

THOMAS DUVE  
HEIKKI PIHLAJAMÄKI (EDS.)

# New Horizons in Spanish Colonial Law

Contributions to Transnational  
Early Modern Legal History

Heikki Pihlajamäki

The Westernization of Police Regulation: Spanish and  
British Colonial Laws Compared | 97–124



MAX PLANCK INSTITUTE  
FOR EUROPEAN LEGAL HISTORY

ISBN 978-3-944773-02-5  
eISBN 978-3-944773-12-4  
ISSN 2196-9752

First published in 2015

Published by Max Planck Institute for European Legal History, Frankfurt am Main

Printed in Germany by epubli, Prinzessinnenstraße 20, 10969 Berlin  
<http://www.epubli.de>

Max Planck Institute for European Legal History Open Access Publication  
<http://global.rg.mpg.de>

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie;  
detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

Cover illustration:

Max Ernst, Humboldt Current, 1951–52, Öl auf Leinwand, 36 × 61 × 2 cm, Fondation Beyeler,  
Riehen/Basel, Sammlung Beyeler, Foto: Robert Bayer, Basel, © VG Bild-Kunst, Bonn 2014

Cover design by Elmar Lixenfeld, Frankfurt am Main

Recommended citation:

Duve, Thomas, Pihlajamäki, Heikki (eds.) (2015), *New Horizons in Spanish Colonial Law. Contributions to Transnational Early Modern Legal History, Global Perspectives on Legal History*, Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, <http://dx.doi.org/10.12946/gplh3>

## The Westernization of Police Regulation: Spanish and British Colonial Laws Compared

“[...] porque todo o lo más, es nuevo [en las Indias] o digno de innovarse cada día, sin que ningún derecho, fuera del natural, pueda tener firmeza y consistencia, ni las costumbres y ejemplos que hayamos introducidos sean dignos de continuarse, ni las leyes de Roma o España, se adapten a lo que pide la variedad de sus naturales, además de otras mudanzas y variedades, que cada día ocasionan los inopinados sucesos y repentinos accidentes que sobrevienen.”<sup>1</sup>

### I. Period Introduction: Legal Globalization in the Early Modern

European law was the primary vehicle and export product of early modern globalization. European law spread with the Spaniards to Central and South America, and the Philippines; with the Portuguese to Brazil, Angola, Mozambique, Goa, and Macao; with the Dutch to Ceylon and Indonesia; with the French to Quebec and Louisiana; with the British to North America, Australia, and countless other places around the world; and even with the Danes to the islands of St. Thomas, St. John, and St. Croix.

Expansion was nothing new to European law at the outset of the modern age. European law had already expanded continuously *pari passu* with the expansion of the Roman Empire, and again after Roman law was revived in late eleventh century Bologna. The medieval expansion had meant that the learned bodies of law, Roman and canon, traveled from the southern parts of Europe to the north, from the western parts to the east, and from the cities to the countryside. Roman law traveled with the learned jurist, canon law with the Catholic Church and its churchmen.<sup>2</sup>

1 SOLÓRZANO Y PEREYRA (1648) IV.XVI.3, 260. I have modernized the spelling in the quote.

2 On the expansion of the law within medieval Europe, see WHITMAN (2009).

To portray European law as a vehicle of globalization may seem Euro-centered. It is of course true that European law has not been the only body of law expanding in the pre-modern world. Islamic law went through a period of rapid expansion from the seventh century onwards. The solutions that the Islamic legal experts had developed, building on the heritage of the Semitic cultures of the Near East, were quickly absorbed not only in the cradle of the religion for commercial needs, but also in large areas of North Africa and Central Asia, to where Islam spread.<sup>3</sup> Chinese law, especially the Confucian concept of *li*, has traditionally exercised influence in large areas of the Far East.<sup>4</sup> The same questions that I will ask about European law in this article could certainly be asked of Islamic and Chinese laws as well. However, it remains fairly clear that of all of these expanding laws of the medieval and early modern periods European law had most success in extending its sphere of influence around the globe, at least measured by sheer geography.

The term globalization, irritating slogan as it has become for many, can be called into question. No globalization has so far been complete in geographical terms – not even the present-day iteration based mainly on the law of the United States of America. Large tracts of the globe have always been left untouched, and even the picture of large tracts being completely dominated by extending bodies of law may prove misleading on closer inspection – and indeed almost always does. The learned *ius commune* applied in the emerging high courts of Europe in the early modern period was not the same as the law applied in remote local courts dominated by unlearned laymen.<sup>5</sup> The difference is naturally even clearer if one compares the *audiencias* of Spanish America to the jungles of Amazonia.

Despite the unquestionable deficiencies in the terminology, globalization is still a useful term. It expresses huge waves of legal transfers, as opposed to mere isolated legal institutions, not linked to any wholesale cultural transfer, floating around the globe. The dimensions of legal transfer are certainly completely different if we take the Swedish-Danish institution of the *ombudsman* as an example of an isolated legal transfer, comparing it with whole

3 On the early expansion of Islam and its connection to the preceding cultures of the Near East, see HALLAQ (2005) 8–28.

4 Chongko Choi even speaks of East Asian *ius commune*; see CHOI (2009).

5 Sweden is the particular case I have in mind.

bodies of law being taken from one continent to another. We need to have a name for the larger phenomenon, and legal globalization is such a name.

Legal globalization, however, is not more than a huge legal transfer, and is subject to similar theoretical ponderings as the more limited legal transfers. It is a truism that all transfers change when adapted to new circumstances, and the new outcome looks different than the old one. The “receiving” culture and its new circumstances unavoidably influences the shape that the transfer takes. Comparative law scholars and comparative legal historians have written extensively on the material aspects of legal transplants: what rules are carried over and borrowed by other jurisdictions and how legal rules change in this process. However, comparative legal historians have written surprisingly little on the conditions which cause transplants to change and, accordingly, how they change. The methods of legal change themselves can sometimes be understood as legal transfer, however. The main contention of this article is that both the Spanish and the British colonizers of America made ample use of one such technique, early modern police regulations. The spread of police regulation to the New World led to globalization or at least thorough Westernization of this legal instrument.

Police regulations were, not however, merely a technique. Although they covered a wide array of regulations, they did not cover everything. Police regulations were about administration, commerce, security, health, and censorship, but they were much less about contract law, rules of evidence, or punishment.

I will start with some theoretical considerations regarding the concepts of European and Spanish colonial law (Section II). Section III, the main part of the article, will discuss the main themes in regard to which Spanish colonial law developed different solutions in comparison with its peninsular Spanish legal order(s). In Section IV, I will then attempt to explain these differences, comparing Spanish colonial law with that of the British North American colonies. Section V sums up the essential points of the article.

## II. Globalization of Law

William Twining defines globalization as “those processes which tend to create and consolidate a world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does penetrate every corner of it.”<sup>6</sup> The diffusion of Western law with early modern colonization not only fits the concept of globalization well, but also can in fact be taken as one of its primary examples. The concept of Western law still requires some discussion. What later became Western law – a term that Harold Berman made universally known – was the same as European law or *ius commune*, the learned law consisting of Roman and canon law at the beginning of the early modern period. European law, by the time the overseas conquests began, was already falling into regional subcategories because of the contact that *ius commune* made with particular local laws.<sup>7</sup> The idea of Castilian regents was to incorporate the desired Roman legal texts into written statutes (most notably the *Siete Partidas* of Alfonso X the Wise) and prevent the use of Roman law otherwise. How successful this was is disputed.<sup>8</sup> In any case, the *derecho común* of Castile was clearly one of the

- 6 TWINING (2000) 4. Twining’s concept of globalization is, however, not historically very sensitive. Duncan Kennedy has, by contrast, approached the subject of globalization historically by distinguishing three periods of globalization in the West: the period of classical legal thought (ca. 1850–1914), the period of socially oriented legal thought (1900–1968), and the most recent period of “policy analysis, neoformalism, and adjudication” (1945–). See KENNEDY (2006).
- 7 Many legal historians, most recently Patrick Glenn, in fact deny the existence of one *ius commune*, claiming that the Latin-based *ius commune* consisting of mainly Roman law never existed, but that it always appeared as regional variants only – *gemeines Recht* and *Derecho común*, for instance. See GLENN (2005) 42–43. Other skeptical views against the existence of a truly unified *ius commune* have been offered by OSLER (1997); HALPÉRIN (2000) 724; and HEIRBAUT (2003) 304–305. These views are very different from the traditional ones represented by Francesco Calasso, Helmut Coing and most recently Manlio Bellomo. As a Nordic legal historian, the author of the present article cannot help but agree with the critical voices. However, the localized variants of *ius commune* had much to do with each other. The overarching learned law was practically the same everywhere, but since the local laws were different (written or not), the overall combination of the two (or more) layers of law turned out differently.
- 8 Again, opinions diverge as to whether the *Siete Partidas* amounted to a “Spanish common law,” or whether the law book of Alfonso X was the highest layer of *ius proprium*, above which the pan-European *ius commune* still existed. See BARRIENTOS GRANDÓN (2000) 203; PETTIT (1982); JACOBSON (2002).

European variants of *ius commune*, sharing the essential features of both civil and procedural law with other variants of the European *ius commune*. This Spanish variant of European law served as the basis and bridge for what came to constitute the law for Spanish America from 1492 onwards.

We still have one more terminological hurdle to cross, the term “Spanish colonial law.” *Derecho indiano* is the term most frequently used in Spanish to denote the legal system in force in the Spanish colonies during the early modern period. Like all geographical ways of limiting law, which is essentially a shifting phenomenon, so *derecho indiano* is also not a natural entity, but was created at a particular time and place. In this case, the term was put into historiographical use in the early twentieth century as part of the Hispanist ideology of that period.<sup>9</sup> Like all geographical definitions of law, *derecho indiano* is helpful in distinguishing and pointing out a particular area of study from other such areas. However, by highlighting its particularity, *derecho indiano* also tends to conceal connections that the law in Spanish America had with Spanish and other European law. In this way, it does not differ from “European” or “Nordic” law. Like any national legal history, the research tradition of *derecho indiano* has tended to highlight its particularity instead of denoting its similarities (or differences) with other colonial systems or European law. In other words, comparative studies on Spanish colonial law have been completely lacking until recent years.<sup>10</sup> This is particularly strange considering that general historians have been engaged in comparative “Atlantic studies” since the 1970s.<sup>11</sup> The lack of comparative studies tends to create an illusion of uniqueness of national (or quasi-national, such as *derecho indiano*) legal systems. Comparative studies tend to diminish such illusions.

This article challenges the uniqueness of Spanish colonial law in two respects. First, I wish to claim that Spanish colonial law was just one variant of European and Spanish law. Second, Spanish colonial law was only one version of colonial legal orders. Therefore, it can and should be approached

9 See PIHLAJAMÄKI (2010).

10 In this respect, Spanish colonial law is not different from the mainstream legal history on any of the discipline’s subfields. Ross’s article (2008a) is a notable exception, and I have myself authored a few articles in which *derecho indiano* is compared to European law from various aspects. See PIHLAJAMÄKI (1997); PIHLAJAMÄKI (2002) and PIHLAJAMÄKI (2004).

11 See DAVIES (1973); ELLIOTT (1970); and DAUNTON/HALPERIN (1999).

in the global context of the expansion of European law to other continents. This does not mean that *derecho indiano* should not be used as an object of study – this article is doing just that, of course. Instead, scholars should be aware of the position of Spanish colonial law within a global context. It is necessary to understand that the concept of *derecho indiano* is essentially modern, created by legal historians trained in the period of national positive law. In this respect, it is no different from concepts like European, Nordic, or Far Eastern law. To portray Spanish colonial law as a separate or quasi-separate system of law would not have occurred to early modern Castilian or *criollo* legal professionals operating under the auspices of the Castilian Crown. I will now turn to the modern definitions of Spanish colonial law.

### III. What was Spanish colonial law?

The Spanish Crown was quick to organize the administration of its overseas territories in America. Formally speaking, the Indies were incorporated into the Castilian Crown, although the Castilian kings were also the kings of Aragon. Because the American territories were incorporated as a conquered territory, it was up to the Castilian Crown to organize their administration without the institutional barriers that limited the authoritarian exercise of kingship in Castile. For instance, no *Cortes*, or representative assembly, was ever introduced on the American side of the Atlantic.<sup>12</sup>

The legal order that regulated life in the colonies was basically Castilian law. This was based on the *Siete Partidas*, a thirteenth century compilation heavily influenced by Roman and canon law later supplemented by royal regulation and court practice. The legal scholarship on *ius commune* inevitably influenced Castilian law as well. Vigorous development by way of royal regulation was precisely what the early modern monarchs engaged in to gain increasing control of their lands. This royal legislation was police regulation.

According to a formal definition, Spanish colonial law was a “compound of legal rules applicable in the Indies, that is, in the American, Asian and Oceanic territories dominated by Spain.” Spanish colonial law can therefore be divided into a. norms specifically created for the Indies (*derecho indiano*

12 ELLIOTT (2007) 120–122. Elliott observes, however, that the institutional barriers limiting the royal authority had not become as important during the Middle Ages in Castile as they had in Aragon.

*propriamente tal o municipal*); b. Castilian law (*derecho castellano*), which was used if “proper *derecho indiano*” did contain the normative solution needed; and c. Indian law (*derecho indígena*), or the law of the aboriginals.<sup>13</sup> In addition to secular norms, we can also speak of the canon law of the Spanish colonies (*derecho indiano canonico*) as the canon law in force in Spanish America.<sup>14</sup> These definitions reveal that “proper” Spanish colonial law stood in relation to Castilian law, used as a subsidiary body of law whenever *derecho indiano* could not provide an answer. The same applies to the canon law of Spanish America and canon law in general.

When did *derecho indiano propriamente tal*, Spanish colonial law in the narrow sense of the term, not provide answers for legal problems? And when it did, what was Spanish colonial law “properly speaking”? Technical definitions do not take a stand on what kinds of rules “Spanish colonial law properly speaking” consisted of. In principle, it could contain all kinds of rules, especially if customary law is taken into consideration, but in practice it did not. If we want to set Spanish colonial law into a comparative context, we cannot avoid looking beyond technical definitions and attempting to understand the norms the Castilian regents thought appropriate to bestow on their possessions on other continents.<sup>15</sup>

Some modern authors have given material descriptions of Spanish colonial law. Ricardo Zorraquín Becú, one of the grand old men of the field defines *derecho indiano* as “a system of law, doctrines, and customs, created or accepted by the Castilian kings, in order to organize the spiritual or secular government of the Hispanic New World, regulate the condition of its inhabitants, direct navigation and commerce, and, above all, ensure the incorporation of the Indians into the Catholic faith.”<sup>16</sup> Anyone acquainting themselves with the literature on Spanish colonial law cannot help noticing the heavy accent on these and other issues, and the lack of literature on others. Collections of papers issued regularly as a result of the conferences organized by the Institute of the History of Spanish Colonial Law (*Instituto de Historia*

13 “[E]l conjunto de reglas jurídicas aplicables en Indias, o sea, los territorios de América, Asia y Oceanía dominados por España.” DOUGNAC RODRÍGUEZ (1994) 11.

14 See DUVE (2008).

15 This is not to exclude local norm-giving, which occurred in all parts of Spanish America and at various levels of its administration.

16 ZORRAQUÍN BECÚ 22 (1994) 407.

*del Derecho Indiano*) are a good way of obtaining an overview of what *indianistas* have produced – and what they have not been so interested in.<sup>17</sup>

The Conference papers show a heavy emphasis on questions such as constitutional and administrative law, ecclesiastical law, mining law and water law. Much has also been written on the administrative institutions (such as *cabildos* and *audiencias*) and institutions of feudal law (such as *encomienda*). Considerably less has been written on the private law, criminal law, and procedural Law of the Indies. The scholarship on the history of private law in the Indies has tended to stress Spanish colonial law as part of the European *ius commune*. Much the same can be said about the literature on criminal and procedural law.<sup>18</sup>

The reason for the scarcity of scholarship in some fields and the concentration of scholarship in others is obvious: *derecho indiano* “properly speaking” was mostly the regulation of fields that needed special treatment in the Indies. Zorraquín Becú’s definition of *derecho indiano* above hints at this trend, which I have treated in more detail elsewhere; namely, that much of *derecho indiano propiamente dicho* is in fact functionally the same type of legislation which has been called “police law” (*Polizeirecht*) or laws pertaining to “good government” (*buen gobierno*) in recent international legal historiography. Police law in the early modern sense of the word refers to the legislative activity of an early modern state, which organizes its administration with statutes, decrees, ordinances, and other pieces of legislation.

The ideology legitimating this often massive amount of legislation pouring from the chanceries of early modern kingdoms, towns, and other legislating entities was that of good government, *Staatsräson* or *raison d’État*. Areas as different as religion, security and public order, agriculture, industry and commerce, traffic, construction, culture and sciences, as well as the control of the poor and the marginalized, needed detailed legislation.<sup>19</sup> In these various ways, early modern police ordinances attempted to create and maintain public order, discipline and stability, but at the same time promote

17 The Conferences have been organized at intervals of 2–4 years since 1966 in either Hispanic America or peninsular Spain.

18 See, for instance, the conference proceedings mentioned above, note 10 (PIHLAJAMÄKI).

19 In recent decades, the literature on police has grown immensely, and no comprehensive list is worth attempting here. See, for instance, STOLLEIS (1993), HÄRTER / STOLLEIS (1996) and the subsequent parts of the series.

the well-being of society.<sup>20</sup> Church ordinances in the reformed parts of Europe came very close to police ordinances. In some parts of Europe, such as Sweden, separate church police regulations (*kyrkopoliti*) were issued, but not church ordinances.<sup>21</sup>

The emergence of police regulation is thus closely linked to the rise of the modern state and modern absolutism. Spain was no exception to this general European tendency. Johannes-Michael Scholz has noted that the Spanish legislator's interest in police matters grew considerably between the *Nueva Recopilación* of 1640 and the *Novísima Recopilación* of 1805.<sup>22</sup> Police law was the most modern regulatory tool that the early modern prince aiming at absolute power had at his disposal, although one has to bear in mind that the effectiveness of police regulation often left much to be desired. Although police law was a tool of the monarch, its legitimating ideology also imposed limits on the use of police, because the regulations could only be used to further the common good, the *bonum commune*.

From the very beginning of the conquest, the Spanish Crown issued a large number of statutes to regulate life in the Indies. The jurist Antonio León Pinelo is said to have extracted the thousands of royal *cédulas* that made up the *Recopilación de las leyes de Indias*, a compilation of statutes printed in 1680 but already finished in 1635, from approximately 400,000 laws.<sup>23</sup> The laws tended to govern every detail of routine administration and were often extremely casuistic, as police regulation tended to be. Clarence Haring mentions, as examples of the areas governed, "the fixing of prices, the ferry charge on the river at Santo Domingo, the right to own fishing boats, permission to import from Spain cattle and foodstuffs necessary for the subsistence of the new overseas communities, the right to engage in local trade with nearby settlements, or to build vessels for such a trade; the exact manner in which a town must be laid out, the width of the streets and their direction in relation to the sun, the size and subdivision of the city blocks, the location of the church and the town hall."<sup>24</sup> Religious matters could with good reason be

20 HÄRTER (1993) 62–63.

21 On the different concepts of police in relation to ecclesiastical administration, especially in Germany, see STOLLEIS (1992) 250.

22 See SCHOLZ (1996) 230–231.

23 HARING (1947) 113. Haring says that the final *Recopilación* contains 6400 *cédulas*, whereas more recent scholarship mentions the figure 7308; see DOUGNAC (1994) 11.

24 HARING (1947) 120–121.

added to the list, making it look like a rather typical catalog of police regulation in any region of the early modern Western world.

The amount of legislation was indeed such that it soon started to call for some sort of general presentation. Both compilations and literature started to appear to meet this need. Of the scholars in the field, the most famous was Juan Solórzano Pereira, who was a judge of the *Audiencia* of Lima. The leading *derecho indiano* author of the colonial period, Solórzano's major work, *Política Indiana* (1648), deals with "the law and the government particular to the Indies" (*Derecho y Gobierno particular de las Indias*).<sup>25</sup>

The work is divided into six "books," which deal with the discovery of America (I), the social position of the aborigines (book II), the creoles as landowners (book III), ecclesiastical government (book IV), as well as administrative (book V) and economic organization (book VI) of the Indies. The general plan of the book reveals that Solórzano's *política* was essentially similar to European police regulations. In the second book, chapters I–XXIV are about the "personal services" of the Indians, such as the construction of buildings (II.VIII.1.–14.), agriculture (II.IX.1.–40.), the postal service (II: XIV.1.–32.), mining (II.XV.1.–56.), as well as tributes (II.XIX.1.–56.) and tithes (II.XXIII.1.–43.). These are all areas of regulation central to the European *ius politiae*.

Because we are dealing with a particular kind of police regulation, Solórzano Pereira's *magnum opus*, however, is almost completely devoid of major areas of law such as private, criminal, and procedural law. The law in these areas by and large followed Castilian law, which, in turn, was just one version of the European *ius commune*.

The huge amount of the laws was also compiled, first as private initiatives, then as more official ones as well. The *cedulario* (register of royal laws and decrees) of Vasco de Puga, judge of the New Mexico *audiencia*, was printed as early as the 1560s. The registers proved helpful in compiling the work, and later compilers also used them as material. Antonio León Pinelo, as mentioned above, bore the main burden of compiling the major general collection of laws of the laws of the Indies. The work took place under the supervision of first Rodrigo de Aguiar y Acuña and then Juan Solórzano Pereira.

25 SOLÓRZANO Y PEREYRA (1648) I.I.1, 22. The work first appeared in Latin as *De indianum iure* in 1629.

Once completed, copies of the compilation were sent to viceroys, *audiencias*, *cabildos*, and other major figures of the Spanish colonial administration.<sup>26</sup>

The *Recopilación* is divided into nine books, which include – roughly speaking – ecclesiastical government (I), matters concerning the Council of the Indies and *audiencias* (II), political and military administration, viceroys, and captains-general (III), the legal foundation of colonization (IV), provincial government (V), Indians (VI), criminal law (VII), the royal exchequer (VIII), and commerce and navigation (IX).<sup>27</sup> The titles of the books are quite telling of the contents of the compilation and thus of Spanish colonial law itself, since the material included in Pinelo's compilation concentrates heavily on the administration of various kinds and commerce.

Book VII, the provisions of which share elements of penal law, is by far the shortest and far from intended as a comprehensive criminal code. Its eight headings include regulations on judges (1), games and players (2), marriage problems resulting from husbands being away from their wives in America (3), vagabonds and gypsies (4), the black people and those of mixed race (5), prisons (6), prison inspections (7), and crimes and punishments (8). Most of the titles thus again deal with matters of typical police regulation. Criminal law as such is not the point here, not even in heading 8 on crimes and punishment, the 29 laws of which are really a haphazard collection of regulations concerning matters of particular concern for the Crown in the colonies. For instance, law 11 of heading 8 requires that those sentenced to the galleys should be sent to Cartagena or Tierra Firme to serve their sentences. According to law 15, the judges ought not to moderate the legal punishment – which was probably also customary in America as elsewhere in the Western world. Furthermore, law 17 established that judges should refrain from accepting settlements except in “very special cases, at the request and wish of the parties, and if the case was such that it [did] not require satisfaction to the public cause.”

The examples are numerous, but I think the point is clear: Book VII is no penal code in the sense of *Constitutio Criminalis Carolina* (1532) or *Ordonnance de Villers-Cotterêts* (1539), but rather a collection of rules not capable of functioning without the general background of Spanish penal and proce-

26 HARING (1947) 113.

27 The *Recopilación* is now conveniently available on the Internet, <http://www.congreso.gob.pe/ntley/LeyIndiaP.htm>.

dural law. This is even more obvious if we think about private law, on which the *Recopilación* is practically silent.

I will take one more example of the Spanish colonial legislation from a particular part of the Spanish colonies, for which the catalogues of statutes have recently been published, Río de la Plata (1534–1717), Charcas (1563–1717), and Tucumán and Paraguay (1573–1716). The great majority of the statutes catalogued in these registries can, hardly surprisingly considering what has been said above, be classified as police law. Some of the statutes deal with administration, religion and the protection of aborigines. A vast majority, however, has to do with the economy and the military.<sup>28</sup> Again, criminal, procedural, and private law remain only sporadically regulated.

The precise character of police regulation as “law” is not clear either. Police regulations were, for instance, left out of the Swedish Law of the Realm of 1734, a compilation of laws otherwise thought perfect and unchangeable. The natural law ideology underlying the compilations designed as eternal in fact demanded the exclusion of police regulations because of their mutable character.

Was *derecho indiano* really considered law, in the natural law understanding of the word? At least the name of the original Latin version of *Política Indiana, De indianum iure*, suggests as much, although the title of the Spanish translation seems to convey that we are moving in the borderlands of law and more practical regulation. Another essential and specific characteristic of Spanish colonial law often mentioned in the literature is its changing character. The law adapts to circumstances, which change, according to Tau Anzoátegui, “quicker than ... is experienced in other, more consolidated societies.”<sup>29</sup> In his *Casuismo y sistema* (1992), Tau Anzoátegui shows how the notion of the mutability of the Indian world became common currency at the beginning of the sixteenth century, and remained so all through the Spanish conquest.<sup>30</sup> Gaspar de Villarroel, one of the leading American legal scholars of the seventeenth century wrote that “it is impossible that in this new world the government were firm and stable, and that the laws were

28 See *Libros registros-cedularios del Río de la Plata I–III (1534–1717)* (1984–1991); *Libros registros-cedularios de Charcas (1563–1717)* (1992–1994); *Libros registros-cedularios del Tucumán y Paraguay (1573–1716)* (2000); and PIHLAJAMÄKI (2002).

29 TAU ANZOÁTEGUI (1992) 108.

30 TAU ANZOÁTEGUI (1992) 108–114.

lasting; because there is such a large number of particularities, in the cure of which the laws assist, the human animal varies so much that today he is disturbed by the same medicine that healed him yesterday.”<sup>31</sup>

The changing nature of Spanish colonial law also goes hand in hand with the changing nature of police law in general. The need for constant and rapid change was even greater in the distant American lands, which were not only remote but also internally disparate. The modern legislative technique of *ius politiae* was extremely suitable for such circumstances. The institution of “obedience without compliance,” the inheritance of medieval Castilian law, came to serve much the same goal of constantly accommodating legislation to local needs.<sup>32</sup>

The whole legislative ideology changed in the modern era. In the middle ages, legislation, at least in theory, had not created new law but only followed tradition. In the absolutist state, all this necessarily ended: from now on, the sovereign’s command was law. Law could be changed anytime and basically in any way the sovereign wished, as long as he respected the limits of natural law and the law of God, and as long as his commands worked in favor of the common good. This type of legislation, as Stolleis has remarked, could easily react to the changing circumstances but was lacking “scientific coherence.” In this sense, a police statute was in fact closer to the individual command of the sovereign than to a law intended to last. Because of this “lack of jurisprudential character” (*Marginalitäten des juristischen Elementes*) in Germany (and elsewhere), police statutes were not taught in law faculties of the universities until the nineteenth century, but rather shoved over to philosophical faculties.<sup>33</sup>

In short, corresponding to the latest trend in European statutory law, Spanish colonial law was police regulation. This can be said, I think, at least

31 “Es imposible que en este nuevo mundo sea firme y fijo el gobierno, y que las leyes humanas sean duraderas: porque sobre ser tan sin número los casos particulares, a cuyo remedio asisten las leyes, es el hombre animal tan vario, que hoy le turba la salud la medicina que le sanaba ayer.” Villarroel, *Gobierno*, II, XVII, IV, 14. Cited at *TAU ANZOÁTEGUI* (1992) 111.

32 The principle of “obsérvase pero no cumpla” allowed the authorities of the Spanish colonies, as an individual statute did not seem suitable for the local circumstances, to leave the statute unapplied while at the same time not formally violating it. *ELLIOTT* (1970) 131–132.

33 *STOLLEIS* (1992) 244.

as long as we do not stick to a formalistic definition of Spanish colonial law, which defines it as everything applied in the Spanish law. *Derecho indiano* was police law if we concentrate our observations on what was typical of *derecho indiano propiamente dicho*; in other words, the parts of Spanish colonial law which differed most from the compound of the laws of peninsular Spain and which were most typical of the Indies – typical in the sense that the police regulations formed the kernel of Spanish colonial law. In this respect, *derecho indiano* was no different from the law in most regions of Europe.

The comparative research question that now almost automatically arises is whether the same can be said of the other colonial legal orders of the early modern period. Alternatively, are we allowed to continue to speak of *derecho indiano* in terms of exceptionalism that until now has dominated the discussions, if not expressly then at least as a tacit presumption? I shall now move on to these problems.

#### IV. Comparative Aspects: British Colonial Law in North America

I will now briefly discuss the case of British colonial law in North America. The precise question is: To what extent did statutory regulation in the British American colonies resemble *derecho indiano*, and in what respect were the two different from each other?

The point that I wish to make in this section is that one of the many ingredients that English law around 1600 shared with continental law was police regulation, and that this kind of regulation found its way into the British North American colonies as well. In developing police regulation, England was no different from the German territories, Sweden, or France. In all of these polities, legislative powers not only sometimes published codes but also issued great quantities of piecemeal legislation on all walks of life. In German legal language, this kind of legislation came to be conceptualized as “police” (*policey*); elsewhere, the conceptualization was either lacking, or was ill-defined. The phenomenon, according to present scholarly understanding, was the same everywhere. A brief look at the colonial legislation quite clearly reveals that the British colonies in North America were no exception. Why should they have been, eager as they were to utilize many other facets of English law as well? I will thus claim that it does not suffice, as far as colonial legislation is concerned, to pay attention to the colonial codes

that have rightly merited much scholarly attention. It is also worthwhile to look into the abundant colonial police regulation.

The emphasis that scholars have recently placed on the complex nature of English law at the inception of the colonial period in America is pivotally important. As David Thomas König observes, the diversity of North American law can hardly be understood without understanding the context of early modern English law. Despite the common law's position at the courts of Westminster, English law was far from uniform. Sir Edward Coke, for instance, enumerated more than 100 courts in the realm, including ecclesiastical courts, manorial courts, and merchants' courts on his list. "The reach of the central common law courts," according to König, was "according to local forces and practices."<sup>34</sup> It has been calculated that approximately fifteen different bodies of law governed the life of an average Englishman in 1600: no wonder William Blackstone lauded the fact that "the law hath appointed [such] a prodigious variety of courts in England."<sup>35</sup>

England's legal culture thus offered huge potential upon which to construct the legal orders of the colonies. William Offutt explains that the far-from-uniform seventeenth century English law provided colonial legal literates ample material, or "legal capital," on which multiple legal solutions could be drafted. The legal literates made conscious choices between the various legal inheritances "to accommodate, prioritize, and integrate" them into a coherent system, Offutt argues, and ought not to be regarded as primitive versions of metropolitan law.<sup>36</sup> It is crucial to understand that colonial law did not turn out the way it did by force of accident. However, as far as I have been able to determine, none of the contributors to the debate have discussed one important choice that the framers of colonial law made, which links it not only to English metropolitan law but also to Spanish colonial law.<sup>37</sup> This is the nature of North American colonial law as police regulation.

34 KÖNIG (2008) 151; see also HULSEBOSCH (2003); OFFUTT (2005) 161.

35 BLACKSTONE (1765–1769), 3:24, 30.

36 OFFUTT (2005) 161. Offutt's main point is that by the 1680s and 1690s "the multiple sources that had originally nourished colonial legal imaginations were slowly dying out." Instead, "the common law [...] became virtually the only form of legal capital still flowing across the Atlantic." OFFUTT (2005) 161–162.

37 Richard Ross, however, touches upon the subject in his comparative article on the aspect of religious discipline, drawing on Massachusetts, Geneva, and Scottish sources. See Ross (2008b) 975–1002.

In recent decades, legal historical scholarship on police regulation has spread from Germany to other regions of early modern Europe.<sup>38</sup> Scholars have confirmed that similar regulation existed practically everywhere.<sup>39</sup> England is no exception, although little research has been done on English police regulation from the comparative point of view. This may be a result of the traditional exceptionalism and isolation of English legal history, although critical research has recently lowered the barrier between common law and civil law.<sup>40</sup>

As far as I know, Robert von Friedeburg's article on English police regulation (which he calls *Ordnungsgesetzgebung*) is the only study on the subject. Royal proclamations and parliamentary statutes were, as von Friedeburg shows, both instruments of police regulation. In the years 1485–1553, at least 437 proclamations were issued. Many of them were, however, intended to strengthen the authority of the statutes, and sometimes proclamations only gave further instructions in regard to parliamentary statutes.<sup>41</sup> Statute law, according to the dominant theory of the sixteenth century, was the leading source of law because it stemmed from Parliament. Under Thomas Cromwell, a period of statutory reform was instigated, and during Henry VIII's reign alone, 677 statutes were issued.<sup>42</sup> Both the proclamations and the statutes of the late fifteenth to early seventeenth centuries covered very much the same matters as police regulation everywhere else in Europe: commerce, luxury, clothing, poor relief, vagabondage, health care, and religion, to mention but some of the most typical.<sup>43</sup> Royal proclamations, according to the prevailing scholarly understanding, probably had little

38 One notable exception is RAEFF (1983), in which the author compares German and Russian police regulations in the early modern period. In the history of police regulation, Raeff was also an early starter and could therefore not take into consideration all the research in the field that has actually emerged only since the 1990s.

39 See the articles in STOLLEIS/HÄRTER/SCHILLING (1996).

40 See, for instance, Zimmermann, who has on many occasions emphasized the similarities of legal institutions on both sides of the English Channel; see, e. g., ZIMMERMANN (1993); and Freda, who has stressed the fact that not only common law but also early modern continental legal orders were very much driven by court precedents; see FREDa (2009) 263–278.

41 FRIEDEBURG (1996) 583–584.

42 FRIEDEBURG (1996) 586.

43 See HUGHES/LARKIN (1964), (1969a) and (1969b).

practical effect, or at least we know little of their effects.<sup>44</sup> This, again, fits the general European pattern. The fact that the English police regulation can be observed from the point of view of domestic power politics of the estates and the Crown, does not, however, prevent one from seeing the English royal proclamations and parliamentary statutes as essentially part of the same wave of police regulation that was taking over most of Europe in the early modern period. There was, no doubt, English *policey*.<sup>45</sup>

Written law, the actual “codes” included, was even more important for the colonies than for England. The colonists could not wait for the inherited common law doctrines to develop so as to meet the specific needs of the Americans. As a text-book of American legal history says, “England [...] had no need to consider, in its law, the problem of hostile native tribes [...] Some variations were natural – they stemmed from climate or the lay of the land; others were structural, depending upon whether the colony was a Crown colony, a chartered colony, or a proprietorship [...] Initial differences in land or structure led to still further differentiation.”<sup>46</sup> William Nelson has observed that in Virginia, the “rulers sought to accomplish their main chore, which was to coerce labor out of the local inhabitants, through intimidation and brutality, while New England’s leaders strove to create a religious utopia by recourse to the law of God, not the law of England.” These norms took the form of statutory law, such as Dale’s Code of Virginia (1611), in addition to which English customary law was also used. In the initial period of the colonization, however, English common law was not on the agenda.<sup>47</sup> Common law with all its intricacies was simply too sophisticated a tool for directing the new colonies effectively and, what is more, it could not function without lawyers. Common law might have been, as Lawrence Friedman puts it, “somehow the norm; colonial differences, then, were examples of some sort of rude primitivity.”<sup>48</sup>

44 ELIOT (1965); FRIEDEBURG (1996) 583.

45 Von Friedeburg remarks that the English language did not follow the continental terminology in transforming the Aristotelian “polity” to “policey” during the seventeenth century (FRIEDEBURG (1996) 579). This does not, of course, mean that the English were not aware of the continental development or that the English “police” were completely different from its continental counterpart.

46 FRIEDMAN (1985) 37.

47 NELSON (2008) 16.

48 FRIEDMAN (1985) 34.

The common law gained importance over time as soon as lawyers started arriving. These “legal literates” often had legal education and continued enhancing their need of legal information by reading English treatises.<sup>49</sup> The legal orders of the colonies were also controlled by the Privy Council in London, although, as Richard Ross has observed, the Council’s decisions were too few to control legal life in the colonies effectively. The Privy Council only took relatively few cases from the colonies under consideration. In this respect, the difference from Spanish America is clear: it was much easier for private individuals and authorities to have their cases heard in the Council of the Indies than it was for the British colonists to reach the Privy Council.<sup>50</sup>

Even the common law turned out differently in America. In many cases, English legal doctrines needed to be simplified to suit the needs of the colonies. For instance, the writ system was not adopted as such. The less technical bill procedure was used instead, at least in Virginia.<sup>51</sup> Many cases did not come to court at all because of the widespread use of arbitration and mediation, and in most of the colonies juries decided both questions of fact and law.<sup>52</sup> Nor did the professional division of lawyers into solicitors and barristers develop.

The level of legal culture is still another factor, which unavoidably affected the closeness of colonial law to English law. At least around 1700, colonial legal culture was underdeveloped, as seen through the eyes of an English observer. The lawyers had received little or no training at an educational institution such as the Inns of Court, had not been formally admitted to a professional organization, and lacked the social status of their English counterparts.<sup>53</sup>

Although the colonists thus adopted the basic blueprint of English law, they did so only with many deviations from the original model. The deviations were typically simplifications, necessary because of the initial lack of lawyers and their later scarcity. The functioning of the English common law would have been unthinkable in its original form in the absence of lawyers able to master its technicalities.

49 See BILDER (1999) 83–102.

50 ROSS (2008a) 118–121.

51 NELSON (2008) 37.

52 NELSON (1975) x.

53 See KONIG (2008) 157.

Not all changes were due to the lack of lawyers, however. Some resulted from the fact that the circumstances in America were radically different from those in England, where the common law doctrines had emerged. England's sixteenth century experience of extending its justice system into the Welsh and Northern marchlands, Ireland served as a background for events in Virginia and, despite differing circumstances between North America and Virginia, there were also many similarities leading to similar outcomes.<sup>54</sup>

In Wales and the North, instead of a fully developed common law system, judicial power was entrusted to the local lords and their conciliar courts with a simple royal commission, which granted barons broad discretion in shaping justice. Hardly surprisingly, it came to look quite different from the common law. The conciliar justice involved no juries. Legal proceedings were speedy, as no common law protection shielded the accused in criminal cases and because the complicated forms of the civil procedure were not followed. As David Thomas Konig observes, the Crown was forced to tolerate these deviances from the common law as the price for maintaining at least minimal control over these areas. Later on, the same pattern emerged in Ireland, as the Tudors extended conciliar justice there, leaving the central courts at Westminster with little influence on the island. In Ireland, just as previously in Wales and the North, the interests of a centrally led but complicated common law needed to yield to a more straightforward and discretionary judicial power. Little external constraint or accountability was imposed upon any of these courts.<sup>55</sup>

However, unlike Wales and the northern marshlands, conciliar justice failed in Ireland, largely because of the weaker status of the local magnates. Conciliar justice ultimately made way for the common law, which, better equipped as it was to secure land tenures, served the interests of English colonizers and land owners more effectively.<sup>56</sup>

The first phase of colonization in North America followed similar patterns. The leaders assumed and were granted wide powers in organizing legal administration, and they largely ignored and bypassed English common law developments. By the 1630s, however, the initial phase of "marshland justice" was over. Eight common law courts replaced the monthly courts that

54 KONIG (1991).

55 KONIG (1991) 72.

56 KONIG (1991) 78.

had delivered justice hitherto, and sheriffs took the place of provosts-marshals. In 1632, the General Assembly ordered that justice be administered “as neere as may be, accordinge to the lawes of England.”<sup>57</sup>

At the beginning of colonization, since it was often unclear which law should be applied, so-called introduction statutes were issued in some colonies.<sup>58</sup> A principle developed over the years, according to which the laws of the colonies should not be repugnant to the English laws although differences arising from the needs of the place and the people could arise. Mary Sarah Bilder calls this the “transatlantic constitution,” According to Bilder, the “constitution” was unwritten, although it sometimes found its way into legal documents. The Rhode Island Charter of 1663 expresses these principles of repugnancy and divergence as follows:<sup>59</sup>

[T]he laws, ordinances, and constitutions [of Rhode Island], so made, be not contrary and repugnant onto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and the constitution of the place and people there.<sup>60</sup>

Until the eighteenth century, it remained unclear whether and to what extent the laws of England, the common law statutes, would apply in the colonies. The so-called introduction statutes solved the problem by determining the circumstances in which the English law would apply. Rhode Island’s introduction statute of 1700 declared that English law would be executed if the colony’s own laws would not cover the case.<sup>61</sup> English law was, in other words, given subsidiary status in a true *ius commune* sense of the term.

Both the discretion left to the local magnates in charge of shaping conciliar justice in Wales, Northern England, and Ireland and the failure of conciliar justice in Ireland and North America reveal important things about how laws were transferred to colonies in the early modern period. The initial phase of legal development in the North American followed much the same pattern of simplified justice. The way legal orders took shape was not merely influenced by political realities, the practical need to allow concessions to those actually in charge of representing the political power of the Crown.

57 KONIG (1991) 92.

58 BILDER (2008) 99.

59 BILDER (2004) 1.

60 BILDER (2004) 2.

61 BILDER (2008) 98–99.

The local holders of judicial power also had to gain legitimacy among the populace. In other words, political alliances decisively determined how justice would and could be shaped.

The political power alignment was nevertheless only one determinant. Another was geography. Time and space both created challenges from the point of view of maintaining a genuinely English system of common law, even after the common law courts had been established in the 1630s. The geographical differences *per se* sometimes called for different legal arrangements. The time factor also played a role since crossing the ocean took time, as such the colonists were not always aware of the latest legal developments in England, at least not right away.<sup>62</sup> In this respect, British North America was similar to Spain's South America. Another similarity was that the local circumstances, in both parts of America, soon came to be controlled by a similar legislative technique, police regulation.

If English police regulation has attracted little attention, the American equivalent has produced even less scholarship; in fact none. The English Crown produced relatively little special legislation for the American colonies, which is a major divergence from Spain's relations with its overseas colonies from a comparative point of view. Taking into consideration the fact that police regulation was far from unknown in England, the scarcity of British legislation in America cannot be explained by the existence of a common law tradition. The lack of royal laws can be understood much better when observed against the context of the relative laxness of colonial practices on the British side of the Atlantic.

In Spanish America, various authorities were constantly reporting on each other to the Crown. The activities of Spanish officials could be checked in various ways. The *visita* or visitation, an institution developed in medieval canon law and known in many parts of Europe, could be imposed upon an official as a result of an individual complaint to *Consejo de Indias* or if suspicions had otherwise arisen. At the end of his term of office, every official's activities were checked as a matter of course in the *residencia*

62 But, as Ross remarks, "the great distances that the Atlantic Ocean created between colonies and metropolises provides (by itself) a weak explanation of the forms of imperial governance in the Americas. The English and Spanish empires, which both spanned the Atlantic, established different systems of legal communication that grew out of the dissimilar political and social contexts." Ross (2008a) 118.

procedures.<sup>63</sup> The English Crown imposed no such routine scrutiny on the American authorities.<sup>64</sup>

The British issued important legislation regarding the whole Empire, especially on commerce, such as the important navigation acts, laying the basis for British mercantilism.<sup>65</sup> Although the English otherwise allowed the local authorities much more freedom in deciding how to run the colonies, some royal proclamations dealing specifically with colonial issues were nevertheless issued. Examples include the proclamation on forbidding a lottery in Virginia and the one forbidding the importation of tobacco from elsewhere than Virginia or the Summer Island.<sup>66</sup> Royal proclamations, at least under James I were, however, few. Almost all of them dealt with transatlantic questions, typically commerce.

A more voluminous statutory regulation, intended to regulate the colonial affairs *per se*, was worked out on the spot in the colonies themselves. In line with the dual authority system of the British colonial world, by the late seventeenth century it had become clear that not only the Crown but also all colonial assemblies were entitled to draft, enact, and change their own laws, although they were then subject to review by the Crown.<sup>67</sup>

Virginia's statutes are a good example of the use of statute law in the English colonies in North America, because Virginia's legislation was one of those imitated by the other colonies. William Hening collected Virginia's statutes from 1619 to 1823.<sup>68</sup> This is not the place to thoroughly survey Hening's *Statutes at large*. Henning's *Statutes* fill thirteen volumes, and the amount of statutory law did not show signs of diminishing towards the end of the colonial period.

Even a brief look into the index of the *Statutes* reveals that the Virginian statutes fall squarely into the general pattern of Western early modern police regulation. Early Virginians legislated on bastards (1657), church wardens (1623), drunkenness (1632), fences (1642), hunting (1642), powder (1642), coinage (1645), trespassing animals (1748), weights (1748), and beggars (1755) to mention only a few of the typical areas of statutory law. They do

63 HARING (1947) 148–157.

64 ELLIOTT (1970) 126.

65 See PRIEST (2008) 406–407.

66 LARKIN/HUGHES (1973) 500–502, 627–632.

67 BILDER (2004) 55.

68 HENING (1923).

not essentially differ from the police regulation in continental Europe: piecemeal legislation disciplining and controlling every aspect of people's everyday lives.

Customary law soon started to develop in its own directions in both the Spanish and English colonies. Nevertheless, both were also very much governed with the help of statutory law. There are, however, two major differences between the ways in which police regulation was employed. The first major difference is that whereas the vast majority of statutory laws in the Spanish colonies originated in Madrid, an overwhelming majority of the statutes in the English North American colonies were produced in the colonies themselves. Both Spanish and English colonizers took advantage of the most modern legislative technique, the *policey*. In both cases, some of that legislation was produced on the spot, in the colonies themselves. The second major difference between the Spanish and English colonial legal orders is that the law in the English North American colonies grew further apart from the laws of the mother country. It seems that this was not so much due to the greater geographical differences or other local needs (which exists to a similar extent in both North and South America) but simply because the Spaniards were able to keep their lawyer-civil servants on a tighter leash better than the English could theirs, as shown by scholars such as J. H. Elliott and Richard Ross.

Another factor contributing to greater uniformity of *derecho indiano* as against North American law was, undoubtedly, the Castilian legislator's greater propensity towards unification. Statutes emanating from the *Consejo de Indias* were recorded in the *cedularios*, registries kept by the local authorities, which enhanced their usability. The greater centralization of Spanish law is also reflected in the way its laws were codified. The *Recopilación* of 1680 has no counterpart in North America, although North Americans did not resist the idea of statutory law or codification as such. The English colonies began to publish authoritative collections of their laws early on, in addition to which private collections also appeared.<sup>69</sup> Although the differences within the vast area of the Spanish Empire were many, the American colonies had been allowed to drift even further apart, legally speaking, at an early stage.

<sup>69</sup> As examples can be mentioned *For the colony in Virginea Britannia* (1612), COTTON (1641), and *The Book of the General Laws and Libertyes* (1648) of Massachusetts.

## V. Conclusion: the Westernization of Police Regulation in the Early Modern Period

I have attempted above to demonstrate how the early modern colonialism took advantage of the most modern form of contemporary legal techniques, police regulation, not only in practically all corners of Europe, but also everywhere in the Western world. Although it may seem self-evident and hardly revolutionary to us now, police regulation is, just like any other major legal phenomenon, a historical product developed in time and space. The amount of literature produced on codification, court decisions, and – as far as Europe is concerned – police regulation, shows that it is hardly insignificant which form law takes.

The substance of American police regulation has not been given much consideration in this short piece. Such an undertaking would certainly require more time and space than I presently have at my disposal. Police regulation was a good legal technique to import to the British colonies because it typically did not require professional lawyers as draftsmen or users. The English common law did, the European *ius commune* did, and codifications have always required expertise. Police regulation was also quick and flexible – to what extent it was also effective may be questionable.

Just like the English, so the Spaniards also used the whole array of legal techniques available in peninsular Spain to govern their overseas territories. The traditional areas of civil, criminal, and procedural law could be transported over to the Indies relatively easily with the corps of legal professionals following in the footsteps of the actual *conquistadores*. The traditional legal techniques – scholarship, court decisions, and codes – were, however, not quick and flexible enough to master the multitude of new circumstances and peoples to which the law needed to react. Instead, the heart of Spanish colonial law, *derecho indiano*, also came to be based on police regulation, of which Spaniards had already gathered plenty of experience on the peninsula.

Police regulation as a legislative technique was a legal transfer, and legal transfers adapt to new social and political circumstances, often changing while they are moved from one place to another. In at least one important respect, police regulation in Spanish America was crucially different from police law in British America. In the latter colonies, the bulk of the regulation was drafted and issued in the colonies themselves, reflecting the rel-

ative independence of the British colonies from London. In the Spanish colonies, however, the majority of the regulation continued to flow from the Council of the Indies right up to the end of colonial period, thus reflecting the centralized nature of the Spanish Empire.

Are we thus entitled to speak of a globalization of police regulation? This may have to await further studies on Dutch, French, and Portuguese colonial laws. At the moment, in any case, it seems fair to assume that in the early modern period, police regulation became at least thoroughly westernized.

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