The normative fabric of conviviality

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Introduction

Apart legal pluralism, there is a curious inflation of expressions in contemporary legal discussion to reflect on normative multiplicity: many legalities, entangled legalities, hybrid laws, normative pluralism, jurisdictional complexity, law's many bodies, to name a few examples, and what will interest us in this work, multinormativity. A keen awareness of the diversity of law in different conjunctures of the past and present, and the collisions in contemporary transnational law are some of the reasons for coining pertinent headings to understand the issue or to create decision-making tools (Hespanha, 2016). Each new proposal, however, is called upon to prove its worth in comparison with the more widespread and influential discussion on legal pluralism that has accumulated, since at least the 1970s, an extensive and ramified literature (Tamanaha, 2021; Guevara Gil and Thome, 1992). After all, to stay within the limits of this contribution, in what sense does multinormativity raise attention to distinct and

fruitful questions beyond the rich literature of legal pluralism? This question prepares us to investigate the normative dimension of conviviality. Thus, we ask about the heuristic gains of discussing the concepts of multinormativity and conviviality together.

The interest in the intersecting debate of legal pluralism, multinormativity and conviviality is directed towards alternative analytical perspectives to the influential conception of law as a normative system. This conception has advantages for contemporary legal theory in terms of information processing, but it exhibits bias in the comparative study of other historical conjunctures and blocks the understanding of the social and cultural bases of normative production in past and present societies. I argue that multinormativity replaces the image of discrete normative orders in collaboration, conflict or indifference, which is a characteristic of many versions of legal pluralism, in favour of translation practices that give shape to the normative fabric of convivial configurations.

In the next section, I present the praxeological concept of multinormativity, introduced in legal history by Thomas Duve, as well as the corresponding criticisms of legal pluralism. I then discuss the thesis of discontinuity between old and new legal pluralism, proposed by Tamar Herzog, which raises serious doubts about the generic use of legal pluralism for different historical conjunctions. This background serves to prepare the discussion of the collaboration between the concepts of multinormativity and conviviality that will occupy the third section of the chapter. Finally, I analyse three historical examples of normative production by translation practices and their contribution to the composition of conviviality.

The point of multinormativity

A spectre haunts the discussion of legal pluralism: the counter-concept of legal monism, also called "legal centralism" in the influential text by Griffiths (1986), whose emblem par excellence is state law

(Gonçalves, 2023). Although the effort is to question the exclusive link between law and statehood, as well as the unity of state law, paradoxically many analyses of legal pluralism have state law as an insurmountable horizon. This is the case, for example, with the study of native legal orders in colonial societies vis-à-vis the attempt to impose the coloniser's law. Informal and parallel legal orders in different societies (colonial or not), described by sociological or ethnographic research, are defined in contrast to state law (in the end, "parallel" and "informal" in relation to what?). The validity and effectiveness of transnational law is often compared to (inter-)state law. The spectre does not disappear when the interest is in studying the internal diversity of state law, made up of norms from different times and places, special legal regimes for ethnic groups and other markers of difference. Indeed, Humfress (2023) argues that legal pluralism is part of the mythology of modern law, not an alternative to it. This is also one of Duve's premises (this volume) in his critique of legal pluralism and a reason for developing the concept of multinormativity.

Recently introduced from the history of law by Miloš Vec (2009), multinormativity refers to ceremonial normativity in the societies of the ancien régime and the technical norms of standardisation in industrial society, such as the definition of the design of the screw. The liberating gesture was to describe normativities that were not thematised by legal literature without raising the prior question of demarcating the legal/non-legal.

With Duve (2017; 2021; 2022a; 2022b), the concept of multinormativity takes on more ambitious analytical contours. It is part of a research programme for writing the history of law as an alternative to the grand narrative of the history of European law of scientification and rationalisation promoted by jurists. In other words, it is a critique of the history of the formation of learned law and its transformation into the state law of constitutionalism and the codifications of modernity. Losano (2002) summarised this long teleology as the

work of building a system of concepts (legal dogmatics) and a system of legal norms.

To introduce the concept of multinormativity within this larger research programme, it is useful to outline an image of thinking that is influential among jurists and also in the social sciences. Law would predominantly be made up of legislated rules created, applied and enforced by state bodies. Parliament, Administration, Judiciary and Police carry out the dynamics of law in this arc that goes from the establishment of legislation (e.g. prohibiting a behaviour), through the judicial process (e.g. proving the facts and deciding on a sanction) and leading to execution (e.g. the imprisonment of the person convicted of murder). Norms explicitly define obligations, prohibitions, permissions and rights, which are open to interpretation, a task that is undertaken by holders of specialised knowledge (jurists). Other types of law are defined on the basis of this central case: international law is created by states and is valid within the territory of a sovereign unit when it is recognised by it; the extent of the normative power of entities such as churches, companies and associations is defined by the state law to which they are subordinate. Of course, this image is not the only one available, nor is it complete. Other features would emphasise the problem of the effectiveness of this set of rules for choices of action; counter-examples could also be mentioned, such as a transnational law that is not created by states. In any case, the image captures the prototype of contemporary law that is the reference standard for descriptions that extend (to other periods), complete, correct or attempt to question this paradigm.

The role played by the concept of multinormativity is to emphatically place the problem of normative production on a new footing that problematizes this image of thought. Firstly, instead of centralising the work of jurists, Duve draws attention to the different collectives that produce normativity and law. Secondly, and more fundamentally, underlying any explicit work of creating and applying the law, there is a background normativity, made up of implicit practices and knowledge. The creation or application of a law, for

example, is not conditioned solely by the express legal knowledge of jurists, nor does it have a basis of validity only in other explicit rules, but is based on implicit practical assumptions, on a basic normative knowledge that can be reconstructed by historiography. European jurists developed a theory of the sources of law in order to select legal normativity, i.e. law would be produced in the form of legislation, judicial decisions, customs, etc. They also developed doctrines of interpretation and argumentation for the purposes of applying the law. Duve's suggestion is that the production of law is not explained exclusively by the sources of law and the doctrine of interpretation. Multinormativity refers to this explicit normativity, but also and above all to background normativity, practices and reserves of knowledge. Multinormativity in an emphatic sense refers to the background of the practices that underpin normative production. Using Hart's (1961) vocabulary, he suggests that the primary rules of obligation and the secondary rules that explicitly regulate the creation and application of law are anchored in fundamental practical conventions, which he calls tertiary rules.

I think it can shed light on the argument to remember the analytical thesis that a rule is not enough to define its application (Bloor, 1997, p. 2). A legal source is not enough to guide its use. For example, it's not enough to have a rule to know how to apply it, nor is it enough to indicate the interpretative method for applying it, because it would not know how the method should be used. The method is an explicit rule for interpreting a rule, but it needs another rule and so on. However, there is an application of rules that are not paralysed by this regression, which presupposes implicit presuppositions, the basic normative knowledge that defines their correct application.

The theses articulated in the concept of multinormativity, notably the importance of the background of normative knowledge practices, have been incorporated into the larger research programme that seeks contacts with the history of knowledge, the sociology of conventions and other analytical offerings. It is possible to parallel the turn from the history of science centred on the European Scientific

Revolution as a model of rationality to the history of knowledge practices located in different societies and times; and the turn from a history of European legal science to the historical regimes of normative knowledge (Renn, 2014). It is not certain that the label "multinormativity" will continue to feature prominently in the programme's development. The problem signalled by the concept, however, remains central and is subsumed in the concept of the historical regime of normativity, defined as "a form of observation of stabilised arrangements of knowledge of normativity in relation to a particular field of action" (Duve, 2022b, p. 2). Knowledge comprises "discourses, practices, rules, norms, and principles, as well as their contingent conditions" (Duve, 2022b, p. 2). Normativity expresses the characteristic of bindingness (Duve, 2021, p. 58) and "generalised behavioural expectations" (Duve, 2022b, p. 3).

A key part of the research programme is the concept of cultural translation, used to describe normative production. Collectives use knowledge resources to produce normativity. As an example, Duve and Danwerth (2020) coordinated research into the practices of epitomising normative knowledge in the colonial Iberian empires. The book deals with a widespread genre called pragmatic literature, such as catechisms, formularies and manuals. The traditional emphasis of historiography was on the great treatises written by university jurists. In his introduction, Duve distinguished between two types of translation in the production of normativity. On the one hand, there is the translation of locally produced information into generalised normative knowledge that can be condensed, for example, in a brocardo, and preserved and disseminated in some media, such as print; on the other hand, there is the translation of generalised knowledge into the production of a normative solution in a concrete case. Not only university lawyers take part in these translation practices, but also different epistemic communities and communities of practice. The translations use reserves of knowledge, and depend on the implicit background of knowledge.

Does "old" legal pluralism exist?

Herzog (2021) proposed a thesis on the discontinuity between "the old and the new" legal pluralism in Latin America. The new legal pluralism is evidenced by constitutional reforms since the 1980s, recognising to a greater or lesser extent plurinationality, special rights for ethnic collectivities, political autonomy and courts for traditional communities. This legal pluralism is supported by local and transnational social movements, with the support of the United Nations (Thornhill, 2018). In turn, the "old" legal pluralism is summarised in the thesis of the two republics that separated, on the one hand, Spaniards, Spanish judges and Spanish law, and on the other, the natives with their customary law and their authorities (Deardorff, 2018). Formulated by historiography since the 1960s, it is noteworthy that the two republics model mirrored the ongoing discussion about legal pluralism in the colonies in the 20th century, which opposed discrete normative orders, i.e. native law to the coloniser's law.

Since the 1980s, a new political-institutional historiography, initially by Iberian and Italian authors, has brought a more complex picture to the law of ancient régime societies (Hespanha, 1994; Clavero, 1991; Costa, 1969; Garriga, 2006. Without presupposing a Leviathan, both on the peripheries and in the centre of the monarchies, there was a society organised by multiple political bodies, guilds and republics. This was the case with cities, professional guilds, judicial institutions, the family, religious orders, pueblos and Indian reductions, etc. Ancien régime society was a "republic of republics" (Agüero, 2016, p. 41). Graubart (2015, p. 197) is emphatic in pointing out that "rather than two racialised republics, the Castilian kingdoms were ruled via a network of legal entities and multiple republics". Herzog emphasises that jurisdiction was distributed among the various corporations that were not bound to a legal system of their own. Law was an amalgam of different sources, Roman, canon, feudal, customary, local and crown law (Herzog, 2021, p. 710; Hespanha, 2014).

Each authority with jurisdiction was in charge of concretising this constellation of norms for the specific case. Indigenous authorities could apply Spanish law and Spanish judges could apply native law. Indians, for example, were subject to indigenous law, crown law, canon law, etc.; they enjoyed their own status as miserables within Spanish law (Herzog, 2021, pp. 711-712).

Soon after, Herzog (2023, p. 6) characterises this framework as "polyphonic and polycentric" and concludes that "it had very little to do with legal pluralism the way it is characterised today". Strictly speaking, there is no plurality of interacting legal systems in corporate society, there are no discrete parallel legal orders, clashing or collaborating in the same social space. Law is concretised locally from a diverse repertoire of norms. In corporate societies, "republics of difference" (Graubart, 2022), the law defined differences according to a variety of criteria, ethnicity being just one of those used. For Herzog (2023, p. 9), the importance of stressing the discontinuity between the old and the new pluralism lies in challenging uses of the past that essentialise contemporary groups and their practices.

With regard to the use of the concept of legal pluralism, António Manuel Hespanha, one of the main names in the renewal of the political-institutional and legal history of the Iberian Empires, does not hesitate to employ it to describe the composite monarchies in Europe and overseas (Hespanha, 2014). However, the detailed descriptions he offers can lead us to question the usual view of legal pluralism based on the relationship between distinct normative orders in the same space. To name just one work from his vast oeuvre, Hespanha (2012) presented a parallel between the different political structures of the Portuguese empire and "legal pluralism" or the "entanglements of legal orders". There was a "plasticity of organisation", with very diverse government structures, such as municipalities, captaincies, fortresses, vassalic alliances, trade monopolies, patronage, etc. In describing legal pluralism, Hespanha shows that there was no clear separation between the Crown's law applicable to Portuguese citizens, the indigenous people's own law and the law of foreigners. Enslaved people,

for example, were subject to the law of the kingdom as members of the domestic community. Indigenous people were tutored under the status of miserables. Foreigners could be considered "territorial subjects'" under the laws of Portugal. There were cases of vassalage treaties that subjected Portuguese to local native justice. What emerges from these cases, rather than the relationship between different normative orders, is the creation of a diverse, hybrid normative fabric, with variable formalisation, supported by different polities.

Cross-fertilisation between conviviality and multinormativity

The concept of legal pluralism was used in the study of *convivencia*, one of the expressions that sometimes appears in genealogies of conviviality. The thesis of the *convivencia* of Muslims, Jews and Christians in medieval Spain was critically introduced by Américo de Castro (1948) to problematise the essence of an eternal Spain from "Seneca to Unamuno". Castro idealised the formation of the Spanish way of life based on religious syncretism, with "interpenetration, interdependence and cultural coexistence" (Szpiech, 2013, p. 136). Some historians of the period have drawn on the concept of legal pluralism to describe each community's own law, each with authorities that had jurisdiction over its members. The descriptions, nevertheless, reveal the complexity of the interactions, with translations between legal regimes, daily negotiations and cross-cutting between the various communities (Graubart, 2019; Deardorff, 2018). Everything suggests that the analytical offerings of the concept of multinormativity could usefully be employed to describe relations of coexistence. In an important review, Soifer observed that

> Paradoxically, the practical arrangements that enabled the religious minorities' existence within the host societies remain poorly understood. There is yet much to be done in order to tease out the social,

> political, and cultural conventions that made coexistence possible and that eventually failed to prevent its collapse. (Soifer, 2009, p. 31)

The promise of multinormativity is precisely to analyse cultural conventions. At the same time, the concept of multinormativity should be enriched by encountering the problem of coexistence.

In any case, Castro's thesis, called the "Copernican revolution in Spanish historiography" (Hillgarth, 1985, p. 33), opened up fierce polemics (Wolff, 2009). Some authors have opted for a re-reading of the concept based on anthropology (Glick and Pi-Sunyer, 1969), while others prefer expressions less laden with assumptions, such as "coexistence" characterised by mutual influence, rivalries and conflicts (Soifer, 2009, p. 136). Taking advantage of this warning, I am not going to go into the controversial field of the concept of *convivencia*. Next, I will develop the collaboration between the concept of conviviality and multinormativity. This encounter is promising for their mutual fertilisation.

To begin with, it is worth emphasising that conviviality is not a fundamental concept in the social sciences and humanities, like the concept of power, class or gender. Its importance is pragmatic; it serves to focus on specific problems. For Heil (2015), conviviality points to a mode of sociability in the context of cultural and social differences, in unequal societies and with asymmetrical power structures. It raises the question of the ability of different people to live together, negotiating their differences in conditions of inequality. They carry out translations that make it possible for minimal local consensus to emerge. It is a fragile sociability; there is potential conflict, uncertainty, discontinuities and ruptures. Conviviality focuses neither on processes of integration, where differences cease to make sense, nor on processes of forced exclusion, violent elimination, absence of negotiation.

For the sake of a more detailed discussion, I shall rephrase this formulation. Conviviality focuses on the dynamics of the composition of social bonds based on cultural differences in practical tension

with asymmetries and inequalities. These are fragile relationships (precarious, conflictual and unstable). The composition of social ties both concretises available normative resources and produces new normativity.

The cross-discussion of conviviality and multinormativity enhances the understanding of normativity. In addition to Duve's suggestion of defining normativity in terms of expectations and the binding nature of behaviour, we will introduce it as a type of knowledge that employs bipolar criteria of correctness/non-correctness to evaluate actions, or more generally, a state of affairs. Used as a criterion for correction/non-correction, the rule is distinguished from regularity or the norm of what normally happens. This conception is captured in Hart's concept of the social rule as a criterion for justifying actions that follow the rule and for criticising contrary action (Hart, 1961). In order to maintain the fruitfulness of the concept and guarantee its use for cross-cultural comparisons, it is useful not to restrict the ways in which normativity can be expressed. It can be expressed in an explicit proposition (e.g. a legislated rule), but also in images, in rituals, in practical appreciation, etc.; it can manifest itself in the know-how of a practice. Normativity can be embodied (e.g. as a way of speaking, moving, interacting). Normativity can be learnt through explicit propositions, but also by imitating examples, training, etc. These indications form part of the concept of multinormativity and can be used fruitfully to study the normative dimension of conviviality. Heil (in this book) makes use of the literature of the anthropology of morality and ordinary ethics to focus precisely on this normative dimension of conviviality. At the same time, the everyday scale favoured by the concept of conviviality rejects the so-called *régulisme* (Bourdieu, 2015), i.e. the conception that social action necessarily requires the formulation of discrete normative propositions. The practices of conviviality explore different modalities of normative knowledge, without privileging normative propositions.

The second aspect of the convergence of conviviality and multinormativity is the valorisation of the local scale of social and

normative reproduction. Practices are localised, the use of normative knowledge is local. By remaining on the scale of everyday life, conviviality contributes to drawing multinormativity into localisation. One of the directions of normative translation is decontextualization, i.e. normative knowledge produced in one place is generalised, condensed, inscribed in some medium so that it can be used in another. The risk is to emphasise the decontextualised normative product as such. Looked at closely, the knowledge is produced locally and applied locally, even if the second location is different. But multinormativity does not identify localisation and everyday life. There are formalised and institutionalised places of normative production. Multinormativity takes advantage of the accumulated reflection on the constitution of legal spaces, which has implications for the study of conviviality.

Legal space is a perspective on the circular and mutually constitutive relationship between law and space; it seeks to observe how law constitutes social space and how it is constituted by it (Albani, Barbosa and Duve, 2014). On the one hand, law is one of the normative modes that give meaning to space, configuring it in different ways: private property, territories, jurisdictions, immunity zones, areas of passage or restricted access, borders, etc. Law and other social norms produce obligations, privileges and permissions about the appropriate place for people, creating "moral geographies", i.e. what space is appropriate according to gender, race and legal status. The law is, in fact, one of the most important normative ways of defining the belonging and exclusion of people in relation to a space that is created by these normative limits. The definition of citizenship and nationality therefore depends on the relationship between law and space. On the other hand, space presents a set of conditions that enable and limit the reproduction of law. The assumption is that in space the meaning of law is interpreted, negotiated, contested, transgressed, resisted and forgotten. Which participants are involved in these practices, as well as the situated relations of power, are decisive factors in the formation of law. Distances, another factor, limit the law

that can be known and its effects. Thinking about the formation of legal meaning in specific spaces is, in fact, an alternative perspective to the current conception of law as a system of previously constituted norms.

The fragility of convivial relations is another relevant aspect for correcting the bias that values the stabilising function of normative orders. Law is often thought of in terms of social control (Strathern, 1985). In contrast, the fragility of conviviality points to the fluctuations, flows, lines of flight, of normative arrangements. There is undoubtedly an ambivalence in the fragility of conviviality that can express the precariousness of normative agreements and insurmountable conflict, but also the opportunity for resistance to illegitimate heteronomous determinations.

This aspect is related to two other elements of the concept of conviviality: practical tension with inequalities and the performance of difference. Using the vocabulary of ordinary ethics, the practical tension was enunciated by Lambek:

> Ethnographers commonly find that the people they encounter are trying to do what they consider right or good, are being evaluated according to criteria of what is right and good, or are in some debate about what constitutes the human good. Yet anthropological theory tends to overlook all this in favor of analyses that emphasize structure, power, and interest. (Lambek, 2010, p. 1)

Lambek's point was to demarcate a space of ethical problems neglected by the literature that Ortner (2016) called "dark anthropology". On the one hand, conviviality expresses a normative way of life aspired to by participants; on the other, it is actualised under structural conditions of inequality, oppression, domination and power. The practical tension is an antinomy because there is normativity on the side of conviviality as well as on the side of structural conditions. Multinormativity offers a vocabulary to describe the rights claims, evaluations, ethical choices of relations of conviviality and the normative regime that constitutes these structural conditions.

Lastly, the concept of conviviality has been used as an alternative to assimilationist policies and multiculturalism. Gilroy (2004, p. xi) questions the ambivalent use of identity to analyse race, ethnicity and politics. In contrast, "the radical openness that brings conviviality alive makes a nonsense of closed, fixed, and reified identity and turns attention toward the always-unpredictable mechanisms of identification". Costa (2007) discusses how the concept of conviviality incorporated the post-structuralist interpretation of difference that transpires in Gilroy and others. Conviviality as a process of cohabitation and interaction is a performance of differences; differences are constructed in the process of manifestation, they do not express a "cultural stock. The appeal to an original tradition is best understood as an act of performance (Costa, 2016, p. 12). Almost certainly law has worked as a tool for identification and has served assimilationist and multicultural policies (Góngora Mera; Vera Santos and Costa, 2019; Costa, 2016). However, law and multinormativity are also resources for translations and performance of differences.

Exercises of normative translation

The above discussion is indicative of some points of contact between the concepts of conviviality and multinormativity. From a pragmatic point of view, greater analytical detail is productive if done *pari passu* with localised research. The three cases discussed below focus on the problem of the production of normativity through translation processes that challenge the imaginary net separation of normative orders and the internal homogeneity of the state. It is an exploratory foray into three different conjunctures: the production of law within the framework of moral theology (16th century), the construction of a normative system based on the translation of a heterogeneous body of norms (19th century) and the constitutional opening up to an ecology of knowledge in order to produce a special legal regime for indigenous peoples (20th century). The three cases highlight

different collectives for normative production (religious order, professional lawyer, university, social movements) and different normative styles (principles, normative proposition, expert report, and others).

The normativity of moral theology

Religion played a central role in justifying and ruling the conquests of the Iberian empires. Under the terms of various bulls, the monarchies' dominion over lands, seas and populations came in exchange for the obligation to evangelise non-Christians in the Americas, Asia and Africa (Boxer, 2007). Doubts of conscience about trade, slavery, mission, sacraments and conquest stimulated the differentiation of moral theology, which acquired autonomy in the course of the 16th century (Marcocci, 2014; Legendre, 1980). In this context, the work of the Jesuits and canonists such as Martin de Azpilcueta, author of one of the most influential confessors' manuals of the 16th century (Decock, 2018).

The Jesuit Manoel da Nóbrega was the Superior of the Jesuit Mission to Brazil in 1549, the first in the New World (Zeron, 2011). He had been Azpilcueta' student in Coimbra and Salamanca, to whom he wrote letters with information about the mission. Nóbrega also communicated solutions to practical problems regarding marriage, confession and compulsory labour, among other issues, as well as raising doubts. Azpilcueta, for his part, answered queries from Jesuits and the Portuguese king about cases of conscience in America. He also updated the Manual with information and cases from Brazil. There is therefore cultural translation in both directions: the Jesuits use Azpilcueta in Brazil to develop solutions to cases and the canonist reflects on Brazil in the Manual, generalising norms based on information from overseas (Bragagnolo, 2020; Cabral, 2020).

Neither the Jesuits nor Azpilcueta had a set of lapidary rules given *ex ante* by a legislator. They worked with a collection of opinions bequeathed by tradition that needed to be selected, weighed up, agreed

upon; with a collection of theological, canonical and juridical principles; with a rich *topica* (virtues, sins, sacraments, decalogue) to organise knowledge (Barbosa, 2024). The collection was transformed into an interpretation of cases in order to construct a practical and just judgement (Scatolla, 2009). Nelles (2010) argues that the regular practice of Loyola's spiritual exercises promoted frequent writing and cognitive tools for the Jesuits' observation of the world.

This normative production served as a resource for convivial configurations in the hierarchical and unequal space of colonial society. In the 1560s, when the economic vocation of the colony was defined by plantations based on slave labour, there was pressure to increase the trafficking of Africans and the enslavement of natives (Zeron, 2011). Nóbrega was asked to give his opinion on the hypotheses of legitimate enslavement (Cabral, 2020; Ehalt, 2019; Leite, 1965). The Mesa de Consciência (the court of moral theology instituted by the king) and authorities in Bahia enquired about two hypotheses of enslavement: (1) the father who sells his son in great need; (2) someone who sells himself in great need. The norm was not given, it had to be constructed. Nóbrega did not draw on a code, constitution or law to give his opinion. On the one hand, he relied on opinions (arguments from jurists and theologians) and the normative stock of tradition (Eisenberg, 2000; Storck, 2012). On the other hand, he analysed the circumstances of the context ("*quid facti*") because the normative solution needed to be adjusted to the cases. Nóbrega, for example, distinguished between the cases of Indians who sold themselves out of hunger ("extreme need") and therefore legitimate cause for enslavement; and Indians who sold themselves out of fear, fraud, or hunger caused by unjust wars waged by Christians. In the latter case, enslavement was illegitimate (Leite, 1960, p. 481).

In the Manual of Confessors, Azpilcueta translated information from tradition and from Brazil to distinguish legitimate from illegitimate enslavement:

> Si compro hombre que no tuuiesse necessidad extrema de venderse [...] sino que fue hurtado, o tomado de ladrones naturales, o estraños, y lleuado a tierras y gentes estrañas, y a ellas vendido: quales (segun fama) ay hartos negros, y Indios tomados por cossarios christianos, y por ladrones de su tierra vendidos a christianos. M. con obligacion de ponerlo en su libertad. Diximos (que no tuuiesse necessidad estrema de venderse) por los paganos, que compran los christianos enel Brasil, y en otras partes de otros paganos enemigos suyos, que los tienen presos, y los ceuan para matar, y comerlos. Porque estos justamente se pueden vender o consentir, que los vendan, y les quiten la libertad, por saluar la vida. Porque la vida es mas preciosa, que la libertad. Y por que el padre puede vender al hijo en tiempo de hambre extrema. (Azpilcueta, 1556, cap. 23, § 95, p. 480)

The excerpt presents hypotheses that refer to situations of which he has been informed ("segun fama"). Azpilcueta articulated general principles of Roman Law "la vida es mas preciosa que la liberdad" and tópos, such as "necessidad extrema", also used in Brazil. It is a mortal sin (abbreviated as "M.") to buy a man who has been sold if he is not in dire need. Azpilcueta referred to the slave trade (piracy carried out by Christians) and the kidnapping of blacks and Indians, cases which, according to his judgement, generated the obligation to restore freedom. In contrast, a case of extreme necessity was that of Gentiles imprisoned to be eaten, the so-called "presos de corda" in Brazil at the time. In this case, ransom and enslavement had legitimate cause.

Azpilcueta's translation exhibited a complex normative construction. Accepted opinions, *topoi* and cases were combined to present a fair solution. Law was not composed of synthetic rules forming a unitary system, but expressed a body of knowledge to produce solutions adapted to cases.

There was undoubtedly legislation in the ancien régime, but with a different normative style, in contrast to synthetic propositions that defined obligations, prohibitions and rights in a code form (as the Napoleon Code). Laws often responded expressly to cases and

circumstances, such as the Law of 10 September 1611, published to assist settlers who were opposed to the Indian Freedom Law of 1609, which was contested by riots in São Paulo.[1] They made mention of the contexts and reasons justifying the law, not general rules formulated in abstraction, as is typical of the code form. Laws resembled judgements, after all, the king is first and foremost a judge. The key question for the king and those who had jurisdiction was to know the justice of the case (Hespanha, 1994). To do this, it was necessary to receive information, weigh up reasons, discover premises in order to decide. The repertoire for the invention of premises had various sources: literate literature (civil and canonical), the topic of moral theology, styles, customs and laws. Law was framed by rhetoric and political theology. Thus, deciding whether captivity was lawful or unlawful was not just a matter of applying legislated rules that existed finished, but the result of a judgement that mobilised *topoi*, presumptions, burdens and privileges. Extrapolating on the simile of

[1] "E sendo eu informado que com tudo era necessario provêr com differente remedio, mandei, por minha Provisão, passada em 5 de Junho de 1605, que em nenhum caso se podessem os ditos Gentios captivar. E por Lei feita em 30 de Julho de 1609, os declarei a todos por livres, conforme a Direito, e seu nascimento natural, com outras declarações e cousas conteudas na dita Lei. E tornando-a ora a mander ver, e a considerar os inconvenientes, que se representaram, conforme a importancia da materia; e querendo atalhar a elles, e aos que ao diante se podem seguir, e juntamente provêr no que mais convem ao governo dos ditos Gentios, e sua conversão á nossa Santa Fé Catholica, e á conservação da paz d'aquelle Estado, com parecer dos do meu Conselho, mandei ultimamente fazer esta Lei [...] E porque tenho intendido que os ditos Gentios tem guerras uns com os outros, e costumam matar e comer todos os que nellas se captivam, o que não fazem, achando quem lh'os compre; desejando prover com remedio ao bem delles, e salvação de suas almas, que se deve antepôr a tudo; e considerando, como é certo, que nenhuma pessoa quererá dar por elles cousa alguma, não lhe havendo de ficar sujeitos: hei por bem, que sejam captivos todos os Gentios, que, estando presos e captivos de outros para os comerem, forem comprados, justificando os compradores delles, pelas pessoas que, conforme a esta Lei, podem ir ao Sertão com ordem do Governador, que os compraram, estando, como fica dito, presos de outros Gentios para os comerem; com declaração, que, não passando o preço, por que os taes Gentios forem comprados, da quantia que Governador com os adjunctos declarar, serão captivos sómente por tempo de dez annos, que se contarão do dia da tal compra; e passados elles, ficarão livres, e em sua liberdade; e os que forem comprados por mais, ficarão captivos, como dito é" (Silva, 1854, p. 309).

Viveiros de Castro (1992) and Padre Vieira, colonial law was not the marble law of codes and liberal law, but the myrtle law of equitable judgement, fickle, requiring permanent cultivation and adaptation to circumstances.

The making of a system of norms

The second example is part of the legislative reforms of the imperial government in the 19th century in Brazil. It is the context of liberal law, with a Constitution (1824) and Codes (Criminal, 1830; Criminal Procedure, 1832; Commercial, 1850), and the routine production of legislation by Parliament (Dantas and Barbosa, 2021).

In 1855, the government of the Empire of Brazil hired lawyer Augusto Teixeira de Freitas (1816-1883) to work on classifying all the country's legislation and consolidating civil law. Both tasks would be preparatory work for the subsequent drafting of the civil code. The classification work was never completed. The consolidation of civil laws (*Consolidação das Leis Civis*) was delivered in 1857 (Meira, 1983).

The Consolidation followed the method of presentation proposed by the government, which stipulated that the law would be presented in the form of "clear and succinct propositions" and that the law or custom on which the proposition was based should be cited in the footnotes (Teixeira de Freitas, 1876, p. xxxi). The consolidation would be a compilation of the civil law in force, rationalised in the style of normative propositions. The translation work undertaken by Teixeira de Freitas created a system of normative propositions based on the heterogeneous normativity (Byzantine compilation of Roman law, ecclesiastical law, doctrine, ancien régime legislation, the Constitution, jurisprudence, customs, court styles, etc). This normative information was selected, clarified, adapted, and generalised in the form of propositions that were systematised in the Consolidation (Barbosa, 2012). The first edition of the Consolidation, however, was criticised by the imperial government for omitting the rules applicable to slavery. In the second edition of 1865, Teixeira de Freitas introduced the

provisions in force relating to slavery in the footnotes. The "footnote black code", as Eduardo Spiller Pena calls it (Spiller Pena, 2001, p. 75).

See for example Article 1 which stated: "People are considered to be born only when they are formed in their mother's womb; the law preserves their rights of succession for the time of their birth" (Teixeira de Freitas, 1876, pp. 1-2).

The footnote mentioned the sources used to generalise this rule: Philippine Ordinances (Ord.), Digest and Codex, Criminal Code, Regulations, Decrees, books of doctrine (Perdigão Malheiro, Demolombe). It made cross-reference to other provisions in the Consolidation. For example, the first reference in the note stated "Ord. L.3º T.18 §7º, and L.4º T.82 §5º. I have generalised the provisions of Arts. 199 and 1015" (Teixeira de Freitas, 1876, p. 1).

The entry in Philippine Ordinances (L.4º T.82 §5º) provided for hypotheses relating to wills, among them the right to inherit from the "posthumous son", as the doctrine calls him, i.e. the one born after the father's death. Teixeira de Freitas generalised this passage, which was restricted to the right to inherit, to any right of the unborn. Article 1 also illustrates the way in which the rules of slavery were presented. The proposition quoted above did not mention slavery, it only referred to it in the footnote. Teixeira de Freitas generalised a Codex rule on the right to freedom of those who were unborn at the time of the mother's manumission:

> Manumission may be granted to a slave who still exists in the mother's womb. If the mother gives birth to two or more children, freedom is deemed to be given to all of them, even though the testator has only mentioned one - L. 16 Cod. de fideicomiss. libertat. (Teixeira de Freitas, 1876, p. 2)

The length of the notes differed. Some required a more detailed doctrinal discussion to justify the generalisation of the proposition. This is the case with Article 63, which stated:

> The only exception to the plenitude of the right to property, in accordance with Art. 179 §22 of the Constitution of the Empire, will take place when the public good requires the use and utilisation of the citizen's property due to necessity or utility. (Teixeira de Freitas, 1876, p. 70)

The normative repertoire to be simplified, listed in the footnotes, covered the Philippine Ordinances, laws, decrees, court decisions, Roman law and custom. There was also a detailed doctrinal argument about forced manumissions. The question was whether the master of enslaved people could be forced to free them on payment of the price, or whether the hypothesis violated the right to property. Leaving it up to the discretion of the master to decide whether or not to grant a manumission was considered a central feature of the slavery regime and the conviviality between masters and enslaved people in the cities and on the plantations (Chalhoub, 1990; Dias Paes, 2019). Teixeira de Freitas argued that this kind of manumission was in force in civil law. To this end, he compiled provisions from the legal tradition that limited the power of masters, such as the law of 24 December 1734 (slaves who discovered diamonds of twenty carats or more were freed) and a *Aviso* (government official interpretation) of 1856 (slaves who leave the Empire accompanied by their master, when they return, are free). Teixeira de Freitas selected fragments of tradition to propose a rule. Yet there was no consensus that forced manumission was possible under Brazilian law. Only with the Free Womb Law (28 September 1871) was there a legislated rule recognising forced manumission. This rule was quoted by Teixeira de Freitas in the 3rd edition of the Consolidation: "The slave who by means of his *peculio* obtains the means to indemnify his value, has the right to freedom. If the compensation is not fixed by agreement, it shall be fixed by arbitration (art. 4, §2)" (Teixeira de Freitas, 1876, p. 73).

With regard to the legal regime of slavery and convivial relations, João José Reis (2021) discussed cases of enslaved people (not freed people) owning slaves in the city of Salvador (Bahia) in the first half

of the 19th century. With the master's permission, the enslaved could acquire a *peculio*, made up of earnings from their labour and donations. A slave could be part of the *peculio* of another enslaved person. Without naming the concepts of legal pluralism and multinormativity, Reis referred to the complex normativity that shaped the regime of slavery in this context. The "network of convivial relations", as the author calls it, was made up of a detailed set of norms, such as the rule that defined the Church's role in registering baptisms, which in fact generated part of the documentation analysed in this work. Customary norms also predominated, many of which were implicit norms about the reciprocal expectations between the master, his direct enslaved and the enslaved of the enslaved. This study can be read to show that the assumption of an informal legal order parallel to the formal legal order does not seem to capture the dynamics of the use of normativity. In convivial settings, express and implicit norms make up a normative fabric used to negotiate the status of subjects and create fragile compromises in everyday life.

The Consolidation is a prototypical case of jurists rationalising the law. However, the example allows us to emphasise the conditions for the creation of the legal system. It was built by work that selected, adapted and organised the normative knowledge available. The system also depended on media conditions (the printed book with its paratexts, distinguishing the presentation of the proposition from the sources in the footnotes), on the authorisation of valid knowledge (approval by the imperial government). The composition of the system of rules was not stabilised but unfolded over time, i.e. with each edition of the Consolidation the system was modified, complemented and corrected. Despite its influence and wide acceptance in practice, there was controversy as to whether the normative generalisations proposed were correct. See, for instance, criticisms by Antonio Rebouças (Teixeira de Freitas, 1867). Teixeira de Freitas' work and the debates between jurists played with explicit and implicit knowledge, styles of thinking, scholarly practices and the habitus of the legal field.

Ecology of knowledge for the production of normativity

The third translation exercise takes place in the context of the new legal pluralism of Latin American constitutional reforms analysed by Tamar Herzog. The Brazilian Federal Constitution of 1988, drafted with the re-democratisation of the country after the dictatorial period (1964-1985), had the participation of social movements (indigenous, indigenists, the black movement, environmentalists) and was in tune with ongoing transformations in international law to ensure special rights for ethnic and cultural minorities.

With regard to indigenous peoples, to take one example, the Constitution recognised the right to physical and cultural reproduction of the indigenous way of life with no time limit, rejecting the point of arrival of a final assimilation. Indigenous peoples were given the status of bearers of ways of life with a right to the future, no longer as remnants of the past on the verge of extinction. To this end, the Constitution recognised the original rights to the lands traditionally occupied by the Indians, giving the Union the power to demarcate them. Lands of traditional occupation remain in the permanent possession of indigenous peoples, who have the exclusive usufruct of their wealth, without being subordinated to the imperatives of national development projects. The Constitution introduced full recognition of a traditional way of life, with its social organisation, customs, languages, beliefs and traditions (Marés, 1999; Almeida, 2004).

There is no doubt that this constitutional framework allows for multicultural interpretation. But this is not the only possibility. Conviviality and multinormativity make it possible to observe the performance of differences and the translation of normativity into the composition of the collective and the claiming of rights. Uses of the past and cultural practices in the present fuel the production of diacritical traits that differentiate the indigenous collective without freezing an essence (Viveiros de Castro, 2006). In this context, traditionality and ancestry are not synonymous. Traditionality is a way

of life that reproduces the differentiation of the indigenous collective and is orientated towards the future; ancestry is an identification resource, orientated towards the past, which can be used strategically.

The exercise of the right to difference mobilises different types of knowledge. In the case of the administrative process of demarcating traditionally occupied indigenous land, the federal government implements Decree 1.775/96 and other infra-legal rules. The first stage of the administrative demarcation process is for the federal government's Indian assistance agency (now FUNAI) to set up a specialised technical group, coordinated by an anthropologist, with the aim of producing "complementary studies of an ethnohistorical, sociological, legal, cartographic and environmental nature and the land survey necessary for the delimitation" (D. 1775 art. 2, §1). This working group will produce an identification and delimitation report, the headings of which are defined in detail by FUNAI. For example:

> General information on the indigenous group(s) involved, such as cultural and linguistic affiliation, possible migrations, demographic census, spatial distribution of the population and identification of the criteria determining this distribution;
>
> Research into the history of occupation of indigenous land according to the memory of the ethnic group involved;
>
> Description of the group's cosmological aspects, areas of ritual use, cemeteries, sacred places, archaeological sites, etc., explaining the relationship between these areas and the current situation and how this relationship is being addressed in the specific case (Portaria, Nº 14/1996)

The report produced by the working group must be approved by a specialised state body (FUNAI), then by the Minister of Justice and finally by the President of the Republic. During this proceeding, there is an administrative hearing with the possible production of new reports. The courts can be sued to suspend or annul the demarcation

process. Once the land has been demarcated, it can also be contested in court (Silva, 2015; Santilli, 1993).

The legal framework for indigenous peoples' territorial rights is therefore based on an ecology of knowledge. The legal definition of indigenous land is not given exclusively by the categories of legal dogmatics, nor is it the result of endogenous interpretation of the legal system. The meaning of "traditionally occupied land" is the result of the combination of the Brazilian state's 'provisions (administrative process), the knowledge of indigenous peoples and the work of academics. The production of the report makes use of historical documentation (notaries, travel narratives, etc.), oral history, ethnographic research and others. It also draws on the accumulated knowledge produced at the University (Barbosa, 2018).

What is the balance of the three examples above? The exercises are approximations intended to suggest the complexity of normative production for the composition of the bonds of conviviality. Norms are not produced by the fiat of an authority, nor do they arise from legal sources. Norms are generalised from information: Azpilcueta learned about the different conditions of the indigenous people (kidnapped, trafficked, imprisoned for cannibalism); Teixeira de Freitas selected and generalised from a kaleidoscope of norms in force; the anthropological report condenses information and has the normative value of evidence for judicial and administrative purposes. Norms are concretised to be applied to cases: Nóbrega proposed solutions based on the normative repertoire; Teixeira de Freitas justified generalisation with a discussion of real or fictitious cases at the bottom of the consolidation; the administrative or judicial decision to demarcate traditionally occupied land uses legislation and anthropological reports. In all three cases, different actors are mobilised to produce norms. Even in the case of Teixeira de Freitas, who at first glance worked alone, there was the counterpoint of the Imperial government, which contracted, defined the mode of presentation (normative style) and evaluated the consolidation work, as well as an

incipient legal public sphere that evaluated the solutions proposed by Teixeira de Freitas.

An understanding of the production of normativity is not gained by assuming discrete legal orders in opposition/collaboration/indifference. Moral theology, spirituality practices, royal orders, information and local norms, to name a few complexes of knowledge and norms, were organised and translated by Nóbrega to act in the context of the missions. The productive question does not seem to be whether moral theology was legal or not, or what the relationship was between moral theology and crown law. The question is what conditions limited and enabled normative translations, i.e. the production of norms from other information and norms.

In the case of indigenous territorial rights, the demand for demarcation is not against so-called official law, but takes advantage of the recognition made by the Constitution. Demarcation is not resolved exclusively with official law, but requires native knowledge to complete the meaning of "traditionally" occupied land. There is an assemblage of constitutional norms, legal and infra-legal norms, international law, native knowledge, ethnohistorical knowledge, etc.

Coda

Conviviality, or living with difference (Gilroy, 2004; Heil, 2020), exploits normativities and conveys them through translations among different collectives. Using the analytical lens of multinormativity to assess the choreography of conviviality has the advantage of avoiding the "legal" symbol, as is present in the concept of "legal pluralism" (Gonçalves, 2023). This prevents the over-inclusive aporia of considering all normativities as law. It suspends *prima facie* the question of the demarcation of legal normativity from non-legal normativity. Multinormativity is flat, without distinguishing between legal and non-legal. For many situations, this differentiation is not productive or does not even make sense. If it is productive and makes sense,

then one can ask what the practical difference of law is, i.e. by whom, when, why, how, in what circumstance the legal symbol is employed and the resulting effects. Furthermore, multinormativity does not form a system of norms, nor is it the set of discrete normative orders in relationship (collaboration, conflict or indifference). The normative fabric of convivial configurations takes place in translations and hybridisations, in contrast to the image of the neat separation and internal homogeneity of states and normative orders. In this sense, multinormativity expresses the normative multiplicity that cuts across pluralism-monism dualism.

A blind spot in the argument deserves to be formulated. Costa (2019) drew attention to the post-humanist lineage of the literature on conviviality. Indeed, Boisvert (2010) invited us to think about the term conviviality from its Greek translation, symbiosis, which points to the multi-species entanglements and interactions between humans and non-humans. The present time is the new climate regime that imposes a reflection of the bases of historical knowledge (Chakrabarty, 2021) and urges us to reconsider the great divide between nature and culture. The "intrusion of Gaia" (Stengers, 2001) challenges the modern constitution (Latour, 1991) that separated a silent reality known to science from the variety of human discourses, ways of acting and living together. This modern constitution has kept apart nature (thing-in-itself) and politics (men-in-themselves), leaving the proliferation of hybrids and quasi-objects unthemed. The point of these observations is to encourage us to realise that without the burden of the modern constitution, the history of knowledge and normativity is open to a more radical exercise of translation, with unexpected results for understanding the composition of collectives and their geohistorical conviviality (Costa, 2019; Manzi, 2020; Dünne, 2023). We definitely need a legal history with more spirits, animals, rivers, trees, food, climate, diseases. For now, within the limits of this chapter, the concepts of multinormativity and conviviality fall short of this line of thought.

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