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Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires in the 16th – 17th Centuries

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Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires in the 16th – 17th Centuries*

Thomas Duve

I. Introduction

Normative orders are a social and cultural construction, produced and transformed in a continuous process by a multitude of actors. They are created, modified and stabilised by the production, storage, processing, legitimisation – and thus also by the delegitimation and forgetting – of normative information. This process of continuous translation of normative information into normative knowledge results in historical normative orders which take their shape through the normative information available, through the contingent configuration of actors and actants, the power relations between them, as well as through the social, cultural and material conditions peculiar to a concrete historical setting.

Legal historical and general historical research have increasingly provided us with information about many of these elements. Due to this, we can aspire to understand why a normative order has historically become what it is, why, for example, certain regimes of governance, diversity, dependency etc., have emerged in a more or less specific space and at a more or less specific time. Reconstructing the elements that make up these historical regimes, how they interact and change and understanding their transformation and intertwinement in time is at the core of legal historical research.

This book, however, does not deal with any of these specific historical regimes.¹ It does not reconstruct the history of forced labour, property or other institutions as historical forma-

* This article is the introductory chapter to the upcoming collective volume “Knowledge of the pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America”, edited by Thomas Duve and Otto Danwerth. Names in square brackets refer to the other authors in the same volume. I am grateful for the comments of the members of the research group “The knowledge of the pragmatici”, to Nicole Pasakarnis, Christian Pogies and Alexandra Woods for their help in editing this text and their comments and to Tamar Herzog for her suggestions.

¹ The term ‘historical regime’ is understood here as a more or less stabilised historical formation of specific practices, rules, principles and norms in a certain field of action. This definition takes up the conceptual debate going back to KRASNER (1983), that was further developed in various cultural and social scientific disciplines. See on this the survey of LIST (2007).

tions in the 16th or 17th century Iberian worlds. It focuses on a different aspect: understanding how the production of normative knowledge in the early modern Ibero-American colonial world worked as such and what role a literary genre, conceptualised in this book as ‘pragmatic normative literature’, played in this process. Phrased in knowledge-historical terms, the object of this book is the reconstruction of an historical regime of knowledge production in the field of normativity and the functionality of a specific medium therein.²

Due to the need to reduce the scale of observation and considering the importance of normative knowledge from the field of religion in the 16th and 17th century Ibero-American worlds, most of the chapters of this book study pragmatic literature related to moral theology and canon law and its making and use by theologians, missionaries and Church officials. They provide insights into the fundamental role actors from the religious field had in establishing something like a colonial normative literacy, a capacity of managing a basic understanding of the rules of colonial social life.³ They can thus help to understand how normative knowledge reached a wider audience and was translated in everyday interactions, a fundamental question of colonial legal history that often remains unanswered if we focus only on action or patterns of behaviour without asking for the underlying knowledge. In this sense, they are, just like the whole volume, a contribution to a broader intellectual project aiming to understand Iberian colonial legal history as part of an historical process of ‘glocal’ knowledge production, driven by different, flexible and overlapping epistemic communities and communities of practice with their own communicative spheres, with special emphasis on normative knowledge produced by actors from the religious field.⁴

² The ‘historical regime of knowledge production in the field of normativity’ can be understood as a more or less stabilised historical formation of specific practices, rules, principles and norms of producing normative knowledge. This definition takes up and specifies the definition of ‘knowledge regimes’, developed by WEHLING (2007), 704. See on knowledge regimes also BÖSCHEN (2016). In general terms, we have opted for the concept ‘historical regimes of knowledge’ and not for ‘Wissenskulturen’ discussed especially in German academia in the 1990s because of the proximity of the debate about ‘knowledge regime’ to the field of historical epistemology and praxeology, developed not least in the history of science. For a survey of the use of ‘Wissenskulturen’, see ZITTEL (2014). On ‘legal knowledge’ see the inspiring observations of James Boyd White, describing legal knowledge “as an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language”, WHITE (2002), 1399. On the reasons why we prefer to speak of “normative” knowledge and not “legal knowledge” see from a legal theoretical perspective MÖLLERS (2015) and from a legal historical perspective DUVE (2017b).

³ See for this aspect recently the contributions in OWENSBY/ROSS (eds.) (2018).

⁴ See for this perspective DUVE (2011), DUVE (2015); it also underlies the collective volume dedicated to Salamanca as a phenomena of global knowledge production, to be published in 2020: DUVE et al. (eds.) (forthcoming). It is part of an attempt to set European legal history into a global perspective, see with further references DUVE (2018a); DUVE (2017a). From the perspective of the history of knowledge, important contributions have been developed by Jürgen Renn, especially in the volume RENN (2012). On the relevance and potential for interaction between global legal history and history of knowledge see RENN (2014). On the methodological assumptions underlying the idea of “communicative spheres” close to what is called here “communities of practice” and “epistemic communities” see HESPANHA (2018).

The aim of this chapter is to introduce some basic features of this historical regime of knowledge production, to showcase how legal history could be seen as a process of knowledge production and to suggest a definition of ‘pragmatic normative literature’ as one important medium in this specific historical regime.⁵ It therefore starts with an attempt to present the legal history of the Iberian empires as part of a legal tradition that can be understood as a huge diachronic process of intertextuality (1), a long history of reiterating acts of translation of normative information into normative knowledge (2). It sketches out why normative knowledge produced by religious actors was of overwhelming significance within the knowledge economy of the 16th and 17th century Iberian empires and how practical theology, normative practices and pragmatic literature were intertwined (3, 4). From this reconstruction of certain basic characteristics, it is possible to suggest a definition of ‘pragmatic normative literature’ (5), to summarise the state of the art on the media comprised in this genre in the historiography of law, canon law and moral theology (6) and to conclude with some remarks on why pragmatic literature might have been of special significance for governing an empire (7).

II. Legal history as a process of diachronic intertextuality

Legal history in Europe can be interpreted as a huge process of diachronic translation of normative information and thus also as a history of recursive processes of closure and differentiation of bodies of normative knowledge. Although inseparable from the secular sphere, the Church, her institutions and personnel and the media produced by them were perhaps the most important drivers in this process. Centuries of research have been dedicated to the reconstruction of this history, often presented as the formation of a distinct western legal tradition. Whereas this history has traditionally been written with a clear focus on the rediscovery of Roman law in the Middle Ages and seen as a cultural-historical process of scientification, secularisation and professionalisation that led to modern statehood, in the last three decades important contributions have emphasised the fundamental role of canon law, Church actors and Religion in this history.⁶

⁵ For a general introduction into the field ‘history of knowledge’ see BURKE (2015) with further references. For a good introduction into the discussion about the relation between a history of science and a history of knowledge, as well as into the concepts of ‘knowledge’ see RENN (2015); Lorraine Daston reflects about risks and opportunities of the opening of history of science towards a history of knowledge which could, *mutatis mutandis*, also apply to the legal historical field, DASTON (2017). A good introduction is also MÜLLER-WILLE et al. (2017).

⁶ Due to the vast period covered and the introductory character of this chapter, bibliographical references have to be kept to a minimum, especially on questions of method and specific references to pragmatic literature. For a general outline of Western or European legal history and, despite their shortcomings resulting from a Eurocentric perspective as well as their focus on the learned law tradition and the need to reduce complexity, the masterly accounts of WIEACKER (1996); GROSSI (2010); BERMAN (1983) provide

Without being able to engage deeper into this large and complex history, it might be sufficient for the purpose of this chapter to point out that it was, not least, the continuous updating through selection and addition in an epistemic network that guaranteed the identity and, simultaneously, the dynamics and thus functionality of these normative orders through time.

Already in the early medieval legal cultures, built around a smaller amount of written texts and produced in complex constellations with orality, intertextuality was so strong that some of these ‘living texts’ have been called “mutating monsters”⁷. However, as time went on, more and more new normative knowledge was produced and stored in writing so that the body of accessible normativity continuously grew. By the 11th century, at the latest, theology and law had thus begun to develop a different attitude towards the legacy of these authoritative texts. People undoubtedly still felt bound by the decisions of the past, but they approached them in ways that are commonly seen as the beginning of legal scholarship: new intellectual strategies for coping with the seemingly contradictory parts of the tradition, for example, by using the technique of distinction, were accompanied by the use of new formats and new literary genres, a new organisation of knowledge through a non-chronological order, new finding devices, paratexts etc., all having important effects on the interpretation of the content.

In addition to the constant growth of the existing normative knowledge due to its accumulation over time and despite some losses and forgetting of normativity, the increasingly complex texts with their multiple historical layers – and now also interpretations – became more easily available. Already in the late Middle Ages, the existing as well as new normative texts (the so-called *ius novum*) were copied in increasing numbers due to novel forms of production (such as the *pecia* system) and the general passage “from memory to written record”⁸. Manuscripts were used at the many newly founded universities and by a growing number of professionals, stored in libraries and handed over from generation to generation. In other words, the mass of normative information that could be used for producing new normative knowledge became ever larger, the margins of flexibility grew and many attempts of coping with this avalanche of information produced new media in which this information could be stored – and multiplied.

With the use of the printing press, this process of ‘looping and feedback’ of normative information gained even more momentum, not least because the so-called media revolution coincided with other major developments in late 15th and 16th century Europe such as Eu-

the reader with a good introduction into the field. With special attention to the religious dimension and the practice of administering justice, see PRODI (2000); HESPANHA (2012) and HERZOG (2018) have presented fresh views on European legal history, including the colonial dimensions. For a first orientation, see also the different chapters in PIHLAJAMÄKI et al. (eds.) (2018). As for the so-called *Derecho indiano*, the colonial legal history of Spanish-America, the best introduction into its rationality and practices is TAU ANZOÁTEGUI (1992); for the Portuguese empire see HESPANHA (2015); HESPANHA (2019). For a comparative survey of the Hispanic and the Portuguese historiography, see HESPANHA (2017). The combination of translation with an evolutionary perspective presented here is not least indebted to the writings of H.P. Glenn and his conceptualisation of ‘legal tradition’, see on this more extensively DUVE (2018).

⁷ FIREY (2010).

⁸ CLANCHY (1993).

ropean expansions, reformations and the emergence of the premodern state. Both Catholic and Protestant scholars now examined the normative knowledge stemming from tradition, whether in theology or in canon law, and prepared ever-new foundational works as well as summaries of their worldviews, their *confessions*, also in the field of law. In part due to this confessionalisation, new universities were founded in many places in Europe and the number of university students increased in large part to supply the growing need for personnel in the huge administrative apparatuses that emerged. Not least in the Iberian monarchies, institutions of governance grew and new practices emerged as a response to imperial dimensions; the same applies to the Roman Curia and the religious orders that became ‘global players’.

The European expansions to other continents and its manifold consequences like increasing trade, the need for imperial governance and massive missionary activities, but also the professionalisation in the administration of justice, demanded reproducible compilations of normative knowledge such as confessional and catechetical literature as well as basic information on (canon) law. The mission also brought new intellectual challenges, including questions on how to deal with indigenous peoples and their laws and beliefs, which were unknown to the Catholic world and different from the established categories of *infideles*. These questions motivated many authors and institutions on both sides of the Atlantic, and thereafter in the Pacific parts of the Empires, to edit new texts, drawing on and transforming existing literary traditions both in Europe and in the Americas, as [Bragagnolo], [Egío] and [Honores] illustrate. Bishops [Rex Galindo] and Church assemblies, in particular the extraordinarily important Third Provincial Councils of Lima (1582/83) and Mexico (1585), saw it as their special responsibility to draft normative texts that were relevant to their diocese and oriented towards the needs of practice. At the same time, they had to respond to the important dogmatic and legislative production carried out in Trent and its intellectual environment. The Third Mexican Provincial Council, for example, produced not only canons, but also one handbook for confessors, three catechisms and a *rituale*, a book that provided all the information required by a priest for his performance of liturgical rites [Moutin]. These pragmatic texts often referred to the need to integrate the reforms discussed in Trent, many of which continued and were implemented after the closure of the Council in 1563.

These examples draw our attention to the expansion of the normative order of the Catholic Church and, at the same time, the need to adapt, clarify and select the relevant normative knowledge for particular areas or groups within this growing Catholic world. In more abstract terms: we can observe that, with the nearly contemporary European expansion and the media revolution, a growing variety of epistemic communities produced bodies of normative knowledge, drawing on the existing texts, modifying or interpreting them, often with specific communities of practice in mind. The epistemic network now spanned over larger territories and the variety of situations led to increasing differentiation. Thus, the so-called ‘legal pluralism’ inherent to medieval and early modern European law became even more complex: the attempt to provide diverse communities of practice with adequate tools for their task accelerated the continuous processes of differentiation within the overlapping normative orders present in the Catholic world. For example, members of powerful religious orders

like the Dominicans or Jesuits followed different opinions on issues of huge practical importance such as usury or restitution. In the same vein, Church Provinces like those of Peru and Mexico started to develop distinct legal politics, for example, with regard to the inclusion or exclusion of indigenous and mestizo populations in the clergy. The specific circumstances of the Americas or the Asian parts of the monarchies led actors to deviate from solutions established in Europe, sustaining that the different circumstances required new solutions to old problems and that these needed specific knowledge that could only be acquired in practice. This is what, for example, the first bishop of Manila, the Dominican friar Domingo de Salazar who had lived for decades in Mexico before arriving in the Philippines, meant when he wrote to the emperor in 1582 that, even if so many excellent advisors from all disciplines served at the Court, to adequately decide over issues of the Indies there is no doubt that “it is necessary to have been there, and not only a few years”⁹.

However, even the differentiation, localisations and specifications resulting from this globalisation of the Church and its institutions and the attempt to adapt their normative knowledge to the requirements of each place did not cause a closure of the different legal regimes that emerged. On the contrary, the need to actualise the body of normative knowledge and to answer concrete problems opened these legal regimes up to normative knowledge coming from different fields, regions or regulatory bodies. Mutual observation of what was done in other parts of the polycentric Spanish monarchy or within the widely spread Portuguese Empire was a frequent practice and, as a consequence, where a clear solution lacked in one place, it was possible to argue that a practice that was legitimate in Panamá might also serve for Lima or for México and vice versa. Moreover, as customs were considered a source of law, a *lex non scripta*, and these customs were continuously (re)created and later recognised, daily practice produced new normative knowledge that could eventually be used in other cases as well, enriching the body of normative knowledge upon which actors could draw. Most importantly, kings and popes, intermediate regulatory bodies as well as local officials constantly produced new *reales cédulas*, *provisiones*, bulls, *breves* etc., often directed to specific recipients, but known and taken into account elsewhere. To offer an idea about the productivity of these regulatory bodies, it might be sufficient to keep in mind that the early Spanish recopiations of royal decisions regarding the affairs of the Indies from the late 16th and early 17th centuries (the so-called *Cedulario* of Diego de Encinas from 1596 and the draft of a *Recopilación* by Antonio León Pinelo from 1636) had taken their selections from an estimated amount of more than 15000 documents. They were motivated not least by the fact that already in the 70s of the 16th century not even the members of the governing body, the *Consejo de Indias*, had a clear picture of the relevant normative framework.¹⁰

⁹ The memorial of the first Bishop of Manila, Domingo de Salazar, sent to the emperor, is cited in MOUTIN (forthcoming), “Y atrévome a decir esto porque, aunque Vuestra Magestad tiene tan cerca de sí tantos y tan excelentes letrados en todas las facultades, pero para determinar muchas cosas de Indias, sin duda es menester haber estado en ellas, y no pocos años.”

¹⁰ See on the *Cedulario de Encinas* GARCÍA-GALLO (1992) with a panorama of the insecurity of the knowledge in the 1570s. On the later *Recopilación* of Pinelo see SÁNCHEZ BELLA (1992), vol 1, 32.

In synthesis, actors on all levels of society saw themselves confronted simultaneously with a need for regulation of new situations as well as with an information overload that could hardly be mastered. There was, as is so often the case in the history of law, simply “too much to know” and, at the same time, a lack of a precise solution to the case in question.¹¹ This general condition of uncertainty triggered different coping strategies, some of them already known from the past, others newly developed under the conditions of expansions, the printing press, reformation and early modern statehood. A wave of writings about *methodus*, new theories of coping with insecure normative knowledge like the probabilism and its precedents and variants, technical innovations, such as new finding devices, and new literary genres emerged. Early modern states as well as the Curia and the religious orders engaged in far-ranging reforms of their institutional procedures and structures. For the individual, however, the *multitudo* of normative knowledge upon which one could now draw had to be mastered. Not least specialised books providing overviews of the different solutions possible, such as the genre of *differentiae* promised help, and the many *compendia*, epitomisations and *summae* which are at the core of what we call ‘pragmatic normative literature’ are part of these multiple responses to the early modern information overload and resulting structural insecurity about the relevant knowledge. [Meyer’s] *longue-durée* survey of epitomisation as a scholarly practice and [Bragagnolo’s] case study of one of the bestsellers of the second half of the 16th century, the confession manual of Martín de Azpilcueta, highlight the variety of these coping strategies.

To summarise, normative orders – at least, but perhaps not only, in the European tradition – can be understood as the result of diachronic and recursive processes of translation of normative knowledge, a textual practice intimately connected to the history of the media in which this knowledge was stored. New normative knowledge was continuously produced by a variety of actors and entered into this process of looping and feedback, giving way to a differentiation and specialisation, localisation and regionalisation by and for specific epistemic communities and communities of practice. At the same time, the practices of translating the knowledge, themselves also part of the normative knowledge, experienced a similar process of stability and adaptation.

III. Translations

The general overview of the evolution of normative orders in time, understood as a continuous process of translation of normative knowledge, shows that there was a need for pragmatic literature as a response to the information overload. It also brings us closer, but does not suffice, for an understanding of how these translations happened on a concrete level and in the specific historical regime of knowledge production we are considering. At least

¹¹ On the early modern information overload, see BLAIR (2010).

for analytical purposes, it might be helpful to distinguish two moments. First, when normative information is translated into normative knowledge by certain epistemic communities through the embedding of this information into a different context and, second, when this newly generated normative knowledge is translated by members of a community of practice deciding upon a specific case.

1. From normative information to normative knowledge

The first translation occurs when normative information is captured and thus inserted into a specific context. This transformation of information into knowledge is closely linked to the mediality, for the storage in a certain medium combines the normative information with a certain field of action and thus adds a new layer of significance to the information.¹²

This embedding into a more or less specific context can be seen as a first translation in the broad sense of the term because the normative information, disembedded from its original temporal and factual context through the storage in a medium, is likely to acquire new meaning. For example, embedding normative information stemming from the religious sphere in a legal medium makes it likely that the normative information will now be read as a legal one, with not unimportant consequences for the methods and practices of interpretation to be used. In other cases, the embedding in a specific institutional context, for instance, as ordinances formulated by bishops and approved by the king [Rex Galindo] or as an instruction authorised by the Inquisition [Mejia] entails that the normative information included in the medium now enjoys the authority attributed to this format or to its editors, compilers or to the authorities that recommended its use. The normative knowledge included in the selection is thus charged with authority, while other normative options become less authoritative. For colonial Hispanic America, the most famous example for this charging with authority of some texts and de-authorising others might be the *Recopilación de Leyes de los Reinos de las Indias* from 1680, a collection that did not derogate the royal legislation not included but had a clear bottle-neck-effect for the survival of normative knowledge.

¹² Within the vast debate about ‘information’ and ‘knowledge’ and the definition of these two, we have opted for a distinction that considers information as the basic unit, understood as data with a general relevance and purpose. Information is converted into knowledge as soon as it is contextualised and integrated into a field of action, opening possibilities for action. As such, knowledge can be understood as the entirety of all the propositions which the members of a group consider to be true or which are considered to be true in a sufficient amount of texts in this group, comprising all kind of patterns of thought, orientation and action. It comprises also implicit knowledge, embedded in practices, organisational routines; see on the different definitions for example NEUMANN (2013), 811 and the bibliography cited above, especially WEHLING (2007). It is a narrower definition than the one used by RENN/HYMAN (2012), 21-44 who define knowledge as the capacity of an individual, a group, or a society to solve problems and to mentally anticipate the necessary actions, a problem-solving potential; they give an interesting list of forms of knowledge representations and forms of transmission. For a systematic overview see also ABEL (2014). ‘Normative’ knowledge refers to knowledge as positively labelled possibilities, a definition that Christoph Möllers develops in his *Die Möglichkeit der Normen*, MÖLLERS (2015).

Often this authorising and de-authorising of normative knowledge does not happen through selection or simply local writing, as [Honores] shows but explicitly, for example, in deliberations about different possible solutions for a problem, a typical mode of reasoning not only in the tradition of scholastic argumentation. Notwithstanding the fact that this playing out of authorities against each other was specific for erudite literature, not least in the scholastic tradition, we can also find these authorisations and de-authorisations in smaller texts, including in those we focus on in this volume. “I do not approve the opinion of those who [...]”, writes, for instance, the first bishop of Mexico in his *Doctrina breve y muy provechosa* (1543–1544), as [Egío] shows, making clear that a doctrine formulated for the *infideles* in Europe was not to apply to indigenous peoples in his diocese.¹³ Other chapters in this volume contain similar examples of authorisations, for example, in the Third Mexican Provincial Council of 1585. In short, individuals or groups that can be considered, for many reasons, as part of epistemic communities, like members of a religious order or viceroys selecting relevant norms for their realm, contributed to a translation of normative information into normative knowledge through the action of inserting it into their excerpts, manuscript copies and books. Often these texts were specifically made for practitioners.

2. Normative knowledge in practice

This recontextualised normative knowledge, produced for specific contexts of action and for specific communities of practice, was the starting point for these communities when resolving individual cases. From a modern (and yet justifiably contested) perspective, this process of finding a right solution for a specific case is often understood as a logical operation referred to as subsumption and associated with the notion of syllogism.¹⁴ If one takes a closer look at early modern sources, however, we can identify a completely different mode of reasoning, a special *ars inveniendi*. This mode of reasoning can be understood as a second translation in which the normative framework according to which a decision was made had to be generated from the existing normative knowledge in a moment before the selected authorities were weighed against one another in the light of the specific case, again drawing on normative knowledge often embodied in practices and resulting in the production of a normative statement for the individual case.

The logic of this *ars inveniendi* only becomes understandable if we take into account its underlying epistemological assumption that the texts one could draw upon did not contain ready-made solutions for all cases, but that all these were concretisations, part of and a way to a higher objective truth that could not be accessed directly. As famously put by the Digest at the beginning of its final title (Dig. 50.17.1): *Non ex regula ius sumatur, sed ex iure quod regula fiat* – The law is not derived from the rule, but it is the law from which the rule is derived.

¹³ See Egío in this volume, at note 59.

¹⁴ For a critique of this syllogistic model and a clear introduction into ‘concretisation’, much closer to what we can observe in early modern practice, see VESTING (2018), 109–114.

It was, in other words, possible to find a just solution for each case by looking through the authoritative texts, and this is why one had to have them, or at least a selection of them, at hand. However, the solution could not be plucked directly from the authorities, but had to be found through a rational process that drew on different authorities and critically weighed their applicability and appropriateness for the case in question. Authorities from the past and the current normative production by the sovereigns were obviously weighty arguments. They showed a way, perhaps even the only way, to find the right solution. But they were, in the end, just an aid and not the solution as such. For this process of producing the right solution, scholars developed certain rules, a *methodus* and a theory of legal sources and their authoritative value. We can call this the “theory of practice”. According to this theory, it was necessary to search in different places (*loci, topoi*) for the normative option whose partial truth seemed most appropriate for the individual case at hand. The philosophical background of this method was – legal, philosophical and theological – early modern *topica* and the resulting procedure, the *dialectica*. The *methodus* provided specific techniques of interpretation.¹⁵

However, it was not only this theory of practice, the theory of sources and the method that influenced the production of a decision. Of particular importance were the practices of norm production as such, factors far beyond the ‘theory of practice’, such as established patterns of action, conventions or implicit knowledge about how to proceed rightly. These practices were also part of the normative knowledge¹⁶. Recent historical research has increasingly paid attention to this normative dimension, i.e., the rules of practice, regulatory rationalities, implicit understandings, aesthetic norms as structures of thought, habitus etc., often summarised under the heading of praxeology.¹⁷ Their significance cannot be overrated in legal historical research, especially in a regime of knowledge production that left large margins of discretion to the actors (as was the case in the early modern Iberian empires), thus sharing a general characteristic that can also be found in the ‘theory of practice’ with its wide understanding of meaning, wide rules of interpretation and the all-encompassing need to find just solutions.

It is not least these rules inherent in practice, the ‘practices of practice’, that make up communities of practice: groups that share a certain consensus about how to translate the normative knowledge into a decision for a concrete case. These groups might be identical to the epistemic communities mentioned above that produced pragmatic literature for a special area, group or purpose. However, they might also simply be united by their preferences for

¹⁵ This theory of practice, comprising reflection about the theory of sources of law, the method and the interpretation of law, has been the central object of legal historical research on the history of early modern legal method. On the early modern period, see especially the seminal study of SCHRÖDER (2012).

¹⁶ See very clearly on this James Boyd White who defines legal knowledge “as an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language; this may in fact be the closest analogy we have, for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world – how to use legal language to create legal meaning”, WHITE (2002), 1399.

¹⁷ See on this, with further references, the contributions in DUVE (2017b).

certain texts and the way they use them; it is not by chance that, as various chapters in this volume show, Church Councils and religious orders obliged the members of their group to acquire certain texts and to have them close at hand. In any case, whether members of these communities of practice or not, those who had to produce a decision on a specific case, as confessor, judge or consultant, had to use, in their artisanal exercise to find the right answer, certain texts which provided them with the relevant information about the normative knowledge upon which they could draw their task.

If a decision about a specific case was made on the basis of this *ars inveniendi*, which was based on a material, non-formal concept of law and some operational rules (i.e., of a theory of practice) and its corresponding practices (i.e., the rules of practice), then a new normative statement emerged, tailored to the concrete case; a particular casuistic norm. This new normative statement, however, did not only resolve the case. If captured in a medium, like in a collection of decisions or a manuscript that summarised good practice for office holders, precedents etc., it also passed into the general body of normative information, to be then again disembedded and processed into normative knowledge until it becomes, once more, an object of translation by a community of practice. This recursive process is thus continuous, constantly adding to and changing the composition of the normative information processed and converted into normative knowledge. “Legal knowledge is thus constantly created and recreated differently by different minds on different occasions”¹⁸. In some cases, we can observe something like the delocalization of local normative knowledge, for example, when a locally motivated action led to a specific regulation that was later applied to other cases or even included in the collection of royal legislation, such as the *Recopilación*¹⁹. Even if the change in the composition of the body of normative knowledge caused by these processes of localizing and delocalizing normative knowledge, might have been of homoeopathic dosage and barely noticeable at first, cumulatively and over time it was considerable. It is here where we can also find a clue as to how normative orders change because a multiplicity of actors on micro and meso levels produced normative knowledge in their daily activities, continuously transforming the system through minimal adaptations.

The diversity of regulatory bodies, called here ‘epistemic communities’, as well as the *ars inveniendi* practiced by them acting as ‘communities of practice’, are key elements of what some legal historians, looking at the secular sphere, have described as early modern *cultura jurisdictional*.²⁰ This jurisdictional culture reflected the ‘plural’ structure of medieval and early modern societies, mirrored in their multiple *iurisdictiones*, ranging from the jurisdictions of corporate bodies to the royal and imperial jurisdictions. The tension between these jurisdictions was constitutive for early modern societies, because in a normative order without a sep-

¹⁸ WHITE (2002), 1400.

¹⁹ DUVE (2010).

²⁰ See for example GARRIGA ACOSTA (2006) with references to the rich tradition of reflection about the significance of the concept of *iurisdictio* in European legal history developed by Pietro Costa, Paolo Grossi, Bartolomé Clavero, A.M. Hespanha, Carlos Petit/Jesús Vallejo during the last decades and further developed by Marta Lorente, Alejandro Agüero and others.

aration of powers in the modern sense, extending the sphere of jurisdiction basically meant extending power, and correspondingly, for the sovereign, conceding jurisdictional privileges was one of the key tools of governance. He was, however, not free in conceding these privileges, because even the sovereign was bound to respect the law with its many long-established rules about the distribution of jurisdictional competences.

Within the multiplicity of these jurisdictions on different levels, and notwithstanding a certain overstatement of this divide in the legal historiography, it was possible to distinguish jurisdictions belonging to the secular and those belonging to the ecclesiastical sphere. This does not mean that jurisdictional conflicts would only have occurred between these two spheres. On the contrary, under the conditions of the royal patronage, the lines of conflict often did not run along this divide, but followed other logics and historical contingencies. There were, for example, fierce conflicts between religious orders and secular clergy, or between bishops and members of the Inquisition. Most importantly, however, all of these *iurisdictiones*, secular or ecclesiastical, were fundamentally grounded on the idea of an objective divine order from which all other human sub-orders could be derived. Both secular and canon law were subject to this divine order, giving religion an overwhelming importance for the production of normative knowledge in the Iberian empires. For this reason, it was important for the entire knowledge economy underlying this jurisdictional culture when, in the early 16th century, a new producer of normative knowledge – and an important provider of pragmatic literature – entered the stage: moral theology.

IV. Secular and Religious Normative Knowledge

The reasons for the rise of moral theology as an independent scholarly discipline and a producer of normative knowledge are manifold and closely connected with the multiple historical transformations of the first decades of the 16th century mentioned above: reformations, European expansions, the media revolution and the rise of the early modern state, growing not least through the absorption of jurisdictional competences traditionally claimed by the Church.²¹

Without going into details, it is important to highlight that, in this historical situation, the Catholic Church and its law came under considerable pressure. Of course, canon law remained indispensable when people were baptised, were married, fasted, celebrated or were buried; it still marked the passages between the different stages of Christian life. The bishop, whose position was strengthened by the Council of Trent, continued to exercise his jurisdiction in the so-called *forum externum*: in the ecclesiastical court within the framework of his *visitatio* or at synods. Delegate judges and a number of ecclesiastical offices, authorities and in-

²¹ For an overview on these processes, see PRODI (2000).

stitutions, such as religious communities, hospitals, poorhouses and many others, continued to live according to canon law on a daily basis.

However, in many respects the Church's jurisdiction was curtailed. In response, the Roman Curia developed a system of indirect governance, including the adoption of administrative and political practices resembling those of early modern secular states, for example, by expanding the system of *nuntii* at kings' and emperors' courts or by intensifying communication with the emerging national Churches. The attempt to standardise normative knowledge, for example, by regulating the production of catechetical works, as discussed in the contribution of [Egío], through devotional literature, as [Mejía] shows in her chapter the Inquisition in Cartagena de Indias or through the requirement of Curial approval of synodal decrees, was part of this.²²

In this context, the importance of canon law scholarship as a producer of normative knowledge declined, not least because of the strengthening centrality of the Roman Curia and its new institutions, introduced after the Council of Trent, and specific measures like the prohibition of commentary on the council's decrees. The normative knowledge produced by the Church continued to operate beyond the ecclesiastical sphere through the authority of tradition. It remained part of the available normative options upon which one could draw as a source of law, as *ratio scripta* and as a body of juridical learned practices. However, it was a far cry from the significance it had held in the High Middle Ages.

It was in this historical setting that the normative knowledge developed for the so-called *forum internum* or *forum conscientiae*, often related to the practice of confession but not confined to it, grew in importance and moral theology emerged as a new producer of normative knowledge for this *forum internum*.²³ The normative knowledge produced by this discipline around the *forum internum* was seen to be no less juridical than the canon law practiced in the *forum externum*. The confessor was considered a judge of souls, the *iudex animarum*, and confession was equalised to a judicial procedure: the decrees of the Council of Trent explicitly called the granting of absolution an *actus iudicialis*.²⁴

As a consequence, the balance between different normative resources from the religious sphere shifted away from canon law towards a normativity produced for the *forum internum*, which became a key component of the normative economy in the Iberian empires. At the end of the 16th century, whoever was searching for the right answer to a problem had to take note of important moral theological texts. The importance of moral theology as a producer

²² ALBANI/PIZZORUSSO (2017).

²³ On this foundation, see MAHONEY (1989); for the significance of the *forum internum* for example O'BANION (2012); MARCOCCI (2014).

²⁴ In the text of the session of the Council of Trent dedicated to the sacrament of confession, the penitents are seen as accused facing a trial, "*ante hoc tribunal tanquam reos*", the confession is equalised to a trial and the confessor to a judge: "*ad instar actus iudicialis, quo ab ipso velut a iudice sententia pronuntiatur*", see Council of Trent, sessio XIV, 25.11.1551, doctrina, cap. II, VI, in the edition of Alberigo, Dossetti et al., Conciliorum Oecumenicorum Decreta, edition tertia, 1973, cited according to the text in WOHLMUTH (ed.) (2001), quotations on 704 and 707.

of normative knowledge in Ibero-America emerges particularly clearly in the contributions of [Machado Cabral] on Portuguese America, in the chapters of [Egío], [Moutin] and [Rex Galindo] on Mexico and in [Danwerth's] research on the presence of these texts in Hispanic America. They also point to the fact that there was one outstanding institution, also an epistemic community and a community of practice that dominated the production of normative knowledge in this field for more than a century, at least in the Iberian worlds: the so-called "School of Salamanca". A closer look at this school can help us understand the connection between practical (moral) theology, its normative reasoning and thus the function and significance of pragmatic literature therein.

V. Practical Theology and Pragmatic Literature

The significance of the School of Salamanca as a web of normative knowledge production and also of pragmatic literature might, at first glance, seem surprising because we usually associate the school with the big multi-volume treatises, *De iustitia et iure* and *De legibus* by Domingo de Soto, Luis de Molina and Francisco Suárez. However, the theologians at the University of Salamanca and in the Dominican convent of San Esteban, the core of the so-called "School of Salamanca", did not inhabit an ivory tower, producing their theoretical systems in seclusion from the world only for other academics.²⁵

Alongside their theoretical work, the theologians in Salamanca and elsewhere were deeply immersed with practice and real life. In the turbulent decades of 16th century expansions, reformations, wars, financial speculation and inflation, people were assailed by moral doubts and they searched for advice. They faced problems of everyday life or high politics, concerning just price, financial transactions and fasting rules. They were insecure as to whether the use of force against insurgent indigenous peoples was justified, whether prisoners taken in the conquests could be enslaved and whether there was a legitimate right to take booty. It was this need for moral advice, the preoccupation with religious questions, eschatological hopes and fears, together with a renewal of theology, as well as the impact of personalities such as Francisco de Vitoria, Domingo de Soto and Melchior Cano, that set the stage for the emergence of Salamanca as one of the centres of a new practical theology.

Of course, many of the problems to be resolved were not new. Usury, war or fraud have been classic topics of normative reflection for centuries. However, the intellectual mobilisation in the Iberian peninsula during the first half of the 16th century, the intense quarrels about the right theological method and the uncertainty caused by the existence of many contradictory authorities that became more visible with the growing body of normative knowledge stored in ever more books, made a re-thinking of the normative system necessary. Moreover, because finding the right solution meant looking at each case's specific circumstances,

²⁵ In this section, I am drawing on DUVE (2020).

taking into account the status of the persons, their knowledge and interests, the object of dispute and the decision's consequences, it needed erudite individuals who could perform this reflection. In cases of doubt, an expert's opinion was indispensable. Francisco de Vitoria stated this clearly at the beginning of his famous *Relectio* on the Indies: "Effectively, for an act to be good, if there is cause for doubt, it is necessary to do it according to a wise man's advice and determination"²⁶.

The wise men – *sapientes* – were, in the first place, theologians, not least because of their experience in the confessional and their training in practical theology and the *summae confessorum* tradition. The *sapientes* were thus, in fact, also practitioners. Moreover, as theologians, they felt not only entitled, but also obliged to advise the faithful: their chief duty was to ensure the salvation of souls and this empowered them to give their opinion on any issue that involved questions of right or wrong. According to Vitoria, "*the task and office of the theologian are so far-reaching that no proof, no consideration, and no topic appears to lie beyond the purview of the theological profession and office.*"²⁷ Similar statements can be found in Domingo de Soto²⁸ or in later texts like Francisco Suárez's *De legibus*, to cite only the most famous authors.²⁹

From this general point of view, and especially in cases like that of the native Americans, secular and canon law were mere ancillary sciences for the theologians. Of course, one needed to know both, if only because of the practical implications, as both jurists and canonists emphasised. Not least the *ius commune* tradition provided important points of view that had to be addressed, as the canonist Martín de Azpilcueta stressed in trying to set a limit to theologians' pretensions.³⁰ Obviously, the question of who qualified to give opinions on all matters was also a battle between the disciplines dedicated to normativity – secular law, can-

²⁶ Francisco de Vitoria, *Relectio* [...] quam habuit [...] anno a dominica incarnatione millesimo quingentesimo trigesimo nono [...]: "Et in his omnibus ita res se habet, quod si quis antequam deliberaverit, & legitime illi constiterit tale factum licitum esse, aliquod tale faceret, & fortè secundum se esset licitum: talis peccaret, neque excusaretur per ignorantiam: cum illa, ut patet, non esset inuincibilis, postquam ille non facit quod in se est, ad examinandum quòd liceat, aut non liceat. Ad hoc enim ut actus sit bonus, oportet si aliàs non est certum, ut fiat secundum diffinitionem & determinationem sapientis. Haec enim est una conditio boni actus [...]" VITORIA (2018) 289.

²⁷ Francisco de Vitoria, *Relectio* [...] de potestate civili: "OFFICIVM, ac munus Theologi tam latè patet, ut nullum argumentum, nulla disputatio, nullus locus alienus uideatur à theologia professione, & instituto" VITORIA (2018) 174.

²⁸ Soto (1566), 5: [...] Neque vero est quod Theologis vitio detur, hanc sibi assumere provinciam quae Iurisperitis accommodatior videri potest: quandoquidem Canonica iura ex visceribus Theologiae prodire: Civilia vero ex media morum Philosophia. Theologi ergo est iuris Canonici decreta ad normam Evangelicam exigere; philosophique Ciulia ex principiis philosophiae examinare [...].

²⁹ SUÁREZ [(1613) 2019], Prooemium, 1: Nulli mirum videri debet, si homini Theologiam profitenti leges incidant disputandae [...].

³⁰ AZPILCUETA (1569), Dist. 6., Cap. I, § caveat, n. 11, p. 188: De iustitia enim Theologi generatim discere sciunt, quid illa est, & quotuplex, an sit virtus cardinalis, an omnium moralium potissima, in qua potentia locanda, & alia id genus, quae parum aut nihil confessario conferunt. Quod item iniustitia sit peccatum mortale, facile definire norunt. At definire, quando in iudiciis, in contractibus, in ultimis voluntatibus, et nonnunquam in delictis committatur iniustitia in casibus innumeris, qui praeter legem naturae occurrunt, vires Theologi excedit: nisi legum quoque se peritum fecerit.

on law, (moral) theology and philosophy. However, as Vitoria's disciple, Melchior Cano, put it in his fundamental work *De locis theologicis*, in the end, the *auctoritates* of the jurists were irrelevant to theologians in questions of faith and of little or no relevance with respect to norms that could be derived from the *lex evangelica* or *ratio*. The only area where they could be of use was in cases of doubt about *moribus ecclesiae & religionis*.³¹ In general, however, the theologians knew it better and this is why it is characteristic of the School that its members gave advice in personal conversations, in written expert opinions or as *iudices animarum* in the confessional, but also through their books with an inherent pragmatic purpose – another exercise of practical theology.

Some of these books were more, others less, useful in practice, depending on what kind of 'practice' was at stake. Even if Domingo de Soto, for example, assured that he wrote his multivolume *De iustitia et iure*, published in 1556, not least because of the pressing need to give orientation on practical matters like usury and for the salvation of the souls,³² his erudite Latin elaborations might not have served every community of practice. Merchants who wanted to know precisely what kind of contracts were immoral and thus illegitimate might have preferred to look at Thomas de Mercado's *Tratos y Contratos de mercaderes*, written by the Mexican Dominican friar on the petition of the merchants of Seville and printed in Salamanca a few years later in 1569.³³ This raises the question of how to define 'pragmatic normative literature'. Why not include, for example, Domingo de Soto's *De iustitia et iure*, and why Thomas de Mercado's *Tratos y contratos* or Martín de Azpilcueta's *Manual de confesores*?

³¹ Cano CANO (1563), Liber octavus, Caput Septimum, 284: Prima conclusio: In his, quae ad fidem pertinent, iurisconsultorum auctoritate theologus non eget [...]; CANO (1563), *De locis Theologicis*, 285: Secunda conclusio: In his etiam, quae ad mores pertinent, quatenus vel lex evangelica, vel ratio Philosophiae de huiusmodi praescribit, iureconsultorum auctoritas parum aut certe nihil theologo conferre potest; CANO (1563), 285–286: Tertia conclusio. In tertio illo genere rerum, ubi scilicet de moribus ecclesiae & religionis institutis per leges [...] iurisperorum omnium communis consensus concorsque sententia, theologo magnam fidem facere debet.

³² Soto (1556), Liber VI, Prooemium, 505: Eo denique destinati operis perventum nobis est, cuius praecipue gratia de illo coepimus cogitare. Haec inquam usurarum, contractuum, cambiorumque ac simoniarum sylvia in animum potissime nobis induxit, ut tantam operem molem aggredieremur; see also: Soto (1556), Prooemium, ante Lib. I., 5: [...] peperit tamen humana libido per temporum iniquitatem, parturitque in dies novas fraudulentiae formas, quibus contra ius & fas suam quisque expleat insatiabilem avaritiam. Quapropter nihil aliud quam operae pretium arbitrandum est si iniqua pacta & conventa, & cambia, tamquam adeo multa usurae simoniaeque recentia genera in animum nobis induxerunt, nova de re veteri volumina aedere.

³³ See the preface in MERCADO (2019).

VI. Pragmatic Normative Literature: description and definition

Taking the function of a text in a concrete context of use as the defining criterion for a type of literature, as literary studies suggest,³⁴ and following what has been said until now, pragmatic normative literature can be defined as thus: written texts used by practitioners in an immediate way to access the relevant normative knowledge required to produce a normative statement related to the legitimacy of human action.

There are some implications of this definition. First, as ‘written text’, pragmatic normative literature is distinguished from other media, such as audio-visual media. The latter, for example, in the form of pictorial representations in altarpieces, crucifixes, *lienzos* or performances such as plays and processions, were frequently employed in mission and for catechesis and were thus important for the transportation and implementation of normative ideas. They were an important part of the regime of knowledge production in the early modern Catholic world. No doubt, the pragmatic literature needs to be read in its close connection with these other media, not least in its intertwinement with orality, as in the case of the *sermonarios* discussed by [Rex Galindo]. However, these other media generally served educational and catechetical purposes and were generally not directed to those practitioners who were in charge of producing normative statements.

Second, it should be noted that pragmatic normative literature is by no means limited to printed texts. On the contrary, a large part of pragmatic normative literature was probably never printed, but circulated in manuscript form: copies, excerpts, abridgements or compilations of relevant documents made by practitioners or for practitioners. In spite of the low survival rate of these texts and the poor cataloguing of the surviving manuscripts, there are some indications that these manuscript texts were numerous and of huge practical importance.³⁵ However, because the dissemination of printed works in the period under consideration was already considerably greater than that of individual manuscripts and due to practical constraints, in this volume we concentrate on the printed texts. It would, however, be important to consider manuscripts, especially from practitioners who often assembled a set of documents they found helpful and used them as tools for action.

³⁴ See BUSSE (2000). This criterion has also been used in other fields, for example, in the debate about vernacular literature and its significance in German legal history, see the discussion in SCHUMANN (2013) 136 or in the research on “pragmatische Schriftlichkeit”; see KELLER et al. (eds.) (1992). In general terms, surprisingly little attention has been paid in legal historical research to the classification of “types of legal literature” even in the (older) standard works on history of literature, see e.g., HOLTHÖFER (1977), 106 (“[the typology] with reference to the traditional forms of the Late Middle Ages [has been formulated] exclusively on the basis of the sources”); in a similar manner SÖLLNER (1977), 514 (“The typology follows in general formal criteria”); Troje TROJE (1977), 634 places “types of literature” in quotation marks and thereafter uses the word “forms of literature”. Attempts to apply quantitative methods and a sociological perspective have not led to a clear picture about the criteria for the definition of types of literature, see, however, RANIERI (1982). Martin Bertram gives an insight into the lack of clear criteria about how to classify what is called here ‘pragmatic literature’ in the historiography on canon law, BERTRAM (2014), 574.

³⁵ See the references at [Danwerth] in this volume.

When we use ‘normative’, we refer to ‘normativity’ in a dual sense: first, it refers to the fact that these handbooks are themselves normative, meaning that they give instruction on how to act rightly. This normative character, however, applies to many texts from navigation manuals and books on how to exercise the office of a notary to cooking recipes. Second, and more importantly, they are normative in the sense that they contain specific knowledge for the production of a normative statement. For the latter, we adopt a broad notion of ‘normativity’ that refers to precepts from law (in a wide, sociological sense) and religion. This broadening seems to be nothing else but the consequence of early modern normative or jurisdictional pluralism and, not least, the importance of religion and the precepts stemming from moral theology for the every day administration of justice and decision-making. Thus, pragmatic normative literature includes texts that contain knowledge labelled in a positive way as a possibility of action.³⁶ It therefore does not only consist of works of secular law, canon law and moral theology, but also might include other texts in which recommendations for right action and conduct were stored, such as catechetical and pastoral literature, collections of sermons and devotional books. The chapters of [Machado Cabral], [Mejía], [Moutin] and [Rex Galindo] provide impressive illustrations of the breadth of the literature that come into play within this widened meaning.³⁷

Another assumption underlying the definition is that the addressees of pragmatic literature were principally those who should be well-informed about the relevant normative knowledge because they had to take decisions: the practitioners. It was this group that needed information for the exercise of the *ars inveniendi* described above. Obviously, the range of practitioners can be extremely wide, depending on the community of practice we have in mind. However, in view of the limited literacy and for economic reasons as well as taking into consideration the historical circumstances in the Iberian empires, it might have been, above all, professional users. The studies on book circulation, book ownership [Danwerth] and on the use of pragmatic literature in this volume examine different types of practitioners: missionaries, merchants, jurists, but also members of the laity.

In a certain way, the users were *pragmatici*, a term used in 19th century legal historiography by Roderich Stintzing in his path-breaking study on popular literature of Roman-canon law until the 16th century.³⁸ With this, Stintzing, however, resorted to the pejorative use of the word *pragmatici* as *homines quidam forensis professionis* which, at least since the days of humanistic jurisprudence, referred to a person who in some way worked in court practice but lacked

³⁶ For this broad concept of normativity, see MÖLLERS (2015). With this, we are employing a broader concept than, for example, Dave De ruysscher in his discussion of merchant guidebooks, DE RUYSSCHER (2018).

³⁷ As pragmatic literature is defined according to its function and not from the field, this definition could be applied to a wide range of fields, for example, on pragmatic normative literature for certain professions like notaries, navigators, artisans, or merchants. For the latter, see, for example, the collection HOOCK/JEANNIN (eds.) (1991). If such a handbook for merchants contains knowledge about the legitimacy of certain actions, like contracts, it can be considered as pragmatic normative literature.

³⁸ STINTZING (1867).

erudition.³⁹ The tools of these practitioners, the so-called ‘popular’ literature, were characterised accordingly as “tools of the semi-erudite”, *Hilfsmittel der Halbgelehrten*, which in a certain sense is close to what the users of pragmatic literature in their respective communities of practice were. However, as the use of the term ‘popular’ was rooted in a philosophically charged discussion about the reception of learned law in Europe and was constructed as a countermodel to ‘learned’ law, it was soon criticised as misleading and as carrying a whole lot of implications.⁴⁰ For these reasons, the term is not employed here, also to avoid further misunderstandings that might arise due to more recent connotations of ‘popular’ literature as a specific genre for subaltern actors.

As for the communities of practice that might have been the (intended) users of these texts, we can find a wide variety. Sometimes we know about the community of practice for which these books were written, for example, when they were named explicitly by the authors, as was the case of Thomas de Mercado. However, the chapters in this volume show various examples of a production for specific communities of practice even when these have not been explicitly addressed in the titles. When the first bishop of New Spain, Juan de Zumárraga, for example, produced catechetical literature in a key phase of the history of the Church of Mexico [Egío] or when half a century later his successors in the Provincial Council of Mexico again had to make a multitude of decisions in order to select, update and adapt the available normative knowledge to the specific regional circumstances, it is clear that they had the members of their clergy in mind. As [Moutin] shows, they addressed them and other parts of the population, for example, those who made inquiries with the Council, with different media strategies: by producing council canons, a confessional manual and other texts, which we would today describe as pastoral literature, but which contained normative knowledge framed in different formats. [Machado Cabral] examines the production and use of such texts by the Jesuits in Brazil, and [Bragagnolo] shows the connection between translations and envisioned audiences: the first version of Azpilcueta’s confessional handbook was based on a Portuguese model, whereas the later version integrated the experiences of the first Jesuit missions. From then on, the author himself kept adapting his handbook to meet the needs of different communities of practice.⁴¹

Having these practitioners as the main addressees in mind, it also appears more appropriate to speak of ‘pragmatic literature’ instead of using the term ‘practical literature’ employed in more recent studies in the history of science on texts by practitioners for practitioners, for example, when European expansion and advances in astronomy produced innovations in

³⁹ See, for example, the *Annotationes Prioris & Posteriores Gulielmi Budaei Parisiensis* [...] in *Pandectas* [...], Lutetiae: Michaelis Vascosani 1556..., *Reliquae*, fol. 241v, littera H, online: https://archive.org/details/bub_gb_GkZ_VQTVi-QC/page/n509: *Pragmatici igitur erant quidam forensis professionis*; this understanding continued in later reference works, such as KAHL (1749), sub v. Pragmatici, 301: *Pragmatici erant homines quidam forensis professionis, qui causarum actores juris ignaros monebant interdum, juris responsa, actionumque formulas subministrantes*.

⁴⁰ See, for example, BELOW (1905), 110–112; see also ERLER (1984), 127–134.

⁴¹ BRAGAGNOLO (2018).

navigation techniques. The production of these texts, a response to the need to provide information for less experienced practitioners, shows some interesting parallels with the attempt to provide missionaries or other officials with pragmatic normative literature. The interest in practical literature by historians of science, however, mainly consists in overcoming the divide between theoretical and practical knowledge. They thus focus, above all, on practice as a form of knowledge production and its contribution to ‘science’ as the classical object of scholarly interest. In fact, pragmatic normative literature in some cases probably served a similar function –[Meyer]’s chapter on epitomisation points in this direction and there might be more examples of how pragmatic literature written for practitioners led to important innovations, for example, through abstraction and condensation of knowledge. However, the pragmatic literature of interest in our context was mostly written by erudite authors (who were also practitioners) with the aim to provide less erudite practitioners with useful tools for the exercise of their search for the right answer. Thus, in a certain way, the legal historical perspective taken here is inverse to the studies on the contribution of non-erudite actors to scientific knowledge.⁴²

Finally, the ‘pragmatic’ character of the books is often expressed in a semantic of pragmatization, in some cases clearly visible in the titles: *Manual*, *Práctica*, *Enchiridion*, *Memorial*, *Arte*, *Norte*,⁴³ with interesting variations of meaning, as [Casagrande] shows in his chapter. Only some of these include the term *epitome*; more use the Latin synonyms such as *compendium*, *breviarium* and *summarius*. The aim of presenting a selection and summary from the immense treasure of normative information, i.e., of collecting the relevant knowledge, also appears in the subtitles and paratexts: the knowledge shall be presented *breviter*, *sumariamente*, *breve y llana*, *breve y claras*. In Azpilcueta’s *Manual* we find expressions like *brevissimamente*, *summa brevedad*, *breves y claras*, *breve memoria*, etc. and in the case of the *cartillas* used in the Inquisition in Cartagena de Indias, the diminutive form already indicates their small format.

These titles might be useful indicators as to whether a book might be considered as pragmatic literature or not, not least because they express clearly to whom the books were addressed. Books entitled *De iustitia et iure*, for example, appealed to a different audience⁴⁴ and they did not serve in an immediate way for finding the right solution in a practical exercise. Just like other types of literature, for example, vocabularies and other collections of normative knowledge like commentaries, they might have been used as auxiliary instruments for normative reasoning, but not directly in and for practice. In terms of form, pragmatic liter-

⁴² On early modern practical literature, see the contributions in VALLERIANI (ed.) (2017); VALLERIANI (2017). The term ‘pragmatic’ can also build on a somewhat different, but in some aspects related research on *pragmatische Schriftlichkeit*, see on this KELLER et al. (eds.) (1992). They define the concept of pragmatic writing (formulated for different contexts) as “all forms of the use of writing and texts which directly serve purposeful action or which are intended to guide human action through the provision of knowledge”, KELLER et al. (eds.) (1992), 1. On handbooks and manuals, see also CRAEGER (forthcoming). I am grateful to Angela Craeger for providing me access to this text.

⁴³ An overview is provided by BARRIENTOS GRANDÓN (2000), especially 260–263.

⁴⁴ On these treatises see FOLGADO (1959), BARRIENTOS GARCÍA (2001).

ature often contained indices and other *finding devices* that were intended to facilitate use.⁴⁵ Even though the works' titles often mentioned their handy format, brevity, and ease of use, this was by no means always true: many of the summaries grew again through continuous expansion and additions and thus were objects of epitomisations. However, as books made for practical use, they were usually of a smaller format.

VII. Between Law in Books and Law in Action

It should have become clear by now that pragmatic normative literature fulfilled an important function within the regime of knowledge production in 16th and 17th century Ibero-America. It was an important tool for the *ars inveniendi*, characterised here as a 'second translation' carried out by certain communities of practice in a more or less erudite and learned manner, according to the concrete circumstances. Through its selectivity, pragmatic literature reduced the scale of normative knowledge to a manageable amount and thus responded to the practitioners' needs. Pragmatic literature authorised some parts of the normative knowledge and de-authorised others, in many cases viewing the local conditions for which they were made. Thus, it helped to reduce uncertainty about whether one had the relevant normative knowledge at one's disposal. This reduction of uncertainty was also possible because, most probably, pragmatic normative literature was not as expensive as the big books and thus could be acquired from time to time in updated versions; it is not by chance that many of the books belonging to this group saw various editions.

On a systemic level, pragmatic normative literature was a medium produced by epistemic communities for the selection and storage of normative knowledge for concrete fields of action; it was a product of what has been called a 'first translation' that converted normative information into normative knowledge. It thus contributed to the implementation of normative knowledge and its reproduction in different local contexts. It could do so because it specified parts of normative knowledge for certain communities of practice, for example, for the members of religious orders, and therefore triggered processes of regional differentiation.

Looking at these important functions, it is astonishing that legal historians have not paid more attention to pragmatic literature and its role in the historical regimes of knowledge production. Despite the fact that at least since the days of Stintzing, legal historians studying the *ius commune* and its legal literature have been aware of the existence and historical significance of this literature for practitioners, books we would consider as pragmatic literature have received considerable attention mainly in Germanic legal history, a comparatively small field after World War II.⁴⁶ With regard to late medieval canon law, it is only recently that the

⁴⁵ BLAIR (2010).

⁴⁶ See especially MÜTHER (1961) and SECKEL (1898). See also more recently SCHMIDT-WIEGAND (2007); SCHUMANN (2012); SCHUMANN (2013); WITTMANN (2015); some discussion also in NEUHEUSER (2011).

importance of pragmatic literature has been pointed out and claims have been made to see it as a long-underrated tool for the implementation and regionalisation of normative knowledge.⁴⁷ It is briefly mentioned in the reference books as literature on the border between canon law and practical theology⁴⁸ and textbooks on the history of canon law list some of the great authors' moral theological works⁴⁹, just as the history of modern private law occasionally mentions moral-theological pragmatic literature, emphasizing its importance for the reception of Roman-canon law in areas with a lower degree of literacy.⁵⁰

Overall, however, legal historical research, still dominated by the legal-historiographical paradigm of the scientification of law and professionalisation of legal practitioners, has not really looked at these texts in their functionality for the formation of normative orders or even tried to conceptualise them as a *genre*.⁵¹ They were simply not interesting for a historiography tracing what was seen as the progress of scientific law to modernity, in a certain teleology and with a narrow concept of law.⁵²

At the same time, pragmatic normative literature was not cherished by general historiography, because these texts seemed not to reveal anything about what is sometimes called the "law in action", the central object of most historical studies on the colonial Iberian worlds. The manuals for confessors and other moral theological texts have basically been seen as part of the attempt to discipline the population and establish colonial power, a function they definitely also fulfilled. They have, however, only rarely been understood as a carrier of normative knowledge that contributed to a general 'legal' literacy enabling all parts of colonial society, not least also the members of indigenous peoples, to engage in the discourse about their rights, as Honores points out in his chapter in this volume⁵³. Pragmatic literature therefore remained largely invisible between an interest in the "law in the books", focusing nearly exclusively on the big authors and texts leading to the modern system, and the search for "law in action" through research on court records and other documents of legal practice. Pragmatic normative literature leads us, however, precisely into the wide field between these two reductionist perspectives and can, if one really wants to employ the established terminology, best be considered as "law books in action".⁵⁴

⁴⁷ Especially Martin Bertram has emphasised the need to study these texts and criticised the state of the art, BERTRAM (2014).

⁴⁸ SCHULTE (1877); ERDÖ (2006).

⁴⁹ For example, VAN HOVE (1945) 566.

⁵⁰ BERGFELD (1977), 1001; on the importance of pragmatic literature from the School of Salamanca in this context, BERGFELD (1977), 1027–1028.

⁵¹ More recently, legal commentary literature has received more attention, for example JANSEN (2014); KÄSTLE-LAMPARTER (2016). However, these were precisely auxiliary tools for erudite practice, so that again the focus is on the role of this literary genre for the emergence of "scientific" law.

⁵² See on this the historiographical review of this tradition in DUVE (2012).

⁵³ On the rights of the indigenous peoples and their participation in the colonial negotiations see DUVE (2018b).

⁵⁴ The recent publications on "law books in action", which concentrate mainly on textbooks or treatises from the perspective of common law in the 19th century, focus on different aspects, periods and areas, see

Only scarce attention has been paid to this genre in other fields, such as the research on early modern moral theology. Here, too, scholarship has largely focused on famous authors and their works.⁵⁵ Some of the literature from the 19th and early 20th centuries include brief surveys of important moral theological works of the early modern period,⁵⁶ mostly selected according to their practical value as *auctores probati* for contemporary juridical use. Some introductory sections of moral-theological textbooks⁵⁷ contain some information and sometimes the historical significance of these *opera practica* is highlighted.⁵⁸ All these references, however, have remained fairly marginal for the history of the discipline and were not connected to an analysis of the process of production of normative knowledge.

Studies on the history of theology, mission and catechesis in the Americas, examining the production of reception of moral-theological works, have provided some interesting insights but are mostly focused on discipline-specific topics, such as mission theology, sacramental doctrine, etc., and do not look at the *genre* of pragmatic literature as such.⁵⁹ Research on the School of Salamanca has, in the past, also concentrated mostly on the great authors and treatises and only occasionally on the smaller pragmatic handbooks. The connection between practical theology and the production of pragmatic literature has however, as far as I can see, not yet received any scholarly attention.⁶⁰

In the research on the early modern history of law in Latin America, Ismael Sánchez Bella has examined the *literatura jurídica práctica* in an exhaustive study, followed by some others, and more recent works have showcased the importance of pragmatic literature in the field of procedural and criminal law within their studies of jurisdictional culture.⁶¹ Some research has been done on legal reference books and dictionaries⁶² as well as on teaching and examination literature.⁶³ However, none of these studies has looked at these books in their functionality in the early modern regime of production of normative knowledge, linking their form and content to their specific significance as tools of empire.

It was António Manuel Hespanha who showed the intimate connections between form and content in early modern legal literature very clearly, and earlier than others, in an article published in 2008 and who placed the history of the legal method, traditionally reconstructed mostly as a result of theoretical discussions, in a media-historical context. His aim was to draw attention to the fact that what he calls the two dominant techniques of simplification of legal discourse – “reducing dialogue to reason” and “replacing doctrinal law by ‘legal law’” –

FERNANDEZ/DUBBER (eds.) (2012); FERNANDEZ (2018); the discussion of textbooks and their authority in SIMPSON (1981) retains its seminal importance.

⁵⁵ See, for example, VEREECKE (1973); VIDAL (2012).

⁵⁶ FUCHSIUS (1848) 232–268; BUND (1900).

⁵⁷ BOUQUILLON (1903) 71–167; PINCKAERS (2004), 264–288.

⁵⁸ See also THEINER (1970).

⁵⁹ SARANYANA et al. (eds.) (1999).

⁶⁰ See DUVE et al. (eds.) (2020).

⁶¹ See, for example, AGÜERO (2008); GARRIGA ACOSTA (2006).

⁶² BARRERO GARCÍA (1973).

⁶³ BECK VARELA (2018).

have to be seen as deeply intertwined with changing material conditions.⁶⁴ He distinguished between different templates and showed the interdependence between these templates and their content. For him, different strategies to cope with this early modern information overload led to the emergence of different types of literature. Within this, the increasing production of indexes, reference works, and other developments also resulted in what he calls a “trivialisation” of legal books. “Compactness, readability, user-friendliness, order: these now become the qualities of a good legal book, qualities which are stressed in the very titles”, like *Liber utilissimus*, *liber in quo facile explanantur*, *Manual* etc.⁶⁵ It was not least this perspective that many authors of the chapters of this book had in mind when they were examining their pragmatic literature, putting these specific media into a pragmatic context.

VIII. Big empires, small books?

“Imperial Majesty ought not only to be adorned with arms but also armed with laws, so that it can govern right in both times of peace and of war”, Justinian’s *Constitutio Imperatoriam* of 533 runs, before claiming to have brought peace and faith to the infidels.⁶⁶ In the early modern Spanish empire, these sentences from the very beginning of the *Institutiones* of Justinian resonated not only for jurists. Like so many *spolia* from Antiquity and Christian tradition, the idea of an emperor who defended the religion, armed with both laws and weapons, had become part of political language and imagery. The *symbolum* IV in Saavedra Fajardo’s collection of emblems⁶⁷ illustrates this, just as statements like Castillo de Bovadilla’s “The defense of the republic is made by letters, weapons, and religion”⁶⁸. It has been rightly said that “Roman law, through its multiple transformations, provided a common language for imperial law-makers; more profoundly, Roman practices of legal rule [...] enabled creative, open-ended considerations and refinements of imperial legalism”⁶⁹ and a wide range of scholarship has dedicated itself to reconstructing the use of normative knowledge in debates about the legitimisation of the conquest, international law or in more specific contexts.

⁶⁴ HESPANHA (2008), 18.

⁶⁵ HESPANHA (2008), 31.

⁶⁶ “Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, utrumque tempus et bellorum et pacis recte possit gubernari”, see *Constitutio Imperatoriam*, pr. and 1, quoted after the edition by Krüger, available online at <https://droitromain.univ-grenoble-alpes.fr/>

⁶⁷ The *Symbolum* IV, *Non solum armis* is contained in *Idea principis christiano-politici, centum symbolis expressa a Didaco Saavedra Faxardo [...] - Bruxellae: excudebat Ioannes Mommartius, suis, et Francisci Vivieni sumptibus* (Bruxellae, 1649), 8v, 24), online: <http://www.fondiantichi.unimore.it/FA/emblem01/saavg004.html>.

⁶⁸ See CASTILLO DE BOBADILLA (1597) Liber I, Cap X, Sumario, 187: *La Defensa de la Republica consiste en letras, armas, y religion*.

⁶⁹ BURBANK/COOPER (2013), 280.

It was, however, not only Roman law that was translated in an enormous diachronic process. In the 16th and 17th century Ibero American worlds, it was not least normative knowledge from the field of religion that made the empire. It was in everyday life that the colonial normative order was stabilised and actualised again and again, far beyond the frontiers of the “lettered city”, by an infinite number of actors on micro and meso levels.⁷⁰ This knowledge production took place in many imperial locations such as Madrid, Manila or Mexico as well as in the *reducciones de indios*, in rural regions or in the no-man’s lands between the Spanish and Portuguese spheres of influence. This production of normative knowledge did not presuppose any in-depth expertise, but rather elementary normative knowledge. Many studies in this volume show that such elementary knowledge was surprisingly widespread, not just among Euro-Americans, but also among native Americans. A central medium that might have made this basic legal intelligibility – and thus also imperial governance and normative imperialism – possible was the pragmatic normative literature. It was widely distributed and used, as the survey on the circulation and presence of pragmatic books in the chapters written by [Danwerth] and [Honores] and many case studies on their use make very clear.

These findings support the hypothesis that gave rise to the research published in this volume: the pragmatic literature from the religious field is particularly important if we want to understand the emergence of the colonial order as a continuous process of translation of normative knowledge, occurring not only in some imperial centres such as Lima, Mexico, Santo Domingo, but as part of a global knowledge production in the field of normativity, a widely underestimated layer in the globalisation process that led to the modern world.

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⁷⁰ On legal literacy see OWENSBY/ROSS (eds.) (2018), HERZOG (2015) and more specifically on indigenous literacy see RAPPAPORT/CUMMINS (eds.) (2011).

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