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Local Law and Localization of Law.
Hispanic Legal Tradition and Colonial Culture
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Local Law and Localization of Law

Hispanic Legal Tradition and Colonial Culture (16th–18th Centuries)*

1. Introduction

The first issue to be considered in a study related to the historical concept of *local law* is the different cultural conditions of the pre-contemporary normative language. We have to be aware of the particular conditions of a cultural background in which the normative value of legal norms was not exclusively related to some formal feature, like the institutional authority which enacted them, but rather to a hazy consensus on their intrinsic justice, according to the context of production or application.¹ As it has been noted, many difficulties associated with the study of the colonial local law are related to the perspective from which legal historians of the nineteenth and twentieth centuries have looked at the past, focusing their interest, with rare exceptions, in those phenomena comparable to the contemporary state law.² From a traditional point of view, characterized by a double normativist and state-centered approach, the dimension of local law in the pre-contemporary experience has been usually overlooked or described with conceptual tools not entirely suitable for its thorough comprehension.

The criticism towards the state-centered paradigm that arose during the last decades of the 20th century has promoted a significant change on the coordinates for the historical study of the forms of power and institutional

* A first version of this paper was prepared for a project about the problem of local law in the Spanish colonies of Río de la Plata and published in TAU ANZOÁTEGUI/AGÜERO (2013).

1 On the medieval roots of this topic, VALLEJO (2009) 1–13.

2 Tau Anzoátegui (2005) 231–253. We use the terms *colonial law* to make reference to the Spanish legal culture in the colonial domains. This approach does not include the point of view of the *conquered natives* but that of the settlers and its relationship with Metropolitan authorities.

languages.³ Accordingly, once the gravitational effect of the state – as naturalized unit of measure on the institutional field – has been removed, two different but substantially related areas have recovered prominence: the great empires and local sphere. As in social studies of the current times, where the increasing interest for the global order has been accompanied by the emergence of communitarian positions (so at the theoretical level as in political struggles for regional identities) it can be said that historiography is also looking with new eyes at the great imperial horizons and the varied world of the local spaces that bubbled beneath them.

The current interaction between supranational, regional and local legal systems, has led to recover the analytical value of some essential aspects of the pre-contemporary experience, such as the jurisdictional complexity and the normative pluralism, that is to say, the coexistence of different normative orders with incidence on the same subjective, material and territorial dominions.⁴ Considering the current «legal pluralism», some scholars have used the metaphoric image of a «new middle ages» to warn about the risk involved by «localisms and universalisms» over the standards of the European liberal criminal law.⁵ And in fact, the coexistence of one universal law along with different local laws, was one of the defining features of the long lasting legal culture of *Ius Commune* which, rooted on its medieval settings, was kept in force to a great extent during the modern centuries.

Focusing our analysis on the Hispanic legal tradition, particularly, on the colonial experience, we seek in this paper a dual purpose: first, to outline a concept of *local law* according to the theoretical framework of temporal context, and, second, to point out the cultural factors that converged to bring on a general effect of localization of the law over whatever kind of normative standard. We will try to figure out the relationship between those two different but complementary aspects: on the one hand, the concept of *local law*, addressed to define, from a synchronic point of view, a certain type of norms that can be qualified *prima facie* as *local*; on the other, the notion of *localization*, useful to describe the dynamic process of interpretation of the general order performed by local authorities in their daily work. After outlining the conceptual framework, we will analyze some examples taken from

3 HESPANHA (1986) 191–227; GARRIGA (2004) 13–44.

4 BENTON (2002); SASSEN (2006).

5 DONINI (2003) 92–119.

the colonial experience of a frontier jurisdiction such as Córdoba del Tucumán located in the hinterland of the current Argentinean territory.

2. Local Law: Statutes, customary law and privileges

In defining a concept of local law that should fit with the Spanish colonial experience, we need to take a look at the cultural horizon of *Ius Commune* and its imprints in the legal tradition of Castilian conquerors.⁶ As is well known, despite its dual universal slope derived from its Catholic foundations and its Roman imperial legacy, the doctrine of the *Ius Commune* had to be adapted to the discontinuous nature of the socio political context in which it was spread in medieval Europe. In this horizon, self-regulation of each human community (understood in organic terms) was a basic intuition fully integrated into the theories of the medieval jurists. As it has been rightly pointed out, the medieval culture «could not imagine a *universitas, populus, community*» that did not have «its own rule, and that was not a whole with it».⁷ With these words, Ugo Nicolini stressed the indissoluble connection between communal self-government and *ius proprium* (own law) in the context of the medieval northern Italian cities, during the rise of the *Ius Commune* culture.

In that context, the Roman categories related to territorial organization had to conform to the plural and polycentric nature of the medieval order.⁸ The Roman concept of province was assimilated by the Commentators both to the district of the Archbishop, in ecclesiastic matters, and to the kingdom in the secular jurisdiction; but even more, in the light of the provisions set by the Peace of Constance (1183), the term *province* was also equivalent to that of *civitas*, with the consequent recognition of customary and statutory law of the signatory cities from the Lombard league.⁹ In this case, the local

6 For a recent discussion on the issue of whether the European *Ius Commune* tradition is valid to analyze the colonial experience, see HESPANHA (2006) and (2007), and the opposite perspective expressed by CLAVERO (2012). In the line of Hespánha thinking, see for the Portuguese-Brazilian case GARRIGA/SLEMIAN (2013).

7 NICOLINI (1982) 249.

8 On the polycentric nature of the medieval space, KANTOROWICZ (1985) 189–223. On the concept of *politic space* in the Iberian legal tradition, HESPANHA (1993) 85–121.

9 VALLEJO (1992) 135–136.

law of each city (statutory or customary law) was comparable with the *ius proprium* of a whole kingdom. At the same time, this last expression would be reserved to designate the territorial law developed by each of the kingdoms excluded from the Holy Roman Empire, stressing the contrast between their *ius proprium* and the *Ius Commune*. Nonetheless, in the extent in which the kings «in their kingdoms» were equalized to the Emperor «in his Empire»,¹⁰ the theoretical relations between *Ius Commune* and *ius proprium* provided a framework to think about, and to deal with, the sometimes conflictive relations between the royal territorial law and a diverse set of localized legal expressions such as *fueros*, local statutes and customary law.

The normative standards of the *Ius Commune* addressed to deal with the relationship between *princeps* and *populus*, such as the *lex omnes populi* (Digest 1, 1, 9) and the *lex regia de imperio* (Digest 1, 4, 1), including also the precepts of the Peace of Constance, were still useful among the Castilian jurists in the early centuries of the Modern Ages. In his renowned glosses of 1555 to *Las Siete Partidas*, Gregorio López invoked those standards when commenting a key passage of that medieval legal text: the law 12, title I, Partida I, in which it was steadfastly stated:

«An Emperor or King may make laws for the peoples of his dominions but no one else has the power to make them with regard to temporal matters, except where they do so with their [Emperor or kings] permission ...».¹¹

In the same way that medieval jurists did when commenting the Roman text (Codex 1, 14, 12, 3: «leges condere soli imperatori concessum est») that inspired Alfonso the Wise's law, Gregorio López warned that such law was only with regard to «general laws for the whole kingdom» and, consequently, that it should not be interpreted as forbidding the villages, cities and other places to make their own statutes. The gloss by López added that the commented law was not related to this kind of local norms which were, instead, regulated by the *Ius Commune* according to which it was allowed to cities, villages and places to make their own statutes («secundum quod per multas leges permittitur populis condere statuta»).¹²

10 This principle is expressed in the Castilian medieval law, in *Las Siete Partidas*, Part II, title I, laws 5 and 8.

11 I have taken the English translation of *Las Siete Partidas* from BURNS (2001) 5.

12 LÓPEZ (1555) (1985), gloss «sobre las gentes de su señorío» in Part I, title I, law 12.

A nineteenth-century edition of *Las Siete Partidas*, with glosses translated into Castilian, provides a hint on the enduring significance of that expression related to local *statuta*. Where Gregorio López, in 1555, said: «Si tamen sint statuta particularia locorum, villarum & civitatum regni, non tollit illa hæ lex», the 1843 Castilian translation said: «Si son, empero, estatutos [leyes ó fueros, ú ordenanzas] particulares de lugares, villas y ciudades del reino no los impide esta ley».¹³

So, in the long horizon of the Hispanic legal culture, the reflections of medieval jurists on the statutory power of the cities could still provide a base to describe the nineteenth century legal particularism as it is shown by the words between brackets introduced in the translation to denote the meaning of the Latin word *statuta*. In the background, it was still present the persistent medieval reading of the Codex (1, 14, 12, 3) which allowed to conciliate the opposite extremes: on the one hand, the exclusive legislative power of the *Princeps* and, on the other, the *natural* power of self-regulation assigned to every human community. While a *Prince* or King could make general laws for the kingdom by Himself – not needing other concurrent will (that was the sense attributed to «*solī imperatori*») – local statute had to be the outcome of a common consensus of the city's councils.¹⁴

Beyond the many issues that were the subject of discussion on this topic, the aforementioned reasoning also serves to point out the conditions that ruled the enunciation of a power to make general laws and the limitative sense in which was understood the adjective *general*: because of their being *general* such laws did not affect, at least in a direct or immediate way, local statutes. In addition to this, in the enduring lexicon of jurists, the word *lex* was commonly used to make reference to both general and local norms. In that context, from the beginning of the *Ius Commune* times, it was theorized the very notion of a particular, especial or –properly – local law (*legem locale*) to define the self-government and local power ascribed to every *populus* identified as a *universitas*. In this legal tradition, when jurists had to

13 «However, particular statutes [laws, fueros, or ordinances] from places, villages and cities of the kingdom are not forbidden by this law», SANPONTS Y BARBA (1843–1844) Gloss 58, Part I, title I, law 12.

14 NICOLINI (1982) 262. On the difference between individual legislative power of the Prince and the common or collective nature of the local statutory power, VALLEJO (1992) 205–233.

face the question about who was empowered to make laws, the distinction between general and local law («*lege speciali sive locali aut lege propria*») was immediately brought into play.¹⁵

Within this cultural framework, some key elements related to the principles that ruled the relationship between general and local law should be highlighted:

A) The said relationship was not primarily thought in terms of normative hierarchy (although this argument eventually came to be used to repeal some local customs), but rather as an integrative criterion according to which the local law, as specific law, had precedence over the general laws that, in turn, were intended to play a subsidiary function of integration. It is precisely this approach that explains the acceptance of a *contra legem consuetudine*, understood as an expression of local law that had precedence because of its character of special law (*lex speciali*).¹⁶

B) At the core of the original notion of local law, the consent of the *populus* (always embodied in their natural representatives) plays a key role regardless the fact that to make local statutes in the cities without jurisdictional privileges it was formally needed the further approval of the land lord, delegate of the prince or a royal confirmation.¹⁷

C) As the faculty of making laws was conceived as part of the exercise of jurisdictional power («making laws is an act of jurisdiction» repeated the doctrinal sources), local law was conditioned by the range and degree of jurisdiction that every *populus* was endowed with, according to its own privileges, customs or other specific title.

Following the last principle, normative powers of cities could be subjected to different limitations. It was considered, for example, that penal laws imposing afflictive or death penalties were reserved to the supreme royal jurisdiction, exceeding the powers of a local community. Apart from that, in some cases, as cities without jurisdictional privileges, it could be distinguished the local statutes that required the intervention of a royal delegate (or royal confirmation) from those norms passed for the *oecono-*

15 VALLEJO (1992) 215.

16 NICOLINI (1982) 259.

17 See the reference to the consent of the *populus* in LÓPEZ (1555) (1985), gloss «*sobre las gentes de su señorío*», Part I, title I, law 12.

mic – domestic – government which were part of the exclusive competence of the local council and did not require such intervention or confirmation.¹⁸

These general principles could be subject to multiple conditions, according to cases and circumstances, particularly in the Castilian Monarchy in which the royal power was consolidated at the beginning of the Late Middle Ages.¹⁹ However, it would be wrong to think that the early consolidation of royal power involved the dissolution of local regulatory powers. On the contrary, it should be noted that the intervention of the King's power in the production of local law was conceived as a collaborative role with local authorities. Thus, the act of establishing local ordinances reflected, in most cases, the exercise of a power shared by the cities and the Crown.²⁰

It is also important to remark that during the second half of the eighteenth century, despite the increasing royal authority and the trend towards legal unification, the distinction between general law and local or particular law was still active as a fundamental criterion of enunciation of the normative order. Let's see, for example, a work issued at the edge of the *Ancient Régime*, in which is possible to find elements of a new methodology (mixed with more traditional assessments) like the famous «Instituciones del Derecho público general de España con noticias del particular de Cataluña» by Ramón Dou y de Bassols.²¹ While the distinction general/particular was present since the very title of the book, the author made reference to it in two passages denoting its persistent significance. In the first reference, Dou stated that local law was not the subject of his work:

«What is part of the local law of a city, or a province, without extending at least to all provinces of Castile or to the whole principality of Catalonia, is not subject of this work nor should be found things belonging to the Indies except those which are intimately connected with our continent ...».²²

18 AGÜERO (2013) 160–163.

19 MACKAY (1985).

20 This collaborative function was graphically expressed by Castillo de Bobadilla who argued that the authority to determine the necessity of reforming the local statutes belonged «copulatively to Corregidor [royal delegate] and aldermen, and not to one without the others», CASTILLO DE BOVADILLA (1597, 1704) (1978), book III, chap. VIII, §155, v. 2, p. 154. On this topic, AGÜERO (2013).

21 CLAVERO (1978) 307–334; TAU ANZOÁTEGUI (1992a) 473.

22 DOU Y DE BASSOLS (1800) I, LIV.

Despite the secondary importance that they seem to assign to local law, the words by Dou quoted show that the concept still kept its polysemic value, being referable to a city, a province or to all the provinces of a kingdom within the Monarchy. Perhaps only the latter would be considered as *public law* – the main subject of Dou’s concerns. However, when analyzing the specific topic about «the Laws», he claimed:

«The most interesting distinction about the object we are considering is the fact of being some laws general and other particulars».

Dou invoked the principle according to which the laws should fit the circumstances of place, times, customs and the «genius of the subjects», arguing that the Romans, because of their prudence and wisdom, had allowed municipalities to be governed by their own customs, adding that the same was usual in his time in states of vast extension like Spain.²³ This is just an example to show how in the latter expressions of the ancient regimen’s Spanish legal doctrine, the concept of law did not work yet as an exclusionary concept with regard of norms of different range and hierarchy that were a byproduct of an irreducible diversity of localized normative powers.

Besides the underlying particularism, which we will refer later, it must be remarked on now that that double face of law – general and local – was, in turn, the spitting image of a social structure in which, what could be considered the *public sphere* (using this concept in its widest sense) was still composed, discontinuous, aggregative, and grounded on a basic duality: the powers of the king and the powers of local corporations or republics.²⁴ This duality is evident in the medieval legal texts where several prerogatives, nowadays usually attributed to the public administration, were assigned to the king and the cities in such a way that both were casuistically treated as different but equivalent public powers.²⁵ The long standing persistence of

23 DOU Y DE BASSOLS (1800) I, 64–66.

24 On the *public sphere* in colonial Latin America, see SCHAUB (1998) 27–53. On the relationship between Monarchy and republic, see LEMPÉRIÈRE (2004) and ZARKA (2007).

25 Consider these examples taken from *Las Siete Partidas*: in Part III, title XXIII, law 10, is recognized the procedural privilege of suspending the time limit for appeal to those who were out due to a king’s commission or «en pro comunal de su concejo», that is to say, a city. In Part III, title XXIX, law 7, is stated that royal revenues are not susceptible to be acquired by prescription and the same privilege is given for squares, roads, pastures, suburbs, and other similar places that belong to the «common of people» (that means, to a

this dual structure was anchored in the condition of *body politics* (*republics*) assigned by natural law to the cities which, upon that condition, kept a dialogic relationship with the king. In this sense, still in 1800, Dou said that the perfect Monarchy's constitution was a combination of aristocracy and democracies.²⁶

Grounded upon the feudal logic of exchanging services for privileges, the range of local power could vary from one place to another according to the historical negotiations between the Crown and every city, town or village.²⁷ From this perspective, there is another level of local law in the huge amount of privileges conceded by the King that were considered as an acquisition and integrated into the normative set of self regulation of every place. The settlement of a city in the colonies was nothing but the establishment of a *republic* by means of privileges conceded in the same terms that those used during the times of the medieval *fueros*. The new republics were empowered with ordinary jurisdiction and *mero mixto imperio* alongside with a set of franchises and freedoms that constituted the grounds of a first local power that could be developed afterwards through customs and local statutes.²⁸ Even more, for those acts exceeding the local competences, the original local power could be increased by negotiating new privileges with the Crown or by obtaining special provisions from the district Royal Courts (*Reales Audiencias*).²⁹

If at a first glance the difference between royal privileges and local ordinances and customs seems to be clear, the line was not so neat. We have already made reference to the collaborative intervention of the royal jurisdiction to authorize or confirm local statutes. This was a contact point

city council). In Part IV, title XV, law 5 is conceded the privilege of legitimating the natural son who was given by his father for the service of «the Emperor's Court, the King, a city council or some other dignity». In Part V, title XIV, law 26, the «King's Chamber» and a «city council» are equalized in order to state that tax debts (caused by «pecho o derrama») cannot be compensated. In Part VI, title IX, law 13, is established that sacred things belonging to the Church cannot be object of a legacy, and same is valid for goods of the King or belongings of «cities or villages».

26 DOU Y DE BASSOLS (1800) I, 18.

27 FORTEA PÉREZ (1991) 119.

28 AGÜERO (2008) 49–58.

29 On the concept of privilege and its significance in the institutional organization of the colonial world, see ROJAS (2007).

between royal privileges and local statutes. But the distinction could also be dissolved through certain mechanisms involving the fictitious attribution to the Prince of institutional acts that were an exclusive product of the local practice. Notions like the *tolerance* or the *tacit consent of the Prince* made it possible to attribute to the King norms that were the outcome of local practice, equalizing, this way, local customs with royal privileges. Theoretically the convergence was given by the condition of *lex speciali* assigned to both the royal privileges and the local customs. According with the Ius Commune opinions, Castillo de Bobadilla in 1597 said: «Privilege and customs are equivalent in law, and custom still has the strength of special privilege».³⁰ Thus, privileges, customs and local practices – consented or tolerated by the Prince –, were pieces of the complex set of local law whose elements were barely distinguishable.

Finally, it should be noted that if customs and privileges are expressions of local law mostly related to small districts like cities, in some cases they could have a regional dimension being also predicable from a province or a whole kingdom. In the Castilian experience this was particularly evident with the late medieval *fueros extensos* or general privileges. In this cases, the difference between local or provincial law, and even with the own law of the kingdom (*ius proprium*) becomes obscure. In the colonial world is usual to see references to the customs of a province or region (i. e. «las costumbres del Perú») and, even more, the whole law passed to rule the colonial domains were sometimes qualified as a «municipal law» or «particular law» within the Castilian law.³¹

3. The dynamic dimension of local law: localization of law

The concepts we have been using up to this point (privileges, customary law, statutes, etc.) were shaped by centuries of doctrinal disquisitions. However, they come used to describe issues related to local law from a static perspec-

30 CASTILLO DE BOVADILLA (1597, 1704) (1978), book III, chap. VIII, §194–196. The equivalence between customary law and privilege was also expressed in an ancient law included in the 1567 New Compilation of Laws of Castile (Nueva Recopilación). See *Recopilación de las leyes destes reynos* (1567) (1640), book VII, title II, law 5. About *tolerance* and *tacit consent* of the Prince, some examples can be seen in AGÜERO (2013) 150–152.

31 BRAVO LIRA (1988) 9–10; BARRIENTOS GRANDON (2000).

tive. For this reason, they are not enough to point out the complex interaction of factors that framed the local determination of law. In order to do this, we must look at the cultural conditions that made it possible to put on act the legal field in dynamic terms.³² Just from this point of view we are going to be able to consider the full potential that particularism could reach in the general legal framework of the *ancient régime*.

As we know, for its institutional structure and its cultural conditions, in the pre-contemporary legal culture rules did not work as rigid abstract standards even when they were part of the so called general law of the kingdom. It is also known that in the cultural context we are dealing with, the defining element of *making the law* was not mainly referred to a kind of norm but to the function of justice.³³ A substantive conception of justice imposed, in turn, the need of a constant process of interpretation aimed to adjust the rules to the precise conditions of time and place. In order to describe the particularist effect derived from such conception of law and justice, we will use the notion of *localization*, which means, according to the Oxford dictionary (second meaning) «make (something) local in character».³⁴

The notion of localization is used today in different areas of knowledge. In the software industry it is used to denote the process of adaptation of a product to satisfy the cultural, idiomatic and other requirements of a specific local market.³⁵ In the field of social sciences it has been used by scholars concerned with globalization phenomena; the concept of localization comes often used as a correlative term of globalization, both in sociology and anthropology.³⁶ In the context of historical disciplines, Oliver W. Wolters used it to analyze the process of diffusion and appropriation of ideas amongst different cultures in his studies on cultural history of Southeast Asia.³⁷ In the same field, it has been most recently suggested that the concept of localization has a wider analytic potential in comparison with other alternatives like *grafting*, *framing* or *transplantation of norms*, since it stresses the dynamic process of norms diffusion and emphasizes the agency role of

32 For the meaning legal dynamics, in spite of the different context, see KELSEN (1982) 203–204.

33 LACCHÈ/MECCARELLI (2012) 9.

34 <http://oxforddictionaries.com/definition/localize>; AGÜERO (2012) 201.

35 See *Localisation Industry Standards Association* (LISA), quoted by AREVALILLO DOVAL (2000).

36 About localism and globalization see SOUSA SANTOS (1998).

37 WOLTERS (1982).

local actors in performing those processes according to their cognitive conditions, beliefs and interests.³⁸

In general terms, the notion of localization makes perfect sense in the context of a transnational normative order, with hegemonic features, imposed in peripheral areas by virtue of multiple forms of adaptation resulting from the active involvement of local agencies.³⁹ Undoubtedly, this is not exactly the context we have in mind when we talk about the Spanish ancient regime and its colonial culture. Nonetheless, as we have said before, there are some parallelisms between the current global order and the ancient legal culture that may authorize the use of that category in order to describe the way in which colonial jurisdictions were able to adapt the legal order to their specific context.⁴⁰

We could say that the catholic religion, the doctrines of *Ius Commune* and the Castilian law were part of a hegemonic order which was enforced throughout the colonies by means of multiple institutional processes that required the intervention of authorities conditioned by local circumstances. Of course, it was not a case of *foreign norms* except for the original inhabitants. However, if we consider the case of the Spanish settlers and their so called *Spaniards Republics* we would say that they had a political identity linked to their local republics, grounded in the corporative structure of the ancient society; they also shared a set of common localized interests that they could invoke in order to adapt, transform and even resist general standards. Certain features of the pre-contemporary legal culture, with special relevance in the colonial world, contribute to this outcome: they were particularism, casuism and normative factualism (that is to say, the admitted possibility of derive a norm from factual conditions); these three cultural patterns converged necessarily in the process of localization of law.⁴¹

38 ACHARYA (2004) 239–275.

39 Examples in MERRY/STERN (2005) 387–409. See also, MERRY (2006) 99–116.

40 Clavero has recently warned about the possible neocolonial intentions that may lie behind this parallelism and also in the theory of legal transplants and other related concepts, CLAVERO (2012) 718–729. Being aware of that, we still think that the notion of localization is useful to understand not just the colonial legal practice but some peculiar features of the legal developments after the independence processes in Latin American countries.

41 On particularism and casuism in the Spanish colonial law, see TAU ANZOÁTEGUI (1992a); on factualism in the medieval grounds of the ancient legal culture, GROSSI (1996) 89. On

If we consider, for instance, the value assigned to customary law, we could say that it was a consequence of the dynamic effects of those three cultural traits: in a good extent the normative strength of custom was derived from particularist and casuist convictions while the constant practice of the same behavior was its factual base. Solórzano Pereyra – the most famous jurist in Spanish colonial law – said that «by custom often becomes licit what is not» and that ancient custom «has the presumption that is convenient and useful». ⁴² This last reference to what was «convenient» should be read under the hermeneutic frame of a long semantic tradition that linked what was considered appropriate by nature for each thing (*convenientia rerum*) with the central concept of *aequitas*, from which, in turn, the notions of justice and law were derived. ⁴³ Thus, different but connected notions as convenience and *aequitas* were valid to support a process of localization.

There was still another cultural element that contributed to *localize* the law. It did not come from the ground of facts but from the sky of transcendental principles of justice that, ultimately, gave normative strength to positive law. According to Catholic theology, an unjust law or any standard which could be considered against religion or natural law did not have to be obeyed. As a theologian in Lima, in 1604, stated in a commentary about some royal letters: «[...] in the things that are manifestly unjust or illegal and against the laws of God, no command of any man even if he is the King can oblige». ⁴⁴

The widespread use in the Spanish colonies of the medieval formula «I obey but do not execute», as a measure to resist some Royal commands, was a good example of the convergence of both factualism and that transcendent conception of justice: a command had to be just to oblige, but to be just it had to be free from vices of *obreption* and *subreption*, that is to say, it had to be sustained in a truthfully description of facts. ⁴⁵ In practical terms, this convergence implied a necessary and ongoing search for consensus on what could be considered just or fair according to local circumstances, to prevent

factualism in the pre-contemporary moral language, see MACINTYRE (2007) 57–78. A typical case of factualism in the New World can be seen in the normative function assigned to the concept of new land as it was stressed by MARILUZ URQUIJO (1976) 389–402.

42 SOLÓRZANO PEREYRA (1648), (1736) II, 77.

43 GROSSI (1996) 180.

44 AGÍA (1604) 76–77.

45 TAU ANZOÁTEGUI (1992b) 69–143.

that the positive laws, including decisions taken from the top of the royal power, were considered as unjust and then *legitimately* disobeyed. By reasons of *aequitas* it was also possible to invoke local convenience as *public utility* to resist legitimately a positive command.

We can see how that combination of facts, conveniences and principles was still in the background of some legal treaties of the eighteenth century when they deal with the topic of obedience. In 1748 Santayana's advised royal magistrates to not execute royal's commands from which could result an offence to the royal conscience (that is to say, to religious standards, mainly), to law (in objective sense), to public utility, or that may cause any manifest unjust injury to someone's acquired rights. Considering the discontinuous nature of the *public sphere*, the reference to public utility opened the door for reasons related to local convenience or to what could be considered useful in a particular place in order to disobey a royal command. At the same time, given the communitarian cultural background, the notion of *acquired right* could be perfectly understood as referred to local corporative privileges rather than to individual rights.

According to this, the strength of a positive command, in general terms, was conditioned by a double interpretative aperture: one derived from objective principles of justice (the royal conscience, the objective law) and other linked to the specific conditions of enforcement (public utility, acquired rights). This double opening was more functional for processes of localization considering that institutional authorities were not set as merely executive but as jurisdictional agents.⁴⁶ The jurisdictional role of authorities implied necessarily an interpretative activity in which both ends must meet, connecting what was just and fair with what was convenient according to local circumstances.

Finally it should be noted that the legal order, so open, flexible and responsive to the specific conditions of local enforcement, was largely managed by authorities closely linked to local communities. If this aspect was clearly evident in the New World, it was also a pervasive feature among governments of metropolitan territories, although overshadowed by the image of a centralized state conveyed by classic historiography. Let's see, for example, how in 1800 Dou described local jurisdictions in Spain analyz-

46 MANNORI (1990) 323–504.

ing the question about the district of territorial magistrates of royal appointment (*corregidores* and *alcaldes mayores*). He said that the jurisdiction of *corregidores* and *alcaldes mayores* was limited to their city of residence and to the towns that did not have their own justices, adding that so in Castile as in Catalonia most of villages and towns had their ordinary judges «different and independent» of *corregidores* and *alcaldes mayores*, for carrying out justice.⁴⁷

On that sort of network of «independent» local justices rested the daily enforcement of a cumulative compound normative universe, composed of doctrinal and legal elements of diverse origin, shaped by practices, customs and privileges of each place. As justice and government at the local level were functions assigned to the same kind of jurisdictional authorities, judges were not only meant to determine lawsuits according to that complex normative universe, but also to keep the peace taking into account reasons of opportunity and convenience (nowadays typical of governmental institutions) in their daily task. All these elements that formed a «justice of judges not of laws» – as it has been recently suggested – played a significant role in processes of localization.⁴⁸

At last, it should be also noted that talking about localization does not mean denying the hegemonic nature of the common legal culture which provided the framework of possibility for local law, or rejecting the central role of royal jurisdiction in the institutional order of the ancient regime. On the contrary, because of the hegemonic trait of its cultural and religious grounds, processes of localization were possible and necessary within the extension of the Spanish imperial order. Thus, far from being an unwanted or conflicting effect, localization processes fulfilled an essential role in the maintenance of political balances in such imperial extension. The central idea of proposing the notion of localization is to pay more attention to the weight of those cultural patterns (particularism, casuism, factualism, transcendent idea of justice, normative value of reason of convenience, etc.) that inclined the exercise of power to mediate between the general

47 «Las villas en Castilla, y en Cataluña no solo las villas sino también casi todos los lugares tienen juez ordinario, distinto e independiente del corregidor, y alcalde mayor en la administración de justicia», DOU Y DE BASSOLS (1800) II, 134. On the colonial administration, AGÜERO (2008) 67–124.

48 LORENTE SARIÑENA (2007).

standards of an hegemonic culture and the local needs of different political corporations structured upon the base of deep communitarian convictions.

As a complementary category related to the topic of local law, localization denotes the dynamic processes by which different authorities, regardless of royal or local appointments, adjusted the general standards to local conditions by means of carrying out justice, governing or granting special protections and exceptions (*provisiones, amparos*) upon request of each community.⁴⁹ In the following section we analyze some significant examples illustrating the phenomenon of localization in a peripheral context of the Spanish Monarchy as it was the former province of Tucumán and, in particular, the city of Córdoba.

4. Local law and localization of law in the colonies

As we have seen, due to its intrinsic characteristics, the institutional order that Spaniards brought to the New World was flexible and adaptable. This was a consequence of its own cultural background rather than a result of a special Crown policy aimed to rule her colonial domains.⁵⁰ Certainly, colonial factual conditions may have often influenced in taking the inherent elasticity of the Hispanic legal culture to an extreme degree but, in turn, that flexibility played a key role in making possible the institutional organization of the New World, helping the Monarchy keep the loyalty of the colonial elites on its side almost until the fall of the Spanish Atlantic Empire.

Spanish colonization was carried out by two different institutional devices: on the one hand, territories were organized in provinces under the authority of a magistrate of royal appointment (governors, *corregidores, alcaldes mayores*); on the other, settlers were bound to establishing cities, that is to say republics, receiving all of them the privileges and freedoms that the Castilian law granted to municipalities.⁵¹ It was within every municipal territory where institutions and Christian political life (*policía cristiana*)

49 AGÜERO (2008) 235–275. On local law and political representation, AGÜERO/OYARZÁBAL (2013) 263–306.

50 As it was suggested by PHELAN (1960) 47–65; a general approach on this topic in TAU ANZOÁTEGUI (1992a) 83–140. For Portuguese colonies, HESPAÑA (2006) 59–81.

51 On the institutional organization of territories, GARRIGA (2006) 35–130; about colonial municipalities, the classic reference is BAYLE (1952).

had place and where local law was developed by means of statutes for regulation of common goods and needs and also by local customs. It has been said that customary law had a special strength in the colonies and that the colonial law was a sort of paradise for *praeter* and even *contra legem* customary law.⁵²

Judicial records of a bordering city like Córdoba del Tucuman give us significant testimonies about the way in which local law and customs were integrated in dynamic processes of localization. Despite the constant lack of *letrados* (legal professionals) in the district, litigants showed an accurate knowledge of the normative arguments that were able to support localization strategies. One of them consisted of assigning special value to «practice» that is to say the habits and styles of the local courts. As a lay defender said in 1746, «practice repeals all laws and even makes laws». Common Law doctors (Bartolo, Jaso) were quoted to uphold that statement and to conclude that the judgment given against the «evident practice» was null.⁵³

In addition to this, special categories of the legal language like the concept of *notorious crime* or the formula «public voice and fame», used to qualified statements related to facts or ways of life attributed to the defendants, opened the door for introducing local prejudices and beliefs in the judicial decision making process. While the «usefulness and convenience» of each republic could be invoked to give legal effect to a number of arguments related to local needs, subjective circumstances – as having a good reputation (*buena fama*) – allowed to take into account more specific local conditions as is the case of social hierarchies among the members of each community.⁵⁴

Judicial records show also the special strength of local customary law. In 1762, a woman claimed she was entitled to defend her husband being a fugitive, despite the positive laws that required the presence of the accused to hear his defense. She invoked the «very laudable, prescribed and well established custom in this city and its courts», according to which it was «admitted to hear the wives of an absent defendant in cases of this nature». She also recalled that «[the King] approves and declares that the customs of the cities

52 FLORIS MARGADANT (1990) 172; BARRIENTOS GRANDON (2000) 293–390; TAU ANZOÁTEGUI (2001) 182–233.

53 Archivo Histórico de la Provincia de Córdoba (hereafter AHPC), Crime, vol. 5, file 5, 1746.

54 AGÜERO (2008) 344–360.

and places are special law and that custom is even more valid when it is [more] opposed to positive law, because with it privileged force repeals the laws, according to the Common Law and doctors opinions». She proved the said custom with testimonies taken from the local courts records. At the appeal stage, The Royal Court of the distant city of Charcas supported her argument, disposing that she had the right to allege in defense of her fugitive husband.⁵⁵ In doing so, the highest royal court in the region approved the value of a local custom over the positive general law showing thus that localization was not exclusively a matter of localized elite's interests but a way of normal functioning of the legal culture.

The weight of factual conditions in normative reasoning implied a constant slide of law determination to the particular context of its effective enforcement. For this reason, some institutions usually described as tools of a centralized Monarchy – like penal servitude – were also used at the services of local republics in the colonial world. A typical colonial example is the process by which New Spain settlers achieved to use forced labor (*servicio personal*) of Indians as a kind of punishment, despite the many royal laws that attempted to ban this practice. Faced with these prohibitions, in the mid-sixteenth century, they argued that forced labor of Indians should be permitted as a kind of penalty, because, among other reasons, in America there were «no galleys or borders or other places where they can be forced to serve» and because there was no way to control banishments (due to the features of the territory). In addition to this, they argued that Indians didn't suffer whipping penalties in the same way the Spanish did (because they lacked the same sense of honor) and that forced labor was even convenient for Indians themselves because during this time they could learn skilled trades and good manners. The Crown responded by sending a royal letter stating «for everyone in their district to do and provide what they may see as more convenient and just according to what they can and ought to do ...».⁵⁶

That decision, along with similar ones sent thereafter, was included in the compilation of royal colonial laws of 1680, the so called *Recopilación de las Leyes de Indias*. The Crown had to accept that the penalties of forced labor

55 AHPC, Crime, vol. 17, file 3, 1762.

56 ZORITA (1574) (1983–1984) Book VIII, title VI, law 3^a, 355–356.

imposed on the Indians were applied to the needs of the «republics».⁵⁷ But the same kind of argument can be found in different contexts throughout the colonial world. In 1753, a prosecutor from Córdoba argued that, given the difficulties in applying penalties like galleys in the districts of the hinterland and given also the lack of «presidios», the punishment should fit the «comfort of each place» so that crimes do not rest unpunished, and added: «as it is clearly seen in this city the practice followed with the prisoners sentenced to die at the gallows, as there is no executioner or other person to take over, they are sent to be shot and after that the death body is hung from the gallows [...]».⁵⁸

Out of the courts of justice, the normative function of local conditions played also a role in localization, particularly, when cities submitted petitions to high royal authorities claiming for a special privilege. For example, in the middle of the eighteenth century, the city of Córdoba pleaded before the Royal Council of the Indies (the highest bench of royal jurisdiction for the Indies) to get a special law to allow its judges to impose death penalties for crimes committed with a knife or any kind of dagger «regardless if the wound was mortal or not». In its petition the city argued that these kinds of crimes had been increasing in the last decade and that the usual penalties were not enough to prevent this misconduct. The Royal Council conceded the requested norm, on one condition: the local judges had to get a confirmation from the Royal Court of the district before executing the penalties. As the royal attorney pointed out before the Council, only the special local circumstances alleged by the city could authorize such harsh penalty that would be unjust in a different context.⁵⁹

One special case of localization in the province of Tucuman can be considered as paradigmatic for its institutional implications. It is about the way in which the cities of the said Province, by means of petitions invoking local factual conditions and the «welfare of the republics», got a special provision from the Royal Court of the district and the Royal Council of the Indies to repeal in their territories the general rule according to which

57 *Recopilación de las leyes de los Reynos de las Indias* (1680, 1791) (1998), Book I, title 7, laws 8 and 10.

58 AHPC, Crime, vol. 7, file 15, 1753.

59 AGÜERO (2007) 13–45.

royal judges had to be outsiders. This rule was a general standard aimed to guarantee the impartiality of royal magistrates in the provinces. It was in the Castilian law and also in the laws for the colonies.⁶⁰ However, in different opportunities since 1584 the cities pleaded against that rule claiming that foreigner lieutenants of governors caused damages to the republics and there was no way to make them responsible after they had left the towns. In 1627, the Royal Court of Charcas decided that «*Tenientes*» appointed by governors had to be «*vecinos*» of the cities and not outsiders. In the grounds of its decision, the Court considered the conflicts experienced in the region, the «damage and inconveniences» suffered by the cities and townspeople for their «great poverty» and that those who were outsiders, «destroy and wipe out the cities as they use their posts to enrich themselves». The special provision was approved by the Royal Council in Spain in 1634. Ten year later, in a new case of conflict, and upon request of all the cities in the province of Tucuman, the Court issued a new royal provision stating that «the custom of this province to appoint, for the post of *Tenientes*, their own *vecinos*, be observed [...]». It is remarkable to note how a special privilege conceded by the Royal Court and Royal Council had become into a «custom of the province».⁶¹

Another interesting case of localization is to be found in the way in which governors and their lieutenants of this region acquired the competence to act as judges of appeal. At first it was just a local practice justified by the huge dimension of the districts and the long distances that separated the cities from the Royal Courts. However, after a conflictive case, in 1718, the Royal Court of Charcas decided that all first instance judges of Tucuman had to give their appeals directly to that Court and not to governors or *tenientes*. Governors and *tenientes* took the case to the Council of the Indies in Spain. They argued that the said decision was against the law and against the customs of the province. Many cities supported this argument. The *Cabildo* of Córdoba sent a letter to the Council of the Indies expressing that it was an «immemorial custom of the region» to take the appeals to the governors, and

60 For the Castilian law GONZÁLEZ ALONSO (1970) 300. For colonial law, the prohibition was sent in 1552 to New Spain, ENCINA (1596) (1945–1946) III, 10–11. It was included in the *Recopilación de las leyes de los Reynos de las Indias* (1680, 1791) (1998), book V, title II, law 45.

61 The case is analyzed in AGÜERO/OYARZÁBAL (2013).

that it must be maintained given the poverty of most of the litigants that made it impossible for them to reach the distant Court of district. After consulting the case with the Viceroy of Peru, in 1751 the Council of the Indies decided to maintain the competence of governors to act as judges of appeal in their districts.⁶²

The last two cases show how strategies of localization could affect significant standards of the institutional structure in the peripheral colonial context. Of course, much of the Bourbons reforms, in the late eighteenth century, were addressed to change those traditional practices. The new Governor Intendants did not act as judge of appeal. But as they were also deprived of the faculty of delegating their jurisdiction in lieutenants, most of the cities remained ruled by their own local judges except the capital of Intendance. In this particular topic, it can be said that the reforms strengthened the localization of justice administration and the sense of self government of the local elites.⁶³

Anyhow, beyond the discussion about the Bourbons reforms, what they did not change at all was that fundamental cultural conceptions according to which justice was to serve the welfare of the republics and that it had to be adjusted to what could be regarded as more suitable for each place.⁶⁴ Due to this kind of reasoning, during the Intendant period in Córdoba penalties of forced labor applied to public works in the city had a marked increase. Upon the argument of local needs, a new kind of punishment, consisting in banishment with the obligation for the convict and his family to settle in a village close to the frontiers was also introduced. In the same way, a new measure of social control was implemented, by local statute, consisting of a compulsory labor relationship with a landowner (*obligación de conchavo*) imposed on anyone who had been subjected to criminal prosecution (as a condition to be released after serving the penalty) or to anyone who, not being able to justify an independent way of living, could be qualified as a bum.⁶⁵

Strategies of localization were even useful in that period to resist the attempt of control undertaken by the new Royal Court of Buenos Aires in

62 LEVAGGI (1984) 192–193.

63 LEVAGGI (1991) 375.

64 On Bourbons reforms in colonial justice administration, GARRIGA (2002) 781–821.

65 GONZÁLEZ DE MARTÍNEZ (1994), TAU ANZOÁTEGUI (2004) 347–479.

1785. That year the Royal Court decided to limit the punishment power of the local judges of the Viceroyalty in order to prevent abuses in the exercise of criminal justice. A general rule was passed requiring that sentences imposing penalties of whipping or other afflictive punishments had to be confirmed in the Court of Buenos Aires before being executed. The cities soon claimed against this measure. Local judges from Córdoba, for example, argued that if they had to do so in every case, most of the crimes would remain unpunished because of the long time that it would take the confirmation proceedings and the lack of security in the local jail. The Intendant of Córdoba supported these arguments and asked the Court to authorize the local judges to execute sentences imposing penalties of up to 25 or 30 lashes and of one or two years of forced labor without any formal proceeding for the most common crimes, like cattle rustling, that caused great damage to local landowners. The request was justified in the «circumstances of the country», «the impossibility of following a complete formal proceeding with so many cases of thefts of horses, cattle stealing and the like, commonly committed by the *plebe* and vile people [...]». The Intendant also mentioned the characteristics of the territory that provided facilities for fugitives and recalled the «universal clamor of the landowners for punishing thefts of all kinds of cattle they suffer». The Court admitted the arguments, and granted an exception to authorize the local judges of Cordoba to execute, without the need to carry out the confirmation proceeding, penalties of 25 lashes and four months of forced labor for crimes of theft and other misdemeanors, «according to the circumstances of the accused and his crime» under the supervision of the Intendant. The same was accepted for other cities of the Viceroyalty.⁶⁶

Looking at the long transition period that began after the crisis of the colonial order, it would be possible to say that processes of localization reached its most remarkable expression during the first half of the 19th century in the Rio de la Plata region, particularly after the decade of 1820 when the old cities shifted their institutional nature from municipalities into sovereign republics upon the base of their foundational privileges and their long lasting sense of self government. Free from any external jurisdictional control, local elites enacted, within their territories, mechanism of expedi-

66 MARILUZ URQUIJO (1952) 271–291; AGÜERO (2008) 423–448.

tious justice potentiating solutions that had begun as local law during the last decades of colonial era. Furthermore, due to the long lasting experience of localization, the ancient local jurisdictions became a fundamental element during the constituent conventions that took place in 1853 and 1860, shaping a peculiar feature of the Argentinean federalism.⁶⁷

5. Final reflections: local law and localization

To conclude these brief reflections, we would like to highlight some analytical virtues that the notion of localization can offer as a complementary category for the historical study of local law. Firstly, as it is meant to denote a dynamic process, the notion of localization avoids the risk of incurring in the anachronism of connecting the static concept of local law with our current comprehension of the normative order as pyramidal scheme of hierarchy.

Second, though related, while the idea of localization does not fit with the current theory of *sources of the law* (often retro-projected to the past), it is useful to think about the local law beyond the restricted limits provided by the customary or statutory forms of law. In other words, the notion of localization has not the implicit semantic load that tends to link the local law to municipal ordinances according to the current classification of the territorial validity dominions (city, province, state). On the contrary, localization is functional to describe processes of determination of law regardless the formal hierarchy of norms, highlighting the complementarity and subsidiarity relationship between the general order and the local praxis, stressing the normative weight of contextual circumstances. These had a special incidence in a legal culture that identified the legitimate exercise of power with different forms of jurisdiction.

Finally, if localization of law played a significant role in helping the Monarchy keep the loyalty of the colonial elites on its side almost until the fall of the Spanish Atlantic Empire, it provides, in turn, an heuristic key for the comprehension of the legal developments after the said falling when, on both sides of the Hispanic Atlantic world, *local-centered* tendencies – using in a wide sense the expression suggested by Van Young for Mexico –

67 AGÜERO (2010), AGÜERO (2012).

became dominant in the struggles for the exercise of political powers and territorial representation,⁶⁸ hindering the (sometimes rhetoric) goal of establishing a national legal order based on a general and abstract conception of law.

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68 VAN YOUNG (2010). About the imprints of the ancient traditions on the constitutional discussion in the Hispanic Atlantic world, LORENTE/PORTILLO (2011).

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