

How to Approach Colonial Law?

3.1 A Civil Law for a Religious Society

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To inquire on Latin American colonial law requires remembering a time before the institution of national legal systems and before legislation became the primary tool for legal creation. Understanding that time, so foreign to our contemporary experience, mandates that we take a journey into a past that was vastly different than our present. This journey will show that the main issue in understanding early modern alterity is not revealing the obvious fact that specific norms were different, but instead shedding light on a legal universe that was profoundly distinct from our own.¹ It will also demonstrate the enormous difficulties in imagining a colonial law as many scholars have described it in the past: clearly distinguishable from a metropolitan law, mainly resulting from legislation, and with a certain unity or intentionality (for the details of the relevant historiographical discussions, see Section 1.1).

To understand how Europeans implemented legal systems in the colonies and how these operated, it is essential to begin in Europe, our first stop. In the chapter's first section, we will observe what early modern European law consisted of, and how it functioned, including the relations between civil and canon law and the existence of a multiplicity of jurisdictions, that is, of authorities endowed with the capacity to declare and apply the law (*juris-dictio*). Moving ahead, our second stop will be to examine how this pan-European matrix

1 A. M. Hespanha, "The Law in the High and the Late Middle Ages: The Learned *Ius Commune* and the Vernacular Laws: Southern Europe (Italy, Iberian Peninsula, France)," in H. Pihlajamäki, M. D. Dubber, and M. Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press, 2018), 332–57. See also J. L. Halpérin, "Est-il temps de déconstruire les mythes de l'histoire du droit français?," *Clio@Thémis* 5 (2012), 1–19, who criticizes the move to equate the history of medieval and early modern law with the history of the state.

operated in Spain and Portugal. Here, among other things, we will see that royal orders were jurisdictional acts that declared and applied the law but did not create it. Iberian kings did not invent new rules; they applied rules allegedly already in existence to concrete situations. The third stop of our journey focuses on how, starting in the sixteenth century, this matrix was transported to the Americas, where both the Spanish and the Portuguese faced the questions of how to adapt their own laws to the colonial situation and how to deal with what they perceived as local variations, including indigenous and African legalities. To explain how all this operated, the fourth stop will be a close examination of the case of customary law. After surveying its role in Europe, and then in Spain and Portugal, we will observe how it operated in the Iberian American colonies in general, and *vis-à-vis* indigenous and Afro-Latin American legalities in particular. Our journey will end with the practical questions of how we can reconstruct colonial law and how we can set Iberian colonial law in the larger global context of European early modern colonialism.

The Early Modern European Legal Universe

The first stop on our journey is to understand that the early modern European law (*derecho*, *direito*, *diritto*, *droit*) that shaped developments in the colonies was not a collection of legal solutions but an assortment of suggestions – some more prescriptive than others – regarding how to analyze social phenomena so as to identify a just solution. The basic assumption that guided this legal universe was that a preset divine order existed, indicating how things must transpire. All members of society, including the authorities but also a plethora of other actors such as jurists, theologians, judges, officials, and many others, had the obligation to defend this divine order.² To uncover what it prescribed, they considered multiple sources.³ Those who attended university looked for indications in texts of Roman, canon and feudal law, as well as theology, all of which they learned to analyze and debate during their academic training. They, and others who had no university training, also appealed to Scripture, customs, common sense, as well as royal and local enactments.

2 The classical definition of justice during this period was “to give each person their due.” This definition originated in antiquity. It was already mentioned by Cicero (*iustitia suum cuique distribuit*) and was later reproduced in the *Corpus Iuris Civilis*, where students were told, for example, in the *Institutes*, lib. I, title I “concerning justice and law,” that “justice is the constant and perpetual desire to give each man his due right.” This definition was then taken on by medieval jurists.

3 J. Vallejo, “El cáliz de plata: Articulación de órdenes jurídicos en la jurisprudencia del *ius commune*,” *Revista de Historia del Derecho* 38 (2009), 1–13; and A. M. Hespanha, *Como os juristas viam o mundo. 1550–1750. Direitos, estados, pessoas, coisas, contratos, ações e crimes* (Lisbon: CreateSpace Independent Publishing Platform, 2015).

The plurality of actors who engaged in these efforts at discovery, the variety of situations they discussed, and the multiplicity of sources they considered, ensured that this hermeneutical effort led to constant debates and disagreements, with different actors and authors often proposing distinct, sometimes even outright contradictory, solutions. Some solutions were considered more trustworthy than others, either because of the reputation of those who proposed them, or because they had successfully stood the test of extensive debate. However, no solution was ever considered final, because at stake was not who made the pronouncement, but whether it correctly captured what contemporaries considered the ultimate truth.

This understanding of the law was widely disseminated both socially and geographically. In the past, many scholars appealed to what they described as a gap between law and its application, “law on the books” versus “law in action,” an erudite and a popular sphere of legal knowledge and practice. Yet, these descriptions mostly depended on a very narrow and often anachronistic understanding that equated law with legislation. This understanding assumed that early modern kings enacted rules that their subjects were obliged to follow.⁴ But this was not how early modern European law operated. Indeed, when the activities of contemporary actors are compared not only to royal enactments or the opinion of a single jurist, but instead to the compound world of legal debates and its multiplicity of suggestions, it becomes astonishingly clear that even illiterate actors living in remote communities fully participated in this universe.⁵ These actors knew, for example, that in order to use communal pasture, they needed to be members of the community, and that, to achieve recognition as such, they had to demonstrate their loyalty to it. They were equally aware that their usage of the land gave them rights to continue doing so, and they understood that if others invaded their territories, they needed to protest immediately, else their silence would be interpreted as consent. Though less erudite actors were not always clear about why this was the case, or what plethora of options were available in

4 From this perspective, to argue, as does L. Benton, “Possessing Empire: Iberian Claims and International Law,” in S. Belmessous (ed.), *Native Claims: Indigenous Law Against Empire, 1500–1920* (New York: Oxford University Press, 2012), 19–40, at 19 and 21–22, that actors did not always adhere to the letter of the law, or that they used law as a resource rather than as a script, is both anachronistic and a misunderstanding of how law operates generally, even today.

5 T. Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003), also available in Spanish and French translations; and T. Herzog, *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Cambridge: Harvard University Press, 2015), also available in Spanish, Portuguese, and Brazilian Portuguese.

legal debates, nonetheless, individuals of very different social, educational, and economic backgrounds were cognizant of how they had to behave to obtain or guard rights.

Historians have yet to explain how these processes of communication between a juridical and a popular sphere took place. Most actors, convinced that these practices were so self-evident as to require no explanation, seldom discussed them explicitly. When asked by neighbors, the authorities, or judges why they thought these behaviors awarded them rights, most suggested that they followed them because this was how god created the universe: The practices reflected the way things were, and had always been, everywhere.⁶ These responses point to legal knowledge acquired by processes of socialization. These likely included informal observation and conversations, texts read or read out in public by town criers, as well as participation in public rituals and ceremonies in which certain ideas and structures were created, manifested, and reproduced. Clergymen also had a major role in inculcating this implicit normative knowledge in their Christian flock by intervening in local conflicts, giving advice, hearing confessions, explaining and telling the law, and preaching sermons.⁷

Europe: Civil and Canon Law

Though the sources considered by those seeking to reach a just solution were diverse and a multiplicity of persons was engaging in these discussions, we tend to divide the European legal universe into two branches, distinguishing civil from canon law. This distinction, intuitively dependent on a split between the material and the spiritual, was nevertheless also based on a particular vision of the law, one that placed the sources studied, as well as jurisdiction – that is, the faculty to declare and apply the law – at the center of the legal universe.⁸ This vision organized legal knowledge not according to purely thematic divisions, as we do today (such as “contract law” or “criminal law”), and not even according to what pertained to the spiritual (everything

6 Herzog, *Defining Nations*, 18–25 and 166–69; and Herzog, *Frontiers of Possession*, 33–40.

7 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), particularly 1–39. See also C. Cunill, “La circulación del derecho indiano entre los mayas: escritura, oralidad y orden simbólico en Yucatán, siglo XVI,” *Jahrbuch für Geschichte Lateinamerikas* 52 (2015), 15–36; and P. Cardim and M. Baltazar, “A difusão da legislação régia (1621–1808),” in J. Fragozo and N. Gonçalo 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), 161–207, at 174.

8 P. Costa, *Iurisdictio. Semantica del potere politico nella pubblicistica medievale (1100–1433)* (Milan: Giuffrè Editore, 1969).

did), but according to the texts consulted, as well as by whether they originated with or were likely to be required by secular or religious authorities.

Despite this separation, however, early modern actors believed that both civil and canon law worked together to guarantee justice and that, together, they formed the common law of the Christian community, its *ius commune*.⁹ Contemporaries referred to this understanding when they described civil and canon law as “the one and the other law” (*utrumque ius*) and expected most university-trained jurists to have studied both. Monarchs also acknowledged this when they ruled that if an answer could not be found in “one of the two laws,” it could be sought in the other. Thus, though both rulers and jurists distinguished civil from canon law, they also considered them to be mutually supportive and to form a unified legal universe together.¹⁰

The co-penetration between civil and canon law, and often moral theology, was not only the domain of theory but also clear in the treatment of specific questions. For example, the *Decretum*, the mid-twelfth-century compilation of canon law, instructed users to follow civil law where canon law was silent. Canon law practitioners constantly looked to civil law for answers to questions such as whether a heretic had a valid legal personality and could administer a valid baptism, or to affirm that rules about communal life must be approved by all (*quod omnes tangit debet ab omnibus approbari*), a principle derived from classical Roman law.¹¹ Jurists of civil law followed the same procedure when they debated the categorization of certain individuals as *miserrabilis* (in need of special protection due to poverty, sickness, old age, or similar) (see Sections 1.3 and 3.2), a classification that originated in canon law but was soon after also taken up by civil law.¹² Debates regarding how judges must proceed to collect and weigh evidence and to reach conclusions, initially conducted in the context of ecclesiastical courts, also affected the ways

9 The literature on *ius commune* is enormous. I found the following most useful: M. Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. L. G. Cochrane (Washington: Catholic University of America, 1995); P. Grossi, *A History of European Law*, trans. L. Hooper (Chichester and Malden: Wiley-Blackwell, 2010); and A. M. Hespanha, *A cultura jurídica europeia. Síntese de um milénio* (Coimbra: Almedina, 2018). For an abbreviated history of *ius commune*, see T. Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge: Harvard University Press, 2018), 75–92.

10 First developed in the twelfth century and subsequently refined during the early modern period, a special literary genre named *differentiae iuris civilis et canonici* helped practitioners overcome the differences between both laws: J. Portemer, *Recherches sur les Differentiae juris civilis et canonici au temps du droit classique de l'Église: l'expression des differentiae* (Paris: Jouve, 1946).

11 P. Stein, *Roman Law in European History* (New York: Cambridge University Press, 1999), 50–52.

12 B. Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley: University of California Press, 1959).

secular courts operated.¹³ The pope's efforts to affirm his supremacy within the Church and *vis-à-vis* the bishops contributed to the development of legal and political models that would eventually lead to the birth of states, and the emergence of the concept of sovereignty.¹⁴ The Church also intervened in matters we today associate with civil law, such as contract law.

This close association between civil and canon law, as well as moral theology, allowed actors as late as the eighteenth century to conclude that a theologian's education qualified him to serve as a judge also in civil courts.¹⁵ What he lacked was not knowledge or an understanding of the relevant normative debates, only experience in the courts, which he could easily obtain while exercising the office. Thus, although in this volume we treat civil and canon law separately, it is important to remember that during the medieval and early modern periods, they were not considered independent of each other, but instead seen as together forming the *ius commune* of Christian Europe.

Europe: A Multiplicity of Jurisdictions

Early modern European law thus featured discussions rather than solutions, guiding ideas rather than rules. In such a universe, there was never a single authoritative answer, but rather a variety of possibilities that actors had to consider. If there was no single answer, neither was there a single authority that could decide what it would be. Early modern European states were not the unitary structures headed by a king or a republican authority that historians once imagined them to be. Instead, historians of European law now define these states as "jurisdictional states" consisting of a conglomerate of communities and corporations, including cities and villages, confraternities and guilds, families and congregations, religious and ethnic groups.¹⁶ Each of these units was considered

13 K. Pennington, "Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*," *Rivista internazionale di diritto comune* 9 (1989), 9–47.

14 The classic work of H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) has over the years won both admirers and critics, but there is much to it that still holds true.

15 T. Herzog, "¿Letrado o teólogo? Sobre el oficio de Justicia a principios del siglo XVIII," in J. M. Scholz (ed.), *Fallstudien zur spanischen und portugiesischen Justiz. 15.–20. Jahrhundert* (Frankfurt am Main: Vittorio Klostermann, 1994), 697–714.

16 These ideas can be traced back to Otto von Gierke and Otto Brunner. For a more recent reiteration, see A. M. Hespanha, "A historiografia jurídico-institucional e a *morte do estado*," *Anuario de Filosofia del Derecho* 3 (1986), 191–227; M. Fioravanti, "Stato e costituzione," in M. Fioravanti (ed.), *Lo Stato moderno in Europa: Istituzioni e diritto* (Rome and Bari: Laterza, 2002), 4–36; C. Garriga, "Orden jurídico y poder político en el antiguo régimen," *ISTOR: Revista de Historia Internacional* 4(16) (2004), 1–21; and A. Agüero, "Las categorías básicas de la cultura jurisdiccional," *Cuadernos de Derecho Judicial* 6 (2006), 19–58, at 41.

a “republic,” that is, a body politic, and each had authorities endowed with jurisdiction, that is, with the capacity to declare and apply the law.

Thus, despite the conviction that a universal Christian and Roman *ecumene* existed, in practice this *ecumene* was divided into communities, each having a natural right to regulate itself. As the famous jurist Baldus de Ubaldis (1327–1400) once argued, this right was inherent to all groups and functioned “like spirit and soul in animated creatures.”¹⁷ Communal organs intervened in the local order by pronouncing sentences that rendered determinations about the past or by announcing norms that would apply in the future. Legal historians have thus asserted that, although the norms applying to the future may seem legislative to us – and indeed many historians have interpreted them as “legislation” – in reality, they were jurisdictional: Rather than inventing new rules, their goal was to declare and apply rules that were said to have predated the need to use them.¹⁸ Furthermore, whether the authorities of corporations were resolving past conflicts or enacting instructions regarding the future, their decisions had to be just, that is, they had to reflect the preexisting divine order and thus to preserve the status quo that allegedly reproduced it.

Though the commonly agreed goal was to preserve the status quo, the various authorities could bitterly disagree about how this should be done, because, among other things, the indications they found in the sources were multiple rather than singular, and because each situation was considered distinct and thus meriting a detailed examination. Aiming to come to a just decision in accordance with the divinely ordained order, rather than to follow a particular rule or guarantee legal certainty, the authorities had a great degree of discretion. Indeed, discretion was considered essential to ensuring a just solution, as it allowed adapting existing norms and ideas to the specific case in hand. Royal orders did not limit this discretion, as they mostly indicated not how a case was to be resolved but emphasized the primacy of the duty to decide the matter justly. Given these characteristics of early modern European law, to expect decisions to be constant across cases and authorities is to misunderstand how this legal universe operated.

17 For example, Baldus in his commentary on the *Digesta* (D.I.1.5): Baldo degli Ubaldi, *Lectura super Digesto Novo* (Lyon: Johannes Sibert, 1498), fol. 9r. Jurists often referred to the right of communities to jurisdiction by arguing *ubi societas, ibi ius* (“wherever there is a society, there is law”).

18 L. Mayali, “*Lex animata*: Rationalisation du pouvoir politique et science juridique (XII^e–XIV^e siècles),” in A. Gouron and A. Rigaudière (eds.), *Renaissance du pouvoir législatif et genèse de l’État* (Montpellier: Société d’Histoire du Droit et des Institutions des Anciens Pays de Droit Écrit, 1988), 155–64, at 161–62; and J. Vallejo, *Ruda Equidad: Ley Consumada. Concepción de la Potestad Normativa (1250–1350)* (Madrid: Centro de Estudios Constitucionales, 1992).

The early modern normative world in Europe was thus both deeply united and highly fractured. It was united because all social actors were committed to upholding the preset divine order, and they all engaged in discussing how this could be done by relying on similar sources and employing similar vocabularies and techniques. It was fractured because within it there were multiple authorities competent to declare and apply the law, and these could, and did, easily produce different, even contradictory, solutions. As a result, while there was a shared framework and extensive communication between different jurisdictions and authorities, the norms in each could vary dramatically.

The main task of jurists was to ensure that despite conflicting indications as to which was the correct solution, or even conflicting results, the legal system would remain united. To achieve this goal, jurists developed vocabularies, techniques, and ways of arguing. They also adopted important rules regarding interpretation, which mandated, for example, that the local be preferred to the general, and the newer to the older, unless the general and the older were considered more just.¹⁹

The legal order thus operated simultaneously on a pan-European level and in a highly particularistic way. This said, it would be erroneous to consider this universe as featuring legal pluralism, as some historians have argued.²⁰ The 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. In other words, though this legal universe operated on multiple levels and with a plurality of sources and authorities, it remained one single system.

The European Legal Matrix as It Operated in Spain and Portugal

Most present-day historians of Spanish, Portuguese, and Latin American law subscribe to these interpretations. They explain that, as elsewhere in Europe, the laws of the Iberian kingdoms were composed of multiple sources, discussed by multiple agents, and implemented by multiple authorities endowed

19 Juan de Hevia Bolaños, *Curia Philipica* (Madrid: Imprenta de Ulloa, 1790 [1603]), 16–17.

20 Criticizing this use are Vallejo, “El caliz,” 3–5 and 11–12; A.M. Hespanha, “The Legal Patchwork of Empires,” *Rechtsgeschichte – Legal History* 22 (2014), 303–14; 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 am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 101–29, at 102. See also T. Herzog, “Latin American Legal Pluralism: The Old and The New,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 50(2) (2021), 705–36; and T. Herzog, “Legal Pluralism,” in M. Mirow and V. Uribe (eds.), *A Companion to the Legal History of Latin America* (Leiden: Brill, 2023), 553–72.

with jurisdiction. Though the decisions of the various authorities could differ from each other, sometimes radically so, they nonetheless confirmed the existence of a *ius commune* that featured the universal search to uncover and preserve the preset divine order by discussing ancient and religious texts, by studying customs and the activities of multiple jurisdictional bodies, and by employing “common sense.”²¹

These features were pan-European, yet scholars of Spanish and Portuguese legal history also stress the important connections between developments in the different kingdoms of the Iberian Peninsula. They argue that scholars and practitioners in Southern Europe, also including Italy and France, formed part of a particularly intensive communication system, whose members read and cited one another with great frequency (see Section 1.3). These exchanges led to striking similarities in the ways they debated questions and proposed solutions. Spain and Portugal also shared legal traditions that emerged not only because of their common adherence to *ius commune* or due to a shared communication network but also because of their common historical trajectory, including Roman, Visigoth, and Muslim occupation, the so-called Reconquest, overseas expansion, temporary periods of unity during the Middle Ages and the early modern period, similar experiences concerning state formation and liberal revolutions, French occupation, and so forth. These commonalities sustained the existence of a “customary Iberian law” and explain, for example, why, until the seventeenth century and possibly even later, Portuguese actors could use the Castilian *Siete Partidas*, a thirteenth-century restatement of *ius commune*, as if it were their own.²²

21 On the reception of *ius commune* in the Iberian Peninsula, see J. M. Font Rius, “La recepción del derecho romano en la península ibérica durante la edad media,” *Recueil des mémoires et travaux publiés par la Société d’Histoire du Droit et des Institutions des Anciens Pays de Droit Écrit* 6 (1967), 85–104; B. Clavero, *Historia del derecho: Derecho Común* (Salamanca: Universidad de Salamanca, 1994), 31–59; A. J. Torrent Ruíz, “La recepción del derecho justinianeo en España en la baja edad media (siglos XII–XV). Un capítulo en la historia del derecho europeo,” *RIDROM: Revista internacional de derecho romano* 10 (2013), 26–119; A. Vitória, *Legal Culture in Portugal from the Twelfth to the Fourteenth Centuries* (Porto: Universidade do Porto, 2013); Hespanha, *Cultura jurídica europeia*, 114–75; and J. Domingues, “Recepção do *ius commune* medieval em Portugal, até às Ordenações Afonsinas,” *Initium: Revista catalana d’historia del dret* 17 (2012), 121–67, at 123–24.

22 B. Clavero, “Lex Regni Vicinioris. Indicio de España en Portugal,” *Boletim da faculdade de direito de Coimbra* 58(1) (1983), 239–98; and P. Cardim and J. Domingues, “A tradição Jurídica,” in *Entre Portugal e a Galiza (Sécs. XI a XVII). Um Olhar Peninsular sobre uma Região Histórica* (Porto: Fronteira do Caos, 2014), 385–99. On the *Siete Partidas*, and *ius commune* more generally, in Portugal, see G. Braga da Cruz, “O direito subsidiário na história do direito português,” in *Obras Esparsas: Estudos de História do Direito. Direito Moderno* (Coimbra: Biblioteca Geral da Universidade de Coimbra, 1981), vol. II, pt. 2, 245–436; Domingues, “Recepção do *Ius Commune*”; J. Domingues, “As Partidas de Castela e o Processo Medieval Português,” *Initium: Revista catalana d’historia del dret*

Spain and Portugal: The Status of Royal Enactments

A key question in understanding how this legal universe dealt with new situations – such as those raised by the establishment of colonies and the resultant encounter with non-European normativities – is to understand the status and role attributed to royal orders in it. In the older historiography, royal legislation was often seen as the key ingredient of colonial law. However, as has become clear in the preceding discussion, in the early modern legal universe, monarchs were just one of a plurality of authorities who could declare the law, and all these authorities searched for a just solution by referring to a common set of texts, techniques, and practices.

Over the course of the early modern period, Spanish and Portuguese monarchs, like their counterparts elsewhere in Europe, did attempt to bolster their powers by insisting on their authority to declare and apply the law, and by demanding that their decisions be preferred to all other legal sources. In Castile, the *Ordenamiento de Alcalá* (1348) and the *Leyes de Toro* (1505) attempted this by instructing that royal orders be accorded the greatest authority, followed by customs (*fueros*), and only then by *ius commune*. Castilian monarchs also elaborated rules regarding which jurists should be favored. For example, in 1499, the Catholic kings expressed a preference for the works of the Italian civil jurist Bartolus of Sassoferrato (1313–1357) and his student Baldus de Ubaldis, and the Italian canon law jurists Johannes Andreas (1270–1348) and Niccolò de Tudeschi, alias Panoramitanus (1386–1445). In Portugal, royal pronouncements similarly established the rule that *ius commune* was to serve as a subsidiary source and be consulted only when royal law, courtly practice (*estilo da nossa corte*), and ancient customs of the kingdom (*costume dos nossos reinos antigamente usado*) were insufficient.²³ If no solution could be found in these, experts were first to appeal to canon law, then to the interpretations offered by the Italian jurist Franciscus Accursius (1182–1263), and as a last resort to the work of Bartolus of Sassoferrato, because, as the Portuguese kings put it, even if other jurists disagreed with him, most held his opinions to be most reasonable.

18 (2013), 237–88; J. Domingues, “O elemento castelhano-leonês na formação do direito medieval português,” *Cuadernos de Historia del Derecho* 14 (2021), 213–27, at 218–24; J. Domingues, “Códices medievais de *ius commune* em Portugal: *Status quaestionis*,” *Anuario de estudios medievales* 46(2) (2016), 725–50, at 740; and J. Domingues, “As Partidas de Castela na Sistemática Compilatória do Livro I da Reforma das Ordenações,” *Initium: Revista catalana d’història del dret* 21 (2016), 39–108.

23 *Ordenações Afonsinas* (1446–447) liv. 2, tit. 9. The *Ordenações Manuelinas* (1521) liv. 2, cap. 5 include similar provisions. See also Jorge de Cabedo, *Decisiones supremi lusitanici senatus regni* (Lisbon: J. Rodríguez, 1602–1604) pt. 1, dec. 211; and Álvaro Valasco, *Decisiones consultationum ac rerum judicatarum in regno Lusitaniae* (Venice: Baptistam & Bernardum Sessam, 1597), cons. 117, n. 24.

As far as we can tell, however, in practice, Spanish and Portuguese jurists and practitioners mostly ignored these royal attempts to establish a hierarchy of sources of law or developed legal presumptions that rendered them irrelevant. Presumptions were legal techniques that allowed jurists to assume the existence of a fact without having to prove it first. One such presumption was that royal orders were never intended to modify either *ius commune* or customary law.²⁴ Jurists also insisted that *ius commune* featured a complex system of organization, interpretation, and discussion that embodied a “natural reason” and could therefore be applied irrespective of whether the king allowed the use of *ius commune* or not.²⁵ Furthermore, as we saw earlier, in the early modern legal universe, it was undisputed that judges must rule by employing *arbitrium*, that is, the power (and the obligation) to decide correctly, rather than simply obeying a particular norm.²⁶

Thus, although royal orders mattered, it is essential for understanding early modern law – and the development of colonial law in particular – that we appreciate that they were never perceived as external to the existing order, nor as capable of modifying it – at least until theories of sovereignty won the day in the eighteenth century. Like the pronouncements made by other authorities endowed with jurisdiction, royal orders were directed at finding a just solution for a particular case. Royal enactments themselves explicitly acknowledged this understanding of their status and purpose. As early as the thirteenth century, royal jurists stated that the final aim of all legislation (*ley*) was to demonstrate the things of God, provide a guide to living well, be a source of discipline, show the law (*derecho*) and what the good customs were, and to love justice.²⁷ Royal orders, therefore, were not legislation as we would understand this term today. Most did not deal with matters generally,

24 For example, Jerónimo Castillo de Bobadilla, *Política para corregidores y señores de vasallos en tiempo de paz, y de guerra y para jueces eclesiásticos y seculares* (Madrid: Instituto de Estudios de la Administración Local, 1978 [1704]), lib. 3, cap. 8, n. 195, argued in 1597 that customs were preferable to both *ius commune* and statutes. See also lib. 2, cap. 10, ns. 25 and 39, lib. 5, cap. 3, n. 51, lib. 3, cap. 8, ns. 194–95, and lib. 1, cap. 5, ns. 9–10. The same was true of Juan de Solórzano y Pereira, *Política Indiana*, ed. F. Ramiro de Valenzuela (Madrid: Compañía Ibero-Americana de Publicaciones, 1972 [1647]), lib. 2, cap. 6, n. 14. For a discussion arguing against authors who considered that a clear hierarchy of norms existed in Spain and its empire, see L. Nuzzo, “Dall’Italia alle Indie: Un viaggio del diritto comune,” *Rechtsgeschichte – Legal History* 12 (2008), 102–24, at 109–10.

25 Hevia Bolaños, *Curia Philippica*, 15.

26 M. Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Milan: Guiffirè, 1998).

27 This was what the *Fuero Juzgo*, enacted in 1241 by King Fernando III, stated, and was probably derived from the Hispano-Roman-Visigothic *Liber Iudiciorum* (654), lib. I, title II, law 2. By the early modern period, the *Fuero Juzgo* was considered a collection of kingdom-wide customs.

but were instead jurisdictional acts, produced to resolve a particular situation that required royal intervention. They usually included information on the specific circumstances of the case and often also mentioned the existence of conflicting possibilities as to how it could be solved.

Compilations of royal orders, such as the famous Castilian *Nueva Recopilación* of 1567 and *Novísima Recopilación* of 1805, the Spanish-American *Recopilación de Indias*, and the Portuguese *Ordenações*, openly discussed the limited enforceability of royal orders. They instructed readers to obey the latter, yet also acknowledged that they were not final (as new solutions might be required), that local norms and norms pertaining to corporations and communities, even if contradictory, must be respected, and that, in cases of legal *lacunae*, when no answers could be found in royal instructions, other sources must be consulted.²⁸ It is therefore not surprising that authorities in both Madrid and Lima agreed that instructions of the *Recopilación de Indias* that went against local practices should be ignored.²⁹

Because they were the easiest to find and use, particularly when included in *Recopilaciones*, royal orders were often the most visible part of the legal system, both to contemporaries and to later historians. However, they were neither superior to other sources of law nor did they stand on their own. Furthermore, *recopilaciones* omitted most of the information regarding the case that the royal orders had been intended to resolve, as well as the legal reasoning that underlay the original decision. Despite this silence, contemporaries were aware of the fact that compilations furnished only the tip of the iceberg: Hidden from view was the huge volume of discussions that underlay royal decisions and was essential for understanding their correct meaning. This was particularly the case in compilations of royal orders that served as indices rather than law books. While *recopilaciones* were thus meant to facilitate the work of jurists and interested parties by letting them know which cases had already been resolved by the monarch, they still needed to consult the original decisions to know whether a case could serve as a precedent, or indeed why it had been decided as it was.

Furthermore, royal compilations were not the only instruments that jurists and litigants could use. Many jurists also authored legal recompilations, which

28 *Recopilación de Indias*, lib. 2, title 1, laws 1 and 4. See also C. Ramos Núñez, "Ius Commune y derecho real en la práctica forense de Manuel Lorenzo de Vidaurre," in L. E. González Vales (ed.), *XIII congreso del Instituto Internacional de Historia del Derecho Indiano: Actas y estudios* (San Juan de Puerto Rico: Academia Puertorriqueña de la Historia, 2003), vol. 1, 403–30.

29 V. Tau Anzoátegui, *El Poder de la Costumbre. Estudios sobre el Derecho Consuetudinario en América hispana hasta la emancipación* (Madrid: Fundación Mapfre, 2000), 32–33.

they believed were necessary to facilitate knowledge of the legal system. While only a few were sanctioned by the kings, others – which we would nowadays perhaps consider mere personal projects – also aided contemporaries as they navigated this complex legal universe.³⁰ Whether privately prepared or sanctioned by the monarchs, however, all compilations of royal orders followed the same procedure, with original decisions being stripped of their context and the reasons that had led to their adoption. Thus, even in the case of authoritative compilations, contemporaries insisted that the validity of the precedents enumerated in a *recopilación* did not depend on their insertion in the collection, but on the validity of the original decision. Early modern jurists often criticized even the formal *recopilaciones* that won royal approval for failing to reproduce the precedents correctly, for assembling precedents that were unrelated, for rearranging royal orders incorrectly, and for neglecting to mention the facts that had led to the royal decision – criticisms echoed by many modern scholars. Some of the latter have even gone as far as to characterize the processes of selection and summation involved in the production of royal *recopilaciones* as capricious.³¹ Given these concerns, litigants and jurists who were able to cite the original royal decisions tended to do so. The *Siete Partidas*, a work that collected juridical opinions and acquired an extended gloss, was similarly often ignored by more erudite discussants, who preferred to consult the original texts.³²

In the Portuguese world, too, collections of royal orders were drawn up. Though the Portuguese monarchs did not sanction compilations other than the various *Ordenações* (most famous among them, the *Ordenações Afonsinas*, *Manuelinas*, and *Filipinas*), individual jurists and institutions labored to remedy

30 M. Galán Lorda, “La relación entre la tarea recopiladora de Encinas, León Pinelo y Paniagua en algunos títulos de la Recopilación de Leyes de Indias,” in T. Duve (ed.), *Actas del XIX Congreso del Instituto de Historia del Derecho Indiano* (Madrid: Dykinson, 2017), vol. I, 423–51; and W. Ahrndt, *Edición crítica de la Relación de la Nueva España y de la Breve y Sumaria Relación escritas por Alonso de Zorita*, trans. L. F. Segura (Mexico City: Instituto Nacional de Antropología e Historia, 2001), 27–28.

31 A. García Gallo, *Estudios de historia del derecho indiano* (Madrid: Instituto Nacional de Estudios Jurídicos, 1972), 55–93; E. Martiré, “Guión sobre el proceso recopilador de las leyes de Indias,” in F. Icaza Dufour (ed.), *Recopilación de leyes de los reinos de Indias. Estudios históricos jurídicos* (Mexico City: Miguel-Ángel Porrúa, 1987), 27–41; A. Muro Orejón, *Estudio general del nuevo código de las leyes de Indias* (Seville: Universidad de Sevilla, 1979); A. Bermúdez Aznar, “Las ordenanzas de audiencias en la recopilación de 1680,” in *Memoria del X Congreso del Instituto Internacional de Historia del Derecho Indiano* (Mexico City: Universidad Autónoma de México, 1995), 161–68; and A. Lira, “El derecho y la historia social,” *Relaciones. Estudios de historia y sociedad* 15(57) (1994), 33–48, at 37–39.

32 On the relationship between the *Partidas* and their gloss, see, for example, D. Alberto Panateri, “Uso, costumbre y fuero en relación al discurso medieval de la soberanía. Alfonso X el sabio y la glosa de Gregorio López,” *Temas Medievales* 20 (2012), 147–96.

this lack by providing their own. Yet the Portuguese jurists, too, acknowledged that these compilations had no normative value, because they were tools rather than laws.³³

The Immigration of European Law to the Americas

Together with European people, religion, and social, cultural, and economic institutions, this legal universe was exported overseas. Its immigration into the colonial territories was promoted by Iberian monarchs who ordered the implementation of Castilian or Portuguese law overseas, but it was mainly a by-product of the way early modern European normativity, which largely ignored political divisions, functioned. Implementing the European legal universe in the colonies meant that not only the belief in a preset divine order was imported but also the technologies developed over time as to how to discover and protect it. These technologies led to debates rather than to unique solutions and revealed guidelines rather than rules.³⁴

Similarities between Spanish and Portuguese law in Europe and in the Americas also extended to the existence of a multiplicity of jurisdictions. Like the Iberian territories in Europe, Spanish and Portuguese America were divided into multiple communities (which contemporaries identified as “republics”), each with authorities endowed with the right (and the obligation) to declare and apply the law. These communities were multiple because each locality, group, and household was one (see Section 3.3). There were

33 Cardim and Baltazar, “A difusão da legislação régia,” 188–90.

34 A. Pérez Martín, “Derecho común, derecho castellano, derecho indiano,” *Rivista internazionale di diritto comune* 5 (1994), 43–90; J. Barrientos Grandón, *Historia del derecho indiano: Del descubrimiento colombino a la codificación. Ius commune – ius proprium en las Indias occidentales* (Rome: Il Cigno Galileo Galilei, 2000); V. Tau Anzoátegui, “La doctrina de los autores como fuente del derecho castellano-indiano,” *Revista de Historia del Derecho* 17 (1989), 351–408; V. Tau Anzoátegui, “El derecho indiano en su relación con los derechos castellano y común,” in B. Clavero, P. Grossi, and F. Tomás y Valiente (eds.), *Hispania entre derechos propios y derechos nacionales: atti dell’incontro di studio Firenze-Lucca 25, 26, 27 maggio 1989* (Milan: Giuffrè, 1990), vol. II, 573–59; H. Nébias Barreto, “Legal Culture and Argumentation in the Vice-Reign of Peru from the 16th to the 18th Centuries,” *Clio@Themis* 2 (2009); B. Bravo Lira, “Vigencia de las partidas en Chile,” *Revista de estudios histórico-jurídicos* 10 (1985), 43–105; A. M. Hespanha, “Modalidades e limites do imperialismo jurídico na colonização portuguesa,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 41 (2012), 101–35, at 122–23; L. S. de Oliveira Coutinho Silva, *Nem teúdas, nem manteúdas: História das mulheres e direito na capitania da Paraíba (Brasil, 1661–1822)* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2020); T. Herzog, “Colonial Law: Early Modern Normativity in Spanish America,” in J. Tellkamp (ed.), *A Companion to Early Modern Iberian Imperial Political and Social Thought* (Leiden: Brill, 2020), 105–27; and T. Herzog, “Rights of People in Spain and Its Empire,” in R. Hammersley and A. Fitzmaurice (eds.), *Cambridge History of Rights III: The Sixteenth and Seventeenth Centuries* (Cambridge: Cambridge University Press, forthcoming).

hundreds of Portuguese, Spanish, and indigenous “republics,” “republics” that were based on locality, and others that embraced individuals who exercised the same profession, professed the same creed, or lived in the same household. Though multiple, all these republics belonged to the “republic of republics,” the Christian ecumene.

A paradigmatic example of how the European legal system operated in the colonies is provided by the work of Juan de Solórzano y Pereira (1575–1655). Solórzano was a judge in Lima and the author of a mid-seventeenth-century manual of legal matters arising from colonial situations that was extremely popular, particularly in its abbreviated Spanish translation.³⁵ In this manual, Solórzano included questions that a colonial judge or administrator might encounter and provided a number of possible answers. While he did give his opinion as to which of the possible options was the most just, he nonetheless showcased the multiplicity of questions that needed asking and the variety of possible answers, as well as the need to consult a wide range of authors. He referenced no less than 30,000 works written by over 3,000 authors, many of whom were born, had studied, or resided outside Spain.

Solórzano never imagined that the questions he asked had a simple, definitive answer.³⁶ Neither did he believe that such an answer could be found in royal enactments or in royal recompilations. When he did use the medieval *Siete Partidas*, he treated it not as a royal command, but as an encyclopedia of *ius commune*. Although most historians consider Solórzano to have authored a manual of colonial law, Solórzano himself never conceived of his work as describing a new or separate law for the colonies. He was clearly conscious of the fact that conditions in the Americas presented new questions and new challenges and therefore warranted discussion, but nowhere in his writing does he conclude that a colonial law, distinct from European law, existed. Instead, Solórzano articulated a synthesis of what he observed as a practicing judge, what he read, what was already established, and of new solutions that he formulated using existing techniques. He employed the knowledge he gathered

35 Solórzano y Pereira, *Política Indiana*. On how other colonial judges dealt with such realities, see, for example, A. Casagrande, “Forensic Practices and the ‘History of Justice’ in the 17th and 18th Centuries: A View from a Spanish American Periphery,” in Duve and Danwerth, *Knowledge of the Pragmatici*, 350–78.

36 On Solórzano’s methodology, see, for example, T. Duve, “Los privilegios de los indios: ¿Derecho local?,” in M. Torres Aguilar (ed.), *Actas del XV Congreso del Instituto Internacional de historia del Derecho Indiano* (Córdoba: Universidad de Córdoba, 2005), 112–30; and S. Scafidi, “Old Law in the New World: Solórzano and the Analogical Construction of Legal Identity,” *Florida Law Review* 55 (2003), 191–204. On Solórzano’s life, oeuvre, and working methods, see also E. García Hernán, *Consejero de ambos mundos: vida y obra de Juan de Solórzano* (Madrid: Fundación Mapfre, 2007).

by residing in the Americas and working as a magistrate, but he also constantly relied on his training as a jurist and his familiarity with both civil and canon law. His manual aimed at systematizing a huge array of often contradictory solutions, which he applied to his specific time and place – mid-seventeenth-century Peru – and arranged into a logical edifice that was plausible but, as always, only one proposal among many. Despite Solórzano's efforts and enormous erudition, the edifice he created, like early modern law itself, was replete with contradictions, ambiguities, and inconsistencies.

Thus, regardless of what we may think about early modern actors and their values today, the conviction that law must provide a just solution that fitted the specific circumstances of each case, place, and time, was as pervasive in the colonies as it was in Europe. Ibero-America neither had a distinct colonial law nor was it a zone of lawlessness, as Carl Schmitt argued. Instead, it was a highly legalistic space where both the Spanish and the Portuguese implemented legal systems that formed part of European law, in which debates were more frequent than agreements, and where a general *ius commune* coexisted with a mosaic of specific solutions.³⁷

When the authorities failed to adapt the solutions to the specific context, locals protested. Among the most famous mechanism enabling them to do so was to “obey but not comply” (*obedecer y no cumplir*).³⁸ This faculty, long seen by historians as permitting abuses, was nevertheless a legitimate legal procedure practiced in medieval and early modern Iberia as well as being present elsewhere in Europe. It allowed locals to suspend obedience to orders that were against local practices, customs, or privileges, or that were considered in other ways unjust, and to advocate for a different, sounder solution. Procedures similar to *obedecer y no cumplir* also existed in Portuguese America, where royal orders were considered binding only as long as they

37 Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press, 2003).

38 V. Tau Anzoátegui, “La ley ‘se obedece pero no se cumple’. En torno de la suplicación de las leyes en el derecho Indiano,” in V. Tau Anzoátegui, *La ley en América hispana del descubrimiento a la emancipación* (Buenos Aires: Academia Nacional de la Historia, 1992), 69–143. On how this worked in the Iberian Peninsula, see, for example, B. González Alonso, “La fórmula ‘obedézcase, pero no se cumpla’ en el derecho castellano de la Baja Edad Media,” *Anuario de historia del derecho español* 50 (1980), 469–88; and J. M. Fernández Hevia, “El ejercicio de la fórmula ‘obedecer y no cumplir’ por parte de la Junta General del Principado durante el siglo XVI,” *Boletín del Real Instituto de Estudios Asturianos* 55(157) (2001), 123–50. On its presence elsewhere, see the somewhat related French institution of *remontrances*, for example, F. Bidouze, “Remontrances contre lettres de cachet, ou l’*habeas corpus* à la française en 1788,” *Parliaments, Estates and Representation* 31(2) (2011), 137–54; O. Chaline, “La pratique des remontrances au XVIII^e siècle: Paris, Rouen, Rennes,” *Annales de Bretagne et des Pays de l’Ouest* 122(3) (2015), 89–105.

were compatible with local norms. When royal precepts did not seem appropriate to local conditions or contradicted local privileges, actors could ignore them.³⁹ The conviction that the norms must fit the circumstances of place and time was also expressed by royal officials; the fifth viceroy of Peru, Francisco de Toledo (1515–1582), for example, pointed out the danger of giving the same rules to communities that were different.⁴⁰

As in Europe, royal attempts to control this diversity and to subject law to the royal will mostly failed. On multiple occasions in the sixteenth and seventeenth centuries, the Spanish kings insisted on the applicability of Castilian law in the “New World” and pointed out that the overseas territories should be governed according to the preferences expressed in the 1505 *Leyes de Toro*, which placed royal orders at the top of the hierarchy of norms. Legal historians have shown that these efforts were as unsuccessful in colonial Latin America as they had been in Europe. Equally moot was a royal attempt to ensure that Peninsular law won the approval of the Council of the Indies before being applied in the Americas. As a result, looking to the royal law to understand Iberian colonial law is incorrect and anachronistic, as is the assumption of a separation of colonial from metropolitan law.⁴¹

39 A. Wehling, “Sem embargo da ordenação em contrário. A adaptação da norma portuguesa à circunstância colonial,” in N. Mello Souza (ed.), *Brasil: Construindo uma Nação* (Brasília: Confederação Nacional do Comércio de Bens, Serviços e Turismo, 2014), 115–35, at 132 specifically mentions the Spanish American *obedecer y no cumplir* as a similar institution.

40 “Ordenanzas particulares para los pueblos de indios del distrito de La Paz, Arequipa, 6 de noviembre de 1575,” in G. Lohmann Villena (ed.) and M. J. Sarabia Viejo (trans.), *Francisco de Toledo: Disposiciones gubernativas para el Virreinato del Perú, 1569–1574* (Seville: Escuela de Estudios Hispanoamericanos, 1989), vol. II, no. 63, 203–16, at 203.

41 As early as the 1940s, R. Altamira, “Autonomía y descentralización legislativa en el régimen colonial español: Siglos XVI a XVIII,” *Boletim da Faculdade de Direito* 20 (1944), 1–71, warned against equating colonial law with royal legislation (26). Also criticizing authors who argued as much is Nuzzo, “Dall’Italia alle Indie,” 108–12. The same is true for Portuguese America: A. M. Hespanha, “Porque é que existe e em que é que consiste um direito colonial brasileiro,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 35 (2006), 59–81, at 59–60; N. Camarinhas, “Administração da justiça em espaços coloniais: A experiência imperial portuguesa e os seus juizes, na época moderna,” *Jahrbuch für Geschichte Lateinamerikas* 52 (2015), 109–24, at 112 and 120–24; A. Slemian, “A primeira das virtudes: justiça e reformismo ilustrado na América portuguesa face à espanhola,” *Revista complutense de historia de América* 40 (2014), 69–92, at 70, 80, and 85; G. C. Machado Cabral, “Senhores e ovidores de capitanias hereditárias: uma contribuição ao estudo das fontes do direito colonial brasileiro a partir da literatura jurídica (séculos XVI a XVIII),” in G. Silveira Siqueira and R. M. Fonseca (eds.), *História do direito: olhares diacrônicos* (Belo Horizonte: Arraes Editores, 2015), 97–118, at 112–15; G. C. Machado Cabral, “*Ius Commune* in Portuguese America: Criminal Issues on Local Canon Law in the ‘First Constitutions of the Diocese of Bahia’ (1707),” *Glossae: European Journal of Legal History* 13 (2016), 308–27; and G. C. Machado Cabral, “Pegas e Pernambuco: notas sobre o direito comum e o espaço colonial,” *Revista Direito & Práxis* 9(2) (2018), 697–720.

Present-day legal historians, therefore, conclude that colonial Latin American law was an American version of *ius commune* or, as contemporaries sometimes classified it, a “municipal” law in a legal universe that admitted both a pan-European framework as well as local variations.⁴² These historians reject the view of earlier generations who portrayed Spanish colonial law as a unitary and systematic body of law developed specifically by the monarchs for overseas rule (see Section 1.1). They also question older views that identified such a unified body of law as *derecho indiano*, arguing that this term, rather than reflecting early modern realities, was the product of historiographical and political ambitions in the nineteenth and early twentieth centuries, which sought to identify a particular (and superior) Spanish mode of colonialism.⁴³

Paradoxically, although historians of Portuguese America never pretended that Portuguese overseas territories were ruled by a single, unitary colonial law, they, too, engaged in the effort of presenting the Portuguese imperial endeavor as exceptional. An older generation of historians argued that, in contrast to other colonial empires, the Portuguese were willing to adapt to local realities, developing legal regimes that were highly flexible. However, this portrayal, sometimes called Luso-Tropicalism, also responded to twentieth-century ideological pressures that reflected political goals rather than history. In fact, Luso-American law formed part of the general European *ius commune*: the *Ancien régime*, as António Manuel Hespanha put it, also extended to the tropics.⁴⁴

How Early Modern European Law Operated I: The Example of Customary Law

How all this operated in Europe (first) and the colonies (second) can be demonstrated by observing customary law, which has been on the minds of

42 Altamira, “Autonomía y descentralización,” 26; and Tau Anzoátegui, *El Poder de la Costumbre*, 51–54 refer to this law as “municipal.” C. Petit, “El caso del derecho indiano,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 22 (1993), 665–77, at 665 refers to it as a version of *ius commune*.

43 On how the concept of *derecho indiano* was born and the type of political work it was supposed to perform, see (besides Section 1.1) L. Nuzzo, “Between America and Europe: The Strange Case of the *derecho indiano*,” in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Colonial Spanish Law: Contributions to Transnational Early Modern Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 161–91; and A. M. Hespanha, “O ‘direito de índias’ no contexto da historiografia das colonizações ibéricas,” in Duve, *Actas del XIX Congreso*, vol. 1, 43–83.

44 A. M. Hespanha, “Antigo Regime nos trópicos? Um debate sobre o modelo político do império colonial português,” in J. Fragoso and M. F. Gouvêa (eds.), *Trama das redes: Política e negócios no império português, séculos XVI–XVIII* (Rio de Janeiro: Civilização Brasileira, 2010), 43–94; and A. M. Hespanha, *Filhos da terra. Identidades mestiças nos confins da expansão portuguesa* (Lisbon: Tinta de China, 2019).

legal historians in recent years.⁴⁵ Customs are an interesting example because the older colonial historiography assumed that they were an authentic reflection of communal traditions, that they did not form part of the “law” but were external to it, or were particular to certain groups but not others (such as the alleged distinction between a written legal system followed by the colonists and the unwritten customs of the indigenous populations). Recent scholarship has questioned these conclusions, pointing out that customs were an important part of European law, too, and that they operated similarly in Europe and its colonies. The study of customs, therefore, allows us to examine how early modern European law operated, while also demonstrating the need to understand the functioning of European law in order to grasp developments in the colonies.

The European background, with which I begin this section, shows why older interpretations that suggested that indigenous customs included an autochthonous normativity that either reflected ancient traditions or at least stood for a distinct culture that might have served to delay or resist the implementation of European law, are problematic. A better grasp of the development of the European understanding of customary law explains how, on the contrary, it was possible for indigenous customs in the American territories to be relatively recent, change over time, and be affected by imperial law and colonial conditions. How indigenous and Afro-Latin American customary law interacted with the imported Iberian legal universe to create a colonial law will be the subject of the following two sections.

Customs were an important source of European law from as early as the second century AD and throughout late antiquity, the Middle Ages, and the early modern period. During this long timespan, jurists viewed customs as norms reproducing local particularism that could differ from and sometimes even contradict the general law, yet complemented rather than stood in opposition to it.

This understanding of customs was particularly clear in the thirteenth and fourteenth centuries, when university-trained jurists began categorizing existing European local law as “customary.”⁴⁶ They argued that each

45 T. Herzog, “Immemorial (and Native) Customs in Early Modernity: Europe and the Americas,” *Comparative Legal History* 9(1) (2021), 1–53.

46 M. Ascheri, *The Laws of Late Medieval Italy (1000–1500): Foundations for a European Legal System* (Leiden: Brill, 2013). The involvement of jurists in the creation of “customary law” is discussed, among others, by A. Gouron, “Sur les plus anciennes rédactions coutumières du Midi: Les ‘chartes’ consulaires d’Arles et d’Avignon,” *Annales du Midi* 109(218) (1997), 189–200, at 196; A. Gouron, “Aurore de la Coutume,” in A. Gouron, *Droit et coutume en France au XIIIe et XIIIe siècles* (Abingdon-on-Thames: Routledge,

community had norms that constituted its “customs.” These local norms could originate in statutes, constitutions, acts of authority, jurisprudence, or in repeating acts that community members believed prescriptive. What distinguished customs from other laws, then, was not the way they were created, but the fact that they were particular to a locality. Though such local norms could vary from community to community, jurists saw no contradiction between the diversity of customs and the unity of *ius commune*. They believed that they mutually reinforced rather than opposed one another.⁴⁷ To them, customs were an essential component of the legal universe because they guaranteed just solutions by being highly attuned to the specific context of place, time, and group. They were also the natural product of the process of concretization required of legal practitioners, who, as we saw earlier, found just solutions not by following abstract rules but by weighing different norms anew for each individual case. Meanwhile, *ius commune* guaranteed that, despite these local variations, all Christians would share a basic understanding of what justice mandated.

Customs, in other words, might have been created locally by either the authorities or community members, but they also won the approval and support of jurists, who labored both to identify local norms as customary and to integrate them into a wider legal universe. The interconnectivity between customs and legal thought was especially evident during campaigns to write down the local law, in which jurists abandoned the axiom that customs must be oral and produced written collections of customary law. Such campaigns took place across Europe in the late Middle Ages and the early modern period. In the Iberian world, when collections of customs covered a wide range of activities, they obtained the status of *fuero* or *foro*. There were *fueros* and *foros* of towns, certain guilds or occupations, and groups, such as the *fuero militar*, which applied to soldiers.

While the efforts of writing down the local customs were supposedly motivated by the wish to better know and conserve them, the resulting collections demonstrate that those recording customs often dramatically changed them.

1993) ch. 20, 181–87; K. Pennington, “Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept,” *Syracuse Journal of International Law and Commerce* 20 (1994), 205–15; L. Mayali, “La coutume dans la doctrine romaniste au moyen âge,” *Recueils de la Société Jean Bodin Pour l’Histoire Comparative des Institutions* 52(2) (1990), 11–31; and E. Conte, “Consuetudine, Coutume, Gewohnheit and Ius Commune: An Introduction,” *Rechtsgeschichte – Legal History* 24 (2016), 234–43.

47 P. Ourliac, “Coutume et mémoire: Les coutumes françaises au XIIIe siècle,” in B. Roy and P. Zumthor (eds.), *Jeux de mémoire: Aspects de la mnémotechnie médiévale* (Montreal: Presses de l’Université de Montréal, 1985), 111–22, at 114.

In their attempts to systematize and rationalize local laws, jurists decontextualized and de-historicized what they observed and made unique solutions into general rules. The modifications introduced by them were so extensive that some scholars have likened the process to the forced acculturation that colonizers inflicted on the colonized.⁴⁸ In choosing what to record as custom, jurists also developed the rules regarding what custom was. They distinguished practices that were compulsory (customs) from others that were not (which they called *usos*, “uses”), and set rules as to how long a norm needed to have existed for it to become prescriptive. As a result of these processes of recording and definition, customary law as scholars tend to think about it today came into being. The image of customary law as community-based and ancient has become so pervasive and so evident that we tend to forget how it emerged. Thus, while we remember that customs might have originated in communities or with their authorities, we no longer recall that they underwent juridical reinvention from the thirteenth and fourteenth centuries and were deeply affected by the dominating presence of *ius commune*.

Juridical intervention in customary law was so successful that, by the fourteenth century, customs (*consuetudo*) and customary law (*ius consuetudinarium*) had become an integral part of European law. One of the main reasons for the growing significance of customs was that they came to be considered a useful tool not only for affirming local autonomy but also for defining the relations between the different units that together constituted the emerging states, as well as between them and the developing central authorities. Members of different groups, alleging that customs were part of their communal heritage,

48 R. Jacob, “Les coutumiers du XIIIe siècle ont-ils connu la coutume?,” in M. Mousnier and J. Poumarède (eds.), *La coutume au village dans l’Europe médiévale et moderne: Actes des XXe Journées internationales d’histoire de l’Abbaye de Flaran, Septembre 1998* (Toulouse: Presses Universitaires du Mirail, 2001), 102–19. On efforts to write down French customary law, see J. P. Dawson, “The Codification of the French Customs,” *Michigan Law Review* 38(6) (1940), 765–800; M. Petitjean, “La coutume de Bourgogne: Des coutumiers officiels à la coutume officielle,” *Mémoires de la société pour l’histoire du droit et des institutions des anciens pays bourguignons* 35 (1972), 13–20; A. Gouron, “Aux origines de l’ ‘émergence’ du droit: glossateurs et coutumes méridionales (XIIIe-milieu du XIIIe siècle),” in *Religion, société et politique: Mélanges en hommage à Jacques Ellul* (Paris: Presses Universitaires de France, 1983), 255–70; M. Grinberg, “La rédaction des coutumes et les droits seigneuriaux,” *Annales HSS* 52(5) (1997), 1017–38; and M. Seong-Hak Kim, “Custom, Community, and the Crown: Lawyers and the Reordering of French Customary Law,” in C. H. Parker and J. H. Bentley (eds.), *Between the Middle Ages and Modernity: Individual and Community in the Early Modern World* (Lanham: Rowman & Littlefield, 2007), 169–86. On developments elsewhere, see, for example, J. Gilissen, “La preuve de la coutume dans l’ancien droit belge,” in *Hommage au professeur Paul Bonenfant 1899–1965: Études d’histoire médiévale dédiées à sa mémoire* (Brussels: Universa, 1965), 564–94, at 591–93.

used them to make demands on kings. Kings, in turn, invoked custom both to signal their respect for the liberties of their subjects and, on the contrary, to impose limits on them.⁴⁹

Although by the fifteenth and sixteenth centuries, many customs could be found in written compilations, those not recorded in writing could still be substantiated by the declaration of witnesses, who tended to describe them as “immemorial.” Many historians have assumed that immemoriality was the same as antiquity or even authenticity, yet such was not the case. Rather than necessarily attesting to the antiquity of customs, “immemoriality” was an instrument designed and implemented by jurists: It was a presumption, that is, a category of proof that jurists invented to solve difficult cases.

Presumptions mostly reproduced conclusions that seemed commonsensical to contemporaries.⁵⁰ A typical presumption was the inference that a child born in wedlock was the offspring of both spouses. Most presumptions only acted to reverse the burden of proof. Instead of placing it on the plaintiff (to show that the child was the offspring of both spouses, e.g., in cases of alimony), they shifted it to the defendant, who had to produce evidence to contradict the presumption (in this case, showing that the child could not be the offspring of the husband by proving, for example, that he was absent when the child was conceived). Immemoriality, however, used by jurists to prove the existence of a custom, was a special type of presumption, called a *praesumptio juris et de jure*. In contrast to other presumptions, it admitted of no rebuttal.⁵¹ Even if there was solid evidence showing that it led to the wrong conclusion, jurists still adhered to the presumption, allowing a party to prove something that they knew was incorrect.

49 This is why Castillo de Bobadilla, *Politica para corregidores*, lib. 3, cap. 8, n. 195, could think about local customs as “privileges.” Also, see M. Toch, “Asking the Way and Telling the Law: Speech in Medieval Germany,” *Journal of Interdisciplinary History* 16(4) (1986), 667–82; and A. Wood, *The Memory of the People: Customs and Popular Senses of the Past in Early Modern England* (Cambridge: Cambridge University Press, 2013). On the relationship between customs and contracts, see W. Ullmann, “Bartolus on Customary Law,” *Judicial Review* 52 (1940), 265–83, at 269–70 and 280–81.

50 The literature on presumptions is enormous. For a brief description of how they operated at different times and in different settings, see R. H. Helmholz and W. D. Sellar (eds.), *The Law of Presumptions: Essays in Comparative Legal History* (Berlin: Dunker and Humblot, 2009).

51 Aimone Cravetta, *Tractatus de antiquitatibus temporum* (Lyon: Haeredes Iacobi Iuntae, 1559) part I, argument 1, ns. 1 and 3, part III, argument 3, ns. 23, 40, and 60; Miguel de Reinoso, *Observationes practicae* (Lisbon: Typis Petri Craesbeeck Regii Typographi, 1625), observation 65, 357–65, most particularly ns. 1 and 3; António Cardoso do Amaral, *Liber utilissimus iudicibus, et advocatis, additionatus ad Fratrem Josepho Leitam Telles* (Coimbra: Franciscum de Oliveyra, 1733) vol. I, 155; and Hieronymus de Monte, *Tractatus de finibus regundis ciuitatum, castrorum, ac praediorum, tam vrbanorum, quam rusticorum*

The juridical assertion that customs could be classified as immemorial is therefore a powerful proof of jurists' desire to support and legitimize them. Jurists not only accepted local law as customary and proceeded to record it, but they were also willing to adopt extreme solutions to enable locals to argue (by invoking immemoriality) for the existence of customs even when information was scarce or wholly absent. The presumption of immemoriality converted local norms for which no one remembered how and why they had originated into "the best title in the world" (*consuetudo immemorabilis praestat meliorem titulum de mundo*) that could not be refuted.⁵² Juridical support of customs also included the argument that it was plausible to assume that the authorities, both civil and ecclesiastical, and/or the community at large, had agreed to what was immemorial, else they would have prohibited it. And, because immemorial practices were presumed to have won broad social acceptance, some jurists argued that they could be assumed to be reasonable and good.

Jurists might have curated customs into powerful tools, but jurisdictional authorities and litigants also supported them. Comparing, for example, what litigants said to what jurists argued demonstrates the surprising degree to which most litigants described not their individual experiences, but instead what was legally required.⁵³ Incorporating and domesticating juridical categories as their own – without being necessarily aware of their full implications, and most probably following the advice of notaries, judges, lawyers, or other experts or peers – witnesses in late medieval and early modern Europe constantly argued that their customs were immemorial.⁵⁴ They understood that this term was a powerful one, and they employed it in order to ensure a result to their liking.

Historians have asserted that, paradoxically, recourse to immemoriality enabled change, with newer customs being easily characterized as

(Cologne: Johann Gymnich, 1614 [1565]) 48–49. See also J. P. Lévy, *La hiérarchie des preuves dans le droit savant du Moyen Âge depuis la Renaissance du Droit Romain jusqu'à la fin du XIVe siècle* (Paris: Librairie du Recueil Sirey, 1939), 62–66; and J. Franklin, *The Science of Conjecture* (Baltimore: Johns Hopkins University Press, 2001), 31.

52 Reinoso, *Observationes practicae*, 65 and 357–65, most particularly ns. 1 and 3.

53 J. A. Jara Fuente, "Que memoria de onbre non es en contrario": Usurpación de tierras y manipulación del pasado en la Castilla urbana del siglo XV," *Studia Historica: Historia Medieval* 20–21 (2002–2003), 73–104; and P. Miceli, "La costumbre en perspectiva histórica: desde el consenso populi a la voluntad popular," *Anales de historia antigua, medieval y moderna* 44 (2012), 277–304, at 142 and 152–65.

54 On the role of notaries, see Francisco González de Torneo, *Práctica de escribanos que contiene la judicial y orden de examinar testigos* (Madrid: Antonio Vázquez, 1640 [1587]), lib. 4, fols. 102v–103r and fols. 124v–125r, as well as lib. 5, tit. 5, fols. 141r–142v; and José Febrero, *Librería de escribanos e instrucción jurídica teórico-práctica* (Madrid: Imprenta de Pedro Martin, 1789), vol. III, part I, cap. 8 (1), at 56 and 66 n. 49.

immemorial. In addition, immemoriality was invoked even when the customs described had a clear point of departure that the witnesses remembered, and the presumption was thus not strictly necessary. While immemoriality, ironically, allowed for constant change, the writing down of customs did the opposite. Though recording customs in writing did modify what was remembered and how, after customs had been written down, they became fixed. As a result, they could no longer easily cater for changes.

The study of customs thus reveals the interdependency between customs and juridical debates as well as between customs and royal attempts to control them. It demonstrates the importance of presumptions and commonsense assertions, and the plurality of options that existed at each given moment. It also displays the pan-European character of these legal entanglements because the dynamics unleashed by the processes of defining, addressing, and proving customs were common to many European countries. They were certainly impactful also in Spain and Portugal, where the presence of customs was recorded in antiquity, where kings attempted to control local normativity mainly by writing it down, and where local compilations of *ius commune* – such as the *Siete Partidas* – dealt extensively with customs.⁵⁵ As would eventually happen also in the Americas, Spanish monarchs ordered their subjects and officials to obey customary law as long as its instructions did not contradict the mandates of god or reason, did not require improvement or change, and did not contradict royal instructions.⁵⁶ Spanish and Portuguese practitioners, theologians, and jurists did the same, describing different customs, explaining their origins, and advocating their importance.⁵⁷

55 *Siete Partidas*, partida 1, título 2. On developments in the kingdom of Aragon, see A. Iglesia Ferreirós, “La creación del derecho en Cataluña,” *Anuario de Historia del Derecho Español* 47 (1997), 99–423; A. Iglesia Ferreirós, “Ley y costumbre en la Cataluña medieval,” in A. Iglesia Ferreirós (ed.), *El Dret Comú i Catalunya: Actes del V Simposi Internacional* (Barcelona: Fundació Noguera, 1996), 207–22; J. A. Obarrio Moreno, “El valor de la costumbre en el reino de Valencia,” *Anuario da facultade de dereito da Coruña* 9 (2005), 637–62; and A. Planas Rosselló, “La costumbre en el derecho histórico de Mallorca,” *Cuadernos de Historia del Derecho* 22 (2015), 101–16. On Portugal, see, for example, M. J. Brito de Almeida e Costa, “Foros ou costumes,” in J. Serrão (ed.), *Dicionário de história de Portugal* (Porto: Livraria Figueirinhas, 1985), vol. III, 59–60; A. Tavares, “Direito local português na Idade Média: Os Costumes e foros (Guarda, Évora, Santarém e Beja),” *Quiroga: Revista de Património Iberoamericano* 13 (2018), 80–90, at 82 and 86–87; and J. Domingues, “Os foros extensos na Idade Média em Portugal,” *Revista de Estudos Histórico-Jurídicos* 37 (2015), 153–74.

56 See, for example, *ley 1 of the Leyes de Toro*, 1505.

57 Castillo de Bobadilla, *Política para corregidores*, lib. 1, cap. 5, n. 9, lib. 2, cap. 10, ns. 34–58 and lib. 3, cap. 8, ns. 194–97; and Francisco Suárez, *Tractatus de legibus ac deo legislatore: in decem libros distributus* (Coimbra: G. de Loureyro, 1612), lib 7.

How Early Modern Law Operated II: Customary Law in the Iberian Colonies

The interaction between local customary and global law, and between customary law and jurists, which emerged in late medieval and early modern Europe, was central to developments also in the colonies. In both Spanish and Portuguese America, a huge plethora of customs was recognized by jurists and practitioners as prescriptive: local customs as well as customs of corporations, communities, households, and groups, and customs of Spanish, indigenous, and Afro-Latin American communities.⁵⁸ As in Europe, these customs were understood as representing a local legal specificity operating alongside the common framework that united them all, a true *ius commune*. Often written down, customs could also be supported by the declarations of witnesses who frequently classified them as immemorial, though this did not mean that they were necessarily ancient. Finally, customs were perceived as belonging to certain groups and could become a powerful instrument to resist external imposition and affirm local autonomy to declare and apply the law, but this did not make them external to the law itself, only an important, indeed an essential, part thereof.

Because customs – in the colonies as in Europe – could be integrated into the early modern legal universe only after jurists declared them “good” and in harmony with religious precepts, the question which customs could be recognized as valid greatly preoccupied contemporaries. Also important was the need to decide which practices were *usos* that had no normative valence and which were customs (*costumbres* and sometimes *fueros*) and therefore binding.⁵⁹

The Particular Case of Indigenous Customs

These findings challenge previous historians’ understanding of custom in the colonies. Historians tended to concentrate their attention mostly on indigenous customs – seen either as authentic practices or a colonial invention – but

58 R. Levene, “El derecho consuetudinario y la doctrina de los juristas en la formación del derecho indiano,” *Hispanic American Historical Review* 3 (1920), 144–51; Tau Anzoátegui, *El poder de la costumbre*, 15–16; T. Duve, “La pragmatización de la memoria y el trasfondo consuetudinario del Derecho Indiano,” in R. Folger and W. Oesterreicher (eds.), *Talleres de la memoria: reivindicaciones y autoridad en la historiografía indiana de los siglos XVI y XVII* (Münster: Lit, 2005), 77–97; M. R. Pugliese, “Apuntamientos sobre la aplicación del derecho indiano local en el Río de la Plata,” *Revista de Historia del Derecho* 33 (2005), 219–95; Agüero, “Local Law,” 117–23; V. Tau Anzoátegui, “Provincial and Local Law of the Indies: A Research Program,” *New Horizons in Spanish Colonial Law* 3 (2015), 235–55. Customs were explicitly addressed by Solórzano y Pereira, *Política Indiana*, lib. 4, cap. 3, n. 6 and lib. 5, cap. 14, n. 18.

59 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(282) (2021), 283–313.

always as different from “the law.” However, as we have seen, customs – including, but not restricted, to indigenous customs – were part of the legal order.⁶⁰ Furthermore, customs were always extremely local: Rather than belonging, for example, to all Spanish or all indigenous communities (as in the idea of “Spanish customs” or “indigenous customs”), each group and each locality had its own. Multiple rather than unique, complex rather than simple, customs included an enormous range of practices and norms that could vary dramatically from place to place, group to group, and over time.

Given the importance of customary law to European and Iberian legal traditions, it is not surprising that colonial actors turned their attention to indigenous customs. They did so as clergymen who wished to guarantee indigenous conversion, as administrators looking for feasible solutions, but also as jurists whose task it was to cater for local variations as long as they did not contradict the *ius commune*. Royal officials made efforts to find information about indigenous normativities by sending out questionnaires throughout the territories, asking which indigenous customs, good or bad, pre- or post-conquest, existed.⁶¹ Aware of the enormous diversity in indigenous customs, the local officers and indigenous individuals who answered the questionnaires sent back information regarding governmental structures, taxation, laws, and the administration of justice.⁶² Royal magistrates also participated in these efforts of discovery and documentation by conducting their own surveys and writing down what they identified as indigenous customary law.⁶³ The resulting copious records are what enables modern historians to

60 The Spanish formally acknowledged the validity of indigenous customs in 1530, 1542 and 1555, long before this acknowledgement was inserted in the *Recopilación de Indias*: Tau Anzoátegui, *El Poder de la Costumbre*, 70–74 and 135–37. See also J. Manzano, “Las leyes y costumbres indígenas en el orden de prelación de fuentes del derecho indiano,” *Revista del Instituto de Historia del Derecho Ricardo Levene* 18 (1967), 65–71; C. J. Díaz Rementería, “La costumbre indígena en el Perú hispánico,” *Anuario de estudios americanos* 33 (1976), 189–215; M. A. González de San Segundo, “El elemento indígena en la formación del derecho indiano,” in M. A. González de San Segundo, *El mestizaje jurídico: el derecho indiano de los indígenas (estudios de historia del derecho)* (Madrid: Universidad Complutense de Madrid, 1995), 1–54, at 5–6, 12 and 16–19; T. Herzog, “Indiani e cowboys: il ruolo dell’indigeno nel diritto e nell’immaginario ispanocoloniale,” in A. Mazzacane (ed.), *Oltremare: Diritto e istituzioni dal colonialismo all’età postcoloniale* (Naples: Cuen, 2006), 9–44; and Herzog, “Immemorial (and Native) Customs.”

61 Ahrndt, *Edición crítica*, 25–27 describes some of these efforts. As for the type of questions that had to be answered, see, for example, Francisco de Solano, *Cuestionarios para la formación de las relaciones geográficas de Indias, siglos XVI–XIX* (Madrid: CSIC, 1988), 23 and 82.

62 See, for example, M. Strecker and J. Arteaga, “La ‘Relacion de algunas costumbres’ (1582) de Gaspar Antonio Chi,” *Estudios de historia novohispana* 6 (1978), 1–21.

63 For more detail on the various methods employed by those recording indigenous customs, see Herzog, “Immemorial (and Native) Customs,” 40–43.

imagine what indigenous law might have looked like even before Europeans invaded the continent (see Chapter 2).

Although the motivation of those collecting and writing down data on indigenous customs could vary, the jurists and ecclesiastics who took part in these endeavors largely followed the same procedures as their European equivalents in the preceding centuries.⁶⁴ Judging their task as essential to the integration of multiple communities into a “jurisdictional state” – which, in the colonial setting, also included a variety of ethnicities – jurists and clergymen gathered information, observed what they could, and wrote down what seemed most relevant, appropriate, and just, while also endeavoring to transform it into something familiar and comprehensible. In the surveys they conducted, they sometimes used indigenous informants and witnesses, as well as indigenous mnemonic devices. However, they often relied on the expertise of Spaniards, either settlers or ecclesiastics, who were said to be familiar with indigenous peoples and their customs.

Some colonial actors clearly advocated in favor of indigenous customs, which they believed were an antidote to chaos; others criticized them bitterly, believing them pagan, unjust, or simply unwise. But whatever their attitude, like their predecessors in Europe, all those recording customs in the colonies tended to decontextualize and de-historicize the evidence they collected. They distinguished good customs (which should persist because they were compatible with divine and natural law and the main tenets of *ius commune*) from bad ones (which should be prohibited). Although colonial

64 Polo Ondegardo, “Informe del licenciado Juan Polo Ondegardo al licenciado Briviesca de Muñatones sobre la perpetuidad de las encomiendas en el Perú,” Lima, December 12, 1561; and “Las razones que movieron a sacar esta relación y notable daño que resulta de no guardar a estos indios sus fueros,” Lima, June 26, 1571, in G. Lamana Ferrario (ed.), *Pensamiento colonial crítico: Textos y actos de Polo Ondegardo* (Cuzco and Lima: Centro Bartolomé de las Casas and Instituto Francés de Estudios Andinos, 2012), 139–204 and 217–330; A. de Zorita, “Breve y sumaria relación de los señores y maneras y diferencias que había de ellos en la Nueva España,” in J. García Icazbalceta (ed.), *Nueva colección de documentos para la historia de México* (Mexico City: Liechtenstein Kraus, 1971 [1886]), vol. III, 71–227, at 73–78; “Carta de don Francisco de Toledo al rey, fecha en los Reyes, 18 de abril de 1578,” in J. Toribio Medina, *La Imprenta en Lima (1584–1824)* (Lima: Casa del Autor, 1904), vol. I, 187–99; and Gaspar de Escalona Agüero, *Gazofilacio real del Perú* (La Paz: Editorial del Estado, 1941 [1647]), lib. 2, part 2, cap. 20, n. 1, 239–40, and n. 15, 252. Francisco de Toledo, viceroy of Peru from 1569 to 1581, was particularly active in both recording and changing indigenous customs. See, for example, “De lo que han de guardar los indios de cada pueblo en general y en particular,” in *Relaciones de los virreyes y audiencias que han gobernado el Perú: Memorial y ordenanzas de D. Francisco de Toledo* (Lima: Imprenta del Estado, 1867) vol. 1, 204–17. On how Zorita proceeded to record indigenous law, see 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.

recorders acknowledged the existence of a huge variety of customs among indigenous peoples, as their European equivalents had done in the “Old World,” they nonetheless tended to reduce the customs’ complexity, and to portray them as belonging to a single normative universe by turning concrete examples into general rules. The result was that, in the process of recording, these actors also modified what they had found. They allowed European law as applied in the colonies to absorb indigenous customs but, in the aftermath, neither indigenous customs nor European law were ever the same.

The Spanish officials who engaged in these campaigns were driven by a bias in favor of European alphabetical writing and believed that this was the only technology that would enable the conservation of indigenous customs. They expressed their fear that, unless they proceeded as they did, many indigenous customs would be “lost,” because indigenous peoples had no system to write down their own laws.⁶⁵ According to this view, due to the lack of written collections, indigenous people could not account for their customs; they could only repeat what their ancestors had done. Some Spaniards concluded that it was “almost impossible” to find out the truth about indigenous customs, because an authoritative compilation – a “general history of the customs of the Indians of Peru,” for example – was lacking.⁶⁶

The belief that indigenous customs must be recorded led Spaniards to pay attention also to indigenous methods of recollection. In testimonies collected in Cuzco in 1582, for example, multiple witnesses explained that the indigenous peoples of Peru had their own systems of registration, which had “secretaries” sing (!) the information on laws and ordinances while holding a Khipu in their hands.⁶⁷ Khipus were colorful knotted cords that, as far as we presently know, included information that was numerical, legal, and perhaps also literary and historical. It identified kinship organization and communities and

65 Strecker and Artiega, “La Relación de Algunas.” See also Bernabe de Cobo, *Inca Religion and Customs*, trans. R. Hamilton (Austin: University of Texas Press, 1990 [1653]), lib. 1, cap. 1, 9. Vasco de Quiroga, for example, stated that the Spanish must record indigenous customs because this was the best as well as the most appropriate thing to do: P. B. Villella, “‘For So Long the Memories of Men Cannot Contradict It.’ Nahua Patrimonial Restoration and the Law in Early New Spain,” *Ethnohistory* 63(4) (2016), 697–720, at 698.

66 J. A. Guevara Gil, “Los caciques y el ‘señorío natural’ en los andes coloniales (Perú, siglo XVI),” in J. A. Guevara Gil, *Diversidad y complejidad legal: Aproximaciones a la antropología e historia del derecho* (Lima: Pontificia Universidad Católica del Perú, 2009), 301–18, at 31–12, citing Alonso Fernández de Bonilla, a doctor in canon law and *visitador* and *juez de residencia* of Viceroy Toledo. Present-day scholars express similar disappointment; see, for example, J. Ravi Mumford, “Litigation as Ethnography in Sixteenth Century Peru: Polo de Ondegardo and the Mitimaes,” *Hispanic American Historical Review* 88(1) (2008), 5–40, at 8.

67 “Carta de don Francisco,” 192, 194, and 196–98.

narrated their privileges.⁶⁸ According to several colonial testimonies, Khipus sometimes included information on Inca law, and not only reflected reality but contributed to its making, because they allowed not only the preservation of the memory of the past but also planning and distribution of resources in the future.⁶⁹

Precolonial in origin, Khipus continued to be produced during the colonial period, though their presence somewhat diminished from the 1590s, and starkly decreased from the mid-seventeenth century onwards. In the early period, the Spanish authorities often ordered that the contents of Khipus be transcribed into Spanish-type documentation, and colonial judges routinely accepted Khipus as valid proof. To admit Khipus as evidence, indigenous experts (*Khipucamayocs*) who had them in their possession testified to their contents in the courts. We know that litigants and judges who heard these expert testimonies assumed that Khipus contained facts about past events, but they also tended to believe that these historical accounts had normative dimensions. Khipus were thus seen in the early modern period as reflecting the indigenous management of justice and order, perhaps even law, and as records of decisions that were categorized as jurisdictional because they declared and applied the law. Belief in the veracity of Khipus was such that, on occasions, Spanish judges demanded to hear what Khipus, which they described as “truthful and correct,” indicated. In 1575, Viceroy Toledo ordered Khipus to be collected, and instructed the *Khipucamayocs*, who by that stage were considered notaries (*escribanos*), to write down their contents so that the information would be “more certain and durable.”⁷⁰

Andeans were not the only indigenous peoples to record information in forms that appeared alien to the colonizers yet were considered reliable. Mayan elites presented colonial magistrates with information recorded using traditional hieroglyphic scripts that captured historical accounts as well as evidence regarding communities and land rights.⁷¹ During the colonial period,

68 G. Urton, “From Knots to Narratives: Reconstructing the Art of Historical Record Keeping in the Andes from Spanish Transcriptions of the Inka Khipus,” *Ethnohistory* 45(3) (1998), 409–39; C. B. Loza, “El quipu y la prueba en la práctica del derecho de Indias, 1550–1581,” *Historia y cultura* 26 (2000), 11–37; and 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), 19–53. On the presence of Khipus in the post-colonial Andes, see F. Salomon, *The Cord Keepers: Khipus and Cultural Life in a Peruvian Village* (Durham: Duke University Press, 2004).

69 José de Acosta, *Historia natural y moral de las indias*, ed. Edmundo O’Gorman (Mexico City: Fondo de Cultura Económica, 1940 [1590]), lib. 6, cap. 8, 465.

70 “Ordenanzas generales para la vida común en los pueblos de indios, Arequipa, 6 de noviembre de 1575,” in *Francisco de Toledo: Disposiciones*, vol. II, no. 64, 217–66, at 238.

71 J. F. Chuchiak IV, “Writing as Resistance: Maya Graphic Pluralism and Indigenous Elite Strategies for Survival in Colonial Yucatan, 1550–1750,” *Ethnohistory* 57(1) (2010), 87–116.

those trained to read these scripts were recognized as notaries. Many of them produced both Spanish and Maya documentation, as well as mixed texts that, written in Spanish, incorporated Maya style, forms of address, measurements, numerals, and classifiers, or that, though written in indigenous languages, used Spanish alphabetical script.

Aztec authorities and litigants relied on indigenous painted histories to keep information safe.⁷² Considered faithful recollections of the past, these paintings were admissible in colonial courts and accepted as reliable evidence for claims regarding the rights of communities to certain lands, or of families to certain leadership positions.⁷³ Perhaps because these instruments seemed so foreign, Spaniards sometimes questioned whether they only included facts or also normative knowledge. Vasco de Quiroga (1477/78–1565), for example, argued in 1535 that the indigenous peoples of Mexico did not have “ordinances” nor laws and that their paintings only represented records of past events.⁷⁴ By contrast, his contemporary Bernardino de Sahagún (c. 1499–1590) believed that Aztec paintings were like writing and contained information on litigation, laws, and customs.⁷⁵

72 On Nahuatl writing systems and their interaction with Spanish alphabetical record keeping, see J. Lockhart, *The Nahuatl after the Conquest: A Social and Cultural History of the Indians of Central Mexico, Sixteenth through Eighteenth Centuries* (Stanford: Stanford University Press, 1992), 326–73. See also J. Galarza, *Estudios de escritura indígena tradicional Azteca-Nahuatl* (Mexico City: Archivo General de la Nación, 1980); E. Hill Boone, “Pictorial Documents and Visual Thinking in Postconquest Mexico,” in E. Hill Boone and T. Cummins (eds.), *Native Traditions in the Postconquest World: A Symposium at Dumbarton Oaks 2nd through 4th October 1992* (Washington: Dumbarton Oaks, 1998), 149–99; and E. Hill Boone, *Stories in Red and Black: Pictorial Histories of the Aztecs and Mixtecs* (Austin, University of Texas Press, 2000).

73 T. de Benavente, *Historia de los indios de la nueva España*, ed. M. Serna Arnaz and B. Castany Prado (Madrid: Real Academia Española, 2014), 5. On the usage of indigenous record keeping in Spanish courts, see, for example, A. Megged, “Between History, Memory, and Law: Courtroom Methods in Mexico,” *The Journal of Interdisciplinary History* 45(2) (2014), 163–86; and, more generally, J. Rappaport and T. Cummins, *Beyond the Lettered City: Indigenous Literacies in the Andes* (Durham: Duke University Press, 2012), 175–88. See also Egío, “From Castilian to Nahuatl,” 145–48.

74 Vasco de Quiroga, “Información en derecho” (Mexico, July 24, 1535), in *Colección de documentos inéditos relativos al descubrimiento, conquista y organización de las antiguas posesiones españolas en América y Oceanía* (Madrid: Bernaldo de Quirós, 1868), vol. 10, 333–513, at 423.

75 Bernardino de Sahagún, *Historia general de las cosas de la Nueva España* (Mexico City: Imprenda de Alejandro Valdés, 1829 [1540]), lib. VI, cap. 43, vol. II, 241, lib. XVIII, cap. 15, vol. II, 304, cap. 24, vol. II, 314, and lib. X, cap. 13, vol. III, 30. Historians tend to believe that Aztec records did indeed include normative information, yet they also argue that this information had to be explained, justified, and interpreted by expert decoders. They thus highlight the dynamic relations between rules, principles, and implementation. See, for example, J. A. Offner, “The Future of Aztec Law,” *The Medieval Globe* 2(2) (2016), 1–32, at 2–3 and 6.

Despite preference for written over oral transmission, and despite the push to record indigenous customs in (alphabetical or other) writing, colonial courts, both Spanish and indigenous, were constantly called upon to apply indigenous law as reconstructed by the declarations of witnesses. However, historians who have studied how this worked in practice argue that Spanish officials who claimed to decide cases according to indigenous customary law actually curated a new law that no indigenous individual would have easily recognized (see also Chapter 2).⁷⁶ These officials were not ethnographers seeking to discover what indigenous law mandated, but behaved as early modern judges did elsewhere, namely, they searched for what they considered was the just result, using the methods discussed earlier. They thus applied to indigenous law their own judgment of what justice required. For example, they supported the nomination of heirs to leadership positions according to patriarchal principles and linked the right to land with possession. The Spanish administrative authorities followed suit, despite frequently insisting – even as they sought to control or alter indigenous customs – that their orders were not meant to change the customary law. Instead, they claimed that colonial administrators and judges were merely continuing and repeating “ancient” indigenous legal practices.⁷⁷

Indigenous judges and litigants were often similarly creative in inventing or shaping customs according to present needs while at the same time claiming to be following long-established practices. Rather than focusing on preserving their ancient traditions or expressing allegiance to the past, they translated and adapted old practices to new realities in pursuit of what they considered just and followed the strategies to which they attributed the greatest chances of success.⁷⁸ Indigenous judges, influenced by colonial conditions

76 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), 3–4, 35, 47, 49–50, and 57–58; C. J. Díaz Rementería, *El cacique en el virreinato del Perú. Estudios histórico jurídico* (Seville: Universidad de Sevilla, 1977), 47 and 113 n. 2; B. Lavallé, *Al filo de la navaja. Luchas y derivas caciquiles en Latacunga, 1740–1790* (Quito: Corporación Editora Nacional, 2002), 184–87; and T. Herzog, “Colonial Law and ‘Native Customs’: Indigenous Land Rights in Colonial Spanish America,” *The Americas* 63(3) (2013), 303–21.

77 See, for example, T. Cummins, “Let Me See! Reading Is for Them: Colonial Andean Images and Objects ‘como es costumbre tener los caciques Señores,’” in Hill Boone and Cummins, *Native traditions*, 91–148, at 110–11.

78 B. Premo, “Custom Today: Temporality, Law, and Indigenous Enlightenment,” *Hispanic American Historical Review* 94(3) (2014), 355–79; Y. Yannakakis and M. Schrader-Kniffki, “Between the ‘Old Law’ and the New: Christian Translation, Indian Jurisdiction, and Criminal Justice in Colonial Oaxaca,” *Hispanic American Historical Review* 96(3) (2016), 517–48; F. Salomon, “Collquiri’s Dam: The Colonial Re-Voicing of an Appeal to the Archaic,” in Hill Boone and Cummins, *Native Traditions*, 273–74; S. Muñoz Arbeláez, *Costumbres en disputa: Los muisecas y el imperio español en Ubaque, siglo*

as well as Christianity, and often presiding over communities composed of members from a plurality of origins, mixed elements from various traditions. In the process, they created a law that was certainly local but was neither authentic nor necessarily old – in contrast to what they sometimes argued and what historians used to assert.

Indigenous authorities also contributed to disseminating knowledge about Spanish law.⁷⁹ On occasions, they or local scribes were responsible for translating Spanish norms into local languages, or preparing collections of law for local use.⁸⁰ Comparison of what they produced with the Spanish originals demonstrates that, while their work enabled Spanish concepts and norms to penetrate locally, it also ensured their adaptation to local concepts, idioms, and possibilities, for example, by stressing orality, by adding commentaries, or by referring to customs, distinguishing between those that should be maintained (because they were “good”) from those which must not. In other words, like Spanish judges, indigenous judges were involved in processes of cultural (and legal) translation and searched for a just solution (see Sections 1.3 and 1.4).

Indigenous litigants learned to use the colonizers’ language of “customs” to refer to their own normativity. They defended some customs as “good” and thus valid and classified others as “bad” and therefore no longer prescriptive.⁸¹ They invoked custom, which they often categorized as “immemorial,” to justify new habits and argued – in line with the European understanding of the term – that immemoriality required that there would be “nothing in human memory to contradict it.” Thus, indigenous judicial practices and concepts substantially changed during the colonial period not just due to the adherence to Spanish law but also through the transformation of indigenous normativity into a European style “customary law.”⁸²

XVI (Bogotá: Universidad de los Andes, 2015), 27–67; and M. Deardorff, “Republics, Their Customs and the Law of the King: *Convivencia* and Self-Determination in the Crown of Castile and Its American Territories, 1400–1700,” *Rechtsgeschichte – Legal History* 26 (2018), 162–99, at 162 and 165–66.

79 C. Cunill, “La circulación del derecho indiano entre los mayas: escritura, oralidad y orden simbólico en Yucatán, siglo XVI,” *Jahrbuch für Geschichte Lateinamerikas* 52 (2015), 15–36, at 27–35.

80 B. D. Sells and S. Kellogg, “We Want to Give Them Laws. Royal Ordinances in a Mid-Sixteenth Century Nahuatl Text,” *Estudios de cultura Náhuatl* 27 (1997), 325–67.

81 Vilella, “For So Long the Memories”; and Cunill Rovira-Morgado, “Lo que nos dejaron nuestros padres.”

82 Such transformations were described, for example, in the pioneering work of S. Kellogg, *Law and the Transformation of Aztec Culture, 1500–1700* (Norman: University of Oklahoma Press, 1995). See also M. Á. Romero Frizzi, “The Power of the Law: The Construction of Colonial Power in an Indigenous Region,” in E. Ruiz Medrano and

In other words, whether written down or applied by the courts, in Spanish America as in Europe, customs were both a means of preserving local normativity and a motor for change. The early modern European concept of customary law allowed for the integration of a wide range of jurisdictions – in this case, indigenous communities and their laws – into a *ius commune*, but both customs and the common law were modified as a result. Historians have thus concluded that one can consider colonial indigenous customs as the outcome of complex processes involving local agency, juridical mediation, and an ongoing conversation regarding what was local and what was global, what was permissible and what was prohibited, what was written down, and what remained oral. Customs both European and indigenous, new or old, communally based, reimagined by jurists, or mandated by kings, formed part of a complex legal universe in which a great variety of norms competed but also, according to the contemporary understanding of *ius commune*, cohered.

While there is ample information on how these processes operated in Spanish America, we still lack data regarding the equivalent developments in Luso-America. Nonetheless, there is reason to believe that similar processes occurred. Unlike the Spanish, the Portuguese did not formally acknowledge the validity of indigenous jurisdictions or indigenous law.⁸³ However, in Portuguese territories, too, indigenous leaders (*principais*) substantially contributed to the maintenance of order within indigenous communities and therefore must also have engaged in declaring and applying the law.⁸⁴ This

S. Kellogg (eds.), *Negotiation within Domination. New Spain's Indian Pueblos Confront the Spanish State* (Boulder: University Press of Colorado, 2010), 107–35; Y. Yannakakis, “Costumbre: A Language of Negotiation in Eighteenth-Century Oaxaca,” in Ruiz Medrano and Kellogg, *Negotiation within Domination*, 37–173; and J. C. de la Puente Luna and R. Honores, “Guardianes de la real justicia: alcaldes de indios, costumbre y justicia local en Huarochirí colonial,” *Revista Histórica* 40(2) (2016), 11–47.

83 In Africa, however, the Portuguese took into account, and sometimes formally recognized, indigenous customs: see, for example, C. Madeira Santos, “Entre deux droits: Les lumières en Angola (1750–v.1800),” *Annales HSS* 60(5) (2004), 817–48; C. Madeira Santos, “Eslavaggio africano e traite atlântico confrontados: transações langagiêre et jurídicas (à propos du tribunal de mucanos dans l’Angola des XVIII^e et XVIII^e siècles),” *Brésil(s). Sciences humaines et sociales* 1 (2012), 127–48.

84 M. R. Celestino de Almeida, *Metamorfoses indígenas: Identidade e cultura nas aldeias coloniais do Rio de Janeiro* (Rio de Janeiro: Arquivo Nacional, 2003), 134 and 145–68; V. M. Losada Moreira, “Territoriality, Mixed Marriages, and Politics among Indians and Portuguese,” *Revista brasileira de história* 25(70) (2015), 17–39, at 17–19 and 21; V. M. Losada Moreira, “Casamentos indígenas, casamentos mistos e política na América portuguesa: amizade, negociação, capitulação e assimilação social,” *Topos* 19(39) (2018), 29–52, at 31; P. P. Langer, *A Aldeia de Nossa Senhora dos Anjos: a resistência do guarani-missionário ao processo de dominação do sistema colonial luso (1762–1798)* (Porto Alegre: Est Edições, 1997), 3; and M. C. Coelho, “O Diretório dos Índios e as chefias Indígenas: Uma inflexão,” *Campos* 7(1) (2006), 117–34, at 121–22.

must have been the case throughout the colonial period, though indigenous jurisdictional powers possibly intensified after the mid-eighteenth-century reforms that tasked indigenous village councils and justices of the peace (*juiz ordinário*) with adjudicating conflicts.⁸⁵ Though this theoretically transformed the indigenous population into vassals and subjected them to Portuguese law, there is some evidence that indigenous judges continued to be influenced by indigenous legal concepts.⁸⁶ Our ignorance of how this transpired is mostly explained by the limitations of the source material, which is either scarce or nonexistent.

Afro-Latin American Customs in Colonial Latin America

Whereas indigenous law has been the object of ample research, at least with respect to Spanish America, the literature has yet to ask questions regarding the presence of African law in the Iberian empires' American colonies. The current assumption among historians of both Spanish and Portuguese America is that enslaved Afro-Latin Americans lacked opportunities to exercise their laws and that those who achieved freedom mostly sought to integrate into colonial society by, among other things, abandoning their distinct traditions.⁸⁷ However, colonial documentation often demonstrates the persistence among Afro-Latin Americans of a wide

85 On these issues, see also P. Cardim, "Os povos indígenas, a dominação colonial e as instâncias de justiça na América portuguesa e espanhola," in Â. Domingues, M. L. Chaves de Resende, and P. Cardim (eds.), *Os indígenas e as justiças no mundo ibero-americano (sécs. XVI–XIX)* (Lisbon: Universidade de Lisboa, 2019), 29–84, at 55, 58–59, and 65–67. These reforms have been studied by many scholars; see, for example, M. Carneiro Cunha and N. Farage, "Caráter da tutela dos índios: origens e metamorfoses," in M. Carneiro Cunha (ed.), *Os Direitos dos Índios: ensaios e documentos* (Rio de Janeiro: Brasiliense, 1987), 103–18; R. H. de Almeida, *O Diretório dos Índios: um projeto de civilização no Brasil do século XVIII* (Brasília: Editora Universidade de Brasília, 1997); Â. Domingues, *Quando os índios eram vassalos: colonização e relações de poder no norte do Brasil na segunda metade do século XVIII* (Lisbon: Comissão Nacional para as Comemorações dos Descobrimentos Portugueses, 2000); P. Melo Sampaio, "Fronteras de la libertad: Tutela indígena em el directorio pombalino y em la carta regia de 1798," *Boletim Americanista* 64 (2012), 13–23; M. C. Coelho and R. R. Nascimento dos Santos, "'Monstruoso systema (...) intrusa e abusiva jurisdição': O diretório dos índios no discurso dos agentes administrativos coloniais (1777–1798)," *Revista de História* 168 (2013), 100–30, at 103–7; Â. De Araújo Antunes, "As paralelas e o infinito: uma sondagem historiográfica acerca da história da justiça na América portuguesa," *Revista de História* 169 (2013), 21–52, at 50; and Coelho, "O Diretório dos Índios," 123–26.

86 Losada Moreira, "Territoriality, Mixed Marriages, and Politics," 24–26.

87 D. Wheat, *Atlantic Africa and the Spanish Caribbean, 1570–1640* (Durham: University of North Carolina Press, 2016), 216–52; G. C. Machado Cabral, "Normative Orders in a Seaborn Empire: Sources of Law in Portuguese America (16th–18th Centuries)," unpublished paper presented at the Seminaire "Franco-Brazilian Chair of Legal History," 31 May 2021.

variety of African legal practices, originating in different groups and areas, or sometimes developed in colonial cities in Africa where enslaved persons could spend years before they were sent to the Americas (on these issues, see Section 1.4). One of the elements that can be traced to specific regions in Africa is the use in colonial Latin America of rituals of divination and ordeals to decide who committed a crime or to discover stolen goods. In these instances, spiritual specialists functioned as judges in settings comparable to trials.⁸⁸ Similarly, social problems, including what was considered social deviance, could be solved by using a “cult of affliction,” which involved communicating with spirits said to both cause the problem and be in a position to solve it.⁸⁹ These rites justified many of the powers held by leaders and explained why their instructions were followed. It is also possible that the formation of colonial families was greatly influenced both by a particular African definition of family and by their openness to integrate outsiders, including former enslaved persons or their offspring, into them. This likely also affected experiences how and when freedom could be achieved, and what it entailed.⁹⁰ Afro-Latin Americans, in other words, used as well as manipulated their multifaceted heritage to cope with slavery as well as with living in a colonial society.⁹¹

There is also reason to believe that specifically African legal notions might have operated in maroon communities, where escaped enslaved persons and freed Afro-Latin Americans created new political, social, and judicial structures, and followed their own norms. Though we still know very little about how these communities operated, there are plenty of indications that they were led by specific individuals or kin groups, who managed them as true

88 J. H. Sweet, *Recreating Africa: Culture, Kinship, and Religion in the African-Portuguese World, 1441–1770* (Chapel Hill: University of North Carolina Press, 2003), 119–37 and 228–30. See also J. C. Bristol, *Christians, Blasphemers, and Witches: Afro-Mexican Ritual Practices in the Seventeenth Century* (Albuquerque: University of New Mexico Press, 2007). It is possible that these dynamics continued into the nineteenth and twentieth centuries: R. W. Slenes, “Like Forest Hardwoods: Jongueiros *Cumba* in the Central-African Slave Quarters,” in P. Meira Monteiro and M. Stone (eds.), *Cangoma Calling. Spirits and Rhythms of Freedom in Brazilian Jongo Slavery Songs* (Dartmouth: University of Massachusetts, 2013), 49–64, at 55.

89 R. W. Slenes, “L’arbre *nsanda* replanté. Cultes d’affliction kongo et identité des esclaves de plantation dans le Brésil du sud-est (1810–1888),” *Cahiers du Brésil Contemporain* 67–68 (2007), 217–313.

90 H. M. Mattos de Castro, *Das cores do silêncio: os significados da liberdade no sudeste escravista, Brasil século XIX* (Rio de Janeiro: Arquivo Nacional, 1993), 162–63. Though this study focuses on the nineteenth century, there is no reason to assume that the colonial period was different.

91 R. W. Slenes, *Na senzala, uma flor: esperanças e recordações na formação da família escrava. Brasil Sudeste, século XIX* (Rio de Janeiro: Editora Nova Fronteira, 1999), 148.

“republics.”⁹² At least, both the Spanish and the Portuguese believed such was the case and treated maroon leaders as “governors” who controlled both people and territory. According to the colonial sources’ portrayal, these leaders had power over subjects, distributed work, and administered criminal justice, either personally or through judges. Many maroon communities seem to have had norms distinguishing members from outsiders, as well as procedures for accommodating and integrating newcomers.

Of course, we do not know if these legal arrangements were based on European, indigenous, or African notions, or perhaps some combination of them all, but it is hard to imagine that the African heritage of the communities’ leaders or members, most particularly in the first generations, did not affect their choices.⁹³ A number of historians have suggested this might have been the case, pointing to similarities between what transpired in maroon communities and normative systems in some parts of Africa.⁹⁴ For example, ritual behavior that recognized subjection to local leaders identified as kings, such as prostration at their feet or applauding, was common in Congo and Angola, and has also been reported for maroon communities in Ibero-America. Equally striking is the presence in some maroon communities of African *kilombo*, a custom that enabled the social, religious, political, and perhaps also legal integration of younger males by mandating their temporary separation from the community in order to prepare them to become warriors and full community members. It is also clear that African linguistic

92 F. dos Santos Gomes and H. S. Gledhill, “A ‘Safe Heaven’: Runaway Slaves, Mocambos, and Borders in Colonial Amazonia, Brazil,” *Hispanic American Historical Review* 82(3) (2002), 469–98, at 488; J. G. Landers, “Cimarrón and Citizen: African Ethnicity, Corporate Identity, and the Evolution of Free Black Towns in the Spanish Circum-Caribbean,” in J. G. Landers and B. M. Robinson (eds.), *Slaves, Subjects, and Subversives: Blacks in Colonial Latin America* (Albuquerque: University of New Mexico Press, 2006), 111–45; S. Hunold Lara, “Marronnage et pouvoir colonial: Palmares, Cucaú et les frontières de la liberté au Pernambuc à la fin du XVIIIe siècle,” *Annales HSS* 62(3) (2007), 639–62; C. Beatty-Medina, “Caught between Rivals: The Spanish-African Maroon Competition for Captive Indian Labor in the Region of Esmeraldas during the Late Sixteenth and Early Seventeenth Centuries,” *The Americas* 63(1) (2006), 113–36; C. Beatty-Medina, “Between the Cross and the Sword: Religious Conquest and Maroon Legitimacy in Colonial Esmeraldas,” in S. K. Bryant, R. S. O’Toole, and B. Vinson III (eds.), *Africans to Spanish America: Expanding the Diaspora* (Urbana Champaign: University of Illinois Press, 2012), 95–113, at 97; S. Hunold Lara, “Com fé, lei e rei: um sobado africano em Pernambuco no século XVII,” in F. Gomes (ed.), *Mocambos de Palmares. História e fontes (séc. XVI–XIX)* (Rio de Janeiro: Viveiros de Castro Editora, 2010), 100–18; and A. C. Viotti, “Revisitar Palmares: histórias de um mocambo do Brasil colonial,” *Trashumante. Revista Americana de Historia Social* 10 (2017), 78–99, at 83 and 90–91.

93 H. L. Bennett, *Colonial Blackness: A History of Afro-Mexico* (Bloomington: Indiana University Press, 2009), 105, calls upon us to remember generational differences as well as change over time.

94 Hunold Lara, “Marronnage et pouvoir colonial,” 647 and 652–53.

elements were present in many maroon communities, and it seems reasonable to assume that these also communicated values and concepts, including some pertaining to the law.

Afro-Latin Americans living in maroon communities could both rely on normative knowledge obtained before enslavement and utilize what they had learned after they had been captured while waiting for the ships in African ports; second-generation enslaved persons could gather information from newcomers, or they could depend on diasporic customs that evolved in the Americas.⁹⁵ Yet, most historians warn us against concluding that maroon communities were true African states where renegades sought to revive African traditions, as some have argued. Clearly, these communities were new creations in which new African diasporic customs – with roots in multiple locations and social or ethnic groups – might have emerged, and where a diversity of customs of African origin came into intense contact with Iberian and possibly also indigenous legal traditions.⁹⁶

*Customs: European, Indigenous, and Afro-Latin American
Entanglements*

It is therefore fair to say that, though indigenous peoples clearly had their own laws before Europeans invaded the continent, as did Afro-Latin Americans before they endured enslavement, during the colonial period these normativities underwent dramatic transformations. These substantial and dynamic changes mean that, while colonial documentation can help us to imagine the precolonial indigenous order (see Chapter 2) and to explain what transpired during the colonial period (and may even, on occasion, illuminate what occurred during the nineteenth and twentieth centuries), it cannot give us definitive answers as to what originated from where. Like all normativities, indigenous and African laws changed over time, but in addition, they were also greatly modified by the intense dialogue with other legal traditions,

95 On some of these issues, though focusing on the nineteenth century, see M. Dias Paes, “Ser dependente no Império do Brasil: terra e trabalho em processos judiciais,” *Población & Sociedad* 27(2) (2020), 8–29, at 13–16 and 21–24; and M. Dias Paes, “Direito e escravidão no Brasil Império: Quais caminhos podemos seguir?,” in M. Duarte Dantas and S. Barbosa (eds.), *Constituição de poderes, constituição de sujeitos: caminhos da História do Direito no Brasil (1750–1930)* (São Paulo: Universidade de São Paulo, 2021), 182–203. On the shared legal culture of Portuguese posts in Africa and Brazil, see M. Dias Paes, “Shared Atlantic Legal Culture: The Case of a Freedom Suit in Benguela,” *Atlantic Studies: Global Currents* 17(3) (2020), 419–40.

96 R. W. Slenes, “‘Malungu, ngoma vem!’ África coberta e descoberta no Brasil,” *Revista USP* 12 (1991–1992), 48–67; R. S. O’Toole, “To be Free and Lucumí. Ana de la Calle and Making African Diaspora Identities in Colonial Peru,” in Bryant, O’Toole and Vinson, *Africans to Spanish America*, 73–92; Beatty-Medina, “Between the Cross.”

regardless of whether this dialogue was imposed (as many have rightly observed) or voluntary, and regardless of asymmetries in power relations.

More easily traceable in the Spanish territories, but most likely to some degree also taking place in Portuguese America, processes of change, hybridization, translation, concretization, and reinvention had their local and group particularities, yet they also shared much in common with similar processes transpiring elsewhere in the Iberian world. On both sides of the ocean, in both Spanish and Portuguese territories, communal authorities – but also outsiders, such as the central authorities in the Peninsula or the colonizers in America – sought to identify, control, and change the customary law. By pronouncing what this law included and, on occasion, by writing it down, multiple agents confirmed both the existence of local variations, which they identified as “customary,” and the importance of a common framework.

Indigenous and Afro-Latin Americans, of course, also greatly contributed to the formation of colonial law – not only by inserting their own customs, but also by engaging with European Spanish and Portuguese law. They did so as authorities endowed with jurisdiction and as individuals in their daily activities or in court. Their contributions to the development of colonial law of European origin cannot be overestimated. Interpretations of European law by local actors introduced a huge variety of new understandings and customs – perhaps not necessarily of indigenous or African origin, but nonetheless colonial (see Sections 1.3 and 1.4 and Chapter 2). Indigenous litigants and agents, for example, redefined the meaning and extent of their status as protected individuals.⁹⁷ They extended the use of entailed estates to cover situations in which indigenous leaders argued for historical rights to land based on their nobility. These and other actions led to the development of a corpus of jurisprudence regarding indigenous leadership positions (*cacicazgo*) that relied on European debates and notions but took them in novel directions. Some indigenous individuals gained sufficient literacy to intervene in Spanish courts on behalf of their communities, pushing for solutions that used Spanish terminology and Spanish frameworks, yet promoted new ideas.⁹⁸ Freed

97 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; and A. Dueñas, “Indian Colonial Actors in the Lawmaking of the Spanish Empire in Peru,” *Ethnohistory* 65(1) (2018), 51–73.

98 The literature on these questions is enormous. I found the following particularly useful: S. J. Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640* (Madison: The University of Wisconsin Press, 1982); B. P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008); S. Belmessous (ed.), *Native Claims: Indigenous Law against Empire 1500–1920* (Oxford and New York: Oxford University Press, 2011); K. Burns,

Afro-Latin Americans did the same, arguing against their discrimination, for example, by advancing different interpretations of what being worthy of the rights and duties of vassals, Spaniards, or Portuguese, meant.⁹⁹ Particularly fascinating is the contribution of enslaved persons who, by appealing to the courts, greatly affected the meaning of the legal concepts of both slavery and freedom. They did so by using legal arguments to claim a space between one status and the other, by living as free despite their status as enslaved persons, and by following practices that allowed them to gradually free themselves.¹⁰⁰ These contributions not only clarified what the different statuses were, they also brought about new ideas regarding the obligations and rights of different members of society.

In addition to colonized indigenous individuals' contributions to and entanglements with colonial law, indigenous law also existed side-by-side with colonial law. This was the case in indigenous communities that maintained their autonomy and independence during the colonial period, including those inhabiting much of the Southern Cone as well as the Chocó and Amazon regions. These communities continued to use their own laws, laws that until the present have not been sufficiently studied. From records produced by the Spanish and the Portuguese when they attempted to befriend or enter into alliances with these groups, it is evident that Europeans generally failed to appreciate the diverse legal traditions of these independent communities, believing instead that European law should apply because, according to them, it had universal validity.¹⁰¹

"Making Indigenous Archives: The Quilcaycamayoc of Colonial Cuzco," *Hispanic American Historical Review* 91(4) (2011), 665–89; and J. Charles, "'More Ladino than Necessary': Indigenous Litigants and the Language Policy Debate in Mid-Colonial Peru," *Colonial Latin American Review* 16(1) (2007), 23–47.

99 See, for example, M. Dantas, "Humble Slaves and Royal Vassals: Free Africans and Their Descendants in Eighteenth-Century Minas Gerais, Brazil," in A. B. Fisher and M. D. O'Hara (eds.), *Imperial Subjects: Race and Identity in Colonial Latin America* (Durham: Duke University Press, 2009), 115–40; and T. Herzog, "The Colonial Expansion and the Making of Nations: The Spanish Case," in C. Carmichael, M. D'Auria, and A. Roshwald (eds.), *Cambridge History of Nationhood and Nationalism* (Cambridge: Cambridge University Press, 2022), vol 1, 145–62.

100 A. de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: Coartación and Papel," *Hispanic American Historical Review* 87(4) (2007), 659–92; M. McKinley, *Fractional Freedoms: Slavery, Intimacy and Legal Mobilization in Colonial Lima, 1600–1700* (Cambridge: Cambridge University Press, 2016); and A. Chira, *Patchwork Freedoms: Law, Slavery, and Race beyond Cuba's Plantations* (Cambridge: Cambridge University Press, 2022).

101 T. Herzog, "Dialoging with Barbarians: What Natives Said and How Europeans Responded in Late-Seventeenth- and Eighteenth-Century Portuguese America," in B. P. Owensby and R. J. Ross (eds.), *Justice in the New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York: New York University Press, 2018), 61–88.

Conclusion: How to Reconstruct Colonial Law

The previous discussion has shown that to understand colonial law, we need to place it in dialogue with European law. We also need to know more about both indigenous American precolonial law and Afro-Latin American law and trace the processes that led to their reinvention under imperial rule. However, though consideration of these longer and larger contexts is vital, so is attention to place, time, and the specific parties involved: We need to explore how these frameworks operated in a particular setting. It is therefore clear that we can neither imagine colonial law as entirely separate and distinct from European law nor simply equate it with royal orders.¹⁰² Neither can we forget the role of normative sources such as juridical discussions, canon law, theology, or customary law. To imagine a *derecho indiano* that was particularly Spanish, to envision a distinct Portuguese colonial law, or to separate royal decision-making from the principles that it sought to implement, is to give life to a strawman.

These findings enable us to assess the validity of the various methods by which historians have previously tried to reconstruct colonial law (see Section 1.1). Studying the royal decrees, as many have done in the past, is of course possible, but only if we take into account that these were jurisdictional acts that reflected not only royal objectives or social, economic, and political interests (as has often been asserted) but also normative debates. Examining what the various *Recopilaciones* included is equally plausible, but it requires bearing in mind that these compilations were indexes or summaries, and that the fragments they reproduced were taken out of context, might not have been cited correctly, and lacked references to the debates that led to their enactment. Studying Solórzano is a must, but this, too, can be done only as long as one recalls that his work, like the *Siete Partidas* in the thirteenth century, was no more than an attempt – ingenious, informed, and logical, yet still only a suggestion – as to how to fit a pan-European *ius commune* to the demands of place and time. Interrogating case law is just as important, but this, too, requires considering the juridical debates and disagreements upon which it relied. As Vasco de Quiroga argued already in 1535, listing examples (in his case, solutions adopted by case law or in royal orders) is not the same

102 As recently as 2004, some authors still equated colonial law with royal orders: M. C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004), 45–46. On earlier reiterations of these ideas despite recognition of the role not only of written law but also of doctrine, customs, and equity, see C. R. Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque: University of New Mexico Press, 1995), for example, 31–43.

as understanding the principles that governed them. Only by placing all these pieces of evidence of a long-gone juridical past in their early modern legal context will we be able to understand what they tell us.

A Final Word about the Global Context

These characteristics of early modern law operated in colonial Latin America, but – as mentioned throughout this text – they were also typical of Europe. As a result, it is easy to imagine that other European powers that colonized parts of the Americas, Asia, or Africa during the early modern period equally followed them. These powers also asked whether metropolitan law could be implemented in the colonies and how it must be adapted to colonial conditions. They discussed whether it was advisable and/or possible to incorporate indigenous law and how to distinguish what of the latter could be integrated from what must be rejected. While many similarities are evident, the biggest difficulty in inserting Latin American narratives into the larger story of law and European colonialism is not that the various imperial pasts were different, but the huge differences in the relevant historiographical traditions, which focus on different questions and use different methodologies. Scholars of colonial North America, for example, have concentrated on understanding the laws that applied to settlers, traditionally saying relatively little about other normativities, which they sometimes assumed were in some profound way external to the colonial legal system.¹⁰³ The literature on New France largely follows this approach, though it is somewhat more open to recognizing the existence of indigenous communities and their laws.¹⁰⁴ Meanwhile, the most recent literature on Portuguese colonialism in Asia and Africa has been particularly focused on recuperating a colonial law that was neither European nor indigenous, but extremely entangled.¹⁰⁵ These studies narrate,

¹⁰³ For example, A. M. Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca: Cornell University Press, 2018); and T. A. Midtrød, *The Memory of All Ancient Customs: Native American Diplomacy in the Colonial Hudson Valley* (Ithaca: Cornell University Press, 2012).

¹⁰⁴ See, for example, H. Dewar, *Disputing New France: Companies, Law and Sovereignty in the French Atlantic, 1598–1663* (Montreal: McGill-Queens University Press, 2022); and B. Rushforth, *Bonds of Alliance: Indigenous and Atlantic Slavery in New France* (Chapel Hill: University of North Carolina Press, 2012). On how such questions continued to be invoked even in the twentieth century, see, for example, K. E. Hoffman, “Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930–1956,” *Comparative Studies in Society and History* 52(4) (2010), 851–80.

¹⁰⁵ For example, Madeira Santos, “Entre deux droits” and “Eslavagem africana”; Â. Barreto Xavier, *A invenção de Goa: Poder imperial e conversões culturais nos séculos XVI e VII* (Lisbon: Imprensa de Ciências Sociais, 2008); C. Nogueira da Silva, *A construção jurídica dos territórios ultramarinos portugueses no século XIX: Modelos, doutrinas e leis* (Lisbon: Imprensa

for example, how Portuguese law interacted with African and Asian laws in Portuguese enclaves (such as Angola or Goa, for example), and with what results, and how the authorities and residents of these locations responded. They highlight not only important commonalities but also the prevalence of local norms.

Given these historiographical differences, it is currently impossible to productively compare the legal experiences of colonizers and colonized in the different European powers' overseas territories. Indeed, where such a comparison has been attempted, the results, by repeating what the existing literature described without subjecting it to critical examination, have often reified the differences rather than the commonalities between different colonial experiences, or have focused on what transpired during the colonial period, without necessarily understanding the principles that enabled it.¹⁰⁶ Thus, although scholars working on European colonialism in Latin America and elsewhere have asked many important questions regarding colonial law, we still have much to ask, learn, and understand.

. . .

3.2 Religious Normativity for Colonial Empires

THOMAS DUVE

Many legal histories of colonial Latin America begin with the bulls issued by Alexander VI in May of 1493. A member of the notorious Borgia family, and born near Valencia, he granted special rights and duties to the so-called Catholic Kings in relation to territories known today as Latin America and the Caribbean.¹⁰⁷ Modeled on previous privileges granted to the Portuguese

de Ciências Sociais, 2017); J. Flores, *Unwanted Neighbours: The Mughals, the Portuguese and Their Frontier Zones* (New Delhi: Oxford University Press, 2018); Hespánha, *Filhos da terra*; and M. Bastias Saavreda (ed.), *Norms beyond Empire. Law-Making and Local Normativities in Iberian Asia, 1500–1800* (Leiden: Brill, 2022).

¹⁰⁶ For example, J. H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492–1830* (New Haven: Yale University Press, 2006).

¹⁰⁷ On the bulls and how they were modeled on the preceding bulls granted to Portugal, see the still foundational studies of A. García-Gallo, “Las bulas de Alejandro VI y el ordenamiento jurídico de la expansión portuguesa y castellana en África e Indias,” *Anuario de Historia del Derecho Español* 27–28 (1957–1958), 461–829. For a general overview over the legal instruments, the institutional framework, and the main ideas of the evangelization and the history of the Church, see the various chapters in P. Borges (ed.), *Historia de la Iglesia en Hispanoamérica y Filipinas (siglos XV–XIX), vol. I: Aspectos generales* (Madrid: Biblioteca de Autores Cristianos, 1992). Many papal privileges have

Crown and to the Portuguese Order of Christ for expansion (*extra territorium*) along the African coast and into Asia, these bulls were based on the idea that the pope exercised *dominium* over the entire world. To substantiate this claim, the papacy could draw on a century-old juridical debate about the rights of the pope, the legal status of non-Christians, and the legitimacy of war, the so-called *bellum iustum*.¹⁰⁸ While the Treaty of Tordesillas, concluded between the Portuguese and Spanish Crowns in 1494, did introduce some changes, it was based on the same foundation, followed medieval juridical practices, and was confirmed by Pope Julius II in 1506.¹⁰⁹ Spreading the gospel, missionizing *infideles*, as well as developing, sustaining, and protecting the Church thus became a central justification for the Iberian empires' imperial politics. For centuries, and notwithstanding the famous debates about the juridical titles of the Spanish Crown triggered by Francisco de Vitoria and other theologians from the School of Salamanca, both empires claimed the papal donation as the primary legitimation of their imperial rule in the Americas, the Caribbean, and the Pacific.¹¹⁰

been printed in collections such as Cyriaci Morelli, *Fasti Novi Orbis et ordinationum apostolicarum ad Indias pertinentium breviarium cum adnotationibus* (Venice: Antonium Zatta, 1776); P. F. J. Hernández, *Colección de bulas, breves y otros documentos relativos a la Iglesia en América latina y Filipinas* (Vaduz: Kraus Reprint, 1964 [1879]), vol. I; others can be found in R. Konetzke (ed.), *Colección de documentos para la historia de la formación social de Hispanoamérica. 1493–1810* (Madrid: Consejo Superior de Investigaciones Científicas, 1953–1962), 3 vols.; and in J. Metzler, *América Pontificia primi saeculi evangelizationis 1493–1592. Documenta pontificia ex registris et minutis praesertim in Archivo Secreto Vaticano existentibus* (Vatican City: Libreria Editrice Vaticana, 1991), 2 vols.; J. Metzler, *América Pontificia primi saeculi evangelizationis, vol. III: Documenti pontifici nell'Archivio Segreto Vaticano riguardanti l'evangelizzazione dell'America 1592–1644* (Vatican City: Libreria Editrice Vaticana, 1995).

108 On the previous experiences, see F. Fernández-Armesto, *Before Columbus: Exploration and Colonization from the Mediterranean to the Atlantic, 1229–1492* (Philadelphia: University of Pennsylvania Press, 1987); on the tradition in canon law, see J. Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250–1550* (Philadelphia: University of Pennsylvania Press, 1979); J. Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1995).

109 On the Treaty of Tordesillas, see with further references T. Duve, "Spatial Perceptions, Juridical Practices, and Early International Legal Thought Around 1500: From Tordesillas to Saragossa," in S. Kadelbach, T. Kleinlein, and D. Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (The History and Theory of International Law) (Oxford: Oxford University Press, 2017), 418–42.

110 The literature on these issues is endless. For a good overview of the theories in Spanish, see P. Castañeda Delgado, *La teocracia pontifical en las controversias sobre el Nuevo Mundo* (Instituto de Investigaciones Jurídicas Serie C: Estudios Históricos 59) (Mexico City: Universidad Nacional Autónoma de México, 1996); on the legal problem of *dominium* and the debates in the School of Salamanca, see M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021), 117–211.

The fact that European expansion to Latin America and the subsequent empire-building was legitimized with reference to papal bulls – not to mention that the harshest criticism of this legitimation came from theologians – points to the importance of religion for the legal history of Latin America. Even more than in the European territories, the kings of Spain and Portugal saw themselves as patrons of the Catholic Church in their overseas dominions, and thus they felt obliged to foster missionary activities and act as protectors of the Church. If the idea of a *Respublica Christiana* was deeply rooted in medieval political theory and had already legitimized the war against the Arabs on the Iberian Peninsula during the High Middle Ages, the entitlement to christianize the so-called infidels in the Americas made it a guiding principle of the entire colonial enterprise.¹¹¹

However, it was not only the religious legitimation of the expansion as such or the patronage of the kings over the Church that made religion a central facet of colonial rule. Religious symbols, language, and practices – that is, knowledge of normativity from the religious sphere (see Section 1.3) – shaped everyday life. Sacraments structured one's life from birth to death. Catalogs of sins and virtues contained norms for behavior, confession was a regular practice, and religious celebrations were essential elements of urban and rural conviviality. Long before they ever crossed paths with a jurist or a Crown official, many indigenous peoples had already encountered and, in many cases, lived amongst missionaries and priests. Through religious precepts and prohibitions – in catechesis, in the confessional, in school, in images, in pictographs, in performances like processions, and in choral singing – indigenous peoples, Afro-Latin Americans, and Asian Americans learned the language and the culture of the European colonizers. They were introduced to what Christian faith presented as good and evil, just and unjust, permissible and impermissible. Sexual behavior, marital practices, and food consumption were all subject to and regulated by religious norms. Moreover, many cultural and social categories stemmed from religion and established social and political hierarchies. Whether one was classified as a neophyte, as an old or

¹¹¹ The importance of religion for the early modern Iberian empires, their law, and imperial governance has been emphasized by Spanish and Portuguese legal historians, most notably by B. Clavero, *Usura. Del uso económico de la religión en la historia* (Colección Derecho, Cultura y Sociedad) (Madrid: Tecnos, 1984); A. M. Hespanha, *As vésperas do Leviathan. Instituições e Poder Político. Portugal – séc. XVII* (Coimbra: Almedina, 1994), 227–58; C. A. Garriga Acosta, “Sobre el gobierno de la justicia en Indias (Siglos XVI–XVII),” *Revista de Historia del Derecho* 34 (2006), 67–160. For a study of the *Respublica Christiana* as a guiding principle of governance in colonial Mexico, see for example, A. Lempérière, *Entre Dieu et le Roi, la République. Mexico, XVI^e–XIX^e siècles* (Histoire 65) (Paris: Belles Lettres, 2004).

new Christian, was a member of the clergy, or was granted privileges and dispensations, had a profound impact on one's opportunities in life.¹¹² Church courts presided over cases concerning marital violence, alimony claims, and even crimes. Because ecclesiastical institutions provided loans and sometimes partook in large business enterprises, some disputes taken to the ecclesiastical courts involved substantial amounts of money. Religion also influenced and shaped secular law: Punishment could be more lenient if one was considered a good Christian, and what was just or unjust was determined according to the precepts of religion and with the help of the doctrines of moral theology.¹¹³ Bishops, religious orders, ecclesiastical judges, confessors, confraternities,

112 Most studies on the emergence of racial and social classifications point to the importance of religion and Church institutions for the negotiation and classification, for example, N. von Germeten, *Black Blood Brothers: Confraternities and Social Mobility for Afro-Mexicans* (The History of African American Religions) (Gainesville: University Press of Florida, 2006); H. L. Bennett, *Colonial Blackness: A History of Afro-Mexico* (Blacks in the Diaspora) (Bloomington and Indianapolis: Indiana University Press, 2009); J. F. Cobo Betancourt, *Mestizos heraldos de Dios. La ordenación de sacerdotes descendientes de españoles e indígenas en el Nuevo Reino de Granada y la racialización de la diferencia, 1573–1590* (Colección Cuadernos Coloniales) (Bogotá: Instituto Colombiano de Antropología e Historia, 2012); J. Rappaport, *The Disappearing Mestizo: Configuring Difference in the Colonial New Kingdom of Granada* (Durham and London: Duke University Press, 2014); B. Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* (New York: Oxford University Press, 2017); R. S. O'Toole, *Bound Lives: Africans, Indians, and the Making of Race in Colonial Peru* (Pittsburgh: University of Pittsburgh Press, 2012); R. C. Schwaller, *Géneros de Gente in Early Colonial Mexico: Defining Racial Difference* (Norman: University of Oklahoma Press, 2016); S. B. Schwartz, *Blood and Boundaries: The Limits of Religious and Racial Exclusion in Early Modern Latin America* (Waltham: Brandeis University Press, 2020). On the role of the Church and religious orders in the formation of the slave society in Brazil, for example, see C. A. de Moura Ribeiro Zeron, *Linha de Fé. A Companhia de Jesus e a Escravidão no Processo de Formação da Sociedade Colonial (Brasil, Séculos XVI e XVII)* (São Paulo: EDUSP, 2011); C. A. Zeron, "O governo dos escravos nas Constituições Primeiras do Arcebispado da Bahia e na legislação portuguesa: separação e complementaridade entre pecado e delito," in B. Feitler and E. Sales Souza (eds.), *A Igreja no Brasil. Normas e Práticas durante a Vigência das Constituições Primeiras do Arcebispado da Bahia* (São Paulo: Editora Unifesp, 2011), 323–54; C. de Castelnau-L'Éstoile, "'Os filhos obedientes da Santíssima Igreja.' Escravidão e estratégias de casamento no Rio de Janeiro do início do século XVIII," in M. Cottias and H. Mattos (eds.), *Escravidão e subjetividades. No Atlântico luso-brasileiro e francês (séculos XVII–XX)* (Marseille: OpenEdition Press, 2016). On mestizaje, specifically from the perspective of canon law regulation, see P. Castañeda Delgado, *El mestizaje en Indias. Problemas canónicos* (Madrid: Editorial Deimos, 2008); on indigenous peoples and the ecclesiastical courts, see J. E. 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); on the concept of "neophyte," see T. Duve, "Derecho canónico y la alteridad indígena: los indios como neófitos," in W. Oesterreicher and R. Schmidt-Riese (eds.), *Esplendores y miserias de la evangelización de América. Antecedentes europeos y alteridad indígena* (Pluralisierung & Autorität 22) (Berlin and New York: De Gruyter, 2010), 73–94.

113 See T. Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650–1750)* (Ann Arbor: University of Michigan Press, 2004); and the case study by A. Agüero,

and many other institutions of the Church ceaselessly produced knowledge of normativity via ecclesiastical courts, at synods and councils, through ordinances, statutes, catechesis, preaching, counseling, and in the confessional.

Even in the late eighteenth century – when the influence of the Church in many places was on the wane, the Jesuits were expelled, and Enlightenment thinking questioned the role of religion – public discourse and the law remained profoundly shaped by religious semantics. After independence, “political catechisms” served to teach the new citizens the ten commandments of the republic, symbolizing the ambivalent secularization of religious forms under the conditions of modern states.¹¹⁴ More than a few states declared themselves “Catholic” nations, and some constitutions have retained privileges for the Catholic Church to this day. The fact that the Catholic Church, and increasingly other Christian confessions, played an important role in political life in the twentieth century shows the long-lasting effects of the religious dimension of Iberian imperial politics (see Chapter 4 and Sections 5.1 and 6.2).

All of this has not gone unnoticed. Since Robert Ricard wrote about the *conquête spirituelle* almost a century ago, scholars have been very aware of the importance of religion, especially for building up colonial society.¹¹⁵ Yet in the literature on legal history, very few references to canon law and moral theology are found, or to the importance of secular clergy and religious orders. Even less common are references to the role of the Roman Curia and to globally active religious orders. This lack of attention is probably due to the legalistic character of both the historiography on the so-called *Derecho indiano* and Portuguese colonial legal history, and their focus on state institutions. Just as the theory of the *patronato* – and later *vicariato* – placed the monarchy above the Church, Church institutions and thus knowledge of normativity from the religious sphere seemed to have been absorbed by secular institutions and law.¹¹⁶ However, this has

Castigar y perdonar cuando conviene a la República. La justicia penal de Córdoba de Tucumán, siglos XVII y XVIII (Historia de la Sociedad Política) (Madrid: Centro de Estudios de Políticos y Constitucionales, 2008).

¹¹⁴ See, for example, R. Sagredo Baeza, “Actores políticos en los catecismos patriotas y republicanos americanos, 1810–1827,” *HMex XLV* 3 (1996), 501–38.

¹¹⁵ R. Ricard, *The Spiritual Conquest of Mexico: An Essay on the Apostolate and the Evangelizing Methods of the Mendicant Orders in New Spain, 1523–1572*, trans. L. B. Simpson (Berkeley and Los Angeles: University of California Press, 1966 [1933]).

¹¹⁶ Most of the literature on the relations between Church and state until the 1990s was written from this perspective. Although in the meantime the perspective has changed considerably, much of this literature still contains valuable information, for example, J. M. García Añoveros, *La Monarquía y la Iglesia en América* (La Corona y los pueblos americanos 6) (Valencia: Asociación Francisco López de Gomara, 1990); I. Sánchez Bella, *Iglesia y Estado en la América Española* (Pamplona: Ediciones Universidad de Navarra, 1990);

all started to change as a result of new interpretations on the role of religion in early modern Iberian (legal) history, understanding colonial society in terms of a jurisdictional culture based on ideas of material justice deeply rooted in Christian discourse (see Sections 1.1, 1.2, and 3.1), and in no small part due to the research findings of cultural and social history. Legal historians are beginning to discover the role of institutions such as charitable confraternities, church courts, synods, and provincial councils for legal history.

Notwithstanding these developments, the way these institutions operated and the knowledge they built upon is not easy to understand. There are only a handful of introductions to the history of canon law dedicated to the early modern period, and even fewer to Latin America. Research on the history of mission and (moral) theology is often unknown to legal historians. Therefore, this section aims to provide some basic information about the bodies of knowledge of normativity from the religious sphere, about techniques of localizing canon law, and the institutional framework within which actors moved. It assumes that legal history can best be understood as a huge process of translation of knowledge of normativity, as explained in Section 1.3, and thus provides introductory information about the institutions – or “epistemic communities” – that produced knowledge of normativity relevant for the religious sphere, as well as on the knowledge of normativity from the religious sphere as such.

Though other religions were of course present in Latin America, this Section’s focus is on the Catholic Church. Indigenous peoples, Afro-Latin Americans, and Asian Americans brought to the Americas as captives or enslaved persons, as well as people of Jewish ancestry, practiced their religions and followed the laws and precepts of their beliefs in the Americas.¹¹⁷

P. Castañeda Delgado and J. Marchena Fernández, *La jerarquía de la Iglesia en Indias. El episcopado americano, 1500–1850* (Colección Iglesia Católica en el Nuevo Mundo 9) (Madrid: Editorial MAPFRE, 1992); A. de la Hera, “El patronato regio en Indias,” in P. Borges (ed.), *Historia de la Iglesia en Hispanoamérica y Filipinas (siglos XV–XIX)*, vol. 1: *Aspectos generales* (Madrid: Biblioteca de Autores Cristianos, 1992), 63–79; C. Maqueda Abreu, *Estado, Iglesia e Inquisición en Indias. Un permanente conflicto* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000). For a survey of early modern canonists’ perspective, see A. González-Varas Ibañez, “Derecho de patronato,” in T. Duve and P. Mejía (eds.), *Diccionario Histórico de Derecho Canónico en Hispanoamérica y Filipinas, Siglo XVI–XVIII (DCH)*, <https://dch.hypotheses.org/>.

¹¹⁷ A succinct overview of Afro-American religions and their relationships to the Catholic faith can be found in J. Bristol, “The Church, Africans, and Slave Religion in Latin America,” in V. Garrard-Burnett, P. Freston, and S. C. Dove (eds.), *The Cambridge History of Religions in Latin America* (New York: Cambridge University Press, 2016), 198–206; on cryptojudaism, see A. A. Faria de Assis, *Macabeias da Colônia. Criptojudaísmo feminino na Bahia* (São Paulo: Alameda, 2012); for insights into religious dissidents in

Despite severe immigration controls, even some Protestants came to the Americas starting in the sixteenth century, and their numbers increased with the acceleration of trade in the late eighteenth century. However, as indigenous religions, crypto-Judaists, and Protestants were persecuted, and non-Catholic religious practices classified as superstition, their impact on public life was limited. Similarly, while Protestant communities in Dutch Brazil even held a synod in 1642, their presence between 1621 and 1654 ultimately remained an interlude.¹¹⁸ This is why the focus of the following analysis is on the bodies of knowledge of normativity stemming from the Catholic Church. Within this context, the oldest and richest repository of knowledge of normativity was the *ius canonicum*, that is, the law of the Catholic Church. Without some basic information about canon law, it is neither possible to understand the administration of justice in the Church nor the emergence of moral theology as a powerful second layer of knowledge of normativity in the sixteenth century.

*The Repository of Knowledge of Normativity: Universal
Canon Law*

Canon law goes back to the beginnings of the Church and consisted over the course of the first few centuries primarily of texts by Church fathers, constitutions of Church councils, and fragments from Scripture.¹¹⁹ Soon, papal responses to inquiries in legal matters (so-called decretals) and, since the eleventh century, canon law scholars furthered its development. With the mass of authoritative statements growing continuously, scholars, bishops, and later the

colonial Brazil, see C. A. Myscowski, *Amazons, Wives, Nuns, and Witches: Women and the Catholic Church in Colonial Brazil, 1500–1822* (Louann Atkins Temple Women & Culture 32) (Austin: University of Texas Press, 2013); for a wide range of studies on institutions and practices of control, see Yllan de Mattos, P. Gouveia Mendonça Muniz, A. A. Faria de Assis, and A. C. Rodrigues (eds.), *Edificar e Transgredir: Clero, Religiosidade e Inquisição no espaço ibero-americano (séculos XVI–XIX)* (Jundiaí: Paco Editorial, 2016).

118 On the Church in Dutch Brazil, see F. L. Schalkwijk, *Igreja e Estado no Brasil Holandês (1630 a 1654)* (São Paulo: Soc. Religiosa Ed. Vida Nova, 1989).

119 For a general introduction to the history of canon law, see M.A. Eichbauer and J.A. Brundage, *Medieval Canon Law*, 2nd ed. (New York: Longman Group Limited, 2022); A. Winroth and J. C. Wei, *The Cambridge History of Medieval Canon Law* (Cambridge: Cambridge University Press, 2022); R. H. Helmholz, *The Spirit of Classical Canon Law (The Spirit of the Laws)* (Athens: University of Georgia Press, 1996); G. Le Bras, C. Lefebvre, and J. Rambaud, *L'âge classique. 1140–1378. Sources et théorie du droit* (Histoire du Droit et des Institutions de l'Église en Occident 7) (Paris: Sirey, 1965); C. Lefebvre, M. Pacaut, and L. Chevallier, *L'époque moderne (1563–1789). Les sources du droit et la seconde centralisation romaine* (Paris: Éditions Cujas, 1976), vol. XV; on the modern period C. Fantappiè, *Chiesa romana e modernità giuridica. L'edificazione del sistema canonistico (1563–1903)* (Milan: Giuffrè, 2008), vol. I–II.

Roman Curia selected and integrated parts of this heritage into collections of canons. An important part of this legacy was included in the *Decretum Gratiani* from the first half of the twelfth century and supplemented by the *ius novum*, that is, law from the period of “classical” canon law between the twelfth and mid-fourteenth centuries. In 1234, a part of this new canon law was selected, integrated into a systematic structure, and edited as *Liber extra*, which was a particularly influential, authoritative collection of more recent papal decretals. Other collections eventually followed (*Liber Sextus*, *Clementinae*).

Between the eleventh and fourteenth centuries, scholarship on canon law flourished. Canonists wrote glosses and extensive treatises on specific problems. Their writings enjoyed a high level of authority, not least because in practice papal decretals and even collections required recognition by scholars for their acceptance. Popes sent the collections containing “new law” to universities, where it was up to the scholars to integrate them into their writings and teaching. One consequence of this practice was that the opinion of scholars acquired the status of a source of law. At the beginning of the sixteenth century, a complex body of knowledge of normativity had emerged that was comparable to the so-called *ius civile*, that is, the “civil” or secular law elaborated by medieval jurisprudence based on Roman law. Even if the *ius canonicum* was clearly distinguished from the *ius civile*, together with this and some other bodies of knowledge of normativity, it formed the *ius commune*.¹²⁰

Shortly after 1500, the most important elements of this canon law tradition were compiled by a publisher to form the *Corpus Iuris Canonici*, which, as the designation indicates, was to stand alongside the *Corpus Iuris Civilis*. Many printed editions from the late sixteenth and early seventeenth centuries also included a short textbook modeled on the institutions of Roman law, the *Institutiones Iuris Canonici* by Giovanni Paolo Lancelotti (1522–90). This convergence of the forms was no accident. The relationship between canon and secular law was complex. Though their evolution over the centuries involved constant exchange, they were nevertheless quite distinct. Partly as the result of this co-evolution and mutual interdependence, a popular introduction to the study of law published in Salamanca at the beginning of the seventeenth century compared secular and canon law to a pair of gloves: having just one is of very little use.¹²¹

¹²⁰ On the relation between civil and canon law see Section 3.1 in this volume.

¹²¹ Francisco Bermúdez de Pedraza, *Arte legal para estudiar la iurisprudencia* (Madrid: Editorial Civitas, 1992 [1612]), “El buen Iurista ha de saber entrambos Derechos: porque son como vn par de guantes, que el vno sin el otro es de poco prouecho: no basta saber el Derecho Ciuil para ser perfecto Iurista, es preciso, que sepa tambien el Canonico...,” 59.

Given that the Council of Trent (1545–1563) was marked by the Catholic Church's attempts to counter the Reformation and implement reforms in the Church and the Roman Curia, and bishops from Hispanic America had asked the king in vain for permission to participate, the Council did not explicitly dedicate itself to the mission in Latin America. Nonetheless, important areas of canon law were discussed and further developed, and the decisions of the Council are actually of great relevance to Latin American legal history. The Council took place during a period in which the Church was consolidating its structures in Latin America, and it simultaneously produced both centralizing and pluralizing effects in the Catholic Church at the global level. It both strengthened the centrality of the Roman Curia, for example, by attempting to monopolize the interpretation of canon law through the prohibition of commenting on the Council's canons. At the same time, it fortified the position of local bishops and created the framework for Catholicism as a world religion. In many respects, it was through the provincial councils and synods that Tridentine canon law was translated into Latin American realities.¹²²

As part of the attempts to centralize the administration of justice in the realm of the Catholic Church in the aftermath of the Council, an official edition of the *Corpus Iuris Canonici* was produced. This *Editio Romana*, the work of a group of cardinals and scholars known as the *Correctores Romani*, was part of the move to reformulate important normative texts of Church life in the post-Tridentine period. These texts included the *Catechismus Romanus* (1566), the *Breviarium Romanum* (1568), the *Missale Romanum* (1570), the *Pontificale Romanum* (1596), the *Caeremoniale Episcoporum* (1600), and the *Rituale Romanum* (1614). These texts were tools for evangelization and counter-reformation, and they also served as normative foundations for a renewal of the symbolic power of the Catholic Church. The publication of the *Catechismus Romanus* was particularly important for Latin America, as it influenced the numerous catechisms written in the late sixteenth- and throughout the seventeenth century, especially those by provincial councils in Lima and Mexico and by religious congregations. These catechisms were translated into many different indigenous languages. Despite the fact that they are full of rules,

122 S. Ditchfield, "Tridentine Catholicism," in A. Bamji, G. H. Janssen, and M. Laven (eds.), *The Ashgate Research Companion to the Counter-Reformation* (Farnham and Burlington: Ashgate, 2013), 15–31; S. Ditchfield, "De-centering Trent: How 'Tridentine' Was the Making of the First World Religion?," in W. François and V. Soen (eds.), *The Council of Trent: Reform and Controversy in Europe and Beyond (1545–1700)*, vol. III: *Between Artists and Adventurers* (Ref0500 Academic Studies 35.3) (Göttingen: Vandenhoeck & Ruprecht, 2018), 185–208.

prohibitions, and commandments, little attention has been paid to them as a source for legal history.¹²³

The Council of Trent also brought about important changes in the role of legal scholarship on canon law in the production of knowledge of normativity. At first glance, however, not too much appeared to have changed. Since commentaries on the decrees of the Council of Trent were forbidden, canonists' writings, and to some extent Church practice, followed the structure of the *Liber extra* and, in some cases, in the later period the order of Lancelotti's *Institutiones*. The *Cursus iuris canonici, hispani, et indici* by the Jesuit Pedro Murillo Velarde from the Philippines – printed in 1743, 1763, and 1791 – represented the most comprehensive account of canon law in the Spanish empire and was still based on the order of the *Liber extra*.¹²⁴ Some synods and provincial councils also arranged their decisions in accordance with this structure. Thus, medieval canon law had not only shaped the order of knowledge before Trent, it also continued to provide the intellectual structure into which the increasingly specialized proto-national variations and appropriations of universal canon law were integrated.

In a similar vein, the reference to pre-Tridentine authorities remained an important scholarly practice. The general opinion of scholars (*communis opinio doctorum*) and recognized authors (*probati auctores*) were still important sources of law for the practice of canon law in Latin America as well as in Europe. This is why, for example, Gaspar de Villarroel, bishop of Santiago de Chile, pointed

123 On catechisms in Hispanic America, see the collection of J. G. Durán, *Monumenta catechetica hispanoamericana* (Buenos Aires: Facultad de Teología de la Pontificia Universidad Católica Argentina, 1984–2017), 3 vols.; an example for a pictorial catechism is E. Hill Boone, L. M. Burkhart, and D. Tavárez (eds.), *Painted Words: Nahua Catholicism, Politics, and Memory in the Atzaqualco Pictorial Catechism* (Dumbarton Oaks Pre-Columbian Art and Archaeology Studies Series 39) (Dumbarton Oaks: Trustees for Harvard University, 2017); on the translations see L. M. Burkhart, *The Slippery Earth: Nahua-Christian Moral Dialogue in Sixteenth-Century Mexico* (Tucson: University of Arizona Press, 1989); G. Urton, "Sin, Confession, and the Arts of Book- and Cord-Keeping: An Intercontinental and Transcultural Exploration of Accounting and Governmentality," *Comparative Studies in Society and History* 51(4) (2009), 801–31; A. Durston, *Pastoral Quechua: The History of Christian Translation in Colonial Peru, 1550–1650* (South Bend: University of Notre Dame Press, 2007); R. Harrison, *Sin & Confession in Colonial Peru: Spanish Quechua Penitential Texts, 1560–1650* (Austin: University of Texas Press, 2014); especially on the translation of concepts like "sin" for example, L. K. Pharo, "Transfer of Moral Knowledge in Early Colonial Latin America," in H. Wendt (ed.), *The Globalization of Knowledge in the Iberian Colonial World* (Max Planck Research Library for the History and Development of Knowledge: Proceedings 10) (Berlin: Edition Open Access, 2016), 53–94.

124 Pedro Murillo Velarde, *Cursus iuris canonici, Hispani et Indici* (Madrid, 1763), 2 vols.

out in the introduction to his treatise on good governance of the Church in the Indies, the *Governo ecclesiastico pacifico* (1656–1657), that the purpose of his book was to put “a whole library” at the reader’s disposal. He did so because he was convinced that a decision could only be reached in a responsible manner if it was based on a thorough examination of the authorities of canon law.¹²⁵ A century later, in 1744, Pope Benedict XIV chided the archbishop of Santo Domingo in a response to a practical legal question raised by the archbishop that the *opinio communis doctorum* could not simply be dismissed.¹²⁶ The practical need for arguments and orientation in legal matters – perhaps also the interest of the Curia in counteracting the centrifugal tendencies in canon law associated with the formation of what were eventually referred to as “national” Churches – was also served by reference works such as Lucio Ferraris’ *Prompta bibliotheca canonica*. First published in 1746 (and many times thereafter), it assembled the opinions of the most relevant scholars on matters of canon law and was organized around hundreds of entries in alphabetical order. These and other, less erudite media served as repositories for the knowledge of normativity required to find the right solution to a specific case. Research on the circulation of books and on holdings of libraries has shown that many of these works were available in Latin America in monasteries, seminaries, and universities.

Notwithstanding this apparent stability of scholarly practices and content, the Council of Trent also introduced important changes. Many of these reforms went into effect in the decades that followed. Most importantly, the Council of Trent sought to monopolize the interpretation of canon law and to centralize the amendment and reform process at the Curia, especially in the newly founded Congregation of the Council. From that point onward, the most important new scholarly books, such as the commentary on the *Liber Extra* by Prospero Fagnani (who was himself active in the Congregation of the Council) or the *Theatrum veritatis et iustitiae* (1669–1673) by Giovanni Battista de Luca, drew primarily on the sentences of the *Rota Romana*, that is, the so-called *decisiones* of the highest court of the Roman Catholic Church. Not least the Congregation *Propaganda Fide*, founded in 1622 to promote evangelization all across the globe, issued numerous regulations that became the basis for the growing missionary law.¹²⁷ Its impact, however, was different in

125 Gaspar de Villarroel, *Governo ecclesiastico pacifico* (Madrid, 1656/1657), 2 vols.

126 C. H. F. Meyer, “Probati auctores. Ursprünge und Funktionen einer wenig beachteten Quelle kanonistischer Tradition und Argumentation,” *Rechtsgeschichte – Legal History* 20 (2012), 138–54.

127 G. Pizzorusso, *Propaganda Fide. La Congregazione Pontificia e la Giurisdizione sulle Missioni* (Rome: Edizioni di Storia e Letteratura, 2022), vol. I.

the Spanish and the Portuguese empires. As the mission in Spanish America had already started and been well developed prior to the foundation of the *Propaganda Fide*, due to the *patronato regio* and the fact that the Tridentine reforms had already been introduced, the Hispanic American territories were not considered to be under the jurisdiction of the Congregation. With regard to Portuguese America, however, the Holy See often considered the *patronato regio* to be ineffective and claimed jurisdiction over these territories, granting authority to the *Propaganda Fide*.¹²⁸ In addition to these institutions, a *Nunciatura Apostólica de las Españas* had been created in 1529, replaced in 1769 by the *Tribunal de la Rota de la Nunciatura Apostólica en España*. Both institutions exercised jurisdiction over and continuously created knowledge of normativity for the Spanish empire.¹²⁹ These are but a few examples of how the Roman Curia developed institutions and practices for the governance of what was becoming a world religion.

In terms of content, however, not much changed. Canon law most notably contained regulations for the core areas of Church life such as sacramental law, that is, norms on baptism, marriage, the Eucharist, and priestly ordination. It regulated ecclesiastical offices, property law, criminal law, and procedural law. The ecclesiastical judge, that is, the bishop or his delegate in the *forum externum*, decided such cases that were considered *causae spirituales*. The Church also claimed exclusive jurisdiction over several groups of persons, especially over the broad group of persons considered clerics. This competence was characterized as jurisdiction *ratione personarum*. Under specific circumstances, the Church also asserted its jurisdiction in cases of mixed jurisdiction, the so-called *causae mixti fori*, and it insisted on its competence to judge any behavior that constituted a sin (*ratione peccati*). For this reason, one finds in canon law important norms relating to contract or property law, yet each instance of a breach of contract, fraud, or usury constituted a sin and therefore could be tried, according to this doctrine, before an ecclesiastical court.

128 G. Pizzorusso, *Governare le missioni, conoscere il mondo nel XVII secolo. La Congregazione Pontificia de propaganda fide* (Studi di storia delle istituzioni ecclesiastiche 6) (Viterbo: Edizionei Sette Città, 2018); G. Pizzorusso, "The Congregation de Propaganda Fide and Pontifical Jurisdiction Over Non-Tridentine Church," in M. Catto and A. Prosperi (eds.), *Trent and Beyond: The Council, Other Powers, Other Cultures* (Mediterranean Nexus 1100–1700 4) (Turnhout: Brepols, 2017), 423–42.

129 On this see M. Calvo Tojo, "Aportación del Tribunal de la Rota de la Nunciatura a la iglesia española," in F. R. Aznar Gil (ed.), *La administración de la justicia eclesiástica en España. Jornadas celebradas en Salamanca, 5 y 6 de febrero de 2001* (Salamanca: Universidad Pontificia de Salamanca, 2001), 111–79.

Particularly important for understanding canon law is that most of the provisions it contained derived from concrete practical problems. Canon law was meant to facilitate the administration of the Church and was first and foremost created for the salvation of souls. Of course, general statements exist, especially in the texts of the Church fathers and in the decisions of councils that were included in the collections of laws. Scholarship strove to establish coherent doctrines and to resolve contradictions, and it was eventually able to fill in some gaps that remained when papal collections were compiled. However, almost all of the decretals, that is, the papal responses to concrete legal questions, and many scholarly opinions concerned individual cases. While geared toward specific addressees, they at the same time served as authoritative statements to be consulted in similar cases. It is because of this specific technique of legislating in a casuistic manner that we find “cases” that were created to clarify certain practical problems, for example, the question whether a marriage was valid if the spouses gave their consent in a church ceremony but it later came to light that the husband was an impostor or an enslaved person (*Causa 29* of the *Decretum Gratiani*). Such situations served as occasions for deliberation about the relevance of false or misrepresented identity (*error in persona*) and, more importantly for later Latin American legal history, the need for permission of the enslaved person’s “owner” to contract a valid marriage (which canon law did not require).¹³⁰ In this respect, one can speak of a casuistic structure of canon law shaped by principles of theology and legal doctrine. In the ambiguity of this principle-oriented case law lies an important functional mechanism for the adaptability of canon law to particular times and circumstances. But it was primarily a consequence of the conviction that the ultimate goal of administration of justice consisted in reaching a suitable decision for the case at hand, and that this decision could only be reached by having all the concrete circumstances in mind. Decisions in previous cases thus could serve as a guideline, they could serve to reflect about important aspects to take into account, but they did not impose a decision.

However, not only this structural ambiguity of a casuistic order left margins for interpretation and adaptation to specific situations and circumstances. The most important instruments for concretizing canon law with regards to

¹³⁰ On this case from the *Causa 29* of the *Decretum Gratiani*, see A. Winroth, “Neither Slave nor Free: Theology and Law in Gratian’s Thoughts on the Definition of Marriage of Unfree Persons,” in W. P. Müller and M. E. Sommar (eds.), *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington* (Washington: The Catholic University of America Press, 2006), 97–109.

certain persons, situations, or regions were legal institutions known as dispensations, privileges, and customary law.

*Tools for Concretization: Dispensations, Privileges,
and Customary Law*

Dispensations and privileges were among the most important forms of action in canon law in everyday life. A “dispensation” basically meant that a norm should not be applied because it would lead to an unjust result in a concrete case. Dispensations were particularly common in Latin America with regard to impediments to marriage – for example, exemption from the minimum age or from the marital impediment of kinship – or to receiving the sacrament of priestly ordination. Similarly, many practices considered in historical research to be part of a culture of non-application were based on the same material understanding of law underlying the possibility (or obligation) of granting dispensations. Thus, non-application of a norm does not necessarily mean that there was a gap between “theory” and “practice.” Rather, the contemporary understanding of justice could require that a law not be applied. Dispensations were a legal means of putting this into practice.

Privileges (*privilegia*), in contrast to dispensations, contained a special regulation made with a particular addressee or group of persons in mind. In principle, they did not suspend the applicability of a norm, but instead created a new, more specific norm. Accordingly, privilege usually was defined as a *lex specialis*, the opposite of a *lex generalis*. However, because privileges were used in many distinct ways, there is a fair amount of overlap with other terms, for example, with the *ius singulare* and *dispensatio*. Though the widely known bull *Altitudo Divini Consilii* (1537), for instance, is often referred to as a privilege – because it made special provisions for the marriage of so-called neophytes, that is, recently baptized persons and more or less a synonym in Latin America for members of indigenous groups – it is actually a dispensation. And while *privilegium* often denoted the special regulation itself, it sometimes simply referred to the form of conferral. Some privileges were already included in texts of the *ius commune*, that is, in Roman and canon law, but in line with this tradition, scholarship could also establish privileges. Moreover, and contrary to later understandings, *privilegium* did not always mean an improved position for all parts involved; there were also *privilegia odiosa*, that is, privileges that favored one person to the detriment of others.

Privileges were used to implement many of the fundamental measures for the organization of the Church in Latin America. The pope himself established dioceses, appointed bishops – in agreement with the Crowns – and

founded universities by means of privileges. Both the power of local actors as well as the *patronato regio* relied on rights acquired through privileges granted by the pope. In most cases, the privileges were given in the form of a bull, often retaining the form of earlier models, and in some instances even repeating the same initial words. For example, as mentioned at the beginning of this text, the pope had granted the Portuguese Crown far-reaching powers for expansion into Africa and Asia via the *Ordem de Cristo* in 1455, and the Alexandrian bulls of 1493 granted to the Catholic kings were modeled on this structure. With the bull *Universalis Ecclesiae* (1508), the Spanish Crown was given the right of patronage, and with the bulls *Eximiae Devotionis* (first in 1501 and again in 1510), it was given a series of other rights. These rights were confirmed and extended through other important bulls (e.g., *Praecelsae devotionis*, 1514). Particularly important was the delegation to the Spanish Crown of the power to organize and supervise the sending of missionaries (*Exponi nobis*, also called *Omnimoda*, 1522). Notwithstanding these rights granted to the Crowns, privileges also endowed the missionary orders with jurisdictional powers in the *forum internum*, namely, the authority to hear confessions. Privileges were also granted to the many lay confraternities in Latin America. When a confraternity of indigenous nobles from Cuzco, with a Jesuit acting as a courier, asked for recognition and a series of special rights, not only were the privileges conferred, but they were written in both Latin and Quechua.¹³¹ While this is the only known case of a papal bull in Quechua, it was certainly not the only privilege granted to confraternities of indigenous peoples.

A great number of special regulations relating to members of indigenous peoples in Latin America were issued, often referred to as *privilegios de los indios*. Lists of these privileges can be found in texts written for catechesis, missions, pastoral work, preparation for confession, and other practical purposes. Examples of this include the *Confesionario para los curas de indios*, approved by the Third Council of Lima in 1585, and the *Gramatica o Vocabulario de la lengua general de todo el Perú llamada lengua quichua...*, written by the Jesuit Diego González Holguín (1608).¹³² While some of these privileges

131 M. Gnerre, "Una Bula Pontificia de 1603 en quechua," in L. Laurencich Minelli and P. Numhauser (eds.), *Sublevando el Virreinato. Documentos contestatorios a la historiografía tradicional del Perú colonial* (Quito: Ediciones Abya-Yala, 2007), 339–50.

132 See the *Sumario de algunos privilegios y facultades concedidas para las indias por diversos Sumos Pontífices*, approved at the Third Council of Lima, in J. G. Durán, *Monumenta catechetica hispanoamericana (siglos XVI–XVIII)*, vol. II: *Siglo XVI* (Buenos Aires: Facultad de Teología de la Pontificia Universidad Católica Argentina, 1990), 590–94; on the context: J. G. Durán, *Monumenta catechetica hispanoamericana (siglos XVI–XVIII)*, vol. I: *Siglo XVI* (Buenos Aires: Facultad de Teología de la Pontificia Universidad Católica

had been enacted by the pope, many others were derived from classical canon law. For example, Diego de Avendaño's *Thesaurus indicus* (1668) contains the chapter *De privilegiis indorum* in a folio format of 150 pages. After a discussion of some general considerations, Diego de Avendaño enumerated a large number of privileges: special rights regarding baptism, confirmation, the Eucharist, confession, as well as ordination and marriage. He also detailed regulations regarding the observance of Church holidays, the fasting commandments, marital obligations, and other such subject matters.¹³³ He thus assembled privileges of various origins – some granted by a sovereign, others developed by legal scholars or created by his own interpretation of the legal tradition.

While privileges served to adapt the general rules to special cases and thus ensure the ultimate goal of canon law, namely, the salvation of the soul, they were also quite profanely a means of generating revenue. The *Bula de la Santa Cruzada* – distributed by a *Comisario de la Santa Cruzada* on behalf of the Crown and regularly issued for Hispanic America from 1574 onwards – is a good example of this combination of spiritual and financial purposes. The bull granted a number of privileges or dispensations in exchange for a payment. It was one of the Spanish Crown's most important revenue sources during the colonial period, and for this reason, among others, it was regulated in a separate title in the *Recopilación de Indias*. Its theological and canonical aspects have been discussed at length in numerous books and treatises by canon lawyers and theologians.¹³⁴

The *Bula de la Santa Cruzada* itself consisted of various parts. The so-called *Bula de lactinios* could exempt individuals from some food prohibitions, for example, the prohibition on consuming animal products such as eggs, milk, and fat, especially during Lent. Such prohibitions could become important in everyday life when alternative products were either not available or expensive. Exemptions from such food prohibitions were by no means

Argentina, 1984). See also the appendix with the *Summario [sic] de los privilegios y facultades concedidas para los indios* in Diego de Gónzales Holguín, *Vocabulario de la Lengua General de Todo el Perú Llamada Lengua quichua o del Inca* (Lima: Universidad Nacional Mayor de San Marcos, 1952 [1608]), following the index to the main work.

¹³³ Diego de Avendaño, *Thesaurus indicus* (Antwerp, 1668), lib. II, tit. XII.

¹³⁴ On the *Bula* in New Spain see M. del Pilar Martínez López-Cano, *La Iglesia, los fieles y la Corona. La bula de la Santa Cruzada en Nueva España, 1574–1660* (Mexico City: Universidad Nacional Autónoma de México, 2017); in Peru J. A. Benito Rodríguez, *Historia de la Bula de la Cruzada en Indias* (Madrid: Fundación Universitaria Española, 2002); in Brazil C. M. F. Figueiredo, "Os esmoleiros do rei: a Bula da Santa Cruzada e seus oficiais na Capitania de Minas Gerais (1748–1828)," Ph.D. thesis, Universidade Federal Fluminense (2014).

uncommon. In 1522, for instance, Pope Hadrian VI had authorized the clergy sent to America to be exempted from some food prohibitions, mainly meat, eggs, and dairy products during the forty-day Lent. In later papal bulls, the indigenous population was almost completely exempt from observing the abstinence commandments altogether.¹³⁵

Beyond the exemption from food prohibitions, another part of the *Bula de la Cruzada*, the so-called *Bula de Composición*, exempted those who acquired its privileges and dispensations from the obligation to retribute something they had obtained in an illegitimate way should the beneficiary of the restitution not be locatable. This was of considerable practical relevance, for example, if one had amassed booty in the course of unjustified warlike conflicts (i.e., in a *bellum inustum*), exploited indigenous peoples beyond the “legitimate measure,” or gained unjustified advantages in business, such as through usury. Since restitution was a precondition for absolution in confession, a major problem would arise if the beneficiary of the restitution could not be located. To compensate this unresolved debt by means of the bull was, therefore, a convenient solution to this problem – and as the revenues of the *Bula* were shared between the Church and the Crown, it was profitable for both. Of course, this exemption was quite controversial and criticized not only in the Protestant world but also by Catholic moral theologians. Francisco de Vitoria, for example, claimed that this possibility for compensation by paying a minimum of what one owed was “the biggest joke on earth.”¹³⁶

In addition to privileges and dispensations as tools for adapting the legal framework to specific needs, custom was also able to establish or derogate rights (on customary law, see also Section 3.1). According to early modern doctrine, a repeated practice that was reasonable under certain conditions could become a legally recognized custom. It was then considered “unwritten law” (*lex non scripta*) and had the same weight as written law. The requirements for the recognition of a practice as a custom were intricate and had been disputed for centuries. By the beginning of the seventeenth century, however, a consolidation of doctrine had occurred, in part through the Spanish Jesuit Francisco Suarez’ epoch-making work *De legibus*.

¹³⁵ On food prohibition, see C. Ferlan, “Ayuno Eclesiástico (DCH),” *Max Planck Institute for European Legal History Research Paper Series No. 2018–09* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2018), <http://dx.doi.org/10.2139/ssrn.3260582> (last accessed Jan. 13, 2022).

¹³⁶ T. Duve, “¿‘La mayor burla del mundo’? Francisco de Vitoria y el *dominium* del Papa sobre los bienes de los pobres,” in J. Cruz-Cruz (ed.), *Ley y dominio en Francisco de Vitoria* (Pamplona: Ediciones Universidad de Navarra, 2008), 93–106.

In both empires, people frequently invoked custom as a means to legitimize their behavior or legal titles, or to derogate laws. For example, it was discussed at length whether the aforementioned prohibitions on the consumption of milk, eggs, fat, or other animal products during Lent were not derogated by customary law. If so, it would not have been necessary to pay for the *Bula de la Cruzada* in order to be exempt from these prohibitions. Gaspar de Villarroel devoted an entire chapter to this problem in his *Gobierno eclesiastico pacifico*, and referring to Francisco Suárez' doctrine of customary law, he came to precisely this conclusion. In other words, the legitimate practice was a *lex non scripta* and thus would even supersede a papal privilege that seemed to suppose that the custom did not exist. Given the remaining uncertainty, however, the bishop of Santiago de Chile concluded his deliberations with a pragmatic recommendation: Though not strictly necessary, it was nevertheless better to err on the side of caution and acquire the dispensation granted in the *Bula de la Cruzada*. While perhaps an astonishing recommendation from today's perspective, it is characteristic of the early modern *modus operandi*: Insecurity about the legal framework and its interpretation, and the need to maintain a peaceful coexistence between Church and state, compelled him to recommend avoiding a conflict by making a prudent decision.¹³⁷

Dispensations, privileges, and customary law thus provided universal canon law with effective techniques to tailor appropriate solutions to individual cases. They could also serve to make canon law more flexible and more specific with regard to particular situations or groups of persons. An expression of the economy of grace that came to characterize the Iberian monarchies as well as other Catholic societies, they were used for very different purposes: to achieve justice, as an instrument of control, and to generate revenue. They also contributed to a regionalization of universal canon law. For instance, when bishops or missionary orders requested numerous privileges for specific territories for an extended period of time, when the inhabitants of entire regions were meant to be freed from certain obligations in conjunction with local customs, or when bishops and missionaries tended to grant dispensations in special cases, distinct regional normative orders would emerge.¹³⁸ This dialectic between universal and particular canon law, formed by the

¹³⁷ On this case, see T. Duve, "Algunas observaciones acerca del *modus operandi* y la prudencia del juez en el Derecho Canónico Indiano," *Revista de Historia del Derecho* 35 (2007), 195–226.

¹³⁸ Many of these regulations are contained in collections such as Hernáez, *Colección de bulas*; Morelli, *Fasti Novi Orbis*; Metzler, *America Pontificia*; Simon Marques, *Brasilia Pontificia* (Lisbon, 1749).

lawgiver as well as in daily practice, was one of the fundamental principles of the global governance of the Church that also shaped the legal landscape of Latin America.

Nonetheless, the most important agents in the concretization of universal canon law and the development of regional canon law were the various corporate bodies of the Church at the local level. For even if the Church is understood ecclesiologically in terms of a unity, from a historical-sociological perspective, it consisted of a variety of bodies or communities of practice, and these exercised jurisdiction and produced knowledge of normativity in their own spheres. They translated the knowledge of normativity stemming from tradition into their specific worlds.

Church-Made Law: Corporate Bodies and Ecclesiastical Jurisdictions

Like early modern monarchies, the early modern Church was a composite and multilayered institution.¹³⁹ It was hierarchically organized into different spaces. Church provinces and archdioceses formed the supreme organizational unit.¹⁴⁰ Every archdiocese contained multiple dioceses, which were further divided into parishes. The first Hispano-American dioceses in the

¹³⁹ On this notion, see the classic considerations of J. H. Elliot, "A Europe of Composite Monarchies," *Past & Present* 137 (1992), 48–71; with regard to early modern Catholicism, C. Windler, "Early Modern Composite Catholicism in a Global Perspective: Catholic Missionaries and the English East India Company," in A. Badea, B. Boute, and B. Emich (eds.), *Pathways Through Early Modern Christianities* (Köln: Böhlau, 2023); See also the overall picture sketched by A. Maldavsky and F. Palomo del Barrio, "La misión en los espacios del mundo ibérico: conversiones, formas de control y negociación," in A. Barreto Xavier, F. Palomo, and R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (Sécs. XVI–XVIII). Dinâmicas Imperiais e Circulação de Modelos Administrativos* (Lisbon: Universidade de Lisboa, 2018), 543–90.

¹⁴⁰ For an overview of the history of the Church in Hispanoamerica, see the contributions in Borges, *Historia de la Iglesia*, vol. I; and A. de Zaballa Beascochea, "Las Instituciones eclesiásticas en la Monarquía Hispánica," in A. Barreto Xavier, F. Palomo, and R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (Sécs. XVI–XVIII). Dinâmicas Imperiais e Circulação de Modelos Administrativos* (Lisbon: Universidade de Lisboa, 2018), 481–512. On the history of the Church and its structures in Brazil, see E. Sales Souza, "The Construction of a Tridentine Christianity in Portuguese America (Sixteenth and Seventeenth Centuries)," in A. Prosperi and M. Catto (eds.), *Trent and Beyond: The Council, Other Powers, Other Cultures* (Mediterranean Nexus 1100–1700 4) (Turnhout: Brepols, 2017), 479–500; E. Sales Souza, "Estruturas eclesiásticas da Monarquia portuguesa. A Igreja diocesana," in A. Barreto Xavier, F. Palomo, and R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (Sécs. XVI–XVIII). Dinâmicas Imperiais e Circulação de Modelos Administrativos* (Lisbon: Universidade de Lisboa, 2018); E. Sales Souza "Ecclesiastical Geography of Colonial Brazil," in W. Beezley (ed.), *Oxford Research Encyclopedia of Latin American History* (Oxford: Oxford University Press, 2020), 1–20; and D. R. Vieira, *História do Catolicismo no Brasil, vol. I: 1500–1889* (Aparecida: Editora Santuário, 2016).

Caribbean, established in 1504, belonged to the archdiocese of Seville until 1546. When later the archdioceses of Santo Domingo, Mexico, and Lima were erected, they became the first archdioceses in Latin America and the Caribbean. In present-day Brazil, the diocese of San Salvador de Bahía was originally established in 1551 as part of the archdiocese of Lisbon. However, once the dioceses of Río de Janeiro and Olinda were founded, San Salvador de Bahía was elevated to the status of archdiocese in 1676. These differences in chronology point to the different dynamics in Portuguese overseas expansion, as institutional structures in Portuguese America consolidated only once Brazil's importance grew within the Portuguese empire, and thus later than they did in Hispanic America.

The Church-made law within the jurisdictional spaces defined by this hierarchy. Of particular importance was lawmaking at provincial councils and synods.¹⁴¹ At the provincial councils, the bishops of a province deliberated on important aspects of Church life, and in many cases, they also addressed questions submitted externally to the council. In particular, the provincial councils of Mexico and Lima were responsible for far-reaching decisions about the organization of the Church. The particularly important third provincial councils of Lima (1582/1583) and Mexico (1585) played decisive roles in the implementation of the decisions made at the Council of Trent.¹⁴² In Brazil, the decisions of the synod of the archdiocese of Bahía of 1707 – the *Constituições Primeiras do Arcebispado da Bahia of 1707* – were the first synodal

141 For a useful list of the synods and provincial councils in the Hispanic World, see M. Deardorff, "Synods and Councils of the Hispanic World, 1300–1700," *Max Planck Institute for Legal History and Legal Theory Research Paper Series No. 2022–14: subsidia et instrumenta* (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie, 2022), <http://dx.doi.org/10.2139/ssrn.4131300>; a very helpful overview and index to the issues raised in a South American diocese (Arquidiócesis de la Plata) between the sixteenth and eighteenth centuries is N. C. Dellaferrera and M. P. Martini (eds.), *Temática de las constituciones sinodales indianas (s. XVI–XVII). Arquidiócesis de La Plata* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2002). See also M. T. Fattori, "Districts, Metropolitans and Ecclesiastical Territories: Geo-Local Aspects of Ecclesiastical Territorial Evolution," *Zeitschrift für Kirchengeschichte* 132(2) (2021), 218–62.

142 The texts of the provincial councils and other materials have been edited by a group of Mexican and Spanish scholars. Regarding the Third Provincial Council of Lima, see L. Martínez Ferrer (ed.), *Tercer Concilio Limense (1583–1591). Edición bilingüe de los Decretos*, trans. J. L. Gutiérrez (Lima and Rome: Facultad de Teología Pontificia y Civil de Lima, 2017); regarding the Third Provincial Council of Mexico, see L. Martínez Ferrer, *Decretos del Concilio Tercero Provincial Mexicano 1585. Edición histórica crítica y estudio preliminar por Luis Martínez Ferrer* (Zamora: El Colegio de Michoacán, Universidad de la Santa Cruz, 2009). The materials of the Mexican Council have been edited by A. Carrillo Cázares, *Manuscritos del Concilio Tercero Provincial Mexicano (1585)* (Zamora and Mexico City: El Colegio de Michoacán, Universidad Pontificia de México, 2006–2011), 5 vols.

legislation by a local bishop and were motivated by the need to create a legal framework for the Brazilian archdiocese established three decades earlier.¹⁴³

In nearly all synods and provincial councils, the members of the councils discussed matters of Church discipline, the regulation of local Church life, but also questions that went far beyond these issues. In the Third Provincial Council of Mexico, for example, the council fathers debated at length whether the war against the so-called Chichimeca, a group of indigenous peoples, was a legitimate “just war” (*bellum iustum*). After intense deliberations, they concluded that this was not the case and that the use of force against them could not be justified.¹⁴⁴ At the same council, the bishops and their advisors also dealt with the legitimacy of contracts and financial transactions and answered a large variety of questions from laypeople. While some of the decisions reached led to dispositions in the council constitutions (*canones*), other results of the deliberations were included in a manual for confessions.¹⁴⁵ Catechisms were drafted in the provincial councils in Lima and in Mexico, and the catechisms redacted in Lima were published in Spanish and Quechua.

At the diocesan level, the bishop held the power of jurisdiction (*potestas iurisdictionis*).¹⁴⁶ He could convene synods to discuss any and all affairs related to the diocese, and it was his authority as bishop that meant the decisions of the synods were considered binding law. We now have access to a great number of synodal decisions, especially from Hispanic America and, to a lesser extent, from Portuguese America. Their importance lies above all in the concretization of the normative options made available by universal canon law and in the special regulation with regard to indigenous people. Last but not least, synodal decisions also played an important role in the repetition and thus reaffirmation and implementation of norms. Most synods in Hispanic America

¹⁴³ See the contributions in B. Feitler and E. Souza Sales (eds.), *A Igreja no Brasil. Normas e Práticas durante a Vigência das Constituições Primeiras do Arcebispado da Bahia* (São Paulo: Editora UNIFESP, 2011). On the implementation of Trent in Brazil, in particular, see B. Feitler, “Quando chegou Trento ao Brasil?,” in A. Camões Gouveia, D. Sampaio Barbosa and J. P. Paiva (eds.), *O Concílio de Trento em Portugal e nas suas conquistas. Olhares novos* (Lisbon: Centro de Estudos de História Religiosa, Universidade Católica Portuguesa, 2014), 157–73.

¹⁴⁴ The deliberations have been transcribed and commented on by A. Carrillo Cázares, *El debate sobre la guerra Chichimeca, 1531–1585. Derecho y política en la Nueva España* (Zamora and San Luis: El Colegio de Michoacán, El Colegio de San Luis, 2000), 2 vols.

¹⁴⁵ On the making of the Third Provincial Council of Mexico, see O. R. Moutin, *Legislar en la América hispánica en la temprana edad moderna: Procesos y características de la producción de los Decretos del Tercer Concilio Provincial Mexicano (1585)* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016).

¹⁴⁶ For an overview about the institutions of the secular church in Mexico, see J. F. Schwaller, *The Church and Clergy in Sixteenth-Century Mexico* (Albuquerque: University of New Mexico Press, 1987).

took place in the late sixteenth and early seventeenth centuries. After 1769, during an extended period of synodal inactivity, a number of important synods and provincial councils took place in Hispanic America and the Philippines.

In his diocese, the bishop exercised his office as chief judge in the so-called *forum externum* through a commissioner (*provisor y vicario general*) in the ecclesiastical court and in his regular visitations, especially important in Latin America due to the vast distances.¹⁴⁷ A wide variety of matters were submitted to the bishop. He – or his delegate judges – decided on all matters involving members of the clergy, especially crimes and property disputes, in part because religious institutions, confraternities, and others were the main creditors in colonial society. Ecclesiastical courts exercised jurisdiction over matrimonial law, wills and trusts, and disputes over Church tithes.¹⁴⁸ They also had jurisdiction over the indigenous population, including matters that would have fallen under the jurisdiction of the Inquisition if Spaniards or Portuguese had been involved. Because ecclesiastical jurisdiction was open to any baptized person, members of indigenous peoples, women, Afro-Latin Americans, and members of other ethnic minorities pursued their causes in Church courts, which enabled an important legal mobilization of these groups.¹⁴⁹ For instance, cases in which ecclesiastical courts required slaveholders to allow married slaves to live together were quite common.¹⁵⁰ The cathedral chapter (*cabildo eclesiástico*), which regulated the affairs of the

147 Individual studies on ecclesiastical jurisdiction are available, for example, on New Spain by J. E. Traslosheros, *Iglesia, justicia y sociedad en la Nueva España. La audiencia del arzobispado de México, 1528–1668* (Mexico City: Editorial Porrúa, 2004); on Pernambuco by G. A. Mendonça dos Santos, *A justiça do bispo: O exercício da justiça eclesiástica no bispado de Pernambuco no século XVIII* (Recife: Universidade Federal de Pernambuco, 2019); on Maranhão see P. Gouveia Mendonça Muniz, *Réus de Batina. Justiça Eclesiástica e clero secular no bispado do Maranhão colonial* (São Paulo: Alameda Casa Ed, 2017). On ecclesiastical offices, see J. R. Gouveia, “Ministros De Los Tribunales (DCH),” *Max Planck Institute for Legal History and Legal Theory Research Paper Series No. 2021–11* (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie, 2021), <http://dx.doi.org/10.2139/ssrn.3862514> (last accessed Jan. 13, 2022).

148 On the procedural law, offices, and institutions, see various entries in the *DCH*, <https://dch.hypotheses.org/category/publicaciones> (last accessed Jan. 13, 2022).

149 K. B. Graubart, *With Our Labor and Sweat: Indigenous Women and the Formation of Colonial Society in Peru, 1550–1700* (Stanford: Stanford University Press, 2007); R. S. O’Toole, *Bound Lives*; M. A. McKinley, *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600–1700* (Studies in Legal History) (New York: Cambridge University Press, 2016); Premo, *Enlightenment on Trial*; 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).

150 On Africans in colonial Mexico and their use of ecclesiastical courts, see H. L. Bennett, *Africans in Colonial Mexico: Absolutism, Christianity, and Afro-Creole Consciousness, 1570–1640* (Blacks in the Diaspora) (Bloomington: Indiana University Press, 2003); in Brazil Castelnau-L’Étoile, “Os filhos obedientes.”

diocese when no bishop was in office, also had its own jurisdiction and regulated its activity in documents that in many cases contained detailed rules (e.g., *consuetas*).¹⁵¹

Apart from this spatially organized jurisdiction, there were many other jurisdictional spheres not defined by territory. Within the Church, many corporate bodies were granted specific rights for taking care of their own affairs and thus exercised jurisdiction in the wider sense this term had in the premodern world. The religious confraternities (*cofradías*), in Brazil *misericórdias*, were particularly important institutions in colonial daily life.¹⁵² They enjoyed a certain degree of autonomy and were of significance not only for the elite but also for the population groups much lower down the social hierarchy, such as the indigenous peoples, Afro-Latin Americans, people of mixed ethnicity (*mestizos*), and others. Confraternities served the interests of their members and advocated, for example, for the status and rights of people of mixed ethnicity, but they were also a means of internal differentiation within the group itself.¹⁵³ A variety of other institutions with their own jurisdictions also existed. Of particular relevance were the *Tribunal de la Santa Cruzada*, the *Juzgado de testamentos*, and the *Juzgado de capellanías y obras pías*.

The missionary orders, divided into provinces and answering to their central authorities, largely remained independent of the secular clergy.¹⁵⁴ Of the many religious orders that existed in Europe, the Dominicans, Franciscans, Augustinians, Mercedarians, and – especially in today’s Argentina, Brazil, and Paraguay – Jesuits were particularly important in Latin America. They exercised jurisdiction, elaborated their own statutes, and decided on the affairs

151 For an example from late sixteenth-century Lima, see M. L. Grignani, “La legislación eclesiástica de Toribio Alfonso de Mogrovejo, segundo arzobispo de Lima: la Regla Consuetua y los sínodos diocesanos,” in O. Danwerth, B. Albani and T. Duve (eds.), *Normatividades e instituciones eclesiásticas en el virreinato del Perú, siglos XVI–XIX* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2019), 19–42.

152 See R. Aguirre Salvador, *Cofradías y asociaciones de fieles en la mira de la Iglesia y de la Corona: arzobispado de México, 1680–1750* (Mexico City: Real Universidad de México, 2018).

153 See J. J. Hidalgo and M. Valerio (eds.), *Indigenous and Black Confraternities in Colonial Latin America: Negotiating Status Through Religious Practices* (Amsterdam: Amsterdam University Press, 2022). On Brazil, see E. W. Kiddy, *Blacks of the Rosary: Memory and History in Minas Gerais, Brazil* (University Park: Pennsylvania State University Press, 2005); Germeten, *Black Blood Brothers*. On Peru, see K. B. Graubart, “‘So color de una cofradía’: Catholic Confraternities and the Development of Afro-Peruvian Ethnicities in Early Colonial Peru,” *Slavery & Abolition* 33(1) (2012), 43–64.

154 See the overview in Maldavsky and Palomo del Barrio, “La misión en los espacios del mundo ibérico,” 543–90; for Spain R. A. Gutiérrez, “The Spanish Missions of North and South America,” in V. Garrard-Burnett, P. Freston, and S. C. Dove (eds.), *The Cambridge History of Religions in Latin America* (New York: Cambridge University Press, 2016), 173–97.

of the members of the order; only the convents of nuns were subject to the jurisdiction of the local bishop. In many cases, members of missionary orders acted as judges, deciding on disputes and setting rules. Within the Portuguese realm, a *Junta Geral das Missões*, sometimes called *Junta da Propagação da Fé*, was established in Lisbon in 1655. Another was established in Brazil (located first in Pernambuco, then in Rio de Janeiro and Marañão) in 1680 and was staffed mainly by the secular clergy. In addition to serving as an appeal instance, these *juntas* also decided cases in which members of indigenous peoples defended themselves against illegal enslavement or deprivation of liberty.¹⁵⁵ Also worth noting were *doctrinas*, administrative units created for missionary purposes with the indigenous population in mind.

The Inquisition was an independent institution with its own jurisdiction and a remarkable degree of power over both Church and Crown officials.¹⁵⁶ In both Iberian empires, supervision of the courts of the Inquisition rested with the king; unlike in practically all other matters in Hispano-America, appeals against the decisions by the Inquisition could not be lodged with the Council of the Indies but with the *Supremo Consejo de la Inquisición* in Madrid. Only for members of indigenous peoples did local bishops have jurisdiction to prosecute what were considered crimes against the faith. In a few cases, the Inquisition's jurisdiction also seems to have been used strategically, for instance, by enslaved persons who feigned heretical practices in order to protect themselves from mistreatment.¹⁵⁷

The corporative structure of the Church, and the fact that many corporations were able to produce and enforce special rights, led to numerous disputes within the ecclesiastical sphere. Even if traditional historiography

¹⁵⁵ See on Maranhão, for example, A. L. Ferreira, *Injustos cativoiros. Os índios no Tribunal da Junta das Missões do Maranhão* (Belo Horizonte: Caravana, 2021).

¹⁵⁶ For an overview, see F. Bethencourt, *The Inquisition: A Global History, 1478–1834*, trans. J. Birrell (Past and Present Publications) (Cambridge and New York: Cambridge University Press, 2009); for the Portuguese Inquisition G. Marcocci and J. P. Paiva, *História da Inquisição Portuguesa (1536–1821)* (Lisbon: A Esfera dos Livros, 2013); on Brazil, B. Feitler, *Nas malhas da consciência. Igreja e Inquisição no Brasil. Nordeste 1640–1750* (São Paulo: Alameda Casa Ed, 2007); B. Feitler “Continuidades e rupturas da Igreja na América Portuguesa no tempo dos Áustrias. A importância da questão indígena e do exemplo espanhol,” in P. Cardim, L. Freire Costa, and M. Soares da Cunha (eds.), *Portugal na Monarquia Hispânica. Dinâmicas de Integração e de Conflito* (Coleção Estudos & Documentos, 18) (Lisbon: CHAM, 2013), 203–30; B. Feitler, “The Inquisition in the New World,” in V. Garrard-Burnett, P. Freston, and S. C. Dove (eds.), *The Cambridge History of Religions in Latin America* (New York: Cambridge University Press, 2016), 133–42; A. C. Rodrigues, *Igreja e Inquisição no Brasil. Agentes, carreiras e mecanismos de promoção social (século XVIII)* (São Paulo: Alameda Casa Ed, 2014).

¹⁵⁷ J. Villa-Flores, “‘To Lose One’s Soul’: Blasphemy and Slavery in New Spain, 1596–1669,” *The Hispanic American Historical Review* 82(3) (2002), 435–68.

places the Church and state in opposition to one another, the tension between holders of jurisdictional powers *within* these spheres was often more pronounced. Striking examples of the fierce, sometimes even violent, conflicts in the first decades of the construction of ecclesiastical structures in today's Mexico between the 1530s and 1560s are the numerous legal disputes by Vasco de Quiroga, first bishop of Michoacán. His lawsuits against neighboring dioceses (New Galicia and Mexico), against the religious orders of the Franciscans and Augustinians, as well as against secular officials, private individuals, and the indigenous inhabitants of Tzintzuntzan document not only his own litigiousness but also the shaping of the political constitution in the Iberian empires and the Catholic Church.¹⁵⁸ Disputes between the official Church and the religious communities in which the boundaries of jurisdictions were negotiated remained on the agenda until the end of the colonial period and beyond.

On the local level, however, not only were conflicts within the Church at issue but also numerous conflicts between Church and Crown officials. Fruitful cooperation was an explicit aim, and both Crowns had an interest in mutual control of the secular and the ecclesiastical officeholders. Nevertheless, cooperation was difficult to implement in everyday life, even though the king had appointed the Church officials and required them to swear an oath of allegiance to him. The main source of the manifold conflicts could be traced back to the king's patronage over the Church in Latin America, which meant that a number of issues were regulated by both secular and canon law.

Various factors contributed to this overlap and to the conflicts that resulted from contested jurisdictions. On a very basic level, one must bear in mind that the extent of the *patronato regio* was not easy to determine, as the rights of the Crown had been conferred not in one document but through a series of privileges. The existence and exact wording of many of these privileges were simply not widely known at the time. Even Juan de Solórzano Pereira, one of the most important jurists of his time and author of the *De Indiarum Iure* and the *Politica Indiana*, did not have firsthand knowledge of the Alexandrian bulls.¹⁵⁹ This uncertainty about the exact wording or even existence of such fundamental legal documents is the reason one finds transcriptions of important privileges not only in Solórzano Pereira's books but

158 See P. Serrano Gassent, *Vasco de Quiroga. Utopía y derecho en la conquista de América* (Madrid: Fondo de Cultura Económica, 2001); A. Carrillo Cázares (ed.), *Vasco de Quiroga: La pasión por el derecho y el pleito con la orden e San Agustín (1558–1562)* (Zamora: El Colegio de Michoacán, 2003), 2 vols.

159 Juan Solórzano Pereira, *Política Indiana* (Madrid, 1647), 4.2.

also in manuals for the mission and in the books on the good government of the Church, including those by José de Acosta, Diego de Avendaño, Alonso de la Peña Montenegro, and others.

In addition to the uncertainty about the wording of such privileges, the proliferation of privileges and special legislation made consulting and remembering all of them difficult. The Jesuit Domingo Muriel from Córdoba de Tucumán in what is today Argentina, for example, compiled more than 600 special regulations in his *Fasti novi orbis et ordinationum apostolicarum ad Indias pertinentium breviarium*. Muriel explained the need for this publication stating that there were so many peculiarities in the canon law of overseas territories that one could not decide anything without first having knowledge of these.¹⁶⁰ A similar line of reasoning motivated Simon Marques, a Jesuit living in Río de Janeiro, to write his *Brasilia Pontificia, sive speciales facultates pontificiae, quae Brasiliae Episcopis conceduntur*, printed in Lisbon in 1749.

Even in cases in which the relevant texts from both secular and ecclesiastical authorities were available, it was nevertheless difficult to interpret their content and judge the legitimacy of contradictory claims. In theory, the patronage of the Crowns over the Church did not empower them to legislate, act against, or regulate matters reserved to canon law. However, as long as the Crowns did not make regulations that openly deviated from canon law, even a regulation clearly aimed at sacramental matters or relating to fundamental aspects of the Church could be interpreted as a confirmation of rather than an interference in canon law. Such was the case, for example, in 1564 when the Spanish king Philip II decreed that the decisions of the Council of Trent should be applicable in Hispanic America.

A peaceful coexistence, however, was more difficult when the Crown claimed rights that had not been conferred on it or that were clearly contrary to canon law. Such usurpations of power became increasingly common from the mid-sixteenth century onwards. Both Crowns began, no later than under King Philip II, who also ruled Portugal from 1580 as Philip I, to regulate vast areas of ecclesiastical life by invoking their rights as patrons of the Church. The resulting ecclesiastical law, that is, the law set by the state with regard to religion, was not part of canon law, yet it shaped the conditions under which Church institutions operated, and it guided and constrained the actions of Church officials to the same extent as canon law.

160 Morelli, *Fasti Novi Orbis*, prologus. The collection itself was based, as he reports in the preface, on the preliminary work done by Antonio León Pinelo. This work was also used by B. de Tobar, *Compendio bulario indico* (Seville: Escuela de Estudios Hispanoamericanos de Sevilla, 1954–1966), 2 vols.

Crown-Made Church Law: Ecclesiastical Law

As mentioned at the beginning of Section 3.2, the pope had granted both the Spanish and the Portuguese Crowns extensive rights regarding the organization and shaping of the Church in Latin America. Within the framework of patronage law (*ius patronatus*), which had its roots in medieval canon law, it was common for secular rulers to promote christianization and mission, to establish churches, to provide the financial means necessary for their operation, and to physically construct them (*fundatio, dotatio, aedificatio*). In return, secular rulers received a number of rights and benefits, most notably, the right to propose candidates to fill ecclesiastical offices and to share in the revenues from Church tithe.¹⁶¹

The distinctive feature of the *patronato regio* by the Iberian monarchies in Latin America consisted in the fact that, over time, the Crowns obtained or claimed for themselves ever more powers. The extremely unspecific and wide-ranging rights granted by the first papal bulls were followed by a series of specific and much more concrete privileges. In the case of Brazil, in 1551, the Portuguese Crown obtained the transfer of the rights originally granted to the *Ordem de Cristo* and to the *Mesa de Consciência e Ordens*,¹⁶² making this institution the highest instance of ecclesiastical jurisdiction. A similar gradual process of extension can be found with regard to Hispanic America in a royal decree of 1574, which hearkened back to a failed larger project of legislation (the so-called *Código de Ovando*) and concerned patronage rights, later incorporated into the *Recopilación de Indias*.¹⁶³

161 See recent overviews in I. Fernández Terricabras, "El Patronato Real en la América Hispana: fundamentos y prácticas," in A. Barreto Xavier, F. Palomo, and R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (Sécs. XVI–XVIII). Dinâmicas Imperiais e Circulação de Modelos Administrativos* (Lisbon: Universidade de Lisboa, 2018), 97–122; A. Barreto Xavier and F. Olival, "O padroado da coroa de Portugal: Fundamentos e práticas," in A. Barreto Xavier, F. Palomo, and R. Stumpf (eds.), *Monarquias Ibéricas em Perspectiva Comparada (Sécs. XVI–XVIII). Dinâmicas Imperiais e Circulação de Modelos Administrativos* (Lisbon: Universidade de Lisboa, 2018), 123–60; and G. Pizzorusso, "Il padroado régio portoghese nella dimensione 'globale' della Chiesa romana. Note storico-documentarie con particolare riferimento al Seicento," in G. Pizzorusso, G. Platania, and M. Sanfilippo (eds.), *Gli archivi della Santa Sede come fonte per la storia del Portogallo in età moderna* (Viterbo: Sette Città, 2012), 177–219.

162 See on the *Mesa da Consciência e Ordens* G. Marocci, "Conscience and Empire: Politics and Moral Theology in the Early Modern Portuguese World," *Journal of Early Modern History* 18(5) (2014), 473–94; and M. do Carmo Dias Farinha and A. Azevedo Jara (eds.), *Mesa da Consciência e Ordens* (Lisbon: Instituto dos Arquivos Nacionais da Torre do Tombo, 1997). On the role of the military orders in the expansion, see F. Olival, *The Military Orders and the Portuguese Expansion (15th to 17th Centuries)* (Peterborough: Baywolf Press, 2018).

163 On this, see R. C. Padden, "The Ordenanza del Patronazgo of 1574: An Interpretative Essay," in J. F. Schwaller (ed.), *The Church in Colonial Latin America* (Wilmington: Scholarly Resources, 2000), 27–47; J. F. Schwaller, "The ordenanza del Patronazgo

From the Spanish Crown's perspective, Church patronage included powers beyond the traditional rights to present incumbents and maintain churches. Among other things, the Crown insisted that all papal orders be directed to their recipients through the Crown (*pase regio* or *exequatur*), that ecclesiastical officeholders swear allegiance not only to the pope but also to the Crown, on a general appeal against the decisions of ecclesiastical courts to secular courts (*recurso de fuerza*), the routing of communications between bishops and Rome through the Crown, and on control over the activities of religious orders.¹⁶⁴ This comprehensive catalog was justified in the seventeenth century by appeal to the theory that in Latin America the Catholic kings had become deputies of the pope (*vicariato*). Juan de Solórzano Pereira was an advocate of this theory, which is why his *De Indiarum Iure* was placed on the Index of Prohibited Books by the Church. Despite this prohibition, several ecclesiastical authors supported this interpretation.

In Brazil, the Crown controlled, directly or indirectly, all the most important ecclesiastical appointments.¹⁶⁵ The *Ordenações Filipinas*, enacted during the personal union between the Portuguese and Spanish Crowns in 1595 and put into force with its publication in 1603, contained numerous provisions that affected Church life. Especially in the course of the Pombaline reforms in the second half of the eighteenth century, the Portuguese Crown enforced its policy of strengthening its rights as a patron, a pursuit very similar to the Spanish idea of *regalismo* – both with regard to the secular clergy and the religious orders.¹⁶⁶ The Portuguese and Spanish Crowns thus exerted influence on the regulation of ecclesiastical affairs in Latin America that far exceeded what they had been granted in their European territories. Not until the Concordat of 1753 did the Spanish Crown gain the right of patronage over its territories on the Iberian Peninsula.

Notwithstanding these many rights and attributions, the picture researchers have long painted of the Church in Latin America as completely under

in New Spain, 1574–1600,” in J. F. Schwaller (ed.), *The Church in Colonial Latin America* (Wilmington: Scholarly Resources, 2000), 49–69; S. Poole, *Juan de Ovando. Governing the Spanish Empire in the Reign of Philip II* (Norman: University of Oklahoma Press, 2004), 144–50; as well as A. Martín González, *Gobernación espiritual de Indias. Código Ovandino, Libro 1* (Guatemala: Instituto Teológico Salesiano, 1977).

¹⁶⁴ Compare the overview in Sánchez Bella, *Iglesia y Estado*; García Añoveros, *La Monarquía*, 68–136; briefly also De la Hera, “El patronato.”

¹⁶⁵ A. R. Disney, *A History of Portugal and the Portuguese Empire, vol. II: The Portuguese Empire* (Cambridge: Cambridge University Press, 2009), 160.

¹⁶⁶ See A. Wehling, “Absolutismo e regalismo: a alegação jurídica do bispo Azeredo Coutinho,” in J. L. Soberanes Fernández, R. M. Martínez de Codes (eds.), *Homenaje a Alberto de la Hera* (Mexico City: Universidad Autónoma de México, 2008), 867–84.

the control of the Portuguese and Spanish Crowns may not be entirely accurate.¹⁶⁷ Research has primarily been oriented toward legislation and the discussions surrounding the theory of *patronato regio* and vicariate, giving too much weight to programmatic political discourses. Moreover, most research by legal historians has focused on state archives, almost to the exclusion of the holdings in ecclesiastical archives, especially those of the religious headquarters and the Roman Curia. Yet the intensive communication between local churches, members of religious orders, and their central offices can only be found in these archives. We also know today not only much more about how extensive the exchange actually was but also more about how it took place, for example, through missionaries and secular clerics carrying letters, reports, and books with them on their journeys.

It is in this context that moral-theological and pastoral literature that circulated in great numbers between the Old and New Worlds gained particular importance. Together with spiritual and juridical books, this literature made up a large portion of the books that were imported to the Americas.¹⁶⁸ A title like the *Manual for Confessors* by Martín de Azpilcueta, for example, had more than ninety editions published in Portuguese, Latin, Spanish, and later in Italian during the author's lifetime, making it a bestseller in the book trade.¹⁶⁹ Each edition of this work was updated, and the revised edition then served as a model for other books printed to help guide the clergy in their duties. These books, together with the many manuscripts and excerpts that traveled with missionaries and priests, contributed to the emergence of a dense web

- 167 B. Albani, "Nuova luce sulle relazioni tra la Sede Apostolica e le Americhe. La pratica della concessione del 'Pase regio' ai documenti pontifici destinati alle Indie," in C. Fernal (ed.), *Eusebio Francesco Chini e il suo tempo. Una riflessione storica* (Trento: F. B. K. Press, 2012), 83–102; B. Albani, "Un nuncio per il Nuovo Mondo. Il ruolo della nunciatura di Spagna come istanza di giustizia per i fedeli americani tra Cinque e Seicento," in P. Tusor and M. Sanfilippo (eds.), *Il papato e le Chiese locali. Studi/The Papacy and the Local churches. Studies* (Viterbo: Sette Città, 2014), 257–86; B. Albani and G. Pizzorusso, "Problematicando el Patronato Regio. Nuevos acercamientos al gobierno de la Iglesia Ibero-Americana desde la perspectiva de la Santa Sede," in T. Duve (ed.), *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano, Berlín 2016* (Madrid: Editorial Dykinson, 2017), 519–43.
- 168 On this see O. Danwerth, "The Circulation of Pragmatic Normative Literature in Spanish America (16th–17th Centuries)," in T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Leiden and Boston: Brill Nijhoff, 2020), 89–130.
- 169 See on this M. Bragagnolo, "Managing Legal Knowledge in Early Modern Times: Martín de Azpilcueta's Manual for Confessors and the Phenomenon of Epitomisation," in T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America*, (Leiden and Boston: Brill Nijhoff, 2020), 187–242.

of communication between Europe, the Americas, and Asia, far beyond the control of the communication between Rome and its dioceses.

The high demand for moral theological literature points to a jurisdictional sphere that has largely been overlooked by legal history, but which was of paramount importance in practice: the *forum internum*. The knowledge of normativity generated and used in this *forum* came primarily from moral theology. Its importance increased so much between the sixteenth and the eighteenth centuries that moral theology has been called a “second canon law.”¹⁷⁰

A Second Canon Law: Moral Theology

The reasons for the rise of moral theology as a body of knowledge of normativity are manifold and closely connected with the multiple historical transformations in world history during the sixteenth century, not least the rise of the early modern state and European expansion.¹⁷¹ In a certain sense, royal patronage and the successive absorption of jurisdictional competencies by the Crowns in Latin America was simply an early case of what was happening in both Catholic and Protestant territories in Europe after the Reformation and the emergence of confessional states on a larger scale. These confessional states had a strong tendency to establish churches that responded to the political geography and differentiated themselves from each other. In response to these developments, the Roman Curia had attempted to standardize knowledge of normativity, for example, by regulating the production of catechetical works, through devotional literature, and through the requirement of curial approval of synodal decrees. The *Editio Romana*, that is, the official text of the *Corpus Iuris Canonici*, mentioned at the beginning of this section, stems from this same context.

At the same time, and even more importantly, the Church strengthened its jurisdiction in the so-called *forum internum*, often related to the practice of confession. The revitalized theological discipline of moral theology provided knowledge of normativity for this *forum internum*, which was regarded as no less juridical than the *forum externum*.¹⁷² The confessor was considered a

170 P. Legendre, “L’inscription du droit canon dans la théologie. Remarques sur la Seconde Scolastique,” in S. Kuttner and K. Pennington (eds.), *Proceedings of the Fifth International Congress of Medieval Canon Law, Salamanca, 21–25 September 1976* (Vatican City: Biblioteca Apostolica Vaticana, 1980), 443–54.

171 On the history of Moral Theology, see J. I. Saranyana (ed.), *Teología en América Latina* (Frankfurt and Madrid: Iberoamericana Vervuert, 1999–2005), 3 vols.

172 See J. Mahoney, *The Making of Moral Theology: A Study of the Roman Catholic Tradition* (Oxford: Clarendon Press, 1987); for the significance of the *forum internum* for

judge of souls, a *iudex animarum*, and confession was equated with a judicial procedure: The decrees of the Council of Trent explicitly called the granting of absolution an *actus iudicialis*.¹⁷³ In a certain sense, the Church tried to strengthen its control over the souls in the *forum internum* because it was losing its power in the *forum externum*.¹⁷⁴

Of particular importance for Latin America was the knowledge of normativity produced by the so-called School of Salamanca. This intellectual movement is usually associated with the Dominican convent and the University of Salamanca because prominent theologians such as Francisco de Vitoria, Domingo de Soto, and others taught there. In reality, however, this phenomenon was by no means limited to Castile. In Coimbra, Évora, México, Lima, and many other places, attempts were made to find answers to the burning questions of the time by employing the scholastic method and by working mainly with Thomas Aquinas' *Summa Theologiae*. Although the School of Salamanca is today best known for its great systematic treatises *De iustitia et iure* and *De legibus*, its real aim was to offer Christians guidance on how to live and act properly so as not to endanger their salvation.¹⁷⁵ In various passages of his *De iustitia et iure*, which many consider to be the foundational text of the School of Salamanca, Domingo de Soto stated that he wrote the treatise primarily to offer people guidance, in particular with regard to the then common problem of usury.¹⁷⁶ The more

example, P. J. O'Banion, *The Sacrament of Penance and Religious Life in Golden Age Spain* (Pennsylvania: Pennsylvania State University Press, 2013); G. Marcocci, "Conscience and Empire: Politics and Moral Theology in the Early Modern Portuguese World," *Journal of Early Modern History* 18 (2014), 473–94.

- 173 In the text from the session of the Council of Trent dedicated to the sacrament of confession, the penitents are seen as the accused facing a trial, *ante hoc tribunal tanquam reos*, the confession is equated to a trial, and the confessor considered a judge: *ad instar actus iudicialis, quo ab ipso velut a iudice sententia pronunciat*; see Council of Trent, sessio XIV, 25.11.1551, doctrina, cap. II, VI, in the edition of J. Alberigo, J. A. Dossetti, P. P. Joannou et Al. (eds.), *Conciliorum Oecumenicorum Decreta*, 3rd ed. (Bologna: Edidit Istituto per le Scienze, 1973), cited according to the text in J. Wohlmuth (ed.), *Dekrete der ökumenischen Konzilien, vol. III: Konzilien der Neuzeit* (Paderborn: Ferdinand Schöningh, 2002), 704 and 707.
- 174 See on this process P. Prodi, *Una historia de la justicia. De la pluralidad de fueros al dualismo moderno entre conciencia y derecho* (Buenos Aires: Katz, 2008 [2000]), 247–97.
- 175 See T. Duve, "The School of Salamanca: A Case of Global Knowledge Production," in T. Duve, J. L. Egio and C. Birr (eds.), *The School of Salamanca: A Case of Global Knowledge Production* (Leiden and Boston: Brill Nijhoff, 2021), 1–42; T. Duve, "Law," in H. Braun, E. De Bom and P. Astorri (eds.), *A Companion to Spanish Scholastics* (Brill's Companions to the Christian Tradition 102) (Leiden and Boston: Brill Nijhoff, 2021), 57–84.
- 176 Domingo de Soto, *De iustitia et iure* (Salamanca, 1553), *Prooemium*, fol. 5.

difficult the case, the greater the need for an expert's opinion. Francisco de Vitoria had stated this clearly at the beginning of his famous *Relectio* on the Indies: "Effectively, for an act to be good, if there is cause for doubt, it is necessary to do it according to a wise man's advice."¹⁷⁷ The wise men he refers to were the theologians.

Such statements express not only a methodological conviction but also what could be called a culture of consultation prevalent in the Iberian monarchies during the sixteenth and seventeenth centuries. One sees this culture at the highest hierarchical level in the *juntas* held before the king, in the important role of confessors, in the many questions posed by the Crowns to moral theologians in Coimbra, Évora, or Salamanca, and in institutions such as the Portuguese Crown's *Mesa da Consciência*, which was "one of the two pillars of Portuguese colonial society."¹⁷⁸ Priests and moral theologians were confronted with an abundance of requests also in their daily lives.¹⁷⁹ Although this naturally elevated their status and placed them in a position of power, they were not always enthusiastic about it. At the beginning of one of his answers to questions about the permissibility of certain commercial customs, Francisco de Vitoria wrote: "I do not really feel like answering the cases brought by the traders of finance without knowing who wants information and why. After all, many only ask in order to have an advantage, and to be happy when you give them permission. And if one says something that goes against their interests, they do not care and make fun of the doctrine and its author."¹⁸⁰

This practical dimension of moral theology – an orientation toward the solution of concrete cases – meant that moral theologians dealt with

177 Francisco de Vitoria, in T. Duve and M. Lutz-Bachmann (eds.), *Francisco de Vitoria, Relectiones Theologicae XII* (Mainz: Akademie der Wissenschaften und der Literatur, 2018 [1557]), vol. II; *The School of Salamanca. Eine Digitale Quellensammlung*, <https://id.salamanca.school/texts/W0013>, "Relectio ... quam habuit ... anno a dominica incarnatione millesimo quingentesimo trigesimo nono..." 289, "Ad hoc enim ut actus sit bonus, oportet si aliàs non est certum, ut fiat secundum diffinitionem & determinationem sapientis. Haec enim est una conditio boni actus..." 288.

178 C. R. Boxer, *The Portuguese Seaborne Empire, 1415–1825* (Lisbon: Carcanet, 1991 [1969]), 273. On the *Mesa de Consciência e Ordens*, see Carmo Dias Farinha and Azevedo Jara, *Mesa da Consciência*.

179 See A. González Polvillo, *El gobierno de los otros. Confesión y control de la conciencia en la España Moderna* (Seville: Universidad de Sevilla, 2010); O'Banion, *Sacrament of Penance and Religious Life*.

180 Francisco de Vitoria, "Disensiones del reverendo padre maestro fray Francisco de Vitoria sobre ciertos tratos de mercaderes," in Z. Huarte and M. Idoia (eds.), *Francisco de Vitoria. Contratos y usura* (Colección de Pensamiento Medieval y Renacentista) (Pamplona: Ediciones Universidad de Navarra, 2006), 302.

many practical legal problems. The fundamental reflections on the *ius gentium*, on the status of indigenous peoples, or on the legitimacy or illegitimacy of slavery are found in texts written by moral theologians because they felt a responsibility to judge these issues.¹⁸¹ Since precise knowledge of the local circumstances was crucial to adequately address such matters, ready-made answers were simply insufficient, especially in Latin America, where many situations were new and at least perceived to be different. Offering advice without knowledge of local circumstances was considered extremely dangerous. Written at the request of the merchants in Seville, and based on his experience in Mexico, the Dominican Tomás de Mercado emphasized this point in his 1569 manual on contract law: “In this little book, I have thought it necessary to write on the theory of businesses along the way they are practiced, because this is something that the common people know and that the very learned men ignore, or, at least, do not fully understand.”¹⁸²

The results of moral theologians’ reflections on these questions of everyday life were disseminated in a variety of ways: through individual advice, artistic representations, sermons as well as manuals for confessors and for confession, catechisms, and other texts of a pragmatic nature.¹⁸³ Unlike legal books, confessional manuals and catechisms were frequently translated into indigenous languages. Both pictograms and printed translations of texts were of major importance for evangelization and thus for the teaching and implementation of knowledge of normativity.¹⁸⁴ Indigenous believers and Afro-Latin Americans who participated in confraternities helped disseminate this knowledge of normativity in their communities. In this way, too, knowledge of normativity from the religious sphere was translated into the diverse and multiple situations of everyday life and became localized.

181 See on *ius gentium* Koskenniemi, *Uttermost Parts of the Earth*, 117–211; on slavery the overview in J. M. García Añoveros, *El pensamiento y los argumentos sobre la esclavitud en Europa en el siglo XVI y su aplicación a los indios americanos y a los negros africanus* (Madrid: CSIC, 2000), vol. VI.

182 J. L. Egío, “Travelling Scholastics: The Emergence of an Empirical Normative Authority in Early Modern Spanish America,” in C. Zwierlein (ed.), *The Power of the Dispersed: Early Modern Global Travelers Beyond Integration* (Intersections: Interdisciplinary Studies in Early Modern Culture 77) (Leiden and Boston: Brill Nijhoff, 2022), 169.

183 D. Rex Galindo, *To Sin No More: Franciscans and Conversion in the Hispanic World, 1683–1830* (Stanford: Stanford University Press, 2017).

184 Pharo, “Transfer of Moral Knowledge,” 53–94; Hill Boone, Burkhart and Tavárez, *Painted Words*; G. C. Machado Cabral, D. X. de Farias, and S. K. Limão Papa (eds.), *Fontes do Direito na América Portuguesa. Estudos sobre o fenômeno jurídico no período colonial (séculos XVI–XVIII)* (Porto Alegre: Editora Fi, 2021).

*Translating and Localizing Religious Knowledge
of Normativity*

The localization of knowledge of normativity from the religious sphere via cultural translation (with the concrete situation in mind) occurred each time a normative statement was produced (see Section 1.3). This production of a normative statement could take place in the ecclesiastical court, in the confessional, in writing a legal opinion, or in advising merchants, soldiers, or kings.¹⁸⁵

A prominent example for how this process of continuous cultural translation occurred is the knowledge of normativity that had accumulated over the centuries around the term *miserabilis persona*. In Latin America, this knowledge was used to create normative options to deal with specific problems related to the integration of indigenous peoples into Christianity.¹⁸⁶ As shown more extensively in Section 1.3, the term had been employed by jurists and canonists since the Middle Ages to designate a person who was, according to Christian principles, in a situation worthy of commiseration, and thus deserved privileged treatment. The broad field of normative options that emerged over the centuries around this notion was used in colonial Latin America in quite flexible ways. It also served, for example, to claim ecclesiastical jurisdiction over indigenous peoples. When Bartolomé de las Casas took office as bishop of Chiapas, he and the bishops from Guatemala and Nicaragua jointly claimed in a letter to the *Audiencia* in 1545 that the indigenous population as a whole should be placed under ecclesiastical – that is, their – exclusive jurisdiction. Though well-founded in medieval canon law, the bishops' argument was unsuccessful. However, what they were proposing was anything but far-fetched. Ten years later, the prominent Castilian jurist Gregorio López – who was involved in the deliberations on the “new laws” (*Leyes Nuevas*) and was familiar with the peculiarities of the New World as a member of the Council of the Indies – also dealt with

185 On localization, see B. Clavero, “Gracia y derecho entre localización, recepción y globalización (lectura coral de Las Vísperas Constitucionales de António Hespanha),” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 41 (2012), 675; A. Agüero, “Local Law and 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* (Global Perspectives on Legal History 6) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 101–30.

186 On the following, see T. Duve, *Sonderrecht in der Frühen Neuzeit. Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt* (Frankfurt: Vittorio Klostermann, 2008).

the problem of ecclesiastical jurisdiction over *miserabiles personae* in his gloss on the *Siete Partidas*. Though he concluded that no realistic case under the current circumstances would justify the application of such a doctrine, one exception seemed possible to him. In rare circumstances, he wrote, one might accept a subsidiary jurisdictional power of the bishop in instances of negligence on the part of secular judges regarding cases of *miserabiles personae* in areas where it was not easy to access royal justice (*defectus iustitiae*). This would be the case, he added, for bishops of provinces of “particularly remote areas,” as in the case of the New World, “where there are Indians recently converted to the faith, who are also called *miserabiles personae*.”¹⁸⁷ In short, a doctrine developed in medieval canon law was used to find a solution to a problem in Latin America, where vast distances generated challenging practical problems when it came to large parts of the population. The knowledge accumulated over centuries was selected, adapted, translated into new circumstances.

Though reference to centuries-old traditions and extensive quotations of medieval canon law were not uncommon in the Indies, this was obviously a phenomenon of erudite elite practice. Yet the mechanism of translating a normative option taken from the tradition was by no means restricted to the elite. When cases of superstition (*superstitio*) were examined as part of the Inquisition proceedings at Cartagena de Indias, for example, the officials naturally referred to an offense that had been dealt with in a plethora of texts over centuries. However, there were some difficult questions to be decided in the concrete cases, and given the distances involved, it was not always easy to call in an expert to judge the case. For example, it was important to determine whether a given superstitious practice should be sanctioned as a major cause or only as a very slight deviation (*causas leves y levisimas*). A number of criteria could be taken into account, such as the frequency with which the superstitious practice was carried out, the persons involved, and so on. These and many other questions had to be resolved by relying on the knowledge available in handbooks for the Inquisition and similar resources, but these sources nevertheless left many open questions. In order to resolve this situation, leaflets (*cartillas*) and small treatises (*obritas*) summarized the answers developed in the practice of the tribunal. Doing so meant producing a specific (or even new) meaning of the offense, as well as introducing

187 Gregorio López, *Las Siete Partidas del Sabio Rey don Alonso el nono, nuevamente Glosadas por el Licenciado Gregorio Lopez del Consejo Real de Indias de su Magestad ...* (Salamanca, 1555), ad 1.6.48, glos. g, ad v. Rey.

new distinctions and categories. Repetition of this practice could lead to entrenched meanings and thus to different legal situations in different places, not to mention that this production of norms in specific cases simultaneously defined the content and limits of popular religiosity.¹⁸⁸ Here again, what occurred was a translation of knowledge of normativity from tradition or previous practical experience to solve new concrete cases under specific conditions. This translation produced new knowledge that could then be used to resolve the future cases, eventually leading to a local or regional practice distinct from other places'. However, if this knowledge was stored in media, for example, leaflets or small handbooks, it could circulate and have an impact on other areas, too.

Especially when it came to the indigenous population, the need to establish special regulations and new meanings was enormous. A central problem was marriage law. The privileges granted by the pope recognizing the validity of certain marriages prior to baptism solved many, though not all, of the important problems. How should one deal with cultural practices that were difficult to interpret, for example, with celebrations and rituals preceding the wedding or work performed by the future son-in-law in the household of the future parents-in-law? Did such celebrations already constitute a promise of marriage and the work a dower?¹⁸⁹ Here again, the indigenous practices had to be translated, now into the Catholic mindset.

Intense discussion also arose about how long members of indigenous peoples should be regarded “neophytes,” that is, as “still young plants” in the faith. Certain privileges, for example, with regard to religious duties, and exclusions, for example, the exclusion from the sacrament of priestly ordination, were attached to this category. Once this issue was concluded, for example, because enough time had passed and the category “neophytes” was no longer applicable, the main point of contention focused on whether the so-called *mestizos*, descendants of mixed marriages, should have access to the

188 P. Mejía, “‘Just Rules’ for a ‘Religiosity of Simple People’: Devotional Literature and Inquisitory Trials in Cartagena de Indias (17th–18th Centuries),” in T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Leiden and Boston: Brill Nijhoff, 2020), 328–48.

189 A. de Zaballa Beascochea, “Matrimonio (DCH),” *Max Planck Institute for European Legal History Research Paper Series No. 2018-15* (Frankfurt am Main: Afro-Latin Americans, 2018), <http://dx.doi.org/10.2139/ssrn.3299914> (last accessed Jan. 13, 2022); on marriage of indigenous people and African-Americans C. de Castelneau-L'Étoile, *Un catholicisme colonial. Le mariage des Indiens et des esclaves au Brésil, XVI^e–XVIII^e siècle* (Paris: Presses Universitaires de France, 2019).

priesthood and could enter religious orders.¹⁹⁰ Though these disputes were partly motivated by the social and economic significance of holding these offices, the results shaped the interpretation of canon law, for example, with regard to the category *neophytus*. According to the traditional interpretation, certain requirements had to be met to be admitted to the sacrament of ordination, but in many cases a dispensation was possible. In the end, if the personal conditions were met and the necessary qualification proven, any baptized male was eligible to become a priest. In Latin America, however, the situation was far from clear, not least due to the different strategies employed by the Church and the Crown. While Pope Gregory XIII had dispensed the so-called *mestizos* from the ordination prohibition of illegitimate descent in 1576, enabling them to become priests, the Spanish Crown issued a general prohibition of ordination against them in 1578. Echoing the sentiments of the Crown, and following the Jesuit José de Acosta's advice in his authoritative work *De procuranda indorum salute*, the Provincial Council of the Jesuits in Lima also decided in 1582 not to admit *mestizos* to the order.

Before the Third Provincial Council of Lima in 1582/83, however, a group of *mestizos* conducted a sort of trial (*proceso*) to collect evidence for their claim to be admitted to ordination. They successfully obtained the Council's permission to question witnesses and obtain detailed opinions to make the king revoke the previous disposition banning them. Their collective action, supported by confraternities of *mestizos* in various cities of the Viceroyalty of Peru, was ultimately successful. After at least two envoys presented their arguments and handed over the material to the king, the ban was lifted in 1588. The royal decree stating that *mestizos* were allowed to enter the priesthood was even included in the *Recopilación de Indias* a century later. In this case, collective action by *mestizos* before the council in Lima eventually led to the repeal of a royal norm contradicting the principles of universal canon law ten years after its enactment, and the publication in the *Recopilación* meant that this law could be invoked beyond the Viceroyalty of Peru. Not only did local action on the part of *mestizos* before the church council in Peru result in the amendment of royal legislation, it also created arguments applicable to other cases, that is, about the children of members of indigenous peoples

190 A. J. Machado de Oliveira, "Dispensa da cor e clero nativo: poder eclesiástico e sociedade católica na América Portuguesa," in A. J. Machado de Oliveira and W. de Souza Martins (eds.), *Dimensões do catolicismo no Império português (séculos XVI–XIX)* (Rio de Janeiro: Garamond, 2014), 199–229. For a broad overview, see M. C. Giannini, "Il problema dell'esclusione dei non bianchi dal sacerdozio e dagli ordini religiosi nei cattolicesimi dell'età moderna (XVI–XVII secolo)," *CrSt* 42(3) (2021), 751–92.

with people of African descent, or of so-called *mestizos* with so-called *mulatos*, both in Latin America and beyond.¹⁹¹ Local action thus transformed the laws of the empire and reinforced and localized the universal canon law.

The case also illustrates the deep entanglements between the Church, secular institutions, and their respective laws. Church and secular institutions were part of the same political empires: They shared the idea of a *Respublica Christiana*, operated under the conditions of a “jurisdictional culture,” and cooperated in many ways. Much more so than in the case of knowledge of normativity from the secular sphere, however, knowledge of normativity from the religious sphere must be understood in terms of the tension between the claim to universality, on the one hand, and the necessity of localization, on the other. The global outreach of the Catholic Church, together with the need to localize its precepts, thus turns out to be a showcase for the process of “glocalization.”

Glocalizations

Notwithstanding the many instruments for accommodation and localization, the challenge involved in translating the knowledge of normativity stemming mainly from canon law and moral theology into seemingly new situations was enormous. The numerous overlapping jurisdictions inside the Church as well as between it and the state added further complexity, forcing actors to continuously negotiate boundaries. The methods used to cope with this need were firmly rooted in European juridical culture and scholarly practices, and a multiplicity of consolidated local practices of juridical conviviality emerged. Knowledge of normativity stemming from the religious sphere was stored in different media and activated in different forums. It played an essential role in the continuous construction of society and its law, going far beyond the realm of Church institutions, and was deeply entangled with secular knowledge of normativity.

A comparison of the Spanish and Portuguese spheres indicates that the institutional variations, different temporalities, and individual strategies of settlement in Latin America (as well as in the Philippines and the Caribbean) did not result in two completely dissimilar historical paths. As soon as the role of Brazil within the Portuguese empire changed over the course of the seventeenth century, both the institutional setting and state actions with regard to religion in Portuguese and Spanish America start to converge. As a result of the personal union between the Spanish and Portuguese Crowns,

¹⁹¹ Castañeda Delgado, *El mestizaje en Indias*.

the similarity of their reform efforts during the Pombaline and Bourbon eras, the strong presence of the missionary orders and their moral theologies, and the significant role of the Curia after the Council of Trent, knowledge of normativity from the religious sphere operated under increasingly similar conditions in both colonial empires. At the same time, the knowledge of normativity was translated under local conditions in numerous places throughout the world, leading to what has been called an “early modern composite Catholicism” and the “making of Roman Catholicism as a world religion.”¹⁹²

Despite secularization, the Catholic Church maintained its influence in many parts of Latin America well into the twentieth century. In some places, this influence continues to this day. The growing political influence of evangelical movements in some parts of Latin America within the past few decades, as well as heated debates about topics like the criminalization of abortion, show the enduring presence and legal significance of religion and its normativity for Latin American law.

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3.3 The Domestic Sphere^{*}

ROMINA ZAMORA

The historical regime of normativity that took shape in colonial Latin America consisted of several orders which developed in a complementary manner. While each of those normative spheres applied to people’s everyday lives to regulate a wide range of realities – including interactions between persons of different social classes, possession and ownership, effective governance over a specific territory, and the implementation of shared principles of justice and punishment – the domestic normative sphere remained the most immediate and often the most relevant in people’s lives.¹⁹³

¹⁹² See Windler, “Early Modern Composite Catholicism”; S. Ditchfield, “‘Provincializing Europe’: The Circulation of the Sacred and Reciprocity in the Making of Roman Catholicism as a World Religion,” in K. von Greyerz and A. Schubert (eds.), *Reformation und Reformationen. Kontinuitäten, Identitäten, Narrative/Reformation and Reformations. Continuities, Identities and Narratives* (Schriften des Vereins für Reformationsgeschichte 221) (Gütersloh: Gütersloher Verlagshaus, 2022), 177–206.

^{*} Translated from Spanish by Jean-Paul Calderón.

¹⁹³ C. Garriga, “¿Cómo escribir una historia ‘descolonizada’ del derecho en América Latina?,” in J. Vallejo Fernández de la Reguera and S. Martín Martín (eds.), *En Antidora. Homenaje a Bartolomé Clavero* (Madrid: Thomson Reuters Aranzadi,

Following the invasion of American lands, Spanish and Portuguese colonizers reorganized territorial and political structures.¹⁹⁴ Cities functioned as scattered islands with their own governance structures within a territory that was only partially explored and controlled.¹⁹⁵ That being said, ruling over such an extensive territory also required assistance from other normative transmission channels, such as the *pueblos de indios* (indigenous towns/communities established by the Spanish Crown) and the European *casas grandes* (literally: big houses or large households).¹⁹⁶

In this section, I will analyze the *casa grande's* role, and most importantly, the person in charge thereof – the *pater familias* – in shaping the colonial normative landscape. I will demonstrate that the *casa grande* was a key institution that played a highly complex, recognized, and predominant role in governing a territory's economic production, social interactions, and political and legal organization.¹⁹⁷ I will focus on the householder, *hacendado*, or *fazendeiro*

2019), 325–76; C. Ramos Nuñez, *Historia del derecho peruano* (Lima: Palestra, 2019); D. Barriera, *Historia y justicia. Cultura, política y sociedad en el Río de la Plata (Siglos XVI–XIX)* (Buenos Aires: Prometeo, 2019); A. M. Hespanha, “Fazer um império com palavras,” in Â. Barreto Xavier and C. Nogueira da Silva (eds.), *O Governo dos Outros. Poder e Diferença no Império Português* (Lisbon: ICS, 2016), 67–100; B. Clavero, “¿Es que no hubo genocidio en las Américas?,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 47 (2018), 647–87.

194 “L’histoire de la formation territoriale de la monarchie espagnole a conféré à la république urbaine une importance politique considérable.” A. Lempérière, *Entre Dieu et le Roi, la République. Mexico, XVIIe–XIXe siècle* (Paris: Les Belles Lettres, 2004), 6; A. Pereira Sousa, *Poder político local e vida cotidiana: a Câmara Municipal da cidade de Salvador no séc. XVIII* (Bahía: Universidad Estatal del Sudoeste de Bahía, 2013); P. Sanz Camañes, *Las ciudades en la América Hispanha. Siglos XV al XVIII* (Claves históricas) (Madrid: Sílex, 2004); R. Morse, “El desarrollo urbano de la Hispanoamérica colonial,” in L. Bethell (ed.), *Historia de América Latina* (Barcelona: Ed. Crítica, 1990), vol. III, 15–48; J. Hardoy and R. Schaedel (eds.), *Las ciudades de América Latina y sus áreas de influencia a través de la historia* (Buenos Aires: Siap, 1975).

195 D. Barriera, “Archipiélagos de gobierno: distancias y discontinuidades territoriales como problemas para el análisis histórico de los territorios americanos de la monarquía española,” keynote speech, VI Congreso Internacional de Historia de la América Hispánica (Siglos XVI–XIX), Coahuila (3 Nov. 2021).

196 J. Erbig, *Entre caciques y cartógrafos. La construcción de un límite interimperial en la Sudamérica del siglo XVIII* (Buenos Aires: Prometeo, 2022); C. Mayo, *Estancia y sociedad en la pampa (1740–1820)* (Buenos Aires: Biblos, 1995); E. A. Davis, *Louisiana: A Narrative History* (Baton Rouge: Claitor’s Publishing, 1971); E. Florescano, “Formación y estructura de la hacienda en Nueva España,” in L. Bethell (ed.), *Historia de América Latina* (Barcelona: Ed. Crítica, 1990), vol. III, 92–122.

197 There is a wealth of research on the *casa grande* and plantations. Researchers from North America, Mesoamerica, the Caribbean, and all over South America have covered the topic and analyzed it through different perspectives. It is, among others, identified as a space of social reproduction and economic production. Research has also focused on the *casa grande's* linkages with slavery and the work of servants; some authors have looked into the matter from a possession and property point of view, and others have inquired into its archaeological and architectural dimensions and

(*senhor da terra*) who concurrently played the roles of father, neighbor, and master, and held a central position in people's everyday lives, in a context where at least 80 percent of the populace still lived in the countryside.¹⁹⁸ This focus will provide a clearer understanding of those domestic spaces that contributed to the transmission, creation, and recreation of norms while also highlighting that a wealth of knowledge of normativity was produced, shared, and applied by a myriad of actors with different backgrounds, social positions, and motivations.¹⁹⁹

also on its environmental impact. See: C. Shammass, "Anglo-American Household Government in Comparative Perspective," *The William and Mary Quarterly* 52(1) (1995), 104–44; E. Adams Davis, R. A. Suarez, and J. Gray Taylor, *Louisiana: The Pelican State* (Louisiana: Louisiana State University Press, 1985); P. E. Hoffman, *Luisiana* (Madrid: Mapfre, 1992); B. Wyatt-Brown, "The Plantation Household Revisited," *The Mississippi Quarterly* 65(4) (2012), 591–612; A. J. Bauer, "Millers and Grinders: Technology and Household Economy in Meso-America," *Agricultural History* 64(1) (1990), 1–17; M. D. Groover, "Creolization and the Archaeology of Multiethnic Households in the American South," *Historical Archaeology* 34(3) (2000), 99–106; J. Handler and D. Wallman, "Production Activities in the Household Economies of Plantation Slaves: Barbados and Martinique, Mid-1600s to Mid-1800s," *International Journal of Historic Archaeology* 18 (2014), 441–66; J. Gelman, *Campesinos y estancieros. Una región del Río de la Plata a fines de la época colonial* (Buenos Aires: Los libros del Riel, 1998); J. C. Garavaglia, *Pastores y labradores de Buenos Aires. Una historia agraria de la campaña bonaerense, 1700–1830* (Buenos Aires: Instituto de Estudios Histórico Sociales, Ediciones La Flor, Universidad Pablo de Olavide, 1999); L. Flores García, *La casa y el territorio* (Zacatecas: Texere, 2013). – see: F. Chevalier, *La formación de los latifundios en México. Hacienda y sociedad en los siglos XVI, XVII y XVIII*, 3rd rev. enl. ed. (Mexico City: Fondo de Cultura Económica, 2013); E. Van Young, *La ciudad y el campo en el México del siglo XVIII. La economía rural de la región de Guadalajara, 1675–1820* (Mexico City: Fondo de Cultura Económica, 1989); E. A. Kuznesof, *Household Economy and Urban Development. São Paulo, 1765 to 1836* (New York: Routledge, 2019); J. A. Guevara Gil, *Propiedad agraria y derecho colonial. Los documentos de la hacienda Santotis. Cuzco (1543–1822)* (Lima: PUCP, 1993); T. Halperín Donghi, *La formación de la clase terrateniente bonaerense* (Buenos Aires: Prometeo, 2007); D. Brading, *Miñeros y comerciantes en el México Borbónico* (Mexico City: Fondo de Cultura Económica, 1979); H. Prem, *Milpa y hacienda. Tenencia de la tierra indígena y española en la cuenca del Alto Atoyac, Puebla, México (1520–1650)* (Mexico City: Fondo de Cultura Económica, 1988); N. Sibill, *Ayllus y haciendas. Dos estudios de caso sobre la agricultura colonial en los Andes* (La Paz: HISBOL, 1989); H. S. Klein, *Haciendas and "Ayllus." Rural Society in the Bolivian Andes in the Eighteenth and Nineteenth Centuries* (Stanford: Stanford University Press, 1993); M. Dubber, "The Power to Govern Men and Things: Patriarchal Origins of the Police Power in American Law," *Buffalo Law Review* 52(4) (2004), 1277–345; A. M. Hespanha, *Filhos da Terra. Identidades Mestiças nos Confins da Expansão Portuguesa* (Lisbon: Tinta da China, 2019); V. Tau Anzoátegui, *Nuevos horizontes en el estudio histórico del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1997); T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Global Perspectives on Legal History 3) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015).

198 M. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

199 Hespanha, *Filhos da Terra*; Tau Anzoátegui, *Nuevos horizontes*; Duve and Pihlajamäki (eds.), *New Horizons*.

I will start by offering a descriptive account of the challenges experienced by colonizers in their attempts to establish and recreate a European normative model within the complexities of the American landscape. I will then comment on that model's ability to organize society, particularly relating to the establishment of social status within a multiethnic and diverse population. This is followed by a discussion of the linkages between the householder's domestic governance capacity and the recognition of his role in local governance. The section ends with some general and specific questions – admittedly without providing many answers – on the extent of the *casa grande's* normative reach in the colonial Latin American legal landscape. To what extent and how did the *pater familias'* actions and decisions in the domestic sphere become broadly applicable rules?²⁰⁰ This leads me to wonder how norms were developed based on issues arising in the domestic sphere, including obedience to the father, social status within multiethnic populations, work, ownership of land and authority over those living thereon, slavery, or domestic service. Given that theoretical knowledge and practical solutions to everyday problems (emerging under specific, but also changing and contingent circumstances) are both necessary components of casuistic systems, it is worth asking to what extent they had an impact on other norm-production spheres.²⁰¹

*The Casa Grande in Latin America. Creation, Recreation,
and the Originality of a Model*

As a social institution, in Latin America, the *casa grande* was instrumental in ensuring the occupation and control of the territory, just as it was for British America. This was not only true for the colonial period but also – and with particular significance – when colonies became independent. It was a basic unit of social reproduction, and most importantly, it was the primary traditional corporate governance structure and played an extraordinarily powerful role in regulating different aspects of everyday life such as micropolitics, and the internalization of discipline and faith.²⁰² A closer look at the *casa grande* shows

200 Cesare Beccaria argued that the privileges of the nobles, that is, of the particular interests of the leading families, form a large part of the laws of nations. Cesare Beccaria, *De los delitos y las penas*, trans. and annot. F. Tomás y Valiente (Buenos Aires: Hyspa, 2005 [1764]), 90.

201 T. Duve, "What Is Global Legal History?," *Comparative Legal History* 8(2) (2020), 73–115.

202 Otto Brunner pioneered historiographic research on the matter with his study on "das ganze Haus": O. Brunner, "La 'casa grande' y la 'Oeconomía' de la vieja Europa," in O. Brunner, *Nuevos caminos de la historia social y constitucional*, trans. A. F. de Rodríguez (Buenos Aires: Alfa, 1976 [1948]), 87–123; G. Freyre, *Casa-Grande y Senzala* (Madrid: Marcial Pons, 2010 [1933]).

how it contributed to regulating domestic relationships, sexuality, health care, religious education, and the transmission of values within the domestic community. A broader view shows a political system where the legitimacy of a person's functions in the public sphere rested on domestic authority. The function and authority of the *pater familias* was the central pillar of different forms of power, ranging from the parental relationships to the most feudal and asymmetric ones. The main role in the *casa grande* was undoubtedly played by the father: He was the cornerstone of internal dynamics, discipline, property-related rules, and political relationships.²⁰³

Lawyers and jurists focusing on Spanish America, such as Juan de Matienzo, Miguel de Agía, or Juan Solórzano Pereira, argued that governing the *casa* was equivalent to ruling over the republic. These jurists lived in Latin America and had firsthand knowledge of the issues that arose there. They contended that some had to command and others to obey to ensure order and harmony within the mystical body of the republic, for the sake of its preservation and perpetuity. Similar to the human body, composed of parts with different complementary properties and functions, the republic's body needed different parts to fulfill a variety of roles. This was held to be such an absolute truth that Agía suggested that "it would not be difficult to convince those who know about governance of this truth, and of the republic's need for different classes of people."²⁰⁴

Large areas of territory were under the direct governance of a *casa grande*, which included authority over large populations that extended far beyond the *casa's* biological family. The *casa* thus became a central locus of governance.²⁰⁵ The main figure was the father, or both the patriarch and

203 P. Laslett, "La famiglia e l'aggregato domestico come grupo di lavoro e grupo di parenti: aree dell' Europa tradizionale a confront," in R. Wall, J. Robin, and P. Laslett (eds.), *Family Forms in Historic Europe* (Cambridge: Cambridge University Press, 1983), 253–304; B. Clavero, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas* (Studies in Comparative Legal History) (Berkeley: Robbins Collection, 2005).

204 Miguel de Agía, "Tratado que contiene tres pareceres graves en Derecho. Primer parecer," in Miguel de Agía, *Servidumbres personales de indios*, F. J. de Ayala (ed.) (Seville: Escuela de Estudios Hispanoamericanos, 1946), 43; A. Flores Galindo, *La ciudad sumergida. Aristocracia y plebe en Lima, 1760–1830* (Lima: Editorial Horizonte, 1986).

205 D. Frigo, *Il padre di famiglia. Governo della casa e governo civile nella tradizione dell'economica tra cinque e seicento* (Rome: Bulzoni, 1985); T. Duve, "Der blinde Fleck der 'Oeconomia'? Wirtschaft und Soziales in der frühen Neuzeit," in H. Mohnhaupt and J.-F. Kervégan (eds.), *Wirtschaft und Wirtschaftstheorie in Rechtsgeschichte und Philosophie* (Frankfurt: Vittorio Klostermann, 2004); A. Seelaender, "A longa sombra da casa. Poder doméstico, conceitos tradicionais e imaginário jurídico na transição brasileira do antigo regime à modernidade," *Instituto Histórico e Geográfico Brasileiro* 473 (2017), 327–418; R. Zamora, *Casa poblada y buen gobierno. Oeconomia católica y servicio personal en S. M. Tucumán, siglo XVIII* (Buenos Aires: Prometeo, 2017).

matriarch, since the *casa* could fall under the control of either the father alone or the father and mother together.²⁰⁶ Because marriage was the bedrock of the *casa grande*, women were not merely relegated to a lesser role. The mother played an undeniably relevant role, which was reinforced by the Latin American culture – but also Iberian, to a certain extent – of matrilocality.

The house itself did not only accommodate the married couple and its children, but also all their next of kin and other people close to them (i.e., illegitimate children, members of the extended family, and guests) “[who were] under their protection and were familiar with them, and all those who supported and remained [in] their *casas* ... providing assistance, services or care for their family or domestic matters.”²⁰⁷ The servants were also included in the household, under the generic designation of *criados*.²⁰⁸ In addition, temporary laborers, enslaved persons, and *agregados* (see Section 3.1) also lived on the *casa grande*’s extensive lands. The father – as well as the mother – exercised their authority over these individuals by setting their expectations, including moral and obedience standards but also knowledges of normativity relating to notions of right and wrong, on social status, work, wealth production, and on land possession and ownership. In the *casa grande*, the mother was in charge of female servants, child-rearing, health care, food preparation, representing the family’s moral character in public, but also of relationships with other women of the principal families in order to establish influential connections in the political sphere.²⁰⁹ Many *haciendas* also had *obrajes* (textile and other workshops) where women and men worked under harsh conditions, including – in some places and times – with shackles on their feet to prevent them from escaping.²¹⁰ In addition to these people, the

206 R. Zamora, “Oeconomía,” in J. Vallejo Fernández de la Reguera and C. Garriga (eds.), *Manual de Historia del Derecho español* (Madrid: Tirant lo Blanch, in press).

207 *Recopilación de Leyes de Indias [Compilation of the Laws of the Indies]* (1680), vol. I, lib. 2, tit. 2, law XXVIII: “Que por criados, allegados y familiares sean tenidos todos los que esta ley declara.”

208 *Recopilación [Compilation]*, vol. I, lib. 2, tit. 2, law XXVIII: “Que por criados sean tenidos todos los que llevaren salario o acostamiento.”

209 S. Stern, *La historia secreta del género. Mujeres, hombres y poder en las postrimerías del período colonial* (Mexico City: Fondo de Cultura Económica, 1999); A. Becker, “Gender in the History of Early Modern Political Thought,” *The Historical Journal* 60(4) (2017), 843–63.

210 E. de la Torre Villar, *Los pareceres de don Juan de Padilla y Diego de León Pinelo acerca de la enseñanza y buen tratamiento de los indios* (suplemento al Boletín del Instituto de Investigaciones Bibliográficas 6) (Mexico City: UNAM, 1979); K. Graubart, *With Our Labor and Sweat: Indigenous Women and the Formation of Colonial Society in Peru, 1560–1700* (Stanford: Stanford University Press, 2007); A. Carabarin Gracia, *El trabajo y los trabajadores del obraje en la ciudad de Puebla. 1700–1710* (Mexico City: Centro de Investigaciones Históricas y Sociales, 1984).

Latin American *casa grande* was in need of an indigenous labor force, which required specific forms of incorporation.

The Encomienda: A Form of Casa Grande?

The *encomienda* was the first form of *casa grande* to emerge in Latin America.²¹¹ It was based on a royal grant “entrusting” a specific number of the local indigenous population to a Spanish *vecino* (a person of high status and good reputation who owned a house in a town or city; this title was usually bestowed on those relocating to populate the colonies on behalf of the Crown). The *vecino* was in charge of evangelizing indigenous peoples and also entitled to use their labor for a set period of time that could last anywhere from two years to two generations.²¹² Gradually, this labor was conflated with the tribute exacted from indigenous peoples by the king. An *encomienda*'s duration varied according to time and location, but following the New Laws of 1542 issued by Carlos I of Spain and the Manila Codicil of 1545, it was more or less settled at a period of two generations before it reverted to the Crown, which could decide whether the indigenous peoples subject to the *encomienda* would be entrusted to a *vecino* again.²¹³

Pursuant to these grants, indigenous communities would retain possession and use of their land, as the person in charge – the *encomendero* – was not allowed to live there and had no rights over a specific territory.²¹⁴ However,

211 Originally called *repartimiento*, this form of service “emerged in the Antilles, almost at the same time as – but independent from – the payment of tribute to the king. Its objective was to fulfill the labor needs of colonial and royal agricultural and mining enterprises. Legally, it was a system of forced labor.” As its legal status solidified, it became an *encomienda*. S. Zavala, *La encomienda indiana* (Madrid: Junta para la ampliación de estudios e investigaciones históricas, 1935), 4.

212 The dispute between the *encomenderos* and the Crown regarding the perpetuity of the *encomiendas* lasted throughout the sixteenth and part of the seventeenth centuries until no more *encomiendas* were granted. J. de la Puente Brunke, *Encomiendas y encomenderos del Perú* (Seville: Diputación de Sevilla, 1992).

213 S. Zavala, *El servicio personal de los indios en Nueva España*, 8 vols. (Mexico City: Colegio de México, 1995); S. Zavala, *El servicio personal de los indios en el Perú*, 3 vols. (Mexico City: Colegio de México, 1978–1980); C. Gibson, *Los aztecas bajo el dominio español 1519–1810* (Mexico City: Siglo XXI, 1996); M. Mörner, “La hacienda Hispanoamericana. Examen de las investigaciones y debates recientes,” in E. Florescano (ed.), *Haciendas, latifundios y plantaciones en América Latina* (Mexico City: Siglo XXI, 1975), 15–48; G. Madrazo, *Hacienda y encomienda en los Andes. La Puna de Jujuy bajo el marquesado de Tojo, siglos XVII–XIX* (Buenos Aires: Fondo Editorial, 1982).

214 T. Herzog, “Colonial Law and ‘Native Customs’. Indigenous Land Rights in Colonial Spanish America,” *The Americas* 9 (2013), 303–21; M. Menegus Bornemann, “Títulos Primordiales de los pueblos de indios,” in M. Menegus Bornemann (ed.), *Dos décadas de investigación en historia económica comparada en América Latina. Homenaje a Carlos Sempat Assadourian* (Mexico City: Colegio de México, UNAM, CIESAS, Instituto Mora, 1999),

Spanish colonizers were permitted to settle on uninhabited indigenous territories or bordering regions. This often resulted in the taking of such lands by the Spanish, especially given that many territories were vacant and unoccupied due to the decline of indigenous populations.²¹⁵ Philip II issued a royal *cédula* in 1591 – known as *de los baldíos* (of the wasteland), which sought to resolve this issue and to curb settlers' abuses against both indigenous communities and the king. The implementation of this decree (including its misuses and improper applications), however, produced varying results.²¹⁶

The *encomendero* exercised “paternal dominion” over the entrusted community.²¹⁷ This meant he not only had a right, but also the duty to protect the *encomendados* and to care for them in the event of illness. The *encomienda* did not establish a *casa grande* per se; rather, the *casa grande* became the subject of manifold discussions and prompted the crafting of many (varied and sometimes even contradictory) norms, which generally revolved around the status of indigenous peoples and the scope of Christian freedom.²¹⁸ For jurists

137–62; D. Bonnett Vélez, “De la conformación de los pueblos de indios al surgimiento de las parroquias de vecinos. El caso del Altiplano cundiboyansense,” *Revista de Estudios Sociales* 1 (2001), 9–19; I. Goicovic and A. Armijo, “Tierras en disputa. El traslado de los pueblos de indios de Melipilla, Chile, siglos XVIII–XIX,” *Historia y Sociedad* 39 (2020), 24–50; J. Farberman, “Las márgenes de los pueblos de indios. Agregados, arrendatarios y soldados en el Tucumán colonial. Siglos XVIII y XIX,” *Nuevo Mundo, Mundos Nuevos* (2009) <https://doi.org/10.4000/nuevomundo.57474> (last accessed Jan. 12, 2022); L. M. Glave, “El arbitrio de tierras de 1622 y el debate sobre las propiedades y los derechos coloniales de los indios,” *Anuario de Estudios Americanos* 71(1) (2014), 79–106; C. Jurado, “Las reducciones toledanas a pueblos de indios: aproximación a un conflicto,” *Cahiers des Amériques latines* (2004), 123–37; G. P. Lopera Mesa, “Creando posesión vía desposesión. Visitas a la tierra y conformación de resguardos indígenas en la Vega de Supía, 1559–1759,” *Fronteras de la Historia* 25(2) (2020), 120–56.

215 J. V. Mumford, *Vertical Empire: The General Resettlement of Indians in the Colonial Andes* (Durham: Duke University Press, 2012); S. A. Wernke, *Negotiated Settlements: Andean Communities and Landscapes under Inka and Spanish Colonialism* (Gainesville: University Press of Florida, 2013); E. Noli, “Pueblos de indios, indios sin pueblos: los calchaquíes en la visita de Luján de Vargas de 1693 a San Miguel de Tucumán,” *Anales Nueva Época* 6 (2005), 330–63.

216 S. Stern, *Los pueblos indígenas del Perú y el desafío de la conquista española. Huamanga hasta 1640* (Madrid: Alianza Editorial, 1982).

217 “Ordenanzas dadas por Gonzalo de Abreu para el buen tratamiento de los indios en las provincias de Tucumán. Santiago del Estero, 10 de abril 1576,” in R. Levillier (ed.), *Correspondencia de la ciudad de Buenos Aires con los reyes de España. Documentos del Archivo de Indias. Cartas del Cabildo; memoriales presentados en la corte por los procuradores, apoderados y enviados de la ciudad* (Buenos Aires: Municipalidad de Buenos Aires, 1915), vol. 2, 291–332.

218 It is in this context that Francisco de Vitoria’s suggestion to use the principle of *ius gentium* emerged. This idea was closely linked to the Christian aspects of the old *ius commune*, which had recognized the freedom of indigenous communities. L. Nuzzo, “Between America and Europe: The Strange Case of the derecho indiano,” in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law* (Global Perspectives on Legal History 3) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 161–91, at 171.

and theologians, it was an indisputable fact that the conversion of indigenous peoples to Catholicism not only spread the faith but also obligated them to serve.²¹⁹ This link between indigenous people and the services they had to render became a legal ground to justify their work in the *casas grandes*.

Nevertheless, the fact that the *encomienda* was not perpetual meant that no genuine feudal ties with indigenous populations could be established under the *encomienda*; these relationships were limited to the – quite imperfect – evangelization of indigenous peoples and their exploitation by the *encomendero*. It is also worth noting that for different reasons, the *encomenderos* became increasingly less desirable to the Crown, which stopped granting *encomiendas* in the Andean and Mesoamerican central regions during the seventeenth century.²²⁰ With the decline of *encomiendas*, the *haciendas* gained prominence as units of production and cultural transmission, as well as spaces that supported the reproduction of order.²²¹

The Casa as Land Management Institution

As a consequence of the significant distances between cities – but also between production and distribution centers and ports, and even more so between colonial cities and the metropole – there were large tracts of land that were only intermittently known and controlled. While one would think that those “interstitial gaps” would be filled by a wide range of government and ecclesiastical agents, the truth is that the only existing authorities in those areas were the Spanish and Portuguese living in the countryside, who either received land grants from the Crown, or had successfully sought the recognition of a right of possession and thus became lords of a *casa* and controlled some land.

It took centuries to clarify how this territorial and social assemblage would be governed. First, an institution and a specific place were required, and these were provided by a family and the *casa*. The Spanish Crown required that those leaving Spain to colonize the Americas had to establish a *casa poblada* (inhabited house) in an urban settlement.²²² While holding a

219 R. Zamora, “Consapevolezza dello spazio e plasticità giuridica. Due fasi nella regolazione delle encomiendas indigene a Tucumán (región andina meridional, XVI e XVII secolo),” *América Crítica* 5(1) (2021), 55–61.

220 In marginal regions such as New Granada and Tucumán, the *encomenderos* managed to maintain their positions at least until the end of the eighteenth century.

221 L. M. Glave and I. Remy, *Estructura agraria y vida rural en una región andina. Ollantaytambo entre los siglos XVI y XIX* (Cusco: Centro de Estudios Regionales Andinos, 1986).

222 *Recopilación [Compilation]*, vol. II, lib. 4, tit. 10, law VI: Que para los oficios se elijan vecinos: “El que tuviere casa poblada, se entienda por vecino.”

casa poblada was necessary to have political and jurisdictional rights, it was not – with very few exceptions – an immediate source of wealth for those who had a *casa*. Until well into the latter part of the eighteenth century, most of the goods and wealth – save for the sale of goods made in Castile or by enslaved persons – was produced in the countryside in mines, *obrajes*, *encomiendas*, or *haciendas*. This is why the Spanish *casa grande* in America can be seen as a discontinuous territorial puzzle comprising three parts: the *casa poblada* in the city, the *hacienda* in the countryside, and the *encomienda* of indigenous peoples.

Most of the early Spanish *vecinos* requested and were granted lands located in areas neighboring the cities in which they lived or near their *encomiendas*. As land was only valuable as long as people would work on it, householders attracted landless indigenous peoples, people of lower lineage (*casta*), and poorer Spaniards to farm land, work in the *obrajes*, and care for cattle. By virtue of orders by Philip II that were later codified in the *Recopilación de Leyes de Indias* of 1680, the Spaniards could take indigenous peoples to farm lands as long as they were not attached to a *casa* or assigned to an *encomienda* (unless they had the *encomendero*'s permission).²²³ Over time, some indigenous people fled, others were taken from their villages to work, free labor was authorized, and racial mixing (*mezizaje*) became widespread. It became increasingly difficult to identify a worker's ethnic status, as well as the reasons why he or she was in the *hacienda*, and the landholders thus progressively became less interested in clarifying those questions.²²⁴

The relocation of indigenous populations to the *encomendero*'s *hacienda* was also a common practice. Other indigenous people escaped from their own communities and found shelter in *haciendas* in exchange of their labor. These indigenous peoples – who were usually christianized and westernized (*ladinizados*) and lived on lands held by Spaniards – were known in the Andean

223 *Recopilación [Compilation]*, vol. IV, lib. 3, tit. 5, law III: Que para labradores y oficiales, se puedan llevar indios voluntarios.

224 A. M. Lorandi, "El servicio personal como agente de desestructuración en el Tucumán colonial," *Revista Andina* 6(1) (1988), 135–73; G. Doucet, "La encomienda de servicio personal en el Tucumán, bajo régimen legal: comentarios a las ordenanzas de Gonzalo de Abreu," in A. Levaggi (ed.), *El Aborigen y el Derecho en el Pasado y el Presente* (Buenos Aires: Universidad del Museo Social Argentino, 1990), 141–244; Q. Aldea Vaquero, *El Indio peruano y la defensa de sus derechos* (Madrid: Consejo Superior de Investigaciones Científicas, 1993); I. Castro Olaneta, "Servicio personal, tributo y conciertos en Córdoba a principios del siglo XVII: La visita del gobernador Luis de Quiñones Osorio y la aplicación de las ordenanzas de Francisco de Alfaro," *Memoria Americana* 18(1) (2010), 101–27.

regions of South America as *yanaconas de españoles*.²²⁵ They were entire families living in relatively stable conditions on the land of the Spanish lord who were in general not paid for their work, but were provided with a plot of land, sometimes under a lease contract, or with no legal protection against evictions. In different places, they were also called *agregados a la tierra*, *arrimados*, or *huasipungos*. These people were part of an indigenous or mixed population undergoing a “peasantization” or *macehualización* process (from the Mexican term *macehual*, i.e., indigenous commoner).²²⁶

The three spheres comprised under the Spanish *casa grande* in Latin America – the *casa poblada* in the city, the *hacienda* in the countryside, and the *encomienda* of indigenous peoples – were not static; they varied significantly through time. Once the *encomiendas* reverted to the Crown, the Spanish *casa* was reduced to two realms: the urban *casa* and the rural *hacienda*, which is a reality that persisted until the early nineteenth century.²²⁷ Only the wealthiest traders of goods produced in Castile or the masters of foreign enslaved persons could subsist on only an urban *casa*. Paradoxically, those traders were not always considered as *vecinos* by local Spanish urban societies, but only as residents with no right to full participation in local political life. The *casas grandes* held by some of the main Spanish families comprised an urban *casa poblada* (which granted political rights) and the countryside *hacienda*, where wealth was produced. This complex arrangement caused serious governance challenges to the Crown, the *audiencias*, *gobernaciones*, and *cabildos*, but these issues were

225 C. Díaz Rementería, “En torno a la institución del yanaconazgo en Charcas,” *Congresos del Instituto de Historia del Derecho Indiano. Actas y publicaciones* (Madrid: Digibis Publicaciones Digitales, D.L., 2000), vol. IV, 305–22; P. Revilla Orías, “Historizando al Yanacona. Decisiones metodológicas, implicancias y desafíos,” in M. F. Fernández Chaves and R. M. Pérez García (eds.), *Tratas atlánticas y esclavitudes en América. Siglos XVI–XIX* (Seville: Universidad de Sevilla, 2021), 229–47.

226 V. Tau Anzoátegui, *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); K. Spalding, *De indio a campesino. Cambios en la estructura social del Perú colonial* (Lima: Instituto de Estudios Peruanos, 1970); C. López de Albornoz, *Los dueños de la tierra, economía, sociedad y poder, Tucumán, 1770–1820* (Tucumán: Universidad Nacional de Tucumán, 2002); G. Doucet, “Génesis de una visita de la tierra. Los orígenes de la visita de las gobernaciones de Tucumán y Paraguay por el licenciado Don Francisco de Alfaro,” *Revista del Instituto de Investigaciones de Historia del Derecho* 14 (1986), 123–215; F. Chevalier, “Servidumbre de la tierra y rasgos señoriales en el Alto Perú prehispánico, apuntes comparativos sobre los yanaconas,” *Revista de Historia de América* 115 (1993), 7–22.

227 G. Tío Vallejo, “El ocaso del Imperio, sociedad y cultura en el centro sur andino,” *Revista de Historia del Derecho* 49 (2015), 259–64; A. Annino, “Imperio, constitución y diversidad en la América Hispana,” *Mundo Nuevo, Nuevos Mundos* (2008) <https://doi.org/10.4000/nuevomundo.33052> (last accessed Jan. 12, 2022).

mainly resolved by those concurrently holding the roles of *pater familias*, master, and lord. Until the early nineteenth century, both peasant and urban societies located in the Portuguese regions of Latin America continued to be structured around families as the householder remained responsible for those living in his *casa*.²²⁸

In the Portuguese *casa grande*, the *fazendeiros* (plantation owners) were not required to have a *casa* in the city in order to be part of the political community.²²⁹ By contrast to the Spanish colonial context, the Portuguese cities were inhabited more by traders and urban lower classes than landholders. The *casa*, as a land management mechanism, operated differently in Portuguese American territory because the *fazenda* was established on a more unified (but not less diverse) territory. The plantation and *hacienda* landholders controlled a certain amount of people of different legal status and ethnic backgrounds. Those workers lived in the *senzalas* (plantations) but were also scattered throughout the countryside. These people used the land under unclear and precarious arrangements as *agregados*.²³⁰

Serving Within and Outside the Casa

The challenges posed by the diverse Spanish American population had to be resolved both in the government and normative spheres. Legal structures were needed to define principles such as the concept of order and different social positions. Population was hierarchically organized around different statuses, which each entailed different sets of rights and duties.²³¹ Being granted the status of Spanish or Portuguese – the apex of the social pyramid – required more than mere Peninsular origins or a specific skin color, but also the ability to be recognized as such. In the early beginnings of the conquest, the *conquistadores* and settlers were recognized as Spanish *hijosdalgos* (lower-level nobles), which is a status that was passed on to their descendants.²³² The

228 B. J. Barickman, "Reading the 1835 Parish Censuses from Bahia: Citizenship, Kinship, Slavery, and Household in Early Nineteenth-Century Brazil," *The Americas* 59(3) (2003), 287–323.

229 A. Comissoli, "Os 'homens bons' e a Câmara de Porto Alegre (1767–1808)," unpublished master's thesis, Universidade Federal do Rio de Janeiro (2006).

230 M. Dias Paes, *Esclavos y tierras, entre posesión y títulos. La construcción social del derecho de propiedad en Brasil (siglo XIX)* (Global Perspectives on Legal History 17) (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie, 2021).

231 T. Herzog, "La vecindad: entre condición formal y negociación continua. Reflexiones en torno a las categorías sociales y las redes personales," *Anuario IEHS* 15 (2000), 123–31.

232 *Recopilación [Compilation]*, vol. II, lib. 4, tit. 4, law VI. Que los pobladores principales y sus hijos y descendientes legítimos sean hijosdalgos en las Indias: "... y les concedemos todas las honras y preeminencias que deben gozar todos los hijosdalgos y caballeros de estos Reynos de Castilla, según fueros, leyes y costumbres de España."

hijosdalgos and the *caballeros* (a nobility title based on wealth and military activity) were exempted from paying tribute to the king, which only had to be paid by indigenous peoples.

Peninsular and American Spaniards regarded themselves as the main and most respectable component of Hispanoamerican societies; they were the ones who should generally settle in the cities and ideally have a *casa grande*.²³³ Those Peninsulars who, for different reasons, were not considered *vecinos* or residents of a city were usually not identified as Spaniards and were not considered part of the elite. They were rather associated to their respective homeland (e.g., *Castellanos*, *Navarros*, *Vizcaínos*). In other words, they remained foreigners to the political community. Devoid of any right to participate in local governance and administration of justice, they were part of the multiethnic lower classes living in the cities and the countryside.²³⁴

Indigenous peoples of America were first deemed to be “slaves of war.” That being said, since 1503, indigenous people had to be recognized as free vassals, which had significant consequences on later theological and legal debates, including key issues such as whether indigenous people had souls, and questions relating to how they should be treated. Those questions laid the foundations of a new way of understanding relationships between peoples: the law of nations.²³⁵

In the early days of colonization, *repartimiento*, *encomienda*, and personal service were synonymous; by virtue of the right of conquest, indigenous people under the *repartimiento* and *encomienda* had to work for the conquerors. Joseph de Acosta indicated that personal service “generally covered any advantage that we hope to get from [indigenous people’s] work and services relating to farming, livestock, house building, mining, errands, chores, and other public and domestic works.”²³⁶

The living conditions of indigenous peoples under the *encomienda* were exposed by many who were close to the king as well as by ecclesiastics such as Bartolomé de Las Casas, who was likely one of their most famous advocates.

233 T. Herzog, “The Appropriation of Native Status: Forming and Reforming Insiders and Outsiders in the Spanish Colonial World,” *Rechtsgeschichte – Legal History* 22 (2014), 140–49.

234 Zamora, *Casa Poblada*.

235 D. Brading, “El gran Debate,” in D. Brading, *Orbe indiano. De la monarquía católica a la república criolla, 1492–1667* (Mexico City: Fondo de Cultura Económica, 1993); J. López de Palacios Rubios, *De las islas del Mar Océano. Del dominio de los Reyes de España sobre los indios* (Mexico City: Fondo de Cultura Económica, 1954).

236 Juan Solórzano Pereira, *Política Indiana*, vol. I, lib. 2, cap. II, § 1, 140.

The focus of their concerns eventually shifted toward the living conditions of those serving within and outside the *encomienda*. In 1609, Miguel de Agía took part in discussions with Peru's viceroy on the servitude of indigenous people; the ecclesiastic contended that it was necessary, as indigenous labor was required to preserve the Indies and to ensure the expansion of Christianity. By contrast, Juan de Padilla, a magistrate (*alcalde*) of the criminal chamber of Lima's *Real Audiencia* (a royal body with appellate and first instance judicial functions, among others), raised concerns regarding the abuses carried out toward indigenous people condemned to servitude, and the resulting vulnerability of communities. According to Padilla, as indigenous people were taken from their lands to work in the *encomenderos'* fields, *casas* and *obrajes*, indigenous lands were left vacant and communities would therefore lose their land-related rights.²³⁷ With no land, he argued, indigenous communities would inevitably break up and disappear; to survive, indigenous people would have no other choice than to serve in Spanish *casas*, and the king would thus lose the tribute of indigenous communities.²³⁸

Juan Solórzano Pereira devoted considerable thought to the issue of indigenous people's personal service. In his monumental work *Política Indiana*, he discussed indigenous labor and documented the Crown's efforts to ensure the survival and adequate treatment of indigenous people by establishing restrictions to and punishments for abuses perpetrated by the *encomenderos*, *corregidores de indios* (local administrative and judicial officials who ruled indigenous communities), and missionaries, including the prohibition of all forms of forced labor. The jurist identified those royal *cédulas* in which the king confirmed that indigenous people were only obligated to pay a specific amount as tribute in currency or in kind but were allowed to make use of the remaining part of their time to engage into other endeavors, as free persons. They should only be serving Spaniards of their own volition. This was also confirmed by *visitadores* (officials of the *Real Audiencia* commissioned by the Crown to monitor colonial authorities) in the early seventeenth century and included in the 1680 *Recopilación de Leyes*.²³⁹ It is worth noting that these laws, as well as the *visitadores'* prescriptions, authorized indigenous people to work freely. Indigenous people – as free vassals but under conditions of servitude – had a legal status that put them at a disadvantage. Finding balance was only

237 Torre Villar, *Los pareceres*; Agía, "Tratado"; S. Zavala, "Orígenes coloniales del peonaje en México," *El Trimestre Económico* 10(40) (1944), 711–48.

238 A. M. Lorandi, "El servicio personal como agente de desestructuración en el Tucumán colonial," *Revista Andina* 6(1) (1988), 135–73.

239 Zamora, "Consapevolezza."

possible by establishing service linkages with someone who would be their *pater familias*, lord, and master.

Personal service became more of a social position than a type of work. It was a mode of social integration and an identity for an elusive, malleable, and very broad range of people which included not only indigenous people but also *mestizos*. The complex system of *castas* was the result of countless instances of hybridization of cultures, languages, customs, religions and rites among the European, American, African, and Asian populations that settled in the continent since the sixteenth century.

Enslaved persons had a different status.²⁴⁰ Indigenous warriors who were captured by the colonizers were considered enslaved persons, as were the African people sold into the New World. African people were not utilized as temporary workforce outside of the *casas*, but they were rather considered as “part” of the *casa*. With some exceptions – such as in Minas Gerais toward the late eighteenth century – enslaved persons were not connected to a *casa*. Depending on the region, slavery took place in plantations or referred to urban service relationship.

Enslaved persons who escaped from their masters gathered in *palenques* or *quilombos*. Some took risks and traveled long distances to reach remote *haciendas* where masters sought workers to farm their land and would not send back the fugitives to their previous, far-off, and often unknown masters.²⁴¹ The following generations blended with indigenous people and Spaniards, thus giving rise to a broad spectrum of *castas*, from which many attempted to draw up taxonomies based on degrees of whiteness, indigeneity, and negritude. Some “*casta* paintings” depicted up to sixteen degrees to which blood was considered mixed, whose labels provided progressively animalistic and disturbing analogies as the proportions of indigenous and African blood

240 M. Candiotti, “Nuevos horizontes en la historia de la esclavitud en América Latina,” *Páginas. Revista Digital de la Escuela de Historia* 13(33) (2021), 1–4; M. Morrissey, *Slave Women in the New World: Gender Stratification in the Caribbean* (Lawrence: University Press of Kansas, 1989); A. J. Finley, *An Intimate Economy: Enslaved Women, Work, and America’s Domestic Slave Trade* (Chapel Hill: University of North Carolina Press, 2020); H. S. Burton and F. Todd Smith, “Slavery in the Colonial Louisiana Backcountry: Natchitoches, 1714–1803,” *The Journal of the Louisiana Historical Association* 52(2), 133–88; M. McKinley, *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600–1700* (New York: Cambridge University Press, 2016); J. W. Parkhurst, “The Role of the Black Mammy in the Plantation Household,” *The Journal of Negro History* 23(3) (1938), 349–69.

241 Galindo, *La ciudad*; D. E. Kanter, “Their Hair Was Curly’: Afro-Mexicans in Indian Villages, Central Mexico, 1700–1820,” in T. Miles and S. P. Holland (eds.), *Crossing Waters, Crossing Worlds: The African Diaspora in Indian Country* (Durham: Duke University Press, 2006), 164–80.

increased. Those included terms such as *lobezno* (wolf pup), *pantera* (panther), *caboclo* (copper-colored skin), and *salta-atrás* (a jump backward).

Owing to the fact that they went almost unnoticed by Spanish authorities, the treatment reserved for Asian populations migrating across the Pacific Ocean was different. Only a small portion of this population was enslaved, but a considerable number of free people arrived in Latin America from the Philippines, Malaysia, China, and Japan aboard the Manila galleons, the ships that traveled the only official route between America and the Philippines. Deborah Oropeza has accounted for at least eight thousand “Chinese” people legally arriving through the port of Acapulco in Mexico and staying in New Spain between the sixteenth and eighteenth centuries. The number of Asian immigrants arriving illegally through other means may have been ten times higher.²⁴² Similarly, the same occurred in the port of Callao, in Peru, which was an important hub for the trafficking of goods, merchandise, knowledge, and persons traveling illegally from Asia. Those people moved into *casas* to work as servants, and were registered as such in colonial files.²⁴³ The masters of a significant number of people known as *indios chinos* in seventeenth-century Lima considered them as “Chinese indigenous peoples of service.”²⁴⁴

The *chino* status was particularly confusing for the reason that it was associated to the status of enslaved persons. In her work on indigenous vassals, Tatiana Seijas highlights how the *indio* and *chino* labels were not only given based on place of origin. The Crown decided that those born in the Philippines should be called *indios*, but the masters of enslaved Asian persons advocated to call them *chinos* to ensure that they would not be granted the freedom associated to the *indio* status.²⁴⁵

Be they *mestizos*, *zambos*, *indios chinos*, or *negros libertos*, the entire racially mixed Latin American population fell under the concepts of *pardos*, *castas*, or the general populace. This raised a normative and governance concern not so

242 D. Oropeza, *La migración asiática en el virreinato de la Nueva España: Un proceso de globalización (1565–1700)* (Mexico City: Colegio de México, 2020).

243 M. Bonialian, “Relaciones económicas entre China y América Latina. Una historia de la globalización, siglos XVI–XXI,” *Historia Mexicana* 70(3) (2021), 1231–74; S. Gruzinski, *Las cuatro partes del mundo. Historia de una mundialización* (Mexico City: Fondo de Cultura Económica, 2010).

244 J. J. Vega Loyola, “El padrón y lista de los indios de la China y el Xapon e India de Portugal en Lima de 1613,” *Tipshe Revista de Humanidades* (2015), 197–210; J. J. Vega Loyola, “Asiáticos en Lima de inicios del siglo XVII,” in J. Olveda (ed.), *Relaciones intercoloniales. Nueva España y Filipinas* (Jalisco: El Colegio de Jalisco, 2017), 221–42.

245 T. Seijas, “Native Vassals: Chinos, Indigenous Identity and Legal Protection in Early Modern Spain,” in C. H. Lee (ed.), *Western Visions of the Far East in a Transpacific Age, 1522–1657* (London: Routledge, 2012), 153–64.

much because racial mixedness was an issue per se, but because these mixes did not lead to clear social distinctions. Racially mixed people were poor and free and had no specific social position. In the eighteenth century, as ethnic pedigree became less helpful to organize differences, the *cabildo* (municipal council) authorities indicated that “the poor and free people whose only livelihood is to serve, those part of the ‘serving class’, or those ‘serving’” (the *gente de servicio*) had the duty to find a master who would be accountable for them.²⁴⁶ The “serving class” did not only comprise indigenous people or *mestizos*, but also every poor and free person who could only survive by working for a more powerful person.

This did not, however, mean that the *casa grande* absorbed the shantytowns, the rural hamlets scattered on unowned land, or the *palenques*: These informal spaces did not cease to exist, because they were the *casa grande*’s main source of labor. A person from a lower class with no fixed abode could alternate between those informal spheres and the *casa grande*. On the one hand, the *casa grande* entailed living under a normative sphere, but on the other hand, the urban and rural marginal spaces were regulated by different social and solidarity codes; there, people worshipped different gods, spoke different languages, and different normative codes regulated everyday life. An important challenge for the lower classes was that their life was intrinsically shaped by the fact that they were generally invisible to the law: They were safe as long as they went unnoticed. Both the marginalized and the regulated spheres – which referred to specific places of residence and relationships – coexisted with forts, indigenous villages, *reducciones* (Jesuit missions), convents, and monasteries; they existed along with a set of normative spaces separated by empty rural or tropical spaces, which could extend over hundreds of kilometers.²⁴⁷

Being part of the *casa* meant food, shelter, and clothing for the poor and free people who had no property or other source of income. Being linked to a *casa* also involved some form of protection against the legal system; having a master who was accountable for them meant that the *alcaldes* and *alguaciles* (constables or bailiffs) could not see them as “vagrants and lingerers” (*vagos y*

246 R. Zamora, “La polvareda periférica. Los bandos de buen gobierno en el Derecho indiano provincial y local. El caso de San Miguel de Tucumán en el siglo XVIII,” in V. Tau Anzoátegui and A. Agüero (eds.), *El derecho local en la periferia de la Monarquía hispana. Siglos XVI–XVIII. Río de la Plata, Tucumán y Cuyo* (Buenos Aires: Dunker, 2013), 215–34.

247 Flores Galindo, *La ciudad*; N. Websdale, *Policing the Poor: From Slave Plantation to Public Housing* (Northeastern Series on Gender, Crime, and Law) (Boston: Northeastern University Press, 2001).

malentretrenidos) and thus had no authority to force them to labor in different public works, ports, or in forts.²⁴⁸

The Casa and the Governance of the Republic

The strategy of the Castilian Crown to control New World territory was the same used to conquer Granada: establishing cities pursuant to a royal license (*licencia real*) and granting *encomiendas* to those leading the expedition.²⁴⁹ Establishing a city with a *cabildo* as well as building the main church and immediately populating the city with Spanish families were necessary steps to control a specific place. To be part of the *cabildo*, men were required to own a *casa poblada* in the city.²⁵⁰

Family men legitimized their political role in the republic by resorting to an *oeconomic* rationale, drawing from their role in ensuring good governance over their respective *casas* and in managing relationships among peers. As the *casa* was the backdrop of all these power relationships, the community of *casas* was the *raison d'être* of the local republics: It justified the gathering of all families under a political community, gave shape to the structures of the republics, and informed their need for good governance. The *casa* and the local republic were thus intertwined: The former justified the existence of the latter, whose purpose was the good governance for the benefit of the community of *casas* and the pursuit of common good. As mentioned by Justus Lipsius (1589), “encompassing and restraining so many people under the same body was a heavy burden”;²⁵¹ that burden was no other than that of governing. Therefore, a *pater familias’* domestic – or *oeconomic* – power was a required and necessary condition to access jurisdictional power, and only the most deserving family men could be in charge of the community’s political governance.²⁵²

The Latin American *cabildo*, similarly to the Spanish one, combined both justice and governance functions, as the *alcaldes* were those in charge of

248 F. Alonso, M. Barral, R. Fradkin, and G. Perri, “Los vagos de la campaña bonaerense. La construcción histórica de una figura delictiva (1730–1830),” *Prohistoria* 5 (2001), 171–202; A. Araya Espinoza, *Ociosos, vagabundos y malentretrenidos en Chile colonial* (Santiago: LOM Ediciones, 1999).

249 P. A. Porras Arboleda, *La orden de Santiago en el siglo XV* (Madrid: Dykinson, 1997).

250 *Recopilación [Compilation]*, vol. II, lib. 4, tit. 4, law VI. Que para los oficios se elijan vecinos (Apr. 21, 1554): “el que tuviere casa poblada, aunque no sea encomendero de indios, se entienda ser vecino.”

251 P. Rosanvallon, *El buen gobierno* (Buenos Aires: Manantial, 2015), 175.

252 I. Atienza Hernández, “Pater familias, señor y patrón: *oeconomía*, *clientelismo* y *patronato* en el Antiguo Régimen,” in R. Pastor (ed.), *Relaciones de poder, de producción y parentesco en la Edad Media y Moderna* (Madrid: Consejo Superior de Investigaciones Científicas, 1990), 411–58.

adjudication and the *regidores* (councilors) were overseeing political and *hacienda*-related relations within the city. Governing the city was equated with managing a *casa*: The *regidores* were called to rule over people pertaining to different social classes and had to command obedience with the same authority they exerted over their *casas*; they were also in charge of protecting property to ensure the *people* could enjoy its benefits.

In mid-seventeenth-century New Spain, the *hacendados* of Tepeaca succeeded in getting the king to issue a royal *provisión* of immunity so that the local legal authorities were not allowed to enter within the limits of their *casas grandes*.²⁵³ This provision was endorsed by the *Real Audiencia*, and its application was extended, in practice, to the entire territory of the viceroyalty. Its scope and application in the other Hispanic territories remain to be studied.

While it also established cities with political institutions, the Portuguese Crown prioritized the establishment of *fazendas* and the settling of Portuguese people in the countryside. To be a member of the *câmara* (city council), men were not required to be *vecinos* of the city but had to be considered to be “good men,” Old Christians, with no mixed blood, honest; they were chosen among those “[persons] who care for the public interest and value good morals.”²⁵⁴

Politically organizing Latin America in this manner was useful to the Crown as it provided the king with some – but minimal – control over the local republics. Spaniards had to establish a *casa poblada* in a Spanish city to be part of the political life and to be granted lands by the Crown, while the Portuguese had to prove that they were Old Christians, cared for the public interest, were respected by their community, and had to demonstrate skill in managing the land and people under their control.

In this context, householders were those managing the *cabildos*, whose function was to ensure the common good of the notables of the city, and they also decided who could (and could not) be considered a member of the community.²⁵⁵ Seeing the republic as the self-governance of the city’s polity meant that the *ius commune* had to adjust to *domestic* realities and to the needs of local day-to-day decision-making. This conception of the republic informed how

253 F. Chevalier, *La formación de los latifundios en México. Haciendas y sociedad en los siglos XVI, XVII y XVIII*, rev. and enl. ed. (Mexico City: Fondo de Cultura Económica, 2013), 29.

254 Alvará [decree], 12 Nov. 1611, *Em que se declarou a forma de fazer as eleições de Juizes e Procuradores*; C. R. Boxer, *The Portuguese Seaborne Empire, 1415–1825* (London: Hutchinson, 1969).

255 Lempérière, *Entre Dieu et le Roi*; Jean Bodin, *Los seis libros de la República*, ed. and trans. P. Bravo Gala (Madrid: Tecnos, 2006 [1576]).

society was ordered through law and also determined how the laws applicable to corporations – for example, the city, which comprised families – were coordinated with the kingdom’s different laws.

The Pater Familias

The concept of *pater familias* referred less to a biological link than to authority, responsibility, and control and subjection of all those falling under the *casa*. It was therefore an important legal concept. The father’s authority gave shape to a religiously inspired cultural structure, which informed different institutions such as family, marriage, lineage, inheritance, and servitude. Those qualified to develop norms, rule over a territory, and achieve justice through local political structures had to be – first and foremost – family men valued by the community. For most people, those men were invariably members – directly or indirectly – of the political entity in charge of governing and administering justice.

Both having a *casa poblada* in the city and being recognized as a notable were requirements established to consolidate existing Latin American elites and to curb the ambitions of those leaving the Iberian Peninsula to settle in the New World. Not every *pater familias* disposed of the material and intangible resources to meet such standards: They were not all regarded as *vecinos*, nor were all the *senhores da terra* seen as *homens bons*. The elites within the local republics sought – with variable results – to prevent the “poor with no privilege” from being granted *encomiendas* or land by the Crown, which could ultimately allow them to be recognized as members of the community.²⁵⁶

While the householders were those holding the reigns of local government, neither the *alcaldes* nor the judges or any other officeholder could interfere in matters relating to a *vecino*’s *casa*, that is, in issues of discipline and domestic governance that fell under the father’s exclusive purview. Other jurisdictions could only meddle in matters relating to the *casa* when some outrageous or violent events could not be contained within the domestic sphere. Rather, public authorities had to protect the privacy of that space. Within the household, authority could not be challenged and

²⁵⁶ Incomplete letter from the Tucumán governor Juan Ramírez de Velasco to his majesty the King on administrative and governance matters, Santiago de Estero, October 2, 1590, in R. Levillier, *Gobernación del Tucumán. Papeles de Gobernadores en el siglo XVI. Documentos del AGI* (Madrid: Imprenta de Juan Peyo, 1920), vol. I, 294. J. Marchena Fernández and C. Gómez Pérez, “Los señores de la guerra en la conquista,” *Anuario de Estudios Americanos* 42 (1985), 127–215; R. Douglas Cope, *The Limits of Racial Domination: Plebeian Society in Colonial Mexico City, 1660–1720* (Madison: University of Wisconsin Press, 1994).

was backed by domestic values such as love and loyalty toward the next of kin. But it is well known that romantic love was not the primary driver behind marriage in the main families; these were usually arranged and domestic violence was often exposed to public view and brought before courts. Similarly, cases of intergenerational violence between parents and children were documented by colonial courts.²⁵⁷ Even more so, claims against masters abusing servants, laborers, and enslaved persons were brought before the highest royal courts.²⁵⁸

In contrast, in the Portuguese context, the *meirinho mor* (main bailiff) had jurisdiction over the great lords but his right to enter into their houses remained unsettled.²⁵⁹ This bailiff was a very important person, chosen among the oldest and most distinguished members of the community. Social prestige vested him with the authority to impart justice with more clout than other notables. In other words, *oeconomic* rationale and jurisdictional authority were linked just as they were in the Spanish colonies, even if institutional structures were slightly different.²⁶⁰

The analogy between the city and *casas* – “the casa is a small town and the city is a casa grande”²⁶¹ – highlighted the significance of paternal authority and the binding character of some elements of domestic power structures. That authority and structure provided the strongest rationale for compliance and supported solid and lasting obedience. The political arena mirrored domestic power structures: Binding linkages based on private principles such as love could not be confused with administrative or public

257 “Cultural factors amplified the frequency with which accounts of murderous children and child martyrs were told and retold.” B. Hamann, “Child Martyrs and Murderous Children. Age and Agency in Sixteenth-Century Transatlantic Religious Conflicts,” in T. Arden and S. Hutson (eds.), *The Social Experience of Childhood in Ancient Mesoamerica* (Boulder: University Press of Colorado, 2006), 205–6; B. Premo, *Children of the Father King: Youth, Authority, and Legal Minority in Colonial Lima* (Chapel Hill: University of North Carolina Press, 2005); B. Premo and O. González (eds.), *Raising an Empire: Children in Early Modern Iberia and Colonial Latin America* (Albuquerque: University of New Mexico Press, 2007).

258 H. J. Nickel and M. E. Ponce Alcocer (eds.), *Hacendados y trabajadores agrícolas ante las autoridades. Conflictos laborales a fines de la época colonial documentados en el Archivo General de Indias* (Mexico City: Universidad Iberoamericana, 1996); Websdale, *Policing*.

259 *Ordenações, e leis do Reino de Portugal. Recopiladas per mandado do muito alto catholico, e poderoso rei dom Philippe o Primeiro*, lib. 1, tit. XVII, Do Meirinho Mór: “E a seu Officio pertence prender pessoas de stado, e grandes Fidalgos e Senhores de terras, e taes, que as outras Justiças não possam bem prender.”

260 A. Almeida Santos de Carvalho Curvelo, *O senado da câmara de Alagoas do Sul. Governança e poder local no Sul de Pernambuco (1654–1751)* (Recife: O autor, 2014).

261 Jeronimo Castillo de Bovadilla, *Política para corregidores y señores de vassallos, en tiempos de paz y de guerra y para juezes eclesiásticos y seglares, juezes de comisión, regidores, abogados y otros oficiales públicos (1597)*, lib. I, cap. I, n. 29, 13.

relations considerations. Love was the main source of unity, cohesion, and respect that gave shape to obedience and tutelage relationships within the *casa* and the family, which also provided a model of discipline applicable in the political sphere.²⁶²

Conversely, the *cabildo* – the city’s main political body – was in charge of regulating and establishing norms to define the nature of relations between persons or between persons and things. The *cabildo* had the authority to regulate work, including the *distribución de mitayos* (forced labor draft) among the *vecinos* who did not hold *encomiendas*, and also to facilitate the hiring of seasonal workers and setting salaries for the *casas*’ domestic servants.²⁶³ *Cabildos* were also in charge of providing land grants in the cities and in the territories falling under their jurisdiction.²⁶⁴ The *cabildo* – a political body made up of the masters of the *casas grandes* – thus had authority to regulate two core elements of the *casa grande*’s operations: land possession and the establishment of servant-like relationships.

The Casa Grande as a Normative Sphere

The safeguards applicable to those governing were not based on principles of division of powers, but on conceptions of good governance and common good, which were closely linked to good morals and the cardinal virtue of justice. Both virtues had to inform the behaviors of both a *good judge* and a *good father*. The notion of common good provided guidance to those ruling over both the household and the city. Common good did not go against the concept of individual interest because it referred to both the public administration of common goods and to the management of private privileges to achieve the well-being of all the *pater familias* and their respective households.

Royal governance institutions were transplanted to Latin American soil and contributed to breaking up the territory in to large patches of land with undefined (and sometimes overlapping) borders.²⁶⁵ In parallel, a religious structure was also brought to the New Continent: The Church played a key role in

262 P. Cardim, “‘Governo’ e ‘política’ no Portugal de seiscentos,” *Penélope: revista de história e ciências sociais* 28 (2003), 59–92.

263 R. Zamora, “De la ‘servidumbre y clausura’ al ‘trabajo asalariado para la felicidad pública’.” Las normativas sobre el conchabo en el Río de la Plata y en San Miguel de Tucumán en el siglo XVIII,” *Prólogos* 6 (2013), 15–40.

264 J. M. Ots Capdequí, *Manual de historia del Derecho Español en las Indias y del derecho propiamente Indiano* (Buenos Aires: Losada, 1945); Zamora, *Casa*.

265 V. Tau Anzoátegui, “La monarquía. Poder central y poderes locales,” *Nueva Historia de la Nación Argentina* (Buenos Aires: Planeta, 2000), vol. III, 211–50.

shaping colonial control. The European seigniorial mindset was also transposed to Latin America, which did not, however, lead to the establishment of a feudal order but required the imposition of Western and Christian standards on indigenous populations. This mindset also entailed that indigenous peoples had to submit to the notion that the benefit of their work would be reaped by the lords, those holding *encomiendas*. The same applied to the settlers' notions relating to property and use of land.

Mestizos, mulatos, zambos, indios chinos, and Afro-Latin Americans had social, religious, and discipline-related knowledges which drew on a variety of sources and were thus different from European perspectives. These people were therefore compelled to conform to European structures by forsaking their cultural patterns, languages, and gods, with varying results depending on levels of coercion, on the one hand, and of resistance, on the other. The source of coercion was generally not jurisdictional, but domestic: Knowledge of normativity was conveyed within the Spanish *casas*. The following generations of members of the *pardos* or *castas* internalized Spanish or Portuguese normative standards as a way to relate to others but also – and most importantly – as a way to survive. Depending on available opportunities, they could be regarded as members of the main family when the *pater familias* recognized them as such or if he allowed them to remain in his *casa*. It is worth noting that there was a high level of tolerance toward miscegenation, when Spanish men reproduced with women pertaining to other *castas*. They could also be considered as *indios* if they were accepted within an indigenous community or village. Generally speaking, the lower *castas* were part of a diverse and very elusive population that could work in a Spanish *casa*, *obraje*, or *hacienda* for a certain period of time under the authority of the *pater familias* who simultaneously played the role of master, father, and lord.²⁶⁶

For Latin American indigenous and common people, joining a *casa grande* meant entering into the most important normative space. This is where they would learn to obey, speak Spanish or Portuguese, pray, respect authority, and to internalize the rules applicable to their social class.

It may be worth coming back to the questions raised earlier in this section: To what extent did the knowledges developed in the *casas grandes* become normative principles, and how did the *casa* contribute to the implementation of legal principles? Archives provide little more than

266 B. Ares Queija, "Mestizos en hábito de indios. ¿Estrategias transgresoras o identidades difusas?" in R. M. Loureiro and S. Gruzinski (eds.), *Passar as Fronteiras* (Lagos: Centro de Estudos Gil Eanes, 1999), 133–46.

silence on these points.²⁶⁷ Víctor Tau Anzoátegui highlighted this gap and emphasized that no law, not even the *bandos de buen gobierno* (proclamations of good government) referred to the domestic sphere until well into the eighteenth century. He demonstrated how municipal norms remained silent on what happened within the *casas* owned by the main families, which contrasted with how spaces inhabited by ordinary people were regulated as well as with how laws were permanently meddling in the affairs of common households.²⁶⁸

This silence is due to the fact that the *casa grande*, which comprised the *hacienda* and the *casa poblada*, was governed by its own order and authorities without being bothered by the *cabildo*. The *casa* was the forum where household- and family-related normative principles were implemented, adapted, and recreated. While those were longstanding normative principles, they underwent modifications in the New World. For example, rules applicable to inheritance were adapted to the Latin American context, and the relationships with servants and enslaved persons may have appeared similar to European practices but still remained different.²⁶⁹

From a normative standpoint, the first half of the sixteenth century was probably the part of the colonial period most significantly marked by legal hybridization. As indicated by Tau Anzoátegui, there were only a handful of Spaniards to rule over millions of indigenous peoples.²⁷⁰ The most complex issues probably emerged in situations involving indigenous institutions or normative principles which progressively evolved, but some were accepted as compromises required during this early colonial period.²⁷¹ These were likely the “least Catholic” times of colonization: a period where many indigenous religious traditions (along with their worldviews) persisted and often

267 J. Derrida, *Mal de archivo. Una impresión freudiana*, trans. P. Vidarte (Madrid: Editorial Trotta, 1997).

268 “The late appearance of certain precepts regarding the domestic order, resulting from the silence of the previous era, probably serves to prove the condition of the ‘big house,’ exempt from any jurisdiction alien to it in everyday life, where the civil authority could not enter.” V. Tau Anzoátegui, “Provincial and Local Law of the Indies,” in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Global Perspectives on Legal History 3) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 235–55, at 245.

269 B. Clavero, “El mayorazgo indiano,” in B. Clavero, *Mayorazgo: Propiedad feudal en Castilla (1369–1836)* (Madrid: Siglo XXI, 1974), 181–207; F. Cuena Boy, “Yanaconazgo y derecho romano: ¿una conjunción extravagante?,” *Revista de Estudios Histórico-Jurídicos XXVIII* (2006), 401–24.

270 V. Tau Anzoátegui, “La costumbre jurídica en la América española (siglos XVI–XVIII),” *Revista de Historia del Derecho* 14 (1986), 355–425.

271 Herzog, “Native customs”; V. Tau Anzoátegui, *El poder de la costumbre* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2000).

conflicted with Christian morals and rituals. The Spaniards had to negotiate with existing indigenous structures to establish institutions that were acceptable to everyone.

To ensure they were respected and obeyed during that period – that is, when most of the active population was indigenous and under an *encomienda* – *encomenderos* had to acknowledge some of the underlying principles of local traditions. This was basically how the *in situ* integration of global and local knowledges of normativity was conceptualized. Obedience had to be negotiated.²⁷² The most skilled *encomenderos* knew they had no other choice than securing agreements with the *curacas*, *tlatoques*, and the leaders of different ethnic lordships to ensure the payment of tribute and to prevent escapes.²⁷³ Rules alone were not sufficient to subject whole populations to servitude and to ensure the payment of tribute; neither could direct and violent compulsion be considered the single means to control people who used to be free. The early *encomenderos* and Portuguese *senhores da terra* had to continuously negotiate payment conditions, relocation of scattered populations into villages and *reducciones*, compliance with work shifts, conversion to Catholicism, alignment of indigenous family structures with European standards, and respect for a social hierarchy and religious morality. The settlers had to engage in such negotiations with the traditional leadership of people who were forced to undergo a radical change in mentality.

Over time and due to factors such as the decline of indigenous populations, the demise of the *encomienda*, the emergence of *Afrolatinos* (and, to a lesser extent, people of Asian descent), and to the general demographic hybridization, the Spanish and Portuguese were able to implement more Western normative principles in the spheres falling under the *hacienda* and the *casa*. As noted by António Manuel Hespanha, the breakdown or re-articulation of traditional power and justice arrangements was not solely determined by political and normative authorities; the impact of demographics played a peripheral role that those authorities had to reckon with.²⁷⁴ In this case, a growing and increasingly mixed and adaptable population gradually adjusted to the *casa* and the *hacienda's* territorial structure and thus contributed to developing their full potential.

272 M. Zuloaga Rada, *La conquista negociada: guarangas, autoridades locales e imperio en Huaylas, Perú (1532–1610)* (Lima: Instituto de Estudios Peruanos, Instituto Francés de Estudios Andinos, 2012).

273 Stern, *Los pueblos*, 59–77: “Ascensión y caída de las alianzas postincaicas.”

274 A. M. Hespanha, *Visperas del Leviatán. Instituciones y poder político (Portugal, siglo XVII)* (Madrid: Taurus Humanidades, 1989).

Thomas Duve argues that these domestic fora generated and implemented norms, as they were in fact the expression of the diversity of collective decision-making mechanisms (see Section 1.3). At this point, one could wonder what was the relationship between legal doctrine and those scattered and plural – but highly binding – knowledges of normativity that were produced, appropriated, and recreated by different epistemic communities in specific and contingent contexts where no jurists or written procedures were involved.²⁷⁵ Similarly, customs did not require legislative validation or judicial recognition to be recognized as such and to have binding force. Custom did not go hand in hand with the idea of uniformity and much less with the conception of law as a closed system:

The doctrinal jurist expects certainty and formality from custom, but custom does not have such features and cannot provide them; trying to meet such expectations would put it at risk of losing its identity. In turn, the doctrinal jurist will ruin his own system if he appreciates custom as it is... There is thus a dialectical interplay, a vicious argument, a dilemma between different essences.²⁷⁶

Both the Spanish and Portuguese *casa grande* developed their own normativity – their customs – to achieve the levels of order and obedience needed to bind those falling under their purview. As householder and *vecino* of the city, the *pater familias* could demand these norms be recognized as customs by local authorities insofar as he was part of the local political institutions and could be a member of the *cabildo* or the *cámara* (city council). While the administration of the *casa* and the city were different, normative solutions were often determined by the *pater familias* and then confirmed by the *cabildo* before being implemented in other cases falling under the *cabildo's* jurisdiction. In other words, practices established by families did not require having the force of law to be effective within the household, but some could be accepted as local uses and customs by institutions and be wielded to protect local interests against royal authorities.²⁷⁷ Both casuistry and the weight of specific local custom served as safety valves and fostered normative plasticity without entailing some form of transgression or distortion; they rather meant that rules were being adapted to the facts to reach the most equitable results.²⁷⁸

275 T. Duve, "Historia del derecho como historia del saber normativo," *Revista de Historia del Derecho* 63 (2022), 1–60.

276 Tau Anzoátegui, *El poder*, 29–30.

277 Tau Anzoátegui, *El poder*, 96.

278 V. Tau Anzoátegui, *Casuismo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992).

Conversely, abusive domestic practices could be challenged and reported by local authorities. Under the influence of Enlightenment thought and with written law taking a predominant role, abusive customs were increasingly challenged during the latter part of the eighteenth century. These customs thus generally began to be questioned in Spanish and Portuguese territory and more specifically in the *cabildos*, *audiencias*, or in the *câmaras* and *tribunais da relação*. Some actors also sought to put an end to practices they considered to be *contra legem*. Most of the records of such customs show discussions relating to litigation, which (in some cases) gave rise to new rules similar to the *bandos de buen gobierno*; these proclamations sought to delineate the confines of domestic customs and authorities, which were progressively less protected by public authorities.²⁷⁹

Those joining or remaining for some time on a *hacienda* or in an urban *casa* owned by the main families were subjected to strict rules. This regime was imposed by the father and master, who was also in charge of implementing rules directly or with the support of other members of the *casa*.

These rules referred to a specific field of action: the tenant's rent payments, land tenure regimes, and the regulation of labor. They also referred to a significant amount of information relating to ways of organizing the domestic life of workers and their families, observing the sacraments, attending mass, while implicitly tolerating indigenous, Asian, or African rituals and allowing consensual and *de facto* unions and the burial of the dead at traditional sites (not only in church graveyards). All this knowledge gave a normative content to everyday life and could vary depending on regions, cities, *haciendas*, or *casas*. Every case reflected how global knowledge was locally absorbed depending on the background and the distinct traditions of those who were part of a *casa grande*, but also on the normative wishes of the father and master of the household.

Many *haciendas* had their own detention and punishment spaces to sanction deviant behaviors and transgressions. Part of domestic discipline fell under the father's exclusive jurisdiction. The father could set himself up as

279 V. Tau Anzoátegui (ed.), *Los Bandos de buen gobierno del Río de la Plata, Tucumán y Cuyo (época hispánica)* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2004); D. Apaolaza Llorente, *Los Bandos de Buen Gobierno en Cuba. La norma y la práctica (1730–1830)* (Inéditos de Historia 11) (Bilbao: Universidad del País Vasco, 2016); L. González Pujana, *El libro del cabildo de la ciudad de Cuzco* (Lima: Instituto Riva-Agüero, 1982); R. Zamora, "Acerca de las discusiones sobre el salario de las criadas: Algunas reflexiones sobre el orden jurídico local en San Miguel de Tucumán a fines del siglo XVIII," *Revista de Historia del Derecho* 39 (2010), 1–20; B. Bandecchi, "O município no Brasil e sua função política (I)," *Revista de História* 44(90) (1972), 495–530.

the judge within his own household.²⁸⁰ Those living in the *hacienda* could be subject to punishment related not only to theft, attempted escapes, or altercations, but more generally also for threatening social hierarchy and morality when practices and knowledge were not sufficient to internalize the principles of order.²⁸¹ By contrast, in the urban *casas pobladas*, it was the mothers who ensured the internalization of behaviors and effective punishment, as those spaces were mainly inhabited by women. Mothers were in charge of the discipline of the *criadas*, sons and daughters, and those living in the *casa*.²⁸²

As there was an infinite range of differences from one *casa* and domestic group to the other, enforcement had to go hand in hand with norm transposition and recreation processes. As the *casa*'s inhabitants carried different types of knowledges and mindsets that came from different places, knowledges from diverse origins had to be blended to provide a shared normative understanding of the *casa* (see Section 1.4). In the case of Asian knowledges, Confucianism was accepted – or at the very least not rejected – in Latin America due to the clarity of its standards relating to obedience to family and political subjection. These standards had significant impact on the *casas grandes* that were inhabited by *indios chinos*, but these knowledges were also disseminated by Asian traders and travelers. Missionaries who had spent time in the East Indies before arriving in Spanish America (mainly Jesuits or Franciscans, such as Martín Ignacio de Loyola y Mallea) also contributed to the circulation of such knowledges, which were furthermore shared by American jurists such as Juan Egaña, Pedro Murillo Velarde, or Ignacio de Castro.²⁸³

280 M. Fargas Peñarrocha, "La práctica de la justicia en el orden doméstico: el padre de familia en Domingo de Soto y su tiempo," *Studia Historica: Historia Moderna* 40(2) (2018), 271–304.

281 B. Garnot, "Justice, infrajustice, parajustice et extrajustice dans la France d'Ancien Régime," *Crime, History & Societies* 4(1) (2000), 103–20. Quoted in Fargas Peñarrocha, "La práctica," 273.

282 P. Gonzalbo Aizpuru, "La historia de la familia en Iberoamérica," in F. Chacón Jiménez, A. Irigoyen López, E. de Mesquita Samara, and T. Lozano Armendares (eds.), *Sin distancias. Familia y tendencias historiográficas en el siglo XX* (Murcia: Universidad de Murcia, Universidad de Colombia, 2002), 47–60.

283 R. Carrillo, "Asia llega a América. Migración, influencia cultural asiática en Nueva España (1565–1815)," *Asiadémica. Revista universitaria de estudios sobre Asia oriental* (2014), 81–98; A. C. Hosne, *Entre la fe y la razón. La Doctrina y el Catecismo del Tercer Concilio Limense (1584–85) de José de Acosta SJ como autor principal del texto en castellano, y la Verdadera Doctrina del Señor del Cielo (Tianzhu shiyi) de Matteo Ricci SJ en China (1603)*, unpublished Ph.D. thesis, Universidad de Buenos Aires (2009); D. Sola, *El cronista de China. Juan González de Mendoza, entre la misión, el imperio y la historia* (Barcelona: Universidad de Barcelona, 2018); A. Dougnac Rodríguez,

For their part, Afro-Latin Americans preserved the memory of their earlier domestic life and cohabitation practices, which they hoped to revert to once they became freedpeople, and sometimes even while remaining legally enslaved persons. This was possible when the *fazendas* were not organized in collective *senzalas* or *bohíos* but rather as pieces of land held in precarious tenure where they built homes, lived with their families, and farmed on small plots of land whose harvests could be claimed by the lords as consideration for using the land (similarly to what was the practice with *agregados*: see Section 3.1).²⁸⁴

The *casa* acted as a catalyst for those diverse knowledges by creatively mixing them to facilitate the cohabitation of people of different origins, with varying motivations, and who were subject to differentiated rights and duties based on their class. The most difficult interactions between persons or communities and the law emerged in cases where social classes were defined in a colonial context where non-Spanish and non-Portuguese were *a priori* considered as lesser and as having deficient capacity, if not lacking it altogether.²⁸⁵

Knowledges of normativity available to those living in a *casa* were actualized in a particular way under specific socioeconomic conditions, based on specific power relations, and on the distinct *savoir faire* of the social group that was involved in both the production and implementation of those knowledges. This meant that the structure of each historical normative regime differed in many aspects, including conceptions of ethnic hierarchies, possession and use of land, labor, family structure, and also regarding Christian precepts, which were – contrary to glorifying narratives – malleable, vague, and contingent.

These knowledges of normativity were conveyed orally within the *casas*. They did not have to be developed by jurists or to be written laws in order to be effectively valid. But these knowledges had force of law in the mainly illiterate communities with only a rough command of the Spanish language that were delimited by the *haciendas'* boundaries and the cities' *ejidos* (suburban land available for the common use of the *vecinos*), and surrounded by borders, as though they were scattered normative islands.

"El pensamiento confuciano y el jurista Juan Egaña (1768–1836)," *Revista de Estudios Histórico-Jurídicos* 20 (1998), 143–93; P. Murillo Velarde, *Curso de derecho canónico hispano e indiano* (Mexico City: El Colegio de Michoacán, 2004), 4 vols.; Martín Ignacio de Loyola y Mallea, *Viaje alrededor del Mundo (1585)* (Barcelona: Red Ediciones, 2021); Ignacio de Castro, *Relación de la fundación de la Real Audiencia de Cuzco en 1788* (Madrid: imprenta de la viuda de Ibarra, 1794).

284 Dias Paes, *Esclavos y tierras*.

285 Duve, "What is Global Legal History?," 94: "Emancipating from hegemonic concepts."

This leaves open the question of the extent to which practical issues relating to labor, land tenure, social positions, the principles of obedience in a hierarchic, multiethnic, and multicultural society as well as the practical solutions developed within Latin American *casas grandes* reflected the existence of a standalone and diverse normative system. Those solutions were haphazard attempts to establish a social structure with ties to the greater Catholic community. All of this unfolded in the context of chaotic, changing, and immeasurably vast territories, lands with varied and infinite characteristics, a population in constant social and territorial motion due to its diverse backgrounds, hybridizations, and evolving social hierarchies.

This is not just a matter of demonstrating that norms that were created and recreated within the Spanish *casas grandes* forayed into other normative production spheres (which they did). It is rather a question of whether it is possible to conceptualize these normative knowledges as part of a legal, hierarchic, and political system. Regardless of their legitimacy, these normative knowledges were part of the main challenges that constitutional lawyers and codifiers encountered during the nineteenth century.