L'Atelier du Centre de recherches historiques

Revue électronique du CRH

22 | 2020 :
Sous tutelle. Biens sans maître et successions vacantes dans une perspective comparative, XIIIe-XXe siècles

The King Heir. Claiming Vacant Estate Succession in Europe and in the Spanish World (13th-18th Centuries)

Le roi héritier. Les revendications sur la succession vacante en Europe et dans le Monde espagnol XIIIe - XVIIIe siècles

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https://doi.org/10.4000/acrh.10917

Résumés

English Français
This article deals with the claims on "vacant successions" (*bona vacantia*) and on "property of none" (*res nullius*) in early modern Europe, with a focus on the case of the Spanish monarchy between the thirteenth and eighteenth centuries (both in the old and in the new world). After briefly reconstructing the legal debate on the matter, the essay tries to demonstrate how the control over successions was at the centre of competing and conflicting claims, among which that of the "king heir". In the end, what the analysis of this problem shows is that the discontinuity created by the inability of human beings to manage family and community goods and resources was a constant threat to the corporate membership-based societies of those times. Therefore, a number of corporate bodies and institutions (such as the Spanish Juzgado de bienes de difuntos) were encouraged to mobilize in order to ensure that no patrimony were left without an owner, and that there was always someone responsible for responding to the obligations deriving from the ownership of goods.

Cet article porte sur les revendications relatives aux « successions vacantes » (*bona vacantia*) et aux

« biens sans maître » (*res nullius*) dans l'Europe moderne, avec une attention particulière portée au cas de la monarchie espagnole entre les XIIIe et XVIIIe siècles (aussi bien dans l'Ancien que dans le Nouveau Monde). Après avoir brièvement reconstitué le débat juridique en la matière, cette contribution s'efforce de démontrer comment le contrôle des successions était au centre de prétentions multiples et conflictuelles, parmi lesquelles figurait celle du « roi héritier ». En dernière analyse, l'article témoigne de ce que la discontinuité créée par l'incapacité des êtres humains à gérer les biens et les ressources de la famille et de la communauté était une menace constante pour les sociétés corporatives de l'époque. Par conséquent, toute une série de corporations et d'institutions (comme le *Juzgado de bienes de difuntos* espagnol) furent poussées à se mobiliser pour éviter que les biens ne soient laissés sans propriétaires et qu'il y ait toujours un responsable pour s'acquitter des obligations découlant de la propriété sur les choses.

Entrées d'index

Mots-clés : succession vacante, biens sans maître, monarchie espagnole, Europe d'Ancien Régime, Juzgado de bienes de difuntos

Keywords : Vacant Successions, Property without Owner, Spanish Monarchy, Early Modern Europe, Juzgado de Bienes de Difuntos

Notes de l'auteur

This research was made possible by Marie Skłodowska-Curie Individual Fellowship (Call: H2020-MSCA-IF-2014; project: 655316 "Global Inheritances: Personal Identification and Inheritance Rights in the Early Modern Spanish Empire"), at the CRH, EHESS (Paris).

Texte intégral

Introduction

1 The study of the strategies used by family institutions to ensure the continuity and survival of the lineage name, estate, memory of ancestors and so on is both a social history and anthropology topos[1]. Such strategies have been analysed primarily from a perspective that could be defined "internal" to what a long tradition of study considers full blown corporate households. What are being analysed are, in fact, the resources and tactics adopted by the representatives/administrators of these corporations (marriage exchanges and alliances, wills and donations, entail/majorat or chantries, etc.) for the ultimate purpose of ensuring the corporation's survival together with the appointment, each generation, of reliable corporation representatives/administrators.

2 Less attention has been paid to the crisis and the failure of such reproduction strategies. When a household representative/administrator was temporarily or permanently missing (whether because of temporary absence, incapacity, criminal failure or because no appointment had been made), whose duty was it to take on the financial, social, religious and the other obligations expected of individual members and the domestic institution as a whole? Whose duty was it to protect far off absent heirs, incapable of taking up their inheritance, deal with creditors and carry out all third-party obligations? Whose duty was it to look after rights to material assets or the souls of the dead –considered legal entities themselves– for example by collecting real estate dues, paying religious and *pro anima* legacies for ancestors and also ensuring that the *patrimonium* did not deteriorate or was not taken over illegally? Lastly, whose duty was it to safeguard the community[2] against the negative effects deriving from the inability of the corporate households to accomplish their obligations (*i.e.* paying taxes, taking part in maintaining local resources and ceremonial duties, maintaining borders between those who belonged to the community and those who did not, etc.)?

3 In a "house-based society" (*société à maisons*) interest in perpetuating corporate households went beyond the family institutions themselves. Such bodies actually performed a fundamentally important role in the constitutional and socio-political order of the *res publica* and were the basic unit of social and economic reproduction.

4 Faced with the ongoing risk of crisis and extinction of households, then, both sovereign and community institutions (as well as the economic system as a whole) developed legal, social and institutional devices, the purpose of which was to sustain the financial and constitutional viability of family institutions, including, as a last resort, taking on the responsibilities of the

corporate households and substituting them when they were not capable of fulfilling (or fraudulently attempted to get out of) their primary duties to guarantee *ad infinitum* a representative/administrator capable of carrying out the body's responsibilities. To use a modern parallel, it could be said that when a corporation's *pro tempore* administrator was absent, the community, religious or sovereign institutions developed administration methods to safeguard such duties (through a sort of bankruptcy receiver) in order to manage and honour its third-party obligations. The entire social order would, in fact, have been undermined if trust in the solidity of the family institutions as a nucleus of social production and reproduction had ceased to exist. These safeguarding devices, moreover, were always twofold in nature. On the one hand, they were mechanisms for social control, through which the upper lay and ecclesiastical echelons intervened in the internal dynamics of the bodies; and on the other hand, they provided precious tools to the latter in laying claim to rights and responding to the risk of failure.

5 The aim of this article is to analyse these safeguarding mechanisms and the institutions set up to deal with the issue of the failure of domestic institutions, focusing attention on the intergenerational transmission of assets, rights and obligations. In particular I will deal with the topic of the management of what civil law calls *hereditas iacens* (literally "lying inheritance" or "inheritance in abeyance", *i.e.* estates which remain temporarily without an owner in expectation of the legitimate heir's claim to his rights) and vacant successions (what civil law calls *bona vacantia*, estates with no owner as a result of the extinction of the inheritance succession). This essay will be divided into three parts. First of all, I will attempt to deal with the institution of "inheritance in abeyance" in its historical development, from Roman law to European ius commune. Secondly, I will briefly attempt to offer a number of insights drawn from the European context. Thirdly, I will examine the case of the Spanish monarchy, analysing both the medieval tradition and the Early Modern Spanish world. In conclusion, I will make a contribution to a comparative analysis of the issue.

Inheritance in Abeyance: from Roman Law to *ius commune europeum*

6 "Family, *i.e.*, patrimony", noted Alberico de Rosciate (1290-1360) in his *Dictionarium iuris tam civilis quam canonici*;[3] in those same years Bartolus de Saxoferrato (1314-1357) similarly considered that "in legal terms, family means patrimony"[4]: in other words, patrimony was conceived of by European medieval jurists as the very essence, the "substance", uniting family lineage through its various generations, like an endless chain.[5] As Andrea Romano acutely highlighted, medieval and Early Modern family structures –real "political associations"– revolved around two central elements: the authority of the *pater familias* (the head of the family) and the integrity of the *patrimonium* (patrimony) whose "crisis point was the opening up of the succession, when doubt was thrown on consolidated equilibria".[6] It was in this sense, then, that the defence of patrimonial integrity, safeguarding the family's social dignity and political and economic power, and the tutelage of intergenerational transmission of assets (first and foremost real estate) constituted the "cornerstone of the whole legal edifice".[7]

7 Therefore, issues related to family inheritance and succession –above all in societies conceived of as composed not of separate individuals but of corporate bodies modelled primarily on the domestic model[8]– could not be regarded as a private matter, as they affected the stability of the social order itself. It was thus natural that jurists should concern themselves with establishing special devices designed to safeguard its correct working. Moreover, as *ancien régime* economic relationships were broadly founded on credit,[9] it is clear that guaranteeing debt payment was once again not simply a matter of straightforward individual dealings, but fully impacted on the sovereign authorities called on to guarantee order and justice.

8 What happened, then, when family assets were suspended between the deceased and its heirs? Who would guarantee payment of the deceased's debts, effective implementation of legacies and legatees and the reciting of requiem masses for his soul? And what was to be done in the event of an intestate death without the knowledge of legitimate heirs or perhaps in far off place? Since ancient Roman times, a legal device had intervened to safeguard all the interests which coalesced around an inheritance: the *hereditas iacens* institution. This principle still exists in the law codes of many countries[10] demonstrating that the issue dealt with here can be

analysed in a variety of historical contexts and far beyond the confines of Europe. Hence, at least a brief reference to the Roman world –a necessary reference point in subsequent European legal thinking and institutions– is essential.

9 The main purpose of inheritance in abeyance was to "safeguard hereditary estates to the benefit of future heirs",[11] that is to protect such estates from illegitimate occupation and prevent usucaption (*i.e.* adverse possession or acquisitive prescription) by individuals attempting to seize assets which remained temporarily without a possessor. It is important to note that this principle, in fact, aimed at distinguishing between these assets, on the one hand, and nobody's things (*res nullius*) or assets voluntarily abandoned by their owners (*res derelictae*), on the other.[12] The fundamental difference between these two categories of ownerless assets –perhaps we should properly say "possessorless"– was the title by which they could be acquired. Nobody's things could be acquired by means of occupation (as occurred in the case of wartime occupation, *manu militari*, of abandoned land). The institution of the *hereditas iacens*, on the other hand, was designed to avoid (as occurred "in the early days of Roman history", according to Bartolomeo Dusi)[13] such goods falling into the hands of the first who occupied them. As we will see when we look at the Iberian case, it was an issue of considerable importance, but which was not always clear in practice.

10 The question which Roman and later medieval jurists were called on to respond to was essentially this: during the abeyance period, who was the legal subject of the hereditary estate, that is "of the rights and duties to which the deceased had previously been subject and the rights and duties emerging *ex novo* during this interval?"[14] In all likelihood Roman jurists dealt with the subject of *hereditas iacens* as a simple *de facto* situation, without according it specific legal status. What interested them was providing practical tools to the *administrators* of such estates to deal with this state of suspension.[15]

11 The notion that abeyant inheritance could in itself constitute a juridic person is more likely Justinian[16] and, above all, medieval in origin. The very concept of *persona ficta*, as is well known, is the outcome of a medieval elaboration of the concept of person, which –from Boethius († 524 CE ca.) to Baldus de Ubaldis († 1400 CE) via Pope Innocent IV (Sinibaldo Fieschi, †1254 CE)– by means of theological and legal debates, built the foundations for those common constitutional principles of the *ius commune europaeum*, which lasted until the 19th century (and in some places even later).[17]

12 Hence, only in the light of medieval and early modern conception of succession can long-lasting ideas like the one Henry Sumner Maine found to be "the centre round which the whole [Roman] Law of Testamentary and Intestate succession" orbited be understood, that is "the principle that a man lives on in his Heir".[18] This belief was still operative in the early modern era and beyond. As an example, the mid-19th century edition of the Italian *Dictionary* of the *Accademia della Crusca*,[19] in its definition of the term *identity*, still reported a 17th century jurisprudential excerpt from Cardinal Giovan Battista De Luca († 1683 CE), one of the most important early modern Italian jurists and author of the influential *Theatrum veritatis et justitiae*:[20] "after the acceptance of the inheritance [...] the heir *identified himself* [...] *as a whole with the deceased*, and their patrimonies mixed up".[21] The heir, through succession, identified himself with his ancestor.

13 In legal terms De Luca could have said that they *have* the same person. What does this mean? As Bartolomé Clavero has clearly shown, until the late 18th and 19th century "person" as a legal term "did not signify or could signify *individual* in the meaning of human being"[22]. In medieval and early modern legal terminology, the individual could only *have* a person, not *be* a person; in other words, the individual could or could not have "legal capacity", in any possible way he could be regarded as a "legal subject".[23]

14 If an individual could not *be* a person, but rather *have* a person, the term has to be understood in its original Latin meaning, passing through the mediation of medieval theology,[24] as a theatrical mask an individual could wear in court, representing a person in its status, that is with all his rights and obligations. This makes understandable the fact that the same material and physical person (*persona corporalis*) could have and represent more than one person at a time, like the famous two bodies of Ernst Kantorowicz's king.[25] "The one who has two statuses, dignities or offices, represents two persons, different and enigmatically separated".[26]

15 Not surprisingly, then, when the concept of *persona ficta* was developed in medieval legal doctrine,[27] the terminology and the technical expressions used are those used by Roman law to designate the hereditary succession[28] in which the lying inheritance was equated to a "sort of fictitious person" representing the image of the dead, whilst and until a "real" person (the heir)

accepted it.[29] After his *identification* with the ancestor, as we have seen, the heir would represent the person of the deceased and wear the latter's legal mask.[30]

16 In this regard, as Bartolus de Saxoferrato (†1357) stated, *hereditas* was expressly compared to the *universitas* (corporation) by late medieval jurists:

> The universitas [...] is the person represented, as it is what represents the living person indeed, so it can own and have usufruct rights [...] but the inheritance represents the person of the deceased –or, as well– The person of the dead is represented by the inheritance.[31]

17 The same is asserted by Paulus Castrensis († 1441) talking about lying inheritance as the representative of the deceased's legal person:

> The lying inheritance is a sort of fictitious person: representing the person of the deceased, after it is accepted, this representation is transferred to a real person, that is the heir of the represented person, therefore the fiction, or the fictitious representation, ceases.[32]

18 This is the explanation behind an expression that, at first sight, might sound curious: debtors and creditors claim to have debts or credits against the "deceased's goods" or somebody's inheritance, not against the deceased himself. The very name of the tribunal we are about to analyse reveals the main character of our story: in the *Juzgado de bienes de difuntos* (the Tribunal of deceased goods), and in its "autos sobre bienes de difuntos" (judicial decrees on deceased goods), goods, not people, seem to be the main actor.

19 However, what occurred when the heir was absent, could not or would not accept the inheritance? The *hereditas iacens* could not act in court, could not pay the debts of its late owner or collect his credits, could not endow his daughters or buy requiem masses for his soul, in other words carry on all the deceased's duties, without a human legal representative (Paulus Castrensis' *personam veram*). Like a child, or an incompetent, he needed a tutor or, better, an administrator (*curator*).[33]

20 In most cases the *de cuius*, by means of the testament, would nominate executors, and his networks of kin, friends, and neighbours would carry out his last will. At the same time, creditors could appeal to a notary or a city's and sovereign's court in order to defend their rights, for instance by acting against executors or requesting the designation of an inheritance's *curator*.[34]

21 Nevertheless, a great many people suddenly died intestate and often very far from home, where nobody even knew their names and parental relationships. What happened to their "substance", that bundle of patrimony, rights and obligation that –as Bartolus said– was to be considered the very essence of a family? Someone had to take care of it: ultimately no estate could remain unclaimed, no inheritance could be left without an heir, representing the legal person of the deceased and fulfilling his duties towards society.[35] In the last instance, where no heir was available, sovereigns claimed the right to intervene: as the father of the realm,[36] princes claimed by right to succeed and represent the person of the deceased.[37]

22 Therefore, this is the reason that fiscal courts appointed to defend public treasury were frequently charged with requisitioning vacant inheritances, carrying out all the appropriate investigations in order to exclude the existence of potential legitimate successors and evaluating the credentials and the titles of aspirant heirs and creditors in early modern European monarchies and republics.

Tutelage over Abeyant Inheritance in Early Modern Europe

23 The work by Simona Cerutti offers one of the clearest examples of the great potential for comparison on this theme. The case of the Piemontese *diritto d'ubena* in the *ancien régime* period shows that the intervention of the monarch in foreigners' succession –"foreigners, *that is* the deceased without heirs"– was legitimised by a powerful social demand for "control and ordering of the transmission of uncertain estates".[38] This claim is not, then, to be interpreted as undue interference by an "absolutist state" in the private affairs of its subjects[39] but rather as a "prudent" measure designed to safeguard "unclear" interests. The Piedmontese Royal fisc described its role as "protecting the interests of the "uncertain" and the absent who claim to be

legitimate heirs or have interests and rights to inheritance".[40] This defence of the absent resembles what happened in Latin American communities where –as we will see in the next paragraph– in addition to the *defensor de bienes de difuntos* present in every *Audiencia*, a whole series of public defenders charged with defending the rights of the incapable (whether they were real persons or *fictitious* ones) existed in municipal communities in the 18th and 19th centuries. "A public defender of minors, a defender of the absent, a defender of abeyant inheritances [...] a defender of potential right, a functionary in charge of defending the community".[41] These public defenders, who also existed in Castile under the name "padre general de los Menores y defensor de ausentes"[42] resemble the Piedmontese "lawyer of the poor" cited by Cerutti.

24 Safeguarding the estates of the deceased and the rights of the absent is never to be regarded, then, as a specific feature of a given historical context. In Early Modern Portugal a range of subjects and tribunals carried out this role. In the first place, as in Castile, in Portugal there were royal courts with global jurisdiction called on to carry out very similar duties to those which we will describe for the Spanish empire. These were the so-called *Juízo da India e da Mina e das Justificações Ultramarinas* (Court of India and the Gulf of Guinea and of Overseas Justifications) in Lisbon and the *Provedoria dos Defuntos, ausentes, capelas e resíduos* (Advocacy Office of the deceased and absents' estates, chantries and residues) in the various colonial territories. The *Provedoria* has been described thus for the province of Minas Gerais (Brazil) in the 18th century:

> The *Provedoria* [...] was a legal institution which received, in second instance, cases from the *Juízo de Órfãos* (the Orphans' Tribunal). Its main characteristic consisted in direct intervention in matters relating to inheritance property and regulation.[43]

25 As in the case of Castile, in Portugal this protection was medieval in origin and originated in the turmoil of the *Reconquista* where the problem of safeguarding the absent was frequently linked to its falling into Muslim hands.[44] In addition to safeguarding the inheritance of minors, the *Juízo dos Órfãos* was also entrusted with the task of appointing a curator for the "estates of the absent and the deceased who have not left an heir" and with "defending the said inheritance from demands made on it by creditors".[45] With the extension of the Empire, such figures also appeared in the colonies –firstly in Asia and then in America– remaining in close contact with the Lisbon tribunal *Juízo das Justificações Ultramarinas*[46] whose functions were similar to those performed by the Spanish *Casa de Contratación*. Contending with the "curator king" in the safeguarding of abeyant inheritances there were also the powerful *Misericórdias* in the Portuguese empire (on which subject Isabel Dos Guimarães Sá's work is cardinal). The *Santa Casa da Misericórdia* was a Portuguese charitable institution, a brotherhood founded at the end of the 15th century and placed under direct royal protection which spread across the Empire with branches extending from Nagasaki in Japan to inland Brazil. With its global scale network and the privileges it enjoyed, it was frequently used by the Portuguese scattered across the globe to pass on their inheritances at home. In exchange, these institutions obtained not only generous bequests (up to half of estates) but could also take advantage of these huge sums of money for lending operations.[47]

26 The jurisdictional privileges enjoyed by the hospitals, charitable institutions and pious places in general made them a frequently used channel for the transferral of whole estates all through Europe, as they offered guarantees even across jurisdictional borders in the various Christian kingdoms: as an example, they could protect assets against the claims of a foreign king. As attorney Henry Aymond argued, defending the rights of the Lyon Hôtel-Dieu to the inheritance of a French merchant who died in the Spanish Lombardy against the Milanese Fisc's right of reprisal, the assets of religious institutions (such as hospitals) could not be confiscated because:

> [...] it cannot be said that these assets pertains to any French subject, but rather exclusively to a holy place [the Lyon Hôtel-Dieu Hospital], which falls under the protection of the Blessed Virgin, which is [the Virgin Mary] the same across the whole of Christendom.[48]

27 It is thus clear that such institutions (powerful credit institutions governed by local elites) were frequently held to be an effective and safer alternative to entrusting one's estates to (often chaotic and contorted) royal justice. The Portuguese Misericordia model was, and not by chance, exported to the Philippines by Portuguese emigrants who founded a *Santa Mesa de la Misericordia* in Manila (1594), the sole institution (as far as I am aware) to receive privileges by

the Spanish sovereign enabling it to administer abeyant inheritances beyond the jurisdiction of the *Juzgado de bienes de difuntos*.[49]

28 Returning to Europe, then, in various states of Early Modern Italy specific fiscal courts dealt with recognising legitimate heirs and safeguarding vacant inheritances (and, more generally, recovering *bona nullius*). To cite just a few examples, in the State of Milan (which was under the Spanish Habsburg crown from 1535 to 1700 and then, until the mid-19th century, under the Austrian Habsburgs) it was the *Magistrato straordinario* which was responsible for this task. In the Republic of Venice, of the various magistracies charged with supervising vacant successions, the *Ufficiali al Cattaver* merits mention first of all.[50] Just like the Venetian Republic, in the *ancien regime* Kingdom of Naples succession always required certification by a magistrate. Thus, to defend one's status as heir, "those with reason to fear uncertain or contestable inheritance or those with minors to safeguard" usually requested the so-called "preamble decree" from the *Gran Corte della Vicarìa* tribunal.[51] Preamble decrees, according to definitions by Giuseppe Maria Galanti, were "decrees with which someone is declared heir to another", a certificate of kinship which distinguished those who belonged from foreigners.[52] The *Giudici del Proprio* performed a similar task in Venice.

29 An analogous role to these continental tribunals was played by English common law at the Probate courts, using a procedure which echoes that of medieval Spain, with the intervention of "good neighbours" in the inventory and protection of abeyant estates:

> Shortly after the death of one of the wealthier parishioners, an inventory of his or her goods would be drawn up by two neighbours and the goods valued as a protection for the heirs. The will and inventory would be taken by the appointed executors to the probate court, considered there and usually after this the executors would be empowered to dispose of the property. The property of someone who died intestate could be inherited once letters of administration had been obtained from the probate court.[53]

30 Going beyond sovereign institutions, cities could lay claim to the role of "'supreme will executor' (*obrister geschäfftherr*)" for their citizens, too, as dictated by the Council of Regensburg, a free city of the Holy Roman Empire, in 1464. It was precisely to ensure this role that other German cities such as Lübeck, Vienna and Konstanz registered the last will and testament of their citizens to ensure that these were respected even in the event of death abroad. In 1386, for example, the Council of Regensburg sent a great many letters to Italy to its counterpart in Bologna to ensure that the Masses provided for in Friedrich Mäller's will – merchant and citizen of Regensburg– were effectively being performed.[54] Similarly, the statutes of the Florence Comune protected creditors from non-payment by heirs who gave up their inheritances in an attempt to avoid paying the debts of their kin, activating its magistracies in safeguarding these interests.[55] In other contexts, such as in Zagreb (now in Croatia), cities could claim the right to succeed in vacant estates. Medieval Zagreb's foundation charter (1242) stipulated that "the poor ought to receive at least a third of the property of those who died heirless and intestate (the other two-thirds were destined for the urban community and the Church)" and documents from 16th century confirm that this claim was still put into practice by local courts.[56]

31 Where these were not available or heirs preferred not to resort to royal justice, mercantile and private networks could replace them. Emma Rothschild has told the story of French Marie Aymard of Angoulême, for example, wife of a carpenter who died in Martinique (an island of the Antilles). In order to claim her rights she appeared before a notary in 1764 to state that her husband's inheritance, a small fortune consisting of "a certain quantity of Negroes and some mules", was now "in the hands of M. Vandax, a ship owner or merchant living on the harbor promenade of Martinique or in Fort St Pierre". Having learnt of this "by certain people in the town of Angoulême [...] she now, having heard that a sublieutenant in the merchant navy was going to Martinique, wished to nominate him, in a procuration or power of attorney, to recover the possible fortune".[57] As far as I know, at least until the18th century, no centralised system similar to the Spanish or Portuguese ones existed in the coeval French empire. Royal *droit d'aubaine* privileges may have been granted to the *Compagnie des Indes Occidentales*, as the litigation in front of the upper council of Île de Bourbon between the lawyer of a certain Bellon family and the *Compagnie des Indes* claiming precisely such right would seem to suggest.[58] Elsewhere, the question must have fallen to the ordinary courts: the socalled "Curateurs aux biens vaquants" are mentioned in Martinique at the end of 17th century, and after the suppression of the *Compagnie* (1674) the collection of the *successions en déshérence* seem to have been entrusted to these curators, officers of justice appointed by the Superior Councils of

each colony.[59] During the 18th century, a more centralised system must have been put in place, at least from the starting point of a 1781 edict,[60] as is shown by the voluminous (and still unexplored) fund "*Successions vacantes*" at the Archives Nationales d'outre-mer in Aix-en-Provence (whose most oldest documents concerning the Antilles date back to 1714).[61] As for the territory of the Kingdom of France, instead, rural history studies have shown that vacant and abandoned land (the so-called *terrains en non-valeur*, *i.e.* "no-value" assets) reverted back to the communities, which were free to assign them to anyone who committed to paying the communal taxes.[62]

Royal Claim of Vacant Estates in the Kingdom of Castile and the Viceroyalty of New Spain

32 Royal succession to the property of those who died without a legitimate heir was just one of the possible solutions to the issue of vacant inheritance. As far as Iberian history is concerned, as a well-documented article by Francisco Tómas y Valiente shows, High Middle Ages' "successions were sometimes concluded in the Church's favour, sometimes in favour of the soul of the deceased or the city or even the owner of the house the individual died in".[63] During the period of Visigoth domination (6th century-711 CE), although the German tradition accorded local lords the right to acquire the goods of those who died heirless, the Breviary of Alaric (*Lex Romana Visigothorum* 506 CE) adopted a norm from Codex Theodosianus (438 CE) in which it was the municipal curia which acquired such vacant inheritances.[64]

33 In the early Middle Ages, two different impulses contributed to a solution which was very different from the one envisaged by Roman law. In a context in which the monarchy was weak, the loss of importance of the free testamentary disposition of goods (in favour of *ipso iure* automatic succession), and the influence of the ecclesiastical institutions, contributed to the affirmation of principles according to which vacant assets tended not to leave the municipal context and, above all, to be used for the salvation of the soul of the deceased, for charitable work (such as help to the poor or hospitals) or public work benefiting the town or village community (repairing bridges or walls, etc.) In the local laws that took root in the 11th and 12th centuries it was thus the local community and the local poor who benefited from such goods.[65]

34 In effect, such an evolution is not incompatible with medieval Germanic law, and its theoretical justification was less a matter of a claim to succession rights by the community than a right of reversion (*ius devolutionis*, *Heimfallsrecht*) claimed by it over local property.[66] What was being safeguarded was, in the last analysis, not the rights of absent heirs but the community's right not to see its resources diminished by a foreign heir. Evidence of this is to be found in the treatment reserved for foreigners' goods (defined as "someone not neighbour", *i.e.* not *vecino*) dying without *in loco* heirs by the local *fueros* (statutes, customs):[67] their estates were *de facto* presumed heirless and seized by "hosts", or the deceased's "lord", who had to devolve a fifth of these in favour of the deceased's soul.[68] There was thus no space for searching out a potential legitimate heir or for claims by the latter.

35 The treatment reserved for foreigners, *i.e.* non-members of the local community, is significant in understanding the underlying rationale of the solutions adopted for vacant inheritances. Most revealing, in my opinion, are the methods with which royal jurisdiction began to establish itself in this sphere, beginning precisely from the safeguarding of a specific category of subjects without local roots, legally labelled "miserables" to the extent that they were poor in relationship resources,[69] *i.e.* pilgrims.

36 In the Spanish context in particular it was pilgrimages to Santiago de Compostela which generated huge pilgrim flows (and merchants, to whom the same laws applied).[70] An analysis of the various royal dispositions and privileges granted to places on the *Camino de Compostela* in the 11th and 12th centuries makes clear that it was three subjects who claimed the goods of foreigners who died *ab intestato*: the kings of the various Christian kingdoms which divided up the Iberian peninsula, the ecclesiastical institutions and those who had provided accommodation to these foreigners. Solutions alternated, sometimes moving in favour of the Church and the king, as ruled by King of León Alfonso IX,[71] and at others, as in the *Fueros de Castilla*, giving precedence to the pilgrims' hosts. It was the *Siete Partidas* (1265)[72] resolution

which came to the fore, however, and developed Alfonso IX's dispositions.[73] On the intestate death of a pilgrim those hosting them were to call "two good men" from the town to recognise his goods and inventory them. His things were then to be put into safekeeping by the bishop who had jurisdiction over the place of the pilgrim's death, who was to send a letter to the deceased's place of origin to enable any heirs to state their claim to succession. If no-one did so, the vacant inheritance was to be used for charitable work at the bishop's discretion.[74] As we will see, this norm was echoed in the settlement adopted in the New World three centuries later.[75]

37 Unsurprisingly, in the long run, the primary determination in royal legislation was favourable to the fiscal coffers and royal finance. From the *Fuero Real* (1255)[76] –collected into the Castilian *Nueva Recopilación* in 1567– onwards, it was the king who had the right to vacant goods:

> If pilgrims die without leaving a will, local *Alcaldes* [ordinary judges] in the place of death receive the goods and pay for their burial with this, and what remains they store away and inform us in order that we may organise what is to be done.[77]

38 Not only did the progressive reception of Roman law (under the influence of Italian glossators and Azo in particular) legitimate the royal fiscal claims to control such vacant estates, but it also combined with a progressive thinning out of the ranks of heirs with potential rights to succession, in favour of royal inheritance. Limited to the 10th degree of kinship in the 13th century, collateral kinship was further reduced to the 4th degree in the 16th century.[78]

39 Ultimately, claims by the kings of Castile-Leon to the goods of the heirless deceased was only one of a number of solutions found to the problem of vacant inheritance in Medieval Iberia. Various entities (the Church, local communities, the poor, those who exerted a sort of direct lordship over the dead at the moment of their deaths) laid claim to a role in the safeguarding of vacant succession (in the last instance by appropriating these), and the kings were only one of these, though certainly strengthened by ever greater power at least from the mid-13th century onwards. On a purely legal level, a series of contradictory precepts survived even in royal legislation into the 16th century: the *Leyes de Toro* (1505), for example, still established that vacant inheritances were in part to go to spouses and in part to be used for charitable work "for the souls" of the deceased, therefore excluding the royal fisc.[79]

40 The situation was further complicated by the partial alienation of fiscal rights over vacant goods which occurred in the 14th and 15th centuries. From the mid-14th century onwards, in fact, the kings of Castile granted the *Merced* and *Trinidad* orders,[80] especially active in ransoming Christian prisoners and slaves who had fallen into Muslim hands, the right to the "pro anima share" (one fifth) of vacant inheritances. These privileges were confirmed by Ferdinand and Isabella, the Catholic Kings, in the 15th century and further entities came forward with claims to the "soul's fifth", namely the *commissioners of the Tribunal of the Holy Crusade*.

41 If in general, as we saw above, the idea existed that vacant goods were to be used in some way for the "public good" and charitable work for the souls of the dead, under the influence of the crusading *Reconquista* spirit,[81] one possible interpretation of this public interest was certainly the anti-Muslim struggle, as was paying the ransoms of Christian prisoners in the hands of the infidels (a charitable work, indeed).[82] It is thus unsurprising that vacant goods (together with *bienes mostrencos*, *i.e.* nobody's things) ended up in the hands of the *General commissioner*, and then the Madrid *Consejo de Cruzada* (Crusade Council).

42 The origin of this administration has not yet been clarified by historians. It would seem that a sort of "colecturía" (collector's office), managed by the Apostolic Nuncio to organise the tributes owed by the Spanish clergy and faithful to the Holy See, existed in the 13th century, and these tributes included contributions to the Crusades. During the 15th century a whole range of Papal Bulls were granted to the Castile monarchs for the purposes of gathering resources for the conquest of Granada (the last surviving Muslim kingdom in Spain) and for the anti-Turkish struggle. In exchange for these contributions the faithful received indulgences valid not only for their own souls but also for those of their deceased kin.[83] This revenue (one of the so-called *three graces*) was converted into a *de facto* royal tax (although called *extraordinary* and ecclesiastical in nature) in 1482.[84] It was precisely the revenues generated by the preachings of the *Bula de la Cruzad*a (*i.e.* indulgences acquired by the faithful) which generated an ecclesiastical administrative machine (under royal control), at both central and local levels, first with the appointment of a General Commissioner heading a specific tribunal and then the creation of a supreme organ such as the Council mentioned above (in 1554), entrusted with a dual ecclesiastical and temporal jurisdiction.

43 This is not the place to analyse this issue further (as it will be the subject of an in-depth study by Thomas Glesener).[85] What should be noted here, however, is that (perhaps from the 15th century onwards, although the issue is not clear) from the kingdom of Charles I (1516-1556) and then above all after the formation of the *Consejo de Cruzada*[86], it was the *sub-delegate commissioners* of the Cruzada who had sole power to "request and require *abintestatos* from those lacking heirs up to the fourth degree".[87] Vacant goods, such as *res nullius* and *derelictae* (which, as we have seen, were called *bienes mostrencos*),[88] turned into extraordinary tax revenues specifically used to pursue the ends of the Catholic monarchy in defence and in the promotion of "the public cause of evangelical truth".[89]

44 From this point of view, Thomas Glesener has rightly noted that, while the granting of vacant goods to the Crusade Tribunal crossed the Iberian peninsula and extended to the crown of Aragon, theoretically "this jurisdiction was limited in the Indies where the royal *Audiencias* [the supreme royal courts] were declared to be the only ones entitled to deal in these matters".[90] As early as the first half of the 16th century *bulas* were circulating in the New World, although it was initially forbidden to preach indulgences to the Indios. The financial needs of the crown prompted it, in 1574, to extend the collection of such "donations" to the Spanish Americas and set up a Crusade Tribunal in the Realms of the Indies too.[91]

45 Whatever the claims of those –such as Juan de Solórzano Pereira– who argued that the privileges granted to the religious orders and the *Cruzada* in Castile should not apply to the Indies,[92] conflicts soon arose between them and the ordinary jurisdiction. Both royal laws and ordinances and "the municipal laws of our Indies", wrote Sólorzano Pereira, concurred in forbidding "the Crusades and the *Merced* religious order" from interfering in the collection of vacant goods and *Mostrencos*, and this had been frequently reiterated throughout the 16th and 17th centuries. Nonetheless, Sólorzano Pereira himself –which, in addition to having written important treatises and been the main compiler of the Indian law collection, had first served as a judge at the Lima Audiencia and then on the supreme *Consejo de Indias* Council– had been obliged to defend the rights of the Crown at the *Consejo de Indias* in 1620 against the clergy of the *Nuestra Señora de la Merced*.[93] The conflict with the administration of the Bull of the Crusade must have been already in place in the first quarter of the 16th century if, in 1532, a royal letter from Madrid to the Royal Audiencia in Santo Domingo forbade "the treasurers, collectors and other individuals in charge on this island [*La Española*] of levying the Bull of the Crusade"[94] from appropriating *mostrencos* goods. Once again, in the mid-17th century, as the New Spain documentation shows, the Mexico City Crusade's treasurer officer sent his own commissioner to the Yucatan to check that "mostrencos abitenstatos" had effectively been seized by the local sub-delegate commissioner.[95]As in the Iberian Peninsula, the issue still requires further examination in the colonial context.[96] However, a "very peculiar specialty"[97] characterised the Indian context, namely the so-called *Juzgado de Bienes de Difuntos*. The Audiencias ordinary justice not only had to compete with the Crusade Tribunal, with the ecclesiastical (*Juzgado de testamentos, capellanías y obras pías*) and other lay tribunals (e.g. from 18th century onwards the *Juzgado de la acordada*),[98] but from 1550 onwards it also had to share its jurisdiction with another privileged tribunal defending the rights of the Royal fisc.

46 In fact, it was immediately evident, in the early years of the 16th century, that the trans-oceanic movement which had begun in what was soon to become a global scale empire, exacerbated the problems generated by the management of the goods of the first *conquistadores* and Spanish colonisers who died in the Western Indies. The new situation, however, would not be regulated until the *Real Audiencias* were found. The first measure taken by the Madrid court to deal with the problem was a *Real Provisión* issued in Granada in 1526[99], which explicitly condemned the fact that the goods of those who died "in our Indies have not been handed over entirely, nor as rapidly as they might have been, to their legitimate or *ab intestato* heirs". This was greatly "to the detriment of the said heirs and has blocked the execution of *pro anima* legacies by the said deceased".[100] The finger was pointed in particular at will executors, those who managed the abeyance, who were said to be guilty of misappropriation. Even when they sent the goods of the deceased to Seville's *Casa de Contratación*, as required by the law,[101] they were accused of having done so without "indicating the nicknames or surnames of the deceased, nor the places in which they were *vecinos* [citizens], thus making it difficult, if not impossible, to locate their heirs".[102]

47 Starting from this date, then, certain roles designed to manage the abeyant inheritances began to be created: the royal officials in the *Reales Audiencias* (*jueces-oidores*) were responsible for presiding over and certifying the work of the will executors (such as, for

example, goods inventories, safekeeping and sale at auction). Additionally, to safeguard abeyant inheritances, the role of the *tenedor de bienes de difuntos* (keeper of the deceased's assets) was introduced in such places in which no ordinary justice officers existed. It would seem that the first mention of the issue in the acts of the Mexico City town council dates to 1528-1529, years in which the first "diputados de los bienes de difuntos" took place.[103]

48 It was with the *Carta Acordada* of the 16th of April 1550 (completed by an ordinance dating to 8th August 1556)[104] that a special tribunal in charge of the management of abeyant inheritances of Spaniards who died in the Indies, the so-called *Juzgado de Bienes de Difuntos*, was set up. This provided for the yearly appointment of a judge in each *Audiencia* to act as *Juez mayor de bienes de difuntos* (supreme judge of the goods of the deceased). In provinces with a *governor* and no *Audiencia* it was the former who were to nominate such judges. To reach even the remotest places, lastly, ad hoc *commissioners* were to be appointed.[105]

49 This resulted in a special jurisdiction for specific categories of vassals of the King of Castile: the *Juzgado* was to be informed of *ab intestato* deaths distinguishing, firstly, between those who had left heirs *in loco* and those who had left these behind in the Iberian peninsula. As a measure taken by Philip IV in 1653 read:

> We order that *ab intestato* deaths be dealt with and notified to the *Juzgados de bienes de difuntos* even where it is not [initially] known that heirs and interested parties are in this Kingdom of Castile or where death took place, with the restriction that cases in which the deceased dies in a province in which he is known to have children or legitimate heirs in the absence of these, so known that no doubt is cast on their kinship relationship by succession or ancestry, need not be notified to the *Juez general* [*de bienes de difuntos*] but are a matter of ordinary justice and where the contrary is publicly known deaths must be notified to the *Juzgado de bienes de difuntos* because the privilege of the Royal fisc excludes ordinary jurisdiction in such cases.[106]

50 As the colonising process gradually progressed, in fact, a dual channel was created: ordinary justice dealt with the inheritance process where the deceased had a stable residence and heirs *in loco*; an exclusive and privileged justice favoured the crown's fiscal claims in vacant inheritances and thus safeguarded the hereditary transmission of all those mobile "Spaniards" who had no stable roots in the Realm of the Indies.

51 From 1550 onwards, then, the *Juzgado* claimed virtually global privileged jurisdiction encompassing all the "Realms of the Indies" from the Americas to the Philippines and even expecting to be notified of deaths outside the confines of Spanish sovereignty, such as in the case of the claims of the Juez Mayor of Manila to be informed of the deaths of Spaniards in China or Japan.[107]

52 The *Juzgado*'s *modus operandi* can be described as follows: it was in charge of ensuring that the hereditary assets of individuals who had been born in Spain but died in the Indies without successors *in situ* were temporarily administered, successfully transferred to Spain (to the *Real Audiencia y Casa de la Contratación de India* in Seville) and finally delivered to their legitimate heirs. This institution performed three essential tasks: it acted as a sort of executor for the deceased persons who had no family or any other networks who would enact their wills in the place where they died; it protected the rights of absent and unidentified heirs, as well as creditors, by preventing misappropriation of the assets in question; and it carried out enquiries in the places in which the deceased had lived, evaluated the evidence presented by aspiring heirs, and identified legitimate heirs and creditors in the Iberian Peninsula.

53 Thus, this global tribunal reconstructed the context in which the individual could be identified, and re-established connections between persons and goods that intercontinental mobility had, in some way, weakened. Serge Gruzinski used an enlightening simile when he compared the historian's job with that of an electrician, repairing the connections between phenomena and historical actors and re-enabling the "flow of electricity" through a previously disconnected network.[108] In some ways, the *Juzgado de Bienes de Difuntos* tried to reach the same goal in seeking a deceased person's legitimate heirs and creditors and offering them the opportunity to justify their claims. In other words, the tribunal offered an institutional way of transmitting property, where personal and informal networks had failed to accomplish their duty: transmitting the inheritance from a person to his heirs.

54 Normally, a *bienes de difuntos* lawsuit could be summarized as follows.
It usually began when a local Spanish judicial authority (*tenientes de gobernador*, *alcaldes mayores*, *corregidores* and their local tenants, etc.)[109] learned that someone had died without heirs nearby.[110] Subsequently, the local judicial authorities were entrusted with the

precautionary seizure of the deceased's movable and immovable property. At this first stage, *alcaldes* and *corregidores*, by means of witnesses and material evidence, investigated the identity and the origin of the deceased person, whether or not he[111] had written a last will and testament, and any rumours about a wife, children or other relatives entitled to succeed in Spain (or in other parts of the Indies). Moreover, they sought information about his pending debts and claims, and received petitions from any person who claimed rights against the inheritance.

55 Thereafter, all the deceased's belongings were auctioned off in order to pay all possible expenses (e.g. burial costs, etc.) and meet creditors' claims and official fees (*e.g*. those of the *tenedor*, the *escrivanos*, the parish priest, etc.) The remaining assets were sent to the *Juzgado* chest (*caja de bienes de difuntos*) of the *Audiencia* under whose jurisdiction the village, town or city lay. There, the *Juez general de bienes de difuntos* sent the file and the money to the *Casa de Contratación* in Seville (after 1717, in Cádiz) with the first fleet departing towards the Iberian peninsula. Furthermore, in every *Audiencia*, there was a *defensor de bienes de difuntos*, a defence attorney who represented the inheritance in abeyance in court and safeguarded its interests.

56 When the trial arrived at the *Casa de Contratación* a second phase of the lawsuit began. In Seville, the President and judges of the *Casa de Contratación* had to publish news about the arrival of an unclaimed inheritance. Furthermore, they sent messengers to the towns and cities of the presumed heirs where town criers read the edict in the public squares and the parish priest did the same at Sunday mass.[112] This was the way the heirs –but also the creditors– became aware of the death of a relative and, consequently, showed up in court (personally or by means of an attorney), in order to demonstrate their identities and family relationships, by means of both oral witnesses and written evidence (*i.e*. baptism and marriage certificates, etc.). If nobody objected (objections caused additional investigations and even trials in the *Casa de Contratación*), they would eventually come into possession of the inheritance.

57 As previously said, while abeyant inheritance represented the person of the deceased, it, in turn, needed to be represented by an administrator: that is the sovereign himself, by means of his delegated justice. The *Juzgado* tribunal, then, fostered the flow of information and knowledge that allowed the network that linked the heirs and creditors to the deceased goods to be reconstructed.

58 As can thus be seen, what had been created was a jurisdiction designed to safeguard, a specific category of the king's vassals (potential and actual misappropriations by royal officials notwithstanding) together with the Royal fisc's rights.[113]

59 The creation of the dual channel referred to above is significant, in my opinion, and can be explained in the light of what studies such as those of Tamar Herzog, Simona Cerutti and Isabelle Grangaud have shown us on the subject of "foreigners", or rather "extraneousness", in the pre-modern world.[114] As occurred elsewhere in Europe, the Castilian monarch claimed the right to confiscate the goods of foreigners who died in the Realms of the Indies.[115] This right –called in France *droit d'aubaine* (and in Italy *albinaggio* or *ubena*)– was described effectively by Jean Bacquet as follows:

> [...] it was introduced in France [...] in order to have knowledge of who is born of the kingdom, and of who is not born of it, while nevertheless having come there to reside, and in order to make a distinction between the one and the other.

60 As Simona Cerutti has argued, then, it was primarily conceived of as a social classification tool, "as an instrument to identify 'real' foreigners".[116] What were the signs marking out a real foreigner from the others? In the first place, incorporation into a succession chain. The so-called "droit de batârdise", in which the inheritances of illegitimate children (born from adulterous relationships) were confiscated, was proof of this: in the early 17th century, the french jurist Jean Boullenois considered this right to be common to "the right of mortmain over a servant, the *d'épave* right claimed against a foreigner who died in a lordship, the *d'aubaine* right claimed over a domiciled foreigner".[117] The impossibility of succession, then, defined whoever was foreign to that body which constitutionally constituted society's fundamental unit, the family. As a matter of fact, according to Jean Bodin's famous definition, the *Res publica* was "a lawfull government of many families, and of that which unto them in common belongeth, with a puissant soveraigntie".[118]

61 Just as the *droit d'aubaine*, therefore, was designed to distinguish "those who belonged" from foreigners, the *Juzgado*, it seems to me, was entrusted in the same way with the defence of the king's vassals against the dangers of being treated like foreigners. Those subjected to its

jurisdiction were, in fact, characterised by a specific vulnerability: mobility. As mobile persons, they were thus lacking sufficient relational capital, *i.e.* a network of people who could defend their right to be incorporated into a chain of succession in the places they died in. In this sense, like the pilgrims and merchants protected by royal privileges in the 13th century, they were vassals of the king who would in some way have shared the fate of all those categories of foreigners incapable of passing on their estates if they had been left to the local justice of the New World.

62 From this perspective, it is in the light of the special protection accorded by the sovereign authorities to "miserables" –whose poverty was to be seen more as a legal fragility than a state of economic deprivation[119]– in line with medieval precedents, that the apparent contradictions to be found in the practices of the *Juzgado de bienes de difuntos* in the colonial territories and the *Casa de Contratación* in Seville can be understood. Once again, the treatment meted out to foreigners gives us an insight into the internal logics of the Spanish institutions.

63 In my research experience, I have, in fact, found that the tribunals in the Indies did not confiscate the goods of foreigners who died *ab intestato* in the colonial territories where these had local heirs (despite the fact that this is what the law required them to do).[120] This was the case, for example, of Domingo de Araújo, citizen of the town of Ovar[121] (Oporto bishopric, in Portugal), who, in the Port city of Veracruz (México) in 1701 claimed and obtained for himself and his sister the inheritance of his brother Antonio, who had died *ab intestato* and had been buried in the city of Veracruz.[122] Both Domingo and Francisca, the latter resident in Portugal, were publicly known as "non-natives of the Kingdom of Spain" and as such they were theoretically unable to inherit.

64 In the event that there were no heirs claiming a right to such goods immediately after their relative's demise, too, the inheritances of foreigners who died in the Indies were in any case sent to Seville without any objections being raised. This was the case, for example, of Domingo de Aguilar, a native of Genoa in Italy, who was defined by witnesses in the Santiago de Guatemala *Juzgado de bienes de difuntos* papers as a "Spaniard of Genoese nationhood".[123] As can be seen, then, in Guatemala's society a person born outside the so-called Kingdom of Spain could, however, also be considered a "Spaniard" unproblematically. The tribunal thus wrote to Seville for the purposes of passing his inheritance to his heirs who were in Italy.

65 The opposite occurred in the Seville *Casa de Contratación* tribunal when the vacant inheritances of such people arrived in this Andalusian city, where the king demanded and obtained its confiscation as "goods of foreigners". What is the explanation for this contradictory behaviour within the same royal administration? The key comes from the sources themselves: the lawyers defending abeyant inheritances at the *Casa de Contratación* show that two equal and contradictory legal assumptions operated in the Indies and Spain. In the Indies it was assumed that the simple fact of having arrived in the Americas demonstrated that the individuals concerned were in some way naturalised Spanish. Foreigners were indeed forbidden from travelling to the Spanish Indies. Presence and roots in colonial society were thus a *de facto* situation which implied rights of belonging. The fact of having heirs to succession *in loco* was simply a further demonstration of successful integration into colonial society.

66 In Seville, on the other hand, the opposite assumption applied : the fact of not having heirs *in loco* implied that, for the king, such people were foreigners and had thus travelled without a king's license in the Indies, even when it was possible to demonstrate that the deceased had arrived legally and settled. This, for example, was the case of Manuel Soares de Oliviera, who had served as lawyer to the *Real Audencia* in the Philippines from 1626 to 1675, acted as judge to the island's governors general, was a citizen (*vecino*) of Manila, had held public offices there and married a Spaniard (both during and after the Union of the Spanish and Portuguese Crowns).[124] Despite the fact of having all the appurtenances of a naturalized Spaniard, his assets were seized by the *Casa de la Contrataición* as pertaining to a foreigner. In other words, their foreigner status was demonstrated by the fact that they had effectively been unable to pass their assets on (and not vice versa).

67 To avoid good vassals of the king of Spain effectively being treated like foreigners by local institutions in the Indies –*i.e.* not put in a condition to pass on their goods– as had occurred in the early days of the conquest, special royal protection had to be implemented for this specific category of mobile subjects. Mobility was viewed with suspicion in ancient regime's societies.[125] On this subject, however, the observations made by Tamar Herzog on the migratory policies of the Spanish crown apply. These were designed less to forbid movement in itself (guaranteed by *ius migrandi*, a natural right taken to the extent of justifying the colonisation and conquest of

the New World) than to distinguish between those with good reason to move (*i.e.* medieval pilgrims and merchants or Early Modern conquistadors and missionaries) and those who had no grounds on which to do so (*i.e.* debtors, foreigners without permits, vagabonds or infidels). According to ius gentium, all individuals had the right to move from one of the kingdom's realms to another but one important limitation did exist: remaining isolated was forbidden. In other words, all movements had to result in "incorporation",[126] an individual's re-integration into a new corporate-body which would guarantee for him (according to the principle of collective responsibility) and thus be capable of limiting individuals' inherent freedom, judged potentially destructive by that society. It was for this reason that the laws encouraged family emigration, for example, and families reunions, and discouraged the emigration of single people and husbands without wives.[127]

68 Given these premises, in my opinion the genealogy of the Royal claim on vacant goods may well be traceable to the principles behind the medieval protection accorded to good mobility. Mobile individuals did not fully belong to local society but were not for this reason deserving of the "hateful laws" applied to foreigners (as the attorney of the above-mentioned Manuel Soares de Oliviera put it).[128] It is not, in my opinion, by chance that over the 18th century in Mexico the Juzgado name evolved from the generic "General tribunal of deceased estates" to "General tribunal of the Overseas" (Juzgado general de Ultramarinos),[129] overturning the colonial perspective and thus distinguishing sharply between the "overseas" and those who belonged, the peninsula's inhabitants from the vecinos of the Realms of the New Spain.

69 Thus, like the earliest *conquistadores*, their "good mobility" had to be protected by a special jurisdiction mitigating their legal vulnerability. It was a jurisdiction which watched over the re-incorporation of each individual into their own household and made sure that even people without heirs had one: the King. In the last analysis, it was the very sovereignty of the King of Spain, against the claims of others, which was at stake. As the college of fiscal attorneys and the Milanese *Magistrato straordinario* put it in 1662 –arguing against the claims of the Church to the vacant inheritance of the Bishop of Trent (who died in the Spanish Lombardy in 1659)– in a report to the Madrid 's king:

> It is the King who has the right to the vacant goods on the grounds of supreme rule and jurisdiction over the area [...] and it is a *regalìa* [*i.e.* a right belonging to the sovereign], inherent to the bones of the prince and estimated one of his greatest rights. [...] A right of which only the Prince is capable, or those to whom he has delegated it, and no-one else.[130]

70 Using the corporeal metaphor, the right to vacant goods was the King's skeleton. Thus this claim and its defence defined sovereignty.

Conclusions: Notes for a Comparative Analysis

71 As we have seen, when faced with the crisis of the household, many subjects field social and institutional mechanisms designed to reinforce trust[131] in the fact that the domestic institutions do their duty to society as a whole, in both economic and social order terms. Such mechanisms take charge of ensuring the greatest possible continuity and, when this is not possible, they attempt to substitute for families.

72 A minimum common denominator, which I believe characterises the solutions found to the issue of household failure, from the legal technique point of view is the tutelage by a higher body (or one which claims superiority and attempts to consolidate this) over a lower body for the purposes of ensuring tasks constitutionally entrusted to it (or which the higher body imposes on it).[132] The downgrading of the governed body to a state of a minor needing tutelage, a very long way from being characteristic of colonial contexts alone,[133] turns out to be a basic mechanism of patriarchal authority (with solid roots, at least in Europe, in the idea of the paternal direction of the Church and the medieval theory of corporations).[134] Power, in Early Modern Europe, was primarily depicted as iurisdictio (the act of declaring the right) but also "oeconomica coercitio":

> [...] the sovereign "as the head and the parent of the Commonwealth" [*tamquam Reipublicae caput et parens*] can legitimately [...] assume the attitudes and vocation of a *paterfamilias* in relation to his subjects. Like this latter, in particular, he does not limit

> himself to conserving and administering the domestic patrimony but also provides for the needs of the weaker subjects subjected to his tutelage. Thus, the prince's task is not simply to manage the riches of the great state family (*i.e.* his *fiscus*) but also "the solicitude, and the domestic authority to give administrators and superintendants to all those lacking the power to act on their own business or their own things" [*haec cura, et auctoritas oeconomica dandi nempe curatores, vel administratores iis omnibus qui suis negotiis, aut rebus interesse non valent*]".[135]

73 The bulk of medieval theories, in fact, tend to equate the incapable needing protection with a whole series of legal persons entrusted with collective interests. This mechanism can be noted at the corporate level, as self-protection –and it is for this reason that city administrators, for example, described their role as "tutors" of the city and, as we have seen in Regensburg, were so defined in relation to their safeguarding of the hereditary succession of their citizens.[136] The king's jurists' claim is to be considered an extension of royal tutelage to the detriment of other entities making the same claim (first of all, the local communities). The reduction of governees to a state of legal incapacity, at any event, would appear not to be exclusive to European society (and Roman-Canon law) but is also to be found in Japan[137] and was used by the Bayt al-mâl to justify his actions in the Ottoman empire.[138]

74 Alongside the tutelage mechanism, and precisely in reference to the issue of succession to vacant goods, what was at stake was also the mechanism of *substitution* and *representation*: as the heir identifies with the deceased, the sovereign's succession (and that of other subjects such as the city, the religious institution, etc.) to the person and interests of the deceased would seem to have taken place via *substitution* and *representation*. If *pater familias* is considered a legal status, as a person or a mask to be worn to acquire a certain capacity to act,[139] the conflicts which took place around this nucleus of interests, the family *patrimonium*, can perhaps be described as a struggle for representation[140], namely for the personification of this mask.[141]

75 The whole volume is dedicated to the comparative analysis of these issues, so in these last lines I would just like to offer some cause for reflection: I would argue that this is a consequence of a more general mechanism underlying many societies, based on hierarchical inequality,[142] that is the collective responsibility characterising the self-government structures of the *corporate bodies* which limited individual freedom. If, on one hand, it laid the foundations for the self-government of a whole series of public interests, on the other, it was potentially used by rulers to impose a series of services on lower bodies. Such a mechanism is certainly not exclusive to the Euro-Mediterranean area but is observable in many societies which are very distant from one another in both time and space, as studies based on archaeological-anthropological research like that of Richard Blanton and Lane Fargher have highlighted.[143]

76 Just as neighbourhoods regulated the lives of the European cities and communities,[144] systems of mutual responsibility are known to have existed in the Asian context and regulated justice and the paying of revenues: think, for example, of collective responsibility at the village community (*mura*) and district (*chō*) levels in Japan, or of multiple household organisation systems such as the *bao-jia* (China), *goningumi* (Japan) or the "five household control law" (Korea).[145]

77 It should not, then, surprise us to find (as in the German cities referred to) a system of will registration in Japanese ward and street communities, too, designed to ensure the correct functioning of succession and avoid estates passing into the hands of foreigners.[146] Just as, in Spain, King Charles I ordered the registration of all those leaving for the Western Indies in 1531 without distinguishing between "naturals" and "foreigners", "because if they should die in the said Indies we will know where those who are to inherit live and who their heirs are",[147] Japan's civil registration system (*shūmon aratame*) was also designed to anchor family heads and heirs to their obligations: "farmers cannot leave [...] unless they have appointed an heir, as they must pay land taxes".[148]

78 Not only, then, do the norms regulating mobility in Japan closely resemble those adopted, for example, in English parishes in the Early Modern age[149] or the ban on leaving the province imposed on those with cases pending at *Juzgado de bienes de difuntos* in the Spanish empire,[150] but the words with which Ogyū Sorai[151] (*Seidan*, Discourse on Government, 1725-1727 ca.) described the ideal society based on "ancient laws" also echo what I have said on the subject of individual incorporation and "good mobility" in the European context:

> When people are attached to their native village, their relatives also live close by. Moreover, when their friends from early childhood also fill their neighborhood, it is a matter of course that they do not do evil out of consideration for these relative and friends. Furthermore, whether in a city block or in a village, there is no one whom the

> block or village elder does not know. When people know each other from generation to generation and are intimate from childhood, they know what is good and what is bad about each other. And when, on the basis of the law of the five-family contingents (*goningumi*) things are investigated, nothing can remain hidden.[152]

79 In this ideal society, in which everyone remained anchored to the place assigned them by inheritance (an household, a place), "harmony would naturally prevail in people's relationships and evil people naturally be kept at a distance".[153] The isolated individual, free of limitations and responsibilities, was, on the other hand, cause of the evils which 18th century Japan laboured under:

> We now have census registers (*ninbetsuchō*), block [*chō*, *machi*] and village [*mura*] elders and five-family contingents [*goningumi*], but people move freely and can even go freely to other provinces. When people can come from and go to other provinces and settle where they want, people throughout Japan soon fall into disorder. Confusion spreads and they become temporary residents wherever they live. They develop no constant feelings; they do not care for their neighbours and the neighbours do not care for them. "I know nothing at all about his background!" they say, thereby ridding themselves of all responsibility. So when it is not known where people have come from, the *nanushi* elders and everyone else simply state that these people do not concern them, and each and every one cares only for himself and follows only his own desires.[154]

80 Such a mindset would have been shared in the Early Modern Spanish World without any problems.

Notes

1 In relation to transmission and continuity, family strategy can be understood as "the means given to those responsible for family reproduction to avoid the potential multiple and inevitable risks which can threaten their succession plans as far as possible", Élie Haddad, *Fondation et ruine d'une "maison". Histoire sociale des comtes de Belin (1582-1706)*, Limoges, Presses Universitaires de Limoges, 2009, p. 118.

2 By community here I primarily mean the whole of the bodies co-responsible for the continuity or failure of the households from fiscal, penal, ceremonial and other "joint responsibility" mechanisms.

3 "Familia id est substantia", Albericus de Rosate bergomensis, *Dictionarium Iuris tam Civilis, quam Canonici* [...], Venetiis, 1573, *sub voce*.

4 "Familia accipitur in iure pro substantia", Bartolus a Saxoferrato, *Commentaria in primam infortiati partem* [...], Lugduni, 1552, *ad l. In suis, ff. de liberis et posthumis* (D. 28, 2, 11).

5 This well-known excerpt from Bartolus reveals the centrality of succession not only for the private life of the household but also for *ancien régime* society as a whole. "In this view of inheritance, the individual counts for little. The heir is a steward rather than an owner. Ideally, the estate passes through his hands untouched. Rather than use it or even add to it, his first duty is to preserve it". Thomas Kuehn, *Heirs, Kin, and Creditors in Renaissance Florence*, Cambridge, Cambridge University Press, 2008, p. 7. See the acute reflections of Robert Descimon, "Don de transmission, indisponibilité et constitution des lignages au sein de la bourgeoisie parisienne du XVII^{e} siècle", *Hypothèses*, n^{o} 1, 2007, p. 413-422.

6 Andrea Romano, *Famiglia, successioni e patrimonio nell'Italia medievale e moderna*, Turin, Giappicchelli, 1994, p. 19-20.

7 The expression cited is Antonio Pertile's (Andrea Romano, *Famiglia, successioni e patrimonio nell'Italia medievale e moderna*, Turin, Giappicchelli, 1994, p. 3). Unless otherwise specified, it is understood that all translations from the original languages of excerpts from articles or books, and archival documents, are mine.

8 "With the end of the Middle Ages [...] the idea of the medieval 'family' united in its personal element weakened. The notion of an estate to be kept stable in the name of family solidarity, both defending and benefiting individuals, was progressively replaced by the idea of the indivisibility of estates understood as functional to the survival of the family line, identified with the male line and specifically the first-born male. The focus of interest thus tangibly shifted from the personal to the patrimonial element (which had always existed). [...] Succession was seen as the passing down of the family estate through the generations, a sort of return of goods to offspring or relatives" (Andrea Romano, *Famiglia, successioni e patrimonio nell'Italia medievale e moderna*, Turin, Giappicchelli, 1994, p. 59). On the difference between "person" and "individual" in *ancien regime* Roman-Canon law, see Bartolomé Clavero, *Tantas personas como estados*, Madrid, Tecnos, 1986; Bartolomé Clavero, "Cádiz 1812: antropología e historiografía del individuo como sujeto de constitución", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, n^{o} 42, 2013, p. 201-279. For Claude Lévi-Strauss "maison" was a "formation sociale [...] distincte de la famille, [qui] ne coïncide pas non plus avec la lignée agnatique, [et] est même parfois dépourvue de base biologique, et consiste plutôt en un héritage matériel et spirituel comprenant la dignité, les origines, la parenté, les noms et les symboles, la position, la puissance et la richesse". Distinct from tribe, clan, or lineage it can be defined as "une personne morale; détentrice, ensuite, d'un domaine composé de biens matériels et immatériels" (Claude Lévi-Strauss, "Histoire et ethnologie",

Annales. Économies, Sociétés, Civilisations, 38e année, nº 6, 1983, p. 1224).

9 For Renata Ago, who has analysed the Roman *ancien regime* economy in depth, "the massive recourse to credit which can be demonstrated from a study of the notarial documents [...] has to be regarded as a specific characteristic of the [pre-modern] economy": see her "Enforcing Agreements: Notaries and Courts in Early Modern Rome", *Continuity and Change*, v. 14, nº 2, 1999, p. 192. See also her *Economia barocca: Mercato e istituzioni nella Roma del Seicento*, Roma, Donzelli, 1998; Craig Muldrew, *The Culture of Credit and Social Relations in Early Modern England*, Basingstoke, Palgrave, 1998; Bartolomé Clavero, *Antidora. Anropología católica de la economía moderna*, Milan, Giuffré, 1991; António Manuel Hespanha, *La gracia del derecho: Economía de la cultura en la Edad Moderna*, Madrid, Centro de Estudios Constitucionales, 1993.

10 The Italian Civil Code, for example, states in its Book II, *Delle successioni*, Capo VIII, *Dell'eredità giacente*, artt. 528-529 (Italian Civil Code: URL: http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/Lib2.htm, date of consultation 01/08/2019): that in the absence of summonees (because these are not known or inheritance has not been accepted) or when heirs, both *ex testamento* and *ab intestato*, are not in possession of the hereditary assets, the district magistrate nominates an inheritance curator who "is responsible for carrying out an inventory of the inheritance, to exert and promote its interests, respond to any claims made against it, administrate it, deposit with the postal bank or a banking institution nominated by the magistrate any moneys in the inheritance or earned by the sale of moveable or immoveable goods and, lastly, to be accountable for their administration" (art. 529: "Duties of the administrator").

11 These are the words of Bartolomeo Dusi, *La eredità giacente nel diritto romano e moderno*, Torino, Fratelli Bocca, 1891, p. 7, author of one of the first monographs on the subject and an extremely successful one. In the same period, the subject was examined by other Italian jurists such as C. Lesen and G. Blandini.

12 Whilst the owner of the former was temporarily absent, the latter had none (either because they had never had one or because they had been voluntarily abandoned). This, moreover, is the origin of the legal status of abeyant *estates* (which could become vacant –*vacantia*– in the event of an heir giving them up or the unavailability of an heir) as "assets" (*bona*) and not "things" (*res*). On this issue see Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 189-254, and, more recently, Yan Thomas, "La valeur des choses. Le droit romain hors la religion", *Annales. Histoire, Sciences Sociales*, 57e année, nº 6, 2002, p. 1431-1462 and Miguel Luis Lacruz Mantecón, *La ocupación imposible: Historia y régimen jurídico de los inmuebles mostrencos*, Madrid, Dykinson, 2011, especially p. 41 onwards.

13 Bartolomeo Dusi, *La eredità giacente nel diritto romano e moderno*, Turin, Fratelli Bocca, 1891, p. 8.

14 Here again, we will rely on Dusi's words: see Bartolomeo Dusi, *La eredità giacente nel diritto romano e moderno*, Turin, Fratelli Bocca, 1891, p. 27. The question was a popular one in scientific circles in the late 19th century: attributing legal personality to *hereditas iacens* was actually a full-blown *pièce de résistance* in the German Historical School of Jurisprudence, with scholars such as Windsheid and Savigny interpreting Roman law as a system of subjective laws (Barbara Biscotti, "Curatore e 'amministrazione interimistica' dell'eredità giacente. Spunti per una riflessione storico-comparatistica", in Isabella Piro (ed.), *Scritti per Alessandro Corbino*, Roma, Libellula Edizioni, 2016, p. 272).

15 This is Barbara Biscotti's interpretation: "abeyant inheritance whose specific nature neither acquired [...] the deceased's estate nor transmitted them to the heir, was not accorded legal person status but considered a *de facto* situation in which an estate acted temporarily in the world of law whilst awaiting an owner in its heir. The necessary administrator thus defined it in these terms" (Barbara Biscotti, "Curatore e 'amministrazione interimistica' dell'eredità giacente. Spunti per una riflessione storico-comparatistica", in Isabella Piro (ed.), *Scritti per Alessandro Corbino*, Roma, Libellula Edizioni, 2016, p. 274).

16 "Before the research of the Interpolationists [in the early 20th century] allowed the Justinian matrix of abeyant inheritance as legal personality to be acquired", Dusi cited extracts such as *Florentinus*' fragment "hereditas personae vice fungitur" to support his argument that Roman jurists had traced inheritance to neither "personification nor fiction, but rather to an 'early and perfect legal subjectivity type' which, for the Romans, was the natural person for whom it would stand in for as a 'faded image'. The theory of personality, 'which for many is the sole orthodoxy to the extent that it derives directly from Roman sources, is not, for us, truly Roman in origin but a product of modern dogmatic construction' and to be studied as such", Dusi said, quoted in Achille De Nitto, "Dusi, Bartolomeo", in *Dizionario Biografico degli Italiani*, v. 43 (URL: http://www.treccani.it/enciclopedia/bartolomeo-dusi_%28Dizionario-Biografico%29/, date of consultation 01/08/2019). See also Ubaldo Robbe, *La hereditas iacet e il significato della hereditas in diritto romano*, Messina, Università di Messina, 1975; Alfonso Castro Sáenz, *La herencia iacente en relacion con la personalidad juridica*, Seville, Universidad de Sevilla, 1998.

17 See, among others, Bartolomé Clavero, *Tantas personas como estados*, Madrid, Tecnos, 1986; Bartolomé Clavero, "La máscara de Boecio: Antropologías del sujeto entre persona e individuo, teología y derecho", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 39, 2010, p. 7-40.

18 Quoted in Thomas Kuehn, *Heirs, Kin, and Creditors in Renaissance Florence*, Cambridge, Cambridge University Press, 2008, p. 22. In this respect, there is a major difference between Roman and other legal traditions, such as for example the Jewish tradition: "According to Roman law the heir or heirs succeeded to the estate of the deceased as his complete replacement [...] as extensions or prolongation of his legal personality [...]. This doctrine of universal succession was never part of Jewish law" as heirs were considered merely representatives of the deceased, and the notion of agency developed by Jewish law "maintained very early that an agent is [...] not an extension of the person of

the principal" (Emanuel Rackman, "A Jewish Philosophy of Property: Rabbinic Insights on Intestate Succession", *The Jewish Quarterly Review*, v. 67, nº 2/3, 1976, p. 77-78.) On the contrary, on the basis of Roman law, the concept of "*repraesentatio identitatis*" was fully developed by Mediaeval Christian thought, within the Christological debate (see Hasso Hofmann, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento*, Milan, Giuffrè, 2007, chapter V).

19 *Vocabolario degli Accademici della Crusca*, 5th edition (1863-1923), v. 8, p. 10 (URL: http://www.lessicografia.it/pagina.jsp?ediz=5&vol=8&pag=10&tipo=3, date of consultation 01/08/2019).

20 His legal encyclopaedia was hugely successful during the 17th and 18th century and printed 18 times in Italy, France and Germany (Alessandro Dani, "De Luca, Giovanni Battista", in *Il Contributo italiano alla storia del Pensiero*, *Diritto*, Roma, Treccani, 2012 (URL: http://www.treccani.it/enciclopedia/de-luca-giovanni-battista_%28Il-Contributo-italiano-alla-storia-del-Pensiero:-Diritto%29/, date of consultation 01/08/2019).

21 The italics are mine. "Consumato [l]'atto dell'adizione [...] l'erede s'identificava, come ancor oggi senza [il beneficio de] l'inventario s'identifica in tutto e per tutto col defunto, confondendosi l'uno e l'altro patrimonio". Giovanni Battista De Luca, *Il dottor volgare* [...], 1673 (See edition Florence, 1839, URL: http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=1&dir=2_240&ww=#pagina, date of consultation 01/08/2019), Libro IX, Capitolo III, *Dell'Erede*, § 2.

22 "*Persona* non significaba ni podía significar *individuo* en el sentido de ser humano", Bartolomé Clavero, "La máscara de Boecio: Antropologías del sujeto entre persona e individuo, teología y derecho", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 39, 2010, p. 13. See also Bartolomé Clavero, *Antidora. Antropologia catôlica de la economia moderna*, Milan, Giuffré, 1991, chapter 5. More generally, following Jerôme Baschet, *Corps et âmes. Une histoire de la personne au Moyen Âge*, Paris, Flammarion, 2016, p. 35, the term "person" could represent the human being (as a union of body and soul) at least from the second half of the twelfth century.

23 The Justinian *Codex*, where *De Personis* or *De Iure Personarum* is the lion's share of the *Institutiones*' first book, the basic elements of the law, contains quotes like the following: "Qui legitimam personam in iudiciis habent vel non" (who legitimate has *person* in compliance with law in order to act in court or not): following Bartolomé Clavero, "La máscara de Boecio: Antropologías del sujeto entre persona e individuo, teología y derecho", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 39, 2010, p. 14, the *rights of the person*, thus, meant *legal capacities* not the *rights of individuals*.

24 See Sergio Marini, *Dalla persona alla...persona: Appunti per una storia*, Milan, Università Cattolica del Sacro Cuore, 2008; Bartolomé Clavero, "Cádiz 1812: antropología e historiografía del individuo como sujeto de constitución", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 42, 2013, p. 201-279.

25 See Ernst Hartwig Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton-New Jersey, Princeton University Press, 1957.

26 "Is qui habet duos status aut dignitates aut etiam diversa officia, duas etiam ipsemet repraesentat personas, et diversas ac separatas aenigmatice" (Bartolomé Clavero, "La máscara de Boecio: Antropologías del sujeto entre persona e individuo, teología y derecho", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 39, 2010, p. 21-22). See also Bartolomé Clavero, *Tantas personas como estados*, Madrid, Tecnos, 1986.

27 When they conceived of representation, "as Thomas Aquinas had, jurists, too, thought primarily in terms of affinity of image and correspondence. This was true equally of the 'persona repraesentata' and [...] 'corpus fictum' doctrines. [...]" Innocent IV's "*fingatur* a person [...] pert [ains] not to the metaphorical meaning of 'representing oneself' but the literal meaning 'give form'. And this, too, and not only for Pope Innocent, applied in general terms for all his jurist followers", *i.e.* Bartolo and the theorists of fiction (Hasso Hofmann, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento*, Milan, Giuffrè, 2007, p. 158).

28 "Concurremment à la terminologie de la fictio, Innocent IV avait introduit, pour désigner ces entités, tels les cités ou les chapitres, la notion de 'nom de droit' (*nomen iuris*), de 'nom désignant une idée' (*nomen intellectuale*) ou de 'chose incorporelle' (*res incorporalis*), expressions que l'on retrouve un siècle plus tard chez Balde. De cette terminologie, on ne retient guère d'habitude que la valeur d'abstraction. Mais on ne s'est pas suffisamment avisé qu'il s'agit au départ d'expressions techniques, étroitement contextualisées. En droit romain, elles désignaient le patrimoine, en particulier le patrimoine successoral, l'*hereditas*". Yan Thomas, "L'extrême et l'ordinaire. Remarques sur le cas médiéval de la communauté disparue", in Jean-Claude Passeron and Jacques Revel (dir.), *Penser par cas*, Paris, Éditions de l'EHESS, 2005, p. 70.

29 "Starting point and dominant element in the dogmatic construction of abeyant inheritance according to the gloss is the frequently reiterated affirmation in the texts that this acts in the capacity and place of the deceased in the interval between deferral and legal possession". In any event Giuseppe Ermini would seem inclined to believe that Accursio interpreted "abeyant inheritance [...] not truly as constituent person itself and neither as representative of the person of the deceased but rather as a full blown depiction (within the limitations imposed by death) of the person himself who was considered almost as if he were still present" (Giuseppe Ermini, "Il concetto di eredità giacente nella Glossa ordinaria al Corpus Iuris", *Rivista di storia del diritto italiano*, v. 12, nº 1), 1939, p. 3-4, and 13).

30 In the wake of Sinibaldo Fieschi (pope Innocent IV), when common law jurists developed the notion of "*persona ficta*" they agree in seeing "persona repraesentata" as a totality "representing" a person, *i.e.* one which depicts the image of the deceased in person (in the case of abeyant inheritance) or living in the reciprocity of its members (in the case of worldly corporations)" (Hasso Hofmann, *Rappresentanza-*

rappresentazione: parola e concetto dall'antichità all'Ottocento, Milan, Giuffrè, 2007, p. 159).

31 "Universitas [...] est persona repraesentata, quia verum est quod repraesentat persona viventis, ideo potest possidere sicut usufructum habere [...] sed hereditas repraesentat personam mortui"; "Personam defuncti repraesentat hereditas". Bartolus a Saxoferrato quoted in Hasso Hofmann, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento*, Milan, Giuffrè, 2007, p. 158-159).

32 "Hereditas iacens est quedam persona ficta: repraesentans personam defuncti [...] postquam vero adita, ista repraesentatio transfertur in personam veram, qui tunc heres est illa que repraesentat, ideo cessat fictio seu ficta repraesentatio", Paolus Castrensis quoted in Hasso Hofmann, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento*, Milano, Giuffrè, 2007, p. 159.

33 On the difference between *tutor* and *curator*, see Giovanni Battista De Luca, *Il dottor volgare* [...], 1673 (See edition Florence, 1839, URL: http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=1&dir=2_240&ww=#pagina, date of consultation 01/08/2019), libro VII, *Dei tutori*, capitolo I: "Si dà il tutore principalmente alla persona, e per conseguenza al governo ed amministrazione della roba [...] e all'incontro il curatore si dà principalmente alla roba, e consecutivamente alla persona" (§ 2). "Sono di tre specie i tutori: uno cioè si dice il testamentario [deputato dal padre del pupillo nel testamento]; l'altro che si dice legittimo [secondo le regole di successione ab intestato]; ed il terzo che si dice dativo [...]" (§ 3) "ed il [tutore] dativo è quegli, il quale si dia dal giudice quando non vi siano parenti idonei, o veramente che mancasse il testamentario, o che per l'impedimento di questo convenga deputare un altro tutore provvisionalmente" (§ 5) "dandosi ancora il curatore all'eredità giacente, ed al patrimonio decotto, il qual sia posto sotto il concorso de' creditori" (§ 9). In the book XIV *De' giudizj* "si discorre della stessa diversità de' stili sopra de' curatori de patrimonj decotti posti sotto il concorso, e delle eredità giacenti". On the problem of the *hereditas iacens* administrator in roman law see Barbara Biscotti, "Curatore e 'amministrazione interimistica' dell'eredità giacente. Spunti per una riflessione storico-comparatistica", in Isabella Piro (ed.), *Scritti per Alessandro Corbino*, Roma, Libellula Edizioni, 2016, p. 272).

34 For some Renaissance Florence examples see Thomas Kuehn, *Heirs, Kin, and Creditors in Renaissance Florence*, Cambridge, Cambridge University Press, 2008, p. 175-178.

35 As Paolo Grossi highlighted in the medieval and post-medieval mindset things possess the right to be used. This goes against our modern legal mindset in which things remain inert. Paolo Grossi, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milan, Giuffrè, 1977; Paolo Grossi, "La proprietà e le proprietà nell'officina dello storico", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 17, 1988, p. 359-422; Paolo Grossi, "Assolutismo giuridico e proprietà collettive", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 19, 1990, p. 505-555; Paolo Grossi, *L'ordine giuridico medievale*, Roma and Bari, Laterza, 1995.

36 The definition of the form of kingly authority as "patriarchy" would seem to be especially well-suited to describing the Spanish situation (Bianca Premo, *Children of the Father King: Youth, Authority, and Legal Minority in Colonial Lima*, Chapel Hill, University of North Carolina Press, 2005) and obviously not only this. In general, see Raffaella Sarti, "Men at Home: Domesticities, Authority, Emotions and Work (Thirteenth-Twentieth Centuries)", *Gender and History*, v. 27, nº 3, 2015, p. 521-558; for the Russian case, Marianna Muravyeva, "'A king in his Own Household': Domestic Discipline and Family Violence in Early Modern Europe Reconsidered", *The History of the Family*, v. 18 nº 3, 2013, p. 227-237. In an "house-based society", using a *patri-focal* political language, individuals' biological status (gender, age) was always mediated by means of legal status. Bianca Premo has ably highlighted this (*Children of the Father King: Youth, Authority, and Legal Minority in Colonial Lima*, Chapel Hill, University of North Carolina Press, 2005, p. 9-10): "it might seem absurd to categorize the authority a young female slaveholder possessed over an elder male slave as patriarchal", but if we think of the father's authority as a position within a system of power, "mothers as well as fathers, and female slave masters as well as priests, could exert control over others based on socially constructed notions of what natural familial authority entailed, even if only momentarily and conditionally". In *Siete Partidas* (II, X, 2) the king's love for his people is described in three ways: first "aviendo merzed dellos, faziendole merzed"; second "aviendoles pietad" like a "cabeza de todos" which suffers for its limbs: "ser les ha como padre, que cria sus fijos, con amor, e los castiga con pietad", for "princeps dicitur omnium pater"; third "aviendole misericordia". The fact, for example, that the *Fiscus* (one of the prince's persons) was obliged to provide for the daughters of people who had had their goods confiscated well represents the idea that the prince *substitute for* fathers: "Secuta confiscatione bonorum delinquentis, qui habeat filias nuptui collocandas, paternum munis illas dotandi transire ad Fiscū" (as Baldo and the Rota Bononiense sentences show) (Angeli Stephani Garoni, *Commentaria in tit. de Iur. & priuil. fis. Constit. Status Mediolani*, Mediolani, apud Io. Baptistam Bidellium, 1629, p. 181, § 1). Tacitus describes the *lex Papia Poppaea* (9 CE) –which, however, saw the succession of the *Aerarium populi Romani* (the patrimony of "the people" initially distinct from the *fiscus*, the patrimony of the *princeps*)– as designed "to enrich the *aerarium* [...] so that [...] properties without owners will fall to the people as a universal parent [*Velut parens omnium populus uacantia teneret*]" (Fergus Millar, *Rome, the Greek world, and the East*, v. II, *Government, Society and Culture in the Roman Empire*, edited by Hannah M. Cotton and Guy MacLean Rogers, Chapel Hill, University of North Carolina Press, 2004, p. 58-61; Tacitus, *Annales*, III, 28, 3 (Texte établi et traduit par P. Wuilleumier, Paris, Les Belles Lettres, 1990).

37 "La solución que el Derecho romano transmitió a la posteridad, y la que más influyó andando el tiempo, fue la de atribuir las herencias vacantes al Fisco imperial, con sumisión de la adquisición a normas de Derecho sucesorio, como si el Fisco fuese un adquirente individual, esto es 'loco heredis'" (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 200). The Roman law origins of the fiscal claim to vacant properties are difficult to establish. It appears for the first time during Tiberius's rule (14-37 CE), but there were probably precedents during the Egyptian Ptolemaic era (305-30 BCE) and during

the Seleucid (312-63 BCE): in Roman Egypt the office of the *Idios Logos* existed "who investigates the properties that are without owners and that ought to fall to Caesar". It is not clear how this Egyptian practice passed to the rest of the Empire. Such fiscal claims took root in the 2nd century CE (at the expense of *aerarium*) and was proclaimed by Caracalla (198-217 CE) (Fergus Millar, *Rome, the Greek world, and the East*, v. II, *Government, Society and Culture in the Roman Empire*, edited by Hannah M. Cotton and Guy MacLean Rogers, Chapel Hill, University of North Carolina Press, 2004, p. 58-61). According to Milanese jurist Angelo Garoni (Angeli Stephani Garoni, *Commentaria in tit. de Iur. & priuil. fis. Constit. Status Mediolani*, Mediolani, apud Io. Baptistam Bidellium, 1629, p. 181, § 1), however, the nature of this inheritance of vacant goods by the state coffers was controversial (p. 181, § 4): the *Fisc* "non sit propriè heres", given that "sed tamtū loco heredis: non enim per repræsentationem, sed per anichilationem personæ succedit" (p. 181, § 8). All things considered, "licet Fiscus verè non sit heres, est tamen successor" and jurisprucence "nomine heredem anomalum appellat" or "quasi heredem extraneum, & impropriè heredem". Tomás y Valiente also considered intestate death without an heir succession systems "que podríamos llamar anormales, en cuanto que no encajan en los módulos generals" (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 193). For the Aragonese historical legislation see Miguel Luis Lacruz Mantecón, *La ocupación imposible: Historia y régimen jurídico de los inmuebles mostrencos*, Madrid, Dykinson, 2011, p. 31-37.

38 Simona Cerutti, "À qui appartiennent les biens qui n'appartiennent à personne? Citoyenneté et droit d'aubaine à l'époque moderne", *Annales. Histoire, Sciences Sociales*, 62e année, nº 2, 2007, p. 359, p. 362.

39 As argued by Peter Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and after*, London, Cornell University Press, 2004. The same was argued about the *Juzgado de bienes de difuntos*, as an example by Delphine Tempère, *Vivre et mourir sur les navires du Siècle d´Or*, Paris, Presses de l'Université Paris-Sorbonne, 2009.

40 Simona Cerutti, "À qui appartiennent les biens qui n'appartiennent à personne? Citoyenneté et droit d'aubaine à l'époque moderne", *Annales. Histoire, Sciences Sociales*, 62e année, nº 2, 2007, p. 365.

41 "El Municipio se encargaba de la víndicta pública, de la protección legal de la comunidad y por eso nombraba un Defensor de Menores que actuaba de oficio, un Defensor de Ausentes, un Defensor de Herencias Yacentes (cuestión que era muy importante en una sociedad en la cual la herencia es una de las formas básicas de transmisión de la propiedad) y un Defensor de Derechos Eventuales, un funcionario que se encargaba de defender a la comunidad" (Enrique Ayala Mora, "El municipio en el siglo XIX", *Procesos: revista ecuatoriana de historia*, nº 1, p. 69-86, 1991, here p. 75).

42 The *defensor de ausentes* could also intervene in the case of vacant inheritances where absent interests needed to be protected, as in the case of Juan Antonio Pastoriza in Archivo General de Indias, Seville (Agi), *Contratación*, 567, N.2, R.4: Juan Antonio Pastoriza (1697). See Lloyd de Mause, *Historia de la infancia*, Madrid, Alianza, 1982.

43 "A Provedoria das Fazendas de Defuntos e Ausentes, Capelas e Resíduos se insere no quadro geral do arcabouço judicial e de seus principais agentes instalado em Minas Gerais no século XVIII. Tratava-se de uma instituição jurídica que recebia, como segunda instância, causas vindas do Juízo de Órfãos. Sua principal característica implicava intervir diretamente nas questões de propriedade e na regulamentação da transmissão de heranças", Wellington J. Guimarães da Costa, "A prática da Justiça na Provedoria de Defuntos e Ausentes de Vil Rica (1711-1808)", in *Anais do XIX Encontro regional de história*, 2014 (anais eletrônicos, URL: http://www.encontro2014.mg.anpuh.org/site/anaiscomplementares#G, date of consultation 01/08/2019), p. 1; see also Wellington J. Guimarães da Costa, "Das desordens na Provedoria de Defuntos e Ausentes, Capelas e Resíduos na América Portuguesa", in *Anais do XXVIII Simpósio Nacional de História*, Florianópolis 2015 (anais eletrônicos, URL: http://www.snh2015.anpuh.org/resources/anais/39/1434426149_ARQUIVO_TextoANPUHWellington.pdf, date of consultation 01/08/2019).

44 Just like in Castile, vacant estates in Portugal were used to pay ransoms for the freedom of prisoners of the *Mamposteiro-mor dos Cativos*, under the supervision of the supreme royal tribunal of Mesa da Consciência, António Manuel Hespanha, *Vísperas del Leviatán. Instituciones y poder politico (Portugal, siglo XVII)*, Madrid, Taurus, 1989.

45 *Ordenações Manuelinas* (1512), Livro 1, Titulo 69: "Do Curador que he dado aos bens do ausente, e aa herança do finado, a que nom he achado herdeiro" (University of Coimbra on-line edition, URL: http://www1.ci.uc.pt/ihti/proj/manuelinas/ordemanu.htm, date of consultation 01/08/2019).

46 *Ordenações Filipinas* (1603). Livro 1, Titulo 51: Do Juiz da Índia, Mina e Guiné (Rio de Janeiro: edição de Cândido Mendes de Almeida, University of Coimbra on-line edition, URL: http://www1.ci.uc.pt/ihti/proj/filipinas/ordenacoes.htm, date of consultation 01/08/2019). Unfortunately, only a part of the Tribunal's documentation is still preserved at the National Archive of Torre do Tombo in Lisbon, the most part regarding the late XVIII and the beginnings of XIX centuries.

47 See Isabel dos Guimarães Sá, *As Misericórdias Portuguesas de D. Manuel I a Pombal*, Lisbon, Livros Horizonte, 2001, p. 57-60. "Uma das fontes de rendimento das Misericórdias relacionadas com heranças era a procuradoria dos defuntos, que consistia em efetuar contactos entre os falecidos no Império e os seus potenciais ou declarados herdeiros, através de correspondência entre as Misericórdias interessadas, usando como pivots as Misericórdias mais importantes como a de Goa e a de Lisboa. No fim das averiguações e trâmites burocráticos necessários, os herdeiros habilitavam-se à herança, e os bens eram-lhes remetidos do ultramar, num processo geralmente moroso e ineficaz. As Misericórdias lucravam não apenas uma percentagem sobre o total da herança, como também beneficiavam dos bens em depósito" (Isabel dos Guimarães Sá, *Quando o rico se faz pobre: Misericórdias, Caridade e Poder no Império Português, 1500-1800*, Lisbon, Comissão Nacional para as Comemorações dos Descobrimentos

Portugueses, 1997, p. 70). Isabel dos Guimarães Sá, *O Regresso dos Mortos: Os Doadores da Misericórdia do Porto e a Expansão Oceânica (Séculos XVI-XVII)*, Lisbon, Imprensa de Ciências Sociais, 2018.

48 Archivio di Stato di Milano (Asmi), *Finanze p.a.*, 777 (Eredità Vacanti, Vignone), 1668, 18th June. Memorial by Henri Aymond, lawyer to Lyon Hôtel-Dieu.

49 On the *Misericordia* of Manila Carmen Yuste, "Las fundaciones piadosas en correspondencias de riesgo a premio de mar en la Casa de la Santa Misericordia de Manila en el transcurso del siglo XVIII", *Espacio, Tiempo y Forma*, nº 28, p. 99-115; Agi, *Filipinas*, 341, L. 6, f. 75r-76r: Real Cédula al gobernador de Filipinas y a la Audiencia de Manila (Madrid, 1649, 4 September); Agi, *Filipinas*, 72, N.2, f. 1r-4r: Memorial de la Mesa de la Misericordia de Manila (1699, 2 April). On Portuguese "Irmandades da Misericórdia" see also Isabel dos Guimarães Sá, Maria Antónia Lopes, *História Breve das Misericórdias Portuguesas: 1498-2000*, Coimbra, Imprensa da Universidade de Coimbra, 2008. On the soul as a juridical subject, see Maria de Lurdes Rosa, *As almas herdeiras: Fundação de capelas funebres e afirmação da alma como sujeito de direito (Portugal, 1400-1521)*, Lisbon, Imprensa Nacional-Casa da Moeda, 2012.

50 I have personally examined the issue in the Milanese and Venetian context in Alessandro Buono, "Le procedure di identificazione come procedure di contestualizzazione: Persone e cose nelle cause per eredità vacanti (Stato di Milano, secoli XVIe-XVIIIe)", in L. Antonielli (ed.), *Procedure, metodi, strumenti per l'identificazione delle persone e per il controllo del territorio*, Soveria Mannelli, Rubbettino, 2014, p. 35-65; Alessandro Buono,"La manutenzione dell'identità. Il riconoscimento degli eredi legittimi nello Stato di Milano e nella Repubblica di Venezia (secoli XVIe-XVIIIe)", *Quaderni Storici*, nº 148, 2015, p. 231-265. On the Milan case see also Emanuele C. Colombo, "Potenzialità di una fonte. Le eredità vacanti (Lombardia spagnola, XVII secolo)", *Studi Storici Luigi Simeoni*, v. LX, 2010, p. 95-106.

51 See the *Parentele* fund in Archivio di Stato di Venezia (Asve), *Giudici del proprio*.

52 Annunziata Berrino, *L'eredità contesa. Storie di successioni nel Mezzogiorno prenapoleonico*, Roma, Carocci, 1999, p. 21-24.

53 James A. Johnstone, "The Probate Inventories and Wills of a Worcestershire Parish 1676-1775", *Midland History*, v. 1, 1971, p. 20-33.

54 Olivier Richard, "Memoria et institutions municipales à Ratisbonne à la fin du moyen âge", *Histoire urbaine*, v. 1, p. 75-89, 2010, here p. 78-79.

55 Thomas Kuehn, "Law, Death, and Heirs in the Renaissance: Repudiation of Inheritance in Florence", *Renaissance Quarterly*, v. 45, nº 3, 1992, p. 484-516; see also *Heirs, Kin, and Creditors in Renaissance Florence*, Cambridge, Cambridge University Press, 2008.

56 Suzana Miljan, Bruno Škreblin, "The Poor of Medieval Zagreb Between Solidarity, Marginalisation and Integration", in Justin Colson, Arie van Steensel (eds.), *Cities and Solidarities: Urban Communities in Pre-Modern Europe*, London and New York, Routledge, 2017, p. 102.

57 Emma Rothschild, "Isolation and Economic Life in Eighteenth-Century France", *The American Historical Review*, v. 119, nº 4, 2014, p. 1055-1082, here p. 1069-1070.

58 Archives Nationales, Paris (AnP), Fonds Panon-Desbassayns et de la Villèle (1689-1973): "dispense de droit d'aubaine sur les biens de la veuve de Jacques Beda, lettre de la Compagnie du 10 décembre 1725 et 26 avril 1727" and "Convention entre la Compagnie des Indes et les héritiers Beda (abandon par les héritiers de tous les biens meubles, cases, esclaves, bêtes à cornes, chevaux et autres effets; et abandon par la Compagnie de toutes les terres qui revenaient au domaine de la Compagnie pour raison de ses droits d'aubaine). 21 janvier 1730".

59 A *post mortem* inventory for a citizen of Saint-Christophe (Saint Kitts) dead in 1660 was made by the "procureur fiscal des isles". Several documents mention the fact that "curators to the vacant goods" have always been established. (I thank Baptiste Bonnefoy –who is currently Ph.D candidate at EHESS, and whose thesis is titled: *Miliciens de "couleur" à l'âge des révolutions. Cap-Français, Carthagène des Indes, Maracaibo et les Îles du Vent (1763-1804)*, sous la direction de Jean-Paul Zuñiga– for the information he provided me).

60 In article 22 the edict set out that, in the absence of known heirs, the colonial authorities were obliged to inform "the prefect general in France, the parliament or the sovereign council of the province in which the deceased seemed to have originated or in which his heirs were assumed to be living". In turn, the prefect had to inform anyone with rights once the news arrived (L.-G. Faure, *Répertoire administratif des parquets à l'usage des premiers présidents, procureurs généraux* [...], Clermont-Ferrand, De Perol, 1843, p. 284-285).

61 "La réglementation s'est élaborée à partir de l'édit du 24 novembre 1781 qui s'appliquait aux Antilles (Guadeloupe, Martinique, Saint-Domingue, Tobago). Ses dispositions ont ensuite été rendues applicables à la Guyane, au Sénégal et à Saint-Pierre-et-Miquelon par des actes de l'autorité locale. La Réunion et l'Inde étaient soumises à un régime fixé par des arrêtés locaux de 1803 et 1809 pour la Réunion et de 1844 pour l'Inde. L'ordonnance du 16 mai 1832 tente d'unifier la législation et de réfréner les abus en confiant l'administration des successions vacantes de la Martinique, de la Guadeloupe et de la Réunion aux receveurs de l'Enregistrement. Le décret du 27 janvier 1855 établit un nouveau mode d'administration des successions vacantes pour les Antilles et la Réunion. Il est étendu successivement à la Guyane (1857), au Sénégal (1861), aux établissements de l'Océanie (1867). Il est enfin rendu applicable à l'ensemble des colonies par le décret du 14 mars 1890", Archives Nationales d'Outre-Mer, Aix-en-Provence (Anom), Fonds Ministériels - Premier Empire colonial (XVIIe -début XIXe siècle), Série J - Successions Vacantes (1714/1909) (URL: http://anom.archivesnationales.culture.gouv.fr/ark:/61561/wz818kefk, date of consultation

01/08/2019).

62 This, for example, was established in a royal edict promulgated for the *Généralité de Montauban* in 1666. See Francis Brumont, "La répartition de la taille entre communautés: l'élection d'Armagnac aux XVIIe et XVIIIe siècles", in Antoine Follain and Gilbert Larguier (dir.), *L'Impôt des Campagnes. Fragile fondement de l'État dit moderne (XVIIe et XVIIIe siècle)*, Paris, Comité pour l'histoire économique et financière de la France, 2005, p. 403-433.

63 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 194.

64 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 201-204. The Theodosian Code was a compilation of Roman Empire's law under Christian emperors since 312.

65 With community understood not as an abstract "Kingdom's political community" but the as "most direct and immediate form" of local community. Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 210-211.

66 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 211.

67 "Alguien no vecino", Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 215. The Spanish word "vecino" has the twofold meaning of *neighbour* and *citizen* or "person who belongs". For a definition of *vecino* see Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America*, New Haven, Yale University Press, 2003.

68 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 215-216

69 Here I use the definition proposed by Simona Cerutti, *Giustizia sommaria. Pratiche e ideali di giustizia in una società di Ancien Régime (Torino XVIII secolo)*, Milan, Feltrinelli, 2003 and Simona Cerutti, "Justice et citoyenneté à Turin à l'époque moderne", in Juan Carlos Garavaglia, Jean-Frédéric Schaub (eds.), *Lois, justice, coutume, Amérique et Europe latines (XVIe-XIXe siècle)*, Paris, Éditions de l'EHESS, 2005, p. 57-91.

70 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 217-218.

71 This was the case of the council held by the King of León in 1228, with all the bishops of his realm present, at which it was decided that if, after a year from the goods being put into safekeeping by a bishop, no-one turned up to lay claim to the pilgrim's goods, this would be divided up as follows: one third for the Church and the other two to the king who was to use them to fortify the border with Islamic lands (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 219-220).

72 The law books compiled on the behest of the king of Castile and León Alfonso X the Wise (1252-1284), the fundamental Castilian law code which also applied to the New World. See Partida VI, Título I, Ley XXXI: "Como deben seer puestos en recabdo los bienes de los romeros et de los pelegrinos quando mueren sin manda" (*Las Siete Partidas del Rey don Alfonso el Sabio, cotejadas con varios codices antiguos por la Real Academia de la historia*, Madrid, en la Emprenta Real, 1807).

73 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 221.

74 The original reads thus: "Muriendo algunt pelegrino ó romero sin testamento ó sin manda en casa de algunt alberguero, aquel en cuya casa muriere debe llamar homes buenos de aquel logar et mostrarles todas las cosas que traie, et ellos estando delante, débelas facer escribir, non encobriendo ninguna cosa dellas, nin tomando para sí nin para otro, fueras ende aquello que debiere haber con derecho por su hostalage, ó si le hobiere vendido alguna cosa para su vianda. Et porque las cosas dellos sean mejor guardadas, mandamos que todo quanto les fallaren sea dado en guarda al obispo del logar ó á su vicario, et envie decir por su carta á quel logar onde era el finado, que aquellos que con derecho podieren mostrar que deben ser su herederos, que vengan ó envíen uno dellos con carta de personería de los otros, et que gelo darán. Et si tal home viniere et se mostrare segunt derecho que es su heredero, débengelo todo dar: et si por aventura tal heredero non viniese, ó non podiesen saber donde era el finado, débenlo todo dar et despender en obras de piedat allí do entendieren que mejor lo podrán facer. Et si algunt hostalero contra esto ficiese, tomando ó encobriendo alguna cosa, mandamos que lo peche tres doblado todo quanto tomare ó encobriere, et que faga dello el obispo ó su vicario, asi como sobredicho es" (Partida VI, Título I, Ley XXXI).

75 José Enciso Contreras, *Testamentos y autos de bienes de difuntos de Zacatecas (1550-1604)*, Zacatecas-México, Tribunal Superior de Justicia del Estado de Zacatecas, 2000.

76 *Fuero Real*, Libro IV, Titulo XXIV, Ley III: "Si romero muere sin manda, los Alcades de la Villa do muriere reciban sus bienes, è cumplan dellos lo que fuere menester à su enterramiento, è lo demás guardenlo, è faganlo saber al Rey, y el Rey mande lo que tuviere por bien" (*El Fuero Real de España, diligentemente hecho por el noble Rey don Alonso IX*, Madrid, Pantaleon Aznar, 1781).

77 *Nueva Recopilación*, I, XII, V (cited in Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 222).

78 *Siete Partidas* (VI, XIII, VI) and *Fuero Real* (III, V, IV) accorded with this. According to Roman praetorian law "cognate" kin were eligible for succession up to the 6th degree of kinship (or

exceptionally up to the 7th degree in the case of sons of "second cousins"). Justinian's Novels 118 (543 CE), however, imposed no limits on collateral kinship and was thus interpreted by some authors as restricting the state's claims (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 198-199, 225). In this regard, the thesis of Jack Goody, according to which the Church had a decisive role in this question, must be nuanced, as also shows Isabel dos Guimarães Sá's chapter in this volume.

79 Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 228.

80 The "mercedari" (the *Orden Real y Militar de Nuestra Señora de la Merced y la Redención de los Cautivos* founded in 1218), together with members of the Order of the Holy Trinity, were especially active in this respect. Similar privileges existed in Portugal too.

81 In 1228 King Alfonso IX, referred to above, set aside two thirds of pilgrims' vacant goods for fortifying the border between the Kingdom of Leon and the "Moors" (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 220).

82 On the issue of ransoms for Christian slaves, see Giovanna Fiume, *Schiavitù mediterranee. Corsari, rinnegati e santi di età moderna*, Milan, Bruno Mondadori, 2012.

83 The 1455 bull granted by Callixtus III was renewed by Pope Pius II Piccolomini "on condition that half of the money collected be used on the struggle against the Turks and the other half on the Granada enterprise", *i.e.* half for the pope and half for the Spanish crown (José Martínez Millán, C. Javier De Carlos Morales, "Los orígenes del Consejo de Cruzada (siglo XVI)", *Hispania*, v. 3, nº 179, 1991, p. 903-904).

84 The same happened to the *subsidio* (subsidy), a tax levied on the clergy in favour of the Apostolic camera which ended up being appropriated by the crown and to the *excusado* (a part of the ecclesiastical tithes). José Martínez Millán, C. Javier De Carlos Morales, "Los orígenes del Consejo de Cruzada (siglo XVI)", *Hispania*, v. 3, nº 179, 1991, p. 905.

85 See Thomas Glesener's chapter in this volume.

86 The consolidation phase of the *Comisaría General* and then the *Consejo de Cruzada* has been identified as 1529-1554 (José Martínez Millán, C. Javier De Carlos Morales, "Los orígenes del Consejo de Cruzada (siglo XVI)", *Hispania*, v. 3, nº 179, 1991).

87 Real Cedula of 20th December 1522 (cited in Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 233). Charles I reiterated the issue in a series of later measures (1531, 1544, 1547) (see Thomas Glesener's chapter in this volume) then incorporated it into the 1567 *Recopilación de las leyes de Castilla*, Ley 1, Titulo 10. This privilege remained unaltered until the reign of Fernando VI (1746-1759) (Francisco Tomás y Valiente, "La sucesión de quien muere sin parientes y sin disponer de sus bienes", *Anuario de historia del derecho español*, v. 36, 1966, p. 233).

88 The etymology of the word is uncertain. On the basis of Juan de Solórzano Pereira's writings in *Política Indiana*, Madrid, Diego Diaz de la Carrera, 1648, according to Antonio de Nebrixa's interpretation, it may derive from "Mesta" (a powerful sheep farming body in medieval Castile) as a result of the privilege granted it to appropriate animals found without owners ("el llamar *Mostrencos* a estos bienes, aviendolos de llamar *Mestengos*, por quanto el ganado sin dueño pertenece a la Mesta"). A further interpretation comes from Sebastián de Covarrubias (author of the famous *Tesoro de la lengua Castellana*), according to whom it derives from the verb "mostrare" (to show) because these were goods which once found were publicly exhibited to find their owners ("del verbo Mostrando, porque donde quiera que se hallan, se han de mostrar, y manifestar luego, y pregonarlos publicamente, para que se busque su dueño. El qual sino pareciere dentro de año, y dia, quedan por el Rey, y se aplican, y adjudican a su Fisco, y Camara Real") (Juan de Solórzano Pereira, *Política indiana* [...], En Amberes, Por Henrico y Cornelio Verdussen, Mercaderes de libros, 1703, p. 372).

89 These are the words of Gil González Dávila (*Teatro de las grandezas de la villa de Madrid, Corte de los Reyes Católicos de España, al muy poderoso Rey Don Filipe III, Por el maestro Gil Gonzalez Davila, su coronista*, Madrid, Thomas Iunti, 1623*):* "Considerando los Pontífices Romanos, que los Reyes Católicos de España defienden con sus armas la obediencia de la Santa Sede, como verdaderos padres de la Religión, fauorecen de su parte empresa tan justa y santa con socorros espirituales, concediéndoles la Bula de la Cruzada, y gracias de Subsidio y Excusado, para que con más potencia defiendan y dilaten la causa pública de la verdad Evangélica" (cited in José Martínez Millán, C. Javier De Carlos Morales, "Los orígenes del Consejo de Cruzada (siglo XVI)", *Hispania*, v. 3, nº 179, 1991, p. 909).

90 See Thomas Glesener's chapter in this volume.

91 The granting of the bull by Gregory XIII in 1573 was followed by the first preaching encompassing both Spaniards and Indios in 1574 as is testified to by cosmologist and chronicler of the Indies Juan López de Velasco "Y así mismo lo que procede la Cruzada que se publicó antiguamente algunas veces, para los españoles solos; y así valió poco, y por haberse publicado en el año de 74 (1574) para los españoles e indios parece que debe de valer mucho" (José Antonio Benito Rodríguez, "Historia de la Bula de la Cruzada en Indias", *Revista de Estudios Histórico-Jurídicos*, nº 18, 1996, p. 87).

92 "Y no obsta [...] el dezir, que en España el Comissario General, y Consejo de Cruzada, recogen, y administran estos bienes Mostrencos, y abintestatos, y conocen, y juzgan de las causas de ellos, porque esso procede por leyes, Comissiones, Instrucciones particulares, que se lo han concedido. [...] Pero en las Indias no ay tal concession, sino la contraria" (Juan de Solórzano Pereira, *Política indiana* [...], En Amberes, Por Henrico y Cornelio Verdussen, Mercaderes de libros, 1703, Libro IV, chapter 25, § 27).

93 In particular, this latter had asked the Apostolic Nuncio to excommunicate the Royal Indian Council (Juan de Solórzano Pereira, *Política indiana* [...], En Amberes, Por Henrico y Cornelio Verdussen, Mercaderes de libros, 1703, Libro IV, chapter 25, § 24).

94 "Los Thesoreros, è Recaudadores, è otras personas, que tengan cargo en essa Isla de la cobranza de Cruzada" (Juan de Solórzano Pereira, *Política indiana* [...], En Amberes, Por Henrico y Cornelio Verdussen, Mercaderes de libros, 1703, Libro VI, chapter 6, § 7).

95 Archivo General de la Nación, Ciudad de México (AgnMex), *Novohispano*, *Bulas de la Santa Cruzada*, v. 2, exp. 1: "El tesorero de Cruzada Juan de Alcocer sobre que el procedido de bienes mostrencos abintestato y otros ramos entreguen e su poder" (1637).

96 Those who had looked at the application of the *Bula de Cruzada* in New Spain have considered its administration of vacant goods and inheritances as a matter of scant importance: "de menor consideración, se aplicaron a la Cruzada otras sumas, como los bienes mostrencos, ab intestatos, mandas forzosas, licencias de oratorios privados, monto de las composiciones que efectuaban los comisarios, así como parte de las multas y penas pecuniarias impuestas por los tribunales eclesiásticos" (María del Pilar Martínez López-Cano, "La administración de la Bula de la Santa Cruzada en Nueva España, 1574-1659", *Historia Mexicana*, v. 62, nº 3, 2011, p. 983). See also José Antonio Benito Rodríguez, *La bula de Cruzada de Indias*, Madrid, Fundación Universitaria Española, 2002; María del Pilar Martínez López-Cano, "La implantación de la bula de la Santa Cruzada en Nueva España en el último cuarto del siglo XVI", in Francisco Javier Cervantes Bello (coord.), *La Iglesia en la Nueva España. Relaciones económicas e interacciones políticas*, Puebla, Benemérita Universidad Autónoma de Puebla, 2010, p. 21-49; Alejandra Contreras Calcáneo, "La Bula de la Santa Cruzada en Nueva España: implantación y consecuencias", *Antrópica. Revista de Ciencias Sociales y Humanidades*, v. 3, nº 5, 2017, p. 181-189. For the Iberian Peninsula Tomás y Valiente mentions it while Martínez Millán and De Carlos Morales make no reference to it.

97 An "specialidad [...] bien notable", to put it in the words of Juan de Solórzano Pereira.

98 It was a matter, for example, for the episcopal tribunals such as *Juzgado de testamentos, capellanías y obras pías* present in every diocese of New Spain who laid claim not only to ecclesiastical jurisdiction but also to all those hereditary transmissions involving "charitable work", of which the most important were the founding of the chantries. On this *Juzgado* see, above all, studies by Michael P. Costeloe, *Church Wealth in Mexico. A study of the "Juzgado de capellanías" in the Archbishopric of Mexico 1800-1856*, Cambridge, Cambridge University Press, 1967; John F. Schwaller, *Origins of Church Wealth in Mexico. Ecclesiastical Revenues and Church Finances, 1523-1600*, Albuquerque, University of New Mexico Press, 1985; Gisela Von Wobeser, *Vida eterna y preocupaciones terrenales. Las capellanías de misas en la Nueva España, 1600-1821*, México, Unam, 2005; Gisela Von Wobeser, *El crédito eclesiástico en la Nueva España. Siglo XVIII*, México, Unam-FCE, 2010; Gisela Von Wobeser, *Dominación colonial. La consolidación de vales reales en Nueva España, 1804-1812*, México, Unam, 2014; Jorge E. Trasloheros, *Iglesia, Justicia y Sociedad en la Nueva España. La Audiencia del Arzobispado de México 1528-1668*, México, Porrúa-Universidad Iberoamericana, 2004; José R. Juárez, *Reclaiming Church Wealth: The Recovery of Church Property after Expropriation in the Archdiocese of Guadalajara, 1860-1911*, Albuquerque, University of New Mexico Press, 2004; María del Pilar Martínez López-Cano, Gisela Von Wobeser, Juan G. Múñoz Correa (coord.), *Cofradías, capellanías y obras pías en la América colonial*, México, Unam, 1998; María del Pilan Martínez López-Cano, Elisa Speckman Guerra, Gisela Von Wobeser (coord.), *La Iglesia y sus bienes. De la amortización a la nacionalización*, México, Unam, 2004. In the 18th century, moreover, the creation of a new "police" tribunal, the *Juez de la Acordada*, led to jurisdictional conflicts such as in Archivo General de la Nación, Ciudad de México (AgnMex), *Novohispano*, *Intestados*, v. 252, exp. 1: "Competencia entre los Juzgados de bienes de difuntos y la Acordada sobre el conocimiento en los bienes que quedaron por la muerte de don Rafael Portu, vecino de esta ciudad, dejando como únicos herederos a sus hijos que se encuentran en los reinos de castilla. México".

99 This *Real Provisión* has been examined in many studies including José Luis Soberanes Fernández, "El Juzgado general de bienes de difuntos", *Revista Chilena de Historia del Derecho*, nº 22, 2010, p. 640-641. A history of the birth of the *Juzgado de Bienes de Difuntos* is also to be found in Carlos Alberto González Sánchez, *Dineros de ventura: La varia fortuna de la emigración a Indias (siglos XVI-XVII)*, Seville, Universidad de Sevilla, 1995. For an up-to-date bibliography of work which has made use of the *Juzgado* sources see Francisco Fernández López, "El procedimiento y los expedientes de bienes de difuntos en la Casa de la Contratación de Indias (1503-1717)", *Tiempos Modernos*, nº 30, 2015, who does not, however, cite Delphine Tempère, *Vivre et mourir sur les navires du Siècle d'Or*, Paris, PUPS, 2009

100 "Gran daño de los dichos herederos y se ha estorbado el cumplimiento de las animas de los tales difuntos" (José Luis Soberanes Fernández, "El Juzgado general de bienes de difuntos", *Revista Chilena de Historia del Derecho*, nº 22, 2010, p. 641).

101 Responsible since its foundation for the management of this repatriation with ordinances dating to 1510-1512, see Carlos Alberto González Sánchez, *Dineros de ventura: La varia fortuna de la emigración a Indias (siglos XVI-XVII)*, Seville, Universidad de Sevilla, 1995, p. 5.

102 "No declaraban los sobrenombres ni apellidos de los tales difuntos ni los lugares de donde eran vecinos, de manera que nunca o con gran dificultad se podían saber los herederos de ellos" (José Luis Soberanes Fernández, "El Juzgado general de bienes de difuntos", *Revista Chilena de Historia del Derecho*, nº 22, 2010, p. 641).

103 They were chosen between city "alcaldes" and "regidores", María de los Angeles Rodríguez Álvarez, *Usos y costumbres funerarias en la Nueva España*, Michoacan, El Colegio de Michoacán, 2001, p. 168.

104 "Carta acordada, para todas las Indias, acerca del orden que se ha de tener en los bienes de

difuntos" (16th April 1550). This royal letter was probably the outcome of the dysfunctions found during Don Francisco Tello de Sandoval's visit to the *Audiencia* of *Nueva España* in 1543. See José Luis Soberanes Fernández, "El Juzgado general de bienes de difuntos", *Revista Chilena de Historia del Derecho*, nº 22, 2010, p. 643.

105 See, for example, the case of remote provinces such as that of the Caylloma mines in the 1680s where there was no ordinary justice and *Juzgado* jurisdiction was commissioned ad hoc to the provincial *corregidor*, as in the case of the abeyant inheritance of Francisco Martínez Flores, in Agi, *Contratación*, 564, N.1, R.2.

106 "Ordenamos, que las causas de abintestados, se traten y conozcan en los Juzgados de bienes de difuntos, aunque no conste de la calidad de que los herederos y interessados estén en estos Reynos de Castilla, ó fuera de donde sucediere la muerte, con tal limitacion, que si el difunto dexare en la Provincia donde falleciere, notoriamente hijos, ó descendientes legitimos, por falta de ellos, tan conocidos, que no se dude del parentesco por descendencia, ó ascendencia, no ha de conocer el Juez general, sino las Justicias Ordinarias, y no constando con notoriedad lo contrario, tocará el conocimiento al Juez general, y faltando herederos, quedarán los bienes vacantes, y tocará el conocimiento al Juzgado de bienes de difuntos, pues el privilegio fiscal excluye a la jurisdicion ordinaria en este caso". Cited in Carlos Alberto González Sánchez, *Dineros de ventura: La varia fortuna de la emigración a Indias (siglos XVI-XVII)*, Seville, Universidad de Sevilla, 1995, p. 36.

107 This was the case, for example, of Gaspar de Gaya, naturalised in Seville and resident in Manila. According to certain reconstructions this latter drowned in a storm which struck the vessel he was travelling on in search of *Silver Island* (probably Yin-Shan). According to others he had been shipwrecked on the Chinese coast and was being kept prisoner in the Canton prison as no further specified "public rumours" from the Kingdom of Japan had it ("se dezia y tenia por cossa publica en el Reyno del Japon que estaban presos en la carcel de la ciudad de Canton"). On the 13th of June 1614, however, the *defensor de bienes de difuntos* of the Manila Audiencia stated that he and the ship's helmsman had been decapitated in Canton ("los avian muerto en la costa de China donde les avian cortado las cavezas") and then the story changed once again on 17th February 1615 when tit was declared that he was apparently still alive ("contradixo la dicha informacion y que estaban vivos"). Agi, *Contratación*, 470, N.1, R.1: Gaspar de Gaya (1618).

108 Serge Gruzinski, *Les quatre parties du monde: Histoire d'une mondialisation*, Paris, Éditions de La Martinière, 2004 (spanish edition: México, Fondo de Cultura Económica, 2010); Caroline Douki, Philippe Minard, "Histoire globale, histoires connectées: un changement d'échelle historiographique?", *Revue d'histoire moderne et contemporaine*, nº 54-54bis, 2007/5 (http://www.cairn.info/revue-d-histoire-moderne-et-contemporaine-2007-5-page-7.htm#re1no1, date of consultation 01/08/2019).

109 On governmental organization in the Indies, see Ricardo Zorraquín Becú, "La organización de las Indias en la época de los Austrias", in *Historia general de España y América. El descubrimiento y la fundación de los reinos ultramarinos: hasta fines del siglo 16*, Madrid, Rialp, 1982 (2nd edition, t. VII, p. 601-621).

110 The *Juzgado* was prevented from intervening if the deceased's heirs were in the Indies (Ley de 1ºde junio de 1619), José María Zamora y Coronado, *Biblioteca de legislación ultramarina en forma de diccionario alfabético*, Madrid, de Alegria y Charlain, 1844-1849, t. 2, letras B-C, p. 51. See also the *Recopilación de Leyes de los Reynos de las Indias*, Madrid, 1680 and José Enciso Contreras, *Testamentos y autos de bienes de difuntos de Zacatecas (1550-1604)*, Zacatecas-México, Tribunal Superior de Justicia del Estado de Zacatecas, 2000.

111 Almost all the deceased involved in *Juzgado* trials were male.

112 In this, the *modus operandi* which was described in the *Siete Partidas* on the subject of the abeyant assets of pilgrims is still visible.

113 Carlos Alberto González Sánchez, *Dineros de ventura: La varia fortuna de la emigración a Indias (siglos XVI-XVII)*, Seville, Universidad de Sevilla, 1995, and Delphine Tempère, *Vivre et mourir sur les navires du Siècle d´Or*, Paris, Presses de l'Université Paris-Sorbonne, 2009, have analysed this thoroughly.

114 Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America*, New Haven, Yale University Press, 2003; Simona Cerutti, "À qui appartiennent les biens qui n'appartiennent à personne? Citoyenneté et droit d'aubaine à l'époque moderne", *Annales. Histoire, Sciences Sociales*, 62e année, nº 2, 2007, p. 359, p. 362; Simona Cerutti, *Étrangers: Étude d'une condition d'incertitude dans une société d'Ancien Régime*, Montrouge, Bayard, 2012; Simona Cerutti, Isabelle Grangaud, "Sources and Contextualizations: Comparing Eighteenth-Century North African and Western European Institutions", *Comparative Studies in Society and History*, v. 59, January 17, p. 11, DOI: https://doi.org/10.1017/S0010417516000591.

115 It should be noted that, in the Spanish peninsula, the Spanish kings did not claim this right.

116 Simona Cerutti, Isabelle Grangaud, "Sources and Contextualizations: Comparing Eighteenth-Century North African and Western European Institutions", *Comparative Studies in Society and History*, v. 59, January 17, p. 11, DOI: https://doi.org/10.1017/S0010417516000591.

117 "Le droit de main morte levé sur un serf, le droit d'épave levé sur un étranger venu mourir dans une seigneurie, le droit d'aubaine levé sur un étranger domicilié", Sylvie Steinberg, *Une tache au front: La bâtardise aux XVIe et XVIIe siècles*, Paris, Albin Michel, 2016, p. 57.

118 Jean Bodin, *The Six Bookes of a Commonweal*, (translated by Richard Knolles, 1606, edited by Kenneth Douglas McRae), Cambridge - Massachusetts, Harvard University Press, 1962. The Latin definition, again by Bodin (*De republica libri sex*, 1586), is as follows: "Respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitude".

119 A clear definition has been provided by Edoardo Grendi (cited in Simona Cerutti, "Justice et citoyenneté à Turin à l'époque moderne", in Juan Carlos Garavaglia, Jean-Frédéric Schaub (eds.), *Lois, justice, coutume, Amérique et Europe latines (XVIe-XIXe siècle)*, Paris, Éditions de l'EHESS, 2005, p. 63) "la non appartenance à un corps de défense social" or a state of deprivation which implies the need of such people for a tutor: "les étrangers; les pauvres; les veuves, les orphelins, les mineurs; les incarcérés; certaines personnes collectives (tels que les communes, les hôpitaux ou les confréries); les juifs; les soldats et les membres du clergé" are all figures sharing this condition of poverty and "legal incapacity" in European common law sources (Simona Cerutti, "Justice et citoyenneté à Turin à l'époque moderne", in Juan Carlos Garavaglia, Jean-Frédéric Schaub (eds.), *Lois, justice, coutume, Amérique et Europe latines (XVIe-XIXe siècle)*, Paris, Éditions de l'EHESS, 2005, p. 62).

120 Recopilación de Leyes de los Reynos de las Indias (1680), Libro 2, Titulo 32, Ley XLIV. "Que al entregar bienes de difuntos se examinen los recaudos, y no se entreguen los de estranjeros, ni de naturales a estrangeros. Ordenamos y mandamos á lo Virreyes y Audiencias, que si personas legitimas con recaudos bastantes acudieren á pedir los bienes de difuntos en las Indias, se los manden entregar, no siendo de estrangeros, ni de naturales á estrangeros, [...] y en que para ello [...] se examinen con gran vigilancia los recaudos y legitimacion de personas, de forma que no se contravenga a las prohibiciones hechas en esta razon, por el riesgo que tiene la verdad en tan grande distancia".

121 The original reads "vezino de la villa de Obar en el Obispado de Oporto" (Agi, *Contratación*, 982, N.3, R.1,5).

122 Agi, *Contratación*, 982, N.3, R.1.

123 Agi, *Contratación*, 455, N.1, R.9, 2v: "Información de la naturaleza y herederos" (1661, 12th December). Statement by Don Roque Malla de Salzeda, corregidor de Quesaltenango (33 years of age); Joan del Poso y Cabrera, vecino de Santiago in Guatemala (40 years of age).

124 Agi, *Contratación*, 975, N.2, R.2: Manuel Suárez de Olivera (alias Manuel Soares de Oliveira).

125 For a long term perspective on Mediterranean society, see Claudia Moatti (ed.), *La mobilité des personnes en Méditerranée de l'Antiquité à l'époque de contrôle et documents d'identification*, Roma, École française de Rome, 2004; Claudia Moatti, Wolfgang Kaiser (eds.), *Gens de passage en Méditerranée de l'Antiquité à l'époque moderne: Procédures de contrôle et d'identification*, Paris, Maisonneuve and Larose-École française de Rome, 2007; Claudia Moatti, Wolfgang Kaiser, and Christophe Pébarthe (eds.), *Le monde de l'itinérance en Méditerranée de l'Antiquité à l'époque moderne: Procédures de contrôle et d'identification*, Bordeaux, Ausonius, 2009.

126 As Bert De Munck and Anne Winter argue "the main challenge [of urban migration policies] should [...] be described as incorporation, *i.e.* the allocation of newcomers to their appropriate status and corporative groups in the existing urban hierarchy, in order to channel their entitlement to communal resources while ensuring their commitment to the communal normative framework and the political status quo" (Bert De Munck, Anne Winter (eds.), *Gated Communities?: Regulating Migration in Early Modern Cities*, London and New York, Routledge, 2012, p. 14). I believe that the validity of this argument extends beyond the urban context to corporative society as a whole, as shown by Tamar Herzog, "Terres et déserts, société et sauvagerie. De la communauté en Amérique et en Castille à l'époque moderne", *Annales. Histoire, Sciences Sociales*, 62e année, nº 3, 2007, p. 507-538.

127 On Spanish migration policies to the New World see: Richard Konetzke, "La emigración de las mujeres españolas a América durante la época colonial", *Revista Internacional de Sociología*, nº 3, 1945, p. 123-150; Richard Konetzke, "Legislación sobre inmigración de extranjeros en América durante la época colonial", *Revista Internacional de Sociología*, nº 3, 1945, p. 269-299; Auke P. Jacobs, *Los movimientos migratorios entre Castilla e Hispanoamérica durante el reinado de Felipe III, 1598-1621*, Amsterdam and Atlanta, Rodopi, 1995; Gregorio Salinero, "Sous le régime des licences royales: L'identité des migrants espagnols vers les Indes (XVIe-XVIIe siècles)", in Claudia Moatti, Wolfgang Kaiser (eds.), *Gens de passage en Méditerranée de l'Antiquité à l'époque moderne: Procédures de contrôle et d'identification*, Paris, Maisonneuve and Larose-École française de Rome, 2007, p. 345-367; Tamar Herzog, "Naming, Identifying and Authorizing Movement in Early Modern Spain and Spanish America", in Keith Breckenridge, Simon Szreter (eds.), *Registration and Recognition: Documenting the Person in World History*, Oxford, The British Academy-Oxford University Press, 2012, p. 191-209; Rocío Sánchez Rubio, Isabel Testón Núñez, "Mecanismos de control y sistemas de identificación de la Monarquía hispánica en el trasvase poblacional al Nuevo Mundo (siglo XVI)", in L. Antonielli (ed.), *Procedure, metodi, strumenti per l'identificazione delle persone e per il controllo del territorio*, Soveria Mannelli, Rubbettino, 2014, p. 67-89.

128 Agi, *Filipinas*, 4, N. 57: Memorial by Duarte Ribeiro de Macedo in defence of Manuel Suárez de Olivera (*alias* Manoel Soares de Oliveira), [probably end 1679].

129 Archivo General de la Nación, Ciudad de México (AgnMex), *Novohispano*, *Bienes de Difuntos*, v. 14, exp. 2: Testamentaria. El Lic. Sebastián Jarero, defensor del Juzgado general de ultramarinos contra Jose Tomás Manjón (1792-1805).

130 "[...] Bona vacantia ad Principem Supremum Dominium Territorij, & Iurisdictionis spectare, ut habetur in *l. i. c. de bon. vacant. & in cap. unic. quae sint regul* Kloch *de aerar. tit de bon vacant 136 num. 2* Rosent *cap. 5 concl. 52 in fin.* & est Regalia, quae inheret ossibus Principis, ac connumeratur inter Regalia maiora *in d. cap. unic.* & notat Boss. *de bon. vacant. in fin.* Peregrin. *de iure Fisc. lib. 4. tit. 3. num 19. glos. ad Rosental. in glos. Asupra* Montan. *de Regal. in verb. bona vacantia num. 4. vers. sed non sufficiat.* Regalium autem solus Princeps capax est, vel qui habent ab eo concessionem, non alius". Archivio di Stato di Milano (Asmi), *Finanze p.a.*, 567: "Bona vacantia Clericorum ad Cameram Regiam spectant [...]" in 1662, 14th June (on the vacant inheritance of Don Carlo Mandruzzi, Bishop of Trento).

131 On the concept of political "trust", see Niklas Luhmann, *Trust and Power: Two Works by Niklas*

Luhmann With Introduction by Gianfranco Poggi, Chichester, John Wiley & Sons, 1979; Diego Gambetta, *Trust: Making and Breaking Cooperative Relations*, New York, Basil Blackwell, 1988. For legal-constitutional considerations relating to the ancien regime see Paolo Prodi, *Il sacramento del potere: Il giuramento politico nella storia costituzionale dell'Occidente*, Bologna, il Mulino, 1992 and also Paolo Prodi, *La fiducia secondo i linguaggi del potere*, Bologna, il Mulino, 2007. I believe that a useful comparison may be that of economic historians who have enquired into the subject of trust in the study of commercial networks. See, for example, Sebouh Aslanian, "Social capital, 'trust' and the role of networks in Julfan trade: informal and semiformal institutions at work", *Journal of Global History*, nº 1, 2006, p. 383-402; for a critique to this neo-institutionalist approach see Francesca Trivellato, *The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period*, New Haven, Yale University Press, 2009.

132 Considerable light has been thrown on this mechanism for the Italian context by Luca Mannori, *Il Sovrano tutore: pluralismo istituzionale e accentramento amnistrativo nel principato dei Medici (Secc. XVI-XVIII)*, Milan, Giuffré, 1994.

133 Bianca Premo, *Children of the Father King: Youth, Authority, and Legal Minority in Colonial Lima*, Chapel Hill, University of North Carolina Press, 2005.

134 Giovanni Levi, "Reciprocidad mediterránea", *Hispania: Revista española de historia*, nº 204, 2000, p. 103-126, acutely critiques those (such as Quentin Skinner and Bartolomé Clavero) who, working in the "political anthropology of the *ancient regime's* Catholic societies are surprised by the apparently libertarian character of its social rules: men are completely free in their choices, their political systems are not God's creations but fruit of free will. But this freedom is under tutelage: like children experimenting with their own relationship with the real world under the watchful gaze of their parents, men [...] experiment with the task entrusted them to form a political and economic society. But the Church, incarnation of God's directional and coercive power, is entrusted with a control and attraction task to channel men, in accordance with the law, in the direction of the achievement of supernatural objectives from which they move away continually as sinners". Human freedom is thus "only apparent: it is the freedom of the sinner under tutelage".

135 Luca Mannori, "Per una 'preistoria' della funzione amministrativa: Cultura giuridica e attività dei pubblici apparati nell'età del tardo diritto comune", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 19, 1990, p. 428-429.

136 Luca Mannori, "Per una 'preistoria' della funzione amministrativa: Cultura giuridica e attività dei pubblici apparati nell'età del tardo diritto comune", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 19, 1990, p. 428-429.

137 Herman Ooms, *Tokugawa Village Practice: Class, Status, Power, Law*, Berkeley and Los Angeles, University of California Press, 1996.

138 Simona Cerutti, Isabelle Grangaud, "Sources and Contextualizations: Comparing Eighteenth-Century North African and Western European Institutions", *Comparative Studies in Society and History*, v. 59, January 17, p. 11, DOI: https://doi.org/10.1017/S0010417516000591.

139 "The father image served to express power relationships. By means of this image the whole of the family's rights and duties were expressed" (Élie Haddad, *Fondation et ruine d'une "maison". Histoire sociale des comtes de Belin (1582-1706)*, Limoges, Presses Universitaires de Limoges, 2009, p. 116). On this subject Claire Dolan has coined the expression of a society with a "père focal" (patri-focal) ideology (Claire Dolan, *Le notaire, la Famille, et la ville (Aix-en-Provence à la fin du XVIe siècle)*, Toulouse, Presses Universitaires du Mirail, 1998). Moreover, Bartolomé Clavero (reviewing Luca Mannori's, *Il sovrano tutore* and Stefano Mannoni's *Une et indivisible* books) rightly notes that the image of the "father" was not used solely by the king for the purposes of state centralisation but was also used by all entities to establish a power relationship, Bartolomé Clavero, "Tutela administrativa o dialogos con Tocqueville (A propósito de *Une et indivisible* de Mannoni, *Sovrano tutore* de Mannori y un curso mío)", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, nº 24, 1995, p. 419-468.

140 Understood as representation by identification, Hasso Hofmann, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento*, Milan, Giuffrè, 2007, in particular chapter V.

141 Think, for example, of the struggles around the interpretation of the will of the "founder" in the management of entails or chantries, see Maria de Lurdes Rosa's chapter in this volume.

142 Paolo Grossi, *L'ordine giuridico medievale*, Roma and Bari, Laterza, 1995; Giovanni Levi, "Reciprocidad mediterránea", *Hispania: Revista española de historia*, nº 204, 2000, p. 103-126.

143 Based on a comparison of a global sample of 30 societies from the 5th century BCE to the 20th century CE. Richard Blanton, Lane Fargher, *Collective Action in the Formation of Pre-Modern States*, New York, Springer, 2008 and Richard Blanton and Lane Fargher, *How Humans cooperate: Confronting the Challenge of Collective Action*, Boulder, University Press of Colorado, 2016. It is also important to bear in mind that the principle of collective responsibility in *ancient regime* European societies was not solely a matter of the society of the living. On the subject of the *fondations de messes* (chantries) in late medieval France, Gaëlle Tarbochez has noted that as beneficiaries of *pro anima* intercession alongside "earthly families", *the founders* were referred to as "Christians both dead and alive" testifying to a "belief in the *communion of the saint*s, namely mutual responsibility between the faithful as a whole, both dead and alive" (Gaëlle Tarbochez, "Les solidarités familiales par-delà la mort à Dijon à la fin du Moyen Âge", *Revue de l'histoire des religions*, nº 1, p. 25-41, 2005, here p. 28-29). More generally, Jacques Chiffoleau, *La comptabilité de l'au-delà: les hommes, la mort et la religion dans la région d'Avignon à la fin du Moyen Age, vers 1320-vers 1480*, Roma, École française de Rome, 1980.

144 *E.g*. the “viciníe” characterising the internal structure of Italian “Commune”.

145 On the *baojia* system Ch’ü T’ung Tsu (Tongzu Qu), *Local Government in China under the Ch’ing*, Cambridge - Massachusetts, Harvard University Press, 1962, p. 2-4; Robert J. Antony, *Unruly People. Crime, Community, and State in Late Imperial South China*, Hong Kong, Hong Kong University Press, 2016, p. 70-79; on collective responsibility in China Joanna Waley-Cohen, “Collective Responsibility in Qing Criminal Law”, in Karen G. Turner, James V. Feinerman and R. Kent Guy (eds.), *The Limits of the Rule of Law in China*, Seattle and London, University of Washington Press, 2000, p. 112-131. On Japan, Herman Ooms, *Tokugawa Village Practice: Class, Status, Power, Law*, Berkeley and Los Angeles, University of California Press, 1996; Osamu Saito and Masahiro Sato, “Japan’s Civil Registration Systems. Before and After the Meiji Restoration”, in Keith Breckenridge, Simon Szreter (eds.), *Registration and Recognition: Documenting the Person in World History*, Oxford, The British Academy-Oxford University Press, 2012, p. 113-135; Francine Herail (ed.), *Histoire du Japon. Des origines à nos jours*, Paris, Hermann, 2009, p. 706-744. On Korea, Martina Deuchler, *Under the Ancestors’ Eyes. Kinship, Status, and Locality in Premodern Korea*, Cambridge - Massachusetts, Harvard University Asia Center, 2015, p. 261-264 On this subject see also Alessandro Buono, “Anziano, calpixqui, shaykh, nanushi. Note per una storia globale dei ‘ruoli inter-gerarchici’ e del vicinato”, in Stefano Levati, Simona Mori (eds.), *Una storia di rigore e passione. Studi per Livio Antonielli*, Milan, Franco Angeli, p. 167-189.

146 Nakai Nobuhiko, John McClain, “Commercial Change and Urban Growth in Early Modern Japan”, in John McClain (Author) and John W. Hall (ed.), *The Cambridge History of Japan*, Cambridge, Cambridge University Press, 1991, here p. 535. Neighbourhood interference in inheritances, moreover, would seem to me to be wholly comparable as is shown by the case of two women’s contested inheritances in Japan and Italy: Ken (of Makibuse, Nagano prefecture, Japan) (Herman Ooms, *Tokugawa Village Practice: Class, Status, Power, Law*, Berkeley and Los Angeles, University of California Press, 1996, chapter I) and Caterina (Sarzana, Liguria, Italy) (Edoardo Grendi, *Lettere orbe: Anonimato e poteri nel Seicento genovese*, Palermo, Gelka, 1989, p. 76-79).

147 Rocío Sánchez Rubio, Isabel Testón Núñez, “Mecanismos de control y sistemas de identificación de la Monarquía hispánica en el trasvase poblacional al Nuevo Mundo (siglo XVI)”, in L. Antonielli (ed.), *Procedure, metodi, strumenti per l’identificazione delle persone e per il controllo del territorio*, Soveria Mannelli, Rubbettino, 2014, p. 74.

148 Osamu Saito, Masahiro Sato, “Japan’s Civil Registration Systems. Before and After the Meiji Restoration”, in Keith Breckenridge, Simon Szreter (eds.), *Registration and Recognition: Documenting the Person in World History*, Oxford, The British Academy-Oxford University Press, 2012, p. 120. Similarly, in China during the Song dynasty, “The state’s interest in *juehu* [*extinct household*] property was threefold. First, it was vitally concerned that the land continued to be farmed, taxes paid, and labor services rendered. Song law required that the extinction of a household be reported to local officials within three days after the death of the surviving parent or, as one Northern Song official sarcastically put it, even before ‘the deceased’s eyes have fully closed’. The fear behind the urgency was that the land would lie fallow or that other families in the village would secretly assume cultivation of it. Either outcome would deprive the state of much-needed taxes and labor services. A related concern was the state’s desire to check the engrossment of land by powerful official and gentry families who, through a combination of legal exemptions and illegal means, were able to evade labor service duties and taxes” (Katherine Bernhardt, “The Inheritance Rights of Daughters: The Song Anomaly?”, *Modern China*, v. 21, nº 3, 1995, p. 277-278). See also Sun and Gabbiani’s and Matsubara’s chapters in this volume.

149 I am thinking of “removal orders” and “settlement certificates” (Joan R. Kent, “The Centre and the Localities: State Formation and Parish Government in England, Circa 1640-1740”, *The Historical Journal*, v. 38, nº 2, 1995, p. 363-404).

150 Carlos Alberto González Sánchez, *Dineros de ventura: La varia fortuna de la emigración a Indias (siglos XVI-XVII)*, Seville, Universidad de Sevilla, 1995.

151 Sorai Ogyū (1666-1728), Japanese Confucian philosopher, from 1696 to 1709 in the service of Yanagisawa Yoshiyasu, a senior councillor to Tsunayoshi, the fifth shogun of the Tokugawa dynasty.

152 Sorai Ogyū, *Ogyu Sorai’s Discourse on government (Seidan): An annotated translation, by Olof G. Lidin*, Wiesbaden, Harrassowitz Verlag, 1999, p. 91-92.

153 Sorai Ogyū, *Ogyu Sorai’s Discourse on government (Seidan): An annotated translation, by Olof G. Lidin*, Wiesbaden, Harrassowitz Verlag, 1999, p. 92.

154 Sorai Ogyū, *Ogyu Sorai’s Discourse on government (Seidan): An annotated translation, by Olof G. Lidin*, Wiesbaden, Harrassowitz Verlag, 1999, p. 92.

Pour citer cet article

Référence électronique
Alessandro Buono, « The King Heir. Claiming Vacant Estate Succession in Europe and in the Spanish World (13th-18th Centuries) », *L’Atelier du Centre de recherches historiques* [En ligne], 22 I 2020, mis en ligne le 25 novembre 2020, consulté le 10 décembre 2020. URL : http://journals.openedition.org/acrh/10917 ; DOI : https://doi.org/10.4000/acrh.10917

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Introduction [Texte intégral]
Paru dans *L’Atelier du Centre de recherches historiques*, 22 | 2020

Droits d’auteur