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What About African Legal History?

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What About African Legal History?

The year of 2018 saw the publication of two *Oxford Handbooks* dedicated to Legal History: *The Oxford Handbook of European Legal History*, edited by Heikki Pihlajamäki, Markus Dubber, and Mark Godfrey, and *The Oxford Handbook of Legal History*, edited by Markus Dubber and Christopher Tomlins. These two publications reflect the consolidation of legal history as an empirically oriented academic field. As such, they also reflect much of the path dependencies and the thematic and methodological biases of the field. Though both intend to be as comprehensible as possible, one of the questions that inevitably arises on reading them is: what about African legal history? The absence, silences, and marginalization of Africa in both publications raise issues concerning the future development of the field.

The *Oxford Handbook of Legal History's* editors stress in their preface that their volume does not focus on the history of specific geographic regions, but rather addresses more general and methodological topics of historical legal research. Nevertheless, Part IV of the volume is entitled »Traditions: Tracing Legal History«. The »legal traditions« represented in this part are Roman law, medieval canon law, Common law, Continental civil law, Jewish law, Islamic law, Chinese law, Aboriginal law, Latin American indigenous rights, and Indian law. African law, African legal traditions, African rights, and African legal thought are not addressed. Both in this specific part and in the other articles of the *Oxford Handbook of Legal History*, Africa is mentioned only sporadically and in passing.¹ No contribution really takes it as its core, as it happens to other regions and societies throughout the publication.

Two of the volume's contributions tackle issues that are deeply linked to African legal history: Renisa Mawani's »Archival Legal History: Towards the Ocean as Archive« and Paul G. Mchugh's »Imperial Law: The Legal Historian and The Trials And Tribulations of An Imperial Past«. The first of these argues that oceans should be considered as

legal archives of slavery. Transatlantic journeys that took place for centuries generated documents, objects, and artifacts that can be studied by legal historians and, more specifically, legal historians who focus on slavery. The article's perspective, however, is still Eurocentric since »the ocean« is seen mostly from the perspectives of European merchants and colonial administrators. The only Africans referred to are enslaved persons who were the focus of European colonizers' regulations. To take »the ocean« as an actual locus of legal historical research should also encompass a perspective that consider Africans, their agency and their legal institutions as active parts in the making of a transoceanic legal order.

Mchugh's article claims to present the most recent work on »imperial law«, but like Mawani's contribution, his article also lacks non-European perspectives. The British Empire is seen through the lens of a historiography mostly focused on the European side of constructing imperial legal orders. A historiography that largely draws on archives situated in the former metropole clearly involves problematic path dependencies. The exception regarding Africa is the work of Martin Chanock on Zambia and Malawi, which Mchugh cites in his bibliography. It is also notable that what the author refers to as the legal history of »imperial law« is actually the legal history of »British imperial law«, since he does not address other colonial experiences.

Perhaps surprisingly, Africa has a stronger, but still marginal, presence in the *Oxford Handbook of European Legal History*. In its preface, the editors claim that they were motivated by the »conviction that the concept of European legal history needed updating« and sought to frame the publication accordingly. Indeed, many of the articles engage in debates that include other regions of the world apart from Europe. For example, »Africa« even appears as a keyword in the article »Early Roman Law And The West: A Reversal of Grounds« by Pier Giuseppe Monateri, who challenges the con-

1 For example, Frankenberg, 49; Likhovski, 154–155; Lovelace Jr., 635; Salaymeh, 771; and Schmidt, 280.

struction of Roman law as a »unitary Western legal tradition«. He dedicates Section III of his article to what he calls the »African-Semitic Theory« that »points to the Middle East and Egypt as places of a high-level legal culture from whence the Romans borrowed more advanced legal theories than they themselves possessed when Roman law was still quite primitive«. Monateri also stresses:

I am not interested in discussing whether Egyptians are to be labelled as ›African‹ from a racial point of view. I use the term ›Africa‹ or ›African‹ with a mere geographical implication, since the land of Egypt lies in Africa, according to a European partition of the globe. I want to use this term because it is always ›denied‹ in discussions among legal historians, where Egypt is constantly referred to as an ›oriental‹ or Middle Eastern country, or at best a Mediterranean region. This ›denial‹ of the term ›African‹ is striking, and as such it is quite interesting even if (or especially because) it can be rationally justified by traditional legal historians. In this way, my use of the term can be justified on ›neutral‹ geographic principles, but it is not intended to be neutral at all. (9–10)

Monateri also engages critically with the academic debates of 19th- and early 20th-century Orientalist scholars concerning the »African-Mediterranean legal world«. In his conclusion, he challenges academic conceptions that draw continuities between Roman Law and Western legal traditions, emphasizing that »›Western‹ law is not nearly so ›Western‹ as we have been led to believe«.

In their article »A More Elevated Patriotism: The Emergence of International and Comparative Law (Nineteenth-Century)«, Martti Koskenniemi and Ville Kari dedicate one section to the »Non-European World«. Here, Africa is one of the regions of the world mentioned as examples of how colonialism shaped international and comparative law. Specifically, Egyptian scholars are discussed as examples of local elites' engagement with the legal academic debates held in Europe. The authors,

however, present these Egyptian lawyers as part of the »Arab World«, not of the African one.

Still on the topic of imperial legal orders, Markus Dubber's article »Colonial Criminal Law and Other Modernities: European Criminal Law in the Nineteenth and Twentieth Centuries« explores issues concerning German colonial criminal law in South-West Africa (today's Namibia). He argues that analysis of colonial criminal law might shed light on issues still not addressed by the history of European criminal law, stressing that these two »types« of criminal law – colonial and European – were not clearly distinguished from each other, as some researchers suggest.

In his contribution »Colonial and Indigenous ›Laws‹ – The Case of Britain's Empires, c. 1750–1850«, Mark Hickford does not explicitly address British colonialism in Africa, though he includes some relevant books in the article's footnotes. Throughout the text, Hickford tends to employ the terminology of »indigenous« when these notes actually indicate that he is likely talking about Africans. In the context of imperial legal history – and above all when the focus is the British Empire, which encompassed regions in America, Africa, Asia, and Oceania – the use of such a generic and ethnocentric term as an analytical tool is likely to overshadow the specificities of African societies and colonial domination experiences, particularly as the article explicitly mentions other regions of the British Empire, such as America and Australia.

Africa again appears as a region linked to slavery in the article of Matthew Mirow entitled »Spanish Law and its Expansion«. As in Mawani's contribution, Africans appear only as slaves and objects of European colonial legal orders. Mirow does not consider, for example, the importance of African conceptions of law and justice in the making of colonial societies in Latin America.

As we can see from this brief survey of the two *Handbooks*, the gaps concerning African legal history are geographical, chronological, and thematic. There are some general and brief references to »Africa« scattered throughout the publications.²

2 Apart from the ones mentioned, for example also in Hespanha's, and Cordes' and Höhn's contributions to the *Oxford Handbook of European Legal History*.

Egypt was the only African country with which the articles engaged in more detail. Other African locations that are briefly mentioned, such as Namibia, are not analyzed as deeply as other geographical regions throughout both volumes. There is thus a geographical bias that renders Africa as a whole invisible in the academic production on legal history publicized in both *Handbooks*.

In terms of chronology, African territories are mentioned in articles dealing with the Roman Empire, Atlantic slavery, and 19th- to 20th-century imperialism. Anything outside these periods is absent. Partially due to this chronological bias, the themes relating to African legal history are extremely restricted. Readers of these *Handbooks* might take away the impression that there are no topics of interest for legal history in Africa apart from three specific forms of European domination, that is, the Roman Empire, the transatlantic slave trade, and 19th- and 20th-century imperial legal orders. Even from an Eurocentric perspective that only considers the interactions between Non-Europeans and Europeans in terms of »colonial expansion«, there is a huge thematic bias in the *Handbooks*. Nothing is said, for example, of the long presence of European administrative and judicial institutions in sub-Saharan African territories since the 16th century. Also, the in-depth cultural exchange – which involved law – in the Mediterranean area (including North Africa) that took place over many centuries is mostly ignored. On the other hand, if we seek to broaden legal history perspectives and take non-Eurocentrism as a theoretical and methodological guideline seriously, then the possibilities of research themes involving Africa are countless. If we only focus on »empire«, many perspectives of African legal history end up getting lost.

The list of contributors to both *Handbooks* also reveals an issue of author bias. As the introduction to this *Forum* shows, all 105 authors are based in countries of the Global North. There are no authors affiliated to universities or research institutions from the Global South. The institutional affiliations of authors can influence not only the themes and geographical spaces they cover, they

also determine which methods and academic debates will be highlighted. It is not by chance that most of the literature cited is Anglophone: more than half of the authors are based in English-speaking countries.

This author bias is particularly pronounced in the *Oxford Handbook of Legal History*, which has the great majority of its contributors based in English-speaking countries. In the preface, the editors stress that their goal »was never a handbook of law across time and space. What we were after instead was a volume that would capture the glorious variety of research on legal history going on around the world today« (v). Concerning the contributors, they claim: »The handbook takes a broad and inclusive approach to its subject matter. Its list of contributors includes scholars from several countries and legal systems.« But is there really a variety of research represented in the publication? Can a »broad and inclusive approach« be realized with contributors who do not actually come from »several countries and legal systems«, but are all concentrated at Global North research institutions, mostly in the Anglophone world? The *Oxford Handbook of Legal History* claims to represent »a variety of methodological approaches, areas of expertise, and research agendas«, but its author bias demonstrates how problematic it can be when edited publications focus almost exclusively on contributors who are part of the English-speaking academic community, silencing a huge variety of theoretical and methodological perspectives and rendering entire geographic regions' legal experiences invisible.

The silences, gaps, and marginalization concerning African legal history in both publications reflect a much broader problem of academic structural inequality. To overcome this, researchers who hold important positions in the international academic debate need to start acknowledging this continuing bias and imbalance, and take concrete measures to include African legal history as a fundamental and inescapable perspective of historical legal research.

