VIII.

Law versus Justice?
An Intercultural Approach to the Problem
of European Collections of Colonial Provenance

Contexts of Colonial Acquisition

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Stephan Meder

Abstract

This contribution addresses the importance of "legal" provenance research for the restitution debate over colonial acquisitions. It explores the complexities of analyzing ostensibly voluntary transactions under a strong structural power imbalance and the influence of various legal frameworks, considering both historical and normative aspects of the field and the challenges posed by temporal distance and normative diversity. Citing the principle that actions must be judged according to the relevant standards of the time, questions of which legal system to apply, structural asymmetry, limits to voluntary action, applications of the statute of limitations, and changes to systems over time are all addressed. Examining European and German colonial jurisprudence, the chapter details the shift away from social contract theory and centralist philosophical ideals to a more pluralistic understanding of legal frameworks and increased academic interest in Indigenous legal systems.

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Contextes d'acquisition coloniale: éléments historiques et normatifs de la recherche de provenance légale (Résumé)

Ce chapitre traite de l'importance de la recherche sur la provenance légale pour le débat sur la restitution des acquisitions coloniales. Il explore les complexités de l'analyse de transactions ostensiblement volontaires dans le cadre d'un fort déséquilibre structurel de pouvoir et l'influence de divers cadres juridiques, en considérant les aspects historiques et normatifs du domaine et les défis posés par la distance temporelle et la diversité normative. Citant le principe selon lequel les actions doivent être jugées selon les normes pertinentes de l'époque, les questions du système juridique à appliquer, de l'asymétrie structurelle, des limites à l'action volontaire, des applications de la prescription et des changements apportés aux systèmes au fil du temps sont toutes abordées. En examinant la jurisprudence coloniale européenne et allemande, le chapitre détaille le passage de la théorie du contrat social et des idéaux philosophiques centralisateurs à une compréhension plus pluraliste des cadres juridiques et à un intérêt académique accru pour les systèmes juridiques indigènes.

Where did these things come from? Provenance research, which investigates the origins of cultural objects and is usually regarded as a sub-discipline of history or art history, begins with this inquiry. Yet research into origins encompasses not only actual events but also a normative principle, becoming increasingly prominent under the premises of current restitution debates. The legal circumstances under which cultural artefacts were acquired are of interest because decisions have to be made regarding questions of legitimacy and thus whether the objects are to be kept, returned, or whether compensation – in monetary or other form – should be arranged. It makes a difference, for example, whether a cultural object was handed over "voluntarily" or "under pressure", whether it was given as a gift, exchanged, bought, simply taken, stolen, looted, plundered, or brought to the recipient country as "spoils of war". In short: the graver the injustice, the weaker the legitimacy and thus the higher the probability that restitution will be deemed appropriate.

On the Methodology of Legal Provenance Research

Legal provenance research consists of two elements generally referred to by the methodology of jurisprudence as "case" and "norm". In a first step, the situation and preceding events – the so-called "facts of the case" – must be determined. These address the concrete origin and actual circumstances under which the change of ownership took place. These must be distinguished from the second step, the normative element, which seeks to establish justice. Practitioners of law have the task of applying justice to the concrete facts of the case in order to ultimately present a practical result in the form of a "decision" or "verdict". While the first, the factual element, can be researched primarily based on a historical approach, the normative element gives rise to particular methodological difficulties which can be characterised by terms such as "temporal distance" and "normative diversity".

Temporal Distance and Normative Diversity

Temporal distance arises between the moment at which an object was acquired and our postcolonial position today. Since a legal event must be judged against the standards in force at the time of the deed, the first question to be asked is: How is the change of ownership to be evaluated in the light of historical law? If, for example, the object was handed over "voluntarily", this could be assessed as an indication of legitimacy and thus the right to keep it. But how should we judge a case in which the object that came into the possession of the recipient country had been inalienable according to the law of the time, such as an object dedicated to religious or secret practice? Would the descriptor "voluntary gift" sufficiently legitimise the change of ownership in this case? And what part might have been played by structural asymmetry, power imbalances or dependency relationships between the Indigenous population and colonists? Another problem is the statute of limitations: Can this be waived in the case of restitution claims? Such questions illustrate how the acquisition of a cultural artefact must always be assessed from a postcolonial perspective, beyond the historical legal context. It might

thus come about that a sale justified under historical law is subsequently declared unlawful, or that a claim that theoretically would have expired under limitation is nevertheless still asserted. Past and present thus merge inseparably, leading to a fundamental issue primarily discussed – mutatis mutandis – in other contexts: the relationship between legal history and the laws currently in force.

Alongside "temporal distance", "normative diversity" is another characteristic of legal provenance research: Which law was actually applicable at the time of acquisition? The law of the society or country of origin? The law of the recipient country? Or a combination of legal systems?[1] It is here that work in this field diverges yet further from the tasks of other lawyers. Anyone conducting legal provenance research is confronted with the question as to whether and to what extent the content of past legal systems, such as Indigenous law, can even be determined at all today. Normative diversity also sheds light on the different interests of the actors involved. Colonists, for example, were often anxious to invoke the law of their colonising country because the latter's laws around debt, property or credit opened up opportunities to take advantage of the fact that the native population may not be familiar with it. In cases of legal verdicts with regard to past events, contemporary, post-colonial ideas also come into play when acquisition processes are located at the intersection of different normative systems.

Issues of legal legitimacy can largely be ignored in all restitution cases pertaining to objects that came to Europe in a colonial context. In Germany, the prevailing view is that legal criteria determine whether artefacts may be kept: "The lawful acquisition of every object must be verified".[2] Objections to this have pointed to a lack of "critical reflection" and the inadequacy of proving that an object has been purchased, exchanged and so on. Relationships of dependency, structural asymmetries and power imbalances must also be taken into account.[3]

In Search of Criteria to Assess Legitimacy

French President Emmanuel Macron initiated a turnaround in cultural policy with his Burkina Faso speech of 2017. Until then, restitution claims from Africa had been rejected on the grounds that national cultural property was inalienable.[4] Since 2017, however, German museums have been finding it equally difficult to ignore restitution claims for cultural assets from many countries of origin or ethnic groups. Inquiries must be made into the legality or

illegality of the acquisition in order to ascertain whether and to what extent artefacts from formerly dependent territories are to be returned. The task of a legal framework for provenance research, therefore, is to formulate criteria with which to reach a verdict on the legitimacy of an acquisition and thus on the future fate of a cultural object acquired in colonial times.

"Colonial jurisprudence", which came into force around 1900, thus moves into the spotlight, and not only with its misconceptions but also with its emancipatory and forward-looking approaches. One of these misconceptions is the characterisation of a people as "uncivilised", ruled by "arbitrariness" and without the "rule of law". Approaches pointing in the opposite direction are those which recognise the laws of these peoples, seek to research them more closely and record them in accordance with scientific standards, thus incorporating the interests of the country of origin and the well-being of its inhabitants, at least within a certain framework.

The fact that historians, ethnologists, missionaries, linguists, and lawyers had lively discussions around these issues in early twentieth-century Germany has been largely forgotten today. A closer examination of these debates sheds light on the standards that were developed at the time for judging right and wrong in the German colonial territories. The arguments that seem forward-looking from today's perspective must, of course, also be considered critically in their context of economic policy characterised by the national striving for power. Nevertheless, they can offer pointers for the formulation of criteria to determine whether an artefact should be kept or returned.

Colonial Jurisprudence: Its Roots in Political Philosophy around 1900

The fundament of "modern" statehood is the narrative of the state of nature and the social contract, on which such diverse teachers as Thomas Hobbes (1588–1679), Samuel von Pufendorf (1632–1694), Christian Thomasius (1655–1728), Jean-Jacques Rousseau (1712–1778) and Immanuel Kant (1724–1804) built their philosophies of natural law and state. According to Thomas Hobbes, at the beginning of history "everyone made a contract with everyone" to permanently transfer undivided sovereignty to a sovereign.[5] This "social contract" marked a turning point, according to Hobbes, because it ended the so-called "state of nature" and established the kind of statehood that we still call "sovereignty" today.

Hobbes famously described the "state of nature", so important for the conceptual history of Indigenous people, as a state of war, or an absence of law and history, where man was "a wolf to man". To end it, a social contract had to be entered, the purpose of which was to secure peace and protect private property through the consensual transfer of undivided power to *one* sovereign.

Inherent in this narrative are several consequences that can only be touched upon here. The state, the community or the legal order did not exist from the beginning but were created artificially by a consensual declaration of will: the social contract. The consequence is a liquidation of any norm formation that could exist outside the state, for example through common law, unions, or customs. All in all, the narrative of the state of nature serves to legitimise a strong, undivided sovereignty, whether of an absolute monarch or the sovereignty of the people.

It is this kind of natural state that Georg Friedrich Hegel (1770–1831) also refers to in his statement that in Africa there are no states, no law, no religion and no history: it is the doctrine "that we know from the idea that the state of nature itself is the state of absolute and universal injustice".[6] Informed by this notion, Hegel drafted a theory of "natural man in all his wildness and unruliness", a philosophy of the "uncivilised" peoples, whose common feature was supposed to be that they lacked the "category of universality", only being familiar with the particular.[7]

This philosophy of state, law, religion, and history, which is only roughly sketched here, met with resistance from a movement that became dominant in jurisprudence after the turn of the 19th century. Gustav Hugo (1764–1844), Friedrich Carl von Savigny (1779–1861) and other protagonists of the Historical School of Law rejected the doctrines of the state of nature and the social contract as mere fictions. Savigny in particular refused to accept that the state "came into being through the caprice of individuals, i.e., through contract". This "most widespread view" had, he claimed, "led to consequences as pernicious as they are false".[8] Here, Savigny was primarily referring to the transfer of undivided power to *one* sovereign and the common assumption that the concept of law was reserved for norm-setting by the state. Rather, he purported that law was not created by the will of a sovereign, but primarily by the forces living within a society: the "spirit of the people".

According to this view, every people would have a history, a state, a religion and, of course, a legal system. Law and state, however, are not one and the same thing here: law goes beyond the promulgated *lex scripta*. The formation

of norms outside of law and state, such as via customary or juristic law, is subject to scholarship as *lex non scripta*. This deserves emphasis because the law of those peoples whose cultural artefacts were brought to Europe as a result of colonisation is also a *lex non scripta*.[9]

Interim Findings

Savigny rejected the asserted difference between "civilised" and "uncivilised" peoples as assumed by Hegel and the protagonists of the doctrine of the state of nature. Rather, he praised the advantages of oral legal cultures, even attesting them a "clear awareness of their conditions and relations [...], while we, in our artificially entangled existence, are overwhelmed by our own wealth".[10] He also abhorred the arrogance with which supposedly civilised states regarded the normative orders of oral legal cultures.[11] Both Hegel's centralist position and Savigny's pluralist stance were significant in the debates on colonial law taking place around 1900, with Savigny's approach dominating, at least among scholars informed by legal anthropology.

Colonial Jurisprudence between Centralism and Pluralism

German colonial history began in 1884 with "protective rule" over some territories in Africa and ended abruptly in the First World War. While it thus remained a mere episode, its presence is still felt in debates on collective memory and in the lines of German historical tradition. Colonial civil, criminal, and constitutional law has so far been somewhat neglected by the discipline of jurisprudence. This must be regarded as a deficit since the debates that took place around 1900 are not only of interest to legal history but are also of great importance for the question of provenance law regarding the right to keep cultural artefacts.

Acquisition History in Context

Legal provenance research invokes the factor of time from a twofold perspective. Firstly, because legal conduct can in principle only be judged according to the norms applicable at the time of the event[12] and events from colonial times are thus to be assessed against colonial-era standards. In addition, colonial jurisprudence must also be considered in the context of its time. This includes the assumption that "whites" are cultured, and "natives" are uncultured: "the natives are children" and must be accustomed to obeying the rules of "a state hitherto unknown to them".[13] The background to this is the expectation that the colonies would one day become an "essential factor in the economic life of the empire".[14]

The era of colonial jurisprudence was also the time when the German economy entered into world trade and unbridled expansionism. There is, however, another side to the contemporary debate that deserves to be emphasised from both a provenance law and a post-colonial perspective: most of the contributions are informed by a "purely" epistemological interest in researching Indigenous law and anchoring legal anthropology in science and studies. Almost without exception, they are based on the premise that Indigenous law must be respected and remain unclouded by preconceptions of European legal thought: "The determination of Indigenous law must, as far as is at all possible, be kept at a distance from our cultural law".[15]

"A glorious law of nations": Civil Law rather than Public Law

This approach is also of interest because legal provenance research has thus far been considered more as a sub-field of public law and international law.[16] However these two areas can contribute only little to the field of Indigenous law for at least two reasons, closely interwoven. Firstly, both public law and international law are primarily legal systems of the Global North and thus to a large extent the "laws of colonisers",[17] according to which the removal of artefacts would not, as such, be an injustice given that, from a contemporary point of view, the colonised territories did not constitute states. They lacked

"sovereignty" and thus an essential characteristic of the "modern" philosophy of the state propagated in the wake of Hobbes, Pufendorf or Kant. The territories were classified as "unclaimed", with the result that "states" were permitted to annex them at any time.[18] As early as 1778, the poet and translator Christoph Martin Wieland (1733–1813) remarked on the "glorious law of nations", describing the theft of a tin spoon by an "O-Tahitian boy", whose deed European seamen sought to punish according to their "positive civil law". Wieland commented that such behaviour was "typical" of Europeans

> *and reeks of the same impertinence with which these gentlemen, in the name of their most gracious kings,* ceremoniously take possession *of every island and peninsula of the South Pacific that they happen to be cast upon by wind, weather or the need for refreshment. It does not occur to them to ask the ancient populations of these islands for their opinion on this misappropriation. A glorious law of nations indeed! And it is these enlightened, philosophical gentlemen, highly erudite in matters of the law, who avenge a pilfered tin spoon with the four-pounder.*[19]

Thus, in Germany too there were voices that considered any kind of occupation or misappropriation to be in violation of international law. Even around 1900, the question was raised as to whether it was right to consider European ideas an "absolutely authoritative norm" to which "the whole world must be subjected".[20] Even the "natives", it was claimed, were aware of order; they could even be said to have a "developed legal consciousness", otherwise there would be a "constant war of every man against every man".[21] Others even spoke of an "intelligent N[...]* people".[22] Nevertheless, colonial jurisprudence was a long way from the "equal rights of all cultures", or even their "equal value" as demanded in current debates. Even its emancipatory approaches cannot hide the fact that it was indeed a "glorious law of nations" whose basic principles rendered occupation permissible.

International law has little to say about a historical event such as the actual "taking possession". It is unable to provide an answer as to which types of acquisition or change of possession might justify a restitution claim. Civil law, on the other hand, can certainly address the normative dimensions of colonial-era acquisition processes. It is therefore interesting that colonial jurisprudence, informed by legal ethnology, sometimes has recourse to civil law. Provenance research is dependent on such references because, as already indicated, the acquisition or appropriation process must also be measured against the standards that applied at the time of the change of ownership.

Colonial Choice of Law as *Iurisprudentia*

The requirement of prudence has often been emphasised in colonial legal literature. German law should not simply be imposed on the Indigenous population; rather, the "autonomy" of the latter's laws should be recognised.[23] On the other hand, the German colonial administration is itself known to have often lacked prudence, leading to a Herero uprising that was brutally crushed in 1904 in the Battle of Waterberg on the basis of the so-called "extermination order".[24] And when an estimated 100,000 Indigenous people were killed in the "Maji Maji Uprising" in 1905/06, a change in colonial policy was deemed necessary.[25]

The new policy found expression in the demand for a more scientific approach, which was supposed to lead to a noticeable improvement in the living conditions of the population in the colonies. The new motto was to preserve African legal systems. But how were lawyers to familiarise themselves with African law? Questionnaires were supposed to offer a solution and had already been resorted to by the co-founder of modern legal ethnology, Valtazar Bogišić (1834–1908).[26] But who could be interviewed? Local legal authorities ("Wali"), village elders or chiefs? Colonial officials or missionaries living in the colonies? Or were "special commissioners" to be sent from home to investigate the law *in situ*?[27]

Beside these difficulties, there was also the issue as to which law should be applied in the colonies: African law? German law? Or a mixture of different legal systems? For legal disputes among whites, who enjoyed the full rights deriving from German citizenship, the legal context was clear. Most interesting for provenance law are the "mixed matters"; that is, disputes between members of different legal systems.[28] The subject was repeatedly discussed around 1900 in the light of increased interaction between Germans and "natives", and it was proposed that legal transactions would be regulated

> *according to the law of the agent, sales according to the law of the seller, land acquisition* [...] *according to the law of the previous owner, the right of inheritance according to the law of the testator, fines according to the law of the injured person,* [and] *a weregild would be valued according to the law of the person killed.*[29]

Even today, the concrete factual situation in which the legal relationship is rooted is the point of departure in the case of contradictory laws between different legal systems.[30] In this context, "rooted" is to be understood as a metaphor intended to indicate the place or point from which the legal event originated. Accordingly, modern European provisions for conflicts of law still declare the law of the seller to be decisive in the case of sale.[31] The primacy of native law was, however, subject to a few limitations from the perspective of colonial law: it was to be applied more in civil law than in criminal law because the former generally defended against attacks against generally recognised legal interests such as life, limb and property.[32] Further, the legal assessment of ritual acts raised particular problems insofar as they could also endanger the life and health of people, such as poison tests and similar ordinances, human sacrifices or sorcery.[33] According to colonial law, concessions had to be made in such cases in order to avoid "an exodus of the native workforce from the protectorate".[34]

Colonial jurisprudence placed particular emphasis on property and real estate law: "As the economically weaker", the "natives" were to be "protected from exploitation by whites". Measures were called for to prevent whites taking advantage of their position and of use of the German Civil Code.[35] These efforts are interesting from the perspective of provenance law because, when considering whether cultural property may remain in the recipient country or must be returned, one decisive factor is by which legal system the sale would originally have been evaluated. This places the focus of interest on Indigenous law and its modifications.

Property Law as the Principal Area of Legal Relations with Indigenous Peoples

Contemporary literature on colonial law often contains references to Indigenous law with its functions and specificities in comparison with European legal systems. In this context, as already indicated, cases are also discussed in which Indigenous people and Europeans compete, and much importance is given to the "reconciliation of cultures separated by a great gulf and to build a bridge from one to the other".[36] In African legal systems, it was claimed, as in all segmentary societies, family law is the real pivotal point, with great value being placed on formalities and solemnities, as is typical of oral legal

cultures.[37] In view of the fundamental differences between Indigenous and European law, special rules would have to be created, especially for "mixed marriages" and the "rights of children born of such marriages".

In addition to family and inheritance law, property law is the second principal area of importance in legal relations between natives and whites.[38] Here, clarification is first required as to what the "natives understand by movable property",[39] in turn raising the question of whether "objects would have to be considered inalienable as a result of special provisions, such as cult regulations".[40] Another area of interest is what we now call the law of credit security. In Africa, credit or debts would often "increase the power of the creditor" to "take away the debtor's entire property".[41] The "issue of credit" therefore requires particularly careful consideration in the case of Indigenous people entering into a legal relationship with whites.

In South-West Africa, "the excesses of unrestricted lending based on the recklessness of the natives" had already led to "serious disadvantages".[42] A general ban on "selling goods to the natives on credit" was to be considered.[43] In any case, "business with the natives should be conducted in cash as far as possible", and general regulations should be put in force "that protect the natives from usury and exploitation and deem certain transactions immoral".[44]

Summary and Conclusions

The considerations of colonial jurisprudence regarding the protection of native people from usury and exploitation are of great importance when evaluating matters of provenance law. But what do we mean by "law"? As stated above, conduct can only be evaluated in legal terms in relation to what was already known at the time of the event. Did protection of the weaker already exist in colonial times? Are the demands made in this respect not merely proposals? And can mere proposals qualify as "law"?

Based on the premises of a centralist state philosophy, the question would have to be answered in the negative.[45] Such a philosophy would only consider laws and – at the very most – some forms of common law as "law". In the legal reality, however, there are a multitude of phenomena that a pluralist philosophy of state seeks to grasp under keywords such as juridical law, autonomy, or dogmatics. At the same time, the centralist and pluralist legal

models also have one important thing in common: both are dependent on consensus; on agreement. In the first case, it is the consent of the electorate and parliament; in the second, that of the legal profession, academia, certain groups, or the public. It is therefore advisable to illustrate the emergence of law using a scale ranging from initial drafts, proposals, or interim results, through preliminary agreement and near-agreement within a small circle, to the recommendation of a general adoption of results, common law, state law and worldwide acceptance. Using such a spectrum, academic postulates of the era had already achieved what could qualify as "law", summarised again in the following.

There is widespread agreement in the literature on colonial law that European law must not simply be imposed on the Indigenous population, but that the normative orders of the "natives" must be given primacy. This applies above all to property law. To this day, the legal assessment of a sale is carried out according to the law of the seller, thus impeding the colonists' successors from seeking to legitimise acts of misappropriation or removal of property with recourse to an alleged "glorious law of nations". Protection against exploitation is another consideration that equally enjoys widespread consensus in the literature. We may, further, assume that such proposals would correspond (or would have corresponded) to the hypothetical (or actual) will of the Indigenous population. Indeed, the demands of colonial jurisprudence following the uprisings of 1904 and 1905/06 were even given a hearing by the imperial government.[46]

While jurists around 1900 certainly contributed notably to the legitimisation of colonialism and genocide, we can nevertheless also discern structures within their discourses that are significant for us today considering the growing importance of postcolonial consciousness. Because it is impossible to differentiate strictly between the object of historical research and the location of contemporary academia, it seems permissible to reach beyond contemporary international law to the – from today's perspective – forward-looking proposals of colonial jurisprudence. Given our lack of knowledge about the actual laws of African peoples around 1900 and the ambiguities surrounding the colonial administration of justice in the short period of its existence, these proposals may claim a degree of legal quality that might guide today's evaluation procedures of specific acquisition histories.

The following criteria can be applied to the assessment of an acquisition. A voluntary sale in the context of a purchase or exchange would advocate for the recipient country keeping the artefact. However, this presumption can be refuted by pointing out, for instance, that the object was an inalienable cult object. The same is likely to apply to a gift, although here it would be necessary to ascertain whether and to what extent the expectation of a reciprocal gift was met.[47]

Verdicts regarding acquisitions made via credit transactions must be reached on a case-by-case basis. The purpose for which the loan was used and the circumstances under which it was rendered available are likely to play an important role here. Moreover, we can safely assume that a structural power imbalance will have existed between lender and borrower, especially in the case of credit transactions. Objects that have been stolen, plundered, or looted, on the other hand, are likely to pose fewer problems. In these cases, objects will have to be returned, or at the very least compensation will have to be offered.

1 What is referred to as "colonial jurisprudence" used to differ between legislation for non-whites, for whites, or legislation for mixed circumstances. See, for instance, Wick, Heinrich (1913): *Das Privatrecht der Farbigen in den deutschen Schutzgebieten*, Münster, p. 23.
2 Parzinger, Hermann (2019): "Wir wollen maximale Transparenz", in: *Neues Deutschland*, 18 January 2019, https://www.nd-aktuell.de/artikel/1110323.kolonialismus-wir-wollen-maximale-transparenz.html, accessed 20 April 2023.
3 Goldmann, Matthias; von Loebenstein, Beatriz (2020): "Alles nur geklaut? Zur Rolle juristischer Provenienzforschung bei der Restitution kolonialer Kulturgüter", in: *Max Planck Institute for Comparative Public Law & International Law (MPIL),* Research Paper no. 2020-19, p. 2. The reasons why this critique is justified are explained in more detail elsewhere: "Provenienzforschung als Disziplin der Rechtsgeschichte", in: Stephan Meder (Ed.) (2022): *Geschichte und Zukunft des Urheberrechts III*, Göttingen, pp. 211–238.
4 Macron, Emmanuel (2017): "Discours de Ouagadougou", in: *Translocations. Anthologie. Eine Sammlung kommentierter Quellentexte zu Kulturgutverlagerungen seit der Antike*, https://translanth.hypotheses.org/ueber/macron, accessed 20 April 2023.
5 On this and the following, see Meder, Stephan (2015): *Doppelte Körper im Recht*, Tübingen, pp. 25–27, 86–94, 119–128.
6 Hegel, Georg Wilhelm Friedrich (1986): "Vorlesungen über die Philosophie der Geschichte. Einleitung", in: *Werke in zwanzig Bänden (1832–1845)*, Vol. 12, Frankfurt am Main, p. 129 (further verification in Meder, 2022, *Provenienzforschung als Disziplin der Rechtsgeschichte*).
7 Hegel, 1986, *Philosophie der Geschichte*, p. 122. On the contemporary description of non-Europeans "as natural, ahistorical, and lacking culture" see Zimmermann, Andrew (1999): "German Anthropology and the "Natural Peoples", in: *The European Studies Journal,* Vol. 16, p. 97.
8 Savigny, Friedrich Carl von (1840): *System des heutigen römischen Rechts*, Vol. I, Berlin, p. 23, 28.
9 The lex non scripta argument also lays bare the weakness in Hegel's critique of Savigny's theory of legal sources in the former's Elements of the Philosophy of Right (*Grundlinien der Philosophie des Rechts*, 1820), § 211, at the end.
10 Savigny, Friedrich Carl von (1814): *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, p. 9.
11 "Wir in neueren Zeiten haben sie [die förmlichen Handlungen oraler Rechtskulturen] häufig als Barbarei und Aberglauben verachtet, und uns sehr groß damit gedünkt, daß wir sie nicht haben, ohne zu bedenken, daß auch wir überall mit juristischen Formen versorgt sind", die „von jedem als etwas willkürliches und darum als eine Last empfunden werden", cited after Savigny, 1814, *Vom Beruf*, pp. 10 f. English translation: "We, in latter times, have often made light of them [the formal acts of oral legal cultures] as the creation of barbarism and superstition, and have prided ourselves on not having them, without considering that we, too, are at every step beset with legal forms, [which] are felt by all as something arbitrary, and therefore burthensome." *Of the Vocation of Our Age for Legislation and Jurisprudence.* Translated from the German by Abraham Hayward, London, 1831, p. 27. Available at: http://docenti.unimc.it/luigi.lacche/teaching/2018/18657/files/texts-to-study-preparing-for-the-exam/Savigny%20Of_the_vocation_of_our_age_for_legislati.pdf, accessed 22 April 2023.
12 On *ex post facto* cf. C.1.14.7; Schwarz, Kyrill-A. (2020): *Vertrauensschutz als Verfassungsprinzip*, Baden-Baden, pp. 61–80.
13 Bauer, Paul (1905): "Die Strafrechtspflege über die Eingeborenen der deutschen Schutzgebiete", in: *Archiv des öffentlichen Rechts (AöR)*, Vol. 19, no. 4, pp. 34 f. and 82; Meyer, Felix (1905): *Wirtschaft und Recht der Herero*, Berlin, p. 5; Friedrich, Johann Karl Julius (1911): "Strafrechtsgewohnheiten der Eingeborenen in deutschen Schutzgebieten", in: *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft (ZKKK)*, Vol. XIII, no. 4, p. 299; Karstedt, Oskar (1912): *Beiträge zur Praxis der Eingeborenenrechtsprechung*, Daressalam, p. 49. See also: Utermark, Sören (2012): *Schwarzer Untertan versus schwarzer Bruder*, Kassel, pp. 85–99, 285–303.

14 Meyer, Felix (1907): "Die Erforschung und Kodifikation des Eingeborenenrechts", in: *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft (ZKKK),* Vol. IX, no. 11, p. 847; Friedrich, Julius (1909): "Eingeborenenrecht und Eingeborenenpolitik", in: *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft (ZKKK)*, Vol. XI, no. 6, p. 478.
15 Friedrich, 1909, *Eingeborenenrecht*, p. 300.
16 See, for instance, Dann, Philipp; Hanschmann, Felix (2012): "Postkoloniale Theorie, Recht und Rechtswissenschaft", in: *Kritische Justiz* (KJ), Vol. 45, pp. 127–162; Schönberger, Sophie (2019): "Die Säule von Cape Cross und das Völkerrecht", in: *Historische Urteilskraft*, Vol. 1, pp. 28–31; Goldmann, von Loebenstein, 2020, *Alles nur geklaut?*, pp. 1–26.
17 For an accurate portrayal see Schönberger, 2019, *Die Säule von Cape Cross*, p. 29.
18 Ibid., p. 21. The assumption of unclaimed territory was challenged as early as 1900, however: cf. Meyer, 1905, *Wirtschaft und Recht der Herero*, p. 66.
19 Wieland, Christoph Martin (1984): "Auszüge aus Jacob Forsters Reise um die Welt (1778)", in: *Sämmtliche Werke XIV (1798)*, Hamburg, p. 241 (original italics).
20 Weickmann (1910): "Über die Frage der Schaffung eines selbständigen kolonialen Strafrechts", in: *Verhandlungen des Deutschen Kolonialkongresses*, Berlin, p. 474.
21 Schreiber (1903/04): "Rechtsgebräuche der Eingeborenen der deutschen Schutzgebiete in Afrika", in: *Beiträge zur Kolonialpolitik und Kolonialwirtschaft*, Vol. 5, p. 237; Wilke, in: Weickmann, 1910, *Koloniales Strafrecht*, p. 489; Friedrich, 1909, *Eingeborenenrecht*, p. 299 f.
22 The old discriminatory terms are not used here. See Schreiber (1907), "Zur Kodifikation des Eingeborenen-Rechts", in: *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft (ZKKK)*, Vol. IX, p. 484.
23 See Meder, 2022, *Provenienzforschung als Disziplin der Rechtsgeschichte*.
24 The notorious Lieutenant Lothar von Trotha formulated the idea of genocide in the oft-quoted words: "Within the German border, every Herero with or without a rifle, with or without cattle, will be shot. I will no longer accept women and children, will drive them back to their people and will have them shot as well." Federal Archives (*Bundesarchiv*) Berlin, BArch R 1001/2089, p. 1.
25 E. g. Lederer, Claudia (1994): *Die rechtliche Stellung der Muslime innerhalb des Kolonialrechtssystems*, Würzburg, pp. 71–77.
26 Meder, Stephan (2011): "Valtazar Bogisic und die Historische Schule", in: *Spomenica Valtazara Bogisica*, Vol. 1, Belgrad, pp. 517–537. Albert Hermann Post and Josef Kohler also drew up questionnaires (on the beginnings of legal ethnology in Germany see Meder, 2022, *Provenienzforschung als Disziplin der Rechtsgeschichte*).
27 Meyer, 1907, *Die Erforschung des Eingeborenenrechts*, p. 857.
28 There is a lack of detail on this in recent literature (cf. Meder, 2020*, Provenienzforschung als Disziplin der Rechtsgeschichte).*
29 Schreiber, 1907, *Kodifikation des Eingeborenen-Rechts*, pp. 486, 484.
30 Savigny, Friedrich Carl von (1849): *System des heutigen römischen Rechts*, Vol. VIII, Berlin, pp. 25, 28, 108.
31 Cf. Art. 4 para. 1(a) of the EU Regulation of 17 June 2008 (Rome I): "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence".
32 Bauer, 1905, *Strafrechtspflege über die Eingeborenen*, p. 35.
33 Examples ibid., pp. 80–86, 84; Schreiber, 1907, *Kodifikation des Eingeborenen-Rechts*, p. 485 (parricide, witch-hunting, expulsion of sick individuals, etc.).
34 Bauer, 1905, *Strafrechtspflege über die Eingeborenen*, p. 84. On the "workforce issue", see Utermark, 2012, *Schwarzer Untertan versus schwarzer Bruder*, pp. 60–62 passim.
35 Wick, 1913, *Das Privatrecht*, pp. 4, 21 f.; Schreiber, 1907, *Kodifikation des Eingeborenen-Rechts*, p. 483.
36 Meyer, 1907, *Die Erforschung des Eingeborenenrechts*, p. 868.
37 E.g. Schreiber, 1903/04, *Rechtsgebräuche der Eingeborenen*, pp. 242–255.

38 Schreiber, 1907, *Kodifikation des Eingeborenen-Rechts*, p. 483; Meyer, 1907, *Die Erforschung des Eingeborenenrechts*, p. 867; id., 1905, *Wirtschaft und Recht der Herero*, p. 66–80; Kohler, Josef (1900): "Rechte der deutschen Schutzgebiete", in: *Zeitschrift für vergleichende Rechtswissenschaft*, Vol. XIV, pp. 367–379.
39 Meyer, 1907, *Erforschung des Eingeborenenrechts*, p. 867. There is also mention of purchase or exchange – and of the particularities of a gift, which according to native legal concepts is often based on reciprocity or the requirement of a gift in exchange. For more detail on the particularities of gifts, see Meyer, 1905, *Wirtschaft und Recht der Herero*, pp. 76–78.
40 Meyer, 1907, *Erforschung des Eingeborenenrechts*, p. 867; id., 1905, *Wirtschaft und Recht der Herero*, p. 74 f.; id.: "Das Eingeborenenrecht und seine Kodifikation", in: *Vossische Zeitung*, Supplement to Issue 421, 8 September.
41 Meyer, 1907, *Die Erforschung des Eingeborenenrechts*, p. 867.
42 Ibid., p. 868.
43 Ibid.
44 Ibid.; Wick, 1913, *Das Privatrecht*, pp. 16–23 (Examples under consideration included acceptance requirements, condition of counter-performance, eliminating risks associated with advance payment, prohibition of sureties, etc.).
45 For more detail on the following see Meder, 2022, *Provenienzforschung als Disziplin der Rechtsgeschichte*, chapter VI.
46 Meyer, 1907, *Erforschung des Eingeborenenrechts*, p. 847. This is not to say that the efforts of jurisprudence in the area of legal anthropology have remained unchallenged (cf. Meder, 2022, *Provenienzforschung als Disziplin der Rechtsgeschichte*).
47 Cf. Meder, Stephan (2012): "Etwas aus Nichts?", in: Manfred Rehbinder (Ed.): *Vom homo oeconomicus zum homo reciprocans?*, Bern, pp. 117–143.