

# What Is Legal History of Latin American Law in a Global Perspective?

## 1.1 How Was and Is Latin American Legal History Written?

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Presenting a legal historiography of Latin America in just a few pages is a challenging task. To begin with, it is necessary to take a position on whether there actually was a geo-cultural entity with that denomination; a collective space that has existed (and continues to do so) under a normative system whose history has been the object of professional narratives. If we were to accept this point of view, we would be back, almost a hundred years later, to cherishing the dream of “the epic of Great America” that was launched in 1932 by the American Historical Association, and of a desirable “general (legal) history of America.”<sup>1</sup> But we can also opt for the description of a plurality of territorially localized legal histories which more or less coincide with the current sovereign states. Broadly speaking, it is possible to establish the boundary between the comprehensiveness of a legal American *Ancien régime* and the “national definition” of the law at the time of the processes of independence. However, this approach, while undoubtedly useful, is in practice fraught with difficulties.

On the one hand, the *Latin* omits or silences the *American*, that is, the presence and experiences of indigenous peoples whose history rarely enters the narrative; an issue of capital importance that only began to receive attention at the end of the last century.<sup>2</sup> On the other hand, the traditional approach – but also the proposals intended to renovate classic historiography – leave non-Iberian America (English, French, and Dutch, but also Russian and Danish, to be precise) out of the picture, although the facts of the past reveal

1 S. Bernabéu Albert, “El universo americanista. Un balance obligado para acabar el siglo,” *Revista de Indias* 60 (2000), 271–306, at 275.

2 Fortunately, in recent years, several scholars have devoted themselves to analysing the normative experiences of indigenous peoples. See also Chapter 2 in this volume.

crossed experiences and diverse spaces of influences. This was the case of Franco-Spanish Hispaniola and the Brazilian Nova Holanda as well as the Californian missions and the Russian empire's claim to territories on the northern Pacific coast. And even within the Peninsular tradition itself, the duplicity between Hispanic America and Portuguese America makes it difficult to articulate a historiographical discourse around the so-called *derecho indiano*, that great legal experience which, as António Manuel Hespanha has demonstrated, cannot simply be applied to the case of Brazil.<sup>3</sup>

The picture is complicated by the diverging development of local historiographies; the image of the "leopard skin" used by the well-known Americanist Peter Novick is useful in this respect, as it symbolizes the fragmentation of research topics and approaches.<sup>4</sup> Indeed, the sovereign nations that were born out of the processes of independence have their own traditions (histories of *derecho patrio*), with a remarkable production of narratives; only a few subjects – as is the case with the codification of private law – have received continental attention.<sup>5</sup> There are states with a more robust historiographical practice, where legal history has existed for a long time as a subject taught at university; they contribute to common knowledge with textbooks and journals (Argentina, Brazil, Chile, Mexico). These journals have generally been founded only recently (ranging from the 1970s in Chile and Argentina to the present day in the case of Brazil). Where there is no academic focus on the field, it is not uncommon to find studies of a nonprofessional nature, that is, research work that is undertaken by jurists and historians who specialize in other areas and occasionally take an interest in the law of the past; their methods and results are, of course, quite different.

Given the earlier-mentioned difficulties, it only seems possible to outline the circumstances in which interest in the historical research of the law(s) of Latin America – including Brazil – emerged, and its subsequent development.<sup>6</sup>

3 A. M. Hespanha, "O 'direito das Índias' no contexto da historiografia das colonizações ibéricas," in T. Duve (ed.), *Actas del XIX Congreso del Instituto Internacional de Derecho Indiano: Berlín 2016* (Madrid: Dykinson, 2019), vol. 1, 43–83, 73–77. Nor, obviously, does it apply to British colonization: R. J. Ross, "Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing *Derecho Británico Indiano*," in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 9–28.

4 Bernabéu, "Universo americanista," 281–82.

5 C. Ramos Núñez, *El Código napoleónico y su recepción en América latina* (Lima: Pontificia Universidad Católica del Perú, 1997); A. Guzmán Brito, *La codificación civil en Iberoamérica. Siglos XIX y XX* (Santiago: Editorial Jurídica de Chile, 2000).

6 An interesting historiographical assessment was offered by V. Tau Anzoátegui, "Instituciones y Derecho Indiano en una renovada Historia de América," *Anuario de*

*The Origins of Latin American Legal Historiography*

The academic study of early (modern) *derecho indiano* begins in 1883, on the occasion of the celebration of the third centenary of Hugo Grotius' birth.<sup>7</sup> Ernest Nys' contribution on *ius belli* and the predecessors of the great Dutch humanist and writer preserved for the benefit of modern legal science the so-called *magni hispani* – until then rarely studied – as a brilliant group of Thomist thinkers who discussed the legitimacy of Castilian rule in the Indies and the conditions for a legitimate war of occupation.<sup>8</sup> The origins of international law of “Spanish” mold were thus mixed with the study of the Iberian domination of America and the war against the “infidel Indians,” who were supposedly opposed to the *ius communicationis* imposed by the Castilian and Portuguese adventurers and justified by the theologians of Salamanca or Évora. It was in this context that the historiographical invention of the so-called *derecho indiano* took place. It consisted of a peculiar system “made up of those legal norms – royal charters, provisions, instructions, ordinances, etc. – that were dictated by the Spanish monarchs or by their delegated authorities to be applied exclusively – in a general or particular way – in the territories of Spanish America.”<sup>9</sup> The chronological sequence of the works of Eduardo de Hinojosa y Naveros (1852–1919), the scientific father of legal history in Spain (and consequently, in Spanish America), is revealing: His acclaimed study *Influencia que tuvieron en el Derecho público de su patria, y singularmente en el Derecho penal, los filósofos y teólogos españoles anteriores a nuestro siglo* (1890) was followed by *Las Relecciones de Francisco de Vitoria*

*Estudios Americanos* 75 (2018), 435–58. Also, L. Nuzzo, “Between America and Europe: The Strange Case of the *derecho indiano*,” Duve and Pihlajamäki (eds.), *New Horizons*, 161–91.

- 7 The expression “*derecho indiano*,” with a strong presence in Argentina as a synonym of “colonial law” (thus, J. B. Alberdi, *Bases y puntos de partida para la organización política de la República Argentina* (Buenos Aires: Impta. Argentina, 1852), 57), penetrated academic terminology thanks to Ricardo Levene, but the syntagma is documented at least from the time of the Constitution of Cádiz (1812): J. F. de Azcárate, *Proyecto de reforma de algunos estatutos de la Real Academia de Jurisprudencia teórico-práctica, real y pública* (Mexico City: En la oficina de D. Mariano Ontiveros, 1812), 25. It seems clear that he copied the famous title of J. de Solórzano, *Política indiana* (1648): cf. *Teatro histórico, jurídico y político militar de la Isla Fernandina de Cuba y principalmente de su capital La Habana* (1791), in R. Cowley and A. Prego (eds.), *Los tres primeros historiadores de la Isla de Cuba* (Habana: Impta. y Librería de Andrés Prego, 1876), vol. II, 1876 and 18.
- 8 *Le droit de la guerre et les précurseurs de Grotius* (Brussels and Leipzig: Librairie Européenne C. Muquardt, Merzbach and Falk, 1882), 165–68. Cf. I. de la Rasilla del Moral, *In the Shadow of Vitoria: A History of International Law in Spain (1770–1953)* (Leiden and Boston: Brill, 2018).
- 9 J. M. Ots y Capdequí, *Historia del derecho español en América y del derecho indiano* (Madrid: Aguilar, 1968), 3. (Unless otherwise indicated, all translations are by the autor.)

(1903) and *Los precursores españoles de Grocio* (1911). Since then, the titles to the Indies by conquest, the incorporation of the new territories to the Crown of Castile, the concept of legitimate war, the papal bulls that divided the newly (and yet to be) discovered oceanic and terrestrial regions between Castile and Portugal, the legal status of the new subjects, the evangelizing cause – all these factors have constituted the main arguments of Americanist legal historians.<sup>10</sup>

*Meticulous Documentation: The Archivo General de Indias*

The study of the theological roots of the “discovery” of America ran parallel to the first undertakings in editing and publishing documentation. The work of the Royal Academy of History (Madrid), the modern chronicler of the Indies, was decisive. Despite its errors and inexplicable omissions, the renowned *Colección de documentos inéditos relativos al descubrimiento, conquista y colonización de las posesiones españolas en América y Oceanía* (first series forty-two volumes, 1864–1884) provided an enormous mass of unpublished sources, which was completed in the twentieth century by a second series (twenty-five volumes, 1885–1932).

These were documents that, according to the subtitle of the collection, were “drawn from the archives of the kingdom, and especially from the archive of the Indies.” This archive, located in Seville, the old port of the Indies, was and still is the world’s main repository of documents for the history of the law and the governance of Spanish America.<sup>11</sup> Founded in the time of Carlos III (1785) for the custody and administrative use of the papers of the Council of the Indies, it was belatedly opened to public consultation at the end of the nineteenth century, on the occasion of the fourth centenary of the “discovery” of America (1892) and the Hispanic-Portuguese-American Congresses held at the time (conferences of Americanists, geographical, mercantile, medical sciences, legal studies,

10 From R. Levene, “La concepción de Eduardo de Hinojosa sobre la historia de las ideas políticas y jurídicas en el Derecho español y su proyección en el Derecho indiano,” *Anuario de Historia del Derecho Español* 23 (1953), 259–87, to the still recent thesis by C. López Lomel, *La polémica de la justicia en la conquista de América*, Universidad Complutense de Madrid (2002). Many other doctoral theses were defended along the same lines: F. Rendón y Trova, *Condición jurídica de los indios desde el descubrimiento de América hasta la muerte de Isabel la Católica* (1898); F. Puig Peña, *La influencia de Francisco de Vitoria en la obra de Hugo Grocio* (1932); A. García Gallo, *La aplicación de la doctrina española de la guerra. Datos para su estudio*, Universidad de Madrid (1934); A. Gómez Gutiérrez, *El derecho indiano*, Universidad Complutense de Madrid (1940).

11 J. A. Calderón Quijano, *Americanismo en Sevilla, 1900–1980* (Seville: Escuela de Estudios Hispano-Americanos, 1987).

military, literary, pedagogical), which represented the first attempt at a “global” study of all things American.<sup>12</sup> The archive was placed in the hands of experts – professional archivists who were members of a corps of civil servants created in 1858 – and shortly after acquiring the status of “general archive” (1901) under the Ministry of Public Instruction and Fine Arts, the catalogs were made available and historians were offered professional assistance. It is not by chance that among the first historians to consult the archive were Latin American scholars, who came to Seville to document their national histories, but also to clarify the territorial limits of their countries of origin, which were often the subject of disputes. This important historical and legal question was addressed by the Ibero-American Legal Congress of 1892. Indeed, it is no coincidence that the central theme of the meeting, which was discussed from historical and geographical perspectives, was international arbitration.<sup>13</sup>

### *Spanish Heritage as Hispanidad*

The fourth centenary of the “discovery” saw the birth of *hispanidad*, a hard-to-define concept that soon morphed into a Hispanoamerican holiday.<sup>14</sup> The royal decree of September 23, 1892 (*Gaceta* of the twenty-fifth) declared October 12 an official holiday, “without prejudice to the ability for the Crown with the *Cortes* to declare it perpetual thereafter.” The Spanish government even got Italy – the disputed land of Christopher Columbus – and several transatlantic republics to establish this holiday. However, the celebration of October 12 – the day of the *Virgen del Pilar*, patron saint of *hispanidad* –<sup>15</sup> as a public holiday, endowed with the perpetuity that it lacked at the outset, was born years later at the initiative of Argentina, and announced as *Día de la Raza* (1917); Catholic militancy, represented by the priest Zacarías de Vizcarra,

12 S. Bernabéu Albert, *1892: El IV Centenario del Descubrimiento de América en España. Coyuntura y celebraciones* (Madrid: Consejo superior de Investigaciones Científicas, 1987).

13 Arbitration also played a role in the *Congreso Militar Hispano-Portugués-Americano. Actas I-II* (Madrid: Impta. y Litografía del Depósito de la Guerra, 1893).

14 The term *hispanidad*, which is documented in the dictionary of the Real Academia Española in 1817, meant, as an archaism, “the same as hispanismo.” Its presence has been irregular (editions of 1884 and 1935) and only in the 1992 edition, celebrating the V Centenary, does it appear with the two meanings that are of interest here: (1) “generic character of all the peoples of Hispanic language and culture” and (2) “the ensemble and community of Hispanic peoples.”

15 See also D. Martínez Vilches, “De patrona de la monarquía a patrona de la nación. La Inmaculada Concepción entre España y Portugal,” *Historia y Política* 46 (2021), 209–35; M. Rodríguez, *Celebración de “la raza.” Una historia comparativa del 12 de octubre* (Mexico City: Universidad Iberoamericana, 2004).

dominated the celebration.<sup>16</sup> The well-known historian Richard Konetzke, who was primarily responsible for the promotion of Ibero-Americanist studies in Central Europe, also adhered to the idea of *hispanidad*.<sup>17</sup>

These circumstances would seem of little relevance if it were not for the fact that they responded to a certain cultural context. I am referring to the reason for the “decline of the Latin race” – the surest proof of which was allegedly the adverse result of the Franco-Prussian (1870) and Hispano-American (1898) wars – in the face of the “Anglo-Saxon race,” which was said to be “younger, more Protestant, richer, and more powerful.” The ideas codified by the Italian sociologist Giuseppe Sergi in his famous work on *La decadenza delle nazioni latine* (1900) entered the mainstream – the early, multi-lingual experiment (French, Portuguese, Spanish, Italian) of the newspaper *La Raza Latina* (1874–1884) is significant – and this heartfelt *latinidad*, seen from America, seemed to prelude the hispanophile movement that dominated Argentina after the centenary of the May Revolution (1910). Having lost the war of arms, it was now necessary to win the war of language and culture.<sup>18</sup>

It is worth recalling that as late as the fourth centenary of the “discovery,” the Spanish-Portuguese-American Geographical Conference (October 17 to November 4, 1891) was presented as the “congress of the race that discovered and conquered worlds and oceans,” a (white and dominating) race of peoples who “constitute a great family that cannot live disunited without great prejudice to their general and private interests, and that, at a minimum, a commercial coalition is required to guarantee the future of all the states of Spanish and Portuguese origin.” This way, a close ideological relationship linked the concept of *hispanidad* with the “moral superiority of the Latin race” and with the American adventure of the Iberian peoples: “The social regime that Spain established in its colonies by means of its admirable laws of the Indies is superior to all other systems of colonization, which exploit rather than civilize, and cause the extermination of the indigenous races.”<sup>19</sup> I know of no better synthesis of the clichés that a large sector of Americanist legal

16 There was also a migration policy in favor of the reception of a “pure” race, that is, white and Catholic, free of “yellows, Turks, Jews, blacks and *mestizos*”: cf. D. Pablos Papanikas, *La Iglesia de la Raza. La Iglesia católica española y la construcción de la identidad nacional en Argentina, 1910–1930*, Ph.D. thesis, Universidad Autónoma de Madrid (2012).

17 A. Sáez Arance, “Entre la «Volksgeschichte» alemana y la historiografía nacionalista del franquismo: una relectura de las primeras publicaciones de Richard Konetzke sobre España (1929–1946),” *Ayer* 69 (2008), 73–99.

18 P. F. Ledesma Fernández, *El giro hispanófilo. Configuraciones de lo hispano en Argentina*, Ph.D. thesis, Universidad Complutense de Madrid (2019).

19 Bernabéu Albert, *1892: El IV Centenario*, 82–3. But the story was a long one: A. Feros, *Nación y raza en el mundo hispánico, 1450–1820* (Madrid: Marcial Pons, 2019).

historiography has carried forward to the present day, where the “Hispanic race” (Portuguese and Castilians, and their “Creole” descendants) was clearly opposed to some “indigenous races” that only appeared in the general picture in order to show the ethical-religious, and thus civilizing, stature of Peninsular colonization as opposed to the materialistic and abusive English colonization. The Africans, who were brought to the North and South Americas by way of forced, criminal abduction and enslavement, were not even mentioned.

*History Writing and Republican Culture: Brazil*

The bases that inspired Hispanic racial ideology and the resulting legitimizing narrative developed differently in Brazil. A few years after the reform that introduced the study of the history of law as a subject taught at university in Spain (1883), and long before the appearance of José Caeiro da Matta’s *História do Direito Português* (1911), the minister and patriot Benjamin Constant Botelho de Magalhães introduced legal history at the University of Recife in Pernambuco (1891). There, the holder of the chair, the young publicist José Izidoro Martins Junior (1860–1904), who was a disciple of Tobias Barreto and an abolitionist, published *História do Direito Nacional* (1895). A pioneer of its kind, this scientific-positivist work (Martins confessedly belonged to the “naturalistic school”) conceived law as “an organic whole determined by bio-sociological fatalities,” and therefore with no prior commitments to morality or the attribution of a transcendent origin to the legal experience, which was perfectly in line with republican secularism.<sup>20</sup> Nothing of the kind existed in the Spanish language, neither for *derecho indiano* nor for *derecho patrio*. When it finally arrived – I have the prolific Argentinean author Ricardo Levene (1885–1958) in mind – the theoretical foundations, and consequently the subject matter addressed, responded to partially different parameters.<sup>21</sup>

In his treatment of the legal past, Martins followed the *filiação* method (whereby the present was only understandable on the basis of the past), which led him to deal, in part one of his *História*, first with the history of Portuguese law (*Epocha dos antecedentes*) before moving on to trace the institutional history of Brazil. In doing so, he inaugurated a practice that was followed by future Latin American legal history textbooks. The past was described according to its “genetic” elements, with Portuguese (Alexandre

20 J. I. Martins Junior, *História do Direito Nacional* (Rio de Janeiro: Typographia da empresa democrática editora, 1895), 7.

21 Cf. R. Levene, *Introducción a la Historia del Derecho indiano* (Buenos Aires: Valerio Abeledo, 1924); previously, by the same author, *Notas para el estudio del Derecho indiano* (Buenos Aires: Imp. Virtus, 1918).

Herculano, Teófilo Braga) and Brazilian (Cândido Mendes) classics serving as the plinth on which then, in part two, the “national” legal experience was based (*Epocha embryogénica*). This was supported by motives and authorities imbued with the same positivist ideal of Comtian and Spencerian tradition (especially Italians: Brugi, Cogliolo, D’Aguanno). As such, Martins’ *História* offered a diverse view of the colonial past.

To begin with, the so-called “ethnic-legal protoplasm” of the country was racially mixed (“the Brazilian people is currently made up of Aryan whites, Guarani Indians, blacks of the Bantu group, and *mestiços* of these three races,” in the words of the writer Silvio Romero). After asserting the superiority of the white Portuguese, the discoverers, and conquerors (the *raça predominante* or “predominant race”), Martins resorted to another quotation, this time from Carlos Frederico von Martius, to warn against the error of forgetting “the forces of indigenous and imported black peoples” – a fundamental aspect, alongside the European racial substratum, for the formation of Brazilian nationality.<sup>22</sup> This was, in short, quite the opposite of the exclusionary *hispanidad* that was making inroads in other American lands.

Thus, the starting point for a rendition of Brazil’s legal past was this racial diversity, which was reconstructed thanks to an extensive library produced by ethnographers and philologists who identified the origins, differences, and settlements of the indigenous and African populations. However, according to this version, the African populations – the authority in this case was another professor from Recife, the great Clóvis Beviláqua – did not really contribute anything to Brazilian law because of their condition as enslaved people (“without personality, without legal attributes beyond those that can emanate from a bundle of goods”). This was just the opposite of the indigenous peoples, whose customs and institutions – Beviláqua had researched those too – Martins treated with some attention. But it was clear that, both in the colonial past and in the present system, the contribution of Portugal, “a nation already in existence, which has a complete and codified legislation,”<sup>23</sup> had been decisive. It remained for the republican government to develop a program of “nationalization” that would succeed in synthesizing the three racial elements that made up Brazil in order to obtain “a homogeneous and compact whole, corresponding worthily to the physical and social environment in which it has to act and evolve.”<sup>24</sup> In this way, Brazilian legal

22 Martins, *História*, 134.

23 Martins, *História*, 130–39 (American peoples), 143–50 (African peoples), 154–55 (European superiority).

24 Martins, *História*, 156.



historiography put itself at the service of the nation whose racial complexity was sublimated into a happy tropical “melanism.” Compared to other cases – the United States, in particular – it was argued that “in no country in the world do the representatives of such different races coexist in such harmony and under such a profound spirit of equality.”<sup>25</sup>

*The Development of Literature on Derecho Indiano*

The important role played by Argentina in the celebration of the *raza* – the apotheosis of a Euro-Creole super-nation – and its commitment to legal historiography through the figure of Ricardo Levene, who succeeded Carlos Octavio Bunge in the chair of “Introduction to Law” at the University of Buenos Aires, can be justified by recalling the American journey of Rafael Altamira y Crevea (1866–1951), a friend and correspondent of Levene.<sup>26</sup> Altamira, who stood out among the first Spanish professors of legal history, took up the chair at Oviedo in 1897 and then went on to become the protagonist of a famous cultural embassy to Latin America, where he gave seminal lectures (1909) – particularly influential and prolonged in the case of Argentina.<sup>27</sup> This allowed his country to strengthen ties with its former colonies and to develop a perspective for the future after the loss of the last Spanish overseas territories. Similarly to Levene in America, Altamira founded American legal historiography in Europe. His experience as a researcher of customs (including indigenous customs, 1946–1948), his skepticism toward legislation as a primary source of law, and his attention to popular legal conscience – all traits of the Krauso-positivist tradition of thought in which Altamira had been trained – coincided with the professional vision of Levene, a jurist-historian and “sociologist” concerned with the reality of law and the pluralism of normative manifestations.<sup>28</sup>

Altamira’s move from the small town of Oviedo to the Central University (Madrid), where he held the chair of “History of the Political and Civil

25 F. J. Oliveira Vianna, “O typo brasileiro; seus elementos formadores,” in *Dicionário Histórico, Geográfico e Ethnográfico do Brasil* (Rio de Janeiro: Imprensa Nacional, 1922), vol. I, 277. But the author gave a good example of racial preconceptions on 285–27 of “Psychologia do indio e do negro e do seu mestiço.”

26 J. Ferrándiz Lozano and E. La Parra López (eds.), *Rafael Altamira: Idea y acción hispano-americana* (Alicante: Instituto Alicantino de Cultura Juan Gil-Albert, 2011). On the (epistolary) relationship between Levene and Altamira, see V. Tau Anzoátegui, “Diálogos sobre derecho indiano entre Altamira y Levene en los años Cuarenta,” *Anuario de Historia del Derecho Español* 67 (1997), 369–90.

27 G. H. Prado, *Las lecciones iushistóricas de Rafael Altamira (1909). Apuntes sobre historia del derecho, derecho consuetudinario y modelos formativos del jurista* (Pamplona: Analecta, 2015).

28 V. Tau Anzoátegui, “De la sociología al derecho indiano. Contrapuntos entre Ricardo Levene y Ernesto Quesada,” *Revista de Historia del Derecho* 34 (2006), 357–417.

Institutions of America” from 1914 to 1936, enabled him to exert a considerable influence on the younger generation; thus, the first corpus of scientific studies on *derecho indiano* formed around him. The research focused more on the recovery and history of legal sources than on the reconstruction of the historical regime of American institutions.<sup>29</sup> Altamira added his own work to the magisterium, especially his late contributions. These were published when the elder Altamira, who had been a judge at the International Court of Justice (1921), went into exile in Mexico (1944–1951) following the terrible Spanish civil war.<sup>30</sup>

Two main developments can be traced back to Altamira. On the one hand, mention should be made of the figure and work of his first disciple, the Valencian José María Ots y Capdequí (1893–1975). A professor at the faculty of law, his tenure for several years at the University of Seville (as of 1924) allowed him to develop his research and participate in the many initiatives that arose on occasion of the great Ibero-American Exhibition (Seville, 1929). In addition to monographic studies, especially on questions of private law,<sup>31</sup> during his exile in Colombia, the republican Ots produced the first and most complete general exposition by a Spanish author: *The Manual de historia del derecho español en las Indias y del derecho propiamente indiano* (1943). Published in Argentina with a prologue by Levene, it served as a reference book for the teachings which, little by little, began to consolidate in several American countries. Other younger researchers belonged to the same school as Ots, such as Javier Malagón (1911–1990), a jurist and historian who was forced to

29 Many of these doctoral works were published in the law school’s journal. For example, among institutional studies, J. Barrasa y Muñoz de Bustillo, “El servicio personal de los indios durante la colonización española en América,” *Revista de Ciencias Jurídicas y Sociales* 6 (1923), 231–76, 361–83; 7 (1924), 5–25, 288–328, 481–517; and 8 (1925), 325–60; for the history of the sources, A. Muro Orejón, “El nuevo Código de las Leyes de Indias. Proyectos de Recopilación legislativa posteriores a 1680. Tesis doctoral,” *ibid.* 12 (1929), 287–339; 13 (1930), 484–532, 631–60; 14 (1931), 67–112, 177–240, 416–38; 15 (1932), 5–64, 216–88, 502–31, 568–88; and 16 (1933), 130–52, 204–38 and 436–72, with a separate edition prefaced by Altamira (Madrid: Universidad Central, 1929). Muro held the chair dedicated to “Historia del Derecho Indiano” (1946–1974) at the University of Seville, in *History of America*; cf. A. Muro, *Lecciones de Historia del Derecho hispano-indiano, publicadas por discípulos mexicanos* (Mexico City: Porrúa, 1989).

30 Cf. R. Altamira, *Manual de investigación de la historia del derecho indiano* (Mexico City: Instituto Panamericano de Geografía e Historia, 1948).

31 His thesis, supervised by Altamira, offered a historical outline of the rights of married women in the legislation of Spanish America (*Bosquejo histórico de los derechos de la mujer casada en la legislación de Indias* (Madrid: Reus, 1920)); see also “El derecho de propiedad en nuestra legislación de Indias,” *Anuario de Historia del Derecho Español* 2 (1925), 49–168, a true *pièce de résistance* of the author and the object of his courses and research. Cf. M. Valiente Ots, *José María Ots Capdequí. El americanista de la II República* (Seville: Editorial Renacimiento, 2022).

leave Spain after the war but went on to have an excellent career in Santo Domingo, Mexico, and the United States, and Juan Manzano (1911–2004), professor of legal history in Seville and Madrid, scholar of American legal sources, and well-known supporter of the theory according to which America was discovered well before Columbus “discovered” it.

On the other hand, the American followers of Altamira – beneficiaries of the boom in historical studies brought about by the Spanish Republic – created local schools of varying dimensions.<sup>32</sup> Besides the Chilean Aníbal Bascuñán Valdés (1905–1988), Alamiro de Ávila’s teacher and an expert in legal history and public law,<sup>33</sup> the Mexican Silvio Zavala (1909–2014) stood out above all others. He became the reference of a school that has enjoyed, along with the Argentine school, the greatest presence in historiography. A contemporary of Zavala’s who also received extensive training in Europe and North America was the Peruvian Jorge Basadre Grohmann (1903–1980). He was among the first to publish a work of general ambition that, once more, led from pre-Hispanic antecedents to Peruvian law (*Historia del derecho peruano*, 1937). From a theoretical point of view, having learned the lesson from Altamira, Latin American historiography in the 1930s and 1940s sought to establish in its studies a supposedly objective – one might say “Rankean” – truth through a very meticulous use of sources and the orderly presentation of data that was always compared and contrasted. This approach nevertheless failed, for lack of direct testimonies, when attempts were made to reconstruct institutional life prior to the conquest.<sup>34</sup>

The relationship of Latin American researchers with the legal past of the colonizing powers, particularly Spain, was variable and conflicted. It was closer in the cases of Chile and Argentina, and less intense in countries which, like Mexico and Peru, had highly developed indigenous presence.<sup>35</sup> Surely the most radical proposal came from the highly respected Alamiro de Ávila, who did not hesitate to affirm that Chileans “are Spanish and our origins are the same as those of any Spanish people,” while the indigenous peoples and their

32 P. Vélez, “Política e historiografía. El americanismo español hasta 1936,” *Revista de Indias* 68 (2008), 241–68, 258–63.

33 A. de Ávila, “Recuerdo de mi maestro Aníbal Bascuñán Valdés, fundador de la escuela chilena de historiadores del Derecho,” *Anuario de Filosofía Jurídica y Social* (1989), 11–26. Also E. E. Palma and M. F. Elgueta, “Enseñanza de la historia del derecho centrada en el aprendizaje de los estudiantes a lo largo de 115 años de la fundación de la cátedra (Chile, 1902),” *Precedente* 12 (2018), 29–62, 49 on Bascuñán.

34 L. Mendieta and Núñez, *El derecho precolonial* (Mexico City: Porrúa hermanos y cía, 1937).

35 M. del R. González, “Silvio Zavala y la historia del derecho,” *Anuario mexicano de historia del derecho* 10 (1998), 375–84.

experiences were, at most, “one of the elements, and in our case, not an important one, that inform *derecho indiano*.” Consistent with such an extreme form of Eurocentrism, the reform of studies promoted by Ávila at the University of Chile (1977) allowed him to teach two courses in legal history: the first focused entirely on the history of Spanish law, from prehistory to the independence of American regions; the second, on *derecho indiano* and Chilean *derecho patrio*.<sup>36</sup> Latin American legal history textbooks typically began with a chapter addressing Spanish legal history in more or less detail – as Levene had written, “the history of America begins with the history of Spain” – but Ávila went so far as to reduce Chile’s legal history to Spain’s. I know of no other similar case.<sup>37</sup>

Zavala’s example in Mexico did not immediately generate a legal historiography worthy of the name. In fact, the formalistic description of the great legal monuments, such as the *Siete Partidas* or the laws of Hispanic America (*Recopilación de leyes de Indias*, 1680), served to express a fundamental conception that accepted the inexorable rise of the state as a political form and the “civilizing logic” of the law as the only legal source, in a superficial and uncritical account. The renewal of studies only came in the 1970s, when Guillermo Floris Margadant (1924–2002) at the *Instituto de Investigaciones Jurídicas* (National Autonomous University of Mexico, UNAM) and the *Colegios* of Mexico and Michoacán began promoting research work and exchanges and hosting international meetings in the field. The culture that places legal positivism at the heart of legal history has been eroded by the opening up to other historiographical traditions, not only European; it is considered at present a decisive moment in the rebirth of Mexican legal history.<sup>38</sup>

### *National Celebration and Legal Historiography in Brazil*

After Martins Junior’s efforts in Recife at the end of the nineteenth century, no scholars of a standing equivalent to Levene or Zavala emerged in Brazil in the first half of the twentieth century. Nor was there someone like

36 A. de Ávila Martel, “La enseñanza de la Historia del Derecho Español en la Universidad de Chile,” *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 8 (1984), 31–38, at 33; on 35–38 he describes the syllabus of the “Spanish” course, which, by his own admission, he developed during his work stays in Spain.

37 For example, W. Vega Boyrie, *Historia del Derecho Dominicano*, 2nd ed. (Santo Domingo: Instituto Tecnológico, 1989), which is based on Late Fifteenth-Century Castile, 7–19.

38 J. del Arenal Fenocho, “La ‘Escuela’ mexicana de historiadores del derecho,” *Anuario mexicano de Historia del Derecho* 18 (2006), 57–76; by the same author, “De Altamira a Grossi: presencia de historiadores extranjeros del Derecho en México,” *Historia Mexicana* 55 (2006), 1467–95. Zavala’s influence extended that of his master: R. Altamira, *Lecciones en América. Edition and preliminary study by Jaime del Arenal Fenocho* (Mexico City: Escuela Libre de Derecho, 1994).

Altamira to strengthen friendships and cultural relations, which were rather better between Portugal and Brazil to start with than those between Spain and Mexico or Argentina. It was not until the 1950s that another account of the *História do Direito Brasileiro* (I–IV, 1951–1956) was published, thanks to the influential lawyer, politician, and prolific writer Waldemar M. Ferreira (1885–1964).<sup>39</sup> The sixty years that separated Martins from Ferreira did not, however, consign the history of law to oblivion. Rather, the celebration of another event – the centenary of Brazil’s independence (1822–1922) – gave impetus to historical studies, including legal studies.

In 1922, the first *Congresso Internacional de História da América* (Rio de Janeiro, September 8–15, 1922) was held, with Ricardo Levene being among the most prominent participants. It was convened by the *Instituto Histórico e Geográfico*, a venerable institution officially founded in 1838 to seek knowledge of the physical environment – the delimitation of the territory of the Brazilian states was, even with the establishment of the federal republic, merely approximate – and to write the history of the nation. “Among the interconnections of civic catechism,” observed one of its members in 1912, “the study of the home country’s history stands out.”<sup>40</sup> In this historical meeting, methodologically guided by the positivist historiography of the Third French Republic (Charles Victor Langlois, Charles Seignobos), two subsections dealt with institutional history, another with constitutional and administrative history, and finally, the fifth section treated parliamentary history.

The thematic structure of the congresso was also followed in the second initiative sponsored by the Instituto Histórico e Geográfico.<sup>41</sup> I am referring to the *Dicionário Histórico, Geográfico e Ethnográfico* (1922), whose first volume, with general studies on Brazil, also contained chapters of legal interest: besides the usual constitutional (“Organização política,” Max Fleiuss and Augusto Tavares de Lyra) and administrative histories (Max Fleiuss), a “História judiciária do Brasil” (Aurelino Leal) was added, as well as a descriptive essay on “legal teaching” (Elpidio de Figueiredo). All of these authors

39 Also the author of *O direito público colonial do estado do Brasil sob o signo pombalino* (Rio de Janeiro: Editora Nacional de Direito, 1960), Ferreira contributed a *História do direito constitucional brasileiro* (São Paulo: Max Limonad, 1954), as well as an impressive *Tratado de Direito comercial* (São Paulo: Saraiva, 1960–1966), vol. I–XV, whose first volume described “o estatuto histórico e dogmático do direito comercial.”

40 J. L. Nascimento Júnior, “O Congresso, os Anais e a historiografia. Apontamentos sobre o I Congresso Internacional de História de América (1922),” *Revista Latino-Americana de História* 8 (2018), 269–84.

41 The official *Livro de Ouro*, with award-winning monographs, also coincided in content: J. Ribeiro Junqueira, “As comemorações do sete de setembro em 1922. Uma re(leitura) da história do Brasil,” *Revista de história comparada* 5 (2011), 155–77.

were prominent political figures close to the Instituto. For the history of law, the contributions of Fleiuss (1868–1943), permanent secretary of the institute, and Leal (1877–1924), author of a *História constitucional do Brasil* (1914), stand out above all others. Both produced excellent descriptions, with bibliographical references and extensive notes, of the institutions of government and justice from the early days of the Portuguese presence in America up to the First Brazilian Republic. Their work was similar in chronology, development, and index to the legal-historical texts that were beginning to be published in Spanish-speaking countries.

*The Instituto Internacional de Historia de Derecho  
Indiano* (1966)

The academic traditions of research described in the beginning of Section 1.1 and the underlying motives that sustained them – *hispanidad*, race, religion, and universal destiny – led to the foundation, in the mid-1960s, of the “International Institute for the History of Derecho Indiano.” Gathered in Buenos Aires on the occasion of the Fourth International Congress on the History of America, Alamiro de Ávila Martel (1918–1990), Ricardo Zorraquín Becú (1911–2000) and Alfonso García-Gallo (1911–1992) agreed to promote knowledge of the Latin American legal past by holding regular congresses and publishing their scientific results. This rather domestic foundational meeting in 1966 was followed by another in Santiago de Chile in 1969; since then, an uninterrupted series of conferences has taken place, which now extends to the twenty-first session (Buenos Aires, 2024). Modern historians from other traditions, such as the German (Horst Pietschmann, Enrique Otte), French (Annick Lempérière, François-Xavier Guerra), and Italian (Antonio Annino, Luigi Nuzzo, Aldo Andrea Cassi) ones, further contributed to the efforts of the institute and occasionally participated in its congresses.<sup>42</sup>

We already know that the Chilean Ávila was a disciple of Bascuñán. Zorraquín, like the younger José María Mariluz (1921–2018), was a disciple of Levene. García-Gallo trained in Madrid with Galo Sánchez, a medievalist expert who produced little though important work and always remained oblivious to the history of America. However, Galo Sánchez did open the

42 Former historians of the earlier-mentioned traditions studied the institutions of government in the Indies: cf. E. Schäfer, *Geschichte und Organisation des Indienrats und der Casa de la Contratación im sechzehnten Jahrhundert* (Hamburg: Iberoamerikanisches Institut, 1936); F. Chevalier, “Les municipalités indiennes en Nouvelle Espagne, 1520–1620,” *Anuario de Historia del Derecho Español* 15 (1944), 352–86.

*Anuario de Historia del Derecho Español*, which he had helped found in 1924, to research on Latin American law with the help of his friend and colleague Ots Capdequí.<sup>43</sup> Although García-Gallo devoted his doctoral thesis to the Spanish “theologians-internationalists,” his early research faithfully followed Sánchez’ work on medieval sources.<sup>44</sup> His dedication to American studies came later, when he assumed the Madrid chair of “History of the Political and Civil Institutions of America” (1944), which had previously been held by Altamira. A monograph on the territorial government of the Indies, composed on that occasion, was the beginning of the very fertile Americanist production of this author.<sup>45</sup>

The 1966 Buenos Aires meeting was inaugural, not only because it initiated a long series of academic encounters, but because this conference laid the foundations that conditioned subsequent research. Alfonso García-Gallo was in charge of providing the methodological guidelines.<sup>46</sup>

The method, in this case, was hardly distinguishable from the techniques that were applied for analyzing historical sources. Since his accession to the chair of “History of Spanish Law” in 1934, García-Gallo had been rejecting any “sociological” temptation in historical-legal studies: the subject “must deal,” he wrote at the time, “exclusively with legal matters and deal with all legal questions.” A fundamental distinction supported his approach: whereas historical science deals with singular and unrepeatable facts, the legal fact, born of a preexisting mandate (of a norm), was destined to repeat itself as long as the rules that constrained it did not undergo changes. That was the reason why the history of law was a branch of legal science that had to be pursued “purified” of cultural, economic, or socio-political circumstances.<sup>47</sup>

43 In addition to the studies of Ots, the *Anuario* could count on the collaboration with Levene right from the beginning: cf. R. Levene, “Fuentes del Derecho indiano,” *Anuario de Historia del Derecho Español* 1 (1924), 55–74.

44 A. García-Gallo, *La aplicación de la doctrina española de la guerra. Datos para su estudio*, Ph.D. thesis, Universidad Central de Madrid (1934). Cf. also *Anuario de Historia del Derecho Español* 11 (1934), 5–76, focused on Spanish-French relations, with documents. Nor do we find a specific section on *derecho indiano* in A. García-Gallo and R. Ríaza, *Manual de Historia del Derecho Español* (Madrid: Victoriano Suárez, 1934).

45 “Los orígenes de la administración territorial de las Indias,” *Anuario de Historia del Derecho Español* 15 (1944), 16–106. See A. García-Gallo, *Estudios de historia del Derecho indiano* (Madrid: Instituto Nacional de Estudios Jurídicos, 1972).

46 A. García-Gallo, “Problemas metodológicos de la Historia del Derecho indiano,” *Revista del Instituto de Historia del Derecho Ricardo Levene* 13 (1967), 13–64, in an issue of the *Revista* which collected the works of that “Primera reunión de historiadores del Derecho indiano.”

47 R. Medina Plana, “*Maneras de entender o entender la manera. Las primeras Memorias de oposición a cátedras de Historia del Derecho*,” *Cuadernos de Historia del Derecho* 6 (1999), 19–142, at 121–36.



He further argued that “*derecho indiano* – like all law – is an ordering of social life; but in no case is it social life itself, nor can it be confused with it.”<sup>48</sup>

The commitment to “juridicality,” in the sense of an exclusively *legal* approach to research that did not take into account sociological or economic considerations, involved the rejection of the preceding tradition, in particular, that represented by Rafael Altamira. For García-Gallo, this author lacked “personal research,” although he valued his role in guiding numerous disciples; and now – he wrote in 1953 – “sociological concern has begun to give way to an essentially juridical consideration of the history of *derecho indiano*.” If this went beyond Altamira’s “historicist” approach,<sup>49</sup> it also went beyond Levene: the admired Argentinean master “in his sociological orientation of legal history ... remains in the traditional line of his predecessors.”<sup>50</sup>

A subsequent study, born out of the Buenos Aires meeting and presented at the second conference (Santiago de Chile, 1969), codified the same method, that is, working techniques and presentation of results. This is the *Metodología de la historia del Derecho Indiano* (1970), disseminated as the *vade mecum* of the discipline.<sup>51</sup> It does not take much effort to identify the lines of thought to which the work responded. The past was assumed as something given, which the researcher had to recover through intense study of the sources, without falling prey to subjectivity: “the personality of the scholar must yield to it.”<sup>52</sup> The *Metodología* conceived law as an autonomous object, susceptible of separate

48 A. García-Gallo, “Problemas metodológicos,” 17. The recommendation to be thoroughly familiar with the history of French and Italian law (Medina, “Entender la manera,” 133) seems a remote echo of Latin “racial” consciousness.

49 “Su preocupación sociológica relegaba en él la jurídica a segundo plano ... no aporta resultados originales. Pero es, en el mejor sentido de la palabra, un agitador de la conciencia histórica y un orientador de la juventud interesada en los temas americanos.” A. García-Gallo, “Hinojosa y su obra,” in E. de Hinojosa y Naveros, *Obras*, vol. 1: *Estudios de investigación* (Madrid: Instituto Nacional de Estudios Jurídicos, 1948), xi–cxxiv, at cx–cxi.

50 A. García-Gallo, “El desarrollo de la historiografía jurídica indiana,” *Revista de Estudios Políticos* 70 (1953), 163–85, at 184.

51 Among the many reviews that the *Metodología* received, the one published by A. de la Hera in the *Anuario de Historia del Derecho Español* 43 (1973), 562–67, should receive express mention because de la Hera, professor of canon law in Murcia and Seville, devoted himself extensively to the history of colonial law and even assumed the Madrid chair of “Historia de la Iglesia en América e Instituciones Canónicas indianas” (1971). With two other “indianists” he published a general work: I. Sánchez Bella, A. de la Hera, and C. Díaz Rementería (eds.), *Historia del Derecho Indiano* (Madrid: Mapfre, 1992) which added – as did Ots Capdequí before him – the exposition of the institutions of private, penal and procedural law to the more usual history of the legal sources and of the institutions of government, both temporal and spiritual.

52 It is unavoidable to remember P. Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (New York: Cambridge University Press, 1988).



study: “It undoubtedly constitutes an aspect of the global culture of society, but with sufficient entity to be an object of study in its own right.” To this end, García-Gallo proposed to follow the “institutional orientation”: only the purely normative aspects of basic social relations were of interest to the legal historian. In reality, the pure and objective “noble dream” of the jurist-historian was in the service of a goal set fifteen years earlier: “to awaken or revive in all parts of America the interest in *derecho indiano*” and to demonstrate scientifically that it “was a decisive element in the forging of the peoples of America, in whom it inoculated the ideals of justice and liberty, who it led – by way of law – to achieve their independence; and because this Indian Law, given that it was common to all Spanish-speaking peoples, together with the language, constitutes the substratum of their cultural community.”<sup>53</sup> The *fin-de-siècle* paradigm of Euro-Creole and Catholic *hispanidad* was still present.

*New Horizons: The Casuismo of Víctor Tau*

The rigid separation between the history of *derecho indiano* and the history of the national laws of Latin America guided the work of the *Instituto Internacional* and its conferences, although the methods used for the former did not differ much – the influence of García-Gallo on Latin American legal historiography was and is considerable –<sup>54</sup> from those followed to develop the latter. Changes in themes and approaches only began on the occasion of the eleventh conference in Buenos Aires (1995), thanks to Víctor Tau Azoátegui (1933–2022), a well-known Argentinean legal historian, who was a disciple of Levene and an admirer of Altamira. Tau’s long trajectory as an active member of the *Instituto Internacional* revealed, indeed, an original path: he had been interested in customs (third conference, Madrid, 1972; fourth conference, Mexico, 1975; seventh conference, Buenos Aires, 1983), low-ranking norms dictated by lower authorities (sixth conference, Valladolid, 1980), and local objections to the legal orders (fifth conference, Quito-Guayaquil, 1978).<sup>55</sup> His sensitivity to what were, until then, considered

53 García-Gallo, “Problemas metodológicos,” 61.

54 As seen in the Ph.D. theses that García-Gallo directed in Madrid: among others, M. N. Oliveros, *La condición jurídica del indio en el Derecho Indiano* (1963); G. Morazzani de Pérez-Enciso, *La reforma del gobierno indiano en el siglo XVIII* (1963); B. Bernal Gómez, *Prudencio Antonio de Palacios: notas a la Recopilación de Leyes de Indias*, Universidad Complutense de Madrid (1976); C. René Salinas Aranedo, *De las instituciones de gobierno en Indias*, Universidad Complutense de Madrid (1980).

55 In particular: 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).

minor regulations was well demonstrated. At the eleventh conference (1995), his paper was developed and published separately, and *Nuevos horizontes en el estudio histórico del derecho indiano* (1997) offered a new canon for the historical-legal studies of Latin America.

The paper was not the result of chance. Three years earlier, Víctor Tau had published *Casuismo y sistema*, an original treatise whose general theme made it resemble a manual. A basic thesis, however, distanced it from the usual description of sources and institutions: that there was tension between a case-based culture (*casuismo*) and *systematic* efforts, which for this author contained all the experience of the early modern colonial law.<sup>56</sup> Ortega y Gasset's distinction between *beliefs* and *ideas* served Tau to articulate his work: the belief in *casuismo* coexisted with the idea of system, as followed in four fields of analysis (namely, the jurist's apprenticeship, the creation of the law, the jurisprudential works, and the application of the rules). In fact, the culture of *derecho indiano* was always a culture of the case, although it was familiar with ideas of system which were nevertheless extrinsic to the legal object they pretended to organize in a rational manner, and therefore never altered the dominant conception. The final result could not have been more "impure," since the reactivation of "a way of thinking about law" – the dominant case-based approach – which the rationality and abstraction of modern legal conception had condemned to oblivion only seemed possible by framing the legal fact within morality, theology, and politics: "The notion of a closed and sufficient legal order, conceptualized and methodically set out in laws is inapplicable to colonial law."<sup>57</sup> In that operation, the old objective dream that García-Gallo had cherished also disappeared, because "the historian, whose ineludible task is to look at the past, does so from his vantage point, located in the present, where one more turn of history can be glimpsed."<sup>58</sup>

A general revision of the old ways of practicing the history of law soon followed. Regarding legal sources, *Nuevos horizontes* denied the leading role of the law in the face of other norms that concurred with it, but also because it was conceived as just another piece of legal culture. From the point of view of the subject matter, a new catalog of arguments – the public servants and the works of theoretical and practical jurisprudence – was offered for

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

57 Tau Anzoátegui, *Casuismo y sistema*, 571.

58 Tau Anzoátegui, *Casuismo y sistema*, 578. Cf. J. García-Huidobro and D. Pérez Lassarre, "De Altamira y Levene a Tau Anzoátegui (pasando por García-Gallo). Tres aproximaciones al derecho indiano," *Revista de Estudios Histórico-Jurídicos* 39 (2017), 195–212.

future research.<sup>59</sup> But Tau also challenged the temporal barriers established between colonial law and national law by drawing attention to institutional continuity. Subsequent conferences reveal the impact of these proposals, as the study of the nineteenth century has been commonplace since the Toledo conference (the twelfth, in 1998), and in La Rábida (the twentieth conference, 2019) the theme was *Pervivencias del Derecho Indiano en el siglo XIX*. In Berlin (nineteenth conference, 2016), “colonial law in the nineteenth century” was directly addressed.

### *Broadening Horizons*

The eleventh conference held in Buenos Aires introduced a novelty: it included Brazilian historians in the list of “indianistas.” Arno and María José Wehling (Rio de Janeiro) contributed a study on the *Tribunal da Relação in Rio de Janeiro*, and their names have since become a regular presence at the meetings. In those years, Arno Wehling, former president of the *Instituto Histórico e Geográfico Brasileiro*, later a member of the *Academia Brasileira das Letras* (2017), participated in the foundation (2002) of the *Instituto Brasileiro de História do Direito*. Its conferences, the latest of which was held in Curitiba (eleventh conference, 2019), bring together Brazilian, American, and European scholars of the subject, and its *Anais* – the annals – constitute a rich body of research by the younger ones.

The Wehlings’ approach to Spanish-speaking Latin American legal historiography did not, however, include the communication of methods. A history of the institutions of colonial Brazil was legitimate and possible – few authors promoted it as the Wehlings did – without participating in the scheme of understanding provided by *derecho indiano*. The analysis of this point fell to António Manuel Hespanha, who was responsible for the inaugural lecture at the Berlin conference.

Spanish nationalism and Portugal’s civilizing mission were the starting points of the historiographies described there. Portuguese historians have thought of the colonial adventure as an experience that was open to local contexts and the plurality of legal and institutional models; the old discussions on Lusitanian racial origins (Oliveira Martins, Sardinha) marked a vision that prioritized the gentleness and friendly character of the Atlantic nation, a romantic and traveling nation due to its geographical conditions. In contrast,

59 Another legal historian of Buenos Aires stood out in his research on these questions: J. M. Mariluz Urquijo, *El agente de la Administración pública en Indias* (Buenos Aires: Instituto Internacional de Historia del Derecho Indiano and Instituto de Investigaciones de Historia del Derecho, 1998).

drawing on the idea of *hispanidad* – also Catholic and altruistic – scholars of the Spanish expansion in America emphasized its integrating and unitarian character, as revealed, significantly, by the well-known extension of Castilian law to the new territories and their peoples (“the Indies were not colonies”); certainly, exotic circumstances and normative interventions by peripheral authorities provided specific responses to local problems, but these responses were always integrated into the dominant legal system.<sup>60</sup> Despite the constant testimony of diversity and *casuismo*, Spanish-American law was ultimately described as centralist, unitary, and coherent.

Hespanha’s lecture concluded that the two Iberian forms of colonialism responded to an identical religious, political, and legal matrix. As such, the duplicity of historiographical traditions did not respond to appreciable differences in the historical materials. Rather, it was the respective cultural traditions of the nations – the feeling of opposition to Castile in the Portuguese case, and the exaltation of the imperial idea in the Spanish case – that allowed different visions to be developed.

#### *Toward a Postcolonial Legal Historiography*

The drawback of all this is that Latin America is presented to us as a gigantic *insula in mari nata*, empty and available for occupation by the first discoverer; “some interpretative coordinates,” Luigi Nuzzo has rightly written, “from which it was possible to imagine a *derecho indiano* without Indians and without Indies, a legal history of the conquest without conquest and without conquered.”<sup>61</sup> This warning finally brings us to the current moment in the historiography of law in Latin America. And here, the work of Bartolomé Clavero stands out in particular.<sup>62</sup>

The connection between “history” and “constitution” has been a constant theme in Clavero’s research. Since his first reflections in *Derecho indígena*, this author has endeavored to provide an analysis in which the indigenous is the protagonist element. It is understood, in the classical manner, as a *status* – a

60 Cf. J. Barrientos Grandon, *Historia del Derecho Indiano, del Descubrimiento colombino a la codificación*, vol. I: *Ius commune – Ius proprium en las Indias Occidentales* (Rome: Il Cigno Galileo-Galilei, 2000).

61 L. Nuzzo, “De Italia a las Indias. Un viaje del derecho común,” *Estudios Socio-Jurídicos* 10 (2008), 87–126. Also in *Rechtsgeschichte – Legal History* 12 (2008), 102–24 (in Italian). Most recently, by the same author, “Entre Derecho Indiano y Derecho Internacional. Tradición jurídica europea y crítica del eurocentrismo,” in Duve, *Actas del XIX Congreso*, vol. I, 271–89.

62 B. Clavero, *Derecho indígena y cultura constitucional en América* (Mexico City: Siglo XXI, 1994); *Genocidio y justicia. La destrucción de las Indias ayer y hoy* (Madrid: Marcial Pons, 2002); *Constitucionalismo colonial. Oeconomía de Europa, Constitución de Cádiz y más acá*

specific social condition that locates its members at the heart of the unequal and hierarchical society of the *Ancien régime* – which is not merely limited to the category of the *miserable* or the *rustic* that is more frequently used by historiography. That status was the state of *ethnicity*, “legally the space that the colonizers reserved for the colonized.”<sup>63</sup> This is undoubtedly another perspective on the term “race,” which we know to be decisive in the origins and development of Latin American legal historiography.

According to Clavero, ethnicity is accompanied by another concept, the mere enunciation of which is a condemnation, and a general censure of a complacent history. The European presence in America has been a colossal genocide, committed (and partially denounced) yesterday and today, in a “now” that is only too inclined to enact a “white legend,” replicating the *leyenda negra* or “black legend” invoked by mainly Protestant authors to denounce the atrocities committed by the Spanish in America.<sup>64</sup> This author’s perspective is one of accusation. “How can we approach colonial history without taking into account the rights of the indigenous peoples who suffered colonialism and suffer its consequences?” is the question – as well as the reproach – launched by Clavero when analyzing António Manuel Hespanha’s contributions to a “*direito luso-brasileiro*” that could result in a tropical reinvention of *derecho indiano*.<sup>65</sup> The question is full of disturbing implications since, in the first place, it draws attention to the omission in the historiographical narrative of the voice of the colonized, whereas philology’s recent contributions now allow us to access a body of sources that enable us to hear it. Clavero’s use of indigenous languages, at least to title his studies, undoubtedly responds to this new sensitivity.<sup>66</sup> Secondly, and more importantly, historiographical criticism is aimed at unraveling the current effects – as visible in the constitutional and international sphere – of colonial

(Madrid: Universidad Autónoma, 2016); *Europa y su diáspora. Debates sobre colonialismo y derecho* (Santiago de Chile: Olejnik, 2016). For a recent balance, see C. Garriga, “¿Cómo escribir una historia ‘descolonizada’ del derecho en América latina?,” in J. Vallejo, S. Martín (eds.), *En antídora. Homenaje to Bartolomé Clavero* (Cizur Mayor: Thomson Reuters Aranzadi, 2019), 325–76.

63 Clavero, *Derecho indígena*, 19.

64 B. Clavero, *Genocide or Ethnocide, 1933–2007: How to Make, Unmake and Remake Law with Words* (Milano: Giuffrè, 2009).

65 A. Hespanha, *O direito dos letrados no Império português* (Florianópolis: Fundação Boiteux, 2006); also, “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. Cf. B. Clavero, “Gracia y derecho entre localización, recepción y globalización. (Lectura coral de las Visperas constitucionales de António Hespanha),” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 41 (2012), 675–763, 700–707.

66 B. Clavero, *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000).

domination, with such relevant examples as modern slavery.<sup>67</sup> The constitutional history of Latin America – and not only Latin America’s – started from the implicit understanding and dissimulation of ethnicity to configure a deceitful citizenship; it is enough to recall the example of the Mexican state of Sonora y Sinaloa in the times of the 1824 Federal Constitution – since the state charter (1825) suspended the rights of citizens “for being in the habit of walking shamefully naked.” Anthropological diversity sustained the fiction of the public law of independence, prolonging the dictates of the old *derecho indiano*. It should be pointed out that Clavero’s suggestions have been passed on to recent Brazilian legal historiography, interested in *povos indígenas* whose rights, yesterday and today, are in continuous dispute.<sup>68</sup>

The history of Latin American law is one, if not the main form, of producing and applying law in Latin America. Or put differently, it is a “history of [Latin American] law in the present.”<sup>69</sup> It is thus a delicate object that – negatively – invents traditions, forgets subjects, and offers culturally connoted frameworks of understanding. It also – positively – identifies peoples and pluri-national states; it defends jurisdictions, territories, and resources. Scholarly activity ultimately becomes civic engagement. It is no coincidence that this historiographical renewal coincides with a new international law attentive to indigenous peoples and with a renewed constitutionalism.<sup>70</sup>

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## 1.2 What Is Legal History and How Does It Relate to Other Histories?

TAMAR HERZOG

Historians, jurists, and legal historians have long debated what legal history is, how it should be done, and what it must accomplish. These debates began long ago and continue to this day. They obscure not only important questions

67 B. Clavero, “Esclavitud y codificación en Brasil, 1888–2017. Por una historia descolonizada del derecho latinoamericano,” *Revista de Historia del Derecho* 55 (2018), 27–89.

68 See S. Barbosa, “Usos da história na definição dos direitos territoriais indígenas no Brasil,” in M. Carneiro da Cunha and S. Barbosa (eds.), *Direito dos povos indígenas em disputa* (São Paulo: UNESP, 2018), 125–37.

69 B. Clavero, *Constitucionalismo latinoamericano: Estados criollos entre pueblos indígenas y derechos humanos* (Santiago de Chile: Olejnik, 2019), 153.

70 Clavero, *Derecho indígena*, for an anthology of “constitutional recognitions.” Specifically, Clavero, *Constitucionalismo latinoamericano*.

related to what history and law are, respectively, but also what is the point in engaging in legal history at all. Is legal history useful for jurists? What about for historians or the public at large? Moreover, what makes a history *legal*? Is it the research object being pursued, the sources used, the methodology employed? Or is it more about the questions asked?

In what follows, I deliberately take issue with how legal historians of Latin America, Spain, and Portugal answered some of these questions. I am conscious of the fact that many other scholars have debated them and that these debates greatly contributed to the emergence of the views held by the Latin American, Spanish, and Portuguese scholars whose work I study and that informs my perspective. I pursue this endeavor convinced that the scholarship I examine is insufficiently known to a wider readership, while at the same time, it has and continues to shape the way the legal history of Latin American law has developed. This analysis focuses on what transpired since the 1960s because, although older visions persist, this volume attempts to follow the lessons we have learned up to this point. In part, I do so also as a tribute to António Manuel Hespanha, whose work inspired so many of us, and who was one of the editors of this project but regrettably passed away before we could bring it to fruition. As I wrote this text, I constantly dialogued with his work as well as repeatedly asked myself: What would he have said? How would he have addressed these questions?

The relations between law and history are quite old. It is often argued that, although the realization that laws change over time reaches back to antiquity, the first inquiry that resembles present-day historical epistemology was popularized by legal humanists who in the fifteenth and sixteenth centuries set out to criticize contemporary jurists for their understanding and use of Roman law.<sup>71</sup> Disputing the operative premise that Roman law could serve as a matrix for a universal and atemporal science of law, legal humanists suggested instead that Roman law was a relic of the past. To study it properly, it would be necessary to develop philological and historical methods aimed

71 A very brief introduction to some of these developments can be found in P. Stein, "Legal Humanism and Legal Science," *Tijdschrift voor Rechtsgeschiedenis* 54(4) (1986), 297–306. Recent scholarship on humanism tends to question some of these conclusions, for example, B. H. Stolte, "Text and Commentary: Legal Humanism," in K. Enekel and H. Nellen (eds.), *Neo-Latin Commentaries and the Management of Knowledge in the Late Middle Ages and the Early Modern Period (1400–1700)* (Leuven: Leuven University Press, 2012), 387–406; P. Gilli, "Humanisme juridique et science du droit au XV siècle. Tensions compétitives au sein des élites lettrées et réorganisation du champ politique," *Revue de Synthèse* 130(4) (2009), 571–93; and P. J. du Plessis and J. W. Cairns (eds.), *Reassessing Legal Humanism and Its Claims: Petere Fontes?* (Edinburgh: Edinburgh University Press, 2016).

at reconstructing the original texts while also devising ways to restore their original meaning. Among the methods legal humanists proposed was considering non-legal sources and even artifacts, studying the evolution of language, as well as imagining how readers and practitioners of that time might have comprehended things. Convinced that law was the product of society and therefore must be studied in both its temporal and geographical contexts, legal humanists also turned to observe the local customary law, which they argued was the true law of their communities. Thereafter, and using legal history both as a guide and weapon, legal humanists described Europe not only as a space for a *ius commune* but also as a patchwork of local legal solutions dependent on the time, place, and speakers involved. They envisioned a peaceful coexistence between a universal science of law and a plethora of specific arrangements that were constantly elaborated, changed, or abandoned by multiple individuals, groups, and communities who sought to define the rules that should guide their interactions.

In their quest to study law properly, fifteenth- and sixteenth-century legal humanists thus contributed to the development of historical methods. Yet, relations between law and history are not only the outcome of scholarly pursuits; they are also embedded in the very nature of juridical practice. More often than not, this practice centers on understanding the legal consequences of something that had already transpired. Evaluating the juridical meaning of both existing norms and past events necessarily involves a certain historical reconstruction, yet jurists and judges who seek to establish how to read certain texts, or how to appraise certain actions, do so in ways both similar and dissimilar to historians.<sup>72</sup> While the similarities are quite clear – attention to words, detail, context, and circumstances – so too are the differences. Jurists and judges have a practical reason to engage in evaluating historical evidence, namely, the need to solve conflicts. It is legitimate for them, indeed frequently even required, that they ignore all that is not essential to attaining that end. What they seek to uncover is mostly a “usable past,” which can serve as a resource in the present. To draw conclusions, jurists often selectively piece together, reorganize, and reconfigure disparate events that *a priori* are not necessarily related to one another or are connected in ways other

72 The distinction between a juridical and a historical truth has been the object of many studies, perhaps most famous among them, at least for historians, is C. Ginzburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice*, trans. A. Shugaar (London and New York: Verso, 1999). The issue, however, has been the subject of debate for a long time. See, for example, P. Calamandrei, *Il giudice e lo storico* (Milan: Giuffrè Editore, 1939).



than what they postulate. In other words, their reconstructions are not necessarily intended to uncover the truth, the whole truth, and nothing but the truth, but instead to achieve a certain goal. Jurists also inhabit an adversarial culture. There, it is completely normal to claim authority over certain interpretations, arguing that they and *only* they are correct. This same attitude is applied to their observations of the past, ascribing certainty and singularity where none existed. While historians of course also make decisions about what to include and what to ignore, or how to read what they uncover, their aim is not the attainment of a specific result but the expansion of knowledge. The conclusions and findings of their analyses normally follow the same epistemic rationale: They are not considered definitive, but instead open to re-examination, discussion, and change.<sup>73</sup> Most historians admit the possibility of a multiplicity of responses, and they are not particularly alarmed by ambiguity, by questions that cannot be answered, or that the past may not tell us all that we need in the present.

Jurists of course also intervene in history by writing it through pleading in the courts or delivering judicial decisions. A judge that orders the correction of a report elaborated by a truth commission, for example, deleting the name of an individual who is listed as having committed human rights violations, interferes with what is knowable and what is considered to have been proven.<sup>74</sup> Judges also intervene in the production of history when they sit in commissions or trials in which they adjudicate conflicts and determine what had transpired. In all these cases, the proceedings they conduct not only supply evidence that historians can use but also rulings that often illuminate – even determine, in the eyes of many – what the past contained. Juridical reconstruction of history can also be implicit, for example, when judges take

73 R. G. Ortiz Treviño, “Algo acerca del oficio del historiador del derecho,” *Anuario Mexicano de Historia del Derecho* 18 (2006), 463–85, at 256–59. A (relatively) early reflection on these differences is included in J. Sankey, “The Historian and the Lawyer. Their Aims and their Methods,” *History* 21(82) (1936), 97–108. I found the following most illuminating: J. M. Balkin, “Lawyers and Historians Argue About the Constitution,” *Constitutional Commentary* 35 (2020), 345–400. The term “usable past” is discussed by Balkin, for example at 383–400.

74 Decision dated Recife (Brazil), Apr. 8, 2021, of the Federal Judge of 6-Vara-Pe, Hêlio Silvio Querém Campos, in *Marcos Olinto Ovais de Sousa and Maria Fernanda Novais de Souza Cavalcanti v. União Federal – União*, Processo no. 0824561-44.2019.4.05.8300. The decision is available online at <https://averdade.org.br/novo/wp-content/uploads/2022/02/5decd83d-jfpe.pdf> (last accessed Mar. 15, 2022). On whether courts should or can decide on which past is verified, also see the most recent C. Douzinas, “History Trials: Can Law Decide History?,” *The Annual Review of Law and Social Sciences* 8 (2012), 273–89; and G. Resta and V. Zeno-Zencovich, “Judicial ‘Truth’ and Historical ‘Truth’: The Case of the Ardeatine Caves Massacre,” *Law and History Review* 31(4) (2013), 843–86.

“judicial notice” of allegations that involve assumptions about the past or that interpret the past in certain ways that are said to be consensual.<sup>75</sup> Though supposedly encapsulating common knowledge, controversies among judges, for example, regarding the history of discrimination, the meaning of family over time, or the legacies of WWII, demonstrate that such assumptions and interpretations are not uncontentious.

Expressed in different terms, behind all judicial decisions lies a narrative – implicit or explicit – on how things came to be as well as which lessons have the power to influence our vision of the past and can, therefore, be mobilized to support present-day agendas.<sup>76</sup> The writing of history by jurists and judges is particularly daunting because they are often ill-equipped to evaluate historical events, yet their rulings provide these events with a definitive narrative that can potentially acquire a normative value.<sup>77</sup>

Despite the enormous differences between historical and legal pursuits, many early historians were jurists, and they employed the techniques of exegesis, discovery, and reconstruction they acquired by studying and practicing law. Though this holds true in many different places, it is particularly illustrative of how scholarly engagement with Spanish American history has developed. In Spain, for example, many consider Eduardo Hinojosa y Naveros (1852–1919) to be the founder of historical studies. Hinojosa also trained many of those who would later go on to become historians of Spanish America. Nevertheless, Hinojosa was a jurist whose work was not particularly focused on legal questions.<sup>78</sup> Along similar lines, the first university chairs dedicated to the history of the Americas were established in the early twentieth

75 “Judicial notice” includes knowledge that parties do not have to prove because it is supposed to be common to all members of society, for example, what day of the week it is or the location of the court. However, it can also include more questionable facts such as the date on which colonialism ended or who was involved in a certain war. On these and other issues, see D. Barak-Erez, “History and Memory in Constitutional Adjudication,” *Federal Law Review* 45(1) (2017), 1–16.

76 J. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011), 3.

77 Presently, there is a significant debate among historians, for example, regarding how the US Supreme Court implements the doctrine of “originalism,” which states that the US federal constitution should be interpreted according to the intentions of its authors. This doctrine requires that judges reconstruct what late eighteenth-century authors meant, as well as the context in which they operated. On their failure (perhaps refusal) to do so correctly, see, for example, the criticism by J. N. Rakove, “The Second Amendment: The Highest State of Originalism,” *Chicago-Kent Law Review* 76(1) (2000), 103–66; and R. Piller, “History in the Making: Why Courts are Ill-Equipped to Employ Originalism,” *Review of Litigation* 34(1) (2015), 187–212.

78 J. Sánchez-Arcilla Bernal, “Alfonso García-Gallo: Aportaciones metodológicas y conceptuales a la historia del derecho,” *Cuadernos de Historia del Derecho* 18 (2011), 13–49, at 19–20.

century. These chairs were either situated in law faculties or their holders, among them Antonio Ballesteros Beretta, Rafael Altamira y Crevea, and José María Ots Capdequi, taught both history and law.<sup>79</sup> These intellectuals were also responsible for expanding the legal history of Spain (*Historia del derecho español*) to include colonial law – a law that eventually came to be identified as *derecho indiano* (see Section I.I).

Developments in early twentieth-century Spanish America were not very distinct. The Argentinean Ricardo Levene, for example, held the chair of history before switching to legal history; the Mexican Silvio Zavala, who studied law, spent most of his career among historians; and the Brazilian Salomão de Vasconcellos, who trained as a lawyer but went on to become a prominent historian. This generation of foundational scholars, all trained in law, did not distinguish between history and legal history. Regardless of whether they were working in law faculties, history departments, studied history, or studied law, they used similar sources and pursued similar objectives to such an extent that it is often difficult to ascertain their formal education and field to which they belonged.<sup>80</sup>

Later generations did not continue pursuing this initial convergence of disciplines. Legal historians writing on this parting of ways usually blamed historians for having abandoned the law in favor of social and economic history, which, whether under the spell of the *Annales* school or Marxism, portrayed law as a stale and irrelevant pursuit. Historians, they argued, moved away from legal and political history, adopted quantitative methods, and embraced longer temporal periods, moves that together often resulted in the removal

79 V. Tau Anzoátegui, “Instituciones y derecho indiano en una renovada historia de América,” *Anuario de Estudios Americanos* 75(2) (2018), 435–58, at 438–39; and F. Tomás y Valiente, “Escuelas e historiografía en la historia del derecho español (1960–1985),” 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 Editore, 1990), vol. I, 11–46, at 13 and 17–18.

80 On the influence of Spanish scholars on the development of Spanish American legal history, see, for example, J. del Arenal Fenochio, “De Altamira a Grossi: presencia de historiadores extranjeros del derecho en México,” *Historia Mexicana* 55(4) (2006), 1467–95; P. Mijangos y González, *El Nuevo Pasado Jurídico mexicano. Una revisión de la historiografía jurídica mexicana durante los últimos 20 años* (Madrid: Universidad Carlos III, 2011), for example, at 19–23; and C. Villegas del Castillo, “Historia y Derecho: La interdisciplinariedad del derecho y los retos de la historia del derecho,” *Revista de Derecho Público* 22 (2009), 3–22, at 9–10 who also mentions Colombian historians who had a law degree at 7. In Spain, Antonio Muro, who was trained in law, initially dedicated his attention to non-legal history: A. García-Gallo, “Antonio Muro. Historiador del derecho indiano,” *Anuario de Estudios Americanos* 22 (1974), XXI–XXXIX. The same was true of many others in Spain, Portugal, and Latin America, for example, M. Habel de Vasconcellos, “Salomão de Vasconcellos. Doctor, Lawyer, Historian,” *Américas* 30(5) (1978), 17–20.

of law from their list of research interests. Even if this analysis rings true, it is equally clear that legal historians have also contributed to this estrangement by abandoning history and by producing studies that mainly sought to reconstruct the genealogy of rules and institutions, a genealogy that was generally portrayed as the progressive betterment that led to present-day structures.<sup>81</sup> Conceiving of law in terms of an autonomous field, law faculties in Latin America, Spain, and Portugal monopolized legal history, and its practitioners were mainly interested in what some have identified as an “internal” history that looked at the law as if it had no “external” history, for example, its relationship to society.

Reacting to this growing separation, from the late 1960s onwards, many Latin American, Spanish, and Portuguese legal historians expressed their commitment to another type of legal history that also doubled as social, institutional, and political history.<sup>82</sup> To do so, proponents of these visions advanced a new understanding of what legal history is and ought to be. They called upon jurists to engage with the historicity of the law and appealed to historians to both acknowledge the pervasiveness of law and recognize its particularities. Yet, despite the desire to bring law and history together again, these legal historians never claimed that the two pursuits were one and the same. Instead, and as discussed later, they wanted history to improve the study of law, and the study of law to improve history. They asked questions

81 These attitudes, of course, were not particular to Latin American, Spanish, or Portuguese scholars. See, for example, P. D. Halliday, “Legal History: Taking the Long View,” in M. D. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), 323–42, at 325–26.

82 A. M. Hespanha, “Is There a Place for a Separate Legal History? A Broad Review of Recent Developments on Legal Historiography,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 48 (2019), 7–29. Some of these developments are reviewed in the article. These historians responded to the contrary visions that argued that legal history was a juridical rather than a historical science. An example of this debate and its pan-European ramifications can be found in A. García Gallo, “Cuestiones de historiografía jurídica,” *Anuario de Historia del Derecho Español* 44 (1974), 741–64; and the responses by F. Tomás y Valiente, “Historia del derecho e historia,” in J. J. Carreras Ares, A. Eiras Roel, A. Elorza Domínguez, et al. (eds.), *Once ensayos sobre la historia* (Madrid: Fundación Juan March, 1976), 160–81; and B. Clavero, “La historia del derecho ante la historia social,” *Historia. Instituciones. Documentos* 1 (1974), 239–61. The participation of Latin American scholars in these debates is examined in R. M. Fonseca, *Introducción teórica a la historia del derecho*, trans. A. Mora Cañada, R. Ramis Barceló, and M. Martínez Neira (Madrid: Universidad Carlos III, 2012), in particular the chapters on the *Annales* school and Marxism at 71–111; and A. Levaggi, “Consideraciones sobre investigación en historia del derecho,” *IUShistoria Investigaciones* 5 (2012), 433–49. On a multidisciplinary vision of the law, also see M. Brutti and A. Somma (eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Global Perspectives on Legal History 11) (Frankfurt am Main: Max-Planck-Institute für europäische Rechtsgeschichte, 2018).

about the nature of legal history, and they advanced reasons for why being familiar with it would be important for both jurists and historians.

The first target identified by this new generation of legal historians was the traditional divide; a division retained by jurists and historians alike and that distinguished “law in the books” from “law in practice.” This divide, they argued, was the result of a misunderstanding of how law operates, among other things, because it assumes that law was the same as legislation and restricts its study to state-made normativity. Instead of following such a reductive reading, these legal historians defended the view that their task was to ask what the juridical value of certain phenomena was, what roles did law play in social formation, and how juridical grammar and technology affected reality. They envisioned the study of legal history as a pursuit meant to elucidate how a technology we now identify as “legal” was used to organize, arrange, and rearrange social relations, as well as grant words and actions a normative value that placed them in a hierarchy granting greater protection to some things over others. By employing methods of abstraction, and by constructing similarities and distinctions without ever losing sight of the concrete circumstances and contexts of each case, law’s final aim, they argued, is to propose solutions that would guarantee a certain equilibrium between conflict and consensus by legitimizing certain things but not others, or at least not to the same extent. As a result, any study of knowledge production, social practices, or power relations, to mention but three examples, needs to reflect on law (see Sections 1.3 and 1.4 and Chapter 3).

Asking about which actors were involved in each case, their rationale, how divisions and distinctions were constructed, as well as what kinds of answers the law supplied and how prescriptive they were, these legal historians conceived of the legal field as one in which everyone participates to some degree or another. Some actors might exercise more control, possess greater agency, or have a better understanding of how the legal system works, but no one lives outside the law or completely independent of it, not even those at the social extremes: the very privileged and the heavily oppressed.

Criticizing both formalism and statism, these legal historians also rejected legal nationalism, which presupposes that law is the product (and reflection) of a particular community or nation, as the German Historical School had once argued. Like legal humanists before them, they suggested instead that law, though always attentive to local circumstances, was also a technology that crossed political, ethnic, and national borders. Finally, these legal historians argued that law should not be studied as a separate body of norms that are completely autonomous and unrelated to other normative phenomena.

Rather than imposed from the outside (as a statist formalist approach would lead us to believe), or forming a permanent and stable structure from within (as proponents of customary law presented it), they suggested that law, though varying to a great extent across time and geographies, is nonetheless a scaffold that seeks to give structure and meaning to human interactions, as well as acts as a means to arrange and rearrange them.

These views, which reflected a new understanding of the thematic field that legal history must cover, also insisted on the historicity of law. Accordingly, it is insufficient to ask about the historicity of a particular event, piece of legislation, or moment. To understand legal history, we must also consider how the legal context mutated, that is, how the legal framework in which different solutions operated differed over time. The task these legal historians adopted as their own was, therefore, to explain that law as a technology of conflict resolution had a history of its own, and that this history must be uncovered if we are to understand how law interacted with society. For example, medieval and early modern schemes for administrative work, they observed, can best be found in theories of judgment rendering and the history of the family, not in administrative correspondence or in royal decrees. Because the logic of past normative arrangements was so different from our own, to understand how they operated we must consider areas of legal research such as the juridical norms of the domestic sphere (see Section 3.3), religious normativity (see Sections 3.1 and 3.2), the legal valence of friendship and love, or even the jurisprudence tied to the various colors.<sup>83</sup>

Remembering that not only particular solutions but also the legal context constantly mutated would have us ask, to mention yet another example, when did *directum* (the prior term for “law” in many European languages) supersede *ius* (the ancient Roman term) as the most immediate label designating “law”? What can this transition tell us about societal expectations across Europe, where this mutation took place in some areas but not in others? Why was justice (*ius*) tied to direction (*dirigere* as in *directum*) in certain times and places but not in others?<sup>84</sup> How can we understand the radically

83 B. Clavero, *Antidora. Antropología católica de la economía moderna* (Milan: Giuffrè Editore, 1991); A. M. Hespanha, *La gracia del derecho. Economía de la Cultura en la Edad Moderna* (Madrid: Centro de Estudios Constitucionales, 1993); and A. M. Hespanha, “As cores e a instituição da ordem no mundo de antigo regime,” in A. Wehling, G. Siqueira, and S. Barbosa (eds.), *História do direito. Entre rupturas, crises e descontinuidades* (Belo Horizonte: Arraes Editores, 2018), 1–18.

84 S. Cruz, *Ius. Decretum (Directum)* (Coimbra: Universidade de Coimbra, 1971). On these issues, also see A. García Gallo, “Ius y derecho,” *Anuario de Historia del Derecho Español* 30 (1960), 5–48.

different ways in which certain documents were read over time, such as the emblematic Magna Carta, if we did not appreciate the constantly evolving contexts in which they were interpreted?<sup>85</sup>

These observations were aimed at convincing readers that law itself is not an atemporal or ahistorical construct that could be discussed in the abstract as if it were the same unchanging phenomenon. If we already recognize that the meaning of law can differ from place to place, time to time, and according to who is observing, we must also remember that the role law occupies in society does not remain static, and neither does the precise technology it proposes or what it considers prescriptive.

For this group of scholars, it was particularly important to assert the specific character of the late medieval and early modern law, which they claimed was distinct from our present-day structures, though the opposite is commonly thought to be the case. Distinctiveness was not only tied to the obvious fact that specific solutions were different, but mainly to the fact that the basic assumptions regarding what law is, how it operates, what it is supposed to accomplish, how it pretends to intervene in society, and the relations it has with other normative and cultural spheres were vastly different. Late medieval and early modern law did not dictate solutions (see Sections 3.1 and 3.2); instead, it indicated which questions should be asked and what considerations should be taken into account. What law did, therefore, was to aid in making a just decision by advancing options, explaining variations, and imagining possibilities, all while giving actors a tremendous amount of discretion as to which road they take. In other words, law was a system in which a plurality of options existed, as well as a multiplicity of sources and authorities, all of which were equally valid and none *a priori* superior to the other.

The wish to problematize the past also led this group of legal historians to rebel against portraying it as consisting of “systems” that preceded one another in an orderly fashion.<sup>86</sup> Such a depiction implied a degree of regularity and unity that was largely absent. A “system” presupposed a hierarchy of sources, a clear catalog of values, and/or a singular rationality. Yet, medieval and early modern law featured a casuistic universe. Furthermore, the image of various systems preceding one another portrayed the development of law as a

85 T. Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge: Harvard University Press, 2018), 1–2, 5, and 145–48.

86 V. Tau Anzoátegui, *Casuismo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992); Tomás y Valiente, “Escuelas e historiografía,” 29; and Sánchez-Arcilla Bernal, “Alfonso García-Gallo,” 26–27 and 30–31.



succession of schools and centers, as in the stereotypical depiction of European law: conceived in Italy, developed in France, and improved in Holland.<sup>87</sup> It also sent historians to “juridical traditions” that were supposed to communicate homogeneity and permanence as well as singularity and distinction when compared to all others. These legal historians argued that such images of the legal past undermined the important role of plurality, interpenetration, flexibility, and constant updating.<sup>88</sup> Proposing abstractions that were perhaps necessary for lawyers in their pursuit of resolving conflicts, they nonetheless entailed a form of violence that imposed on the past our present-day desire for clarity and certitude. Instead of searching for clear answers, legal history must describe the variety of voices, contrasting positions, and alternative proposals that, rather than depicting the past as “the kingdom of what is predetermined,” would demonstrate that it was “the theatre of possibilities.”<sup>89</sup>

One of the remarkable results of this move to historicize not only legal application but also law itself was, for example, the preoccupation of this group of legal historians with the creation, administration, and imposition of categories. Who had the power to create legal categories? How prescriptive were they and how were they managed? How did the emergence of categories change society and societal processes? Identifying law as an essential instrument for creating, imposing, and debating distinctions between right and wrong, as well as between what could be considered efficient and useless, also led to the obvious observation that the greatest struggle in history was perhaps not so much for social and economic prominence but over the ability to create and impose norms. This, as Foucault would probably have argued, may seem a gentler way to order the world, but as a technique, it was no less powerful and no less violent.<sup>90</sup>

The proponents of these views also took issue with practitioners, whom they accused of anachronistic approaches motivated *not* by ignoring

87 F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen: Vandenhoeck & Ruprecht, 1967), 169.

88 T. Duve, “Tradições jurídicas’ e história do direito,” in A. Wehling, G. Siqueira, and S. Barbosa (eds.), *História do direito. Entre rupturas, crises e descontinuidades* (Belo Horizonte: Arraes Editores, 2018), 19–41.

89 T. Duve, “Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (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: Brill Nijhoff, 2020), 1–39, at 5–9.

90 A. M. Hespanha, “Sábios e Rústicos. A doce violência da razão jurídica,” *Revista Crítica de Ciências Sociais* 25–26 (1988), 31–60; and A. M. Hespanha, *Imbecilidade. As Bem-Aventuranças da Inferioridade nas Sociedades do Antigo Regime* (São Paulo: Annablume Editora, 2012).



change over time – most of them knew that laws and practices constantly mutated – but by the refusal to grant sufficient attention to what else had changed. They suggested that many jurists and historians employed a retrospective quest that mostly searched the present in the past by tracing its “roots” or “origins.” Others went to extraordinary lengths to justify or legitimize their preference of present-day arrangements, in some cases rendering the past incomprehensible or even ridiculous. Either way, this regressive history, which made the past look like the present, might have questioned institutions, laws, and practices, but it did not observe the legal system itself. By going down this road, proponents of this type of history argued for continuity where none existed, and they ignored all that was no longer relevant to the present or was simply too strange or too counterintuitive to digest.

While pleading that we remember that the legal framework, and not only individual solutions, was subject to mutation, these legal historians also advocated the need to take law seriously via a close examination of its logic. Law, they argued, may use words that seem comprehensible, but like all technologies that seek to influence reality, such words carry a tremendous amount of baggage – and this baggage needs to be taken into consideration when examining legal language. In other words, though it is essential to understand the conditions that led to the emergence of certain terms, ideas, categories, or practices, it is also vital to consider that all of them have the consistency of loose sand. Like all other words, and probably more so than most words, legal terms appear immobile and immune to change; however, in reality, they are constantly shifting.

Take, for example, an apparently straightforward term like “family.” While families may very well have always existed, the definition of a “family” has dramatically changed from a voluntary association of individuals in antiquity to structures we now conceive as based on blood relations. The meaning and extension of blood relations also constantly mutated: Whose blood mattered, how, why, and to what degree? Over time, law recognized radically different configurations of “family,” applying to them a series of changing rights and obligations as well as intervening in them to various extents and in a multiplicity of ways. The literal continuity of terms such as family, therefore, masked deep and constant changes, with “a radical discontinuity of sense lurking beneath the ostensible uniformity of worlds.”<sup>91</sup> To rescue family

91 A. M. Hespanha, “Legal History and Legal Education,” *Rechtsgeschichte – Legal History* 4 (2004), 41–56, at 43.

law, in other words, it is insufficient to show that rules regarding the family changed. It is necessary to inquire as to what a family was, who posed the question, why, when, where did the multiplicity of answers originate, and how prescriptive or discretionary were the answers.

If “family” as a right and obligation-bearing entity was a completely different affair depending on the place and time, to rescue its history would require not only knowing a great deal about the location, period, and actors but also take into consideration how law intervened in such debates by giving different factual constellations a juridical meaning. This meaning depended on facts, but it mainly operates by attributing to these facts a normative value and by asking about their juridical significance. By using the persuasive power of language, law employs words to obtain certain goals. Though law also uses coercion and violence, it mostly seeks to convince by using language – which is why, by definition, it always includes a variety of options and involves lengthy debates that the parties use to demonstrate why they are right and the others are wrong.

To understand how the term “family” was “normalized” in the sense that at different moments in time, it was granted different normative meanings, one would have to reconstruct these debates. Family, in other words, may be a term we presently take for granted, or some consider a natural institution, but if we keep in mind that in other periods it was conceived as a constructed, artificial unit, we maybe able to liberate ourselves from considering its existence or meaning a forgone conclusion. This would also remind us that, because law has a normalizing effect, and because this effect is always part of broader discussions, the terms it uses are an open sesame that invites scholars to unfold what is otherwise unseen. Family operates in this way, but so do many other placeholders such as intention, customs, immemoriality, or consent.

Of course, one could argue that these placeholders only operate within a restricted field established by jurists or juridical experts. Yet this conclusion would defy all that we observe in society – both past and present. In this transformative process of facts to phenomena with normative value, particular traditions and practices matter, and they matter not only to jurists but also to contemporaries who use the law. How else can we explain the claims of illiterate peasants that they had to resist incursions on their territory by neighbors or else their silence would be construed as consent?<sup>92</sup> Alternatively, how

92 T. Herzog, *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Cambridge: Harvard University Press, 2015), 8, 34, 37–48, 106–7, 139–40, 203, and 237.

can we understand why a plethora of individuals, unable to prove what they wanted, invoked immemoriality? They knew that it was a powerful tool even if they did not know why.<sup>93</sup>

In this quest to refashion legal history, these Latin American, Spanish, and Portuguese scholars refuted the claim that the history of ideas was a legal history or that legal historians can stop at describing how norms evolved. They lamented the propensity by which actors invoke history to make claims in the present, and they expressed a desire for a legal history that would transcend national boundaries and be guided by the entities that were relevant in the past, not the present. They would ask questions such as: Was there a colonial law or is this law tied to our current needs and therefore a fiction of our imagination? Would it not be more appropriate to ask about transfers, translations, and exchanges as well as follow practices and processes of analysis and determination as they crossed the oceans than create categories *a priori*? (see Sections 1.3, 1.4, and 3.1 and Chapter 4).

If how to study legal history was a major issue for these legal historians, another involved the role it should play. In the past, these scholars argued, legal history mainly served either to strategically legitimize or criticize existing structures. Legal humanists strove to employ the power of local law against both universalistic tendencies and the increasing powers of kings. In nineteenth-century Germany, legal history served to justify as well as facilitate both German unification and debates regarding the character of German law. The instrumentalization of history to support political projects is, of course, a very common phenomenon. However, in the case of legal history, they argued, it has a particularly pernicious effect because this use reinforced the tendencies to portray legal evolution as linear and foretold. It often transformed the past into a repository of either better times to be recaptured or horrible times to be avoided.<sup>94</sup>

Rather than justifying or explaining the present – as many have done in the past – these scholars encouraged practitioners to transform legal history into a space of critical observation. They argued that recognizing legal historicity and the extreme alterity of the past should enable us to imagine alternative

93 T. Herzog, “Immemorial (and Native) Customs in Early Modernity: Europe and the Americas,” *Comparative Legal History* 9(1) (2021), 1–53, 2, 22–34, 36, and 46–47.

94 Mijangos y González, *El Nuevo Pasado*, 23–25; Fonseca, *Introducción teórica*, 65–66; and S. S. Staut Júnior, “Direito e história: Algumas preocupações a partir da obra de Antônio Manuel Hespanha,” in A. Peixoto de Souza (ed.), *Estudos de história e historiografia do direito em homenagem ao professor Antônio Manuel Hespanha* (Curitiba and Madrid: Editora Intersaberes, Marcial Pons, 2020), 31–56, at 36–42.

and unexpected routes in the present as well.<sup>95</sup> Instead of looking into a mirror, legal history could force us to look at familiar things from a different perspective – one that would question, rather than confirm, our present-day biases. For legal history to do so, we must seek not only to record but also to explain in the etymological sense of *ex-plicare*: the unfolding and revealing of hidden aspects that were either too obvious or too consensual for contemporaries to even mention, let alone elucidate.<sup>96</sup> According to this usage, it would be often more important to ask questions than to answer them, to express doubts than to look for certainties.<sup>97</sup> Thereafter, the goal would be to “make and unmake history” (*fazer e desfazer a história*) while also constructing and deconstructing the law.<sup>98</sup> This quest would transform the study of sources into an instrument rather than an end in and of itself.<sup>99</sup> The same could be said of episodes and events.

The extent to which these calls have been heeded remains to be seen. Though communication between jurists, historians, and legal historians has intensified in recent decades, and indeed legal history seems to be everywhere, formalist legal history remains popular, and there are still plenty of books that describe the legal past with certitude, reconstructing rules rather than possibilities, norms rather than discussions.<sup>100</sup> Meanwhile, many historians continue to either dismiss law altogether or consider it an external scaffolding rather than an internal spinal cord of all social interaction.<sup>101</sup> Perceiving law as a superstructure and believing that the social, political, or economic could be reconstructed by ignoring or at least marginalizing the law, many historians, who are otherwise extremely sensitive to historical contexts, nevertheless fail to contextualize

95 G. Silveira Siqueira, “História do direito como um olhar para o futuro: entre as experiências jurídicas e os horizontes de expectativas,” in A. Peixoto de Souza (ed.), *Estudos de história e historiografia do direito em homenagem ao professor António Manuel Hespanha* (Curitiba and Madrid: Editora Intersaberes, Marcial Pons, 2020), 99–211.

96 Fonseca, *Introducción teórica*, for example, 18, 24, and 38.

97 J. Vallejo, “En busca de audiencias perdidas: a propósito de Bartolomé Clavero, ‘Sevilla, Concejo y Audiencia: invitación a sus Ordenanzas de Justicia,’ estudio preliminar (pp. 5–95) de *Ordenanzas de la Real Audiencia de Sevilla*, edición facsímil de las de 1603–1632, Sevilla, Audiencia/Diputación/Universidad/Fundación El Monte, 1995, 1001 pp.,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 25(1) (1996), 711–27, at 715–16.

98 Â. Barreto Xavier, “António Manuel Hespanha: Fazer e desfazer a história,” *Cuadernos de Historia Moderna* 44(2) (2019), 689–91. “Fazer e desfazer a história” was also the subtitle of a history journal with which A. M. Hespanha was long associated.

99 Clavero, “La historia del derecho,” 247.

100 For example, I. Sánchez Bella, A. de la Hera, and C. Diaz Rementería, *Historia del derecho indiano* (Madrid: Editorial Mapfre, 1992); and M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004).

101 From that perspective, little has changed since the 1970s when Tomás y Valiente lamented these attitudes: F. Tomás y Valiente, “Historia del derecho,” 166–67; or in 2005 when A. M. Hespanha denounced them, *Cultura jurídica europeia: síntese de un milénio* (Florianópolis: Fundação Boiteux, 2005), 45.

and historicize the law. They adhere to a very narrow understanding of the law, equating it with present-day structures, or they implicitly use law as a synonym for state legislation in periods that, paradoxically, predated the emergence of states. Many also frequently assume that law prescribes solutions, that the words it employs have an obvious meaning, or they imagine that interpreting law to one's advantage is a form of resistance. As a result, otherwise incredibly respectful historians can confuse ancient Roman law with the Roman law that Europeans brought with them to the Americas (the revived medieval Roman law that formed part of the *ius commune* and that was largely distinct from ancient Roman law). Or, alternatively, they arrive at conclusions pointing out that certain actors (but not others) used the law as a "resource" rather than a "script" or that actors could choose and pick what to follow.<sup>102</sup> They suggest that the distinctions we currently maintain between state and international law (or inter-polity) had always been meaningful, and they express surprise when "internal" law affects "external" developments.<sup>103</sup> Many historians also routinely insist on a gap between law and its application, that is, "law in the books" versus "law in action." This allows them to see lawlessness and corruption or, on the contrary, agency where none exists. Where others see a soccer match, they only see many individuals running aimlessly after a ball.<sup>104</sup>

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### 1.3 How Is Law Produced?

THOMAS DUVE

If legal history is the history of "law," the question as to what is meant by "law" needs to be addressed. Philosophers have tried to answer this question for centuries. If defining law today proves difficult, then finding a concept

102 L. Benton and B. Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28(1) (2010), 1–38; and L. Benton, "Possessing Empire. Iberian Claims and International Law," in S. Belmessous (ed.), *Native Claims: Indigenous Law Against Empire, 1500–1920* (Oxford: Oxford University Press, 2012), 19–40, at 19 and 21–22.

103 For a particularly critical take on such anachronistic assumptions, see M. Koskeniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021).

104 See my response to a forum discussing my text *Frontiers of Possession* in M. Barbot, A. Stopani, and T. Herzog, "A proposito di 'Frontiers of Possession' di Tamar Herzog," *Quaderni Storici* 51(2) (2016), 538–87, at 586. I have to thank Thomas Duve for this image, which he included in a review of the book: T. Duve, "Grenzenlose Räume," *Rechtsgeschichte – Legal History* 23 (2015), 307–8.

determining “the law” of the past would seem to present an almost insurmountable challenge, and raises a whole host of questions: What to include into our observation of Latin American colonial law? How broadly does one draw the semantic field? Should one also take into consideration, for example, *usos*, *costumbres*, or *ritos*? Moreover, how should indigenous laws be included in legal history? What about rules stemming from the field categorized by Western modernity as “religion,” often distinguished from “morality” and “law” but fulfilling many similar functions?

Even if these questions go unanswered, researchers are inevitably operating with a certain concept of law, or at least with a pre-understanding of what it is they are looking for in the past. Critical reflection on these assumptions is a central dimension of global legal history, given its explicit aims to overcome methodological Eurocentrism, historiographic neocolonialism, and to decenter analytical tools and perspectives (see Section 1.4).<sup>105</sup> No critical exercise of self-reflection, however, can replace the need to explicitly define what object of observation we actually constitute when writing legal history. For even if we pretend to limit ourselves to observing practice, we still focus on specific actors, specific actions, and describe our findings in a specific language. While these choices are perhaps unconscious, they are by no means innocent.

For a long time, as Carlos Petit and Tamar Herzog show (Sections 1.1 and 1.2), jurists writing on Latin American legal history, interested in the prehistory of the legal institutions of their times, analyzed the past by employing a concept of law taken from the present. Anachronism was a practice, not a postulate.<sup>106</sup> In recent decades, however, a growing number of scholars have become critical of this tradition and propose leaving aside the search for “the” concept of law. Instead, they suggest understanding law in terms of a communicative practice, focusing more on the way people actually speak and act than searching for some possible underlying concept of law. Following this approach, researchers began devoting attention to documents of legal practice and to the processes of production of law.

This change of perspective not only had an invigorating effect on legal historical research in general terms, it has also proved particularly important with regard to two fundamental methodological challenges confronting Latin American legal history. The first deals with the question of how to write a

105 T. Duve, “What Is Global Legal History?,” *Comparative Legal History* 8 (2020), <https://doi.org/10.1080/2049677X.2020.1830488> (last accessed Jan. 12, 2022), 73–115.

106 Cf. against the problematic pledge for anachronism L. Benton, “Beyond Anachronism: Histories of International Law and Global Legal Politics,” *Journal of the History of International Law / Revue d’histoire du droit international* 21 (2019), 7–40.

legal history capable of doing justice to the laws of the indigenous peoples and other groups (see Chapter 2). The second challenge involves how to analyze the multiple entanglements, hybridizations, transfers, and the legal pluralism that characterized Latin American law during the colonial period – in other words, how to write a *global* legal history of Latin America (see Section 1.4). Both aspects are central to our understanding of Latin America and have tremendous political consequences.<sup>107</sup>

This section offers an introduction to doing legal history as a reconstruction of the production of law or, as I will explain, the production of “knowledge of normativity.” It begins with a brief review of some of the pre-understandings of the object of legal history and contrasts these with the perspective developed most importantly by António Manuel Hespanha, whose seminal contributions have been one of the primary motors of innovation in legal historical research on the Iberian empires. The section then develops a perspective based on this understanding, presenting legal history as a process of the production of knowledge of normativity through “cultural translation.”

### *Concepts of Law Underlying Legal Historical Research*

Carlos Petit’s review of the history of research on Latin American legal history (Section 1.1) clearly shows the extent to which the findings of legal historians working on Latin America were predetermined by their respective conceptions of law – some explicit, others implicit. Legal historians such as the Argentinean Ricardo Levene had a different concept of law at the beginning of the twentieth century than jurists such as the Spaniard Alfonso García-Gallo, whose work was formative for a large segment of the research community working on the so-called *derecho indiano* in the second half of the twentieth century. If Levene employed – at least in his methodological writings – a sociological conception of law that understood law as one mode of normativity, emanating from the pulsating social life, García-Gallo insisted that the object of legal history must be a historical legal system focusing on the institutions of the early modern state.<sup>108</sup> Following García-Gallo, the majority of legal historians working on colonial Latin America understood

<sup>107</sup> On these aspects, see J. Esquirol, *Ruling the Law: Legitimacy and Failure in Latin American Law* (ASCL Studies in Comparative Law) (Cambridge: Cambridge University Press, 2019).

<sup>108</sup> See V. Tau Anzoátegui, “De la Sociología al Derecho indiano. Contrapuntos entre Ricardo Levene y Ernesto Quesada,” *Revista de Historia del Derecho* 34 (2006), 357–417; V. Tau Anzoátegui, “El tejido histórico del Derecho Indiano. Las ideas directivas de Alfonso García-Gallo,” *Revista de Historia del Derecho* 21 (1993), 9–72.

law as a (somehow stable) system of norms emanating from state institutions. The laws of indigenous peoples were seen either as a residual part of a past to be overcome, or they were integrated into the colonial normative system not as “law” but as “custom,” for example, when García-Gallo included them in 1975 into his vision of “legal pluralism.”<sup>109</sup>

This legalistic and state-oriented vision of legal history and the neocolonial treatment of indigenous peoples’ laws have been criticized for decades. The starting point of this criticism was the renovation of legal history in Southern Europe with regard to the early modern period. Scholars like Bartolomé Clavero and António Manuel Hespanha argued that legal history could no longer be written in a teleological manner as a history leading to the modern state with (state) institutions and (state) legislation at the center (see Section 1.2). On the contrary, early modern law should be analyzed against the background of the corporative social structures of medieval and early modern societies. Medieval and early modern legal orders originated from a variety of corporations, all characterized by a special practice of producing law, for example, the authorities and members of the guilds who produced norms pertinent to them, or religious orders, the military, and so forth. As many studies following this approach have shown, a casuistic structure characterized this early modern “jurisdictional culture,” also in colonial Latin America.<sup>110</sup> Within the daily production of rules, various normativities were at play: not only “legal” norms but also norms grounded in religion, love, compassion, grace, and so forth. As a result, this “jurisdictional culture” needed to be analyzed in terms of a practice, and it could only be understood by paying specific attention to the legal and other kinds of knowledge that constrained and shaped an actor’s actions (see Sections 3.1–3.3). First advanced by Bartolomé Clavero and António Manuel Hespanha, building on the work of Paolo Grossi, and further developed by Argentinean legal historian Víctor Tau Anzoátegui and others, this approach has stimulated researchers to write different histories of the colonial legal regime of

109 A. García Gallo, “El pluralismo jurídico en la América Española 1492–1824,” in A. García Gallo, *Los orígenes españoles de las instituciones americanas. Estudios de Derecho Indiano* (Madrid: Real Academia de Jurisprudencia y Legislación, 1987), 299–310.

110 See, for example, C. A. Garriga Acosta, “Sobre el gobierno de la justicia en Indias (Siglos XVI–XVII),” *Revista de Historia del Derecho* 34 (2006), 67–160; C. A. Garriga Acosta, “Historia y Derecho. Perspectivas teóricas para una historia localizada del derecho,” in J. A. Achón Insausti and J. M. Imízcoz Beúnza (eds.), *Discursos y contra-discursos en el proceso de la modernidad (siglos XVI–XIX)* (Madrid: Sílex, 2019), 67–168; A. Agüero, “Las categorías básicas de la cultura jurisdiccional,” in M. Lorente (ed.), *De justicia de jueces a justicia de leyes: hacia la España de 1870* (Madrid: Consejo General del Poder Judicial, *Centro de Documentación Judicial*, 2007), 19–58.



Latin America. Groups previously falling outside the purview of legal historical research, subaltern people, and local actors now entered the stage of legal history.<sup>111</sup> Social history and legal history, for a long time at odds, suddenly complemented each other.<sup>112</sup> Researchers learned how to describe legal practice and thus the dynamics of producing law as a communicative process operating under asymmetrical power relations.

Even if the original aim of Clavero and Hespanha's critique, as representatives of the "new legal history" of the 1980s and 1990s, was to deconstruct legalist and statist legal historiography in Portugal and Spain, and notwithstanding debates about the (im)possibility of speaking of an "Ancien Régime in the tropics,"<sup>113</sup> their critique was based on fundamental legal-theoretical considerations. Hespanha, in particular, continuously developed these theoretical foundations, critically reflecting also on the political intentions underlying this shift.<sup>114</sup> The blending of methodological approaches developed in cultural studies, social history, legal theory, and sociology of law, combined with a deep knowledge of early modern legal history, led him to the conclusion that law is "a communicative system, or rather, a set of related communicative systems" and needs to be analyzed historically as such.<sup>115</sup>

111 As an example for this tendency, see B. Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* (Oxford: Oxford University Press, 2017).

112 For an excellent review of this development, see D. G. Barriera, *Historia y Justicia. Cultura, política y Sociedad en el Río de la Plata (Siglos XVI–XIX)* (Buenos Aires: Prometeo, 2019), Chapters 1–4.

113 This expression was coined by Hespanha and was the subject of intense debates; see A. M. Hespanha, "Ancien Régime in the Tropics? A Debate Concerning the Political Model of the Portuguese Colonial Empire," in C. Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution After 1800 Years* (Stuttgart: Franz Steiner Verlag, 2016), 157–76; see also A. M. Hespanha, "Uncommon Laws. Law in the Extreme Peripheries of an Early Modern Empire," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 130 (2013), 180–204; for a critique of this perspective from a position that shares the basic understanding of legal history but dissents on this aspect and provides further references, see B. Clavero, "Gracia y derecho entre localización, recepción y globalización (lectura coral de Las Visperas Constitucionales de António Hespanha)," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 41 (2012), 675.

114 See on these aspects the contributions in P. Cardim, C. N. da Silva, Â. Barreto Xavier (eds.), *António Manuel Hespanha. Entre a História e o Direito* (Coimbra: Edições Almedina, 2015), and more extensively in a collection of articles published in 2018: A. M. Hespanha, *O direito democrático numa era pós-estatal. A questão política das fontes de direito* (Amazon Publishing (Kindle Edition), 2018).

115 A short summary of this perspective is found in A. M. Hespanha, "Southern Europe (Italy, Iberian Peninsula, France)," in H. Pihlajamäki, M. Dubber, and M. Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press, 2018), 332–56.

*Law as a Set of Communicative Systems*

The notion of law as a set of related communicative systems relies on theoretical assumptions ranging from Wittgenstein and Foucault to Habermas, Luhmann, and more recent media and information theories. Within the scope of this section, unfortunately, we cannot explore in detail how Hespanha combined these ideas. More important, however, are the consequences for legal historiography he drew from them. For him, the decisive advantage of seeing law as a set of related communicative systems was that it allowed for an analysis not pre-structured by political entities; instead, it enabled legal historians to reconstruct the overlapping spheres in which people communicated about the law. Hespanha pointed out that the “idea of legal communicative systems (or spheres) emphasizes – and gives a sounder analytical support to – the idea of the coexistence of a plurality of laws according to factors of differentiation other than global entities, mostly related to a nation state precomprehension, such as ‘races,’ ‘nations,’ ‘kingdoms’.” The “shared dispositives of ‘telling the law’” that made up these spheres may have corresponded to “populations speaking the same dialect or living a common practice of conviviality, to a group of monasteries sharing a similar textual heritage, or to a network of clerks or intellectuals referring to a similar cluster of texts of authority.”<sup>116</sup> Due to this approach, communities that traditionally had not received attention, for example, subaltern groups, appear as active producers of norms. In his last major work, *Filhos da Terra* (2019), Hespanha took these concepts as a starting point for dealing with the phenomenon he identified as the “empire in the shadow” of the Portuguese: the numerous and heterogeneous people who referred to themselves as “Portuguese,” traveling all over the world, sharing some basic assumptions and practices regarding law.<sup>117</sup>

Hespanha considered the various and overlapping communicative spheres to be relatively autonomous. Learned jurists were communicating within one sphere, whereas members of corporate bodies like guilds and religious orders mainly referred to the authorities and communicative practices of their own groups. This did not mean, however, that law was independent from political or economic influences. On the contrary, and clearly referring to systems-theoretical theories of communication, Hespanha assumed that external factors were of fundamental importance to the evolution of these spheres. However, researchers should strive to observe these external factors in terms

<sup>116</sup> All quotations taken from Hespanha, “Southern Europe.”

<sup>117</sup> A. M. Hespanha, *Filhos da Terra. Identidades Mestiças nos Confins da Expansão Portuguesa* (Lisbon: Tinta da China, 2019).

of processes carried out within the respective subsystems, with special attention paid to the specific internal logic and mechanisms of reproduction at work within a given sphere.<sup>118</sup> This approach also means that the media utilized to communicate such ideas take on a central role within legal historical research.<sup>119</sup> Much earlier than most, Hespanha drew the attention of legal historians to the importance of mediality and materiality for legal history.<sup>120</sup> The understanding of legal history as a communicative practice or, as suggested in the following, as a process of production of knowledge of normativity through cultural translation, is building on these fundamental insights.

### *Law as (Cultural) Translation*

What does it mean to understand legal history as a process of production of knowledge of normativity through “cultural translation”? A quick glance at some “classical” instances and cases, taken from the nascent period of early modern colonial Latin America legal history and from the transition to the republican period, may serve to illustrate the point.<sup>121</sup>

As is well known, the European invaders also brought basic concepts of law, practices, and customs with them to the shores of the Caribbean islands and later to the American continent. With the reading of the *requerimiento*, the erection of the cross, the king’s coat of arms and motto, and many other acts of taking possession, a new legal order was established in the Americas – from the perspective of those who performed these acts. Just like the papal bulls

118 A. M. Hespanha, “Is There Place for a Separated Legal History? A Broad Review of Recent Developments on Legal Historiography,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 48 (2019), 7 and 14. For more on his methodological reflections with regard to the jurist’s law, see also A. M. Hespanha, *Como os juristas viam o mundo. 1550–1750. Direitos, estados, coisas, contratos, ações e crimes* (Lisboa: CreateSpace Independent Publishing Platform, 2015), 5–29.

119 Hespanha, “Is There Place”; *ibid.*, at 13: “In my opinion, one of the most promising topics in today’s legal history is this stressing of the communicative nature of law and of the importance that devices of its ‘telling’ and ‘sharing’ have in its way of being. This approach allowed to diversify histories of the law, according to the communicative spheres in which law respectively circulates, emphasizing non-homologous chronological and spatial profiles of the several layers of law.”

120 A. M. Hespanha, “Form and Content in Early Modern Legal Books. Bridging the Gap between Material Bibliography and the History of Legal Thought,” *Rechtsgeschichte – Legal History* 12 (2008), 12–50.

121 For a more detailed account, see T. Duve, “Legal History as a History of the Translation of Knowledge of Normativity,” Max Planck Institute for Legal History and Legal Theory Research Paper Series No. 2022-16 (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtslehre, 2022), <http://dx.doi.org/10.2139/ssrn.4229323>; T. Duve, “Rechtsgeschichte als Geschichte von Normativitätswissen?,” *Rechtsgeschichte – Legal History* 29 (2021), 41–68.

that had granted the Catholic kings of Spain and later the Portuguese Crown far-reaching rights to the still unknown territories, actors necessarily relied on the words, concepts, and practices of this European tradition.<sup>122</sup> They used the language of law inherited from Castile or Portugal, and translated this language, consisting not only of words but also of legal practices such as rituals, into new rules and practices that met the needs and requirements of the new situation. In this context, “translation” meant selection, interpretation, and adaptation to new circumstances. While a linguistic component was sometimes part of the broader translation process, “cultural translation” consisted of much more.<sup>123</sup> In the end, every normative statement produced – whether a court sentence, act of governance, writing of a legal text, issuing a legal opinion, and so forth – could be understood as a communicative practice or as a translation of knowledge of normativity, that is, a concretization of knowledge of normativity for the case in question. The newly created concrete normative statement then formed part of the knowledge of normativity that was again the object of translations.<sup>124</sup>

Not only the foundational acts but also the whole establishment and further development of the colonial legal order followed this pattern of translating knowledge of normativity according to the demands of the new situation. A prominent example for how this process transpired is the use of the term *miserabilis persona* for the integration of indigenous peoples into the colonial legal system (see also Chapter 2 and Section 3.2), the use of which has a long history.<sup>125</sup> The term and the legal knowledge accumulated around it originated in a privilege of jurisdiction issued by the Roman emperor Constantine, which was later included in a part of the *Corpus Iuris Civilis*, the *Codex* (Cod. 3.14).

122 “Tradition” is used here in the sense H. P. Glenn has given the term: H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2014); on Glenn’s current understanding, see the contributions in H. Dedek (ed.), *A Cosmopolitan Jurisprudence: Essays in Memory of H. Patrick Glenn* (ASCL Studies in Comparative Law) (Cambridge: Cambridge University Press, 2021).

123 On the concept of “cultural translation,” see P. Burke, “Cultures of Translation in Early Modern Europe,” in P. Burke and R. Po-chia Hsia (eds.), *Cultural Translation in Early Modern Europe* (Cambridge: Cambridge University Press, 2007), 7–38; P. Burke, “Translating Knowledge, Translating Cultures,” in M. North (ed.), *Kultureller Austausch. Bilanz und Perspektiven der Frühneuezeitforschung* (Köln: Böhlau, 2009), 69–88; P. Burke, *What Is the History of Knowledge?* (Cambridge and Malden: Polity, 2015).

124 See on legal history as a history of cultural translation Duve, “Historia del derecho como.”

125 See on this P. Castañeda Delgado, “La condición miserable del indio y sus privilegios,” *Anuario de Estudios Americanos XXVIII* (1971), 245–335; T. Duve, *Sonderrecht in der Frühen Neuzeit. Das frühneuezeitliche “ius singulare,” untersucht anhand der “privilegia miserabilium personarum,” “senum” und “indorum” in Alter und Neuer Welt* (Frankfurt: Klostermann, 2008).

According to this concept, widows, orphans, the elderly, and the sick could turn directly to the imperial court. Over the centuries, this special right of privileged access to justice, issued under Christian influence, became a privilege of jurisdiction for an ever-wider group of persons. Since the High Middle Ages, many types of disadvantaged persons could claim to be “worthy of commiseration” and thus *miserabiles personae*, and these jurisdictional privileges became part of *ius commune* and its manifold regional articulations. In the Castilian tradition, people considered as such could claim that their cases were *casos de corte*, *causae curiae* in the learned law tradition, giving them immediate access to the royal court.<sup>126</sup> From the High Middle Ages onward, and in the context of an intensifying quarrel over jurisdiction between secular and spiritual power, the Church claimed exclusive jurisdiction over these groups. Finally, in the early modern period, an ever-widening field of special rights for a variety of different groups was derived from this tradition. At the beginning of the seventeenth century, the Neapolitan jurist Giovanni Maria Novario compiled no less than 176 privileges for the *miserabiles personae* from nearly every field of law: the law of obligations, inheritance, procedural law, and so forth. Furthermore, the range of persons who could claim these privileges also had grown enormously through casuistry and due to the extensive interpretation of privileges favoring Christian values and goals (*piae causae*). Over time, not just the poor, sick, and elderly but also clerics, pilgrims, hospices and pious foundations, traveling merchants, and other disadvantaged peoples such as prostitutes or prisoners were beneficiaries of these privileges.<sup>127</sup>

For this reason, it is not at all surprising that jurists and canonists of the Iberian empires used the knowledge accumulated in conjunction with this term to apply it to indigenous peoples. When Bartolomé de las Casas took office as bishop of Chiapas in 1545, for example, he and the bishops of Guatemala and Nicaragua referred to this regulatory tradition and claimed that the indigenous population as a whole should be placed under ecclesiastical – that is, their – jurisdiction.<sup>128</sup> In a similar manner, both the office of the

126 See Duve, *Sonderrecht*, 102–37.

127 Giovanni Maria Novarius, *Tractatus de miserabilium personarum privilegiis* (Naples, 1637), Sectio Prima, Praeludium VIII; on the privileges see also Gabriel Álvarez de Velasco’s more erudite and complete deliberations, *Tractatus de privilegiis pauperum, et miserabilium personarum* (Madrid, 1630).

128 Letter dated Oct. 19, 1545, printed in F. Cantú, “Esigenze di giustizia e politica coloniale: una ‘petición’ inedita di Las Casas all’ Audiencia de los Confines,” *Ibero-Amerikanisches Archiv NF III* (2) (1977), 135–65, at 156.

*Protector de indios* in the Viceroyalty of Peru and a special tribunal for cases brought forward by indigenous peoples, the *Juzgado General de Indios* in the Viceroyalty of New Spain, were justified with reference to the obligation of emperors to protect the *miserabiles personae*.<sup>129</sup> It is very probable that direct appeal to Portuguese kings by both enslaved and free persons of African descent in colonial Brazil, that is, the “acts of grace,” were also responding to this regulatory tradition.<sup>130</sup> As a result, the astounding number of so-called *privilegia indorum* – privileges for the members of indigenous groups – compiled in the most influential books on the laws of Hispanic America are in fact concretizations of the regulations laid down in the canon and civil law tradition that had been translated into new realities. In other words, the particular “status” of indigenous peoples was developed by translating tradition.<sup>131</sup> When the famous Castilian jurist Juan de Solórzano Pereira, citing the work of Novario, referred to the *miserabilis persona* in his foundational books *De Indiarum Iure* (especially in the second part, 1639) and *Política Indiana* (1647), indigenous peoples were able to appeal to one of the most respected authorities and jurists of the Spanish empire when claiming such privileges.<sup>132</sup> Research examining court cases has shown that actors effectively claimed and were granted this status.<sup>133</sup>

Were these century-old notions and the 176 privileges amassed by Novario and referred to by Solórzano applicable “law”? Unsurprisingly, many of the privileges collected in Naples to establish a legal framework for institutions of poor relief did not fit the needs of indigenous peoples.<sup>134</sup> The few that were deemed useful, however, especially certain privileges

129 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); M. Novoa, *The Protectors of Indians in the Royal Audience of Lima: History, Careers and Legal Culture, 1575–1775* (Legal History Library 19 – Studies in the History of Private Law 10) (Leiden and Boston: Brill Nijhoff, 2016).

130 For more on this topic, see A. J. R. Russel-Wood, “‘Acts of Grace’: Portuguese Monarchs and Their Subjects of African Descent in Eighteenth-Century Brazil,” *Journal of Latin American Studies* 32 (2000), 307–32.

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

132 Juan Solórzano Pereira, *Política indiana* (Madrid, 1647), lib. II, cap. 28, n. 25–26; more extensively also in Juan Solórzano Pereira, *De Indiarum iure sive de iusta indiarum occidentalium gubernatione, tomus secundus* (Lyon, 1672), lib. I, cap. 27.

133 See on this C. Cunill, “L’Indien, personne misérable. Considérations historiographiques sur le statut des peuples indigènes dans l’empire hispanique,” *Revue d’histoire moderne & contemporaine* 64(2) (2017), <https://doi.org/10.3917/rhmc.642.0021> (last accessed Jan. 12, 2022), 21–38; B. P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008), 55–58.

134 Duve, *Sonderrecht*, 161–66.

in procedural law, were often cited and used by jurists and representatives of indigenous groups. This practice of selecting and adapting that which seemed reasonable for the case in question was standard procedure for early modern jurists. They continuously faced the need to translate legal knowledge stemming from tradition into new realities, opting for some of the authoritative statements they found and leaving out others. Roman law, *ius commune*, and medieval law books like the *Siete Partidas* were full of regulations that did not make sense as such. What they did contain, however, were deep and insightful reflections about law and a seemingly infinite number of examples as to how to resolve legal problems. In other words, they served as repositories of authoritative solutions and seemed to be expressions of a higher truth that often proved helpful in finding a just decision for any given legal question. It was precisely this quality that led early modern jurists to use their *arbitrium* and to decide in each specific case whether the regulations they found were applicable (see Section 3.1). As a result, when a 1671 *memorandum* for the reform of the office of the *Protector* addressed to the Viceroy of Peru began affirming that the “Indians of Peru, like the others of the West, are and must be counted among the persons who in law are called the *miserables*...,” the author did not refer to any specific “applicable” law.<sup>135</sup> Instead, he simply pointed to a body of legal knowledge developed over the centuries that revolved around the idea of protecting wretched persons. This knowledge was “culturally translated” within the specific circumstances of the case at hand into the local contexts, thus producing new statements adapted to the local contexts and, once accomplished, could then be used by others.

Examples of these cultural translations of knowledge from other periods and areas abound, and not just in the colonial period. One can also find them after independences. When nineteenth-century independent Latin American states faced the need to create their own national legal orders, they did so by means of continuous cultural and lingual translations of bodies of knowledge from other areas, especially from the USA and Europe. In this period of capitalist expansion and the “transformation of the world,”<sup>136</sup> the intensification of communication through technological innovations like the telegraph and

<sup>135</sup> Nicolás Matías del Campo y de la Rynaga, *Memorial histórico y iurídico que refiere el Origen del Oficio de Protector general de los Indios del Perú* (Madrid, 1671), fol 1: “Excmo Señor: Los indios del Perú, como los demas del occidente, son y deben ser reputados entre las personas que el derecho llama miserables...”

<sup>136</sup> J. Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century*, trans. P. Camiller (Princeton: Princeton University Press, 2015).



steamships and the growing integration of Latin America into a new system of world trade created a great need for new regulations. At the same time, the exchange of goods and people, not to mention the development of new forms of communication, made a previously unseen mass of legal knowledge available to a broader audience. As the sections on codification, constitution-making, and the contestations and exclusions show (see Sections 5.1–5.3), from the early nineteenth century onwards, models of constitutions and codifications circulated between Europe and Latin America as well as within Latin America.<sup>137</sup> Amongst the profusion of models and drafts, the French Civil Code of 1804 proved particularly influential. Early codifications like the ones of Haiti, the Dominican Republic, Mexico, and later Bolivia and Peru, adopted important parts of the French model, and other Latin American states used these and other models for their codifications.<sup>138</sup> Similar processes of *bricolage* happened in criminal law, where after several decades of copying and assembling European models, lively debates between criminologists on both sides of the Atlantic emerged, giving rise to new scientific communities or – along the lines of Hespanha – to new communicative spheres that produced legal knowledge across the oceans.

In a similar manner, teaching at Latin American law faculties often relied on European – in some cases US – textbooks translated into Spanish and sometimes adapted to local realities. Thus, these seemingly “European” models became part of localized “Euro-American” law and influenced the legal language, thought, and practice in Latin America. They shaped the

<sup>137</sup> On the circulation of models in civil and constitutional law, see F. J. Andrés Santos, “Napoleon in America? Reflections on the Concept of ‘Legal Reception’ in the Light of the Civil Law Codification in Latin America,” in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History 1) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2014), 297–314; A. Parise, “Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875),” in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History 1) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2014), 315–84; S. P. Donlan, “Entangled Up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, 1803–1810,” in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History 1) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2014), 213–52; E. Zimmermann, “Translations of the ‘American Model’ in Nineteenth Century Argentina: Constitutional Culture as a Global Legal Entanglement,” in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History 1) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2014), 385–426.

<sup>138</sup> A. Guzmán Brito, *Historia de la codificación civil en iberoamérica* (Madrid: Thomson Aranzadi, 2006).

legal imagination of the actors. An illustrative case is José María Álvarez's book *Instituciones de derecho real de Castilla y de Indias*, first published in Guatemala in three parts between 1818 and 1820, shortly before the declaration of Guatemalan independence in 1821 and Álvarez's own death.<sup>139</sup> The book combined linguistic and cultural translation in a variety of ways. The *Instituciones* was a Spanish translation of the *Recitationes in elementa iuris civilis secundum ordinem institutionum*, a book edited by the son of the acclaimed German jurist Johann Gottlieb Heineccius (1681–1741).<sup>140</sup> This German text was translated into Spanish by Álvarez and adapted to the local circumstances of pre-independence Guatemala. In the years that followed, this version of the *Instituciones* was edited in various places, and in many cases it was adapted to the volatile political circumstances experienced in these turbulent years, for example, the *nuevamente revista, corregida y aumentada* published in Mexico in 1826. Later editions were printed in Philadelphia in 1826, in New York in 1827, in Havana in 1834 (second edition in 1841), and in many other places in the Americas. In 1829, the *Instituciones* was published in Madrid, again with amendments, now under the title *Instituciones de derecho real de España*. In this edition, all notes added in the previous editions for Hispanic American readers were taken out. Using this Spanish edition as a basis, Dalmacio Vélez Sarsfield, who three decades later penned the Argentine *Código Civil*, prepared a new edition, printed in 1834 in Buenos Aires. In his book, he eliminated the references to Spain introduced in Madrid in 1829 and reintroduced those parts of the legislation for the colonies still in use in Buenos Aires at that time. As stipulated in the preface, he corrected "errors" as well as added annotations, new topics, and appendices. For example, after the first section on persons, he inserted an appendix on the legal situation of enslaved persons after independence in Río de la Plata. Much like Vélez Sarsfield, Andrés Bello, author of the Chilean Civil Code, published a textbook based on another text written by

139 For a reconstruction of the life and work of Álvarez, as well as on the editions, see the introductory articles in the edition of J. M. García Laguardia and M. del Refugio González, J. M. Álvarez, *Instituciones de derecho real de Castilla y de Indias* (Mexico City: Universidad Autónoma de México, 1982 [1826]), vol. I, <https://biblio.juridicas.unam.mx/bjv/id/388> (last accessed Jan. 12, 2022); see also A. Guzmán Brito, "La literatura de Derecho Natural Racionalista y la literatura de Derecho Indiano con especial referencia a las 'Instituciones' de José María Álvarez," in Instituto Internacional de Historia del Derecho Indiano (ed.), *XI Congreso del Instituto Internacional de Historia del Derecho Indiano. Buenos Aires, 4 al 9 de septiembre de 1995. Actas y estudios* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1997), vol. I, 481–98.

140 Heineccius was already well known in Spain and Latin America in the eighteenth century, see F. Pérez Godoy, "Johannes Heineccius y la historia transatlántica del ius gentium," *Revista Chilena de Derecho* 44 (2017), 539–62.

Heineccius, that is, the *Elementa iuris naturae et gentium*, which also incorporated parts of works authored by other notable jurists. Taken together, these many cultural translations and modifications constituted a dense web of legal knowledge resulting from an entangled legal history between the Americas, Europe, and even some parts of Asia – a process of global knowledge creation that transpired under the conditions of asymmetric power relations.<sup>141</sup>

Without delving into further examples, and as many of the chapters in this volume show, one can summarize that Latin American legal orders emerged and reproduced themselves through continuous linguistic and cultural translations of legal knowledge. These translations take place all the time, everywhere, and under varying power relations: when indigenous peoples practiced their laws, when the European invaders arrived, when the independent nations emerged, and even now in the twenty-first century, for example, when legal theories, or practices of transitional justice, are translated into different realities. In the colonial period, the translations were influenced in virtue of being part of European empires, and during the independence era, informal legal imperialism and European and US cultural, economic, and political hegemony had a huge impact on the process of state building and legislation. As a result of these multiple and ongoing processes of cultural translation, the legal orders that emerged in Latin America show considerable similarities but also marked differences, according to the flows of communication and the circumstances of the cultural translations.

### *Knowledge of Normativity*

The vast and ongoing process of cultural translation, however, is not focused solely on “legal” knowledge as its object. Legal actors draw upon more than “legal knowledge” in a narrow sense, that is, the primary and secondary rules conceived by the legal theorist H.L.A. Hart. These primary and secondary rules are, obviously, at the core of law and thus of legal history, as the examples just given demonstrate.

In the production of a normative statement, however, legal actors necessarily rely on much more than primary and secondary rules. According to the world they live in and the legal culture they inhabit, various kinds of knowledge are drawn upon: knowledge about the concrete problem they are dealing with, knowledge about the practical consequences of their decisions,

141 Regarding these processes of global knowledge creation, see T. Duve, “The School of Salamanca: A Case of Global Knowledge Production,” in T. Duve, J. L. Egío, and C. Birr (eds.), *The School of Salamanca: A Case of Global Knowledge Production* (Max Planck Studies in Global Legal History of the Iberian Worlds 2) (Leiden and Boston: Brill Nijhoff, 2021), 1–42.

about the persons involved, their status and the effects of this status on the case, and so forth. As the chapters on precolonial law (Chapter 2) and colonial law (Chapter 3) show, the varieties of knowledge – and thus the disparity and diversity of sources legal historians have to work with – is pretty much infinite. Legal actors often follow conventions, routines, and practices without being aware of them.<sup>142</sup> They might be guided by “grace” and “love,” as Hespanha has pointed out, and by principles taken from religion and other belief systems.<sup>143</sup> All this knowledge has normative value in the sense that it guides the actors’ operations. As such, it far exceeds what is usually considered as belonging to “legal knowledge.”<sup>144</sup> To make this clear, it seems preferable to speak of “knowledge of normativity.” This “knowledge of normativity” is operating in the process of translation of legal knowledge and other elements of knowledge, like practices, and it is itself translated – selected, adapted, transformed, and so forth – into a solution for a specific case.<sup>145</sup>

<sup>142</sup> From the perspective of the history of science, see L. Daston, “The History of Science and the History of Knowledge,” *Know* 1(1) (2017), <https://doi.org/10.1086/691678> (last accessed Jan. 12, 2022), 131–54. On page 139, practices are defined as “roughly, what scientists actually do as opposed to what they say they do.”

<sup>143</sup> A. M. Hespanha, *La gracia del derecho. Economía de la cultura en la edad moderna* (Madrid: Centro de Estudios Políticos y Constitucionales, 1993); A. M. Hespanha, “La senda amorosa del derecho: ‘Amor’ y ‘iustitia’ en el discurso jurídico moderno,” in C. Petit Calvo (ed.), *Pasiones del jurista. Amor, memoria, melancolía, imaginación* (Madrid: Centro de Estudios Políticos y Constitucionales, 1997), 23–73.

<sup>144</sup> The term “legal knowledge” is used by authors in many different ways. In this chapter, the term is used in a narrow sense, referring to what one might identify with H. L. A. Hart’s primary and the secondary rules, see H. L. A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961). Other authors like James Boyd White are using the term in a much broader sense, and much closer to what is referred to in this chapter as “knowledge of normativity” (see J. B. White, “Legal Knowledge,” *Harvard Law Review* 115 (2002), 1396–1431, at 1399: “Legal knowledge is an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence ... for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world – how to use legal language to create legal meaning”). However, as I understand it, and with regard to what is explained in the following, this broad understanding is better expressed by the term “knowledge of normativity.” See on this also Duve, “Legal History”; Duve, “Rechtsgeschichte.”

<sup>145</sup> Legal scholars have been addressing this broad body of knowledge toward the end of the twentieth and beginning of the twenty-first century using general terms like “legal culture.” Some discussing law as either a “craft” (Scharffs) or “cultural competence” (White), while others framed it in terms of “legal imagination” (Koskenniemi) or “legal consciousness” (Kennedy), none of them really connecting their terminology to an advanced theory of cultural production taking into consideration the practice turn. Current debates in the history of knowledge and global history provide precisely this theoretical background. On “knowledge of normativity,” see Duve, “Historia del derecho como”; T. Duve, “Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (16th–17th

Some examples might help to clarify this. Research on colonial court practice in Hispanic America, for example, has shown the extent to which Christian interpretations and values guided the interpretation of legal concepts (see Sections 3.1 and 3.2). Some of these values were directly expressed in secular law, as in the case of the *miserabilis persona*, so they became part of “legal knowledge.” In most cases, however, Christian values were simply tacit or implicit knowledge, and the consequences were so self-evident that they were not even mentioned.<sup>146</sup> The same holds true for local knowledge. In a number of sources from the colonial period, Crown or Church officials insisted on the need to know the local conditions,<sup>147</sup> and they emphasized the importance of practical experience.<sup>148</sup> What they were basically asking for was local knowledge, that is, what one “knows” without further specification. The often-misunderstood practice of non-application of a royal order by using the formula “we obey the law but we do not put it into practice” (*la ley se obedece pero no se cumple*), for example, is not a picaresque way of evading legal obligations. On the contrary, in many cases it was a way of acting legally by not implementing a decision that led to unjust results, usually because of a (perceived) lack of knowledge about the local situations, consequences,

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, 2020), 1–39.

146 T. Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650–1750)* (Ann Arbor: University of Michigan Press, 2004); A. Agüero, *Castigar y perdonar cuando conviene a la República. La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII* (Madrid: Centro de Estudios Políticos y Constitucionales, 2008).

147 Domingo de Salazar, first bishop of the Philippines, for example, insisted in a letter addressed to King Philipp II on the need to know the facts, *el hecho*, and complained about the deficient way central institutions like the *Consejo de Indias* were dealing with local problems: “The problem is that information has to arrive from as far as the Spanish Philippines, ... so that who has not been there must be cautious not to be deceived, because in what refers to the indigenous peoples only very few of those speaking about them are doing this without any own interests, or an interest of their friends and allies,” see: Domingo de Salazar, *Tratado en que se determina lo que se ha de tener acerca de llevar tributos a los infieles de las Islas Filipinas*, cited and translated in O. R. Moutin, “‘Sepamos, Señores, en que ley vivimos y si emos de tener por nuestra regla al Consejo de Indias’: Salamanca in the Philippine Islands,” in T. Duve, J. L. Egío, and C. Birr (eds.), *The School of Salamanca: A Case of Global Knowledge Production* (Leiden and Boston: Brill Nijhoff, 2021), 245–63, at 257, n. 47.

148 Toward the beginning of his book on contract law, published in 1569, the Dominican Tomás de Mercado wrote: “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.” On this and the value of experience, see 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 Imagination* (Intersections 77) (Leiden: Brill, 2022), 158–208, quotation at 169.

and so forth.<sup>149</sup> This conscious and selective non-implementation was itself a legal practice that emerged out of a legal culture that privileged material over formal justice and constituted an essential element of the relevant knowledge of normativity.

Political and economic interests are also important elements of the relevant “knowledge of normativity,” because they guide and constrain actors’ interpretations and actions, and they often end up shaping the law. An in-depth study of court cases on “political crime” during the First Brazilian Republic, for example, has shown that the classification of an offense as a “political crime” depended on various factors.<sup>150</sup> Apart from legal dogmatics, that is, the traditional doctrine defining this crime, translated into circumstances of late nineteenth-century Brazil, the heavily debated positivist positions in contemporary criminology, and the particular persons involved in specific cases mattered. Public opinion, in some cases orchestrated by the interested parties, backed some interpretations and delegitimized others. The decisions made under such specific conditions encoded concrete interests into seemingly abstract legal knowledge about the definition of this crime and the relevant jurisdiction used in subsequent cases. Local circumstances and contingencies, as such studies show, exerted more than an external influence on the law; this knowledge directly shaped it. They conditioned the production of law through cultural translation of the extant knowledge. Expressed in theoretical terms, cases like these confirm that the sub-system “law” absorbs external factors and processes them within its own logic of reproduction. This is why political, economic, and social circumstances cannot simply be seen as “external” influences. They need to be integrated into a legal historical analysis and analyzed as part of the knowledge of normativity people had at their disposal when they were producing law.

Finally, one field in which attention to “knowledge of normativity” far beyond the realm of “legal knowledge” in a narrow sense is of seminal importance is the history of the laws of indigenous peoples and other groups. As Caroline Cunill (Chapter 2) shows with regard to indigenous laws before and after the European invasion, the legal histories of indigenous peoples can only be appropriately written with special attention to knowledge stemming

149 V. Tau Anzoátegui, “La ley ‘se obedece pero no se cumple’. En torno a 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 Historia, 1992), 67–143.

150 See on this R. Sirotti, *Within the Law: Criminal Law and Political Repression in Brazil (1889–1930)* (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie, forthcoming).

from fields other than those considered “law” as traditionally understood by legal historians. The same holds for the knowledge of normativity of epistemic communities like Afro-Latin Americans, individuals from Asia working as slave labor in the Americas, or for the many corporate bodies of colonial or twenty-first-century societies that produced and enforced their regulations within their spheres of influence (see Chapters 3 and 7).<sup>151</sup> Speaking of “legal” knowledge in the narrow sense does not do justice to the breadth of normativities operating in these cases.

In particular, the analysis of cases often described as hybridizations or as examples of legal pluralism profits greatly from analyzing the knowledge of normativity employed by actors. Asking about the knowledge of normativity at work helps to overcome static visions of the law and avoid succumbing to the pitfall of identifying certain groups exclusively with certain bodies of knowledge of normativity, as often occurs in studies on legal pluralism. Contrary to what one might think, actors more often than not managed various registers at the same time, and the choice of the body of legal knowledge mobilized in any specific case was not necessarily limited to the jurisdiction it was made for or originally stemmed from. Especially under conditions of interlegality, that is, a legal pluralism under asymmetric power relations, use of multiple registers of knowledge of normativity seems to have been the rule rather than the exception. When indigenous actors invoked colonial justice, for example, they used colonial concepts and practices, and this use was not without repercussions for their own systems, because these concepts later shaped their own practices.<sup>152</sup> Research has shown that when property rights were at stake, indigenous peoples made use of property concepts from Castilian law when it was advantageous to their case.<sup>153</sup> And vice versa, if they considered it advantageous, Spaniards also defended themselves by invoking indigenous rights – a practice that,

151 Epistemic communities are groups of persons that share a certain *episteme*, that is, some basic assumptions with regard to values, causal beliefs, notions of validity, common practices, etc. For more on epistemic communities, including further references, see P. M. Haas, “Epistemic Communities,” in J. Krieger (ed.), *The Oxford Companion to Comparative Politics* (Oxford: Oxford University Press, 2012), vol. I, 351–59; also A. Bianchi, “Epistemic communities,” in J. D’Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham and Northampton: Edward Elgar Publishing, 2019), 251–66.

152 J. C. de la Puente Luna and R. Honores, “Guardianes de la real justicia: alcaldes de indios, costumbre y justicia local en Huarochirí colonial,” *Histórica* 40 (2016), 11–47.

153 K. Graubart, “Shifting Landscapes. Heterogeneous Conceptions of Land Use and Tenure in the Lima Valley,” *Colonial Latin American Review* 26 (2017), 62–84; see also K. Graubart, “Learning from the Qadi: The Jurisdiction of Local Rule in the Early Colonial Andes,” *Hispanic American Historical Review* 95 (2015), 195–228.



again, could have effects on the self-interpretation of this knowledge of normativity by indigenous peoples.<sup>154</sup> In some cases, indigenous officials invoked colonial law and used it against the “old” – that is, their own pre-colonial – law.<sup>155</sup> In the same vein, case studies on the interaction between colonial powers and indigenous peoples in the Americas have given insight into the “legal literacy” of participants and the different meanings these encounters produced.<sup>156</sup>

### *Glocalizations*

What picture emerges when we analyze Latin American legal history as a history of the production of knowledge of normativity through cultural translation? As the chapters in this volume show, we find similarities and dissimilarities between different areas of Latin America. The perspective presented in Section 1.3 can help to explain the reasons for this. As local conditions vary, so too does the outcome of the process of translation of knowledge of normativity. Actively engaged in the types of translations described earlier, and despite the asymmetric power relations, Latin American legal actors – often as “semi-peripheral jurists”<sup>157</sup> – drew on legal knowledge coming from other areas. However, in translating this knowledge into their local situations, they continuously produced new originals, not copies. Thus they contributed to the emergence of normative orders that in many cases mirrored the asymmetric power relations, yet cannot be adequately understood if viewed simply as a product of European imperialism or as an extension of European legal history, as the traditional notions of “legal transplants,” “legal transfer,” or “reception” often insinuate.<sup>158</sup>

What we observe instead is a process of “glocalization,” understood as the localization of transnationally circulating – “global” – legal knowledge through an infinite number of (cultural) translations in various local

154 T. Herzog, “Colonial Law and ‘Native Customs’: Indigenous Land Rights in Colonial Spanish America,” *The Americas* 63 (2013), 303–21; T. Herzog, “Did European Law Turn American? Territory, Property and Rights in an Atlantic World,” in T. Duve and H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 75–96.

155 Herzog, “Colonial Law and ‘Native Customs.’”

156 B. P. Owensby and R. J. Ross (eds.), *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York: New York University Press, 2018).

157 For more on this, see A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press, 2015).

158 For an overview, see M. Graziadei, “Comparative Law, Legal Transplants, and Receptions,” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019), 442–73.

and temporal settings.<sup>159</sup> These translations depended on the accumulated knowledge of normativity, and they continuously produced new knowledge. Throughout centuries of migrations of peoples and imperialism, before and after the European invasion, and due to the intense flows of communication, clear divisions between “the indigenous” and “the European” as well as between “the Spanish” and “the Portuguese” disappeared.

. . .

## 1.4 What Is Global Legal History and How Can It Be Done?

MARIANA DIAS PAES

What is global legal history and how can it be done? Though still a marginalized topic within the field of legal history – and one strongly overshadowed by methodological nationalism – it has nevertheless attracted more attention over the past few years.<sup>160</sup> Some authors have concentrated on the circulation of people – mostly throughout the Atlantic – and on the legal matters that they encountered in the course of their lives.<sup>161</sup> Others departed from a

159 On “glocalization” with references to Robertson and others, see V. Roudometof, *Glocalization: A Critical Introduction* (London and New York: Routledge, 2016). On “localization” and “globalization,” see, for example, Clavero, “Gracia y derecho”; 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), 101–29.

160 T. Duve, “What Is Global Legal History?,” *Comparative Legal History* 8(2) (2020), 73–115. It is important to stress that the entire field of the history of international law has been booming. Nevertheless, the history of international law is not global legal history, which is capable of addressing broader topics than the norms regulating international relations. For current trends on the history of international law, see M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021); J. Marglin, “Nationality on Trial: International Private Law Across the Mediterranean,” *Annales. Histoire, Sciences Sociales (English Edition)* 73(1) (2018), 81–113; and I. Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (The History and Theory of International Law) (Oxford: Oxford University Press, 2020).

161 C. de Castelnau-L’Estoile, *Páscoa et ses deux maris. Une esclave entre Angola, Brésil et Portugal au XVII<sup>e</sup> siècle* (Paris: PUF, 2019); D. Galeano, *Criminosos viajantes. Circulações transnacionais entre Rio de Janeiro e Buenos Aires, 1890–1930* (Rio de Janeiro: Arquivo Nacional, 2016); J. M. Hébrard and R. J. Scott, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Cambridge: Harvard University Press, 2012), 6–19; J. Marquez, “Witnesses to Freedom: Paula’s Enslavement, Her Family’s Freedom Suit, and the Making of a Counterarchive in the South Atlantic World,” *Hispanic American Historical Review* 101(2) (2021), 231–63.

perspective that drew on the history of empires and that conflated, to some extent, the “imperial” with the “global.” Even fewer works embrace a more explicit claim that includes global perspectives in the analysis of specific regions of the world.<sup>162</sup>

In Section 1.4, I argue that writing legal history in a global perspective has the potential to overcome theoretical blind spots and put forward less Eurocentric perspectives on how law is made. When it comes to legal histories of regions in the Global South, the most common approaches depart from theoretical assumptions that place the production of law outside these regions themselves. The Global South is often depicted as a recipient of law, that is, places to which law is transplanted, transferred, adapted, and so on. According to these assumptions, inspired by their foreign counterparts, elite jurists in these locations lay the groundwork for this reception and adaptation of foreign law.<sup>163</sup>

Placing the production of norms primarily outside the Global South reflects origin myths that still pervade scholarship on legal history. For scholars with a legal or historical background, it is still commonplace to identify the origins of legal categories and institutions in Roman law, the French Civil Code, the US Constitution, Savigny’s work, and so on. These origin myths are usually

162 See, for example, L. Benton, “The Legal Regime of the South Atlantic World, 1400–1750: Jurisdictional Complexity as Institutional Order,” *Journal of World History* 11(1) (2000), 27–56; Duve, “Global Legal History;” T. Green, “Baculamento or Encomienda? Legal Pluralisms and the Contestation of Power in the Pan-Atlantic World of the Sixteenth and Seventeenth Centuries,” *Journal of Global Slavery* 2(3) (2017), 310–36; W. L. Silva Júnior, “No limiar da escravidão: uma mirada global sobre os debates em torno de *coartados* em Cuba (1856) e *statuliberi* no Brasil (1857),” *Revista de História* 179 (2020), 1–33.

163 For a summary on the debates concerning legal transplants, transfer, adaptation, hybridization, etc. that still inform most of the research on Latin America legal history, see M. Graziadei, “Comparative Law, Transplants, and Receptions,” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019), 442–73. More recently, scholars have been calling attention to the innovative production of norms taking place in Latin America. The fields of constitutional law, international law, and legal anthropology are especially thriving. See, for example, J.-M. Barreto (ed.), *Human Rights From a Third World Perspective: Critique, History and International Law* (Newcastle Upon Tyne: Cambridge Scholars Publishing, 2013); A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge Studies in International and Comparative Law 115) (Cambridge: Cambridge University Press, 2014); D. Bonilla Maldonado, “El constitucionalismo radical ambiental y la diversidad cultural en América Latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia,” *Revista Derecho del Estado* 42 (2018), 3–23; L. Obregón, “Between Civilisation and Barbarism: Creole Interventions in International Law,” *Third World Quarterly* 27(5) (2006), 815–32; L. Obregón, “Peripheral Histories of International Law,” *Annual Review of Law and Social Science* 15 (2019), 437–51.

accompanied by a strict dichotomy separating “law” from “practice.” This dichotomy, in turn, leads to the clear distinction between the “production of law” and the “use of law.” Production is often associated with jurists and government agents. Usage, on the other hand, usually encompasses a wider spectrum of social groups, frequently ones able to resort to courts in order to claim rights and better living conditions.

In what follows, I demonstrate that a global perspective can shed light on how law was made in regions of the Global South, going beyond hegemonic paradigms such as “transplant.” To do so, I will present a set of conceptual tools that might help to highlight the role of other agents and places outside the traditional ones in the making of law. This perspective goes beyond the habitual analysis that considers jurists and politicians as the main agents in producing norms within solemn places, such as state institutions and law schools. In the first section, I will discuss the “production of norms” as a process assigning “concrete meanings” to legal categories and institutions – a process consisting of many layers. While some of them have long been the object of historiographical attention, such as the role of early modern jurists in building conceptual legal frameworks, others have not yet received sufficient attention.<sup>164</sup> The most important among them are the role of “practice,” of reiterated habits, the reproduction of formalities, and the reinforcement of worldviews in the making of law.<sup>165</sup>

Assuming the engagement of a wide array of agents in the making of law, I use “memories” and “zones of shared production of norms” as conceptual tools to bring “the global” to the analysis of the law. “Memories” – understood as shared cultural backgrounds – can potentially highlight the role that non-Western normative systems and diverse worldviews might have played in assigning concrete meanings to legal categories and institutions. In this sense, “the global” can exist within the experiences of a single person or within a group of individuals that share common cultural backgrounds.<sup>166</sup> “Zones of shared production of norms”

164 A. M. Hespanha, *Como os juristas viam o mundo. 1550–1750. Direitos, estados, pessoas, coisas, contratos, ações e crimes* (Lisboa: CreateSpace Independent Publishing Platform, 2015), 3–24.

165 For a discussion of the role of practice in normative production, see T. Duve, “Historia del derecho como historia del saber normativo,” *Revista de Historia del Derecho* 63 (2022), 1–60. See also M. Dias Paes, “Legal Files and Empires: Form and Materiality of the Benguela District Court Documents,” *Administrativ – Zeitschrift für Verwaltungsgeschichte* 4 (2019), 53–70.

166 D. Sachsenmaier, *Global Entanglements of a Man Who Never Traveled: A Seventeenth-Century Chinese Christian and His Conflicted Worlds* (New York: Columbia University Press, 2018). See also M. J. M. de Carvalho, F. dos Santos Gomes, and J. J. Reis, *The Story of Rufino. Slavery, Freedom, and Islam in the Black Atlantic*, trans. H. S. Gledhill

are, in turn, inductively defined geographical spaces that may or may not coincide with imperial or national boundaries. They indicate that “the global” entails a geography that encompasses connections between places where norms can be produced outside and independent of European spaces.

Although Section 1.4 and volume focus on the legal history of Latin America, its theoretical and methodological claims also apply to the writing of legal histories of other regions of the Global South, for example, Africa.<sup>167</sup> While I will make explicit references to Latin America throughout the text and use mostly examples drawn from the scholarship on Latin American legal history, my broader aim is to contribute to the elaboration of new ways of writing legal history. In this sense, this section is not addressed exclusively to legal historians focused on Latin America but to legal historians in general.

### *Myths of Origin in Latin American Legal History*

As Tamar Herzog emphasizes (see Section 1.2), a multiplicity of ways of doing legal history have been pursued over the last few decades. When it comes to the history of law in Latin America, despite many attempts to promote interdisciplinarity, a fairly harsh institutional, theoretical, and methodological division still exists between legal historians with a background in law and those with a background in history. Though exceptions exist, especially among younger scholars making a real effort to engage in debates with peers from different disciplinary backgrounds, such scholars are by no means the rule.

This institutional division minimizes the role that historians have played in the building of legal history scholarship. In recent years, social history in particular has been extremely important in the writing of the legal history of Latin America. Though the contribution of social historians is not adequately acknowledged in narratives on the history of the field, their work has, nonetheless, played a crucial role in promoting core debates on methodological issues when analyzing law, as well as on stressing the engagement of subaltern groups with legal matters. That subaltern groups, such as enslaved

(Oxford: Oxford University Press, 2020); Castelnau-L'Estoile, *Páscua et ses deux maris*; Hébrard and Scott, *Freedom Papers*; B. G. Mamigonian, “José Majojo e Francisco Moçambique, marinheiros das rotas atlânticas: notas sobre a reconstituição de trajetórias da era da abolição,” *Topoi. Revista de História* 11(20) (2010), 75–91; Marquez, “Witnesses to Freedom.”

<sup>167</sup> It is important to stress that “Africa” is a highly diverse continent, within which societies with different cultural backgrounds exist: *hausa, somali, berber, akan, fulani, igbo, kikongo, yoruba, zulu, shona, ovimbundo*, etc. Nevertheless, for the sake of reading fluidity, I will employ “Africa” the same way I do with “Europe” and “Latin America,” that is, to refer to a geographical space within which diverse societies exist.

persons, women, workers, indigenous populations, and children, made their way into historical research on law is due in large part to social history. Besides directing attention to new agents, the work of social historians also made it clear that researchers interested in law should analyze sources other than the writings of jurists and enactments by state institutions. Social historians also contested many theoretical and methodological assumptions of the more traditional scholarship on law and history. They were, for example, the main party responsible for claiming that the writing of legal history should rely on extensive archival research, encompassing a broad array of sources in addition to legislation and legal doctrine.<sup>168</sup>

Though some progress has been made toward combining legal and historical training, when it comes to addressing global issues, scholars in both “groups” tend to disregard non-jurists and non-government agents as producers of norms and tend to place innovative production of norms outside Latin America.

Carlos Petit (see Section 1.1) explains how legal historians with a legal background wrote over the years the history of law in Latin America. As he clarifies, for many years, this way of doing legal history privileged official sources and focused mostly on legislation and legal doctrine.<sup>169</sup> This scholarship

168 E. Azevedo, *O direito dos escravos. Lutas jurídicas e abolicionismo na província de São Paulo* (Campinas: Editora da Unicamp, 2010); P. Cantisano and M. Dias Paes, “Apresentação: processos judiciais e escrita da história na América Latina,” *Varia Historia* 37(74) (2021), 353–60; S. Chalhoub, *Visões da liberdade. Uma história das últimas décadas da escravidão na corte* (São Paulo: Companhia das Letras, 1990); M. A. Corva, “Rastreado huellas: la búsqueda de documentos judiciales para la investigación histórica,” *Revista Electrónica de Fuentes y Archivos* 6 (2015), 43–65; M. Dantas and F. N. Ribeiro, “A importância dos acervos judiciais para a pesquisa em história: um percurso,” *LexCult. Revista Eletrônica de Direito e Humanidades* 4(2) (2020), 47–87; K. Grinberg, *A Black Jurist in a Slave Society: Antonio Pereira Rebouças and the Trials of Brazilian Citizenship* (Chapel Hill: University of North Carolina Press, 2019); T. Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650–1750)* (Ann Arbor: University of Michigan Press, 2007); S. H. Lara, *Campos da violência. Escravos e senhores na Capitania do Rio de Janeiro. 1750–1808* (Rio de Janeiro: Paz e Terra, 1988); S. H. Lara and J. M. N. Mendonça, “Apresentação,” in S. H. Lara and J. M. N. Mendonça (eds.), *Direitos e justiça no Brasil. Ensaios de história social* (Coleção Várias Histórias 22) (Campinas: Editora da Unicamp, 2006), 9–22; S. Mallo, C. Mayo, and O. Barreneche, “Plebe urbana y justicia colonial: las fuentes judiciales, notas para su manejo metodológico,” *Frontera, sociedad y justicias coloniales: Estudios-Investigaciones* 1 (1989), 47–53; B. Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* (Oxford: Oxford University Press, 2017); M. Yangilevich, “Normas, rupturas y continuidades: la administración de justicia y los ataques contra la propiedad en la Provincia de Buenos Aires (2ª mitad del siglo XIX),” *Revista de Historia del Derecho* 38 (2009), 1–11.

169 For further discussion of this legal history historiography, see T. Duve, “Rechtsgeschichte als Geschichte von Normativitätswissen?,” *Rechtsgeschichte – Legal History* 29 (2021), 41–68; and A. M. Hespanha, “Is There a Place for a Separated Legal History? A Broad Review of Recent Developments on Legal Historiography,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 48 (2019), 7–28.

traced the origins of Latin America's legal categories and institutions mostly to Iberian colonial law and Roman law. Norms were either a transplant or subject to the influence of foreign legal debates, such as those posed by the Historical School, and foreign legislation, such as the French Civil Code. The places of innovative norm production were, therefore, mostly outside of Latin America. Global perspectives were virtually absent since this historiography was framed largely by methodological nationalism.<sup>170</sup> The “global” appeared mostly as the myths of origin created by Roman or colonial law that somehow linked Latin America to European traditions.<sup>171</sup>

The Eurocentrism characteristic of this way of doing legal history was influenced by the assumption that the “law of jurists” was the primary object of research in the field.<sup>172</sup> It presupposed that the only actors who produced norms were part of a narrow elite, learned group. These were the actors influenced by foreign legal debates and responsible for adapting them to Latin American realities. Other historical actors were considered irrelevant to legal history. An eloquent example of this perspective is given by Petit (Section 1.1): “[T]he African populations – the authority, in this case, was another professor from Recife, the great Clóvis Beviláqua – did not really contribute anything to Brazilian law because of their condition as enslaved people.”<sup>173</sup>

As emphasized in other chapters in this volume, the work of António Manuel Hespanha, Víctor Tau Anzoátegui, and Bartolomé Clavero criticized this tradition and proposed other ways of writing the legal history of the Iberian empires (see Section 1.2). More recent works incorporated much of what the aforementioned authors proposed regarding the relative autonomy of law; the role of local practices and customs; the importance of other normative spheres, such as religion, affection, and so forth; and the necessity to broaden the range of primary sources. Yet, the relation of Latin America to other parts of the Global South occupied only a marginal space in their work or was altogether absent. In this sense, the “global” was again embodied in ideas such as “circulation,” “reception,” “transfer,” “adaptation,” “comparison,” which seemed to lead only to the protagonism of some places but not others. Moreover, jurists and government agents are still depicted in many studies as the main producers of norms, though some scholars broaden the array of actors, including in

170 On “methodological nationalism,” see Duve, “Global Legal History,” 3–11; Duve, “Rechtsgeschichte als Geschichte.”

171 On ideological grounds of linking colonial law to European traditions, see A. M. Hespanha, “O direito de Índias no contexto da historiografia das colonizações ibéricas,” in T. Duve (ed.), *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano. Berlin 2016* (Madrid: Dykinson, 2017), vol. I, 43–85.

172 Duve, “Rechtsgeschichte als Geschichte.” 173 See Section 1.1.



their analysis the lower echelons of colonial bureaucracies and people who constantly interacted with the law but did not necessarily have a formal legal education.<sup>174</sup> And while subaltern groups, such as women, indigenous people, and enslaved persons, have indeed been the subject of more recent research, they are usually portrayed as “users” of the law who mobilize legal categories in order to resist, claim rights, or achieve better living conditions. They are not considered, however, producers of norms.

Though taking a different route, legal historians with a background in history usually end up falling into the same trap. The contribution of social history to the field of Latin American legal history is immeasurable. However, in most of these works, a very traditional idea of law continues to persist, that is, associating law with written legislation. In this sense, everything that happens contrary to, or in the absence of, written legislation is considered “custom” or “practice.” An example of this narrow conception of law are the debates over enslaved persons’ *peculium*. Having shown that enslaved people went to court to pay for their manumission well before the Free Womb laws came into existence was undoubtedly a significant innovation on the part of social historians. Forming a *peculium* and later claiming the right to pay for manumission, however, was characterized by these historians as a “customary practice” that was eventually recognized by legislation. In other words, though these scholars acknowledge that enslaved people were aware of and engaged with the law, their actions were situated in the realm of custom and *not* law – certainly not in the sense of the Free Womb legislation. According to this view, courts were therefore an “arena of struggle” where law was “mobilized.” The engagement of subaltern groups with norms was depicted in terms of “practice” and often contrary to “law.” The result of such perspectives is the reproduction of narrow conceptions regarding the places and agents of the production of norms. As for “the global,” transplanted paradigms and related perspectives often make their way into this scholarship. One such “classic” misconception is to tie the roots of slavery law to Roman law. The result of this assumption is that the law “used” by subaltern groups has its origins mostly outside of Latin America. Again, Europe plays a central role in the innovative production of norms, resulting in the exclusion of other geographies of production.<sup>175</sup>

174 See, for example, O. Danwerth and T. Duve (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Max Planck Studies in Global Legal History of the Iberian Worlds 1) (Leiden: Brill Nijhoff, 2020).

175 See also, M. Dias Paes, “Direito e escravidão no Brasil Império,” in S. Barbosa and M. Dantas (eds.), *Constituição de poderes, constituição de sujeitos: caminhos da história do direito no Brasil (1750–1930)* (Cadernos do IEB 14) (São Paulo: Instituto de Estudos Brasileiros, 2021), 182–203.

Over the last few years, social historians have produced an amazing body of scholarship showing the entanglement between different cultural backgrounds – notably the highly diverse cultural practices of African societies – in the making of Latin American societies.<sup>176</sup> Why exclude law from this perspective? Why should law be considered something primarily made in regions of the Global North by elite groups? Why should the legal systems of the societies of the Global South and of subaltern groups be classified as “customs” – a label that clearly reproduces the perspective framed by colonial agents?<sup>177</sup> In Section 1.4, I propose that Latin American legal history would benefit from a global perspective that enables a broadening of the places and agents of the production of norms, rendering a more complex answer to the question: How is law made?

### *The Production of Norms and Concrete Meanings*

The “production of norms” is a conceptual tool that allows us to overcome dichotomies such as “law” and “reality,” “law” and “practice,” “law-in-action” and “law-in-the-books,” and “law” and “custom.” “Production” emphasizes that law is not a given; it is not a monolithic thing transplanted from one place to another in an atemporal and decontextualized fashion. Law is produced in a specific historical context by a variety of historical agents. It is not

176 C. Alfagali, “‘Capazes de trabalhar’: domínio, política e cultura nas relações de trabalho do Atlântico Sul (séculos XVII e XVIII),” *Topoi. Revista de História* 22(47) (2021), 387–407; Carvalho, Santos Gomes, and Reis, *The Story of Rufino*; A. Chira, *Patchwork Freedoms: Law, Slavery, and Race Beyond Cuba’s Plantations* (Cambridge: Cambridge University Press, 2022); Hébrard and Scott, *Freedom Papers*, 6–19; S. H. Lara, *Palmares & Cucaú. O Aprendizado da Dominação* (São Paulo: Edusp, 2021); I. L. Miller, *Voice of the Leopard: African Secret Societies and Cuba* (Jackson: University Press of Mississippi, 2012); J. J. Reis, *Slave Rebellion in Brazil: The Muslim Uprising of 1835 in Bahia*, trans. A. Brakel (Baltimore: Johns Hopkins University Press, 1993); J. J. Reis, *Divining Slavery and Freedom: The Story of Domingos Sodré, an African Priest in Nineteenth-Century Brazil* (New Approaches to the Americas), trans. H. S. Gledhill (Cambridge: Cambridge University Press, 2015); R. Slenes, “‘Malungo, ngoma vem!’: África coberta e descoberta do Brasil,” *Revista USP* 12 (1992), 48–67; R. Slenes, *Na senzala, uma flor. Esperanças e recordações na formação da família escrava: Brasil Sudeste, século XIX* (Campinas: Editora da Unicamp, 2011).

177 For a discussion of how “custom” is a concept framed within colonialism, see M. Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985); T. Ranger, “The Invention of Tradition in Colonial Africa,” in E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983), 211–62. See also T. Herzog, “Immemorial (and Native) Customs in Early Modernity: Europe and the Americas,” *Comparative Legal History* 9(1) (2021), 3–55; F. Salomon, “Collquiri’s Dam: The Colonial Re-Voicing of an Appeal to the Archaic,” in E. Hill Boone and T. Cummins (eds.), *Native Traditions in the Postconquest World: A Symposium at Dumbarton Oaks, 2nd through 4th October 1992* (Cambridge: Harvard University Press, 1998), 265–93.

an abstract entity that “came from Roman law,” but rather it is produced by people on a daily basis and is deeply entangled with local cultural backgrounds, worldviews, social structures, and political struggles. Moreover, using the concept of “norms” instead of “law” prevents us from considering only state-produced written legislation as that which belongs to the legal sphere. “Norms” is a broader concept that can shed light on other forms of normative behavior as well as knowledge of normativities that are crucial to understanding the various layers of complexity that regulating societies and solving conflicts entail.<sup>178</sup>

The production of norms is a broader process that entails much more than creating legislation, legal categories, or institutions that will at a later point in time be applied or used by historical agents. Producing norms means assigning concrete meanings to legal categories. This assignment of concrete meanings happens through the reproduction and enforcement of different knowledge of normativity.<sup>179</sup> Therefore, legal history scholarship gains complexity when focusing on the way people act when it comes to normative matters. Moreover, people’s knowledge of normativity is a key aspect of the making of law, as the examples later illustrate. Paying close attention to what people say about norms and to how they behave on a daily basis, informed by certain normative ideas, makes it clear that this process of assigning concrete meanings to norms does not solely occur in solemn places such as the state. This process takes place in an extremely diffuse way, both on a local and global level. In order to explain how this process occurs, let us look at the example of possession.

“Possession” is a structural legal category of European societies. Before the advent of codification, it was hardly defined in written legislation; its formal definition was mostly found in doctrinal texts. A widespread definition of “possession” among learned jurists was: “the natural faculty to apprehend a thing with the intention of having it as one’s own.”<sup>180</sup> But what does it concretely mean to have something as one’s own? The doctrinal definition *per se* does not really explain what possession is. Therefore, if we only looked to written legislation or to doctrinal texts, we lose some of the fundamental dimensions of this legal category.

The concrete meaning of possession – what it actually meant to have something as one’s own – varied with regard to a given time and space. For

178 Duve, “Global Legal History.” 179 See Section 1.3 in this volume.

180 P. J. Mellii Freirii, *Institutionum juris civilis lusitani cum publici, tum privati* (Lisboa: Typographia Ejusdem Academiae, 1800), lib. III, 14. See also, Hespanha, *Como os juristas*, 352–60.

example, to possess a piece of land in nineteenth-century Brazil meant things like building houses corresponding to specific patterns of “quality,” usually associated with Portuguese colonial architecture (*casas de vivenda*); cultivating certain crops, for example, coffee; planting specific kinds of trees such as guava trees; having enslaved persons, free workers, or dependents working one’s land and reverting part or the entire production to the “legitimate master and possessor”, allowing free dependents to occupy the land, and so on. These acts, and many others, constituted the concrete meanings of possession in nineteenth-century Brazil because local communities recognized them as patterns of behavior that would ground land rights and, therefore, constantly repeated and enforced them. It is worth noting that jurists also recognized these actions as acts imbued with legal value, placing them at the center of judicial disputes over land and of public policies.<sup>181</sup> For years, however, most of the scholarship considered such acts of possession “practices” and “customs” that unfolded outside of or even in opposition to law. By restricting norms to written legislation or even juridical doctrine, such perspectives tend to obscure other aspects of the production of norms. Acts such as those listed earlier were not just social practices but also legal ones. Informed by specific knowledge of normativity, they were normative behaviors capable of generating law.

The well-known legal category of *indio* is another instance of how paying attention to the creation of concrete meanings attributed to norms highlights a richer and more complex picture of Latin America legal history. Let’s take as an example the case of enslaved persons of Asian origin in colonial Mexico. During the sixteenth and the seventeenth centuries, various enslaved persons reached Mexico from different regions of the Indian subcontinent and Southeast Asia. Initially categorized by Spanish colonial officials as *chinos*, many enslaved persons and some jurists argued they were actually *indios*, that is, vassals of the Spanish Crown. Throughout the centuries, different historical agents disputed and assigned a wide array of concrete meanings to the legal category of *indio* when referring to Asian populations. To some, the indigenous people of the Philippines – with the exception of those coming from Muslim societies – were vassals of the Spanish Crown and therefore classified as *indios chinos*, a group that could not be enslaved. Asians from

181 M. Dias Paes, “Ser dependente no Império do Brasil: terra e trabalho em processos judiciais,” *Población & Sociedad* 27(2) (2020), 8–29; 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 europäische Rechtsgeschichte, 2021).

regions not subject to Spanish colonial power, on the other hand, were *chinos* that could be enslaved. Under certain circumstances, colonial officials considered all *chinos* to be “free *indios*.” The assignment of concrete meanings to the legal category of *indio* within the context of Asian slavery in Mexico was clearly a process that occurred in different places and involved a variety of actors: well-known jurists who wrote legal treatises; legal officials and judges who acted on the ground and in local courts; religious authorities who took part in global and local debates over the legitimacy of slavery; enslaved persons of different Asian origins who self-identified as *indios* in their everyday lives and filed court cases; and indigenous individuals who had personal relations and eventually established family ties with people from the other side of the Pacific.<sup>182</sup>

Understanding the production of norms as a process that creates concrete meanings assigned to legal categories is a theoretical perspective that also applies to postcolonial and contemporary societies. The case of “contemporary slavery” makes it very clear. There is no consensus in the international community on what currently constitutes “slave labor.”<sup>183</sup> Thus, the meaning of this legal category can change dramatically depending on specific contexts. The Brazilian Penal Code defines the crime of reducing someone to a condition analogous to that of a slave as follows: (a) submitting someone to forced labor, (b) submitting someone to exhausting working hours, (c) subjecting someone to degrading working conditions, (d) restricting someone’s mobility due to a debt with the employer, (e) to curtail the employer from using means of transportation with the goal of keeping the worker at the workplace, (f) to employ ostensible vigilance at the working place and to retain workers’ documents, or (g) personal objects with the goal of keeping them at

182 T. Seijas, *Asian Slaves in Colonial Mexico: From Chinos to Indians* (Cambridge: Cambridge University Press, 2014). The historiography analyzing the different meanings of *indio* in Latin America is enormous. For bibliographic references on this topic, see ch. 2, 3.3, 5.3, and 7 in this volume. In the chapter on Global Legal History, it is also important to stress that the legal category of *indio* was not particular to Latin America. In the context of Portuguese colonialism in Africa, the legal category of *indígena* also acquired concrete meanings that had commonalities and differences with the legal meanings it acquired in Latin America. See, for example, L. Macagno, *A invenção do assimilado. Paradoxos do Colonialismo em Moçambique* (Lisboa: Edições Colibri, 2020); I. Monteiro, “A cidadania e o Indigenato: uma confrontação sociopolítica e cultural no Cabo Verde colónia (1820–1960),” Ph.D. thesis, Universidade de Coimbra (2017); C. Nogueira da Silva, *Constitucionalismo e império. A cidadania no ultramar português* (Coimbra: Almedina, 2009).

183 Scholars, jurists, and activists have been trying to address this lack of consensus in order to make the repression to this crime more effective. See, for example, J. Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012).

the workplace. According to the letter of the law, any and all of these actions constitute the crime. They do not need to all happen at the same time, nor is one more relevant than the other in constituting the offense.<sup>184</sup> But, as I have been arguing, assigning concrete meanings to norms is a much more complex process than enacting a penal code.

Despite the letter of the law as found in the Brazilian Penal Code, for a crime to have occurred, judges tend to consider that the employer or someone acting on his behalf must restrain the mobility and the autonomy of the worker. This understanding resonates with narratives found in legal doctrine that traces “slavery” to common sense ideas regarding transatlantic slavery – ideas that do not take into consideration the huge body of knowledge about this topic produced by historians and legal historians over the last few decades.<sup>185</sup> On the other hand, activists and some jurists have a different conception of what constitutes contemporary slavery. They argue that the actual meaning of the Brazilian Penal Code’s article is that slavery is related to labor conditions against or incommensurate with human dignity.<sup>186</sup> Workers subjected to degrading working conditions also have their own conceptions about what constitutes slavery, how working conditions should be, and what actions by their employers are and are not permissible.<sup>187</sup> In this sense, even in the twenty-first century, we can see that different actors, each with different knowledge of normativity, interact and dispute the concrete meanings of norms. In these disputes, they create law.

184 M. Dias Paes, “La esclavitud contemporánea en la doctrina jurídica brasileña: un análisis desde la perspectiva de la historia del derecho,” *Revista Electrónica del Instituto de Investigaciones Ambrosio L. Gioja* 17 (2016), 6–34; M. Dias Paes, “L’histoire devant les tribunaux: la notion d’esclavage contemporain dans les décisions judiciaires brésiliennes,” *Brésil(s). Sciences humaines et sociales* 11 (2017).

185 Dias Paes, “La esclavitud contemporánea”; Dias Paes, “L’histoire devant les tribunaux;” R. Scott, “O trabalho escravo contemporâneo e os usos da história,” *Revista Mundos do Trabalho* 5(9) (2013), 129–37.

186 L. A. de Andrade Barbosa, C. H. Borlido Haddad, and R. J. Scott, “How Does the Law Put a Historical Analogy to Work? Defining the Imposition of ‘A Condition Analogous to That of a Slaver’ in Modern Brazil,” *Duke Journal of Constitutional Law & Public Policy* 13 (2017), 1–46; R. Rezende Figueira, E. M. Galvão, and A. Antunes Prado (eds.), *Discussões contemporâneas sobre trabalho escravo: teoria e pesquisa* (Rio de Janeiro: Mauad X, 2017); R. Rezende Figueira, E. M. Galvão, V. Jacob, and A. Antunes Prado (eds.), *Estudos sobre as formas contemporâneas de trabalho escravo* (Rio de Janeiro: Mauad X, 2018); M. Gomes Silva Lopes, M. C. Fernandes Oliveira, and T. Souza Rodrigues (eds.), *Quanto vale a dignidade? Estudos contemporâneos sobre trabalho escravo* (Belo Horizonte: RTM, 2021).

187 R. Rezende Figueira, *Pisando fora da própria sombra. A escravidão por dívida no Brasil contemporâneo* (Rio de Janeiro: Civilização Brasileira, 2004); R. Rezende Figueira, R. F. Palmeira, and A. Antunes Prado, *A escravidão na Amazônia. Quatro décadas de depoimentos de fugitivos e libertos* (Rio de Janeiro: Mauad X, 2021).

Shared legal understandings, habitual practices, and daily reiteration of forms and procedures are therefore an essential dimension of the production of norms; they are not something related to yet nevertheless occurring outside of it.<sup>188</sup> When the role of practice as constitutive of law itself is taken into consideration, adopting global perspectives in the writing of legal history become almost inevitable.

### *Memories as Shared Cultural Backgrounds*

Assigning concrete meanings to norms takes place through different mechanisms. Some of them have long been the object of historiographical attention, such as the construction and reproduction of learned legal knowledge within law schools, courts' jurisprudence, codification debates, and so forth. Given the dimensions involved, the role of global processes might seem fairly evident since learned jurists and governmental agents traveled from one place to the next, had access to foreign literature, and explicitly claimed the authority of foreign influence to justify their arguments and proposals. The global dimension of the participation of other groups in the production of norms is, however, not that explicit.<sup>189</sup>

"Memories" is another concept that can help to highlight other dimensions of the entanglement of global processes in the production of norms. When studying enslaved families in nineteenth-century Brazil, historian Robert Slenes argued that the great majority of enslaved persons in the southeast region were either from West Central Africa or their direct descendants. Despite the existence of different ethnic groups in West Central Africa, most of them shared a common cultural background that had a direct impact on how enslaved persons shaped their ways of life and strategies of resistance in Brazil. This common cultural background could be considered "memories" that informed the actions of West Central African enslaved persons and their descendants in Brazil. Enslaved persons did not lose their cultural "memories" when forced to cross the Atlantic. On the contrary, they kept these memories and were able to disseminate them among their descendants.<sup>190</sup>

Slenes' idea that "memories" – understood not as individual and subjective experiences, but instead as shared cultural backgrounds – shaped the ways of life of enslaved Africans and their descendants in Brazil can be extended to law

188 Duve, "Rechtsgeschichte als Geschichte."

189 For a discussion on how to include global perspectives when analyzing the lives of people "who never travelled," see Sachsenmaier, *Global Entanglements*.

190 Slenes, "'Malungo, ngoma vem';" Slenes, *Na senzala, uma flor*.



and, more broadly, normative behavior. It is a useful concept for approaching the production of norms in a more complex fashion. Norms exist in any society, and they shape people's behavior and daily actions. Not only cultural practices as the structure of families, modes of resistance, culinary habits, and artistic manifestations are part of "memories." Knowledge of normativities and normative behavior also constitute people's "memories." Digging through these memories makes it possible to uncover the more complex backgrounds underlying certain patterns of normative behavior, repetitive practices, and reiterated habits that help assign concrete meanings to norms. Taking "memories" seriously in writing the legal history of Latin America could challenge the origins that are often attributed to legal categories and institutions, namely Europe or the United States. It inserts Africa and Asia into the equation and suggests entanglements that are quite different from "reception" or "imitation." It also puts the legal history of Latin America in a truly global perspective.<sup>191</sup>

An example of what including "memories" can do to the writing of Latin American legal history in a global perspective is the recent scholarship that discusses the presence of African Muslims in the Americas during the era of the transatlantic slave trade. Although the exact numbers are difficult to estimate, data suggests that during the nineteenth century, most of enslaved Muslims left from ports in Upper Guinea and disembarked in the Spanish Caribbean and in the Amazon region.<sup>192</sup> Some enslaved persons who arrived in Mexico were Muslims from the Philippines.<sup>193</sup> There is also a substantive body of scholarship that analyzes the social practices and modes of resistance of enslaved Muslims in the northeast of Brazil.<sup>194</sup>

As was the case with the West Central African enslaved persons who were the focus of Slenes' research, Muslim Africans did not lose their "memories" (cultural background) when forcibly trafficked to the Americas. Since the

191 In addition to the existence of a common cultural background, scholars have been showing how subaltern groups actively produced written documents that attest to a literacy that also extended into the realm of "the law." J. Rappaport and T. Cummins, *Beyond the Lettered City: Indigenous Literacies in the Andes* (Narrating Native Histories) (Durham and London: Duke University Press, 2012); Premo, *The Enlightenment on Trial*; G. Ramos and Y. Yannakakis (eds.), *Indigenous Intellectuals: Knowledge, Power, and Colonial Culture in Mexico and the Andes* (Durham and London: Duke University Press, 2014).

192 D. Eltis, N. Khan, P. Misevich, O. Ojo, and D. B. Domingues da Silva, "The Transatlantic Muslim Diaspora to Latin America in the Nineteenth Century," *Colonial Latin American Review* 26(4) (2017), 528–45.

193 Seijas, *Asian Slaves in Colonial Mexico*, 61–67.

194 Carvalho, Santos Gomes, and Reis, *The Story of Rufino*; Reis, *Slave Rebellion in Brazil*; Reis, *Divining Slavery and Freedom*.

seventeenth century, the perseverance of their beliefs in Cartagena de Indias posed constant challenges to the projects of Catholic missionaries.<sup>195</sup> Apart from being a religion that shapes cultural manifestations and modes of resistance, Islam is also a legal system. Therefore, the presence of such individuals in Latin America raises the question of how “memories” of Islamic legal systems,<sup>196</sup> that is, a shared legal background, might have impacted these enslaved Muslims and their descendants’ patterns of normative behavior and thus formed part of the history of law in the Americas. To what extent might the fundamental and even magical role that written words possess in Islam have affected how enslaved persons approached manumission papers?<sup>197</sup> To what extent might their previous familiarity with the possibility of claiming rights and freedom in courts have shaped their judicial behavior before Latin American tribunals?<sup>198</sup>

It is well known among historians of Latin America that enslaved persons resorted to courts in order to complain about abuse and misconduct on the part of owners. Moreover, enslaved persons in Cuba made strong claims to have acquired rights through the practice of *coartación*, that is, an agreement between them and their owners to pay for freedom in installments. The lawsuits originating from these kinds of disputes show that enslaved people had their own shared conceptions about the law, about practices that were legal or illegal, and about their rights and their owners’ obligations.<sup>199</sup> It is

195 T. H. Mota, “Wolof and Mandinga Muslims in the Early Atlantic World: African Background, Missionary Disputes, and Social Expansion of Islam Before the Fula Jihads,” *Atlantic Studies. Global Currents* 20(1) (2021), 150–76.

196 Similar to *ius commune* legal tradition, Islamic legal systems rely heavily on doctrinal writings. There are four main schools of jurisprudence within Islamic Law: *Maliki* (predominant in North Africa), *Hanafi*, *Shafi’i* (predominant in East Africa), and *Hanbali*. A. A. Sikainga, “Shari’a Courts and the Manumission of Female Slaves in the Sudan, 1898–1939,” *The International Journal of African Historical Studies* 28(1) (1995), 1–24.

197 On the role of writing among Muslim African diaspora, see Carvalho, Santos Gomes and Reis, *The Story of Rufino*; Reis, *Slave Rebellion in Brazil*. See also the hypothesis raised by Hébrard and Scott, *Freedom Papers*, 6–19. On the selling of Korans in nineteenth-century Rio de Janeiro, see A. da Costa e Silva, “Buying and Selling Korans in Nineteenth-Century Rio de Janeiro,” *Slavery & Abolition* 22(1) (2001), 72–82.

198 Sikainga, “Shari’a Courts;” E. R. Toledano, *As If Silent and Absent: Bonds of Enslavement in the Islamic Middle East* (New Haven: Yale University Press, 2007); E. R. Toledano, *Slavery and Abolition in the Ottoman Middle East* (Publications on the Near East) (Seattle and London: University of Washington Press, 1998); J. M. White, “Slavery, Manumission, and Freedom Suits in the Early Modern Ottoman Empire,” in S. Conermann and G. Şen (eds.), *Slaves and Slave Agency in the Ottoman Empire* (Ottoman Studies/Osmanistische Studien 7) (Bonn: Bonn University Press, 2020), 283–320.

199 A. de la Fuente, “Su ‘único derecho’: los esclavos y la ley,” *Debate y Perspectivas* 4 (2004), 7–21; 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. See also E. Pérez

noteworthy that enslaved persons in Muslim communities made similar legal claims. Muslim judges (*qadi*) could decide to sell or manumit someone whose owner was not treating them appropriately. Manumission agreements such as the establishment of a fixed sum the slave would pay to buy his freedom, or the commitment the slave would be free after the owner's death, were also present in Muslim societies.<sup>200</sup> When dealing with similar claims for rights in Latin America, it would be fruitful to take into account other cultural backgrounds in addition to tracing norms that regulated slavery to Roman law.<sup>201</sup>

The case of enslaved Muslims in the Americas is an example of how "memories," shared cultural backgrounds, have the potential to add new layers of complexity to the writing of legal history. This shift in the theoretical paradigm also requires reconsidering the methodology. In order to grasp how knowledge of normativities other than the European ones might have played a role in the making of law in Latin America, it is important to rethink our toolkit of research skills and broaden the types of documents we analyze. As for research skills, it would be fundamental to learn languages other than European ones. This would allow legal historians to engage with other kinds of documents and even conduct interviews or ethnographic fieldwork. Moreover, it would open a dialogue with the scholarship produced in non-European languages. In order to get at "memories" through empirical research, it is also necessary to consider other kinds of primary sources that are of common use among historians but have not yet made their way to legal history, such as iconography and photography, interviews, travel accounts, etc.<sup>202</sup>

Taking the "memories" of historical agents seriously when writing the history of law in Latin America makes evident the limitation of national or imperial boundaries when defining the geographical scope of our research. It also highlights the existence in the field of "myths of origin" that only look to some actors and some places but not others. Determining that a legal category or institution came from one foreign place – primarily regions of the Global North – obscures not only the local production of norms but also a varied set of backgrounds that shapes local legal processes.

Morales, "Manumission on the Land: Slaves, Masters, and Magistrates in Eighteenth-Century Mompox (Colombia)," *Law and History Review* 35(2) (2017), 511–43.

200 Sikainga, "Shari'a Courts."

201 For a parallel between the *qadi* and the *cacique*, see K. B. Graubart, "Learning from the Qadi: The Jurisdiction of Local Rule in the Early Colonial Andes," *Hispanic American Historical Review* 95(2) (2015), 195–228.

202 About different sources for writing the law of subaltern groups, see Chapter 2 in this volume.

*Zones of Shared Production of Norms*

Much has been debated about just how “global” global legal history should be. Should it encompass the entire world, all the territories of an empire, or all the territories of a specific legal tradition? When deciding to adopt a global perspective in our research, the memories of historical agents have shown that an inductive approach should be taken with respect to the geographical scope. In other words, this decision should be sensitive to the spaces within which the production of norms takes place in entangled ways. These “zones of shared production of norms” change over time and may or may not correspond to imperial or national boundaries. For example, the South Atlantic experienced a strong interconnectedness between the sixteenth and nineteenth centuries, which gradually diminished after this period.<sup>203</sup>

The legal category of *agregados* is a good example of how the production of norms takes place in entangled geographical areas that can extrapolate imperial and national boundaries. In some regions of West Africa and the Americas, there was a socio-legal category of dependency called *agregados*. The *agregados* were part of a household, and they performed different kinds of labor within this context. It was not the kind of work they performed that was constitutive of the relationship, but rather the fact that these people were taken in as *agregados* on the basis of the alleged favor and goodwill of the head of the household. Ideas of “favor,” “protection,” and “being part of a family” were what determined this dependency relation, framed its labor configuration, and shaped its legal aspects.<sup>204</sup>

Despite being a noun defined in well-known Portuguese dictionaries of that period,<sup>205</sup> to this day, *agregados* do not appear in the scholarship on land and dependency relations on the Iberian Peninsula, and its role as a structural legal category with direct impact on the acquisition of land rights is largely ignored. Nevertheless, most would tend to explain its existence in the Americas as the direct consequence of the “transplantation” of Iberian law and family structures to colonial territories. It is well known that “grace,” “liberality,” “mercy,” and “gratitude” were principles that structured society, shaped normative behavior, and pervaded law in the Iberian Peninsula.<sup>206</sup>

203 On South Atlantic interconnectedness, see L. F. de Alencastro, *The Trade in the Living: The Formation of Brazil in the South Atlantic, Sixteenth to Seventeenth Centuries* (Albany: State University of New York Press, 2018).

204 Dias Paes, *Esclavos y tierras*, 53–71.

205 Raphael Bluteau, *Vocabulario portuguez e latino* (Coimbra: Collegio das Artes da Companhia de Jesu, 1712), vol. 1, 168.

206 B. Clavero, *Antidora. Antropología católica de la economía moderna* (Milano: Giuffrè, 1991); A. M. Hespanha, “La senda amorosa del derecho: amor e iustitia en el discurso jurídico

Thus, it is beyond question that the *oconomía católica* contributed to the reproduction of extended families and consequently to the existence of *agregados* in Latin America.<sup>207</sup> Recounting the legal history of *agregados* in Latin America giving consideration only to the Iberian legal perspective, however, would overshadow other aspects of this legal category and of how it was produced. Adopting a perspective that takes “memories” into consideration, on the contrary, would help to broaden the global aspects of the processes that enabled the existence of *agregados* in Latin American jurisdictions.

Research indicates that although *agregados* could be from any ethnic background, it was relatively common for formerly enslaved persons – during the time of slavery – to engage in this kind of dependency relationship after acquiring manumission.<sup>208</sup> Continuous repetition and daily enforcement of these connections gave this institution a particular social significance. The transformation of formerly enslaved persons into *agregados* might have played a central role in transforming this legal category into a constitutive and structural feature of Latin American societies. It is obvious that such relationships were a consequence of the violence rooted in racial relations in these jurisdictions and the constant menace of re-enslavement people of color faced that dependency ties could help to prevent. Nevertheless, it is also noteworthy that formerly enslaved persons sought to “acquire” *agregados*, perhaps as a strategy of social ascension.<sup>209</sup>

Yet, beyond explanations that sends us to Iberia or to the local circumstances, the engagement of people of African descent in *agregado* relationships also had a “memory” component. Africanist historians have been debating for decades the concept of “wealth in people.” In West African societies, they showed that accumulating dependents could be key to controlling labor and, consequently, to acquire patrimony and prestige.<sup>210</sup> In this sense, Iberian

moderno,” in C. Petit (ed.), *Pasiones del jurista. Amor, memoria, melancolía, imaginación* (Historia de la Sociedad Política) (Madrid: Centro de Estudios Constitucionales, 1997), 23–74.

207 R. Zamora, *Casa poblada y buen gobierno. Oeconomía católica y servicio personal en San Miguel de Tucumán, siglo XVIII* (Buenos Aires: Prometeo Libros, 2017).

208 A. Chira, “Uneasy Intimacies: Race, Family, and Property in Santiago de Cuba, 1803–1868,” Ph.D. thesis, University of Michigan (2016), 218–30; E. Guimarães, *Terra de preto. Usos e ocupação da terra por escravos e libertos (Vale do Paraíba mineiro, 1850–1920)* (Niterói: Editora da Universidade Federal Fluminense, 2009).

209 Chira, “Uneasy Intimacies,” 218–30.

210 For a summary of the debate over the concept of “wealth in people,” see J. I. Guyer, “Wealth in People, Wealth in Things – Introduction,” *The Journal of African History* 36(1) (2009), 83–90. For a critique on the harsh separation between “wealth in people” and “wealth in things,” see M. Candido, “Understanding African Women’s Access to Landed Property in Nineteenth-Century Benguela,” *Canadian Journal of African Studies* 54(1) (2020), 1–23.

social structures linked to *oconomia católica* would not be strange to enslaved persons coming from these regions – quite the contrary. Recent scholarship also stressed that enslaved Africans and their descendants reproduced African family structures and dependency relations in Latin America. Therefore, the history of the legal category of *agregado* would gain complexity by taking these “memories” into consideration.<sup>211</sup> It would also force the conclusion that the production of norms takes place in truly diffused ways. Norms do not necessarily have clear origins, or at least these are very hard to identify. *Agregados* are an example of this diffusiveness. It is a legal category relatable to *oconomia católica*, to African “wealth-in-people” social structures, to consequences of local practices of manumission, and so on.

But the history of *agregado* as a legal category is not exhausted by tracing back enslaved Africans’ and their descendants’ memories. It also points to the existence of zones of shared production of norms. *Agregados* existed in various jurisdictions of Latin America,<sup>212</sup> but in some of them, whether or not one was an *agregado* was crucial to the success of a person in claiming land rights in court. In Brazil and Argentina, if a person claimed land and the adversary could prove that he was an *agregado*, chances were that the claimant would lose the case. In these jurisdictions, the legal category of *agregado* gained specific meanings that embodied and strengthened the idea that dependents could not acquire ownership rights, even if they exercised possession over a piece of land.<sup>213</sup>

Considering the current state of the scholarship, it seems that the concrete meanings of the legal category of *agregado* that limited the possibility of acquiring rights over land were produced in various regions of Latin America. These territories were connected by certain kinds of economic and labor relations, especially intensive forms of slavery and coerced labor. Southern Brazil,

211 Chira, “Uneasy Intimacies,” 218–30; Dias Paes, “Ser dependente no Império”; F. Schleumer, *Laços de família. Africanos e crioulos na capitania de São Paulo colonial* (São Paulo: Alameda, 2020), 290–94.

212 D. Bonnett Vélez and M. Herrera Ángel, “Ordenamiento espacial y territorial colonial en la ‘región central’ neogranadina. Siglo XVIII. Las visitas de la tierra como fuente para la historia agraria del siglo XVIII,” *América Latina en la Historia Económica* 8(16) (2001), 11–32; Chira, “Uneasy Intimacies,” 218–30; H. R. S. Mejía, “De esclavos a campesinos, de la ‘roza’ al mercado: tierra y producción agropecuaria de los ‘libres de todos los colores’ en la gobernación de Santa Marta (1740–1810),” *Historia Crítica* 43 (2011), 130–55; M. de los Ángeles Meriño Fuentes and A. Perera Díaz, *Familia, agregados y esclavos. Los padrones de vecinos de Santiago de Cuba (1778–1861)* (Santiago de Cuba: Editorial Oriente, 2011).

213 Dias Paes, *Esclavos y tierras*, 53–71; C. M. Poczynok, “Los procesos civiles como fuente para el estudio de las luchas por los derechos de propiedad de la tierra (Buenos Aires, 1776–1822),” *Varia Historia* 37(74) (2021), 393–427.

La Plata basin, and West Central Africa are not usually studied together, and legal historical research was no different in this respect. Yet, these regions were nevertheless bound together until the mid-nineteenth century. West Central African ports, such as Luanda and Benguela, were the places of departure of the majority of slave ships transporting the enslaved workforce to southern Brazil and the Río de la Plata basin.<sup>214</sup> Circulation promoted by the slave trade was, however, wider than this commerce. As Atlantic history has shown over the years, commercial routes very often promoted wider cultural entanglements.<sup>215</sup> Because law is a cultural practice, commercial routes also promoted legal entanglements between different regions of the world. The case of the *agregado* is just such an example that allows us to think of the southern Atlantic as a zone of shared production of norms.

The concrete meanings that *agregado* acquired in the South Atlantic were the result of processes that mostly took place outside the metropolitan territories of the Spanish and Portuguese empires and which did not “respect” imperial borders. There is no doubt that the production of norms was strongly determined by imperial experiences and by the asymmetrical power relations inherent to them. However, more than being circumscribed to imperial geographies, the production of norms took place within entangled spaces inside and beyond Latin America. Zones of shared production of norms are dynamic, change over time, and depend on material conditions and on economic configurations.

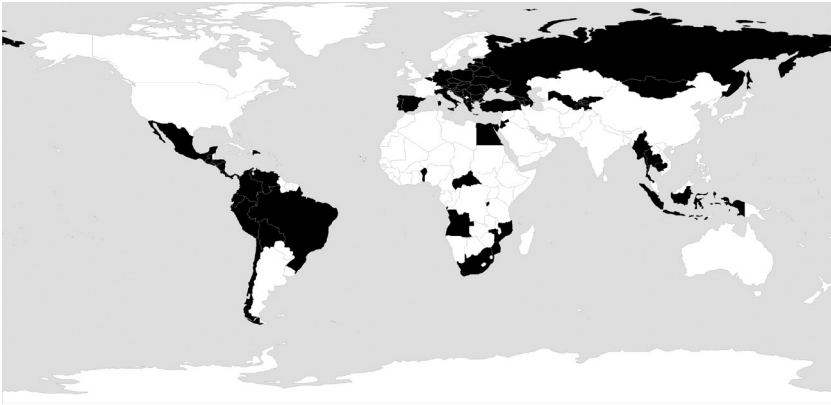
Zones of shared production of norms is a conceptual tool that helps to frame the geographical space of one’s research, even when the object of study extrapolates the Latin American colonial period. Constitutional review is a good example of how legal history research could profit from this concept in order to complexify the analysis of the making of law.

It is by no means unusual to find texts tracing the “origins” of judicial and constitutional review in Latin American countries to the US Supreme Court’s *Marbury v. Madison* case or to Hans Kelsen’s work. The history of this institution is, however, more intricate. Over the last century, many constitutions adopted some sort of judicial review. In this global expansion, constitutional

<sup>214</sup> Alencastro, *Trade in the Living*; A. Borucki, D. Eltis, and D. Wheat, “The Size and Direction of the Slave Trade to the Spanish Americas,” in A. Borucki, D. Eltis, and D. Wheat (eds.), *From the Galleons to the Highlands: Slave Trade Routes in the Spanish Americas* (Albuquerque: University of New Mexico Press, 2020), 15–46.

<sup>215</sup> R. Ferreira, *Cross-Cultural Exchange in the Atlantic World: Angola and Brazil During the Era of the Slave Trade* (African Studies 121) (Cambridge: Cambridge University Press, 2012), 1–19.





Map 1 Uninterrupted experiences of constitutional review.

Source: J. Mariano Silva, “Jurisdição constitucional em Espanha (1981–1992) e Brasil (1988–1997),” Ph.D. dissertation, Universidade do Estado do Rio de Janeiro, 2016, p. 63. Reproduction authorized by the author.

review (the “abstract” judicial control of legislation and other normative acts equivalent to legislation) spread mostly to countries in the Global South, the Colombian case being one of the oldest uninterrupted cases of constitutional review.<sup>216</sup>

Map 1 clearly highlights that, when it comes to the history of constitutional review, “diffusion” or “transplant” perspectives might not be the best way to explain its existence in various regions of the world.<sup>217</sup> Instead, “zones of shared production of norms” might be a more appropriate conceptual tool that would complexify the analysis of the production of this legal institution, shifting the attention of legal historians to other parts of the world other than the United States or certain European countries.

### *Final Remarks*

Many aspects of the interaction of global processes with local experiences frame the production of norms. Abandoning fictions of origins and instead assuming the blurred dynamics that underlies the production of norms can push forward research that takes seriously the need to overcome

<sup>216</sup> T. Ginsburg and M. Versteeg, “Why Do Countries Adopt Constitutional Review?,” *The Journal of Law, Economics, and Organization* 30(3) (2013), 587–622; J. Mariano Silva, “Jurisdição constitucional em Espanha (1981–1992) e Brasil (1988–1997),” Ph.D. thesis, Universidade do Estado do Rio de Janeiro (2016), 48–63.

<sup>217</sup> Ginsburg and Versteeg, “Countries Adopt Constitutional Review.”

Eurocentrism in global legal history. European conceptions of law were disseminated around the world both during and after the colonial expansion. However, we should not take for granted that they were the exclusive or the most important normative framework operating in Latin America or in other regions of the Global South. If not always, then at least there were multiple moments and opportunities where local population agency, their vernacular understandings of law, as well as non-European legal systems clearly played a pivotal role in the daily production of norms.

These conceptual tools answer the question that is the title of Section 1.4, namely, “What is global legal history and how can it be done?” These tools are not exclusive to research focused on Latin American legal history. “Production of norms,” “concrete meanings,” “memories,” and “shared zones of production of norms” can also shed light on still unexplored aspects of the making of law in other geographical areas. In addition to space, these conceptual tools blur time. Production of norms can take place in chronologies that are not bound to categories such as the “pre-colonial,” “colonial,” and “post-colonial” periods. Thus, the conceptual tools I am proposing can be useful to research framed by various chronologies while, at the same time, highlighting that the temporal and geographical scopes should not be determined in advance but instead depend on the object of inquiry.