

QUADERNI FIORENTINI

per la storia del pensiero giuridico moderno

37
(2008)



GIUFFRÈ EDITORE

BARTOLOMÉ CLAVERO

HISTORIES AND MEMORIES, CULTURES AND ETHICS (1)

Good day to everybody. Let me welcome all of you to Seville. Here you are, ready to hold your meeting on *Crossing Legal Cultures*, the critical subject of the thirteenth conference of the European Forum of Young Legal Historians, the first one to take place in a University located in Southern Europe. So let me welcome you to Southern Europe, which is close to the non-European world and therefore whence bridges for crossing legal cultures may be more easily built.

This is your forum, the young legal historians' forum. As a senior guy, I am not entitled to give any presentation or take part in the debates. Only upon your invitation may I have the floor for the inauguration address. First of all, let me thank all of you for this privilege of speaking about legal history in a juniors' forum, before people who have resolved to become experts in legal history and can still determine what kind of legal history is worth being produced — both researched and taught — as a personal commitment. Perhaps our experience — seniors' experience — may help you. The best I can do just on this occasion as a response to your invitation is to talk a little bit about my personal experience.

For senior people, experience is, first of all, memory. Let me recall without any nostalgia (« Youth divine treasure, you leave and never return [...] », thus spoke the poet, not the man); with no melancholy at all for the times of my early life were hard and mean, undoubtedly worse than they are today. Let me remember my youth as a fresh legal historian in times of trouble.

(1) Address to the XIII European Forum of Young Legal Historians, Seville, EU, September 5, 2007.

Over thirty years ago, in the summer of 1975, just around this same time, a seminar was held nearby, in the former University of La Rábida, now the International University of Andalusia, on purposes and methods, abilities and undertakings, ends and means of the so-called basic legal sciences — the legal sciences other than the practical or so-called positive ones — and thus on purposes and methods, abilities and undertakings, ends and means of legal history along with legal philosophy, Roman law, and a surrogate of constitutional law. As we were under a dictatorship, that of the late general Franco, constitutional law wasn't at the time a practical or positive legal branch in Spain. It wasn't even called constitutional but political law instead.

We, the then juniors, were summoned there in La Rábida to listen to the seniors and so learn from them. In principle, that seminar had nothing to do with the kind of meeting you are about to hold on this occasion, but something happened that changed the agenda. Franco, the Spanish dictator, was seriously ill and the dictatorship moved onto the defensive. This summer of 1975 a counterterrorist legislation no less terrorist than terrorism itself was set into force and this became a burning issue inside and outside the meeting room of our seminar. I have never forgotten which seniors and juniors — a minority to be sure — supported this outrageous legislation in the debate it prompted there in La Rábida.

The case was that policy triggered participation and the juniors abandoned their scheduled role as passive recipients for seniors' science. The dictatorship's end did not seem as clearly to hand as it actually was, but anyway, beyond doubt, the times they were changing here in Spain over thirty years ago. A small number of the seniors and most of the juniors attending La Rábida seminar were eager to converse not just about policy but also law as the subject matter of our research and teaching. We discussed the future in general and that of our scholarly profession — about the purpose and method, ends and means of legal history in the case. So the meeting evolved into a permanent debate inside and outside the meeting room among most of the juniors in the presence of the seniors and with the help of some, only some of the latter.

Francisco Tomás y Valiente was one of the seniors who addressed us and furthermore he entered into the whole debate on an

equal footing with us, the juniors. Then, he was a plain legal historian, the legal history chair in the University of Salamanca. Later, when times changed, he would become Chief Justice and thus a reputable expert not just on the history of constitutional and criminal law but also law itself. He distinguished himself by showing full support for the abolition of any kind of abuse through law, including the death penalty (the last death sentences had been executed in 1974). In 1996, he was shot to death in his school office by a gunman belonging to ETA. Tomás y Valiente is one of the eight hundred and thirty four people killed by ETA since 1968 up to now, the summer of 2007. In euskera, the Basque language, ETA stands for *Euskadi ta Askatasuna*, Basque Homeland and Freedom, which the terrorist application pretends still to mean. Yet meaning stems not just from language but also politics and, most of all, ethics. Heed this because it concerns my point here.

Tomás y Valiente's presentation in the 1975 La Rábida seminar was someway related to his later positions. He openly advocated a kind of legal history that could be of significant help by looking at the present as for the selection of issues and even the focus of research. He exemplified his proposal with his own work. If he had studied torture as a judicial procedure in the *Ancien Régime*, it was because he was concerned with the underground practice of torture in our present times, no need to mention Franco's regime. If he was interested in historical forms of misgovernment, like that of the *Validos* or irregular premiers as favourites of the Spanish Hapsburg monarchs, it was due to his concern with present arbitrary regimes, no need ever to mention that of the dictator Franco. And so on. He even repudiated his early work because, by tackling exclusive historical issues, it was not helpful at all for the present.

There is no transcription of the debate with the published proceedings, but I clearly remember since it kept evolving for years after. I frankly disagreed with Tomás y Valiente by arguing that it is not advisable to link history and policy so directly. Of course I thought that history might help somehow but in a completely different way. I contended my preference for a kind of history which could show the strangeness and otherness of the past in order to shed some light on the transience and precariousness of the present. Legal history ought to focus on the *Ancien Régime* law not

as it might regard the present but by itself, for the sake of the past with all its insurmountable peculiarities, so that we could become conscious of the profound revolution that was needed to bring about the present and the different revolution then necessary to beget the future. In sum, history could illuminate the otherness of the past so as to bring the otherness of the future into sight. That was what I thought and what I said.

We — Tomás y Valiente and I — argued then and kept arguing after. To hold a debate you have to share some middle ground on which to be able to discuss. For that matter, we, both of us, had two basic points in common. First, we thought that history ought not to be primarily researched on behalf of either the present or the future but by itself according to the historians' demanding rules for obtaining evidence through the collection and scrutiny of sources specific for the issue and sufficient as for the context. History ought to be consistent so as to be helpful out of time too. Bad history is good for nothing or at least nothing sound. Thus we agreed that history by itself makes sense as far as good history goes by itself beyond its time of reference, towards either the present or the future.

Secondly, we, both of us, agreed that the usual lawyers' history construed from the present to help the present is completely useless as history and seriously biased as law. It was, you know, the usual history of Roman law and all its more or less nationalistic cognates coming from the nineteenth century. Regarding this, we could paraphrase the famous dictum from Maitland at the end of that century: « If we make historical research the servant of given law, it ceases to be history right away » (Maitland more cautiously said: « If we try to make history the handmaid of dogma she will soon cease to be history »). No question about this. We were not interested in the serviceable kind of lawyers' history because it turns out to substitute history for law — bad history for bad law besides.

We expressed our common ground in different ways, characterizing the history of law, he as a historical science and I as a legal one, yet we agreed about outright rejection of lawyers' history and the vindication of historians' history in the very legal field on behalf of the law itself. We argued about the means and the extent of linking the present of our experience and the past of our research.

Should we select the topics to be studied bearing in mind their importance for the present? He said yes; I said no. I contended that we should tackle the more exotic topics in history as they might be the most significant ones for a different society — that of the past — and in this way open our minds for the necessary difference of the future. Should we ever be mindful of the problems of the present when studying those of the past? He said yes and I said no. I thought that there was a risk that this would blinker our minds regarding the future.

He was concerned about how to bring about a better present and I about how to achieve a different future. This made a big difference because the present was there and the future wasn't anywhere. In practice I was the one who called for a history by itself, yet under the argument that it is most advisable to know a different social system, that of past Europe, so as to be able to imagine further differences, those of the European future. Or rather I would say past Spain and the Spanish future. Then, in the mid-seventies, we were all still imprisoned in the nationalistic kind of legal history. If we, juniors, visited Germany or Italy, Frankfurt am Main or Florence upon Arno for instance, it was to excel as experts in the history of Spanish Law rather than to open further horizons.

Now that time has passed, times have a-changed, and he, Francisco Tomás y Valiente, is gone or rather snatched from life, what can I say about our long-lasting dispute? Well, now I think that he was right and I wasn't wrong. He was right yet I was not wrong.

He was right. My agreement now would be broader. Let me put Tomás y Valiente's stance in the nowadays language of historiographical debates. It would qualify as an example of the ethical turn, the intellectual trend and scientific practice that characterizes history as « the project of working through the past in the interest of the living » and consequently highlights « historian's obligations to the living on behalf of the dead », all this on the grounds of the demanding rules of historical research with appropriate sources, a set of rules never able to reach an indisputable, absolute truth but sufficient to find out and get to know what may be of interest to our present requirements.

Therefore history has a twofold responsibility toward the present, that of being reliable and that of being helpful, neither be-

ing absolutely truthful, neither becoming the manifestation of an absolute truth about the past. There is no such thing as scientific history (as a junior and a good Marxist-non-Leninist, I faithfully believed in History with the capital letter but let me think I know better as a senior and still a committed citizen). There is no such thing as historical research capable of achieving definitive results uncontaminated by researchers' approach. You would do well to begin research by checking your background.

In the previous paragraphs I am specifically drawing on and quoting from Dominick LaCapra, whose approach to history as an intellectual endeavour on ethical grounds constitutes his personal answer to an existential question: « How can history be not simply a profession but a vocation? » or how the historian can be not just a good scholar but also a good citizen as a very expert, not as a capacity apart. The challenge is currently so pointed that three years ago the journal *History and Theory* hit its all time record of submissions when a call for papers on *Historians and Ethics* was posted on its website.

Needless to say, history ethics involve concerns other than those considered by the current codes of conduct for historians specifically or scholars in general. For instance, the former come up against unbalanced narratives that disparage alien cultures and advocate new rights such as the dead people's entitlement to due process by history. However, the latter — the current codes, the codes in force, so to speak — come up against flagrant plagiarisms that breach copyrights and are mainly concerned with scholars' professional and economic interests. Some topics may overlap — for instance, 'thou shalt not steal' — yet they do not stand for the same ethics at all.

Be mindful rather of the former, the as yet unusual ethics. Pay heed to the existential question and the ethical answer conveyed by LaCapra. You can extend both of them to all the branches of learning in the social sciences. By no means do they exclusively concern history, this despite most historians' reluctance or even opposition. Today the ethical turn is instead handled mostly by linguistic, literary, and cultural studies. In any case, the theme of the XII European Forum of Young Legal Historians, the previous one, had to do with this. This last conference of yours was dedicated to

Erinnern und Vergessen, the ethics, in the end, of legal history between remembrance and oblivion.

As for young and old legal history, since the ethical turn elaborates what he stood for, Tomás y Valiente would agree with both the query about our vocational profession and the reply concerning its ethical burden. Under the ethical turn, legal history might even happen to be an applied science, which would please Tomás y Valiente mostly after his tenure as Chief Justice and consequent return to a chair of legal history in a law school, not plain history in a humanities department or anywhere of that ilk. Site, legal site rather than any other, was of consequence for him.

He was right and I was not wrong, yet I'm not confident whether not being wrong is the same as being right too. Let me explain myself. I argued for a history focused on the knowledge of the past as such, with all its strangeness, so as to learn about human differences. To put it in the terms of the ethical turn, the awareness and knowledge of radical human differences — differences between not just persons but also cultures or peoples in the plural — would be likewise an ethical requirement whose challenge history and especially legal history might help to face. Historical knowledge makes ethical sense not just as a contribution to our ethics in our present but also as an access to alien ethics and presents all in the plural; in terms then of disputable, transitory, relative truths, as an access to the truths of others — cultures or peoples and not exclusively persons — so as to enable us to reach a middle and common ground, the very human truths, the most widely shared truths.

Today, at this point, I know that I articulated my position very poorly, so poorly that I would reject it today. The difference I referred to was not such a key difference. It was our own difference, the difference of our own past for the sake of our own future all in the singular, the possessive *our* meaning culturally European people's, so to speak. Does that difference make any difference at all? The European past as a different past that I spoke of was in fact Christian Law, both Catholic and Protestant, not even Orthodox Christian Law, let alone Jewish Law or Islamic Law with all their respective variants. I did not even identify past European Law as Christian Law to make room for the others, but it was deemed as European Law by itself, period.

Of course, I was not alone in such a vain presumption. Remember the date, 1975. During the sixties and early seventies of the last century, legal history had experienced major pushes for renewal through Europe, mainly coming from Frankfurt and Florence — the Max-Planck-Institut für Europäischen Rechtsgeschichte and the Gruppo, later Centro per la Storia del Pensiero Giuridico Moderno respectively. They were my intellectual terms of reference in the mid-seventies. If they — Florence and Frankfurt — have had, as a collective endeavour (few people aside), any deeply shared intellectual connection indeed, it is the close and mostly unrecognized identification between past European Law and Western Christian Law.

Let me challenge you, all of you, to find the chapters on European non-Christian Law, either Jewish or Islamic *Privatrecht* for instance, throughout the multi-volume *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* from the Max-Planck-Institut and upon failing, determine the meaning of the silence, because silence in context may be most meaningful. Imagine how much of past Europe is missing in the European legal history that we, the seniors, bequeath to you, the juniors. The huge *Handbuch* case may convey the best illustration of the flaws and shortcomings of the environment where I helplessly intended to discover difference in identity, the other in the same. Autistic legal history was actually our common ground years ago. We ignored our ignorance. We didn't suspect how deep it was as regards the pasts and presents of real othernesses, the European others' and the non-European others' all in the plural, even the futures.

When I decided to author the biography of Francisco Tomás y Valiente and his family gave me access to his personal archive, I was shocked by how little he had moved abroad, outside Spain, before the dictatorship came to an end. Still, no wonder. How could I have been so naïve? Then a passport for foreign travel was not a personal right here in Spain, but a political grant, the same as public funding to move anywhere, and some people couldn't step over the border at will. Open movements were contingent on secret files in police quarters. Spain was like a big prison except for emigrating workers and European tourists. The autism then wasn't an available choice but a guilty verdict without due process. Now, to-

day, it can be an option, the poor option. You, young legal historians, don't have any excuse if you fail to go beyond, so to speak, Frankfurt and Florence through, needless to say, Florence and Frankfurt.

Here you are, about to move across legal cultures. Let me give you a last piece of advice. To cross you have to know the field or rather a set of fields, the one on your side and those on the other side. For and by crossing, *sapere aude*, dare know. *Habe Muth*, have courage.

Dare to know beyond cultural boundaries. Learn from each other as through an adversary, daring trial process. Don't be afraid of the cultural relativity of legal truths, European or non-European. To be able to cross forth and back, back and forth, get rid of your scholarly background of legal, even constitutional principles and regulations (separation of powers, rule of law, grant of human freedoms as legal rights, and so on) as long as they are not checked in European or non-European settings by empirical research. Neither bookish doctrines nor lofty philosophies are helpful as such. For historical inquiry, either doctrines or philosophies must be objects, not guides; sources, not pieces of bibliography.

Try hard to draw two-way bridges both inside Europe and with off-Europe. By Europe I mean a cultural marker beyond geography through colonialist diasporas. Europe extends as far as the Americas and Australasia, until the very antipodes, though not reaching to everybody everywhere, not to indigenous, colonized peoples and cultures, needless to say yet convenient to remember. Try to take a look at all sorts of non-Europes and reflect on the role of mainstream European and Euro-American legal history in the singular as a contributor to the building of big Europe or little Europes around the world. Most experts still haven't heard of or refuse to pay attention to this awkward piece of news, yet the times of that kind of legal history — the legal history we seniors made — appear to be over or ought to be so in strict consequence of its faulty, colonial ethics. Times, they have really a-changed.

Are these the reasons why you are here ready to confer on crossing cultures? The response is up to you, not me; to juniors, not seniors. This is your meeting. Get a lot of benefit from your presentations and debates. Make the most of your conference. Don't

keep it to yourselves but disseminate and share. I don't advise 'publish or perish' but interact by searching and teaching or else become autistic experts, maybe good historians but bad citizens anyway. You — experts-to-be — have still time ahead to make up your minds and hearts about your walk of life and profession. This is your party. Enjoy your stay here in Seville, Southern Europe. Thanks for your attention. Good work and good luck.

References in order of appearance.

- Rubén DARÍO, *Obras Completas*, vol. I, *Poesía*, Madrid, Galaxia Gutenberg, 2007.
- Francisco TOMÁS Y VALIENTE, *Obras Completas*, Madrid, Centro de Estudios Constitucionales, 1997.
- José María CALLEJA e Ignacio SÁNCHEZ-CUENCA, *La derrota de ETA. De la primera a la última víctima*, Madrid, Adhara, 2006.
- Bob DYLAN, *The Times They Are A-Changin'*, New York, Columbia Records, 1964; lyrics available online: <http://www.bobdylan.com/albums/times.html>.
- El Primer Año de Derecho. Actas de las Jornadas de Profesores del Primer Año de la Facultad de Derecho, Universidad de la Rábida, 27 de agosto - 5 de septiembre de 1975*, Madrid, Ministerio de Educación y Ciencia, 1978.
- Luis RUBIO MAYORAL, *Disciplina y rebeldía. Los estudiantes de la Universidad de Sevilla, 1939-1970*, Sevilla, Universidad de Sevilla, 2005.
- Ignacio FRANCA, *Salamanca, 1950-1992. Materiales para la Historia*, Salamanca, Caja Duero, 2002.
- Jesús VALLEJO, *Un cuarto de siglo, una historia, un anuario*, en *Crónica Jurídica Hispalense*, 1, 2003, pp. 388-418.
- Frederic William MAITLAND, *Why the History of English Law is not Written* (1888), in H.A.L. FISHER (ed.), *The Collected Papers of Frederic William Maitland*, Gaunt, Holmes Beach, 1999, vol. I, pp. 480-497.
- Dominick LACAPRA, *History in Transit: Experience, Identity, Critical Theory*, Ithaca, Cornell University Press, 2004.
- History and Theory: Studies in the Philosophy of History*, 43-4, 2004, special issue on *Historians and Ethics*.
- American Historical Association, *Statement on Standards of Professional Conduct*, 2005, online: <http://www.historians.org/pubs/free/professionalstandards.cfm>.
- A. Dirk MOSES and Hayden WHITE, *Forum: The Public Role of History*, in *History and Theory: Studies in the Philosophy of History*, 44-3, 2005, pp. 311-347.

- Courtney THOMAS, *History as Moral Commentary: Ideology and the Ethical Responsibilities of Remembrance*, in *Nebula: A Journal of Multidisciplinary Scholarship*, 1-3, 2005, pp. 179-196 (e-journal: <http://www.nobleworld.biz>).
- Richard A. POSNER, *Against Ethical Criticism*, in *Philosophy and Literature*, 21-1, 1997, pp. 1-27.
- Keith JENKINS, *The end of the affair: On the irretrievable breakdown of history and ethics*, in *Rethinking History: The Journal of Theory and Practice*, 11-2, 2007, pp. 275-285.
- Todd F. DAVIS and Kenneth WOMACK (eds.), *Mapping the Ethical Turn: A Reader in Ethics, Culture, and Literary Theory*, Charlottesville, University Press of Virginia, 2001 (against Judge POSNER, pp. 59-79; Martha C. NUSSBAUM, *Exactly and Responsibly: A Defense of Ethical Criticism*).
- Holy Bible: King James Version*, New York, American Bible Society, 1999, *Exodus*, XX, 15.
- XII European Forum of Young Legal Historians, *Erinnern und Vergessen / Remembering and Forgetting*, München, Martin Maidenbauer, 2007.
- Helmut COING (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, München, C.H. Beck (Max-Planck-Institut für Europäische Rechtsgeschichte), 1973-1988.
- Julien TAIEB, *From Maimonides to Napoleon: The True and the Normative*, in *Global Jurist*, 7-1, 2007, article 8 (e-journal: <http://www.bepress.com/gj>).
- Bartolomé CLAVERO, *Tomás y Valiente: Una biografía intelectual*, Milano, Giuffrè (Biblioteca per la Storia del Pensiero Giuridico Moderno), 1996; *Tomás y Valiente, jurista en tiempos de tribulación y transición*, en Salustiano DE DIOS, Javier INFANTE y Eugenia TORIJANO (eds.), *El Derecho y los Juristas en Salamanca, Siglos XVI-XX. En Memoria de Tomás y Valiente*, Salamanca, Universidad de Salamanca, 2004, pp. 15-39.
- Timothy GARTON ASH, *The File: A Personal History*, London, Harper-Collins, 1997.
- Paolo GROSSI, *Mitologie giuridiche della modernità*, Milano, Giuffrè, 2001.
- Pietro COSTA and Danilo ZOLO (eds.), *The Rule of Law: History, Theory and Criticism*, Dordrecht, Springer, 2007.
- Immanuel KANT, *Beantwortung der Frage: Was ist Aufklärung?* (1784), free online at *Projekt Gutenberg-De* (<http://gutenberg.spiegel.de/index.php>).
- Allan A. GLATTHORN, *Publish or Perish: The Educator's Imperative*, London, Sage Publications, 2002.