre che vi fosse pratica di assegnazione di terre ai barbari), lo debba restituire al romano. Se lo avesse tuttavia posseduto per un tempo maggiore di trenta anni allora l'azione del querelante romano sarebbe stata inficiata dalla eccezione di tempo:

Variae, I, 18.2: Si Romani praedium, ex quo deo propitio Sonti fluenta transmisimus, ubi primum Italiae nos suscepit imperium, sine delegatoris cuiusquam pittacio praesumptor barbarus, occupavit, eum priori domino summota dilatione restituat. quod si ante designatum tempus rem videtur ingressus, quoniam praescriptio probatur obviare tricennii, petitionem iubemus quiescere pulsatoris.

Qui Cassiodoro si riferisce alla costituzione di Teodosio del 424 sulla *praescriptio* trentennale (CTh. 4.14.1[44]) – tempo descritto come "*longi temporis obscuritas*"[45] - che implica interazioni tra barbari e romani anche sul piano

43 Vismara 1967, p. 114 ss.

44 CTh. 4.14.1 Imp. Theod(osius) A. Asclepiodoto P(rafecto) P(raetori)o. *Sicut in re speciali est, ita ad universitatem ac personales actiones ultra triginta annorum spatium minime protendantur. Sed si qua res vel ius aliquod postuletur vel persona qualicumque actione vel persecutione pulsetur, nihilo minus erit agenti triginta annorum praescriptio metuenda: eodem etiam in eius valente persona, qui pignus vel hypothecam non a suo debitore, sed ab alio possidente nititur vindicare. .... Dat. XVIII Kal. Decemb. Constant(ino)P(oli) Victore V.C. cons.*

45 Variae, I, 18.3 *Illa enim reduci in medium volumus, quae, nostris temporibus*

dell'efficacia del tempo sul diritto, e che in questo contesto di interesse mostra il nesso tra sistema dei possedimenti terrieri e sistema di tassazione.

Dunque è abbastanza evidente notare come i problemi della terra, delle espropriazioni e/o delle assegnazioni a favore dei barbari si collochino tra princìpi di *hospitalitas*, i buoni rapporti tra senato e Teodorico, e il sistema finanziario romano che si estende anche ai barbari; per i problemi delle terre, tale integrazione, consentiva all'élite romane e barbare di coalizzarsi in vista di scopi comuni.

Il capitolo 43 dell'*Edictum* mostra in definitiva un fenomeno di evasione fiscale attuata dagli stessi Goti di Teodorico che sembra nascere come naturale conseguenza del rapporto instauratosi sul piano della distribuzione delle terre e dei relativi oneri, e, soprattutto, dall'assimilazione della pratica del *patrocinium* che aveva già imperversato, non venendo mai meno, nelle corti romane.

5. Considerazioni conclusive

Gli esempi qui esposti, se pur brevemente, ci mostrano un quadro variegato in cui, tuttavia, al centro degli interessi statali e dei conflitti sociali, appare un filo conduttore, il recupero delle entrate finanziarie, comune ad ogni società, antica e moderna. Senza dubbio le modalità e i metodi di recupero messi in atto dagli imperatori romani rispondono a esigenze coeve e rispecchiano la società del tempo, come dimostra il caso delle due sorelle egiziane che, per non pagare i tributi dovuti per le loro proprietà, si diedero alla fuga e poi, tornate presso i propri possedimenti, tentarono di non adempiere gli oneri finanziari connessi, ma, al contempo, possono rappresentare quasi dei modelli di riferimento laddove l'interesse primario diventa il contemplamento di tutti gli interessi in gioco, in vista di un equilibrio tra le parti e di un buon vivere civile. Le risposte imperiali all'evasione, all'inflazione, alla crisi evidenziano perfino un'interazione tra i romani e "gli altri", come abbiamo visto a proposito dei Goti, nelle fonti dell'*Edictum Theodorici*, in cui i barbari si uniscono ai romani nel comportamento illegale del *patrocinium*, e, oggi, lo Stato si trova ad affrontare problemi di evasione, crisi economica, cattiva distribuzione delle ricchezze, disuguaglianze e conflitti sociali in un momento di profonda interazione, purtroppo legata ad evidenti e pericolosi atteggiamenti di neo-razzismo, tra immigrati e cittadini.

---

praesumpta, damnamus, quia locus calumniandi non relinquitur, cum longi temporis obscuritas praeteritur.

La storia tardo antica può insegnare molto, pur nel suo approccio spesso non sistematico, al problema qui evidenziato. Un patrimonio storico può inoltre coadiuvare il lavoro, lo studio, le scelte di un giurista positivo che non può non tener conto delle proprie radici.

Bibliografia

Fonti secondarie

Bianchi 2009 = P. Bianchi, *Spunti ricostruttivi sul lungo possesso delle terre nella tarda antichità*, cit., lettura tenuta a Napoli all'"Istituto di studi Filosofici", aprile 21 2009, URL http://www.studitardoantichi.org/ einfo2/file/Bianchi.pdf.

Bianchi 2010 = P. Bianchi, Sulla *praescriptio* costantiniana. *P. Col. VII 175: ricostruzione di una vicenda processuale*, in AARC, XVII Conv. Intern. in onore di Giuliano Crifò, Roma 2010, p. 707-744.

Bianchi 2012 = P. Bianchi, *Spunti ricostruttivi sul lungo possesso delle terre nella tarda antichità*, in P. Bianchi- M. Felici (curr.), *Prospettive e trasformazioni nella società tardoantica*, Roma 2012.

Bianchi 2017 = P. Bianchi*, Distribuzione della terra ai Goti. Contadini e barbari e l'evasione fiscale nella tarda antichità: cenni*, in C. Lorenzi- M. Navarra (edd.), *Questioni della terra. Società economia normazione prassi*, *AARC* XXII Conv. *In onore di Mariagrazia Bianchini*, Napoli 2017, p. 449-490.

Bianchi 2018 = P. Bianchi, *Gli effetti del passaggio del tempo nelle leggi imperiali e nella prassi da Costantino a Giustiniano. Evasione fiscale e possesso, inerzia dei creditori*, Rome, 2018.

Bravo 1978 = G. Bravo, *El estatuto sociopolitico del colono en la genesis de la sociedad bajo imperial*, in *Memorias de historia antigua* 2, 1978, p. 59-70.

De Francisci 1946 = P. De Francisci, *Storia del diritto romano*, III, I, Milano 1946.

De Simone 2012 = M. De Simone *Rescriptum Constantini de quadraginta annorum praescriptione*, in G. Purpura (cur.), *Revisione ed integrazione dei Fontes Iuris Romani Anteiustiniani (Fira). Studi preparatori*. I *Leges*, Torino, 2012, p. 737-767.

De Simone 2013 = M. De Simone, *P. Col. VII, 175. Aspetti giuridici di un verbale di udienza*, in *AUPA* LVI 2013, 27 ss.

Fascione 2017 = L. Fascione*, Barbari e lavoro della terra in Occidente da Teodosio I (382) a Odoacre (476)*, in *Historia et ius* 11, 2017 - paper 9, pp. 1-24.

Fernández de Buján 2015 = A. Fernández de Buján, *Derecho público romano*, Madrid[8], 2015

Fiorentini 2017 = M. Fiorentini, *Spunti volanti al problema dei beni comuni*, in *BIDR* IV s., 7, 2017, p. 75-103

Jones 1964 = A. H. M. Jones, *The later roman Empire. A Social, Economic, and Administrative Survey*, Oxford, 1964.

Lovato 2017 = A. Lovato, *Prima e dopo Adrianopoli. Forme e modalità d'insediamento dei barbari nei territori romani in età tardo imperiale*, in *AARC* XXII, *In onore di Mariagrazia Bianchini*, 2017, p. 261-281.

Maddalena 2014 = P. Maddalena, *Il territorio bene comune degli Italiani. Proprietà collettiva, proprietà privata e interesse pubblico*, Rome, 2014

Martínez Vela 2016 = J. A. Martínez Vela, *Referencias a la politica fiscal y financiera de la secunda mitad del siglo IV d. C. a través del epistolario de Basilio de Cesarea*, in A. Fernández De Buján, A. Trisciuoglio G. Gerez Kraemer (edd.), *Hacia un derecho administrativo, fiscal y medioambiental romano*, III, Madrid, 2016, pp. 577-594.

Morelli 2000 = F. Morelli, Agri deserti *(mawât), fuggitivi, fisco: Una* κλήρωσις *in più in SPP VIII 1183*, in *ZPE* 129 (2000), p. 167-178.

Nörr 1969 = D. Nörr, *Die Entstehung der longi temporis praescriptio. Studien zum Einfluß der Zeit im Recht und zur Rechtspolitik in der Kaiserzeit*, Köln-Opladen, 1969.

Pergami 1998 = F. Pergami, *Interesse pubblico e tutela del privato nella legislazione tardoimperiale in materia di processo fiscale*, in *AARC* XII Conv. Intern. *In onore di M. Sargenti*, Napoli, 1998, p. 413-431.

Rudokvas 2005 = A. D. Rudokvas, *Del possesso per usucapione continuato, aperto e in buona fede*, in *D@S*, 4 2005 (URL http://www.dirittoestoria.it/4/Contributi/Rudokvas-Possesso-per-usucapione-legislazione-russa. htm, visitato il 10-11-2018).

Seeck 1919 = O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit* , Stuttgart, 1919

Serrano Madroñal 2016 = R. Serrano Madroñal, ¿Crisis social en el Bajo Imperio romano? El derecho como herramienta de reconducción estatal, in G. Bravo Castañeda, R. González Salinero (Edd.), *Crisis en Roma y soluciones desde el poder*, *Actas del XIII Coloquio de la Asociación Interdisciplinar de Estudios Romanos*, celebrado en la Universidad Complutense de Madrid los días 18-20 de noviembre de 2015 Madrid-Salamanca, 2016, p. 383-404.

Solidoro Maruotti 2014 = L. Solidoro Maruotti, *Forme di appartenenza dei beni: diritti reali e possesso*, in A. Lovato *et all., Diritto privato romano*, Torino, 2014, pp. 246-433.

Tarozzi 2013 = S. Tarozzi., *Riforma dello Stato e gestione della terra. La questione degli agri deserti nella prospettiva dei Codici tardo antichi. Alcuni spunti*

di riflessione, in *MEFRA* 125, 2013, URL: http://journals. openedition.org/mefra/1861; DOI: 10.4000/mefra.1861, visitato il 12-5-2016

Tarozzi 2017 = S. Tarozzi, *Norme e prassi. Gestione fondiaria ecclesiastica e innovazioni giuridiche negli atti negoziali ravennati dei secoli V-VII,* Roma, 2017.

Vismara 1967 = G. Vismara, *Edictum* Theodorici, Ius Romanum medii aevi, I, 2, b, aa, 1. Milano, 1967.

Voci 1989 = P. Voci, *Nuovi studi sulla legislazione romana del tardo impero*, Padova, 1989.

LAND GRANT IN LATE ANTIQUITY: A PATTERN FOR MODERN COLONIAL REGULATIONS?

Simona Tarozzi

1. Introduction

Although modern colonialism is actually a contingent phenomenon whose causes are determined by different factors and there is no doubt that the circumstances which arose the new colonialism in the 19th were not the same of the roman colonate, it is undoubted that the modern colonialism reflects some roman concepts and in part resumes the meaning of the terms '*colonus*' as a tenant farmer and sharecropper, who paid back landowners with a portion of their crops, in exchange for use of their farmlands. In the literature of the ending of the 19th and beginning of the 20th century, the '*colonus*' was contracted to work for a fixed time and sometimes on imperial lands. He could have never obtained the ownership of the cultivated lot. According to Savigny,[1] the colonate could have three origins: a man could become a *colonus* by birth, by contract or by spending a long number of years as a tenant on the same land. He also added punishment as another possibility. One three sources of colonate appearance seen by Fustel de Coulange[2] was that free colonists (*coloni*) who contracted to work for five years were reduced by debt and overdue rent to serfs bound to the land and its owner. Saumagne,[3] in his study dated 1937, considered that two types of *coloni* existed at the time of the Principate: *coloni* and *inquilini*. This idea was primarily based on the inscription from Henchir Metich in North Africa, that shows that both, a) *coloni* who had *villae dominicae* and who were *in fundo* and b) those who were *ultra fundo, inquilini* in Saumagne's opinion worked on lands belonging to the emperor. Both terms were retained in the later Roman empire: the *colonus* of the earlier period became the *adscripticius* or *tributarius* after Diocletian.[4]

1 Savigny 1850, p. 1 ff.

2 Fustel de Coulanges 1885, p. 35 ff.

3 Saumagne, 1937, p. 487 ff.

4 The problem of the late Roman colonate has been debated since the seventeenth century, but this topic does not interest my paper's object. In a few words, the question is when, how and why the *colonus* of the Principate, a voluntary tenant of land, free to move when his lease expired, became the *colonus* of the later empire, a serf tied to the land by

Saumagne designated the first as *colonus*, while the former *inquilinus* took on the meaning originally held by the *colonus* and is also given the designation *colonus*.

The use of symbols and terms which refer to the Roman empire and other ancient societies is typical for modern empires. For its territorial expansion and its approximately twelve centuries of existence, the Roman empire was a great model from whom it was possible to draw inspiration.

The Chilean experience is especially interesting because Andres Bello, mainly responsible for the Chilean Civil Code, promulgated in 1855, was sent to London in 1810 (with Simón Bolívar) on a political mission for the Venezuelan revolutionary junta and he elected to stay there for 19 years, acting as secretary to the legations of Chile and Colombia and spending his free time in study, teaching, and journalism.

The Chilean Civil Code is of clear neoclassic inspiration and had the same influence throughout South America as that of Code Napoléon had in Europe. Each institution is introduced through an axiom and articles or sections cite examples or consequences of the axiom with a didactic purpose. The indisputable main source of the Civil Code is the *Siete Partidas* of King Alfonso X, perhaps the pinnacle of Spanish *ius commune* and regarding the law of obligations and the law of things, another main source of inspiration for the Chilean Code has been the Napoleonic Code. But, for example, in relating the acquisition of property, the code makes a clear distinction between the *title*

---

hereditary bond. The position of a *colonus* in the early third century is clearly defined by the lawyers cited in the Digest. He held a lease, normally for five years, which by the tacit consent of both parties became on expiry an annual tenancy. A *colonus* might, if he were, as he often was, in arrears with his rent, find practical difficulty in leaving; for in such circumstances his landlord would have no hesitation in distraining on his stock. The first clear evidence that *coloni* - or at any rate some *coloni* - were tied to their farms and to their landlords is a law of Constantine (*CTh*. 5.17.1, 332 A.D.) in which any person with whom a *colonus* belonging to some other person is found shall not only restore him to his place of origin but be liable for his poll tax for the period. It will furthermore be proper that *coloni* themselves who plan flight should be put in irons like slave, so that they may be compelled by a servile penalty to perform the duties appropriate to them as free men. The first explicit reference to the hereditary character of the bond is in a Emperor Valens'law of 365 A.D. (*CTh*. 5.19.1, which orders that slaves and *coloni* and their son and grandsons who had deserted imperial estates to join the army or the civil service should be recalled. Worth mentioning works on colonate of A.J.B Sirks, most recent are: Sirks 2008, p. 120-143; Sirks 2012, p. 133 – 143; Sirks 2017 p. 235-243.

and the actual *acquisition* of property, similarly to the Roman Law and the German BGB (a strong by Roman Law influenced modern code) and we can presume, for his studies in London and his knowledge of Latin, he could have direct known these sources, not just through the *Siete Partidas* or *Code Napoléon*. He wrote furthermore a *Manual de derecho romano*.

After the independence from the Spanish Empire, the newborn Republic of Chile should have faced up the question of southern land, regarded by the Government as never been tilled, even if they are populated by native people, the Mapuche This consideration brought the Government to take possession of Mapuche's lands and to give them to European and North American settlers for improving soil's conditions and the country's growth. In the Roman Empire, we have a similar situation in the phenomenon of *agri deserti*, abandoned lands by owners a cause of their infertility or tax pressure.

The means used to solve the problems by Roman emperors are the same used by the Chilean Government: my research would have the aim of comparing the land grant system of both experiences and in the following pages it will be given a brief description of the results.

2. A lexical approach

Most of roman constitutions on (public) land grant were promulgated between III and IV century A.D., some of them were adopted by Theodosius II in his code and after by Justinian.

Unfortunately, the manuscript tradition (MS *Codex Taurinensis II a 2*) of the book of Theodosian Code, the fifth, particularly focused on these topics, shows so many lacunae that let us impossible to know how the matter was exactly regulated.

This is particularly clear in the words used by imperial chancellery to define the different typologies of land grant: what according to Levy[5] *ius emphiteuticum* would be the long term lease on estates of the emperors privy pursue (*res patrimoniales*);[6] *ius perpetuum* would be the permanent lease on possessions of the crown as such (*res privatae*)[7] and *ius privatum* would comprehend *dominium* if the grantee, as a rule, owed the canon and he might

5 Levy 1951, p.43 ff.

6 Patrimonial estates of the Emperor that were held under the regular terms of rental for such estates.

7 Personal estates of the Emperor.

also be subjected to a compulsory "imposition" of unproductive land (*epibolé*) for which he had to contribute a proportional amount of the tax due from it (*perequatio*). As an alternative an *ius privatum* the sources show the expression *ius privatum salvo canone*.[8] On the contrary, Jones[9] believes they are no differences and these terms are interchangeable and concerning the same reality, especially after Constantine's reform which brought together *res patrimoniales* and *res privatae* and created a new position to manage them, the *comes rerum privatarum*.

It is a fact that these lexical differences do not always correspond to substantial variations, sometimes these *iura* were mixed up each other or were joint together. As, for example, in a constitution of Emperor Theodosius I promulgated on 393 (*CTh*. 5.14.33),[10] which assign emphyteutic land estates in perpetuity to possessors, nullifying differences between *ius emphiteuticum* and *ius perpetuum*, but in this case, it was an exceptional situation because the law regards unfertile lands, abandoned by their possessors (*agri deserti*). In the above-mentioned constitution, Theodosius I obliges, or rather tries to oblige, grantees of fertile lands to accept unfertile ones too, with tax charges, ordering to praetorian prefect, Rufinus, to establish for the judges, their offer staffs and the defenders a penalty if they do not "come to the aid of the abandoned and inferior lands by combining them with profitable lands".

---

8 The conveyance of the land in private ownership though subject to a permanent canon payable to the emperor. In exceptionable cases, we have a *ius privatum dempto canone*, a conveyance even without such qualification, but ever without ownership (never implied ownership).

9 Jones 1964, p. 812 ff.

10 *Codex Theodosianus* 1904:

CTh. 5.14.33 [Translation by Pharr 1952): The same Augustuses (Valentinian, Theodosius, and Arcadius) to Rufinus, Pretorian Prefect. The emphyteutic right, by which landed estates belonging to Our patrimonial domain or the privy purse are assigned to possessors in perpetuity, is maintained, not only by Our orders but also by those of Our predecessors, as so indefeasible that once an estate has been delivered, it can never be occupied by Us or by anyone else while the others are in possession. 1. But since it has come about through the arrogance of wicked men that all the best lands are serving their greed for gain and profits and such inferior fields in the province are left as none of the aforesaid men deign to hold, Your Sublime Magnificence shall establish for the judges, their office staffs, and the defenders the following penalty, namely, that unless they come to the aid of the abandoned and inferior lands by combining them with profitable lands, they shall know that they must sustain the fine and penalty which has been promulgated. (30 July 393)]

As regards Chilean Law, according to art. 589, third paragraph,[11] of Chilean Civil Code[12] are public goods (*bienes fiscales* o *del Estado*) those goods that do not belong to anyone, but State. The art. 590[13] decrees that estates, which are placed within the country's border and do not belong to anyone, belong to State.

In Chilean laws of 19th-century ancestral territories of different native people are not considered in the same way, depending on the different grades of resistance and consequently on different means used to get control over these lands. Arauncanía (south of Bío Bío and north of Valdivia province) was distinguished from the rest of southern territories, which arrive in the austral region (South Pole); the latter was considered abandoned and consequently belonged to State. The question of Araucania was more intricate: the Spanish did not conquer this region, they did not go over today's metropolitan region, Santiago de Chile and its surroundings. Strong resistance of the Mapuche people and lack of real interest in southern Chile, a territory without noble metals, were causes of this decision.

For resolving the question with the Mapuche people, the Chilean Government tried to acquire their lands in Araucania, by sale or by proof that these lands did not belong to anyone. The Mapuche people should have proved to be owners, by showing property deeds, which should be recorded in Land Office (*Conservador de Bienes Raíces*). The lands, which belonged to native people, are called *tierras indigenas*, the others, belonged to State, are called *tierras fiscales*.

---

11 *Código Civil de la Republica de Chile* 1856:

art. 589, 3: *Los bienes nacionales cuyo uso no pertenece generalmente a los habitantes, se llaman bienes del Estado bienes fiscales*

12 The *Código Civil de la Republica de Chile* is the work of Venezuelan-born Chilean Andrès Bello. In 1829 he accepted a post in the Chilean Ministry of Foreign Affairs, settled in Santiago, and took a prominent part in the intellectual and political life of the city. He was named senator of his adopted country—he eventually became a Chilean citizen—and founded the University of Chile (1843), of which he was rector until his death. The Chilean Civil Code was promulgated in 1855 and had much the same influence throughout South America as the Code Napoléon in Europe. Among its sources of inspiration have been considered Roman Law and BGB (*Bürgerliches Gesetzbuch*, the German Civil Code, which has been strongly influenced by Roman Law too).

13 *Código Civil de la Republica de Chile* 1856:

art. 590: *Son bienes del Estado todas las tierras que, estando situadas dentro de los limites territoriales, carecen de otro dueño.*

For both types of land, the Chilean Government, taking different measures, carried out a policy aimed whether at integrating native people in Chilean society or at providing incentives for cultivation.

For the *tierras indigenas*, two years after the establishment of first government assembly, Government and Senate passed regulations[14] for helping the Mapuche people to go out their indigence conditions and for promoting their integration with Spanish origin people. Native people could live in towns, which were specially built for them, where a house with a plot of land was assigned to them. *Tierras indigenas*, those native people left to live in town, became *tierras fiscales* and were assigned through a sale by auction (*remate*); they were mortgaged to guarantee funds for native people's civilization (this civilization was operated especially by Church). In 1819 native people, called by the Spanish, *Naturales*, obtained Chilean citizenship.

3. Land Grant system in Rome and Chile:[15]comparing methods.

The figure of modern colon, who was contracted in order to stay with his family in a lot for a fixed time and to cultivate it, goes back to Roman experience, but it is not so evident that the sale by auction recalls the Roman law too, especially about the question of '*agri deserti*'.[16]

It is generally agreed that there was a decline in agriculture in the later Roman empire and on its causes debate has been inconclusive, whether it was due to the general exhaustion of the soil, to a shortage of agricultural manpower, or partly to German invasion and depredation, but predominantly to over-taxation.

"That the area of land under cultivation shrank considerably cannot be doubted. Unfertile and abandoned lands (*agri deserti*) are a constant theme of imperial legislation from before Diocletian's time to that of Justinian. The problem first appears in the late second century, when the emperor Pertinax issued an edict, inviting all and sundry to cultivate deserted land, whether private or imperial property, in Italy and the provinces, promising them ten years 'immunity' from taxes and full ownership. In the late third century, Au-

14 Boletín 1813, p. 253-258.

15 Essential bibliography: Encina 1949; Ibañez Santa Maria 2013. About the land reform of the 20th century in Chile see the contribution of AugustÍn Parise in this volume.

16 Bianchi 2018, pp. 17-67. See also the contribution of Paola Bianchi and Silvia Schiavo in this volume

relian decreed that the councils of the cities were to be responsible for the taxes of deserted lands in their territories. Constantine renewed this law, but added that, where the councils were not equal to the burden, the tax obligations of abandoned land should be distributed to lands and territories, immunity for three years being granted."[17] Furthermore, lands are abandoned because depopulated by smallpox, Black Death and famine and during the Principate, Marcus Aurelius tried to repopulate the territory with a lot assignment to various German tribes. The pressure at the boundaries of Empire of these people and the persistent problem of *agri deserti* brought next Emperors to assign in emphyteusis these abandoned lands to Germans under certain conditions. The chief tribes should have guaranteed to give back military support and cultivate the land without tax payment.

Unfortunately, the land assignment system to German people, entirely demanded to local governors and army, was not ever so efficient and the assignment did not go out as supposed.

Therefore, as above said, deserted lands could be allocated by authority, but not ever this procedure was practicable and when it was not possible to force the assignment of these unfertile lands, they were sold by auction.

Principal rules for a sale by auction (*licitatio*) provided for assignment of land to whom offered the best bid and best guarantees of solvency in the rent[18] payment for almost three years (*CTh*. 4.13.1[19] by Constantine and *CTh*.

17 Jones 1964, p. 812.

18 Jones 1964, p. 820: "The rent depended obviously on the quality of the land and its agricultural use, as olive groves, vineyards, arable or pasture. In Syria, there was an elaborate system of classification into olives, 'old' and 'mountain', vineyard, three qualities of arable and pasture. The fiscal unity, the *iugum*, was made up of varying areas of each. Syria seems, however, to have been exceptional. In Africa, for example, the system was even rougher and ready, the land being assessed by the *centuria* of 200 *iugera*, apparently without regard to use or quality. In Syria, therefore, the tax would, in so far as the land was correctly classified, vary with the rental value, while in Africa all land would pay the same tax whether it produced a high or low rent. This may partly explain why the proportion of deserted land was so much higher in Africa than in Syria."

19 *Codex Theodosianus* 1904:

CTh. 4.13.1 [Translation by Pharr 1952: Emperor Constantine Augustus to Junius Rufus, Governor of Aemilia. The right to collect imposts shall remain in the possession of the person who was the highest bidder. Thus the contract of letting shall be concluded at the end of a period of not less than three years, and in no way shall the time granted for the collection of imposts be interrupted. When that time has passed, the rights of bidding and of obtaining the contract shall be renewed, and similarly, the concession must be let

4.13.4[20] by Constance). By a law of Valentinian immunity for three years was granted to who started voluntary tilling deserted land (*CTh*. 5.11.8[21]). To favorize and support people who would have voluntarily cultivated abandoned parcels, by law they could immediately get a property right on these because here the grantees were found of trying to fertilize them. In this case, these lands belonged to a private citizen, but it is not so significative if abandoned lands were private and no public, because it there was, however, a public interest that this area was finally cultivated for increasing and improving land productivity and then to obtain fixed income to imperial finances. According to laws, the new farmer obtained on this land *ius privatum* (that means, according to Levy, that he had title of private ownership, but subject to a permanent canon payable to the emperor), after the landlord did not have done anything for a reasonable period of time of two years and past time the landlord could take legal steps within two months (six in the Code of Justinian) against this assignment: he could pursue his title through an *action in rem*. According to *CTh*. 13.11.16[22], part of a law of Honorius, the landlord should have

---

to others. If it should appear that any collector of imposts has exacted anything more from the provincials than the amount established by statute, he shall be subjected to capital punishment. … (July 1, 321)]

20 *Codex Theodosianus* 1904:

CTh. 4.13.4 [Translation by Pharr 1952: Emperor Constantius Augustus to Proclianus, Proconsul of Africa. The payment of the impost contains the utmost utility and it must be guarded with such great diligence that it may be increased by frequent bidding. 1. Therefore Your Gravity shall order that the increases over the old payments of the accounts of the imposts shall be preserved for the resources of the fisc … (Constantinople, January 19(18), 360)]

21 *Codex Theodosianus* 1904:

CTh. 5.11.8 [Translation by Pharr 1952: The same Augustuses (Valentinian and Valens) to Rufinus, Praetorian Prefect. If any persons should choose to take possession of parcels of deserted land, they shall receive an exemption for three years. 1. But if persons who have obtained some of the deserted fields under a definite tax declaration should declare a smaller amount than the reckoning of such detained, up to three years from the day of issuance of this law, in that kind of possession only which they have voluntarily offered to assume. But after this time has elapsed, they shall know that they will be compelled to pay the entire land tax. 2. Therefore, if any person should judge this to be to his disadvantage, he shall immediately return the landholding, the future burdens of which he declines to assume … (Milan, August 6, 365)]

22 *Codex Theodosianus* 1904:

CTh. 13.11.16 [Translation by Phar 1952r: The same Augustuses (Honorius and Theo-

supplied to *comes primis ordinis* the necessary documents which proved his title and, if his application was accepted, expenses for improvements should be refunded to a new farmer. This favour shows its maximum effects in a constitution by Theodose I of 24 September 386 (*CTh.* 5.11.11[23]) according to that if owners should have not come back on owns lands within May after the issue of the edict, the free new farmer would have obtained on these lands *ius dominii et perpetuitate* with remission of not paid canons immediately, which means that landowners did not have possibilities to claim against new farmers.

---

dosius) to Sebastius, Count of the First Order. The surreptitious filing of partitions shall be barred, and a landholding shall remain firm in the possession of that man to whom it has been established once for all that it was delivered by tax equalizer. We do not allow the fisc to demand from the new master delinquent taxes for time that has already passed, so that one man may not begin to undergo an expense due to the fault of another. If any private citizen, indeed, should affirm either that a landholding is obligated to him which has remained thus far abandoned, or should prove that it is rightfully due him under any title, he must present his allegations before Your Respectability without delay, either through himself or through some other person ordained by law. Thus, if reasons of equity should persuade and the landholding should be transferred to the petitioner, the person who received it from the tax equalizer shall be relieved by the recovery of the expenses that were incurred in improving the estate. But in order that ownership once established shall not be disturbed by specious litigations, We decree that a space of two month must be observed, within which time, if any man should suppose that the property belongs to him by provable reason, he shall institute due action. But if the prescribed time should pass and should remain silent, it is Our will that no suit at all shall be begun for recovery. If any person at the time at which the tax equalizer assigns a landed estate to someone else should not suppose that suit should be brought about his own right, either by himself or by his men, he must, after the statutory period of two months has elapsed, forever hold his peace. … (Ravenna, March 14, 417)]

23 *Codex Theodosianus* 1904:

CTh. 5.11.11 [Translation by Pharr 1952. … which have been extended for a long time and are now almost without debtors, the debts shall be remitted. However, the following regulation shall be observed, namely, that first the owners shall be summoned by longer periods of time and very frequent edicts, in order that because of the hope of impunity they may be recalled more easily to their ancestral lares and their own dwellings. Then, finally, if they should not return before the month of May, which is sufficient time for those persons who are at a distance and too long a time for those who wish to return, any person who voluntarily offers himself shall not be obligated for the past burden, but, for the future he shall pay the ground rent of the fixed taxes in kind, according to his portion of such landholding; and he shall be secure in the right of ownership in perpetuity. …(Constantinople, September 24, 386)]

In the next centuries, methods of achieving this aim remained the same. The deserted lands might be granted or sold or leased on favourable terms,[24] including a firm title and temporary immunity. They might be compulsorily allocated to individual landlords, who made what they could out of them but were responsible for the full tax.[25]

To guarantee stability in southern territories Chilean Government granted *tierras fiscales* to Chileans, at first through permissions of occupation and exploitation (*permisos de ocupación omde explotación*); in a few cases, the generals gave plots of land to whom had helped the soldier, otherwise, the Government gave lands to whom will occupy borderlands.

The decree of 10th June 1823[26] was the first regulation to order the sale by auction of *tierras fiscales* and was carried out by decree of 28th June 1830. According to this, before the auction, the province intendant, together with the land surveyor, had the task of finding out if native people lived still here, then to surveying and to taxing lands left by native people (consequently belonged to State). Each lot could not exceed ten hectares and the sale by auction should be promoted everywhere, in provinces, towns, and *villas* (small country towns). The lands remained in native people's perpetual ownership if they were legitimate owners. These sales by auction were not successful because of the native people's assaults (they were not dominated) and land-scarce size, which aroused any commercial interest.

Afterwards was issued the Law of 4th December 1866[27] "*Fundación de poblaciones en el territorio de los indígenas*" (Foundation new villages in the territory of native people). It stated that the Chilean Government could buy

24 In the fourth century the government used private lands deserted by their owners to provide allotments for veterans, and in A.D. 368 Valentinian gave a general license to veterans to cultivate wastelands, forbidding the owners to appear at harvest time and claim *agraticum*.

25 They issued laws that required the landlord to pay anyway tax on deserted lands [*CJ*. 11.59(58).2 (= *CTh*. 11.1.4 *De annona et tributis*), A.D. 337; *CJ*. 11.59(58).12 (= *CTh*. 11.1.3), A.D. 412 for African landlords]; or compelled landlords to manage fertile lands together with those unfruitful [*CJ*. 11.59(58).9 (= *CTh*. 5.14.34), A.D. 394]. Sometimes it was given a fiscal immunity [*CJ*. 11.59(58)10 (= *CTh*. 13.11.9) A.D. 398] or the loss of fertile lands was inflicted [*CJ*. 11.59(58).5 *sine data*, *CJ*. 11.59(58).6 (= *CTh*. 10.3.4) A.D. 383)].

26 In 1813 the same regulations, which decreed the foundation of towns for the Mapuche people, established a sale by auction for lands abandoned, but they did not take place because of *Reconquista Española*.

27 Boletin 1866, p. 426 - 430.

lands by native people or by private citizens to whom the Mapuche people had sold them before. Or it took ancestral lands when native people did not show property deeds and in this case, the State helped them, with economic support, to go to live in town. Lands, purchased by the Government or left by native people, were lot sold by auction. The best offer price could be extended in fifty years at 2% annual interest. One part of these lots should be set aside for the Chilean or foreign colonies settlement. Eight years after, this law was confirmed by the Law "*Enajenacion de terrenos situados en territorio araucano*" (4th August 1874[28]) (Transfer of public lands located in the Araucanía region), which furthermore regulated transfers of native lands, acquired by private citizens. It was strictly forbidden purchased lands which belonged to the Mapuche people's territory and these lots were confiscated and put out for sale by auction. In the presence of deeds legally recorded, owners could be refunded for expenses and could obtain the equivalent of the bid value. Through sale by auction, Chilean Government allowed private citizens or foreigner to establish a settlement.

At the beginning of the 19th century, the Government of Chile made laws to sponsor Chilean and foreign settlements, but first attempts were unsuccessful.[29] In 1845 was issued the Law of 18th November "*Colonias de naturales I estranjeros*" (Settlement of Chilean and Foreigners) which established assignments of lots to Chilean or foreign families. Detailed rules on settlement were regulated afterwards by the laws as mentioned above of 1866 and 1874.

According to art. 11 of the law of 4th August 1874, the Government drew up contracts with individuals or companies, charging them with the selection of families from Europe and North America for their transfer to Chile. The private citizens, who founded a new settlement, and each family, who came from Europe or the United States of America, obtained a lot; it could be extended until 150 hectares in plain and the double in mountain, and, decreed by the President of Chile Republic, to each son or family member older as ten years was assigned more a half of lot and to each one younger as four a quarter of lot.

For the High Decree of 10th October 1882 an Immigration Office (*Agencia General de Inmigración*) was set up in Paris (till 1888 Francisco de Borja

28 Boletin 1874, pp. 82-87

29 Earlier attempts were unsuccessful. On 10th April 1824, because of O'Higgins abdication, was issued a law which gave guarantees and exemptions either to colons who would install in Chile industrial production or to colons who would devote themselves to agriculture.

Echeverría was at the head of the office). According to the next Immigration Regulation of 24 June 1905, two agencies were set up in Genoa and in Hamburg, the most important harbours for boarding to (South) America.

The *Agencia* was competent to draw contracts with individuals; whereas the companies obtained the land granting and the authorization to conclude an agreement with private citizens by decree of Government of Chile.

Who wanted to go to Chile, should have presented an application (*solicitud*) to Immigration Office with the following certificates: certificate of birth of him and his family members; health certificate; certificate of good morality, good life and conduct and a statement of the skills evaluation.

After the Immigration Office had accepted the request, the contract was drawn. The future colon bound himself to go to Chile with his family, to settle in the designated lot and to stay there at least six years, afterwards he would have obtained the title. The Immigration Office paid travel tickets (either through agreements with shipping companies or tickets purchase). The Government bound itself to give colon and his family, at arrival in Chile, hospitality and a daily allowance of thirty cents of *pesos* for each adult and fifteen cents for each kid older than ten years, until they would have taken possession of the lot, selected by law or by company in agreement with the *Inspección General de Tierras*. The colons knew which lot they would have obtained, before going on the trip. After the colons had taken possession of the lot, they received necessary footage for buying a house, pack animals and tools for soiling (in case of woodland, a deforestation machine for twenty families). Furthermore, a pension of twenty *pesos* for one year and health care and medicines for two years. The government only anticipated all these costs, which the colons would have given back in ten annual instalments. After they had paid one-third of their debt, stayed at the farm for six years (reduced to three with the decree of 12th October 1908) and built a house, the colons obtained the title, which was as mortgaged as if the lot had been sold by auction. After the total payment, title without a mortgage was obtained through a decree (and then through a deed) recorded in *Conservador de Bienes Raíces*.

Foreign settlements were only in part successful, especially German settlements, which, how it is still possible to observe, helped strongly to the development of South Chile territory. And, though to a lesser extent, Italian settlement in *Capitan Pastene* and in the neighboring area, near to Temuco, in the *Araucanía*, the Mapuche people land (*Región de la Araucanía* today).[30]

30 In 1904 and 1905 Sociedad Nueva Italia, assignee of Fratelli Ricci & Co.'s rights,

But some experiences failed and reasons could be as follows: a) breach of contract on company's side: the company did not carry families or did not give tools for settlement or did not give whole assigned lot or defrauded the Government of Chile, because the company obtained more lots compared to the number of families.; b) breach of contract on State's side: as result of bad knowledge of the land map, the Government promised more land what he had or he promised lots which were already granted or sold; c) Exaggerated generosity by State in drawing land granting contracts without knowing the real situation of the country.[31]

4. Conclusion

Some means adopted by the Chilean government in the attempt to taking control over the southern territories and improving soil conditions do not represent new strategies. It is known that the term '*colonus*' was already used in the laws of the Roman empire and since Principate, emperors had to face up with the question of *agri deserti* who shows strong similarity with the Chilean question of native people's land.

But it is interesting - and I think it would deserve more attention than what it has received - to mark how two experiences so distant in the time and space had very similar problems and faced up with the same solutions.

---

who was assignee of Sebastián Nicosia's rights, settled down for Decree No. 553 of 30th May 1908 one hundred Italian families from small towns of the Apennines of Emilia-Romagna North-East Italy. They were in a very good relationship with the Mapuche people, improved soil conditions and attended to keep Italian food tradition. Recently, the Italian Ministry of Foreign Affairs gave to ham of *Capitan Pastene* PDO (Protected Designation of Origin) certificate for ham production.

31 There was a spontaneous migration to Chile too. For High Decree of 10th September 1899, these migrants were recognized as foreign colons, if they made a request. Whoever was interested, put in an application to *Ministerio de Colonización* (Office for Settlement) with enclosed certificates as mentioned above. Their skills requested were farm jobs. After the competent office had accepted the request, the migrant (colon) received a lot with variable size (up to forty hectares for each householder (*padre de familia*), more up to twenty for each almost twelve years old son. The colon bound himself to stay there with his family and to soil land in person for five years; furthermore, he had to mark the boundary and to get better his lot, which he could not transfer or sell. He could obtain the ownership such as the foreigner who arrived in Chile by contract. For the High Decree of 13th July of 1903, the possibility to make a request a plot of land was restricted to foreigners who were arrived in Chile within a year.

It is possible to see an analogy between Chilean and Roman experience. Both, Chile and the Roman empire, had problems with the exploitation of some lands in their territory. For different causes: Chilean Government had to face up the question of the Mapuche people lands, whereas the Roman emperors should resolve the question of *agri deserti*, lands which were infertile and abandoned by landlords who could no more pay the taxes (or they did not want to do it). The effects were the same: bad exploited lands and fewer tax revenues for the State.

According to Jones:[32] "The problem of imperial lands was administratively simpler. The government would offer emphyteutic or perpetual leases, with a few years' initial immunities, insisting that grantees must hold good land of their own to guarantee the rent: in A.D. 337 it was enacted that anyone who bought the good private land of an emphyteutic lessee of bad imperial land became responsible for the emphyteutic lease. The emperors also frequently ruled that in any lease, for term o years or in perpetuity, badlands must be mixed with good and that lessees must never be allowed to take productive land only"

The question of ancestral land rights in Chile is still struggling. On December 2013 appeared in "The Independent" an article titled "Chile: The nation that's still waging war on Native Americans".[33] It told the history of a native family who lives in a wooden shack on a plot of land outside the rural town's limits, Ercilla, a seven-hour bus journey south of the Chilean capital, Santiago. This land, one of those lots which Chilean Government sold to foreign settlers, belongs to its rightful owner, but the native family has been occupying it as part of an ancestral land rights claim. This is only an example of the relationship between native people and landowners, which has continued to intensify over the last decade with hunger strikes and violence, until when a married couple burnt to death after their farmhouse was set on fire by a Mapuche leader. The country's refusal to recognize ancestral land claims has sparked a deadly conflict with the Mapuche people.

The dispute has its roots at the end of the 19th century in the so-called "pacification" of the Araucania region, when the territory was incorporated into Chilean State. From the time it became independent, the Chilean Government faced up the problem of these lands. Native people were not inte-

32 Jones 1964, p. 813.

33 www.independent.co.uk/news/world/americas/chile-the-nation-that-s-still-waging-war-on-native-americans-8996336.html

grated, and they had a connection with Nature so different that their lands were considered bad exploited or abandoned. Chilean State tried then to resolve the question through organized colonization of these lands; especially inviting foreigners from Europe and the United States of America to settle down in Chile, where they would have received a plot of land to cultivate.

Chile, adopting the solution found by Roman laws, acquired the native people's lands (in the Roman empire, abandoned lands belonged to the emperor or landlords) and sold them by auction to whom was good to till the soil and to improve it. The Chilean Government went further and decided to give these sold lots for founding foreign settlements. From Europe and the United States of America came many families to settle down in Chile and to help the growth and development of the country.

They did it and for that, the solution taken by the Government can be considered as the best, but unluckily instead of working out the question of the Mapuche people, settlements of their ancestral lands have made it worse.

In both experiences, Roman farmers and foreign settlers in Chile became owners of these lands, after a fixed period, but was this title legitimate? Could Roman emperors or the Chilean Government transfer these lands? We can affirmatively answer for the Roman empire: the emperors made and were the Law, so they could decide what they wanted and apart from this, these were land abandoned by their owners, who could anyway claim them within a fixed term. Of course, we could say the same for the Chilean Government and the transferred title was legitimate, but here the question is that these lands belonged to other people who had a different mother tongue, different culture, different laws and who probably did not understand what it was happening to their lands, and, although in many cases the Mapuche people left their lands or sold them without conflicts, their descendants assert that the whole question of foreign settlement in Chile was not legitimate, but that is another question.

My paper does not talk about ancestral land rights and their political implications,[34] but just shows Chilean colonialism's historical roots and its strong connections with the later Roman empire's experience, when Roman emperors used the same means to resolve similar land problems in some territories of the empire.

34 The Chile Government set up a body to resolve the Mapuche land dispute: the Conadi (*Corporacíon Nacional de Desarrollo Indígena* - National Corporation for Indigenous Development). The organization is allotted a yearly budget to buy properties from landowners if they want to sell. It has no power to fix prices or expropriate.

Bibliography

Primary Sources

Boletin 1813 = Boletín de las leyes y decretos del Gobierno, Santiago de Chile, Imprenta Nacional, Calle de la Moneda, I, 1813

Boletin 1866 = Boletín de las leyes y decretos del Gobierno, Santiago de Chile, Imprenta Nacional, Calle de la Moneda, XXXIV, 1866.

Boletin 1874 = Boletín de las leyes y decretos del Gobierno, Santiago de Chile, Imprenta Nacional, Calle de la Moneda, XLII, 1874.

Codex Theodosianus 1904 = *Codex Theodosianus*. I. *Theodosiani libri XVI cum constitutionibus Sirmondianis*, ed. Th. Mommsen, I.2, Berlin, 1904

Código Civil de la Republica de Chile 1856 = *Código Civil de la Republica de Chile* Santiago de Chile: Imprenta Nacional, calle de Morandé, núm. 36. Mayo 31 de 1856

Pharr 1952 = C. Pharr, *The Theodosian Code and Novels, and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography*, Princeton, 1952

Secondary Sources

Bianchi 2018 = P. Bianchi, *Gli effetti del passaggio del tempo nelle leggi imperiali e nella prassi da Costantino a Giustiniano. Evasione fiscale e possesso, inerzia dei creditori*, Rome, 2018

Encina 1949 = F.A. Encina, *Historia de Chile*, Santiago de Chile, 1949 (3ª ed.).

Fustel de Coulanges 1885 = Fustel de Coulanges, *Le colonat romain. Recherches sur quelques problemes d'histoire*, Paris, 1885.

Ibañez Santa Maria 2013 = A. Ibañez Santa Maria, *Historia de Chile (1860 – 1973)*, Santiago de Chile, 2013.

Jones 1964 = A.H.M. Jones, *The Later Roman Empire. 284 – 602*, voll. 2, Oxford, 1964.

Levy 1951 = E. Levy, *West Roman Vulgar Law. The Law of Property*, Philadelphia, 1951.

Saumagne 1937 = Ch. Saumagne, *Du rôle de l'*origo *et du* census *dans la formation du colonat romain*, in *Byzantion*, 12, 1937, p. 487 – 581.

Savigny 1850 = F.C. von Savigny, *Über dem römischen Kolonat*, *Vermischte Schriften*, Vol. II, Berlin, 1850.

Sirks 2008 = A J B Sirks, *The Colonate in Justinian's Reign*, in *Journal of Roman Studies,* 98, 2008, p. 120-143.

Sirks 2012 = A.J.B Sirks, *Did poverty lie at the origin of the Colonate?*, in *Koinonia*, 36, 2012, p. 133 – 143.

Sirks 2017 = A.J.B Sirks, *L'aspetto fiscal del colonato dopo il 438*, in (ed. G. Bassanelli Sommariva, S. Tarozzi, P, Biavaschi) *Ravenna Capitale. Dopo il Teodosiano. Il diritto pubblico in Occidente nei secoli V – VIII*, Santarcangelo di Romagna, 2017, p. 235-243 (https://www.ravenna-capitale.it/images/libro/2017/14_Sirks.pdf).

CONTEXTUALIZACIÓN IUSHISTÓRICA DE LA REFORMA AGRARIA CHILENA (SIGLO XX)*

Agustín Parise

1. Introducción

El presente estudio apunta a contextualizar la reforma agraria que se llevó a cabo en la República de Chile durante el siglo XX. La experiencia de reforma chilena amerita especial atención ya que, cuando se la compara con experiencias en otras jurisdicciones de las Américas, refleja el mayor grado de impacto en la modernización de la agricultura.[1] Es dable notar que la propiedad es principalmente una cuestión de mentalidad,[2] y la cabal comprensión de la mentalidad en un momento y lugar determinados ayuda a entender el alcance de un derecho. Las fronteras que delimitan los intereses de los diferentes actores (*v.gr.*, Estado, propietarios) son problemáticas[3] y las instituciones del derecho de propiedad proporcionan un terreno fértil para los problemas cuando estos límites se solapan.[4] Esos conflictos atraen la atención de los académicos más allá del derecho, y ese interés ha resultado en estudios por, *inter alia*, economistas, sociólogos, politólogos y teólogos.[5] Por lo tanto, la problematización de la propiedad a menudo dispara preguntas relacionadas con el papel de los diferentes actores. Nuevas condiciones sociales afectan así a las culturas locales y esos impactos provocan cambios en las instituciones del derecho de propiedad.[6] Un enfoque desde el estudio de la historia del derecho ayuda a identificar las transformaciones en las instituciones del derecho de propiedad, ayudando así a demostrar que las interpretaciones actuales no son

---

* El presente estudio ofrece una traducción de secciones tomadas de Agustín Parise; *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries)*. Leiden: Brill Nijhoff, 2017.

1 Sampaio 1993, p. 20.

2 La expresión fue compartida por Abelardo Levaggi en un curso sobre historia del derecho de propiedad en la Universidad de Buenos Aires en agosto de 2001.

3 Reich 1964, p. 733.

4 Castán Tobeñas 1963, p. 7.

5 Castán Tobeñas 1963, p. 7.

6 Beaglehole 1935, p. 316.

dogmas sagrados e incuestionables.[7]

El presente estudio explora la experiencia chilena de reforma agraria y se divide en tres partes. En primer lugar, se presenta el afloramiento del paradigma de la función social. Se abordan entonces brevemente sus orígenes en múltiples foros y los esfuerzos de Léon Duguit, quien obró como principal paladín. En segundo lugar, se conceptualiza la reforma agraria y se elabora sobre sus orígenes y expansión en América Latina. En tercer lugar, se ofrece información sobre el desarrollo normativo en Chile, abriendo surcos para la reforma mediante legislación especial. Se verá de ese modo la evolución y la implementación de la reforma en esa parte de las Américas. El presente estudio ofrece así herramientas para entender cómo la República de Chile experimentó cambios en su paradigma de propiedad.

2. Afloramiento de una función social[8]

El derecho privado experimentó un proceso de socialización en el período comprendido entre 1890 y 1930,[9] ya que el paradigma liberal había ofrecido pocas limitaciones al derecho de propiedad. Cambios graduales comenzaron a ocurrir en la sociedad en relación con el alcance de este derecho y el paradigma de la función social comenzó a desarrollarse en el hemisferio occidental. Ese enfoque implicaba una comprensión menos *egoísta* de la propiedad.[10] Se habían producido cambios en las estructuras sociales y económicas de las diferentes jurisdicciones, con migraciones masivas a las ciudades y los efectos de la Revolución Industrial.[11] En consecuencia, el crudo paradigma individualista comenzó a ser desafiado como una reacción a los problemas sociales que se estaban desarrollando en el hemisferio occidental.[12]

El cambio se percibió con los sucesos revolucionarios de 1848 en Europa[13] y con los escritos de, *inter alia*, Pierre-Joseph Proudhon,[14] Karl Heinrich Marx[15]

7 Azcárate (de) 1879, p. xviii; Azcárate (de) 1883, p. 352.

8 Aspectos de esta sección 2 fueron publicados previamente en Parise 2019.

9 Halpérin 1996, p. 186.

10 Areán 1994, p. 188.

11 Cordero Quinzacara 2008, p. 503.

12 Azcárate (de) 1883, p. 357-453.

13 Azcárate (de) 1883, p. 359.

14 Peset 1999, p. 443 y 449.

15 Adrogué 1991, p. 32.

y Auguste Comte.[16] La idea de una función social no se limitó al derecho de propiedad, ya que estuvo presente en diferentes áreas del derecho,[17] *inter alia*, el derecho de familia, sucesiones[18] y procedimiento civil.[19] Quienes abogaran por la adopción de un paradigma amplio de la función social podían apuntar a encontrar en la legislación un reflejo de la realidad social,[20] donde el derecho debía ser un producto de esta última.[21] Por lo tanto, la función social podía estar sujeta a alteraciones, según las mutaciones en las circunstancias sociales de diferentes sociedades en diferentes momentos.[22]

Los defensores de un cambio de paradigma pronto surgieron en Europa continental,[23] más allá de los juristas socialistas y sus escritos.[24] La necesidad de cambio también estuvo presente en las obras de autores provenientes de jurisdicciones de habla inglesa,[25] aunque no necesariamente en la misma línea o en la misma medida que en Europa continental.[26] El nuevo paradigma también estuvo presente en los escritos de la Iglesia Católica,[27] los cuales no negaron la existencia de un carácter tanto social como individual para la propiedad.[28] Se desarrolló una Doctrina Social de la Iglesia, cuyo objetivo era humanizar la propiedad, siendo un derecho natural, gravado con una *hipoteca social*.[29]

El jurista francés Duguit fue el paladín del paradigma de la función social,[30]

---

16 Ankersent & Ruppert 2006, p. 95; Bergel 1994, p. 18; Adrogué 1991, p. 34.

17 Véase, por ejemplo, Lloredo Alix 2012, p. 214.

18 Caroni 2012, p. 340-341; Caroni 2013, p. 89-99. El segundo trabajo abordó la función social en el derecho de sucesiones en Suiza.

19 Verkerk 2010, p. 257-277.

20 Hernández Gil 1969, p. 74.

21 Keiser 2005, p. 162.

22 Ruíz B. 1964, p. 39.

23 Véanse, por ejemplo, trabajos de Heinrich Ahrens, Gumersindo de Azcárate, Otto von Gierke, Henri Hayem, Anton Menger y José María de Semprún y Gurrea.

24 Castán Tobeñas 1963, p. 63; Bolgár 1960, p. 288.

25 Véanse, por ejemplo, trabajos de James Barr Ames, Benjamin Nathan Cardozo, Richard Theodore Ely, Oliver Wendell Holmes, Jr. y Frederic Pollock.

26 Simpson 1998, p. 27.

27 Véanse, por ejemplo, las encíclicas *Rerum novarum* (1891) de León XIII, *Quadragesimo anno* (1931) de Pío XI, *Mater et magistra* (1961) de San Juan XXIII y *Populorum progressio* (1967) de Pablo VI.

28 Quadragesimo anno 1931, § 45. Véase también Adrogué 1991, p. 34.

29 Expresión acuñada por el Papa San Juan Pablo II. Véase Adrogué 1991, p. 34.

30 Sobre la vida y obra de Léon Duguit, véase en general el volumen conmemorativo en Melleray 2011 y Calvo González & Monereo Pérez 2005.

afirmando desde el principio que el paradigma liberal estaba en extinción.[31] El publicista francés popularizó el término *función social* (*fonction sociale*) en 1905,[32] y unos años más tarde, en agosto y septiembre de 1911, pronunció una serie de seis conferencias[33] en la Universidad de Buenos Aires,[34] donde defendió la función social en el derecho privado.[35] En la sexta conferencia, que trata principalmente sobre la función social de la propiedad, indicó que la propiedad estaba sujeta a la socialización, lo que implicaba dos cosas: "que la propiedad individual [ya] no es un derecho individual, y se transforma en una función social; y segundo, que hubo un aumento en el número de casos de riqueza asignados a colectividades, que deben estar sujetos a protección jurídica".[36] Duguit también declaró que los propietarios podían usar las cosas siempre y cuando cumplieran una función social. Tenían que asumir tres tareas:[37] (i) disfrutar de las cosas al satisfacer necesidades individuales o colectivas;[38] (ii) no dejar las cosas sin uso o explotación;[39] y (iii) permitir el uso de las cosas cuando se pretende cumplir con los intereses sociales.[40] El autor francés bordó la existencia de derechos subjetivos y defendió que "la propiedad ya no es el derecho subjetivo del propietario; es la función social del poseedor de riqueza".[41] Las ideas y escritos de Duguit generaron debate y motivaron otros estudios.[42] Sus postulados también fueron bienvenidos en América Latina, especialmente luego de sus Conferencias de Buenos Aires.[43]

El paradigma de la función social se extendió por América Latina y motivó cambios en la redacción de constituciones y códigos civiles, mientras que, a

31 Duguit 1912, p. 155.

32 Halpérin 1996, p. 197.

33 Sobre el contenido de las seis conferencias, véase también Mirow 2010, p. 203-209.

34 Duguit 1912, p. I; Mirow 2010, p. 198.

35 Para un estudio sobre el impacto de los postulados de Léon Duguit en el derecho privado, véase en general Morin 1932.

36 Duguit 1912, p. 148-149.

37 Duguit 1912, p. 165-166, citado también por Alessandri Rodríguez et al. 2010, p. 41-42. Véase también Salvat 1962, p. 17.

38 Duguit 1912, p. 165-166.

39 Duguit 1912, p. 166-167.

40 Duguit 1912, p. 168-169.

41 Duguit 1912, p. 158. Véase también Mirow 2010, p. 207.

42 Sobre los diferentes grados de aceptación y rechazo de las ideas de Léon Duguit, véase el estudio detallado en Hakim 2011.

43 Keiser 2012, p. 269.

su vez, incluyó cambios en la interpretación de los tribunales y en el desarrollo de legislación especial que abogaba por el nuevo enfoque de la propiedad. Esa recepción tuvo lugar principalmente durante las primeras décadas del siglo XX, si bien algunos textos más recientes aún incorporan la idea de una función social.[44] La recepción se percibió en diversos ámbitos y el presente estudio se focaliza en la acogida brindada mediante la legislación especial de reforma agraria.

3. Postulados de la reforma agraria

Las jurisdicciones latinoamericanas incorporaron el paradigma de la función social también dentro de legislación especial y de los nuevos códigos *satélite*. Esas disposiciones se desarrollaron fuera de los códigos civiles y tenían como objetivo incluir al nuevo paradigma. La legislación especial ayudó a avanzar con un cambio de paradigma de propiedad, despegándose de los principios liberales de los códigos civiles decimonónicos que, quizá debido a la veneración de la que eran objeto, fueron difíciles de dejar atrás. Un ejemplo clave de legislación especial se encuentra en las leyes de reforma agraria que se extendieron a través del continente. La legislación especial contribuyó a crear un nuevo *statu quo* o dimensión social,[45] introduciendo reformas profundas en el derecho de propiedad, transformando la propiedad en un derecho limitado por el bienestar común.[46] La descodificación también allanó el camino para la incorporación del nuevo paradigma. En consecuencia, el cambio de paradigma también se incluyó en los códigos *satélite* que no formaron parte de los códigos civiles, pero que afectaron su contenido. La descodificación hizo posible la promulgación de códigos *satélite* que hicieron que los códigos civiles dependieran necesariamente de ellos. Ejemplos de descodificación son los códigos rurales, laborales y de familia que se introdujeron durante el siglo XX en diversas jurisdicciones americanas.

La promulgación de leyes de reforma agraria abrió camino para la recepción del nuevo paradigma en las Américas. La reforma agraria ha sido así descrita de diferentes maneras,[47] y además no tiene un significado úni-

44 Por ejemplo, el artículo 56, párrafo 1 de la Constitución Política de Bolivia de 2009 hizo referencia a la función social de la propiedad. Véase Constitución de Bolivia 2009.

45 Cordero Quinzacara 2008, p. 504.

46 Delgado de Miguel 2002, p. 62.

47 Ankersent & Ruppert 2006, p. 71.

co.[48] Estas reformas pueden verse como procesos históricos que se desarrollaron a partir de impulsos políticos apenas previsibles, tanto internos como externos.[49] Los procesos se pueden definir de forma resumida como medios para proporcionar tierra a los habitantes que carecen de ella,[50] seguido de una redistribución de la tierra, que tiende a beneficiar a los pequeños agricultores y trabajadores agrícolas.[51] La redistribución de la tierra se mueve desde la élite terrateniente hacia quienes tienen un acceso limitado o nulo a la tierra.[52] Sin embargo, la reforma agraria también puede considerarse un elemento para el cambio social que apunta a eliminar estructuras sociales rígidas, donde los actores dentro de esos contextos provocan cambios.[53] En la década de 1960, este tipo de reformas fue descrito como un "proceso muy complejo que implica transformaciones sustanciales no sólo en los modos de vida de las zonas rurales, en la estructura de la economía, sino además, en la estructura del poder y de la organización social".[54]

La reforma agraria varió según la perspectiva adoptada y, en consecuencia, los diferentes actores (*v.gr.* latifundistas, políticos, pequeños agricultores) ofrecieron diferentes definiciones y modos de entender el proceso.[55] Una serie de condiciones fueron fundamentales para desencadenar estas reformas. La estructura de tierras debía ser inadecuada, caracterizada por latifundistas y por trabajadores con acceso a la tierra muy limitado (o nulo).[56] Debía existir incluso una pobreza notable en las áreas rurales, donde los pequeños agricultores no podían acceder a los beneficios de los desarrollos agrícolas e industriales.[57] Finalmente, la inestabilidad política debía acompañar este escenario.[58] Sin embargo, la reforma agraria fue muchas veces rechazada por

48 Mirow 2004, p. 219.
49 Sampaio 1993, p. 45.
50 Tai, p. 11.
51 Barraclough 1973, p. 33; Warriner 1969, p. xiv, citado también por Karst & Rosenn 1975, p. 241.
52 Dekker 2003, p. 78.
53 Barraclough 1973, p. 34-35.
54 Chonchot 1965, p. 104.
55 Barraclough 1965, p. 127.
56 Barraclough 1965, p. 145.
57 Barraclough 1965, p. 145.
58 Barraclough 1965, p. 145.

los latifundistas, quienes controlaban grandes extensiones de tierra.[59] En el presente estudio, la legislación sobre reforma agraria abarca aquellas emanadas de las legislaturas con el objetivo de modificar la distribución existente de la tierra dentro de una jurisdicción. Al mismo tiempo, esa legislación hace que la propiedad de la tierra existente esté disponible para aquellos miembros de la sociedad a quienes tradicionalmente se les había negado su capacidad o derecho de propiedad. Como corolario, esa nueva legislación ayuda a generar un cambio de paradigma dirigido hacia la función social.

Los esfuerzos para lograr una reforma agraria se extendieron por todo el mundo, experimentando un desarrollo significativo durante la segunda mitad del siglo XX.[60] Los primeros precedentes en las Américas siguieron a la Revolución Mexicana, mientras que en Europa varias jurisdicciones implementaron reformas agrarias luego de la Primera Guerra Mundial[61] (*v. gr.*, España, década de 1930).[62] La legislación dirigida a la reforma agraria estuvo presente en América Latina y se desarrolló con diferentes grados de éxito en Europa, África, Asia[63] y más tarde en Australia,[64] alcanzando, entre otros, Filipinas, India, Irán, Pakistán y Taiwán.[65] Varios países en desarrollo y otros en proceso de reconstrucción (*v.gr.*, Japón, década de 1940)[66] emprendieron reformas ambiciosas, principalmente durante la segunda parte del siglo, con el objetivo de lograr cambios profundos en la división y el régimen de las tierras rurales.[67] Esa tendencia mundial hacia la reforma agraria resultó finalmente en la primera Conferencia Mundial de las Naciones Unidas sobre Reforma Agraria y Desarrollo Rural, que se celebró en Roma en 1979.[68]

La función social ofreció un contexto para la mayoría de los esfuerzos de reforma agraria en las Américas.[69] La *función social*, en el contexto de esas jurisdicciones, fue un término amplio que promovió el uso de la tierra como

59 Lapp 2004, p. 2.

60 Sin embargo, el propósito de la redistribución de la tierra se remonta a la Antigua Grecia. Ankersent & Ruppert 2006, p. 72.

61 Durán Bernales 1966, p. 172-174.

62 Robledo - Espinoza 1999, p. 406.

63 Dekker 2003, p. 78 y 88-102; Halpérin 2008, p. 312-319.

64 Véase Villiers (de) 2003, p. 89-129.

65 Véase en general Tai 1974; Conesa 2012, p. 5.

66 Barraclough 1973, p. 33.

67 Halpérin 2008, p. 312-313.

68 Parra Silva 2006, p. 239-240.

69 Ankersent - Ruppert 2006, p. 71.

un medio para lograr el progreso social y económico.[70] En última instancia, la reforma agraria se convirtió en un componente importante del derecho de propiedad en las jurisdicciones de América,[71] una región que era considerada líder en la distribución desigual de la tierra,[72] donde el 90 % de la tierra era propiedad del 10 % de la población durante la década de 1960.[73] Esa relación tradicional de la tenencia de tierra dio forma al sistema social,[74] donde los campesinos solían carecer de educación formal, atención médica adecuada y vivienda digna.[75] Los reformistas intentaron terminar con los latifundios y erradicar las zonas desocupadas,[76] mientras que el nuevo paradigma pareció justificar la intervención para eliminar la distribución desigual de la tierra.[77]

La reforma agraria tuvo lugar en la mayoría de las jurisdicciones latinoamericanas. La primera experiencia se remonta a México, a partir de 1915, poco después de la Revolución.[78] México adoptó una serie de decretos, códigos y leyes para lograr la reforma.[79] La Constitución Mexicana de 1917 incorporó elementos de la reforma agraria, principalmente en el artículo 27.[80] En 1934 se dieron nuevos pasos hacia la reforma a través de la descodificación, cuando se promulgó el Código Agrario en México.[81] Ese código estimuló el establecimiento de ejidos,[82] donde la tierra podría cultivarse colectivamente o distribuirse.[83] Varias jurisdicciones siguieron a México en el camino hacia la reforma agraria durante el próximo medio siglo, aunque algunas jurisdicciones parecen no haber exigido una reforma (*v.gr.*, Argentina, Uruguay).[84] En la

70 Hendrix 1993, p. 3.

71 Mirow 2004, p. 227.

72 Ankersent - Ruppert 2006, p. 70; Karst & Rosenn 1975, p. 242.

73 Lapp 2004, p. 2.

74 Barraclough 1973, p. 40. Para un análisis sociológico de la reforma agraria en América Latina, véanse los trabajos de Antonio García (*v.gr.*, García 1973).

75 Alexander 1974, p. 101.

76 Ankersent - Ruppert 2006, p. 100.

77 Ankersent - Ruppert 2006, p. 119.

78 Halpérin 2008, p. 313-314; Assies & Duhau 2009, p. 359-360. Véase en general Mirow 2004, p. 219-222.

79 Hernández Gaona 1991, p. 93.

80 Mirow 2004, p. 206; Halpérin 2008, p. 313-314; Alexander 1974, p. 25.

81 Hernández Gaona 1991, p. 88; Meyer 1998, p. 187.

82 El ejido existió antes de este período, debe notarse. Sobre el ejido más allá de la primera mitad del siglo XX, véase Duhau 2009.

83 Alexander 1974, p. 26.

84 Alexander 1974, p. 26; Lapp 2004, p. 14.

región se produjo un *contagio*[85] de legislación de reforma agraria. Ejemplos de los primeros pasos legislativos de reforma agraria[86] se encuentran en Colombia (1936), Venezuela (1940), Puerto Rico (1941), Guatemala (1952), Bolivia (1953), Cuba (1959), República Dominicana (1961), Chile (1962), Costa Rica (1962), Honduras (1962), Panamá (1962), Paraguay (1963), Perú (1963), Brasil (1964), Ecuador (1964), Nicaragua (1979) y El Salvador (1980).[87] La reforma agraria experimentó un auge en la década de 1960[88] y se desaceleró en la década de 1980.[89] Incluso se ha afirmado que los cambios en las estructuras agrarias de esas jurisdicciones fueron mayores durante el período entre 1930 y 1980 que durante los 400 años anteriores.[90]

Las reformas variaron significativamente en la medida en que reestructuraron la tenencia y la producción de la tierra.[91] Las medidas requerían, entre otras cosas, el establecimiento de limitaciones a la propiedad privada y la expropiación de grandes extensiones de tierra.[92] Los programas variaron en alcance: algunos concedieron prácticamente todas las tierras individualmente para ser cultivadas como granjas familiares; otros optaron por sistemas mixtos, dando la bienvenida a la agricultura cooperativa y a la propiedad privada de la tierra; mientras que otros optaron por la socialización de la tierra, como fue el caso en Cuba.[93] La experiencia de la reforma agraria cubana de 1959 fue radical[94] y se llevó a cabo como parte de la revolución comunista.[95] Ese movimiento despertó preocupación en los EE.UU, impulsando reformas en las jurisdicciones a través del programa denominado Alianza para el Progreso

85 Este término se toma prestado, *mutatis mutandis*, de Colley 2014, p. 237.

86 Algunas jurisdicciones promulgaron múltiples leyes de reforma agraria. Por ejemplo, Colombia promulgó leyes de reforma agraria en 1936, 1961 y 1980. Sampaio 1993, p. 10.

87 Sampaio 1993, p. 10; Zoomers & Haar (van der) 2000, p. 19; Chonchot 1965, p. 100; Halpérin 2008, p. 314-315; Alexander 1974, p. 40; Janvry (de) et al. 2001, p. 279; Lapp 2004, p. 13; Rosenn 1963, p. 335; Wilkie 1974, p. 1.

88 Tai 1974, p. 15.

89 García 1985, p. 120.

90 Long - Roberts 1994, p. 325.

91 Long - Roberts 1994, p. 362.

92 Zoomers & Haar (van der) 2000, p. 19.

93 Alexander 1974, p. 58.

94 Sampaio 1993, p. 11.

95 Alexander 1974, p. 37.

del presidente John Fitzgerald Kennedy.[96] Ese programa abogó por reformas progresivas que ayudaran a evitar más revoluciones a lo largo del continente[97] y transformó la idea de reforma agraria, de algo que se consideraba subversivo, a una especie de compromiso general de las jurisdicciones que apuntaba hacia un objetivo respetable.[98] Sin embargo, la promulgación de leyes de reforma no significó necesariamente que la reforma agraria se llevara a cabo.[99] A pesar de que se puede afirmar que las disposiciones de reforma agraria en última instancia no alteraron sustancialmente la estructura agraria de la región,[100] o que en algunas jurisdicciones *no fueron más que un gesto*,[101] ayudaron a acoger la recepción del nuevo paradigma. Esas normas se sumaron a los esfuerzos plasmados en diversas constituciones y códigos civiles. La promulgación de leyes especiales y la introducción de la función social llevaron a la eliminación de la comprensión unitaria de la propiedad.[102]

4. Desarrollo normativo

Chile acogió el paradigma de la función social en su legislación especial.[103]

---

96 Una carta estableció la Alianza y se firmó en Punta del Este (Uruguay) en 1961. Véase Karst - Rosenn 1975, p. 275; Sampaio 1993, p. 11.

97 Chonchot 1965, p. 102; Long & Roberts 1994, p. 361; Carroll 1970, p. 126; Sampaio 1993, p. 33; Lapp 2004, p. 28-29.

98 Alexander 1974, p. 23, 42.

99 Karst - Rosenn 1975, p. 274.

100 Sampaio 1993, p. 15.

101 Alexander 1974, p. 40.

102 Cordero Quinzacara 2008, p. 513.

103 Nótese que Chile también dio la bienvenida a la función social, *inter alia*, en su texto constitucional. La actual Constitución de Chile fue adoptada en 1980, y sus predecesoras fueron adoptadas en 1833 y 1925. Diversas reformas fueron incorporadas a esos tres textos, sin embargo. Dos de esas reformas, implementadas en 1963 y 1967, incorporaron elementos de reforma agraria. Por su parte, el término *función social* fue introducido en el parágrafo 10 del artículo 10 del texto constitucional: "El derecho de propiedad en sus diversas especies. La ley establecerá el modo de adquirir la propiedad, de usar, gozar y disponer de ella y las limitaciones y obligaciones que permitan asegurar su función social y hacerla accesible a todos. La función social de la propiedad comprende cuanto exijan los intereses generales del Estado, la utilidad y salubridad públicas, el mejor aprovechamiento de las fuentes y energías productivas en el servicio de la colectividad y la elevación de las condiciones de vida del común de los habitantes. [...]" Ley 16615 (1967).

Véase también Muñoz León 2005, p. 263-269; Carrasco Delgado 2006, p. 322.

Tal como se sostuvo anteriormente en el presente estudio, la promulgación de leyes de reforma agraria en Chile tuvo, en comparación con otras jurisdicciones, el mayor grado de impacto en la modernización de la agricultura. [104]

A. Evolución

Las primeras décadas del siglo XX aún reflejaban que los terratenientes se oponían enérgicamente a una reforma agraria significativa en Chile.[105] De manera similar a otras jurisdicciones americanas, la estructura de la tenencia de la tierra en Chile había sido heredada del período español y continuó durante las primeras décadas de los períodos republicanos.[106] Los cambios en Chile se iniciaron durante la presidencia de Arturo Fortunato Alessandri Palma en 1920, cuando el poder político de los terratenientes comenzó a erosionarse.[107] Durante ese siglo, la industrialización y los ideales del capitalismo se filtraron en el sector rural, provocando un efecto que debilitó a la élite terrateniente.[108] Las principales reformas se llevaron a cabo en la década de 1960 y se consolidaron en la década de 1970,[109] durante las presidencias de Eduardo Nicanor Frei Montalva, Jorge Alessandri Rodríguez (*n.b.*, hijo de Alessandri Palma) y Salvador Guillermo Allende Gossens. Las áreas rurales de Chile, antes de esas reformas significativas, se caracterizaban por contar con propietarios de extensas tierras, que mantenían una relación cuasi feudal con los inquilinos,[110] donde el 80% de las tierras agrícolas se dividía entre el 3% de las familias rurales.[111] Había una clara dicotomía entre los grandes terratenientes en las haciendas (latifundios) y los pequeños agricultores que poseían tierras que apenas bastaban para subsistir (minifundios).[112] Incluso cuando las haciendas parecían ser propiedades multifamiliares, seguían siendo unidades económicas singulares[113] y el latifundio era la unidad económica y social do-

104 Sampaio 1993, p. 20.
105 The Chilean Land Reform 1963, p. 312-313.
106 Thome 1971, p. 491.
107 Thome 1971, p. 494.
108 Lapp 2004, p. 54.
109 Brahm García 2012, p. 254.
110 Barraclough 1999, p. 20.
111 Barraclough 1999, p. 21.
112 Dekker 2003, p. 7; Barraclough 1973, p. 133-134.
113 Becket 1965, p. 561.

minante.[114] En Chile, durante el período revolucionario (1960-1980), algunos grupos intentaron apartarse del capitalismo y adoptar el socialismo.[115]

Diversas disposiciones limitaron el derecho de propiedad más allá de leyes de reforma agraria en Chile desde principios del siglo XX. Por ejemplo, la propiedad familiar también se introdujo en Chile. Su recepción se remonta a la Constitución de 1925 y a otras leyes especiales (*v.gr.*, Ley 1838 de 1906, Ley 5950 de 1936 y Ley 7600 de 1943).[116] Se impusieron aún más limitaciones al derecho de propiedad, *inter alia*, mediante legislación que trató sobre servidumbres públicas (*v.gr.*, Ley 4851 de 1930), sobre limitaciones de carácter municipal o urbanístico (*v.gr.*, Decreto 1472 de 1941), sobre salubridad pública (*v.gr.*, Código del Trabajo) y sobre utilidad social (*v.gr.*, Decreto-Ley 261 de 1925 y Ley 6844 de 1941).[117]

B. Implementación

Un primer conjunto de reformas dio la bienvenida al paradigma de la función social y se emprendió a partir de la década de 1920. La estructura laboral y de tenencia de la tierra en Chile motivó la intervención del Estado.[118] En Chile se había desarrollado un sistema de hacienda, donde existía una estructura social de producción agrícola, junto con el poder político ejercido por los terratenientes sobre los campesinos.[119] Esa estructura hizo que los trabajadores, los inquilinos y los pequeños terratenientes dependieran de la hacienda, convirtiéndola en un sistema social y no solo en una unidad de producción.[120] Se pueden establecer–vale notar–paralelos entre el sistema de haciendas y el feudalismo en Europa.[121] En 1928, durante la presidencia de Carlos Ibañez del Campo, se estableció la Caja de Colonización Agrícola,[122] la cual apuntaría luego a dividir las grandes extensiones de tierra, transformándolas en unidades pequeñas o medianas, para así poder aumentar el número de propietarios.[123]

114 Petras - Zeitlin 1970, p. 507.
115 Bellisario 2006, p. 169.
116 Peñailillo Arévalo 2006, p. 69.
117 Lira Urquieta 1944, p. 176-182.
118 Véase la descripción de la estructura en Barraclough 1973, p. 139-140.
119 Bellisario 2006, p. 172.
120 Barraclough 1973, p. 147-148.
121 Bellisario 2006, p. 172.
122 Brahm García 2012, p. 250; Claro Solar 1979, p. 406-408.
123 Durán Bernales 1966, p. 329.

Ese tímido esfuerzo logró solamente distribuir 10 000 unidades de tierra, y no alcanzó a los 600 000 campesinos que podrían haber sido beneficiados.[124] Las actividades de la Caja de Colonización Agrícola allanaron el camino para las reformas que siguieron en los años sesenta y setenta del mismo siglo, debe notarse sin embargo.[125]

Un segundo conjunto de reformas se llevó a cabo en la década de 1960,[126] cuando la estructura de la tierra siguió exigiendo cambios en Chile. El Tercer Censo Agropecuario de 1955 declaró que 345 000 familias vivían en las áreas rurales de Chile, mientras que el 47% de esas familias no poseían tierras.[127] Asimismo, en ese momento, el 55% del área cultivada estaba dividida entre latifundios de más de 5000 hectáreas.[128] La Ley 15020 de 1962[129] ofreció la primera experiencia chilena de reforma agraria, siendo bien recibida,[130] aun cuando se la consideró demasiado extensa y detallada, por lo que presentaba desafíos para su implementación.[131] Ese esfuerzo inicial se realizó durante la administración de Alessandri Rodríguez, en el contexto de las actividades de la Alianza para el Progreso[132] y de la Comisión Económica para América Latina (CEPAL),[133] y fue una extensión de las políticas que ya existían en Chile.[134] La Ley 15020 fue la primera legislación de reforma agraria en América Latina luego del establecimiento de la Alianza para el Progreso,[135] al tiempo que

---

124 Hurtado-Edwards & Smith 1964, p. 93; Barraclough 1999, p. 23.

La Caja concluyó sus actividades en 1962, luego de afectar solamente a 4206 familias. Véase Thome 1971, p. 495.

Se han indicado paralelos entre las actividades de la Caja y las reformas sobre la tierra implementadas en Italia a partir de la década de 1940. Véase Durán Bernales 1966, p. 331.

125 Barraclough 1999, p. 23.

126 Véase la información sobre las reformas de la década de 1960 en Mirow 2011, p. 1209-1211.

127 Silva 1987, p. 57. Véase también González Terán 2010, p. 89.

128 Lapp 2004, p. 54.

129 Ley 15020 (1962).

130 Lapp 2004, p. 66.

131 La ley incluyó 104 artículos y ocho artículos transitorios para facilitar su implementación. Véase Ley 15020 (1962) y Thome 1971, p. 497.

132 Sampaio 1993, p. 70.

133 Mirow 2011, p. 1209.

CEPAL, por ejemplo, organizó una reunión en Santiago de Chile en mayo de 1961 para abordar temas de reforma agraria. Véase Brahm García 1994, p. 171.

134 Becket 1965, p. 579; Brahm García 1994, p. 168.

135 The Chilean Land Reform 1963, p. 311.

Chile se encontraba en 1963 entre los principales beneficiarios de los fondos de la Alianza.[136] La nueva ley pretendía incluso eliminar el ineficiente sistema de hacienda[137] y, en palabras de Alessandri Rodríguez, pretendía ser "un instrumento eficaz para que nuestro país pueda satisfacer la aspiración humana y justa de quienes trabajan la tierra en orden a tener un más fácil acceso a la propiedad de ella [...]".[138] La Iglesia Católica también dio la bienvenida a la reforma agraria en Chile,[139] abogando por un cambio con el gobierno de Alessandri Rodríguez.[140] Asimismo, la Iglesia Católica había implementado la redistribución de la tierra en partes de sus posesiones rurales en 1963.[141]

La Ley 15020 dio la bienvenida a la función social de la propiedad[142] y permitió la expropiación por parte del Estado de tierras improductivas, reconociendo la responsabilidad social de los propietarios.[143] El artículo 1 de la ley indicó que la propiedad se limitaba de acuerdo con los requisitos de mantenimiento y progreso exigidos por el orden social.[144] El artículo 3 agregó que era primordial, entre los objetivos de la reforma, dar acceso a la propiedad a quienes trabajan en la tierra.[145] Se requirió la creación de instituciones para

136 The Chilean Land Reform 1963, p. 331.

137 Gallardo Fernández 2002, p. 61.

138 The Chilean Land Reform 1963, p. 5-6.

139 Tai 1974, p. 14-15; Mirow 2011, p. 1210.

140 Brahm García 1994, p. 173.

141 Thome 1971, p. 498; Barraclough 1999, p. 24.

142 Brahm García 1994, p. 163.

143 Lapp 2004, p. 66.

144 El artículo 1 de la Ley 15020 sostuvo: "El ejercicio del derecho de propiedad sobre un predio rústico está sometido a las limitaciones que exijan el mantenimiento y progreso del orden social. Estará sujeto, especialmente, a las limitaciones que exija el desarrollo económico nacional y a las obligaciones y prohibiciones que establece la presente ley y a las que contemplen las normas que se dicten en conformidad a ella.

Todo propietario agrícola está obligado a cultivar la tierra, aumentar su productividad y fertilidad, a conservar los demás recursos naturales y a efectuar las inversiones necesarias para mejorar su explotación o aprovechamiento y las condiciones de vida de los que en ella trabajen, de acuerdo con los avances de la técnica". Ley 15020 (1962).

145 El artículo 3 de la Ley 15020 sostuvo: "Con el propósito de llevar a cabo una reforma agraria que permita dar acceso a la propiedad de la tierra a quienes la trabajan, mejorar los niveles de vida de la población campesina, aumentar la producción agropecuaria y la productividad del suelo, se dictan los preceptos que a continuación se expresan". Ley 15020 (1962).

Véase también Lapp 2004, p. 66.

implementar la reforma agraria. En consecuencia, la ley estableció la creación de, *inter alia*, la Corporación de la Reforma Agraria (CORA) y el Instituto de Desarrollo Agropecuario (INDAP).[146] El artículo 11 de la ley estableció que la Caja de Colonización Agrícola se transformara en la CORA,[147] con el objetivo de administrar la adquisición y la redistribución de la tierra. El artículo 12 indicó que el INDAP debía, entre otras funciones, otorgar apoyo financiero para los pequeños agricultores.[148] La Ley 15020 ha sido considerada como el paso más trascendental hacia la recepción del aspecto social de la propiedad en Chile.[149] Si bien en última instancia afectó solamente a 980 familias y abarcó más del 1.5% de la superficie total de Chile,[150] su efecto principal fue introducir eficazmente en la agenda política la reforma agraria y destacó las deficiencias del sector agrícola chileno.[151] La Ley 15020 fue, de hecho, un importante escalón para las subsiguientes leyes de reforma agraria.[152]

Una nueva etapa de reforma se inició mediante la Ley 16640 de 1967.[153]

146 Thome 1971, p. 495; Alexander 1974, p. 83.

147 El artículo 11 de la Ley 15020 sostuvo, en parte: "Transfórmase la Caja de Colonización Agrícola en Corporación de la Reforma Agraria. Dicha Corporación tendrá el carácter de persona jurídica de derecho público, empresa autónoma del Estado de duración indefinida, con patrimonio propio, con plena capacidad para adquirir, ejercer derechos y contraer obligaciones.

La Corporación de la Reforma Agraria será la sucesora de la Caja de Colonización Agrícola, en todos sus bienes, derechos y obligaciones". Ley 15020 (1962).

148 El artículo 12 de la Ley 15020 sostuvo, en parte: "Transfórmase el Consejo de Fomento e Investigaciónes Agrícolas en Instituto de Desarrollo Agropecuario. [...] Sus funciones serán las que siguen:

a) Otorgar asistencia técnica gratuita y ayuda crediticia a los pequeños y medianos agricultores, incluyendo a los que exploten minifundios y a los indígenas, y a las respectivas cooperativas; como también fomentar las actividades de artesanía y pequeña industria en zonas rurales, especialmente las relacionadas con las complementarias de la agricultura;

b) Otorgar asistencia crediticia a dueños de minifundios de propiedades familiares agrícolas o de pequeños predios no divisibles a fin de facilitar la adjudicación de la tierra en beneficio de quien la trabaje, en casos de liquidación de herencia o comunidades; o para transformar el minifundio en unidad económica o para pagar el todo o parte del saldo de precio de un inmueble comprado con el mismo objetivo [...]". Ley 15020 (1962).

Véase también Lapp 2004, p. 66.

149 Brahm García 1994, p. 163.

150 Sampaio 1993, p. 70.

151 Sampaio 1993, p. 70.

152 Thome 1971, p. 497; Barraclough 1999, p. 23-24.

153 Ley 16640 (1967).

Esa ley fue el resultado de un proceso de elaboración interdisciplinario, con la participación de juristas, sociólogos, agrónomos, agricultores y economistas.[154] En ese entonces aún había preocupación por el rendimiento de la producción agrícola, y las reformas de Alessandri Rodríguez parecían haberse estancado.[155] Asimismo, un movimiento de trabajadores rurales se había gestado en Chile y había encontrado apoyo en el gobierno del presidente Frei Montalva,[156] quien abogó por una reforma agraria efectiva que pusiera fin a la estructura existente de tenencia.[157] El movimiento obrero rural tuvo lugar casi simultáneamente con las actividades de reforma agraria y algunos de sus participantes tomaron un papel activo en el proceso de reforma.[158]

La ley 16640 tenía como objetivo modernizar el campo chileno y establecer la democracia.[159] El artículo 2 de la ley claramente dio la bienvenida al nuevo paradigma, al mencionar expresamente que la expropiación era autorizada para que "la propiedad agraria cumpla su función social".[160] La nueva ley, que encuentra paralelos en los postulados de Duguit, indicó en el artículo 4 que la propiedad podía limitarse para los predios que "se encuentren abandonados y los que estén mal explotados".[161] Los Consejos Comunales Campesinos jugaron un papel fundamental en esa etapa de la reforma agraria, principalmente en la toma de control de los latifundios y su reemplazo por nuevas unidades

154 Thome 1971, p. 497.

155 Lapp 2004, p. 70.

156 Alexander 1974, p. 95-96. La ley fue aprobada por el 93% de los miembros del Congreso Nacional. Véase Sampaio 1993, p. 71.

157 Thome 1971, p. 489.

158 Alexander 1974, p. 95-96.

159 Sampaio 1993, p. 70.

160 El artículo 2 de la Ley 16640 sostuvo: "Con el objeto de que la propiedad agraria cumpla su función social, declárase de utilidad pública y autorízase la expropiación total o parcial de los predios rústicos que se encuentren en cualquiera de las situaciones que se expresan en los artículos 3° y 4° a 13° inclusive de la presente ley". Ley 16640 (1967).

161 El artículo 4 de la Ley 16640 sostuvo: "Son expropiables los predios rústicos que se encuentren abandonados y los que estén mal explotados.

No obstante la causal de expropiación por mala explotación, sólo se aplicará después de tres años contados desde la fecha de publicación de la presente ley, respecto de aquellos predios rústicos que, desde una fecha anterior al 4 de noviembre de 1964, tengan una superficie que no exceda de 80 hectáreas de riego básicas". Ley 16640 (1967).

Véase también Alexander 1974, p. 38.

productivas.[162] La Ley 16640 finalmente benefició a 20 976 familias[163] que recibieron 2.6 millones de hectáreas de tierra,[164] mientras que la producción agrícola creció a una tasa anual del 2.9%.[165] Chile experimentaría nuevos esfuerzos de reforma agraria, debe notarse.

Un tercer y más radical conjunto de reformas se llevó a cabo en el período 1970-1973,[166] durante la presidencia de Allende Gossens, y fue interrumpido por el *coup d'État* de Augusto José Ramón Pinochet Ugarte.[167] Sin promulgar una nueva ley, la administración de Allende Gossens se propuso acelerar y desarrollar aún más la reforma agraria e involucrar al Estado en las actividades del sector agrícola.[168] Allende Gossens dejó en claro su intención de terminar el dominio del latifundio.[169] En consecuencia, parte de los latifundios expropiados continuaron transformándose en asentamientos, si bien con algunas modificaciones y denominados Centros de Reforma Agraria,[170] y resultaron en la implementación de cambios en la estructura de la tenencia de la tierra.[171] El objetivo era socializar los medios de producción,[172] al tiempo que se sustituía la dicotomía latifundio-minifundio con una nueva estructura construida sobre modalidades estatales, comunales, cooperativas y familiares de tenencia.[173] El Congreso chileno no hubiera respaldado una nueva ley de reforma agraria originada por Allende Gossens, por lo que éste último optó por utilizar las leyes existentes en su máximo potencial, expropiando durante su primer año en el gobierno una cantidad similar de hectáreas a la que Frei

162 García 1973, p. 32-33.

163 Sampaio 1993, p. 71.

164 Lapp 2004, p. 72.

165 Sampaio 1993, p. 71.

166 Véase la información sobre las reformas en ese período en Mirow 2011, p. 1211-1212.

167 Sampaio 1993, p. 71.

Luego del *coup d'État*, el 55% de la tierra que había sido afectada por las reformar fue otorgada a beneficiarios individuales que en definitiva controlaron el 22% del total de la tierra útil para agricultura. Véase Sampaio 1993, p. 20, 72.

Matthew Mirow indicó, sin embargo, que Augusto Pinochet comulgó con algunos postulados de la función social de la propiedad. Véase Mirow 2011, p. 1212-1214.

168 Sampaio 1993, p. 71.

169 Lapp 2004, p. 78.

170 Barraclough 1999, p. 26.

171 Cantor & Kraus 1990, p. 520.

172 Sampaio 1993, p. 71.

173 García 1973, p. 179.

Montalva había alcanzado durante toda su presidencia.[174] La expropiación creció exponencialmente en Chile, como se percibió en las 6 297 000 hectáreas que se vieron afectadas y que finalmente beneficiaron a 37 277 familias.[175]

Chile representa uno de los mejores ejemplos de adopción de legislación de reforma agraria, donde se experimentó un verdadero cambio durante el proceso de reforma.[176] Esto se refleja en el cambio en el número total de propietarios, que aumentó de 140 000 en 1924 a 317 955 en 1976.[177] La recepción del nuevo paradigma dentro de la legislación especial también fue el resultado de los esfuerzos de intelectuales locales y extranjeros. Estos actores participaron en las actividades de reforma agraria en Chile resaltando las deficiencias del sistema de haciendas y proporcionando enfoques comparativos que analizaron las experiencias de la reforma agraria en otras jurisdicciones.[178] Todo el sistema de haciendas se vio afectado indiscutiblemente por la expropiación y redistribución de tierras en Chile, y los latifundios ya no fueron dominantes en Chile.[179] En consecuencia, Chile acogió herramientas para restringir el derecho de propiedad, comenzando así a alejarse del paradigma que había prevalecido durante el siglo XIX y parte del siglo XX.[180]

5. Recapitulación y acotaciones

El presente estudio se centró en la recepción del nuevo paradigma de propiedad en la República de Chile en el marco de la legislación especial sobre reforma agraria. Esa experiencia sirvió para ilustrar el cambio de paradigma de propiedad durante el siglo XX. En primer lugar, se elaboró sobre los orígenes del nuevo paradigma. Se advirtió sobre la atención que recibió la temática en la literatura continental europea, del *common law* y de la Iglesia Católica. También se mencionó que Léon Duguit fue uno de sus principales representantes a ambos lados del Atlántico. En segundo lugar, se abordó la reforma agraria y su presencia en América Latina. Las jurisdicciones en América experimentaron un *contagio* de reformas agrarias durante la segunda mitad del siglo XX, con distintos grados de éxito. En tercer lugar, se trató sobre las tres

174 Lapp 2004, p. 79; Barraclough 1999, p. 25.
175 Sampaio 1993, p. 72.
176 Mirow 2004, p. 223.
177 Gallardo Fernández 2002, p. 67.
178 Barraclough 1999, p. 27.
179 Gallardo Fernández 2002, p. 61-62.
180 Matus Valencia 1958, p. 81.

etapas en que se desarrolló la reforma agraria en Chile durante el mentado siglo. Se resaltó que la promulgación de leyes de reforma agraria en Chile tuvo, en comparación con otras jurisdicciones, el mayor grado de impacto en la modernización de la agricultura. El presente estudio ofreció entonces información para mejor contextualizar los eventos que ocurrieron en Chile ante el cambio de paradigma de propiedad.

Los paradigmas de propiedad experimentaron un cambio en Chile y en otras jurisdicciones latinoamericanas. El presente estudio señaló que el paradigma liberal fue reemplazado por uno que dio la bienvenida a limitaciones sociales al derecho de propiedad. La función social implicó una comprensión menos *egoísta* de la propiedad, adaptando ese pilar fundamental a las necesidades de los actores sociales. El paradigma de la función social se configuró cuando la sociedad alcanzó un lugar de preminencia. Las jurisdicciones latinoamericanas en efecto abandonaron el paradigma liberal e incorporaron los principios del paradigma de la función social. La recepción del nuevo paradigma difirió conforme las diferentes jurisdicciones, siendo algunas más conservadoras que otras. Un grupo de jurisdicciones debilitó el carácter absoluto de la propiedad al adoptar doctrinas y principios que tuvieron un impacto indirecto en ese pilar fundamental del derecho; mientras que otro grupo de jurisdicciones–incluyendo Chile–acogió con satisfacción el nuevo paradigma expresamente en su legislación especial, incluso refiriéndose expresamente al término *función social*.

Bibliografía

Fuentes primarias

Constitución de Bolivia 2009 = Bolivia - Constitución Política del Estado 2009, https://www.oas.org/dil/esp/Constitucion_Bolivia.pdf (última consulta, 26 de marzo de 2019).

Duguit 1912 = Léon Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*, Paris, 1912.

Ley 15020 (1962) = *Reforma Agraria,* Biblioteca del Congreso Nacional de Chile. http://www.leychile.cl/Navegar?idNorma=28016&tipoVersion=0 (última consulta, 26 de marzo de 2019).

Ley 16615 (1967) = *Modifica la Constitución Política del Estado,* Biblioteca del Congreso Nacional de Chile. http://www.leychile.cl/Navegar?idNorma=130884&tipoVersion=0 (última consulta, 26 de marzo de 2019).

Ley 16640 (1967) = *Reforma Agraria*, Biblioteca del Congreso Nacional de Chile. http://www.leychile.cl/Navegar?idNorma=28596&tipoVersion=0 (última consulta, 26 de marzo de 2019).

Quadragesimo anno 1931 = Encíclica Quadragesimo anno 1931 (español), http://w2.vatican.va/content/pius-xi/es/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (última consulta, 26 de marzo de 2019).

Fuentes secundarias

Adrogué 1991 = M. I. Adrogué, *El Derecho de Propiedad en la Actualidad. Introducción a sus Nuevas Expresiones,* Buenos Aires, 1991.

Alessandri Rodríguez et al. 2010 = A. Alessandri Rodríguez et al., *Tratado de los Derecho Reales*, 6 ed., Vol. I, Santiago, 2010.

Alexander 1974 = R. J. Alexander, *Agrarian Reform in Latin America*, New York, 1974.

Ankersent & Ruppert 2006 = T. T. Ankersent y T. Ruppert, Tierra y Libertad*: The Social Function Doctrine and Land Reform in Latin America*, en *Tulane Environmental Law Journal*, 19, 2006, p. 69-120.

Areán 1994 = B. Areán, *Curso de Derechos Reales: Privilegios y Derecho de Retención*, 3 ed., Buenos Aires, 1994.

Assies & Duhau 2009 = W. Assies & E. Duhau, *Land Tenure and tenure regimes in Mexico: An overview*, en J. M. Ubink et al. (eds.), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*, Leiden, 2009, p. 355-385.

Azcárate (de) 1879 = G. de Azcárate, *Ensayo sobre la historia del derecho de propiedad y su estado actual en Europa*, vol. I, Madrid, 1879.

Azcárate (de) 1883 = G. de Azcárate, *Ensayo sobre la historia del derecho de propiedad y su estado actual en Europa*, vol. III, Madrid, 1883.

Barraclough 1965 = S. L. Barraclough, ¿Qué es una reforma agraria?, en Ó. Delgado (ed.), *Reformas Agrarias en la America Latina: Procesos y Perspectivas*, Mexico y Buenos Aires, 1965, p. 127-145.

Barraclough 1973 = S. L. Barraclough (ed.), *Agrarian Structure in Latin America; A Resume of the CIDA Land Tenure Studies of: Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Peru*, Lexington, 1973.

Barraclough 1999 = S. L. Barraclough. *Land reform in developing countries: the role of state and other actors*. Geneva: UNRISD Discussion paper No. 101.

Beaglehole 1935 = E. Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, en *Iowa Law Review,* 20, 1935, p. 304-316.

Becket 1965 = J. Becket, *Problemas de la reforma agraria*, en Ó. Delgado (ed.),

Reformas Agrarias en la America Latina: Procesos y Perspectivas, Mexico y Buenos Aires, 1965, p. 559-592.

Bellisario 2006 = A. Bellisario, *The Chilean Agrarian Transformation: The Pre-Agrarian Reform Period (1955–1965)*, en *Journal of Agrarian Change*, 6:2, 2006, p. 167-204.

Bergel 1994 = J.-L. Bergel, *La Propriété,* Paris, 1994.

Bolgár 1960 = V. Bolgár, *The Magic of Property and Public Welfare*, en *Inter-American Law Review*, 2, 1960, p. 283-298.

Brahm García 1994 = E. Brahm García, *El concepto de propiedad en la Ley Nº 15.020 sobre reforma agraria*, en *Revista Chilena de Derecho*, 21:1, 1994, p. 159-187.

Brahm García 2012 = E. Brahm García, *Algunos aspectos del proceso de socialización del derecho de propiedad en Chile durante el gobierno del general Carlos Ibañez del Campo (1927–1931)*, en *Rechtsgeschichte*, 20, 2012, p. 234-256.

Calvo González & Monereo Pérez 2005 = J. Calvo González y J. L. Monereo Pérez, *Léon Duguit (1859-1928): jurista de una sociedad en transformación*, en *Revista de Derecho Constitucional Europeo*, 4, 2005, p. 483-547.

Cantor & Kraus 1990 = P. Cantor & J. Kraus, *Changing Patterns of Ownership Rights in the People's Republic of China: A Legal and Economic Analysis in the Context of Economic Reforms and Social Conditions*, en *Vanderbilt Journal of Transnational Law*, 23, 1990, p. 479-538.

Caroni 2012 = P. Caroni, *Escritos sobre la Codificiación*, A. Mora Cañada & M. Martínez Neira trad., Madrid, 2012.

Caroni 2013 = P. Caroni, *Lecciones de Historia de la Codificación*, Madrid, 2013.

Carrasco Delgado 2006 = S. Carrasco Delgado, *La evolución político-constitucional de Chile*, en *Estudios Constitucionales*, 6:2, 2006, p. 301-324.

Carroll 1970 = T. F. Carroll, *Land Reform as an Explosive Force in Latin America*, en R. Stavenhagen (ed.), *Agrarian Problems and Peasant Movements in Latin America,* Garden City, 1970, p. 101-137.

Castán Tobeñas 1963 = J. Castán Tobeñas, *La propiedad y sus problemas actuales,* 2 ed., Madrid, 1963.

Chonchot 1965 = J. Chonchot, *Razones económicas, sociales y políticas de la reforma agraria*, en Ó. Delgado (ed.), *Reformas Agrarias en la America Latina: Procesos y Perspectivas*, Mexico y Buenos Aires, 1965, p. 100-126.

Claro Solar 1979 = L. Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado*, Vol. III:VI:I, Santiago, 1979.

Colley 2014 = L. Colley, *Empires of Writing: Britain, America and Constitutions, 1776–1848*, en *Law and History Review*, 32:2, 2014, p. 237-266.

Conesa 2012 = E. Conesa, *El impuesto a la tierra libre de mejoras, recursos naturales,*

hidrocarburos y el federalismo en la Argentina, 2012, http://portalacademico.derecho.uba.ar/catedras/archivos/catedras/19/el_impuesto_tierra_libre_de_mejoras_y_a_los_recursos_naturales_en_general_en_el_regimen_federal_argentino_copia.pdf (última consulta, 26 de marzo de 2019).

Cordero Quinzacara 2008 = E. Cordero Quinzacara, *De la propiedad a las propiedades. La evolución de la concepción liberal de la propiedad*, en *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso,* 31, 2008, p. 493-525.

Dekker 2003 = H. A. L. Dekker, *The Invisible Line: Land Reform, Land Tenure Security, and Land Registration*, Aldershot y Burlington, 2003.

Delgado de Miguel 2002 = J. F. Delgado de Miguel (coord.), *Instituciones de Derecho Privado: Reales*, Vol. II, Madrid, 2002.

Duhau 2009 = E. Duhau, *A case study on the implementation and outcomes of the 1992 reforms on the Mexican agrarian property institutions: An* ejido *in the frontier of the urbanisation process*, en J. M. Ubink et al. (eds.), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*, Leiden, 2009, p. 388-407.

Durán Bernales 1966 = F. Durán Bernales, *Población, Alimentos y Reforma Agraria,* Santiago, 1966.

Gallardo Fernández 2002 = G. L. Gallardo Fernández, *Communal Land Ownership in Chile: The agricultural communities in the commune of Canela, Norte Chico (1600-1998)*, Aldershot, 2002.

García 1973 = A. García, *Sociología de la reforma agraria en América latina,* Buenos Aires, 1973.

García 1985 = A. García, *Modelos operacionales de reforma agraria y desarrollo rural en América Latina*, San José, 1985.

González Terán 2010 = D. L. González Terán, *El Derecho de Propiedad Privada en el Liberalismo Individualista*, tesina inédita, Universidad de Chile, Santiago, 2010.

Hakim 2011 = N. Hakim, *Duguit et les privatistes*, en F. Melleray (dir.), *Autour de Léon Duguit: Colloque commémoratif du 150e anniversaire de la naissance du doyen Léon Duguit. Bordeaux, 29-30 mai 2009*, Brussels, 2011, p. 81-114.

Halpérin 1996 = J.-L. Halpérin, *Histoire du droit privé français depuis 1804*, Paris, 1996.

Halpérin 2008 = J.-L. Halpérin, *Histoire du droit des biens*, Paris, 2008.

Hendrix 1993 = S. E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, LTC Paper 149, Madison, 1993.

Hernández Gaona 1991 = P. Hernández Gaona, *Evolución y proyección de la legislación agraria mexicana*, en *Anuario Mexicano de Historia del Derecho*, III-1991, 1991, p. 81-94.

Hernández Gil 1969 = A. Hernández Gil, *La función social de la posesión (Ensayo de teorización sociológico-jurídica)*, Madrid, 1969.

Hurtado-Edwards & Smith 1964 = J. L. Hurtado-Edwards & R. Gene Smith, *The Chilean Agrarian Reform*, en *Inter-American Law Review*, 6, 1964, p. 93-137.

Janvry (de) et al. 2001 = A. de Janvry et al., *The Changing Role of the State in Latin American Land Reforms*, en A. de Janvry et al. (eds.), *Access to Land, Rural Poverty and Public Action*, Oxford, 2001, p. 279-303.

Karst - Rosenn 1975 = K. L. Karst y K. S. Rosenn, *Law and Development in Latin America: A Case Book*, Berkeley, 1975.

Keiser 2005 = T. Keiser, *Eigentumsrecht in Nationalsozialismus und Fascismo,* Tübingen, 2005.

Keiser 2012 = T. Keiser, *Social conceptions of Property and Labour – Private Law in the aftermath of the Mexican Revolution and European Legal Science*, en *Rechtsgeschichte*, 20, 2012, p. 258-273.

Lapp 2004 = N. D. Lapp, *Landing Votes: Representation and Land Reform in Latin America*, New York, 2004.

Lira Urquieta 1944 = P. Lira Urquieta, *El Código Civil y el Nuevo Derecho*, Santiago, 1944.

Lloredo Alix 2012 = L. M. Lloredo Alix, *Rafael Altamira y Adolfo Posada: Dos aportaciones a la socialización del derecho y su proyección en Latinoamérica*, en *Rechtsgeschichte,* 20, 2012, p. 209-233.

Long - Roberts 1994 = N. Long & B. Roberts, *The agrarian structures of Latin America, 1930-1990*, en L. Bethell (ed.), *The Cambridge History of Latin America*, Vol. VI, Cambridge y New York, 1994, p. 325-390.

Matus Valencia 1958 = J. G. Matus Valencia, *The Centenary of the Chilean Civil Code*, en *The American Journal of Comparative Law*, 7, 1958, p. 71-83.

Melleray 2011 = F. Melleray (dir.), *Autour de Léon Duguit: Colloque commémoratif du 150e anniversaire de la naissance du doyen Léon Duguit. Bordeaux, 29-30 mai 2009*, Bruselas, 2011.

Meyer 1998 = J. Meyer, *Mexico: revolution and reconstruction in the 1920s*, en L. Bethell (ed.), *The Cambridge History of Latin America*, reimpresión, Vol. V, Cambridge y New York, 1998, p. 155-194.

Mirow 2004 = M. C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, 2004.

Mirow 2010 = M. C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, en *Florida Journal of International Law,* 22, 2010, p. 191-226.

Mirow 2011 = M. C. Mirow, *Origins of the Social Function of Property in Chile*, en *Fordham Law Review*, 80, 2011, p. 1183-1217.

Morin 1932 = G. Morin, *L'œuvre de Duguit et le droit privé*, en *Archives de Philosophie du droit et de Sociologie juridique*, 1-2, 1932, p. 153-162.

Muñoz León 2005 = F. Muñoz León, *Notas sobre la Historia constitucional de Chile: génesis y evolución entre 1810 y 1970*, en J. Woischnik (ed.), *Anuario de Derecho Constitucional Latinoamericano 2005,* Vol. I, Montevideo, 2005, p. 245-271.

Parise 2019 = A. Parise, *La función social de la propiedad y la humanización de un pilar del derecho (siglo XX)*, en R. D. Rabinovich-Berkman (ed.), *Los derechos humanos desde la historia. Inmersiones libres,* Santiago, 2019, p. 271-286.

Parra Silva 2006 = R. Parra Silva, *Conferencia internacional sobre reforma agraria y desarrollo rural*, en *Estudios Agrarios,* 31, 2006, p. 239-253.

Peñailillo Arévalo 2006 = D. Peñailillo Arévalo, *Los Bienes: la Propiedad y otros Derechos Reales*, 4 ed., Santiago, 2006.

Peset 1999 = M. Peset, *Fundamento ideológico de la propiedad*, en S. de Dios et al. (coord.), *Historia de la Propiedad en España siglos XV-XX. Encuentro Interdisciplinar. Salamanca, 3-6 de junio de 1998,* Madrid, 1999, p. 441-470.

Petras & Zeitlin 1970 = J. Petras & M. Zeitlin, *Agrarian Radicalism in Chile*, en R. Stavenhagen (ed.), *Agrarian Problems and Peasant Movements in Latin America,* Garden City, 1970, p. 503-531.

Reich 1964 = C. A. Reich, *The New Property*, en *Yale Law Journal*, 73, 1964, p. 733-787.

Robledo - Espinoza 1999 = R. Robledo & L. E. Espinoza, *La Reforma Agraria en la II República: El Proceso de Asentamiento de Comunidades de Campesinos en la Provincia de Salamanca*, en S. de Dios et al. (coord.), *Historia de la Propiedad en España siglos XV-XX. Encuentro Interdisciplinar. Salamanca, 3-6 de junio de 1998,* Madrid, 1999, p. 403-439.

Rosenn 1963 = K. S. Rosenn, *Puerto Rican Land Reform: The History of an Instructive Experiment*, en *Yale Law Journal* 73, 1963, p. 334-356.

Ruíz B. 1964 = G. A. Ruíz B., *La función social de la propiedad agrícola en la ley de reforma agraria venezolana de 1960*, Caracas, 1964.

The Chilean Land Reform 1963 = *The Chilean Land Reform: A Laboratory for Alliance-for-Progress Techniques*, en *Yale Law Journal*, 73, 1963, p. 310-333.

Salvat 1962 = R. M. Salvat, *Tratado de Derecho Civil Argentino: Derechos Reales*, 5 ed., Vol. II, Buenos Aires, 1962.

Sampaio 1993 = P. Sampaio, *La Reforma Agraria en America Latina. RLAC/93/10 - DERU-46,* Santiago, 1993.

Silva 1987 = P. Silva, *Estado, neoliberalismo y política agraria en Chile 1973-1981*, Dordrecht, 1987.

Simpson 1998 = A. W. B. Simpson, *Land Ownership and Economic Freedom*, en

H. N. Scheiber (ed.), *The State and Freedom of Contract*, Stanford, 1998, p. 13-43.

Tai 1974 = H.-C. Tai, *Land Reform and Politics: A Comparative Analysis*, Berkeley, 1974.

Thome 1971 = J. R. Thome, *Expropriation in Chile Under the Frei Agrarian Reform*, en *The American Journal of Comparative Law* 19, 1971, p. 489-513.

Verkerk 2010 = R. R. Verkerk, *Fact-Finding in Civil Litigation: A Comparative Perspective*, Antwerp, 2010.

Villiers (de) 2003 = B. de Villiers, *Land reform: Issues and challenges. A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*, Joahnnesburg, 2003.

Warriner 1969 = D. Warriner, *Land Reform in Principle and Practice*, Oxford, 1969.

Wilkie 1974 = J. W. Wilkie, *Measuring Land Reform. Supplement to the Statistical Abstract of Latin America with a special map and graph series on land reform by Richard W. Wilkie and John Marti*, Los Angeles, 1974.

Zoomers & Haar (van der) 2000 = A. Zoomers & G. van der Haar, *Introduction: regulating land tenure under neo-liberalism*, en A. Zoomers & G. van der Haar (eds.), *Current Land Policy in Latin America: Regulating Land Tenure under Neo-liberalism*, Amsterdam, 2000, p. 17-26.

LA INFLUENCIA DEL DERECHO ROMANO EN LA ADQUISICIÓN Y EN EL SISTEMA DE TRANSFERENCIA DE LOS DERECHOS REALES EN EL SIGLO XIX, ARGENTINA

Pamela Alejandra Cacciavillani

> [L]os jurisconsultos romanos han sobresalido en dictar reglas muy juiciosas sobre interpretación, y son, aún hoy nuestros guías.
>
> José Daniel Goitía[1]

1. Introducción

La declaración del Juez Federal, José Daniel Goitía, a finales del siglo XIX, es solo uno de los tantos ejemplos de la enorme influencia que el derecho romano ejerció en el sistema jurídico argentino. Desde la creación de las universidades durante el período colonial, el influjo romano se apreció tanto en la enseñanza del derecho y en la formación de juristas, como también en las sentencias y en las obras jurídicas, fruto de la labor de profesionales formados en la tradición romanista. Sin embargo, en la actualidad en Latinoamérica "el derecho romano va siendo paulatinamente relegado. En cuanto a planes de estudios suplantado (…) en muchos otros reducido a un capítulo más en la historia del derecho".[2]

No obstante este desplazamiento, de una manera fragmentaria y "ahistórica" los manuales de diversas disciplinas jurídicas, especialmente las abocadas al estudio del Derecho Privado, remiten al Derecho Romano –como también al *Ius Commune* y al Derecho Indiano– mediante una construcción narrativa que genera una "instrumentalización respecto del derecho vigente".[3] Coincidente es la opinión de Hespanha, quien advierte diferentes efectos que derivan de un cierto uso de la historia, entre ellos se destaca la "sacralización del derecho actual por medio de la utilización de la historia".[4]

---

1 Citado por Levaggi 1986, p. 33.

2 Hinestrosa 2007, p.5. Es el caso de la Universidad de Monterrey, en la carrera de licenciado en derecho algunas nociones básicas del derecho romano son impartidas en una unidad dentro del programa de la asignatura Historia de la Instituciones Jurídicas.

3 Caroni 2014, p. 16.

4 Hespanha 2002, p.19. En materia de enseñanza del derecho penal, por su parte,

En un área específica, como es el estudio de los derechos reales, o también denominado derecho de bienes, los vocablos como tradición (*traditio*), acción reivindicatoria (*rei vindicatio*), posesión (*possessio*), la denuncia de obra nueva (*Operis novi nuntiatio o interdictum demolitorium*), entre otros, evocan una conexión inexorable con su versión latina, como también con su raíz jurídica romanista. En este contexto, no debe sorprendernos el uso que los autores y las autoras hacen de estas palabras en latín. En materia de trasmisión del dominio, para el caso argentino, se sostiene que "Vélez Sarsfield adoptó el sistema romano del título y el modo, y a este último elemento (*traditio*) como la expresión de la transmisión del dominio".[5] Frente a este tipo de aseveraciones vale indagar el significado de la expresión 'sistema romano del título y modo'. En este sentido, debemos preguntarnos cómo fue entendido el derecho romano por parte de los juristas argentinos de finales del siglo XIX y del siglo XX. A primera vista, se advierte una lectura de la experiencia jurídica romana completamente descontextualizada puesto que en el devenir histórico jurídico romano la transferencia de derechos sobre cosas fue el escenario de diversas reformas. Von Ihering advierte que en el derecho romano antiguo "la transferencia del derecho de propiedad no era la del derecho de propiedad, sino más bien la transmisión de la cosa", lo que resulta relevante aquí no es la idea de derecho sino "el abandono por parte del propietario actual de una cosa de la que un nuevo propietario se apoderaba".[6] El autor considera que tanto en la *mancipatio* como en la *in jure cesio* no se producía una transferencia del derecho en cabeza del nuevo adquirente sino que este tomaba la cosa, ya que quien la estaba poseyendo dejaba de hacerlo, situación que se encuentra en los primeros momentos de la *traditio*. En el periodo del derecho romano clásico, Schulz reconoce la existencia de "cinco actos inter vivos mediante los cuales, la propiedad podía ser transmitida: *mancipatio, in iure cessio, traditio, adiudicatio y adsignatio*".[7]

Frente a este complejo panorama, inexorablemente emerge el interrogante sobre la finalidad de los juristas de simplificar la experiencia jurídica romana y de emplearla como un patrón de referencia y de diferenciación. Para

---

Alejandro Agüero ha analizado de manera crítica no solo los límites temporales que predominan en los manuales de enseñanza sino también el rol que cumple esta imagen del pasado. Al respecto, ver: Agüero 2017.

5 Scotti 2002, p. 21.

6 Ihering 1998, p. 615.

7 Schulz 1960, p. 330.

comprender este tipo de posiciones creemos que son sumamente valiosas las reflexiones de Duve en torno a los procesos de creación de normas, especialmente respecto del estudio de las particularidades en "la apropiación de opciones normativas enraizadas en otra normativa".[8]

2. El estudio del derecho romano desde la mirada latinoamericana

Para comprender la particularidad que representa el ámbito latinoamericano en lo que respecta al estudio del derecho romano, hemos relevado trabajos que analizan la influencia de la disciplina en esta área. Esta búsqueda nos permitió no solo divisar diferentes líneas aproximativas sino también evitar "la exclusión apriorística de cualquier procedimiento [que] es ilegítima y [que] puede esconder tras de sí un prejuicio ideológico, tanto más peligroso y anticientífico cuanto más encubierto y menos consciente".[9]

Como resultado de esta aproximación hemos divisado los siguientes tópicos: la enseñanza del derecho, la aplicación del derecho y la producción del mismo mediante obras doctrinarias. En el primer caso, analizar la enseñanza del derecho romano implica una aproximación a la formación de los abogados y los juristas, tanto en el periodo colonial como también durante el derecho patrio, y a posteriori durante la experiencia codificadora.[10] Respecto de la aplicación del derecho, la principal fuente consiste en el estudio de las sentencias y se predica el periodo temporal ya mencionado.[11] Finalmente otra metodología consiste en analizar la recepción de nociones jurídicas romanas en obras jurídicas específicas. En este punto, coincidimos con Duve quien considera que durante un importante lapso de tiempo la recepción fue considerada como una nota distintiva de los procesos de intercambio normativo lo cual dejó "un pequeño ámbito para el análisis del proceso de reproducción creativa"[12] acaecido en los espacios locales.

El estudio de obras concretas proporciona importantes referencias, no solo en cuanto a la formación y trayectoria de sus autores sino también respecto del proceso por el cual el derecho romano es traducido, interpretado e

8 Duve 2016, p. 16.

9 Cuena Boy 1993, p. 388.

10 Aspell 2012; Aspell 2010; Ávila Martel 1965; Levaggi 1986; Stringini 2018.

11 Santos Martínez 1991; Cacciavillani 2018, p.74.

12 Duve 2016, p. 16.

introducido, por ejemplo mediante notas,[13] en instrumentos jurídicos específicos como es el caso del código civil.[14] Respecto de la incorporación normativa en los códigos, Guzmán Brito señaló que al igual que en Europa el derecho romano "daba sustancia a los códigos, [pero] en sí mismo quedaba fuera de vigor. Pero no por ello fue desplazado de la formación de los juristas sino que a partir de allí se divisa "su transformación a disciplina académica en las facultades de derecho".[15] En este sentido, se destacan los trabajos realizados, tanto por romanistas como históricos del derecho, que analizan la elaboración de los códigos civiles en el ámbito latinoamericano. En esta corriente se encauzan los trabajos de Guzmán Brito, Luis Rodriguez Ennes,[16] Antonio Fernandez de Bujan y Fernandez,[17] Rosalia Rodriguez López,[18] Carlos Ramos Nuñez,[19] entre otros.

3. Nuestra propuesta: un puente ecléctico

Resulta difícil y a la vez poco pertinente, adoptar una posición excluyente respecto de la aproximación metodológica en nuestra temática. Al plantearnos como horizonte la reflexión en torno a la influencia del derecho romano en el código civil argentino, especialmente en materia de trasmisión de dominio, podría inferirse que el último tópico desarrollado *ut-supra* sería el marco de reflexión teórica más apropiado. No obstante la indiscutible relación entre esta propuesta metodología y nuestro objeto de estudio, consideramos que partiendo de una premisa que aboga por la historicidad *per se* del derecho la forma más conveniente de dirigir esta investigación consiste en "aspirar al estudio del derecho romano en la integridad de su desarrollo histórico y desde todos los puntos de vista imaginables que puedan tener significación para el derecho".[20] Para ello, y considerando las reflexiones en torno a la traducción cultural, proponemos una aproximación "ecléctica" que a partir de una historización, combine no solo el análisis del texto del código civil y la formación

13 Turelli 2018.

14 Esto no quita el estudio del derecho romano en la erección de otros códigos, véase: Salinas Araneda 1992.

15 Brito Guzmán, p. 80.

16 Rodríguez Ennes 2012, p. 737-755.

17 Fernández de Bujan y Fernández 1994.

18 Rodríguez López 1999.

19 Ramos Núñez 1994.

20 Cuena Boy 1993, p. 392.

de su autor, sino también referencias al régimen jurídico romanista en materia de transmisión de la propiedad y cuestionamientos sobre las interpretaciones, que juristas contemporáneos y no contemporáneos al codificador, han sostenido en esta materia. En esta dirección pretendemos comprender por quiénes y cómo fue leído el derecho romano y con qué finalidad.

¿Quién fue *Dalmasio Vélez Sarsfield?*

Dalmasio Vélez Sarsfield (1800-1875), fue un jurista y político cordobés de marcada trayectoria que llevó adelante la gran empresa codificadora en materia civil. Sus primeros contactos con la materia jurídica se remontan inexorablemente a su paso por la universidad. Como sostiene Levaggi, "durante el período hispánico (...) la influencia del derecho romano tanto en la enseñanza universitaria como en la jurisprudencia y en la práctica forense y notarial es notoria".[21] En la Universidad Mayor de San Carlos de Córdoba, casa de estudios en la que se formó Vélez, la cátedra de Institutas comenzó a operar en 1791, creándose luego de dos años una segunda. Como toda universidad indiana, la instrucción jurídica se centró en el derecho romano y canónico con las respectivas adecuaciones al derecho real. Si bien el plan de estudios fue escenario de importantes reformas durante los primeros años del siglo XIX, el derecho romano, al igual que el latín, siguió impartiéndose.

Sobre la vida universitaria del codificador, Chaneton señala no solo que fue sumaria sino que tampoco se advierte un "brillo excepcional". Cuando Vélez accedió al claustro universitario, debido a las reformas, existía la posibilidad de tomar dos de los cuatro ramos que impartía la casa de estudios lo que le otorgó "opción al título de bachiller y éste poníale en condiciones de abogado, después de la práctica requerida".[22] Lo que caracterizó y contribuyó a la formación de Vélez, sostiene Chaneton, fueron dos factores, por un lado su acentuado espíritu autodidacta y por otro su paso por la vida política y la praxis jurídica. Durante los años 1855-1858, Vélez trabajó como asesor de gobierno de la provincia de Buenos Aires, en sus dictámenes, a diferencia de lo que señalan algunos autores para el caso del código civil, es posible advertir referencias directas a la experiencia jurídica romana. Mediante un estudio exhaustivo de estas fuentes histórica-jurídicas, Somovilla advirtió referencias explícitas al Digesto.[23]

21 Levaggi 1986, p. 17.

22 Chaneton 1969, p. 350.

23 Ver: Somovilla 2007, p. 1-11.

Con fecha 20 de octubre de 1864 el entonces presidente de la República Argentina emitió un decreto por medio del cual designó a Dalmasio Vélez Sarsfield como redactor del proyecto del Código Civil, días más tarde, el 25 de octubre, el jurista cordobés aceptó la desafiante tarea.[24] La impronta del derecho romano en este instrumento jurídico es indiscutible tanto por la formación del autor como por el método adoptado y por el fuerte impacto que destacados romanistas han tenido en la obra. En este sentido se destacan nombres "tales como Vinnio, Heinecio, Cujas y Pothier y los más próximos a la época del codificador, continuamente citados en sus notas, Maynz, Mackeldey, Ortolan y Molitor".[25] Pero quizás el más destacado de todos ellos fue Friedrich Carl von Savigny mediante su obra, en versión francesa, *Sistema de Derecho Romano Actual* la cual fue empleada por el codificador en materia de "personas jurídicas, obligaciones en general, dominio y posesión".[26]

4. La tradición en la adquisición y transferencia de los derechos reales

Si bien algunos autores consideran que el derecho romano no fue una fuente directa, en el sentido de que "ninguna de las disposiciones del Código fue extraída directamente del *Corpus Iuris Civilis* o de algún pasaje de un jurisconsulto romano" es notable que Vélez Sarsfield en materia de derechos reales, específicamente en lo que hace a la transmisión del dominio "volvió al criterio romano, aun ya abandonado por las legislaciones más recientes".[27] Entre las notas definitorias del régimen de los derechos reales del código civil argentino destacan: el sistema del *numerus clausus* o enumeración taxativa de los derechos reales,[28] la adopción del principio de convalidación- como excepción al principio *nemo plus iuris,*[29] entre otros.

Para comprender la idea que plantean diversos autores sobre la remisión al

24 Ver: Cabral Texo 1920.

25 Llambías 1960, p. 213.

26 Llambías 1960, p. 213.

27 Llambías 1960, p. 123.

28 *Código Civil de la República Argentina* 1871,

Art.2503 "Son derechos reales: el dominio y el condominio, el usufructo, el uso y la habitación, las servidumbres activas, el derecho de hipoteca, la prenda y la anticresis".

29 *Código Civil de la República Argentina* 1871,

Art. 3270 "Nadie puede transmitir a otro sobre un objeto, un derecho mejor o más extenso que el que gozaba; y recíprocamente, nadie puede adquirir sobre un objeto un derecho mejor y más extenso que el que tenía aquel de quien lo adquiere".

derecho romano debemos prestar atención a lo normado en el artículo 2502[30] y en su nota. En esta disposición normativa el codificador adoptó el principio por el cual los derechos reales solo pueden ser creados por ley, lo que lo apartó de cualquier tipo de sistema en el que la voluntad de las partes pudiera tener fuerza creadora. Si bien en la nota al artículo la crítica es respecto de la realidad que se vivía en España, el *quid* se encuentra en el cuestionamiento de la voluntad como fuerza creadora de los derechos reales. Respecto a la experiencia jurídica española, el autor señaló que este sistema se encontraba en contraposición con la concepción romanista. En este sentido expresó que "el derecho romano no reconoce [cía] al lado de la propiedad, sino un número de derechos reales, especialmente determinados, y era por lo tanto privada la creación arbitraria de nuevos derechos reales".[31]

Si bien esta referencia resulta comprensible si consideramos su horizonte de finalidad, desde una perspectiva romanista no puede dejar de mencionarse que el concepto de derecho real en sí es completamente ajeno. Schulz remarca que "existe un gran número de importantes concepciones para las cuales los romanos no tuvieron términos técnicos, aunque estos mismos, consciente o inconscientemente, subyacían en sus discusiones. Una concepción importante como la de derechos *in rem* sobre la cual cientos de decisiones fueron basadas, no tenía ni siquiera un nombre".[32]

Al pretender establecer una suerte de puente con la experiencia romana, resulta necesario realizar algunas aclaraciones terminológicas puesto que el concepto de derechos reales es de creación posterior. Frente a este panorama debemos considerar el ámbito de las llamadas *actio in rem* en otras palabras "el medio típico de defensa o tutela del poder que –directamente- se pretende respecto de una cosa corporal *in commercium*".[33] En el contexto del derecho romano clásico, Lozano Corbí considera como el concepto más cercano a lo que posteriormente se denomina derechos reales al sostenido por Gayo: "un poder que el sujeto de derecho puede ejercer sobre cosas corporales, protegi-

30 *Código Civil de la República Argentina* 1871,

Art. 2502 "Los derechos reales sólo pueden ser creados por ley. Todo contrato o disposición de última voluntad que constituyese otros derechos reales, o modificase los que por este Código se reconocen, valdrá sólo como constitución de derechos personales, si como tal pudiese valer".

31 *Código Civil de la República Argentina* 1871, Nota al Art. 2502.

32 Schulz 1956, p. 44.

33 Lozano Corbí 1999, p. 353.

das por las denominadas *actio in rem*".[34]

Más allá de las distancias terminológicas, en el ámbito de los derechos sobre las cosas, Vélez pretendía dar cuenta de las quejas de los juristas españoles quienes se quejaban "de los males que habían producido los derechos reales sobre una misma cosa".[35] Esta confluencia de potestades de diferentes titulares significaba, en algunos casos, que "uno era propietario del pasto que naciera y otro de las plantaciones que hubiesen hecho".[36] El peligro que emergía de este múltiple encuentro de "derechos reales sobre unos mismos bienes" fue motivo de la proliferación de un sinnúmero de pleitos y conflictos a la par del obstáculo "que representaba esta situación para la explotación y circulación de estos bienes".[37] Esto fue explicado por Vélez Sarsfield a partir de la desmejora que sufrían las propiedades y el gran número de pleitos que emergían.

5. La tradición desde la perspectiva velezana y su interpretación doctrinaria

En el Código Civil argentino, la tradición significó tanto el modo constitutivo como el medio de publicidad de la trasmisión de los derechos reales. En materia de transferencia de derechos sobre inmuebles el jurista español Gumersindo de Azcárate propuso una clasificación de las legislaciones en cuatro grupos. "En el primero incluimos a los que exigen la tradición, entrega o toma de posesión, como requisito indispensable para la transmisión de la propiedad; en el segundo, las que declaran que ésta se verifica por virtud de las convenciones, ya den un valor absoluto al mero consentimiento, ya establezcan solemnidades especiales para hacer constar éste, en el tercero las que han sustituido la tradición con la inscripción o transcripción en el registro, en el cuarto las que combinan estas distintas formas, exigiendo ya la tradición y las solemnidades, ya éstas o aquélla y la inscripción, o admitiendo un principio para los contratantes y otro respecto del tercero".[38]

A partir de la lectura del articulado del código advertimos que este se enmarcó en el primer grupo propuesto por Azcárate, muestra de ello es lo normado en el Art. 577: "antes de la tradición de la cosa el acreedor no adquiere

34 Lozano Corbí 1999, p. 353.
35 *Código Civil de la República Argentina* 1871, Nota al Art. 2502.
36 *Código Civil de la República Argentina* 1871, Nota al Art. 2502.
37 *Código Civil de la República Argentina* 1871, Nota al Art. 2502.
38 Citado por: Fuenzalida1998, p. 118-119.

sobre ella ningún derecho real". Respecto de la nota a este artículo, Mariani de Vidal señala que además de apreciarse las críticas al sistema francés, el cual se basaba en el consentimiento, puede comprenderse el alcance que tiene la tradición en nuestro sistema.[39] En el mismo apartado el codificador consideró que la manifestación pública y visible era "la razón filosófica del gran principio de la tradición que la sabiduría de los romanos estableció",[40] pero al cotejar esta aseveración con estudios sobre el derecho romano surgen algunas incertidumbres. Si bien se reconoce que la transmisión de la propiedad era "efectiva cuando el transmitente era el dueño o al menos un autorizado para disponer del objeto, como esto era un hecho que no podría ser percibido a simple vista, permanecía en la incertidumbre si el cesionario había recibido la propiedad o no".[41] En este sentido, se aprecia una suerte de inseguridad jurídica originada en el hecho de que frecuentemente emergían consecuencias jurídicas de una serie de hechos "los cuales eran difícil de reconocer", en este sentido "el derecho romano asimiló demasiado esta inseguridad jurídica con perfecta calma".[42] Lo que permite sostener que "es una nota característica del derecho romano la escaza importancia que fue atribuida a esta clase de seguridad".[43]

La errónea interpretación de la tradición en términos publicitarios, es advertida por Azcárate quien interpretó que pareciera que los Códigos "han [hubieran] retrocedido volviendo al sentido del derecho romano", pero no es así en realidad, aclara el autor ya que "la antigua tradición no se originaba de la necesidad de dar publicidad al acto de la transmisión y de rodear a ésta de to-

39 En el segundo párrafo de la nota de cita al jurista Freitas quien "sosteniendo el principio de la tradición para la adquisición de la propiedad dice: Por la naturaleza de las cosas, por una simple operación lógica, por un sentimiento espontáneo de justicia, por el interés de la seguridad de las relaciones privadas a que se liga la prosperidad general, se comprende desde el primer momento que el derecho real debe manifestarse por otros caracteres, por otros signos que no sean los del derecho personal, y que esos signos deben ser tan visibles y tan público cuanto sea posible. No se concibe que una sociedad esté obligada a respetar un derecho que no conoce". Respecto a la interpretación que Vélez hizo de la postura de Freitas en materia de tradición, diversos autores, entre ellos Bibiloni, Carballo y Mariani de Vidal señalaron la errónea interpretación puesto que Freitas entendía por tradición no la entrega de la cosa sino la inscripción. Ver: Cacciavillani 2018.

40 *Código Civil de la República Argentina* 1871, Nota al Art. 577.

41 Schulz 1956, p. 248.

42 Schulz 1956, p. 248.

43 Schulz 1956, p. 243.

dos los requisitos convenientes para asegurarse de su autenticidad, sino que era una consecuencia derivada de una doctrina completa y estricta".[44]

No obstante lo señalado, esta idea de vincular la tradición con la publicidad podría tener alguna conexión con el derecho romano. En este sentido, algunos autores sostienen que existía una similitud con la experiencia romana en la que se advierten "formas primitivas de publicidad" mediante la presencia de testigos, intervención de autoridades como el *libripens*, la actuación de magistrados y las transcripciones.[45] Por su parte, Schulz también reconoció que "El principio de la publicidad, importante desde el punto de vista de la seguridad de las relaciones jurídicas[46] –si bien– fue escasamente usado en el Derecho Romano, solo –se advierte– en el caso de la *mancipatio e in iure cessio*".[47]

Analizada la tradición en su faceta publicitaria corresponde tratar la cuestión de la tradición como requisito en términos de transmisibilidad de derechos. Si bien la primera idea que denota el vocablo es la entrega material de la cosa, su capacidad traslativa de dominio se encuentra vinculada a que la misma sea realizada "en virtud de título traslativo de propiedad, como venta (…) por el dueño que sea capaz de enajenar sus bienes".[48] En este mismo sentido el codificador interpretó la tradición, comprendiendo la entrega material junto con un acto jurídico que tenga virtualidad para producir la transmisión del derecho (donación, compraventa). La doctrina sostiene que esta interpretación se respalda en la cita que hace Vélez Sarsfield del Digesto, referencia que ha sido señalada en correspondencia con el jurisconsulto Paulo: quien sostenía "La nuda tradición nunca transfiere el dominio, a no ser que hubiere precedido la venta, o alguna causa justa por la cual se siguiera la entrega".[49]

Efectivamente, en este punto existe una conexión entre la noción de tradición que manejó Vélez y la empleada en el derecho romano. La denominada *causa traditionis* se encontraba fuertemente ligada con el propósito, así "se

---

44 Fuenzalida 1998, p. 120-121.

45 Zamora Manzano 2004.

46 En su obra el jurista alemán Schulz advierte que la idea de "seguridad jurídica será tratada aquí en un doble sentido del término, en un sentido esto significa la certeza que el derecho prevalecerá en su luchar /controversia con lo injusto o incorrecto, en el otro certeza respecto de qué es el derecho, su carácter reconocible y la predictibilidad de las consecuencias legales generadas a partir de un conjunto de hechos. Schulz 1956, p. 240.

47 Schulz 1956, p. 249.

48 Escriche 1863, p. 4505.

49 Musto 2000, p. 474.

requirió el convenio de las partes sobre la finalidad legal de la transmisión esto es, sobre si la *traditio* se hacía *venditionis causa*, *donationis causa, dotis causa, solutionis causa, mutui causa*".[50] La falta de acuerdo entre las partes sobre la *causa traditionis* tenía como consecuencia la no transmisión de la propiedad. A la par de este requisito, la transferencia de la posesión era considerada indispensable para el traslado "del poder físico sobre la cosa", lo que generó que "una transmisión de propiedad por simple convenio, fue [ra] totalmente desconocida en el Derecho clásico".[51]

Durante los primeros años de vigencia de código, los juristas contemporáneos comenzaron a marcar las diferencias con el sistema romano. En esta línea, Carballo, un jurista de los primeros años del siglo XIX, en su tesis de doctorado[52] planteó que, para los romanos, "la posesión era fundamental, constituía la base, el punto de partida de los derechos reales, de aquí que negaran toda eficacia al solo contrato, á la simple convención y de aquí también que reconociendo como únicas fuentes del dominio la ocupación, la aprehensión; no concibieran la posibilidad de transmitirlo sin hacer intervenir el acto material de la aprehensión".[53] Para el autor, si bien "la tradición respondía al concepto, que el pueblo romano tenia del derecho. Legado el principio de la tradición a las naciones modernas, lo vemos debilitarse, perder su fuerza poco á poco",[54] quedando reducido a una exigencia teórica sin objeto ni vida propios.

En materia de transmisión inmobiliaria, las críticas de Carballo al sistema adoptado en el Código enfatizaban que la exigencia de la tradición "mirada a través del moderno concepto del derecho" se tornó un mero defecto del simbolismo romano que no sólo se presentó como un obstáculo a la "realización del derecho" sino que fue un óbice en materia de transacciones y enajenación de las tierras. En su anteproyecto al código civil (1932), Bibiloni consideró que la tradición de hecho, en el sentido de acto material, era dificultosa ya que no deja ningún tipo de rastro permaneciendo "oculta en la soledad de los campos".[55] Situación que se tornó más que perjudicial para los terceros ya que "¿Quién sabe en las ciudades sí años atrás se hicieron tradiciones y a quién?".[56]

50 Schulz 1960, p. 336.
51 Schulz 1960, p. 337.
52 Carballo 1912.
53 Carballo 1912, p. 20.
54 Carballo 1912, p. 21.
55 Bibiloni 1932, p. 91.
56 Bibiloni 1932, p. 91.

La razón por la que el codificador se apartó de la idea de tradición sostenida por el jurista Freitas, basada en la inscripción registral, se encuentra en una nota final del codificador a todo el título XIV "De la hipoteca".[57] En breves palabras, en la nota Vélez consideró que debería esperarse a que "la experiencia y el ejemplo de otras naciones, nos enseñen los medios de salvar las dificultades del sistema de inscripción de todos los títulos"[58] la inscripción en el registro no garantiza ni aumenta el valor del título. Si bien los motivos que esgrimió el codificador para no acoger la registración de las transferencias de derechos sobre inmuebles[59] no tuvieron en miras al derecho romano tampoco en este "existió el llamado registro de la propiedad, ni siquiera el de la propiedad territorial".[60]

A pesar de la postura del autor del primer código civil, a nivel nacional una fuerte adhesión a la registración de la propiedad se materializó en las propuestas de diversos proyectos de leyes. Entre ellos se destacan los proyectos de los diputados Eleodoro Lobos en 1899, Julián Barraquero en 1902, José Galiano en 1904, el del Poder Ejecutivo de 1911, el del diputado Frugoni Zabala en 1915 y Carlos F. Melo 1917, un nuevo proyecto del Poder Ejecutivo de 1923, y los anteproyectos de Juan Antonio Bibiloni 1932 y Llambías de 1954. Por su parte, en los espacios provinciales, fueron erigiéndose registros de la propiedad con diferentes variantes. En algunos casos, la inscripción constituía y publicitaba los derechos mientras que en otros tenía solo esta última una función.

6. Reflexiones finales

"Toda investigación romanista debe proponerse la consecución de resultados relevantes para el derecho, pero la pregunta es, ¿para qué Derecho?".[61] Como respuestas al interrogante emergen diferentes propuesta, por un lado los resultados de esta investigación podrían ser considerados romanistas y por ende ser relevantes para el estudio de la circulación, interpretación e influencia del derecho romano en los procesos de producción normativa en La-

57 La autora agradece al Dr. Gabriel B. Ventura por las observaciones y sugerencias hechas sobre este punto durante la defensa de su tesis doctoral.

58 *Código Civil de la República Argentina* 1871, Título XIV.

59 Un análisis de los argumentos que Vélez esgrimió en este punto se encuentra en: Cacciavillani 2018, p. 101-104.

60 Schulz 1960, p. 339.

61 Cuena Boy 1993, p. 391.

tinoamérica, mientras que por el otro sería un estudio de historia del derecho argentino en el que se reflexiona igualmente en torno a la influencia del derecho romano en la construcción del derecho en un espacio.

El objetivo de nuestra propuesta fue ir más allá de una visión dicótoma, para ello decidimos realizar un estudio en el que además de considerar la impronta del derecho romano en el texto del código, mediante la labor y formación de su autor, integre una reflexión que considere el análisis de este desde la perspectiva romanista. A partir de este diálogo entre lo que el codificador comprendió, interpretó y seleccionó en materia de transmisión de derechos reales y lo que el derecho romano estipuló en el contexto de las *actio in rem* y *traditio* pudimos advertir importantes diferencias que principalmente giraron en torno al rol publicitario y traslativo de la tradición. A la par de este cotejo, y con la finalidad de evitar una perspectiva meramente legalista, decidimos incluir algunas referencias de la doctrina para advertir si las interpretaciones del codificador recibieron apoyo o bien fueron objeto de críticas.

Por medio de la lectura de autores contemporáneos -Carballo- y posteriores al código-Bibiloni, Mariani de Vidal, Musto, Llambías, pudimos advertir el fuerte rechazo que generó la adopción de un sistema de transmisión de los derechos reales en cuyo centro se encontraba la tradición. Las críticas que esta decisión desató tienen como sustrato argumentativo las cuestionables interpretaciones que Vélez hizo de la experiencia jurídica romana y el empleo de algunos conceptos romanistas en un contexto completamente diferente que dieron como resultado un sistema de transmisión que dejaba en la completa incertidumbre las transferencias de derechos sobre inmuebles.

A partir de un análisis conciliatorio de la experiencia codificadora civil argentina y especificidades propias del derecho romano pudimos advertir que éste no fue meramente receptado sino que fue interpretado, empleado y resignificado de tal manera que le permitió al codificador apartarse del sistema consensualista y tener argumentos para rechazar la creación de registros de la propiedad.

Bibliografía

Fuentes primarias

Código Civil de la República Argentina 1871 = *Código Civil de la República Argentina,* Buenos Aires, 1871.

Bibiloni 1932 = J.A. Bibiloni, *Anteproyecto de Reformas al Código Civil Argentino presentado a la Comisión encargada de redactarlo*, Buenos Aires, 1932.
Carballo 1912 = H. Carballo, *El sistema Torrens, sus ventajas económicas su implantación en la república Argentina*, Córdoba, 1912.
Escriche 1863 = J. Escriche, *Diccionario Razonado de Legislación y Jurisprudencia*, Paris, 1863.
Salvat 1913 = E. Salvat, *El Código Civil Argentino (Estudio General). Historia, Plan o Método y Fuentes*, en *Revista Argentina de Ciencias Políticas* VII, 1913, p. 420-437.
Segovia 1881 = L. Segovia, *El Código civil de la República Argentina con su explicación y crítica*, Buenos Aires, 1881.

Fuentes secundarias

Agüero 2017 = A. Agüero, *El uso del pasado en la enseñanza del derecho penal en Argentina. La imagen del antiguo régimen como tradición latente*, en *Revista electrónica del Instituto de Investigaciones Ambrosio L. Gioja* 18, 2017, p. 169-129.
Agüero 2002 = L. Argüello, *Manual de Derecho Romano*, Buenos Aires, 2002.
Aspell 2012 = M. Aspell, *Universitas Cordubensis Tucumanae. La enseñanza del Derecho y sus textos de estudios siglo XVIII*, en *Revista Mexicana de Historia del Derecho* XXV, 2012, p. 21-66.
Aspell 2010 = M. Aspell, *Una luz desde las entrañas mismas de la conquista. La universidad de Córdoba y la enseñanza del derecho*, en *Revista Chilena de Historia del Derecho* 22, 2010, p. 1369-1400.
Ávila Martel 1965 = A. Ávila Martel, *El primer programa de Derecho Romano en la Universidad de Chile*, en *Revista Chilena de Historia del Derecho* 4, 1965, p. 283-311.
Brito Guzmán 2001 = A. Brito Guzmán, *Derecho Privado Romano*, Tomo I, Santiago de Chile, 2001.
Brito Guzmán 2015 = A. Brito Guzmán, *La tradición como modo de adquirir el dominio en el Derecho Romano, en el Común y en el Iusnaturalismo y su destino en los derechos patrios en la América española*, en *Revista Chilena de Derecho* 42, 1, 2015, p. 329-344.
Cacciavillani 2018 = P. Cacciavillani, *De propiedad comunal a propiedad individual. El régimen jurídico de la propiedad en Córdoba 1871-1885*, Tesis de doctorado, Facultad de Derecho y Ciencias Sociales, Universidad Nacional de Córdoba, Córdoba, 2018.
Caroni 2014 = P. Caroni. *La soledad del historiador del derecho. Apuntes sobre la conveniencia de una disciplina diferente*, Madrid, 2014.

Chanetón 1969 = A. Chanetón, *Historia de Vélez Sarsfield*, Buenos Aires, 1969.
Cuena Boy 1993 = F. Cuena Boy, *Sobre el método de investigación en el Derecho Romano*, en *Anuario de la Facultad de Derecho de Cáceres* 11, 1993, p. 381-397.
Duve 2016 = T. Duve, *Global Legal History. A Methodological Approach*, en Max Planck Institut für europäische Rechtsgeschichte Research Paper Series 4, 2016, http://dx.doi.org/10.2139/ssrn.2781104
Fernández de Bujan y Fernández 1994 = A. Fernández de Bujan y Fernández, *La influencia del derecho romano en el sistema jurídico iberoamericano*, en *Derecho y opinión* 2, 1994, p. 181-188.
Fuenzalida 1998 = C. Fuenzalida, *Gumersindo de Azcárate y la renovación de la ciencia del derecho en el siglo XIX*, Madrid, 1998.
Hespanha 2002 = A. Hespanha, *Cultura Jurídica Europea. Síntesis de un Milenio*, Madrid, 2002.
Hinestrosa 2013 = F. Hinestrosa, *Derecho romano, tradición romanista y América Latina*, en *Revista de Derecho Privado*, 25, 2013, p. 3-7.
Levaggi 1986 = A. Levaggi, *El derecho romano en la formación de los abogados argentinos del ochocientos*, en *Revista de la Facultad de Derecho PUCP* 40, 1986, p. 18-33.
Llambías 1960 = J. Llambías, *Tratado de derecho civil*, Tomo I, Buenos Aires, 1960.
Lozano Corbí 1999 = E. Lozano Corbí, *Historia e Instituciones de Derecho Romano*, Zaragoza, 1999.
Mariani de Vidal 2004 = M. Mariani de Vidal, *Derechos Reales*, Tomo I, Buenos Aires, 2004.
Musto 2000 = N. Musto. *Derechos Reales*, Tomo I, Buenos Aires, 2000.
Ramos Núñez 1994 = C. Ramos Núñez, *La codificación impulso Moderno de la Familia Romanista*, en *Revista de la Facultad de Derecho PUCP* 8-9, 1994, p. 159-169.
Rodríguez Ennes 2012 = L. Rodríguez Ennes, *La permanencia del derecho romano en los códigos europeos e iberoamericanos*, en *Anuario da Facultade de Dereito da Universidade da Coruña* 16, 2012, p. 737-755.
Rodríguez López 1999 = R. Rodríguez López, *El derecho romano en las codificaciones iberoamericanas*, en M. C. Álvarez Morán & R. M. Iglesias Montiel (coords), *Contemporaneidad de los clásicos en el umbral del tercer milenio: actas del congreso internacional de los clásicos. La tradición grecolatina ante el siglo XXI*, La Habana, 1999, p. 379-388.
Santos Martínez 1991 = P. Santos Martínez, *El derecho romano en un pleito mendocino sobre propiedad (1804-1810)*, en *Revista Chilena de Historia del Derecho* 14, 1991, p. 213-225.

Salinas Araneda 1992 = C. Salinas Araneda, *El derecho romano en el código canónico de 1983*, en *Revista Chilena de Historia del Derecho*, 17, 1992, p.157-163.

Schulz 1960 = F. Schulz, *Derecho Romano Clásico*, Barcelona, 1960.

Schulz 1956 = F. Schulz, *Principles of Roman Law*, Oxford, 1956.

Scotti 2002 = E. Scotti, *Aportes al derecho registral argentino*, La Plata, 2002.

Stringini 2018 = N. Stringini, *El derecho romano y la enseñanza del derecho en Buenos Aires, 1821-1852*, en *Academia. Revista sobre la enseñanza del Derecho* 16, 31, 2018, p. 239-283.

Somovilla 2007 = G. Somovilla, *La presencia del derecho romano en los dictámenes de Dalmacio Vélez Sarsfield como asesor del gobierno de Buenos Aires*, en *Iushistoria* 4, 2007, p. 1-11.

Turelli 2018 = G. Turelli, *Persona jurídica y derecho romano en las Notas al Código civil de Vélez Sársfield*, en *Roma e America. Diritto romano comune* 39, 2018, p. 311-321.

Ihering 1998 = R. von Ihering, *El espíritu del derecho romano en las diversas fases de su desarrollo*. Versión española con la autorización del autor y notas por Enrique Príncipe y Satorres, con estudio preliminar sobre "Ihering, ensayo de explicación", de José Luis Monereo Pérez, Granada, 1998.

Zamora Manzano 2004 = J. Zamora Manzano, *La publicidad de las transmisiones inmobiliarias en el Derecho Romano (Antecedentes de los principios hipotecarios)*, Madrid, 2004.

THE INDIGENOUS CONCEPT OF LAND IN ANDEAN CONSTITUTIONALISM

Silvia Bagni

1. Introduction

Some legal scholars[1] consider the constituent processes held in Latin America between the end of the XX and the first decade of the XXI century as an autonomous constitutional cycle ("*nuevo constitucionalismo latinoamericano*"). The main features selected by Viciano and Martínez to describe it are: originality of content; long texts; the complexity of the multiple values included, even if the language has been kept simple and easy to understand for the general public; a constitutional reform process through a constituent assembly.

As for the first feature, most of the substantial innovations have been introduced in the field of environmental law. It must be taken into account that the constitutional debate in these countries has taken advantage of the international discourse on sustainable development and the actual need to defend the environment, begun in the Seventies with the Stockholm conference on the human habitat and with the 1987 Brundtland report: "Our common future". So, the language of Latin American constitutions, as far as the environment is concerned, refers to modern concepts, such as sustainability, ecosystems, habitats, etc. and explicitly recognizes a healthy environment as a fundamental right.

Consider, for instance, the case of Colombia: "Article 79. Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends. Article 80. The State will plan the handling and use of natural resources in order to guarantee their sustainable development, conservation, restoration, or replacement. Additionally, it will have to caution and control the factors of environmental deterioration, impose legal

1 Viciano Pastor, Martínez Dalmau 2012, pp. 36-44; Carducci 2013, p. 12 s.; De Sousa Santos 2010.

sanctions, and demand the repair of any damage caused. In the same way, it will cooperate with other nations in the protection of the ecosystems located in the border areas".[2]

Personally, I propose going further, preferring to speak of a *nuevo constitucionalismo andino*, whose main features are: interculturalism; popular participation both in the constituent process and in ordinary decision-making processes, through the enhancement of direct, participatory and deliberative instruments; a new legal paradigm for the environment.[3]

These characteristics derive from the choice of including, within the legal system, references to indigenous worldviews, or the ancient traditions that constitute the intercultural background of the values enshrined in these constitutions. The most innovative content of these indigenous traditions, as opposed to the Western approach, is the type of relationship between humankind and nature that they propose and defend: bio-centric, holistic, interdependent.

The most representative examples of this new constitutional cycle are Ecuador and Bolivia, which constitutionalized, in 2008 and 2009, the Kichwa *sumak kawsay* and the Aymara *suma qamaña*. Both constituent processes adopted an intercultural approach. This means that the indigenous cultural paradigm was not simply mentioned as an implementation of the cultural and identity rights of a minority group, as has happened in multicultural contexts,[4] but was included as part of the common cultural heritage of a new pluri-national form of State.[5]

These first experiences influenced other legal systems in Latin America (e.g. references to *Pacha Mama* can be found in Nicaragua's constitutional revision of 2014; the rights of Nature were introduced in the State Constitution of Guerrero in 2014, and in the Mexico City Constitution in 2017), but

2 "Art. 79. Todas las personas tienen derecho a gozar de un ambiente sano. La ley garantizará la participación de la comunidad en las decisiones que puedan afectarlo. Es deber del Estado proteger la diversidad e integridad del ambiente, conservar las áreas de especial importancia ecológica y fomentar la educación para el logro de estos fines.

Art. 80. El Estado planificará el manejo y aprovechamiento de los recursos naturales, para garantizar su desarrollo sostenible, su conservación, restauración o sustitución. Además, deberá prevenir y controlar los factores de deterioro ambiental, imponer las sanciones legales y exigir la reparación de los daños causados".

3 Bagni 2013, p. 19.

4 Even if the multicultural approach is also included in the Constitutions we are commenting on, with chapters dedicated to the rights of indigenous peoples as ethnic groups.

5 Pegoraro 2017, p. 35-36 and p. 66-67; Pavani, Estupiñan Achury 2017, pp. 106-107.

similar patterns can also be found in other continents (see references to the Malagasy *fanahy* in the Madagascar constitutional revision of 2010; or references to Gross National Happiness in the 2008 Bhutan Constitution).

If not at the constitutional level, some legal systems have incorporated aspects of indigenous cultural traditions into specific laws, in particular to defend natural ecosystems from exploitation and human devastation. We can mention in Australia the Yarra River Protection (*Wilip-gin Birrarung murron*) Act of 2017 that legally recognizes the Yarra river as an indivisible living entity deserving protection, based on the Aboriginal understanding of the relationship between the river and the original inhabitants of the land; and in New Zealand, the Te Urewera Act, 2014, and Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, both recognizing natural elements as legal entities, with proper rights, on the basis of the Maori culture.

The legal implications deriving from this process have not been fully perceived, even in the countries where the phenomenon was first generated. In fact, countries like Ecuador and Bolivia continue to base their economic system on extractivism and the over-exploitation of natural resources. Nevertheless, the encounter between legal science and eco-centric cultures should at least produce a profound reconsideration, if not a change of perspective, of many legal dogmas, such as the scope of legal personhood, the fundamental right of property, and the constitutional right to a healthy environment.[6]

The aim of this research is, first of all, to illustrate the main features of Andean indigenous worldviews, stressing in particular their concept of land and nature (§ 2). Secondly, the initial legal consequences produced by the "new Andean constitutionalism" on the regulation of property and the relationship between man and the environment will be analyzed (§ 3). Concluding remarks will evaluate the impact of the recontextualization of indigenous culture on modern law (§ 4).

2. The Andean eco-centric worldviews

According to a 2014 Publication by the UN Economic Commission for Latin America and the Caribbean (ECLAC),[7] by the year 2010 an estimated 45

6 At the basis of this particular critical rethinking of the Western legal paradigm there is a new philosophical approach, called by many scholars "Earth Jurisprudence", whose masterpiece in legal literature is Cullinan 2011.

7 ECLAC 2014.

million indigenous people lived in Latin America, accounting for 8.3 % of the region's population: 826 indigenous peoples, plus 200 living in isolation. Each group lives with its own cultural traditions, even if it is possible to detect a common basis for their understanding of the relationship between man and Nature.

The Mapuche, who originally settled in the South-East of America, are the indigenous people that resisted the longest to the Spanish conquest (they were finally defeated only at the very end of the 19th century), and so their own cultural traditions have not been influenced by Western culture as much as that of other Andean peoples.[8] Their cultural roots are strictly related to the earth, as their own name shows. In the "*Mapudungun*", the language of the Mapuche, "*Mapu*" means "earth" and "*Che*" means "person", so the Mapuche are literally the "Sons of the Earth". This genealogy is so strong that their language also derives from the sounds of natural elements. It means, in fact, the Language of the Earth,[9] and was developed by their ancestors precisely to decipher the messages coming from all the elements of Nature: the sounds of rivers, the whistling of the wind, the howling of the sea, the singing of birds, the sounds of leaves, insects and animals.[10]

The "*Mapu Kimün*", or Mapuche Knowledge, is based on the ideas of circularity and interdependency. In the words of the *Ngenpin* (wise man) Armando Marileo Lefío: "According to our ancestors' outlook, the diverse elements that constitute our worldview interact and depend on each other in a holistic and systemic manner. Inhabitants, land, nature and powers belonging to both the natural and the supernatural dimensions coexist, producing harmony and equilibrium in the "*Nag Mapu*"".[11] Humanity belongs to the earth, as all the other elements, dead or alive, spiritual or material. The Mapuche have an integral epistemology of life, time and space,[12] generating the deep sense of respect that they feel for Nature and the Environment, considered "as a communal good, a means of interrelation and a sharing space with all creatures sustained by it".[13] But the "*Nag Mapu*", the territory where we live, is only one part of the whole cosmos for Mapuche. There are other *Mapus*,

8 Dillehay 2007, p. 1, 23, 54.

9 Marileo Lefío, Salas Astrain 2011, p. 121.

10 Marileo Lefío; Ñanculef Huaiquinao 2016, p. 21.

11 Marileo Lefío.

12 Ñanculef Huaiquinao 2016, p. 41.

13 Marileo Lefío.

above (*Wenu Mapu*, the sky) and below (*Miche Mapu*, underground), and in all cardinal points, all interconnected. It's a clear holistic vision of space, generated from practical observations for thousands of years, and from which the Mapuche knew about the earth's rotation around the Sun long before the Western world.

One of the main principles in Mapuche cosmogony is the feminine, because it represents fertility and its creative power (this assumption is shared with the other Andean traditions on *Pacha Mama*).

The *Nag Mapu* has both a spatial and temporal dimension: it is populated by spirits and energies, good and evil, among which there are also the spirits of the ancestors. There is a strong relationship between the living and the dead,[14] because of the circularity of time, so that the Mapuche say that the future is "in our back" (to indicate that it is in the past).

Before the Spanish conquest, the other Andean peoples belonged to the Incan Empire.[15] The Tawantinsuyu extended from the southern part of Colombia to the Cuzco, Bolivia, and the northern territories of Chile and Argentina. The Incas were a small group of peoples that were able to build a great empire and govern the other Andean peoples (the Muisca of Colombia, the Valdivia of Ecuador, the Quechuas and the Aymara of Peru and Bolivia, were the four most important sedentary Amerindian groups in South America).

In this cultural tradition, too, there is a very strong connection between man and nature. The essence of this worldview is to be found in the four elements that, in a harmonious relationship, generate life in the entire Universe: water, air, earth, fire. Everything on earth is permeated by their creative energy and, as a consequence, each entity is living and interrelated with the others. Human beings should be able to communicate with each single element of the world, from stones to mountains and forests, because they share the same constitutive elements. *Pacha Mama* is the whole, where time and space are fused. Totality and uniqueness coexist. "The Pacha Mama is a framework made up of both the human and nonhuman: people do not occupy it – they are a constitutive part of it. It is ecological and social at the same time".[16]

The dualistic principle in this culture does not produce opposition, but integration: we do not live in a universe, but in a pluri-verse, so fighting to eliminate differences does not make sense.

14 Dillehay 2007, p. 5.

15 Dillehay 2007, p. 25; Ribeiro 1975, p. 169 ff.

16 Gudynas 2018, p. 232.

In one of the many Kichwa legends about the spirits of the universe, from the community of Tigua (Cotopaxi, Ecuador), Pachakamak and Pachamama, the masculine and feminine spirits that created the universe wanted a messenger to communicate with the living beings on the Earth. So, they gathered all the forces of the universe together: the sun, the moon, the rivers, the trees, the winds and the stars, *Taita* Cotopaxi and *Mama* Tungurahua (two Ecuadorian volcanos), the lamas and the men; and from all these energies an egg appeared. The condor, being able to fly very high in the sky, is the sacred messenger, representing the connection between the earth and the cosmos.[17]

The way in which humans should live their lives in harmony with the *Pacha* is expressed in the concept of *sumak kawsay* (in Kichwa) or *suma qamaña* (in Aymara), translated in Spanish as *Buen vivir*. It is an open concept, not easily defined, and still under construction:

> es un espacio de encuentro de diferentes culturas, tanto aquella del sumak kawsay como las de feministas o biocéntricos. No es un mero ejercicio multicultural o de yuxtaposición de culturas, sino que es un encuentro intercultural, entendiendo que existe un plano de igualdad entre distintas culturas, pero que a la vez opera un decolonialidad en admitir la superioridad de los saberes europeos.[18]

The starting point for understanding *buen vivir* is the transition from an anthropocentric conception of the relationship between man and nature, which finds its greatest development in the Renaissance culture and in Catholic personalism, to a biocentric one, which refers to the new ecological thinking.

Generally speaking, the expression means "Life in harmony with nature and other beings": *suma*/*sumak* means "plenty, sublime, excellent, beautiful"; *qamaña* and *kawsay* stand for "life, to live, co-living, being", so, the most faithful translation of the expression would be "fullness of life". The Spanish translation can produce false assonances with western philosophical conceptions, like Aristotle's *eudaimonia*, from which liberalism derived *oikonomia* and the welfare state. The modern idea of wellness has nothing in common with *sumak kawsay*: the first is individualistic and subjective; the second is communitarian and supportive.

In the indigenous cosmovision harmony between the individual and the community is the basis of co-living:

17 Toaquiza 2006.

18 Acosta, Gudynas 2011, p. 81.

Saber vivir implica estar en armonía con uno mismo. Vivir Bien es vivir en comunidad, en hermandad y especialmente en complementariedad. Es una vida comunal, armónica y autosuficiente. Vivir Bien significa complementarnos y compartir sin competir, vivir en armonía entre las personas y con la *naturaleza. Es la base para la defensa de la naturaleza, de la vida misma y de la humanidad toda*.[19]

The main principles of *sumak kawsay* are represented in the *chakana*, the Andean cross: *yachay* (ancestral and collective knowledge)*, ruray* (to do)*, ushay* (energy, vitality)*, munay* (to love, affectivity, or the ability to share ideals and goods).[20] The arms of the cross are the principles that regulate the relationship between the four elements: "reciprocity (*ranti-ranti*; the guidelines of the social communitarian practices of mutual aid); integrality (*pura*; the guidelines of indigenous holistic thought); complementarity (*yananti*; opposites as complementary elements); and interrelation (*tinkuy*; the deliberative principle to reach a consensual decision)".[21]

Indigenous community representatives participated in the constituent processes of Ecuador and Bolivia, so their worldviews influenced the content of the new constitutions and some ideas were translated into binding constitutional norms or principles.

3. Normative reception and implications on some Latin American legal systems

3.1. The concepts of property, land and territory, and legal personhood

In this paragraph I will analyze how the indigenous worldviews described above were introduced into some Latin American legal systems, and the consequences that their reception has produced on the shaping and understanding of some specific concepts in the Western legal tradition, such as property, territory and environmental law.

In most European Constitutions, property is recognized as private and individual, public or state, or mixed. In some Latin American countries, collective property is another form of property recognized by the Constitution and derived from the chthonic tradition. It is important to notice that an essential role in the recognition of the indigenous peoples' right to collective property was played by the case-law of the Inter-American Court of Human

19 Huanacuni Mamani 2010, p. 7 ff.

20 Macas 2014a, p. 186.

21 Hidalgo-Capitán, Arias, Ávila 2014, p. 37; Kowii 2014, p. 166 ff.; Macas 2014b, p. 172.

Rights. In cases like *Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua* (*Sentencia de 31 de agosto de 2001*), *Comunidad Indígena Yakye Axa Vs. Paraguay (Sentencia de 6 de febrero de 2006)*, *Comunidad Indígena Sawhoyamaxa Vs. Paraguay (Sentencia de 29 de marzo de 2006)*, *Pueblo Saramaka Vs. Surinam (Sentencia de 28 de noviembre de 2007)*, the Court stated that art. 21 of the Convention, when applied to indigenous and tribal peoples, must be interpreted as a right to collective property,[22] recognizing the special cultural and existential value that land has for indigenous communities.[23] However, the Court recognized collective property as a specific form of "private property". The main objective of the Court was not to defend and guarantee collective property as an alternative relationship with goods, and a different paradigm of possession, but, instead, to implement the cultural and identity rights of indigenous and tribal peoples.

Even if there is no doubt that the most recent Latin American Constitutions have been influenced by this international legal doctrine and, moreover, that the direct participation of indigenous peoples in the constituent processes played a great part in the recognition of collective property, we have to note that the Ecuadorian Constitution considers the collective (community) property one of the types of property, at the same level as private and public property.[24] The same happens in the Bolivian Constitution, that includes in

22 "148. Through an evolutionary interpretation of the international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua" (Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001).

23 "Indigenous peoples live off the land; in other words, the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally, depends on the collective, communitarian existence and maintenance of the land, as has been the case since ancient times»; «149 [...] For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations" (Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001).

24 "Art. 321. The State recognizes and guarantees the right to property in all of its forms, whether public, private, community, State, associative, cooperative or mixed- economy, and that it must fulfill its social and environmental role".

the definition of the right to property: private, individual or collective.[25] The intercultural dialogue begun with the Andean constitutional cycle has opened a different legal perspective on property and economic rights, that was not present in the previous one, still characterized by a multicultural approach. For instance, in the 1991 Colombian Constitution, collective property is only mentioned in connection with the rights of indigenous communities (art. 329 const.).

The word "territory" in Nation-States usually indicates the area occupied by the State population. It is also used in public and administrative law, to identify intermediate levels of decentralization of the State, such as regions, provinces and municipalities. In Pluri-national States, where indigenous peoples have been struggling for decades to achieve recognition of their collective rights to land, "Asserting the concept of 'territory' has been a hard-won battle, especially strong in Latin America. For indigenous people, land is not only soil and biodiversity and water — it is also the place from which your cultural role and identity as part of a larger Earth Community is defined. The law which governs your life and your community, and which has done so for generations, is born with you, from the land. Language and cultural identity are derived from the land. Your ancestors and the spiritual dimensions of the ecosystem and other species all reside in the territory. The land nurtures the psyche. All this together is the territory from which you are shaped".[26]

Finally, for the Western legal tradition, land and Nature are part of the environment and are considered objects of human rights: property rights, esthetic rights, like the landscape,[27] or environmental rights, like the right to live in a healthy environment, free from contamination. In these Latin American countries, for the first time in the history of law, Nature has been recognized as a legal entity and a subject of rights.

---

25 "Art. 56.I. Everyone has the right to private, individual or collective property, provided that it serves a social function".

26 Hosken 2011, p. 47. See also Martinez-Alier, Anguelovski, Bond *et al.* 2014, p. 19-60: "The concept of *territory* is not only used by indigenous populations but also by other communities who have a special relation with the spaces where they have historically lived in, for example, afro-descendants living in *quilombos* in Brazil or in *palenques* in Colombia or by peasant communities ethnically belonging to national majorities".

27 See as an example art. 9 of the Italian Constitution: "La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica. Tutela il paesaggio e il patrimonio storico e artistico della Nazione".

3.2. The Chilean silent Constitution

The Mapuche cosmovision has not influenced the Chilean legal system yet. The Chilean Constitution is formally still the one approved during Pinochet's regime. Immediately after the end of the dictatorship, in 1989, a set of constitutional reforms was approved. In 2005 a very extensive revision of the Constitution occurred, and Pinochet's signature in the document was cancelled and replaced by that of the President of the time. Nevertheless, the backbone of the constitution is still that of 1980, where Mapuche people were heavily marginalized and discriminated against. The relationship between the Chilean government and the Mapuche communities is still very tense, even if some steps towards the construction of a more inclusive society have been taken in the field of intercultural education. For this reason, there are no traces in the Constitution of a new legal ecological paradigm for land rights, property and environmental rights. In fact, article 19, no. 8º, mentions the human right to live in a healthy environment, from a traditional anthropocentric perspective, obliging the State to preserve nature and the health right of Chilean citizens.

3.3. The Constitutionalizing of Nature's rights in Ecuador

The Andean indigenous cosmovision largely permeated the last Ecuadorian constitutional process and the new Constitution of 2008. Here, *sumak kawsay* was introduced as a main value for all Ecuadorians, a political goal for the State and a system of rights to be implemented. The Ecuadorian Constitution challenges many Western conceptions concerning land rights, property rights and the environment, aiming to "represent a change of civilization".[28]

The most impressive innovation is without any doubt the recognition of nature as a legal entity: "Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon the public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

28 Acosta 2018, p. 2: "en el caso de la Constitución de Montecristi se trata de un proyecto político de vida en común, con elementosque auguran un cambio civilizatorio".

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem". There is no need to explain the reference to the indigenous cosmovision, as the expression *Pacha Mama* is explicitly used in the article. The new concept of "earth" as a living entity and an ecosystem to whom we belong as humans, is also explained in the preamble: "celebrating nature, the Pacha Mama (Mother Earth), of which we are a part, and which is vital to our existence".

The intercultural perspective adopted in writing the constitution also influenced the way in which the constituent used the terms "land" (*tierra*) and "territory" (*territorio*). The former is mainly used to designate the special relationship that indigenous communities have with the space they inhabit (see in particular chapter IV Communities', peoples' and nations' rights, and art. 57 on their collective rights), whereas the second is almost always used to indicate State national territory or territorial autonomy.

The economic dependency of indigenous communities and farmers in general on the rural exploitation of their lands also inspired the content of art. 282 const., that prohibits large estate farming and land concentration, and guarantees that land must be used to fulfill social and environmental functions.

Another important acquisition from indigenous culture that has been incorporated in the Constitution is collective property. Collective property represents both a form of territorial organization, like municipalities, provinces, and so on, when it corresponds to the land of a whole community;[29] and one of the possible legal regimes of property.[30]

Finally, *sumak kawsay* influenced the constitutional regulation of natural resources, which, following art. 408, "are the unalienable property of the State". Special norms protect soil, water, food sovereignty, the biosphere, biodiversity, and the Amazon. The Ecuadorian Constitution is, moreover, one of the few in the world that has a specific norm regarding the measures the State shall take to counteract climate change (art. 414).

29 "Art. 60. Ancestral, indigenous, Afro-Ecuadorian and coastal back-country (*montubios*) peoples can establish territorial districts for the preservation of their culture. The law shall regulate their establishment. Communities (*comunas*) that have collective land ownership are recognized as an ancestral form of territorial organization".

30 "Art. 321. The State recognizes and guarantees the right to property in all of its forms, whether public, private, community, State, associative, cooperative or mixed- economy, and that it must fulfill its social and environmental role".

Notwithstanding the broad scope of the constitutional provisions framing a new eco-centric legal paradigm, the case-law on this subject-matter since the entry into force of the Constitution is very limited. The first case in which a court decided a law suit on the basis of the rights of nature is *Loja v. Río Vilcabamba*, 30 March 2011, provincial Court of Loja. The court applied art. 71 const. for the first time to protect the vital cycle of a river, menaced by excavation works to build a new provincial highway. The legal action was filed by two foreign residents, in application of the principle of universal standing for constitutional actions. Formally, the court ruling represents a success for all the people supporting the idea of widening the concept of legal personhood also to natural elements. However, the judgement remains up to now partially still unenforced. The petitioners filed in 2018 a constitutional action of compliance with a court judgement. They denounced the fact that the public administration had still not approved a plan to restore and regenerate the affected area. With judgement n. 012-18-SIS-CC, 28 March 2018, the Constitutional Court dismissed the action, stating that the activities implemented by the PA to restore the river bed could be considered as sufficient implementation of the jurisdictional order.

We can cite a few other rulings, not particularly meaningful in terms of the defense of the ecosystem: Const. Court judgement n. 017-12-SIN-CC, 26 April 2012, on the limits of establishment at the Galápagos; *Juez Temporal Segundo de lo Civil y Mercantil de Galápagos*, interim injunction n. 269-2012, about public works without environmental authorization; *noveno Tribunal de Garantias penales del Guayas*, criminal judgement 09171-2015-0004, on the illegal fishing of sharks; *Corte Nacional de Justicia. Sala Especializada de lo Penal, Penal Militar, Penal Policial y Tránsito*, case n. 2003-2014 - C.T., 8 September 2015, about the illegal killing of a jaguar; Const. Court judgement n. 218-15-SEP-CC, about measuring the rights of nature and the right to work.

3.4. The concepts of "Land" and "territory" following the Bolivian indigenous majoritarian culture

Bolivia is the Latin American country with the highest percentage of indigenous peoples.[31] The 2008-9 constituent process was the first in Bolivian

31 According to the 2001 Census they constituted 62% of the population. According to the 2012 National Census, 41% of the Bolivian population over the age of 15 are of indigenous origin, although the National Institute of Statistics' (INE) 2017 projections indicate that this percentage is likely to have increased to 48% (Jacquelin-Andersen 2018).

history where indigenous people were widely represented and their requests heard and taken into consideration[32]. Notwithstanding, even if the Constitution incorporates the Aymara equivalent of *sumak kawsay*, that is *suma qamaña*, it does not explicitly recognize nature's rights.

The word "*Pacha*" can be found only in the preamble, associated with Christian references: "We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God". Despite this fault, and even if this new legal concept had been introduced the previous year into the Ecuadorian Constitution, in 2009 President Morales undertook an international promotional campaign to influence public opinion on the "green" restyling of Bolivian economic policies, proposing to the UN General Assembly the institution of the international day of Mother Earth, and supporting the creation of the UN Harmony with Nature Programme.

In Bolivia, the rights of nature were introduced by primary Acts (Act n. 71 of 2010, *Ley de derechos de la Madre Tierra*; and Act 300 of 2012, *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*). Act no. 71 recognizes Mother Earth as a collective entity of public interest (art. 5), who can exercise all the rights attributed to her by the law (art. 7), through the guardianship of all Bolivians. Art. 2 lists the principles that regulate the enforcement of the statute. They have an evident origin in the indigenous cosmovision of the Aymara *vivir bien* (e.g. harmony and interculturalism). Art. 3 defines Mother Earth as the interrelated, interdependent, complementary system for all living entities, sharing a common destiny, and affirms that Mother Earth is sacred for indigenous nations and peoples' worldview. Finally, the Act announces the institution of a public system for the defense of Mother Earth's rights, implemented with Act no. 300. This new Act repeats the main concepts of the previous statute, underlining with greater emphasis its relationship with the indigenous "*bien vivir*", as a cultural and civilizing perspective, an alternative to capitalism and modernity, that fosters a life in harmony, complementarity, solidarity and balance between Nature and society, aiming at eliminating all inequalities and dominations (art. 5.2). The Act also institutes the Plurinational Agency of Mother Earth, with functions of planification and the coordination of public policies on environmental issues, and the management of enforcement programmes and projects concerning the integral system of the development of *vivir bien*.

Unlike in Ecuador, the indigenous influences on the Bolivian Constitution

32 Prada Alcoreza 2014.

were much more related to the claims of indigenous peoples and farmers' communities of collective rights over lands. For this reason, in Bolivia the "pluri-national" dimension of the indigenous demands prevailed over the cultural and environmental ones.[33] There is no difference in the use of the words "land" and "territory", both referred to the recognition of indigenous communities' collective rights regarding their lands. Besides, the word "territory" is the only one used to refer to the State land. Departments, provinces, municipalities and rural native indigenous territories are the territorial units of State decentralization (art. 269). But the indigenous cosmovision implies a specific discipline for this particular type of territorial self-administration. First of all, rural native indigenous autonomy corresponds to the ancestral lands that they currently inhabit. Secondly, it is not only an administrative partition, but a communality of territory, culture, history, languages, and their own juridical, political, social and economic organization or institutions. Finally, the self-governance of the rural native indigenous autonomies is exercised according to their norms, institutions, authorities and procedures (art. 290). So, indigenous cosmovision also affects the interpretation of typical institutions of public and administrative law, such as territorial autonomy.

Art. 403 describes native indigenous territory from a socio-economic point of view: "I. The integrity of rural native indigenous territory is recognized, which includes the right to land, to the use and exclusive exploitation of the renewable natural resources, under conditions determined by law, to prior and informed consultation, to participation in the benefits of the exploitation of the non-renewable natural resources that are found in their territory, to the authority to apply their own norms, administered by their structures of representation, and to define their development pursuant to their own cultural criteria and principles of harmonious coexistence with nature. The rural native indigenous territories may be composed of communities.

II. The rural native indigenous territory includes areas of production, areas of exploitation and the conservation of natural resources, and spaces for social, spiritual and cultural reproduction. The law shall establish the procedure for the recognition of these rights".

Also in Bolivia, property can be individual and collective:[34] "Art. 56.I. Ev-

33 Inturias, Rodríguez, Baldelomar, Peña 2016.

34 "Art. 393. The State recognizes, protects and guarantees individual and communitarian or collective property of land, as long as it fulfills a social purpose or social economic purposes, as the case may be".

eryone has the right to private, individual or collective property, provided that it serves a social function". Unlike in Ecuador, the only limit to property, that the constitution mentions, is its socio-economic function, whereas environmental defense is not taken into consideration (art. 393). The Constitution establishes a correspondence between communitarian or collective property and rural native indigenous territory, native, intercultural communities and rural communities. Due to the major role that indigenous and rural communities play in Bolivian society, and the pluri-national character of the Bolivian form of State, the Constitution describes in detail the nature of collective property: "Collective property is indivisible, may not be subject to prescription or attachment, is inalienable and irreversible, and is not subject to agrarian property taxes. Communities can be owners, recognizing the complementary character of collective and individual rights, respecting the territorial unity in common" (art. 394.III).

Land use, management and redistribution was without any doubt the major interest of the legislator during the Constituent debates, but this was due mainly to the fact that Bolivian society, together with being for its majority indigenous, is also most "*campesina*". This explains the constitutional norms concerning the redistribution of public land, the prohibition of latifundium and of selling public land to foreigners, the declaration of work as the fundamental means by which agrarian property is acquired and maintained. In this regard, the Constitution expressly declares that land use, in conformity with the communities' tradition, is recognized as the fulfilment of a social purpose (art. 397).

Finally, as for natural resources, in Bolivia as in Ecuador, they are "the property and direct domain, indivisible and without limitation, of the Bolivian people, and their administration corresponds to the State on behalf of the collective interest" (art. 349). They include renewable as non-renewable resources, such as water (art. 373) and hydrocarbons (art. 359).

3.5. Case-law on the rights of Nature in Colombia

Even if only in Ecuador and Bolivia the Constitution or the laws have recognized Nature as a legal entity, maybe the most significant step forward in the recognition of Nature's rights has been taken in Colombia, by both Constitutional and Supreme Courts.

"Art. 349.II. The State shall recognize, respect and grant individual and collective ownership rights to land, as well as the rights to use and enjoyment of natural resources".

The 1991 Colombian constituent process was for many scholars the first of the new Latin American constitutional cycle. It was a bottom-up process, highly participated by many sectors of society, including the indigenous peoples, who, in the final draft of the Constitution, received recognition of their right to apply their own customary law to their territory (art. 246), and of indigenous territorial entities as part of the territorial organization of the State (art. 286). Despite this, the recognition of the right to preserve their cultural identity was not guaranteed as clearly as it could have been. In fact, art. 7 speaks in very general terms: "The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation".

The formal approach to the Colombian Constitution is, in fact, still multicultural. It has been the job of the Constitutional Court, since then and until the present, to interpret the Constitution from an intercultural perspective. Over the years, the Constitutional Court has broadened the scope of application of the constitutional provisions in favor of Colombian indigenous communities, defending their customary law, introducing the right to consultation, and finally recognizing, in 2016, the river Atrato as a legal entity, on the basis of constitutional biocultural rights. This new doctrine was promptly enforced by the Colombian Supreme Court in 2018, extending legal personhood to the Amazon.

In the River Atrato case (T-622 of the 10th November 2016, the Constitutional Court, *Sala sexta*) the constitutional complaint was brought by *Centro de Estudios para la Justicia Social "Tierra Digna"*, representing various territorial entities, with the aim of "forbidding the intensive use of different extractive methods and the illegal forest exploitation" in the Chocó region, along the banks of the Atrato river. The plaintiffs stated that these mining and forestry activities endangered the traditional ways of life of various ethnic communities living in the region. The area is up to 96% constituted by the collective territories of 600 afro communities, grouped into 70 community councils and 120 indigenous *resguardos*.

Intensive mining exploitation was destroying the river bed, producing the spilling of polluting chemicals, such as mercury and cyanide, and the dispersion of mercury vapor from the treatment of residual substances, so that "the contamination of the Atrato river is affecting the survival of the human population, of fishes, the development of local agriculture, all the necessary elements for indigenous people, who have built their life and culture for centuries in these lands".

The plaintiffs also denounced forest exploitation, the absence of water purification mechanisms and waste disposal; the increase of mortal childhood illnesses; the loss of navigability in long stretches of the rivers; the drastic lowering of life expectancy (58.3 years, as against 70.3 at a national level).

The court reasoning began from the analysis of the concept of the "Social State of rights", which implies both the recognition of cultural diversity and the protection of the environment and natural resources (point 4.7). For many years the Court had sustained that it is possible to speak of an "ecological constitution" and a "cultural constitution" (point 5.22 ff.).

The Court merged the two concepts, creating the expression *biocultural rights*, meaning the rights of ethnic communities (so, not only indigenous, even afro) to administer and protect the forms of life and the ecosystems where they live, and with which they develop a special symbiotic relationship, applying their own traditional rules.

So, *biocultural rights* are the *trait-d'union* between the environment and culture from a holistic perspective (point 5.11). The defense "*de los ríos, los bosques, las fuentes de alimento, el medio ambiente y la biodiversidad*" is a standard derived from the principle of the "*diversidad* étnica *y cultural de la nación*", so that the State cannot impose a specific worldview on anybody.

The Court concluded, stating that the PA is responsible for omission in facing the dramatic violation of community rights to life, health, the environment, and culture produced by extensive extractivism and forest exploitation. Applying the precautionary principle, it prohibited the use of toxic chemicals in mines and declared the *río Atrato* "a legal person", with the right to restoration (9.25).

To fulfill the ruling, the court ordered the government to be the guardian of the river, together with local communities, by creating a "Rio Atrato Guardianship Commission", integrated by a team of technicians, among them the WWF Colombia and Humboldt Institute. The commission should adopt all suitable measures to fulfil the sentence and should monitor the progress of each task.

This ruling pushes Colombian constitutionalism a little bit further than the model of sustainable development, towards a new eco-centric dogmatism: "9.31. In other words, environmental justice must be applied further than the human scenario and must allow nature to be a legal person. Following this argumentation, the court considers that a step forward must be made

towards the constitutional protection of our main source of biodiversity: the river Atrato".[35]

On 5th April, 2018, the Colombian Supreme Court, *sala de casación civil*, pronounced ruling STC 4360/2018, rendered by justice Luis Armando Tolosa Villabona.

The legal complaint had been proposed against a ruling of the *sala civil especializada en restitución de tierra* of the Bogotá judicial district's *Tribunal Superior*.

The petitioners were a group of 25 citizens, aged between 7 and 25, all resident in towns included in the Colombian black list of cities at risk because of climate change. They asked to stop deforestation inside the Amazon region.

In this case, there is a peculiarity concerning their standing, because the plaintiffs acted as the future generation that will be affected by climate change and by current irresponsible behavior.

According to the 2015 Paris agreement and the 2014-2018 national development Plan, the Colombian State has an obligation to reduce deforestation. However, the plaintiffs proved that every year more and more hectares of land have been destroyed, due to land grabbing, illicit crops, illicit mining, infrastructure, industrial agriculture, illicit timber exploitation. The State is responsible for inactivity in facing this concrete danger.

In the *ratio decidendi*, the Supreme Court stated that the legal order had been passing through an epochal change from an anthropocentric vision of the right to a healthy environment ("*homomensura autista antroprocentrismo*") towards an "eco-centric- anthropic" one.

Nevertheless, the main point of the judgment remains the solidarity principle, applied between man and nature and inter-generations. Sometimes, the reasoning is almost mystical. The judge speaks about "our neighbor" who is otherness, and its essence are other beings who live on the planet, including other animal and vegetal species, even the unborn.

The *ratio* of the ruling is on intra-species solidarity and on the value of nature.

The SC made references to the *Río Atrato* ruling and used the same formu-

35 The Colombian government enforced the ruling with the Decree of the Environmental and sustainable Development Ministry no. 1148, 5 July 2017, by which the Ministry nominated its own representatives for the rights of the Atrato river, and resolution no. 0907, of 22 May 2018, that created the *Comisión de Guardianes del río Atrato*, composed both by State representatives and local community representatives.

la to recognize the Amazon as a legal person and to order other institutions and communities to work jointly to write a plan of action to reduce deforestation and an inter-generational plan to save the life of the Colombian Amazon", with the aim of reducing to zero both deforestation and greenhouse gas emissions.

Recently, even the lower courts have begun to apply the "eco-centric-anthropic paradigm" in environmental cases. For instance, a group of residents in a neighborhood where the sewage system was not working, and, as a consequence, black waters were flowing directly into the nearby river of La Plata, presented a case of "*tutela constitucional*" on 19th March, 2019, to the *Juzgado único civil municipal de La Plata – Huila*. Justice Juan Carlos Clavijo Gonzáles decided that the La Plata river is a subject of rights.[36] The case was not presented by the plaintiffs as a violation of Nature's rights. The plaintiffs denounced the violation of their personal right to good life, health and a healthy environment. Nevertheless, the judge eventually decided that "*La solidaridad que se construye a partir del respeto por la naturaleza, por el contrario, implica un cambio en la forma en que la jurisdicción debe abordar el examen de este asunto, superando el análisis exclusivamente antropocentrista, para ser omnicomprensivo de los derechos de los seres humanos a la par con los del ambiente*" (p. 15).

The development of this constitutional case-law was, without any doubt, nourished by the constitutional innovation that occurred in neighboring Ecuador, but was also preceded by many cases in which the Constitutional Court had reflected on the Colombian indigenous peoples' cosmovision.

For instance, regarding the right to redistribution and the use of indigenous ancestral lands, in the above-mentioned constitutional judgement the Court affirmed:

36 "Es hora de dejar en el pasado la visión antropocéntrica frente al medio ambiente, una posición dominante y consumista de los recursos naturales fundada en el deseo irracional de satisfacer sus intereses que han generado como "efecto boomerang" una degradación de la ecosfera que le impide gozar de su entorno y que encarece la satisfacción de sus necesidades. Las prácticas equívocas han llegado al punto que el Panel Intergubernamental de Expertos sobre el Cambio Climático por sus siglas IPCC, el pasado año advirtiera que existe un serio riesgo de incumplir el objetivo más ambicioso del Convenio de París, quedar por debajo de 1,5° en 2100, pues ello ocurriría en poco más de una década. Por eso "[a]hora es el momento de comenzar a tomar medidads para proteger de forma eficaz al planeta y a sus recursos antes de que sea demasiado tarde o el daño sea irreversible, no solo para las futuras generaciones sino para la especie humana"" (p. 11).

5.57. Por otra parte, debe señalarse que tanto la jurisprudencia constitucional como la del Sistema Interamericano han establecido que el derecho de las comunidades étnicas sobre sus territorios ancestrales va más allá de la demarcación e incluye el derecho que tienen al uso y respeto de los recursos naturales, como son los bosques, animales, ríos, lagos y lagunas. De esta manera, el acceso a sus tierras ancestrales y al uso y disfrute de los recursos que en ellas se encuentran está directamente vinculado con la obtención de alimento y el acceso a agua limpia.

In the same case, the Court analyzed the special cultural, ecological and religious relationship between indigenous communities and their lands, according to which Nature and human beings are equal parts of the same ecosystem, and their respective existence is interrelated, so that land cannot be perceived as individual property but as a collective interest, or maybe, in Western words, as common.[37] This anthropological study was also based on the *concepto* the Court had requested from the *Departamento de Antropología de la Universidad de Los Andes*. In that report, the difference between the use of "*tierra*" and "*territorio*", with respect to Western legal tradition, is well underlined:

Para las comunidades étnicas el territorio no es lo mismo que la tierra. Esa distinción, entre "tierra" y "territorio", que en Colombia es un principio heredado del movimiento indígena, ha sido retomada por el movimiento campesino en los últimos años. Si la tierra es una cosa que se posee y se puede comprar y vender, el territorio es inalienable. Pero no porque tenga una condición jurídica particular, sino porque se trata menos de una cosa y mas de una relación. El territorio es el espacio de la vida cotidiana, y por eso en él se concentran el sentido del presente, la memoria del pasado y la intuición del futuro. Es continuo y discontinuo a la vez, y es siempre colectivo. Además, por tratarse de un decantado de relaciones sociales, trasciende a las relaciones con los congéneres, e incluye las relaciones

37 "6.3. Como complemento de lo anterior debe agregarse que la Corte Constitucional, en reiterada jurisprudencia, ha reconocido que los pueblos indígenas, tribales y afrocolombianos tienen un concepto del territorio y de la naturaleza que resulta ajeno a los cánones jurídicos de la cultura occidental150. Para estas comunidades, como se ha visto, el territorio -y sus recursos- está íntimamente ligado a su existencia y supervivencia desde el punto de vista religioso, político, social, económico e incluso hasta lúdico; por lo que no constituye un objeto de dominio sino un elemento esencial de los ecosistemas y de la biodiversidad con los que interactúan cotidianamente (v.gr. ríos y bosques). Es por ello que para las comunidades étnicas el territorio no recae sobre un solo individuo -como se entiende bajo la concepción clásica del derecho privado- sino sobre todo el grupo humano que lo habita, de modo que adquiere un carácter eminentemente colectivo". Judgement T-622 of the 10th November 2016, the Constitutional Court (*Sala sexta*).

con el entorno, con otros seres vivos, con seres del pasado y del futuro, y también con los seres espirituales (footnote 322 of the judgement).

4. Concluding remarks

The constitutional cycle of the new Latin American (or Andean) constitutionalism has introduced many innovations to the legal systems of those countries, starting with the idea of nature as a legal entity. In a broader perspective, we have detected a legal trend, particularly in countries of the so-called Global South, towards the inclusion of indigenous cosmovisions among the philosophical bases of their respective legal systems. The main fields of law influenced by this intercultural legal approach are property rights concerning land, limitations to the economic exploitation of natural resources, and a new legal framework for the relationship between human beings and the environment. Ecuador, Bolivia and Colombia seem to foster a shift from an anthropocentric to an eco-centric legal paradigm, that implies alternative forms of property and economic development.

However, the gap between formal law and the substantial enforcement of these legal innovations remains quite evident in those same countries[38]. The implementation of the rights of nature is very limited and controversial; collective properties are recognized only in some indigenous communities, many of which are still fighting for their rights on their own land, and too often they are expropriated of their right to decide on the use of the natural resources of their territories. Finally, the economic system of these countries has remained essentially extractivist, based on the extensive exploitation of renewable and non-renewable natural resources.[39] This contradiction is quite evident, even in the law: for instance, Bolivian Act no. 300 of 2012, on the one hand defines *buen vivir* as an alternative vision to capitalism, based on the indigenous harmonious and respectful relationship with Mother Earth (chapter 1); on the other hand, it lists, among the State obligations, to industrialize natural resources in the framework of *vivir bien*, an objective that is totally incompatible with that same cosmovision (art. 10.6); again, it allows the

38 De Castro, Hogenboom, Baud 2016, p. 8; Andrade A. 2016, p. 131 ("The Bolivian and Ecuadorian experiences show that although new forms of regulating the exploitation and use (income) of natural resources can be created, they have prioritized the preservation of the states' access to income and, by implication, of the extractivist activities themselves").

39 Gudynas 2015; Martinez-Alier, Walter 2016, p. 58-85.

exploitation of non-renewable resources and an extractivist economy under the precautionary principle (art. 15.3); and it allows oil and mining activities, simply requiring that they must be developed with the least environmental and social damage (art. 26).[40]

Despite certain major contradictions,[41] the constitutionalizing of indigenous culture has produced at least two main results.

In Latin America, after centuries of oppression, discrimination and assimilationist policies, indigenous peoples have been able to regain their dignity, to become the subjects of rights, and to generate an intercultural discourse with State institutions and within the society.

In the Western world, this new legal trend has the merit of revitalizing reflections on alternative legal paradigms concerning property law, environmental justice, and the economic system.

In the field of property law, bridging Western and indigenous knowledge could help to develop the legal paradigm of the Commons. Communitarian indigenous practices could be compared with local experiments of the common management of "goods", such as water, in Western countries. Studying the indigenous world view as a legal formant should make it easier for Western legal culture to accept the possibility of other forms of relationship between men and other living or natural entities. Indigenous cosmovision does not recognize property as an absolute right, particularly if applied to land and natural resources. For instance, in Australia, the relationship between Aborigines and land has been described in the following terms:

> The concept of ownership in this legal system is not one of right and entitlement as in the Anglo-Australian legal system, but custodial. The relationship between people and place is not proprietary in the sense of the land being subordinate or irrelevant to the owner, rather the land is regarded as the source of life and law. 'Country is central to the identity of an Aboriginal person, providing physical, cultural and spiritual nourishment'. The emphasis in Indigenous land laws on responsibility to 'look after our home country and protect it' is indicative not only of a different construction of the idea of property and ownership to the dominant paradigm of rights-based property, but also indicates a different worldview.[42]

40 All this corresponds to specific constitutional rules (see Part IV, Title II. Environment, natural resources, land and territory, art. 342 ff.).

41 Some scholars consider that Earth Jurisprudence can only flourish if property rights are constrained and if we reach a new eco-society that is not ruled by capital: Solón 2017, p. 156.

42 Graham 2011, p. 311. And again "Eualeyai Elder, Paul Behrendt, employed the

Following this description, property, at least with respect to some specific goods that possess a cultural value or that are essential to the sustainability of human life, should not be considered as a set of rights, but as a relation of responsibility. This perspective would contribute to the sterilization of many environmental conflicts. Environmental justice should be concerned with measuring the scope of each party's responsibility, and not the hierarchy between competing rights and interests.

On the subject of environmental law, a new interest in Earth Jurisprudence and ecological law has flourished in the last decade among legal scholars, and the United Nations have also given attention to this subject-matter, creating the Harmony with Nature Programme. This different approach would encourage lawyers and legal scholars not to consider Nature and the Earth in terms of "goods" and "resources", but, instead, to see all the natural elements and beings as a harmonious part of a living ecosystem. Despite the adherence to the Gaia theory of James Lovelock, or to the Jurisprudence of the Earth of Thomas Berry, only a long walk to freedom from the tyranny of the economic and capitalist vocabulary of "resources", both applied to human relationships and to our environment, will allow us to build a peaceful, harmonious and prosperous society.

Studying and disseminating these different legal formants is a way to contribute to a global movement that, together with the warning of scientists on climate change, and of social and environmental advocacy campaigns supported by the society at large, is trying to influence policy makers at all levels, in order to take concrete actions to solve the global ecological crisis that is threatening the survival of our own species.[43]

Bibliography

Acosta 2018 = A. Acosta, *Buen Vivir, plurinacionalidad y Derechos de la Naturaleza en el debate constituyente. Una lectura comprometida*, https://

metaphor of the parent-child relationship to explain the connection to, and specifically, the responsibility to country that attaches to Indigenous Australian law: Ownership [of land] for the white people is something on a piece of paper. We have a different system. You can no more sell our land than sell the sky … Our affinity with the land is like the bonding between a parent and a child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don't own a child".

43 Carducci 2014.

lalineadefuego.info/2018/10/03/buen-vivir-plurinacionalidad-y-derechos-de-la-naturaleza-en-el-debate-constituyente-por-alberto-acosta/.

Acosta, Gudynas 2011 = A. Acosta, E. Gudynas, *La renovación de la crítica al desarrollo y el buen vivir como alternativ*, in *Utopía y Praxis Latinoamericana*, vol. 16, n. 53, 2011, p. 71-83.

Andrade 2016 = P. Andrade A., *The Government of Nature: Post-Neoliberal Environmental Governance in Bolivia and Ecuador*, in F. de Castro, B. Hogenboom, M. Baud (eds), *Environmental Governance in Latin America*, Basingstoke and New York, 2016, p. 113-136.

Bagni 2013 = S. Bagni, *Dal* Welfare State *al* Caring State*?*, in S. Bagni (a cura di), *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013, p. 19-59.

Carducci 2013 = M. Carducci, *La Costituzione come "ecosistema" nel nuevo constitucionalismo delle Ande*, in S. Bagni (a cura di), *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013, p. 11-17.

Carducci 2014 = M. Carducci, *Costituzionalismo e sopravvivenza umana*, in *Diritti comparati*, 9 May 2014, on line http://www.dirittocomparati.it/2014/05/costituzionalismo-e-sopravvivenza-umana.html#more.

Cullinan 2012 = C. Cullinan, *Wild Law. A Manifesto for Earth Justice*, Dartington Hall, 2011 (Italian translation: *I diritti della natura. Wild Law*, Prato, 2012).

De Castro, Hogenboom, Baud 2016 = F. de Castro, B. Hogenboom, M. Baud, *Introduction: Environment and Society in Contemporary Latin America*, in F. de Castro, B. Hogenboom, M. Baud (eds), *Environmental Governance in Latin America*, Basingstoke and New York, 2016, p. 1-25.

De Sousa Santos 2010 = B. De Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur*, Quito, 2010.

Dillehay 2007 = T.D. Dillehay, *Monuments, Empires, and Resistance. The Araucanian Polity and Ritual Narratives*, Cambridge, 2007.

ECLAC 2014 = ECLAC, *Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges*, Santiago de Chile, 2014.

Graham 2011 = N. Graham, *Owing the Earth*, in P. Burdon (ed.), *Exploring wild law: the philosophy of earth jurisprudence*, Kent Town, South Australia, 2011, p. 259-269.

Gudynas 2015 = E. Gudynas, *Extractivismos. Ecología, economía y política de un modo de entender el desarrollo y la Naturaleza*, Bolivia, 2015.

Gudynas 2018 = E. Gudynas, *Religion and cosmovisions within environmental conflicts and the challenge of ontological openings*, in E. Berry, R. Albro

(eds.), *Church, Cosmovision and the Environment. Religion and social conflict in contemporary Latin America*, New York, 2018, p. 225-247.

Hidalgo-Capitán, Arias, Ávila 2014 = A.L. Hidalgo-Capitán, A. Arias, J. Ávila, *El pensamiento indigenista ecuatoriano sobre el Sumak Kawsay*, in A.L. Hidalgo-Capitán, A. Guillén García, N. Deleg Guazha (eds), *Sumak Kawsay Yuyay. Antología del Pensamiento Indigenista Ecuatoriano*, Huelva y Cuenca, 2014, p. 25-74.

Hosken 2011 = L. Hosken, *Reflections on an Inter-cultural Journey into Earth Jurisprudence*, in P. Burdon (ed.), *Exploring wild law: the philosophy of earth jurisprudenc*e, South Australia, 2011, p. 24-34.

Huanacuni Mamani 2010 = F. Huanacuni Mamani, *Buen Vivir / Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, Lima, 2010.

Inturias, Rodríguez, Baldelomar, Peña 2016 = M. Inturias, I. Rodríguez, H. Baldelomar, A. Peña (eds), *Justicia ambiental y autonomía indígena de base territorial en Bolivia. Un diálogo político desde la Nación Indigena Monkoxi de Lomerío*, Norwich, UK, 2016.

Jacquelin-Andersen 2018 = P. Jacquelin-Andersen (ed.), *The Indigenous World 2018*, Copenhagen, 2018.

Kowii 2014 = A. Kowii, *El sumak kawsay*, in A.L. Hidalgo-Capitán, A. Guillén García, N. Deleg Guazha (eds), *Sumak Kawsay Yuyay. Antología del Pensamiento Indigenista Ecuatoriano*, Huelva y Cuenca, 2014, p. 159-168.

Macas 2014a = L. Macas, *El Sumak kawsay*, in A.L. Hidalgo-Capitán, A. Guillén García, N. Deleg Guazha (eds), *Sumak Kawsay Yuyay. Antología del Pensamiento Indigenista Ecuatoriano*, Huelva y Cuenca, 2014, p. 177-192.

Macas 2014b = L. Macas, *Sumak kawsay. La vida en plenitud*, in A.L. Hidalgo-Capitán, A. Guillén García, N. Deleg Guazha (eds), *Sumak Kawsay Yuyay. Antología del Pensamiento Indigenista Ecuatoriano*, Huelva y Cuenca, 2014, p. 169-176.

Marileo Lefío = A. Marileo Lefío, *The Mapuche universe. Equilibrium and harmony*, http://www.mapuche.info/mapuint/mapuniv030530.html.

Marileo Lefío 2016 = A. Marileo Lefío, *Mapudungun: The Earth Is Speaking*, https://artoflivingguide.org/messages-mother-earth/mapudungun-earth-speaking.

Marileo Lefio, Salas Astrain 2011 = A. Marileo Lefio, R. Salas Astrain, *Filosofía occidental y filosofía mapuche*, in *Revista_ isees*, n. 9, julio-diciembre 2011, p. 119-138.

Martinez-Alier, Anguelovski, Bond *et al.* 2014 = J. Martinez-Alier, I. Anguelovski, P. Bond *et al.*, *Between activism and science: grassroots concepts for sustainability coined by Environmental Justice Organizations*, in *Journal of Political Ecology*, 21, 2014, p. 19-60.

Martinez-Alier, Walter 2016 = J. Martinez-Alier, M. Walter, *Social Metabolism and Conflicts over Extractivism*, in F. de Castro, B. Hogenboom, M. Baud (eds), *Environmental Governance in Latin America*, Basingstoke and New York, 2016, p. 58-85.

Ñanculef Huaiquinao 2016 = J. Ñanculef Huaiquinao, *Tayiñ Mapuche Kimün. Epistemología mapuche. Sabiduría y conocimientos*, Santiago de Chile, 2016.

Pavani, Estupiñan Achury 2017 = G. Pavani, L. Estupiñan Achury, *Mutaciones del Estado unitatio en América Latina. Nuevos rasgos metodológico para el estudio de los procesos de descentralización*, in G. Pavani, L. Estupiñan Achury (coord.), *Plurinacionalismo y centralismo. Tensiones del Estado unitario en América Latina*, Bogotà, 2017, p. 101-159.

Pegoraro 2017 = L. Pegoraro, *Para una teoría integradora del federalismo y la plurinación*, in *Judicatus*, n. 9, 2017, p. 1-69, also in G. Pavani, L. Estupiñan Achury (coord.), *Plurinacionalismo y centralismo. Tensiones del Estado unitario en América Latina*, Bogotà, 2017, p. 31-100.

Prada Alcoreza 2014 = R. Prada Alcoreza, *Descolonización y transición*, Quito, 2014.

Ribeiro 1975 = D. Ribeiro, *Le Americhe e la civiltà. Formazione e sviluppo ineguale dei popoli americani*, vol. I, *La civiltà occidentale e noi. I popoli-testimoni*, Torino, 1975.

Solón 2017 = P. Solón, *Rights of Mother Earth*, in P. Solón (comp.), *Systemic Alternatives*, La Paz, 2017.

Toaquiza 2006 = A. Toaquiza, *Kuntur kuyashkamanta. El Cóndor enamorado/ The Condor Who Fell In Love*, Quito, 2006.

Viciano Pastor, Martínez Dalmau 2012 = R. Viciano Pastor, R. Martínez Dalmau, *Fundamento teórico del nuevo constitucionalismo latinoamericano*, in R. Viciano Pastor (ed.), *Estudios sobre el nuevo Constitucionalismo Latinoamericano*, Valencia, 2012, p. 36-44.

THE *"TRASCRIZIONE"* SYSTEM IN ITALY FROM THE END OF THE NINETEENTH CENTURY TO THE PROMULGATION OF THE CIVIL CODE (1942)

Alan Sandonà

Given its instrumental nature and the intrinsic high degree of technicality, the "*trascrizione*" system would appear, at first glance, to attract the interest of "practical" jurists or, in any case, positive law cultists.

Upon delving slightly deeper, it becomes clear, however, that this is a crucial pillar of the legal system, around which top-priority judicial and economic issues crystallise.[1]

The effects of the system for the public disclosure of transfers and property rights[2] to which the "*trascrizione*" belongs, extend beyond inter-private relationships (between contracting parties and vis-à-vis third parties). Not only is it relevant in relations with the mortgage and land register system, but it is also of significant interest to the national economy, especially in terms of credit certainty (not only in terms of land credit), and consequent growth.

The certainty of immovable property purchases and the possibility to effortlessly provide proof of rights and encumbrances pertaining to properties are prerequisites for an efficient credit system, guaranteeing the safe use of capital on the one hand and rapid debt recovery in the event of default on the other hand. The fact that these conditions can be ensured by an efficient public disclosure system makes it easy to understand why it is such an essential part of any legal system.

The study of the immovable property public disclosure in a legal system and the reform proposals arising therefrom reveals much about its founding principles, internal tensions, the essence of the society of which the system is an expression.

Unsurprisingly, the topic has since returned to the limelight. The econom-

1 Petrelli 2014, p. 103 ff.

2 Every use, in the context of this paper, of the term "property" (also in variants "real property", "immoveable property", "ownership") alludes to the juridical institution of the "*proprietà*" of the civil law tradition (area in which the property is understood as an abstract right over an asset, including the right to dispose of it and enjoy it, directly or indirectly) and not to the corresponding technical-legal terms of the law of property, that pertains to the regime of goods and rights, in common law experience.

ic crisis which has struck Europe (and beyond) since 2008[3] has determined a significant rise in non-fulfilment and insolvency. There has been a consequential rise in the number of immovable property expropriation procedures.

The Italian legislator has attempted to rectify on a number of fronts, [4] despite never extending its efforts to the realm of public disclosure. An updated reflection on the "*trascrizione*" thus acquires new operative meanings, subjecting the regulatory framework to a veritable stress test, which can reveal its strengths and weaknesses.[5]

Hence the interest in studying it from a historical and judicial perspective,[6] especially by focusing the investigation on the period spanning the late 19th century and the promulgation of the 1942 Civil Code (currently in force), which is crucial for the Italian legal system.

The "*trascrizione*", in its materiality, is a mere formality:[7] it is the entry in chronological order of a deed pertaining to real property rights in a register ordered on a personal basis. Depending on the deed requiring registration, the nature of the register in which it is entered and the effect which the system attributes to the fulfilment of the formality at hand (constitutive,[8] declarative[9]

3 Particular reference is made to the repercussions on the real economy generated by the financial crisis caused by the speculative bubble over subprime loans, which began in the United States in 2006 and subsequently infected Europe.

4 Ranging from reforms of (or affecting) the executive process (cf. Act no. 69 of 18 June 2009, Act no. 3 of 27 January 2012, art. 1, subsection 20, Act no. 228 of 24 December 2012, Legislative Decree no. 132 of 12 September 2014, converted with amendments into Act no. 162 of 10 November 2014; Legislative Decree no. 83 of 27 June 2015, converted with amendments into Act no. 132 of 6 August 2015) to the promulgation of the Code of Business Crisis and Insolvency (Legislative Decree no. 14 of 12 January 2019).

5 In 2012 these premises led the National Council of Notaries to prepare an interesting project for the reform of the Italian immovable property publicity system. Cf. Consiglio Nazionale Notarile 2012.

6 Numerous authors have focused, in historical prospective, on immovable property publicity system. These include Besson 1891; Luzzati 1889; Magnin 1896; Coviello 1907, p. 47ff; Regnault 1929; Colorni 1954; Pugliatti 1956, Liberati 1995, Petrelli 2007, 2009.

7 The issue of the qualification of "*trascrizione*" as a mere formality or a veritable "law system" is of paramount importance in determining its nature and function. Cf. Vadala-Papale 1885, p. 8.

8 "Constitutive" publicity is required for the completion of a deed. Therefore, if it is omitted, the deed is null and void and fails to generate effects between parties or vis-à-vis third parties.

9 "Declarative" publicity renders facts or legal deeds enforceable against third parties,

or informative disclosure[10]), the nature and function of this system may manifest, and historically has manifested, heterogeneous characters.

Usually, the origin of this system is identified in French Republican law, 11 Brumaire, year VII (1 November 1798) *"sur le régime hypothécaire*".[11]

Pursuant to this law and drawing inspiration from "*coutumes de nantissement*" (in force during the pre-revolutionary period in north France and Belgium), which envisaged the transcription of immovable property deeds in a public register, the revolutionary legislator forcedly compared the fulfilment of this formality to Roman *traditio* and considered the registration a condition of essence in transfers to third parties.

Whether the transcription, under the Brumaire Law, was actually effective, or held constitutive disclosure value for all, including *inter partes*, is a controversial issue.[12] I personally believe there are valid reasons to support the affirmative thesis.[13] This leads me to post-date the "modern" origin of the "*trascrizione*" system and identify a strong discontinuity between revolutionary legislation and legislation established by the 1804 *Code Civil*.[14]

The Napoleonic codifier embraced the natural law's idea, which postulated

---

regardless of whether third parties are effectively aware thereof. Its omission prevents the deed from generating legal effects vis-à-vis third parties, though it does not render the deed null and void.

10 "Informative" publicity (or public notice) refers to a fulfilment limited to the mere disclosure of certain deeds or events to anyone with an interest to this effect, the omission of which would not prevent said deeds or facts from producing legal effects or rendering them null and void. All this without prejudice to any sanctions which may be incurred for the omission of the formality.

11 Cf. Loi sur le régime hypothécaire 1798.

12 Pugliatti 1956, p. 151 is doubtful, especially on p. 151, notes 728, 729; it is altogether excluded by the following: Coviello 1907, p. 45 and Petrelli 2009, p. 693 s., id. 2007. p. 591; this is acknowledged by Roggero 2013, p. 176 ff., note 2.

13 Cf. Sandonà 2011, p. 368. Also on the basis of what was stated by Merlin 1812, p. 466 ff., and in light of the broad sense of symbolic *traditio* attributable to various formalities pertaining to the framework of *devoirs des lois,* I believe it is can be sustained that said formalities determined the transfer of dominion not only with respect to third parties. For this interpretation, see also cf. Rapport Leliévre, readable in Nouvelle loi sur le régime hypothécaire 1851, p. 105 f.

14 This discontinuity was also supported by the embarrassment of commentators of the *Code* and jurisprudence itself in tackling the problems of inter-temporal law pertaining to sales which were not registered according to Brumaire law. Cf. Duvergier 1835, p. 19 ff., note 4.

the elevation of private will to legislative canon.[15] Admitting that property in general "*s'acquiert et se transmet…par l'effet des obligations*",[16] the obligation of delivering the thing should occur "*par le seul consentement des parties contractantes"* and established the creditor as *"propriétaire …encore que la tradition n'en ait point été faite"*.[17]

However, the introduction of the consensual principle[18] was incompatible with the function ascribed to the formality of "*trascrizione*" in the Brumaire system. This explains the *capitis deminutio* suffered by "*trascrizione*" – relegated to mere formal requirement for mortgage redemption purposes only – in the Napoleonic system.[19] From another point of view, the cult of the individual and their "will" required particular emphasis to be placed on the internal aspect of legal relations, relegating third-party interest to second place as well as, in a certain sense, that of the public disclosure of legal transactions.

In countries subjected to French legal influence, with some exceptions,[20] the Napoleonic system of publicity was largely carried over into the age of the Restoration, with the transcription reduced to a mere appendage of the mortgage system.[21]

It wasn't until the mid-nineteenth century, with the reinterpretation provided by the Belgian law of 16 December 1851 [22] and the French law of 23 March 1855,[23] that the "*trascrizione*" system took on its modern connotation and autonomous dignity.[24]

Hence the affirmation of a system whose legal *ratio* was to provide the

15 Cf. Cavanna 2005, p. 579ff.; Birocchi 1990, p. 654ff.; Dezza 2000, p. 77.

16 Cf. Art. 711 Code civil 1804.

17 Cf. Art. 1138 *ibidem*.

18 For a recent, detailed and in-depth analysis of the historic emergence of the consensual principle in the context of general contract theory, cf. De Cores Helguera 2017.

19 Cf. Sandonà 2011, p. 373ff.

20 For example, in the Grand Duchy of Baden (cf. Kaspers 1972, p. 152) and in the Kingdom of the Netherlands (*Cf.* art. 671, Burgerlijk wetboek 1837), the principle of the real effectiveness of transcription was restated: property rights and rights of lien were only acquired by fulfilling this formality.

21 The codes and special legislation of pre-unified Italy, especially those of the Estense states and the Papal States were no strangers to innovations with respect to the French model. Roggero 2013, p. 193-219.

22 Cf. Nouvelle loi sur le régime hypothécaire 1851.

23 Loi sur la transcription en matière hypothécaire 1855.

24 Cf. Sandonà 2011, p. 387-385.

legal system with a mechanism designed to resolve intersubjective conflicts generated by claims of contrasting rights on the same property. These conflicts were the result by a system of transfer of immovable assets, which was based on the provisions of art. 1138 of the *Code Napoléon*, and was justified in economic terms with the purpose of facilitating and stimulating mortgage loans, but whose main function was a declarative public disclosure.

With these characteristics, the "*trascrizione*" was transposed into the first Italian Civil Code in 1865.[25]

From the standpoint of coeval liberal doctrine of law, tributary of the school of exegesis,[26] the codified regulations were deemed to be in line with the times and well-formulated.[27]

At the turn of the 19th and 20th centuries, the science of law began defining the protection of third party rights as a concept laden with social significance, in terms of protection of both individuals and public economy linked to secure private trading, and began invoking reforms to the rules governing the system.[28]

Criticisms towards title XXII of the Pisanelli Code,[29] excluding the most radical ones,[30] were quantitative and qualitative in nature. The limitation of deeds and requests subject to transcription was deemed arbitrary, illogical and prevented the reconstruction of the legal history of an asset, generating uncertainty as to the claim and challenge to good title perspectives. The protection of third-party rights in good faith was not absolute, as in the case of the resolution of the registrant's right of the assignor. Registration was a burden whose omission was not sanctioned. Overall, the system did not enable the full

25 Cf. Codice civile 1865, Title XXII (articles 1932-1947).

26 Grossi 2002, p. 12.

27 Cf. Pacifici Mazzoni 1874, p. 122 and 207 ff..; Foschini 1867, p. 631 ss. Cf. also *Relazione sul progetto del terzo libro del codice civile* in Gianzana *1887,* I, p. 331ff. .

28 Cf. Gianturco 1890; Luzzatti 1891, Id. 1886; Frola 1888, p. 55. In the late seventies and the early eighties there was a significant shift in cultural convictions and methods. Cf. Cazzetta 2011, p. 46; Aquarone 1960, p. 51.

29 For a general overview on criticism of the system cf. Luzzati 1889, Bianchi 1877, *passim*.; Lozzi 1879, p. 217ff.; Vita 1880, IV, p. 14ff.*;* Vadala-Papale 1885*;* Gabba 1909, p. 23; Mirabelli 1889, p. 88*;* Simoncelli 1892, IV, p. 257ff.; Salvioli 1894, p. 196-236.

30 Vadalà-Papale even stated that the "*trascrizione*" system, due to the very fact that it constitutes a derogation of the consensual principle, was "*amorphous, hybrid, dissatisfying*" and anyone looking to prolong its existence would have to "*bleed themselves dry*". Cf. Vadalà-Papale 1885, p. 8.

reconstruction of the series of immovable property "transfers" and belittle the general disclosure function the system had since come to be expected to fulfil.

The practical consequences were significant, in both law system's consistency and economic and social terms: the uncertainty of the proof of domains and therefore, frequent legal disputes, and the lack of mortgage loan guarantees and therefore a reluctance to invest in immovable property, especially land investments. "Classical" critical issues related to immovable property publicity, whose solution was perceived as urgent.

The very circumstance that the aforementioned defects were particularly felt on occasion of the debate on mortgage loan laws was further proof that general exhortations for a reform of the public disclosure system was not merely doctrinal complaints but rather real life requirements.[31]

In the early years of the 20th century, these inconveniences increasingly attracted the attention of jurists and statesmen who strove to study and implement suitable remedies.

Many of the most critical jurists were members of the parliament. Therefore the "*trascrizione*" reform was included in the legislator's agenda, and in November 1902[32] a commission was established to study amendments to this effect.[33]

Inspired by the *Darlan project* (a bill presented to the French Senate on 27 October 1896),[34] indeed Emanuele Gianturco and Vincenzo Simoncelli[35]

---

31 Cf. Ministerial report on the government project by Luzzatti (Treasury Minister) Ronchetti (Ministry of Grace, Finance, Ecclesiastical Affairs), Rava (Ministry of Agriculture, Industry and Trade), Majorana (Minister of Finances) to relieve mortgage loans, redeem rentals and other duties on properties and facilitate the formation of small properties (*09.02.1905 - 26.06.1906)*. Cf. ASCD, *Archivio della Camera Regia (1848 – 1943); Disegni e proposte di legge e incarti delle commissioni (1848-1943),* vol. 818. It contains the decree of presentation; minutes of the special eleven-member Commission; correspondence and working papers of the Commission; reports and text of the Commission; text of proponents presented at the second reading on 8 June 1905, amended by the Commission (no. 116 B); list of deputies registered for plenary discussion; result of plenary voting. Approved at the session held on 26 June 1906.

32 Cf. R.D. 30 November 1902.

33 Commissioners worthy of mention are Ippolito Luzzatti and Francesco Filomusi Guelfi, who presented autonomous bill drafts on the "*trascrizione*", but only the one submitted by Filomusi was approved by the Commission.

34 Cf. De Loynes 1897, p. 245.

35 Cf. Ministero di agricoltura, industria e commercio*, Annali del Credito e della Previdenza*, 1909, p. 216 ff.

appear to have contributed to its preparation, the commission elaborated a bill for the reform of the "*trascrizione*" (the so-called Filomusi project). It was presented to the Chamber of Deputies on 9 February 1905 within the framework (articles 1-18) of the bill for the approval of "*provisions for the relief of mortgage loans, the redemption of rent and other duties on properties and facilitation of the formation of small properties*" (*Acts of the Chamber of Deputies*, session 1904-1905, no. 116), discussed in March and April 1906 based on the Gianturco report, and finally approved by the assembly,[36] but it was then nullified due to the closure of the session.[37]

The project reflected the French-Belgian system and limited itself to increasing the number of cases subject to transcription. Therefore it failed to satisfy the *desiderata* of legal theory, which also dismissed it as devoid of harmony, and was heavily criticised mainly by Giacomo Venezian, Nicola Coviello[38] and Tommaso Mosca. [39]

The rejection of the Filomusi project led Gianturco, who had played a significant role in the initiative, to prepare his own project which was presented to the Chamber of Deputies on 8 June 1905.[40]

The project faithfully replicated articles 1932, 1933 and 1934 of the Pisanelli Code, as well as provisions of law on "methods" of registration and deeds subject to transcription, but adding to it *mortis causa* deeds (wills and testamentary dispositions), dowry deeds consisting of real rights on immovable property and mortgage loans, deeds and interruptive applications for the prescription of real rights on immovable.[41] Notaries were required to register any stipulated deeds, but only if requested by the party and upon advance payment of registration fees. This undermined the law's effectiveness.

---

36 Cf. Gianturco 1909.

37 Cf. A. Ascoli, *Discorso inaugurale pavese e riforma del Codice civile*, reproduced in Bonini 1996, p. 212.

38 On the life and work of Nicola Coviello, cf. Carnelutti 1913, p. 730; Ascoli 1913, p. 499; Martone 1984; Grossi 1998, p. 409 ff.

39 Cf. Venezian 1905, p. 111ff.; Coviello 1905, p. 9-10; Mosca 1905.

40 Cf. Gianturco 1896 and for a more extensive analysis of the author's thoughts, cf. Id. 1890. In this work the author examines general principles on the subject and the German disclosure system, which at the time was unknown in Italy.

41 The project listed claims, inheritance claim action, the action of releasing bound property, the division, reduction of testamentary provisions and donations, the nullity, revocation of ineffectiveness of a testament or testamentary provision, the nullity or resolution of a contract establishing or transferring immovable property rights.

From a functional point of view, the project did not departed from the concept of registration for mere declarative public disclosure purposes.

It was heavily criticised on the grounds of its inorganic nature,[42] but it was literally reproduced in the Civil Code for the Eritrean colony promulgated with Italian Royal Decree of 28 June 1909.[43]

The last of the pre-war projects presented and discussed was though out by Vittorio Scialoja in 1910.[44] Although during works on colonial legislation, the Turin-born Romanist had supported Gianturco's proposals in form and substance and when he presented his own bill (perhaps as a tribute to his colleague who had died a few years earlier[45]) he had declared himself a tributary of those, the only element both projects had in common was that they were faithful to tradition, in order to prevent "*dangerous imitation of foreign public disclosure systems*", such as the Australian registration system (*Torrens Act)* and the Austrian one of *grundbuch*.[46] The implementation of these systems was recognised impossible due to technical and financial difficulties linked to the need for a radical overhaul of the land registry system. Clearly there were difficulties, but Scialoja's preference for a policy based on Francophile law could have had an influence.[47]

As for its contents, the project increased the number of *inter-vivos* deeds and cases subject to "*trascrizione*", improved regulations on the effects of registration,[48] required notaries to ask the contract parties whether they wished to register the deed and, in the affirmative case, pay the relevant fees

42 Cf. Luzzati 1889, p. 160, note 2.

43 Cf. This Code, published and promulgated with R.D. of 28 June 1909 addresses transcription in tit. XXVI of book III, articles 1973-2003.

44 Cf., Atti parlamentari 1910. Cf. Venezian 1910, p. 509f..; Ferrara 1910, p. 468; Galateria 1937, p. 105ff.

45 Emanuele Gianturco died on 10 November 1907.

46 Cf. Scialoja 1933, p. 58.

47 Mr. Scialoja played a major role in the *Italo-French Code of obligations and contracts* project. For an overview of doctrinal comments on the project, cf. Istituto di studi legislativi 1939. Now also published in Alpa – Chiodi 2007, p. 677ff.. Cf. Vassalli 1960a, p. 520ff.; Betti 1929, p. 665-668; Betti 1930, p. 184-189.

48 It included, among other things, the transfer of assets to benefiting heir's creditors and legatees (clearly when the inheritance included immovable goods), deeds under which the *dominus emphyteuseos* obtained devolution, or the *emphyteuta* was released from the land granted on perpetual lease, as well as deeds covering the endowment made by a woman in favour of herself.

in advance.[49] It also provided for the registration of purchases *mortis causa*,[50] with the aim of reconstructing the chain of transfers and enabling those who in good faith had registered a *mortis causa* purchase to benefit from ten-year usucaption.[51] The principle of authenticity was also strengthened, according to which the formality could only be fulfilled by means of a public deed, or an authenticated or legalized private agreement.[52]

In functional terms, Scajola underlined how his system aimed not only at providing criteria for the prevalence of one among several equally valid ownership titles, it also achieving *"in un non lontano avvenire, la completa pubblicità di tutti i trasferimenti immobiliari"*" ...ordering "*che la pubblicazione di ogni acquisto* [fosse] *subordinata all'accertamento della pubblicazione del diritto dell'autore"*.[53] Indeed, a broader disclosure function also emerged from the decision to order the publicity of provisions affecting the owner's legal capacity to transfer title to the property (in cases of incapacitation or disqualification and bankruptcy). This made it possible to transcend the inconsistent public disclosure system in force at the time regarding incapacitation or disqualification rulings and centred around magistrate's court registers; a system envisaging partial and misleading publicity.

The fact that the project also required the "*trascrizion*e" of deeds interrupting prescription and established the compulsory nature of placing a note in the margin of the mortgage entry in the event of transfer of the lien for disposal, subrogation, deferment of degree and endowment of secured credit, which resulted at the end in a clear vocation of third party protection.

Despite this project did not aim at establishing a "civil state" of immovable property and therefore not striving to reproduce the so-called German system (indeed registration wasn't still an obligation), it functionally departed from the "*trascrizione*" envisaged by the Pisanelli code. With the aim of gathering information on the legal condition of each land property, by improving the mortgage registration system, the project gave the system a prevailing general publicity function.

The promoter's authority and the general appreciation expressed within the parliament[54] were not sufficient for the approval of this project either.

49 Cf. art. 33 of the project.

50 Cf. art. 8 Scialoja project.

51 Cf. art. 8, last paragraph, Scialoja project.

52 Cf. art. 19 Scialoja project.

53 Cf. Senato del Regno 1913, p. 8.

54 In parliamentary terms, the project was defined as "*the most acute, the most bal-*

The war contingencies of the period spanning 1916-18 and the granting of full legislative powers to the Government contributed to convert the reform proposals[55] into law.

With Legislative Decree no. 1525 of 9 November 1916, schedule "H" mainly stipulated[56] the registration of property division deeds. Notaries or other notarising or authenticating public officials were required to register within one month of the deed date, and the obligation was applied to court registrars in the case of judgements and other measures subject to registration. Lastly, a sanctioning system was put in place in the event of omission.[57] Legislative Decree no. 575 of 21 April 1918, integrating the Consolidation Act on mortgage taxes, approved by Legislative Decree no. 135 of 6 January 1918, introduced further changes to the rules. More specifically, whereas art. 18 of the Consolidation Act stipulated that notarising or authenticating public officials were required to register within ninety days of the deed date, art. 19 established that the registrars are required to fulfil the obligation to register the deed within thirty days of the recording of judgements or the filing of petitions at court and registration. Article 4 of Legislative Decree no. 575/1918 summarised the list of new cases subject to registration and Royal Law Decree no. 2163 of 24 November 1919, schedule "E",[58] article 2, established the compulsory nature of certificates of reported succession pertaining to legitimate successions, including immovable assets or rights, establishing the relevant conditions and procedures. This obligation was later extended[59] to testamentary successions, in replacement of the compulsory registration of testaments set forth in art. 6 of Royal Decree no. 1802 of 20 August 1923. Subsequent amendments of a procedural nature were introduced by Royal Decree no. 2772 of 23 December 1923.[60]

The statutory relevance of the registrations ordered by these interven-

---

anced and best suited", to the circumstances of the time, cf. Rossi 1923. p. 43; cf. Ministero della giustizia e degli affari di culto 1925, Annex no. 1, Sub-committee report on amendments to the Civil Code p. 69.

55 Albeit in the substantive terms of the mere extension of cases subject to registration.

56 Effective from 1 January 1917.

57 Cf. articles 1, 2, 3 and 4 of Legislative Decree no. 1525 of 9 November 1916 schedule "H".

58 Effective from 1 January 1920.

59 Effective from 24 August 1923.

60 Valid for successions for which taxes had been paid effective from 1 January 1924.

tions, incorporated in tax measures justified by budgetary requirement, was questioned.[61]

However, since 1931 the Supreme Court of Cassation established that disclosure achieved through registration undoubtedly held statutory purposes and effects.[62]

In fact, this extended the scope of application of public disclosure; requiring the compulsory intervention of public officials to guarantee the fulfilment of formalities; strengthening the principle of authenticity and reducing the hypothesis of nullity, to the benefit of the certainty of the law; creating - via the registration of purchases *mortis causa* and property divisions – the prerequisites for the introduction of the principle of continuity of public disclosure formalities, the aforementioned measures, as summarised and coordinated in articles 17 to 23 of the Consolidation Act on mortgage registration fees under Royal Decree no. 3272 of 20 November 1923,[63] highlighted new disclosure purposes of the "*trascrizione*" system.

The above purposes had since come to transcend the interests of private contracting parties as well as the general interest of good functioning of immovable property trading and credit.

At the end of the First World War, Italy had to tackle the issue of judicial unification with Trentino and Venezia Giulia provinces that were annexed as a result of the conflict and subject to the *grundbuch* system.[64] These circumstances were the occasion for further reflection, mostly by Commissions and ministerial committees set up to study the issues of demobilisation and legislative unification[65], on the opportunity to reform the Italian publicity system which, compared to the germanic one, was generally considered to be inferior.

---

61 Cf. Coviello 1938, cc. 1ff.

62 Cf. Corte di Cassazione 1938, 1931.

63 Cf. Consolidation Act no. 3272 of 30.12.1923 on mortgage registration fees and compulsory registrations.

64 On legal problems regarding the annexation of Venezia Tridentina and Venezia Giulia by the Kingdom of Italy, with particular reference to the immovable property publicity system, cf. Fiocchi Malaspina 2013, p. 247-252; Ead, 2014, p. 145-166.

65 The Royal Post-War Commission (established with Lieutenant's Decree no. 1529, 16 September 1917) was succeeded by the Commission for the review of war legislation and the extension of the laws of the Kingdom to new provinces (established with Royal Decree no.1673 of 7 November 1920, which implemented Royal Decree no.1735 of 14 September 1919), in turn replaced, as stipulated by Royal Decree no. 1038 of 20 July 1922 by a "Technical committee for legislation regarding the unification of law in new provinces".

During the first two decades of the 20th century, the background on which to base a serious reform of the "*trascrizione*" could be deemed well established and the awareness of the need for action had come to maturity.

"Emergency" legislation, together with the Gianturco project, the 1910 Scialoja bill and various institutions of land register legislation of the "new provinces"[66] were the starting point of ministerial projects for the reformation of the "*trascrizione*" system, within a broader context of Civil Code renovation work.

The Scialoja project in particular was completed by the Postwar Commission, which integrated it in light of observations expressed by Coviello in the second edition of his monographic work dedicated to the "*trascrizione*" system.[67]

With law dated 30.12.1923, the Government was entrusted with the amendment of the provisions of registration laws.[68]

For the Chamber of Deputies' parliamentary sub-committee[69] entrusted with reporting on the bill for the reform and publication of new codes, the superiority of the land register system adopted in Germanic countries over the "Latin" system was obvious and the abstractly better choice would have been to unify the legislation of the new and the old provinces, extending the Austrian system to the latter. The structural deficiency of the cadastral system in force in most of Italy would have made this choice inapplicable.

On the basis of these considerations, so as *"not to remove the best whenever the best may prevail"* the Commission proposed to maintain both sys-

66 On the basis of the premise that new provinces would maintain property registers, the possibility of extending the system to old provinces was also considered, but the actual condition of the Italian Land Registry, even more so than the condition of the legislation upholding it, discouraged the initiative. Indeed, as early as in 1893 a commission established by Minister Bonacci was entrusted with the task of carrying out a preliminary feasibility study and issued a negative opinion.

67 Cf. Scialoja 1933, p. 211; Commissione Reale per il dopo guerra 1920. Coviello's work is the 1914 edition, revised and expanded with the assistance of his brother Leonardo and published posthumously in the treatise entitled *Il diritto civile italiano secondo la dottrina e la giurisprudenza…per cura di Pasquale Fiore,* Turin, 1914. Cf. also Cf. Ministero della giustizia e degli affari di culto 1925 (Report (to the Senate = by Sub-committee I. on amendments to the Civil Code), p. 305

68 Cf. Art. 1, paragraph no. 1 of Law no. 2814 of 30 December 1923 in the Official Gazette no. 6 of 8 January 1924.

69 Sub-committee I, consisting of Rossi, Riccio, Ferri, Janfolla, Rosadi, Degni.

tems,[70] but to establish that "*registration becomes an element of essence in the acquisition of property at all levels, including between contracting parties*".[71]

In order to face off probable criticisms of a provision for unification which did not unify in the slightest, the commission also stated that "*rather than two substantially different systems, these are two different ways of guaranteeing the law*".[72]

A hardly convincing argument, albeit underpinned by a major prerequisite. The conviction was that registration was, in functional terms, something more than a mere criteria for the selection of purchasers from the same assignor and represented a device of the objective right rather than the subjective right, thus acquiring full public disclosure relevance.

The Senatorial Commission,[73] appointed to express an opinion on the bill, limited itself to underlining the "unthinkability" of introducing the land registry system in old provinces and the opportunity of reforming the subject matter.

Once the delegated law was approved, in 1924 Sub-committee I of the Royal Commission for the reform of codes was entrusted with all matters pertaining to "*trascrizione*" system.

As a result of the coordination of the Scialoja project, the Pisanelli Code

---

70 The speaker Luigi Rossi expressed an extremely interesting suggestion "*on a personal basis*" for the introduction of the Austrian *grundbuch* system in Italian provinces where the cadastral system was most perfect. Specifically, he proposed to establish a register at each mortgage register office in which to record, for each cadastral map (hence on a real basis), transcriptions, inscriptions and annotations of property rights referred to in the map. He also proposed to report the formalities presented to the land register map section holder and the holders of the relevant property rights, whenever their assent was not already provided in a public deed, authenticated or legally recognised deed under private seal. He suggested that the entry or transcription of a property right in the register should infer the existence of the right and deletion should infer prescription and that there should be a legal assumption of exactness of register entries regarding both the owner and the property. He also proposed that relevant rights should be deemed as acquired by usucaption after 5 years of entry in the register and any registrations and entries could be opposed by the court via a summary procedure.

71 Cf. Ministero della giustizia e degli affari di culto 1925 (Report by Sub-committee I. on amendments to the Civil Code), p. 70.

Albeit in the substantive terms of the mere extension of cases subject to transcription.

72 Cf. ibidem.

73 Sub-committee I, consisting of Scialoja, Venzi, Calisse, Del Giudice and Polacco.

and a few other "*reform proposals for the "trascrizione"* drawn up by Coviello in October 1924, which provided for the principle of the real effectiveness[74] of registration, a draft was prepared and, subjected to further amendments, it formed the text of the first "*progetto di legge della trascrizione*", consisting of 38 articles[75]. Vassalli also worked on this project, which was to become title V of book II "*Cose e diritti reali*", of 1937.[76]

Instead of a mere criteria of selection of purchasers from the same assignor, the "*trascrizione*" became a constitutive element of the *inter partes* purchase of a property right.

The proposal was radical and introduced a *vulnus* of historical significance to the consensual principle and reduced contracts for the transfer of real property rights to merely compulsory contracts, separating *titulus* from *modus adquirendi*. Nevertheless, the registration continued to be ordered according to the "personal" system.

The 1937 project made further amendments to the Pisanelli Code structure.

The most significant amendment concerned: an increase in deeds subject to registration; the requirement of the registration of deeds of a declarative nature (division and transaction), and hence effective retroactively, the indirect obligation of the inalienability of immovable acquired *mortis cause* up to the registration of acceptance; the introduction of so-called "*pubblicità sanante*", which rendered the registered deed unquestionable after 5 years, even if vitiated by and resulting from *a non domino* disposition.

The project was favourably embraced by jurisprudence, with limited observations on the form and systematics.

During the Grandi Ministry,[77] from 1939 to 1941, Filippo Vassalli was mainly entrusted with matters regarding the "*trascrizione*" system,[78] assisted by Francesco Ferrara Jr. and Emilio Albertario.[79]

---

74 Every use, in the context of this paper, of phrase "real effectiveness" alludes to the suitability of the "trascrizione" to determine the transfer of ownership also with respect to third parties, which gives the completion of the formality the value of constitutive publicity.

75 This text later came to be identified as the first Coviello project.

76 Cf. Commissione Reale per la riforma dei codici 1937, p. 152.

77 Dino Grandi was appointed as Minister of Justice on 12 July 1939.

78 Cf. AFV, Lib. tutela/1-A9. Vassalli had participated in codification works from the outset. Cf. Vassalli 1960b, p. 605.

79 AFV, Lib. tutela/ 1-A10

Works on this system[80] began in November 1939[81] with a project entitled "*Della trascrizione*", which was undated (but probably dating back to September 1939[82]), consisting of 27 articles.[83]

The project developed by the committee was disclosed to some members of the Parliamentary Commission, given that in April 1940, the senator Eduardo Piola Caselli, [84] submitted, on request from the Ministry of Finance, a few observations to Vassalli, making himself available for further discussion and specifying that the title would soon be examined by the parliamentary Commission.

Although Vassalli had supported the real effectiveness of the transcription formality and underlined the need to duly acknowledge the orientations expressed by the Committee regarding Italo-German relations,[85] his project, which was completed at the end of September 1939, abandoned the proposal and attributed the "*trascrizione*" a mere public disclosure function, despite it was extensive and attentive to public interest.

It is likely that the civil law specialist, who later complained that he "*had to make and remake the project several times*",[86] was required to rethink the registration rules immediately and embrace the orientation emerged from the Commission of legislative Assemblies, supported by Eduardo Piola Caselli, according to whom the transition to real effectiveness had to be considered premature, despite the registration should have been imposed with greater rigour, in order to guarantee its public disclosure function due to its acquired value of public interest and position as a bridge for desirable transition to a system which would encompass it within a probative land register.

Minister Grandi invited the Commission to consider whether the time had come to complete the transition towards a reform which would confer actual effectiveness upon registration.[87] According to the Minister of Justice, this Reform, which was already anticipated in the provisions contained in the

80 Title V of the Royal Commission's project.

81 Cf. Letter dated 21 November 1939 from Stella Richter (on behalf of the Cabinet of the Ministry) to Vassalli (AFV, Corr. cod. civ.).

82 Cf. letter from Vassalli to Grandi on 29 September 1939, Rondinone 2003, p. 193.

83 Cf. Rondinone, p. 239f.

84 Cf. *ibidem*.

85 Cf. Comitato giuridico Italo germanico 1939. On the events of the Italo-German committee cf. Somma 2005, p. 431ff.

86 Cf. Vassalli 1960b, p. 627, note 1.

87 Cf. Grandi 1940, p. 2.

Eritrean[88] and Libyan[89] land tenure system, as well as the system in force in the new Provinces and the provisions pertaining to the transfer of aircraft,[90] would have returned Italian law to its traditional Roman Law directives from which it had moved away, under the influence of the Napoleonic Code. [91]

Indeed, in the four ministerial drafts of book VI (Tutela dei diritti) containing the title *"della trascrizione"* and in the text of the Code then promulgated, the regulations on the "*effetti della trascrizione*" made no reference to real effectiveness.

Failure to adopt a constitutive publicity system was one of the main criticisms made by jurisprudence towards the 1942 code. The decision of *conditores* to resolve in favour of the usucapient any disputes between the latter and the assignee, deriving from the previous owner, irrespective of the registration of the judgement ascertaining the acquisition of the original title,[92] generated uncertainties in purchases.

This criticism is probably well grounded, provided it is viewed in the teleological perspective of raising the public disclosure system to the highest level of abstract efficiency. It must be considered that rendering the formal entries of a register the only true instrument capable of guaranteeing the security of legal

88 Cfr. R. D. no. 37 of 31 January 1909.

89 On the Libyan legal system cf. D'Amelio 1912, p. 16ff.; more in general on Italian colonial law, cf. Martone 2007.

90 Cf. Title VI, R.D. no. 356 of 11 January 1925.

91 Cf. Padoa Schioppa 2003, p. 495ff.

92 The '37 Commission project provided for the *trascrizione* of applications and judgements for ascertaining usucaption, specifying that remain "*sempre salvi i diritti acquistati dai terzi verso il vero proprietario anteriormente alla pubblicazione della domanda od eccezione tendente a far dichiarare verificata la prescrizione acquisitiva*"" (cf. Art. 365, Commissione Reale per la riforma dei codici 1937). After all, given the functionalisation of transcription for public interest and the certainty of the objective right, it was consistent to attribute prevalence to the formal knowability as provided in public registers, with respect to the de facto relationship with the *res*.

In the first ministerial drafts of the book "Della tutela dei diritti", the transcription of direct applications for declaring the verification of usucaption was maintained, but the *dies ad quem* of the enforceability of the registrant of registered deeds or deeds entered prior to registration was not centred around the fulfilment of formalities, but rather around the "verification of usucaption" (cf. art. 11 no. 5, Ministero di Grazia e Giustizia 1940). In the last version of the book "Della tutela dei diritti", the rule on the transcription of usucaption applications disappeared and there remained only applications for interruption (art. 10, no. 5) and declarative judgements (art. 46).

circulation was incompatible with the *ratio* of the usucaption method, which consisted of privileging those who actively used the property at hand, compared to those who held formal ownership thereof. In a historical context in which the need to attribute a "social function"[93] to property strongly prevailed, reconciling the individualistic aspect with requirements expressed by the community, the decision made by the *conditores* appears far from unjustified.[94]

Returning to the configuration of the "*trascrizione*" system, which emerged from the preparatory work of the Code, considering the extension of the number of cases subject to registration, the extension of the range of judicial petitions subject to transcription, the resizing of the real retroactivity of invalidity and annulment actions, the introduction of so-called "*pubblicità sanante*",[95] the attribution of important statutory effects upon the registration of *mortis causa* purchases and the introduction of the principle of continuity,[96] on the one hand, and the notary obligation of registration, the transcending of the legal theory underpinning the conservator's passive role[97] and the reinforcement of the principle of authenticity, on the other hand; all this within a regulatory context, which required the control by public officials over the contracting parties' capacity and legitimisation and prevented them from receiving or authenticating deeds contrary to the law, public order or good practice, the movement impressed to the public disclosure system by the new code in terms of completeness of immovable property registers is quite clear, including the attribution to the registers of a property "civil state" function, aimed at generating legal certainty as to the ownership of assets.

---

93 Purposes were also stated in the Report to the King which accompanied the definitive text of the third book of the Civil Code which states: « *la proprietà è riconosciuta e protetta perché è considerata come lo strumento più efficace e più utile per la produzione. [...] I beni devono essere diretti alla produzione e il proprietario non può impiegarli ai fini puramente egoistici, ma deve usarli in modo che producano la propria utilità e concorrano al raggiungimento di quei fini unitari»* (n. 23). See also Biggini 1939, p. 68.

94 Regardless of practical difficulties, expressed in the Report to the King (no.1066), which would have resulted in the adoption of a system modelled on the land registry system.

95 That, even if purely subject to the existence of other circumstances (lapse of time, good faith, onerousness of the purchase), it also introduced a principle of *public trust* in immovable property registers.

96 This was fundamental for the use of immovable property registers organised on a "personal basis".

97 With the extension of cases of legitimate refusal of registration.

Focusing on safe trade protection, viewed as a public interest objective instead of protection of the seller and the original owner in view of an increasingly greater public disclosure of events regarding assets and property rights, is tangible proof of the upturning of the principles passed down from tradition. All this, in line with the new role the law has assigned to the protection of entrustment and with the public "interest" (also) in private deed regulations, within the framework of the conception of the individual, the society, the State and their relations that have emerged since the end of the 19th century, which were reviewed during the First World War years and were adopted and completed by the Fascist government with the 1942 Code.[98]

Bibliography

Archives

AFP = Archivio Filippo Vassalli
ASCD = Archivio storico della Camera dei Deputati.

Primary sources

Atti parlamentari 1910 = Atti Parlamentari, Senato del Regno, XXIII Legislatura, prima sessione 1909-1910, *Documenti, Disegni di legge e relazioni, n. 174,* Roma, 1910.

Burgerlijk wetboek 1837 = *Burgerlijk wetboek. Officiele uitgave*, s Gravenhage, 1837.

Camera dei deputati 1970 = Camera dei Deputati (a cura della), *La Costituzione della Repubblica nei lavori dell'Assemblea Costituente, II, Sedute dal 17 aprile 1947 al 19 maggio 1947*, Roma, 1970.

Code civil 1804 = *Code civil des Français*, Paris, 1804.

Codice civile 1865 = *Codice civile del Regno d'Italia*, Torino, 1865.

Commissione Reale per il dopo guerra 1920 = Commissione Reale per il dopo guerra - *Studi e proposte della Prima sottocommissione: presieduta dal sen. Vittorio Scialoja: questioni giuridiche, amministrative e sociali: giugno 1918-giugno 1919*, Roma, 1920.

Comitato giuridico Italo germanico 1939 = Comitato giuridico Italo germanico – Arbeitsgemeinschaft fűr die deutsch-italienischen RechtBeziehungen, *Atti del Primo convegno (Roma 21-25 giugno 1938)*, Roma, 1939.

Commissione Reale per la riforma dei codici 1937 = Commissione Reale per la ri-

98 Cf. Camera dei deputati 1970, p. 1493 f.

forma dei codici, *Sottocommissione per Codice civile - Codice civile - Secondo libro - Cose e diritti reali, Progetto e relazione,* Roma, 1937.

Corte di Cassazione 1931 = Sentenza della Cassazione Civile 3 marzo 1931, in *Repertorio del Foro Italiano*, 1931, col. 1570-A.

Corte di Cassazione 1938 = Sentenza della Cassazione civile 28 giugno 1938 n. 2178, in *Massimario della Giurisprudenza italiana contenente tutte le massime della cassazione civile disposte in repertorio alfabetico,* 9 (1938), col. 638.

Ministero di Grazie e Giustizia 1940 = Ministero di Grazie e Giustizia, *Codice civile. Della Tutela dei diritti. Progetto ministeriale*, Roma, 1940.

Consiglio Nazionale del Notariato 2012 = Consiglio Nazionale del Notariato, *La sicurezza della circolazione giuridica immobiliare. Modifiche legislative in materia di pubblicità immobiliare e di successione necessaria*, Roma, 2012.

Documents relatifs au régime hypothécaire 1844 = Documents relatifs au régime hypothécaire et aux réformes qui ont été proposées publiés par ordre de M. Martin (du Nord), Paris, 1844.

Duvergier 1835 = *Collection complète des lois, décrets, ordonnances, réglements, et avis du Conseil d'Etat … par J. B. Duvergier,* XI, Paris, 1835.

Gianzana 1887 = S. Gianzana, *Codice civile preceduto dalle relazioni ministeriali e senatoria, dalle discussioni parlamentari e dai verbali della commissione di coordinamento, colle referenze sotto ogni articolo agli altri codici: al francese, alla legge romana, nonché a tutti i precedenti legislativi, coll'aggiunta delle leggi complementari che si riferiscono al codice civile,* Torino, 1887.

Loi sur le régime hypothécaire 1798 = *Loi n. 2137 sur le régime hypothécaire du 11 Brumaire an VII* in *Bulletin des lois de la République Française, septième partie, I.er semestre de l'an VII*, Paris, 1798.

Loi sur le règime hypothécaire 1851 = *Nouvelle loi sur le règime hypothécaire, accompagnèe de tous les documents officiels relatifs a la loi,* Brussels, 1851.

Loi sur la transcription en matiere hypothécaire 1855 = *Loi sur la transcription en matiere hypothécaire du 23 mars 1855,* in R.T. Troplong*, Privilèges et hypothèques, commentaire de la loi du 23 mars 1855 sur la transcription en matière hypothécaire, par M. Troplong,*..Paris, 1856.

Ministero della giustizia e degli affari di culto 1925 = Ministero della giustizia e degli affari di culto. *Delega al Governo per emendamenti al codice civile e per la pubblicazione dei nuovi codici di procedura civile, di commercio e per la marina mercantile: lavori preparatori: relazione al disegno di legge, discorsi di S. E. Aldo Oviglio, Ministro della giustizia, alla Camera dei deputati e al Senato del Regno e relazioni delle Commissioni parlamentari sulla delega al Governo della facoltà di arrecare opportuni emendamenti al codice civile e di pubblicare nuovi codici di procedura civile, di commercio e per la marina mercantile, in occasione della unificazione legislativa con le nuove provincie:*

Legge 30 dicembre 1923, n. 2814, Regio decreto 4 giugno 1924, Decreto ministeriale 7 luglio 1924, Roma , 1925.
Senato del Regno 1913 = Senato del Regno d'Italia, *Atti parlamentari del Senato del Regno*. documenti: Dal n. 136 al n. 255, Roma, 1913.

Secondary Sources

Alpa-Chiodi 2007 = G. Alpa, G. Chiodi*, Il progetto italo francese delle obbligazioni (1927). Un modello di armonizzazione nell'epoca della ricodificazione,* Milano, 2007.
Aquarone 1960= A. Aquarone, *La unificazione legislativa e i codici del 1865*, Milano, 1960.
Ascoli 1913 = A. Ascoli, *Nicola Coviello,* in *Rivista di diritto civile,* 1913, p. 499-503.
Betti 1929 = E. Betti, *Il progetto di un Codice italo francese delle obbligazioni e dei contratti*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni,* 1929, I, p. 665-668.
Betti 1930 = E. Betti *Sul progetto di un Codice italo francese delle obbligazioni e dei contratti*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni,* 1930, I, p. 184-189.
Bianchi 1877 = E. Bianchi, *Considerazioni generali sul sistema ipotecario e sulla trasduzione secondo il Codice civile italiano*, Pisa, 1877.
Besson 1891 = E. Besson, *Les Livres fonciers et la réforme hypothécaire, étude historique et critique sur la publicité des transmissions immobilières en France et à l'étranger, depuis les origines jusqu'à nos jours*, Paris, 1891.
Biggini 1939 = C. A. Biggini, *Riforma dei codici e diritto di proprietà,* in *La concezione fascista della proprietà privata, a cura della Confederazione Fascista dei Lavoratori dell'Agricoltura*, Roma, 1939.
Birocchi 1990 = I. Birocchi, *Notazioni sul contratto (A proposito di un recente lavoro di G. Alpa)* in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 19, 1990, p. 637-659.
Bonini 1996 = R. Bonini, *Il diritto privato dal nuovo secolo alla Prima guerra mondiale. Linee di storia giuridica italiana ed europea*, Bologna, 1996.
Carnelutti 1913 = F. Carnelutti, *Nicola Coviello,* in *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 1913, 1, p. 730-732.
Cavanna 2005 = A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero Giuridico. 2,* Milano, 2005.
Cazzetta 2011 = G. Cazzetta, *Codice civile e identità giuridica nazionale. Percorsi e appunti per una storia delle codificazioni moderne*, Torino, 2011.
Colorni 1954 = V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare*, Milano, 1954.

Coviello 1905 = N. Coviello, *Osservazioni sulla riforma della pubblicità immobiliare* in *Temi siciliana,* 1905, p. 9-10.
Coviello 1907 = N. Coviello, *La trascrizione*, I, Torino, 1907.
Coviello 1938 = L. Coviello, *La trascrizione ordinata dalla legge sulle tasse ipotecarie,* in *Relazione al codice civile vigente e al progetto di riforma,* in *Il Foro Italiano*, 63 (1938), IV cc. 1/2-15/16.
D'Amelio 1912 = M. D'Amelio, *Per l'ordinamento giuridico della Tripolitania e della Cirenaica,* Milano, 1912.
De Cores Helguera 2017 = C. De Cores Helguera, *La teoria general del contrato a la luz de la historia,* Montevideo, 2017.
Dezza 2000 = E. Dezza, *Lezioni di storia della codificazione civile. Il code civil (1804) e l'Allgemeines Burgherliches Gesetzbuch (ABGB, 1811)*, Torino, 2000.
Ferrara 1910 = F. Ferrara, *Il progetto Scialoja sulla trascrizione*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 1910, I, p. 468-474.
Fiocchi Malaspina 2013 = E. Fiocchi Malaspina, *Le nuove province del Regno d'Italia: il dibattito legislativo e dottrinale per il riconoscimento dci diritti storici (1918-1929),* in G. Rolla (a cura di), *Regimi Giuridici Speciali di Autonomia delle Comunità Territoriali. Profili di diritto comparato,* Milano, 2013, p. 233-252.
Fiocchi Malaspina 2014 = E. Fiocchi Malaspina*, Il libro fondiario in Venezia Giulia: alcuni profili storico-giuridici*, in G. Rolla, M. Cosulich (a cura di), *Il riconoscimento dei diritti storici negli ordinamenti costituzionali* (Quaderni della facoltà di giurisprudenza dell'Università degli studi di Trento 3/2014), Napoli, 2014, p. 145-166.
Foschini 1867 = G. Foschini, *I motivi del codice civile del Regno d'Italia ordinati sotto ciascun articolo*...Chieti, 1867.
Frola 1888 = S. Frola, *Il catasto nei suoi effetti giuridici e conseguenti riforme nella legislazione civile*, Torino, 1888.
Gabba 1909 = C. F. Gabba, *Natura ed effetti della trascrizione* in *Quistioni di Diritto civile,* I, Torino, 1909.
Galateria 1937 = L. Galateria, *Della pubblicità immobiliare. Le sue origini e i suoi progetti di riforma*, Napoli, 1937.
Gianturco 1890 = L. Gianturco, *Studi e ricerche sulla trascrizione e sul sistema ipotecario,* Napoli, 1890.
Gianturco 1896 = L. Gianturco, *Intorno alla pubblicità del dominio,* Napoli, 1896.
Gianturco 1909 = L. Gianturco, *Discorsi parlamentari pubblicati per deliberazione della Camera dei deputati*, Roma, 1909.
Grandi 1940 = D. Grandi, *Proprietà e diritti reali. Discorso pronunciato alla Commissione delle assemblee legislative per la riforma dei codici il 9 febbraio 1940-XVIII*, Roma, 1940.

Grossi 1998 = P. Grossi, *Assolutismo giuridico e diritto privato*, Milano, 1998.
Grossi 2002 = P. Grossi, *La cultura del civilista italiano. Un profilo storico*, Milano, 2002.
Istituto di studi legislativi 1939 = Istituto di studi legislativi, *Sul progetto italo francese di Codice unico delle Obbligazioni dei Contratti. Saggi critici dei proff. Adler E., Bartsch R. Graulich L., Gutteridge H.C., Lee W. R., Oertmann P., Oser H. Pereterskij I., Perreau E. H., Pollak R., Riezler E., Svatier R., Scaduto G., Siegwart A., Vialleton A., Winfield R. H.,* Roma, 1939.
Liberati 1995 = G. Liberati, *Pubblicità (Diritto Intermedio),* in *Enc. Dir.*, XXXVII, Milano, 1995.
Lo Savio 1893 = G. Lo Savio, *Per la riforma dell'ordinamento immobiliare italiano*, Napoli, 1893.
Loynes 1897 = F. C. De Loynes, *Le projet de loi sur la Réforme du Régime hypothécaire*, in *Revue critique del legislation et jurisprudence*, 1897, p. 229-249.
Lozzi 1879 = C. Lozzi, *Dell'efficacia della trascrizione di una vendita simulata in confronto dei terzi* in *Giornale delle leggi. Pubblicazione didattica di dottrina, giurisprudenza e consulti gratuiti*, X (1879), pp. 217-220.
Luzzati 1886 = I. Luzzati, *Il progetto per la parequazione fondiaria e la legislazione civile sui beni immobili,* Torino, 1886.
Luzzati 1889 = I. Luzzati, *Della trascrizione, commento teorico pratico al titolo XXII, libro III del codice civile italiano*, I, Torino, 1889.
Luzzati 1891 = I. Luzzati, *Disegno di legge sugli effetti giuridici del catasto e sull'istituzione dei libri fondiari preceduto da uno studio sul catasto italiano*, Torino, 1891.
Kaspers 1972 = H. Kaspers, *Vom Sachsenspiegel zum Code Napoléon*, Köln, 1972.
Magnin 1896 = P. Magnin, *Étude sur la publicité des transmissions des droits immobiliers et les livres fonciers*, s.l, 1896.
Martone 1984 = L. Martone, *Nicola Coviello,* in *Dizionario Biografico degli Italiani*, 30 (1984).
Martone 2007 = L. Martone, *Diritto d'oltremare: legge e ordine per le colonie del regno d'Italia*, Milano, 2007.
Merlin 1812 = P. A. Merlin, *Nantissement,* in *Répertoire universel et raisonné de jurisprudence… Quatrième edition,* Paris, 1812-1825.
Mirabelli 1889 = G. Mirabelli, *Dei principii fondamentali dell'istituto della trascrizione e delle conseguenze che ne derivano* in *Raccolta del diritto dei terzi secondo il Codice civile italiano*, I, Torino, 1889.
Mosca 1905 = T. Mosca, *Come dovrebbe essere emendato il disegno di legge sulla trascrizione presentato dal Governo alla Camera il 9 febbraio 1905*, Roma, 1905.

Pacifici Mazzoni 1874 = E. Pacifici Mazzoni, *Istituzioni di diritto civile italiano…*, Firenze, 1874.

Padoa Schioppa 2003 = A. Padoa Schioppa, *Dal code Napoléon al Codice civile del 1942, cit.,* I, p. 531 ss. ora in Id., *Italia ed Europa nella storia del diritto,* Bologna, 2003, p. 495-532.

Petrelli 2007 = G. Petrelli, *L'autenticità del titolo della trascrizione nell"evoluzione storica e nel diritto comparato*, in *Rivista di diritto civile*, 5, 2007, p. 585- 640.

Petrelli 2009 = G. Petrelli, *Pubblicità legale e trascrizione immobiliare tra interessi privati e interessi pubblici, i*n *Rassegna di diritto civile,* 3, 2009, p. 689-754.

Petrelli 2013 = G. Petrelli, *Questioni generali e problemi aperti in materia di trascrizione immobiliare*, in *Rivista del notariato,* 3, pt. 3, 2013, p. 749-762.

Petrelli 2014 = G. Petrelli, *Trascrizione immobiliare e costituzione,* in *Rivista di diritto civile*, 1, 2014, p. 103-132.

Pugliatti 1956 = S. Pugliatti, *La Trascrizione*, XIV- I, in, *Trattato di diritto civile e commerciale diretto dai professori Antonio Cicu e Francesco Messineo*, Milano, 1956.

Regnault 1929 = H. Regnault, *L'insinuation des actes emportant transfert de propriété à titre onéreux dans l'ancien droit français* in Mélanges Paul Fournier, Paris, 1929.

Roggero 2013 = F. Roggero, *La trascrizione immobiliare nella giurisprudenza del secolo XIX,* in L. Moscati (a cura di), *Dialettica tra legislatore e interprete. Dai codici francesi ai codici dell'Italia unita*, Napoli, 2013, p. 169-222.

Rondinone 2003 = N. Rondinone, *Storia inedita della codificazione civile,* Milano, 2003.

Salvioli 1894 = G. Salvioli, *La pubblicità nella vendita storicamente esaminata* in *Rivista italiana per le scienze giuridiche*, XVIII, 1894, p. 196-236.

Sandonà 2011 = A. Sandonà, *Note sull'istituto della trascrizione tra la rivoluzione ed il secondo '800*, in *Rivista di storia del diritto italiano*, LXXXIV (2011), p. 363-416.

Scialoja 1933 = V. Scialoja, *La riforma dei codici di diritto privato in Italia* in *Studi giuridici*, IV, diritto privato, Roma, 1933.

Simoncelli 1892 = V. Simoncelli, *Gli articoli 1932 n. 7 e 1942 del Codice civile e V articolo 687 del Codice di procedura civile* in *Giurisprudenza italiana*, 1892, IV, p. 257-272.

Somma 2005 = A. Somma, *I giuristi e l'Asse culturale Roma-Berlino. Economia e politica nel diritto fascista e nazionalsocialista*, Frankfurt am Main, 2005.

Vadalà-Papale 1885 = G. Vadalà-Papale, *L'istituto della trascrizione e le sue riforme*, in «*Circolo giuridico*», 16 (1885), p. 3-15.

Vassalli 1960a = F. Vassalli, *Insegnamento e riforme del diritto civile. Commemorazione del Prof. De Ruggiero,* in*, Studi giuridici,* II, 7, Milano 1960, p. 509-524.

Vassalli 1960b = F. Vassalli, *Motivi e caratteri della codificazione civile* in *Studi giuridici*, III, 2, Milano, 1960, p. 605-634.

Vita 1880 = L. Vita, *Della trascrizione delle alienazioni successive* in *Giurisprudenza italiana*, 1880, IV, p. 14-29.

Venezian 1905 = G. Venezian, *La riforma della trascrizione nel disegno di legge per lo sgravio del debito ipotecario (1905),* in *Opere Giuridiche, 2. Studi sui diritti reali e sulle trascrizioni, le successioni, la famiglia,* p. 108-119, Roma, 1920.

Venezian 1910 = *Il disegno di legge Scialoja sulla trascrizione*, in *Rivista di diritto civile*, 1910, p. 509-539.

REGISTRO E COLONIALISMO EM ANGOLA

Mariana Dias Paes

Neste trabalho, analiso um processo judicial que integra o acervo do Arquivo Nacional de Angola. Nessa análise, empreendo um "jogo de escalas", ou seja, procuro mostrar, por meio de um conflito concreto, relações jurídicas, econômicas e políticas trabalhadas, pela historiografia, em um nível mais geral. Por meio dessa análise de nível micro é possível identificar aspectos dos conflitos e da construção do colonialismo que podem passar despercebidos por análises que adotam uma perspectiva macro. Com isso, discuto como a introdução de um novo instituto jurídico – o registro –, em um contexto colonial, alterou a dinâmica de certas relações sociais e a configuração dos conflitos fundiários. Ao fazer uso desses novos institutos jurídicos, tanto os colonos europeus quanto as pessoas que estavam sendo desapropriadas de suas terras acabaram por normalizar o novo sistema colonial de regras.[1]

A segunda metade do século XIX foi marcada por novas formas de colonialismo na África Centro-Ocidental. A abolição do tráfico transatlântico de escravos e a independência do Brasil fizeram com que a atenção de Portugal se voltasse, de maneira mais intensa, para suas colônias africanas. Além disso, a expansão do capitalismo esteve na base de novos empreendimentos coloniais e no desenvolvimento de projetos de infraestrutura, como, por exemplo, a construção de estradas de ferro.[2] Na África Centro-Ocidental, uma das regiões mais afetadas por essas novas formas de colonialismo foi a bacia do Rio Cuanza, na chamada "Província de Angola".

A abolição do tráfico transatlântico de escravos, um dos pilares da economia da colônia de Angola até meados do século XIX, coincidiu com o aumento dos preços do café no mercado internacional.[3] As elites coloniais portuguesas, então, defenderam um projeto de produção de café em territórios africanos e se falava, até mesmo, na conversão da região em um "novo Brasil".[4] Os produ-

1 Hébrard, Scott 2014, p. 15-19; Premo 2017, p. 1-25; Putnam 2006; Revel 1998, p. 15-38; Scott 2000.

2 Clarence-Smith 1979; Oliveira Marques 2001, p. 259-291; Vargaftig 2013, p. 135-161; Vos 2015.

3 Marquese 2015.

4 Alexandre, Dias 1998, p. 379-438; Freudenthal 2005, p. 125-220.

tores de café começaram, então, a plantar ao redor de terrenos de café selvagem, como, por exemplo, os da região do Cazengo. Nas primeiras décadas de implementação do plano colonial de agricultura do café, esse tipo de cultivo era feito, principalmente, por populações locais. Contudo, com o desenvolvimento econômico da região, produtores europeus também passaram a se interessar por esse tipo de empreendimento. Com essa finalidade, requisitaram e ganharam concessões de terras do governo português metropolitano e dos administradores coloniais. Esses produtores europeus começaram a criar firmas agrícolas para a exploração do café e de outros produtos na região do Cazengo.[5]

Além das concessões de terras feitas às firmas agrícolas de administração europeia, o governo português também expropriou terra da população local com o objetivo de construir estradas de ferro. A região do Cazengo foi um dos alvos desses novos projetos de infraestrutura, pois os colonos europeus, há muito, demandavam melhorias no sistema de escoamento da produção de café. Assim, a construção da estrada de ferro Luanda-Ambaca, conjuntamente ao crescimento das firmas agrícolas, gerou fortes tensões entre a população local africana, colonos portugueses e autoridades coloniais, na região do Cazengo.[6]

O contexto "pré-Conferência de Berlim" influiu fortemente na configuração desse cenário de desapropriação das populações locais africanas. Nessa época, as potências imperiais europeias disputavam territórios africanos e Portugal tentava garantir que regiões da África Centro-Ocidental fossem reconhecidas como seu território colonial. Assim, a expansão agrícola e dos empreendimentos de infraestrutura era central para garantir o reconhecimento internacional de sua presença e de seu poder colonial na região.[7]

Diversos mecanismos jurídicos foram funcionais à expansão colonial portuguesa na África Centro-Ocidental, em geral, e na região do Cazengo, em particular. Neste artigo, focarei em um deles: o registro. O registro de propriedade fundiária, nesse contexto colonial específico, atendia aos anseios portugueses na medida em que garantia a transferência formal da terra para colonos e produtores europeus, o que servia, no âmbito internacional, como prova de seu bom aproveitamento. Além disso, ao operar a transferência da terra para mãos europeias, o registro garantia que as populações locais desa-

5 Freudenthal 2005, p. 125-220.

6 Alexandre, Dias 1998, p. 159, 468-471.

7 Ferreira 2018, p. 199-280.

propriadas fossem disponibilizadas como mão de obra tanto para as firmas agrícolas quanto para os projetos de infraestrutura.

A população desapropriada, porém, resistiu a esse processo e procurou se resguardar de diversas maneiras. Uma delas foi a tentativa de utilizar o registro a seu favor. Neste trabalho, analiso uma contenda jurídica, na região do Cazengo, que girou em torno de questões referentes ao registro da terra. A partir dessa análise, é possível identificar como institutos e categorias jurídicas adquirem significados e funções a depender de sua utilização por sujeitos históricos específicos.

1. Um conflito fundiário no Cazengo

Foi nesse contexto de novas formas de expansão colonial e desapropriação de terras que, em 1883, o presidente do Tribunal da Relação de Luanda recebeu, do Chefe do Concelho do Cazengo, um pedido para que Ernesto Freire dos Santos fosse proibido de continuar atuando como advogado de provisão[8] e fosse removido de seu cargo de ajudante na conservadoria da comarca. De acordo com o Chefe do Concelho, o motivo para a remoção seria o fato de Santos "ser conselheiro nas questões irritantes de propriedade, em que incita os seus clientes à revolta de mão armada contra os proprietários brancos que em tempo compraram as propriedades".[9]

Em um relatório que acompanhava o pedido de remoção, o Chefe do Concelho apresentou a descrição dos fatos que provariam que Santos estava causando desordem na colônia. De acordo com o relato, no dia 15 de outubro de 1883, ele havia sido chamado, por Joaquim Antônio Carmo Ferreira, proprietário da firma agrícola Monte Bello, para comparecer a seu estabelecimento a fim de "fazer sustentar o direito de propriedade, o qual havia sido atacado por um núcleo de indígenas armados de catanas e cacetes".[10] Carmo Ferreira alegava que, às sete da manhã daquele dia, ele havia dado ordens a seus "serviçais" para que fossem limpar uma vargem com o objetivo de prepará-la para o plantio de cana-de-açúcar. A vargem fazia parte da propriedade Monte Bello, "devidamente registrada na conservadoria desta comarca".[11] Porém,

8 Os advogados de provisão eram aqueles que não tinham educação formal em direito, mas que recebiam autorização para atuar como advogados.

9 ANA, caixa 163, maço 17, p. 1.

10 ANA, caixa 163, maço 17, p. 60.

11 ANA, caixa 163, maço 17, p. 63.

quando os trabalhadores aí chegaram, encontraram aproximadamente 60 negros armados com catanas e cacetes, que disseram aos trabalhadores da firma que eles deveriam se retirar, pois a vargem era sua. Carmo Ferreira, então, foi até o local verificar o que estava acontecendo e foi ameaçado de morte, caso não ordenasse que seus trabalhadores de lá saíssem. Carmo Ferreira e os trabalhadores se retiraram, mas o proprietário da firma decidiu escrever para o Chefe do Concelho requisitando que ele investigasse o caso e punisse os "delinquentes", se não seria impossível manter a ordem na firma agrícola.[12]

No mesmo dia, o Chefe do Concelho se dirigiu ao lugar do conflito. Assim que chegou, ordenou que os trabalhadores voltassem a preparar a vargem para o plantio. O Chefe do Concelho continuou seu relato sobre o caso: "minutos depois apareceram alguns indígenas, mas com modos submissos e respeitadores, e, fazendo eu uma rápida averiguação sobre o fato, alegaram que o local onde o referido Carmo Ferreira estava trabalhando, lhes pertencia, querendo assim usurpar-lhes o direito".[13] Ele, então, respondeu que aquela não era a maneira correta de sustentar direitos de propriedade, ainda mais quando eles já haviam sido negados por sentença judicial, como era o caso.[14]

Naquele momento, Santos, o advogado de provisão, chegou ao local. Ele se apresentou ao Chefe do Concelho como o responsável pela questão por parte dos que pleiteavam a vargem contra a firma Monte Bello. O Chefe do Concelho disse a Santos que aquela não era a maneira correta de aconselhar seus clientes, já que eles deveriam reclamar seus direitos em juízo. As partes supostamente chegaram a um acordo. Porém, logo após chegar em casa, o Chefe do Concelho foi novamente chamado, pois as ameaças e insultos entre as partes haviam recomeçado. Ele, então, decidiu expedir um mandado suspendendo o trabalho no local até que a questão estivesse resolvida pelas autoridades coloniais.[15]

Os vários documentos anexados ao processo gerado pelo pedido de cancelamento da licença de Santos e de sua remoção do cargo de ajudante na conservadoria da comarca nos mostra o impacto do registro e de outros institutos jurídicos a ele relacionados em um contexto de expansão colonial.

Nesses documentos, porém, não há muita informação sobre Santos. Sabemos, com certeza, que ele era ajudante na conservadoria da comarca e que

12 ANA, caixa 163, maço 17, p. 63-64.
13 ANA, caixa 163, maço 17, p. 60.
14 ANA, caixa 163, maço 17, p. 60.
15 ANA, caixa 163, maço 17, p. 60-64.

tinha licença para exercer a atividade de advogado. Não há informação sobre suas origens, mas ele dizia publicamente "não professar religião alguma".[16] No entanto, há uma grande probabilidade de que ele fosse parte de uma nascente elite letrada africana que estava começando a formular discursos críticos à administração colonial.[17] Uma das reclamações de Carmo Ferreira, o proprietário da firma agrícola Monte Bello, era de que alguém havia publicado, no jornal "Pharol do Povo", uma nota o difamando. Não há, no processo, transcrição da nota. Porém, é possível perceber que ela tratava, também, de conflitos fundiários entre o dono da firma agrícola Monte Bello e pessoas que se sentiam esbulhadas por ela. Em razão dessa nota, que considerou injuriosa, Carmo Ferreira ajuizou um processo criminal contra os africanos que estavam demandando a terra, mas todos deram depoimentos afirmando que não haviam sido os responsáveis por sua publicação e que nem sequer sabiam do ocorrido. Por isso, ele insinuou que Santos era o verdadeiro responsável pela nota.[18]

O jornal que publicou a nota contra Carmo Ferreira e a firma Monte Bello foi um dos primeiros jornais nacionalistas angolanos. Contudo, nessa época, ele ainda não propagava um discurso explicitamente anticolonial. Mesmo assim, funcionava como uma via através da qual as elites intelectuais locais podiam expressar seus descontentamentos em relação à administração colonial portuguesa.[19] Admitindo que foi Santos, e não seus clientes, quem, de fato, publicou a nota, o que é bastante provável, considerando que eles eram analfabetos, há uma boa chance de que ele não fosse português, mas parte dessa crescente elite intelectual angolana.[20]

Em seu relatório, o Chefe do Concelho ressaltou que Santos, há muito, estava engajado em atividade subversiva. Ele afirmou que, há três anos, em 1880, Santos havia feito "sublevar uns indígenas no sítio Sá, onde foi necessário empregar-se a força, sendo devidamente castigados". Ele também categoricamente afirmou que o único objetivo de Santos era "ganhar dinheiro, empregando para isso qualquer meio, e guerrear a colônia europeia". Por tudo

16 ANA, caixa 163, maço 17, p. 83.

17 Sobre essa elite africana e seu envolvimento em movimentos contestatórios das autoridades coloniais, ver Kambundo 2017.

18 ANA, caixa 163, maço 17, p. 49-56, 71-73.

19 Kandijimbo de Kandingi (2015, p. 233) identificou uma publicação assinada por Ernesto Freire dos Santos que defendia "direitos dos indígenas" no jornal "O Angolense", em 1917.

20 Sobre o uso da imprensa por intelectuais angolanos, ver Lourenço 2015, p. 29-48.

isso, ele requisitava que Santos fosse impedido de assumir funções públicas e fosse expulso daquele Concelho.[21]

Não há como saber a extensão do exagero do Chefe do Concelho na caracterização de Santos como "inimigo da colônia portuguesa". Sobre o que se pode ter certeza é que, agindo como advogado, Santos ajuizou, no mínimo, três processos judiciais a respeito de questões de propriedade perante o juízo de Ambaca. Todos eles foram ajuizados contra firmas agrícolas e eram:

– ação por esbulho de propriedade; autor José Ferreira Guimarães, como tutor da menor e sua filha, Maria; réu Antonio Qualimo Carreira, como representante da firma agrícola Fonseca & Carreira;
– ação de demarcação e vistoria de terrenos; autores João Pascoal Mendes, Lourenço Gaspar Domingos de Aragão, Francisco Antônio Amaro Alferes e Antônio Francisco Amaro; réu Joaquim Antônio do Carmo Ferreira, como sócio-gerente e representante da firma agrícola Sociedade Monte Bello;
– ação de justificação de mera posse; autores João Pascoal Mendes, Lourenço Gaspar Domingos de Aragão, Francisco Antônio Amaro Alferes e Antônio Francisco Amaro; réus Ministério Público e incertos, tendo comparecido em juízo para contestar a ação Joaquim Antônio do Carmo Ferreira, como sócio-gerente da Sociedade Agrícola Monte Bello.[22]

Ao tempo do pedido de remoção, as duas primeiras ações ainda corriam em juízo e a terceira, a justificação de mera posse, já tinha sido julgada com sentença transitada em julgado. Esta última estava vinculada a uma instituição recém-criada no direito civil português: o registro de mera posse.

2. O registro de mera posse

Pesquisas recentes mostram que a posse era o principal instituto jurídico de regulamentação das relações entre pessoas e coisas nas sociedades ibéricas até, aproximadamente, meados do século XIX. Tanto as interpretações portuguesas quanto as espanholas das categorias e normas do *ius commune* favoreciam o exercício da posse em decisões judiciais a respeito de conflitos fundiários. O registro e a titulação dos bens não eram feitos de maneira sistemática nas jurisdições sob controle dos impérios ibéricos durante esse período e, na prática, títulos e escrituras não eram suficientes para garantir

21 ANA, caixa 163, maço 17, p. 61-62v.
22 ANA, caixa 163, maço 17, p. 23-24v.

direitos sobre coisas quando confrontados com situações possessórias. Registros de terras existiam, mas eles não gozavam de força judicial se não fossem legitimados pelo uso efetivo da terra. Nesse contexto, a posse frequentemente prevalecia sobre os títulos em disputas judiciais.[23]

Esse cenário sofreu modificações profundas ao longo do século XIX. Teorias jurídicas liberais defendiam que a propriedade era um direito absoluto e que sua segurança dependia de títulos que identificassem e individualizassem os detentores desses direitos. Em razão de seu caráter absoluto, o direito de propriedade deveria estar no topo de uma hierarquia de direitos sobre coisas e não poderia ser facilmente prejudicado pelo exercício da posse. Obviamente, demandas possessórias continuaram existindo. Porém, nesse novo sistema de direitos, a posse foi fortemente marginalizada e perdeu a força probatória que tinha em relação aos títulos e escrituras.[24] Os registros faziam parte, também, de um contexto mais amplo de formação dos Estados Nacionais. Durante o século XIX, o registro e a demarcação de terras foram algumas das medidas por eles adotadas com o objetivo de identificar e intensificar o controle sobre seus territórios e suas populações.[25]

Nesse contexto, os juristas portugueses começaram a implementar reformas liberais para regulamentar as relações jurídicas entre pessoas e coisas. Uma das medidas adotadas foi a criação do chamado "registro de mera posse". Esse instituto foi regulado nos artigos 524 a 526 do Código Civil Português de 1867 e tinha como objetivo dar à posse uma configuração mais adequada ao ideário liberal, modificando a forma que ela havia adquirido durante os séculos do *ius commune*. Vejamos como foi construída essa nova arquitetura jurídica.

O Código Civil Português estabeleceu que, para ser hábil a ensejar prescrição (ou seja, aquisição do domínio, agora identificado com o direito de propriedade), a posse deveria ser titulada, de boa-fé, pacífica, contínua e pública. À primeira vista, nada muito diferente da configuração anterior. Porém, uma leitura atenta dos dispositivos do Código deixa entrever a roupagem liberal que a posse estava adquirindo. O artigo 319 definia que o título (entendido como origem do direito), nos casos de posse, não se presumia. Ou seja, o título deveria ser provado por quem invocava a posse. Ora, no *ius commune*, o exercício continuado da posse sanava eventuais vícios no título e era o seu

23 Para uma análise detalhada dessa questão, ver Dias Paes 2018.

24 Para uma análise detalhada dessa questão, ver Dias Paes 2018.

25 Por exemplo, Blaufarb 2016; Garavaglia, Gautreau 2011.

próprio exercício que constituía ou legitimava o título necessário à aquisição ou proteção judicial de direitos sobre coisas.[26]

Outra modificação importante dizia respeito à publicidade da posse. Nas sociedades ibéricas regidas pelas normas do *ius commune*, a publicidade da posse era comprovada por meio do reconhecimento comunitário. Ou seja, considerava-se como pública a posse que era reconhecida como tal pelos membros da comunidade do possuidor. Em casos de conflito judicial, essa publicidade era atestada por meio de depoimentos testemunhais.[27] Já o Código, em seu artigo 323, definiu a posse pública como aquela "que foi devidamente registada, ou tem sido exercida de modo que pode ser conhecida pelos interessados".[28] A própria ideia de que, para adquirir direitos sobre uma coisa por prescrição, o possuidor deveria registrar sua posse já demonstra uma diferença marcante entre o novo contexto liberal e aquele do *ius commune*. Essa ideia respondia ao ideário liberal de que a propriedade deveria ser registrada e que os proprietários deveriam ser identificados para que seus direitos fossem assegurados e protegidos. Assim, o Código igualou a publicidade ao registro. O Código tentava fazer valer uma ideia de que a publicidade estava atrelada ao registro, ou seja, ao controle estatal mais do que ao reconhecimento comunitário compartilhado.

Para serem registradas, as posses teriam que ser provadas por sentença judicial passada em julgado, prolatada em um processo específico (justificação de mera posse) no qual fossem ouvidos o Ministério Público e os "interessados incertos". Estes últimos seriam citados por éditos. Outro requisito era provar que a posse vinha sendo exercida de forma pacífica, pública e continuada por, no mínimo, cinco anos. Ao iniciar o processo, o justificante poderia requerer um registro provisório da mera posse. Esse registro se tornaria definitivo após a averbação da sentença, o que teria efeitos retroativos à data do registro provisório.[29]

Alguns anos depois, em 1876, o Código de Processo Civil Português regulou outros aspectos das justificações de mera posse. Ele estabeleceu que o pedido deveria ser deduzido por meio de artigos e a oposição deveria ser apresentada como contestação. No mais, o feito seguiria os termos do processo ordinário.[30]

---

26 *Codigo civil portuguez* 1868, p. 97. Ver também Dias Paes 2018.

27 Dias Paes 2018, p. 29-38.

28 *Codigo civil portuguez* 1868, p. 98.

29 *Codigo civil portuguez* 1868, p. 98.

30 *Codigo de processo civil* 1877, p. 161.

O instituto jurídico do registro de mera posse e todo o processo judicial que o fundamentava talvez não tenham sido pensados com o fim último de propiciar a expansão colonial portuguesa. Porém, ao analisarmos esses institutos e procedimentos jurídicos levando em consideração os contextos históricos de sua aplicação, fica evidente sua funcionalidade a essa expansão colonial. A citação por édito, por exemplo, fazia com que parte da população – que fosse analfabeta ou que não falasse português – tivesse mais dificuldades de tomar conhecimento do ajuizamento das justificações de mera posse e, portanto, não contestasse uma ação judicial que lhe prejudicasse. Efeito parecido tinha a citação de interessados incertos. Em processos análogos, como, por exemplo, as demarcações, ou em outras ações possessórias, os confrontantes do terreno deveriam ser citados. Aí, a citação era direta e eventuais interessados, de fato, tomavam conhecimento do caso e tinham mais mecanismos para resguardar seus direitos. Nas justificações de mera posse, os confrontantes não eram citados. Os réus eram definidos em abstrato, por meio da categoria dos "interessados incertos". Esse procedimento também pode ter facilitado que pessoas com mais condições de ajuizar esses processos produzissem direitos fundiários reconhecidos pelo governo colonial português.

3. Registro e produção de direitos

Como mencionei, Santos ajuizou uma justificação de mera posse em favor de João Pascoal Mendes, Francisco Antônio Amaro Alferes, Lourenço Gaspar Domingos de Aragão e Antônio Francisco Amaro. Na petição inicial, ele alegou que seus clientes eram possuidores de terrenos, situados no Concelho do Cazengo, com plantações de café e outras árvores frutíferas. Os limites dos terrenos eram: a leste, com terrenos do falecido Mateus Mendes Machado e de José Veiga; a oeste, com a fazenda Monte Bello; a norte, com os riachos Catacala e Kassembele; e a sul, com os terrenos de Custódio Rebelo dos Santos.[31]

Citados o Ministério Público e os interessados incertos por edital, Carmo Ferreira compareceu para contestar a ação. Ele alegou que parte dos terrenos cuja posse os autores pretendiam justificar pertencia à firma agrícola Monte Bello. Como prova, juntou ao processo, a certidão de registro do terreno e o Boletim Oficial no qual havia sido publicada a portaria do Governo da Província de Angola que concedeu, a ele, quinhentos hectares de terra.[32]

31 ANA, caixa 163, maço 17, p. 25.

32 ANA, caixa 163, maço 17, p. 26.

Seguindo os termos do processo, o juiz ouviu as testemunhas. De acordo com ele, elas foram capazes de provar que os justificantes estavam de posse do terreno em questão por mais de cinco anos, de maneira pacífica, pública e contínua. Ademais, elas atestaram que eles efetuaram atos possessórios no terreno, configurando, portanto, uma situação de "mera posse". No entanto, ao contrário do que ocorria no *ius commune*, o juiz não considerou tais depoimentos como suficientes para garantir o direito dos justificantes. Para ele, como a firma agrícola Monte Bello havia registrado parte do terreno contestado na conservadoria da comarca, era ela a proprietária legítima, o que impedia os justificantes de registrarem a sua "mera posse" apesar de configurada a situação jurídica.[33]

> Considerando que os efeitos do registro subsistem enquanto não for cancelado, artigo novecentos sessenta e cinco do Código Civil; considerando que uma justificação de mera posse apenas serve para legalizar bens que não estejam titulados, artigo quinhentos vinte e quatro do citado Código [...] Por todos estes fundamentos, julgo, para os efeitos do artigo quinhentos vinte e quatro do Código Civil, procedente, e por provada a presente justificação, somente na parte relativa aos terrenos que não contestados e que estão fora das demarcações da propriedade "Monte Bello", pertencente à propriedade do mesmo nome.[34]

O juiz considerou que o registro da firma agrícola tinha maior força do que o exercício da posse, ou seja, do que o efetivo trabalho dos justificantes no terreno. Trabalho este que havia sido executado por mais de cinco anos. Assim, eles conseguiram uma sentença que reconhecia seu direito a registrar a mera posse apenas sobre a parte do terreno que não havia sido registrada pela firma Monte Bello. De qualquer modo, um registro parcial era melhor que nenhuma garantia de que seus direitos seriam respeitados, em um contexto de expansão colonial e intensa desapropriação das populações locais. Por isso, logo após o trânsito em julgado da sentença, em junho de 1883, Santos a levou até a conservadoria para ser registrada pelo escrivão. Foram efetuados um "registro de propriedade" e uma "inscrição predial" do terreno.

É interessante notar que, no registro de propriedade, a descrição do terreno ainda segue formatos bastante recorrentes à época do *ius commune*. Isto é, os limites do terreno não são descritos utilizando-se referências e sistemas numéricos, mas a partir de acidentes geográficos como riachos, paus, cumes, pedras, embondeiros e montanhas.[35]

---

33 ANA, caixa 163, maço 17, p. 26.

34 ANA, caixa 163, maço 17, p. 26-27.

35 ANA, caixa 163, maço 17, p. 28-30. Sobre o uso de sistemas numéricos em ações de demarcação, no Brasil do século XIX, ver Dias Paes 2018, p. 89-96.

Já a inscrição predial foi feita pelo próprio Santos, exercendo sua função de ajudante na conservadoria. Nela, ele anotou que a inscrição havia sido feita a requerimento de Francisco Antônio Amaro Alferes, solteiro, proprietário, maior de idade, agricultor e morador no Concelho do Cazengo. Santos também inscreveu, no documento, que a sentença judicial reconhecia, definitivamente, "o domínio sobre os terrenos agrícolas" a favor dos justificantes. Ele acrescentou, ainda, que os terrenos haviam sido adquiridos por herança de seus pais.[36]

Todos esses procedimentos, no entanto, não foram suficientes para aplacar a tensão. Alguns meses depois, no começo de outubro daquele ano, as partes se enfrentaram no episódio que gerou o processo de remoção e cassação de Santos. Também alguns dias depois desse episódio, Santos ajuizou, em favor de seus clientes, uma ação de demarcação e vistoria de propriedade contra a firma agrícola Monte Bello. Ele começou a petição inicial afirmando que seus clientes eram "donos e possuidores de uma extensa área de terra com plantações de cafeeiros, neste Concelho".[37] Porém, a sentença da justificação de mera posse não havia definido quais os limites dos terrenos dos suplicantes e os da firma agrícola Monte Bello. Tal situação estava gerando "disputa entre os suplicantes e o suplicado Carmo Ferreira sobre a várzea do Catacala, que está incluída na posse dos suplicantes, a qual confina com a propriedade Monte Bello, achando-se assim confundidos os limites com a propriedade pertencente à dita firma agrícola Monte Bello".[38] Ao fim, ele pedia fossem nomeados peritos para procederem à demarcação e vistoria dos terrenos e que fosse citado Carmo Ferreira para "apresentar os títulos da sua propriedade".[39]

Foi ainda nesse contexto que se publicou a nota no "Pharol do Povo" contra a qual Carmo Ferreira ajuizou um "auto de investigação de injúrias". Na petição inicial desse processo, ele afirmou que "durante todo o tempo que o suplicante Joaquim Antônio do Carmo Ferreira tem estado à testa de sua propriedade Monte Bello", nenhum dos outrora justificantes havia deixado de "colher todo o café de suas lavras por proibição do suplicante". De acordo com essa versão, os terrenos dos outrora justificantes estavam incrustados

36 ANA, caixa 163, maço 17, p. 31-32.
37 ANA, caixa 163, maço 17, p. 34.
38 ANA, caixa 163, maço 17, p. 35.
39 ANA, caixa 163, maço 17, p. 35.

nas terras de Carmo Ferreira.[40] Ao serem inquiridos, Francisco Alferes Amaro e Lourenço Gaspar Domingos de Aragão confirmaram que Carmo Ferreira não os impedia de colherem o café nos terrenos que estavam incrustados em sua propriedade. Apesar de não saberem que uma nota contra Carmo Ferreira seria publicada no jornal, haviam autorizado Santos a elaborar, em seu nome, um requerimento ao Governador da Província relatando as contendas existentes, há dois anos, entre as partes.[41]

Os depoentes eram africanos mas tinham nomes portugueses, o que atesta que tinham algum nível de integração na sociedade colonial. Porém, isso não impediu que, no interrogatório criminal, fossem classificados como "lavradores" e, ao longo dos documentos produzidos pelo Chefe do Concelho, fossem referidos como "indígenas". Carmo Ferreira, ao contrário, é constantemente referido, na documentação, como "proprietário" e "agricultor". Essa classificação empreendida pelas autoridades coloniais na produção de documentos também cumpria um papel importante na produção de direitos. As últimas décadas do século XIX foram marcadas pela ascensão de discursos jurídicos de marginalização dos chamados "indígenas".[42] Assim, classificar uma das partes de um litígio dessa maneira, poderia contribuir para a deslegitimação de sua pretensão jurídica, limitando o reconhecimento ou a proteção de direitos dessas pessoas sobre coisas.

4. Conclusão: registro e colonialismo

Diante do requerimento do Chefe do Concelho, Santos procurou se defender alegando que era Carmo Ferreira quem intimidava, com armas, seus clientes. Além disso:

> Pois se os advogados são os conselheiros e auxiliadores das partes litigantes em juízo, e os meus clientes longe de defenderem suas propriedades repelindo a força pela força, recorreram à autoridade competente, propondo suas ações em juízo, com que argumento prova meu detrator a revolta que tristemente fantasiou, e me atribui? Se a justiça é uma constante e perpétua virtude de dar a cada um o que é seu, como a definem os jurisconsultos, e na sua balança pesam por igual o nobre e o plebeu, o pobre e o rico, o branco e o preto, é crime procurarem os meus clientes defender a sua propriedade dentro dos limites legais, recorrendo ao lato campo da justiça? E eu serei criminoso por aceitar o mandato, se

40 ANA, caixa 163, maço 17, p. 47, 50.

41 ANA, caixa 163, maço 17, p. 53-55.

42 Silva 2009.

é minha profissão, como advogado, defender os justos interesses de meus constituintes? É por isso teria de fazer seleção de cores ou de raças?[43]

O processo arquivado no Arquivo Nacional de Angola termina sem uma resolução sobre a situação de Santos. Porém, mesmo que as solicitações do Chefe do Concelho não tenham sido atendidas, é bastante provável que Santos tenha continuado a ser perseguido pelas autoridades coloniais, tementes de uma revolta iminente e que colocasse em xeque o projeto colonial português naquela região da África Centro-Ocidental.[44] Afinal, além do Chefe do Concelho, outras autoridades estavam bastante descontentes com a atuação de Santos. O juiz de direito de Ambaca, por exemplo, acusou-o de fazer:

> registros dolosos a favor dos seus constituintes, na falta de outros legais, abusando por esta forma também do cargo que ocupa de ajudante privativo da Conservadoria desta Comarca, e por último, ainda como advogado, incitando os indígenas a invadir as propriedades, procurando assim ver se consegue pela força o que não tem conseguido pelos termos ordinários do processo.[45]

Mesmo sem maiores informações sobre o desenrolar do caso do Cazengo, os documentos que sobreviveram atestam que a introdução do registro e sua constituição como modo, por excelência, para a aquisição de direitos sobre as coisas foi determinante na configuração dos conflitos agrários no território colonial português da África Centro-Ocidental. A força com a qual a ideologia liberal dotou o instituto jurídico do registro alterou os modos de produção de direitos de propriedade. No caso de Carmo Ferreira, por exemplo, as autoridades coloniais produziram, por meio da emissão de uma concessão e posterior registro da mesma, direitos sobre um terreno que estava sendo utilizado, há mais de cinco anos, pela população local. Esse uso efetivo, no entanto, não foi capaz de garantir o direito dos possuidores sobre o bem, sendo suplantado pela abstração do registro.

Por outro lado, Santos registrou a sentença prolatada na justificação de mera posse como "registro de propriedade" e, na inscrição predial, escreveu que essa sentença reconhecia o direito de domínio de seus clientes. De acordo com as normas do Código Civil Português, essa sentença não geraria um registro de propriedade, considerado mais forte do que o de mera posse. Porém,

43 ANA, caixa 163, maço 17, p. 7-8.

44 Veja-se, por exemplo, as inúmeras perseguições relatadas em Assis Júnior 1980.

45 ANA, caixa 163, maço 17, p. 3.

Santos ignorou essa disposição e, com a produção de documentos, procurou produzir, também, direitos mais fortes para seus clientes. Diante da continuação dos conflitos, ele ajuizou, ainda, um processo de demarcação, outra instância produtora de direitos sobre coisas nesse período.[46]

O registro, portanto, desempenhou algumas funções no contexto colonial da África Centro-Ocidental. É bastante evidente a sua funcionalidade à expansão colonial portuguesa. Na medida em que Portugal precisava afirmar seu poder sobre a região, uma das maneiras de consegui-lo era transferir direitos sobre a terra para europeus e para firmas controladas por europeus. Ao mesmo tempo, populações que estavam sendo ameaçadas de expropriação de suas terras recorriam aos próprios institutos do direito colonial para tentar conter esse processo. Daí que o registro e processos judiciais eram também mobilizados por essas pessoas em uma tentativa de resguardar pelo menos parte de seus direitos. O capcioso desse processo era que, ao recorrerem às instituições coloniais, elas acabavam por reforçá-las.[47]

Bibliografia

Arquivos

ANA=Arquivo Nacional de Angola

Fontes primárias

ANA, caixa 163, maço 17, Luanda, justiça, administração judicial, processo de queixa, 1883 a 1884.

Assis Júnior 1980 = A. Assis Júnior, *Relato dos acontecimentos de Dala Tando e Lucala*, Lisboa, União dos Escritores Angolanos, 1980.

Codigo civil portuguez 1868 = *Codigo civil portuguez approvado por carta de lei de 1 de julho de 1867*, Lisboa, Imprensa Nacional, 1868.

Codigo de processo civil 1877 = *Codigo de processo civil approvado por carta de lei de 8 de novembro de 1876*, Coimbra, Imprensa da Universidade, 1877.

46 Sobre o papel das ações de demarcação na produção de direitos de propriedade, no Brasil do século XIX, ver Dias Paes 2018, p. 89-96.

47 Ver também Candido 2011. Sobre análises que relacionam o colonialismo com questões atinentes aos direitos de propriedade, em outros contextos, ver Bhandar 2018; Keenan 2016.

Fontes secundárias

Alexandre, Dias 1998 = V. Alexandre, J. Dias (eds.), *O império africano (1825-1890)*, Lisboa, 1998.

Bhandar 2018 = B. Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, Durham, 2018.

Blaufarb 2016 = R. Blaufarb, *The Great Demarcation: the French Revolution and the Invention of Modern Property*, Oxford, 2016.

Candido 2011 = M. Candido, *African Freedom Suits and Portuguese Vassal Status: Legal Mechanisms for Fighting Enslavement in Benguela, Angola (1800-1830)*, in *Slavery & Abolition* 32, 2011, p. 447-459.

Clarence-Smith 1979 = W. G. Clarence-Smith, *Slaves, peasants and capitalists in southern Angola (1840-1926)*, Cambridge, 1979.

Dias Paes 2018 = M. A. Dias Paes, *Escravos e terras entre posses e títulos: a construção social do direito de propriedade no Brasil (1835-1889)*, Tese de Doutorado, São Paulo, 2018.

Ferreira 2018 = F. A. Ferreira, *No festim dos lobos: o Império do Brasil e o colonialismo na África Centro-Ocidental (1880-1885)*, Tese de Doutorado, Rio de Janeiro, 2018.

Freudenthal 2005 = A. Freudenthal, *Arimos e fazendas: a transição agrária em Angola*, Luanda, 2005.

Caravaglia, Gautreau 2011 = J. C. Garavaglia, P. Gautreau (eds), *Mensurar la tierra, controlar el territorio: América Latina, siglos XVIII-XIX*, Rosario, 2011.

Hébrard, Scott 2014 = J. Hébrard, R. Scott, *Provas de liberdade: uma odisseia atlântica na era da emancipação*, Campinas, 2014.

Kambundo 2017 = B. J. Kambundo, *Os acontecimentos de Lucala e Ndalatando*, Dissertação de Mestrado, Luanda, 2017.

Kandijimbo de Kandingi 2015 = L. D. F. Kandijimbo de Kandingi, *O estatuto disciplinar da literatura angolana: contributo para uma epistemologia dos estudos literários africanos*, Tese de Doutorado, Lisboa, 2015.

Keenan 2016 = S. Keenan, *Smoke, Curtains and Mirrors: the Production of Race Through Time and Title Registration*, in *Law Critique*, 2016.

Lourenço 2015 = J. P. C. Lourenço, *O discurso contestatário dos africanos na imprensa: reflexões à volta da 'Carta aberta ao bacharel Balthazar Britto Rocha d'Aguiam'*, in *Actas do III Encontro Internacional de História de Angola*, volume II, Luanda, 2015, p. 29-48.

Marquese 2015 = R. B. Marquese, *As origens de Brasil e Java: trabalho compulsório e a reconfiguração da economia mundial do café na Era das Revoluções, c. 1760-1840*, in *História* 34, 2015, p. 108-127.

Marques 2001 = A. H. Oliveira Marques (ed.), *O império africano (1890-1930)*, Lisboa, 2001.

Premo 2017 = B. Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire*, Oxford, 2017.

Putnam 2006 = L. Putnam, *To Study the Fragments/Whole: Microhistory and the Atlantic World*, in *Journal of Social History* 39, 2006, p. 615-630.

Revel 1998 = J. Revel (ed.), *Jogos de escalas: a experiência da microanálise*, Rio de Janeiro, 1998.

Scott 2000 = R. Scott, *Small-Scale Dynamics of Large-Scale Processes*, in *The American Historical Review* 105, 2000, p. 472-479.

Silva 2009 = C. N. Silva, *Constitucionalismo e império: a cidadania no ultramar português*, Coimbra, 2009.

Vargaftig 2013 = N. Vargaftig, *Centre ou périphérie?: Le Portugal, l'Afrique et Berlin (1875-1891)*, in C. Gemeaux, A. Lorin (eds.), *L'Europe coloniale et le grand tournant de la Conférence de Berlin (1884-1885)*, Paris, 2013, p. 135-161.

Vos 2015 = J. Vos *Kongo in the Age of Empire: the Breakdown of a Moral Order (1860-1913)*, Madison, 2015.

TRACING SOCIAL SPACES: GLOBAL PERSPECTIVES ON THE HISTORY OF LAND REGISTRATION

Elisabetta Fiocchi Malaspina

1. Entangled narrations: international law, national law and colonial law

In recent years, there has been an increasing interest in the history of international law by scholars seeking to overcome Eurocentrism and to evolve towards a truly global perspective. The field focuses on transfers, networks, connections and transformations that have occurred in time and within a global space, as well as on methodology, scrutinising the different possibilities for writing the history of international law.[1] At the same time, interest in questions of colonialism, imperialism and law, in the complex relationship between international law and empire and in their historical narrative(s) has grown rapidly.[2]

The aim of the article is to present some preliminary considerations concerning an ongoing project, which investigates the mechanisms of land law and land register systems in African colonial territories between the 19th and 20th centuries, focusing on the relationships between international and domestic laws in the imperial expansion and colonial periods.

It proposes to examine the legal mechanisms of colonial expansion and to outline the discourses between the colonial powers and their implications on the legal concepts of land ownership in both a colonial and a European context. Case studies will provide detailed accounts on different land register systems as examples of how larger frameworks of these juridical practices evolved. The article will show that the discourses between colonial powers and the adaptation of European legal concepts regarding property and land registration in the colonies facilitated the expansion and consolidation of colonial empires.

---

1 See Fassbender-Peters 2012, p. 1-24; Obregón Tarazona 2015, p. 95-112; Koskenniemi 2017, p. 381-397. On methology see: Koskenniemi 2013, p. 215-240; Koskenniemi 2014, p. 119-139; Koskenniemi 2016a, p. 104-112. See also: Orford 2013a, 97-117; Orford 2013b, p. 166-197; Orford 2015, p. 369-385; Hunter 2016, 1-32.

2 Rech 2017, 57-80; Koskenniemi 2016b, p. 248-277. See also: Pitts 2018; Starski-Kämmerer, 2017, p. 50-69; Anghie 2005.

Scholars from different disciplines have pointed out that the African colonies were used as a laboratory,[3] as a living laboratory[4] and as a space of transfer and comparison with the European context.[5] The duality of space constructed around the colonies and the European states raises important questions concerning land ownership and land register systems. In this perspective, the aim is to investigate the complex relationships between the colonies and the European states and how these impacted the establishment of register systems; particularly, which register systems managed to prevail and what were the relevant factors in their survival, i.e. which modalities were employed where the customary law of the local population met European concepts of land law and land tenure.

The key concept for trying to explain not only the political and social frameworks but also the legal dynamics that pertained between European and colonial areas is that of "internationalisation". As it expanded during the long 19th century, internationalisation was certainly favoured by the emergence of national legal language, which were the founding elements of an international legal language and at the same time complementary to it. In the 19th century, in fact, the idea of 'nation' became strong and reached its *acme* as the liberal spirit continued to blow like a wind through Europe and across the Atlantic, transmuting and forming itself into many different political, legal, social, economic and scientific realities. The rise of national identities was marked by revolutionary movements, spreading rapidly, as a new geopolitical map of the world appeared with emerging territorial states as central actors.[6]

Thus, the delimitation of borders and territorial independence coincided in the 19th century with the affirmation of the so-called principle of nationality and the principle of non-intervention, developed and perfected by diplomats, politicians, lawyers and jurists. These professionals, however, were simultaneously engaged in the legal construction of the colonial discourse and in the legitimisation of European expansion, which was becoming almost a constituent element of most European nations.

Throughout a period of intense rivalries both in Europe and in the colonial environment, we perceive a sort of cooperation and consultation in the second part of the 19th century.

3 De L'Estoile 2004.

4 Tilley 2011.

5 Nuzzo 2006, p. 52-58; Nuzzo 2005, p. 463-508.

6 Fiocchi 2019.

This moment was crucial for the internationalisation of (legal) discourse. Models and practices were discussed in conferences, associations, congresses, institutions and expositions.[7] The networks of meetings were recently described as "knots in what together constituted a worldwide web".[8]

This cooperation included international law regarding land registration and discussions concerning the application of European legislation not only in the European states but also in the African territories. The idea of a common international dialogue favoured entanglements between the national and international spheres.[9]

These national and international spheres concerning land registration and land ownership will be examined through three different "narratives": 1) internationalising international law 2) nationalising the land register systems and 3) internationalising the land register systems. The choice of the term "narrative" encourages broad methodological debates that entail the perspective of a global legal history, as well as different possibilities of narration considering a variety of spatial and temporal entanglements. Eminent scholars have critically re-read the "master narrative"[10] in the history of international law – the European one – giving space to other non-European narratives from South America and Asia, as well as from Africa.[11]

Martti Koskenniemi, in this sense, captured the complex nature of the term "narrative" most aptly, when he referred to the "history of international law histories".[12] In this context each narrative is devoted to a cultural, social and political sphere as a product of a specific temporal and geographical context. The *fil rouge* of all narratives is the impact of the internationalisation of law, which comprises: the professionalisation of international law, developing as an autonomous discipline in the 19th century; the crystallisation of land register systems influenced by European civil law codifications; and the implemen-

7 Lindner 2015, p. 57-58.

8 Geppert 2010, p. 3, in which the author showed through a transnational approach how expositions favoured the "international" exchanges between nations at the end of the 19th century. See also concerning the role of comparison of law and also international law: Koskenniemi-Kari 2018, p. 974-999. Also Singaravélou 2012, p. 135-157.

9 Bourdieu 1990, p. 1-10.

10 Peter-Fassbender 2012, p. 8, according to the authors the reference is here for Immanuel Wallerstein.

11 See for example concerning the role of the peripheries and semi-peripheries: Becker Lorca 2015; Becker Lorca 2012, pp. 1034-1057; Becker Lorca 2010, pp. 475-552.

12 Koskenniemi 2012, p. 943.

tation of new land register systems, such as the Torrens system, adopted by the British Colony of South Australia. Lastly, it will be shown that the internationalisation of law was the result of the above-mentioned narratives applied in colonial contexts, as for example in Italian Eritrea, as well as in the French Protectorate of Tunisia, the Congo Free State and the Belgian Congo.

2. First narrative: internationalising international law

The first narrative refers to the increasing internationalisation of law during the 19th century. A central role in this development was played by jurists in advancing the scientifisation of international law.[13] Francis Lieber, professor of public international law at Columbia University and author of the renowned *Lieber Code* (a first attempt to formulate the "laws of war"), took a crucial role when he proposed to the Belgian international lawyer Gustave Rolin-Jacquemyns the establishment of an association with the purpose of drafting the general principles of international law, a so-called "espèce de concile juridico-oecuménique sans pape et sans infaillibilité".[14]

Upon this proposal Gustave Rolin-Jacquemyns invited ten of the most distinguished experts of international law to convene in Ghent. Among them were Johann Caspar Bluntschli, Gustave Moynier and Pasquale Stanislao Mancini who subsequently founded the *Institut de Droit International* in September 1873 with the purpose

> En travaillant à formuler les principes généraux de la science de manière à répondre à la conscience juridique du monde civilisé; [...] En donnant son concours à toute tentative sérieuse de codification graduelle et progressive du droit international [...].[15]

The *Institut de Droit International* addressed a variety of legal issues of international interest including colonial law. The debates concerning colonial law became relevant in particular regarding the African and Asian colonies and entailed questions such as the general legitimacy of colonisation, as well as somewhat technical questions, such as regulating river transport on the Congo.[16]

In 1894 the *Institut Colonial International* was founded in Brussels as an institution of predominantly Western and American states for the purpose of

13 Nuzzo-Vec, 2012, p. XII.

14 Rivier 1877, 12. See also Rolin 1923, p. 10.

15 Rolin 1923, p. 18. Nuzzo 2012, p. 133. See also: Nuzzo 2011, p. 319-337.

16 Rolin 1923, p. 10. See also Koskenniemi 2001, p. 92 ff.

exchanging expertise with regard to their colonies. Among the member states were France, Germany, Great Britain, Belgium, the Netherlands, Italy, Spain, Portugal, as well as Russia, the United States, Brazil and Chile.[17]

The aim of the *Institut Colonial International* was to engage and promote transnational exchanges between scholars, politicians, colonial administrators and experts. From the beginning it affirmed its nature as a scientific association whose purpose was:

> faciliter et [répandre] l'étude comparée de l'administration et du droit des colonies; en particulier: des différents systèmes de gouvernement des colonies [...]; de la législation colonial, en tant qu'elle peut intéresser, soit plusieurs colonies déterminées par des mesures arrêtes en commun, soit toutes les colonies par l'importance des problèmes résolus; de ressources des diverses colonies, de leur régime économique et commercial.[18]

The objective of creating an international colonial platform was well expressed in the second paragraph of the same article:

> créer des relations internationales entre les personnes qui s'occupent d'une façon suivie de l'étude du droit et de l'administration des colonies – hommes politiques, administrateurs, savants – faciliter l'échange des idées et des connaissances spéciales entre hommes compétents.[19]

The *Institut* focused on specific topics relevant to the colonial context: regulation of labour, tropical hygiene, acclimatisation of Europeans to colonial environments, and colonial monetary matters, as well as land law and land registration systems. Ulrike Lindner has shown that at the end of the 19th century there was frequent and common cooperation in different fields of international and colonial law. The work and the network created by the *Institut Colonial International* "seem to have reached a surprising level of institutionalised exchange".[20] Legal regulations were central to the *Institut*'s research, something also confirmed by the background of the members, most of whom were lawyers or pursuing a legal profession.[21]

Also of significant importance was the founding of the *Bibliothèque Co-*

17 Lindner 2015, p. 57-58. See also See: Henning Böttger 2006, p. 165-172; of the same author see also: Henning Böttger 2005, p. 109-115.

18 *Institut Colonial International* 1937, p. 5.

19 *Institut Colonial International* 1937, p. 5.

20 Lindner 2015, p. 57.

21 *Institut Colonial International* 1937, p. 5.

lonial Internationale (1895-1930). In its annual or biannual meetings, the *Institut Colonial International* produced and edited a considerable number of research papers, studies and proceedings (the so-called *comptes-rendus*), which represented a fruitful source for various colonial topics.[22]

It is interesting to notice that, despite the publication of numerous studies on, for example, "l'influence du climat sur la colonisation" (1894), the debate "sur l'enseignement colonial" (1900) or "sur le régime forestier aux colonies" (1912), between 1898 and 1906 the *Institut Colonial International* focused its attention on the study of land law and land registration.[23] In 1911, the *Institut Colonial International* published the *Recueil international de législation colonial*: a collection of laws intended to promote discussion and analyses of legal problems in the colonies.

The *Institut de Droit International* and the *Institut Colonial International* are key to understanding how the concept of internationalisation was used as a strategy for the development of the colonial discourse.

In this context, it is notable that the *Institut Colonial International* used a comparative approach in analysing the different topics relevant to colonial consolidation and expansion. Joannès Tramond, for example, in his essay entitled *Des conclusions sur la colonisation comparée*, showed the benefit of comparing colonial experiences in building a collaborative and fruitful dialogue between nations.[24] For legal historians, studying the approaches of the

22 Concerning some topics discussed by the Institute, for example, agriculture see: Daviron 2010, p. 479-501.

23 This was the topic of the 3er Serie of the publication edited by the Institut Colonial International [after the 1. Serie on labour law and the 2. on colonial administrators]: *Le Régime foncier aux Colonies*, which comprehends, for example: *Tome I.– Indie britannique. Colonies allemandes* (Mertens 1898); *Tome II. – Etat indépendant du Congo. – Colonies françaises,* Bruxelles, 1899; *Tome III. – Tunisie. Erythrée. Philippines*. (Mertens 1899); Tome IV.– *Indes orientales néerlandaises*, Bruxelles, 1899; *Tome V.– Lagos.- Sierra Leone.– Gambia.- Bornéo septentrional britannique.– Cap de Bonne-Espérance.– Rhodésie.– Basutoland.– Iles Salomon.– Iles Fidji.– Côte-d'Or,* Bruxelles, 1902.

24 Tramond 1932, p. 527-528 : "Cette unification de la planète ne s'est encore faite, nous ne pouvons la concevoir que sous la forme de ces grands empires s'étendant sur plusieurs climats et sur plusieurs continents, qui sont essentiellement les empires coloniaux. [...] À l'ancienne notion de rivalité, qui causa tant de maux à l'humanité, ne cesse de se substituer celle de solidarité et de sympathie, et l'on peut dire que cette passion coloniale, qui jadis causa tant de guerres et de catastrophes, se mue aujourd'hui en un principe d'union et presque de collaboration. [...] à beaucoup d'égards, les questions coloniales sont entrées dans une phase où leur intérêt dépasse celui des affaires purement nationales".

Institut Colonial International offers a different perspective on the idea of "internationalisation". The *Institut* collected and compared governmental reports and statistics and produced questionnaires addressed to European empires and to their colonial administrators. The answers were collected, published and discussed during the regular meetings.[25] As the *Institut's* founders had hoped, their publications promoted legal debates, discussions and the prospects of specific legislation, decrees or norms to be adapted and used in completely different colonial systems. Examples of this "borrowing" and cross-pollination were the application in African territories of the Torrens system, and of "typically European" land register systems, such as the *Grundbuch* or transcription.

3. Second narrative: nationalising the land registration systems

The development of the aforementioned land register systems during the long 19th century forms part of the second narrative. The problem of land laws, land register systems and of the consequent choice of the best system to adopt were questions that dominated the discussion both in the European states and in their respective colonial possessions during the 19th and 20th centuries, inevitably involving domestic, colonial and international law.

In the 19th century private law codifications and the crystallisation of pri-

25 Stoler 2010, p. 158-160. For example, the questionnaire of the 1899 session included a number of land law and land registration topics. The *Institut Colonial International* collected acts, regulations and orders in these specific areas: the land tenancy under which occupation was sanctioned—fee simple, emphytheusis, ordinary leases, clearance leases; the exclusion or admission of foreigners as grantees; the maxima and minima of the extent of waste lands obtainable by each planter; the prices at which waste lands were sold or leased, whether these prices were determined by regulation or by competition, and the conditions to which the resale of these lands were subject; the taxes to which planters were subject whether they were exempted from certain taxes and if so for how many years; whether compulsory labour still existed for village or other purposes, how far the people on the lands were exempted from such services and what the planters had to pay in consideration for the exemption; [...] the rights of natives (chiefs, communities or private individuals) on the land, occupied or turned to any account by them before the conquest; the limits on the rights of the natives to sell, let, or sub-let their own lands and the conditions under which such rights could be exercised; the regulations that applied to deeds of sale and mortgages on lands belonging to Europeans and natives (public or authentic records, land registers, mortgages, registers, registry, books): *Institut Colonial International* 1898, p. 10-11.

vate property rights were crucial to the discussion and adoption of specific land register systems. Concurrent to the nation-building process was the nationwide unification of law and with it the establishment of land register systems. The idea of "good government", well articulated in the Enlightenment, became central during the 19th century, with its principal objects of procuring the true happiness and security of nations.[26] Land register systems and property were part of the legal discourse around achieving a certain level of security in the transfer of immoveable goods. It was felt, without doubt, that protection of property lay at the core of good government, also affecting other fields of law, from administrative law to tax law. By protecting real property, states ensured a certain level of legal certainty between private individuals and thus encouraged private and economic exchange. The level of legal certainty regarding property transfer was guaranteed by the land register system and its different typologies.[27]

In this perspective, one of the fundamental principles of land register systems was the publicity principle, which had repercussions on certainty of ownership, security of tenure and reduction of land disputes. Victor Ehrenberg described the importance of the effects of publicity for the concepts of "Rechtssicherheit" and "Verkehrssicherheit" also known as "statische Sicherheit" and "dynamische Sicherheit".[28] Influenced by different cultural, political and economic developments, a number of land register systems emerged. By choosing a comparative perspective, this study focuses on the influence of modern civil law codifications, more specifically, the influence of certain concepts of property on the development of land register systems in the 19th century.

The land register system established in France and Austria in the 19th century, and the Torrens system – a register system *ex novo* established in the colony of South Australia in 1858 – serve as case studies for this analysis.

In the course of drafting the French Civil Code, discussions evolved be-

26 In 1758 Emer de Vattel in his *Le droit des gens* wrote that: "The society is established with the view of procuring, to those who are its members, the necessaries, conveniences, and even pleasures of life, and, in general, everything necessary to their happiness, –of enabling each individual peaceably to enjoy his own property, and to obtain justice with safety and certainty,– and, finally, of defending themselves in a body against all external violence": Vattel 2008, B. I, chap. VI, §72, p. 126.

27 Schmoeckel 2018; see also the recent volume edited by Goymour-Watterson-Dixon 2018.

28 Ehrenberg 1903, p. 273, see Petrelli 2007, p. 594.

tween the members of the commission around the transcription system, a land register system that originated from legislation passed during the French Revolution and the *coutumes de nantissement*.[29] For some of the drafters, transcription had to be considered and included in the Code with regard to all transactions of immovable goods, while for other members this was contrary to the idea of an absolute property right, crystallised in art. 544: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements".[30] The drafters of the code ultimately supported the consensualist doctrine of transfer and thus considered all transfers as exchanges, without any impact on "third parties" and any specific provisions concerning, for example, mortgages.

Pursuant to the Code, only certain legal transactions and certificates needed to be transcribed: it was mandatory to transcribe donations, for example, according to art. 939 ff., entailed estates substitutions according to art. 1069, and petitions of restitution, according to art. 958 ff.[31] As Gaetano Petrelli has pointed out, the lack of a homogenous discipline with regard to transcription determined criticism of the codification itself, accompanied by severe repercussions on financing sectors as well as credit financing.[32]

To overcome this problematic situation and uncertainty of legal transfers, detailed provisions regulating the transcription system were issued, only several years later, in 1855 with the *Loi du 23 mars 1855 sur la transcription en matière hypothécaire,* introducing the transcription system "in public registers of property as a whole".[33] This law disciplined the "transcription of mort-

29 For an overview see: Petrelli 2007, p. 594; Sandonà 2011, p. 363-416; Besson 1891. See also the contribution of Alan Sandonà in this volume.

30 *Code Civil Francais* 1804, art. 544, p. 134.

31 Petrelli 2007, p. 594; Wieacker 1980, p. 525. See Nerson 1938, p. 6.

32 Petrelli 2007, p. 594.

33 Vinding Kruse 1953, p. 84. Interesting is the comment of Victor Fons on the importance of this law: "D'après ce titre clair et précis, il semblerait que son objet unique a été l'établissement de la transcription pour les actes translatifs ou modificatifs de la propriété immobilière. Néanmoins, la loi contient des dispositions de la plus grande importance relatives à divers points du régime hypothécaire. L'objet de toutes ses dispositions a été de donner une publicité complète tout à la fois aux transmissions totales ou partielles des immeubles, aux démembrements qu'ils subissent et aux charges dont ils sont grevés, et de procurer ainsi de la sécurité à ceux qui achètent des immeubles ou qui les acceptent pour gage des prêts qu'ils consentent à faire": Fons 1857, p. 6

gage, providing also for the recordation of all transfers of land and vesting all property rights and interest on land".[34]

The law of 1855 extended transcription to transfers of ownership, but the registry of real property was not deemed a legal prerequisite for the transfer of ownership. The transfer of ownership was by mere agreement. Therefore, the transcription system had no probative force. Nonetheless, the registry's purpose was to inform about the legal status of immovable property. The registration was personal. Consequently, the entries in the registry were listed by the name of the owner and not by the immovable property itself, (as, for example, in the *Grundbuch*).[35]

Some years later in a completely different geographical, political context another "model" of codification was enacted, legislating a different system of land registration. The ABGB (Allgemeines Bürgerliches Gesetzbuch) unified the Austrian substantive property laws and entered into force in 1812. It established throughout all territories of the Empire an Austrian land register system, the so-called *Grundbuch* system, under which registration of title constitutes the property as a right *in rem*. Therefore, the registration is a necessary condition for the transfer of ownership, as stated in § 321 of the Austrian civil code: "Wo so genannte Landtafeln, Stadt- oder Grundbücher, oder andere dergleichen öffentliche Register eingeführt sind, wird der rechtmäßige Besitz eines dinglichen Rechtes auf unbewegliche Sachen nur durch die ordentliche Eintragung in diese öffentlichen Bücher erlangt".[36] Detailed legislation regulating the harmonisation of the discipline of the *Grundbuch* in all the territories of the Empire was issued only in 1871.[37]

With regard to transfer of ownership, the *Grundbuch* system and the French transcription system are significantly distinct from each other. The French transcription follows the system of *solo consensus*, in which the mere conclusion of property sale transfers the property. The subsequent registration serves only to protect the original vendor from third party purchasers in good faith, whereas in Austria the transfer of ownership is not valid until the transaction is registered in the *Grundbuch*. The contract of sale and the

34 Bouckaert 2010, p. 192. See: Pfister 2018, p. 157-192.

35 Petrelli 2007, p. 594.

36 *Allgemeines Bürgerliches Gesetzbuch* 1811, § 321, p. 64.

37 See for the Austro-Hungarian Empire: Laws n. 95 and 96 of 25 July 1871, concerning the establishment of (land register). For a comment on them and their application in the Habsburg territories: Gabrielli 1974, p. 2; Gabrielli 2012, p. 179; Gabrielli – Tommaseo 1999; Sicchiero 1993.

transfer of ownership are conceptually distinct in the *Grundbuch* system. The registration thus has a constitutive effect. A real property system, listing according to plots of land and citing their boundaries, was already in existence in the Austrian territories from the 15th century.[38]

Transcription and *Grundbuch* are two parallel systems functioning within property registration but resulting from two different legal concepts. *Grundbuch* differs from transcription in some crucial aspects: the implementation of the registration system, which is property-based instead of subject-based; the constitutional value attributed to registration; the registration principle, which states that an *inter vivos* transaction alone could not be considered a transfer or lead to the establishment of property rights. Other features of the *Grundbuch* are a judicial review of the formal and substantive requirements of the titles and strict compliance with the principle of continuity, since the registration of an item could only be attributed to the person referred to as the owner in the land register.[39]

As a paradigmatic example for a register system *ex novo* in a colonial context we have the Torrens System, established in the British colony of South Australia in 1858 and developed by Australian politician Sir Robert Torrens. Inspired by the Merchant Shipping Act 1854, he largely reinterpreted and adapted its principles on registration of ships and charges to the context of colonial land tenure. He also drew from the land register systems of the German cities of Hamburg, Lübeck and Bremen. His *Real Property Act 1858* introduced mandatory registration for all immovable property. As in the Austrian land register system, all changes of rights to land had to be registered and consequently a real property system was established, assigning to every particular plot a parcel identification number.[40]

Furthermore, entry into the registry was a constitutive element for the conveyance of property. The owner held a certificate of title. The property could be conveyed by transfer of the title deeds.[41] The title deeds had probative value. The validity of the title deeds was supported by the government records of all land titles. As a result the purchaser's title upon registration was basically indefeasible and free from any defects affecting the title of the

38 Kohl 2018, p. 113-132.

39 Gabrielli 1974, p. 3-4; Solidoro Maruotti 2010, p. 146. See also Padovini 2001, p. 713-727; Padovini, 2002, 499-506.

40 Janczyk 1977, p. 213-233.

41 Panforti 2000, p. 715. Rogers 2006, p. 125-132.

vendor.[42] For the rare cases of fraud in which the owner suffered financial loss due to an error in the system, an assurance fund was set up to compensate the owner for his loss. Such guaranteed and marketable titles facilitated the conveyance of real property, enabling property to be traded like commodities.[43]

Recent studies have shown the role played by the establishment of a new land register system in the colonies, focusing on the history of land register systems from a temporal and spatial perspective.[44] For example, the Torrens system was based on the assumption that land has no history. As Sarah Kennan argues, it works like H.G. Wells' time machine: they both share a "basis in fiction, a reliance on radical temporal dislocation, and the facilitation of humanity's arrival in dystopic and racist landscapes. Title registries operate on the basis of fictional accounts of land which portray it as a market commodity with a short and entirely contained history".[45]

The concept of establishing a land register system *ex novo* in a colonial environment, through which the colonisers could exploit lands and enable fast circulation of property rights by title certificates, was extremely well received in many other colonies. The European colonial states decided to introduce the Torrens system in many of their African colonies between the end of the 19th century and the beginning of the 20th century, as well as in many colonies of the East.[46] In the French colony of New Caledonia the Torrens system was described as an experiment that was able to answer the needs of the colonisers.[47]

---

42 Low 2009, p. 205-234.

43 Panforti 2000, p. 715. See also Gillissen 1974, p. 142-144.

44 Mawani 2014, p. 65-96; Keenan 2015.

45 Keenan 2019, p. 283-303; See also: Keenan 2017, p. 87-108.

46 See Guyot Cameron 1915, p. 13 ff. It is interesting to report the entry concerning the Torrens system written by Heyse 1947, p. 920: "L'Acte Torrens a fait du chemin et est appliqué en Indochine et dans la plupart des colonies de l'Afrique centrale. Cependant, il ne s'agit pas d'une application intégrale, car dans la législation du Congo belge et dans celle des autres colonies ou protectorats, on relève de nombreuses discordances et modifications apportées aux conceptions radicales de Sir Robert Richard Torrens, qui a créé une adaptation très ingénieuse du droit immobilier allemand".

47 *Recueil Général de Jurisprudence de Doctrine et de Législation Colonial et Maritimes* 1910, p. 24: "La colonie se trouvait dans les meilleures conditions pour servir à l'expérimentation d'un régime foncier procédant de l'Act Torrens. Lorsqu'arrivèrent dans la colonie les dernières instructions ministérielles prescrivant une étude dans ce sens, elle était administrée par le Gouverneur Pardon, qui parvint à mettre sur pied le projet qui porte encore son nom. Ce projet, qui date du 29 août 1891, n'est pas, comme la loi tunisienne de 1883, une imitation dégénérée de l'acte australien, juxtaposant sans logique des

In other African colonies, however, some European states also experimented with the application of modified versions of the *Grundbuch* system and the French transcription system, as will be shown in the next paragraph.[48]

4. Third narrative: internationalising the land register systems

The third narrative will focus on how the internationalisation of law influenced the development of different land register systems in colonial contexts.

Colonial administrators commonly used their control of land ownership as a tool to control and exploit colonial possessions. Land ownership and property registration played a significant role in African colonialism, where public and private interests mingled with colonial ambitions and economic exploitation. By studying the legal system of land registration, one can examine how European states used their colonies to adapt and experiment with the legal frameworks of land ownership.

The introduction of modified land register systems served to a certain extent for the expropriation of land by colonial powers. But not only economic advantages were of interest. The colonies also served as an experimental space, in which European colonial powers were able to gain knowledge on several land register systems in different circumstances. In Continental Europe various legal systems developed different concepts of property and property rights. Legislative developments were also heavily influenced by tradition and by a relationship between the population and the land regarding property that had developed over time. These European concepts of land ownership were applied and adapted to the colonial context, where they were, vice versa, influenced by native customs. At the end of the 19th century, the spread of the *Grundbuch*, transcription and Torrens systems in the African colonies resulted in a contamination[49] and transfer of legal norms, as the following case studies will show. In the French colonies in Tunisia (1885-1892)

---

dispositions à peine conciliables, empruntées tantôt au système germanique, tantôt au système français. Il adopte d'abord, avec toutes ses conséquences, le principe de l'Act Torrens, "la publicité", d'après lequel la propriété et les autres droits réels ne s'acquièrent que par l'inscription aux registres publics, à l'exclusion du simple consentement; il organise ensuite, à l'instar de son modèle, le "contrôle légal" de toutes les inscriptions faites aux registres (principe de la légalité) [...]".

48 See: Colin-Le Meur-Léonard 2010; Barrière-Rochegude 2010; Nobirabo Musafiri 2007.

49 Guella 2014, p. 167-193.

the decree of 1 July 1885 introduced a land register system based on the Torrens system, but it was also influenced by the French transcription and the German *Grundbuch* system.[50] This law of 1885 had some unique features: the "publicité" was "réelle", which meant that the land, not the owner, was registered (art. 18). The "immatriculation", or registration of land was "facultative" (Art. 22). Concerning any "oppositions à l'immatriculation" a mixed land tribunal (*Tribunal Mixte Immobilier*) was entitled to establish the ownership of contested land (Art. 33 ff.) and at the same time an assurance fund was established: "fonds d'assurance destine à indemniser celui qui se trouvait lésé par l'immatriculation d'un immeuble ou par l'inscription d'un droit réel" (Art. 39).[51]

For the Congo Free State (1885-1908), of relevance in this context is the *Ordonnance* of 1 July 1885 through which the Belgian government established the concept of state land, starting a consequent process of occupation based on legal title. As Johan Pottier pointed out "European concepts of legal tenure, assumed to be universal, became central to the land laws of every colony. In particular, the colonial authorities assumed that the European concept of proprietary ownership covered the full range of customary land rights in Africa".[52]

Article 1 of the *Ordonnance* of 1885 stated: "A partir de la présente proclamation, aucun contrat ni convention passé avec des indigènes pour l'occupation, à un titre quelconque, de parties du sol, ne sera reconnu par le gouvernement et ne sera protégé par lui, à moins que le contrat ou la convention ne soit fait à l'intervention de l'officier public commis par l'administrateur général et d'après les règles que ce dernier tracera dans chaque cas particulier". Furthermore, Article 2 proclaimed: "Nul n'a le droit d'occuper sans titre des terres vacantes, ni de déposséder les indigènes des terres qu'ils occupent; les terres vacantes doivent être considérées comme appartenant à l'Etat".[53]

These Articles represent the legal basis for the proclamation of the Congo

50 See for a bibliography concerning the topic: Hénia 1998; Giudice, 2009, p. 229-239.

51 "Art. 1 Les dispositions du code civil français qui ne sont pas contraires à la présente loi s'appliquent, en Tunisie, aux immeubles immatriculés el aux droits réels sur ces immeubles": law published in *Régence de Tunis, Loi Foncier and règlements annexes, recueil officiel* 1893, p. 18; Dain 1885; Tirman 1885.

52 Pottier 2005, p. 59; See also Brausch 1961.

53 See *Bulletin de l'Etat Indépendant du Congo* 1885, p. 30. See also Kinet 2005, p. 70 ff.

Free State and for subsequent legislation concerning land tenure and the introduction of the Torrens system in the Belgian Congo in 1920.[54] While in Belgium the French transcription system was implemented in 1851, it is interesting to note that in their colony of Congo, the Belgian government opted for the Torrens system and implemented it by a decree dated 6 February 1920. The decision to establish the Torrens system was an attempt at finding a compromise between guaranteeing the boundaries of "tribal" land and protecting the interests of colonial landowners.[55] The same Decree entered into force in 1927 in Ruanda-Urundi. The legislation established that a "land-title of registered proprietor was paramount and indefeasible, unless fraud had been committed. Furthermore, a person dealing with a registered proprietor need not be concerned about the validity of such title - he could rely on the Certificate Title as conclusive".[56]

In Italian Eritrea the Italian government introduced the *Grundbuch* under the Royal Decree of 1909. Article 164 included the establishment of a probative land register system. Article 206 specified that "registration in the special land registers is the only legal statement of rights over property and their transfer". Registration had to "be based on a legal document valid for the purchase and transfer of rights over properties according to the law applicable in the colony" (article 207). Registration of the transfer of a right could not be done if the transferor was not the holder of that right, according to the land register (article 208).[57] According to article 209, any concession deed had to be noted in the land register within sixty days from the date of its stipulation, under penalty of cancellation of the same. All transfer deeds or declarations concerning ownership of property, as well as of any other right over property, had to be registered as well.[58] Subsequently the Decree no. 1247 of 21 November 1918 established a title registration office in Asmara.[59]

This case is especially interesting, since the Italian government was trying to introduce a system in Eritrea that it had failed to implement at home. Eritrea was regarded as an experiment for Parliament, Government and policy makers of the Kingdom of Italy with the purpose of assessing the feasibility

54 See: Yernault 2013, p. 50 ff.
55 Dufrénoy 1939; Heyse 1934.
56 Dirk Beke 1994, p. 65.
57 *Ministero degli affari esteri* 1909, p. 71-72.
58 ibid 72-73.
59 Favali and Pateman 2007, p. 261.

of a change in the Italian system.[60] The Italian law on property, crystallised in the Code of 1865, generally adopted the French registration system, and was largely influenced by the Napoleonic Code, the French law of 23 March 1855 and the Belgian law of 16 December 1851.[61] In 1886, Law no. 3682, also known as the Messedaglia Law, set up the unified Italian land register. It introduced a new type of surface measurement based on land parcels and established a register for land and urban buildings, expanding on the previous Urban Land Register dating back to 1877.[62] In spite of these important reforms, one of the most debated issues in Parliament was the lack of probative elements within the transcription system. Since the enactment of the Civil Code of 1865, the necessity of establishing a land register with probative value similar to the Austrian *Grundbuch* system was widely felt.[63]

There was a strong need for radical change in the functioning of the cadastral and register system in the Kingdom of Italy. Various parliamentary committees were established and many projects were submitted proposing land registers with probative value to enhance the possibility of proving land rights. Worthy of attention is a report by the Minister for Justice, Vittorio Scialoja, resulting from a meeting of 3 March 1910 (exactly one year after the enactment of the Royal Decree 1909 for the Eritrean colony) when a draft law was proposed to the Senate. The report included amendments in Book III of the Civil Code, with special regard to chapter XXII, relating to the transcription of property transactions. Scialoja spoke of:

> Unanimous acknowledgement of the need to reform the land register system to make property titles easier and clearer; disagreement upon the ways in which such an objective could be reached. And while eminent legal experts would certainly accept the map system, other equally influential experts hesitate to approve a radical reform which may affect the structure of society [...].[64]

60 Fiocchi Malaspina 2018, p. 233-251.

61 See: Colorni 1954, p. 189; Solimano 2003, p. 101, 106; Manuel-Gismondi 1933, 348; Di Simone 2006; Ferrante 2008, p. 105; Sandonà 2011, p. 363; Roggero 2013, p. 175-228. See also: Petrelli 2007, p. 602-603.

62 Messedaglia 1936, p. 274.

63 Messedaglia 1936, p. 274. See also the contribution of Alan Sandonà in this volume.

64 "Unanimità di consenso nel riconoscere l'assoluta necessità di riformare il sistema del catasto per rendere più semplice e certo il titolo di proprietà; dissenso invece sui modi cui raggiungere tale scopo. E mentre autorevoli giuristi non esiterebbero ad accettare senz'altro il sistema tavolare, altri giuristi non meno autorevoli si dimostrano titubanti ad una radicale riforma la quale intaccherebbe l'organismo civile [...]" (author's translation).

The debate regarding transcription was resumed upon annexation of the "New Provinces" of Italy, i.e. former territories of the Austro-Hungarian Empire incorporated into the Kingdom of Italy at the end of World War I. These were the provinces of Venezia Tridentina and Venezia Giulia and in these territories the *Grundbuch* continued to be applied. Therefore, two different property register systems coexisted at the same time in Italy, both aiming to meet specific requirements.

The years following the annexation, in fact, were particularly difficult in terms of introducing new legislation. The long period of Habsburg rule had created a very deep-rooted administrative and political system that was difficult for Italian legislators to overturn.[65] Although Italian legislative procedure was very complex, the legislature decided to extend, without any adaptation or limitation, the applicable national laws to the new provinces. However, one of the main exceptions, which greatly impacted private law in particular, was the *Grundbuch*. It was decided not to extend the Italian transcription system (based on French and Belgian law) and at the same time to retain, albeit temporarily, the *Grundbuch* system that dated back to ancient times.[66]

There were various reasons why the *Grundbuch* was maintained in those territories. Among them was the acknowledgement that the *Grundbuch* was deeply rooted in the legal historical tradition and in the economic system. Also, the *Grundbuch* was proving to be efficient, as it was being introduced into Italian Libya by Royal Decree no. 12073 of 3 July 1921, as well as in the Italian Dodecanese Islands by government Decree no. 46 of 22 August 1925.[67] The desire to adopt it in various territories became evident, in particular with regard to other colonies.[68]

5. Conclusion: universal principles on land law and land registration system?

These three narratives reveal the complexity of normativity in relation to the "international" in the second part of the 19th century. The history of inter-

This project has been described by Ferrara as the most advanced and accomplished legislative attempt to regulate the Italian property registration system possibly meeting the land market requirements: Ferrara 1910, p. 468; Galateria, 1937, p. 105.

65 Capuzzo 1992, p. 133. See also: Rossi 2012, p. 502-510.

66 Capuzzo 1992, p. 133.

67 Fiocchi Malaspina 2018, p. 233-251; Bassi 2013, p. 17-18.

68 Cuccaro 2010, p. 4.

national law and the history of international relations and cooperation were developed through the "continuous work of interconnection" carried out by transnational and international institutions created from the second half of the 19th century, with the aim of contributing to a "unique" set of rules in the various colonies.[69]

Our analysis of different systems of land registration shows how European states used their colonies to adapt and experiment with the legal frameworks of land ownership. What happened in the colonies might have been impossible to carry out in the European context. The knowledge acquired by implementing different legal frameworks of land ownership and land registration in the colonies conversely influenced the legal systems applied in Continental Europe.

The *Institut Colonial International* encouraged the exchange of ideas about the various colonial experiences that states had collected in their own particular situations, in order to create common and universal principles. International law and domestic law, or national law concerning land register systems and land law were part of the colonial discourse as it endeavoured to create and adopt universal principles of law, trying to establish a platform of common dialogue, with common premises, concerning different colonies, different colonial experiences and ultimately different cultural, social and political contexts.

The Russian jurist Friedrich Fromhold von Martens, member of the *Institut Colonial International* as well as of the *Institut de Droit International*, compared laws and decrees concerning land law and land register systems in the colonies and emphasised the need to formulate « universal » principles to be adopted in the different colonial experiences:

> Notre désir et notre but est que l'échange des idées sur les différentes expériences faites dans les diverses colonies des différents pays nous aide à obtenir des principes qui puissent être adoptés par les différents pays. [...] Je crois [...] qu'il est absolument nécessaire d'obtenir et établir des principes qui forcent l'unité dans la législation coloniale et le système foncier à appliquer aux colonies.[70]

The international exchange of principles of colonial law presupposed the definition of the general legal principles that Europe sought and established between the end of the 19th and the beginning of the 20th century. Space,

69 Singaravélou 2012, p. 135.

70 Martens 1904, p. 363.

understood as private and public space, was defined by the choice of register systems introduced in Europe and in the colonies.

A global perspective on this space resulted from the proliferation of established land register systems in numerous colonies. Ordering space in the colonies led to increasing interest among the European states as colonial rulers in discussing questions of regional planning and register systems. The search for general principles, as well as the development of individual land register systems, shows the dialectic between universality and particularity on the one hand, and between expansion and the creation of normativity on the other.

The colonial context formed and traced the international space in which a plurality of actors operated within a plurality of norms. This international space was characterised not only by its dynamics, but also by its intrinsic multiplicity of forms and models, with the common aim of guaranteeing the transfer of property rights. In this international space, economic, legal and political interests intertwined and formed an inextricable whole.

Bibliography

Primary Sources

Allgemeines Bürgerliches Gesetzbuch 1812 = Allgemeines Bürgerliches Gesetzbuch, Wien, Sof und Staats-Druckerei, 1812.

Bulletin de l'Etat Indépendant du Congo 1885 = Bulletin de l'Etat Indépendant du Congo, Bruxelles 1885.

Code Civil Francais 1804 = Code Civil Francais, Paris, Imprimerie de la République, 1804.

Institut Colonial International 1898 = Institut Colonial International, *Le Régime foncier aux Colonies, Tome I.- Indie britannique. Colonies allemandes*, Brussels, Mertens, 1898.

Institut Colonial International 1937 = Institut Colonial International, *Notice, statuts et règlement, liste des membres et listes des publications*, Brussels, Mertens, 1937.

Ministero degli affari esteri 1909 = Ministero degli affari esteri, *Ordinamento Fondiario della colonia Eritrea,* Roma, 1909.

Recueil Général de Jurisprudence de Doctrine et de Législation Colonial et Maritimes 1910 = Recueil Général de Jurisprudence de Doctrine et de Législation Colonial et Maritimes, *La Tribune des colonies et des protectorats. Deuxième*

partie. Doctrine et Economie politique Coloniale. Le régime Foncier dans les possessions coloniales françaises, Paris, 1910.

Régence de Tunis, Loi Foncier and règlements annexes, recueil officiel 1893 = *Régence de Tunis, Loi Foncier and règlements annexes, recueil officiel*, Paris, 1893.

Secondary Sources

Anghie 2005 = A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, 2005.

Barrière-Rochegude 2009 = O. Barrière, A. Rochegude (eds.), *Foncier et environnement en Afrique: des acteurs au(x) droit(s)*, Paris, 2009.

Bassi 2013 = M. Bassi, *Manuale di diritto tavolare*, Milano, 2013.

Becker Lorca 2010 = A. Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, in *Harvard International Law Journal* 51, 2010, p. 475-552.

Becker Lorca 2012 = *Eurocentrism in the History of International Law*, in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford, 2012, p. 1034-1057.

Becker Lorca 2015 = *Mestizo International law*, Cambridge, 2015.

Beke 1994 = D. Beke, *Land-law in Belgian Central Africa*, in J. de Moor, D. Rothermund (eds.), *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies*, Band 2, Münster, 1994, p. 57-67.

Besson 1891 = E. Besson, *Les livres fonciers et la reforme hypothécaire: étude historique et critique sur la publicité des transmissions immobilières en France et à l'étranger depuis les origines jusqu'à nos jours*, Paris, 1891.

Bouckaert 2010 = B. Bouckaert, *Title systems and recordation of interests*, in B. Bouckaert (ed.), Property Law and Economics (Encyclopedia of Law and Economics, 5, 2nd ed.), Cheltenham, 2010, p. 91-201.

Bourdieu 1990 = P. Bourdieu, *Les conditions sociales de la circulation internationale des idées*, in *Romanistische Zeitschrift für Literaturgeschichte* 14, 1-2, 1990, p. 1-10.

Brausch 1961 = G. Brausch, *Belgian administration in the Congo*, Oxford, 1961.

Capuzzo 1992 = E. Capuzzo, *Dal nesso asburgico alla sovranità italiana: Legislazione e amministrazione a Trento e a Trieste 1918-1928*, Milano, 1992.

Colin-Le Meur-Léonard 2010 = J. P. Colin, P. Y. Le Meur, E. Léonard (eds.), *Les politiques d'enregistrement des droits fonciers. Du cadre légal aux pratiques locales*, Paris, 2010.

Colorni 1954 = V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare*, Milano, 1954.

Cuccaro 2010 = M. Cuccaro, *Lineamenti di diritto tavolare*, Milano, 2010.

Dain 1885 = A. Dain, *Le système Torrens ; suivi d'une Traduction de l'Act Torrens et de la Loi foncière tunisienne du 5 juillet 1885 ; Les livres fonciers ; Une conservation d'hypothèques sous le régime du livre foncier : de son application en Tunisie et en Algérie : rapport à M. Tirman, gouverneur général de l'Algérie : rapport présenté à M. le Directeur général de l'enregistrement, des domaines*, Algiers, 1885.

Daviron 2010 = B. Daviron, *Mobilizing labour in African agriculture: the role of the International Colonial Institute in the elaboration of a standard of colonial administration 1895–1930,* in *Journal of Global History* 5, 2010, p. 479-501.

De L'Estoile 2004 = B. de L'Estoile, *L'Afrique comme laboratoire expériences réformatrices et révolution anthropologique dans l'empire colonial britannique (1920-1950)*, *Thèse de doctorat en Anthropologie sociale et historique sous la direction de C. Topalov*, Paris, 2004.

Di Simone 2006 = M. R. Di Simone, *Percorsi del diritto tra Austria e Italia secoli 17-20*, Milano, 2006.

Dufrénoy 1939 = P. Dufrénoy, *Le régime foncier au Congo belge et l'acte Torrens*, Brussels 1939.

Ehrenberg 1903 = V. Ehrenberg, *Rechtssicherheit und Verkehrssicherheit mit besonderer Rücksicht auf das Handelsregister*, in *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 47, 1903, p. 273-338.

Fassbender-Peters 2012 = B. Fassbender, A. Peters, *Introduction: towards a global history of international law*, in idd. (eds.), *The Oxford Handbook of the History of International Law*, Oxford, 2012, p. 1-24.

Favali-Pateman 2007 = L. Favali, R. Pateman, *Sangue, terra e sesso : Pluralismo giuridico e politico in Eritrea*, Milano, 2007.

Ferrante 2008 = E. Ferrante, *Consensualismo e trascrizione*, Padua, 2008.

Ferrara 1910 = F. Ferrara, *Il progetto Scialoja sulla trascrizione*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni* 8, 1910, p. 468-474

Fiocchi Malaspina 2018 = E. Fiocchi Malaspina, *Techniques of empire by land law: the case of the Italian colonies (nineteenth and twentieth centuries)*, in *Comparative Legal History* 6, 2, 2018, p. 233-251.

Fiocchi Malaspina 2019 = *The Debate on the International between the 19th and 20th Century: the Italian Legal Horizons*, in T. Dunney, R. Devetak (eds.), *The Rise of the International*, forthcoming in 2020.

Fons 1857 = V. Fons, *Précis de la loi du 23 mars 1855 sur la transcription en matière hypothécaire*, Toulouse, 1857.

Gabrielli 1874 = G. Gabrielli*, Lineamenti di una comparazione tra il sistema*

della trascrizione e l'ordinamento tavolare, in *Atti del Convegno di studio sui problemi del Libro Fondiario*, Trieste, 1974.
Gabrielli 2012 = Gabrielli, *Trattato di diritto civile: La parte generale del diritto. Vol. IV: La pubblicità immobiliare*, Milano, 2012.
Gabrielli-Tommaseo 1999 = G. Gabrielli, F. Tommaseo, *Commentario alla legge tavolare*, Milano, 1999.
Galateria 1937 = L. Galateria, *Della pubblicità immobiliare. Le sue origini e i suoi progetti di riforma*, Napoli, 1937.
Geppert 2010 = A. C. T. Geppert, *Fleeting Cities: Imperial Expositions in fin-de-Siècle Europe*, London, 2010.
Gillissen 1974 = A. J. Gillissen, *Sir Robert Torrens and the Torrens System of Registration*, in *Australian Surveyor* 26, 2, 1974, p. 142-144.
Giudice 2009 = C. Giudice, *La législation foncière et la colonisation de la Tunisie*, in S. El Machet (dir.), *Les administrations coloniales XIXe- XXe siècles, Esquisse d'une histoire comparée*, Rennes, 2009, p. 229-239.
Goymour-Watterson-Dixon 2018 = A. Goymour, S. Watterson, M. Dixon (eds.), *New Perspectives on Land Registration: Contemporary Problems and Solutions*, Oxford, 2018.
Guella 2014 = F. Guella, *Un "libro fondiario" in Eritrea, tra diritto coloniale e diritto tradizionale*, in M. Cosulich and G. Rolla (eds.), *Il riconoscimento dei diritti storici negli ordinamenti costituzionali*, Trento, 2014, p. 167-193.
Guyot Cameron 1915 = A. G. Cameron, *The Torrens System: its Simplicity, Serviceability and Success*, Houghton, 1915.
Hénia 1998 = A. Hénia, *Propriété et stratégies sociales à Tunis XVI-XIXe siècles*, Tunis, 1998.
Henning Böttger 2005 = J. Henning Böttger, « Bienvue dans la capital de l'Empire! » Die Tagung des Inst*itut Colonial International in Berlin (1897)*, in U. van der Heyden, J. Zeller (eds.), *Macht und Anteil an der Weltherrschaft: Berlin und der deutsche Kolonialismus*, Münster, 2005, p. 109-115.
Henning Böttger 2006 = *Internationalismus und Kolonialismus: Ein Werkstattbericht zur Geschichte des Brüsseler „Institut Colonial International" (1894–1948)*, in *Jahrbuch für europäische Überseegeschichte* 6, 2006, p. 165-172.
Heyse 1934 = T. Heyse, *Régime de la propriété immobilière au Congo Belge*, Brussels, 1934.
Hunter 2016 = I. Hunter, *About the dialectical historiography of international law*, in *Global Intellectual History* 1, 2016, p. 1-32.
Janczyk 1977 = J. T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, in *The Journal of Legal Studies* 6, 1, 1977, p. 213-233.

Keenan 2015 = S. Keenan, *Subversive property: law and the production of spaces of belonging*, Abingdon, 2015.

Keenan 2017 = *Smoke, curtains and mirrors: the production of race through time and title registration*, in *Law and Critique* 28, 1, 2017, p. 87-108.

Keenan 2019 = *From historical chains to derivative futures: Title registries as time machines* in *Social & Cultural Geography* 20, 3, 2019, p. 283-303.

Kinet 2005 = R. Kinet, «*Licht in die Finsternis*»*: Kolonisation und Mission im Kongo, 1876-1908: kolonialer Staat und nationale Mission zwischen Kooperation und Konfrontation*, Münster, 2005.

Kohl 2018 = G. Kohl, *The Austrian land register – history, principles, perspectives*, in M. Schmoeckel, Über*tragung von Immobilienrechten im internationalen Vergleich. Conference on real property law and land register*, Baden-Baden, 2018, p. 113-132.

Koskenniemi 2001 = M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge, 2001.

Koskenniemi 2012 = *A History of International Law Histories*, in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford, 2012, p. 943-971.

Koskenniemi 2013 = *Histories of International Law: Significance Problems for a Critical View*, in *Temple International and Comparative Law Journal* 27, 2, 2013, p. 215-240.

Koskenniemi 2014 = *Vitoria and Us: Thoughts on Critical Histories of International Law,* in *Rechtsgeschichte-Legal History* 22, 2014, p. 119-139.

Koskenniemi 2016a= *Expanding Histories of International Law*, in *American Journal of Legal History* 56, 1, 2016, p. 104-112.

Koskenniemi 2016b = *Colonial Laws: Sources, Strategies and Lessons?*, in *Journal of the History of International Law* 18, 2-3, 2016, p. 248-277.

Koskenniemi 2017 = *System, Order and International law: The Early History of International Legal Thought from Machiavelli to Hegel*, in S. Kadelbach, T. Kleinlein, D. Roth-Isigkeit, (eds.), *The History and Theory of International Law*, Oxford, 2017 p. 381-397.

Koskenniemi-Kari 2018 = M. Koskenniemi, V. Kari, *A More Elevated Patriotism: The Emergence of International and Comparative Law (Nineteenth Century)*, in H. Pihlajamäki, M. D. Dubber, M. Godfrey (eds.), *The Oxford Handbook of European Legal History*, Oxford, 2018, p. 974-999.

Lindner 2015 = U. Lindner, *New Forms of Knowledge Exchange Between Imperial Powers: the Development of the Institut Colonial International (ICI) since the End of the Nineteenth Century*, in V. Barth, R. Cvetkovski (eds.), *Imperial Cooperation and Transfer 1870-1930. Empires and Encounters*, London, 2015, p. 57-78.

Low 2009 = K. F. K. Low, *The nature of Torrens indefeasibility: understanding the limits of personal equities*, in *Melbourne University Law Review* 33, 1, 2009, p. 205-234.

Manuel-Gismondi 1933 = P. Manuel-Gismondi, *Le régime de la publicité foncière dans les projets législatifs de réforme en France et en Italie*, Paris, 1933.

Martens 1904 = F.F. Martens, *Débats sur le régime foncier aux colonies (Session de Londres) 1903*, in G. K. Anton, *Le Régime foncier aux Colonies. Rapports présentés à l'Institut Colonial International*, Brussels, 1904, p. 363-365.

Mawani 2014 = R. Mawani, *Law as temporality: Colonial politics and Indian settlers*, *University of California Irvine Law Review* 4, 65, 2014, p. 65-96.

Messedaglia 1936 = A. Messedaglia, *Il catasto e la perequazione: relazione parlamentare*, Bologna, 1936.

Nerson 1938 = R. Nerson, *Les Dispositions du Décret-Loi de 1935 relatives à la Transcription en matière immobilière*, Paris, 1938.

Nobirabo Musafiri 2007 = P. Nobirabo Musafiri, *Droit foncier des peuples autochtones et le droit international: cas des peuples de la forêt "Pygmées" de la R. D. Congo*, Bern, 2007.

Nuzzo 2005 = L. Nuzzo, *Dal colonialismo al postcolonialismo: Tempi e avventure del soggetto indigeno*, in *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 33/34, 2005, p. 463-508.

Nuzzo 2006 = *La colonia come eccezione: Un'ipotesi di transfer*, in *Rechtsgeschichte-Legal History* 7, 2006, p. 52-58.

Nuzzo 2011 = *Disordine politico e ordine giuridico. Iniziative e utopie nel diritto internazionale di fine Ottocento*, in *Materiali per una storia della cultura giuridica* 41, 2, p. 319-337.

Nuzzo 2012 = L. Nuzzo, *Origini di una scienza: Diritto internazionale e colonialismo nel 19. Secolo*, Frankfurt am Main, 2012.

Nuzzo-Vec 2012 = L. Nuzzo, M. Vec, *The Birth of International Law as a Legal Discipline*, in idd. (eds.), *Construction International Law. The birth of a discipline*, Frankfurt am Main, 2012, p. IX-XVI.

Obregón Tarazona 2015 = L. Obregón Tarazona, *Writing International Legal History: An Overview*, in *Monde(s)* 7, 1, 2015, p. 95-112.

Orford 2013a = A. Orford, *The Past as Law or History? The Relevance of Imperialism for Modern International Law*, in M. Toufayan, E. Tourme-Jouannet, H. Ruiz-Fabri (eds.), *Droit international et nouvelles approches sur le tiers-monde: entre répétition et renouveau*, Paris, 2013, p. 97-117.

Orford 2013b = *On International Legal Method*, in *London Review of International Law* 1, 1, 2013, p. 166-197.

Orford 2014 = *Scientific Reason and the Discipline of International Law*, in *European Journal of International Law* 25, 2, 2014, p. 369-385.

Padovini 2001 = F. Padovini, *La pubblicità immobiliare*, in *Rivista di Diritto Civile* 47, 6, 2001, p. 713-727.

Padovini 2002 = Padovini, *Semplificazione in materia di libri fondiari e di procedure di intavolazione*, in *Le Nuove Leggi Civili Commentate* 25, 2002, p. 499-506.

Panforti 2000 = M. D. Panforti, *Torrens Title*, in *Digesto delle Discipline Privatistiche, Sezione Civile*, Milano, 2000, p. 715-722.

Petrelli 2007 = G. Petrelli, *L'autenticità del titolo della trascrizione nell'evoluzione storica e nel diritto comparato*, *Rivista di Diritto Civile* 5, 2007, p. 585-640.

Pfister 2018 = L. Pfister, *The Transfer of Real Property in French Legal History: Between the Consensualistic Principle and Formalities*, in Übertragung von Immobilienrechten im internationalen Vergleich. C*onference on real property law and land register*, in M. Schmoeckel, Baden-Baden 2018, p. 157-192.

Pitts 2018 = J. Pitts, *Boundaries of the International: law and empire*, Cambridge, 2018.

Pottier 2005 = J. Pottier, *Customary land tenure' in Sub-Saharan Africa today: Meanings and contexts*, in C. Huggins, J. Clover (eds.), *"From the Ground Up" Land Rights, Conflict and Peace in Sub-Saharan Africa*, Cape Town, 2005, pp. 55-75.

Rech 2017 = W. Rech, *International Law, Empire, and the Relative Indeterminacy of Narrative*, in M. Koskenniemi, W. Rech, M. Jiménez Fonseca (eds.), *International Law and Empire*, Oxford, p. 57-80.

Rivier 1877 = A. Rivier, *Notice historique sur l'Institut de droit international, sa fondation et sa première session. Gand 1873, Genève 1874*, in *Annuaire l'Institut de droit international* I, 1877, p. 11-16.

Rogers 2006 = E. Rogers, *The impact of the Australian Torrens system on the land transfer debate in the United Kingdom, 1858-1914*, in *Australia and New Zealand Law and History E-journal* 4, 2006, p. 125-132.

Roggero 2013 = F. Roggero, *La trascrizione immobiliare nella giurisprudenza del secolo XIX*, in Laura Moscati (ed.), *Dialettica tra legislatore e interprete: Dai codici francesi ai codici dell'Italia unità*, Rome, 2013, p. 175-228.

Rolin 1923 = A. Rolin, *Les origines de l'Institut de droit international, 1873-1923: Souvenirs d'un témoin*, Brussels, 1923.

Rossi 2012 = D. Rossi, *Un'"anomalia e una curiosità giuridica": La breve esperienza del Consiglio di Stato per le terre redente (1919-1923)*, in G. de Vergottini, D. Rossi, G. F. Siboni (eds.), *Fenomenologia di una macro regione. Sviluppi economici, mutamenti giuridici ed evoluzioni istituzionali nell'Alto Adriatico tra età moderna e contemporanea*, Milano, 2012, p. 502-558.

Sandonà 2011 = A. Sandonà, *Ridurre in un solo volume... Note sull'istituto della*

trascrizione tra la Rivoluzione ed il secondo '800, in *Rivista di Storia del diritto italiano* LXXXIV, 2011, p. 363-416.

Schmoeckel 2018 = M. Schmoeckel (ed.), Übertragung von Immobilienrechten im internationalen Ver*gleich*. *Conference on real property law and land register*, Baden-Baden, 2018.

Sicchiero 1993 = G. Sicchiero, *La trascrizione e l'intavolazione*, Milano, 1993.

Singaravélou 2012 = P. Singaravélou, *Les stratégies d'internationalisation de la question coloniale et la construction transnationale d'une science de la colonisation à la fin du XIXe siècle*, in *Monde(s)* 1, 1, 2012, p. 135-157.

Solidoro Maruotti 2010 = L. Solidoro Maruotti, *La tradizione romanistica del diritto europe. Vol. II: Dalla crisi dello ius commune alle codificazioni moderne*, Torino, 2010.

Solimano 2003 = S. Solimano, *Il letto di Procuste: Diritto e politica nella formazione del codice civile unitario: I progetti Cassinis (1860-1861),* Milano, 2003.

Starski-Kämmerer 2017 = P. Starski, J. A. Kämmerer, *Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition*', in *Journal of the History of International Law/Revue d'histoire du droit international* 19, 1, 2017, p. 50-69.

Stoler 2010 = A. L. Stoler, *Along the Archival Grain. Epistemic Anxieties and Colonial Common Sense*, Princeton, 2010.

Tilley 2011 = H. Tilley, *Africa as a Living Laboratory. Empire, Development and the Problem of Scientific Knowledge, 1870-1950*, Chicago, 2011.

Tirman 1885 = L. Tirman, *Le système Torrens; De son application en Tunisie et en Algérie, Alger*, Algiers, 1885.

Heyse 1947 = T. Heyse, *Torrens (Robert-Richard, Sir)*, in *the Biographie Coloniale Belge*, T. I, 1947, p. 920-922.

Tramond 1932 = J. Tramond, *Des conclusions sur la colonisation comparée*, in *Revue d'histoire des colonies* 85, 1932, p. 527-528.

Vattel 2008 = E. de Vattel, B. Kapossy, R. Whatmore (eds.), *The Law of Nations or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns, with three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Indianapolis, 2008.

Vinding Kruse 1953 = F. Vinding Kruse, *The Right of Property*, Band 2, Oxford, 1953.

Wieacker 1980 = F. Wieacker, *Storia del diritto privato moderno*, trad. italiana di Umberto Santarelli, I, trad. it. U. Santarelli, Milano, 1980.

Yernault 2013 = D. Yernault, *L'État et la propriété. Le droit public économique par son histoire (1830-2012)*, Brussels, 2013.

THE POLITICS OF REAL PROPERTY IN THE KINGDOM OF SARDINIA, 1720–1848

Charles Bartlett

This chapter is interested in the politics attached to real property regimes in 18th- and 19th-century Europe, and it takes as its focus the Kingdom of Sardinia from the end of the War of the Quadruple Alliance to the Statuto Albertino. During this period, the Kingdom of Sardinia underwent drastic territorial and administrative change, much of it inseparable from a broader context of political and social development across Europe. The consequences of such change for the institutions of real property offer a fascinating glimpse into how such institutions relate to structures of political power and collective enterprise, how that relation can lead to their politicization, and how amenable these institutions are to alteration. Although this chapter, like others in this volume, is therefore not solely interested in using political timelines to define the characteristics and developments of land law, it is interested in the effects of each upon the other, and chooses dates of political significance to bound the investigation because these come more easily to hand. That being said, the processes of interest to us are complex, and reference will be made to phenomena that fall outside these years.

The French Revolution and the First French Empire dominate events at the middle of our timeline and had profound effects on the Kingdom of Sardinia, both in terms of political ideology and administration. It will come as no surprise that much of what we will discuss is framed through the issues that actors at the time and scholars subsequently have identified as central, above all the concentration of land-owning and bureaucratic centralization. Although developments in the Kingdom of Sardinia were tied to broader phenomena across the continent, there were nevertheless particularities in the Kingdom of Sardinia that we will discuss in detail. These particularities were due in no small part to variations in land law within the Kingdom of Sardinia at the end of the 18th century, which were owing to the perpetuation of regional differences within the recently expanded polity, and, relatedly, growing pressure for Italian unification.

In characterizing the relationship between political regimes and land law, this chapter relies heavily on the notion of the corporation. In 21st-century

common parlance, the word "corporation" is used to denote a small subset of the organizations and activities to which the word could be applied, and indeed historical consideration only reveals more pluralism. Further, it will come as no surprise that the dominant impression of what a corporation is, among the array of collective ventures that could be so labeled in any one moment, has itself changed over time. In using the lens of the corporation to examine the politics of real property regimes in the Kingdom of Sardinia in the 18th and 19th centuries, this chapter is also interested in a likely shift away from one of the previously instrumental conceptions of the corporation. As we would expect, given the expansive nature of many political and social events of these years, this shift was informed by happenings elsewhere in Europe, and indeed must also be seen within an extra-European context, as will be discussed. Nevertheless, developments in the Kingdom of Sardinia offer a unique example of the shift away from one form of corporate organization through the politics that came to be attached to it.

This chapter proceeds in four parts. It first recalls in broad strokes the political history of the Kingdom of Sardinia during these years. In providing a grounding upon which to examine the changes that interest us, this historical recapitulation will prime us to consider the varied experiences of different regions within the Kingdom of Sardinia in terms of political and real property administration, as well as the affinities between some of those regions and other polities. Next, it will present the salient points of the history of the corporation over the *longue durée*. This sketch will not only demonstrate the varied nature of corporate undertaking over time, but will speak to the dominant conception of the form of the corporation in several periods, as well as how that dominant conception has changed.

We will then delve into the politics of the administration of real property in the Kingdom of Sardinia in our period, especially in the decades on either side of the turn of the 19th century. Having considered the history of the Kingdom of Sardinia and neighboring polities over these years as well as the history of the corporation, we will be in good stead to appreciate how a particular sort of corporation was central to the politicization of real property, and how the movement away from this type of corporation influenced the dominant conception of corporate activity. This is the corporation of peasant laborers that owned and administered collective property under the feudal system of land tenure. More details will follow in due course, but it is a principle aim of this chapter to float the idea that this sort of organization is best understood

as a form of corporation, and that we here glimpse the conception of the "corporation" at a moment of transition toward its more familiar, commercial sense. Finally, we will close by considering how the actions of the restored monarchy in the realm of real property inform upon the regionalism seen in the decades following our period. This chapter will not discuss in detail the Risorgimento or the institutions that followed in its wake, but will offer some suggestions as to how the actions of the government in Turin in the years after 1815, especially in the context of the corporation and the administration of real property, set the stage for regional variations within the Kingdom of Italy and promoted continuing affinity and exchange with areas to the north and west.

Over these four parts, this chapter drives toward three conclusions. It argues first that using the lens of the corporation allows for a more complete picture of the politicization of real property regimes in the Kingdom of Sardinia in our period, and that the events related to this politicization mark a decisive shift in the conception of the predominant form of the corporation toward commerce and away from communal governance. Second, it examines the relationship between the actions undertaken by the restored monarchy in regard to the administration of real property after 1815 and the pronounced regionalism of the Kingdom of Italy. It argues that these policies fundamentally changed the stance of the monarchy vis-à-vis the entities that had previously administered real property in the Kingdom of Sardinia, thereby encouraging the standardization of such administration, and created a somewhat more coherent polity that increasingly looked abroad for influence and exchange; this interaction prompted further developments intelligible in regional terms. Third and finally, this chapter seeks to provide an instance of a much larger historical point, namely that political systems and offices can more easily be changed than can underlying mechanisms of real property transfer and administration. The Kingdom of Sardinia in these years demonstrates the staying power of these mechanisms, and that they often stubbornly resist efforts at reform.

We must also define the terms that form the basis of our discussion. We will use the common understanding of "real property" as land and the buildings constructed on it, although the land itself was the foremost consideration during many of the events described. For our terms, "politicization" means the understanding and characterization of an institution as belonging to or serving the interests of a certain political regime, and therefore able

to changed. And finally, a "corporation" is an entity distinct from its members formed for a collective undertaking, which need not but may own and/or control property, and whose actions and claims in regard to property, and to other rights and privileges, receive legal recognition.

1. The Kingdom of Sardinia, 1720–1848

It will be useful first to contextualize our subject within the history of the Kingdom of Sardinia and the relevant polities during the period of interest to us. Here we will touch upon the territorial expansion of the Kingdom of Sardinia in the first decades of the 18th century; the fissures exposed by invasion, occupation, and administration by France from 1792, as well as the territorial gains that followed the Congress of Vienna in 1815; and finally, the events of the mid 19th century that have been seen as instrumental in the unification of Italy shortly thereafter. This short sketch will hopefully both suggest the extent of the complexities – political, economic, and social – inherent in a polity so situated, and prime us to consider the larger political valences and corporatist dimensions of different administrative initiatives.[1]

The Peace of Utrecht marked the end of the War of Spanish Succession (1701-1714), and the treaties signed in 1713 required Spain to give over Sicily and portions of the Duchy of Milan to Savoy; this rendered the Duke of Savoy, Vittorio Amedeo II at the time, King of Sicily. Spain was also forced to cede Sardinia and the majority of the Duchy of Milan, along with the Spanish Netherlands and the Kingdom of Naples, to Charles VI, Holy Roman Emperor and Archduke of Austria. Several years later, Spain tried unsuccessfully to recapture these lost territories. The resulting War of the Quadruple Alliance (1718-1720) reversed all of the intervening Spanish gains, and at its conclusion, the Treaty of the Hague cemented the territorial arrangements prior to 1717 as far as the Spanish were concerned, but forced Savoy to exchange Sicily for Sardinia, the former now to be ruled by Austria. Thus, the areas of Savoy, Piedmont, the Aosta Valley, the Ligurian Coast from Nice to Oneglia (now Imperia), and Sardinia were constituted as the Kingdom of Sardinia.

As soon as these territorial bounds were established, land reform began in Savoy and later moved to Piedmont. This reform stemmed from the attempts of Vittorio Amedeo II to rectify the financial problems that had developed by

1 For a treatment of the earlier history of the region, cf. Schena 2012 and Barbero 2012.

1720. As in much of Europe, large estates had been created in Savoy over the preceding centuries through lords' accumulation of their dependents' lands through *mainmorte*. In order to raise funds, Vittorio Amedeo confiscated the land of lords who could not produce title to their expansive properties, and curtailed other longstanding noble privileges.[2] Upon succeeding his father, Carlo Emanuele III at first moved away from this initiative, but later in his reign pursued it with force. In 1762 he decreed an end to *mainmorte* on royal land, and in 1771 he abolished *mainmorte* entirely, rendering all peasants in the duchy his direct subjects once they secured their emancipation.[3] While Carlo Emanuele fancied himself a child of the Enlightenment, the fiscal effects of the departure of many peasants from the Duchy were likely a strong motivation for such action, and with this move the Duchy increased its revenues from taxation.[4] When Vittorio Amedeo III became Duke, he dithered as to whether or not to enforce the decree that had been issued just before his succession, and ultimately put into effect an amended decree in 1778. Slowly but steadily redemption payments chipped away at serfdom, until in 1790 the peasants, emboldened by the events in France, called for immediate and complete emancipation, storming chateaux and torching archives.[5]

As it did the whole of Europe, the French Revolution greatly affected the Kingdom of Sardinia, both through war and territorial change from the 1790s and, by means of the political ideas that it brought to the fore, in the decades that followed 1815. There is of course an immense literature on the French Revolution, and rather than rehash the details of these complex years, we need only recall the broad strokes of some of its most consequential ideas in order to see effects upon the Kingdom of Sardinia in the areas of interest to us here.[6]

---

2 For a description of this process, cf. Clark 1995, p. 145.

3 This decree allowed for voluntary emancipation, and provided that if the lord and the peasants could not agree upon terms within a specified length of time, then government officials would set the parameters of the arrangement. A fixed and low indemnification fee was set, and if the fee could not be met, the peasant community could sell off some of the communal land to raise the necessary funds. We will return to this form of corporate ownership below.

4 Blum 1978, p. 217.

5 See Blum 1978, p. 218 for a portrait of Vittorio Amedeo III and a lucid description of the end of this series of decrees.

6 Of the many such studies, three sound treatments of the effects of the French Revolution and Napoleon upon the Italian peninsula are Grew 1999, Broers 2017 (some of

The Kingdom of Sardinia was drawn into conflict with the First French Republic when Savoy was annexed in 1792 as the 84th *Département*; in this year, the French government decreed the immediate end of serfdom and cancelled any remaining redemption payments. Several years later, the disadvantageous Treaty of Paris of 1796 was foisted upon Sardinia after several defeats on the battlefield, and through it, Sardinia recognized the new French state and withdrew from the First Coalition arrayed against it. The treaty forced Sardinia to cede a number of fortresses, and to allow free passage of French troops through Piedmont into the rest of Italy. Sardinia was also compelled to cede the already-annexed Duchy of Savoy and the County of Nice to France. In the wake of the treaty, the French general Barthélemy Catherine Joubert occupied Turin at the end of 1798, forcing Carlo Emanuele IV to flee to Sardinia, and the provisional government set up in Turin voted to unite with France. The *Code Napoléon* was put into force in Italy from 1806 until the end of the Napoleonic Wars.

Within this context of disruption and perceived weakness on the part of the Kingdom of Sardinia, there was a great deal of unrest in Italy during the period of French occupation. In addition to the events in Savoy already mentioned, the Kingdom of Sardinia also saw longstanding tensions stemming from the nature of Savoyard administration of the island of Sardinia boil over into the Sardinian Vespers of 1794-1796. The peasants of Sardinia had chafed under the feudal system that had long existed on the island. After 1720 they were joined in their discontent by the local notables, who resented that they were now governed from Turin and that administrative positions increasingly came to be filled by well-connected people from the mainland. This administration had grown to be more invasive than the Spanish system that had existed previously, and once powerful Sardinians took issue especially with the fact that all the most lucrative episcopates were staffed by Savoyard officials.[7] A viceroy was dispatched to the island, in the manner of a colonial possession, and served as a bureaucrat without independent initiative or political role, but solely to carry out inflexible instructions from Turin.[8] The revolt was finally touched off when the Sardinians, after repelling a French invasion attempt in 1793 and thereby, so they thought, demonstrating their loyalty to

---

which looks especially at the north), and Davis 2006 (which traces developments in southern Italy). Among them these three also provide extensive bibliography.

7 Raspi 1971, p. 793.

8 Sotgiu 1984, p. 25.

Savoy, issued the "Five Requests" to Vittorio Emanuele III. These were an attempt to regain their traditional political and administrative privileges, and to render administration of the island more in line with practices elsewhere in the Kingdom. Although the Five Requests could hardly be called revolutionary, Vittorio Emanuele rejected all of them. In the wake of this rejection, over 500 Savoyard administrative officers were rounded up in Cagliari, put on a boat, and ferried back to the mainland. The revolt spread to elsewhere on the island, and Giovanni Maria Angioy emerged as one of its leaders. It was curtailed in 1796 after loyalist forces gained additional support following the Treaty of Paris, and Angioy was forced to flee to France, where he continued to agitate for French annexation of the island. Sardinia remained under Savoyard control, and although there were several more feudal uprisings until 1821, an altered aristocratic governance was restored and links with the mainland strengthened, culminating in the Perfect Fusion of 1847.

The Kingdom of Sardinia benefitted from the Treaties of Paris of 1814 and 1815, the latter of which finally brought an end to the French Revolutionary and Napoleonic Wars. In 1814, the Republic of Genoa was added to the Kingdom of Sardinia and two-thirds of the Duchy of Savoy was returned, and a year later the remainder of Savoy was restored. Once the monarchy regained its position after its exile in Cagliari, its policies were reactionary.[9] Vittorio Emanuele I withdrew the *Code Napoléon*, returned lands to the nobility and to the Church, and entrusted the Jesuits with many institutions of education and afforded them censorship privileges.[10] Liberals and others in Piedmont resented these policies and instead were increasingly attracted to some of the positions of the Carbonari, especially in regard to the necessity of a constitution.[11] The heir apparent, Carlo Alberto, seemed to support this position, and in March 1821 the revolt that had begun in Naples arrived in Turin. Vittorio

9 Lo Faso di Serradifalco 2016.

10 For a fuller description of Vittorio Emanuele I's efforts to stamp out any change from the ancien regime, cf. Laven, 2000, p. 55 and the relevant bibliography.

11 A complex movement that gained ground throughout the peninsula in the wake of the Congress of Vienna, the Carbonari were drawn from many levels of society and unsurprisingly differed to some degree in their views. Some wanted a radical redistribution of land through an agrarian law, while others from the landowning classes favored, if not a full-fledged republic, a constitution that would bind any particular monarch; many of these landowners had obtained their property from land sales during the period of French occupation. Cf. Rath 1964 and Romani 1950, 9-15; for the Carbonari in France, cf. Spitzer 1971.

Emanuele I abdicated in favor of his brother, Carlo Felice, and made Carlo Alberto regent until his brother returned from Modena. Carlo Alberto proclaimed that the Spanish Constitution of 1812, which would have abolished feudalism and provided for universal male suffrage, would go into effect upon the approval of the absent king, but Carlo Felice refused the action.[12] Carlo Alberto eventually submitted to Carlo Felice, and the latter returned to Turin secure in his position.

Carlo Felice recognized that attempting to reestablish the ancien regime in its entirety would have been catastrophic, and there were moderate reforms throughout the 1820s.[13] There were disturbances throughout the peninsula in the 1830s, owing to the effects of economic hardship and, to perhaps a lesser extent, nationalistic movements elsewhere in Europe, but more drastic change came in the 1840s.[14] The Perfect Fusion of 1847 abolished differences in governmental administration between the island of Sardinia and the mainland, thereby sweeping away many of the institutions and practices that had characterized life on the island since Spanish rule. This came as certain well-positioned Sardinians started to see the Spanish institutions as a major hindrance in light of the administrative reform that had been taking place on the mainland. When the last viceroy departed the island in early 1848, Sardinia was split into three administrative provinces, each ruled by a prefect on the model in place on the mainland since 1815. Although this move was called for by certain Sardinian elites, the result was in large part the further marginalization of the island within the Kingdom of Sardinia, which led many proponents of the initiative later to regret their role in it.[15]

In the immediate aftermath of the Perfect Fusion came the Statuto Albertino of 4 March 1848. This provided the constitutional and legal basis on which the Kingdom of Sardinia was to be administered, and remained in force, with modifications, until 1948. The Statuto was not promulgated at a time of political calm in Italy by any means, and nor did it quell the unrest, drawing the ire of the Church especially.[16] It is beyond the scope of this chapter to detail the happenings of 1848-1849 across Italy, but in closing this historical sketch we must note that this display of constitutional intent by the

12 On the Spanish Constitution of 1812, cf. Schmidt-Nowara (ed.) 2012.

13 Laven 2000, p. 56.

14 Laven 2000, p. 59-61.

15 Siotto Pintor 1877, p. 476-477.

16 Cardoza 2000, p. 118-119.

monarchy in Piedmont changed the political situation by sufficiently aligning monarchic and liberal programs.[17] The economic reforms of the subsequent decade made Piedmont the most commercially powerful state in Italy. These factors led many to migrate to Turin, and this in turn fueled the nationalist and liberal movements in the state, which would come to the fore at the end of the decade.

2. The Corporation by the late 18th century

Now that we have recalled the political events in the Kingdom of Sardinia and neighboring polities during the period of our study, we turn to the history of the corporation. The object of this section is to convey the many forms and ends of corporations across time, and especially to demonstrate that commerce was far from the sole or even primary motivation to incorporate throughout much of western history, in contrast to what quotidian usage today may suggest. That being said, one or several forms within this multitude predominated during any particular period, as we will discuss, and so the colloquial reduction in the term's scope today is not unprecedented. In tracing the emergence of a predominant usage at any one point in time, we will take account of the larger intellectual and political economy developments which these usages reflect. Fortunately, we have a fair bit of evidence for these developments during the period of primary interest to us, as we will examine below.

When many of us hear the familiar word "corporation," the idea of a for-profit enterprise designed to maximize share holder value comes to mind. We certainly recognize a number of variations from this idea, but in many circumstances, this is the default conception of a corporation. Of the two elements of this conception, the drive toward commercial profit and share holder primacy, the former only became a characteristic of some of the most well-known corporations more than a millennium after the first such entities, and the latter is a product almost entirely of the last century.[18] The origins of the

17 Davis 2000, p. 13.

18 Sneirson has documented the history of shareholder primacy extensively. His most recent treatment admirably excavates not only the relationships between shareholder primacy and sympathetic doctrines, but also the assertion, which he correctly points out is false, that corporate law, at least in the United States, all but requires a dedication to shareholder primacy (Sneirson 2019; cf. also Stout 2013). In the United States, this norm was given a strong boost by the decision of the Michigan Supreme Court in *Dodge v. Ford*

corporation are to be found at Rome. Although it is very likely that groups of citizens came together already in the first years of the Republic, whose founding is traditionally dated to 509 BCE, to contract with organs of the "state," the first detailed evidence we have of such an arrangement dates to 215 BCE.[19] Our evidence for Roman history from the late third century BCE to the first century CE makes clear that although their dealings with the state would occasionally revert to hostility, the *societates publicanorum* (sing. *societas publicanorum*) or "companies of publicans," were integral to the workings of the Roman empire, performing crucial administrative tasks. They famously make appearances in several of the Gospels as tax collectors, portrayed in less than the most favorable terms.[20]

There are other documents that give a more complete picture of their tax-collecting operations. One example is the *Customs law of Asia*, an inscription dating to 62 CE that was lost sometime later and discovered in 1976 in Ephesus, Turkey.[21] This document consists of provisions passed by Roman magistrates, including the emperor, which spell out how taxes were collected in the Roman province of Asia Minor (modern-day Turkey). It attests to the power of the *societates* in the Roman world, and indicates their symbiotic relationship with the Roman state and, relatedly, their corporate structure.[22] Although some studies have seen far more similarities to later corporations than the ancient evidence will bear, a Roman juristic source specifies that by the time of the high Empire (2nd century CE), the *societas* had property, a trea-

---

in 1919, but the doctrine had questionable reach before this landmark decision (Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)). The growth of this doctrine was closely connected to developments in the United Kingdom, where too the evidence of a financializing conception of the corporation was unmistakable (cf. Moore 2018).

19 For a discussion of these very first arrangements, cf. Badian 1972, p. 16. The coherence and capacity of political and other civil institutions in the early Roman Republic is an issue of perennial debate among ancient historians.

20 Cf., *inter alia*, Luke 3:12-14; 5:27-28; and 18:9-14. These were the most consequential of the Roman corporations.

21 The most complete publication of the text and a translation, along with an explanatory introduction and several analytical essays, is Cottier et al. 2008.

22 Cf., respectively, lines 40 to 42 and 67 to 68, lines 56 to 58, and lines 74 to 78 of the text of the inscription for specification that the *societates* were allowed to use state resources in performing their duties, that they were the only organizations licensed to collect taxes, and that they were except from the terms of the very law.

sury, and an agent distinct from those of its members.[23] Crucially, this source likens these aspects of the *societas* to the state, which at this time in Roman history was an autocracy. We see similar tendencies in the *Customs law of Asia* to structure the *societas* as a singular entity, especially in its dealings with the state. This relation of the corporation to a state is powerful evidence of the development in Roman political thought, if not in legal doctrine, of the notion of corporate personhood.[24]

In the medieval period there emerged a corporation that would exercise great influence over the development of the corporate form and over debates regarding its nature. That institution was the medieval Church. The Church came to be discussed as something different from those corporations that had preceded it or existed alongside it. No picture of the medieval world is complete without mention of the constantly negotiated arrangements between the papacy, the holy orders, kings, nobles, imperial outposts, and independent polities, not to mention the various autonomous or semi-autonomous interstices. The power dynamics of this reality bear directly upon how the Church came to be conceived of in corporate terms, as there arose the question of whether the power of the Church derived from the Church itself, or from the various self-sufficient bishoprics, abbeys, and monasteries. To put this another way: to what extent did the Church exist, as far as the faithful of any one place were concerned, beyond the affairs of the local bishop?[25] If the ultimate authority was to be found in Rome, and here we must stress the distance from the center of some Christian communities, then certainly a greater feat of mental concentration and understanding of structure was required, and with it a more nuanced theory of delegation. From here it is not a stretch to see how an interest in the potentially numinous nature of the corporation grew.

---

23 *Digest* 3.4.1.1. Cf. esp. Malmendier 2009 for several of the most pervasive anachronistic claims regarding the complexity of the *societates*, including that shares in these companies were traded on an exchange, which the ancient evidence cannot support.

24 Cf. lines 133 to 135 and 140 to 143. Appreciation of the stature of the *societates* in the *Customs law* also allows us to see that these corporations were powerful well into the first century CE, which is to say solidly within the classical period of Roman law. We should understand them as influencing Roman ideas of contract. Maitland (1913, p. xviii) remained unconvinced that the Romans developed a legal notion of corporate personhood, and indeed it does not seem that there were instruments to ensure the survival of the corporation beyond the death of its members.

25 For a discussion of these and related questions, cf. Tierney 1998.

Such an interest is certainly of accord with Pope Innocent IV's suggestion of the existence of a legal *persona*, and indeed jurists became invested in the thirteenth and fourteenth centuries in questions of a potentially operable corporate personhood that transcended the individual members.[26] As mentioned above, Roman jurists had already recognized certain aspects of the corporation that distinguished it from its various members, but there had not been consideration of the implications of endowing a collection of individuals with its own quasi-permanent legal status beyond certain transactions or the lives of certain members. Nor had the question of exactly what sort of status this was been taken up: did the corporation exist as a separate entity apart from the individuals who composed it, or was it an amalgamation of those individuals that nevertheless could express its own preferences, at least in some general sense? At stake in the debate over how to conceive of corporations, and especially over whether to conceive of them as fictive persons, were the sorts of rights and responsibilities that should be conferred upon them, and the manner in which this should be done. It follows from the fact that a corporation cannot die in the way of human beings that certain other expectations relating to social interaction may have to be changed.[27]

The municipal corporation is also of great importance to this history, and was in fact the most commonly formed corporation throughout the medieval and early modern periods.[28] This corporation offered its members various privileges, especially through the legal norms that governed its space, with the result being that this corporation constituted a societal form as well as a body politic or a commonwealth.[29] The municipal corporation often claimed political and legal standing based not on charter but on custom. In this context, the writing of local histories was a decidedly political act, and municipal officials often archived those documents that gave the corporation recognition in law.[30] The types of legal action undertaken by municipal corporations differed to some degree from that of other types of corporations, and its territorial confinements were crucial to its character. The political aspects of this character ensured that it too was fertile ground for figurative thought.[31]

26 Bus 1988.

27 On this and related questions, cf. Seipp 2012.

28 Stern 2017, p. 23-24.

29 Withington 2010; Stern 2017, p. 24.

30 Patterson 1999, p. 70. For a discussion of these ideas in Renaissance Italy, cf. Varanini 2012.

31 Turner 2016.

The guild was also an extremely consequential corporate form in the medieval period. Over the course of these centuries, as ideas of commercial partnership that had come into form around the Mediterranean moved into northern Europe and were interpreted in the terms applied to the corporations already present there, municipalities and religious bodies defended their legal privileges by insisting that they were different from such commercial ventures. This discussion, by relating other types of collective undertaking to those already present but still maintaining differentiation, broadened notions of the corporation to include guilds.[32] In much of Italy, these entities were not by any means only commercial, but indeed have been seen as indispensable to an increase in participation in local government and the formation of the *popolo*.[33] Scholars usually distinguish between merchant guilds and craft guilds, and hasten to assert that guild characteristics and practices varied greatly across time and space.[34]

Merchant guilds enforced contracts between members and non-members. Through the coordination of the affairs of their members, they were able to organize boycotts of certain ports where rapacious political authorities seized the goods or money of merchants; this deprived rulers of critical tariff revenue, and was a powerful bargaining strategy. The corporate structure of guilds did not protect the property of individual merchants in all cases, however. In certain instances when one member did not pay a debt in a foreign port, all of the members of the merchant guild could be held liable and their goods seized to cover the shortfall. Recompense would be sought from the offending merchant upon return to the home market, but we clearly see here the give-and-take of collective negotiation.[35] Craft guilds were organized around particular trades. Manufacturers made durable goods such as textiles and metal wares, and exported them when profitable. Some guilds, such as those of clerks or actors, sold skills and services. Still others, known as victualers, bought and sold agricultural products. There has been much debate as to the control exercised by specific guilds in various times and places, but for centuries they

32 Laski 1917, p. 578; Tierney 1998.

33 Mineo 2012, p. 327-333.

34 There is an immense literature on the history of the guilds. For an up-to-date bibliography of the major titles, cf. Ogilvie 2019; p. 1-34 are helpful in spelling out some of these variations. For a summation of the debate over whether guilds spurred or hindered technological development in European history, cf. Prak and van Zanden 2013.

35 Cf. Thrupp 1989 for a sustained discussion of the relations between these commercial elements and other prominent groups in medieval English society.

remained powerful economic actors when they were able to control entry into certain professions, coordinate the activities of their members, and bargain with political officials.[36]

The guilds certainly retained their importance well beyond the end of the medieval period. Indeed, the guilds were not abolished in the Kingdom of Sardinia until 1844, and lasted at least until the end of the 18th century elsewhere in Italy.[37] The commercial practices of guilds, including their monopolistic control over certain industries and their collective ownership of property, among others, have led some scholars of the early modern period to see them as the precursors of the joint stock corporation.[38] By the 16th century, the corporation was used increasingly, though by no means exclusively, to organize commercial activity, and the joint stock company was a way to coordinate increasingly ambitious commercial and political aims. An innovation of this corporate form was to fund such endeavors with capital from people beyond just those associated with the business of the company.[39]

The relationship between the joint stock company and the state was a fluid one, but one commentator at least has stressed as fundamental the insistence on the part of several joint stock companies that they not be subsumed within the state apparatus.[40] The joint stock company elided elements of a collectivity, the *societas*, as well as those of a unitary *persona*, the *universitas*. The joint stock company also had many executive and administrative roles, including, depending on the parlance of the particular firm, directors, governors, shareholders, subcontractors, and, if the company undertook colonization and governance, settlers and subjects. Among the many differences between the early modern joint stock company and 21st-century ventures is the

36 Cf. Richardson 2001 and Hatcher and Miller 1995 for two discussion of the power of guilds to influence local economic conditions, and Ogilvie 2019, p. 36-82 for an overview of the interactions between guilds and local governments.

37 Caligaris 1998 shows the interactions between guilds and other social organizations in the Kingdom of Sardinia, and how those interactions evolved in the context of 18th-century commercial change.

38 Scott 1912, p. 1.2-8; Cooke 1950. Of the several other types that could be added to this survey of corporations, the university was frequently discussed in early modern treatises on the topic; cf. Stern 2017, p. 24, who notes their importance to Blackstone, and to Coke before him.

39 Cf. Stern 2017, p. 25 for an indication of the broad social basis of such funding.

40 Maitland (1913, p. xxi-xxii) points especially to the Bank of England and the East India Company.

process of chartering such a company. This process was political rather than administrative, with the result that incorporation remained a sovereign prerogative rather than an individual right. The significance of this distinction is that, during the early modern period, those who wanted to form a corporation were often obliged to argue how such a charter would benefit the state. This was not always required, but at times a prospective corporate venture had to highlight the advantages it would confer on the populace at large.[41] The *de facto* power of many corporations meant that keeping a charter came to function as a right, and some argued that legally this was true as well.[42]

So what then is the picture of the corporation by the late 18th century that emerges from consideration of its long history? An impression is best gained by looking at the characteristics, the capabilities, and the purposes of different examples. In terms of the characteristics of the corporation, it collected the interests of many people into one entity in order to advance the goals or protect the position of those people who judged this the most efficacious mechanism. The effectiveness of this mechanism was due to the legal recognition it received, as well as the fact that it existed beyond the lives of any particular members. It had wide-ranging capabilities, including the right to own and administer property, the capacity to control and govern territory, and certainly the ability to bargain effectively with the state to maintain its privileges and advance its interests. The purposes for which various corporations were formed were also many. Alongside the profit motive that is most familiar to us, groups of people chose to incorporate to advance educational, religious, charitable, and administrative interests. The importance of commerce within this list undoubtedly grew over the centuries, but the interrelation of these large societal phenomena counsels against seeing any particular corporation, especially one dealing in a meaningful way with real property, as solely concerning itself with one of the items on this list.

3. Real property, politics, and corporations

Now that we have considered the history of the Kingdom of Sardinia and that of the corporation, we are in good stead to see how these two histories

41 A general incorporation law would eventually do away with this in many countries. For a treatment of the main intentions of such laws in many contexts, cf. Atack 2014, esp. p. 557-558.

42 Cf. Stern 2017, p. 26

interact, and to form judgments about three elements of these interrelated developments. First, we will juxtapose the characteristics of certain types of corporations to demonstrate that in fact the peasant collective should be considered as a kind of corporation. Second, we will show that this consideration affords us a better understanding of the politicization of real property in the Kingdom of Sardinia, especially in the years surrounding the French Revolution. And third, we will see that developments in the years after 1815 suggest a change in the dominant conception of the corporation.

In considering the history of the corporation, the deep similarities between types of corporations that we classify as different emerge. The corporate form evolves from gradual adjustment and discussion, and so it is unsurprising that some elements between different forms would be familiar or that later forms would divide out or build upon the characteristics of earlier forms, and we should not think of these forms as by any means hermetically sealed from one another.[43] The dominant notion of the corporation can change, but nonetheless there may remain some similarities across different corporate types that we should be open to observing. The peasant corporation combines elements of a municipal corporation and a guild, while retaining some unique characteristics. We will have to triangulate this argument by describing the aspects of the municipal corporation and of the guild that the peasant corporation preserves, and then specifying its unique elements. I cannot offer absolute proof of this, but it is my hope that this suggestion will prove interesting and useful in thinking about the corporate form and real property across history.

In terms of the similarities of the peasant corporation with a municipal corporation, we stress first that both had administrative power over the lives of the people in an area, and that participation in the corporation was not discretionary if one wished to live in that area. This phenomenon contributed to the great jurisdictional plurality in many early modern states, although, crucially, the peasant corporations were formed in the wake of the establishment of a fief and did not have the same level of control as municipal corporations over the space in which they functioned.[44] Both also created political community, by fostering personal interaction and organizing the actions of

43 Recall that the new commercial corporations that moved to northern Europe were rendered different from but intelligible in terms of municipal and religious corporations. The joint stock company is especially multivalent.

44 For a description of the powers of different actors over the affairs of a fief, cf. Cengarle 2012, p. 295-300.

their inhabitants in dealings with political authorities. In addition to their functioning, we can look to their origins to see some similarities between a municipal corporation and our peasant corporation. Corporations of each type may or may not have had clear moments of inception, but custom was fundamental in both cases.

As we have seen, the writing of local histories was meant to bolster the recognition that municipal corporations customarily received, and was certainly a political act. I contend that we observe a similar practice in the context of the peasant corporation, namely the creation of a feudal archive, kept especially to record debts. The two forms of documentation have their differences, but from the standpoint of the establishment and operation of the entity in question, they share many similarities, such that the archive should be considered a form of historical documentation. Historical documentation need not produce a bound volume, nor must it be in the service and interest of the members of the corporation it is meant to enshrine. These peasant corporations were by-products of the creation of noble positions, and such positions required these archives. This reality means that the peasant corporation protected to some degree the rights of peasants within the political economy of the ancien regime, but the peasants likely would have favored the dissolution of the corporation in the context of a different political economy altogether.[45] Would that we knew what was contained in them in more detail, but the peasants burned the archives in many parts of Sardinia in 1790, no doubt in an attempt to cripple the debt relationships that sustained this system.

The peasant corporation shares some similarities with the guild as well. The peasant corporation controlled agricultural production within its domain, much as craft guilds monopolized the production and merchant guilds the distribution of certain wares. Again, the creation of these privileges and the means of perpetuating them will have been different between the two forms, but their place in the structure of a local economy may have been quite similar. Crucially, guild members also pooled resources in their dealings with governments as we have seen. We do not have much information on how members of the peasant corporation determined the use of communal land, but there must have been internal reconciliation when collective resources went toward payment of indemnification for individuals, perhaps in a manner not dissimilar from how other members of the guild paid outstanding

45 For a treatment of the emergence of estates and nobility in the centuries preceding our period, cf. Marino 2007 and Cengarle 2012.

debts in foreign markets amassed by certain individual merchants. It would be fascinating to know how decisions regarding the use of this communal land were reached, and procedures must have varied widely.

The proximity of the peasant corporation to these and other corporate forms will have changed over time, especially as the nature of the state, with which they all interacted, underwent such change in the 18th and 19th centuries. Some of these corporate forms adapted and changed, and others died out. But what is different about the peasant corporation at this time? In terms of membership in the corporation, there is only so much land within a given community, and this cannot be divided up past a certain point, nor a later offering made. Additionally, the fact that this property is immovable would make difficult the affairs of anyone living in the area and not wishing to participate in the corporation, and so there was less commercial discretion. This must account for the reality that membership was confined to one stratum of society, but must have affected many in that stratum in some locations.[46]

Focusing on the membership of the peasant corporation allows us to judge its role in the politicization of real property. This corporation like others was a marker of the ancien regime, an example of a privilege recognized or created by the state to control a trade or the administration of an area. Of course, the peasant corporation depended upon a feudal setting as we have said, but interpreting feudalism in this light is instructive; the lens of the corporation affords us a far better understand standing of the dynamics of *mainmorte* on feudal estates. As the ancien regime came under pressure, so too did many domestic expressions of the corporate form, especially those that kept in place such a system of land ownership.[47] The politics of real property is not only who owns or has the right to own land, but how it is administered and the rules governing its use. Therefore, the political project in the years surrounding the French Revolution was about changing the internal rules of corporations regarding how land was administered, through redistribution and administrative standardization, away from the particularism of any one corporation. However, initiatives that affected the whole polity in the realm of the administration of real property could cut both ways. Apart from the

46 For a discussion of this question in the German context, cf. Sagarra 1977, p. 140-154. In terms of the framing of questions related to corporate participation, cf. Kaplan 1986.

47 For an interesting case from Lille where guilds were not suppressed as elsewhere, cf. Bossenga 1988.

immediate context of its destruction during the French Revolution and brief resuscitation after 1815, the ancien regime was not entirely static in regard to private property.[48] In the decades leading up to 1789, a great deal of communal property was privatized, with the result that many peasants lost access to village commons and other lands. This continued on the island of Sardinia with the Enclosures Act of 1820. The removal of such lands was a fundamental change in the system underpinning the peasant corporation, and this, combined with the effects of the abolition of *mainmorte*, led to its end.

With recognition that we are dealing with a complex and ever-shifting phenomenon and that much more work is required to firm up such an assertion, this chapter seeks also to propose the idea that developments in the wake of 1815 were fundamental not only in bringing about the end of the peasant corporation, but also in prompting a change in the predominant understanding of a corporation away from one almost necessarily including some element of governance and toward a primarily commercial conception. As the state asserted itself more forcefully after these years, corporations acted less and less as bodies politic, guilds were eventually abolished, and those corporations that were constituted increasingly asserted commercial ends. This gained an impetus from general incorporation laws in many countries, and is related as well to distinctions made between domestic administration on the one hand, and the governance of Europe's overseas empires on the other.

4. Conclusion: regionalism after 1815 and after 1848

In this concluding section, we will briefly consider the actions of the restored monarchy after 1815 in terms of what they can tell us about regionalism in the Kingdom of Sardinia through 1848 and in the Italian state after 1861, and about the relationship between political change on the one hand, and development in the institutions of real property on the other.

Our main point here is that the actions undertaken in Turin after 1815 ironed out many of the administrative differences across regions within the Kingdom of Sardinia, and that the more unified polity thereby created would in some regards manifest itself as a region once Italy was united, albeit with certain differences after 1861. To a great extent this uniformity excepted the

48 There has been a great deal written about this legislation and the related intellectual movements, especially physiocracy, among which see the articles in Kaplan and Reinert 2019 for up-to-date bibliographies, and Reinert 2019 for a treatment of these issues in Italy.

island of Sardinia, but the fact that real property administration on the island was still changed after 1815, culminating in the Perfect Fusion in 1847, was crucial to doing away with the peasant corporation through the abolition of communal land. The restored monarchy was of course hostile to many of the goals of the revolutionary and Napoleonic years, and could draw on a base of resentment toward France.[49] Nevertheless, the lens of the corporation allows us to see similarities in the initiatives both of revolutionaries and of monarchists toward centralization and standardization after 1789. That being said, the restored monarchies did try to reconstitute some of the corporate privileges that had existed before the end of the 18th century, but this was done in a manner entirely different from that in which the system of corporations emerged before 1789. In fact, the granting of these privileges all at once had a valence, in terms of the power dynamics between the state and these corporations, counter to the negotiated and variegated foundation of such corporations initially, where the state acknowledged that it needed these corporate entities to govern. The position, therefore, of these corporations vis-à-vis the state had changed at its core. Of course, the state did still need these entities in many ways, but the unilateral reinstatement of privileges was different not only aesthetically from the initial negotiation of them centuries before. Indeed, it gestures toward the notion that the state is rather more necessary for commerce the closer to capitalism we come.

In carrying out this administrative standardization, the House of Savoy took cues from other polities, and the decision of what model to use rested on historical affinities and traditional connections over the border in France. We can see the connections between Turin and France in the use of the French provincial model to administer the island of Sardinia, and indeed that Savoy had been an integrated as a *Département* after 1792. The promulgation of the *Code Napoléon* after 1806 will only have deepened these long-standing commonalities. Although certain areas within the Kingdom of Sardinia had historically looked more toward and more like southern France than others, Turin's actions after 1815 brought some measure of standardization to the Kingdom of Sardinia. This standardization did not extinguish the gaze of the House of Savoy, however. Napoleon spurred nationalist feeling throughout the Italian peninsula of course, and increasingly in the decades following 1815 attentions in Turin were pulled south. After the Risorgimento, redrawn national boundaries did not dissolve regional particularities, but did alter at-

49 Broers 2001.

tempts to define identities by reference to other polities. In these years, only parts of what was the Kingdom of Sardinia looked across national lines to the north and west again, in a manner suggesting that some aspects of the regionalism of that by now by-gone polity had only been papered over.[50] Other areas looked to Florence and then to Rome.

Lastly, we should consider that the monarchy's restoration of ancien regime privileges after 1815 may to some degree have been an economic necessity, pointing to the idea that political forms can more easily be changed than can the underlying mechanisms of real property transfer and administration. It was political more than real property institutions that experienced whiplash and chaotic upheaval over these years. The momentum that eventually changed these real property institutions required a great deal of time to swell, such that even after 1815 many trappings of the ancien regime system carried on. What makes this particular period of politicization so interesting is that one type of corporation deeply related to these institutions seems finally to have been abolished, even if it generated far less excitement than the political turmoil of the moment.

Bibliography

Atack 2014 = J. Atack, *America: capitalism's promised land*, in L. Neal and J.G. Williamson (ed.), *The Cambridge History of Capitalism*, Cambridge, 2014, p. I.533-573.

Badian 1972 = E. Badian, *Publicans and Sinners: Private Enterprise in the Service of the Roman Republic*, Ithaca, NY, 1972.

Barbero 2012 = A. Barbero, *The feudal principalities: the west (Monferrato, Saluzzo, Savoy, and Savoy-Acaia)*, in A. Gamberini and I. Lazzarini (ed.), *The Italian Renaissance State*, Cambridge, 2012, p. 177-196.

Blum 1978 = J. Blum, *The End of the Old Order in Rural Europe*, Princeton, NJ, 1978.

Bossenga 1988 = G. Bossenga, *Guilds and the French Revolution: Three Examples from Lille*, in *Annales* 43, 2, 1988, p. 405-426.

Broers 2001 = M. Broers, *Cultural Imperialism in the European Context? Political Culture and Cultural Politics in Napoleonic Italy*, in *Past & Present* 170, 1, 2001, p. 152-180.

Broers 2017 = M. Broers, *The Napoleonic Mediterranean: Enlightenment, Revolution and Empire*, London, 2017.

50 Of the many indications of this, we can point to international capital flows involving Italian banks in the 19th and early 20th century; cf. Spinelli and Fratianni 1991.

Bus 1988 = J.P. Bus, *Law, sovereignty and corporation theory 1300-1450*, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350-1450*, Cambridge, 1998, p. 341-366.

Caligaris 1998 = G. Caligaris, *Trade Guilds, Manufacturing and Economic Privilege in the Kingdom of Sardinia during the Eighteenth Century*, in A. Guenzi, P. Massa, and F.P. Caselli (ed.), *Guilds, Markets and Work Regulations in Italy, 16th–19th Centuries*, Aldershot, 1998, p. 56-81.

Cardoza 2000 = A. Cardoza, *Cavour and Piedmont*, in J.A. Davis (ed.), *Italy in the Nineteenth Century*, Oxford, 2000, p. 108-131.

Cengarle 2012 = F. Cengarle, *Lordship, fiefs and 'small states'*, in A. Gamberini and I. Lazzarini (ed.), *The Italian Renaissance State*, Cambridge, 2012, p. 284-303.

Clark 1995 = S. Clark, *State and Status: The Rise of the State and Aristocratic Power in Western Europe,* Montreal, 1995.

Cooke 1950 = C.A. Cooke, *Corporation, Trust and Company: An Essay in Legal History*, Manchester, 1950.

Cottier et al. 2008 = M. Cottier, M.H. Crawford, C.V. Crowther, J.-L. Ferrary, B.M. Levick, O. Salomies, and M. Wörrle, *The Customs law of Asia*, Oxford, 2008.

Davis 2000 = J.A. Davis, *Introduction: Italy's difficult modernization*, In J.A. Davis (ed.), *Italy in the Nineteenth Century*, Oxford, 2000, p. 1-24.

Davis 2006 = J.A. Davis, *Naples and Napoleon: Southern Italy and the European Revolutions 1780-1860*, Oxford, 2006.

Grew 1999 = R. Grew, *Finding Social Capital: The French Revolution in Italy*, in *The Journal of Interdisciplinary History* 29, 3, 1999, p. 407-433.

Hatcher and Miller 1995 = J. Hatcher and E. Miller, *Medieval England: Towns, Commerce and Crafts, 1086-1348*, London, 1995.

Kaplan 1986 = S.L. Kaplan, *Social Classification and Representation in the Corporate World of Eighteenth-Century France: Turgot's 'Carnival'*, in S.L. Kaplan and C.J. Koepp (ed.), *Work in France: Representations, Meaning, Organization, and Practice*, Ithaca, NY, 1986, p. 176-228.

Kaplan and Reinert 2019 = S.L. Kaplan and S.A. Reinert (ed.), *The Economic Turn: Recasting Political Economy in Enlightenment Europe*, London, 2019.

Laski 1917 = H. Laski, *The Early History of the Corporation in England*, in *Harvard Law Review* 30, 6, 1917, p. 561-588.

Laven 2000 = D. Laven, *The age of Restoration*, in J.A. Davis (ed.), *Italy in the Nineteenth Century*, Oxford, 2000, p. 51-73.

Lo Faso di Serradifalco 2016 = A. Lo Faso di Serradifalco, *Una storia oscurata: Piemonte 1813-1821*, Turin, 2016.

Maitland 1913 = F.W. Maitland, *Introduction*, in F.W. Maitland (trans.) and O. von Gierke, *Political Theories of the Middle Ages*, Cambridge, 1913, p. vii-xlv.

Malmendier 2009 = U. Malmendier, *Law and Finance at the Origin*, in *Journal of Economic Literature* 2009, 47, 4, p. 1076-1108.

Marino 2007 = J.A. Marino, *The Rural World in Italy under Spanish Rule*, in T.J. Dandelet and J.A. Marino (ed.), *Spain in Italy: Politics, Society, and Religion 1500-1700*, Leiden, 2007, p. 405-429.

Mineo 2012 = E.I. Mineo, *States, orders and social distinction*, in A. Gamberini and I. Lazzarini (ed.), *The Italian Renaissance State*, Cambridge, 2012, p. 323-344.

Moore 2018 = M.T. Moore, *Shareholder primacy, labour and the historic ambivalence of UK*

company law, in H. Wells (ed.), *Research Handbook on the History of Corporate and Company Law*, Cheltenham, 2018, p. 142-169.

Ogilvie 2019 = S. Ogilvie, *The European Guilds: An Economic Analysis*. Princeton, NJ, 2019.

Patterson 1999 = C.F. Patterson, *Urban Patronage in Early Modern England: Corporate Boroughs, the Landed Elite, and the Crown, 1580-1650*, Stanford, CA, 1999.

Prak and van Zanden 2013 = M. Prak and J.L. van Zanden, *Introduction*, in M. Prak and J.L. van Zanden (ed.), *Technology, Skills and the Pre-Modern Economy*, Leiden, 2013, p. 1-22.

Raspi 1971 = R.C. Raspi, *Storia sella Sardegna*, Milan, 1971.

Rath 1964 = J. Rath, *The Carbonari: Their Origins, Initiation Rights, and Aims*, in *The American Historical Review* 69, 2, 1964, p. 353-370.

Reinert 2019 = S.A. Reinert, *"A Sublimely Stupid Idea": Physiocracy in Italy from the Enlightenment to Fascism*, in S.L. Kaplan and S.A. Reinert (ed.), *The Economic Turn: Recasting Political Economy in Enlightenment Europe*, London, 2019, p. 699-733.

Richardson 2001 = G. Richardson, *A Tale of Two Theories: Monopolies and Craft Guilds in Medieval England and Modern Imagination*, in *Journal of the History of Economic Thought* 23, 2, 2001, 217-242.

Romani 1950 = G.T. Romani, *The Neapolitan Revolution of 1820-1821*, Evanston, IL, 1950.

Sagarra 1977 = E. Sagarra, *A Social History of Germany: 1648-1914*, London, 1977.

Schena 2012 = O. Schena, *The kingdom of Sardinia and Corsica*, in A. Gamberini and I. Lazzarini (ed.), *The Italian Renaissance State*, Cambridge, 2012, p. 50-68.

Schmidt-Nowara 2012 = C. Schmidt-Nowara (ed.), *Special Issue: Global Horizons and Local Interests in the Era of the Constitution of Cadiz*, in *Bulletin for Spanish and Portuguese Historical Studies* 37, 2, 2012.

Scott 1912 = W.R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint stock Companies to 1720*, Cambridge, 1912.

Seipp 2012 = D. Seipp, *Formalism and realism in fifteen-century English law: bodies corporate*
and bodies natural, in P. Brand and J. Getzler (ed.), *Judges and Judging in the History of the Common and Civil Law: From Antiquity to Modern Times*, Cambridge, 2012, p. 37-50.

Siotto Pintor 1877 = G. Siotto Pintor, *Storia civile dei popoli sardi dal 1798 al 1848*, Turin, 1877.

Sneirson 2019 = J.F. Sneirson, *The History of Shareholder Primacy, From Adam Smith Through the Rise of Financialism*, in B. Sjåfjell and C.M. Bruner (ed.), *Cambridge Handbook of Corporate Law, Corporate Governance, and Sustainability*, Cambridge, 2019; in University of Oslo Faculty of Law Research Paper No. 2019-11, retrieved on May 15, 2019, https://ssrn.com/abstract=3383405.

Sotgiu 1984 = G. Sotgiu, *Storia della Sardegna sabauda*, Rome, 1984.

Spinelli and Fratianni 1991 = F. Spinelli and M. Fratianni, *Storia monetaria d'Italia: l'evoluzione del sistema monetario e bancario*, Milan, 1991.

Spitzer 1971 = A. B. Spitzer, *Old Hatreds and Young Hopes: The French Carbonari against the Bourbon Restoration*, Cambridge, MA, 1971.

Stern 2017 = P.J. Stern, *The Corporation in History*, in G. Baars and A. Spicer (ed.), *The*
Corporation: A Critical, Multi-Disciplinary Handbook, Cambridge, 2017, p. 21-46.

Stout 2013 = L.A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return*
of Managerialism (in the Closet), in Cornell Law Faculty Publications, Paper 865, retrieved on May 15, 2019, http://scholarship.law.cornell.edu/facpub/865.

Thrupp 1989 = S. Thrupp, *The Merchant Class of Medieval London, 1300-1500*, Ann Arbor, MI, 1989.

Tierney 1998 = B. Tierney, *Foundations of the Conciliar Theory: The Contribution of the*
Medieval Canonists from Gratin to the Great Schism, Leiden, 1998.

Turner 2016 = H.S. Turner, *The Corporate Commonwealth: Pluralism and Political Fictions in England, 1516-1651*, Chicago.

Varanini 2012 = G.M. Varanini, *Public written records*, in A. Gamberini and I. Lazzarini (ed.), *The Italian Renaissance State*, Cambridge, 2012, p. 385-405.

Withington 2010 = P. Withington, *Society in Early Modern England: The Vernacular Origins of Some Powerful Ideas*, Cambridge, 2010.

LIST OF ABSTRACTS

Silvia Bagni, *The indigenous concept of land in Andean constitutionalism*
In the Western legal tradition, land and natural resources have always been considered as goods, the primary object of the right of property. Instead, for the Andean indigenous cosmovision, the relationship between Nature and Mankind has always been different: not of dominion, but of respect, harmony and coexistence. This ancestral worldview has recently influenced the national legal systems of some Latin American countries, producing interesting consequences: lands, rivers, hills, plants… are not considered objects any more, but subjects of rights, which could stand for their rights in the courts. The article explores this recent legal pattern.
Keywords: indigenous cosmovision; Latin America; *buen vivir*; territory

Charles Bartlett, *The politics of real property in the Kingdom of Sardinia, 1720–1848*
This chapter examines the relationships between political change and the administration of real property in the Kingdom of Sardinia through the lens of the history of the corporation. It argues that an appreciation of the dynamics of peasant corporations allows for a more complete understanding of these relationships, especially in the decades on either side of the French Revolution and occupation of Italy, and that events in these years fostered a change in the predominant conception of the corporation. It also draws a connection between the policies of the restored monarchy in regard to real property after 1815 and aspects of subsequent Italian regionalism. Finally, it provides indication that political forms are more easily changed than are underlying mechanisms of real property transfer and administration.
Keywords: real property, corporation, Kingdom of Sardinia, feudalism, territorial administration, regionalism

Paola Bianchi, *L'evasione fiscale come problema circolare nelle esperienze storiche: esempi della tarda antichità*.
This paper investigates the effects of tax fraud on the Late Antiquity's economy, especially with regard to the use of land. It argues that we can find specific means trying to solve the problem of abandoned lands (*agri deserti*) in different socio-economic contexts.
In this essay I argue that the analysis of a trial from 339 CE in Fayum led to relevant legal changes in the 4th century BCE, for example, by introducing procedural mechanisms, allowing to impose the possession of lands and the relative

fiscal burdens, known today as *praescriptio longissimi temporis*. In this context, I compare the constantly repeating models of social behaviour with some recurrent economic and fiscal problems: excessive taxation, tax evasion and attempts to fight. Analysing these late ancient phenomena, studied by the doctrine under different profiles, I argue that they may represent the persistence of answers to historically recurring problems.
Keywords: tax fraud; *agri deserti-praescriptio longissimi temporis*; a long-term possession

Pamela Alejandra Cacciavillani, *La influencia del Derecho Romano en la adquisición y en el sistema de transferencia en los derechos reales en el siglo XIX, Argentina*
At the end of the 19th century, the Cordovan jurist Dalmacio Veléz Sarasfield was appointed to carry out the arduous task of drawing up the Civil Code for the Argentine Republic. Among the various sources that can be found in its work, there is Roman Law. The objective of this work will be to analyse the imprint of the Roman juridical experience in a specific theme: the acquisition and the transfer of property rights. In order to address this issue, we propose an eclectic perspective that seeks to combine the different edges of the methodological lines that have been developed in Latin America at the time of studying the circulation of Roman Law in this space. It is especially intended to leave aside the idea of reception and to question how and by whom Roman Law was understood, interpreted and used in Argentina since the end of the 19th and 20th centuries.
Keywords: Dalmacio Veléz Sarasfield, Civil Code, Argentine Republic, Roman Law

Mariana Dias Paes, *Registro e colonialismo em Angola*
In this work, I analyse a judicial process that integrates the collection of the National Archives of Angola and concerns land conflicts in the Cazengo region. In this analysis, I undertake a "game of scales", that is, I try to show, through a concrete conflict, legal, economic and political relations worked by historiography, on a more general level. Through this micro-level analysis, I argue that it is possible to identify aspects of conflicts and the construction of colonialism that may go unnoticed by analyses that adopt a macro perspective. The predominant question is: how the introduction of a new legal institute - registration - in a colonial context has changed the dynamics of certain social relations and the configuration of land conflicts. By making use of these new legal institutes, both European settlers and people who were being expropriated from their lands ended up normalizing the new colonial system of rules.
Keywords: Angola, Registration, Colonialism, Judicial Processes, Possession, Property

Elisabetta Fiocchi Malaspina, *Tracing Social Spaces: Global Perspectives on the History of Land Registration*

The article presents some preliminary considerations concerning an ongoing project that investigates the mechanisms of land law and land registration systems in African colonial territories between the 19th and 20th centuries, focusing on the relationships between global, international and domestic laws in the imperial expansion and colonial periods.

It proposes to examine legal mechanisms of colonial expansion and to outline the discourses between the colonial powers and their implications on the legal concepts of land ownership both in the colonial and the European context. Case studies will provide detailed accounts from different land register systems as examples of how larger frameworks of these juridical practices evolved. The article will show that the discourses between the colonial powers and the adaptation of European legal concepts regarding property and land registration in the colonies facilitated the expansion and consolidation of colonial empires.

Keywords: colonial law, international law, legal history, land registration systems

Agustín Parise, *Contextualización iushistórica de la reforma agraria chilena (siglo XX)*

This article examines, from a legal-historical perspective, the agrarian reform experiences that took place in the Republic of Chile during the twentieth century. Firstly, it addresses the origins of the social function paradigm on both sides of the Atlantic Ocean. Secondly, it offers a conceptualization of the agrarian reform experiences that took place during the twentieth century, dealing with their origins and expansion, while focusing in Latin America. Thirdly, it describes the emergence of agrarian reform legislation in the Republic of Chile. This article ultimately aims to offer tools to understand and assess the Chilean experience of land reform and the resulting changes in ownership paradigm.

Keywords: Latin America, social function, legal history, ownership, paradigms

Alan Sandonà, *The "trascrizione" system in Italy from the end of the nineteenth century to the promulgation of the civil code (1942)*

This paper aims at reconstructing the history of the institute of "trascrizione" in Italy from the end of the nineteenth century to the promulgation of the civil code (1942) through the analytical examination of the preparatory works, the legislative choices and the doctrinal and official reform proposals on real estate advertising laws. The sources examined seem to support the hypothesis of a decisive switch in the function of the institute that upturning the principles passed down from tradition. All this in line with the new role the law has assigned to the protection of entrustment and with the public "interest" (also) in private deed

regulations, within the framework of the conception of the individual, the society, the State and their relations that have emerged since the end of the 19th century, which were reviewed during the First World War years.
Keywords: trascrizione, transcription, land registration, *reform proposals,* property rights public disclosure, Scialoja, Gianturco

Silvia Schiavo, *Transfer of Immovable Properties, Publicity and Land Law in the Age of Justinian: the Perspective of the Praetorian Prefect*
The research focuses on the problem of the transfer of ownership of land in the Justinian age, with particular attention to registration and publicity mechanisms. In this regard, first of all we must point out that Justinian's compilation does not contain specific rules. According to the principles accepted here, it is possible to state that for immovable things the corporeal *traditio* was not imposed, and that the application of the *constitutum possessorium* was widely permitted. Going beyond the compilation, however, a very interesting and detailed picture is outlined in the context of the normative of the praetorian prefects of the East. The prefectorial edicts (little known and studied by scholars) sometimes integrate imperial legislation, completing it through more detailed rules. The article will take into consideration, in particular, Nov. 167, an edict by the prefect of the East Bassus, dating back to 548. This edict was merged into the collection of Justinian's novels; we also know an epitome of the text, reported in the collection of edicts transmitted through Cod. Bodl. Roe 18. The edict provides important information about the entry into possession of land, occurring on the basis of a judicial sentence or a private act (gift, sale): the prefect requires the *sollemnis introductio locorum* as well as the presence of the *defensor civitatis*, who must arrange the *confectio gestorum*. These rules are probably linked to fiscal requirements, for which there was a strong need for publicity.
The article will outline the content of Nov. 167, discussing mainly the problem of the "originality" of his discipline: we will then proceed to the comparison with other prefectural edicts on the subject and with some imperial constitutions of Constantine on gift and sale, where similar rules are issued.
Keywords: Justinian age¸ *constitutum possessorium;* Praetorian Prefect; imperial constitutions of Constantine

Simona Tarozzi, *Land Grant in Late Antiquity: a pattern for Modern Colonial Regulations?*
Toward the end of the 19th century, an independent Chile experienced a fast-territorial expansion and established several colonies in the southern territories of Santiago, included Araucanía, where lived the Mapuche, a group of indigenous inhabitants of south-central Chile and southwestern Argentine. For this, the gov-

ernment in Santiago promoted a new colonial project. First, the Mapuche were persuaded to remise their land and to live in the cities; second, the Chilean government aimed to convince the European to settle in Chile by describing all benefits of a new life in South America. Many families, especially from Germany and Italy, chosen to live in Chile.
This paper aims to point out some similarities between Roman laws of the 4th century CE. regarding the long-standing issue of abandoned lands (*agri deserti*) and Chilean laws relating to remise and colonization of Mapuche's territory, especially the laws of 1866 and 1874.
Keywords: colonate, colonialism, abandoned lands, Chile, Later Roman Empire

LIST OF CONTRIBUTORS

Silvia Bagni (silvia.bagni@unibo.it) is Research Fellow in Comparative Constitutional Law at the Department of Law of the University of Bologna. She received her PhD in Constitutional Law at the same University and a MA in Bioethics at the UPRA (Università Pontifica Regina Apostolorum) of Rome. She has been nominated Expert for the *Harmony with Nature Program,* United Nations. She is author of "La questione incidentale nel controllo di costituzionalità. I sistemi italiano e spagnolo a confronto nel quadro dei modelli dottrinali (Bologna, 2007) and of "Il popolo legislatore" (Bologna, 2017). She has edited 14 books, the last released *Come governare l'ecosistema? - How to govern the ecosystem? - ¿Como gobernar el ecosistema?* (Bologna, 2018).

Charles Bartlett (charles.bartlett@duke.edu) is a postdoctoral associate in the History Department at Duke University. He works on Roman law and Roman political and economic institutions in antiquity, as well as the continuation of these traditions in later periods. He is the author of numerous publications in these fields, including "The *gens* and Intestate Inheritance in the Early Republic," (*Antichthon* 51 (2017) 172–185), several articles in the *Oxford Classical Dictionary* on Roman public law ("Lex Ovinia" and "Lex Publilia Philonis"), and (with John J. Martin) a forthcoming edition of Francesco Casoni's *de Indiciis* with introduction and commentary.

Paola Bianchi (bianchi@juris.uniroma2.it) is Assistant Professor of Roman Law at the Law Faculty of the University of Rome (Tor Vergata), She receveid her MA in Law at the University of Rome "La Sapienza" and her PhD in Roman Law and laws of the ancient Mediterranean at the same University. She has been Research Fellow and Adjunct Professor at the Law Faculty of the University of Rome (Roma 3) and at the Luiss University Guido Carli in Rome. She has been teaching at military Accademies of Allievi Marescialli and Ufficiali Carabinieri of Velletri, Florence and Roma. Her main research interest is Law in the Late Antiquity. Recently she published: *Effetti del passaggio del tempo nelle leggi imperiali e nella prassi da Costantino a Giustiniano Evasione fiscale e possesso, inerzia dei creditori*. Roma 2018.

Pamela Alejandra Cacciavillani (pamela.cacciavillani@udem.edu.mx) is full professor of Legal History at the Law School of University of Monterrey – UDEM (Mexico). After January 2020, she will be national researcher by Consejo Nacional de Ciencia y Tecnología (CONACYT), Mexico (SNI- level "candidate"). She

received her PhD in Legal History at the University of Córdoba (Argentina). She obtained her European Master´s Degree at University of Messina, University of Milan (Italy) and University of Córdoba (Spain). She graduated in Law at the Law School of National University of Córdoba (Argentina). Moreover, she was PhD , postdoc student and researcher at the Max Planck Institute for European Legal History (Frankfurt am Main, Germany). She was visiting professor at the Law Faculty of the University of Zurich, 2019 (Switzerland), and visiting scholar at Pontifical Catholic University of Chile, 2018, with the support of Marie Curie Fellow. She is member of two technological and scientifically research projects (PICT) supported by Agencia Argentina. Among her works: *From comuneros to possessors: Reflections about the Construction of Private Property in the Indigenous Community of Soto at the End of the Nineteenth Century* (Derecho PUCP, n 82, 2019).

Mariana Dias Paes (mdiaspaes@gmail.com) is Research Group Leader at the Max-Planck Institute for European Legal History and at the Cluster of Excellence "Beyond Slavery and Freedom". She received her MA in Law at the University of São Paulo (2014) and her PhD in Law at the same University (2018). During her MA she was awarded with a research internship fellowship (FAPESP-BEPE) to conduct six-months of research in the University of Michigan (2013). Moreover, her PhD was funded by a Doctoral Contract at the Max-Planck Institute for European Legal History. Her research interests are Legal History, Slavery, and Property in Brazil and Angola during the nineteenth-century. She has published on these issues in Portuguese, Spanish, English, and French. Her most recent book is entitled *Escravidão e Direito: o estatuto jurídico dos escravos no Brasil oitocentista, 1860-1888* (2019).

Elisabetta Fiocchi Malaspina (elisabetta.fiocchi@rwi.uzh.ch) is Assistant Professor of Legal History at the Law Faculty of the University of Zurich (Switzerland). She received her MA in Law at the University of Milan and her PhD in Legal History at the University of Genoa (Italy). Moreover, she was awarded several research grants from the Max Planck Institute for European Legal History (Frankfurt am Main, Germany); she was visiting research fellow at the Erik Castrén Institute of International Law and Human Rights at the Law Faculty of the University of Helsinki (Finland). Among her works*: L'eterno ritorno del Droit des gens di Emer de Vattel (secc. XVIII–XIX). L'impatto sulla cultura giuridica in prospettiva globale* (Frankfurt am Main 2017).

Agustín Parise (agustin.parise@maastrichtuniversity.nl) is Associate Professor at the Faculty of Law of Maastricht University (the Netherlands). He received his

degrees of LL.B. and LL.D. at Universidad de Buenos Aires (Argentina), where he was Lecturer in Legal History. He received his degree of LL.M. at Louisiana State University (USA), where he was Research Associate at the Center of Civil Law Studies. He received his degree of PhD at Maastricht University, where he was Researcher at the Department of Methods and Foundations of Law. He visited at, amongst other, the Max-Planck-Institut für ausländisches und internationales Privatrecht and the Max-Planck-Institut für europäische Rechtsgeschichte (Germany); the Institute of European and Comparative Law of University of Oxford (UK); the École normale supérieure, Paris (France); the Faculty of Law of McGill University (Canada); and Columbia Law School (USA). Amongst his work: *Historia de la Codificación Civil del Estado de Luisiana y su Influencia en el Código Civil Argentino* (Eudeba, Argentina, 2013); and *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries)* (Brill Nijhoff, The Netherlands, 2017).

Alan Sandonà (alan.sandona@unibs.it), already holder of several research grants from the University of Brescia (Italy), is lecturer of Legal History supplementary teaching at the Law Department of that University. He received his PhD in Legal History at the University of Milan (Italy). Moreover, he is a member of the Italian Society of the History of Law and author of several publications concerning the statutory right of the Lombardy and Veneto area between the Middle Ages and early modern age (*Note sugli statuti del Comune di Brescia tra medioevo ed età moderna,* Brescia 2018. Leges et statuta communis cartrani. *Gli statuti di Caltrano del 1543,* Arcugnano (VI) 2014) and the real estate advertising systems (N*ote sull'istituto della trascrizione tra la rivoluzione ed il secondo '800*, in *Rivista di storia del diritto italiano,* LXXXIV 2011).

Silvia Schiavo (silvia.schiavo@unife.it), PhD in "Diritto romano e metodo comparativo", University of Ferrara, 2002, is currently Associate Professor of Roman Law at the Department of Law of University of Ferrara, where she teaches Institutes of Roman Law and Roman Law. Her research interests include Roman Criminal Law, Late Antiquity, Byzantine Law. Among her works: Il falso documentale tra prevenzione e repressione. Impositio fidei criminaliter agere civiliter agere (Milano 2007); Ricerche sugli editti dei prefetti del pretorio del Cod. Bodl. Roe 18. Processo e documento (Napoli 2018).

Simona Tarozzi (simona.tarozzi@unibo.it) is Assistant Professor of Roman Law at the Law Faculty of the University of Bologna. She received her MA in Law at the University of Bologna and her PhD in Roman law and laws in the Antiquity

at the University of Padua. She received a Diploma in Archival Training, Palaeography and Diplomatics at the School of Archival Training of the Bologna State Archives and she has practiced as archivist at the Milan State Archives and at the Darmstadt State Archives. She was Visiting Researcher Fellow at the German Federal Archives in Koblenz, the Law Faculty of the Pontifical Catholic University of Chile (Santiago de Chile), the Max Planck Institute for European Legal History (Frankfurt am Main) and Visiting Professor at the University of Mainz. Among her works: *Norme e prassi. Gestione fondiaria ecclesiastica e innovazioni giuridiche negli atti negoziali ravennati dei secoli V-VII* (Milano, 2017; *Spunti di riflessione sulla* diiudicatio *visigota in* Form. Visig. 40 (*GLOSSAE,* 14, 2017); *Alluvioni e paludi: strategie d'intervento dell'amministrazione tardoantica* (*Ravenna Capitale. Il diritto delle acque nell'Occidente tardoantico: utilità comune e interessi privati*, Sant'Arcangelo di Romagna, 2018).

PROGRAMA HISTORIA DEL DERECHO
PUBLICACIONES
ISSN: 2255-5137

1. Luis Grau, *Origenes del constitucionalismo americano. Corpus documental bilingüe / Selected Documents Illustrative of the American Constitutionalism. Bilingual edition*, 3 vols., Madrid 2009, 653+671+607 pp.
   http://hdl.handle.net/10016/5669

2. Luis Grau, *Nosotros el pueblo de los Estados Unidos. La Constitución de los Estados Unidos y sus enmiendas. 1787-1992. Edición bilingüe / We the People of the United States. The U.S. Constitution and its Amendments. 1787-1992. Bilingual edition*, Madrid 2010, 338 pp.
   http://hdl.handle.net/10016/8517

3. Carlos Petit, *Fiesta y contrato. Negocios taurinos en protocolos sevillanos (1777-1847)*, Madrid 2011, 182 pp.
   http://hdl.handle.net/10016/10145

4. Pablo Mijangos y González, *El nuevo pasado jurídico mexicano. Una revisión de la historiografía jurídica mexicana durante los últimos 20 años*, Madrid 2011, 110 pp.
   http://hdl.handle.net/10016/10488

5. Luis Grau, *El constitucionalismo americano. Materiales para un curso de historia de las constituciones*, Madrid 2011, xxii+282 pp.
   http://hdl.handle.net/10016/11865

6. Víctor Tau Anzoátegui, *El taller del jurista. Sobre la Colección Documental de Benito de la Mata Linares, oidor, regente y consejero de Indias*, Madrid 2011, 175 pp.
   http://hdl.handle.net/10016/12735

7. Ramon Llull, *Arte de Derecho*, estudio preliminar de Rafael Ramis Barceló, traducción y notas de Pedro Ramis Serra y Rafael Ramis Barceló, Madrid 2011, 178 pp.
   http://hdl.handle.net/10016/12762

8. Consuelo Carrasco García, *¿Legado de deuda? A vueltas con la Pandectística*, Madrid 2011, 158 pp.
   http://hdl.handle.net/10016/12823

9. Pio Caroni, *Escritos sobre la codificación*, traducción de Adela Mora Cañada y Manuel Martínez Neira, Madrid 2012, xxvi + 374 pp.
   http://hdl.handle.net/10016/13028

10. Esteban Conde Naranjo (ed.), *Vidas por el Derecho*, Madrid 2012, 569 pp.
    http://hdl.handle.net/10016/13565

11. Pierangelo Schiera, *El constitucionalismo como discurso político*, Madrid 2012, 144 pp.
    http://hdl.handle.net/10016/13962

12. Rafael Ramis Barceló, *Derecho natural, historia y razones para actuar. La contribución de Alasdair MacIntyre al pensamiento jurídico*, Madrid 2012, 480 pp.
http://hdl.handle.net/10016/13983

13. Paola Miceli, *Derecho consuetudinario y memoria. Práctica jurídica y costumbre en Castilla y León (siglos XI-XIV)*, Madrid 2012, 298 pp.
http://hdl.handle.net/10016/14294

14. Ricardo Marcelo Fonseca, *Introducción teórica a la historia del derecho*, prefacio de Paolo Cappellini, Madrid 2012, 168 pp.
http://hdl.handle.net/10016/14913

15. Alessandra Giuliani, *Derecho dominical y tanteo comunal en la Castilla moderna*, Madrid 2012, 134 pp.
http://hdl.handle.net/10016/15436

16. Luis Grau, *An American Constitutional History Course for Non-American Students*, Madrid 2012, xx + 318 pp.
http://hdl.handle.net/10016/16023

17. Antonio Ruiz Ballón, *Pedro Gómez de la Serna (1806-1871). Apuntes para una biografía jurídica*, Madrid 2013, 353 pp.
http://hdl.handle.net/10016/16392

18. Tamara El Khoury, *Constitución mixta y modernización en Líbano*, prólogo de Maurizio Fioravanti, Madrid 2013, 377 pp.
http://hdl.handle.net/10016/16543

19. María Paz Alonso Romero/Carlos Garriga Acosta, *El régimen jurídico de la abogacía en Castilla (siglos XIII-XVIII)*, Madrid 2013, 337 pp.
http://hdl.handle.net/10016/16884

20. Pio Caroni, *Lecciones de historia de la codificación*, traducción de Adela Mora Cañada y Manuel Martínez Neira, Madrid 2013, 213 pp.
http://hdl.handle.net/10016/17310

21. Julián Gómez de Maya, *Culebras de cascabel. Restricciones penales de la libertad ambulatoria en el derecho codificado español*, Madrid 2013, 821 pp.
http://hdl.handle.net/10016/17322

22. François Hotman, *Antitriboniano, o discurso sobre el estudio de las leyes*, estudio preliminar de Manuel Martínez Neira, traducción de Adela Mora Cañada, Madrid 2013, 211 pp.
http://hdl.handle.net/10016/17855

23. Jesús Vallejo, *Maneras y motivos en Historia del Derecho*, Madrid 2014, 184 pp.
http://hdl.handle.net/10016/18090

24. María José María e Izquierdo, *Los proyectos recopiladores castellanos del siglo XVI en los códices del Monasterio de El Escorial*, Madrid 2014, 248 pp.
http://hdl.handle.net/10016/18295

25. Regina Polo Martín, *Centralización, descentralización y autonomía en la España constitucional. Su gestación y evolución conceptual entre 1808 y 1936*, Madrid 2014, 393 pp. http://hdl.handle.net/10016/18340

26. Massimo Meccarelli/Paolo Palchetti/Carlo Sotis (eds.), *Il lato oscuro dei Diritti umani: esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo*, Madrid 2014, 390 pp.
http://hdl.handle.net/10016/18380

27. María López de Ramón, *La construcción histórica de la libertad de prensa: Ley de policía de imprenta de 1883*, Madrid 2014, 143 pp.
http://hdl.handle.net/10016/19296

28. José María Coma Fort, Codex Theodosianus: *historia de un texto*, Madrid 2014, 536 pp.
http://hdl.handle.net/10016/19297

29. Jorge Alberto Núñez, *Fernando Cadalso y la reforma penitenciaria en España (1883-1939)*, Madrid 2014, 487 pp.
http://hdl.handle.net/10016/19662

30. Carlos Petit, *Discurso sobre el discurso. Oralidad y escritura en la cultura jurídica de la España liberal*, Madrid 2014, 185 pp.
http://hdl.handle.net/10016/19670

31. Jean-Étienne-Marie Portalis, *Discurso preliminar sobre el proyecto de Código civil*, Madrid 2014, 53 pp.
http://hdl.handle.net/10016/19797

32. Cesare Beccaria, *Tratado de los delitos y de las penas*, Madrid 2015, 87 pp.
http://hdl.handle.net/10016/20199

33. Massimo Meccarelli/Paolo Palchetti (eds.), Derecho en movimiento: personas, derechos y derecho en la dinámica global, Madrid 2015, 256 pp.
http://hdl.handle.net/10016/20251

34. Alessandro Somma, *Introducción al derecho comparado*, traducción de Esteban Conde Naranjo, Madrid 2015, 193 pp.
http://hdl.handle.net/10016/20259

35. A. F. J. Thibaut, *Sobre la necesidad de un derecho civil general para Alemania*, Madrid 2015, 42 pp.
http://hdl.handle.net/10016/21166

36. J.-J.-R. de Cambacérès, *Discursos sobre el Código civil*, Madrid 2015, 61 pp.
http://hdl.handle.net/10016/21254

37. Ramon Llull, *Arte breve de la invención del derecho*, estudio preliminar de Rafael Ramis Barceló, traducción de Pedro Ramis Serra y Rafael Ramis Barceló, Madrid 2015, 233 pp.
http://hdl.handle.net/10016/21406

38. F. C. von Savigny, *De la vocación de nuestra época para la legislación y la ciencia del Derecho*, Madrid 2015, 130 pp.
http://hdl.handle.net/10016/21520

39. Joaquín Marín y Mendoza, *Historia del derecho natural y de gentes*, Madrid 2015, 40 pp.
http://hdl.handle.net/10016/22079

40. Rafael Ramis Barceló, *Petrus Ramus y el Derecho. Los juristas ramistas del siglo XVI*, Madrid 2016, 250 pp.
http://hdl.handle.net/10016/22197

41. Emanuele Conte, *La fuerza del texto. Casuística y categorías del derecho medieval*, edición de Marta Madero, Madrid 2016, 194 pp.
http://hdl.handle.net/10016/22261

42. *Constituciones españolas: 1808-1978*, edición de Javier Carlos Díaz Rico, Madrid 2016, 259 pp.
http://hdl.handle.net/10016/22905

43. Giacomo Demarchi, *Provincia y Territorio en la Constituyente española de 1931. Las raíces europeas del Estado integral*, Madrid 2016, 362 pp.
http://hdl.handle.net/10016/22906

44. Miguel Ángel Ladero Quesada/César Olivera Serrano (dirs.), *Documentos sobre Enrique IV de Castilla y su tiempo*, Madrid 2016, xx + 1446 pp.
http://hdl.handle.net/10016/23015

45. Gustavo César Machado Cabral/Francesco Di Chiara/Óscar Hernández Santiago/Belinda Rodríguez Arrocha, *El derecho penal en la edad moderna: Nuevas aproximaciones a la doctrina y a la práctica judicial*, Madrid 2016, 217 pp.
http://hdl.handle.net/10016/23021

46. Lope de Deza, *Juicio de las leyes civiles*, estudio preliminar de Víctor Tau Anzoátegui, edición de María José María e Izquierdo, Madrid 2016, 136 pp.
http://hdl.handle.net/10016/23228

47. Henrik Brenkman, *Historia de las Pandectas*, estudio preliminar, traducción y notas de Juan Lorenzo, Madrid 2016, 426 pp.
http://hdl.handle.net/10016/23317

48. Massimo Meccarelli (a cura di), *Diversità e discorso giuridico. Temi per un dialogo interdisciplinare su diritti e giustizia in tempo di transizione*, Madrid 2016, 287 pp.
http://hdl.handle.net/10016/23792

49. Beatrice Pasciuta, *El diablo en el Paraíso. Derecho, teología y literatura en el Processus Satane (s. XIV)*, Madrid 2017, 264 pp.
http://hdl.handle.net/10016/24439

50. Maximiliano Hernández Marcos, *Tras la luz de la ley: legislación y justicia en Prusia a finales del siglo XVIII. Un modelo de Ilustración jurídica*, Madrid 2017, 184 pp.
http://hdl.handle.net/10016/24488

51. Eleonora Dell'Elicine/Paola Miceli/Alejandro Morin (comps.), *Artificios pasados. Nociones del derecho medieval*, Madrid 2017, 307 pp.
http://hdl.handle.net/10016/24514

52. Eva Elizabeth Martínez Chavéz, *Redes en el exilio. Francisco Ayala y el Fondo de Cultura Económica*, Madrid 2017, 145 pp.
http://hdl.handle.net/10016/24715

53. Pierre de Jean Olivi, *Tratado de los contratos*, estudio preliminar de Rafael Ramis Barceló, traducción de Pedro Ramis Serra y Rafael Ramis Barceló, Madrid 2017, 171 pp.
http://hdl.handle.net/10016/25200

54. Daniel Panateri, *El discurso del rey. El discurso jurídico alfonsí y sus implicaciones políticas*, Madrid 2017, 284 pp.
http://hdl.handle.net/10016/25377

55. Joaquín Costa, *El problema de la ignorancia del derecho y sus relaciones con el estatus individual, el referéndum y la costumbre*, Madrid 2017, 85 pp.
http://hdl.handle.net/10016/25578

56. Massimo Meccarelli (ed.), *Reading the Crisis: Legal, Philosophical and Literary Perspectives*, Madrid 2017, 224 pp.
http://hdl.handle.net/10016/25705

57. Pablo Ramírez Jerez/Manuel Martínez Neira, *La historia del derecho en la Real Academia de Ciencias Morales y Políticas. Los concursos de derecho consuetudinario*, Madrid 2017, 322 pp.
http://hdl.handle.net/10016/25809

58. Thomas Duve (coord.), *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano*, 2 vols., Madrid 2017, 1681 pp.
http://hdl.handle.net/10016/25729

59. Víctor Saucedo, *Conspiracy. A Conceptual Genealogy (Thirteenth to Early Eighteenth Century)*, Madrid 2017, 350 pp.
http://hdl.handle.net/10016/26095

60. Aurora Miguel Alonso (dir.), *Doctores en derecho por la Universidad Central. Catálogo de tesis doctorales 1847-1914*, Madrid 2017, 571 pp.
http://hdl.handle.net/10016/26198

61. François Hotman, *Francogallia, o la Galia francesa*, estudio preliminar y traducción de Tamara El Khoury, Madrid 2017.
http://hdl.handle.net/10016/26321

62. Rafael Altamira, *Spain. Sources and Development of Law*, estudio preliminar y edición de Carlos Petit, Madrid 2018, lxxxvi + 126 pp.
http://hdl.handle.net/10016/26322

63. Jesús Delgado Echeverría, *Joaquín Costa, jurista y sociólogo. Derecho consuetudinario e ignorancia de la ley*, Madrid 2018, 174 pp.
http://hdl.handle.net/10016/26335

64. Rubén Pérez Trujillano, *Creación de constitución, destrucción de Estado: la defensa extraordinaria de la II República española (1931-1936)*, Madrid 2018, 367 pp.
http://hdl.handle.net/10016/27108

65. Eugenia Torijano Pérez, *Los estudios jurídicos en la universidad salmantina del siglo XIX*, Madrid 2018, 625 pp. + apéndices complementarios.
http://hdl.handle.net/10016/27392

66. Laura Beck Varela/María Julia Solla Sastre (coordinadoras), *Estudios Luso-Hispanos de Historia del Derecho. Estudos Luso-Hispanos de História do Direito*, Madrid 2018, 543 pp.
http://hdl.handle.net/10016/27751

67. Manuel Martínez Neira/Pablo Ramírez Jerez, *Hinojosa en la Real Academia de Ciencias Morales y Políticas*, Madrid 2018, 279 pp.
http://hdl.handle.net/10016/27810

68. Rudolf von Jhering, *La lucha por el derecho*, estudio preliminar y edición de Luis Lloredo Alix, Madrid 2018, 137 pp.
http://hdl.handle.net/10016/27845

69. Enrique Roldán Cañizares, *Luis Jiménez de Asúa: Derecho penal, República, Exilio*, Madrid 2019, 406 pp.
http://hdl.handle.net/10016/28236

70. José María Puyol Montero, *Enseñar derecho en la República. La Facultad de Madrid (1931-1939)*, Madrid 2019, 486 pp.
http://hdl.handle.net/10016/28286

71. Pedro L. López Herraiz, *Formar al hombre de Estado. Génesis y desarrollo de la École libre des sciences politiques (1871-1900)*, Madrid 2019, 333 pp.
http://hdl.handle.net/10016/28313

72. Emiliano J. Buis, *El juego de la ley. La poética cómica del derecho en las obras tempranas de Aristófanes (427-414 a.C.)*, Madrid 2019, 442 pp.
http://hdl.handle.net/10016/28358

73. Virginia Amorosi/Valerio Massimo Minale (ed.), *History of Law and Other Humanities: Views of the Legal World Across the Time*, Madrid 2019, 588 pp.
http://hdl.handle.net/10016/28459

74. Carlos Petit, *Un Código civil perfecto y bien calculado. El proyecto de 1821 en la historia de la codificación*, Madrid 2019, 409 pp.
http://hdl.handle.net/10016/28678

75. Eduardo de Hinojosa, *El elemento germánico en el derecho español*, Madrid 2019, 82 pp.
http://hdl.handle.net/10016/28877

76. Carlos Petit (ed.), *Derecho* ex cathedra. *1847-1936. Diccionario de catedráticos*, Madrid 2019, 491 pp.
http://hdl.handle.net/10016/28916

77. Manuel Ángel Bermejo Castrillo (ed.), *La memoria del jurista español. Estudios*, Madrid 2019, 416 pp.
http://hdl.handle.net/10016/29108

78. Elisabetta Fiocchi Malaspina/Simona Tarozzi, *Historical Perspectives on Property and Land Law. An Interdisciplinary Dialogue on Methods and Research Approaches*, Madrid 2019, 236 pp.
http://hdl.handle.net/10016/29290