

Introduction

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This book is the result of a collective effort by a group of scholars from Latin America, Europe, and the USA, who together wished to write a legal history that would center on the common experiences of Latin American societies over a long time span, which began before Europeans invaded the continent and continues to date. The aim was to identify a narrative that would observe common trends, manifest the dramatic shifts that had occurred throughout this period, and insert these findings into a wider perspective. This would then reveal how various other regions of the globe were facing similar questions and that debates taking place in Latin America were often linked to discussions transpiring elsewhere, to which they both contributed and from which they received input and inspiration.

We feel deeply indebted to the scholars who have preceded us, and we recognize that the study of Latin American law has a long and important tradition. Beginning in the colonial period and throughout the nineteenth and twentieth centuries, detailed accounts described what constituted Latin American Law. Numerous scholars told us how, from the early 1500s onwards, European law was introduced and locally implemented by the various imperial powers. They surveyed the legal changes enacted by the new, independent Latin American states in the early nineteenth century and examined what had transpired since.

Their importance notwithstanding, traditionally these narratives tended to focus on a single empire (during the colonial period) or on a particular locality or state (thereafter). Often, the underlying concept of law they employed was state-centered and legalistic. It presumed that royal enactments (during the colonial period) and legislation (thereafter) were either the only source of law or at least the principal one. Many studies adopted a Eurocentric vision that highlighted the importation of European law while often characterizing this importation as a failure, either because European law was unfit for Latin American conditions or because individuals, groups, and authorities refused

to obey it. In many narratives, precolonial, colonial, and postcolonial indigenous law was absent, as was the law practiced by Afro-Latin Americans. Existing legal histories of Latin America also tended to stress differences across the region while often ignoring common trajectories. Many studied the Latin American experience in isolation, assuming that – for better or for worse – it was radically distinct from all others or had evolved somewhat detached from developments elsewhere, as if colonialism, independence, the transition to new states, and the challenges states faced in the nineteenth and twentieth centuries were unique to this area.¹ Within this older bibliography, when relations with other parts of the globe were examined, it was mostly to affirm the hegemony of foreign ideas. The question how knowledge was translated into local realities, transformed, and accommodated and how local developments contributed to conversations taking place around the globe was rarely asked.

In the last few decades, however, research on Latin American law and society has undergone important transformations and experienced a spectacular growth.² The history of the administration of justice emerged as an important field, scholars examined the role of indigenous groups and enslaved persons in legal production both during the colonial period and thereafter, and many began to pay attention to global entanglements, which provided fascinating insights into the integration of the region into empires, commercial and intellectual networks, world economy, and international relations, to mention but a few examples.³ Religious normativity, missionary activities,

- 1 On the universal projection of such experiences, see, for example, J. Adelman, "Latin American and World Histories: Old and New Approaches to the Pluribus and the Unum," *The Hispanic American Historical Review* 84(3) (2004), 399–409, 400 and 403; and M. Carmagnani, *The Other West: Latin America from Invasion to Globalization*, trans. R. M. Giammanco Frongia (Berkeley: University of California Press, 2011), for example, 3.
- 2 For example, J. L. Esquirol, *Ruling the Law: Legitimacy and Failure in Latin American Legal Systems* (ASCL Studies in Comparative Law) (Cambridge: Cambridge University Press, 2020); L. M. Friedman and R. Pérez-Perdomo (eds.), *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford: Stanford University Press, 2003); M. García Villegas (ed.), *Normas de papel. La cultura del incumplimiento de reglas* (Bogotá: Siglo del Hombre Editores, Dejusticia, 2009); R. Gargarella, *La derrota del derecho en América Latina. Siete tesis* (Buenos Aires: Siglo Veintiuno Editores, 2020); D. E. López Medina, *Teoría Impura del Derecho. La transformación de la cultura jurídica latinoamericana* (Bogotá: Legis, 2004); C. Rodríguez Garavito (ed.), *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo Veintiuno Editores, 2011); B. de Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur* (Lima: Instituto Internacional de Derecho y Sociedad, Programa Democracia y Transformación Global, 2010).
- 3 For example, A. Agüero, *Castigar y perdonar cuando conviene a la República. La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII* (Madrid: Centro de Estudios Constitucionales, 2008); D. G. Barrera, *Historia y justicia. Cultura, política y sociedad en el Río de la Plata (Siglos XVI–XIX)* (Buenos Aires: Prometeo, 2019); S. Chalhoub, "The Precariousness of

and the administration of justice through ecclesiastical institutions, long distinguished from a legal history that tended to concentrate on secular law, are now studied intensely and in their interaction with secular institutions.⁴ New interpretations of the colonial legal culture have been developed and

Freedom in a Slave Society (Brazil in the Nineteenth Century)," *International Review of Social History* 56(3) (2011), 405–39; L. S. de Oliveira Coutinho Silva, *Nem teúdas, nem manteúdas: História das Mulheres e Direito na capitania da Paraíba (Brasil, 1661–1822)* (Global Perspectives on Legal History 15) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2020); N. E. van Deusen, *Global Indios: The Indigenous Struggle for Justice in Sixteenth-Century Spain* (Durham and London: Duke University Press, 2015); M. Dias Paes, *Escravidão e direito. O estatuto jurídico dos escravos no Brasil oitocentista (1860–1888)* (São Paulo: Alameda, 2019); Â. Domingues, M. L. Chaves de Resende, and P. Cardim (eds.), *Os Indígenas e as Justiças no Mundo Ibero-Americano (Sécs. XVI–XIX)* (Atlantica. Lisbon Historical Studies) (Lisbon: Universidade de Lisboa, 2019); A. L. Ferreira, *Injustos cativos. Os índios no Tribunal da Junta das Missões do Maranhão* (Belo Horizonte: Caravana Grupo Editorial, 2021); A. de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: Coartación and Papel," *The Hispanic American Historical Review* 87(4) (2007), 659–92; K. Grinberg, "Illegal Enslavement, International Relations, and International Law on the Southern Border of Brazil," *Law and History Review* 35(1) (2016), 31–52; K. Grinberg, *A Black Jurist in a Slave Society: Antonio Pereira Rebouças and the Trials of Brazilian Citizenship* (Chapel Hill: University of North Carolina Press, 2019); T. Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650–1750)* (Ann Arbor: University of Michigan Press, 2004); T. Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003); T. Herzog, *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Cambridge: Harvard University Press, 2015); M. McKinley, *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600–1700* (New York: Cambridge University Press, 2016); M. E. Alves de Souza e Mello, "As apelações de liberdade dos índios na América portuguesa (1735–1757)," in P. M. Sampaio and R. de Carvalho Erthal (eds.), *Rastros da memória. História e trajetórias das populações indígenas na Amazônia* (Manaus: Editora da Universidade Federal do Amazonas, 2006), 48–72; M. Monteiro Machado, *Entre fronteiras. Posses e terras indígenas nos sertões (Rio de Janeiro, 1790–1824)* (Guarapuava: Unicentro, 2012); F. Pinheiro, *Em defesa da liberdade. Libertos, coartados e livres de cor nos tribunais do Antigo Regime português (Mariana e Lisboa, 1720–1819)* (Belo Horizonte: Fino Traço Editora, 2018); J. C. de la Puente Luna, *Andean Cosmopolitans: Seeking Justice and Reward at the Spanish Royal Court* (Austin: University of Texas Press, 2018); M. Novoa, *The Protectors of Indians in the Royal Audience of Lima: History, Careers and Legal Culture, 1575–1775* (Legal History Library 19, Studies in the History of Private Law 10) (Leiden and Boston: Brill Nijhoff, 2016); B. P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008); J. M. Portillo Valdés, *Fuero indio. Tlaxcala y la identidad territorial entre la monarquía y la república nacional. 1787–1824* (Mexico City: El Colegio de México, 2014); B. Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* (New York: Oxford University Press, 2017); P. A. Revilla Orias, *Entangled Coercion: African and Indigenous Labour in Charcas (16th–17th Century)* (Work in Global and Historical Perspective 9) (Berlin and Boston: De Gruyter Oldenbourg, 2021); A. Wehling, *Direito e Justiça no Brasil Colonial. O Tribunal da Relação do Rio de Janeiro (1751–1808)* (Rio de Janeiro: Renovar, 2004); Y. Yannakakis, M. Schrader-Kniffi, and L. A. Arrijo Díaz Viruell (eds.), *Los indios ante la justicia local. Intérpretes, oficiales y litigantes en Nueva España y Guatemala (Siglos XVI–XVIII)* (Zamora: El Colegio de Michoacán, 2019).

⁴ For example, R. Aguirre Salvador, *Cofradías y asociaciones de fieles en la mira de la Iglesia y de la Corona: arzobispado de México, 1680–1750* (Mexico City: Real Universidad de México, 2018); J. F. Cobo Betancourt, *Mestizos heraldos de Dios. La ordenación de sacerdotes*

established historiographical notions such as *derecho indiano* have been questioned.⁵ Taking to heart the vision that imagines legal production as the result of ongoing communication, scholars also began asking how developments in Latin America, for example, in the field of international law, human rights or transitional justice, participated in and contributed to global conversations.⁶

descendientes de españoles e indígenas en el Nuevo Reino de Granada y la racialización de la diferencia. 1573–1590 (Bogotá: Instituto Colombiano de Antropología e Historia, 2012); G. A. Mendonça dos Santos, *A justiça do bispo: o exercício da justiça eclesiástica no bispado de Pernambuco no século XVIII* (Recife: Universidade Federal de Pernambuco, 2019); B. Feitler, *Nas malhas da consciência. Igreja e Inquisição no Brasil. Nordeste 1640–1750* (São Paulo: Alameda Casa Ed, 2007); T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Max Planck Studies in Global Legal History of the Iberian Worlds 1) (Leiden and Boston: Brill Nijhoff, 2020); R. Harrison, *Sin & Confession in Colonial Peru. Spanish–Quechua Penitential Texts, 1560–1650* (Austin: University of Texas Press, 2014); A. Lempérière, *Entre Dieu et le Roi, la République. Mexico, XVIe–XIXe siècles* (Paris: Belles Lettres, 2004); G. Marcocci and J. P. Paiva, *História da Inquisição Portuguesa. 1536–1821* (Lisbon: A Esfera dos Livros, 2013); G. Pizzorusso, *Governare le missioni, conoscere il mondo nel XVII secolo. La congregazione pontificia de Propaganda Fide* (Viterbo: Edizioni Sette Città, 2018); P. G. Mendonça Muniz, *Réus de Batina. Justiça Eclesiástica e clero secular no bispado do Maranhão colonial* (São Paulo: Alameda Casa Ed, 2017); C. Salinas Aranedá, *Estudios históricos. El derecho canónico en Chile. Derecho canónico indiano* (Valparaíso: Pontificia Universidad Católica de Valparaíso, 2014); J. E. Traslosheros, *Iglesia, justicia y sociedad en la Nueva España. La audiencia del arzobispado de México, 1528–1668* (Mexico City: Editorial Porrúa, 2004); J. E. Traslosheros and A. de Zaballa Beascoechea (eds.), *Los indios ante los foros de justicia religiosa en la Hispanoamérica virreinal* (Mexico City: Universidad Nacional Autónoma de México, 2010).

5 For example, V. Tau Anzoátegui, *Casuismo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano*, 2nd ed. (Seville: Athenaica, 2021); for a panorama of research on *derecho indiano*, including critique and defense of the notion, see the contributions in T. Duve (ed.), *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano*, Berlín 2016 (Madrid: Dykinson, 2017).

6 For example, F. Arocena and K. Bowman, *Lessons from Latin America: Innovations in Politics, Culture, and Development* (Toronto: University of Toronto Press, 2014); A. Becker Lorca, *Mestizo International Law. A Global Intellectual History, 1842–1933* (Cambridge: Cambridge University Press, 2014); J. L. Esquirol, “Alejandro Álvarez’s Latin American Law: A Question of Identity,” *Leiden Journal of International Law* 19(4) (2006), 931–56; A. McPherson and Y. Wehrli (eds.), *Beyond Geopolitics: New Histories of Latin America at the League of Nations* (Albuquerque: University of New Mexico Press, 2015); L. Obregón, “Between Civilization and Barbarism: Creole Interventions in International Law,” *Third World Quarterly* 27(5) (2006), 815–32; J. P. Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (New York: Oxford University Press, 2017); K. Sikkink, “Latin American Countries as Norm Protagonists of the Idea of International Human Rights,” *Global Governance* 20(3) (2014), 389–404; M. Sozzo and J. Núñez (eds.), *Los viajes de las ideas sobre la cuestión criminal hacia/desde Argentina. Traducción, lucha e innovación. 1880–1955* (Global Perspectives on Legal History) (Frankfurt am Main: Max-Planck-Institut für Rechtsgeschichte und Rechtslehre, forthcoming). On the contribution of Latin America to the development of law more generally, see, for example, D. E. López Medina, *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana* (Bogotá: Legis, 2004); and D. Bonilla Maldonado (ed.), *Geopolítica del conocimiento jurídico (Filosofía política y del derecho)* (Bogotá: Siglo del Hombre Editores, Universidad de los Andes, 2015).

These new and exciting perspectives, opened up by innovative multidisciplinary research, have provided us with important insights. However, many of these works continue to focus on countries or regions, rarely engaging with pan-Latin American narratives, and most fail to systematically insert Latin American developments into larger contexts.⁷ The result is that, presently, very few books describe what transpired in Latin America by tracing a common Latin American narrative. Nor is there a volume that places this narrative in a global perspective by showing how local law interacted continuously and resiliently with continent-wide as well as global developments and how it formed part of discussions also taking place in Europe, Africa, Asia, and North America. This book wants to provide a first step toward such a narrative.

Our first aim, therefore, is to craft a pan-Latin American narrative and insert it into a global perspective. Our second aim is to propose a new methodology that would place at the center questions rather than answers, processes rather than results, contexts rather than descriptions of solutions. We want to ask where, how, and why law materializes, who the protagonists are, and what the settings are. We also want to demonstrate the multiple levels on which law operates and how deeply it is embedded in social, political, cultural, and economic processes. This method, we hope, would connect the important literature produced by social, economic, and cultural historians, anthropologists, and linguists (to mention but a few disciplines) with the state of the art in the fields of legal history, legal theory, and legal sociology. Aiming to overcome the traditional divide between what some still perceive as a formal versus a practical vision of the law, between a “juridical” legal history with a legalistic and state-bound perspective and a history of justice and “jurispractice” that reduces law to what actors are doing, in this book, we observe the historical actors’ practice in order to identify not the interests at stake but its grammar. We ask why things were done in certain ways, how knowledge of normativity was produced, and how it changed over time. Given the wealth of research on Latin American law and its history at the present moment, and the opening of the field to scholarship originating from other disciplines, we believe that such an endeavor is now possible.

While seeking to prompt interdisciplinary conversations between experts of law and history from a variety of disciplines, we also wish to facilitate the dialogue between scholars working in distinct national settings and academic

7 Exceptions exist, of course, for example, Rodríguez Garavito, *El derecho en América Latina*.

traditions. Most particularly, we wish to highlight the incredibly important contributions of scholars who work in Latin America and habitually publish in Spanish and Portuguese and bring to the forefront Latin American perspectives and interpretations, in order to avoid what some have identified as epistemicide.⁸

To achieve the above, the scholars who participated in this project were selected because they either work in Latin America or are deeply informed by the scholarship produced there. To ensure a cohesive volume, we met several times to discuss our common goals and how they could be achieved. We each read the others' chapters and commented on them extensively. Among other things, we also wanted to guarantee that all chapters would speak to several seminal themes such as the persistence of indigenous normativities throughout this long history, or the omnipresence of the Church and its legal universe. By doing so, we hoped to be able to demonstrate the complexities of Latin American legal history, tie it to larger debates, and bring it to the attention of a larger audience.

Latin America

What Latin America stands for, what it includes, where it begins and where it ends, has been a subject of debate and contestation for many years. Some tend to conceptualize Latin America as a geographical region; others refer to intense networks of communication, shared historical experiences, a common culture, religion, and language, or a combination thereof. What it meant in the past to various actors is not necessarily what it means today to others. However paradoxical this may seem, during a substantial part of that long history, many identified Latin America only with people and things originating from Europe.⁹ This of course has changed radically and, presently, most tend to include in this realm a huge variety of peoples and cultures and well as their entanglements. In geographical terms, Latin America can include parts of North, Central, and South America, it can extend to the Caribbean and even the Philippines, given their insertion in Latin American networks, and the similarities in their historical trajectories.

8 B. de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Boulder: Paradigm Publishers, 2014). Also, see G. de Lima Grecco and S. Schuster, "Decolonizing Global History? A Latin American Perspective," *Journal of World History* 31(2) (2020), 425–46, at 431–33.

9 W. D. Mignolo, *The Idea of Latin America* (Malden: Blackwell, 2005), for example, xv; and M. Tenorio-Trillo, *Latin America: The Allure and Power of an Idea* (Chicago: University of Chicago Press, 2017).

The term Latin America as such has a long history. Until thirty years ago, it was commonly assumed that it was a European invention, explained by French imperial ambitions. However, we now have ample proof that individuals within Latin America already used this designation in the 1850s before it was taken up by the French.¹⁰ What these individuals meant and why they chose this term depended on who they were and what their agenda was, but historians have generally conceded that the notion of “Latin America” was used mostly in response to US expansionist projects, as exemplified in the wars against Mexico, the immigration of many US individuals to Central America, and the plans for the opening of the Panama Canal. The opposition to these projects, and the defense of local sovereignty, found expression in the vindication of a “Latin race,” which allegedly was different to an “Anglo-Saxon race.” According to this vision, Latin America was different not only because it was “Latin” (a condition that it shared with many in Europe) but also because it was “American.” Using the concept of Latin America was also a rallying cry that encouraged projects of political unification, projects that began long before Europeans invaded the continent, that continued during the colonial period, reemerged with independence, and persisted, even gained new force, in the nineteenth century – when the term Latin America was coined – and in the twentieth century under the guise of pan-Americanism, and pan-Indigenismo.

By the 1860s, identification with a Latin American community had become common among local intellectuals, who possibly wished to project their own preoccupations onto a much bigger, universal stage, which in turn transformed their struggle into one chapter in a larger confrontation also taking place in Europe between “Latins” and “Anglo-Saxons.” During the second half of the nineteenth century, these claims often expressed convictions that “Latins” were superior to “Anglo-Saxons” because they espoused traditions that allowed for syncretism and were open to all. They equally pointed to an Americanness that was tied to pride at the adoption of liberal, republican, and even progressive political structures, which stood in opposition to the monarchical regimes still operating in Europe. On both these accounts, the adhesion

10 M. Quijada, “Sobre el origen y difusión del nombre ‘América Latina’ (o una variación heterodoxa en torno al tema de la construcción social de la verdad),” *Revista de Indias* 58(214) (1998), 595–616; A. McGuiness, “Searching for ‘Latin America’: Race and Sovereignty in the Americas in the 1850s,” in N. P. Appelbaum, A. S. Macpherson, and K. A. Roseblatt (eds.), *Race and Nation in Modern Latin America* (Chapel Hill: University of North Carolina Press, 2003), 87–107; and M. Gobat, “The Invention of Latin America: A Transnational History of Anti-Imperialism, Democracy, and Race,” *The American Historical Review* 118(5) (2013), 1345–75.

to Latin America communicated achievement: It pointed discussants toward the legacy of old, civilized, even spiritual empires that were judged preferable to a new, barbaric, and materialistic USA. Eventually, for many locals, Latin America would also be transformed into a weapon to denounce injustices and call for reform. Some intellectuals would concentrate specifically on legal issues, as they asked whether Latin American law had its own particularities, or whether it formed part of larger systems. Was Latin America indeed exceptional, or were developments there a specific response – as well as an active contributor – to global processes?

Though most probably invented by local actors, soon thereafter the term Latin America was also taken up first by the French and then by a host of other foreign actors. The French proposed a new twist on these interpretations by advancing a new type of anti-Anglo-Saxonism, which was monarchical and based on French traditions. Other foreigners, however, tended to give the term Latin America pejorative interpretations that classified its community as backward and traditional. Thereafter, the opposition between “Anglos” and “Latins” was also translated as one contrasting Protestants with Catholics, “whites” with “mixed race persons.” According to historians, by the twentieth century, some of these characterizations also influenced the way Latin America was treated by international agencies, in transnational litigation and international arbitration, in which it was often conceived as a space where there was a huge gap between law and implementation, ruled by inefficiencies, corruption, and excessive legal formalism, and where European norms were said to have been adopted but failed to materialize.¹¹ Under this guise, Latin America was often understood to represent a case of a failed modernization. It may have had the potential to modernize, but it never did, or did only partially.

Both locals and foreigners, in short, tended to read a particular condition into the designation “Latin America,” which rendered those included in it either superior or inferior, but always different. Historically, in other words, Latin America was not a neutral term. Instead, it embodied projections and political positionings that compared locals to others and that were intended to communicate certain images. Despite, or perhaps even because of, its vagueness, imprecision, and inconsistencies,

11 Esquirol, *Ruling the Law*. On some of these issues see also D. López Medina, “The Latin American and Caribbean Legal Traditions: Repositioning Latin America and the Caribbean on the Contemporary Maps of Comparative Law,” in M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012), 344–67.

and the constant changes in its meanings, “Latin America” has proved to be an extremely resilient category that has lasted from the 1850s to the present. Scholars have remarked that using this term now allows “more-than-national, thought-provoking, presently relevant” narratives and that it has the potential of stressing connections that are otherwise either ignored or undervalued.¹² Applying – albeit rarely explicitly so – a particular lens by which to organize research, some advised their readers of the need to define what it meant, what should be included and what excluded, not a priori, but according to the questions that needed answering or the topic chosen. In other words – as is often the case in history – at stake should be the question whether employing a certain term and adopting a certain circumscription is useful and what the results are: What it can illuminate and what it would hide.

This book takes this advice to heart. Rather than defining what Latin America means, each one of us adopted this vague unit to the subject matter and period under study. We did not specifically exclude the Caribbean, but we included it only where and to the degree that we found this helpful. Equally, we did not consider each and every region. Instead, we selected those places that each of us deemed most relevant to the narrative. The legacies of the past allowed us to envision Latin America as featuring a multiracial history that was the result of transcontinental migrations, forced or voluntary, a relatively early experience with colonialism, early insertion into processes of globalization and global economy, early definition of the liberal state, and so forth. For us, Latin America “represents more than a convenient label.”¹³ It is not the aggregate of disparate units, each with its own trajectory, but rather it is a community where the different units constantly interconnected, interacted, and were entangled internally, while also doing the same with other parts of the globe.¹⁴ From that perspective, we found Latin America a more convenient term than Hispanoamerica, or Ibero-America, which some only identify with Spain, or which, conventionally, places the emphasis on Europe and its ambitions rather than on the Latin American region itself and its local actors of all sorts and shapes.

¹² Tenorio-Trillo, *Latin America*, 168. Also, see 170.

¹³ J. C. Moya, “Introduction: Latin America – The Limitations and Meaning of a Historical Category,” in J. C. Moya (ed.), *The Oxford Handbook of Latin American History* (Oxford: Oxford University Press, 2010), 1–26, at 4.

¹⁴ A typical study of Latin America, which divides it into discrete units and distinguishes Spanish from Portuguese America, is, for example, L. Bethell (ed.), *The Cambridge History of Latin America* (Cambridge: Cambridge University Press, 1985–2008), 12 vols.

A Global Perspective

We want to set Latin America in a global perspective so as to bring its legal history into conversation with the history of law and society elsewhere.¹⁵ We are convinced that there were and are legal developments common to Latin America, but we are also convinced that these developments were not always nor necessarily particular to Latin America. Whether before, during, or after colonialism, Latin American law has always been both a local and a much wider affair that participated in larger conversations and developments taking place in other areas of the globe as well as in global trends. This happened not only because Latin America formed part of the “Iberian Worlds,” or because of its intense interaction with European powers who were either present in the region or exercised, during the nineteenth and twentieth centuries, political, economic, cultural, and legal hegemony. Instead, global entanglements mostly originated with Latin American actors who, facing challenges similar to those that were encountered elsewhere, often tapped into a shared repository of ideas, methods, practices, and ways of thinking, analyzing, and proposing. In turn, they contributed to these repositories by adding, changing, interpreting, questioning, or affirming them.

This common repository used by actors both in Latin America and elsewhere had a mixed origin. Rather than stemming purely from one region or one historical experience, it emerged through communication and exchange, experience, and experimentation by a plethora of different individuals and communities across the globe. We presently have ample information on the Latin American contribution to the development of transitional justice, international law, and “world law” (see Sections 6.2 and 6.3 and Chapter 7), but Latin American actors and experiences have contributed to global conversations about law from the very beginnings of global networks. Sometimes, these entanglements were the result of the circulation of ideas in oral or written form; at other times, they depended on the movement of people. But whatever the media that made the flow of communication possible, the emergence of similarities and differences, and of regional, national, or transnational

15 On global perspectives in legal history, see T. Duve, “What Is Global Legal History?,” *Comparative Legal History* 8(2) (2020), 73–115; on problems and opportunities of global history for Latin American history, see M. Brown, “The Global History of Latin America,” *Journal of Global History* 10(3) (2015), 365–86; Lima Grecco and Schuster, “Decolonizing Global History”; for an interesting global perspective, see M. Restall, “The Americas in the Age of Indigenous Empires,” in J. Bentley, S. Subrahmanyam, and M. Wiesner-Hanks (eds.), *The Cambridge World History*, vol. VI: *The Construction of a Global World, 1400–1800 CE, Part 2: Patterns of Change* (Cambridge: Cambridge University Press, 2015), 210–42.

law depended on continuous acts of translation, which constantly operated on multiple levels, inside and outside groups and regions. These translations of knowledge of normativity (see Sections 1.3 and 1.4) were by no means limited to translations into other languages, for example, the translation of legal institutions from Quechua to Castilian, from French law to Portuguese, or from Spanish to the Anglo-American language of international law. Instead, they happened (and still do) whenever a legal rule, or a mandate stemming from religion, or a juridical practice, is taken up and reproduced to fit specific local contexts, thus creating something new. Global legal history is, thus, a specific way of doing local legal history, which observes local solutions yet understands them as forming part of larger systems of communication.¹⁶

Understanding (global) legal history as an ongoing process of translations – and thus creation – of knowledge of normativity, including practices, helps overcome simplistic visions that often suggest that (mostly European) “originals” were/are “transplanted” or were/are the object of “legal transfers,” and that therefore tend to classify the result as (usually Latin American) “copies” that are considered somewhat deficient or at least inferior, because they are neither original nor autochthonous.¹⁷ Viewing these processes of local concretization as translations also has the potential to decenter the locus of production, by perceiving the different sites where norms and practices were/are translated as equal rather than hierarchically arranged. Viewing the use of law as translation can also be an important step toward a global legal history that pays attention to the geopolitics of knowledge and its asymmetries and avoids, as far as possible, the danger of historiographic neocolonialism.¹⁸

16 On the localization of legal knowledge in Latin American legal history, see, for example, B. Clavero, “Gracia y derecho entre localización, recepción y globalización (lectura coral de Las Visperas Constitucionales de António Hespanha),” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 41 (2012), 675; and the studies collected in V. Tau Anzoátegui and A. Agüero (eds.), *El derecho local en la periferia de la monarquía hispana. Río de la Plata, Tucumán y Cuyo. Siglos XVI–XVIII* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2013).

17 On the use of these metaphors in comparative law, see M. Graziadei, “Comparative Law, Legal Transplants, and Receptions,” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019), 442–73; for a sharp critique of these Eurocentric and theoretically underdeveloped approaches, see H. P. Glenn, “Comparative Legal Families and Comparative Legal Traditions,” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019), 423–41.

18 On this approach, see T. Duve, “Historia del derecho como historia del saber normativo,” *Revista de Historia del Derecho* 63 (2022), 1–60; on the geopolitics of knowledge, see Bonilla Maldonado, *Geopolítica del conocimiento*; on the danger of historiographic neocolonialism, see B. Clavero, *Derecho global. Por una historia verosímil de los derechos humanos* (Madrid: Editorial Trotta, 2014); from the perspective of global history with regard to Latin America, see Lima Grecco and Schuster, “Decolonizing Global History.”

By engaging in a global perspective, we wish to put into practice methodological postulates that, rather than privileging one tradition (mostly European) over all others, allow the incorporation of the legal experience of multiple regions and peoples, among them indigenous peoples and enslaved persons, to mention but two emblematic examples. Guided by the wish to avoid the Eurocentrism implicitly inherent to concepts such as “law” or “custom,” and instead of asking “when do norms become law?,” we focus on the production of knowledge of normativity by different actors and institutions. This approach also renders it possible to consider religious normativity (see Section 3.2), or normativity created and implemented in the social space of the household (see Section 3.3) or by communities living in parallel to the colonial or the modern state (see Sections 3.1 and 5.3 and Chapter 7). The analysis of processes by which knowledge of normativity is produced renders perceptible hybridizations and *mestizajes* (mixings), whose results are often invisible from the frequently static perspective of legal pluralism.¹⁹ Considering hybridizations, and the dynamics that enable them, is incredibly important given current discussions regarding the rights of indigenous peoples and, more recently, individuals of African descent, in international law in general, and in the Inter-American system in particular.²⁰

If taken seriously, a global perspective on legal history can have far-reaching consequences for the way research is organized and conducted. It does not require eliminating colonial empires or nation-states from the narrative. These can remain the primary object of inquiry, as long as they are considered within their transnational constellations. Though empires and states may remain, a global perspective requires the de-nationalization of legal historiography in conceptual as well as spatial terms. It forces legal

19 On the problematic notion of legal pluralism see T. Herzog, “Latin American Legal Pluralism: The Old and The New,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 50(2) (2021), 705–36; on the invention of cultural diversity in Latin America and the danger of essentialism see S. Costa, “Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America,” *Revista Brasileira de Sociologia do Direito* 3 (2012), 139–56.

20 For an overview see, for example, T. Duve, “Indigenous Rights in Latin America: A Legal Historical Perspective,” in M. D. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), 817–37; V. Vadi, “Spatio-Temporal Dimension of Indigenous Sovereignty in International Law,” in A. Di Blase and V. Vadi (eds.), *The Inherent Rights of Indigenous Peoples in International Law* (Rome: University of Rome III Press, 2020), 87–114; M. Monteiro de Matos, *Indigenous Land Rights in the Inter-American System. Substantive and Procedural Law* (Studies in Intercultural Human Rights 10) (Leiden: Brill Nijhoff, 2020); J. Bens, *The Indigenous Paradox: Rights, Sovereignty, and Culture in the Americas* (Philadelphia: University of Pennsylvania Press, 2020).

historians to consider a wide array of sources, and it questions the concept of law underlying a legal history that is still often shaped by the Western idea of the nation-state. It calls upon us to examine and revise canons of knowledge, periodization, and the many teleologies inherent to the grand narratives of modernization and the emergence of modern secular states as a linear historical process. The biggest challenge, however, is to write a legal history that describes the laws imposed by some, but that at the same time enables an adequate representation of the agency and the presence of normativities practiced continuously by others – in other words, to write a de-colonial legal history of people living under the conditions of formal or informal imperialism.

This book tries to adhere to these orientations. Several of its chapters make visible the histories of indigenous peoples or enslaved persons. It analyzes legal history as a history of knowledge production, and it gives weight to normative spheres traditionally not included in legal history, such as social norms emanating from the household, from religion, or informal law. We are, however, conscious that our endeavor is only a beginning. After many decades of debates about de-colonial and postcolonial perspectives on the history of Latin America, and despite the advanced socio-legal reflections about epistemic asymmetries and theories from the Global South,²¹ practical proposals as to how to circumscribe it are still in their infancy.

A Legal History

Most of all, this book is a *legal* history. In recent years, legal history has become a buzzword with multiple meanings, which also means that the discipline can be pursued in multiple ways. Some scholars identify legal history as the study of a piece of legislation, doctrine, or custom, or of individuals and institutions involved in their making. Others wish to investigate how actors strategically used rules or institutions to their advantage. Yet another group looks for information about the past by reading juridical documentation, mainly legislation and court cases, while also debating their biases and

21 D. Bonilla Maldonado and M. Riegner, “Decolonization,” in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2020); W. D. Mignolo, *Idea of Latin America*; E. Lander, “Ciencias sociales: saberes coloniales y eurocéntricos,” in E. Lander (ed.), *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas latinoamericanas* (Buenos Aires: CLACSO, 2000), 11–40.

silences and how to overcome them.²² These are frequent pursuits; however, this book takes a different approach. Rather than asking about individual solutions, or uncovering the life of individuals or groups, its goal is to understand the legal contexts in which specific answers emerged and/or operated. What was the meaning of law at different moments in time? What was it supposed to accomplish? Who was charged with making, interpreting, imposing, or changing it? And how were norms created, altered, enforced, negotiated, or eliminated?

This type of legal history – a bit like law itself – does not seek to provide solutions, such as clarifying the rules that operated in specific cases. Neither does it use only juridical documents to reconstruct the past. Rather, it concentrates on what one might compare to an operating system for a computer and strives to explain the legal setting that – though working in the background and thus mostly unseen – nonetheless enabled certain things but not others. It concentrates not on the specific results obtained in a particular case – results that can be largely accidental – but on how they were reached: What was the method, which were the procedures, and who was involved and in what way? This book views law both as a practice and as a science, where following the right itineraries is what validates the results, whatever these may be. It, therefore, seeks to reconstruct routes rather than destinations and to reveal controversies, not adhere to metanarratives or pretend to uncover a definitive truth. It is meant to help those who engage with juridical questions or juridical documents by providing them with tools to understand what was happening, often behind the scenes. It also seeks to offer a useful framework to meaningfully merge the multiplicity of voices, rules, practices, and institutions that scholars have already uncovered and to supply those who work on legal issues with the necessary information.

22 On the variety of ways to imagine legal history today see, for example, M. D. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018) which lists social history, political history, intellectual history, doctrinal history, economic history, gender history, the history of legal texts, and legal history as methods for studying law and culture. The volume also mentions quantitative legal history and enumerates several “perspectives” either by appealing to specific scholars or by observing historical or sociological jurisprudence, legal formalism, legal realism, law and society, Marxist legal history, the material turn, structuralist and post-structuralist legal history, critical legal history and critical legal studies, feminist historiography, or critical race theory. Finally, it covers various legal traditions such as Roman, medieval canon, and common law, continental civil law, Jewish law, Islamic law, Chinese law, aboriginal law, or Indian law. The aim of the volume, in other words, is to display the multiplicity of ways by which legal history can be done in terms of subject, method, approach, and sources.

This explains why this History of Latin American Law in Global Perspective does not describe how particular groups translated their interests into legal solutions or how particular topics became legally regulated. Nor does it cover the question of how contracts were made or what criminal law mandated, or examine the regimes that applied to specific groups. Instead, it hopes to explain the legal logic within which all legal regimes operated, and the legal context that made them possible and gave them specific meanings.

Summary of Contents

Given the importance of context, this volume is divided mainly according to moments of rupture or radical change: from autonomous indigenous communities (mostly pre-sixteenth century, although some groups persisted with some degree of autonomy into the twentieth century), to colony (depending on region, mostly from the sixteenth to the early nineteenth century), to experiments with building new states (mostly the first half of the nineteenth century), to the consolidation of states (mostly in the late nineteenth and early twentieth century), to the new constitutionalism and the challenges to state law (in the later part of the twentieth century and the present).

This book begins with a series of methodological questions. The first describes the historiography and agendas that have accompanied the writing of Latin American legal history over time (Section 1.1). The next asks what a legal history of Latin America is, mostly by observing what Iberian and Latin American historians have said about the similarities and differences between history and law, and how they justified the importance of legal history (Section 1.2). Section 1.3 discusses the methodological premises of our common project, which seeks to study how norms are produced by centering on processes of translation and concretization. Section 1.4 describes some of the ways by which global legal history can be accomplished by reminding us that things that qualify as “global” do not necessarily require any actual movement in space. Instead, the global can also be present in the life of an individual who experienced dislocation.

Having dealt with these methodological questions, we turn to observe the history of Latin American law. We begin by studying indigenous law in Chapter 2, which describes both what we know and what we don’t about this field of inquiry, as well as the difficulties in acquiring such knowledge and the enormous transformations it has experienced over time. Because so much of the information we currently have regarding indigenous law depends on colonial records (though archaeology and anthropology have been extremely

helpful), while we identify this law as precolonial, Chapter 2 also covers some of what transpired during the colonial period and thereafter. In Sections 3.1, 3.2, and 3.3, we observe the colonial period, dividing it into three parts: civil, religious, and domestic. Despite this division, all three sections speak to the same juridical universe as it is impossible to imagine a colonial Latin American civil law without considering canon law and moral theology as well as the jurisdictional powers of the *pater familias*. Together, these sections describe the entanglements typical of settler colonialism, which allowed European powers to exert control over faraway lands and their original peoples, send European colonists there and, eventually, enslave large populations mostly of African descent. Here the emphasis is on studying attempts to implement norms that were created elsewhere (i.e., in Africa or Europe) or under radically different circumstances (i.e., before Europeans invaded) but that needed to be translated and concretized so as to fit the local (and new) circumstances that included, most importantly, the presence of a large indigenous population and enslaved persons who all practiced their own laws.

Next, we turn to the construction of the Latin American states. We begin with surveying events during the revolutionary period that led from colonial to independent states, and from the Old Regime to a new one (Chapter 4). We seek to demonstrate that the revolutionary period was highly experimental in nature and featured constant struggles to define new communities and their norms, inculcate new practices, and then change it all again. Questions were asked regarding who had the authority to break the ties with the metropole, what structures the new polities would take, who their citizens would be and which their territories were, how their authorities would be chosen, and how norms would be enacted. Eventually, most of these questions would be answered in the “long nineteenth century,” covered in the subsequent Sections 5.1, 5.2, and 5.3, which deal with the construction of states, the elaboration of constitutions, and legal codifications. These sections speak to issues of translations of knowledge of normativity and the participation of local actors in global conversations but also highlight the constant tensions between past and present, global and local, and survey the difficulties in adapting the aspirations of many state-makers to social realities. These sections also examine the price that various groups paid because of these state-building endeavors, as well as the constant need for compromise and reinvention, both processes that met with varying degrees of success.

By the late nineteenth century and during the twentieth century, the legal landscape of Latin America featured the rise of the administrative state (Section 6.1), experiences with dictatorships (Section 6.2), and transitional

justice and demands to protect human rights (Section 6.3). Chapter 7 ends the volume with an incredibly important question, namely whether state law can survive the twenty-first century. Faced by pressures from within (to accommodate the multiple communities and multiple legalities present inside the state, including the laws of cultural communities, but also of peripheral neighborhoods and criminal organizations) and from outside (by international bodies and international law as well as other global actors), what is at stake here is the question whether this fragmentation signals the end of state law, or whether states will be able to contain these pressures and survive.

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We also remember Carlos Ramos Núñez, who passed away in 2021 while preparing his contribution for this book. Carlos was an outstanding legal historian and a generous colleague, whom we will greatly miss.

We dedicate this book to the memory of António Manuel Hespanha. António Manuel agreed to join this project as the third editor but passed away before it came to fruition. As always, even in the initial planning stages, he was inspirational and generously shared his wisdom, erudition, and enthusiasm. Though he is no longer with us, his scholarship, his thoughtfulness, and his kindness are our permanent companions.