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Andrew Fitzmaurice. *Sovereignty, Property and Empire, 1500–2000.* Cambridge: Cambridge University Press, 2014. IX, 378 S. ISBN 978-1-107-07649-5.

Anthony Pagden. *The Burdens of Empire: 1539 to the Present.* New York: Cambridge University Press, 2015. 302 pp. \$29.99 (paper), ISBN 978-0-521-18828-9.



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Sammelrez: Intellectual Histories of Empire

Andrew Fitzmaurice and Anthony Pagden have both written a particular kind of history of empire. They do not depart from an understanding of empire as a political construct that was experienced by human beings. Instead, both authors have written new intellectual histories of empire. They conceive empire as a subject for linguistic contextualism (Fitzmaurice, p. 17), and aim at the reconstruction of a genealogy of uses of the originally Roman notion of *imperium*. More precisely, Fitzmaurice's *Sovereignty, Property and Empire* and Pagden's *Burdens of Empire* are histories of political thought on European imperial projects from the Spanish Conquest of the New World to the present.

Apart from their shared *longue durée* approach to the intellectual history of empire, a central feature that unites the works by Fitzmaurice and Pagden is their insistence that a genealogy of Western articulations of *imperium* cannot be conceived as a straightforward, linear narrative of imperial legitimations. In contrast, they em-

phasize that at the heart of these theoretical debates there were always also critiques of empire. This has become a prominent approach among historians focusing on early modern thought on empire. See e.g. David A. Lupher, *Romans in a New World. Classical Models in Sixteenth-Century Spanish America*, Ann Arbor 2003; and Lauren Benton / Benjamin Straumann, *Acquiring Empire by Law. From Roman Doctrine to Early Modern European Practice*, in: *Law and History Review* 28 (2010), pp. 1–38. *Opposition to imperial appropriations*, as Fitzmaurice argues, *was driven as much by a discourse of possession as was support for expansion* (Fitzmaurice, p. 14). Pushing back against oversimplified histories that forcefully stress the association of Western thought and European empires, it is the forgotten complexity of *fractured and divided* [...] accounts (Fitzmaurice, p. 1) that he seeks to recover in the first place. Though this impetus is also characteristic of Pagden's history, his primary objective is perhaps even more ambitious than that of his

colleague. He endeavors to offer nothing less than a definition of empire, which, of all the terms in the political lexicon, as he rightly claims, is one of the most elusive and among the most contentious (Fitzmaurice, p. 1).

Andrew Fitzmaurice takes his reader on a journey from the late-medieval revival of Roman law in the context of debates about the legitimacy of the emerging European city-states through to the twentieth-century dispute about sovereignty over the polar regions. The concise and clearly formulated focus of his book — how arguments for and against empire centered on either sovereignty or property — allows him to elegantly move across a diverse range of issues and contexts without thereby imposing a teleological perspective of the past upon the present. The real starting point of Fitzmaurice's story is the involvement of the theologians of the so-called School of Salamanca in the debate about the justification of Spain's colonization of the New World. He repudiates post-colonial interpretations of Francisco de Vitoria's famous 1539 lecture — *De indis* — and dooms such readings as ultimately anachronistic. Above all against Antony Anghie's *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2004. For Vitoria, he insists, there was no justification for the conquest (Fitzmaurice, pp. 48–49). While the Salmantine theologian Vitoria, in Fitzmaurice's view, was still operating in an exclusively legal discourse, a novel economic dimension of empire, which constitutes the first key transformation in Fitzmaurice's narrative, emerged in debates about occupation in the seventeenth century. This development originated in an early northern American colonial context (Chapter 3), grew increasingly importantly in Protestant natural law thinkers (Chapter 4), and culminated in the Scottish Enlightenment theorists of commercial society in the eighteenth century (Chapter 5). It is noteworthy that this argument is tacitly grounded in the now rightly contested claim that there was a sharp discontinuity between the Catholic and the Protestant natural law discourse of the sixteenth and seventeenth centuries respectively. This break is prominently advocated in Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant*, Oxford 1999. For a recent alternative view, see Annabel S. Brett, *Changes of State. Nature and the Limits of the City in Early Modern Natural Law*, Princeton 2011. At the same time, however, Fitzmaurice is keen to maintain that, nevertheless, there was no clear break between early modern continental empires and post-Enlightenment commercial empire (Fitzmaurice, p. 6). Although the intellectual advocates of the latter opposed

earlier forms of territorial imperialism through war and conquest, the focus for occupation was constantly shifting between property and sovereignty (Fitzmaurice, p. 6), something that Fitzmaurice shows particularly convincingly in Chapters 4–6.

Fitzmaurice situates the second fundamental transformation, the turn to the distinctively modern notion of the occupation of sovereignty (rather than property), in the nineteenth century (Chapter 7). Unlike recent scholarship that is associated with the critical or historical turn in international law, however, he suggests that there are important continuities between lawyers writing in the first half of the century like Georg Friedrich von Martens and the later members of the *Institut de droit international*. In particular against Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge 2001. What is more, he likewise contests that the international lawyers associated with the *Institut* can uniformly be seen as imperial apologists, arguing that they were instead divided in their views regarding empire (Fitzmaurice, p. 246). Fitzmaurice ends his *tour d'horizon* with an illuminating account of the debates on the polar regions, which were first conceived as spaces that could not be occupied, so-called *terra nullius*. But over the course of the twentieth century, the understanding of that term was increasingly transformed, until the original meaning of *terra nullius* vanished and it became a mere shorthand for conquest. In this sense, Fitzmaurice brilliantly concludes his book by showing that the lost awareness of the complexity of pro- and anti-imperial articulations itself can solely be understood in historical perspective.

Anthony Pagden's history of empire equally starts out with a chapter on Vitoria and the School of Salamanca. In his judgment, however, the project of the Spanish theologians is not so clearly cast as an anti-imperial discourse. Instead, Pagden's view is rather contrary to that of Fitzmaurice in that he asserts that Vitoria did indeed provide a normative justification for the Spanish presence in America (Pagden, p. 75). What is more, Pagden places Vitoria in a continuous line with the later Protestant lawyers Alberico Gentili and Hugo Grotius, and thus questions the scholastic/humanist and Catholic/Protestant divides that Fitzmaurice accepts (Chapters 2 and 5). Unlike Fitzmaurice, Pagden thus aligns himself with those who argue against the sharp break proposed by Tuck. See above at footnote 3. Importantly, the key features that are at the heart of Pagden's proposed working definition of empire most powerfully come to the fore in Chapter 3, where

he shows that despite the identification of the newly discovered American Indians with Aristotle's natural slaves in sixteenth-century Spain, race ultimately played no role in imperial ideologies. Paradoxical though it may seem (Pagden, p. 115), Pagden argues, it was decisive for the success of empires to insist on the unity of human nature, so that all the conquered peoples could be incorporated into the imperial *society* and became subject to imperial *legislation*. At last, this amounted to a practice of indirect rule, which he conceives as the principal characteristic of early modern empires.

Apart from his extensive focus on sixteenth- and seventeenth-century European thought, Pagden is equally concerned with both North and South American voices (Chapters 4 and 6), of which the latter is a particularly intriguing account in that it goes beyond a purely Eurocentric perspective. Crucially, however, he situates the great shift towards what he calls the second empires in the transformation from the law of nations (*ius gentium*) towards the modern notion of international law in European thought. Though this is, generally speaking, in line with Fitzmaurice's stance, the one key thinker with whom Pagden associates this turn and who only plays a marginal role in Fitzmaurice's book is Immanuel Kant (Chapter 7). It was Kant, Pagden maintains, who first opposed the previously dominant theories of just war and who said that no province or colony, and consequently no empire, can, therefore, legitimately be created through war (Pagden, p. 212). What is more, the belligerent nature of early modern empires was likewise criticized by the Enlightenment advocates of commercial society, who are as central to Pagden's story as they are to Fitzmaurice's (Chapter 8). In the opinion of the Scots, in particular, warfare and conquest belonged to a past stage in human history that had been superseded by the eighteenth century. As opposed to the previously pivotal ideas of the social and legal incorporation of conquered peoples, then, the second empires were no longer characterized by indirect rule but by their civilizing objectives. According to Pagden, this ideological change made the ultimate self-determination of [empire's] subject peoples an inevitable goal (Pagden, p. 32) and initiated the decline of the age of imperialism which came to a close with Decolonization in the 1960s. But as the title of his book suggests, Pagden is keen to

emphasize that the burdens of empires still linger. In his final chapter, he compellingly shows that we can hardly understand our modern discourse of human rights, or indeed of any form of contemporary Western rights talk, without an appreciation of its history a history which essentially developed in the context of *imperial*, legislative practices (Pagden, p. 247, original emphasis).

On a final note, I wish to briefly touch upon something which can hardly be sidestepped when writing histories that range from the early modern period to the present: the question of how to relate the past to the present. On the one hand, there is the possibility to stress continuity and coherence, which, at least at some points, surfaces in Pagden's narrative: Vitoria provides the earliest attempt to transform the Roman law of nations into something that later generations would recognize as an international law (Pagden, p. 47), and Gentili stands at the origin of international law in the sense of a law for civilized nations à la Christian Wolff (Pagden, p. 13). The past and the present (or the earlier past and a later past), then, are sometimes a bit too straightforwardly and easily connected. Fitzmaurice, in contrast, emphasizes the fractured nature of Western political thought in order to criticize recent post-colonial or critical histories of the law of nations and of international law as universalist, coherent, and anachronistic accounts (Fitzmaurice, p. 13 et passim). But in so doing, he runs yet another danger. If any uses of past texts for making claims about the present are *a priori* delegitimized, political engagement is avoided under the guise of a methodological point, as Martti Koskenniemi has recently argued, and the result is political through and through. Martti Koskenniemi, Vitoria and Us. Thoughts on Critical Histories of International Law, in: *Rechtsgeschichte à Legal History* 22 (2014), pp. 119-138.

In the end, however, *Sovereignty, Property and Empire* and *The Burdens of Empire* are two studies that constitute excellent and fundamental contributions to the field. Fitzmaurice and Pagden show great erudition in handling an extensive array of primary sources written by theologians, philosophers, jurists, and settlers (to name just the most prevalent ones), and they provide illuminating and thought-provoking new vistas on one of the most pressing current historiographical debates.

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