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SYMPOSIUM ON INTERNATIONAL LAWS PUBLIC AND PRIVATE

THE PRIVATE AS A CORE PART OF INTERNATIONAL LAW: THE SCHOOL OF SALAMANCA, SLAVERY, AND MARRIAGE (SIXTEENTH CENTURY)

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In "Gender and the Lost Private Side of International Law," Karen Knop argued that "recuperating private international law as a lost side of international law can open up counter-disciplinary research on gender in the history of international law."[1] In this essay, I use Knop's argument to revisit our understanding of the sixteen century "School of Salamanca"[2] and its importance for international legal history from a gender perspective. I focus on the practice of jurists and theologians associated with the School of Salamanca in assessing the validity of marriages of newly converted Indigenous peoples in Brazil (*negros da terra*), and later the validity of remarriages of Indigenous people and enslaved Africans (*negros da Guinê*) who had already been married in places from which they had been forcibly removed.[3] To do this, these jurists and theologians engaged in private international law (or conflict of laws) reasoning. A key question involved determining what law governed each marriage—was it *ius gentium*, natural law, or canon law? Examining their arguments, I argue, offers an instance of Knop's insight that recuperating private international law allows us to redress the invisibility of women in the history of international law. In my case study, not only do we better understand "how power operates through international legal concepts and institutions"[4] in the private sphere of the family *in the colonies*, but also, and crucially, how "private international law make[s] visible the effects of colonial . . . law on gender relations and national identity *at home*,"[5] to borrow Knop's words.

Slavery and Marriage: Finding the Applicable Law

International lawyers who study the School of Salamanca have generally focused on the treatment by Francisco de Vitoria and his pupils of the so-called American "Indians," on the development of law governing the use of force, and more recently on the expansion of property law under *ius gentium*. In these studies, however ground-

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[1] Karen Knop, *Gender and the Lost Private Side of International Law*, *in* HISTORY, POLITICS, LAW. THINKING THROUGH THE INTERNATIONAL 359 (Annabel Brett, Megan Donaldson & Martti Koskenniemi eds., 2001).

[2] *See* THE SCHOOL OF SALAMANCA: A CASE OF GLOBAL KNOWLEDGE PRODUCTION (Thomas Duve, José Luis Egío & Christiane Birr eds., 2021).

[3] *See* CARON ZERON, LIGNE DE FOI: LA COMPAGNIE DE JÉSUS ET L'ESCLAVAGE DANS LE PROCESSUS DE FORMATION DE LA SOCIÉTÉ COLONIALE EN AMÉRIQUE PORTUGAISE (XVIE–XVIIE SIÈCLES) (2009).

[4] Knop, *supra* note 1, at 362.

[5] *Id.* at 359 (emphasis added).

breaking, gender is invisible.[6] Also understudied has been the School's view on Black slavery, namely, the enslavement of those referred to at the time as "Ethiopians" (meaning, sub-Saharan Africans) and their forced transportation first to Europe and then to the Americas. In my recent work, I have examined the ways in which jurists and theologians associated with the School of Salamanca—especially those teaching at the prestigious Portuguese universities of Evora and Coimbra[7]—analyzed the legitimacy of the slave trade carried out by Portuguese merchants through the concepts of *dominium* and *ius gentium*.[8] Even less examined, however, are writings of these jurists and theologians on the validity of marriages of Indigenous people and enslaved Africans in Brazil. And yet, this is where we can have some account of women's lives or experiences in a slavery-based colony.

In exploring the issue of marriage, the jurists and theologians of the School of Salamanca were responding to questions asked of them by Jesuit missionaries in Brazil. The latter had arrived in Brazil in 1549, having been sent by the Portuguese Crown to convert the "Indians" to Christianity and to protect them against settlers, who were seen by the Crown as exploiting ruthlessly the Indigenous population. Having failed to convert the natives through expeditions in the hinterlands (*sertão*), the Jesuits began developing the *aldeamento* system, which involved settling Indigenous peoples of diverse origins in supervised coastal villages and Christianizing them there.[9] One question that quickly arose among the missionaries was whether they could baptize (and therefore properly convert) a native even though this person was in a marriage deemed illegitimate or invalid under canon law. This was not a new question for the Catholic Church. During the Crusades, the Church had already recognized that marriage existed in different forms in human societies under natural law and civil law, but insisted that only Christian marriage fulfilled divine law.[10] The challenge for Jesuit missionaries in Brazil was to reconcile "unfaithful unions" of new converts with Christianity, especially unions that allowed for polygamy or that were meant to be temporary. The challenge—both theoretical and practical—was enormous. Principles needed to be established in order to make a clear distinction between the local concepts, practices, customs, and rites that could be tolerated after the conversion of the pagan inhabitants to Christianity, and those that should be eradicated. "Then, clever and workable strategies needed to be developed in order to root out unacceptable local traditions, progressively introduce Christian normativity, and replace, little by little, other customs that, even if permissible, were far from desirable."[11]

For this, *ius gentium* was set aside, as it was deemed too malleable. Natural law turned out to be a better argumentative tool to draw a line between what was tolerable and what was not, thanks to the division between the first and second principles of natural law. Salamancan scholars generally differentiated between two sets of principles of natural law, viewing the second principles of natural law as those that were not self-evident and could therefore be set aside, while the first principles of natural law were categorized as those inscribed within human reason and self-evident to every rational being. The authoritative reference was the work of Domingo de Soto (1494–1560), who

[6] *See* Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005); Martti Koskenniemi, To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870 (2021).

[7] In these universities, Jesuit professors were teaching missionaries; they were also in close contact with missionaries already living in the colonies.

[8] La Traite Négrière vue par l'Ecole de Salamanque (XVIe siècle) (Anne-Charlotte Martineau ed., 2023).

[9] Carlos Zeron, *Mission et espace missionnaire: Les bases matérielles de la conversion*, 169 Archives de Sciences Sociales des Religions 307 (2015).

[10] The validity of marriage of converts to Christianity had been a classic issue in canon law. But these questions became more acute after the conquest of the "New World." The diversity of marital customs led missionaries in the colonies and their professors in Europe to search for guiding principles.

[11] José Luis Egío, *Producing Normative Knowledge Between Salamanca and Michoacán: Alonso de la Vera Cruz and the Bumpy Road of Marriage*, *in* The School of Salamanca, *supra* note 2.

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had been one of Francisco de Vitoria's colleagues in Salamanca. He considered masturbation, simple fornication, and polygamy not to be intrinsically or obviously bad. In contrast, he viewed marriage between parents and their own children, as well as marriage between siblings, to be absolutely illicit and immoral.[12] Jesuit missionaries were thus told that they could baptize husbands and wife if their marriages were "naturally" valid—that is to say, if they did not violate the first principles of natural law.

Adaptation of canon law was also crucial for allowing existing marriages in Brazil. This was usually done through the use of dispensation (i.e., authorization to do something that would normally be illegal if the competent authority had not granted permission). For instance, Jesuit missionaries in Brazil obtained a papal dispensation in 1563 to discard consanguinity—a classical diriment impediment of marriage—as far as the fourth degree of kinship inclusive (i.e., marriages between first cousins).[13] This dispensation was crucial for the mission's evangelical success, because most Indigenous marital rules—such as the Tupi custom of favoring marriage between a girl and her maternal uncle—were seen to be violating the first principles of natural law.[14] Thanks to the dispensation, Indigenous marriages under the laws of nature could be understood as "real but imperfect"[15] (i.e., valid and perfectible through the sacrament of matrimony), and the evangelization mission could continue.

Remarriage and Resistance in the Colonies

In the 1580s, the debate concerning the legality of marriages took another direction in Brazil. The prevailing question for the missionaries was no longer the validity of existing unions of native Brazilians, but one about remarriage. Jesuits missionaries began to ask their former professors on the Iberian peninsula as well as the Roman Curiae whether new converts brought from Angola (*negros da Guiné)* and from the hinterland (*negros da terra*) could enter into second marriages, given that their first wife or husband was still alive.

Why did this change occur? The 1580s are seen a turning point in Brazilian history. The production of sugar prospered. Settlers demanded an even larger workforce from the Crown in order to run their plantations. Jesuits were also becoming involved in sugar production and therefore required more workers. As a result, the Jesuits promoted ventures in the hinterland (*sertão*) to capture Indigenous people, and relied increasingly on enslaved Africans who were brought directly from Angola. The Jesuits did not see this as contradicting their evangelical mission; they continued to save the souls of the local/enslaved population, despite being open to acquiring such persons through *dominium*. As the historian Charlotte de Castelnau L'Estoile has shown,[16] the change of focus from marriage to remarriage was closely linked both to the increasing number of enslaved people who were brought directly from Angola to work on sugar plantations and *fazendas*, and to the expanding capture of Indigenous people in the hinterland (*sertão*) and their forced placement in *aldeamentos*. Questions arose as to whether the sacrament of marriage should be administered by Jesuits to newcomers (from Angola or the Brazilian *sertão*), even though they had been married previously in the place from which they had been forcibly taken. On the Iberian peninsula, Jesuit professors understood the need for remarriage, but disagreed on the justification for its legality.[17] For some, the "Pauline Privilege"—an important component of the Church's law on the

[12] Domingo de Soto, De Iustitia et Iure: Libri decem: De la justicia y del derecho en diez Libros (1571).

[13] Les conciles œcuméniques (Giuseppe Alberigo ed., 1995).

[14] Bull *Romani pontificis* issued in 1571 partially responded to this concern. *See* Document VII of the appendix to Codex Juris Canonici (1917).

[15] José de Acosta, De Procuranda Indorum Salute (1588).

[16] Charlotte de Castelnau-L'Estoile, Un Catholicisme Colonial: Le mariage des Indiens et des esclaves au Brésil, XVIe-XVIIIe siècle (2019).

[17] *See Parecer Sobre os Casamentos dos Indios do Brasil*, File CXVI, 1–33, Archive of the Biblioteca Pública de Évora.

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indissolubility of marriage—was sufficient, because it allowed the dissolution of a marriage between persons who were not baptized at the time the marriage occurred. One could therefore argue that a marriage was invalid because the partner left in Angola or the Brazilian *sertão* had not been baptized. For others, this legal basis was not strong enough, because the initial marriage was still valid under natural law. They urged the pope to clarify the matter. So did he: in 1585, "in response to Jesuit missionaries,"[18] Gregory XIII issued *Populis ac nationibus* asserting the papal power of dissolving the marriage of unbelievers "if necessity urges."[19] The power was delegated to Jesuit confessors "in Angola, Ethiopia, Brazil, and other parts of the Indies"; they could dissolve previous marriages on behalf of enslaved Brazilians and Africans who were "unable to communicate" with their first spouses, but who wanted to convert and remarry.[20]

Jesuit missionaries tried to use remarriage as an instrument to keep *negros da terra* and *negros da Guiné* dependent on them. They faced strong opposition from owners of sugar plantations and *fazendas* who also tried to gain more control over *negros da terra* and *negros da Guiné* by having their own *negros* remarry individuals who were under Jesuit jurisdiction. When this occurred, the newly married couple would move together to the settler's property and work for him. But the new laws of remarriage were also used by Indigenous people—both men and women. Even though most were not legally slaves, the natives living in the *aldeamentos* were nonetheless subjected to conditions of forced labor: they worked in plantations or *fazendas*; they worked for the Crown building fortresses; they were part of the colony's armed forces, etc. In some cases, the *aldeamentos* represented an alternative to slavery and personal dependence on the settlers. In other cases, it was the opposite. In São Paulo, for instance, where Indigenous slavery predominated, the *aldeamentos* were not seen by the natives as effective protection against slavery.[21] There, remarriage provided a certain amount of autonomy. Given that marriage was one of few rights recognized by law, it offered a way of moving and a means of protection from white oppression. Under *Las Siete Partidas*, enslaved couples could not be separated against their wills; the couple could even sue—at least in theory—masters who threatened to separate them.[22] Remarriage thus became "the center of the missionary project of Indigenous transformation and [was] the same as the center of indigenous resistance or negotiation."[23]

Effects of Colonial Policies at the Empire's Center

The effects of slavery and the slave trade—an international legal institution—were not only visible in the private sphere of the family in the colonies. They were also felt at the center of the Portuguese Empire. This corresponds with one of Knop's insights in "Gender and the Lost Private Side of International Law": "private international law shifts attention to the 'fear that whatever occurred, in no matter how distant a corner of the globe, would inevitably have consequences for what took place in the metropolis.'"[24]

These dynamics are visible in the treatise published by João Baptista Fragoso (1559–1639), a Jesuit who had studied law before becoming a professor of theology at the Colégio de Santo Antão in Lisbon and at the University

[18] John T. Noonan, *Experience and the Development of Moral Doctrine*, 54 CTSA Proc. 43 (1999).

[19] Gregory XIII, *Populis ac nationibu*, January 25, 1585, see Document VIII of the appendix to Codex, *supra* note 14.

[20] *Id.*

[21] John Monteiro, Negros da Terra: Índios e bandeirantes nas origens de São Paulo (1994).

[22] 4 Las Siete Partidas: Family, Commerce and the Sea: The Worlds of Women and Merchants (Robert Burns ed., Samuel Parsons Scott trans., 2001). The Siete Partidas are known as the basis for slavery legislation in the Spanish colonies. *See* David Brion Davis, The Problem of Slavery in Western Culture (1966).

[23] Charlotte de Castelnau-L'Estoile, *Interações missionárias e matrimônios de índios em zonas de fronteiras (Maranhão, início de século XVII)*, 19 Tempo 65 (2013).

[24] Knop, *supra* note 1, at 365.

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of Evora. In the tenth book (Volume III) of his massive *Regiminis Republicae Christianae*, two *disputatio* are devoted to questions of *dominium* of the owner over the slave and their reciprocal obligations, as well as to the issue of the slave trade. Immediately thereafter, in the third *disputatio*, Fragoso turns his attention to difficulties that arise "Concerning marriages of slaves, both faithful and unfaithful." He states, among others things, that he is in favor of remarriage of slaves based on the Pauline Privilege: "if a married Ethiopian converts and his or her spouse remains among the infidels without there being any reason to believe that he or she will convert soon, and without it being possible to ask him or her if he or she is ready to convert due to distance and other circumstances, then this Ethiopian may contract a second marriage."[25] This shows how important the legal discussion of the basis for remarriage in the colonies was for the jurists and theologians of the peninsula.

I would also like to stress the last "difficulty" of the third *disputatio.* There, Fragoso's style becomes more casuistic and hypothetical; he wants to address a difficulty that could emerge anywhere, i.e., not only in the colonies. He asks a question: "if a married man or woman sells himself or herself into slavery, is the marriage still valid despite the enslavement?" For the husband, the answer is yes. A man can sell himself and keep his wife, because "he is not obligated to her in everything, only in what his conjugal duties require: for the rest, he has a right over himself." Regarding the wife, Fragoso takes a different position: "it is certain that she cannot legally sell herself without her husband's consent, because beyond their mutual obligation to live together and the other duties of marriage, she is also subject to her husband's commands." Even though Fragoso adopts (like his fellow Salamancans) an abstract style, we can understand what he has in mind—namely, remarriages. In the next paragraph, Fragoso makes it clear that these rules *do not apply on the Iberian Peninsula*. Under the "latest Spanish royal law"[26] (*lege Regia*), he writes, a married Spaniard cannot enslave himself (to escape his current marriage); such a sale must be declared invalid and may be annulled at the wife's request. What Fragoso is saying is that remarriage was a practice allowed in the colonies (for pragmatic reasons, i.e., the increasing need for workers, which by the end of the sixteenth century would be answered by the slave trade)—but remarriage was not allowed at home.

Conclusion

By focusing on the School of Salamanca and its relationship to Indigenous and Black slavery, my hope was to shed light on a neglected aspect of the colonial origins of international law. By recovering the role of private international law, I aimed to show that members of that School were involved in examining not only questions regarding the legitimacy of conquest and property, but also questions regarding slavery and marriage, which involve the private sphere of the family. This article is therefore a call to invite international lawyers to understand that the private is—and as always been—inside international law as a project of global power.

[25] João Baptista Fragoso, Regiminis Republicae Christianae (1639).

[26] *Id.*

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