

How to Approach Indigenous Law?

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It is important to remember that both the term “indigenous peoples” and the concept of “precolonial past” were created as categories only at the time of the European invasion. This does not mean that the people so described did not have their own ways for defining themselves and registering the past, but rather that transforming the conquest into a turning point in the historical narrative was part of an epistemological colonial setting *per se*. The issue is especially acute when dealing with precolonial law because most the available written sources on this topic were recorded during the colonial period and were therefore drafted from the perspective and in the language of their time. How then to approach indigenous law?

For many years, this question was mostly ignored by legal historians. As Carlos Petit points out in Section 1.1, “the *Latin* omits or silences the *American*, that is, the presence and experiences of indigenous peoples” in the history of law. It is therefore necessary to first shed some light on the factors that might explain this lack of interest in indigenous law, which prevailed in legal history from the nineteenth century until the 1920s and explain why this law acquired increasing relevance from that moment on. The first section of this chapter will highlight the links between the treatment of the indigenous component in Latin American legal history and the position that both the indigenous peoples and the law were thought to occupy in the societies in which those narratives were written. The second section will provide a dynamic picture of precolonial law and show that to study this topic requires questioning the relations and boundaries between various disciplines such as archaeology, history, and anthropology. Writing the history of indigenous law from precolonial times is especially challenging, not only because of the diversity of human groups that occupied the continent but also because of the disparity of sources available according to the cultures and periods under consideration. Not all the indigenous peoples have left lasting material traces throughout America over the centuries. Moreover, although the Olmecs, the Maya, the

Mixtecs, and the Aztecs created systems of writing, only a few precolonial texts have survived to the present day. A similar observation can be made with regard to the *quipus*, a system of cords with different colors and knots that were produced in the Andean region from the time of the Wari culture. Nevertheless, the progress made in the fields of epigraphy, archaeology, and ethnohistory sheds new light on indigenous law.

The last section will propose a reflection on the relations between indigenous and European law in the aftermath of the Spanish and Portuguese conquests. We will show that, after the Iberian conquests, a wide range of alphabetic texts focusing on precolonial indigenous normative orders was produced. These records were diverse in authorship, languages, formats, degree of accuracy, and sources selected. Not only the Spaniards but also indigenous peoples and *mestizos* (individuals of mixed descent) wrote – sometimes in their own languages – historical narratives, accounts of deeds and services, and requests to the king. Furthermore, indigenous people participated as litigants in a number of lawsuits in which they gave their own vision of law and justice according to their own interests. It is therefore necessary to ask what this evidence tells us about precolonial normative orders and the way in which they intersected with colonial law after the Iberian imperial conquests.

Indigenous Law in Historiographical Perspective

Although, as will be shown later, the indigenous past was an essential component in writings from the colonial period, the rise of nation-states in the first decades of the nineteenth century marked a shift in the position that both indigenous peoples and their law were held to occupy in Latin America. As was common at that time, the society in which the modern state was going to be built was expected to share a homogenous national identity. Defining national identity as white and European led the Latin American elite either to ignore indigenous peoples or to consider them a problem to be solved through assimilation or, in some extreme cases, physical elimination.¹ Furthermore, the contradiction between a universalist and egalitarian understanding of law and a hierarchical and racialized conception of society was “solved” by creating unequal forms of citizenship within the first Latin American constitutions

1 P. López Caballero and C. Giudicelli (eds.), *Régimes nationaux d'altérité. États-nations et altérités autochtones en Amérique latine, 1810–1950* (Rennes: Presses Universitaires de Rennes, 2016); C. R. Larson, *The Conquest of the Desert* (Albuquerque: University of New Mexico Press, 2020).

on the basis of cultural, moral, socioeconomic, or racial grounds.² According to José María Portillo, a definition of the citizen as an autonomous individual closed the doors of political inclusion not only to women but also to “the plebeian sector of those societies, mainly *mestizo* and indigenous.”³

This is not to say that the precolonial indigenous past was hidden, since its monuments were brought into the spotlight by the consolidation of archaeology as a scientific field, but rather that the dead “Indians” and their ancient civilizations were separated from the living. Antiquarians and scholars considered that “contemporary nineteenth-century American Indians were not direct descendants of the enlightened dwellers of ancient America; or if they were, their stock had degenerated beyond recognition.”⁴ In other words, interest in the indigenous past was articulated around the issue of the origins of humanity and ancient world civilizations, through racist, diffusionist, and evolutionist approaches. In doing so, archaeology emerged as participant in a political project that followed the exclusionary national model, as evidenced by its close links with the museums as well as by the enactment of the first laws intended to protect the patrimony of the Latin American countries.⁵

- 2 According to Silvia Sebastiani, the nineteenth-century emergence of racial anthropology took place in “a new Atlantic and trans-imperial perspective” in which “the Enlightenment debate about the ‘science of man’” was transformed into “a dispute about the inferiority of human races versus the equality of human beings.” S. Sebastiani, “Anthropology beyond Empires: Samuel Stanhope Smith and the Reconfiguration of the Atlantic World,” in L. Kontler, A. Romano, et al. (eds.), *Negotiating Knowledge in Early Modern Empires: A Decentered View* (London: Palgrave MacMillan, 2014), 207–33.
- 3 See Section 5.1; B. Clavero, *Derecho indígena y cultura constitucional en América* (Mexico City: Editorial Siglo XXI, 1995); A. M. Hespanha, “Le Droit et la domination coloniale européenne. Le cas de l’Empire oriental portugais,” in J. C. Garavaglia and J.-F. Schaub (eds.), *Lois, justice, coutumes. Amérique et Europe latines, 16e-19e siècles* (Paris: Editions de l’Ecole des Hautes Etudes en Sciences Sociales, 2005), 203–26; Y. Miki, *Frontiers of Citizenship: A Black and Indigenous History of Postcolonial Brazil* (Cambridge: Cambridge University Press, 2018); J. Harrington, *The Uses of Imperial Citizenship: The British and French Empires* (London: Rowman & Littlefield Publishers, 2020); E. Isin (ed.), *Citizenship after Orientalism: Transforming Political Theory* (London: Palgrave Macmillan, 2015).
- 4 M. Achim, *From Idols to Antiquity: Forging the National Museum of Mexico* (Lincoln and London: University of Nebraska Press, 2017), 253. On the distinction between the dead and the living “Indians,” see also E. Sanz Jara, *Los indios de la nación. Los indígenas en los escritos de intelectuales y políticos del México independiente* (Madrid and Berlin: Iberoamericana, Vervuert, 2011).
- 5 Achim, *From Idols to Antiquity*; S. Gänger, *Relics of the Past: The Collecting and Study of Pre-Columbian Antiquities in Peru and Chile, 1837–1911* (Oxford: Oxford University Press, 2014), 250–53; O. Chinchilla Mazariego, “Archaeology in Guatemala: Nationalist, Colonialist, Imperialist,” in D. L. Nichols and C. A. Pool (eds.), *The Oxford Handbook of Mesoamerican Archaeology* (New York: Oxford University Press, 2012), 55–68. On the changing importance that Latin American elites gave to the precolonial past in the nineteenth-century process of nation-building, see R. A. Earle, *The Return of the Native: Indians and Myth-Making in Spanish America, 1810–1930* (Durham and London: Duke University Press, 2007), especially Chapter 6, “Citizenship and Civilization: The ‘Indian Problem’.”

Furthermore, in line with the desire for a state monopoly over normative production, it was not really possible for contemporaries to see “law” without also taking into account the notion of state itself; or, to put it differently, “law” was defined by them as the written systems of norms decreed by a state. With the existence of precolonial states not even deemed worthy of consideration, legal historians manifested little if any interest in any hypothetical precolonial law. In fact, the very idea of a precolonial indigenous history was questioned, since historical science was thought to be the study of written, and preferentially alphabetic, texts. As Petit points out in Section 1.1, the disintegration of the Spanish empire and the perception of the United States as a threat also played a key role in constituting transatlantic networks of intellectuals around the notions of *raza* and *hispanidad*.⁶ Accordingly, the history of law in Latin America was thought to begin with Spanish and Portuguese law, in an area covered by the *derecho indiano*.⁷ As for the *derecho patrio*, which emerged in the newly created Latin American nation-states after the wars of independence, this was formulated within a national framework that barely considered indigenous peoples and excluded precolonial law altogether (see Section 1.1).

However, there were alternative, although marginal, narratives. In 1864, a Mexican lawyer called Francisco León Carbajal wrote a dissertation on the “legislation of the ancient Mexicans” in which he argued that “if we want to give fair, beneficial and efficient laws to our homeland, not only the few European elements that Mexico possesses, but also particularly the

6 On the role played by the pan-American conferences in the construction of transatlantic networks, see C. Marichal (ed.), *México y las Conferencias Panamericanas 1889–1938. Antecedentes de la globalización* (Mexico City: Secretaría de Relaciones Exteriores, 2002). See also I. Sepúlveda Muñoz, *El sueño de la madre patria: hispanoamericanismo y nacionalismo* (Madrid: Marcial Pons, 2005); L. López-Ocón Cabrera, J.-P. Chaumeil, and A. Verde Casanova (eds.), *Los americanistas del siglo XIX. La construcción de una comunidad científica internacional* (Madrid: Iberoamericana, 2005); L. López-Ocón Cabrera, “El papel de los primeros congresos internacionales de americanistas en la construcción de una comunidad científica,” in M. Quijada and J. Bustamante García (eds.), *Elites intelectuales y modelos colectivos. Mundo ibérico, siglos XVI–XIX* (Madrid: Consejo Superior de Investigación Científica, 2002), 271–84.

7 On the difficulties of applying the concept of *derecho indiano* in the Portuguese empire, see A. M. Hespanha, “O ‘direito das Índias’ no contexto da historiografia das colonizações ibéricas,” in T. Duve (ed.), *Actas del XIX Congreso del Instituto Internacional de Derecho Indiano. Berlín 2016* (Madrid: Universidad Carlos III de Madrid, 2019), 43–83. On the reasons that help explain the absence of this concept in the history of the British Empire, see R. J. Ross, “Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing Derecho Británico Indiano,” in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 9–28.

indigenous ones have to be taken into account.”⁸ The author made use of the early colonial pictographic manuscript known as the *Codex Mendoza*, published by Lord Kingsborough in 1831, which he described as “a judicial lawsuit in Aztec hieroglyphs.”⁹ In Peru, some oral traditions regarding the “just laws and moral values of the Incas” were recorded by Cesare Cantú, in his *Historia Universal*, and by Gabino Pacheco Zegarro in his translation of the Quechua play *Ollantay*.¹⁰ In Brazil, José Izidoro Martins Junior warned against “the error of forgetting the forces of indigenous and imported black peoples,” alongside the European racial substratum, for the formation of Brazilian nationality in his *História do Direito Nacional* (1895).¹¹

In order to better understand this marginal trend in Latin American legal history, one should look at it in a larger political and intellectual context. In the nineteenth-century United States, a number of scholars became interested in the indigenous past, with a clear prevalence of a museum-based archaeology. They also sought to find, by studying the recollections of a few indigenous men, a past that they felt was in danger of disappearing. It is worth noting that this movement was closely linked to nationalism.¹² Moreover, it aimed to achieve a continental dimension, as was demonstrated by the interest shown by North American intellectuals such as Daniel G. Brinton or John Lloyd Stephens for precolonial Central American past and ruins.¹³ The “Native American tradition” therefore offered an alternative to the concepts of *raza* and *hispanidad* in Latin American national discourses and was echoed in legal history.

In the twentieth century, however, under the influence of Franz Boas, anthropology’s primary institutional basis changed “from museum to university.”¹⁴ Not only was the notion of “museum anthropology based on

8 F. León Carbajal, *Discurso sobre la legislación de los antiguos mexicanos, 1864 con estudio preliminar de A. L. Izquierdo y de la Cueva* (Mexico City: Instituto Nacional de Ciencias Penales, 2014), 4 (unless otherwise indicated, all translations are by the author).

9 Carbajal’s description of the *Codex Mendoza* points not only to the content of the document but also to its origins, while drawing a subtle line between the Aztec and the Egyptian civilizations through the designation of the system of writing.

10 R. Cerrón Palomino, “Sobre el carácter espurio de la trilogía moral incaica,” in L. Regalado and F. Hernández (eds.), *Sobre los Incas* (Lima: Instituto Riva-Agüero, Pontificia Universidad Católica del Perú, 2011), 69–76.

11 Petit, Section 1.1.

12 L. Philips Valentine and R. Darnell, *Theorizing the Americanist Tradition* (Toronto: University of Toronto Press, 1999).

13 T. Evans, *Romancing the Mayas: Mexican Antiquity in the American Imagination, 1820–1915* (Austin: University of Texas Press, 2004).

14 S. E. Murray, “The Non-Eclipse of Americanist Anthropology during the 1930s and 1940s,” in Philips Valentine and Darnell, *Theorizing the Americanist Tradition*, 52–74, at 56.

evolution and diffusion of items of material culture” questioned, but anthropology also moved out of the shadow of archaeology. Its main objective went from seeking in a few men’s recollections a past in danger of disappearing to the study of living communities.¹⁵ From this perspective, the historical approach became one factor among many in the understanding of any given community.¹⁶ British functionalist anthropologists such as Alfred Radcliffe-Brown even called into question the pertinence of history in the analysis of “social laws.”¹⁷ These debates, which transcended national boundaries, had critical consequences not only for the understanding of normativity but also for the place contemporary indigenous peoples occupied in the academic field, since their “social laws” became the subject of anthropological studies. Moreover, anthropological studies aimed to be useful in forging state policies within and outside national boundaries, either to address indigenous issues or to implement imperialist views.¹⁸

Mexican intellectuals such as Manuel Gamio or Moisés Sáenz, who both studied at Columbia University in the 1910s, were in contact with Boas and the sociologist and advocate for “Native American matters” John Collier, who played a key role in shaping the “Indian policy” in the United States in the 1930s.¹⁹ They also had close ties with other Latin American scholars.²⁰

¹⁵ Ibid.

¹⁶ R. Darnell, “Theorizing Americanist Anthropology: Continuities from the B. A. E. to the Boasians,” in Philips Valentine and Darnell, *Theorizing the Americanist Tradition*, 38–51, at 50.

¹⁷ Murray, “The Non-Eclipse of Americanist Anthropology,” 52–54.

¹⁸ In *Forjando Patria*, Mexican anthropologist Manuel Gamio lamented that “it was erroneously thought that ... the diverse laws of our continent addressed the lifestyle of native people, whereas the text and the spirit of almost all of them are only inspired by the tendencies, needs, and aspirations of the American groups of European race, culture, and language.... It is thus unfair that the criteria of the Social Sciences, which are supposed to and have to give form to the law ... are unilaterally imposed on the indigenous groups.” M. Gamio, *Forjando Patria* (Mexico City: Editorial Porrúa, 1960 [1918]), 199.

¹⁹ S. Rico Monge, “Manuel Gamio Martínez entre México y América Latina: Indigenismo, nacionalismo y poder,” *Pacarina del Sur* 25 (2015); T. Blanchette, “Applied Anthropology and Indigenous Administration in the United States: 1934–1945,” *Desacatos* 33 (2010), 33–52; W. T. Ahlstedt, “John Collier and Mexico and the Shaping of U.S. Indian Policy: 1934–1945,” Ph.D. thesis (Lincoln, Nebraska: University of Nebraska-Lincoln, 2015); D. Robichaux, “Del Indian New Deal al indigenismo interamericano: Moisés Sáenz y John Collier,” *Cahiers des Amériques latines* 95 (2020), 165–84.

²⁰ The literature on *indigenismo* has increased substantially in recent years. For an excellent historiographical synthesis, see L. Giraud, “Indigenismo en las Américas: balance provisional y perspectivas en los estudios,” the introduction to the dossier “Relire l’indigénisme aujourd’hui. Sources, pratiques, acteurs,” *Cahiers des Amériques latines* 95 (2020), [Online], 95|2020, Online since 14 September 2021, connection on 01 August 2023. URL: <http://journals.openedition.org/cal/12404>; DOI: <https://doi.org/10.4000/cal.12404>. See also J. Coronado, *The Andes Imagined: Indigenismo, Society,*

The Congresos Indigenistas Interamericanos and especially the first one held in Patzcuaro in 1940, which led to the creation of the Instituto Indigenista Interamericano, were also critical in structuring the field of *indigenismo*, which oscillated between an “inter-American scope and national trajectories.”²¹ Although anthropology was central to *indigenismo*, it is essential to ask what the place of history and, especially, the indigenous past was in order to understand how precolonial law was being addressed during this period.

Mexican sociologist Lucio Mendieta y Núñez, who founded the Instituto de Investigaciones Sociales at the National Autonomous University of Mexico in 1930, stated that law was “nothing but one of the expressions of the culture of a specific group and transforms itself depending on the group who creates it, following his historical and social contingencies.” According to him, it was “necessary to deal with the law observed by the indigenous peoples before the conquest ... because ... the actual population of the [Mexican] Republic, in its aboriginal groups, has many cultural contact points with its primitive inhabitants.”²² In other words, law was now conceived as a cultural product and a connection was drawn between the indigenous present-day social life and precolonial past, therefore justifying a dialogue between anthropology and history. Moreover, knowledge of indigenous law, past and present, was now expected to be part of the “national identity” and to be used in the implementation of the nation’s legal policies.

It is thus not surprising that during this period precolonial law was studied by anthropologists or sociologists whose interest in indigenous contemporary life extended to the ancient past, with a view to applying anthropological

and Modernity (Pittsburgh: University of Pittsburgh Press, 2009); S. E. Lewis, *Rethinking Mexican Indigenismo: The INI's Coordinating Center in the Highland Chiapas and the Fate of a Utopian Project* (Albuquerque: University of New Mexico Press, 2018); T. A. Diacon, *Stringing Together a Nation: Candido Mariano da Silva Rondon and the Construction of a Modern Brazil, 1906–1930* (Durham and London: Duke University Press, 2004); J. Pacheco de Oliveira (ed.), *Sociedades indígenas e indigenismo no Brasil* (Rio de Janeiro and São Paulo: EdUERJ, Marco Zero, 1987); A. C. de Souza Lima, “El indigenismo en Brasil: migración y reapropiaciones de un saber administrativo,” in J. P. de Oliveira (ed.), *Hacia una antropología del indigenismo* (Rio de Janeiro and Lima: Contra Capa, Centro Amazónico de Antropología y Aplicación Práctica, 2006), 97–125; C. Briones (ed.), *Cartografías argentinas. Políticas indigenistas y formaciones provinciales de alteridad* (Buenos Aires: Antropofagia, 2008).

- 21 L. Giraudo and J. Martín-Sánchez (eds.), *La ambivalente historia del indigenismo. Campo interamericano y trayectorias nacionales, 1940–1970* (Lima: Instituto de Estudios Peruanos, 2011); L. Giraudo and S. E. Lewis, “Pan-American Indigenismo (1940–1970): New Approaches to an Ongoing Debate,” in L. Giraudo and S. E. Lewis (eds.), Special issue “Rethinking Indigenismo on the American Continent,” *Latin American Perspectives* 39(5) (2012), 3–11.
- 22 L. Mendieta y Núñez, *El Derecho precolonial* (Mexico City: Editorial Porrúa, 1992 [1937]), 26.

knowledge to state policies. In this respect, it is important to note that a preliminary version of Mendieta y Núñez's work was published in *Ethnos*, a review edited by Gamio, and that the anthropologist Carlos H. Alba's *Estudio comparado entre el derecho azteca y el derecho positivo mexicano* was published a few years later by the Instituto Indigenista Interamericano with a prologue by Gamio.²³ In Peru, the anthropologist Luis Valcárcel, who had close ties with the intellectuals José María Arguedas and José Carlos Mariátegui, played a key role in promoting Inca laws as a subject for study in the 1920s and 1930s. He became the director of the Instituto Indigenista Peruano in 1948.²⁴

Given this context, precolonial law, which had previously been of marginal or no interest at all, took on significantly more importance in the writings of Latin American legal historians. A number of Mexican jurists began writing texts on the "judicial institutions of the civilized indigenous people of Mexico before the conquest," to use Alfonso Toro's expression.²⁵ Moreover, "Aztec law" was included in the lessons on the "History of National Law" that were given in the Escuela Libre de Derecho, an institution created in Mexico City in 1912. Josef Kohler's *El derecho de los aztecas*, first published in German in 1892 as an exercise in comparative law, was translated into Spanish and published by the *Revista jurídica de la Escuela libre de derecho* in 1924 and circulated widely throughout Latin America.²⁶ A similar trend can be observed in Peru, as recently shown by Carlos Ramos Núñez.²⁷ The relation between academic knowledge and state policies, and the tensions between the wish not only to recognize and protect but also to integrate and assimilate, were reflected in contemporary Latin American national institutions, as evidenced

23 C. Alba, *Estudio comparado entre el derecho azteca y el derecho positivo mexicano*, with an introduction by M. Gamio (Mexico City: Instituto Indigenista Interamericano, 1949).

24 L. Valcárcel, *Del ayllu al imperio: la evolución político-social en el antiguo Perú y otros estudios* (Lima: Edición Garcilaso, 1925); O. Gonzales, "The Instituto Indigenista Peruano: A New Place in the State for the Indigenous Debate," *Latin American Perspectives* 39(5) (2002); H. Urteaga, *La organización judicial en el imperio de los incas y en la colonia. Contribución al estudio del derecho peruano* (Lima: Imprenta Gil, 1938). The first version of the book, focused on Inca law, was published in 1928.

25 Ramón Prida, Manuel Moreno, Alfonso Toro, Roque Cevallos Novelo, Salvador Toscano, and Toribio Esquivel Obregon can be included among the Mexican jurists who showed an interest in precolonial law in the 1930s. J. de Cervantes y Anaya, *Introducción a la historia del pensamiento jurídico en México* (Mexico City: Tribunal Superior de Justicia del Distrito Federal, 2002), 393–447.

26 J. Kohler, *El Derecho de los aztecas*, trans. C. Rovalo y Fernández, cia (Mexico City: Compañía Editora Latinoamericana, 1924).

27 C. Ramos Núñez, *Historial del derecho civil peruano, siglos XIX y XX: los signos del cambio* (Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2006), tome 5, vol. II, 215–30. As for Brazil, see R. Otávio, *Os Selvagens americanos Perante o direito* (São Paulo: Companhia Editorial Nacional, 1946).

by the creation in Brazil of the Serviço de Proteção aos Índios (1910) and of the Conselho Nacional de Proteção aos Índios (1939).²⁸

Because sources for legal history are “invented” by legal historians, in a sense that they fit their own idea of what the law is in the first place, it is also legitimate to ask what sources were used to write the history of precolonial law in the early 1900s.²⁹ The majority consisted of Spanish texts from the colonial period that had been found and published by nineteenth-century scholars such as Joaquín García Icazbalceta.³⁰ In Peru, significant work was undertaken by Horacio Urteaga and Carlos Romero.³¹ Indigenous and *mestizo* chronicles, however, were almost absent. More critically, the legal historians mentioned earlier did not take into account the imperial context of how these sources were produced. It was as if those texts faithfully “reflected” the precolonial indigenous past and as if colonial policies had had no impact on indigenous peoples’ history – thus justifying the drawing of a connection between their precolonial past and their contemporary life.

However, the Cold War and the struggles against colonial regimes brought about a change among anthropologists and helped create “a sense of how the changing world order ... affected the imperatives of their work.”³² According to Brian K. Axel, before World War II, “within anthropology, the primary concern with history was in evaluating its use as a technique of reconstruction – the viability of which relied upon whether it might successfully yield an image

28 A. C. de Souza Lima, “Poder tutelar y formación del Estado en Brasil: notas a partir de la creación del Servicio de Protección a los Indios y Localización de Trabajadores Nacionales,” *Desacatos* 33 (2010), 53–66. For a reflection on the ambiguities that resulted from the applied dimension of anthropology in Latin American *indigenismo*, see L. Giraudo, “Neither ‘Scientific’ nor ‘Colonialist’: The Ambiguous Course of Inter-American Indigenismo in the 1940s,” *Latin American Perspectives* 39(5) (2012), 12–32.

29 On the “invention” of sources for the colonial law, see Tamar Herzog, Section 3.1. See also T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Leiden: Brill, 2020).

30 R. Martínez Baracs, “Los estudios sobre Joaquín García Icazbalceta,” *Historias, Revista de la Dirección de Estudios Históricos del INAH* 99 (2018), 109–21. Of particular relevance were the sources published in the *Colección de documentos para la historia de México*, 2 vols. (Mexico City: Antigua Librería, 1858–1866) and the *Nueva colección de documentos para la historia de México*, 5 vols. (Mexico City: Antigua Librería de Andrade y Morales, Sucesores, 1886–1892), but also see J. de Mendieta, *Historia eclesiástica indiana* (Mexico City: Antigua Librería, 1870); M. Mould de Pease, “Historia del Perú en traducción: un comentario a las primeras versiones en español de la obra de William Prescott,” *Histórica* 9(1) (1985), 15–34.

31 *Colección de Libros y Documentos referentes a la Historia del Perú, anotados y concordados con las Crónicas de Indias* (1916–1921).

32 This sense of a change did not extend, however, to anthropologists being “willing to make explicit the relationship of their work to colonial violence.” B. K. Axel, “Introduction: Historical Anthropology and Its Vicissitudes,” in B. K. Axel (ed.), *From the Margins. Historical Anthropology and Its Future* (Durham and London: Duke University Press, 2002), 1–44, at 5.

of primitive society prior to the advent of colonialism,” a tendency he also called the “prewar fetish of precolonial purity.”³³ In the post-World War II era, however, the awareness that communities were “enclosed in, and form part of great historical societies” became critical.³⁴ This shift affected the relation between anthropology and history, insofar as they were now concerned with the changes that affected human groups within complex societies. In the 1960s, those new concerns gave rise to the advent of “ethnohistory,” an academic and intellectual movement that can be defined as the study of the indigenous peoples from an interdisciplinary perspective seeking to bridge the gaps between archaeology, history, and anthropology.³⁵

For ethnohistorians it was especially important to analyze the history of indigenous peoples during the colonial period, an aspect that had previously been neglected. The question of continuity of and rupture with precolonial indigenous practices under European colonial domination became a key topic in ethnohistorical studies. This trend also emerged alongside the “invention” of new sources, placing at center stage the publication and study of indigenous chroniclers, archival material, and texts written in local languages or in local scripts.³⁶ John V. Murra’s career and his interest in the precolonial, colonial, and contemporary indigenous peoples of the Andes are emblematic of

33 Axel, “Introduction,” 3 and 7.

34 E. E. Evans-Pritchard, “Anthropology and History,” in *Social Anthropology and Other Essays* (New York: The Free Press of Glencoe, 1962), 147, cited by Axel, “Introduction,” 6.

35 As early as 1962, Adams outlined the main characteristics of Latin American ethnohistory. R. N. Adams, “Ethnohistoric Research Methods: Some Latin American Features,” *Ethnohistory* 9(2) (1962), 179–205. For a general discussion on the rise and limits of ethnohistory, see S. Krech, “The State of Ethnohistory,” *Annual Review of Anthropology* 20 (1991), 345–75. On the development of ethnohistory in Mexico, see A. Araujo Pardo, “La Ethnohistoria en México: Un intento por normar las relaciones entre la Historia y la Antropología,” in G. Marín Guardado and G. Torres Mazuera (eds.), *Antropología e Historia en México. Las fronteras construidas de un territorio compartido* (Mexico City: El Colegio de Michoacán, Universidad Nacional Autónoma de México, 2016), 97–126. On Argentina, see A. Ramos and C. Chiappe, *En la trama de la etnohistoria americana* (Buenos Aires: Editorial La Pluma del Escribano, Universidad de Buenos Aires, 2018).

36 To give only a few examples regarding the publication of ethnohistorical sources, see M. León-Portilla, *Literatura del México antiguo: los textos en la lengua náhuatl* (Caracas: Biblioteca Ayacucho, 1978); A. Recinos, *Crónicas indígenas de Guatemala* (Guatemala: Academia de Geografía e Historia de Guatemala, 1984); F. Pease, *Las crónicas y los Andes* (Lima: Pontificia Universidad Católica del Perú, Instituto Riva-Agüero and Mexico City: Fondo de Cultura Económica, 1995); A. Porro, *As Crônicas do Rio Amazonas. Notas Etno-históricas sobre as Antigas Populações Indígenas da Amazônia* (Petrópolis: Vozes, 1993); and *O Povo das Águas: Ensaios de Etno-História Amazônica* (Petrópolis: Vozes, 1996). Since Barlow’s, Dibble’s, Galarza’s, or Espinoza Soriano’s pioneering studies, an increasing knowledge on the Andean and Mesoamerican systems of writing has accumulated in the last decades. R. Barlow, “Una nueva lámina del Mapa Quinatzin,” *Journal de la Société des Américanistes* 39 (1950), 111–24; J. Galarza, *Codex mexicains. Catalogue. Bibliothèque Nationale de Paris* (Paris: Musée de l’Homme, Société des Américanistes,

the rise of ethnohistory among Latin Americanists. In 1978, he stated that “the living continuities of the Andean world, especially in agriculture, the reciprocity in the working relationships ... make the use of ethnological evidence indispensable for the understanding of the pre-European organization.”³⁷

Not only did Murra participate in excavations in Ecuador financed by the Institute of Andean Research in the 1940s, but he also attached great importance to Spanish chronicles as well as to archival material. The *Proyecto de Huanuco* (1964–6), for example, combined archaeological prospection, fieldwork, and information resulting from a *visita*, that is, an inspection made by colonial authorities in the region in 1562.³⁸ Through his correspondence, the organization of congresses and teaching seminars, and the publication and exchange of books and archival material, Murra created a network of personal and institutional ties with scholars throughout Latin America, Europe, and the United States. As Ramos has shown, mobilizing this network was crucial to the consolidation of both ethnohistory as an academic field and the definition of the Andes as a regional and cultural area (one that went beyond the national boundaries of Peru), thus establishing a counterpart to the concept of “Mesoamerica.”³⁹

There is little doubt that the accumulation of archaeological and archival data, the publication of texts written in local languages in the early colonial

1974); C. Dibble, *Códice Xolotl* (Mexico City: Universidad Nacional Autónoma de México, 1980); W. Espinoza Soriano, “Los Huancas, aliados de la Conquista. Tres informaciones inéditas sobre la participación indígena en la conquista del Perú. 1558–1560–1561,” *Anales Científicos de la Universidad del Centro del Perú* 1 (1971), 5–47. On the research regarding the Maya script, see M. Coe, *Breaking the Maya Code* (London: Thames and Hudson, 1992). For the Andean region, see G. Urton, *Signs of the Inka Khipu: Binary Coding in the Andean Knotted-String Records* (Austin: University of Texas Press, 2003).

37 J. Murra, *La organización económica del Estado Inca* (Mexico City: Siglo XXI, 1978), 20, cited by C. Zanolli, “La antropología, la historia, la antropología histórica. De la teoría al caso,” in C. Zanolli, J. Costilla, D. Estruch, and A. Ramos (eds.), *Los estudios andinos hoy. Práctica intelectual y estrategias de investigación* (Buenos Aires: Prohistoria ediciones, 2013), 123–46, at 126: “las continuidades vividas en el mundo andino, particularmente en la agricultura, reciprocidades en el trabajo ... hacen indispensable el uso de la evidencia etnológica para comprender la organización pre europea.”

38 This investigation gave rise to the publication of the article focused on the economic organization of the Inca empire, “El control vertical de un máximo de pisos ecológicos en la economía de las sociedades andina,” in J. Murra, *Formaciones Económicas y Políticas del Mundo Andino* (Lima: Instituto de Estudios Peruanos, 1975), 59–115.

39 A. Ramos, “John Murra y la formación de una ‘comunidad andina,’” in A. M. Lorandi (ed.), *El Ocaso del Imperio. Sociedad y cultura en el centro-sur andino* (Buenos Aires: Antropofagia, 2013), 259–72. To mention only a few examples, Murra was one of the founders of the *Instituto de Estudios Peruanos* (1964), and he encouraged José María Arguedas and Pierre Duviols to publish the Huarochiri manuscript and other archival materials (1966). See *Dioses y hombres de Huarochiri. Narración quechua recogida por Francisco de Ávila [ca. 1598]*, bilingual edition, trans. J. M. Arguedas, bibliographical studies by P. Duviols (Lima: Fondo Editorial del Instituto de Estudios Andinos, 1966). In

period, and the progress in deciphering the Mesoamerican and Andean writing systems largely contributed to a renewed understanding of pre-colonial law during the 1970s and 1980s.⁴⁰ But what did this bulk of works on Mesoamerica and on the Andes have in common? In what theoretical and methodological frameworks were these texts written? The hypothesis of the cultural continuity from precolonial past to present-day social life was a key issue, since it allowed, and even encouraged the combined use of archaeological, historical and ethnographic data. It also enabled the incorporation of theories developed in the field of legal anthropology, not only in America, but also in Africa or Oceania. Jerome A. Offner used the concept of the “reasonable men” – introduced by Max Gluckman in 1955 to refer to judges in the British colony of Barotseland in Africa who “used implied standards of behavior in reaching decisions” – to describe the Texcocan legal system.⁴¹

As Murra pointed out in 1978, it was of equal importance to draft an “integrative description of a specific society, avoiding its classification according to categories borrowed to the European economic and social history.”⁴² The

1978, he edited a special issue of the *Annales* with Nathan Wachtel and Jacques Revel. In Argentina, he also had close ties with Ana María Lorandi, who would assume a key role in the institutionalization of ethnohistory in this country, thanks to the construction of “colonial Tucuman colonial as a subject of inquiry,” and the organization of the first *Congreso Internacional de Etnohistoria* in Buenos Aires in 1989. A. Ramos and C. Chiappe, “Ana María Lorandi y el Primer Congreso Internacional de Etnohistoria,” *Diálogo andino* 56 (2018), 9–15, at 10. On Murra’s influence on Chilean studies, see L. Núñez, “Sobre los comienzos de los estudios andinos y sus avances actuales en el norte de Chile,” in Zanolli, Costilla, Estruch, and Ramos, *Los estudios andinos*, 79–122. For a discussion on the development of ethnohistory in the United States, see S. Krech, “The State of Ethnohistory,” *Annual Review of Anthropology* 20 (1991), 345–75.

40 A. López Austin, *La constitución real de México-Tenochtitlan* (Mexico City: Universidad Nacional Autónoma de México, 1961); N. Wachtel, *La vision des vaincus. Les Indiens du Pérou devant la Conquête espagnole, 1530–1570* (Paris: Editions Gallimard, 1971); P. Carrasco and J. Broda (eds.), *Estratificación social en la Mesoamérica prehispánica* (Mexico City: Instituto Nacional de Antropología e Historia, 1976); P. Carrasco and J. Broda (eds.), *Economía política e ideología en el México prehispánico* (Mexico City: Instituto Nacional de Antropología e Historia, 1978); J. Offner, *Law and Politics in Aztec Texcoco* (Cambridge: Cambridge University Press, 1983).

41 Offner, *Law and Politics*, 70. Of particular influence were works by M. Gluckman and L. Pospisil, namely *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester: Manchester University Press, 1955) and *The Kapauku Papuans of West New Guinea* (New York: Holt, Rinehart and Winston, 1963). On legal anthropology, see L. Nader, “Antropología legal,” in T. Barfield (ed.), *Diccionario de antropología* (Mexico City: Siglo XXI Editores, 2000), 54–57; E. Krotz (ed.), *Antropología jurídica: perspectivas socioculturales en el estudio del derecho* (Mexico City: Anthropos, Universidad Autónoma Metropolitana-Iztapalapa, 2002).

42 Murra, *La organización económica*, at 19: “una descripción integradora de una sociedad específica, y no su clasificación según categorías que surgen de la historia económica y social de Europa.”

concepts of “reciprocity and redistribution” and of discontinuous territorial control sought to describe the relations between the “Inca state” and its subjects.⁴³ In his prologue to Alfredo López Austin’s *La constitución real de México*, Miguel León-Portilla outlined that one of most important achievements of the book was to have outlined “the indigenous people’s own vision of their laws” and the “Aztec world’s idiosyncratic legal categories.”⁴⁴ Quite paradoxically, however, another critical idea in ethnohistorical studies was the existence of precolonial states, which were perceived as being similar to their European counterparts, probably with the purpose to go beyond previous hierarchizations. The word “constitution,” defined as the “statal organization generated by the social manifestations that structure the relations ... between individuals,” was used, for example, by Alfredo López Austin to describe the Aztec state: The author considered that “any state is structured by a constitution, whether or not a systematic body of juridic norms exists.”⁴⁵

While some scholars described indigenous states, others instead suggested that at least some indigenous societies were built “against the state,” to use the title of Pierre Clastres’ influential study based on the ethnography of the Awé of Brazil.⁴⁶ His work offered an alternative interpretation to the growing bulk of literature focused on the Maya “city-states,” the Muisca “confederation” or the Inca and Aztec “states” or “empire.” Clastres described a society with little centralization, ruled by chiefs who maintained their authority through speeches and were accountable to their people. Some archaeologists projected this vision into the precolonial past of some indigenous groups on the basis of two main arguments: the absence of significant archaeological vestiges, on the one hand, and the reliance on the European chronicles in which the notion of *behetría*, defined in Sebastián de Covarrubias’ 1611 Castilian dictionary as “the freedom to change señores, thus generating great confusion,” was used to define several communities.⁴⁷ Archaeologists Betty J. Meggers and Clifford Evans, for example, developed the theory of the “tropical forest culture” to describe the Amazonian precolonial indigenous past.

43 N. Wachtel, “La réciprocité et l’Etat Inca: de Karl Polanyi a John V. Murra,” *Annales Histoire Sciences Sociales* 6 (1974), 1346–57. See also F. Pease, *Curacas, reciprocidad y riqueza* (Lima: Pontificia Universidad Católica del Perú, 1992).

44 M. León-Portilla’s prologue to López Austin, *La constitución real*, IX.

45 López Austin, *La constitución real*, at 3.

46 P. Clastres, *La Société contre l’État. Recherches d’anthropologie politique* (Paris: Les Editions de Minuit, 1974), translated into Spanish in 1978. See *La sociedad contra el Estado* (Caracas: Monte Ávila Editores, 1978). On the way in which Clastres constructed his theory, see O. Allard, “Faut-il encore lire Clastres?,” *L’Homme* 236 (2020), 159–76.

47 Sebastián de Covarrubias, *Tesoro de la lengua castellana o española*, ed. Felipe Maldonado (Madrid: Editorial Castalia, 1995 [1611]), 177–78.

They emphasized the “lack of cultural traits,” the “environment-based explanation,” and the “peripheral perspective” with respect to the Andean culture.⁴⁸ The result was the gradual building of an alleged opposition between Mesoamerica and the Andes and “other areas” of the continent.⁴⁹

The 1990s, however, were marked by “a persistent critique of the legacies of colonialism in the formation of the modern nation-states and institutions of knowledge production like the area studies.”⁵⁰ In other words, scholars became interested in exploring not peoples, but rather “the production of a people,” not territories, but rather “the production of space and time.”⁵¹ This line of inquiry gave rise to a questioning of national frameworks and center-periphery relations. By contrast, the interplay between the local and the global became a central category of analysis.⁵² As instrumental were the shifts in approaching the history of science, which advocated taking into account the Iberian experiences, on the one hand, and bridging the gap between the local and the global scale in the production

48 See, for example, B. J. Meggers, *Amazonia. Un paraíso ilusorio* (Mexico City: Siglo XXI Editores, 1989 [1976]). On this trend in archaeological studies, see E. O. Neves, “Changing Perspectives in Amazonian Archaeology,” in G. Politis and B. Alberti (eds.), *Archaeology in Latin America* (London and New York: Routledge, 1999), 219–27.

49 On the construction of Mesoamerica and the Andes as area studies, see C. Battcock and A. Ramos, “Mesoamérica y Andes: un debate necesario sobre las áreas de investigación,” draft paper. I am grateful to the authors for giving me the opportunity to read their work. See also B. Cumings, “Boundary Displacement: Area Studies and International Studies during and after the Cold War,” *Bulletin of Concerned Asian Scholars* 29(1) (1997), 6–26; C. Clados and E. Halbmayr, “Between Mesoamerica, the Central Andes, and Amazonia: Area Conceptions, Chronologies, and History,” in E. Halbmayr (ed.), *Amerindian Socio-Cosmologies between the Andes, Amazonia and Mesoamerica: Toward an Anthropological Understanding of the Isthmo-Colombian Area* (London and New York: Routledge, 2020), 123–57.

50 Axel, “Introduction,” 9.

51 *Ibid.*, 3; T. Asad, *Anthropology and the Colonial Encounter* (Atlantic Highlands: Humanities Press, 1973); J. Clifford and G. Marcus (eds.), *Writing Culture: The Poetics and Politics of Ethnography* (Berkeley: University of California Press, 1986); A. Appadurai, “Theory in Anthropology: Center and Periphery,” *Comparative Studies in Society and History* 28(2) (1986), 356–61 and *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996); W. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges and Border Thinking* (Princeton and Oxford: Princeton University Press, 1999).

52 This interpretation benefited from the research on the construction of *americanismo*, *indigenismo*, ethnohistory, and area studies as academic fields in a global perspective. Special emphasis has been put on formal and informal ties between scholars, the impact of personal trajectories, the institutional evolutions, and on the “invention” of new sources such as personal correspondence. A. Ramos, “Consultando archivos, haciendo archivos. La epistolar como fuente para investigación de prácticas académicas,” in C. Cunill, D. Estruch, and A. Ramos (eds.), *Actores, redes y prácticas dialógicas en la construcción de archivos en América Latina, siglo XVI-XXI* (Mérida: Universidad Nacional Autónoma de México, Centro Peninsular en Humanidades y Ciencias Sociales, 2021), 221–47.

of knowledge, on the other. These changes had an impact on the history of law, now understood as a process of legal knowledge production, in which a wide range of actors participated in dialogic and conflictive ways (see Section 1.4).⁵³

When Laura Nader proposed to carry out an anthropological study of the state, she expressed the wish to break the “North/South” line that marked the division between state and non-state societies, between legal and extra-legal cultures that was reproduced in the boundaries between legal sociology and legal anthropology.⁵⁴ As explained by Jonas Bens and Larissa Vetter, until those years,

as sociology investigated those societies characterized by the “modern” nation state, legal sociology was consequently responsible for law in the Global North. As anthropology investigated those societies where the state was presumed to be absent, legal anthropology was consequently responsible for the law of “premodern” non-state societies in the Global South.⁵⁵

Boaventura Sousa Santos also called attention to the overlaps, coexistence, and interpenetration of different normative orders in a same society, a phenomenon he defined as “interlegality.” And Sally E. Merry engaged with the concept of legal pluralism and the relation between law and colonialism, thereby rendering more complex the understanding of how knowledge of normativity was produced in a world marked by local/global dynamics and by colonial domination both in the past and in the present.⁵⁶

Thanks to the contributions of scholars such as António Manuel Hespanha or Víctor Tau Azoátegui, in recent years our understanding of early modern legal cultures has gone through a complete renewal, marked by a growing distance with respect to the nineteenth-century paradigms. As Tamar Herzog points out in this volume (see Section 3.1), early modern law “featured discussions rather than solutions, guiding ideas rather than rules” and if “there was never a single authoritative answer ... neither was there a single jurisdiction,”

53 T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Frankfurt: Max-Planck-Institut für europäische Rechtsgeschichte, 2014).

54 L. Nader, *Law in Culture and Society* (Chicago: Aldine, 1969); M. Goodale, “A Life in the Law: Laura Nader and the Future of Legal Anthropology,” *Law and Society Review* 39(4) (2005), 945–55.

55 J. Bens and L. Vetter, “Ethnographic Legal Studies: Reconnecting Anthropological and Sociological Traditions,” *The Journal of Legal Pluralism and Unofficial Law* 50(3) (2018), 239–54.

56 B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths LexisNexis, 2002 [1985]); S. E. Merry, “Legal Pluralism,” *Law and Society Review* 22(5) (1988), 869–96 and “Law and Colonialism,” *Law and Society Review* 25(4) (1991), 889–922.

since early modern “jurisdictional states” were formed by “a conglomerate of communities and corporations,” each one of these units having “authorities endowed with jurisdiction, that is, the capacity to declare and apply the law.”⁵⁷ These changes affected how historians, anthropologists and archaeologists approached not only Iberian imperial law, but also precolonial law. Indeed, they treated the dichotomy between “state” and “non-state” societies more cautiously and paid increasing attention to legal pluralism.⁵⁸

In the field of Amazonian archaeology, the tropical forest culture theory was abandoned in the 1990s, and the “environment-based explanation” and “peripheral perspective” with respect to the Andes were replaced by an insistence on the “political character” of late Amazonian precolonial societies and the idea that the Amazonian landscape was a “cultural artefact.”⁵⁹ According to Eduardo G. Neves, this shift was due to the re-evaluation of colonial sources, as well as the “warning against the indiscriminate use of ethnographic analogies in the interpretation of the archaeological record.”⁶⁰ In the same period, as noted by Oscar Calavia Sáez, the historiography on indigenous people benefited from a more complex approach to the notion of power and of the pre-modern “states” in both European and extra-European spaces.⁶¹ Moreover, the idea of cultural contact, understood as the influence

57 See Section 3.1. In 1986, A. M. Hespanha proclaimed the death of the state in “A historiografia jurídico-institucional e a morte do estado,” *Anuario de Filosofia del Derecho* 3 (1986), 191–227; A. M. Hespanha, *A cultura jurídica europeia: Síntese de um milénio* (Lisbon: Almedina, 2012); V. Tau Anzoátegui, *Casuismo y sistema: Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992) and *El poder de la costumbre. Estudios sobre el Derecho Consuetudinario en América hispana hasta la Emancipación* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2001). On those developments, see T. Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge: Harvard University Press, 2018).

58 T. Herzog, “Latin American Legal Pluralism: The Old and the New,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 50(1) (2021), 705–36; L. Benton and R. Ross, *Legal Pluralism and Empires, 1500–1850* (New York: New York University Press, 2013); A. M. Hespanha, “The Legal Patchwork of Empires,” *Rechtsgeschichte – Legal History* 22 (2014), 303–14; P. Schiff Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (London: Oxford University Press, 2020); L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2000).

59 Neves, “Changing Perspectives,” 227.

60 *Ibid.*, 228. Manuela Carneiro da Cunha’s editorial project, called *Núcleo de história indígena e do indigenismo*, played a key role in this evolution. See also E. Viveiros de Castro and M. Carneiro da Cunha (eds.), *Amazônia. Etnologia e História Indígena* (São Paulo: Universidad de São Paulo, 1993); A. C. Roosevelt (ed.), *Amazonian Indians from Prehistory to the Present. Anthropological Perspectives* (Tucson: University of Arizona Press, 1994), 79–94; N. L. Whitehead, “Ethnic Transformation and Historical Discontinuity in Native Amazonia and Guayana, 1500–1900,” *Homme* 126–28 (1993), 285–305.

61 O. Calavia Saez, “La jefatura indígena, hoy,” *Indiana* 27 (2010), 47–62. See also M. Abensour (ed.) *El espíritu de las leyes salvajes. Pierre Clastres o una nueva antropología política* (Buenos Aires: Ediciones del Sol, 2007); B. Alcántara Rojas and F. Navarrete

of the European colonizers on indigenous peoples, was reframed in terms of “dialogical relation that constituted both metropole and colony, the European and the other, as indissociable.”⁶²

Already in the 1980s, Bernard Cohn stated that

the anthropological “other” are part of the colonial world.... Whites everywhere came into other peoples’ world with models and logics ... with which they adapted the construction of new environments, peopled with new “others.” By the same token, these “others” had to restructure their models to encompass the fact of white domination and their powerlessness.⁶³

Cohn therefore considered that the “colonial situation” had to be viewed “as a situation in which the European colonist and the Indigene [were] united in one analytic field.”⁶⁴ From this perspective, historians outlined that the colonial sources are not an exact reflection of precolonial indigenous past, but rather reconstructions elaborated from the perspective of a “colonial situation.”⁶⁵ Some even asked whether or not it is possible to capture the pre-Hispanic past through colonial sources, even those written by indigenous authors in their own languages in the aftermath of the Iberian conquests.⁶⁶

But this perspective regarding the past also enables us to put increasing emphasis on indigenous agency, understood as the indigenous people’s capacity to respond to imperial domination either with their own epistemological tools or with Europeans ones. For specialists of indigenous history, the indigenous people’s agency in using or, even, forging the law under imperial rule thus became an especially challenging issue.⁶⁷ There is little doubt that present-day struggles for the recognition of indigenous normative orders

Linares (eds.), *Los pueblos amerindios más allá del Estado* (Mexico City: Universidad Nacional Autónoma de México, 2011).

62 Axel, “Introduction,” 8.

63 B. Cohn, *An Anthropologist among the Historians and Other Essays* (Delhi: Oxford University Press, 1987), cited by Axel, “Introduction,” 9.

64 Axel, “Introduction,” 9.

65 See, for example, Germán Morong Reyes’ excellent work on the colonial discourses focused on the Incas. G. Morong Reyes, *Saberes hegemónicos y dominio colonial. Los indios en el Gobierno del Perú de Juan de Matienzo (1567)* (Buenos Aires: Prohistoria, 2016) and “Lo que conviene a la república: el orden del inca, la condición colonial de los indios y el buen gobierno,” in G. Morong Reyes and M. Gloël (eds.), *Gobernar el virreinato del Perú, S. XVI-XVII. Praxis Político-Jurisdiccional, redes de poder y usos de la información oficial* (Santiago de Chile: Ediciones Sindéresis y UBO ediciones, 2020), 95–124.

66 J. Szeminski, “Los estudios andinos hoy. Practica intelectual y estrategias de investigación. ¿Es posible investigar la historia del Tawantin Suyu anterior a la conquista española?,” in C. E. Zanolli, J. Costilla, D. Estruch, and A. Ramos, *Los estudios andinos*, 19–30.

67 F. Salomon and S. B. Schwartz (eds.), *The Cambridge History of the Native Peoples of the Americas* (Cambridge: Cambridge University Press, 1999).

and jurisdictions within the legal systems of the Latin American nations, as shown by Daniel Bonilla Maldonado in Chapter 7 of this volume, constitute another key factor that helps explaining the increased interest of scholars in precolonial law and its evolution under Iberian imperial domination.⁶⁸ According to Alexandra Huneus, Javier Couso and Rachel Sieder, the analysis of the conditions in which legal pluralism emerged in Latin America requires additional work “on the political role of law and courts in political struggles in Latin American history, as well as the legal history of particular struggles.”⁶⁹ Obviously, these changes, which occurred on a global scale, are affecting our understanding of the role that indigenous peoples have played and still play in forging the law and writing Latin American legal history.

Precolonial Indigenous Law

Given the diversity of the peoples that lived throughout Latin America over time, the following passages offer a study of indigenous law as allocated to specific groups and moments, with special emphasis on the period that preceded the European conquests. Any such study must begin by affirming the obvious, namely, that these legal orders changed over time, since they were designed to meet the needs of the society in which they were produced. Drawing on the interpretation of ancient “painted histories and annals,” the indigenous intellectual Alva Ixtlilxochitl, who wrote in seventeenth-century Tezcoco, stated that shortly after establishing his people in the Valley of Mexico in the tenth century, the Acolhua ruler Xolotl enacted a series of laws to regulate agricultural and hunting practices. According to the chronicler, “burning the fields and the mountains was forbidden without the ruler’s

68 See also S. Garfield, *Indigenous Struggles at the Heart of Brazil. State Policy, Frontier Expansion and the Xavante Indians, 1937–1988* (Durham and London: Duke University Press, 2001); I. Bellier (ed.), *Peuples autochtones dans le monde. Les enjeux de la reconnaissance* (Paris: L’Harmattan, 2013); M. Carneiro da Cunha and S. Barbosa, *Direitos dos povos indígenas em disputa* (São Paulo: Fundação Editora da Unesp, 2018); T. Duve, “Indigenous Rights: Latin America,” in M. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), 817–37 (<https://doi.org/10.1093/oxfordhb/9780198794356.013.42>, last accessed Sep. 15, 2022).

69 A. V. Huneus, J. Couso, and R. Sieder, “Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America,” in J. Couso, A. V. Huneus, and R. Sieder (eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010), 11. The authors define legal cultures as “contested and ever-shifting repertoires of ideas and behaviors relating to law, legal justice, and legal systems” that include “representations, ideologies, norms, conceptions, beliefs, values, and discourses about law,” as well as “language, informal institutions, and symbolic actions (such as mimicry).” *Ibid.*, 6.

license and, if appropriate, punishable by death”⁷⁰ and “taking the prey that had been caught in someone else’s nets was forbidden and punished by the confiscation of one’s bow and arrow.”⁷¹ A few generations later, however, Nezahualcōyotl developed a complex legal system in which justice was administered by specialized courts and a series of crimes and punishments defined and recorded.⁷²

A similar emphasis on the historical dimension of precolonial law can be found in the *Royal Commentaries*, in which Garcilaso de la Vega, known as “El Inca,” a *mestizo* from both Spanish and Inca descent, stated that Inca rulers brought “natural law” and “urbanity” to the people they conquered. According to Garcilaso,

as these people were living, or dying, in the way we have seen [*behetría*, or barbarism], God our Lord permitted that from amongst them there should arise a morning star; someone who would illuminate that extreme darkness and offer people some notion of natural law, and of urbanity, and of the respect, that men should have for one another; so that the descendants of that prophet, proceeding from good to better, would tame the savages and convert them into men, capable of reason, and of receiving any good doctrine: so that when this same God, the sun of justice, finally decided it was the right time to send the light of his divine rays to those idolaters, he would find them no longer savage, but more docile and capable of accepting the Catholic faith.⁷³

It is true that this account was influenced by the concepts and language of the imperial world in which Garcilaso lived, since he used the contrast between “urbanity” and “barbarism” to compare the Incas with other Andean cultures.⁷⁴

70 F. de Alva Ixtlilxochitl, *Obras históricas* (Mexico City: Universidad Nacional Autónoma de México, 1985), vol. II, 24. See also Offner, *Law and Politics*, 47–49.

71 Ixtlilxochitl, *Obras*, vol. I, 526.

72 C. Battcock and M. Aguilar, “Nezahualcōyotl. Paradigma de justicia y rectitud,” *Arqueología Mexicana*, 24(142) (2016). A complete list of crimes and punishments was also drawn up by the Maya Gaspar Antonio Chi in 1582. See M. Strecker and J. Artiega, “La ‘Relación de algunas costumbres (1582)’ de Gaspar Antonio Chi,” *Estudios de Historia Novohispana* 6 (1978), 89–107; A. L. Izquierdo y de la Cueva, “El delito y su castigo en la sociedad maya,” in J. L. Soberanes Fernández (ed.), *Memoria del II Congreso de Historia del Derecho Mexicano* (Mexico City: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1980), 57–68.

73 Inca Garcilaso de la Vega, *Royal Commentaries of the Incas* [1609], book I, chapters XV, f. 13v., translated and quoted by J. A. Mazzotti, “A Syncretic Tropology: Semantic and Symbolic Aspects of the *Comentarios*,” in S. Castro-Klarén and C. Fernández (eds.), *Inca Garcilaso and Contemporary World-Making* (Pittsburgh: University of Pittsburgh Press, 2016), 65.

74 Archaeologist Luis Lumbreras has shown that, contrary to the one-way vision proposed by Garcilaso, the Incas had drawn on the Wari culture. L. Lumbreras, *Los orígenes del Estado en el Perú* (Lima: Instituto de Estudios Peruanos, 1972) and *Arqueología de la América andina* (Lima: Editorial Milla Batres, 1981).

Although Garcilaso might have exaggerated the differences between various indigenous cultures in an attempt to idealize the Inca rule to Christian readers, it is nonetheless plausible that the Inca imposed new laws on other population groups in the Andes and that the expansion of Quechua played a key role in this process.⁷⁵ Inca Garcilaso went a step further when he compared Quechua to the “civilizing impact of Latin in the Roman Empire.” According to him, the Incas

domesticated and united a great variety of different nations of conflicting religion and customs whom they brought into their empire, welding them, thanks to the use of a common language, into such union and friendship that they loved each other like brothers.⁷⁶

Garcilaso’s objective was not only to claim legitimacy for the descendants of the Incas to govern the Andean region, but also to defend Quechua as the language of evangelization, since the clerics were supposed to speak the language of the parishes in which they exercised their pastoral duties. Some local languages became “general languages” in extended territories of the Iberian empires.⁷⁷

However, the imposition of vehicular languages, the emergence of bilingual mediators, and the formulation of dominant linguistic ideologies might also have been common practices in precolonial times.⁷⁸ Long

75 A. Torero, *El quechua y la historia social andina* (Lima: Universidad Ricardo Palma, 1974) and *Idiomas de los Andes: lingüística e historia* (Lima: Instituto Francés de Estudios Andinos, 2002); B. Mannheim, *The Language of the Inka since the European Invasion* (Tucson: University of Texas Press, 1991); R. Howard, *Por los linderos de la lengua: ideologías lingüísticas en los Andes* (Lima: Institut Français d’Etudes Andines and Instituto de Estudios Peruanos, 2007); P. Heggarty and A. J. Pearce, *History and Language in the Andes* (London: Palgrave Macmillan, 2011).

76 I. Garcilaso, *Comentario reales*, in *Obras completas del Inca Garcilaso de la Vega*, ed. C. Saenz de Santa María (Madrid: Atlas, 1960), vol. II, 247, quoted and translated by S. Maccormack, “‘The Discourse of My Life’: What Language Can Do (Early Colonial Views on Quechua),” in A. Durston and B. Mannheim (eds.), *Indigenous Languages, Politics, and Authority in Latin America. Historical and Ethnographic Perspectives* (Notre Dame: University of Notre Dame Press, 2018), 25–58, at 29.

77 D. Moore, “Historical Development of Nheengatu (Lingua Geral Amazônica),” in S. S. Mufwene (ed.), *Imperialism and Language Evolution in Latin America* (Chicago: University of Chicago Press, 2014), 108–42; J. C. Estenssoro and C. Itier (eds.), “Dossier Langues indiennes et empire dans l’Amérique du Sud coloniale,” *Mélanges de la Casa de Velázquez* 45(1) (2015); A. Durston, “Standard Colonial Quechua,” in Mufwene, *Iberian Imperialism*, 225–44; C. Itier (ed.), *Del siglo de Oro al siglo de las luces. Lenguaje y sociedad en los Andes del siglo XVIII* (Cusco: Centro de Estudios Regionales Andinos “Bartolomé de las Casas”, 1995); Y. Yannakakis, “Introduction: How Did They Talk to One Another? Language Use and Communication in Multilingual New Spain,” in R. Schwaller (ed.), “A Language of Empire, a Quotidian Tongue: The Uses of Nahuatl in New Spain,” *Ethnohistory* 59(4) (2012), 667–74.

78 On the expansion of the Guarani, see I. Telesca and A. Vidal (eds.), *Historia y lingüística guaraní. Homenaje a Bartolomé Melià* (Buenos Aires: Paradigma Inicial, 2021). For a general overview of the linguistic history of Brazil from precolonial to present times, see G. Urban, “História da cultura brasileira segundo as línguas nativas,” in C. da Cunha (ed.),

before the Portuguese and Spanish conquests, the Valley of Mexico was a mosaic of diverse ethnic groups that spoke different languages, but Nahuatl was the lingua franca even in distant territories such as Oaxaca and Guatemala.⁷⁹ In the southwestern coastal areas of Guatemala, El Salvador, and Nicaragua, a Nahuatl dialect called Pipil had been spoken since 900 AD due to “trade and diplomacy prior to the rise of the Aztec State,” a phenomenon reinforced by Aztec expansion.⁸⁰ Alva Ixtlilxochitl’s and Garcilaso’s narratives suggest that law was used to govern multiethnic and plurilingual societies that were constantly involved in wars and processes such as migrations, territorial reorganization, and ethnicization. In other words, language policy, diplomacy, matrimonial alliances with members of the local ruling elites, the dispatch of agents and, eventually, migrants through distant regions, and the privileged status of merchants were part of precolonial indigenous legal cultures.⁸¹ According to Tsubasa Okoshi Harada, the post-classic Maya *cúuchcabal*, which the Spaniards translated as “province” in Castilian, did not designate territories with continuous

História dos Índios (São Paulo: Companhia das letras, 1992), 87–103. On the K’ichee’ Maya, see S. Romero, *Language and Ethnicity among the K’ichee’ Maya* (Salt Lake City: University of Utah Press, 2015). A global perspective on linguistic policies and imperialism over time in Latin America can be found in Mufwene, *Iberian Imperialism*, and Durston and Mannheim, *Indigenous Languages*.

79 M. Swanton, “Multilingualism in the Tocují Ñudzaviu Region,” in M. Jansen and L. van Broekhoven (eds.), *Mixtec Writing and Society (Escritura de Ñuu Dzau)* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 2008), 363–73.

80 L. Matthew and S. Romero, “Nahuatl and Pipil in Colonial Guatemala: A Central American Counterpoint,” *Ethnohistory* 59(4) (2012), 765–81.

81 P. Carrasco, *Estructura político-territorial del Imperio Tenochca* (Mexico City: Fondo de Cultura Económica, 1996); C. Brokmann Haro, *La estera y la silla. Individuo, comunidad e instituciones jurídicas nahuas; Hablando fuerte. Antropología jurídica comparativa de Mesoamérica; La fecha dorada. Pluralismo y derechos humanos en los sistemas jurídicos de Mesoamérica* (Mexico City: Comisión Nacional de Derechos Humanos, 2006, 2008, and 2018); M. A. Malpass and S. Alconini (eds.), *Distant Provinces in the Inka Empire : Toward a Deeper Understanding of Inka Imperialism* (Iowa City: University of Iowa Press, 2010); C. Townsend, “Polygyny and the Divided Altepetl: The Tetzcoacan Key to Pre-Conquest Nahua Politics,” in J. Lee and G. Brokaw (eds.), *Prehispanic and Colonial Perspectives* (Boulder: University of Colorado Press, 2014), 93–116; A. Coley, *How the Incas Built Their Heartland. State Formation and the Innovation of Imperial Strategies in the Sacred Valley, Peru* (Ann Arbor: University of Michigan Press, 2006); C. Battcock, *Construcciones y significaciones de un hecho histórico. La guerra entre México-Tenochtitlan y Azcapotzalco* (España, Editorial Académica Española, 2011); F. Berdan, et al. (eds.), *Aztec Imperial Strategies* (Cambridge: Harvard University Press, 1996); M. Castañeda de la Paz, “Historia de una casa real. Origen y ocaso de un linaje gobernante en México-Tenochtitlan,” *Nuevo Mundo, Mundos Nuevos* 2011; R. Hassig, *Trade, Tribute, and Transportation. The Sixteenth-Century Political Economy of the Valley of Mexico* (Norman: University of Oklahoma Press, 1985); M. Kobayashi, *Tres estudios sobre el sistema tributario de los mexicas* (Mexico City: CIESAS, 1993).

frontiers, but rather the people who depended on a local ruler by alliances, kinship, or war.⁸²

The accumulation of information about other peoples, natural resources, and territories might also have been characteristic of the way in which law was forged and adapted to local situations in precolonial times. For a long time, insufficient knowledge of pre-Hispanic systems of writing and the assumption that, before the European conquests, justice was delivered orally – an interpretation in part supported by the fact that, during the colonial period, indigenous “uses and customs” were not habitually written down – led scholars to assume that indigenous law was unwritten. Nevertheless, we now know that the use of *quipus* was widespread in the Andes even before the Inca period. Scholars also suspect that these records contained not only tributary, but also historical evidence (see Section 3.1).⁸³ The *lámina 3* of the *Mapa Quinatzin*, in which a series of crimes and punishments were depicted, could be considered as an early colonial pictographic reminiscence of the “written laws” decreed under Nezahualcōyotl’s rule in Texcoco.⁸⁴ This document, now kept at the Bibliothèque Nationale de France, is thought to have been one of Alva Ixtlilxochitl’s main sources for describing precolonial law.⁸⁵

The nobleman Motelchiutzin, who was in charge of the Aztec estate under Moctezuma II and was baptized under the Spanish name of Andrés de Tapia, kept a number of pictographic records in his house in Tenochtitlan. According to the Spanish conqueror Bernal Díaz del Castillo, Tapia kept a record of “all the tributes due to Moctezuma; he did so with the help of [old] books made of a paper called *amatl*, which filled a big house.”⁸⁶

82 T. Okoshi Harada, “El *cúchucabal* de los Xiu: análisis de su formación y consolidación,” *Contributions in New World Archaeology* 4 (2012), 231–50. Pedro Carrasco had shown that in Mesoamerica the urban space was organized according to ethnic diversity in the so-called “intertwined neighborhoods.”

83 G. Urton, *Inka History in Knots. Reading Khipus as Primary Sources* (Austin: University of Texas Press, 2017).

84 “Mexicain 396,” Bibliothèque Nationale de France, Paris, <https://gallica.bnf.fr/ark:/12148/btv1b10303825m> (last accessed Sep. 15, 2022). An analysis and a facsimile edition of this document were published by L. M. Mohar Betancourt, *Código Mapa Quinatzin. Justicia y derechos humanos en el México antiguo* (Mexico City: Comisión Nacional de Derechos Humanos, 2004).

85 In his *Historia de la nación chichimeca*, the indigenous chronicler mentioned the collection of pictographic records that he had in his house in Tezcoco. Fernando de Alva Ixtlilxochitl, *Historia de la nación chichimeca* (Madrid: Editorial Dastin, 2000 [ca. 1620]), cap. XXXVIII, 156–161. On this topic, see A. Brian, *Alva Ixtlilxochitl’s Native Archive and the Circulation of Knowledge in Colonial Mexico* (Nashville: Vanderbilt University Press, 2016).

86 Bernal Díaz del Castillo, *Historia verdadera y cierta de la conquista de México*, 254, quoted by R. Rovira Morgado, “Lengua, identidad y residencialidad indígenas en la ciudad de México de la primera centuria virreinal: el caso del *nahuatlato* Hernando de Tapia,” in

Rosend Rovira Morgado points out that this archive in the Tapia family's possession might well have been one of the reasons why the Spanish authorities promoted Don Andrés' son to make him one of the most influential indigenous interpreters of the Audiencia of Mexico.⁸⁷ According to a 1576 source, the Tapia family kept in one of their houses "boxes and feathers, and ancient paintings in which his Majesty's [Moctezuma's] tributes were recorded."⁸⁸ Ethelia Ruiz Medrano and, more recently, Ana Pulido Rull have shown that "the use of paintings for litigation was a constitutive element of the Aztec legal system."⁸⁹ Written records of precolonial law were not produced only by the Aztecs or Incas. The social pre-eminence of Maya scribes, observable in the classic and the postclassic iconography, indicates that Maya codices might have been used in registering and keeping normative knowledge.⁹⁰

Vasco de Quiroga, judge of the high court (*audiencia*) of Mexico between 1531 and 1535, recognized that precolonial pictographic records of the Valley of Mexico contained "legal cases" that might have served as jurisprudence in the resolution of conflicts.⁹¹ In his *Información en derecho* (1535), Quiroga claimed that

the Indians did not have ordinances, but paintings similar to annals that contained the cases and the facts like they had happened and occurred fairly or unfairly and they painted them and considered them not as laws, but

C. Cunill and L. M. Glave Testino (eds.), *Las lenguas indígenas en los tribunales de América Latina: intérpretes, mediación y justicia, siglos XVI-XXI* (Bogotá: Instituto Colombiano de Antropología e Historia, 2019), 17–40, at 28–29.

87 Rovira Morgado, "Lengua, identidad," 26–29.

88 Archivo General de la Nación, México, Tierras, vol. 37, exp. 2, f. 99, quoted by Rovira Morgado, "Lengua, identidad," 29. León-Portilla explains that the use of the *tequiamatl* (book of tributes) required specialized, technical knowledge. M. León-Portilla, *Códices. Los antiguos libros del nuevo mundo* (Mexico City: Aguilar, 2003), 250. On the existence of archives in precolonial times, see J. E. Ramírez López, *Catálogo de fuentes para la historia franciscana de Tezcoco* (Mexico City: Diócesis de Texcoco, 2018), 25–50; J. Á. Vázquez Martínez, "El amoxcalli o la casa de los libros," *Acalán* (2011), 5–9.

89 A. Pulido Rull, *Mapping Indigenous Land. Native Land Grants in Colonial New Spain* (Norman: University of Oklahoma Press, 2020), at 45. See also E. Ruiz Medrano, *Mexico's Indigenous Communities. Their Lands and Histories, 1500–2010* (Boulder: University Press of Colorado, 2010), at 2 and 13.

90 C. Coe and J. Kerr, *The Art of the Maya Scribe* (New York: Harry N. Abrams, 1998). It must be said that the few precolonial Maya codices that have survived to the present day have been studied predominantly for their historical, genealogical, and religious content. See G. Vail and A. Aveni (eds.), *The Madrid Codex: New Approaches to Understanding an Ancient Maya Manuscript* (Boulder: University Press of Colorado, 2004).

91 See also Ruiz Medrano, *Mexico's Indigenous Communities*; and Pulido Rull, *Mapping Indigenous Land*.

as examples of what others did badly or well, which is, according to law, reproved since *non exemplis sed legibus in [ju]dicandum est*.⁹²

These practices might explain why, during the early colonial period, extensive use was made of both *kipus* and pictographic records in Spanish courts of justice (see Section 3.1).⁹³ Equally, the systematic destruction of pre-Hispanic codices in the sixteenth century, although traditionally explained as part of the attempt to eradicate indigenous belief systems, could also have been motivated by the Spaniards' wish to erase their legal content.⁹⁴

The intertwining of religious beliefs with the normative order, which was typical of the Iberian legal cultures, also operated among the indigenous peoples. According to Friar Bernardino de Sahagún, from 1524 on the Spaniards sought to

destroy the objects of idolatry, and even the customs of the republic [of the Indians] since they were entangled with their rites and associated with their ceremonies of idolatry, which happened to almost all the customs by which this republic was ruled; and, for that reason, it was necessary to dismantle everything and establish another kind of *policía* (regime) that had nothing to do with their objects of idolatry.⁹⁵

92 Vasco de Quiroga, *Información en derecho* (Madrid: Biblioteca Nacional de España, 1535), ms. 7369, f. 81r, quoted by C. Cunill and R. Rovira Morgado, "Lo que nos dejaron nuestros padres, nuestros abuelos": retórica y praxis procesal alrededor de los usos y costumbres indígenas en la Nueva España temprana," *Revista de Indias* 81 (2021), 283–313, at 288.

93 E. Ruiz Medrano and P. Valle, "Los colores de la justicia: códigos jurídicos del siglo XVI en la Biblioteca Nacional de Francia," *Journal de la Société des Américanistes* 84(2) (1998), 228–35; B. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográficas* (Chicago: University of Chicago Press, 1996); M. Curatola Petrocchi and J. C. de la Puente Luna (eds.), *El quipu colonial. Estudios y materiales* (Lima: Fondo Editorial Pontificia Universidad Católica del Perú, 2007); C. B. Loza, "El quipu y la prueba en la práctica del Derecho de Indias, 1550–1581," *Historia y cultura* 26 (2000), 11–38; M. Medelius and J. C. de la Puente Luna, "Curacas, bienes y quipus en un documento toledano (Jauja, 1570)," *Histórica* 28(2) (2004), 35–82; J. C. de la Puente Luna, "That Which Belongs to All: Khipus, Community, and Indigenous Legal Activism in the Early Colonial Andes," *The Americas* 72(1) (2015), 19–59.

94 On the destruction of the Maya records in Yucatan, see P. Sullivan, "Los archiveros mayas de lo Sagrado," in Cunill, Estruch, and Ramos, *Actores, redes y prácticas*, 107–46; J. Chuchiak, "Pre-Conquest *Ah Kinob* in a Colonial World: The Extirpation of Idolatry and the Survival of the Maya Priesthood in Colonial Yucatán, 1563–1697," in U. Hostettler and M. Restall (eds.), *Maya Survivalism* (Markt Schwaben: A. Saurwein, 2001), 135–60; R. Vainfas, *A heresia dos índios. Catolicismo e rebeldia no Brasil colonial* (São Paulo: Companhia das Letras, 1995).

95 Bernardino de Sahagún, *Historia general de las cosas de la Nueva España* (Madrid: Editorial Dastin, 2003 [1577]), vol. 2, book 10, cap. 27, 815–16, quoted by Cunill and Rovira Morgado, "Lo que nos dejaron," 286.

Even through Sahagún preferred the term “customs” to that of “law,” probably in an attempt to create a hierarchy between indigenous and Spanish legal orders, he recognized the existence of “a kind of *policía*,” that is to say, a series of rules according to which the precolonial republic was governed. The Nahuatl word *tlamaniliztli*, defined by Sahagún as “the laws and the customs that the ancients in the republic bequeathed,” certainly conveys the idea of a normative order.⁹⁶

The intertwining of indigenous law with indigenous belief systems and their ceremonial dimensions might explain the zeal manifested by Europeans not only in destroying precolonial records but also in prohibiting or re-signifying pre-Hispanic dances in the early colonial period. Nonetheless, in some cases, the Spanish religious and civil authorities sought to make use of local linguistic expressions and written or visual traditions as well as rituals, and to insert them into the new religious, political and legal order.⁹⁷ The translation of the word *tlamaniliztli* as (Christian) “*policía*” in colonial bilingual dictionaries is a paradigmatic example of this kind of processes.⁹⁸ When Friars Andrés de Olmos, Juan Bautista Viseo and Bernardino de Sahagún decided to save the *huehuetlatolli* – a textual tradition that gathered the norms governing all matters related to the household and literally meant “the ancient word” in Nahuatl – from destruction, they reframed the norms contained therein according to Christian sensibility.⁹⁹ Illustration 8 of the *Tlatelolco Codex* also

96 Sahagún, *Historia*, vol. 1, book 6, cap. 43, at 610; M. León-Portilla, *La filosofía náhuatl estudiada en sus fuentes* (Mexico City: Universidad Nacional Autónoma de México, 2006 [1956]), 233–36.

97 B. Alcántara Rojas, “El canto-baile nahua del siglo XVI: espacio de evangelización y subversión,” in A. Ciudad Ruiz, M. J. Iglesias Ponce de León, and M. Sorroche Cuervas (eds.), *El ritual en el mundo Maya de lo privado a lo público* (Madrid: Sociedad española de Estudios Mayas, 2010), 377–93; E. Ruiz Medrano, “Fighting Destiny: Nahua Nobles and the Friars in the Sixteenth-Century Revolt of the *Encomenderos* against the King,” in S. Kellogg and E. Ruiz Medrano (eds.), *Negotiation within Domination: New Spain’s Indian Pueblos Confront the Spanish State* (Boulder: University Press of Colorado, 2010), 45–78; P. A. Scolieri, *Dancing in the New World. Aztecs, Spaniards and the Choreography of Conquest* (Austin: University of Texas Press, 2013); J. Fernandes, “Feast and Sin: Catholic Missionaries and Native Celebrations in Early Colonial Brazil,” *Social History of Alcohol and Drugs* 23(2) (2009), 111–27.

98 Alonso de Molina, *Vocabulario en lengua castellana y mexicana* (Mexico City: Casa de Antonio Espinola, 1571), f. 125v. An equivalent was also found in Yucatec Maya language. See R. Arzápalo Marín (ed.), *Calepino de Motul. Diccionario Maya-Español* (Mexico City: Universidad Nacional Autónoma de México, 1995), vol. 1, 199.

99 On the normative knowledge relative to the domestic sphere in colonial law, see R. Zamora, Section 3.3; *Huehuetlatolli. Testimonios de la antigua palabra, estudio introductorio de M. León-Portilla, transcripción del texto náhuatl y traducción al castellano de L. Silva Galeana* (Mexico City: Fondo de Cultura Económica, 1991); L. Silva Galeana, “Los *huehuetlatolli* recogidos por Sahagún,” in M. León-Portilla (ed.), *Bernardino de Sahagún. Quinientos años de presencia* (Mexico City: Universidad Nacional Autónoma de México, 2002), 117–35. On the household as sphere of normativity in the Portuguese and Spanish cultures and its imperial projections, see Romina Zamora, Section 3.3.

shows how dances imitating precolonial styles and traditions were organized in Mexico City to celebrate King Philip II's ascension to the throne in 1556.¹⁰⁰

Although colonial records must be treated with extreme caution, in order to avoid assuming as pre-Hispanic concepts that might have been either imposed, superposed, or co-invented after the European conquests, they do offer a path for research on precolonial law. In the dictionaries of local languages produced in the early colonial period, for example, several terms referred to the assemblies through which governance and justice were enacted. In the *Calepino de Motul*, a Yucatec Maya-Spanish dictionary from ca. 1580, the verbs *mul-can/mul-than*, derived from *mul* ("something that has been gathered") and *can/than* ("conversation"/"word, language, speech"), meant "to deal with some affair between several persons in community."¹⁰¹ Moreover, *mul-tumtah* is registered with the meaning of "to decide, to deliberate, or to determine in council, in audience, or between several persons, even though they are only the two of them, to make an agreement, as well as the agreement and decision taken in this manner," and *molay* with that of "assembly, congregation, college and gathering."¹⁰²

It is true that Spaniards were familiar with collegial decision-making, as reflected in the Castilian words *junta*, *ayuntamiento* or *concejo*. Yet, in Maya Yucatec language, emphasis was put as much on the gathering as on the talking. The relevance of oral exchanges in Maya political thought can be inferred by the widespread use of the terms *can/than* in the substantives that designed a large range of offices relative to both governance and justice.¹⁰³ They also appear in *nuch-can/nuc-than*, from *nuch* "to gather things together," which meant "to confer, to confederate, to ally" and therefore apparently referred to diplomacy.¹⁰⁴ Those expressions were frequently used in early colonial texts written in Maya

100 Illustration 8 of the *Codex Tlatelolco*. Biblioteca Nacional de Antropología e Historia, México. P. Valle, "La sección VIII del Códice de Tlatelolco. Una nueva propuesta de lectura," in X. Noguez and S. Wood (eds.), *De tlacuilos y escribanos. Estudios sobre documentos indígenas coloniales* (Zamora: El Colegio de Michoacán, 1998), 33–48.

101 *Mulcan/multan*: "tratar entre muchos de comunidad algún negocio," *Calepino*, vol. I, 533–34.

102 *Multumtah*: "acordar, deliberar o determinar en concejo, en audiencia o entre muchos, aunque no pasen de dos, convenir y hacer conveniencia así y el tal acuerdo o determinación." From *tumtah* "to demonstrate, to experience, to deliberate, to put in order an affair and to think about it properly and this consideration, deliberation, and order" ("probar, experimentar, arbitrar, deliberar, ordenar, trazar y dar orden en algún negocio y pensarlo bien y la tal consideración, deliberación y orden"). *Molay*: "junta, congregación, colegio y ayuntamiento," *Calepino*, vol. I, 524–25 and 730.

103 C. Cunill, "El pensamiento político maya en el Yucatán del siglo XVI: reflexiones sobre *can* y *than* (la plática/la palabra)," *Estudios de Cultura Maya* 52 (2018), 117–37.

104 *Nuchcan/nuchthan*: "concertarse, confederarse, aliarse" and *nuchah*: "juntar una cosa con otra," *Calepino*, vol. I, 533–34.

Yucatec language that narrated how indigenous governors fixed the limits of their town's jurisdiction in the context of the territorial reorganization imposed by the Spanish authorities. Sentences such as *nuchpah ci u canob* or *hop'i u mulcantoob can*, translated as "they gathered to find an agreement" and "they began to agree in community" by Okoshi Harada, can be found in the *Código de Calkini*.¹⁰⁵

Daniel Graña-Behrens has recently pointed out that a "class of distinguished men, and even women" were referred to as "wise men and women" in precolonial times. These individuals were called *itz'aat* in classic Maya inscriptions from the sixth to the tenth century, and *tlamatini* in early alphabetic records from Central Mexico; they "served as keepers of the collective memory in royal courts as well as within small-scale political units and communities."¹⁰⁶ There is little doubt that the Spaniards built on the tradition of precolonial indigenous assemblies when they established indigenous town councils or *cabildos*. In the translation into Nahuatl of the "ordinances for the indigenous republics" decreed by Viceroy Antonio de Mendoza in the 1540s, an impressive number of Nahuatl words were conserved to describe the "new" councils' officials.¹⁰⁷ It is also worth noting that, in precolonial times, those councils gathered in specific edifices, such as the *tecpan calli*, the house of governance, in central Mexico and, in some cases, there was a continuity in the use of these political and presumably judicial spaces in the early colonial period. According to Rovira Morgado, Andrés de Tapia's house in Tenochtitlan still served as a *tecpan calli* when he was appointed governor by viceroy Antonio de Mendoza in the 1530s.¹⁰⁸

105 T. Okoshi Harada, *Código de Calkini* (Mexico City: Universidad Nacional Autónoma de México, 2009), 60 and 70: "se juntaron para concertarse"; "comenzaron a tratar en comunidad." The same expressions were used in documents elaborated in Mani in 1557. S. Quezada and T. Okoshi Harada, *Los papeles de los Xiu de Yaxá, Yucatán* (Mexico City: Universidad Nacional Autónoma de México, 2001).

106 D. Graña-Behrens, "Itz'aat and Tlamatini: The 'Wise Man' as Keeper of Maya and Nahuatl Collective Memory," in A. Megged and S. Wood (eds.), *Mesoamerican Memory: Enduring Systems of Remembrance* (Norman: University of Oklahoma Press, 2012), 15–32. Among the high-ranking persons who surrounded the supreme ruler (*ajaw*), some late classic Maya stone monuments and ceramics also mentioned the scribe (*aj tz'ib*), the sculptor (*aj[?]lu*), a religious interpreter called *chilam*, the *aj k'uhuun* ("he of the holy books," or "one who keeps, guards"), and the *sajal* ("one who fears"), a subordinate lord who governed "smaller sites within the realm of the larger city-states." *Ibid.*, 16. See also E. Hill Boone, "In *Tlamatinime*: The Wise Men and Women of Aztec Mexico," in E. Hill Boone, et al. (eds.), *Painted Books and Indigenous Knowledge in Mesoamerica: Manuscript Studies in Honor of Mary Elizabeth Smith* (New Orleans: Tulane University, 2005), 9–25.

107 S. Kellogg and B. Sell, "We Want to Give Them Laws. Royal Ordinances in a Mid-Sixteenth Century Nahuatl Text," *Estudios de Cultura Nahuatl* 27 (1997), 325–67.

108 Rovira Morgado, "Lengua, identidad," 28–29. See also B. Mundy, *The Death of Aztec Tenochtitlan, the Life of Mexico City* (Austin: University of Texas Press, 2015).

The Spanish showed some tolerance toward indigenous forms of political organization because they understood that maintaining these could facilitate the implementation of imperial order. However, they also engaged in an ongoing process of marginalizing a wide range of precolonial indigenous “officials” and reducing their positions. Many members of traditional indigenous councils did not receive any official recognition and were categorized under the general concept of *principales*, a Castilian word created to describe and, simultaneously, erase the specificities of local rule. According to Graña-Behrens, “Spanish colonialism did not extinguish the concept of the wise one in either culture zone,” but rather made them invisible in the official records.¹⁰⁹ Owen H. Jones has shown, for example, that in Guatemala the *chinamitales* – although they were not officially recognized by the Spanish authorities – acted as lawyers for K’ichee’ indigenous communities.¹¹⁰

The precolonial indigenous councils might have been more or less specialized, depending on the region and the period. In *lámina 3* of the *Mapa Quinatzin*, four councils were represented inside Nezahualcóyotl’s palace.¹¹¹ Both the pictographic and alphabetic sources suggest that one of these councils could have served as a “legal supreme council.”¹¹² Building on Toribio de Benavente Motolinía’s memorials, Offner described this council as “made up of six sets of two judges responsible for six territories. The judges, located in two rooms, were presided over by two supreme judges and the ruler.”¹¹³ The indigenous chronicler Juan Bautista de Pomar reported that it was composed of twelve judges, “six of royal blood and an equal number of commoners” who had to respect an eighty-day limit for the duration of the cases.¹¹⁴ Offner’s use of the concept of territoriality, however, must be treated with some caution, since in early modern European law jurisdiction was conceived in relation to the people rather than to the territory. A similar situation might have prevailed in precolonial times, as suggested by Okoshi Harada’s investigations of the post-classic Maya *cúuchcabal*, for example. According to Luz María Mohar Betancourt,

109 Graña-Behrens, “Itz’aat,” 15.

110 O. H. Jones, “Chinamitales: defensores y justicias k’ichee’ en las comunidades indígenas del altiplano de Guatemala colonial,” *Revista Histórica* 40(2) (2016), 81–109.

111 Mohar Betancourt, *Mapa*, 107–8. 112 Offner, *Law and Politics*, 55.

113 T. de Motolonia, *Memoriales de fray Toribio de Motolinía, manuscrito de la colección del señor don Joaquín García Icazbalceta* (En casa del editor, Editorial Luis García Pimentel, 1903), quoted by Offner, *Law and Politics*, 55.

114 J. B. Pomar, “Relación de la ciudad y provincia de Tezcoco,” in *Relaciones geográficas del siglo XVI, VIII* (Mexico City: Universidad Nacional Autónoma de México, 1983), 23–113, quoted by Offner, *Law and Politics*, 56.

the council's composition might have had to do with ethnic diversity rather than with territoriality.¹¹⁵

Furthermore, the use of Castilian words to describe precolonial law tends to project European concepts onto indigenous ones. In this respect, the distinction between “nobles” and “commoners” in Pomar’s report is interesting. Although indigenous peoples did not lack a social hierarchical order – in the Valley of Mexico, the *macehualli* or “commoner” category was distinct from the *pilli* or “nobles” – these concepts were built on values that were erased by the use of Castilian in Pomar’s text. Such semantic substitutions were also accompanied by legal mechanisms that sought to recognize an indigenous nobility according to colonial criteria, even if some of them were said to ensure a supposed continuity with the pre-Hispanic past.¹¹⁶ Giving some room to indigenous law yet reframing it into a new legal and political order were thus simultaneous processes. In doing so, the Portuguese and Spanish Crowns hoped to avoid major social discontent, to consolidate their legitimacy, and to maintain political stability in their imperial realms.¹¹⁷

Indigenous Law in Iberian Imperial Settings

During the early colonial period, the official historic narratives were characterized by the practice of comparing indigenous and European legal orders – and, more opportunistically, contrasting royal justice with an alleged tyrannical precolonial rule. Indeed, they were at the core of the enterprise of legitimizing Iberian imperial authority.¹¹⁸ In the second half of the eighteenth century,

¹¹⁵ Mohar Betancourt, *Mapa*, 68.

¹¹⁶ B. Benton, *The Lords of Tetzco: The Transformation of Indigenous Rule in Postconquest Central Mexico* (Cambridge: Cambridge University Press, 2017); J. Ramírez López (ed.), *De Catemahco a Tezcoco: origen y desarrollo de una ciudad indígena* (Texcoco: Diócesis de Texcoco, 2017); A. Argouse, “¿Son todos caciques? Curacas, principales e indios urbanos en Cajamarca (siglo XVII),” *Bulletin de l’Institut français d’études andines* 37(1) (2008), 163–84; S. Quezada, *Maya Lords and Lordship: The Formation of Colonial Society, 1350–1600* (Norman: University of Oklahoma Press, 2014).

¹¹⁷ It must be pointed out that, according to the present state of the research on the field, and although the union of the Crowns of Castille and Portugal in 1580 favored the project to implement the Spanish law in colonial Brazil, it appears that the indigenous people’s relationship with the courts of justice remained more marginal than it was in Spanish America during most of the colonial period. S. Schwartz, *Sovereignty and Society in Colonial Brazil* (Berkeley: University of California Press, 1973) and “The Iberian Atlantic to 1650.”

¹¹⁸ F. Montcher, “Archives and Empires: Scholarly Archival Practices, Royal Historiographers and Historical Writing across the Iberian Empire (Late 16th and Early 17th century),” *History of Historiography/Storia della Storiografia* 68–72 (2015), 21–35. For a comparison with other imperial powers, see E. Bury and F. Montcher, “Savoirs et Pouvoirs à l’âge de l’humanisme tardif,” *Dix-septième siècle* 266(1) (2015), 5–16.

the indigenous past and its manifestations in contemporary life in the empire proved to be essential also to the defense of something else: an American identity, known as *patriotismo criollo*. By adopting the indigenous past as their own, the *criollos* – but also, in some cases, the European subjects of the Spanish and Portuguese monarchies – were reacting to French or British characterizations of the New World as decadent in a context of increasing imperial rivalries.¹¹⁹ During the colonial period, the indigenous past was important also because the king's justice was not only supposed to be the expression of natural and divine law, but that it was also expected to be grounded in the general consent of his vassals, including the indigenous ones.¹²⁰

On several occasions, King Philip II of Spain expressed his desire that the new rules imposed on the indigenous peoples would be perceived as “fairer” than the ones they had in precolonial times. In written exchanges with his counsellors in the 1580s, the Spanish monarch manifested his interest in being informed about precolonial rules, languages, territories, and warfare not only in order to select the “customs” that would be either conserved or erased within the colonial order, but also because he was concerned about his own image as a “king of justice.”¹²¹ The fairness of the law was defined in comparative terms (with respect to a precolonial past reconstructed from an imperial present), and this process played a key role in consolidating colonial authority over indigenous peoples.

But the Iberian Crowns also sought a balance between political obedience and labor obligations owed by their indigenous subjects, on the one hand, and a sense of justice and reciprocity, on the other. In this sense, knowledge of indigenous legal culture proved to be useful for finding a degree of compromise with the indigenous elite, for whom a series of privileges were preserved (provided they could prove that their preeminence in society predated Hispanic

119 J. Cañizares-Esguerra, *How to Write the History of the New World. Histories, Epistemologies, and Identities in the Eighteenth-Century Atlantic World* (Stanford: Stanford University Press, 2001); S. Sebastiani, “Las escrituras de la historia del Nuevo Mundo: Clavijero y Robertson en el contexto de la Ilustración europea,” *Historia y Grafía*, 37 (2011), 203–36; D. A. Brading, *The First America. The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492–1867* (Cambridge: Cambridge University Press, 1991); A. More, *Baroque Sovereignty. Carlos de Sigüenza y Góngora and the Creole Archive of Colonial Mexico* (Philadelphia: University of Pennsylvania Press, 2013); M. Almagro Gorbea and J. Maier Allende (eds.), *De Pompeya al Nuevo Mundo. La Corona española y la arqueología en el siglo XVIII* (Madrid: Real Academia de Historia, 2012).

120 P. Ragon and A. Exbalin (eds.), *Roi de justice aux Indes espagnoles* (Nanterre: Presses Universitaires de Paris Nanterre, 2020); B. Owensby, “Pacto entre rey lejano y súbditos indígenas. Justicia, legalidad y política en Nueva España, siglo XVII,” *Historia Mexicana* 61(1) (2011), 59–106.

121 C. Cunill, “Philip II and Indigenous Access to Royal Justice: Considering the Process of Decision-Making in the Spanish Empire,” *Colonial Latin American Review* 24(4) (2015), 505–24.

times), and with the commoners, whose tributary obligations were decreed by law (after inquiries were made to determine the modalities and amount of the tribute they had had to deliver in pre-Hispanic times). Therefore, although indigenous law tended to be either depreciated or marginalized in Portuguese and Spanish official histories, generating knowledge of precolonial normative orders was critical for the purpose of imperial governance. The missionaries, as well as a wide range of civil agents, were required to undertake historical research and what today we would call ethnographic studies on diverse indigenous groups in order to implement efficient policies at the local level.

Knowing according to which rules goods and riches were accumulated and exchanged, how warfare was conducted, on which grounds alliances were forged, how political authority was constructed, exercised and manifested itself, and what the belief systems were, was indeed instrumental in developing efficient strategies in the conquest, governance and evangelization of the New World.¹²² In the 1570s, indigenous law was still at the core of the questionnaires that the Council of the Indies sent to Americas, and the Spanish

122 Recent studies have indeed highlighted that indigenous expertise was crucial in the hybridization of warfare techniques and political alliances, the implementation of mail systems, the drafting of religious and linguistic policies, the cultivation of plants, the silver extraction, the organization of labor, and the repatriation of tributary obligations. L. Matthew and M. Oudijk (eds.), *Indian Conquistadors: Indigenous Allies in the Conquest of Mesoamerica* (Norman: University of Oklahoma Press, 2007); A. Covey, *Inca Apocalypse: The Spanish Conquest and the Transformation of the Andean World* (Oxford: Oxford University Press, 2020); F. Asselbergs, *Conquered Conquistadors: The Lienzo de Quauhquechollan: A Nahuatl Vision of the Conquest of Guatemala* (Boulder: University Press of Colorado, 2008); J. P. Galvão Ramalho et al., “Os grupos nativos e a morfologia da conquista na América Portuguesa,” *Nuevo Mundo Mundos Nuevos*, Jun. 25, 2020, <https://journals.openedition.org/nuevomundo/80168> (last accessed Feb. 1, 2023); B. R. Ferguson, and N. L. Whitehead (eds.), *War in the Tribal Zone: Expanding States and Indigenous Warfare* (Santa Fe and New Mexico: School of American Research Press, 1999); N. González Martínez, “Communicating an Empire and Its Many Worlds: Spanish American Mail, Logistics and Postal Agents, 1492–1600,” *Hispanic American Historical Review* 101(4) (2021), 567–96; J. O’Malley et al. (eds.), *The Jesuits. Culture, Science, and the Arts (1540–1773)* (Toronto: University of Toronto Press, 1999); A. Bigelow, “Incorporating Indigenous Knowledge into Extractive Economies: The Science of Colonial Silver,” *The Extractive Industries and Society* 3(1) (2016), 117–23; K. Lane, *Potosí. The Silver City That Changed the World* (Berkeley: University of California Press, 2021); R. Gil Montero and P. Zaglasky, “Colonial Organization of Mine Labor in Charcas (Present-Day Bolivia) and Its Consequences (Sixteenth to the Seventeenth Centuries),” *International Review of Social History* 61 (2016), 71–92; J. Lee, “The Aztec Triple Alliance: A Colonial Transformation of the Pre-Hispanic Political and Tributary System,” in Lee and Brokaw, *Texcoco*, 63–91; S. Declercq, “‘Siempre peleaban sin razón’. La Guerra Florida como construcción social indígena,” *Estudios de Cultura Náhuatl* 59 (2020), 97–130; M. Pastrana Flores, *Historias de la Conquista. Aspectos de la historiografía de tradición náhuatl* (Mexico City: UNAM-Instituto de Investigaciones Históricas, 2004) and “La entrega del poder de Motecuhzoma. Una propuesta crítica,” *Estudios de Historia Novohispana* 62 (2020), 111–44; D. E. Chipman, *Moteczuma’s Children. Aztec Royalty under Spanish Rule, 1520–1700* (Austin: University of Texas Press, 2005).

king's literate indigenous vassals were encouraged to participate in the drafting of some of the answers, a process that would give birth to the reports known as the *relaciones geográficas*.¹²³

The question of whether and how this bulk of local knowledge was incorporated into the Iberian monarchies' legal production in relation to their overseas territories is still under debate today.¹²⁴ The historian José Luis Egío considers that judge Alonso de Zorita's accounts on the Aztec tributary system tells us not only about "the extensive translation of European or Castilian normativities into the viceroyalty of New Spain," but also "about the complex ways in which the highly developed Nahua juridical and institutional culture influenced the legal evolution in the Mexican high plateau."¹²⁵ There is little doubt that the "translation" of indigenous law into colonial textual experience participated in the "localization" of the early modern European law in America. At the same time that data on indigenous law was accumulated, it was also reframed into a new legal language and order in a wide range of texts, including lawsuits.

Colonial courts of justice played an important role in the process of legal knowledge production in the Iberian empires. Recent studies have stressed the need to understand how indigenous peoples interacted with both civil and ecclesiastic courts of justice during the colonial period. They showed that a wide range of indigenous actors engaged with colonial courts as litigants, plaintiffs or witnesses, and that the mechanisms through which imperial justice was administered cannot be fully understood without taking their agency into account. Of particular importance in this context was the way in which

123 F. de Solano (ed.), *Cuestionarios para la formación de las relaciones geográficas de Indias, siglos XVI-XIX* (Madrid: Consejo Superior de Investigaciones Científicas, 1988).

124 A. Brendecke, *Imperio e información. Funciones del saber en el dominio colonial español* (Madrid and Berlin: Iberoamericana, Vervuert, 2012); A. Agüero, "Local Law and the Localization of Law: Hispanic Legal Tradition and Colonial Culture (16th-18th centuries)," in M. Meccarelli and M. J. Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History. Research Experiences and Itineraries* (Frankfurt: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 101–29; A. Masters, "A Thousand Invisible Architects: Vassals, the Petition and Response System, and the Creation of Spanish Imperial Caste Legislation," *Hispanic American Historical Review* 98(3) (2018), 377–406; F. Ruan, "Prudent Deferment: Cosmographer-Chronicler Juan López de Velasco and the Historiography of the Indies," *The Americas* 74(1) (2017), 27–55.

125 J. L. Egío, "From Castilian to Nahuatl to Castilian? Reflections and Doubts about Legal Translation in the Writing of Judge Alonso de Zorita (1512–1585)," *Rechtsgeschichte – Legal History* 24 (2016), 122–53, at 123. On the concept of legal translation, see T. Duve, "European Legal History – Concepts, Methods, Challenges," in T. Duve (ed.), *Entanglements*, 29–66; L. Foljanty, "Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor," *Max Planck Institute for European Legal History Research Paper Series No. 2015–09* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015).

indigenous peoples mobilized their legal cultures and their past in order to defend their interests at court and how those interpretations and reformulations of their law gave rise to the emergence of an ever-shifting and contested legal order in the Iberian empires.¹²⁶ In this context, one must bear in mind that the judicial strategies in which indigenous legal concepts were used were designed to defend their authors' views, interests or sense of belonging.

It is therefore not surprising that, from the sixteenth to the eighteenth century, some narratives on precolonial law aimed to convey criticisms against the colonial authority and that their authors claimed a wider access to political life. The “eighty-day limitation on the duration of the cases” invoked by Pomar might well have been a way of criticizing the length of the legal procedures in the vice-regal courts of justice, which – in cases that involved indigenous people – were supposed to follow a summary procedure.¹²⁷ In Peru, colonial authorities thought that the use of the precolonial indigenous

126 See D. Gonzales Escudero, “*Capacocha*, praxis y saber: Los saberes normativos en un ritual inca en el valle del río Chillón prehispánico (ca. 1500–1520s),” draft paper. I am grateful to the author for giving me the opportunity to read his work. S. Kellogg, *Law and Transformation of Aztec Culture, 1500–1700* (Norman: University of Oklahoma Press, 1995); J. E. Traslosheros, “El tribunal eclesiástico y los indios en el arzobispado de México, hasta 1640,” *Historia Mexicana* 51(3) (2002), 485–516; B. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008); Ruiz Medrano, *Mexico's Indigenous Communities*; J. Traslosheros and A. de Zaballa Beascochea (eds.), *Los indios ante los foros de justicia religiosa en la Hispanoamérica virreinal* (Mexico City: Universidad Nacional Autónoma de México, 2010); R. Honores, “Una aproximación a la hiperlexia colonial: caciques, cultural legal y litigación en los Andes (1550–1640),” *Nueva Crónica* 1 (2013), 1–8; B. Premo, *The Enlightenment on Trial. Ordinary Litigants and Colonialism in the Spanish Empire* (Oxford: Oxford University Press, 2017); Y. Yannakakis, M. Schrader-Kniffi, and L. A. Arrijo Díaz Viruell (eds.), *Los indios ante la justicia local. Intérpretes, oficiales y litigantes en Nueva España y Guatemala (siglos XVI-XVIII)* (Zamora: El Colegio de Michoacán, 2019); H. Cuevas Arenas (ed.), *Conflictos indígenas ante la justicia colonial: los hilos entrelazados de una compleja trama social y legal, siglos XVI-XVIII* (Cali: Universidad de Santiago de Cali, 2021); J. Gamboa, *El cacicazgo muisca en los años posteriores a la conquista: del psihipkua al cacique colonial, 1537–1575* (Bogotá: Instituto Colombiano de Antropología e Historia, 2013); S. Muñoz Arbeláez, *Costumbres en disputa. Los muisca y el Imperio español en Ubaque, siglo XVI* (Bogotá: Universidad de los Andes, 2015).

127 W. Connell, “‘De sangre noble y hábiles costumbres’: etnicidad indígena y gobierno en México Tenochtitlan,” *Histórica* 40(2) (2016), 111–33; H. Costilla Martínez, “La reinención de Nezahualcōyotl desde el discurso jurídico en *Historia de la nación chichimeca* de Fernando de Alva Ixtlilxóchitl,” *eHumanista* 33 (2016), 425–38; J. R. Romero Galván (ed.), *Historiografía novohispana de tradición indígena* (Mexico City: Universidad Nacional Autónoma de México, Instituto de Investigaciones Históricas, 2003), 313–51. Similar “idealizations” of precolonial law were used to denounce colonial dysfunctions in Gaspar Antonio Chi's *relación* about the “customs” of the Maya, in Guaman Poma de Ayala's *Coronica de buen gobierno*, as well as in Inca Garcilaso's *Comentarios reales de los Incas*; Streckler and Artiega, “La Relación,” 89–107; R. Adorno, *Guaman Poma: Writing and Resistance in Colonial Peru* (Albuquerque: University of Texas Press, 2000); R. Adorno, “Court and Chronicle: A Native Andean's Engagement with Spanish Colonial Law,” in S. Belmessous (ed.), *Native Claims: Indigenous Law Against*

past for political purposes had constituted one of the factors that led to the uprising in the 1780s known as the “Inca National movement.”¹²⁸ After this rebellion, copies of Inca Garcilaso’s *Royal Commentaries*, which contained information on precolonial law and were widely circulated in the eighteenth century, were confiscated.¹²⁹

Sometimes, the narratives on precolonial law sought to consolidate the prestige of one indigenous city above another or to legitimize a particular indigenous family in the search for political power.¹³⁰ According to Offner, “law occupied a special position in Texcocan history: emphasis on its antiquity and continuity served to legitimize Texcoco’s claim to a superordinate position in valley politics as well as to enhance the majesty of the law of Texcoco under later rulers.”¹³¹ It is also worth noting that, similarly to the lawsuits in which diverse actors were involved, much of the material gathered on indigenous law by royal demand was multiple in authorship, formats, degree of accuracy, and sources selected.¹³² Europeans were not the only ones to participate in these epistemological and political challenges. Several *mestizos* and indigenous intellectuals produced their own interpretations of indigenous legal orders. These actors’ capacity to travel to and meet in specific places, such as the house of the

Empire, 1500–1920 (Oxford: Oxford University Press, 2012), 63–85; M. Zamora, *Language, Authority, and Indigenous History in the Comentarios Reales de los Incas* (Cambridge: Cambridge University Press, 1988); G. Lamana, “Signifyin(g), Double Consciousness, and Coloniality: The *Royal Commentaries* as Theory of Practice and Political Project,” in Castro-Klarén and Fernández, *Inca Garcilaso*, 297–315; J. Godenzzi and C. Garatea (eds.), *Literaturas orales y primeros textos coloniales* (Lima: Pontificia Universidad Católica del Perú, Casa de la Literatura, 2017).

128 A. Flores Galindo, *In Search of an Inca: Identity and Utopia in the Andes* (Cambridge: Cambridge University Press, 2010); F. Macchi, *Incas ilustrados. Reconstrucciones imperiales en la segunda mitad del siglo XVIII* (Berlin and Madrid: Vervuert, Iberoamericana, 2009); C. Walker, *Smoldering Ashes: Cuzco and the Creation of Republican Peru, 1780–1840* (Durham and London: Duke University Press, 1999).

129 P. Guibovich Pérez, “The Dissemination and Reading of the *Royal Commentaries* in the Peruvian Viceroyalty,” in Castro-Klarén and Fernández, *Inca Garcilaso*, 129–53; S. Thomson, *We Alone Will Rule: Native Andean Politics in the Age of Insurgency* (Madison: University of Wisconsin Press, 2002).

130 A. Díaz Serrano, “La República de Tlaxcala ante el Rey de España durante el siglo XVI,” *Historia Mexicana* LXI(3) (2012), 1049–107; J. Baber, “Empire, Indians and the Negotiation of the Status of City in Tlaxcala, 1521–1550,” in Kellogg and Ruiz Medrano, *Negotiation within Domination*, 19–44.

131 Offner, *Law and Politics*, 47.

132 F. Montcher, “Écriture polyphonique de l’histoire. Archives et communication politique dans la monarchie hispanique (c. 1580–1640),” in M. Pia Donato and A. Saada (eds.), *Pratiques d’archives à l’époque moderne. Europe, mondes coloniaux* (Paris: Classiques Garnier, 2019), 323–49; N. L. Whitehead, *Histories and Historicities in Amazonia* (Lincoln: University of Nebraska Press, 2003); and “Historical Writing about Brazil, 1500–1800,” in J. Rabasa, M. Sato, E. Tortarolo, and D. Woolf (eds.), *The Oxford History of Historical Writing* (Oxford: Oxford University Press, 2012), vol. III, 641–61.

indigenous town council in Lima, or the Royal court in Madrid, contributed to the configuration of interethnic and transatlantic networks through which information circulated and pressure was put on the Crown.¹³³

Consequently, the frontiers between distinct types of documents were often blurred, since some ideas that appeared in treaties could also be used in the trials filed before colonial courts of justice.¹³⁴ There is little doubt that indigenous peoples and their allies often succeeded to obtain royal decrees that met their demands, thus showing that they played a role in forging the law in the Iberian empires, even beyond the local sphere.¹³⁵ The academic literature focused on these topics largely contributes to complexifying the overall discussions on the polycentric nature of the Iberian empires, the challenges of governing distant territories and diverse populations, and the idea of legal orders being constantly negotiated by a wide range of actors, including the indigenous ones.¹³⁶

The historian Francisco Quijano Velasco has shown, for example, how the Mendicant friar Alonso de la Veracruz used the concept of natural law to

- ¹³³ A. Dueñas, *Indians and Mestizos in the 'Lettered City': Reshaping Justice, Social Hierarchy, and Political Culture in Colonial Peru* (Boulder: University Press of Colorado, 2010); J. C. de la Puente Luna, *Andean Cosmopolitans: Seeking Justice and Reward at the Spanish Royal Court* (Austin: University of Texas Press, 2018); C. Cunill and F. Quijano, "Los procuradores de las Indias en el Imperio hispánico: reflexiones en torno a procesos de mediación, negociación y representación," *Nuevo Mundo Mundos Nuevos*, <https://journals.openedition.org/nuevomundo/79934?lang=pt> (last accessed Feb. 1, 2023).
- ¹³⁴ L. M. Glave Testino, "La gran vejación: manuscritos reivindicativos de Incas, caciques y defensores de la población indígena," *Revista Andes. Revista de la facultad de derecho y ciencias sociales* 4 (2020), 35–60; F. Ruan, "Language, Genealogy, and Archive: Fashioning the Indigenous Mother in the *Comentarios reales* and in Sixteenth-Century Mestizo Petitions," *Revista Canadiense de Estudios Hispánicos* 41(1) (2016), 35–64; Brian, *Alva Ixtlilxochitl's Native Archive*; J. Charles, "Felipe Guaman Poma de Ayala en los foros de justicia eclesiástica," in A. de Zaballa Beascochea (ed.), *Los indios, el Derecho canónico y la justicia eclesiástica en la América virreinal* (Madrid and Berlin: Iberoamericana, Vervuert, 2011), 203–22.
- ¹³⁵ S. Albiez-Wieck, "Indigenous Migrants Negotiating Belonging: Peticiones de cambio de fuero in Cajamarca, Peru, 17th–18th centuries," *Colonial Latin American Review* 26(4) (2017), 483–508; C. Cunill, "La negociación indígena en el Imperio ibérico: aportes a su discusión metodológica," *Colonial Latin American Review* 21(3) (2012), 391–412; Y. Yannakakis, "Indigenous People and Legal Culture in Spanish America," *History Compass* 11(11) (2013), 931–47 and "Beyond Jurisdiction: Native Agency in the Making of Colonial Legal Cultures. A Review Essay," *Comparative Studies in Society and History* 57(4) (2015), 1070–82.
- ¹³⁶ P. Cardim, T. Herzog et al. (eds.), *Polycentric Monarchies. How Did Early Modern Spain and Portugal Achieve and Maintain a Global Hegemony?* (Brighton: Sussex Academic Press, 2012); G. Gaudin and R. Stumpf (eds.), *Las distancias en el gobierno de los imperios ibéricos. Concepciones, experiencias y vínculos* (Madrid: Casa de Velázquez, 2022); J. Frago and N. G. Monteiro (eds.), *Um reino e suas repúblicas no Atlântico. Comunicações políticas entre Portugal, Brasil e Angola nos séculos XVII e XVIII* (Rio de Janeiro: Civilização Brasileira, 2017).

describe the indigenous legal order to defend the indigenous people's "dominion" over their lands, as well as their political legitimacy at the local level. This – among other arguments and motives – led to the institutionalization of the indigenous town councils and the recognition of their jurisdiction.¹³⁷ Because during the Renaissance language was associated with the political ability of the people who spoke it and with the laws according to which they ruled themselves, debates on local languages' *policía* became central in the defense of indigenous governance under imperial rule. To put it in other terms, the *policía* of a language had much to do with the *policía* of the people who used it. According to Sabine MacCormack, "among Nebrija's concerns was to show that the Castilian vernacular of which he composed the very first grammatical analysis was as orderly and systematic as Latin."¹³⁸ In America, several friars applied the same argument to the local languages that they put into *artes* (grammars). In the dedication of his work to King Philip II, Friar Domingo de Santo Tomás insisted on the "exceptional order and *policía*" of Quechua and claimed that "such being the language, the people who use it should be counted not as barbarous but as possessing *policía*."¹³⁹

Linguistic ideologies, convenient reconstructions of precolonial indigenous past, European traditions of legal pluralism, and the Iberian Crowns' political interests therefore played a crucial role in many respects: the creation of the indigenous town councils (with jurisdiction over their people at the local level), the recognition of indigenous "customs" (as long as they did not contradict Christian principles) (see Section 3.1), and the use of local languages not only in matters of evangelization (by training priests to become bilingual), but also in court, thanks to the mediation of official interpreters. Like their Spanish counterparts, the indigenous town councils conducted legal inquiries and administered justice in their own languages at the local level. If the case matter was serious, they were obliged to advise the higher authorities thereof

137 F. Quijano Velasco, "Alonso de la Veracruz: Natural Law, Dominion and Political Legitimacy in Native American Governance," in J. Paul (ed.), *Governing Diversity: Democracy, Diversity and Human Nature* (London: Cambridge Scholars Publishing, 2012), 89–106 and *Las repúblicas de la Monarquía. Pensamiento constitucionalista y republicano en Nueva España 1550–1610* (Mexico City: Universidad Nacional Autónoma de México, 2017).

138 S. MacCormack, "The Discourse of My Life: What Language Can Do (Early Colonial Views on Quechua)," in Durston and Mannheim, *Indigenous Languages*, 25–58, at 29. See also K. A. Woolard, "Bernardo de Aldrete and the Morisco Problem: A Study in Early Modern Spanish Language Ideology," *Comparative Studies in Society and History* 4 (2002), 446–80.

139 D. de Santo Tomás, *Grammatica o arte de la lengua general de los indios de los reynos del Peru* (Lima: Universidad Nacional de San Marcos, 1951), fol. Av, r-v, quoted by MacCormack, "The discourse," at 30.

and to send them the documentation they had produced. Key sources for investigating the issue of indigenous jurisdiction in the Iberian empires are the royal instructions that were given to indigenous town councils, the rules (*actas*) which these town councils wrote to organize their internal political life, and the local inquiries that were led by indigenous authorities and were inserted (after being translated into Castilian) as evidence in lawsuits.¹⁴⁰

Although only a few documents of this kind have survived to date, which makes it difficult to understand according to which rules this jurisdiction was exercised, researchers have shown that the members of the Mendicant orders played a crucial role in forging and translating the first royal instructions given to the indigenous town councils into local languages. Moreover, we know that these councils did not hesitate to take advantage of the jurisdictional conflicts that arose between the ecclesiastic and civil authorities, in order to forge opportunistic alliances that enabled them to defend their own interests and jurisdiction.¹⁴¹ As Herzog correctly points out, however, “[T]he existence of a plurality of jurisdictions did not produce distinct legal regimes. What existed instead was a universal common law that had to be localized.”¹⁴² In this sense, the Iberian experience in the Americas differed from its British counterpart, where a neat frontier was drawn between English colonists and indigenous

140 The records of the indigenous city of Tlaxcala are a perfect illustration of this ongoing indigenous legal production under Spanish rule. E. Solís, A. Valencia, and C. Medina Lima (eds.), *Actas de Cabildo de Tlaxcala, 1547–1567* (Mexico City: Archivo General de la Nación, 1985); J. Lockhart, F. Berdan, and A. Anderson (eds.), *The Tlaxcalan Actas: A Compendium of the Records of the Cabildo of Tlaxcala, 1545–1627* (Salt Lake City: University of Utah Press, 1986). On the Royal instructions given to the indigenous town councils in the Valley of Mexico, see Kellogg and Sell, “We Want to Give” and R. Rovira Morgado, *San Francisco Padreneh. El temprano cabildo indio y las cuatro parcialidades de México-Tenochtitlan, 1549–1599* (Madrid: Consejo Superior de Investigaciones Científicas, 2017).

141 A. Díaz Serrano, “Las poco y las más repúblicas. Los gobiernos indios en la América española,” in F. Palomo, Á. Barreto, and R. Stumpf (eds.), *Monarquías Ibéricas en perspectiva comparada (siglos XVI–XVIII)* (Lisbon: Universidade de Lisboa, 2018), 237–69; J. C. Puente Luna and R. Honores, “Guardianes de la real justicia: alcaldes de indios, costumbre y justicia local en Huarochirí colonial,” *Histórica* 40(2) (2016), 11–47; A. Dueñas, “Cabildos de naturales en el ocaso colonial: jurisdicción, posesión y defensa del espacio étnico,” *Histórica* 40(2) (2016), 135–67; C. Cunill, “‘Nos traen tan avasallados hasta quitarnos nuestro señorío’: cabildos mayas, control local y representación legal en el Yucatán del siglo XVI,” *Histórica* 40(2) (2016), 40–80; J. Munford, “Las llamas de Tapacarí: un documento judicial de un alcalde de indios en la Audiencia de Charcas, 1580,” *Histórica* 40(2) (2016), 171–85; M. R. C. de Almeida, *Metamorfoses indígenas. Identidade e cultura nas aldeias coloniais do Rio de Janeiro* (Rio de Janeiro: Arquivo Nacional, 2003); K. B. Graubart, “‘Ynuvaciones malas e rreprouadas’: Seeking Justice in Early Colonial Pueblos de Indios,” in B. Owensby and R. Ross (eds.), *Justice in A New World. Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York: New York University Press, 2018), 151–80.

142 Herzog, Section 3.1.

peoples. The latter were not incorporated into the empire under the category of vassals embedded with their own jurisdiction operating within the imperial system of justice but were instead considered as “sovereign nations.” Consequently, diplomacy and treaties, rather than courts, were the instruments through which indigenous peoples and British colonists confronted and negotiated their respective conception of the law.¹⁴³

In the Spanish empire, a comparable situation can only be found in the Chilean frontiers zone, where the relationships with the Mapuche were handled through diplomacy and the mechanism of the so-called *parlamentos*.¹⁴⁴ Differences between the Iberian and British empires were also due to how land tenure was handled. In the Spanish and Portuguese empires, the monarchs held titles over the Americas, but they did recognize the legitimacy of indigenous people’s dominion over their land, thus enabling them to have access to property through royal bestowal (mercy) or sale. As a

¹⁴³ B. Owensby and R. Ross, “Making Law Intelligible in Comparative Context,” in Owensby and Ross, *Justice in a New World*, 1–58; C. L. Tomlins, “The Legalties of English Colonizing: Discourses of European Intrusion upon the Americas, c. 1490–1830,” in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought: Transposition of Empire* (New York: Palgrave, 2000), 51–70; J. Glover, *Paper Sovereigns: Anglo-Native Treaties and the Law of Nations, 1604–1644* (Philadelphia: University of Pennsylvania Press, 2014). According to most of those treaties, indigenous people had the right to attend colonial trials and, eventually, to be part of “mixed juries” when indigenous individuals were involved in a case. Furthermore, indigenous individuals who lived in English plantations or towns and had no tribal ties were subjected to British law. J. Smolenski, “The Death of Sawantaeny and the Problem of Justice on the Frontier,” in W. A. Pencack and D. K. Richter (eds.), *Friends and Enemies in Penn’s Woods: Indians, Colonists, and the Racial Construction of Pennsylvania* (University Park: Pennsylvania State University Press, 2004), 104–28; K. Hermes, “Justice Will Be Done Us’: Algonquian Demands for Reciprocity in the Courts of European Settlers,” in C. L. Tomlins and B. H. Mann (eds.), *The Many Legalties of Early America* (Chapel Hill and London: University of North Carolina Press, 2001), 123–49. In New France, the recognition of the indigenous nations’ sovereignty, the extension of citizenship (the status of *régnicoles* or natural French) to those who accepted Christianity, and the grant of royal “protection” varied depending on time and place. According to Gilles Harvard, “far from being an affirmation of sovereignty, protection was understood as an unequal alliance, a greater power being able to take a secondary power under its wing upon request.” G. Harvard, “‘Protection’ and ‘Unequal Alliance’: The French Conception of Sovereignty over Indians in New France,” in R. Englebert and G. Teasdale (eds.), *French and Indians in the Heart of North America, 1650–1815* (East Lansing: Michigan State University Press, 2013), 113–38, at 117. See also G. Harvard and C. Vidal, *Histoire de l’Amérique française* (Paris: Flammarion, 2003), 170–250.

¹⁴⁴ A. Levaggi, *Paz en la frontera. Historia de los tratados con las comunidades indígenas en la Argentina, siglos XVI–XIX* (Buenos Aires: UMSA, 2000) y *Diplomacia hispano-indígena en las fronteras de América. Historia de los tratados entre la Monarquía española y las comunidades aborígenes* (Madrid: Centro de Estudios Políticos y Constitucionales, 2002); J. M. Zavala Cepeda, J. M. Díaz Blanco, and G. Payàs, “Los parlamentos hispano-mapuches bajo el reinado de Felipe III: la labor del padre Luis de Valdivia (1605–1617),” *Estudios Ibero-Americanos* 40(1) (2014), 23–44.

result, discussions on precolonial law regarding land tenure were relevant for both the preservation and the incorporation of indigenous relations to land within the new legal order. These discussions were also invoked in trials over land that confronted indigenous peoples with settlers and, in the Valley of Mexico, visual evidence was produced to support the indigenous litigants' arguments.¹⁴⁵ By contrast, the British Crown considered that empty land was *terra nullius*, which any sovereign able to settle would be entitled to govern.¹⁴⁶

Closely intertwined with indigenous jurisdiction was the recognition of the legal valence of indigenous peoples' customs. In a 1555 royal decree, the category of "laws and customs" included not only the norms that indigenous peoples had applied in the past and that were still in use within indigenous communities but also the ones that had been produced after Spaniards arrived. The Spanish king decreed that he would

approve and consider as good your good laws and good customs that you had in the past and that you currently have for your good governance and civility (*policía*), as well as the ones you have newly made and ordered altogether, provided that we can add what we want and what seems to us convenient for God our lord's service and ours and for your conservation and Christian civility (*policía*), as long as they do not prejudice neither

¹⁴⁵ On land tenure in the Iberian empires, see T. Herzog, *Frontiers of Possession. Spain and Portugal in Europe and the Americas* (Cambridge: Harvard University Press, 2015) and "Colonial Law and 'Native Customs': Indigenous Land Rights in Colonial Spanish America," *The Americas* 69(3) (2013), 303–21; Pulido Rull, *Mapping Indigenous Land*; Ruiz Medrano, *Mexico's Indigenous Communities*; M. Bastias Saavedra, "The Normativity of Possession. Rethinking Land Relations in Early-Modern Spanish America, ca. 1500–1800," *Colonial Latin American Review* 29(2) (2020), 223–38; J. Holston, "The Misrule of Law: Land and Usurpation in Brazil," *Comparative Studies in Society and History* 33 (1991), 695–725; J. Cañizares-Esguerra, "The 'Iberian' Justifications of Territorial Possession by Pilgrims and Puritans in the Colonization of America," in J. Cañizares-Esguerra, *Entangled Empires. The Anglo-Iberian Atlantic, 1500–1830* (Philadelphia: University Press of Pennsylvania), 161–77; J. Baber, "Law, Land, and Legal Rhetoric in Colonial New Spain: A Look at the Changing Rhetoric of Indigenous Americans in the Sixteenth Century," in Belmessous, *Native Claims*, 41–63; M. E. Matsumoto, *Land, Politics, and Memory in Five Nija'ib' k'iche' titulus. 'The Title and Proof of Our Ancestors'* (Boulder: University Press of Colorado, 2017).

¹⁴⁶ C. L. Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26(2) (2006), 315–72. Tomlins considers that those differences between Iberian and English colonialism not only stem from a distinct legal thought but also in the socioeconomic model that the British Crown and its settlers sought to implement in the Americas. According to him, "the English colonial project was one more of accumulation through clearance and settlement than through extraction, a transference of population rather than the seizure of one." C. L. Tomlins, "Introduction: The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History," in Tomlins, *The Many Legalities*, 1–24, at 12.

what you have done nor the good customs and statutes when they are fair and good.¹⁴⁷

This text demonstrates how the treatment of indigenous “customs” was paradigmatic of imperial ambiguities toward indigenous normative orders. The king’s invocation of “your good laws and good customs” referred to the town councils’ ability to draft their own norms at the local level. However, their content could be modified at any moment to serve God and king, that is to say, according to imperial political rhetoric, to Christianization, and to the conversion of the indigenous people. Furthermore, in court, the recognition of “customs” depended on how successfully the lawyers argued and, above all, on the judges’ decisions, which could be based on a series of imprecise criteria such as the customs’ antiquity, their current social value, and the conflicts in which they were invoked.¹⁴⁸ The invocation of these customs in court could therefore give rise to unpredictable jurisprudence. In some cases, the settlers’ lawyers appealed to this concept to defend their own practices, such as the use of indigenous porters called *tamemes* for transporting the tributes, which indigenous peoples sought to abolish.¹⁴⁹

Local Languages as an Arena for Ever-Shifting and Contested Normative Orders

Language also played a key role in enforcing or contesting legal orders in the Iberian empires. In this context, it is important to note that the use of local

147 D. de Encinas, *Cedulario Indiano*, Book IV, f. 355–56, decree approving the good customs that the “indios” had in the past and have for their good governance and civility, Valladolid, 1555 (Cédula en que se aprueba a los indios las buenas costumbres que antiguamente han tenido y tienen para su buen regimiento y policía): “aprobamos y tenemos por buenas vuestras buenas leyes y buenas costumbres que antiguamente entre vosotros habéis tenido y tenéis para vuestro buen regimiento y policía y las que habéis hecho y ordenando de nuevo todos vosotros juntos con tanto que nos podamos añadir lo que fuéremos servido y nos pareciere que conviene al servicio de Dios nuestro señor y nuestro y a vuestra conservación y policía cristiana no perjudicando a lo que vosotros tenéis hecho ni a las buenas costumbres y estatutos vuestros que fueren justos y buenos.”

148 Y. Yannakakis, *Since Time Immemorial: Native Custom and Law in Colonial Mexico* (Durham: Duke University Press, 2023). T. Herzog, “Immemorial (and Native) Customs in Early Modernity: Europe and the Americas,” *Comparative Legal History* (2021), 1–53; B. Premo, “Custom Today: Temporary, Customary Law, and Indigenous Enlightenment,” *Hispanic American Historical Review*, 94(3) (2014), 355–79; Y. Yannakakis, “Costumbre: A Language of Negotiation in Eighteenth-Century Oaxaca,” in Kellogg and Ruiz Medrano, *Negotiation within Domination*, 137–73; T. Okoshi Harada, “Tenencia de la tierra y territorialidad: conceptualización de los mayas yucatecos en vísperas de la invasión española,” in L. Ochoa (ed.), *Conquista, transculturación y mestizaje: raíz y origen de México* (Mexico City: Universidad Nacional Autónoma de México, 1995), 67–94.

149 Cunill and Rovira, “Lo que nos dejaron,” 290.

languages was tolerated in court. Lawyers and interpreters who were tasked with representing indigenous people or translating their statements before the judges were essential to these dynamics. Discussions around unequal access to royal justice for indigenous persons in comparison with Spaniards and the subsequent decision to consider them as *personae miserabiles* were decisive for the appointment of *defensores de indios*, lawyers specialized in representing the indigenous people in the colonial courts of justice.¹⁵⁰ As for the interpreters, as bilingualism was not a general practice – neither among the judges nor among the indigenous people – their presence in court was required. In the Spanish empire, abuses committed by some interpreters – and the dramatic consequences for the indigenous peoples – led to the institutionalization of this position. As early as 1540, official interpreters were appointed for the court of Mexico. They had to follow a series of rules and were regularly inspected by higher officials. Eventually, the same norms would be used in other jurisdictions as the Spanish Crown expanded its control over other territories.¹⁵¹

Although in Brazil interpreters did not receive official recognition until the nineteenth century, recent scholarship has highlighted the key role that the so-called *linguas* played during the entire colonial period.¹⁵² Along the imperial frontiers, translating and interpreting played a different role. This

150 W. Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* (Berkeley: University of California Press, 1983); C. Cunill, *Los defensores de indios de Yucatán y el acceso de los mayas a la justicia colonial, 1540–1600* (Mérida: Universidad Nacional Autónoma de México, Centro Peninsular en Humanidades y Ciencias Sociales, 2012); M. Novoa, *The Protector of Indians in the Royal Audience of Lima: History, Careers and Legal Culture, 1575–775* (Leiden: Brill, 2016). For a historiographical overview on this topic, see C. Cunill, “La protectoría de indios en América: avances y perspectivas entre historia e historiografía,” *Colonial Latin American Review* 28(4) (2019), 478–95. It is worth noting that, after being abolished, this institution resurfaced in some Latin American nations in the nineteenth century. See J. Pavez Ojeda, G. Payàs, and F. Ulloa Valenzuela, “Los intérpretes mapuches y el Protectorado de Indígenas (1880–1930): constitución jurídica de la propiedad, traducción y castellanización del Ngulumapu,” *Boletín de Filología* 55(1) (2020), 161–98.

151 On the interpreters of local languages, see Cunill and Glave Testino, *Las lenguas indígenas en los tribunales*; Y. Yannakakis, “Making Law Intelligible: Networks of Translation in Mid-Colonial Oaxaca,” in G. Ramos and Y. Yannakakis (eds.), *Indigenous Intellectuals. Knowledge, Power and Colonial Culture in Mexico and the Andes* (London and Durham: Duke University Press, 2014), 79–106; C. Cunill, “Un mosaico de lenguas: los intérpretes de la Audiencia de México en el siglo XVI,” *Historia Mexicana* 269 (2018), 7–48; J. C. de la Puente Luna, “The Many Tongues of the King: Indigenous Language Interpreters and the Making of the Spanish Empire,” *Colonial Latin American Review* 23(2) (2014), 143–70; C. Jurado, “Dar a entender. Prácticas de interpretación y saberes jurídicos en las revisitas. El corregimiento de Chayanta (Charcas, Virreinato del Perú) en el siglo XVII,” in Cunill and Glave Testino, *Las lenguas indígenas*, 165–79; J. Gamboa, “El primer ‘lengua indígena’ de los naturales de la real audiencia de Santa Fe: el mestizo Lucas Bejarano, mediador y protagonista en los tribunales reales (s. XVI),” in Cunill and Glave Testino, *Lenguas indígenas*, 97–120.

152 B. Mariani, “Quando as línguas eram corpos: sobre a colonização linguística portuguesa na África e no Brasil,” in E. P. Orlandi, *Política linguística no Brasil* (Campinas: Pontes

is exemplified by the case of the Mapuche, who fulfilled a function similar to that of the intermediaries along the Spanish-Arab frontier in the context of the late medieval *Reconquista*.¹⁵³ Both interpreters and lawyers were situated at the intersection between the indigenous peoples and the judges. They not only articulated diverse regimes of justice but also brought to the fore different expectations of what justice meant for the actors engaged with the colonial justice system. The images, concepts, and categories that languages convey were, indeed, instrumental to the translation of normative orders in the Iberian empires (and probably also in pre-Hispanic America).¹⁵⁴

The linguistic work on local languages undertaken by the members of the Mendicant orders largely contributed to the imposition of new legal concepts on indigenous peoples. The friars introduced loanwords and neologisms, and they re-signified a selection of indigenous words so that they could fit well with Christian concepts. Because – as shown by Thomas Duve in Section 3.2 of this volume – in early modern European legal culture, ecclesiastical and civil law were intertwined, the friars’ linguistic accomplishments had an impact not only on indigenous religious beliefs but also on their view on governance, justice, and law. The colonial dictionaries and grammars, as well as the sermons, catechisms, and confessionals were vivid manifestations of the conceptual translation work performed by these friars on the indigenous languages.¹⁵⁵ The friars, helped by indigenous specialists, were also in charge

Editora, 2007); D. Silva-Reis and J. Milton, “The History of Translation in Brazil through the Centuries: In Search of a Tradition,” in Y. Gambier and U. Stecconi (eds.), *A World Atlas of Translation* (Amsterdam and Philadelphia: John Benjamins Publishing Company, 2019), 395–417; A. C. Metcalf, *Go-between and the Colonization of Brazil, 1500–1600* (Austin: University of Texas Press, 2008); A. Rodrigues, “As outras línguas de colonização do Brasil,” in S. Cardoso, J. Mota, R. V. Matos Silva (eds.), *Quinhentos anos de história linguística do Brasil* (Salvador: Funcultura, 2006); M. C. Barros, “The Office of Lingua: A Portrait of the Religious Tupi Interpreter in Brazil in the Sixteenth Century,” *Itinerario – European Journal of Overseas History* 25(2) (2001), 110–40.

- 153 G. Payàs and I. Alonso Araguás, “La mediación lingüística institucionalizada en las fronteras hispano-mapuche e hispano-árabe: ¿un patrón similar?,” *Historia* 42(1) (2009), 185–201; M. A. Samaniego López and G. Payàs, “Traducción y hegemonía: Los parlamentos hispano-mapuches de la Frontera araucana,” *Atenea: revista de ciencias, artes y letras* 516 (2017), 33–48; G. Payàs and J. Manuel Zavala (eds.), *La mediación lingüístico-cultural en tiempos de guerra: cruce de miradas desde España y América* (Temuco: Ediciones la Universidad Católica de Temuco, 2012).
- 154 For an interesting comparison with how Persia acquired the “status of a language of Islamic law” in premodern India, see N. Kanalu, “Prefatory Notes on Persian Idioms of Islamic Jurisprudence: Reasoning and Procedures of Law-Making in Premodern Islamicate India,” *Manuscript Studies* 4(1) (2019), 93–112.
- 155 B. Melià, *El guaraní conquistado y reducido. Ensayos de etnohistoria* (Asunción: Universidad Católica del Paraguay, 1993); G. Wilde, *Religión y poder en las misiones de guaraníes* (Buenos Aires: SB Editores, 2009); C. Pompa, *Religião como tradução. Missionários, Tupi e “Tapuia” no Brasil colonial* (Bauru: EDUSC, 2003); C. Castelnu-L’Estoile, *Operários de*

of translating the New Laws of 1542 as well as the first royal ordinances for the indigenous town councils into local languages, and they used linguistic strategies to introduce European legal concepts to indigenous languages. Similarly, the struggles between early modern and revolutionary conceptions of the law manifested themselves in indigenous languages during the Spanish–American wars of independence.¹⁵⁶

Nonetheless, as Capucine Boidin and Angélica Otazú Melarejo put it, drawing offensive parallels “between Amerindian language and Amerindian identity and culture” must be set aside to avoid an essentializing approach to indigenous lexicography.¹⁵⁷ Equally problematic would be the use of categories created by colonial agents, for example, the aforementioned *principales*, to describe indigenous realities, as that would ignore the fact that these categories largely contributed to rendering some members of indigenous councils invisible. Although the use of such terms did not mean that these actors completely disappeared during the colonial period, it deprived them of official recognition and subjected them to indigenous governors’ arbitrary decisions regarding

uma vinha esteril. Os jesuítas e a conversão dos índios no Brasil, 1580–1620 (Bauru: EDUSC, 2006); S. MacCormack, *Religión en los Andes. Visiones e imaginación en el Perú colonial* (Lima: Ediciones El Lector, 2016); A. Durston, *Pastoral Quechua. The History of Christian Translation in Colonial Peru, 1550–1650* (Notre Dame: University of Notre Dame Press, 2007); M. Schrader-Kniffki and Y. Yannakakis, “Sin and Crimes: Zapotec-Spanish Translation in Catholic Evangelization and Colonial Law in Oaxaca, New Spain,” in O. Zwartjes, K. Zimmermann, and M. Schrader-Kniffki (eds.), *Translation Theories and Practices: Selected Papers from the Seventh International Conference on Missionary Linguistics* (Amsterdam and Philadelphia: John Benjamins Publishing Company, 2014), 161–200; S. Dedenbach-Salazar Sáenz, “Idolatría y sexualidad: Métodos y contextos de la transmisión y traducción de conceptos cristianos en los confesionarios ibéricos y coloniales de los siglos XVI–XVIII,” *Indiana* 35(2) (2018), 9–27; W. Hanks, *Converting Words: Maya in the Age of the Cross* (Berkeley: University of California Press, 2010); M. Christensen, *Translated Christianities: Nahuatl and Maya Religious Texts* (Philadelphia: Pennsylvania State University Press, 2014); L. Burkhart, *The Slippery Earth: Nahuatl-Christian Moral Dialogue in Sixteenth-Century Mexico* (Tucson: The University of Arizona Press, 1989); B. Alcántara Rojas, “Evangelización y traducción. La vida de san Francisco de San Buenaventura vuelta al náhuatl por fray Alonso de Molina,” *Estudios de Cultura Náhuatl* 46 (2013), 89–158 and “Los textos cristianos en lengua náhuatl del periodo novohispano: fuentes para la historia cultural,” *Dimensión Antropológica* 74 (2018), 64–94.

156 C. Boidin, C. Itier, and J. Chassin, “Presentación del suplemento especial sobre la propaganda política en lenguas indígenas en las Guerras de Independencias sudamericanas,” *Ariadna Histórica. Lenguajes, conceptos, metáforas* (2016); M. Morris, “Language in Service of the State: The Nahuatl Counterinsurgency Broadside of 1810,” *Hispanic American Historical Review* 87(3) (2007), 433–70; A. Durston, “Quechua Political Literature in Early Republican Peru (1821–1876),” in Heggarty and Pearce, *History and Language*, 165–85; R. M. Laughlin, *Beware of the Great Horned Serpent! Chiapas under the Threat of Napoleon* (New York: Institute for Mesoamerican Studies, University at Albany, 2003).

157 C. Boidin and A. Otazú Melarejo, “Toward a Guaraní Semantic History: Political Vocabulary in Guaraní (Sixteenth to Nineteenth Centuries),” in Durston and Mannheim, *Indigenous Languages*, 125–60, at 126.

their presence at the meetings of town councils. Conversely, a Castilian loanword that appears in a text written in a local language might convey different indigenous representations perfectly.¹⁵⁸ Colonial texts, either in Castilian or in local languages, must thus be understood as spaces of “cultural oscillation,” in which both European and indigenous views could be entangled.

According to José Antonio Mazzotti, when Inca Garcilaso wrote of the “sun of justice” in the fragment of the *Royal Commentaries* mentioned earlier, he referred to the Christian God, but also suggested “meanings within the context of an Incan imagery.”¹⁵⁹ The fact that “the medieval Christian church began to wield the image of the *Sol Iustitiae* in an effort to replace the pagan *Sol Invictus* of the Roman Empire” may not have gone unnoticed by Garcilaso.¹⁶⁰ The inclusion of Quechua words as well as the comparisons between Latin and Quechua and between the Roman and the Inca empires were also part of a rhetorical strategy intended to defend the indigenous jurisdiction under the imperial rule.¹⁶¹ To put it differently, language was an arena in which legal concepts were constantly negotiated through the mediation of specialized agents, whose linguistic work depended on their sociopolitical position. From this perspective, the use of local languages in colonial courts of justice might have contributed to creating *loci* in which diverse interpretations of the law could be expressed and, eventually, discussed thanks to the cultural and linguistic mediation of interpreters.

Glave Testino has shown that the Quechua word *landi*, which among Andean peoples had a meaning close to the ideas of alienation and slavery, was used by the interpreter of the *corregidor* of Cuzco (a high-ranking judicial

158 C. Cunill, “Emprunts lexicaux au castillan en langue maya yucatèque. Une approche historique à partir de textes du XVI^e siècle,” *HispanismeS. Revue de la société des Hispanistes Français* 12 (2019), 7–24. See also D. Zaslavsky, G. Payàs, and I. Carreño, “Vicisitudes de algunas equivalencias en el discurso de la diplomacia hispano-mapuche en el Chile colonial,” *Meta: Journal des traducteurs* 64(3) (2019), 648–67; M. A. Mendoza Posadas, “La retraducción colonial al español de dos testamentos nahuas del siglo XVI: adaptaciones de una tradición discursiva,” in M. L. Arnal Purroy et al. (eds.), *Actas del X Congreso Internacional de Historia de la Lengua Española* (Zaragoza: Institución Fernando El Católico, 2018), vol. II, 1965–982; D. Silva-Reis and M. Bagno, “A tradução como política linguística na colonização da Amazônia brasileira,” *Revista Letras Raras* 7(2) (2018), 8–28; T. Brignon, “Los falsos Tupás: censura, traducción y recepción del concepto de idolatría en las reducciones jesuíticas de guaraníes (s. XVII-XVIII),” in Telesca and Vidal, *Historia y lingüística guaraní*, 81–114.

159 Mazzotti, “A Syncretic Tropology,” 78. 160 *Ibid.*, 66.

161 S. MacCormack, *On the Wings of Time: Rome, the Inca, and Peru* (Princeton: Princeton University Press, 2007); C. Townsend, “The Politics of Aztec History,” in Durston and Mannheim, *Indigenous Languages*, 105–25; D. Tavárez, “Aristotelian Politics among the Aztecs: A Nahuatl Adaptation of a Treatise by Denys the Carthusian,” in J. Mander, D. Midgley, and C. Beaulé (eds.), *Transnational Perspectives on the Conquest and Colonization of Latin America* (London and New York: Routledge, 2019), 141–55.

official in the viceroyalty of Peru in the 1560s) to refer to the “perpetuity” of the *encomienda*, a royal grant given to the conquerors in the form of indigenous tributes. For such a translation, which contributed to fuel the indigenous opposition to a political project that would have undermined their interests, the interpreter was prosecuted in a trial in which the issue of “legal translation” proved to be crucial.¹⁶² Although discussions ultimately took place in Castilian, thus enhancing the asymmetric coexistence of different legal orders that characterized the imperial situation, the relevance of using local languages in the judicial sphere, and the weight of some indigenous legal concepts in political debates must not be underestimated.¹⁶³ Their use in court must be interpreted in the light of ideologies of language, power relationships, and cultural oscillations.¹⁶⁴

Final Comments

The main challenges in the study of indigenous law are not only the disparity of the sources available depending on the groups, areas, or times under consideration but also their diversity. They range from material vestiges, ethnographic surveys, historical narratives, iconographic and pictographic documents to dictionaries, and notarial and judicial texts. In general, the exclusion

162 L. M. Glave Testino, “*Simiachí*: traductor o lengua en el distrito de la Audiencia de Lima,” in Cunill and Glave Testino, *Las lenguas indígenas*, 121–66; C. Cunill, “Indigenous Interpreters on Trial in the Spanish Empire: The Rise and Fall of the Maya Interpreter don Hernando Uz in Seventeenth-Century Yucatán,” in L. Ruiz Rosendo and J. Baigorri Jalón (eds.), *Towards an Atlas of the History of Interpreting* (Amsterdam and Philadelphia: John Benjamins Publishing Company, 2023).

163 On this topic, see also T. Herzog, “Dialoging with Barbarians: What Natives Said and How Europeans Responded in Late-Seventeenth- and Eighteenth-Century Portuguese America,” in Owensby and Ross, *Justice in a New World*, 61–88. For a comparison with the role that language and linguistic mediation played in other imperial settings, see R. M. Morrissey, “The Terms of Encounter: Language and Contested Visions of French Colonization in the Illinois Country, 1673–1702,” in Englebert and Teasdale, *French and Indians*, 43–76; Hermes, “‘Justice Will Be Done Us’.”

164 During the wars of independence, indigenous peoples – as well as Afro-Latin Americans – continued to engage in politics, and a significant bulk of the political literature was produced in local languages with the aim of introducing new legal concepts such as “citizenship” among these sectors of the population. See Herzog, Chapter 4. M. Echeverri Muñoz, *Indian and Slave Royalists in the Age of Revolution. Reform, Revolution and Royalism in the Northern Andes, 1780–1825* (Cambridge: Cambridge University Press, 2016); J. Malerba (ed.), *A independência brasileira. Novas dimensões* (Rio de Janeiro: Editora FGV, 2006). On the political literature in indigenous languages produced during the wars of independence, see C. Boidin, C. Itier, and J. Chassin, “Presentación del suplemento especial sobre la propaganda política en lenguas indígenas en las Guerras de Independencias sudamericanas,” *Ariadna Histórica: Lenguajes, Conceptos, metáforas* (2016); Morris, “Language in Service”; Laughlin, *Beware of the Great Horned Serpent*.

or inclusion in the analysis of specific sources has been intertwined with the conception of law that prevailed in the writing of legal history and the place that indigenous people were expected to occupy in society. Among the factors that have contributed to change the history of indigenous law over the last decades were reflections on the multiple actors who engaged with the production of legal knowledge; the consideration of the local and global dynamics in which legal knowledge emerged in an Atlantic and imperial perspective; and the criticism of the use of European concepts in describing the indigenous peoples' normative orders.

These changes have led scholars to take into account the historical processes through which different precolonial legal orders were intertwined before the Iberian conquests. From this perspective, the contact with European law can be placed within a long history of contested and ever-shifting legal accommodations. It also enables an understanding of how indigenous peoples experienced these negotiations according to their own legal culture. Furthermore, it is crucial to acknowledge the fact that precolonial law did not survive Iberian rule without alteration, but rather that it was subjected to complex changes following the engagement by a wide range of actors with law at different levels. The exercise of the indigenous town councils' jurisdiction, the engagement with the courts of justice, the sending of claims, memorials, and agents throughout the empire were avenues through which indigenous peoples participated in forging Iberian imperial law.

Obviously, this must not supersede the need to take into account the asymmetries in the power relations and to discern distinct degrees of agency when analyzing these questions. When indigenous, *mestizos*, or European peoples, who all occupied diverse sociopolitical positions, reported on indigenous law, they produced legal knowledge, in the sense that they situated indigenous law within a new linguistic, social, epistemological, and judicial setting. In this sense, approaches focused on local languages, translation, and linguistic policies help us go beyond the model of a dominant legal culture spreading and local normative orders resisting or disappearing, and take us closer to the negotiation, disputes, and misunderstandings that underpin the production of law in the Iberian empires.