

THOMAS DUVE
HEIKKI PIHLAJAMÄKI (EDS.)

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Marta Lorente Sariñena

More than just Vestiges. Notes for the Study of Colonial Law
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More than just Vestiges

Notes for the Study of Colonial Law History in Spanish America after 1808*

I. Introduction

On 19 March 2007, a Chilean citizen filed an appeal challenging as unconstitutional a Court Regulation issued by the Court of Appeals in and for the city of Santiago in October 1995. The details of the proceedings are irrelevant here; what is noteworthy is that the judgment that put an end to the proceedings has been considered a true *historic landmark*. Indeed, not only was it the first time that an action against the interference with fundamental rights was admitted before the Constitutional Court, but it was also the first time that the Chilean High Court had declared partly unconstitutional a Court Regulation issued by the courts of justice.¹

Although this development sparked great interest among specialists and lay people, I am aware that it is unrelated to the topic of this publication; furthermore, readers could wonder: What relevance to the renewal of legal historiography might a topic of debate about American or European constitutional case law have? What relation is there, if any, between the labor of constitutional courts and the history of Spanish colonial law on which this book is focused? Or, lastly, has Víctor Tau ever addressed the study of the concentrated control of constitutionality?

Firstly, in reply to the last question, I must admit that I am not familiar with any work by the Argentine legal historian on the creation of the control of constitutionality,² the multiplication of constitutional courts,³ or finally

* DER2014-56291-C3-1-P. I would like to thank Javier Barrientos and Alejandro Agüero for their comments and information, which helped me develop this work.

1 ALDUNATE (2007).

2 CRUZ VILLALÓN (1987).

3 VON BOGDANDY / CRUZ VILLALÓN / HUBER (2007).

the transformation of the sources within the system caused by the foregoing.⁴ In fact, I could only attest to the opposite.⁵ However, I believe that the judgment rendered by the Chilean High Court is not only of great interest to those who study the ways in which law is created,⁶ but also intended for the study of legal historians who have avoided contaminating the interpretation of the legal past with legalism and / or statism, in workshops such as those conducted by Víctor Tau.⁷

The foregoing is not the only reason that can be provided to justify the use of the Chilean judgment as a starting point for this paper. I also believe that its analysis may lead to the formulation of proposals aimed at the renewal of legal historiography as regards the study of colonial law. It is well-known that opening up new thematic and methodological horizons has been a constant concern for Víctor Tau;⁸ yet, I will quote one of his earliest thoughts, from an interview almost twenty years ago:

“I believe that one of the major topics deserving the attention of scholars is what can be called the Law of the Indies at the transitional stage towards the formation of national law systems.”⁹

Víctor Tau himself has developed some aspects of his proposal,¹⁰ but his works will not be analyzed in the following pages; instead, the aim is simply to try to draw attention to some *problematic* aspects of the study of transitional law. The first aspect is evident: is it appropriate to include the Chilean case within the Law of Transition? It should be borne in mind that answering this question in the affirmative suggests that not even at the time when “national law systems were formed,”¹¹ was an end put to what historians have called the *vestiges or remnants of the Law of the Indies in national laws.*¹² It is not necessary to be a specialized linguist to realize that the preceding terms somehow convey the idea of a residual. Therefore, this work is chiefly aimed at questioning the use of such terms in the study of transitional law

4 OTTO (1987).

5 TAU/MATIRÈ (2003).

6 TAU (1992a).

7 TAU (1992b).

8 TAU (1997).

9 ENCISO CONTRERAS/DEL CONACYT (1993).

10 TAU (1977b); TAU (2007–2008).

11 TAU (1977a).

12 GUZMÁN (2010).

history, which forces me to start from the very beginning, that is, by trying to prove that the Chilean case must be included in the list of well-known vestiges or remnants.

II. Colonial Remnants in the 21st Century? From Formal Constitution to Material Constitution in the Republic of Chile

For a legal historian, the following paragraph of the Chilean judgment is worthy of attention:

“This ample reference hampers the accurate definition of the scope of economic powers since, on the one hand, the reference is too vague: ‘manner of operation of the courts.’ The manner of proceeding in disciplinary matters is, for certain, a manner of operation (...) The absence of further examples impedes defining the scope given by lawmakers to these powers. The narrow regulatory scope intended by the applicant for *Court Regulations* is not in line with the tradition of the important matters which have been thus regulated since Colonial times, by the Real Audiencia first, and by the Supreme Court later. Therefore, it is necessary to define the scope of this power at the constitutional level.”¹³ (Emphasis added.)

The Chilean High Court has given constitutional hierarchy to the continuity between the *Reales Audiencias* of the Indies and the republican courts, in the understanding that the latter must be seen as an institutional reformulation of the former institutions. Nonetheless, by reading the paragraph transcribed, something that may concern legal historians can be inferred, since even if the Court acknowledges that the boundaries delimiting the regulatory scope of Court Regulations issued by Chilean courts are blurry, it immediately goes on to affirm that *tradition*, rather than the very confusing current norms, must set the boundaries of such regulatory scope. The fact that the scholarly debate sparked by the judgment has been partly expressed in historicist terms is no coincidence. Having set the groundwork, I believe that the Chilean case helps legal historians free themselves from the endemic *loneliness* inherent in their work,¹⁴ ensuring them a place in this topical debate.

13 ALDUNATE (2007) 229.

14 CARONI (2005).

1. Terminological considerations: domestic power, immemorial practice and, finally, Court Regulations

The Chilean Constitutional Court ruling partly agrees with the academic sector that identifies the regulatory scope of Court Regulations with the power of self-organization of state organs, a power often called *domestic*. However, it is worth recalling that this term has quite a strong connotation. In fact, any legal historian would stress that *domestic power* has a historical meaning that greatly hinders its current use. As is widely known, the historical roots of domestic power can be traced back to ancient times.¹⁵ Nonetheless, this concept managed to survive by integrating and reformulating itself within the culture of *ius commune*, which dominated Western legal thinking at least until the revolutionary crises.¹⁶

To simplify, it could be stated that for such a culture, domestic power was not subject to the law, but rather a direct and largely arbitrary power of the father of a family, which based on love, did not exclude violence.¹⁷ Undoubtedly, the phrase *domestic power* sheltered for centuries the most obscure sector of the government of men on both sides of the Atlantic. Thus, for instance, in her study on the “populated house” in San Miguel de Tucumán, Romina Zamora highlighted the operability that such corpus of texts on *oeconomics* – so interesting for the great Austrian historian¹⁸ – had in the Hispanic world in the late 18th century. The conclusions drawn by Zamora’s study and other similar pieces of research show that there was no reduction in the scope of the ancient domestic power of the 19th century.¹⁹ Accordingly, it cannot be exclusively identified with the power granted to Spanish and American judiciaries,²⁰ given that the *survival* of domestic power within the sphere theoretically pertaining to individual rights was very common throughout the 1800s.²¹ In short, there is nothing natural, if I may say so, in attributing such power to courts.

15 BRUNNER (1977).

16 VALLEJO (1998).

17 HESPAÑA (1997).

18 ZAMORA (2010).

19 Tío VALLEJO (2001).

20 SOLLA (2011).

21 AGÜERO (2010); Tío VALLEJO (2010).

Another point to consider is the fact that a wide sector of the Chilean academia insists on underlining the regulatory nature of Court Regulations by focusing more on form than on substance, provided it is understood that the latter means quantity and quality of the contents said Court Regulations may govern. This has considerable effects on the control of constitutionality of such provisions. In any case, what must be emphasized is that a sector of academia has contended that such regulations are rooted on *immemorial practice*.²² While it is true that for some people such practice incorporates traditional elements into the Chilean source system impregnating it with irrationality,²³ it is also true that, beyond this kind of criticism, the mere use of the phrase *immemorial practice* suggests specific thoughts to legal historians.

Thus, for example, one could wonder: What connection can be established between the word “immemorial” and the *ancient constitution*? Even though this term has had a prominent place in many legal systems, history offers some representative examples of its usage in the constitutional terrain. As Pocock rightly demonstrated many years ago, it was certainly English constitutionalism that used it more effectively for the purposes of placing *common law* outside the scope of political power(s).²⁴ Later on, American revolutionaries resorted to a similar discursive strategy, which would have tremendous consequences for constitutional history. As expressed by an expert:

“The British who opposed the American version of the constitution were ‘looking ahead,’ away from the ancient constitution, to government by consent, to a constitution of parliamentary command, in which government was entrusted with arbitrary power and civil rights were grants from the sovereign. The Americans were ‘looking backward,’ not to government by consent but to government by the rule of law, to a sovereign that did not grant rights but was limited by rights.”²⁵

It is true that not many parallelisms can be drawn between the current Chilean constitutional issues and the political conflicts that confronted the English Monarchy with its Parliament during the 17th century. However, it should be recalled that one thing is to protect immemorial possession and

22 ALDUNATE (2009a).

23 ALDUNATE (2009b).

24 POCOCK (1957).

25 REID (2005) 52.

quite another is to transfer that idea to the realm of constitutional powers. It is in this sense that we might point out that insofar as Chilean legal practice does not go back beyond the creation of the *Real Audiencia*,²⁶ the power granted to its *successor* institutions does not stem from the dark and indefinite mists of time, but rather from the political will of some very determined men. The term “immemorial” is not used in an attempt to protect the rights of individuals; it is only an institutional practice directly linked to a way of understanding the law and its management which comes from a world where the *Audiencias* of the Indies identified with the source of all jurisdiction, *id est*, with the King.²⁷

Nonetheless, this widely known story about the political uses of the ancient Constitution, coincident with the immemorial practices that were so deeply rooted in the Hispanic world, does not concern the most classical Chilean constitutional scholars at all. Not only do they accept the existence of Court Regulations naturally, they also contend that they make up a body of general and abstract rules generally issued by collegiate courts aimed at imposing measures or giving instructions for the most expeditious and efficient operation of the judiciary.²⁸ In short, the new *Audiencias* into which the republican courts turned have further reinforced their self-government power, extending it beyond that of the *Audiencias* of the Indies, since the current system of distribution of competencies is based on regulation and on the predominance of a formal Constitution.

There is little doubt that keeping ancient legal terminology contributes to the legitimacy of continuity. However, while the phrase “Court Regulations” currently has high standing in Chile, the same does not occur in other states that once shared Chile’s legal tradition.²⁹ The Chilean continuity is striking, because it makes it clear that the political gap opened in 1808 did not affect the survival of the legal tradition in the Spanish American territories.³⁰ This can be proved with a single piece of information: the *Dictionaries* published throughout the 1700s in the Peninsula defined the term “Court Regulation”

26 BARRIENTOS (2003).

27 GARRIGA (2004a).

28 SILVA BASCUÑÁN (2005) 156.

29 TAU (1990).

30 AGÜERO (unpublished).

in the old sense.³¹ Nevertheless, the latest edition of the *Diccionario de la Lengua Española* [Spanish Language Dictionary] published by the *Real Academia Española* [Royal Spanish Academy] states that the meaning of the term is:

“In ancient Law, a decision taken as a general point by a supreme court or council with the attendance of all of its divisions.”³²

Such *ancient law* was kept alive in the colonial Spain of the 19th century, but not in the present one, governed by the Constitution of 1978.³³ Conversely, Chile has undergone a rare metamorphosis that has enabled it to become part of the *regulatory typology* determined by the Constitution in force. As some Chilean authors have been claiming, there are still many legal mechanisms created at the core of the Law of the Indies that still survive there, besides Court Regulations. This is the case, by way of example, of the ancient ‘consultation’ process, consisting of the ratification by an upper court of those resolutions deemed too important to be decided just by a lower court, even without a party’s request. Although this consultation process was commonplace in times of the Spanish Monarchy,³⁴ it does not have any parallel in Comparative Law.³⁵ Legal historians cannot be indifferent to this particular terminological continuity; furthermore, I believe that understanding and explaining it is one of their most important duties. Court Regulations, consultations, visits ... These are all words that have survived in some places, but disappeared in others. Their mere existence or inexistence indicates a

31 The term Court Regulation was not included in the well-known *Diccionario de Autoridades*, but in the following one: <http://buscon.rae.es/ntlle/SrvltGUILoginNtlle>. Rafael Altamira largely analyzed the term regulation, but said nothing about the expression Court Regulation: ALTAMIRA (1987) 26–28 »Autos«.

32 http://buscon.rae.es/drae/SrvltConsulta?TIPO_BUS=3&LEMA=auto.

33 Autos acordados de la Real Audiencia de la Isla de Cuba, Habana 1840; Autos acordados de la Audiencia Chancillería Real Establecida en Santo Domingo y trasladada a Puerto Príncipe, suprimida por Real Decreto de 21 de Octubre, cumplimentado en 12 de diciembre de 1853, a la letra, en extracto ó solamente mencionados, según su importancia y vigor, recopilados y anotados por Don José Medina Rodríguez, Puerto Príncipe 1854; Colección de Autos acordados de la Real Audiencia Chancillería de Filipinas y de las soberanas y superiores disposiciones que reúnen a la vez el carácter de gobernadores de provincia, I–V, Manila 1861–1866.

34 BARRIENTOS (1990).

35 CAROCCA (1998) 197.

departure from a common tradition,³⁶ and also highlights the different value of history as a constitutive element of the law in force, which, undoubtedly, concerns both historians and jurists.

I am aware that these assertions are not innovative. Many decades have passed since Paolo Grossi called for collaboration between historians and jurists,³⁷ but I firmly believe that there are not many opportunities for this as offered by the analysis of the Chilean case. Indeed, the complex combination of tradition and will, or, if preferred, between Court Regulations and constitutional normativity, has stimulated a very interesting debate on the adequacy or inadequacy of history to a constitutional order based on the recognition of fundamental rights.³⁸ While part of the academia insists that the Political Constitution of the Republic of Chile does not include a single article expressly empowering the Supreme Court to issue Court Regulations, another part maintains that such power is the most important manifestation of the traditional economic superintendence entrusted to said Court, which is currently found in Article 82 (amended text of the previous Article 79 of the Constitution).³⁹ This latter sector of academia repeatedly resorts to historicist legitimization in order to justify the attribution of an important regulatory power to the judiciary,⁴⁰ regardless of the framework of the well-known superintendence granted to the Court and understood as a legacy of the ancient *Real Audiencia*, which, in addition, is also said to be shared by other Supreme Courts.⁴¹

We should recall that it was not Chilean legal scholars but the Constitutional Court itself that decided that both the Supreme Court and the Courts of Appeals have jurisdiction to issue Court Regulations.⁴² By way of simplification, it could be argued that the Court has empowered courts to continue acting as they did before and after Chilean independence. In the words of another author:

36 E.g.: *Autos, acuerdos y decretos de gobierno del Real y Supremo Consejo de las Indias*, Madrid 1658.

37 GROSSI (1972) 2.

38 SILVA (2009); PFEFFER (2010); USEN VICENCIO (2010); VÁSQUEZ MÁRQUEZ (2010).

39 DELGADO (2010) 802.

40 ALDUNATE (2009b).

41 ZÚÑIGA (1998).

42 Sentencia Rol N° 783 (2007): “Si el artículo 93 nº 2 de la Carta fundamental otorga a esta Magistratura competencia para revisar la constitucionalidad de estas normas, es evidente que valida esta competencia”.

“What turns out to be inconsistent in the precedents of the Constitutional Court analyzed herein is that the abstract control of constitutionality finally protects the regulatory powers of the high courts of justice, anchored in the independence of this branch of Government, and especially of the Supreme Court, boasting of a decision on legal policy of absolute deference to the Judiciary; although this is hard to reconcile with the Rule of Law, which requires observance of the principle of legality and of the distribution of regulatory power that places legislation at the top of the hierarchy of the sources of Law; this priority is protected by the principle of democracy.”⁴³

For an observer outside the Chilean constitutional debate, the regulatory power granted to the courts conflicts with the concepts of national sovereignty, formal legislation and separation of powers, which are supposed to be fundamental for modern constitutionalism.⁴⁴ This imaginary observer is further taken aback when finding out, in addition, that from the dissolution of the *Real Audiencia* of Santiago de Chile in 1817 to the present time, Court Regulations issued by Chilean courts have addressed very general and significant issues, such as the formal aspects of judgments, protection or *amparo* proceedings [summary proceeding for the protection of constitutional rights or guarantees] and the action for compensation for miscarriage of justice. Moreover, several Court Regulations issued by the ancient *Real Audiencia* of Santiago maintained full force and effect in the Republic of Chile until the early 20th century.⁴⁵ So, notwithstanding the task of jurists is the analysis of whether Court Regulations are constitutional or not, the historical concepts used by the Constitutional Court to legitimize the existence and the scope of Court Regulations raise manifold doubts regarding their compliance with the basic principles of what we have come to understand as the Rule of Law.⁴⁶

This is the point where legal experts should pay attention to legal historians, who face a task full of challenges, especially that of trying to recreate the complex history of Court Regulations in order to understand what they were and what they currently are. In order to undertake this task reasonably, the role played by Court Regulations must be contextualized during the different stages of legal tradition, where *casuistry and system* coexisted for many years.

43 ZÚÑIGA (2011) 415.

44 GRIMM (2006).

45 BARRIENTOS (2014) Título preliminar.

46 COSTA (2002).

2. Jurisdictionalism v. statism. The *Real Audiencia* of Santiago, its Court Regulations and, ultimately, the power of custom in the present-day Republic of Chile

The history of the *Real Audiencia* of Santiago, meticulously narrated by Javier Barrientos,⁴⁷ is not very clear on the intersection between the economic and / or domestic functions of the *Real Audiencia* relative to superintendence and the issuance of Court Regulations; furthermore, what Barrientos has described is precisely the opposite. Up to its dissolution in 1817, the *Real Audiencia* of Santiago felt no limitation whatsoever to issue Court Regulations, and these actually dealt with all kinds of matters.⁴⁸ Later on, the Court of Appeals, which replaced the *Real Audiencia* in the first constitutional interregnum, did exactly the same.⁴⁹ I refer readers to Javier Barrientos' thorough analysis on this matter, and I will only point out that to determine the regulatory scope mentioned by the Constitutional Court, which attributes it to the traditional operation of the *Real Audiencia*, a careful reading of all the Court Regulations it issued is required. Nonetheless, challenges remain ahead; as I believe Víctor Tau would say, the Court Regulations issued by Councils and *Reales Audiencias* responded to these *casuistic beliefs* that dominated the legal arena until the late 18th century.

The following question can be posed based on the foregoing: How can we expect to make systemic abstractions today on historic material that completely ignored them at the time?⁵⁰ Once again, projecting current legal categories in an attempt to fill the well-known superintendence attributed to the Supreme Court distorts the history of that *government of justice* that differed so much from what we now know as *statism*.⁵¹ Indeed, it was this kind of government which managed the Indies,⁵² although it did so by

47 BARRIENTOS (2000a).

48 BARRIENTOS (2000b).

49 BARRIENTOS (unpublished).

50 VENTURA BELEÑA (1789). The first volume of this work is a reprint of the second part of Montemayor's Sumarios, while the second volume contains royal orders for New Spain or instructions issued by New Spanish authorities not collected in the Sumarios). For more information on this jurist, see two contributions: BARRIENTOS (2001a) 125–208; (2001b).

51 CLAVERO (1986); HESPAÑA (1989).

52 BARRIENTOS (2004).

repeating old and creating new problems.⁵³ I will not summarize once again the academic controversy related to the term “Modern State,”⁵⁴ which has divided legal historians for decades,⁵⁵ but I cannot resist transcribing a paragraph from one of the greatest Chilean historians.⁵⁶ Góngora endeavored to maintain a very particular concept of state,⁵⁷ which was bellicose and *Spen-glerian* at the same time,⁵⁸ but this paragraph contains a rather contradictory message:

“What we call State is, in the Castilian 16th century, the supremacy of jurisdiction and other royalties, concentrated in the King and exercised through bureaucracy, but also capable of delegations and grants of concession, wider or narrower, under the strictest confidence; privileges so wide that they can be legally defended against the King.”⁵⁹

It is hard to find a better description of what a part of legal historiography qualifies as *jurisdictional culture*,⁶⁰ a culture that helped design a series of institutional devices that were implemented throughout the Hispanic Monarchy.⁶¹ Despite the efforts of some authors to disregard the most recent contributions of European legal historiography,⁶² the idea of dividing the government of justice into *functions* entrusted to *Reales Audiencias* was alien to the basic premises of such culture. In this same vein, it is worth mentioning a subtle warning by Víctor Tau:

“This prevailing criterion of the so-called legal business in the sphere of legal decisions also covered government affairs. A writing of 1714, regarding the management of such affairs, stated that in the *Consejo de Indias* [Council of the Indies], ‘it is unusual to find a file or business which, though denominated governmental, does not contain a great deal of civil, canonical or municipal precedents, laws of the Kingdom, laws of the Indies, Ordinances, resolutions, Bulls and special charters of

53 MARTIRÉ (2005).

54 HESPAÑA (1986).

55 GARRIGA (2004b).

56 GÓNGORA (1981).

57 BULNES (1982).

58 GÓNGORA ESCOBEDO (1990).

59 GÓNGORA (1951) 301.

60 AGÜERO (2007).

61 GARRIGA (2006b).

62 MALAGÓN (2005). It is evident that this author has not read the major work by MANNORI / SORDI (2001). A documentary analysis of the issues dealt with by Malagón can be found in BARRIENTOS (1990–1991).

the Indies, synodal decrees, and decisions *in dubio*, for consultation with his Majesty or the Holy See ...’ (...) We are in the presence of various legal elements – chiefly compiled into laws and authors – which supported and provided grounds for the decisions to be made.”⁶³

At present, some jurists suggest it does not appear sufficient to invoke economic powers to replace lawmakers in matters reserved to legislation, since this is in breach of the Constitution and results in a null and void act. Certainly, this sector of academia may share solutions with legal historiography, although not necessarily arguments, given that understanding, appreciating and even criticizing the special regulatory power granted to the Chilean courts – which, based on tradition, allows them to issue Court Regulations – requires a very special background that, when trying to contextualize the different historical values of the term Constitution,⁶⁴ will get rid of the categories that had no place in the pre-revolutionary universe.⁶⁵

Those trying to nurture this particular legal historiography, called *critical* by others, could clarify the following matters.⁶⁶ Firstly, that *colonial tradition* cannot be blithely invoked given that by reading the collections of Court Regulations one may notice that the *Audiencias* in the Indies issued a series of provisions, generically termed court regulations, “dealing with internal matters and appropriate operation of the judiciary, but there was also a considerable amount of orders regarding matters generically classified within the concept of ‘good government,’ and there are no records that the Crown limited this regulatory activity.”⁶⁷ Secondly, that such power prevailed during most of the 1800s in Chile under the different Constitutions that enshrined the principle of separation of powers, to the point that the matter was not only addressed in the debates that eventually resulted in the enactment of the *Court Organization and Powers Act* of 1875, but it was also done incidentally by resorting to a generic tradition to (re)found continuity. Such continuity was strengthened with the adoption of the Codes of Civil and Criminal Procedure of 1902 and 1906, respectively. A further step was taken in 1971 with the enactment of a law ordering that a subsection be

63 TAU (1992a) 509.

64 HESPAÑA (2000) 5–18.

65 TAU (1997).

66 HESPAÑA (1984); HESPAÑA (2005) 33–35.

67 BARRIENTOS (unpublished) 37.

included into Section 96 of the Organic Code of Chilean Courts, which stated that “all court regulations of a general application and nature issued by the Supreme Court shall be published in the Official Gazette.”⁶⁸ And, lastly, that even when the Chilean Constitutional Court has exercised control over Court Regulations, it has in turn given constitutional value to a pre-constitutional regulatory power.

It is possible to attempt to integrate this special example of colonial survival, if it can be defined as such, within the Chilean legal order; as is widely known, judges and jurists have displayed and continue to display great imagination.⁶⁹ However, it could be said that such power either purports to have a certain *originary* nature or, as I believe Víctor Tau would say, it forces us to acknowledge the strength of the *power of custom* in Chile in the 21st century.⁷⁰ At this point, the spirit of Andrés Bello holding his famous Code appears before historians, who, rather surprised, can only wonder: What has happened with the strong assertion according to which “following the example of almost all modern Codes, custom has been deprived of the force of law”?⁷¹

To sum up, since the existence of Court Regulations has gained ratification in constitutional precedents,⁷² it can certainly be stated that if some aspects of the ancient constitution remain,⁷³ the only possible conclusion is the following: the long-standing struggle between formal Constitution and material Constitution still continues in the Republic of Chile in the 21st century.⁷⁴

3. From Court Regulations to legal historiography

The question that accordingly follows is: When and how were the foundations of such a confrontation laid in the Hispanic universe? And, more

68 All this information in BARRIENTOS (2014) 2–3.

69 WEINSTEIN (1971).

70 TAU (2001).

71 Message from the Executive to Congress proposing the adoption of the Civil Code, Santiago, 22 November 1855, in: Código Civil de Chile (1961) 28.

72 ALDUNATE (2009a).

73 MORAGA (2007).

74 BRUNNER (1983).

specifically, what relationship can be established between the possible answers to the preceding question and the formulation of proposals to open up the horizons of colonial legal historiography? My aim is to answer both questions briefly henceforth; but since it is not possible to encompass the study of these matters, I will stick to the study of certain issues. Neither of them is unknown to historiography but, in my opinion, they require a *modern* approach in two senses. On the one hand, I refer to the relationship between fundamental laws and the Constitution after the disaster of 1808 and, on the other hand, to the origins of the hurdles faced by the codification process both in Spain and in different states in the Americas. Both are key issues for comprehending the *origin and nature* of the persistence of a material understanding of Constitution in the ancient territories of the Monarchy once the revolutionary/independence movements covered the American space with written Constitutions. Without the history of this persistence, I firmly believe that it is not possible to understand the current controversy on the control of constitutionality of Court Regulations in the Republic of Chile.

III. The Starting Point: from Fundamental Laws to Hispanic Constitutions.⁷⁵

It is widely known that we owe Ricardo Levene the first delimitation of the Law of the Indies' history, regardless of the fact that his proposals were not accepted peacefully.⁷⁶ Even though I will not attempt to study the history of legal historiography here, I will, in fact, deal with one of its more relevant subject matters: *the laws of the Indies*. Víctor Tau has warned us against reading them with a legalist view;⁷⁷ he has recently offered a careful description of the *condition* of the legal order of the Indies before the crisis of 1808:

“That order was not confined to the laws issued by the Court. It had to be extracted from the varied present reality and from the roots of the past. For such purpose, it was necessary to resort to briefings, to critical and historical writings, to the most significant legal instruments, to a varied and changing legislation of both royal and

75 This title belongs to a collective work that has been awarded the *Bicentenario de las Cortes de Cádiz* Prize promoted by Congress of Deputies: LORENTE / PORTILLO (2012).

76 TAU (2006) 357–417.

77 TAU (2007).

local laws that, to a great extent, remained outside the scope of the *Recopilación* [Compilation], and to the experience described by viceroys in their memoirs, etc. This is the foundation of the Collection, to which he (Benito de la Mata Linares) added the results of his work, his professional experience, throughout his years in the magistracy.⁷⁸

One of the most relevant features of this legal order was uncertainty, which was part of its own physiology then. However, throughout the final decades of the 18th century, it began to be perceived as a true pathology.⁷⁹ In the words of one of its most fierce critics:

“Royal laws that expressly abolish civil law maxims are commented and twisted so as to reconcile them with the *ius commune* to which they should conform, as if they did not include any new decision. Gómez and the others, on the basis of the axiom that the abolishment of laws is terrible and must be avoided even against the voices and provisions of law, in order to reconcile them, under the assumption that Roman laws are the genuine ones, will use any fiction or extravagant meaning to render our laws futile.”⁸⁰

It should be noted that criticism had scarce incidence in the forum practice, which was marked by unmanageable and unstoppable partitioning.⁸¹ Despite some data which could prove otherwise – *Nueva Planta* Decrees, the decline of Councils and the surge of *Secretarios del Despacho* (Dispatch Secretaries), the creation of the *Intendencias* of the Indies, etc. – we must not be misled by appearances. Far from adopting a rationale tending to unify the Law, the Monarchy increased the number of corporations in the last decades of the 1700s, which entailed the multiplication of jurisdictional spheres and their conflicts.⁸² In short, uncertainty reached unprecedented levels, so that many called for a legal reform, which, expressed in political terms, could well be translated into a constitutional reform.

After the crisis of 1808, however, some dared to suggest that the *ancient American constitution* was rooted in the laws of the Indies.⁸³ It was Fray Servando Teresa de Mier who wrote this proposal that has attracted the attention of historians,⁸⁴ some of whom are convinced that this clergyman

78 TAU (2011) 163.

79 MARTÍNEZ MARINA (1965).

80 MORA Y JARABA (1748) 218.

81 SCHOLZ (1981).

82 MARTÍNEZ (2007) 11–96.

83 MIER (1990).

84 GÓNGORA (2003).

was the last *criollo*.⁸⁵ But beyond the political weight of Fray Servando's proposal, what remains true is that it was not shared by the most prominent political personalities of his time, which suggests that the traditional *criollo* discourse had fallen into decline.⁸⁶ I have used some thoughts of Teresa de Mier with the intention of presenting a well-known issue from an American standpoint, an issue that could be formulated as follows: Did the Catholic Monarchy have a Constitution? And, if so, which one was it?⁸⁷

1. The Monarchy and its constitution(s)

To the present day, historians agree that the question about the constitution was not the cause but the consequence of the crisis of the Monarchy.⁸⁸ This approach has further reinforced the long-dated thesis put forth by Halperín Donghi, which states that the events at the time rather than the willingness of Spanish Americans led to independence in Spanish America.⁸⁹ Indeed, it could be summarized that not only independencies, but also Hispanic constitutionalism itself, may be considered the legitimate offspring of the fall of the Catholic Monarchy. I must clarify that by *Hispanic constitutionalism* I mean the array of texts that appeared in all the territories of the old Monarchy since 1811. In short, I believe that despite the endeavors of the advocates of history understood as the history of progress – if there are any left at this stage – the truth is that rather than the French invasion, it was the shameful resignations of Bayonne and the Constitution granted/adopted there,⁹⁰ that took the then subjects of the Monarchy to wonder whether it had a Constitution.⁹¹

The mere existence of this question inspired others of greater complexity. With the exception of *afrancesados* (Francophiles), by 1808 everyone recognized Ferdinand VII as the legitimate Monarch irrespective of the fact that some began to ask a thorny, long-standing question: How many constitutions were there in the Hispanic territories? The history of the Monarchy

85 ANNINO (2008).

86 BRADING (1991); GARRIGA (2003); GARRIGA (2006a).

87 PORTILLO (1998).

88 PORTILLO (2008).

89 DONGHI (1985). A similar approach in RODRIGUEZ O. (2008); PORTILLO (2006).

90 BUSAALL (2011); BUSAALL (2009).

91 TOMÁS Y VALIENTE (1995); CORONAS (1995).

offered very useful elements to answer this question, given that the Catholic Monarchy was identified with a Republic of Republics, where many of them had a “corporative” constitution. This is exactly what the Marquis of Bajamar expressed in 1785 before the members of the *Consejo de Indias* he chaired:

“We live (...) in a Christian Republic (...) The Ecclesiastical Hierarchy, Prelates, Dignitaries, Town Councils, Priests for Souls, Religions, Monasteries, Prelacies and Communities have been established. They all live in our House: the Sovereign is its owner, and as such sets forth disciplinary and external governance rules in all matters leading to harmony (...).”⁹²

The resignations of Bayonne gave rise to an endless discussion on how to substitute *vacatio regis*. The volatilization of the physical body of the Monarch was lethal to the ancient corporeal metaphor that had dominated western political theory for centuries; however, many discursive possibilities remained.⁹³ The King’s escape did not dissolve the traditional corporative structure of Hispanic society(ies) as if by magic,⁹⁴ so that although the Catholic Monarchy had been a Christian Republic, other corporations understood they could claim a similar condition. The miniaturization of the Republic/Monarchy and its embodiment in other republican entities, understood as perfect societies, could not shock anyone given that this notion was one of the chief pillars of the official political culture at the time. As the extremely conservative public law expert Dou y Bassols, who would later sign the Constitution of Cádiz, stated as late as in 1800:

“What cannot be left unnoticed is that it is not detrimental for the absolutely monarchical constitution of a State to contain democratic and aristocratic entities, regarding the powers of the members of such entities, as long as the head of the nation is entrusted to the superiority and sovereignty of the King above all.”⁹⁵

It was in this cultural context that the beloved subjects of the Catholic King were faced with the famous question on whether there was a Constitution or not. Just as it had happened a couple of years before in the French kingdom, this type of questioning signaled that a profound shift in the legal-political paradigm could break with many centuries of history.⁹⁶ If the existence of a

92 BAJAMAR (1785).

93 PRIMO DE VERDAD Y RAMOS (1808).

94 LEMPÉRÈRE (2004); ROJAS (2007).

95 DOU Y DE BASSOLS (1974).

96 FURET/HALÉVI (1996).

historical constitution was not accepted, then efforts should be made to draft one or more new constitutions, which threatened to create a new constitutional cycle. As widely known, both in the U.S. and in France, the Constitution was no longer considered the result of history: “A constitution is not the act of government, but of a people constituting a government, and a government without a constitution is power without right,” said Thomas Paine (*The Rights of Man* (1791–92) in his famous debate with Edmund Burke (*Reflections on the Revolution in France*, 1790).

Something similar took place in the Hispanic world. At first, various Peninsular and American public law experts tried to make convincing arguments on the existence of countless historical constitutions, whose revitalization was identified with the recovery of private liberties that had been quashed by centuries of despotism.⁹⁷ Nevertheless, the different territories of the Monarchy underwent a relentless process of drafting written constitutions. Readers interested in Hispanic legal plurality may imagine that the examples of the Kingdom of Navarra or the Basque provinces must have played an important role in the constitutional construct of the time,⁹⁸ which is only partly true because the constitutional diversity that emerged after 1808 was not limited to the well-known *foral* speeches.⁹⁹ Valencian, Catalan, Majorcan, Aragonese people ... took advantage of what historians have called the “orphanhood of the Hispanic kingdoms” to claim lost liberties,¹⁰⁰ as rightly stressed by the ultraconservative Borrull in a paper published in 1810, that is, almost one hundred years after the Kingdom of Valencia had suffered the enforcement of its *Nueva Planta* Decree, which abolished Valencian law.¹⁰¹

The historical constitutional framework that began to be shaped in 1808 was not exclusively peninsular; in fact, the Spanish perspective prevented contextualizing the interpretation of a key time for the entire Hispanic world. The study of the famous *Consulta al País* [Country Consultation] stands out among hundreds of examples that could be used as grounds for this assertion. The leading scholars who analyzed this particular initiative

97 PEIRÓ (1985).

98 PORTILLO (1991); GARCIA PÉREZ (2008).

99 BUSAALL (2005).

100 HOCQUELLET (2011).

101 BORRULL Y VILANOVA (1810).

limited its scope to the Peninsula, and failed to consider the American responses to the *Consulta al País*.¹⁰² At the same time, this stance was shared by American historiography, which did not endeavor to study the Spanish American aspect of the *Consulta al País* either. In summary, for decades historiography either concealed or ignored a series of transcendental writings as responses to the *Consulta al País*.¹⁰³ Nonetheless, recent research has shown that the referred Spanish American responses were incorporated into the Instructions to the representatives appointed to the *Junta Central* [Central Board],¹⁰⁴ where the political impulse resulting from the organization of the first elections held on Spanish American soil was consolidated.¹⁰⁵ In other words, too many historians have already incorporated a bi-hemispheric perception of the famous *Consulta al País* into their research.¹⁰⁶

In any case, the history of the crisis of the Monarchy and its consequences still requires research not only on discursive uses in the ancient constitution,¹⁰⁷ but also on those questioning its effective essence.¹⁰⁸ No matter how hard liberal historiography may strive to prove otherwise,¹⁰⁹ most of the first representatives of the different Hispanic territories – both in the *Junta Central* and in the *Cortes Generales y Extraordinarias* – shared a material perception of what a Constitution was or should be. Thus, the *ancient Constitution* could be broken down into as many constitutions as territories were represented, and actually all provincial constitutions included both privileges accumulated over the years and new claims, mostly Spanish American, now understood as rights.¹¹⁰ In fact, there was a novelty, given that these rights were based not only on their ancient privileges and/or customs, but on the geographical and human elements – topography, climate, fauna,

102 ARTOLA (1959); SUÁREZ (1982).

103 Among these instructions there is the *Memorial de Agravios* [Memorial of Grievances] drafted by Camilo Torres. On this matter, readers may refer to the superb documentary collection published by ALMARZA/GARNICA (2007).

104 ROJAS (2005).

105 DEMELAS-BOHY/GUERRA (1993).

106 ROJAS (2008); ALMARZA (2010).

107 GOLDMAN (2007).

108 CLAVERO (2000b).

109 PIQUERAS (2010).

110 It is worth recalling that from early times, several petitions for the acknowledgment of the rights of the trans-Atlantic provinces reached the Peninsula, GARRIDO (1993).

flora, condition of the inhabitants, etc. – that had been revealed by the scientific explorations made during the last decades of the 1700s.¹¹¹

Hence, there are wide territories to be discovered by means of research showing what elements of the ancient constitution survived beyond the new political horizon that opened up after 1808. Although we know that the Hispanic universe set aside the traditional discourse when the written constitutions were drafted, this fact does not shed any light as to how much of the *historic constitution* remained in force in the framework created by a new (?) constitutionalism in the ancient territories of the Catholic Monarchy.¹¹²

2. Political historiography, constitutional historiography

It would be presumptuous of me to assert that historiography has not delved into this complex research field.¹¹³ Moreover, as I have mentioned above, the celebration of the different Bicentennials has not only made available to experts a myriad of sources of potentially unmanageable proportions, but it has also contributed to center much of the debate on independence on constitutional matters.¹¹⁴ Thus, legal historians might become the main players of a debate that does not only affect the knowledge of our past, but also the understanding of our present.

However, I believe the following diagnosis is not an overstatement: although non-legal historiography has experienced great changes in recent decades, this has not been the case of legal historiography. At present, political history holds the predominant place that economic history held for years. Led by recognized authors such as François Xavier Guerra,¹¹⁵ this new political historiography has adopted two different stances, namely: It either calls for the specialized knowledge of legal historians,¹¹⁶ or directly competes with it, insofar as it puts forward new values without resorting to arguments stemming from legal history, be it traditional or modern.¹¹⁷ Even

111 PIMENTEL (1998).

112 BELLINGERI (1993).

113 CHIARAMONTE (2010).

114 GUTIÉRREZ (2010); CALDERÓN (2010).

115 GUERRA (1992).

116 ANNINO (2010).

117 RODRIGUEZ O. (2005).

though the basic sources for the study of the period are of a constitutional nature and, accordingly, chiefly legal, the value of a legal historian's knowledge in the historiographical field is far from guaranteed. The present state of affairs suggests that a wide gap, caused by a special type of deafness, is dividing historians. In my opinion, the main consequence of this situation is that the interpretation of similar sources (minutes of Town Councils or Assemblies, constitutional regulations, documents on elections, court records, and the like) has become endlessly multiplied and increasingly contradictory.¹¹⁸

In this state of affairs, I believe it can be stated that if a *new horizon for colonial law history* exists, it will need to face a three-fold challenge. In the first place, legal historiography must set aside any nationalist conceit. We might not understand the process that started in 1808 in unitary terms, which means peninsular or American. Nor can we affirm that the first manifestations of written constitutionalism were Spanish, Ecuadorian, Colombian or, Argentine, because none of this political entities existed at that time. Accordingly, the origin of national laws (*derecho patrio*) cannot be rooted in any of these constitutions, irrespective of the fact that the institutions which started drafting these new texts and establishing new political and institutional practices were not those of the peaceful (?) times of the Catholic Monarchy. In the second place, legal historiography must attempt to explain how terms such as law/legislation, government, justice, representation, responsibility, and so on must be interpreted within their context and not in isolation, ultimately deprived of legal background. If not, our comprehension of the past will be irreparably distorted by virtue of the projection of present categories. Curiously, the foregoing is a *defect* mostly found in the writings of non-jurist historians, who frequently appear to lack sensitivity regarding the localization of continuities/discontinuities in the language of the law. Lastly, legal historiography must undertake the difficult task of defining the foundations of legal modernity. Within this task, however, the existing difficulties do not stem that much from misunderstandings arising in discussions with other historians but from its own core. The plain truth is that many legal historians have accepted, somewhat uncritically, the methodological options advocated by jurist-historians, who usually pretend to make a genealogy of their own knowledge. Admittedly, this state of affairs

118 ÁLVAREZ JUNCO / LUZÓN (2006).

has changed considerably in recent times, though not enough so as to maintain that Spanish and American legal historiography have completely rid themselves of the burden of the past, let alone to certify that a new legal history of constitutional modernity has managed to introduce new historiographical conventions beyond the very limited scope of the discipline.¹¹⁹

This brief outline of the history of historiography is aimed at giving context to a historiographical argument that broke out against the backdrop of the celebration of the Bicentennials. Focused on the conflict between the ancient and the new constitutions, and deeply marked by artificial territorial determinations, the argument was provoked by the existence of two contradictory versions of the history of the Monarchy crisis. While the first version describes the consequences of the crisis as a rupture, the second version attempts to stress that the continuity of ancient institutional devices and understandings reduced considerably the *modern* components of new political ideas. This serves to answer not only the usual question of how revolutionary the Hispanic revolutions really were,¹²⁰ but also another question that concerns legal historians to a large extent, namely: How *inclined to statism* were those determined to build new worlds? It must be noted that the term “statism” unconsciously refers us to other terms such as “unity,” “generality,” “territoriality,” “hierarchy,” etc. In sum, it refers us to all the elements that make up the photographic negative of a society structured in corporative terms and a political power expressed in jurisdictional terms.¹²¹

3. By way of conclusion: an interpretative proposal

At this point, I will outline the key elements of my proposal, but before I do so, I must admit that they have changed throughout the years. At first, I was lured by the most radical discourses, *id est*, those that understood Hispanic constitutional power or powers as a departure from the ancient discourse of the corporative Monarchy. However, I later understood that the drafting of written constitutions did not imply a transformation as radical as usually contended.

119 LORENTE (2004).

120 Di MEGLIO (2008).

121 LEMPÉRIÈRE (2003).

In my opinion, the first Hispanic constitutions shared a common element: *all of them gave constitutional validity to a panoply of ancient conceptions and old institutional mechanisms*. This meant that large segments of the ancient legal order of the Monarchy were given constitutional hierarchy in their Peninsular and Spanish American versions.¹²² I do not mean that there was nothing new under the sun; quite the contrary, Hispanic constitutionalism could not better itself in some aspects considered essential for the establishment of a new constitutional order in other regions. Thus, for instance, the new legal devices, purportedly born from the inclusion of the principle of separation of powers in all constitutional writings, did not undergo major practical reforms on either side of the Atlantic.¹²³ Something similar holds true for the “revolution of voting”,¹²⁴ since although historiography has highlighted how swiftly the Hispanic world adopted new electoral practices, it has also stressed that accepting the multiplication of electoral ranks¹²⁵ reinforced the corporative nature of the Hispanic institutional fabric.¹²⁶

In a nutshell, if it is assumed that the first Hispanic constitutionalism *voluntarily* incorporated a series of elements from the ancient state of affairs, the so-called vestiges or remnants can easily be considered components of the new legal orders that gradually developed both in the Peninsula and in the Americas after the fall of the Catholic Monarchy. There is little doubt that the number of such elements was large, although it is worth focusing on one of them in particular because it is closely related with colonial law vestiges, namely: the establishment within the Hispanic sphere of a new notion of law and, consequently, of Code.

IV. From Casuistry to System

Víctor Tau has often stated that one of the most fruitful fields for the history of the Law of the Indies is the one that emerged after American independence. Because the interpretations on *derecho de transición* (Law of Transition)

122 GARRIGA / LORENTE (2007); LORENTE (2010).

123 MARTÍNEZ (1999).

124 TERNAVASIO (2002); PANIAGUA (2003).

125 MUÑOZ DE BUSTILLO (1998).

126 ANNINO (1995).

are so numerous, it is impossible to offer a list of relevant works here.¹²⁷ Nonetheless, I believe the approach that both Peninsular and Spanish American legal historiography share in general is not wholly convincing when placing into perspective the complex background of this Law of Transition. Even at the risk of offering unfair criticism, I will outline what I have come to consider insufficiencies. The first one is clearly evident: For decades, the history of 19th-century law has too often been identified with the history of codification; thus, documents such as government directions, private initiatives, drafting of projects, other foreign documents, parliamentary proceedings, comments on new collections, etc. have made up the basic material of the history of Codification, which has also been governed by the binomial legal modernization = Codes. Scholars have agreed that both Peninsular and Spanish American legal scenarios were dominated by slow Codification for many decades, which means that despite political breakup, legal issues remained very similar on both sides of the Atlantic.

So why do I assert that this strategy is insufficient? Simply because rather than interpreting, it merely describes a known fact, which, in turn, can only be appreciated when contrasting it with the example offered by Napoleonic France. However, if we listen to some contemporaries, the problem did not reside in the inability to draft texts but in transforming a political and juridical culture. By way of example:

“Will our laws be observed hereinafter just because we say so? If nothing is missing in our constitution, how come they have been so neglected? (...) What purpose does it serve for the people that the nation established in its general Congresses that the Kings would abide by them, and that they would undertake this as a sacred obligation (...)? Have we unfortunately not always seen them do precisely the opposite?”¹²⁸

Flórez Estrada’s fears were well-grounded. It was not by chance that the forefathers of the early Hispanic constitutionalism gave constitutional hierarchy to the legacy composed of documents and practices that only prolonged that *casuistic* manner of determining and managing the legal order beyond the crisis of the Catholic Monarchy. Thus, the early Hispanic constitutionalism did not only favor the reproduction of a crepuscular *ius commune*, but also supported it so that its domination of the different Spanish

127 Some of them are excellent: GONZÁLEZ (1988).

128 FLÓREZ ESTRADA (1810) 5.

American and Peninsular scenarios continued throughout much of the 1800s. It was at the core of this constitutionalism that the first hurdle appeared for the establishment of general legislation on both sides of the Atlantic. Let's analyze this:

1. “Taking constitutions seriously”

The foregoing argument only makes sense if the history of codification is assumed to be part of the history of constitutionalism, which, even if it may appear evident at first, has not had a relevant place in Spanish historiography. In my country, it has been possible to study the history of codified texts without aligning it to constitutional history, so that the chronology of the legal history of the 1800s and 1900s has been almost exclusively marked by different codification landmarks. This kind of understanding of our most recent past has practically disappeared at the heart of modern legal historiography, but it still causes severe damage in the work of many jurists interested in fashioning the history of their own disciplinary fields.

I suggest that the history of Codification needs to finally assimilate Tárullo's old proposal, which, as widely known, did not distinguish Constitutions from Codes. In historiographical terms, this long-standing proposal entails the permanent eradication of a dichotomy that for decades has been expressed as follows: Given that Constitutions contained vague political statements deprived of legal value, the true law was embodied in the Codes, which, at the same time, abrogated the ancient casuistic culture that had prevailed in the Christian Western world for centuries. I must stress that if these conceptions are maintained, legal historiography is likely to remain in the same place it was, that is, preserving the history of the Constitution as an exclusive field of research for constitutionalists, political scientists and historians of ideas. It is worth mentioning that I have nothing against their work; my criticism is only aimed at the traditional absence of legal historiography in the area denoted by the history of new Constitutions.

Thus, I believe that there is a first link between Codes and Constitutions that cannot be ignored; it simply requires a close reading of Constitutions. This proposal can be explained as follows: Besides analyzing the main statements contained in Constitutions, it is necessary to do the same with their small print. Here is an example to illustrate this idea: Several historians have commented on the famous declaration of the Cadiz Constitution, and have

identified it with the clearest precedent of the policy for the unification of law: “The Civil, Criminal and Commercial Codes shall be the same for the entire Monarchy, without prejudice to variations that the Courts may introduce under specific circumstances” (Section 258). The truth is that the intention of the *Cortes Generales y Extraordinarias* (Constituent Assembly) to unify the law is undeniable; nonetheless, historians tend to forget to relate to the first paragraph of the Section with the second one, although it contains a provision pointing out that the delegates to the Constitutional Conventions of Cadiz were aware of the diversity of territories and peoples.¹²⁹ What the Cadiz Constitution defined as “specific circumstances” looks familiar to those who study the history of colonial law, which for centuries tried to adjust to very different circumstances by using a series of specific mechanisms, among which the recognized *obey but do not comply* stands out.

Anyway, since the vehemence of the Code did not resist any peculiarities, it was necessary to design instruments to enforce it.¹³⁰ Without them, the idea of a Code, rather than the Code itself, resulted in a dead-end idea, or, otherwise, maintained the limitations already in place during the 1700s in the Hispanic world.¹³¹ Being autonomous, such instruments were determined by a familiar premise: the maintenance of the regulatory legacy of the Catholic Monarchy on both sides of the Atlantic. As was the case with the Cadiz Constitution, almost all Hispanic constitutions included two rather contradictory ideas. On the one hand, they committed to renew the regulatory order and, on the other, they deemed that the ancient order should remain in force until those commitments were made effective. Hispanic constitutionalism, which at the outset had been legitimized here and there with the purported recovery of monarchic laws, finally understood that all of them – king, kingdoms, local corporations, various jurisdictions, etc. – continued to coexist under the new constitutional order as long as they did not conflict with it. It shall suffice to recall that the insurgent Constitution of Apatzingán had to acknowledge that “(...) as the Sovereignty of the Nation adopts the set of laws that shall replace the ancient laws, these shall remain in full force and effect, except those repealed herein and in other decrees”

129 CLAVERO (2000a).

130 CARONI (1996).

131 CLAVERO (1978a); CLAVERO (1978b); CLAVERO (1982).

(Section 211). In other terms, the first Hispanic constitutionalism was one of the causes – if not the first – for the maintenance of the casuistic rationale that for centuries had managed the legal order of the Catholic Monarchy.

2. The force of casuistry and the difficulties of the system

On both sides of the Atlantic, formalizing the constitutions of the regulatory legacy of the Catholic Monarchy brought about a series of effects, among which the accumulation of regulations stands out. Thus, it can well be affirmed that the *system* continued to be threatened by *casuistry* for decades. It may seem that the accumulation of regulations is a mere technicality just for the use of legal experts; however, repeals directly affected a new way of conceiving political power, which determined the design of instruments needed to exercise it. Once all Hispanic constitutions had adopted the ancient legacy, they must have undoubtedly pondered this question: in the face of so many texts, from different times and contradicting one other, who decided what law was and how was this done?

The combination of two antithetical notions on how to identify legislation opened the door to a series of widely known issues that dominated the legal scenario in the Hispanic world throughout the 1800s. Firstly, the long-standing idea that law was not exclusively legislation passed by the assembly, but also the ancient privileges and, of course, the opinions of jurists remained.¹³² Secondly, the absence of determination of the regulatory order prevented the establishment of a “normative typology” arranged according to a hierarchical order. Given that a law, order, regulation, ordinance ... were absolutely interchangeable, the rules adopted by Parliament could not prevail over those issued by the other branches of government, which retained a significant normative power. Thirdly, the absence of determination of the regulatory order ensured a wide margin of activity to anyone considered a “judge”, whether legal experts or laymen. In this respect, we should not be surprised by the great difficulties faced by those committed to implementing mechanisms for the defense of law, such as the establishment of the duty of judges to provide grounds for their judgments, or the establishment of appeals to Courts of Cassation. However, both measures had

132 LORENTE (2011).

been adopted in France in 1790, that is, a year before the National Assembly approved the first French Constitution.¹³³

The first Hispanic constitutionalism created an overwhelming and indeterminate collection of texts and interpretations thereof that did not only coexist with ancient regulatory bodies, but also determined the relationship between the legislative, executive and judicial branches, since it forced the reformulation of a set of ancient practices. This had dire consequences insofar as it hindered the unification of the law. Many years after the independence movements, Andrés Bello described some of them:

“For this reform to be truly useful, it must be radical. In no other part of the social order we inherited from Spain is the axe so necessary. As regards political reforms, we are not inclined to dismantling everything; but our trial system merits its total removal and substitution for another. Maybe, it would not be an exaggeration to affirm that this system lacks all guarantees embraced by experience to limit arbitrariness and protect the Law. What sometimes makes us wary of their presence is the concern that exists against some of them, even within the respectable class of magistrates and legal experts. For instance, almost no one recognizes the advantages of having judges and courts ground their decisions, a practice in line with the principle of general responsibility that it is the soul of a republic, or, rather, of any government. In a country where the executive branch cannot make a decision, unless pursuant to a law and by invoking it, on the smallest investment of public monies, can a court have the power to adjudicate disputed property that may be worth hundreds of thousands of pesos without stating pursuant to what law or principle the adjudication has been made, or without explaining why one of the titles invoked must prevail over the other? This seems outrageous.”¹³⁴

The new law, allegedly consisting only of the rules adopted by legislative bodies or of exceptional rules issued by executive bodies, continued to be interpreted from the standpoint of *forensic practices*, which understood that their main objective was to establish “concordances” among normative texts to display the justice in the regulations. Blatantly and briefly put: Bártholo may not have been mentioned any longer in the peninsular forum,¹³⁵ but the advice of Gómez y Negro – whose *Elementos de práctica forense* [*Elements of Forensic Practice*] originally published in 1806, was re-published on several occasions with its corresponding forms¹³⁶ – would be adopted. The afore-

133 LORENTE (1989).

134 El Araucano N° 197, Santiago, 20 de junio de 1834.

135 TORMO (2001).

136 GÓMEZ Y NEGRO (1838).

mentioned work advocated what should be deemed law: *el arte de la litigación* (forensic practice) must be based on the *search* for the rule within the history of national law. Continuity prevailed in an editorial market almost entirely dominated by the presence of works written mostly before 1808, which were criticized, corrected, enlarged, or updated by a succession of authors throughout the never-ending 1800s.¹³⁷ The best example that shows the success of this particular technique is the well-known *Librería de escribanos* [*Library of Notaries*] by Joseph Febrero, published in 1769, which was re-used, or rather (re-)ordered, commented, annotated, etc. not only by various Spanish authors,¹³⁸ but also by some important Spanish American ones,¹³⁹ who for decades replicated the same technique on the other side of the Atlantic.¹⁴⁰ Laura Beck has stressed that the “curse” against this type of literature uttered by Savigny and developed by the Historical School, also necessary for the process of structuring the canon of history of legal literature, has created a dramatic gap between historiography and its own sources; in fact, this does not allow us to assess the constituent value such literature had for legal thinking in the Hispanic world of the 19th century.¹⁴¹ As Beck has asserted, “while kings and queens came and left, ministers and governments fell, Vinnius, Heineccius and Sala remained unmoved from their 19th-century lawyers’ offices”¹⁴² Briefly, it may be stated that the 19th-century legal-political class nurtured a cult for totally hypocritical legality on both sides of the Atlantic.

In the 19th-century newly formed states, both the Code and its culture were ignored,¹⁴³ which was meant to reformulate and assimilate a new conception of the principle of legality, taking steps for its implementation.¹⁴⁴ The inexistence of the foregoing enabled the literature of the well-known *concordancias* (concordances) between Roman Law and the new Spanish, Mexican or Chilean Laws to continue determining the mindset of jurists and informing the practice of judges and courts. This failed to

137 TORRES CAMPOS (1897).

138 Reseña crítica (1852).

139 PASCUA (1834–1835).

140 GONZÁLEZ (1998).

141 BECK VARELA (2008).

142 BECK VARELA (2008) 193.

143 PETIT (1995); PETIT (1996).

144 LORENTE (2001).

contribute to expedite the emergence of a new concept of general law that threatened to depart, once and for all, from the ancient casuistic culture of *ius commune*.

V. Conclusions

What is the value of history? There are few professional historians who have not asked themselves this question during their life. As is widely known, the answers cover the shelves of well-stocked libraries, so readers need not fear that I expand on this matter. However, I would like to recall some thoughts of Tomás y Valiente, who once asserted: “legal historians play a significant role: to contribute their legal experience of the past for the understanding and improvement of our present world.”¹⁴⁵ Tomás y Valiente, as many others, was concerned with the relation between historical times,¹⁴⁶ but he simplified the matter by affirming that if history has a purpose, such purpose is to understand the present (“anyone who does not make this use of history will write dead books”).¹⁴⁷

To this day, I am not quite certain whether some of the objectives of legal history in general, or of colonial law history in particular, are similar to those in the works of Francisco Tomás y Valiente. My intention has been to follow his advice in this contribution as a tribute to Víctor Tau, in an attempt to relate current issues with the historiographical treatment of what can be considered their *origins*. In my opinion, the former comes not only from a tradition that started at the time of the Conquest, which served to extend the imprint of European legal culture in the Americas, but from the inclusion of many old notions in the new (?) legal systems following the independencies. Nonetheless, the treatment of this issue may eventually end as the content of dead books if it is not related to a further question I consider essential: Why did the Hispanic world offer so much resistance to the state-building process that dominated the Western world throughout the 19th century? I am aware that before answering this question, its own hypothetical nature may be challenged. Yet, I believe that the Chilean debate over the legitimization of the existence and scope of Court Regulations issued by courts can only be

145 TOMÁS Y VALIENTE (1997b) 4773.

146 KOSELLECK (1993).

147 TOMÁS Y VALIENTE (1997c) 5062.

explained if we accept that the weakness of general legislation was a key feature of the Spanish and American nations.

This weakness might be verified through the analysis of 19th-century legal practices, which were really old. The creation of laws remained encased in ancient formalities; petitions or claims against the unfairness of ancient laws that once paralyzed their enforcement in the entire Hispanic sphere continued to be in force and proved to be effective as well. At the same time, courts, as well as civil and military administrators, continued to enjoy freedom to determine what should be used in court or executed in each case. A crucial question must be added to the foregoing: Against this backdrop, where the *impossible assimilation of a formal concept of law* prevailed, who was actually *in charge of executing the law*? It is in this regard that another exception becomes evident: Hispanic constitutionalism preferred to create corporate, non-hierarchical institutions. In brief, individualism had no room in Spanish-American legal culture.

The adventure that began in 1808 with the separation of powers ended almost where it had begun, since general legislation continued to face similar obstacles for many decades both in Spain and in the different American nations. At this stage, several questions may be posed: When was an end put not so much to the vestiges of the legal order of the Monarchy but to its structuring nature of the new 19th-century orders in both hemispheres? Was there enough room within the new legal orders for outstanding metamorphoses, as was the case of the renowned Mexican *amparo*? Finally, I am convinced that the comparative study of Transition Law is a real challenge for legal historiography. It may well be included in the list of appealing issues for the development of New Horizons for the study of Colonial Law, which, *inter alia*, may explain the causes for the high standing that Court Regulations still enjoy in the Republic of Chile.

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Contents

- 1 | Thomas Duve, Heikki Pihlajamäki
Introduction: New Horizons of *Derecho Indiano*
- 9 | Richard J. Ross
Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing *Derecho Británico Indiano*
- 29 | Rafael D. García Pérez
Revisiting the America's Colonial Status under the Spanish Monarchy
- 75 | Tamar Herzog
Did European Law Turn American? Territory, Property and Rights in an Atlantic World
- 97 | Heikki Pihlajamäki
The Westernization of Police Regulation: Spanish and British Colonial Laws Compared
- 125 | Brian P. Owensby
The Theater of Conscience in the “Living Law” of the Indies
- 151 | Ezequiel Abásolo
Víctor Tau Anzoátegui and the Legal Historiography of the Indies
- 161 | Luigi Nuzzo
Between America and Europe. The Strange Case of the *derecho indiano*
- 193 | Marta Lorente Sariñena
More than just Vestiges. Notes for the Study of Colonial Law History in Spanish America after 1808

235 | Víctor Tau Anzoátegui

Provincial and Local Law of the Indies. A Research Program

257 | Contributors