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Provincial and Local Law of the Indies.
A research program | 235–255



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Provincial and Local Law of the Indies

A research program

I. The Established Point of View and the New Approach

The historical study of local and provincial *derecho indiano* examined across a regional situation peripheral to the Spanish monarchy pertains to the disciplinary field of legal history and is socio-legally oriented. It extends to any experience or knowledge related to the legal phenomenon. Therefore, interest lies not only in the normative and doctrinal system, but also in the set of habits of mind and style that encompasses both the actions of legal operators and the expressions found in daily practice due to the action and behavior of different social groups. Socio-legal experiences should be incorporated within the framework of what may be termed local legal culture.

Most legal historiographical studies on the *derecho indiano* have rested on the assumption that power was established or that law was created at the upper and central levels of a consolidated order. The image of a unitary *derecho indiano* imposed from the Peninsula, which was perceived to have one general normative power, was accepted by an ample section of the American historiography and spread through cultural spheres. This image met the aspirations of the Enlightenment and, later, those of the liberal political theory of the 19th century, according to which power resided in the State as the central body bringing together other institutions and law was general and uniform. Most historians and jurists read and interpreted ancient texts as well as historical events under this paradigm, and hence reaffirmed that model.

This was the approach that prevailed during most of the 20th century. Historians applied the contemporary state model when studying the past, which implied viewing the law as a normative system created by its exclusive legislative power, evidenced mainly by uniform and complete bodies of law upon which a dogmatic legal system was constructed. From this perspective,

the *derecho indiano* was recreated as a legal system established by the central bodies of the monarchy which culminated in the *Recopilación de Leyes de Indias* of 1680 [Compilation of the Laws of the Indies], a compilation of the entire body of basic law to be applied in the Americas. Underneath this compiling normative system, a particular, changing and casuistic local or “creole” law was hidden. It was issued by the authorities residing in the Indies by virtue of the power delegated to them by the Metropolis, and it was subject to the mechanism of royal assent.

The most salient academic writings of the mid-20th century traditional legal historiography of the Indies have always reflected awareness that the legal complexity of the Indies was not circumscribed to dogmatic forms. Hence, early experts - Rafael Altamira and Ricardo Levene, and more modern ones Alfonso García Gallo, Ricardo Zorraquín Becú, José M. Mariluz Urquijo and Ismael Sánchez Bella - perceived such interest in studying the local legislation, and even set it as a future research goal, signaling some of the most valuable sources for the task. However, local rules that they identified were regarded as merely supplementary and of lesser relevance.

This view started to change gradually and decisively as the initiative to revise those paradigms was set in motion in the last decades of the century. New historiographical approaches emerged, some placing high value on the political-legal autonomy of the peripheral regions from the central power (Antonio M. Hespanha). Consequently, the centralized and uniform conception of the *derecho indiano* started to weaken while an image of multiplicity started to gain strength. It stemmed from the diverse geographical and human realities bundled in the Americas, which obviously could not be reflected in a uniform legal body. Cities began to assume a major role in the creation and application of a system of their own (Bartolomé Clavero). On the basis of variety and Spanish American casuistry, it was necessary to attend to the realities and interplay of a multiplicity of jurisdictional and normative powers that contributed to the development of a peculiar and local provincial system.

Thus began to open a new path of theoretical studies and fieldwork, in which local law was neither merely supplementary nor limited to an isolated area of the *derecho indiano*: rather it has acquired a level of importance undreamt-of before, to the extent that it has come to offer a novel approach to study the whole legal system in force in Spanish American. Furthermore, in this approach this local law is a core element in the continuity of the legal

culture of the Indies after the emancipation, during the so-called period of *derecho patrio* or national law of Spanish American countries, until the time of codification.

Aided by the new theories of recent times and the decline of the former political paradigm, other images are emerging nowadays that depict a multiple and boundless *derecho indiano* born in different places of the New World, respondent to the diverse geographical and human realities bundled in the vast continent, and which make it possible to recognize the existence of diverse local and provincial normative systems.

A new approach (based upon Antonio M. Hespanha's model criterion) posits as a hypothesis the inversion of those terms, addressing the possibility that local areas might be genuine sources of power and creation of law. This inescapably leads to the reconsideration of old assumptions and to the awakening of brand-new ideas about the 'center-periphery' axis and the existence of multiple jurisdictional and normative powers which sometimes work simultaneously at different levels (Tamar Herzog). This encourages the comparison of the mechanisms operating in different local contexts. This operation highlights the structure and dynamics of this vast political entity, as well as the nature of the different laws (socio-legal systems) that were present in it, with diverse margins of autonomous expression and centralized imposition according to time and circumstances.

The *local legal phenomenon* arises as a new instrument to learn more about the *derecho indiano* and, in a broader sense, to deeply understand the mechanisms of articulation in that political entity of great territorial dimensions: the Hispanic monarchy of Spain and the Indies during the Modern Age. Despite the considerable historical-political and historical-legal bibliography on the topic, some issues and questions remain unanswered. These are real legal historiographical problems that call for new light to be shed in order to reach a satisfactory and comprehensive understanding of both its structure and historical development throughout the three long centuries of its existence. In this sense, the approach suggested here may contribute to a deeper understanding.

The specific framework of this approach is limited to a particular space and time: the provinces of the Río de la Plata, Tucumán and Cuyo from the 16th to the 18th centuries. During this period, the foregoing provinces were viewed as peripheral to the centers of political power – Madrid, Lima and Charcas – until the creation of the Viceroyalty in 1776, when their status was

put on a par with that of other peripheral regions of higher rank within the monarchy.

The matter will be addressed in key areas or subjects of that local law. This approach will help revise, adjust and modify, if applicable, the conceptual framework. It will also pave the way for future research in other areas, and for a deeper and more comprehensive analysis of the areas considered here, so that local law will progressively achieve scientific consistency.

II. Research Design. Research Work Areas

The legal culture of the Indies cannot be conceived as the mere normative reflection of a Spanish America geographically integrated with a monarchy based in Europe, nor can it be identified with passive acceptance of metropolitan directives. On the contrary, it is essential that we understand that *derecho indiano* was still in force far beyond political emancipation, and that while its structure had general characteristics perceivable across the whole Indies, specific regional and local varieties emerged that were the result of different geographical, social and economic realities. In other words, it has come the time to consider outdated these old historiographical tendencies, under which the study of the *derecho indiano* was limited to its normative system and questions almost exclusively related to legal creation by an almighty political authority residing in the metropolis. This retrospective view now gives way to the image of a more flexible and multiple *derecho indiano*, which emerged from a diversity of geographical and human realities. Hence, it is convenient to limit the scope of the research program to a particular geographical area, without precluding its broader placement within the legal culture of the Indies and its focus on comparative history across different regions.

The central premise consists in placing focus on an area which, conceived as a natural formation, served as a setting for the display, on various levels and by a multiplicity of peripheral powers – often difficult to identify – of genuine legal autonomy. Such a situation would be a result of a multi-layered combination of mechanisms of action and the simultaneous resistance to royal authority, which was indifferent to being placed within canons derived from rationalistic hierarchical conceptions. Its constant display suggests that those in charge of the administration of provincial and local law, rather than mere recipients of graciously delegated power, acted as real

guardians of alternative authority. This image undermines the credibility of the classic reductionist views, under which the monarchy would appear as the sole power vested with legitimate authority to make laws.

The areas to be studied in particular must be carefully selected taking into consideration the nature of the topic, its local roots, and the availability of experts in the field recognized for their previous knowledge of the subject, who might allow the conclusions of their research to be integrated to the common project.

In order to advance in the knowledge of this provincial and local law, six key study topics have been set as specific objectives. The goal is to detect elements in them through which local features can be verified and analyzed. These topics are: (1) the political condition in the city and the province; (2) the local normative fabric; (3) jurisdictional culture and justice; (4) family and household order; (5) the concept of property and the exploitation of natural resources; and (6) the relation between the universal and the particular in canon law. Some of these topics are now being examined in a number of research projects, whose findings reveal the value of delving into the material and disseminating the analysis so that new elements shaping the local legal culture begin to emerge.

1. The political condition in the city and the province

The root of the local system lay in the city – city meaning “republic” and “corporation” – with its own entity and exclusive law. Both the urban region and the contiguous rural area were under its jurisdiction. Among the constituents of the population center, houses and families, convents and monasteries, unions and associations, schools, universities and consulates stood out at the lower level, each with their rules and regulations, benefits and exemptions, customs and traditions, chiefs, prelates and governors. When Castillo de Bovadilla stated that “houses are small cities and cities are big houses,” he was picturing the basic layers constituting that local system. The political, economic, and judicial authority was vested in the *Cabildo* and the royal official, which acted as guardians of corporations and people. Their normative activity extended mainly over the public sphere, more or less intensely depending on time and place.

Working from more general layouts of the political condition (R. Zorraquín Becú), texts and testimonies depicting characteristic situations can be

gathered that may help refine the way the issue is addressed and verify whether or not there is a correspondence with those layouts, and to what an extent they should be modified or nuanced.

Most importantly, this process will go hand in hand with new historiographical approaches that, without ignoring the existence of a strong tendency towards centralization and uniformity during those centuries, regard the Spanish monarchy as a balanced, complex order, whose powers were spread among recognized centers of authority and their peripheries, and where the monarch played a preeminent yet not dominant role. This new view seems to be in better accordance with the analysis of a reality where the vastness, variety, and specificity of its elements, together with the distance that lay between the provinces and the Crown, precluded the everyday exercise of government from the Peninsula.

This new approach leads us to consider different mechanisms of power, from the one present in clientelism and corporatism to that produced by bureaucracy itself, all this intertwined by subtle links that changed depending on the circumstances. It is thus more proper to talk about a horizontal, rather than a vertical, order in the conception of power, and recognize the existence of fields of action reserved to each sphere of power.

This can be verified by the relation between the local authorities in the provinces of the Río de la Plata and Tucumán with the king and the Peninsular bodies. As I have observed while studying the consultations of the *Consejo de Indias* [Council of the Indies], the *Cámara* [Chamber of the Indies] and the *Junta de Guerra* [Board of War] during the 17th century, the matters they addressed revolved around the following: appointment of royal and ecclesiastical officers, concession of grants and graces, treatment and evangelization of native people, leaves of absence for travel, foreign trade control, and defense and fortification of the territory. A strong intervention in judicial affairs can also be observed, when serious cases of violence, abuse or excess of power by magistrates and governors were reported. The practical exercise of authority by the monarch can thus be limited to certain areas and situations, and it becomes selective and eminent. The remaining power is distributed between the Spanish American centers and peripheries (Lima, Charcas, Santiago de Chile for Cuyo, etc.). The city wields considerable normative and jurisdictional power.

A description of what fell under the charge of the *Cabildo* is recorded in a Buenos Aires council minute of the year 1674, during the course of a power

dispute. The passage is very suggestive and requires an extensive study, impossible to carry out in this paper for reasons of space. Its first part reads: “*Cabildos* (...), under their royal laws and *ius commune*, are vested with the power to rule the city and hear matters pertaining to it, by governing each and every part of it, paying attention to the protection of its fruits and crop fields, its sustenance and that of its people, peacefulness, price, amounts, and better distribution, in such way as they may agree at any time, and deciding whatever they may deem convenient (...).”

New examples and texts can contribute to the treatment of this matter.

2. The local normative fabric

When we consider that prior to the nineteenth century there was a world of diverse and autonomous powers – supernatural, natural and human –, in which norms were created in processes carried out at different levels (Hispanha, *Cultura Jurídica*), it is easier to understand how law was classified in the principal Castilian vocabularies of the early modern age. Two of the seven categories, specifically concerned the local sphere, which thus appeared as a genuine source of power and of law, and not merely as a power delegated by another higher sphere. These two categories were the law ordained by the city or town for its private government and that introduced by custom. However, the different levels of the legal system were implicitly articulated by overarching principles or values according to subject matter, people, and circumstances. Provincial and local law were far from being comprehensive and exclusive. On the contrary, they were open to laws and customs of other places and spheres of power.

It is difficult to define local law because there is no exclusive sector that may actually be so designated. The approach towards a notion of local law should emanate from each city, province or kingdom, analyzing the fabric of the legal system from the bottom up, watching its development and verifying its possibilities to peak or decline. That is to say, a study of this kind is limited to certain geographical areas, and there should be no immediate intention of expanding the results obtained to all the Spanish Indies.

In his research of the city as a general concept, and Seville in particular, between the fourteenth and sixteenth centuries, Bartolomé Clavero notes the absence of what might be termed “a general system” or “communal organization.” Nor was there a legislative power that could establish the rules to

govern the city. What did stand out as an organic whole was the intellectual power of *ius commune* and moral theology case law, which “laid down principles, formulated guidelines and enabled modulation.” It was an effective construction. In addition, there were other normative levels, some closer to what we now understand as law, other levels of a decidedly moral nature, and some that we could classify as socio-legal practices, with separate legal entity and binding. Within this normative fabric lies a customary background that “calls for historiographical creative space.” This same universe of multiple norms – laws, customs and practices –, both written and oral, is a topic deserving patient and intelligent research. Seville can be used as a model for a Spanish American city. And indeed, over the centuries under review this model was frequently referred to.

What was the attitude adopted by the central government of the monarchy towards the mass of norms that was continuously being created in the different local spheres of its vast territory? The question is part of a fundamental issue, which is the articulation of the different levels of power and, obviously, the possibility to control the legal production of the peripheries. The *Consejo de Indias* suffered from an information gap regarding this issue and although there were attempts to fill it, little could be done to make local authorities in the New World send the required information on a permanent basis. Despite the basic interest behind that question, we lack an adequate response today, one with the necessary supporting documents. A working hypothesis could be the following: according to the governing style that can be noted in other matters, and given the material impossibility to control all the corners of its political domains, the Crown consented or surreptitiously permitted, and even approved, local or provincial self-management and the subsequent legislative production in the understanding that kingdoms, provinces and cities enjoyed jurisdictional and regulatory powers that could not be ignored as long local or provincial authorities continued to recognize and maintained their loyalty toward the supreme political authority in the monarch.

This is the issue that deserves the undivided attention of researchers today to grasp the way in which such implementation of law was understood in local life, such implementation being an intertwined fabric of case law/legal knowledge and solutions arising from the local socio-legal experience.

3. Jurisdictional culture and justice

In the research design of a program of this nature, a thematic approach to the issue stated in the title is essential. It is perhaps convenient to attempt such an approach by resorting to a recent work by Alejandro Agüero, in which he sets out the conceptual bases of a study on the topic, whose working hypothesis may be applied to our provinces. By “jurisdictional culture,” Agüero means “a form of power organization and management which can be observed with sparse variations in every European political space from the late Middle Ages until the end of the eighteenth century.” Underpinning that concept are the basic assumptions that social order rests on the idea of a divinely created universe beyond the will of humans (transcendent order), and the idea of the supremacy of a community over its individuals that is applied in various associative expressions (corporation). There are other key elements, such as the primacy of religion in the discourse of knowledge, the relationship between words and things, and the validity of a topical reasoning. The legal culture of the time was thus structured on “a discourse of political power exclusively linked to its concept of justice.” The legitimate exercise of power was tied to the theological notion of justice that gave everyone what, as of right, belonged to them. In charge of said exercise was an authority that enjoyed *iusdictio*, that is, it was vested with some degree of jurisdiction. It followed certain rules of procedure and led to the resolution of the issue, based on procedural rigor and the virtues of the magistrate.

Among the various facets of justice, criminal justice is worth noting. Mario Sbriccoli laid out for the European world of the early modern period a slow transition, entwined by multiple archaic and modernistic lines, from a “negotiated criminal justice” to a “hegemonic institutional justice,” which narrowed the room for negotiation and imposed the idea that no justice could exist without punishment of the guilty. The state started monopolizing punitive power by taking over the duty to apply the punishment rigorously on the basis of four technical presuppositions: the law, the act, the evidence, and the sentence. This model can be used as a working hypothesis to study the world of the Indies in the early modern period.

By way of example, we will refer to Alejandro Agüero’s recent work: a study on these forms of criminal justice in Córdoba del Tucumán in the seventeenth and eighteenth centuries. This author points out the difference between the punitive severity of laws and known practice. Agüero finds

discursive strategies and social practices that helped settle conflicts without resorting to the formal rigor of laws. Clemency, pardon, and complicity by judges and by the parties involved (victims and perpetrators) were procedures that could be seen in practice. This view of criminal justice attempts to overcome a more unilateral view of that past itself, a consequence of the strong mark left by the Enlightenment.

Another issue that can be addressed in this area is the one regarding the imposition that several local texts – particularly manifest in the bands of good government of the late eighteenth century – made on city dwellers: to act as assistants of justice in reporting or detecting different violations of legal and moral norms that were committed in the city and in the countryside.

4. Family and household order

In a study that has become a classic, Otto Brunner discussed with unmatched finesse the meaning given in Europe until the eighteenth century to the “big house” ruled by its master, who had power over economic activity and to protect and control all those living in it, including a broad right to punish his people and the domestic service. It was precisely at that time when – he adds – “the absolute State, which had concentrated in its hands the protection of peace and the police, penetrated the house.” But thanks to the theory of natural law peace in the house was enshrined as one of the fundamental rights, and only by means of a court order could the power of the state penetrate its sphere.

This is the same concept developed in the *Siete Partidas*, that “this word family” – it reads – “denotes the master and his wife, and all the other individuals living in the household under his command, as well as the children and servants and the other servants.” The father of the family was at the top of the small power pyramid sustaining the house, a situation that can be framed within a pyramidal relation as compared to the prince, the “father” of the territory. Alejandro Agüero states: “Disciplined by religion and guided by the *Económica*, the power of the father of the family was withdrawn from the rules of jurisdictional discourse to the extent that his function was performed within an organic unity where subjective plurality was as inconceivable as the smallest otherness, required by a balancing game dealing with disparate interests implicit in the notion of justice (...). Instead

of mediating between various subjective interests, the function of the father of the family was to *guard* the interests of his home, ‘manage’ the assets to ensure the economic viability of the family unit and thus ensure the welfare of its members.”

This family scheme prevailing in Europe was transferred to the New World, where it underwent changes and adaptations as required by the new conditions and by the transformations brought about by the diverse processes of colonization which characterized the typical Spanish and Creole family of the Indies. A detail worth mentioning is the relevant role played by women when leading the family on some occasions, as stated by Dougnac, due to the frequent absence of their husbands.

Mario Góngora explains that “in a socio-historical sense, a house comprises a considerable number of inhabitants: the head of the household, his wife, their unmarried sons and daughters, and often their married children with their own spouses and children; other relatives, including children born out-of-wedlock; servants and those ‘added’ to the household, who also used to have offspring.” Góngora concludes that “this is, properly speaking, a family in the traditional sense.” The head of the household had a wide and strong authority that allowed him to exercise the government and supreme direction of the house, while women, children and the other members of the domestic community owed obedience and submission. He ruled over the family and enjoyed free administration of assets and corrective powers over his children, etc.

It is possible to learn about the rich and secretive world of the family and the domestic order, as it operated before the nineteenth century, by reading some passages from the bands of good government. Though their provisions are not too explicit, they are always suggestive. They are isolated or minor expressions because the power of the legislature only actually reached the gates of the “big house.” It is rare to find such provisions recorded before the last quarter of the 18th century.

The late appearance of certain precepts regarding the domestic order, resulting from the silence of the previous era, probably serves to prove the condition of the “big house,” exempt from any jurisdiction alien to it in everyday life, where the civil authority could not enter.

Texts of a different nature evidence the privileged position enjoyed by the big house or *casa de señores*. The question arises as to whether these texts are remnants or traces of a previous situation or whether they signal the begin-

ning of a transformation combining (or rejecting) the intervention of the civil authority and the protection and guarantee of the rights of the individual. Such contradictory combination of ideas or purposes would not be strange at a time as troubled as that of the late 18th and early 19th centuries.

As can be seen from the foregoing, the issue offers different working hypotheses. Researcher Romina Zamora has already conducted significant research into the topic in one of the major cities of the region, San Miguel de Tucumán, in the last decades of the 18th century, which may serve as a starting point to further study or to extend it to other cities. Moreover, to the traditional figure of the “big house” or “noble house” Zamora has added the “plebeian house” whose presence and role is less visible in documents due to the existence of a hierarchical society; perhaps it is mentioned only in passing in some documents, these mentions being derogatory at times, but deeply ingrained through customs and social practices.

5. The concept of property and the common exploitation of natural resources

Whoever embarks on the task of venturing further into local law will unavoidably be faced with this key issue. European scholars of legal history, politics and social history (such as Paolo Grossi, Bartolomé Clavero, José Antonio Maravall and E.P. Thompson) have written clarifying theoretical and empirical articles that receive special treatment in every research paper on the subject.

According to Maravall, “the concept of property underwent a dramatic transformation” during the fifteenth and seventeenth centuries. It evolved “restrictively to mean the free individual disposition of assets,” deviating from medieval criteria which imposed a set of connections, prescribed common uses, and ordered assistance to the poor and needy. This preface can only introduce us to a very complex issue full of nuances and contradictions, as may be corroborated by resorting to the suggestive pages in which Paolo Grossi deals with the study of the historical forms of property and the big cultural debate on that matter in the 19th century Europe, or to the ones written by Clavero on the matter in the French Revolution. Both provide food for thought and an opportunity for the exchange of ideas.

The referred pages written by European scholars do not include the distinctive features of this matter in Spanish America so we need to resort to

local texts. Our aim is to attempt an empirical approach to that complex and sometimes contradictory world, where more than one line or path can be discerned, and where together with a Modern-Age process of innovation, persistent medieval traces can still be detected. They can be found in the wording of local legal texts but mainly in their background. The matter appears repeatedly in almost every place, but there are also specific cases that ought to be singled out.

A point worthy of mention is the one regarding the community of wild woods, quarries, and rivers. General regulations such as those issued in 1514 were coupled with royal decrees addressed to the Río de la Plata in 1696, 1708 and 1711, in which natives and residents of the Indies were granted the common use of pastures, woods and waters, and the residents of the city of Buenos Aires were allowed the enjoyment thereof, and could even cross the river to Colonia del Sacramento, for the exploitation of wood and firewood without limitation (Mariluz Urquijo). This generalized system started to encounter weak or open resistance depending on how advanced the conceptions proclaiming the individual and absolute nature of property – which excluded all forms of collective exploitation – were.

The common exploitation of various natural resources began to be restricted by the eighteenth century, as much to establish their exclusive use by the city residents – and exclude outsiders without a license – as to declare illegal formerly accepted practices or customs of common use, which were now defined as “abuse,” “theft” or “robbery”. These texts must be read carefully and between the lines. In a chapter of the band of Buenos Aires Governor Bermúdez, of 1715, it is stated: “none be bold to commit wrongs in the city or in the field by taking horses, oxen, cows, fruit or any other thing for, though trivial as it may seem, it will be *declared theft* as the taking was against the owner’s will ...” It seems here that *theft* was being introduced as a criminal offence to make a sharp distinction between the thing subject to the exclusive will of its owner and what could fall within the scope of an eventual common use in practice or, at least, tolerated common use.

In these blurred boundaries between what can be defined as an object of individual property or common exploitation, it is worth resorting to another text of the band of Santa Fe, written in 1709, in which the deputy governor expressed that “because I am aware of the very serious chaos and lack of fear when it comes to the *theft* of mules, horses, oxen, cows, calves and other service animals because *it is not yet considered a venial crime*, and that not even

indoors can said animals be safe, I hereby order that ...” no person “under any circumstances may take livestock or animals of this kind without the express authorization of their owners ...” The text recognizes, by means of certain idiomatic turns – highlighted in italics –, the existence of a practice or use not typified as a crime that the new rule purports to change, by considering it theft and prescribing an express penalty. This was an attempt to sketch out an order in which the individual property of things was becoming more clearly defined. The idiomatic turn used in the provision to establish the requirement to obtain express authorization from the owner to take a livestock leads us to infer that the person did not have the intent to claim ownership over the livestock, but rather to use it temporarily as something available for common use.

A very clear example can be found in an order issued by the *Cabildo* of San Luis in 1779, which reads: “All individuals shall refrain from *the common practice of stealing* branches and firewood from stubbles and fences ... and *those burglarizing farms or stealing fruit* shall be subject to the same penalty.” This is neither the place nor the time to engage in certain digressions, but this order to refrain from a “common practice,” which is then treated as stealing and later extended to cover other acts of burglary of farms or theft of fruits, seems suggestive. It gives the impression that we are faced with a text pinpointing, by means of highlighted words, transitional moments between the common exploitation of certain natural elements and a stricter privacy and exclusivity in the use of individual property.

6. The relation between the universal and the particular in canon law

There are few areas of law that have been as significant to the everyday lives of the men and women of the Old Regime as canon law. Its rules governed life and death, accompanying people from baptism to extreme unction. On the periphery of the Empire in particular, the priest was often the only lawyer, and law was taught solely at the seminary. Notwithstanding this great significance to daily life, which historians of various fields have increasingly detected, the norms of canon law applied locally were based on normative corpora dating from the Middle Ages, intended for the faithful as a whole. This relation between the universal conception of these norms, designed to govern the whole Catholic world, and their particular scope of

application, with the required adaptations and adjustments, makes the study of canon law an enlightening experience for the program described.

Among the various sources that can be studied in this context, so far we have analyzed, firstly, some problems based on the provisions of diocesan synods (Martini, Dellaferrera). Another highly interesting source consists of texts emerging from university teaching that reveal conscious and unconscious adjustments, the use of *ius communes* sources and the changes introduced in an attempt to select and present the required material for jurists in a certain place. Some of the classes taught in courses of canon law at the University of Córdoba del Tucumán are particularly enriching in this context and have been published recently, among them a treatise on impediments to marriage, the fruit of classes taught during the year 1734 (Silvano GA Benito Moya/Guillermo de Santis). This treaty contains *disputationes* on key aspects of the canonical doctrine of marriage – violence and fear; clandestine marriage; impediment of relationship (cognatio) – and offers the possibility to analyze the abovementioned aspects about the *modus operandi* of the jurist in the Cordoba of the 18th century, comparing the explanation with other contemporary sources (such as *Ius canonicum univèrsium* by Reiffenstuel). Furthermore, it allows a comparison between university education and forensic practice.

Thomas Duve has posed questions regarding the local application of *derecho canónico indiano*, including to what extent the particular experiences of the implementation of norms in the Indies impacted upon the Old World. Thus, he states that “the dialectic between the realization of authority in the transplant of the canon law tradition to the Indies on the one hand, and pluralization within this legal culture might even contribute to discover a true *Atlantic dimension* of Legal History, beyond the studies on the unilateral reception of the European legal culture in the Indies.”

III. Research Methodology

The program falls within the discipline of legal history and, therefore, follows its methodological guidelines, which were amended throughout the 20th century. The long-standing debate over whether this is historical or legal science – often settled with eclectic criteria – has been overcome. The position of the discipline between History and Law generated interest and was scientifically sound when Dogmatics was highly regarded in the legal field,

and the legal dimension was dismissed by historians. Both situations have changed.

That relation progressively changed as a stronger link between law and society was sought, and broader “methodological freedom” was introduced that sought to incorporate other disciplines – sociology, anthropology, literature, linguistics, theology, political science, etc. – and open up possibilities for the development of interdisciplinary work, while still acknowledging that Legal History has an individuality and a scientific observatory of its own, which offers its findings to other areas of knowledge.

A very noticeable consequence of this change has been an improved articulation between normativity and social reality. To achieve this, it is necessary to move out of the narrow scope in which Dogmatics enclosed the notion of law, ignoring any other normative sphere than that established by the positive law of the State. In Antonio M. Hespanha’s words, “The most relevant criticism against traditional Legal History is not so much its *formalism* as its *dogmatism*. The former may constitute a positive attitude in that it safeguards legal institutional autonomy and avoids reductive determinism; the latter prevents any historical contextualization, because institutions or doctrinal dogmas are found to be necessary models (and therefore ahistorical) derived from the nature of things or rational evidence. In contrast, the proposed orientation, in relativizing legal institutional models, draws us to consider the study from a historical perspective, placing these models in the context of the *history of cultural forms* and, consequently, their insertion in practical contexts” (*European legal culture*).

There is a tendency to set aside the firm conviction that considered of scientific interest to the historian only those matters that the dogmatic legal scholar defined as pertaining to the legal field. From these new standpoints, it is interesting to admit the existence of normative orders outside the one officially recognized and, generally, this helps expand the researcher’s horizon.

This also leads to a more frequent use, with true methodological root, of the phrase “legal culture of the Indies” – virtually unknown in the past – instead of “Castilian-Indian legislation” (as has hitherto been usual), since it is a deeper and more comprehensive phrase alluding to a phenomenon that cannot be restricted to the legal sphere. It is useful to bear this in mind when analyzing local issues.

Pursuing a research program of this nature, which falls squarely into the specific discipline of Legal History, requires looking into and incorporating

conceptual tools and documentary and bibliographic material of other scientific disciplines that foster the study of humankind and society.

IV. Recommended Bibliography

Given the nature of this article, I have omitted the inclusion of a most comprehensive range of scholarly works; instead, this list includes works used in the text and others that may lead to further consideration and information of the matters discussed herein.

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