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“História do processo penal na modernidade”



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Can Criminal Procedure Ever Be “Modern”? A Historical Comparative Perspective (Editorial of the Dossier “History of Criminal Procedure in Modernity”)


*Sobre a (im)possível modernidade do processo penal.
Uma perspectiva histórica comparada (Editorial do dossiê
“História do processo penal na modernidade”)*

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ABSTRACT: This article is not a mere introduction to the dossier of the *Revista Brasileira de Direito Processual Penal* on “History of Criminal Procedure in Modernity” (composed of 13 contributions on Belgium, Brazil, Finland, France, Italy and The Netherlands), but it also touches upon three methodological questions of comparative legal history. The first one relates to the proper concept of “modernity”, which can be understood differently, not only in various scientific areas (sociology,

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history, legal history...), but also in different parts of the world (the French and English perceptions of the word designating different periods). The second one is the use of “models”, such as inquisitorial versus accusatorial procedures, or popular and lay courts versus professional justice administration. Can such kinds of concepts historically be attached to certain times and places, or should legal scholarship avoid to do so, acknowledging that all systems are always mixed? The third one claims that all comparative legal history ought to be contextual. The dogmatic (or ideal) developments of law, very often explained by referring to legal transplants and translations or hybridisations, can only really be understood by searching for factual factors, responsible for the impact of certain “foreign” ideas.

KEYWORDS: Comparative Legal History; Legal Transplant; Legal Models; Criminal Procedure.

RESUMO: *Este artigo não é uma mera introdução para o dossiê da Revista Brasileira de Direito Processual Penal sobre “História do Processo Penal na Modernidade” (composto de 13 contribuições sobre a Bélgica, o Brasil, a Finlândia, a França, a Holanda e a Itália), mas também toca em três questões metodológicas sobre a história do direito comparada. A primeira está relacionada ao próprio conceito de “modernidade”, que é entendida de maneira diferente, não somente em várias áreas científicas (sociologia, história, história do direito...), mas, também, em diferentes partes do mundo (com as percepções inglesa e francesa designando diferentes períodos). A segunda é o uso de “modelos”, como processo inquisitorial versus acusatório, ou cortes populares versus administração profissional da justiça. Tais conceitos podem ser relacionados a certos tempos e espaços, ou o saber jurídico deveria evitar isso, reconhecendo que todos os sistemas são sempre “mistos”? O terceiro demanda que toda história do direito comparada deve ser contextual. Os desenvolvimentos dogmáticos ou intelectuais do direito, frequentemente explicados referindo-se a transplantes, traduções ou hibridizações jurídicas, só podem ser realmente entendidos buscando por fatores factuais responsáveis pelo impacto de certas ideias “estrangeiras”.*

PALAVRAS-CHAVE: *História do Direito Comparada; Transplantes Jurídicos; Modelos Jurídicos; Processo Penal.*

SUMÁRIO: Introduction: On (early-)modernity; 1. The un-modernity of criminal procedure; 2. A broad panorama of “modernisations”; 3. Learning abroad: the role of professionals; 4. Methodological paths: multiple temporalities, shifts and displacements; Conclusions; References.

INTRODUCTION: ON (EARLY-)MODERNNESS

According to a recent article on the popularising historical website *herodote.net*, French King Louis IX (1214-1270), known as *Saint Louis*, is to be considered the founder of “modern” justice administration³. The image of the King personally dispensing justice under the tree of justice, however old-fashioned such representation might seem, has become one of the prototypes of legal iconography⁴, still present today in the Paris *Cour de cassation*. Louis IX, indeed, is a crucial figure for the organisation of, both civil and penal, justice in what would become “the modern State”. Particularly in criminal matters, it is worth mentioning the establishment, in 1247, of the new functionaries of the *enquêteurs*, who are amongst other tasks competent for the control of the existing, feudally based, *baillis*. The innovation clearly illustrates the King’s wish to establish a just and effective judicial system, protecting his subjects against abuse of power by local and regional functionaries. Is it the legalising, hierarchising and centralising that makes justice administration “modern”?

To today’s Belgian Minister of Justice Vincent Van Quickenborne, “modern” justice does not go back that far in time. Interviewed on his plan to have a new penal code for his country by 2022, he literally cites Cesare Beccaria⁵, “the founder of modern criminal thought” according to the newspaper: “The ideal punishment is the minimal punishment having

³ FORCADET, Pierre-Anne. Histoire de la justice. Saint Louis fonde la justice moderne. *Herodote.net*, Paris, 24/05/2021. Available at : https://www.herodote.net/Saint_Louis_fonde_la_justice_moderne-synthese-2964-169.php. Accessed 06/07/2021.

⁴ RESNIK, Judith; CURTIS, Dennis. *Representing Justice*. Invention, Controversy, and Rights in City-States and Democratic Courtrooms. New Haven: Yale University Press, 2011. p. 202 and p. 351.

⁵ Most authors contributing to this dossier, indeed, also connect “modern” criminal justice with the influence of Enlightenment on law and justice. Luigi Lacchè, for instance, explicitly links it to the critical role of public opinion: “*nosso ponto de partida, ‘o processo penal dos modernos’, implica o amplo universo do espaço público: durante o século XVIII, surge a imagem da ‘opinião pública’ como um ‘tribunal’ diante do qual todos, até mesmo os soberanos, deveriam comparecer para serem ‘julgados’*”.

a real effect. The best prevention of criminality is not by the cruelty of the punishment, but by the impossibility to escape from it”⁶.

As criminal justice under the absolutist Kings of France in the sixteenth and seventeenth centuries was characterised by inquisitorial investigations, *liberum arbitrium* of the judge, *lettres de cachet*, and harsh capital and corporal punishments⁷, exactly the kind of system Beccaria and the eighteenth century *philosophes* abhorred, one might wonder how “modern” can be used by scholars for two such – at least at first sight – completely different systems.

A purely linguistic *caveat* solves part of this problem: look who’s talking. For French historians, the *Temps Modernes* or *Époque Moderne* is the period between the Middle Ages and the (French) Revolution. English written historiography, however, calls the same period the “Early Modern Era”, “early”, because the actual Modern Era starts with the American and French Revolutions, the steam engine and industrialisation. Whereas politically and economically one can speak of “revolutions” between 1750 and 1850, for jurists this is probably much less the case. While new constitutions in this same era do establish new principles and rules of public law, like separation of powers, a strict hierarchy of legal norms and individual fundamental freedoms, dogmatically legally spoken, all this is realised within continuous legal scholarship and judicial concepts. Particularly for criminal proceedings it should be stressed that procedural law is adapted, but not completely reversed. Even today, we can still say that in continental Europe (and its former colonies) criminal procedural law is built on Romano-canonical foundations.

Under the influence of the reception of Roman law, and in the first place of canon law – the church administrations and courts giving the example –, not only the French King, but also many other Sovereigns and City States throughout continental Europe install new courts and councils

⁶ VERBERGT, Matthias. Op corona-inbreuken zou geen celstraf mogen staan. *De Standaard*, 05/07/2021. Available at: <https://www.standaard.be/krant/publicatie/20210705/ds/dn/alg/optimized>. Accessed 06/07/2021. p. 4.

⁷ In this sense Danielle Regina Wobeto de Araújo and Gabrielle Stricker do Valle in their contribution to this dossier mention the “*Inquisição Moderna*”. On the contrary, Edouard Delrée in his article on Belgium starts the history of “modern criminal law” only in 1814.

in the Late Middle Ages and the Early Modern Era. This bureaucratisation affects political and military administration, but in the first place the various judicial systems (feudal courts, seigniorial courts, royal courts, city courts...), where step by step the customary procedural forms are substituted by the *ius commune* inspired Romano-canonical procedure⁸. Being in essence an inquisitorial procedure⁹, the rise of absolutism brings with it the possibility of abuse of power, leading to excesses such as torture as a means of obtaining proof¹⁰, heresy trials, the great witch hunt, and many other dysfunctions, which will be denounced by the philosophers and public opinion of Enlightenment, claiming for respect for the individual rights. Particularly the legality principle in criminal matters, first explicitly installed by the French Revolution, leads to a need for legislating and codifying both material and formal penal law. The codes form the threshold for a new era: they innovate and update, they transform the relationships between production of law and politics¹¹, but they also confirm to a very large extent the existing judicial concepts, forms, terms and rules. Many of these “modern” codes, however, will be criticised throughout the twentieth century for not being able to cope with the needs and rights of women and men in today’s world. Again, rules are adapted, not completely thrown overboard.

⁸ E.g. for Flanders: VAN CAENEGEM, Raoul. *Geschiedenis van het strafprocesrecht in Vlaanderen van de XIe tot de XIVE eeuw*. Brussels: Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, 1956.

⁹ MONBALLYU, Jos. *Six Centuries of Criminal Law*. History of Criminal Law in the Southern Netherlands and Belgium (1400-2000). Leiden: Brill Nijhoff, 2014. p. 414-427.

¹⁰ DAUCHY, Serge. La torture judiciaire dans les anciens Pays-Bas: État de la question. In: DURAND, Bernard (ed.). *La torture judiciaire*. Approches historiques et juridiques. Lille: Centre d’Histoire Judiciaire, 2002. p. 507-538; SCHMOECKEL, Mathias. *Humanität und Staatsraison*. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter. Cologne: Böhlau, 2000.

¹¹ See, for example, GROSSI, Paolo. Códigos: algumas conclusões entre um milênio e outro. In: GROSSI, Paolo. *Mitologias jurídicas da modernidade*. Tradução de Arno Dal Ri Júnior. 2. ed. Florianópolis: Boiteux, 2007. p. 87-114; CAPPELLINI, Paolo. Codificazione. In: CAPPELLINI, Paolo. *Storie di concetti giuridici*. Torino: Giappichelli, 2010. p. 111-121; CARONI, Pio. *Lecciones de historia de la codificación*. Madrid: Universidad Carlos III de Madrid, 2013.

In this sense, the French-English antagonism (“*Moderne*” – “Early-Modern”) is a false one. Both qualifications for the same historical period are correct. “Modernisation” in the sense of specialisation and professionalisation started in the Late Middle Ages and the French Kings are indeed examples of modernisers, but exaggerating the possibilities of the “modernising” State, they also triggered contestation and revolution. The crisis of the “over-modernising” State lead to a more balanced new system, which the French see as a “new” or “contemporary” system, but which can also be seen as the final realisation of the real “modern” State, in which the interests of authority and individuals are more balanced.

Although criticised, the political-institutional periodisation of history in Antiquity, Middle Ages, Early-Modern Era and the Modern State, still stands. The frontiers between these differ from economic, over social to cultural historiography. For institutional and legal historiography, however, the Early Modern Era – although it certainly has its own specific historical features – precisely can be called “early modern”, because seeds of the Modern State already germinate: customary law is step by step overruled by legislation; local benches of wise experienced men are first controlled and finally substituted by hierarchised courts; oral proceedings give way to written ones; specialisation and legal professionalisation start... The spread of universities, with both their Roman and canon Law faculties, all over Europe, later exported to the colonies, is a crucial motor for these manifold developments. Terminology, concepts and rules are constructed on Romano-canonical fundaments. Libraries full of publications have described and analysed this most well-known form of “reception”, underlining how, as a result of these developments, a *ius commune* arose, common to all of continental Europe, be it with local variations.

Just like local societal changes themselves are a *perpetuum mobile*, law is constantly in need of adaptation, in time and in space. Hence, the need and wish for comparative legal history¹², also on criminal procedure. This specific area of the law, though, is maybe less permeable for comparison and reception than other legal branches. The modern

¹² PIHLAJAMÄKI, Heikki. Merging Comparative Law and Legal History: Towards an Integrated Discipline. *American Journal of Comparative Law*, v. 66, n. 4, p. 733-751, 2018.

legality principle, on the one hand, in theory demands for legally pre-established clear rules, to be strictly interpreted, but on the other hand, it expresses State power¹³. This means that criminal procedure probably develops still more piecemeal than other branches of the law do, as ripening ideas have to be very outspoken and need a majority in Parliament to become effective (whereas in other branches doctrine and case law enjoy more playing ground). The history of criminal procedure is not a story of drastic revolutions, but a step by step development starting from late-medieval *ius commune*, leading to today's questions on the rights of defence during online hearings in times of pandemic.

Methodologically, shifts, displacements and multiple temporalities could be useful tools for the analysis of these histories (par. 4). The twelve following contributions to this dossier of the *Revista Brasileira de Direito Processual Penal* prove that the history of criminal procedure is one of piecemeal evolution, with some local idiosyncrasies, but most of all with many common lines. In this introduction, the various articles will be shortly introduced (par. 2), particularly pointing at some comparative elements. Judges, legislators and professors read foreign jurisprudence and case law and, inspired by this “foreign” literature, decide, rule and construe in order to adapt the law to new societal challenges. It is interesting to discover who learns from whom, in what – mostly expected, but sometimes surprising – directions concepts and interpretations travel, displacing law not only diachronically (par. 3 and 4). Not seldom, a legal system innovates or “modernises” by transplanting rules or concepts that have in the meantime become outdated or criticised elsewhere. This leads to the question whether criminal procedure can ever be “modern” (par. 1).

1. THE UN-MODERNITY OF CRIMINAL PROCEDURE

Social theorist Peter Wagner dedicated several books and articles to the, *in se* evolving, concept of “modernity”. Today's sociology, he

¹³ COSTA, Pietro. O princípio de legalidade: um campo de tensão na modernidade penal. In: DAL RI JÚNIOR, Arno; SONTAG, Ricardo (org.). *História do direito penal entre medievo e modernidade*. Belo Horizonte: Del Rey, 2011. p. 33-86.

writes¹⁴, normally links modernity to the trinity of the liberal-democratic state¹⁵, the free market economy and free scientific institutions. Applied to what Saint Louis established in 1247, one can hardly speak of “modern” justice administration. The King ruled as a monarchist and used the courts (and other institutions) to control society, the market and even the way of thinking and believing. However, technically-legally spoken, a legal and judicial system was started, that would become the bearing framework for the modern State, if not in its sociological meaning, then at least in its legal-historical one¹⁶, and more particularly for criminal procedure.

Understood in its sociological sense, it is hardly even conceivable that criminal procedure can ever be “modern”. At first sight, penal proceedings, being an institutional reaction by authority against an individual offender, seem to be *in se* a conservative and reactionary action. Even in today’s liberal-democratic States, a criminal court is a compulsory machinery, that starts working when a pre-established legal rule is broken. Furthermore, the pre-established procedural rules are to be applied to the letter. There seems to be very little space for freedom and popular interventions. The eighteenth and nineteenth century attempts to introduce the democratic element of the jury, for instance¹⁷, barely survive in today’s civil law tradition.

Indeed, the rules of criminal procedure have a history – things have changed –, however common their Romano-canonical roots are. From the era of codification onwards, particularly, each of the national States creates its own codes, and it seems that the common rules give more and more leeway to create specific domestic law. Opposing nineteenth century “national” law to the former *ius commune* “common” legal practice, however, bears witness of a very dogmatic way of looking at legal history.

¹⁴ WAGNER, Peter. *Modernity as Experience and Interpretation*. A New Sociology of Modernity. New York: Wiley, 2008. p. 1-18.

¹⁵ Régis Nodari in his contribution to this dossier explicitly mentions that also in nineteenth century Brazil, “*liberal também era uma palavra associada, mais genericamente, à modernidade*”.

¹⁶ BARBAS HOMEM, António Pedro. *Judex Perfectus*. Função jurisdiccional e estatuto judicial em Portugal, 1640-1820. Coimbra: Almedina, 2003. p. 117-172.

¹⁷ See particularly the contribution of Sylvain Soleil.

Contextual legal history, on the contrary¹⁸, not only looks at the intellectual understanding of the mere rule, but it also tries to understand what external factors, next to the mere scholarship, influence the law's creation and interpretation. For criminal procedural law, in particular, it is clear that political power, for instance, is of paramount importance for the law's content, but new technical possibilities also make the law evolve, and very often concrete scandals are the reason for punctual adaptations of the existing rules¹⁹. That was the case in the eighteenth century, when Voltaire moulded public opinion around the *affaire Calas*, and very similarly the twentieth century *Dutroux* case in Belgium led to more changes in penal proceedings than any Minister of Justice ever managed to introduce.²⁰

By itself, criminal procedural law is not really open to change. Penal procedure does not know the autonomy principle of civil law, nor the discretionary power of an administrative body. Referring to what is said about the sociological concept of “modernity” above: criminal proceedings exist to prosecute criminal offenders; their *raison d'être*, so to say, is not to give freedom, but rather quite the opposite to take freedom away (by the penalty of imprisonment in the first place); it is not liberal as such. It is not democratic either, but rather oligarchic, being an instrument handled by magistrates, most of the time not elected. Although the rules may be established by a democratic Parliament, applying the rule is the competence of a small (oligarchic) group²¹. Whereas in civil cases, multiple players are strong parties, often lobbying for adaptation

¹⁸ On the two ways of legal history scholarship: HEIRBAUT, Dirk. A Tale of Two Legal Histories. In: MICHALSEN, Dag (org.). *Reading Past Legal Texts*. Oslo: Unipax, 2006. p. 91-112.

¹⁹ E.g. the *acquittements scandaleux* in nineteenth-century France and Italy (see the contributions by Lacchè, Miletti and Soleil).

²⁰ See the text of Delrée further in this dossier.

²¹ As Soleil describes, in nineteenth-century France some continue seeing England as the sacred example of what jury justice should be, exactly because the recruitment is aristocratic. Justice is organised “*autour d'une aristocratie provinciale et terrienne à la fois puissante et soucieuse de préserver les libertés publiques. C'est parmi cette aristocratie que l'on choisit les juges de paix et les shérifs dont l'une des missions est de nommer les membres du grand et du petit jury*”. In France, however, in the words of Cottu, cited by Soleil, the Revolution has destroyed aristocracy.

of the rules, in criminal suits, defendants and civil parties are (mostly) “single users”, most of them in weak social positions²².

So, it should not be surprising that the history of criminal procedure is less spectacular than the history of material criminal law, private law, or public law. Rules of criminal procedure know much less (r)evolutions than other areas of the law. During the Middle Ages, there is the paradigmatic shift from the old Germanic accusatorial process to the Romano-canonical inquisitorial one²³. The invention of an institution as the Public Ministry (essential piece of the emerging body of the State) in this very same context is of paramount importance. Ever since, however, changes are much more scarce and superficial. Changes are introduced piecemeal and are very often a game of trial and error²⁴. This is the story witnessed in most of the contributions to this dossier, each of them describing and analysing evolutions in their contexts, changes installed with the objective, time and time again, to amend the criminal procedure, to make it better, shorter, more just, cheaper, living more up to the liberal democratic principles, in sum to “modernise”.

2. A BROAD PANORAMA OF “MODERNISATIONS”

It might surprise the reader that, after the present introductory text, the first contribution to this dossier is about civil claims and civil procedures, in the Early Modern Era. It is precisely to make the point that dogmatic legal concepts are never black or white in judicial practice. The legality principle is as such a perfect theoretical model, for instance, but applying it strictly is impossible, as was experienced during the French

²² E.g. the position of black people in Brazil as evoked by Sabadell and Manoel further in this dossier.

²³ MONBALLYU, *op. cit.*, p. 37-41.

²⁴ An interesting example is the one described by Régis Nodari further in this dossier, when he sees the Brazilian 1890 *Código Penal* as a “turning point”. It reduces to eight the number of crimes for which prosecution only started on the basis of the victim’s claim, thus reducing the space for negotiation and pardoning by the offended: “*mudança de uma justiça negociada para uma justiça hegemônica*”.

revolutionary period²⁵. Purely theoretically, one might expect, in the seventeenth and eighteenth centuries, at the height of Absolutism, in a period when Roman and canon law has had several centuries to realise their reception via legislation and professionalisation, that all crimes and misdemeanours would be prosecuted *criminaliter*, via an inquisitorial procedure, and only civil cases would be handled *civiliter*. However, as Erik-Jan Broers describes, in practice mixed proceedings are possible: victims claiming both personal compensation and public punishment via a party to party proceeding regulated by civil procedure. One might consider these actions to be a surviving species of the old, Germanic rooted, accusatorial process. However, this so-to-say medieval way a victim can sue the offender in the Early Modern Period, is dogmatically legitimised, precisely by describing it as a reception of the Roman *actio iniuriarum aestimatoria*. The claimant on the one hand demands for a pecuniary fine (*de facto* to be paid in favour of a good cause). Through today's eyes one would call this the "public" or "penal" claim, as it is really punitive towards the offender and the fine has to be paid to the community or authority. The second claim, on the other hand, demanding rehabilitation and restoration of the victim's good name, would today be classified as civil. For both the public and the private aspect, though, one and the same action is used, and its proceeding is handled *civiliter*, as a civil case²⁶.

However old this mixture of private and public aspects in one and the same procedure might seem, one can also look at it as a "modern", or maybe even "post-modern", phenomenon. In many countries, in the late twentieth and early twenty-first centuries an "administratisation" of minor offences has occurred. Not only the Public Ministry, but also functionaries of the Executive branch, can settle a case amicably with the

²⁵ See Sylvain Soleil's article in this dossier.

²⁶ See also MONBALLYU, *op. cit.*, p. 409-413; SBRICCOLI, Mario. Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale. In: SBRICCOLI, Mario. *Storia del diritto penale e della giustizia*. 2 vol. Milano: Giuffrè, 2009. p. 1223-1246; ALESSI, Giorgia. O direito penal moderno entre retribuição e reconciliação. In: DAL RI JÚNIOR, Arno; SONTAG, Ricardo (org.). *História do direito penal entre medievo e modernidade*. Belo Horizonte: Del Rey, 2011. p. 169-195.

offender (the compensation of the victim's losses often being an explicit condition to do so). The promotion of mediation between the Public Ministry and both parties is also one of the contemporary tendencies in criminal law²⁷... which does not seem to be such a new idea! In many cases of the early modern practice of the Council of Brabant in the Dutch Republic, Broers writes "the court tried to avoid a legal battle between the opponents and tried to achieve a settlement that would be satisfactory to both of them. If so, the court ordered both parties to appear before two examining judges, who would act as mediators and try to help the adversaries to settle their dispute". *Nil novi sub sole*²⁸.

From what precedes, we might conclude that, probably, instead of insisting on the big antithesis between criminal and civil processes, and between accusatorial and inquisitorial procedures, it would be better to stress that there is a constant fluidity in the mixture of both systems²⁹. Between the discovery of a committed crime and the execution of the

²⁷ In Brazil, for example, there is the law 9.099 of 1995 which has established the possibility of conciliation in cases of minor criminal offences (articles 60 to 92).

²⁸ There is, indeed, nothing new as far as the legal ingredients are concerned. However, it is most interesting to link the legal innovations to their institutional, social and cultural historical contexts. The conciliation created by the 9.099 law of 1995 in Brazil, for example, can be considered a response to a State criminal justice crisis, while medieval and *Ancien Régime* conciliations were in a tense articulation precisely with the process of criminal justice statalization. Moreover, it is possible to question what kind of social imaginary the conciliation is linked to: the referred Brazilian law certainly has little relation with the old Christian ideas of *pax*; in fact, paradoxically, it is very close to contemporary punitivism to the extent that its central purpose was not to depenalise, as some imagined, but to make the state punitive power intervene in situations that traditional criminal justice was not reaching, albeit in a mitigated fashion. On this trait of the 9.099 law, see PAULO, Alexandre Ribas de. Breve abordagem histórica sobre a lei dos Juizados Especiais Criminais. *Âmbito jurídico*, 1/11/2009. Available at: <https://ambitojuridico.com.br/edicoes/revista-70/breve-abordagem-historica-sobre-a-lei-dos-juizados-especiais-criminais/>. Accessed 06/07/2021.

²⁹ As Heikki Pihlajamäki states in his essay, even the *Ancien Régime* common law system has many prosecutorial aspects. The justices of the peace, for instance, gathered evidence only against the accused, not for him. See also: LANGER, Máximo. La larga sombra de las categorías acusatorio-inquisitivo. *Revista Brasileira de Direito Processual Penal*, Porto Alegre, v. 1, n. 1, p. 11-42, 2015.

punishment decided by the court, all investigations-followed-by-procedure, have both inquisitorial and accusatorial moments. It is only the balance between them that evolves through time. Thus, the strengthening versus weakening of the position of the (public) prosecutor, the defendant and the victim are recurrent phenomena in the history of criminal procedural law³⁰, as will also be made clear in other contributions further on. The balance between accusatorial and inquisitorial elements, the possibility of settlement outside the court, the intervention of the jury in some judicial systems, and so many other elements of criminal procedure differ from time to time and from place to place, because of the seriousness of the prosecuted crimes and of the different conceptions about criminal law. As will become clear from many contributions to this dossier, what specific crimes were deemed dangerous at what concrete time and place (leading to specific possibilities for the prosecutor or on the contrary guarantees for the defendant) is the most important contextual factor to understand why criminal procedure changes at a certain moment in time (e.g. political crimes in the age of liberal revolutions, public safety in times of terrorism, victim's rights when state dysfunctions make proceedings last too long).

³⁰ Mostly for reasons of efficiency, many States today allow the Public Prosecution Service to impose a punishment by means of a penalty order, without the intervention of the court. In some countries not only a pecuniary fine, but also for instance community service of up to a certain amount of hours or measures like the suspension of the driver's license can be determined. Almost all countries, however, exclude the most severely punished crimes from this possibility. This kind of amicable settlement between Public Prosecutor and offender brings reminders of the late-medieval and early-modern *composition*, see e.g. CHEVRIER, Georges. *Composition pécuniaire et réparation civile du délit dans la Bourgogne ducale du XVe au XVIIe siècle. Mémoires de la Société du droit et des institutions des anciens pays bourguignons, comtois et romands*, Dijon, v. 21, p. 127-137, 1960; DUPONT, Guy. *Le temps des compositions. Pratiques judiciaires à Bruges et à Gand du XVe au XVIe siècle (Partie I)*. In: DAUVEN, Bernard; ROUSSEAU, Xavier (eds.). *Préférant miséricorde à rigueur de justice. Pratiques de la grâce (XIIIe-XVIIe siècles)*. Louvain-la-Neuve: Presses Universitaires de Louvain, 2012. p. 53-95; VAN ROMPAEY, Jan. *Het compositierecht in Vlaanderen van de veertiende tot de achttiende eeuw. Tijdschrift voor Rechtsgeschiedenis*, v. 29, p. 43-79, 1961; PADOA-SCHIOPPA, Antonio. *Delitto e pace privata*. In: PADOA-SCHIOPPA, Antonio. *Italia ed Europa nella storia del diritto*. Bologna: Il Mulino, 2008. p. 209-229.

This is why the jury, for instance, or in a broader sense “popular justice”, is also a recurring legal institution. When the French revolutionaries introduce it, it looks at first sight like a textbook example of a legal transplant (first indirectly in France itself, then directly by the French occupier in concurred territories)³¹. The jury is a common law institution, alien to the French legal order of the eighteenth century. *Sylvain Soleil*, in his contribution, gives an interesting sketch of the cultural environment in which, in France at that time, England was idealised as the better organised State (the grass is always greener on the other side of the channel), “*parce que le modèle politique et criminel anglais était à la mode*”, as the author writes³². The (double) jury’s functioning is almost immediately criticised, and the French lawgiver – in a period of quickly succeeding political regimes – intervenes several times to counter some of its critiques. The institution itself, however, survives and becomes even typically French, being part and parcel of the French legal heritage brought to other countries.

In the Southern Provinces of the United Kingdom of the Netherlands (1815-1830), where the jury had been abolished, for instance, it is so highly esteemed by the leaders of the Belgian Revolt that it deserves an explicit mention in the 1831 Constitution. Although not part of its own historical tradition, the French experience between 1795 and 1815 seems to suffice for the jury making its way into the national fundamental charter. A decisive motive for this is not as much the “national character” of the legal institution, but the concrete needs of the very moment of the Revolution/Independence. The jury is, at that very moment in the

³¹ WATSON, Alan. *Legal Transplants: an Approach to Comparative Law*. Edinburgh: Scottish Academic Press, 1974; PADOA-SCHIOPPA, Antonio. *La giuria penale in Francia: dai ‘philosophes’ alla Costituente*. Milano: LEL, 1994.

³² Sometimes, one has the impression that the discussion between scholars, still today even, is pretty much like the antagonisms of politics in former days. Soleil correctly asserts that “*les philosophes et les magistrats éclairés font du jury à l’anglaise un modèle à imiter, mais un modèle idéalisé, fantasmé, purgé des défauts réels que l’on connaissait peu ou mal à l’époque*”. An interesting survey on the topic, additional to Soleil’s text, is BERGER, Emmanuel. The Criminal Jury in England and France in the Late 18th Century. *Historiographical Issues and Research Perspectives of Popular Justice*. In: BERGER, Emmanuel (ed.). *Popular Justice in Europe (18th-19th Centuries)*. Bologna: Mulino, 2014. p. 71-88.

1820's-1830's, seen as a guarantee for complete political freedom and independence of the judiciary. From a socio-political point of view, however, one should not see this as a guarantee for the little man (counting on "popular" justice by his peers) in a modern liberal state with equal rights. However explicit the constitutional text on equal rights, the Belgian nationals in the 1830's are not equal at all: women have less rights than men, political rights are reserved for those having voting rights on the basis of fiscal power or professional capacity. In young Belgium, less than one percent of all inhabitants have voting rights. These few "happy men" become not only members of Parliament and ministers, but also magistrates and the "twelve angry men" of the jury³³. The very same elite is the one having the main economic capital in property³⁴, and – maybe the most important element in the nineteenth century – the one deciding, as journalists and editors, on what is published and, thus, able to shape public opinion. When later in the century, gradually, lower classes receive voting rights, enter the jury and declare some suspects innocent, because they do not feel like condemning their peers and punish them with the harsh – legally foreseen – imprisonment or capital punishment, the jurists (mostly belonging to the better class)³⁵ will call these decisions

³³ For the similar prerequisites to become a member of the jury in Brazil, see the contribution by Nunes, Cunha & Costa, who explicitly explain these conditions as a wish of the "*elite jurídica*" to maintain public morality and the socio-economic stratification.

³⁴ The situation is comparable to many other periods in time. Raoul Van Caenegem, for instance, has beautifully described how the big difference between the common law and the civil law systems can be explained by the late arrival of Roman and canon law in England, where meanwhile administration and judicial system were established on a feudal basis, which lead to the prominent role of the courts, see VAN CAENEGEM, Raoul. *Judges, Legislators and Professors*. Chapters in European Legal History. Goodhart Lectures 1984-1985. Cambridge: Cambridge University Press, 1987 (repr. 1998). Another obvious comparison relates to the medieval cities, who hold the economic and military power in the late-medieval Low Countries. They manage to conquer, buy or acquire city charters in which "privileges" are given, like the exemption of arrest procedures, but particularly the right to be judged by one's peers, these peers not being all inhabitants of the town, but the *poorters* (citizens) of the political elite. Similarly in the feudal system, the *iudicium parium* is judgment by the other vassals of the same sovereign.

³⁵ In this sense, Sylvain Soleil is right, legally spoken, when he writes: "*ce système confie le jugement de l'accusé à un groupe de citoyens ordinaires choisis au*

acquittements scandaleux, and find in these a reason to limit or even end the jury's role³⁶. Comparable evolutions happen in many countries³⁷.

In Brazil, the Constitution of 1824 introduces the jury as part of the judiciary. For the 1832 Code of Criminal Procedure, English criminal procedure is an important model: a good example is the institution of the grand jury (*jury de acusação*) and the petit jury (*jury de sentença*). On the other hand, however, several other elements of the 1832 criminal procedure sound French – France being *en vogue* at the time –, e.g. the impossibility to address a complaint (*queixa*) or accusation (*denúncia*) directly to the grand jury. The coexistence between the grand jury and the secret and written instruction can be seen as a mixture between the English(-American) and French models³⁸. When the 1841 reform abolishes the grand jury, Brazilian criminal procedure becomes closer to the French model³⁹, which, at that time, no longer operates with the two types of jury.

sein de la population". However, sociologically spoken, we should not forget that the jury did not represent all layers of social stratification.

³⁶ Also other lay participation in justice administration is being curtailed through time. In Belgium, for instance, the *tribunal de commerce*, originally only counting merchants, first got a legally trained *référéndaire*, who then became the president of the court, and today most judges – also those representing the commercial field – hold a law degree. Similar conclusions count for the *tribunal de travail*, MARTYN, Georges. The Judge and the Formal Sources of Law in the Low Countries (19th-20th Centuries): From 'Slave' to 'Master'? In: BRYSON, W.H.; DAUCHY, Serge (eds.). *Ratio Decidendi. Guiding Principles of Judicial Decisions*. Berlin: Duncker & Humblot, 2006. p. 215-216.

³⁷ For Brazil, see the article by Nunes, Costa & Cunha: the *Código de Processo Criminal* of 1832 gave a central role to the jury, but reforms in 1841 and 1871 turned down the accusatorial character, excluded the justice of the peace and saw the arrival of the *delegado de polícia* and police investigations. The authors conclude "*que foi se passando de uma maneira participativa para uma forma burocrática de administração da justiça*", see also: NUNES, Diego. Codificação, recodificação, descodificação? Uma história das dimensões jurídicas da justiça no Brasil Imperial a partir do Código de Processo Criminal de 1832. *Revista da Faculdade de Direito de Minas Gerais*, v. 74, p. 135-166, 2019.

³⁸ ALMEIDA JÚNIOR, João Mendes de. *O processo criminal brasileiro*. 3. ed. Rio de Janeiro: Typ. Batista de Souza, 1920. p. 256-257.

³⁹ CAMPOS, Adriana Pereira. Juízes de fato: participação e administração da justiça local. *Dimensões*, v. 28, p. 103-122, 2012. p. 111-116; NUNES, *op. cit.*, p. 151-154; DANTAS, Mônica Duarte. O Código do Processo Criminal e a

The jury as a guarantee of independence from government is another recurrent topic in the Brazilian debates of the nineteenth century⁴⁰. Important other problems on the jury are: the lack of independence of the jurors in relation to local powers, and the distortion of the idea of justice by peers in trials involving slaves. Regarding the first point, jurists and politicians lament that Brazilian jurors would be ignorant and subservient. Until the end of the nineteenth century, very few authors doubt that the jury is good, but transplanting an English institution to Brazil would not take into account the so-called civilisational deficits of the local population⁴¹. The aforementioned 1841 act can be considered an “elitist reform of the jury system”⁴², because it significantly increases the criteria for a citizen to become a juror. Would the jury not be a court of masters “against” slaves? The point is discussed since the debates of the 1823 Constituent Assembly until the age of abolitionism in the last decades of the nineteenth century, although it generates practically no reforms to the benefit of the slaves. For the abolitionist José do Patrocínio – a descendant of slaves, with no legal training, but very wise in matters of law – “to compare this legal excrescence - the jury for slaves - with regular courts, that sentence the criminal within normal law and taking into account the integrity of his moral person regarding his crimes; pretending that this trial would have the same social significance as those others is an aberration

Reforma de 1841. Dois modelos de organização dos poderes. *História do Direito*: RHD, v. 1, n. 1, p. 96-121, 2020. p. 113-120.

⁴⁰ FLORY, Thomas. *Judge and Jury in Imperial Brazil 1808-1871*. Social Control and Political Stability in the New State. Austin: University of Texas Press, 1981. p. 169-180; BETZEL, Viviani Dal Piero. *O tribunal do júri*. Papel, ação e composição: Vitória/ES, 1850-1870. Master dissertation in Social history of political relations. Vitória: Universidade Federal do Espírito Santo, 2006. p. 41-65; VELLASCO, Ivan de Andrade; AMENO, Viviane Penha Carvalho Silva. Juízes de facto: a discussão parlamentar da participação dos cidadãos no Júri (1823). *Dimensões*, v. 28, p. 43-57, 2012; CAMPOS, *op. cit.*; NUNES, *op. cit.*; LORENZONI, Lara Ferreira. *Tribunal do júri no banco dos réus*. A luta por uma justiça cidadã no Brasil. São Paulo: Tirant Lo Blanch, 2020. p. 57-139.

⁴¹ These criticisms against the jury are frequently reported in historiography, see, for example: FLORY, *op. cit.*, p. 169 and p. 183-185; BETZEL, *op. cit.*, p. 41-65; VELLASCO; AMENO, *op. cit.*; CAMPOS, *op. cit.*; NUNES, *op. cit.*; LORENZONI, *op. cit.*, p. 57-139.

⁴² FLORY, *op. cit.*, p. 249-250. See also DANTAS, *op. cit.*, p. 113.

that cannot be explained”⁴³. Slavery is abolished in 1888, but the same question could still be asked: does a still censitary court really produce judgments by peers? Despite the relevance of the question, the criticism that led to a severe limitation of the sovereignty and competence of the Brazilian jury in 1938 revolved around other problems⁴⁴.

Luigi Lacchè explicitly pays attention to the role of public opinion in the evolution of law. There is much more juridical security when the vast majority of a social group accepts the legal rules it has to abide by. Using Weberian categories, it can be stated that the legal system will only be efficient and effective, when it is rationally, charismatically and traditionally legitimised. However rational – i.e. dogmatically correct – the law is, it has also to fit in the social traditions and beliefs (which stresses the sense and need of contextual legal history). Public opinion is the most important channel by which the existing legal tradition can be denounced or attacked. In the nineteenth century most European countries experience a boom of public opinion, thanks to the industrialisation of printing, the establishment of the freedom of the press, the crumbling-down of censorship and the rise of political parties. Public opinion, by most scholars seen as an eighteenth century product of Enlightenment, becomes a motor of modernisation. Though the link between criminal proceedings and publicity/public opinion is much older⁴⁵, in this period, indeed, as stressed by Lacchè, it becomes “constitutional”: while the execution of sentences gradually turns more and more invisible, the

⁴³ PATROCÍNIO, José do. O ódio togado [29 de abril de 1889]. In: CARVALHO, José Murilo de (org.). *Campanha Abolicionista: coletânea de artigos*. Rio de Janeiro: Fundação Biblioteca Nacional, 1996. p. 154-155.

⁴⁴ A chapter of this history is addressed by Nunes, Cunha & Costa article in this dossier.

⁴⁵ The public assistance to medieval ordeals, for instance, is a form of interaction with the public, and particularly the “spectacle of suffering” of penal executions is a clear attempt to influence public opinion, but it also gave rise to popularising collections of *causes célèbres* and critiques by an early form of public opinion expressed in market songs and popular art, see DE DONCKER, Jules. *A Canon of Crime. The Rise and Development of the Causes Célèbres in Europe*. Doctoral dissertation in Literature. Ghent: Ghent University, 2017, resp. SPIERENBURG, Pieter. *The Spectacle of Suffering. Executions and the Evolution of Repression, from a Pre-Industrial Metropolis to the European Experience*. Cambridge: Cambridge University Press, 1984.

publicity of the procedure is increasingly considered an indispensable element of its legitimacy.

Lacchè describes the link between criminal procedure and public opinion for Italy, with some remarks on France and Great-Britain⁴⁶, but it is the case for many other countries as well. For Belgium⁴⁷, for instance, having lived twenty years under French rule, followed by fifteen years of Dutch government, the July 1830 Revolution, the October Declaration of Independence and the February 1831 Constitution, are the result of “public opinion”, and more particularly of a rather small group of jurists and journalists, having experienced themselves criminal prosecution because of their political opinion. The Belgian Constitution not only explicitly installs the freedoms of the press, religion, and association, but it also explicitly (re)installs the jury for high crimes, as well as – to the example of the 1830 French Constitution – for political and press offences⁴⁸. It also confirms the legality principle and strictly limits the possibility of provisional detention while investigating a crime. Via public opinion some angle stones of criminal procedure (the ones already cited, but also the publicity of court sessions and the obligation to motivate the judge’s decision) thus find their way into the new country’s constitution.

Lacchè describes how the aspect of publicity of criminal proceedings is at the heart of “modern” justice, but becomes also criticised

⁴⁶ Elementary aspects of “publicisation” in English eighteenth-century law are, for instance, the establishment of the trial on indictment, with its confrontation of the parties, the publicity of the proper hearing, and the role of the jury.

⁴⁷ The interaction of public opinion and law is intense in the period of the 1830 Revolt, but it continues to be a crucial interactive couple throughout the 19th and 20th centuries, see DELBECKE, Bram. The Political Offence and the Safeguarding of the Nation State: Constitutional Ideals, French Legal Standards and Belgian Legal Practice. *Comparative Legal History*, v. 1, p. 45-74, 2013 and DELBECKE, Bram. Justitie en pers. Voor altijd les frères ennemis? In: DE KOSTER, Margo; HEIRBAUT, Dirk ; ROUSSEAU, Xavier (eds.). *Deux siècles de justice*. Encyclopédie historique de la justice belge. Bruges: die Keure, 2015. p. 454-476.

⁴⁸ Lacchè mentions that the “constitutionalized” Kingdom of Sardinia was the first to establish the jury, exactly for press offences. With the Press edict of March 25th, 1845 the jury entered the Italian courtrooms, and became “*um dos pilares do ordenamento liberal italiano*”. Also in Brazil, the jury was first introduced for press offences in 1822 (*Decreto de 18 de junho de 1822*).

in the nineteenth century. Jury proceedings become a type of theatre, where tranquillity and objectivity can be seriously questioned⁴⁹. In Italy, particularly the *Scuola Positiva* denounces publicity as not compatible with the “scientificity” of the judicial process. Lacché brilliantly labels it as “*os positivistas defendem a esterilização médica do processo*”. In the twentieth century, moreover, publicity in Italian crime procedure is forced to give way under pressure of fascism, which illustrates how (also criminal procedural) law is a tool of political power. The conservative reflex of fascism hinders at this point further modernisation.

It is interesting to compare Lacché’s story to the analysis by *Marco Miletti* of the principle of immediacy in Italian law, exactly within the time span between the end of the eighteenth and the early twentieth century. Miletti is writing from a more dogmatic point of view. After defining “immediacy” as a principle requiring that all evidence is presented in court in its most original form⁵⁰, and distinguishing it from “orality”, the author explains how German and French literature inspired Italian doctrine on the subject (cf. *infra*). After a first group of scholars consider immediacy a non-negotiable principle of liberal justice, the Italian Positivist School fears that the rule favours popular and emotional interferences in the trial: the reasoning perfectly fits in the context drafted by Lacché. Miletti nicely maps the heated debates finally leading up to the 1913 Code, confirming the “orality movement”.

Another Italian contribution to this volume, by *Loredana Garlati*, also illustrates how context helps to understand dogmatic evolutions. The influence of social and positive sciences, already mentioned by Lacché, leads to the professionalisation of research techniques, and is a main catalyser for the emergence of specialised police forces. The Scientific

⁴⁹ Just like Lacché in his contribution refers to some magistrates giving privileged seats in court or even distributing tickets, similar practices of the court as theatre are described, for Belgium, by DE BURCHGRAEVE, Amandine. *Le crime de sang à la cour d’assises de Brabant (1893-1913)*. Une histoire judiciaire, politique et médiatique. Doctoral dissertation in History. Louvain-a-Nova: Université catholique de Louvain, 2018.

⁵⁰ For a recent state of the art, see GROENHUIJSEN, Marc; SELÇUK, Hatice. The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law. *Zeitschrift für die gesamte Strafrechtswissenschaft*, v. 126, p. 248-276, 2017.

Police School, founded in 1902 in Rome, teaches both police (within the objective of preventing crimes) and investigative police officers (providing judges scientifically based material truth) a scientific method to perform their tasks. Garlati comments on the important role of Salvatore Ottolenghi, but also contextualises, by drawing a picture of what she calls a “culturally lively period, in which the enthusiasm towards the so-called auxiliary sciences (anthropology, psychology, forensic medicine, statistics, and so forth) came on the scene of criminal trials, also thanks to the boost given by the Positive School”.

The scientific evolutions described surely influence what happens in nineteenth and twentieth century courts. But do they also change procedural law itself? Even using anthropometry, dactyloscopy, graphology, forensic medicine and many other emerging “scientific” (many of them meanwhile seriously questioned and even abandoned) methods of proof⁵¹, these, merely legally spoken, do not in themselves urge the legislator to adapt the judicial system and procedural rules. At first sight, science helps the judge (in some cases the jury) make up his/her/their mind(s), leading to probably a more confident “intimate conviction” within the concept of the free evaluation of proof, but it does not change the legal concept of proof itself, does it? If the “irrational” methods of proof (like the ordeal by water or fire) are long gone, and the early modern, Romano-canonical hierarchy of proofs (recognising torture as a means to come to a confession) is abandoned after harsh philosophical and popular critiques, one can say that the system of the judge’s intimate conviction is the real “modern” method of proof (more particularly, sociologically spoken, in the sense of an application of the results of free scientific investigation). It is firmly installed in the nineteenth century and even

⁵¹ Loredana Garlati describes the pioneering role of French criminologist and policeman Alphonse Bertillon, whose contribution to the scientification of police research methods created the word *Bertillonage*, which even appeared in detective novels by Arthur Conan Doyle and Agatha Christie. In 1890 he published *La photographie judiciaire*. To what this practically lead (and how these old pictures can today be a useful source for art-historical research on architecture) was recently shown in a Ghent University exhibition, whose catalogue is recommended literature on the topic: STERCKX, Marjan (ed.). *Crime Scenes*. Interbelluminterieurs door de lens van de forensische fotografie. Gent: A&S Books, 2021.

today not seriously criticised. Just like every new situation, however, is never a revolution, but merely a piecemeal (trans)formation, every new synthesis always carrying on with some elements of both the thesis and the antithesis, some elements of proof from pre-modern times survive, particularly the oath (having its theological, canon and moral roots in the Middle-Ages) and the confession (for centuries the queen of proofs).

The contribution by *Heikki Pihlajamäki* also relates to the same period, and more particularly to the same background of the growing importance of criminalistics, professional criminal police and prosecutorial services. The article analyses, from a legal comparative perspective, which arguments played in Finland, when in that late nineteenth century the country decided not to install the investigative judge. It was not as much because “guiding” countries as France or Germany opted for other institutions, as the reasons should rather be sought in the evolving scientific context. Having at hand more scientific means of proof, it is at that time obvious to entrust the use of them to a specialised corps of professionals of the Public Ministry. Pihlajamäki explicitly links the investigative judge to the old inquisitorial system and writes that by the 1850’s the perception of what capacities a judge has to have, has completely shifted. “Whether or not a country adopted the use of the investigative judge, however, cannot be fully explained by path-dependence or tradition alone”, the author writes. In other words, belonging to a common law or civil law tradition, or having traditionally a more inquisitorial or rather accusatorial system, is less important to understand legal transplants, than well perceiving the concrete context of the decisive moment.

The contribution by Belgian scholar *Edouard Delrée* confirms this to a very large extent. If the idea of path-dependency serves the description of one country well, then it is surely Belgium and its predecessor (the Southern Netherlands), which are heavily inspired by France (indirect legal transplants) in both the *Ancien Régime* as at the moment of Independence (and afterwards). More important still, though, are the direct legal transplants of the administrative and judicial institutions of France and the five Napoleonic codes in the period 1795-1814⁵². Even

⁵² On the decisive 1795-1815 French period for Belgian legal history, see HEIR-BAUT, Dirk; STORME, Mathias E.. *The Belgian Legal Tradition: From a Long*

today, scholars still doubt whether Belgium really has a legal culture of its own, or if it should be considered a French province⁵³. Delrée describes how the Belgian evolutions of criminal procedural law in the nineteenth and twentieth centuries, for many decades, are piecemeal adaptations, some of them because of the State being condemned by the European Court of Human Rights for infringements of article 6 of the European Convention on Human Rights. Only very recently, at the end of the twentieth century, serious alterations take place under public pressure, more particularly because of the scandalous *Dutroux* case: reorganisation of the police forces, more rights for the victim during the inquisitorial phase of judicial investigation and the end of the political nomination of judges.

Another major change, not only in Belgium, but in many other European states, is the right to be assisted by a personal lawyer from the very first hearing of an investigation, a consequence of the 2008 European Court of Human Rights case *Salduz v. Turkey*⁵⁴. Many scholars consider this “breaking-in” into the inquisitorial investigation to be an

Quest for Legal Independence to a Longing for Dependence? *European Review of Private Law*, v. 5, n. 6, p. 645-683, 2006; particularly on penal codifications: DUBOIS, Bruno; LE MARC'HADOUR, Tanguy. *Un code pour la Nation*. La codification du droit pénal au XIXe siècle (France, Belgique, Angleterre). Lille: Centre d'Histoire Judiciaire, 2010. Parts of the former Southern Netherlands had already been annexed earlier by France. In conquered Flanders a new French sovereign court of justice was installed in 1668; the French ordinance of 1667 was not made applicable, but the 1670 criminal ordinance was. Serge Dauchy and Véronique Demars have researched in what sense “old Flemish” law, as well as other foreign law was allowed to be applied, a research question difficult to answer as French *Ancien Régime* courts did not motivate their sentences, or at least not the way it is done today: DAUCHY, Serge; DEMARS-SION, Veronique. Foreign Law as Ratio Decidendi. The ‘French’ Parlement of Flanders in the Late 17th and Early 18th Centuries. In: DAUCHY, Serge, BRYSON W. Hamilton; MIROW, Matthew C. (eds.). *Ratio decidendi*. Guiding Principles of Judicial Decisions. Volume 2: ‘Foreign’ law. Berlin: Duncker & Humblot, 2010. p. 63-79; DEMARS-SION, Véronique; DAUCHY, Serge. La non motivation des décisions judiciaires dans l’ancien droit français: un usage controversé. In: BRYSON, W.H.; DAUCHY, Serge (eds.). *Ratio Decidendi*. Guiding Principles of Judicial Decisions. Berlin: Duncker & Humblot, 2006. p. 87- 116.

⁵³ HEIRBAUT; STORME, *op. cit.*

⁵⁴ European Court of Human Rights, 27 November 2008, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-89893%22%5D%7D>].

influence of the common law system on the continental one. Part of the attractiveness of the common law example might even be caused, not as much by the idea of what a “just” proceeding should be, but rather by the influence of television and cinema, displaying the common law trial as a fair and equal fight with legal arguments. For sure, the cultural evolutions – shifting from an exemplary role of French literature in the nineteenth century printing age to the successes of Hollywood and BBC detective series today – also play a role in understanding why criminal procedural rules evolve. This is the case, for instance, for the globalisation of plea bargaining⁵⁵.

The Brazilian experiences, described and analysed in the four following articles, align very well with what has been said about continental Europe. *Ana Lúcia Sabadell* and *Júlio Cesar Costa Manoel* study the “reception” of the *inquirições devassas*, established by sixteenth century Portuguese royal legislation (the *Ordenações Manuelinas* of 1521; confirmed by the *Ordenações Filipinas* of 1603) and imported to the colony, but kept in force after the independence, until the 1832 *Código de Processo Criminal*. *Inquirições devassas* are criminal investigations, not necessarily initiated by a complaint by a victim or a denunciation, but autonomously started by the authority. They are a clear example of an inquisitorial procedure⁵⁶, as within this form of procedure the local judge can investigate a committed crime, by hearing witnesses for instance,

⁵⁵ LANGER, Máximo. From Legal Transplants to Legal Translations: the Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. *Harvard International Law Journal*, v. 45, n. 1, p. 1-65, 2004. p. 51-62.

⁵⁶ Originating in canon law (“*com origem na inquirição típica do direito canônico*”), assert the authors, relying on the famous eighteenth-century Portuguese criminalist Pascoal José de Melo Freire, see HESPANHA, António Manuel. *Instituições juris civilis Lusitani, cum publici tum private, Pascoal [José] de Melo Freire [dos Reis] (1738-1798)*. In: DAUCHY, Serge; MARTYN, Georges; MUSSON, Anthony; PIHLAJAMÄKI, Heikki; WIJFFELS, Alain (eds.). *The Formation and Transmission of Western Legal Culture*. 150 Books that Made the Law in the Age of Printing. Cham: Springer, 2016. p. 310-314. Funny to remark that Freire himself was censured in Portugal under Pombaline government. Interesting remarks on international book travelling and national censorship are made by BECK VARELA, Laura. “En el expurgatorio de España se determina lo que se debe tachar”. *Episodios portugueses de la censura de la literatura jurídica (siglos XVII y XVIII)*. *Revista de Historia del Derecho*, v. 55, p. 1-25, 2018.

but also by examining the *corpus delicti*, without even notifying – far from hearing – the suspect. The authors analysed 89 cases treated by local first instance courts from the Côncavo Baiano region, a territory around São Salvador, capital of the Bahia State, and the All Saints Bay, for the period between 1712 and 1832, most of them initiated by a *devassa* investigation.

The *inquirições devassas* are a true instrument of power, very “useful” for the colonial authorities in Brazil. They are “authoritarian and disproportionate”, Sabadell and Costa Manoel conclude. Two types exist: the special ones against known crimes are most used, whereas the general ones are a type of Crown control over the lower magistrates (as they give the possibility for a general investigation over the functional period of a former magistrate, in the first weeks of the installation of a new one, very often taking the form of *devassas janeirinhas*, when a whole revolved year is investigated). The analysis of the practice of the *devassas* (almost all of them being “special” ones, cases in which the crime is known) reveals that the (Portuguese legislation based) procedure is followed in great lines, but that many of its detailed conditions are neglected by the local magistrates. Its conditions of use are as it seems more leniently applied in Brazil than in the mainland Portugal, where the social and cultural conditions are, indeed, different. The “direct legal transplant” by the coloniser could impossibly be perfect, given the socio-cultural circumstances of the colony. Also the coloniser’s legal mentality was favourable to localisms⁵⁷.

With Arthur Barrêto de Almeida Costa’s article on the Brazilian Council of State’s practice of pardoning in Brazilian military penal law between 1842 and 1889, another interesting example is given of how local events and circumstances steer the concrete application of globally known concepts and institutions. Arthur Barrêto investigates

⁵⁷ About these general features of Portuguese legal imperialism in this period, see HESPANHA, António Manuel. Direito comum e direito colonial: porque é que existe e em que é que consiste um direito colonial brasileiro. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, v. 35, p. 59-68, 2006; HESPANHA, António Manuel. Modalidades e limites do imperialismo jurídico na colonização portuguesa. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, v. 41, p. 101-135, 2012.

the pardoning practices of the Section of War and Navy of the Brazilian Council of State, the advisory board that assists the Emperor to use his prerogative of pardoning military convicted offenders (a competence of his “moderating power” according to Benjamin Constant’s theory). The criminal law of the Portuguese (and Brazilian) armed forces is, still in the nineteenth century, governed by the Articles of War, dating back to the Pombaline reforms of the eighteenth century, that brought the Iberian kingdom in line with the illuminist ideals of administrative rationality and enlightened despotism. The Articles were pretty much inspired by the Prussian example.

Barrêto’s field research reveals, however, that their application is far from uniform. The higher the condemning court, for instance, the more hope the defendant can have of being punished less severely. Statistically spoken, “the soldier should expect to face progressively softer treatment as he went higher in the decision levels”. Moreover, the Emperor most of the time leans his ears to demands for clemency, backed by the Council of State’s advice. “In almost 70% of the cases, at least the majority of the Section of War and Navy recommended at least the commutation of the penalty, and sometimes suggested even a full pardon”.

Barrêto lists the categories of reasons why condemned soldiers are graced. Some relate to the committed crime, some to the person of the defendant, some to external reasons. A remarkable case is cited as an example of a reason of clemency: the unjustness of the proper criminal procedure, and more particularly its long duration. A man, having awaited his execution for more than a year, has his death sentence commuted. “We can only imagine what the Brazilian Council of State would think of nowadays prisoners that await years before facing court”, Barrêto remarks. His main conclusion is that “pardon underwent a path with such reasonings that turned it into a more mainstream feature of Brazilian military law and procedure”, a beautiful example of a piecemeal evolution. The author also assesses that doctrine and practice align: the ideas of Brazilian constitutional lawyers are followed to a large extent, be it not always. That is why he concludes that pardoning practices are “part of those extensive changes that brought law to the so-called modernity, a part of the broader process of codification”. The military law itself, on the contrary, is not modern, not even in a period

of transition towards modernity, Barrêto asserts. Why?, he asks. Again, because the factual circumstances allow the law not to modernise: the military law's subjects, the young recruits, are "illiterate people raised in a hierarchical society" and there is no "culture of civism, of rational obedience". Conclusions for this military context, however, should not be extended to society at large.

Diego Nunes, Bárbara Madruga da Cunha and Mayessa H. Costa study what happens with criminal procedure in the State of Santa Catarina between the Brazilian Federal Republican Constitution of 1891 and the *Código de Processo Penal* of 1941, still in force today (be it heavily modified). For this rather short period the States are competent for promulgating their own procedural legislation. However, the old 1832 *Código de Processo Criminal* is only abolished and substituted by new rules, when the State adopts its own judicial code in 1925⁵⁸. Particularly interesting in the analysis of Nunes *cum suis*, is the fact that the authors not only looked at legislative acts and doctrinal publications, but also at journalistic sources of the period under scrutiny. Almost in deceiving words, they come to the conclusion that, even in an era of heavy political turmoil, criminal procedure is not really a key issue. The most prominent, but slow, evolution, particularly towards the end of the period, is the gradual taking down of the jury's importance. The development perfectly aligns with the evolution seen in Europe⁵⁹.

Also Régis João Nodari brings us a story from the same period, and more particularly the First Brazilian Republic (1889-1930), when the individual States of the Brazilian Federal State are competent for organising the criminal procedure. Concentrating on the life and works of criminal procedure scholar João Mendes de Almeida Júnior (1856-1923), Régis Nodari's article shines a light on the way doctrine deals with legislation,

⁵⁸ An *obiter dictum* by Nunes, Cunha & Costa (sub. 1), attested to be true for many other countries, is that (codification/rectification/modernisation of) material law always seems to come first; formal or procedural law is normally only a second step.

⁵⁹ Same conclusions in: SABADELL, Ana Lúcia. Los problemas del derecho procesal penal único en una federación: la experiencia de Brasil. In: Instituto Nacional de Ciencias Penales (org.). *Hacia la unificación del derecho penal*. Logros y desafíos de armonización y homologación en México y en el mundo. México: Instituto Nacional de ciencias Penales, 2006. p. 585-615.

legal practice and jurisprudence. While under the Empire doctrine is very practice oriented and “national”, based on the Brazilian federal code of 1832, under the Republic variation can much more easily occur, as the still practice oriented writings have to deal with rules (possibly) differing from state to state.

Almeida Junior’s works, mainly his most famous *Processo Criminal Brasileiro* (1901), can be seen as a unifying or centripetal reply to the centrifugal legislation. It is funny to read that the book was financially supported by a prize, installed by the national *Código do Ensino* (1900), for books that were scientifically relevant for society at that moment. In fact, Nodari explains, the publication would become a basic and much cited handbook, in some sense filling the knowledge gap that was caused by the scarce presence of federal legislation on the subject. It was a work of scientific scholarship and theory, but the editing house sold it as most useful for judges, lawyers and students. Important to stress is the fact that it was not a mere descriptive work, but – according to the foreword and patent throughout the text – the author explicitly situated his writings in the liberal tradition. He considered his work patriotic and stressed that the guiding principle for procedural law should be the guaranteeing of individual rights (though he never forgot the other pole of this pendulum: State order). At many points Almeida asked the states to intervene as little as possible in the existing law, in order not to break the “general”, i.e. federal, uniformity, and, above all, the Brazilian tradition dating back, at least, to the imperial period.

When only looking at the legislated law, one might easily conclude that, after a period of legislative diversity, the *Código de Processo Penal* (1941) is a reaffirmation of federal power, as a political result of the strong ideology of national union propagated by the *Estado Novo*, installed in 1937. Looking at doctrine and practice, however, teaches us that the idea of reunifying procedural law is much older than the establishment of the provisional government in 1930 or the *coup d’état* of 1937.

Indeed, the narrative of the lawgiver, is another narrative than the one of scholarship, or practice. And a good (contextual) legal historian should listen to all narrators. In their contribution to this dossier, *Danielle Regina Wobeto de Araújo* and *Gabrielle Stricker do Valle* report on a larger research on the narratives of court cases. They present some

methodological thoughts on legal historiography, particularly on the use of criminal processes as historical sources, studying the subject from a narrative perspective. Illustrated by some eighteenth century witchcraft cases (from secular courts in the southern part of the Latin-American Portuguese territory), they reflect on the dialogical and teleological narratives of criminal proceedings. They highlight the possibilities of using archival criminal proceedings files to describe and assess values, individual and social behaviours, and power relations, and particularly the daily situation of the lowest social layers. Their contribution jumps from the more purely legal – be it contextual – analyses of the other papers to the social sciences. In this sense, it invites not only legal scholars, but also social and cultural historians – in the wake of a historiographical tradition that has already produced fruitful research in Brazil – not to neglect the huge amount of sources both material and formal criminal law have generated throughout the centuries.

The authors correctly warn for the “historicity” of juridical concepts, on the one hand, but also for looking at the sources too juridically. The polyphonic narratives in criminal proceedings are historically very interesting, but only if one looks at them anthropologically, knowing full well that the (legal) objective of establishing a judicial truth, which is a main aim of the process itself, does not coincide with the (historical) objective of seizing the lived truth. The procedure itself is thoroughly biased by the contemporary power structures; and one always has to be aware of the fact that the source we read itself is the product of an intermediary. A micro-history of one single proceeding can at this point be very instructive, but should always be confronted with other qualitative and quantitative research. The reflections of Wobeto de Araújo and Stricker do Valle invite to delve into the archives, but also ask to do it very diligently, and paying attention to the legal dimension of this kind of sources.

There is, indeed, an immense number of judicial archives waiting to be discovered and analysed. May the present dossier be an invitation for future studies. Criminal procedures are a fruitful terrain, for instance, for colonial and post-colonial studies, and for the important question of mutual cultural adaptation and travelling of ideas, mentalities, concepts, knowledge, methods... But also in the

proper field of criminal procedure, checking judicial reality might reveal that “law in the books” and “law in action” differ⁶⁰.

3. LEARNING ABROAD: THE ROLE OF PROFESSIONALS

From the first and second paragraph, we can provisionally conclude that criminal procedure does have a history to be researched and written, although it does not know revolutions, but only piecemeal transformations. Time and time again big concepts such as inquisitorial versus accusatorial, state power versus individual rights, specialised courts versus popular justice, pop-up and clash, in search of the best balance, adapted to the concrete social, political and economic circumstances. Maybe the last real “revolution” in criminal procedure on the European continent (and later its colonies), although its realisation is spread over several centuries, is the emergence of the Romano-canonical procedure⁶¹: first installed in the Church courts⁶², later in the royal, town and even feudal courts; dogmatically elaborated by scholars like Damhouder and Carpzov⁶³; slowly entered into customary practice; fixed by the lawgiver in ordinances like the *Constitutio Criminalis Carolina* for the Holy Roman Empire⁶⁴ or

⁶⁰ HALPÉRIN, Jean-Louis. Law in Books and Law in Action: the Problem of Legal Change. *Maine Law Review*, v. 64, p. 46-76, 2011.

⁶¹ Of course, there are idiosyncrasies. However similar the *Ancien Régime* procedures are in France and the Netherlands, for instance, in the first country appeal is possible in criminal affairs, while in the second it is not, MONBALLYU, *op. cit.*, p. 428.

⁶² It is remarkable that Protestantism has almost no influence on criminal and civil procedure, see PIHLAJAMÄKI, Heikki. Executor Divinarum et Suarum Legum: Criminal Law and the Lutheran Reformation. In: MÄKINEN, Virpi (ed.). *Lutheran Reformation and the Law*. Leiden: Brill, 2006. p. 171-204.

⁶³ MAIHOLD, Harald. Praxis rerum criminalium, Joos (or Joost) de Damhouder (1507-1581). In: DAUCHY, Serge; MARTYN; MUSSON; PIHLAJAMÄKI; WIJFFELS (eds.), *op. cit.*, p. 99-102 resp. PIHLAJAMÄKI, Heikki. Practica nova Imperialis Saxonica rerum criminalium I-III, Benedict Carpzov (1595-1666). In: DAUCHY, Serge; MARTYN; MUSSON; PIHLAJAMÄKI; WIJFFELS (eds.), *op. cit.*, p. 187-189.

⁶⁴ Followed, in the Netherlands, by the 1570 criminal ordinances of Philip II, see DAUCHY. La torture judiciaire, *op. cit.*; MONBALLYU, *op. cit.*, p. 16; MOORMAN VAN KAPPEN, Olaf. Die Kriminalordnungen Philips II. für

the 1670 *Ordonnance criminelle* for France (to a great extent confirmed in the Napoleonic *Code d'instruction criminelle* of 1808, establishing a “mixed system”, where the revolutionary ideals are received within the Romano-canonical framework)⁶⁵. Its success is linked to the spreading of law faculties and the rise of new professions and specialised functions (advocates, proctors, councillors, ushers, solicitors, notaries, judges...). From the twelfth century until today, professionalisation can be seen as a determining factor for many transformations.

For all countries studied in the papers of this dossier, the French 1808 code plays a fundamental role, as it is the compromise between the age-old principles of criminal procedure and the enlightened claims for fundamental rights. Its “mixed system” comprises two phases, of which the investigation continues to be in essence inquisitorial, the actual debate in court being adversarial. It mirrors the tensions that throughout the nineteenth and twentieth centuries until today will continue to ask for adaptations, tensions between public power and individual rights. In the defence of these conflicting interests, professionals play an important role. In the late *Ancien Régime* Dutch Republic, for instance, it is exactly because lawyers take up the defending role in criminal procedures, that the modernisation of it gets on its way⁶⁶. Heikki Pihlajamäki sees the

die Niederlande im Vergleich zur Carolina. In: LANDAU, Peter; SCHROEDER, Friedrich-Christian (hgrs.). *Strafrecht, Strafprozess und Rezeption: Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina*. Frankfurt am Main: Klostermann, 1984. p. 227-252.

⁶⁵ There is a huge amount of literature on these basic criminal procedural ordinances, e.g. with an eye on its application in judicial practice: LANDAU, Peter; SCHROEDER, Friedrich-Christian (hgrs.). *Strafrecht, Strafprozess und Rezeption: Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina*. Frankfurt am Main: Klostermann, 1984; MARTINAGE, Renée. *L'ordonnance codificatrice de 1670 et son application en Flandres*. In : MACOURS, Georges; MARTINAGE, Renée (eds.). *Les démarches de codification du Moyen-Âge à nos jours*. Brussels: Academie, 2006. p. 21-45; MARTIN, Xavier. *De Beccaria et Voltaire aux codes criminels de 1808 et 1810: la continuité anthropologique*. *Revue Historique de Droit Français et Etranger*, v. 88, n. 3, p. 377-405, 2011.

⁶⁶ On the appearance of the defence lawyer in the Dutch Republic, see FABER, Sjoerd. *De opmars van de strafadvocaat te Amsterdam (1798-1811)*. *Pro Memorie*, v. 11, p. 115-136, 2009. See also the contribution by Heikki Pihlajamäki for nineteenth-century Finland, confirming that criminal justice “first

same in eighteenth-century Scandinavia, for centuries a stronghold of lay justice administration⁶⁷.

In the Late Middle Ages and Early Modern Era legal professionals first appear at the authorities' side: legal advisers to the Prince, learned lawyers in central courts, juridically schooled functionaries as public prosecutors. The (absolutist) State is legally consolidated by jurists, who are paid for their service to the Crown. In the nineteenth century, however, the number of men having a law degree is drastically higher, and only part of them continue to be public functionaries. Many become independent lawyers, earning money by defending private interests; others become journalists and influence public opinion; some take up a political career. Not surprisingly, jurists play an important role in the liberal revolutions. They pertain to a social and particularly cultural elite: these are the men starting-up public museums, building opera and theatre houses, frequenting *salons*, reading newspapers, and... travelling the world. These men are curious about how other States function.

The construction of the Brazilian State after the independence in 1822 is also guided by legal professionals⁶⁸, although the increase in the number of men having a law degree comes much later compared to Europe. The first two law schools are established in the 1820's; the opening of new ones is only authorised after 1889. Still in the first half of the twentieth century, several positions in the judicial bureaucracy are occupied by people without legal training, and *rábulas* (lawyers without formal legal training) are very common. The small elite of jurists sees itself as having a duty to build a civilised society in Brazil. To this end, it is essential to learn, by reading books or travelling the world, about what is happening in Europe and the United States, seen as the beacons of civilisation. Therefore, Brazilian jurists' curiosity on foreign law and State functioning are doubly motivated.

and self-evidently, tends to connect to politics and social history. Second, professionalization affects criminal justice”.

⁶⁷ From the 1730s, “fundamental changes took place through judicial practice, and they started with the lawyerization of the prosecution [...] They became neutral umpires, applying rules of evidence that were developed to safeguard the jury from undue influence by legal counsel”.

⁶⁸ See CARVALHO, José Murilo. *A construção da ordem: a elite imperial. Teatro de sombras: a política imperial*. 4. ed. Rio de Janeiro: Civilização Brasileira, 2003.

Almeida Júnior, the influential Brazilian author Régis Nodari puts in the spotlight, is such a curious man. His voyages contribute to his theoretical insights, Nodari writes, and he cites as examples the many references to the Italian scholar Francesco Carrara (when talking about preventive imprisonment) and to the French Faustin Hélie (for the theorisation of process forms), while Raffaele Garofalo is only mentioned to reject the man's positivist thinking⁶⁹.

It is, of course, more probable that legal scholars get acquainted with foreign literature, because books, published in other countries, cross borders⁷⁰. In his very interesting contribution to this dossier, Miletto beautifully maps how Italian scholars in the nineteenth century are influenced by foreign literature, and mainly by just a handful of successful authors, like Faustin Hélie from France or Carl Mittermaier from Germany.

Arthur Barrêto in his paper in this dossier surprisingly tells us, for instance, how a (today totally forgotten) Belgian scholar called François Tielemans is cited in Brazil as some kind of authority to establish which kinds of pardoning are possible. Tielemans' *Répertoire de l'administration et du droit administratif de la Belgique* really is a practice oriented manual, not as much a scientific work with international pretensions. How should one understand then its extraterritorial "success"? Its intrinsic dogmatic value is probably not the key to the answer. The *Répertoire* was first published in 1834 (in the fourth year of Belgian independence) and was actually the initiative of two men: Charles de Brouckère (1796-1860) and François Jean Tielemans (1799-1888), two men who played a prominent role in the

⁶⁹ How beautifully digital tools can be used to map mutual influences and quotations of foreign literature, is shown by HAKIM, Nader; MONTI, Annamaria. Histoire de la pensée juridique et analyse bibliométrique: l'exemple de la circulation des idées entre la France et l'Italie à la Belle Epoque. *Clio@Themis, Revue électronique d'histoire du droit*, v. 14, p. 1-32, 2018; see also COSTA, Arthur Barrêto de Almeida. The Tropical Fado that Wanted to Become a European Samba: the Cosmopolitan Structure of Brazilian Administrative Law Investigated with Bibliometric Data (1859-1930). *Forum Historiae Iuris*, 2021 [forthcoming].

⁷⁰ Excellently studied, for the *Ancien Régime*, by BECK VARELA, Laura. The Diffusion of Law Books in early Modern Europe: a Methodological Approach. In: MECCARELLI, Massimo; SOLLA SASTRE, Maria Julia (eds.). *Spatial and Temporal Dimensions for Legal History*. Research Experiences and Itineraries. Frankfurt: Max Planck Institute for European Legal History, 2016. p. 195-239.

Belgian revolt against King William and the first years of Independence. De Brouckère was minister in the young state, member of Parliament and mayor of Brussels. Tielemans is less known today. He had been a public functionary under Dutch King William, but chose the side of the Revolution, in which he was very active as a journalist. Already in 1827 he had published on press crimes, and he defended the Brussels' printer Weissenbruch, who would later publish his *Répertoire*. When, in 1830, Tielemans published a pamphlet on ministerial responsibility, Dutch Minister of Justice Van Maanen felt offended and Tielemans was imprisoned and sued. Condemned for inciting rebellion to seven years of exile, he fled to Paris, where he helped prepare the Belgian Revolution and independence. He was a member of the constitutional commission and organised the new Ministry of the Interior as its *administrateur-général*. He became professor of administrative law at the newly established university of Brussels and magistrate in the Judiciary. Is it his fame in the (international) political news that made him being cited on the other side of the Atlantic? Or was it Belgium's proper fame as a State where the liberal ideals were effectively realised? Or is it just because his book, a twenty volume *Répertoire*, was simply available in Brazil? Checking the online catalogues of some major Brazilian libraries reveals that, today, Tielemans' work is not present any longer, but other works printed by Weissenbruch (Brussels) are, particularly Belgian printed works on Brazilian topics⁷¹. The link with the editing house might be a more important factor to explain the book's success.

Most important for broader divulgation of genuine ideas, attributed to certain authors⁷², are translations, of course⁷³. Franz von Liszt's *Lehrbuch des deutschen Strafrechts* was published in Portuguese already in 1899, more

⁷¹ The *Real Gabinete Português de Leitura*, for instance, holds the book *Don Pedro II: Empereur du Brésil - Notice biographique* by Anfriso Fialho (Bruxelles: Typographie de Mme. Weissenbruch, 1876).

⁷² Remark that the authorship as such is often problematic. Laura Beck Varela categorises five types of 'authors' (in the sense of names appearing on the title page of a book) among *Ancien Régime* publishing legal scholars: *collector*, *auctor*, *inventor*, *editor*, *relator*, see BECK VARELA, Laura. Authorship in Early Modern Jurisprudence. Paul Voet (1619-1667) on auctor and editor. *Quaerendo*, v. 47, p. 252-277, 2017.

⁷³ FOLJANTY, Lena. Translators: mediators of legal transfers. *Rechtsgeschichte/ Legal History*, Frankfurt am Main, v. 24, p. 120-121, 2016.

than ten years before the French and Spanish translations, which helps declare its influence in Brazil⁷⁴. The influence of Mittermaier in Italy, as Miletto points out, is particularly due to the fact that the German author is cited in an Italian translation, published only six years after its original German print. A pitfall when assessing the influence of foreign doctrine, is that contemporary and later jurisprudence and legal historiography often exaggerates the impact of certain big names, that hardly anyone ever questions afterwards if the factual and concrete original impact on legal practice was really caused by an author's ideas⁷⁵.

It is an interesting historiographical question to ask whether the circulation of law is linked with migration or not. The case of Italian scholar Enrico Tullio Liebman is, for instance, well known. Escaping from fascism, he fled to South America and taught in Brazil from 1939 to 1946⁷⁶, but Liebman's discipline was civil procedure. For criminal procedure, it seems that there is not a similar situation since the nineteenth until the middle of twentieth century in Brazil. The adoption of foreign legal ideas or institutes in this field probably developed mainly through a paper-based international circulation. For instance, Régis Nodari, in his contribution to this dossier, describes how in Rio Grande do Sul the reform of the criminal process is strongly influenced by the ideals of the *Riforma della procedura penale in Italia* by Raffaele Garofalo and Luigi Carelli.

What surely also stimulates the role of foreign literature is the professionalisation⁷⁷ we already touched upon. Whereas many legal

⁷⁴ ESPÍNDOLA DE SENA, Nathália Nogueira; SONTAG, Ricardo. The Brazilian Translation of Franz von Liszt's *Lehrbuch des deutschen Strafrechts* (1899): A History of Cultural Translation between Brazil and Germany. *Max Planck Institute for European Legal History Research Paper Series*, n. 2019-17, 2019.

⁷⁵ This is very well described for the impact attributed to Blackstone in the United States by MINOT, Martin Jordan. The Irrelevance of Blackstone: Rethinking the Eighteenth-century Importance of the Commentaries. *Virginia Law Review*, v. 104, n. 7, p. 1258-1397, 2018. p. 1392-1397.

⁷⁶ For, not a historiographical account, but a testimony from one of his Brazilian pupils, see BUZAID, Alfredo. A influência de Liebman no direito processual civil brasileiro. *Revista da Faculdade de Direito, Universidade de São Paulo*, p. 131-152, 1977.

⁷⁷ And, linked to it, education of course. Paying attention to what is happening abroad will be much more popular when law schools have comparative courses in their educational programs. A textbook example of how lay judges

evolutions have a recurring character or know a pendulum swing, professionalisation and specialisation started in the Late Middle Ages with the emergence of *ius commune* and the first legal professions⁷⁸; knew periods of stronger and slower growth⁷⁹, but they never stopped. If one sees the number of law faculties throughout the world (more than one thousand in Brazil!) and the “army” of their alumni, we may say the number of legal professionals (or at least legally trained adults) is enormous. The more jurists there are, the more risk of “juridification”, but also the more (real and felt) need for legal assistance. “The lawyer” no longer exist, instead there are tax lawyers, criminal law specialists, sports jurists, media councillors etc. The smaller the area of law one studies and practices, the more need to know it thoroughly and look at it critically... looking at other legal systems to see how things function over there. In search for good arguments, there is more and more need (and thanks to printing, today internet) more and more possibility to do so. Specialists get connected (by correspondence, dialoguing publications, periodicals, conferences, guest lectures...) in international networks via epistemic groups, experts who are the heart of global expertise⁸⁰.

It would be interesting to map and analyse whether the international circulation of legal know-how is analogous in the *Ancien Régime* and in the contemporary era of national codifications. Is it different in (former) colonial territories than in coexisting independent

and limited legal education hinder the reception of foreign law is illustrated in PIHLAJAMÄKI, Heikki. “Stick to the Swedish law”: the Use of Foreign Law in Early Modern Sweden and Nineteenth-century Finland. In: DAUCHY, Serge; BRYSON, W. Hamilton; MIROW, Matthew C. (eds.). *Ratio decidendi*. Guiding Principles of Judicial Decisions. Volume 2: ‘Foreign’ Law. Berlin: Duncker & Humblot, 2010. p. 169-185.

⁷⁸ But is similar with evolutions in the common law system, like the specialisation and professionalisation of the justices of the peace in the sixteenth century.

⁷⁹ At this point the (French Revolutionary) failure – or early adaptation – of the jury is explained as an evident negation of the ongoing professionalisation. No wonder, already in January 1801, Bonaparte has some aspects changed. *De acte d'accusation* would now be drafted by a *commissaire du gouvernement* (a public functionary nominated by the Executive) and no longer by the jury director, who was an elected citizen-judge.

⁸⁰ See also HAKIM; MONTI, *op. cit.*.

states⁸¹? What Wobeto de Araújo and Stricker do Valle see happen in Brazilian *Ancien Régime* archival sources (learned authors as Prospero Farinacci and Martín Del Rio being cited by local practitioners with no legal education), is exactly what also European legal archives reveal on local practice by “peasant-aldermen”⁸². It looks like practitioners copy texts without (completely) understanding them. *A fortiori* we should not expect as legal history scholars of the twenty-first century that the local practitioners of centuries ago made the difference between scientific scholarship and practical handbooks, between moral or legal literature, between official law text and private point of view... When motivations had to be made, all arguments could serve. A hierarchy of the norms was only very slowly rising...

4. METHODOLOGICAL PATHS: MULTIPLE TEMPORALITIES, SHIFTS AND DISPLACEMENTS

Detaching concepts, such as inquisitorial *versus* accusatorial, from very specific contexts is a way of trying to make them more productive for historical analysis. Instead of considering them to be rigid classifications, it seems more interesting to use them as tools for describing and evaluating the mixed systems elaborated in each time and space, paying due attention to the complexity of each situation, i.e. to the interweaving of the choices of a given time and place. The accusatory *versus* inquisitorial dualism in a given legal culture is not always elaborated as an opposition between two well-crystallised (though “mixable”) models⁸³. The construction of

⁸¹ Wobeto de Araújo and Valle conclude: “*que a particularidade do direito colonial foi a própria circularidade cultural, também manifestada, no caso especial da feitiçaria, pelo sincretismo religioso entre as noções do magismo popular e do satanismo teológico [...] pudemos concluir que a cultura jurídica criminal e processual criminal colonial estava situada entre a erudição jurídica escolástica deglutida pelos manuais praxistas e a adaptação prática dos crimes e do procedimento processual na América Meridional Portuguesa*”.

⁸² MARTYN, Georges. Boerenschepenen en geleerd recht. *Pro Memorie*, Hilversum, v. 5, n. 2, p. 395-401, 2003.

⁸³ SBRICCOLI, Mario. “Vidi communiter observari”. L’emersione di un ordine penale pubblico nelle città italiane del secolo XIII [1998]. In: SBRICCOLI, Mario. *Storia del diritto penale e della giustizia*. Tomo I. Milano: Giuffrè, 2009.

this type of opposition can be historicised; it is traceable, for example, since Enlightenment and post-Enlightenment proposals⁸⁴. What tones does the legal debate around the accusatorial versus inquisitorial dualism acquire in each historical context? It has not always had an ideological-political character, that is, it has not always been linked to a reformist debate that challenged institutions and society from their foundations, as during Enlightenment⁸⁵. The accusatorial versus inquisitorial dualism becomes an eminently legislative policy problem at the “moment” that is usually called “the codification age” in *civil law* systems, i.e. after the end of the eighteenth century. This does not mean that, before that time, it was not a matter of legislation (we need only remember the *Constitutio Criminalis Carolina*, the French ordinances or the Philippine Ordinances), but it seems that there is a change of emphasis, which allows us to ask the question about the very meaning of “mixing” in different historical contexts.

The problem of “mixtures” may be an issue more linked to the management of the process by judges than something that legislation needs to address. Before the codifications, we have several examples of the former case⁸⁶; in the era of the codifications, dualism as a legislative policy problem is abundantly documented⁸⁷. These variations invite us to consider the role of jurists: how do they cooperate in governing the process in these two situations? How do they relate to lawmaking in such different situations? The shift of the accusatorial versus inquisitorial dualism to a matter of legislative policy is also reflected in the way doctrine operates, foregrounding jurists’ views on what legislation should do in

p. 75 e p. 91; MECCARELLI, Massimo. Dimensions of Justice and Ordering Factors in Criminal Law from the Middle Ages till Juridical Modernity. In: MARTYN, Georges; MUSSON, Anthony; PIHLAJAMÄKI, Heikki (eds.). *From the Judge’s Arbitrium to the Legality Principle*. Legislation as a Source of Law in Criminal Trials. Berlin: Duncker & Humblot, 2013. p. 53-58.

⁸⁴ MECCARELLI, *op. cit.*, p. 66.

⁸⁵ DEZZA, Ettore. Accusa e inquisizione nella dottrina dell’Età dei Lumi. In: DEZZA, Ettore. *Lezioni di storia del processo penale*. Pavia: Pavia University Press, 2013. p. 93.

⁸⁶ SBRICCOLI, “Vidi communiter observari”, *op. cit.*, p. 75 ss; MECCARELLI, *op. cit.*, p. 53 ss.

⁸⁷ A good example is Nodari’s article in this dossier.

terms of mixing the two “models”. What is the place of jurists’ applicative interpretation in determining whether the process is more inquisitorial or more accusatorial in these different circumstances?

Legal historian analytical tools must be able to register the specificities of the past, so they must be open and flexible⁸⁸, even to narrate the construction of rigid schemes. To detach dualisms such as accusatorial versus inquisitorial from very specific times and spaces does not mean to make them timeless. The point, in fact, is to make them better instruments to elaborate on interesting questions regarding the history of the criminal procedure.

Having in mind *longue durée* structures and their constant mutations, historical analysis, therefore, needs to account for the multiple temporalities that coexist in a given space and time. The apparently frenetic changes in certain strata should not obscure the reiteration of older and more enduring structures; on the other hand, even at the levels where change is very slow, there is movement, there is articulation with the transformations going on in other temporalities. The herald of *longue durée*, Fernand Braudel, in his famous 1958 article, was convinced of the special heuristic potential of the levels where the pace of history is slow. It is by descending to the level of these structures that it would be possible to construct a total history, for there would be the key capable of making sense of all the strata of a given civilisation. Even recognising that there are mental or social structures that traverse many fields, it seems impossible to determine the totality of an epoch, not least because each historiographical narrative is set out from specific problems that can only be partially confronted with others. The topical and artisanal dynamic of historiographical knowledge is a strong objection to the idea of total history. Then, what we can retain from the Braudelian lesson is that it is worthwhile exploring various levels of historical reality, that even the long duration models of historiography must be confronted with

⁸⁸ COSTA, Pietro. Em busca de textos jurídicos: quais textos para qual historiador? In: COSTA, Pietro. *Soberania, representação, democracia*. Ensaios de história do pensamento jurídico. Curitiba: Juruá, 2010. p. 43-62; COSTA, Pietro. História do direito: imagens comparadas. In: COSTA, Pietro. *Soberania, representação, democracia*. Ensaios de história do pensamento jurídico. Curitiba: Juruá, 2010. p. 17-41.

multiple temporalities. The deepest models also have a beginning and an end. Moreover, Braudel draws attention to the various articulations of these models over time⁸⁹. According to the French historiographer, the call of historiography to social scientists – also valid for jurists – is so that they do not evade time by the instant always present or by the repetition “that does not belong to any epoch”⁹⁰.

In our view, the words “displacements” or “shifts” best express the historical transformations of criminal procedure. They have been used and defined by the historian Peter Burke on several occasions. Let us look at two of them. In his book *What is Cultural History?*, after dealing with the links of the new cultural history with a much older tradition, Burke pointed out that, in spite of the continuities, a shift or turn had actually occurred: “the shift might be viewed as a change of emphasis rather than the rise of something quite new, a reform of tradition rather than a revolution, but after all, most cultural innovation takes place in this way”⁹¹. In the context of the history of knowledge, the “mythology of innovation” is confronted by the study of traditions, which, according to Burke, “are likely to suggest that what is generally recognized as innovation will often turn out, if analysed more closely, to be an adaptation for new purposes of an earlier idea or technique. In short, innovation is a kind of displacement”⁹². In the history of criminal procedure, examples of this dynamic are not lacking.

Peter Burke also explores another sense of the term displacement when dealing with the migration of intellectuals, who often become cultural mediators⁹³. With a slight expansion, this sense of displacement

⁸⁹ BRAUDEL, Fernand. *História e ciências sociais. A longa duração* [1958]. In: NOVAIS, Fernando; SILVA, Rogério F. da (orgs.). *Nova história em perspectiva*. Vol. 1. São Paulo: Cosac Naify, 2011. p. 87-121. p. 113-114.

⁹⁰ BRAUDEL, *op. cit.*, p. 118.

⁹¹ BURKE, Peter. *What is Cultural History?* 2nd ed. Cambridge: Polity, 2008. p. 75.

⁹² BURKE, Peter. *What is the History of Knowledge?* Cambridge: Polity, 2016. p. 35.

⁹³ On the concept of intellectual mediators, see GOMES, Ângela de Castro; HANSEN, Patrícia. *Intelectuais, mediação cultural e projetos políticos: uma introdução para a delimitação do objeto*. In: GOMES, Ângela de Castro; HANSEN, Patrícia (org.). *Intelectuais mediadores: práticas culturais e ação política*. Rio de Janeiro: Civilização Brasileira, 2016. p. 7-40.

also runs through several of the contributions of this dossier: although the migration of people rarely appears, the migration of ideas with the correlative and necessary role of jurists as cultural mediators is often brought to the fore, suggesting paths for research in the history of criminal procedure that are worth exploring in the future. The case of Mittermaier's presence in the Italian debate, already mentioned here and studied in Miletto's article, seems exemplary: the German jurist's ideas circulated in Italy thanks also to an Italian translation of 1851 of *Die Mündlichkeit, das Anklageprincip, die Oeffentlichkeit und das Geschwornengericht*; whereas in the Brazilian case, Mittermaier's ideas on evidence became much better known because of the translation published in 1871⁹⁴ of the *Die Lehre vom Beweise im deutschen Strafprozesse* (1834). Differently from the Italian case, the Brazilian version was not made from the German original, but from the French translation of 1848⁹⁵: displacements and shifts not only in time, but also in space.

CONCLUSIONS

Five Brazilian and seven European (Belgian, Dutch, Finnish, French and Italian) contributions make this dossier of the *Revista Brasileira de Direito Processual Penal* worth reading. They learn – notwithstanding local, regional, national idiosyncrasies – how interconnected the legal histories of these countries are. They all belong to the continental civil law family, firmly based, as far as criminal procedural law is concerned, in the late medieval Romano-canonical inquisitorial procedure. However, they also all underwent influences from abroad, some elements (like the

⁹⁴ MITTERMAIER, Carl Joseph Anton. *Tratado da prova em materia criminal ou exposição comparada dos principios da prova em materia criminal, etc., de suas applicações diversas na Allemanha, França, Inglaterra, etc.* Traduzido por Alberto Antonio Soares. Rio de Janeiro, A. A. da Cruz Coutinho, 1871. A second edition of the translation was published in 1909 by Ribeiro dos Santos publishing house.

⁹⁵ MITTERMAIER, Carl Joseph Anton. *Traité de la preuve en matière criminelle ou exposition comparée des principes de la preuve en matière criminelle, etc., de des applications diverses en Allemagne, en France, en Angleterre, etc., etc.* Traduit par C.-A Alexandre. Paris: Cosse et N. Delamotte, 1848.

jury) being taken from the common law system. It might be most prudent, therefore, to talk of mixed systems.

All of the criminal procedural law systems under scrutiny are in constant evolution. Compared to other areas of the law, however, criminal procedure seems to evolve very slowly and piecemeal, not knowing any real revolutions. What lawgivers, judges, authors and practitioners permanently try to do, is to bring the proceedings up to date, answering to the concrete needs of time and place, in short to “modernise” them. Since *ius commune* substituted the old Germanic legal system by the Romano-canonical one, the global framework was piecemeal adapted, but never really abolished. This is why French historians can correctly say the *Temps Modernes* already start in the “Early Modern Era”; but in the Modern Era the system is again updated, and even today many scholars ask for “modernisations”, a process that never will stop as long as history itself does not stop. Exactly because society changes permanently, the sociological sense of a “modern” criminal justice system will maybe never be reached: can a criminal procedure (that essentially institutionalises the State’s revenge⁹⁶, the protection of the weak and the emendation of the bad) ever be a liberal and democratic state process, easily available on the free market and making use of all free scientific research?

As an introduction to what follows, it is not up to the writers of this editorial to formulate answers. As legal historians we think it is our first role to put questions. This is why in the foregoing paragraphs we stressed the “inexistence” of models (accusatorial-inquisitorial, common law-civil law, professional justice-lay justice) and underlined the fact that all systems are mixed.

Among the material sources making today’s law what it is, foreign influences play an important role, at all times and places, both in colonial and post-colonial context. As we hope to have pointed out, legal scholars should not think that only good or bad juridical arguments decide on which transplant makes it and which do not. There is an important task

⁹⁶ Be it funded in theories of prevention, repression or emendation, ALVES, Sílvia. *Punir e humanizar. O direito penal setecentista*. Lisboa: Fundação Calouste Gulbenkian, Fundação para a Ciência e a Tecnologia, 2014. p. 20-40; MONBALLYU, *op. cit.*, p. 3-14.

to be taken up by comparative legal historians to try to map which factors make legal concepts and rules successfully migrate. The thirteen papers of this dossier want to be a first step in that discovery.

Enjoy reading! Happy discovery!

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