THE CAMBRIDGE HISTORY OF

LATIN AMERICAN LAW IN GLOBAL PERSPECTIVE

EDITED BY
THOMAS DUVE
AND TAMAR HERZOG

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domination, with such relevant examples as modern slavery.[67] The constitutional history of Latin America – and not only Latin America's – started from the implicit understanding and dissimulation of ethnicity to configure a deceitful citizenship; it is enough to recall the example of the Mexican state of Sonora y Sinaloa in the times of the 1824 Federal Constitution – since the state charter (1825) suspended the rights of citizens "for being in the habit of walking shamefully naked." Anthropological diversity sustained the fiction of the public law of independence, prolonging the dictates of the old *derecho indiano*. It should be pointed out that Clavero's suggestions have been passed on to recent Brazilian legal historiography, interested in *povos indígenas* whose rights, yesterday and today, are in continuous dispute.[68]

The history of Latin American law is one, if not the main form, of producing and applying law in Latin America. Or put differently, it is a "history of [Latin American] law in the present."[69] It is thus a delicate object that – negatively – invents traditions, forgets subjects, and offers culturally connoted frameworks of understanding. It also – positively – identifies peoples and pluri-national states; it defends jurisdictions, territories, and resources. Scholarly activity ultimately becomes civic engagement. It is no coincidence that this historiographical renewal coincides with a new international law attentive to indigenous peoples and with a renewed constitutionalism.[70]

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1.2 What Is Legal History and How Does It Relate to Other Histories?

TAMAR HERZOG

Historians, jurists, and legal historians have long debated what legal history is, how it should be done, and what it must accomplish. These debates began long ago and continue to this day. They obscure not only important questions

67 B. Clavero, "Esclavitud y codificación en Brasil, 1888–2017. Por una historia descolonizada del derecho latinoamericano," *Revista de Historia del Derecho* 55 (2018), 27–89.

68 See S. Barbosa, "Usos da história na definição dos direitos territoriais indígenas no Brasil," in M. Carneiro da Cunha and S. Barbosa (eds.), *Direito dos povos indígenas em disputa* (São Paulo: Unesp, 2018), 125–37.

69 B. Clavero, *Constitucionalismo latinoamericano: Estados criollos entre pueblos indígenas y derechos humanos* (Santiago de Chile: Olejnik, 2019), 153.

70 Clavero, *Derecho indígena*, for an anthology of "constitutional recognitions." Specifically, Clavero, *Constitucionalismo latinoamericano*.

related to what history and law are, respectively, but also what is the point in engaging in legal history at all. Is legal history useful for jurists? What about for historians or the public at large? Moreover, what makes a history *legal*? Is it the research object being pursued, the sources used, the methodology employed? Or is it more about the questions asked?

In what follows, I deliberately take issue with how legal historians of Latin America, Spain, and Portugal answered some of these questions. I am conscious of the fact that many other scholars have debated them and that these debates greatly contributed to the emergence of the views held by the Latin American, Spanish, and Portuguese scholars whose work I study and that informs my perspective. I pursue this endeavor convinced that the scholarship I examine is insufficiently known to a wider readership, while at the same time, it has and continues to shape the way the legal history of Latin American law has developed. This analysis focuses on what transpired since the 1960s because, although older visions persist, this volume attempts to follow the lessons we have learned up to this point. In part, I do so also as a tribute to António Manuel Hespanha, whose work inspired so many of us, and who was one of the editors of this project but regretfully passed away before we could bring it to fruition. As I wrote this text, I constantly dialogued with his work as well as repeatedly asked myself: What would he have said? How would he have addressed these questions?

The relations between law and history are quite old. It is often argued that, although the realization that laws change over time reaches back to antiquity, the first inquiry that resembles present-day historical epistemology was popularized by legal humanists who in the fifteenth and sixteenth centuries set out to criticize contemporary jurists for their understanding and use of Roman law.[71] Disputing the operative premise that Roman law could serve as a matrix for a universal and atemporal science of law, legal humanists suggested instead that Roman law was a relic of the past. To study it properly, it would be necessary to develop philological and historical methods aimed

71 A very brief introduction to some of these developments can be found in P. Stein, "Legal Humanism and Legal Science," *Tijdschrift voor Rechtsgeschiedenis* 54(4) (1986), 297–306. Recent scholarship on humanism tends to question some of these conclusions, for example, B. H. Stolte, "Text and Commentary: Legal Humanism," in K. Enenkel and H. Nellen (eds.), *Neo-Latin Commentaries and the Management of Knowledge in the Late Middle Ages and the Early Modern Period (1400–1700)* (Leuven: Leuven University Press, 2012), 387–406; P. Gilli, "Humanisme juridique et science du droit au XV siècle. Tensions compétitives au sein des élites lettrées et réorganisation du champ politique," *Revue de Synthèse* 130(4) (2009), 571–93; and P. J. du Plessis and J. W. Cairns (eds.), *Reassessing Legal Humanism and Its Claims: Petere Fontes?* (Edinburgh: Edinburgh University Press, 2016).

at reconstructing the original texts while also devising ways to restore their original meaning. Among the methods legal humanists proposed was considering non-legal sources and even artifacts, studying the evolution of language, as well as imagining how readers and practitioners of that time might have comprehended things. Convinced that law was the product of society and therefore must be studied in both its temporal and geographical contexts, legal humanists also turned to observe the local customary law, which they argued was the true law of their communities. Thereafter, and using legal history both as a guide and weapon, legal humanists described Europe not only as a space for a *ius commune* but also as a patchwork of local legal solutions dependent on the time, place, and speakers involved. They envisioned a peaceful coexistence between a universal science of law and a plethora of specific arrangements that were constantly elaborated, changed, or abandoned by multiple individuals, groups, and communities who sought to define the rules that should guide their interactions.

In their quest to study law properly, fifteenth- and sixteenth-century legal humanists thus contributed to the development of historical methods. Yet, relations between law and history are not only the outcome of scholarly pursuits; they are also embedded in the very nature of juridical practice. More often than not, this practice centers on understanding the legal consequences of something that had already transpired. Evaluating the juridical meaning of both existing norms and past events necessarily involves a certain historical reconstruction, yet jurists and judges who seek to establish how to read certain texts, or how to appraise certain actions, do so in ways both similar and dissimilar to historians.[72] While the similarities are quite clear – attention to words, detail, context, and circumstances – so too are the differences. Jurists and judges have a practical reason to engage in evaluating historical evidence, namely, the need to solve conflicts. It is legitimate for them, indeed frequently even required, that they ignore all that is not essential to attaining that end. What they seek to uncover is mostly a "usable past," which can serve as a resource in the present. To draw conclusions, jurists often selectively piece together, reorganize, and reconfigure disparate events that *a priori* are not necessarily related to one another or are connected in ways other

72 The distinction between a juridical and a historical truth has been the object of many studies, perhaps most famous among them, at least for historians, is C. Ginzburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice*, trans. A. Shugaar (London and New York: Verso, 1999). The issue, however, has been the subject of debate for a long time. See, for example, P. Calamendrei, *Il giudice e lo storico* (Milan: Giuffrè Editore, 1939).

than what they postulate. In other words, their reconstructions are not necessarily intended to uncover the truth, the whole truth, and nothing but the truth, but instead to achieve a certain goal. Jurists also inhabit an adversarial culture. There, it is completely normal to claim authority over certain interpretations, arguing that they and *only* they are correct. This same attitude is applied to their observations of the past, ascribing certainty and singularity where none existed. While historians of course also make decisions about what to include and what to ignore, or how to read what they uncover, their aim is not the attainment of a specific result but the expansion of knowledge. The conclusions and findings of their analyses normally follow the same epistemic rationale: They are not considered definitive, but instead open to reexamination, discussion, and change.[73] Most historians admit the possibility of a multiplicity of responses, and they are not particularly alarmed by ambiguity, by questions that cannot be answered, or that the past may not tell us all that we need in the present.

Jurists of course also intervene in history by writing it through pleading in the courts or delivering judicial decisions. A judge that orders the correction of a report elaborated by a truth commission, for example, deleting the name of an individual who is listed as having committed human rights violations, interferes with what is knowable and what is considered to have been proven.[74] Judges also intervene in the production of history when they sit in commissions or trials in which they adjudicate conflicts and determine what had transpired. In all these cases, the proceedings they conduct not only supply evidence that historians can use but also rulings that often illuminate – even determine, in the eyes of many – what the past contained. Juridical reconstruction of history can also be implicit, for example, when judges take

73 R. G. Ortiz Treviño, "Algo acerca del oficio del historiador del derecho," *Anuario Mexicano de Historia del Derecho* 18 (2006), 463–85, at 256–59. A (relatively) early reflection on these differences is included in J. Sankey, "The Historian and the Lawyer. Their Aims and their Methods," *History* 21(82) (1936), 97–108. I found the following most illuminating: J. M. Balkin, "Lawyers and Historians Argue About the Constitution," *Constitutional Commentary* 35 (2020), 345–400. The term "usable past" is discussed by Balkin, for example at 383–400.

74 Decision dated Recife (Brazil), Apr. 8, 2021, of the Federal Judge of 6-Vara-Pe, Hélio Silvio Querém Campos, in *Marcos Olinto Ovais de Sousa and Maria Fernanda Novais de Souza Cavalcanti v. União Federal* – União, Processo no. 0824561-44.2019.4.05.8300. The decision is available online at https://averdade.org.br/novo/wp-content/uploads/2022/02/5decd83d-jfpe.pdf (last accessed Mar. 15, 2022). On whether courts should or can decide on which past is verified, also see the most recent C. Douzinas, "History Trials: Can Law Decide History?," *The Annual Review of Law and Social Sciences* 8 (2012), 273–89; and G. Resta and V. Zeno-Zencovich, "Judicial 'Truth' and Historical 'Truth': The Case of the Ardeatine Caves Massacre," *Law and History Review* 31(4) (2013), 843–86.

"judicial notice" of allegations that involve assumptions about the past or that interpret the past in certain ways that are said to be consensual.[75] Though supposedly encapsulating common knowledge, controversies among judges, for example, regarding the history of discrimination, the meaning of family over time, or the legacies of WWII, demonstrate that such assumptions and interpretations are not uncontentious.

Expressed in different terms, behind all judicial decisions lies a narrative – implicit or explicit – on how things came to be as well as which lessons have the power to influence our vision of the past and can, therefore, be mobilized to support present-day agendas.[76] The writing of history by jurists and judges is particularly daunting because they are often ill-equipped to evaluate historical events, yet their rulings provide these events with a definitive narrative that can potentially acquire a normative value.[77]

Despite the enormous differences between historical and legal pursuits, many early historians were jurists, and they employed the techniques of exegesis, discovery, and reconstruction they acquired by studying and practicing law. Though this holds true in many different places, it is particularly illustrative of how scholarly engagement with Spanish American history has developed. In Spain, for example, many consider Eduardo Hinojosa y Naveros (1852–1919) to be the founder of historical studies. Hinojosa also trained many of those who would later go on to become historians of Spanish America. Nevertheless, Hinojosa was a jurist whose work was not particularly focused on legal questions.[78] Along similar lines, the first university chairs dedicated to the history of the Americas were established in the early twentieth

75 "Judicial notice" includes knowledge that parties do not have to prove because it is supposed to be common to all members of society, for example, what day of the week it is or the location of the court. However, it can also include more questionable facts such as the date on which colonialism ended or who was involved in a certain war. On these and other issues, see D. Barak-Erez, "History and Memory in Constitutional Adjudication," *Federal Law Review* 45(1) (2017), 1–16.

76 J. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011), 3.

77 Presently, there is a significant debate among historians, for example, regarding how the US Supreme Court implements the doctrine of "originalism," which states that the US federal constitution should be interpreted according to the intentions of its authors. This doctrine requires that judges reconstruct what late eighteenth-century authors meant, as well as the context in which they operated. On their failure (perhaps refusal) to do so correctly, see, for example, the criticism by J. N. Rakove, "The Second Amendment: The Highest State of Originalism," *Chicago-Kent Law Review* 76(1) (2000), 103–66; and R. Piller, "History in the Making: Why Courts are Ill-Equipped to Employ Originalism," *Review of Litigation* 34(1) (2015), 187–212.

78 J. Sánchez-Arcilla Bernal, "Alfonso García-Gallo: Aportaciones metodológicas y conceptuales a la historia del derecho," *Cuadernos de Historia del Derecho* 18 (2011), 13–49, at 19–20.

century. These chairs were either situated in law faculties or their holders, among them Antonio Ballesteros Beretta, Rafael Altamira y Crevea, and José María Ots Capdequi, taught both history and law.[79] These intellectuals were also responsible for expanding the legal history of Spain (*Historia del derecho español*) to include colonial law – a law that eventually came to be identified as *derecho indiano* (see Section 1.1).

Developments in early twentieth-century Spanish America were not very distinct. The Argentinean Ricardo Levene, for example, held the chair of history before switching to legal history; the Mexican Silvio Zavala, who studied law, spent most of his career among historians; and the Brazilian Salomão de Vasconcellos, who trained as a lawyer but went on to become a prominent historian. This generation of foundational scholars, all trained in law, did not distinguish between history and legal history. Regardless of whether they were working in law faculties, history departments, studied history, or studied law, they used similar sources and pursued similar objectives to such an extent that it is often difficult to ascertain their formal education and field to which they belonged.[80]

Later generations did not continue pursuing this initial convergence of disciplines. Legal historians writing on this parting of ways usually blamed historians for having abandoned the law in favor of social and economic history, which, whether under the spell of the *Annales* school or Marxism, portrayed law as a stale and irrelevant pursuit. Historians, they argued, moved away from legal and political history, adopted quantitative methods, and embraced longer temporal periods, moves that together often resulted in the removal

79 V. Tau Anzoátegui, "Instituciones y derecho indiano en una renovada historia de América," *Anuario de Estudios Americanos* 75(2) (2018), 435–58, at 438–39; and F. Tomás y Valiente, "Escuelas e historiografía en la historia del derecho español (1960–1985)," in B. Clavero, P. Grossi, and F. Tomás y Valiente (eds.), *Hispania. Entre derechos propios y derechos nacionales. Atti dell'incontro di studio, Firenze-Lucca, 25, 26, 27 maggio 1989* (Milan: Giuffrè Editore, 1990), vol. I, 11–46, at 13 and 17–18.

80 On the influence of Spanish scholars on the development of Spanish American legal history, see, for example, J. del Arenal Fenochio, "De Altamira a Grossi: presencia de historiadores extranjeros del derecho en México," *Historia Mexicana* 55(4) (2006), 1467–95; P. Mijangos y González, *El Nuevo Pasado Jurídico mexicano. Una revisión de la historiografía jurídica mexicana durante los últimos 20 años* (Madrid: Universidad Carlos III, 2011), for example, at 19–23; and C. Villegas del Castillo, "Historia y Derecho: La interdisciplinariedad del derecho y los retos de la historia del derecho," *Revista de Derecho Público* 22 (2009), 3–22, at 9–10 who also mentions Colombian historians who had a law degree at 7. In Spain, Antonio Muro, who was trained in law, initially dedicated his attention to non-legal history: A. García-Gallo, "Antonio Muro. Historiador del derecho indiano," *Anuario de Estudios Americanos* 22 (1974), XXI–XXXIX. The same was true of many others in Spain, Portugal, and Latin America, for example, M. Habel de Vasconcellos, "Salomão de Vasconcellos. Doctor, Lawyer, Historian," *Americas* 30(5) (1978), 17–20.

of law from their list of research interests. Even if this analysis rings true, it is equally clear that legal historians have also contributed to this estrangement by abandoning history and by producing studies that mainly sought to reconstruct the genealogy of rules and institutions, a genealogy that was generally portrayed as the progressive betterment that led to present-day structures.[81] Conceiving of law in terms of an autonomous field, law faculties in Latin America, Spain, and Portugal monopolized legal history, and its practitioners were mainly interested in what some have identified as an "internal" history that looked at the law as if it had no "external" history, for example, its relationship to society.

Reacting to this growing separation, from the late 1960s onwards, many Latin American, Spanish, and Portuguese legal historians expressed their commitment to another type of legal history that also doubled as social, institutional, and political history.[82] To do so, proponents of these visions advanced a new understanding of what legal history is and ought to be. They called upon jurists to engage with the historicity of the law and appealed to historians to both acknowledge the pervasiveness of law and recognize its particularities. Yet, despite the desire to bring law and history together again, these legal historians never claimed that the two pursuits were one and the same. Instead, and as discussed later, they wanted history to improve the study of law, and the study of law to improve history. They asked questions

81 These attitudes, of course, were not particular to Latin American, Spanish, or Portuguese scholars. See, for example, P. D. Halliday, "Legal History: Taking the Long View," in M. D. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), 323–42, at 325–26.

82 A. M. Hespanha, "Is There a Place for a Separate Legal History? A Broad Review of Recent Developments on Legal Historiography," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 48 (2019), 7–29. Some of these developments are reviewed in the article. These historians responded to the contrary visions that argued that legal history was a juridical rather than a historical science. An example of this debate and its pan-European ramifications can be found in A. García Gallo, "Cuestiones de historiografía jurídica," *Anuario de Historia del Derecho Español* 44 (1974), 741–64; and the responses by F. Tomás y Valiente, "Historia del derecho e historia," in J. J. Carreras Ares, A. Eiras Roel, A. Elorza Domínguez, et al. (eds.), *Once ensayos sobre la historia* (Madrid: Fundación Juan March, 1976), 160–81; and B. Clavero, "La historia del derecho ante la historia social," *Historia. Instituciones. Documentos* 1 (1974), 239–61. The participation of Latin American scholars in these debates is examined in R. M. Fonseca, *Introducción teórica a la historia del derecho*, trans. A. Mora Cañada, R. Ramis Barceló, and M. Martínez Neira (Madrid: Universidad Carlos III, 2012), in particular the chapters on the *Annales* school and Marxism at 71–111; and A. Levaggi, "Consideraciones sobre investigación en historia del derecho," *IUShistoria Investigaciones* 5 (2012), 433–49. On a multidisciplinary vision of the law, also see M. Brutti and A. Somma (eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Global Perspectives on Legal History 11) (Frankfurt am Main: Max-Planck-Institute für europäische Rechtsgeschichte, 2018).

about the nature of legal history, and they advanced reasons for why being familiar with it would be important for both jurists and historians.

The first target identified by this new generation of legal historians was the traditional divide; a division retained by jurists and historians alike and that distinguished "law in the books" from "law in practice." This divide, they argued, was the result of a misunderstanding of how law operates, among other things, because it assumes that law was the same as legislation and restricts its study to state-made normativity. Instead of following such a reductive reading, these legal historians defended the view that their task was to ask what the juridical value of certain phenomena was, what roles did law play in social formation, and how juridical grammar and technology affected reality. They envisioned the study of legal history as a pursuit meant to elucidate how a technology we now identify as "legal" was used to organize, arrange, and rearrange social relations, as well as grant words and actions a normative value that placed them in a hierarchy granting greater protection to some things over others. By employing methods of abstraction, and by constructing similarities and distinctions without ever losing sight of the concrete circumstances and contexts of each case, law's final aim, they argued, is to propose solutions that would guarantee a certain equilibrium between conflict and consensus by legitimizing certain things but not others, or at least not to the same extent. As a result, any study of knowledge production, social practices, or power relations, to mention but three examples, needs to reflect on law (see Sections 1.3 and 1.4 and Chapter 3).

Asking about which actors were involved in each case, their rationale, how divisions and distinctions were constructed, as well as what kinds of answers the law supplied and how prescriptive they were, these legal historians conceived of the legal field as one in which everyone participates to some degree or another. Some actors might exercise more control, possess greater agency, or have a better understanding of how the legal system works, but no one lives outside the law or completely independent of it, not even those at the social extremes: the very privileged and the heavily oppressed.

Criticizing both formalism and statism, these legal historians also rejected legal nationalism, which presupposes that law is the product (and reflection) of a particular community or nation, as the German Historical School had once argued. Like legal humanists before them, they suggested instead that law, though always attentive to local circumstances, was also a technology that crossed political, ethnic, and national borders. Finally, these legal historians argued that law should not be studied as a separate body of norms that are completely autonomous and unrelated to other normative phenomena.

Rather than imposed from the outside (as a statist formalist approach would lead us to believe), or forming a permanent and stable structure from within (as proponents of customary law presented it), they suggested that law, though varying to a great extent across time and geographies, is nonetheless a scaffold that seeks to give structure and meaning to human interactions, as well as acts as a means to arrange and rearrange them.

These views, which reflected a new understanding of the thematic field that legal history must cover, also insisted on the historicity of law. Accordingly, it is insufficient to ask about the historicity of a particular event, piece of legislation, or moment. To understand legal history, we must also consider how the legal context mutated, that is, how the legal framework in which different solutions operated differed over time. The task these legal historians adopted as their own was, therefore, to explain that law as a technology of conflict resolution had a history of its own, and that this history must be uncovered if we are to understand how law interacted with society. For example, medieval and early modern schemes for administrative work, they observed, can best be found in theories of judgment rendering and the history of the family, not in administrative correspondence or in royal decrees. Because the logic of past normative arrangements was so different from our own, to understand how they operated we must consider areas of legal research such as the juridical norms of the domestic sphere (see Section 3.3), religious normativity (see Sections 3.1 and 3.2), the legal valence of friendship and love, or even the jurisprudence tied to the various colors.[83]

Remembering that not only particular solutions but also the legal context constantly mutated would have us ask, to mention yet another example, when did *directum* (the prior term for "law" in many European languages) supersede *ius* (the ancient Roman term) as the most immediate label designating "law"? What can this transition tell us about societal expectations across Europe, where this mutation took place in some areas but not in others? Why was justice (*ius*) tied to direction (*dirigere* as in *directum*) in certain times and places but not in others?[84] How can we understand the radically

83 B. Clavero, *Antidora. Antropología católica de la economía moderna* (Milan: Giuffrè Editore, 1991); A. M. Hespanha, *La gracia del derecho. Economía de la Cultura en la Edad Moderna* (Madrid: Centro de Estudios Constitucionales, 1993); and A. M. Hespanha, "As cores e a instituição da ordem no mundo de antigo regime," in A. Wehling, G. Siqueira, and S. Barbosa (eds.), *História do direito. Entre rupturas, crises e descontinuidades* (Belo Horizonte: Arraes Editores, 2018), 1–18.

84 S. Cruz, *Ius. Decretum (Directum)* (Coimbra: Universidade de Coimbra, 1971). On these issues, also see A. García Gallo, "Ius y derecho," *Anuario de Historia del Derecho Español* 30 (1960), 5–48.

different ways in which certain documents were read over time, such as the emblematic Magna Carta, if we did not appreciate the constantly evolving contexts in which they were interpreted?[85]

These observations were aimed at convincing readers that law itself is not an atemporal or ahistorical construct that could be discussed in the abstract as if it were the same unchanging phenomenon. If we already recognize that the meaning of law can differ from place to place, time to time, and according to who is observing, we must also remember that the role law occupies in society does not remain static, and neither does the precise technology it proposes or what it considers prescriptive.

For this group of scholars, it was particularly important to assert the specific character of the late medieval and early modern law, which they claimed was distinct from our present-day structures, though the opposite is commonly thought to be the case. Distinctiveness was not only tied to the obvious fact that specific solutions were different, but mainly to the fact that the basic assumptions regarding what law is, how it operates, what it is supposed to accomplish, how it pretends to intervene in society, and the relations it has with other normative and cultural spheres were vastly different. Late medieval and early modern law did not dictate solutions (see Sections 3.1 and 3.2); instead, it indicated which questions should be asked and what considerations should be taken into account. What law did, therefore, was to aid in making a just decision by advancing options, explaining variations, and imagining possibilities, all while giving actors a tremendous amount of discretion as to which road they take. In other words, law was a system in which a plurality of options existed, as well as a multiplicity of sources and authorities, all of which were equally valid and none *a priori* superior to the other.

The wish to problematize the past also led this group of legal historians to rebel against portraying it as consisting of "systems" that preceded one another in an orderly fashion.[86] Such a depiction implied a degree of regularity and unity that was largely absent. A "system" presupposed a hierarchy of sources, a clear catalog of values, and/or a singular rationality. Yet, medieval and early modern law featured a casuistic universe. Furthermore, the image of various systems preceding one another portrayed the development of law as a

85 T. Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge: Harvard University Press, 2018), 1–2, 5, and 145–48.

86 V. Tau Anzoátegui, *Casuismo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992); Tomás y Valiente, "Escuelas e historiografía," 29; and Sánchez-Arcilla Bernal, "Alfonso García-Gallo," 26–27 and 30–31.

succession of schools and centers, as in the stereotypical depiction of European law: conceived in Italy, developed in France, and improved in Holland.[87] It also sent historians to "juridical traditions" that were supposed to communicate homogeneity and permanence as well as singularity and distinction when compared to all others. These legal historians argued that such images of the legal past undermined the important role of plurality, interpenetration, flexibility, and constant updating.[88] Proposing abstractions that were perhaps necessary for lawyers in their pursuit of resolving conflicts, they nonetheless entailed a form of violence that imposed on the past our present-day desire for clarity and certitude. Instead of searching for clear answers, legal history must describe the variety of voices, contrasting positions, and alternative proposals that, rather than depicting the past as "the kingdom of what is predetermined," would demonstrate that it was "the theatre of possibilities."[89]

One of the remarkable results of this move to historicize not only legal application but also law itself was, for example, the preoccupation of this group of legal historians with the creation, administration, and imposition of categories. Who had the power to create legal categories? How prescriptive were they and how were they managed? How did the emergence of categories change society and societal processes? Identifying law as an essential instrument for creating, imposing, and debating distinctions between right and wrong, as well as between what could be considered efficient and useless, also led to the obvious observation that the greatest struggle in history was perhaps not so much for social and economic prominence but over the ability to create and impose norms. This, as Foucault would probably have argued, may seem a gentler way to order the world, but as a technique, it was no less powerful and no less violent.[90]

The proponents of these views also took issue with practitioners, whom they accused of anachronistic approaches motivated *not* by ignoring

87 F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen: Vandenhoeck & Ruprecht, 1967), 169.

88 T. Duve, "Tradições jurídicas' e história do direito," in A. Wehling, G. Siqueira, and S. Barbosa (eds.), *História do direito. Entre rupturas, crises e descontinuidades* (Belo Horizonte: Arraes Editores, 2018), 19–41.

89 T. Duve, "Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (16th–17th centuries)," in T. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (Leiden: Brill Nijhoff, 2020), 1–39, at 5–9.

90 A. M. Hespanha, "Sábios e Rústicos. A doce violência da razão jurídica," *Revista Crítica de Ciências Sociais* 25–26 (1988), 31–60; and A. M. Hespanha, *Imbecillitas. As Bem-Aventuranças da Inferioridade nas Sociedades do Antigo Regime* (São Paulo: Annablume Editora, 2012).

change over time – most of them knew that laws and practices constantly mutated – but by the refusal to grant sufficient attention to what else had changed. They suggested that many jurists and historians employed a retrospective quest that mostly searched the present in the past by tracing its "roots" or "origins." Others went to extraordinary lengths to justify or legitimize their preference of present-day arrangements, in some cases rendering the past incomprehensible or even ridiculous. Either way, this regressive history, which made the past look like the present, might have questioned institutions, laws, and practices, but it did not observe the legal system itself. By going down this road, proponents of this type of history argued for continuity where none existed, and they ignored all that was no longer relevant to the present or was simply too strange or too counterintuitive to digest.

While pleading that we remember that the legal framework, and not only individual solutions, was subject to mutation, these legal historians also advocated the need to take law seriously via a close examination of its logic. Law, they argued, may use words that seem comprehensible, but like all technologies that seek to influence reality, such words carry a tremendous amount of baggage – and this baggage needs to be taken into consideration when examining legal language. In other words, though it is essential to understand the conditions that led to the emergence of certain terms, ideas, categories, or practices, it is also vital to consider that all of them have the consistency of loose sand. Like all other words, and probably more so than most words, legal terms appear immobile and immune to change; however, in reality, they are constantly shifting.

Take, for example, an apparently straightforward term like "family." While families may very well have always existed, the definition of a "family" has dramatically changed from a voluntary association of individuals in antiquity to structures we now conceive as based on blood relations. The meaning and extension of blood relations also constantly mutated: Whose blood mattered, how, why, and to what degree? Over time, law recognized radically different configurations of "family," applying to them a series of changing rights and obligations as well as intervening in them to various extents and in a multiplicity of ways. The literal continuity of terms such as family, therefore, masked deep and constant changes, with "a radical discontinuity of sense lurking beneath the ostensible uniformity of worlds."[91] To rescue family

91 A. M. Hespanha, "Legal History and Legal Education," *Rechtsgeschichte – Legal History* 4 (2004), 41–56, at 43.

law, in other words, it is insufficient to show that rules regarding the family changed. It is necessary to inquire as to what a family was, who posed the question, why, when, where did the multiplicity of answers originate, and how prescriptive or discretionary were the answers.

If "family" as a right and obligation-bearing entity was a completely different affair depending on the place and time, to rescue its history would require not only knowing a great deal about the location, period, and actors but also take into consideration how law intervened in such debates by giving different factual constellations a juridical meaning. This meaning depended on facts, but it mainly operates by attributing to these facts a normative value and by asking about their juridical significance. By using the persuasive power of language, law employs words to obtain certain goals. Though law also uses coercion and violence, it mostly seeks to convince by using language – which is why, by definition, it always includes a variety of options and involves lengthy debates that the parties use to demonstrate why they are right and the others are wrong.

To understand how the term "family" was "normalized" in the sense that at different moments in time, it was granted different normative meanings, one would have to reconstruct these debates. Family, in other words, may be a term we presently take for granted, or some consider a natural institution, but if we keep in mind that in other periods it was conceived as a constructed, artificial unit, we maybe able to liberate ourselves from considering its existence or meaning a forgone conclusion. This would also remind us that, because law has a normalizing effect, and because this effect is always part of broader discussions, the terms it uses are an open sesame that invites scholars to unfold what is otherwise unseen. Family operates in this way, but so do many other placeholders such as intention, customs, immemoriality, or consent.

Of course, one could argue that these placeholders only operate within a restricted field established by jurists or juridical experts. Yet this conclusion would defy all that we observe in society – both past and present. In this transformative process of facts to phenomena with normative value, particular traditions and practices matter, and they matter not only to jurists but also to contemporaries who use the law. How else can we explain the claims of illiterate peasants that they had to resist incursions on their territory by neighbors or else their silence would be construed as consent?[92] Alternatively, how

92 T. Herzog, *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Cambridge: Harvard University Press, 2015), 8, 34, 37–48, 106–7, 139–40, 203, and 237.

can we understand why a plethora of individuals, unable to prove what they wanted, invoked immemoriality? They knew that it was a powerful tool even if they did not know why.[93]

In this quest to refashion legal history, these Latin American, Spanish, and Portuguese scholars refuted the claim that the history of ideas was a legal history or that legal historians can stop at describing how norms evolved. They lamented the propensity by which actors invoke history to make claims in the present, and they expressed a desire for a legal history that would transcend national boundaries and be guided by the entities that were relevant in the past, not the present. They would ask questions such as: Was there a colonial law or is this law tied to our current needs and therefore a fiction of our imagination? Would it not be more appropriate to ask about transfers, translations, and exchanges as well as follow practices and processes of analysis and determination as they crossed the oceans than create categories *a priori*? (see Sections 1.3, 1.4, and 3.1 and Chapter 4).

If how to study legal history was a major issue for these legal historians, another involved the role it should play. In the past, these scholars argued, legal history mainly served either to strategically legitimize or criticize existing structures. Legal humanists strove to employ the power of local law against both universalistic tendencies and the increasing powers of kings. In nineteenth-century Germany, legal history served to justify as well as facilitate both German unification and debates regarding the character of German law. The instrumentalization of history to support political projects is, of course, a very common phenomenon. However, in the case of legal history, they argued, it has a particularly pernicious effect because this use reinforced the tendencies to portray legal evolution as linear and foretold. It often transformed the past into a repository of either better times to be recaptured or horrible times to be avoided.[94]

Rather than justifying or explaining the present – as many have done in the past – these scholars encouraged practitioners to transform legal history into a space of critical observation. They argued that recognizing legal historicity and the extreme alterity of the past should enable us to imagine alternative

93 T. Herzog, "Immemorial (and Native) Customs in Early Modernity: Europe and the Americas," *Comparative Legal History* 9(1) (2021), 1–53, 2, 22–34, 36, and 46–47.

94 Mijangos y González, *El Nuevo Pasado*, 23–25; Fonseca, *Introducción teórica*, 65–66; and S. S. Staut Júnior, "Direito e história: Algumas preocupações a partir da obra de António Manuel Hespanha," in A. Peixoto de Souza (ed.), *Estudos de história e historiografia do direito em homenagem ao professor António Manuel Hespanha* (Curitiba and Madrid: Editora Intersaberes, Marcial Pons, 2020), 31–56, at 36–42.

and unexpected routes in the present as well.[95] Instead of looking into a mirror, legal history could force us to look at familiar things from a different perspective – one that would question, rather than confirm, our present-day biases. For legal history to do so, we must seek not only to record but also to explain in the etymological sense of *ex-plicare*: the unfolding and revealing of hidden aspects that were either too obvious or too consensual for contemporaries to even mention, let alone elucidate.[96] According to this usage, it would be often more important to ask questions than to answer them, to express doubts than to look for certainties.[97] Thereafter, the goal would be to "make and unmake history" (*fazer e desfazer a história*) while also constructing and deconstructing the law.[98] This quest would transform the study of sources into an instrument rather than an end in and of itself.[99] The same could be said of episodes and events.

The extent to which these calls have been heeded remains to be seen. Though communication between jurists, historians, and legal historians has intensified in recent decades, and indeed legal history seems to be everywhere, formalist legal history remains popular, and there are still plenty of books that describe the legal past with certitude, reconstructing rules rather than possibilities, norms rather than discussions.[100] Meanwhile, many historians continue to either dismiss law altogether or consider it an external scaffolding rather than an internal spinal cord of all social interaction.[101] Perceiving law as a superstructure and believing that the social, political, or economic could be reconstructed by ignoring or at least marginalizing the law, many historians, who are otherwise extremely sensitive to historical contexts, nevertheless fail to contextualize

95 G. Silveira Siqueira, "História do direito como um olhar para o futuro: entre as experiências jurídicas e os horizontes de expectativas," in A. Peixoto de Souza (ed.), *Estudos de história e historiografia do direito em homenagem ao professor António Manuel Hespanha* (Curitiba and Madrid: Editora Intersaberes, Marcial Pons, 2020), 99–211.

96 Fonseca, *Introducción teórica*, for example, 18, 24, and 38.

97 J. Vallejo, "En busca de audiencias perdidas: a propósito de Bartolomé Clavero, 'Sevilla, Concejo y Audiencia: invitación a sus Ordenanzas de Justicia,' estudio preliminar (pp. 5–95) de *Ordenanzas de la Real Audiencia de Sevilla*, edición facsímil de las de 1603–1632, Sevilla, Audiencia/Diputación/Universidad/Fundación El Monte, 1995, 1001 pp.," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 25(1) (1996), 711–27, at 715–16.

98 Â. Barreto Xavier, "António Manuel Hespanha: Fazer e desfazer a história," *Cuadernos de Historia Moderna* 44(2) (2019), 689–91. "Fazer e desfazer a história" was also the subtitle of a history journal with which A. M. Hespanha was long associated.

99 Clavero, "La historia del derecho," 247.

100 For example, I. Sánchez Bella, A. de la Hera, and C. Diaz Rementería, *Historia del derecho indiano* (Madrid: Editorial Mapfre, 1992); and M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004).

101 From that perspective, little has changed since the 1970s when Tomás y Valiente lamented these attitudes: F. Tomás y Valiente, "Historia del derecho," 166–67; or in 2005 when A. M. Hespanha denounced them, *Cultura jurídica europeia: síntese de um milênio* (Florianópolis: Fundação Boiteux, 2005), 45.

and historicize the law. They adhere to a very narrow understanding of the law, equating it with present-day structures, or they implicitly use law as a synonym for state legislation in periods that, paradoxically, predated the emergence of states. Many also frequently assume that law prescribes solutions, that the words it employs have an obvious meaning, or they imagine that interpreting law to one's advantage is a form of resistance. As a result, otherwise incredibly respectful historians can confuse ancient Roman law with the Roman law that Europeans brought with them to the Americas (the revived medieval Roman law that formed part of the *ius commune* and that was largely distinct from ancient Roman law). Or, alternatively, they arrive at conclusions pointing out that certain actors (but not others) used the law as a "resource" rather than a "script" or that actors could choose and pick what to follow.[102] They suggest that the distinctions we currently maintain between state and international law (or inter-polity) had always been meaningful, and they express surprise when "internal" law affects "external" developments.[103] Many historians also routinely insist on a gap between law and its application, that is, "law in the books" versus "law in action." This allows them to see lawlessness and corruption or, on the contrary, agency where none exists. Where others see a soccer match, they only see many individuals running aimlessly after a ball.[104]

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1.3 How Is Law Produced?

THOMAS DUVE

If legal history is the history of "law," the question as to what is meant by "law" needs to be addressed. Philosophers have tried to answer this question for centuries. If defining law today proves difficult, then finding a concept

102 L. Benton and B. Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28(1) (2010), 1–38; and L. Benton, "Possessing Empire. Iberian Claims and International Law," in S. Belmessous (ed.), *Native Claims: Indigenous Law Against Empire, 1500–1920* (Oxford: Oxford University Press, 2012), 19–40, at 19 and 21–22.

103 For a particularly critical take on such anachronistic assumptions, see M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021).

104 See my response to a forum discussing my text *Frontiers of Possession* in M. Barbot, A. Stopani, and T. Herzog, "A proposito di 'Frontiers of Possession' di Tamar Herzog," *Quaderni Storici* 51(2) (2016), 538–87, at 586. I have to thank Thomas Duve for this image, which he included in a review of the book: T. Duve, "Grenzenlose Räume," *Rechtsgeschichte – Legal History* 23 (2015), 307–8.