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Thomas Duve

Indigenous Rights in Latin America: A Legal Historical Perspective

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Thomas Duve

Abstract

According to international and national constitutional law, indigenous peoples in most Latin American countries have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. As a consequence of this and of a long and ongoing process of political debate and recognition, ever more indigenous peoples are practicing their own laws, following their own cultural traditions and customs. In doing so, they often draw on history, recreating their identities and reconstructing their distinct legal pasts. At the same time, historical research has increasingly pointed out the intense interaction between indigenous peoples and European invaders during colonial period. It has become clear that it is difficult to draw a clear line between purely 'indigenous' and 'colonial' legal traditions due to the hybridisation of indigenous and colonial laws and legal practices. The aim of this paper is to introduce this historiography and its relevance to law and to present some methodological challenges in writing the history of indigenous rights in Latin America resulting from this shift in (legal) historiography.

According to international and national constitutional law, indigenous peoples in most Latin American countries have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. As a consequence of a long process of recognition of their (limited) legal autonomy, many indigenous peoples now practice their own laws, their own cultural traditions and customs. In doing so, they draw on history, reconstructing their legal pasts, recreating – or even creating – their identities, a process intensely related to what is sometimes called 'ethnogenesis'. At the same time, historical research has increasingly pointed out the intense interaction between indigenous peoples and European invaders during colonial period. Thus, it has become clear that many of the so-called 'indigenous' or 'colonial' legal traditions are more properly seen as hybridisations of indigenous and colonial laws and legal practices. What does this mean for the current debate on the rights of indigenous peoples?

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The aim of this chapter is to introduce this historiography and its relevance to law and to present some methodological challenges in writing the history of indigenous rights in Latin America resulting from this fairly recent shift in (legal) historiography. It starts with a short introduction into the recognition of indigenous rights in the present and the past (1). Second, it surveys the legal historiography of indigenous rights in Latin America, emphasising the changing context of historiography, the new interpretation of the indigenous peoples' histories, especially in the overall colonial period, and recent research on the history of the rights of the indigenous peoples in Latin America (2). Finally, it addresses some methodological problems of doing research on the legal history and the rights of indigenous peoples (3).

1. The recognition of indigenous rights in the present and the past

According to Art. 5 of the UN Declaration on the Rights of Indigenous Peoples from 2007 (A/RES/61/295), indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. This UN Declaration is the culmination of a long process of growing recognition of indigenous peoples' rights on an international level as well as on the level of many national constitutions (for this process, see Anaya 2005; Bengoa 2007). As a consequence, many indigenous peoples of Latin America are now claiming and exercising their right to self-determination. They are practicing their own laws, their own cultural traditions and customs.

In going about such practices, many indigenous peoples look back to millenary legal traditions that originated centuries before European invasion. However, these legal traditions have evolved in continuous processes of translation of previous beliefs and practices into the present. Due to migration and the imperial expansion of some indigenous peoples, like the Inca, in the pre-conquest period, there were processes of hybridisation even before European invasion (see for example Duverger 2007 and the various contributions in *The Cambridge History of the Native People*, Vol. 2, 3). After the so-called 'conquest', the development and exercise of indigenous rights was generally determined by colonial conditions. European invaders imposed their cultural systems and, simultaneously, their law on the conquered. Yet there were important differences. Some regions have been less affected by the European presence, in some cases there was intense cooperation and thus a certain respect for indigenous peoples' political and juridical systems, and in others the European invaders simply eradicated what they had found. The Spanish and Portuguese crowns pursued distinct colonial policies, though there might have been more commonalities than traditionally believed (Herzog 2015a).

Colonial legal systems were not homogenous and closed. On the contrary, they were structurally open. European *ius commune*, shaped by a multinormative past and, until at least the 18th century, characterised by overlapping jurisdictions, provided an intellectual and institu-

tional framework for the integration of different legal traditions. Moreover, the Castilian and the Portuguese crowns were not only shaped by this tradition, but had developed their own practices of making *convivencia* possible over the preceding centuries on the Iberian peninsula (see on this complex topic the survey by Soifer 2009), with a mixture of what some modern observers call ‘tolerance’ with oppression and violence (on the legal tradition of dealing with *infideles* see Muldoon 1979). These experiences contributed to a process of hybridisation of indigenous legal traditions with those the conquerors had brought to Latin America. The structural openness soon found expression in concrete legislation. The first known decree on these matters dates from 1530, ordering crown officials to collect information about the “order and way of living” of the indigenous peoples of New Spain, recognizing their right to live according to their “good practices and customs as long as they were not against our Christian religion” (see on this Zorraquín Becú 1986). In a later royal decree dating from 1555, Spanish King Charles V stated that antecedent indigenous laws as well as those newly enacted would be respected. Some decades later, reforms of the colonial administration, like Viceroy Toledo’s Peruvian ordinances, granted judicial autonomy to members of indigenous communities in their respective settlements. Another century later, some of these particular decisions, like Charles V’s royal decree of 1555, were collected in the *Recopilación de Indias* (2.1.4), referring to the ‘laws and good customs’ of the pre-conquest period and the ‘usages and customs which had been observed’ afterwards.

Even if this respect has been classified as an example of a (weak) legal pluralism, there were important limits to the autonomy granted to the indigenous peoples: a repugnancy clause explicitly excepted those usages and customs that violated the principles of Christianity or royal legislation. However, as a result of these concessions and some previous royal laws and decrees dating from as early as 1500 and 1512 (*Leyes de Burgos*) that qualified the indigenous people as rational persons, later papal documents (*Sublimis Deus*) and intense debates on the status of the indigenous peoples, which affirmed their condition as human beings and free vassals of the crown, the members of indigenous communities were subject to the normativities of at least two worlds: the general legal regime in the colonial territory as well as to their own (very heterogeneous) laws. They were integrated asymmetrically into a colonial legal system that was itself based on difference.

This legal regime changed considerably under the conditions of modern constitutionalism following the independence movements in the 19th century. To many indigenous peoples the political reforms carried out in this period, especially the aggressive modernising policies of the 19th and early 20th centuries, represented existential threats (see on this Clavero 1994, 2005). Like other special rights and privileges, those of the indigenous peoples were expunged from the official legal landscapes. Seemingly liberal constitutions were enacted and established in the centre of national legal orders. In theory, all citizens were made equal, and there was little or no space for differences to be recognised in law, and even less so for those the encroaching immigrant societies saw as part of a backward, uncivilised past. If inequality persisted not only in practice, but also in law, apportioning rights of political participation unequally, it was to favour powerful groups in the creole elite and Euro-American society. In-

indigenous peoples were the big losers in the process of eradicating a jurisdiction-centred justice system with provisions for limited autonomy. State-building processes, land registration, new property laws, territorial expansion and resettlement policies left only limited margins of autonomy to the indigenous peoples. Nonetheless, indigenous rights persisted through practice and often unwritten transmission. They shaped – or at least influenced – daily life in many places. Today, as a consequence of the substantial changes in international and national regulations as well as in cultural perceptions, some Latin American states officially recognise indigenous rights and grant judicial autonomy to indigenous peoples. As in earlier colonial times, members of indigenous communities are subject to general as well as special legal regimes in modern constitutional legal systems that are trying to respond to the growing demand for recognition of ethnic, social and cultural diversity. As a consequence, indigenous legal institutions and indigenous practices of administering justice have gained purchase in much of Latin America. Vernacular languages have been readmitted in some courts, and some judicial sentences are being published in indigenous languages.

In this fairly recent process of restituting legal autonomy, history has become an important argument. In Bolivia – the most significant experiment in putting political claims of autonomy and pluralism into constitutional practice by far – returning to indigenous traditions predating the colonial period has been the central legitimation for the transformation of the political system. Indeed, article 30 of the 2009 Bolivian constitution defines the ‘rural native indigenous people and nationality’ as those human collectives that share a ‘cultural identity, language, historic tradition, institutions, territory and worldview, whose existence predates the Spanish colonial invasion’. Also in other countries, the general tendency is to base legal recognition of indigenous peoples on successful claims of ancestral traditions, or at least on their ability to prove certain practices’ historical roots in their communities’ lives. Collective and individual property rights are protected whenever the claims can be historically justified. In many specific contexts of current legal life, tradition and, concomitantly, the history of these traditions – in a word, legal history – plays a major role. History has become a constitutive element of constructing modern legal pluralism.

2. The legal historiography of indigenous rights

In spite of its importance, the legal historiography of indigenous rights in Latin America has only recently been given its due. For a long time, (legal) historians have paid only limited attention to the fact that indigenous peoples have vivid legal traditions also beyond the limits recognized by official law and were not simply practicing outdated customs that were bound to disappear. Not least due to the domination of Euro-American academic traditions and practices in Latin American academia during large parts of 20th century, indigenous peoples’ rights have remained a blind spot of the discipline. They seemed to be merely a case for anthropology, not for legal history. This has changed dramatically in recent decades.

Changing contexts of historiography

To understand the current debates, it is important to look at least briefly at some aspects of the changing contexts of historiography. Since the 1980s, most Latin American countries have experienced an intense process of redemocratisation and a wave of new constitutions ('New Constitutionalism', see Nolte/Schilling-Vacaflor 2012; a general picture of the development of law in Latin America in this period in Rodríguez Garavito 2015). Many of these constitutions incorporated the transcendent reforms in international law regarding the protection of indigenous rights that took place in the same period. An important step in this process was the International Labour Organization's adoption of Convention 169, 'Indigenous and Tribal Peoples Convention' (ILO 169) in 1989, which was ratified by many Latin American countries. ILO 169 made history a central argument in claiming the status and the attendant legal privileges of being recognised as 'indigenous people' because it applies to 'tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations' and to 'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country [...] at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'. Similarly, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples in 2007 (A/RES/61/295), which elevated a group's self-identification, its traditions and historical identity formation to the level of a fundamental consideration in determining its status. All this was possible due to the emergence of a transnational indigenous rights movement, among other factors, which raised local conflicts to the international level.

Political decolonisation and intensifying globalisation, however, not only created fertile conditions for the transnational indigenous rights movement and thus empowered many local actors. It also catalysed some mortal threats to indigenous peoples. Since the late 1980s, many Latin American countries witnessed a period of economic growth, stronger integration into the world economy and deregulation, adopting development models labelled today as 'new extractivism', which rely heavily on the extraction of natural resources (Veltmeyer/Petrás 2014). In consequence, many rural areas that had been difficult or impossible to access – often the homelands of indigenous peoples – have been subjected to increasing extractivist activities since the 1980s. Even in countries like Bolivia, this has led to worsening conflicts between political and economic development models, legally speaking between ethnic rights and class-based rights (Lalander 2016). One decade after the UN Declaration, it seems as if the growing legal recognition of indigenous peoples has deepened complex processes of re-indigenisation and an important strengthening of indigenous peoples' interests in the public discourse. It has also aggravated conflicts, not least because most states have failed to provide a juridical framework to realise these rights and resolve the resulting conflicts. Thus, despite progress in some areas, recent decades have seen often violent conflicts between state author-

ities and indigenous peoples claiming their rights, mostly regarding the possession of land (on this development, see the case study on the Mapuche by Bengoa 2014).

In addition to these political developments, historical theory and methodology have shifted too, which has profoundly affected the historiography on indigenous peoples and their rights, especially during colonial period. Subaltern history and postcolonial studies have reached even the mainstream of professional academia. Due to the increasing influence of Anglo-American academia and its intellectual preferences, race, ethnicity and identity formation, among other factors, have become key topics of historical research in regard to Latin America. Ethnohistoriographical methods have been refined and increasingly integrated into historical accounts. As a consequence, historiography has been sensitised to the ‘invention of traditions’, of identities and the complex process of ethnic definition (‘ethnogenesis’). Since the late 1970s, legal anthropology has devoted its attention to analysing situations of legal pluralism and the integration of diversity into unitary systems (Assies, Haar, Hoekema, 2000), emphasising the importance of law, which has long been seen as a mere epiphenomenon of social structure. In line with this trend, the rise of global history has – after some delay – finally spread to Latin America (Gruzinski 2004; Carmagnani 2011; Brown 2015). Given that global history promotes decentralising historical narratives, argues for equal opportunities to interpret history and, especially, discarding the reductionist interpretations and stereotypes in colonial perspectives, like passivity, isolation and the undifferentiated marginalisation of indigenous peoples in colonial empires, this is a weighty shift. Another priority of such global (legal) history is to use analytical frames derived from indigenous regional logics, rather than from European historiography (Sousa Santos 2014), respecting indigenous or non-European or North-American epistemologies (Clavero 2014; Conrad 2016; Duve 2017).

The emergence of indigeneity as a global identity during the Cold War along with new communications technologies and greater sensitivity to the value of biological and cultural diversity have provided indigenous peoples with new opportunities to generate and respond to public attention (on the performance of indigeneity, see Graham/Glenn Penny 2014). The various forms of *indigenismos* (Tarica 2016) and (re-)indigenisation processes in Latin America have their own histories, rooted even in earlier periods (see for example Earle 2007, Cadená 2003), but are nonetheless facets of a global phenomenon (on the USA, see, for example, Wilkins 2013), which is inseparably bound to a global trend of addressing past injustices and the underlying global regimes of memory (Clifford 2013; Rousso 2015).

Indigenous peoples’ histories

The shifts in policy and in general scholarly discourse since the 80ies and their impact on the historiography of indigenous peoples and their rights have been catalysed by two momentous events. The first in 1992 was the 500th anniversary of the arrival of Europeans in America, and the second is the wave of celebrations that has been sweeping across Spanish America since 2010 in remembrance of two centuries of so-called ‘independence’ from Spain. These two events have brought to light very different views on the history of indigenous peoples in

the wake of European expansion and from the advent of the nation-state until today. It was not least a confrontation between traditional national historiographical communities and those who advocated for a renovation of perspectives.

The picture that has emerged from this evolution has substantially modified our vision of indigenous peoples' histories, especially with regards to Hispanic America. Whereas early general historiography and more specialised writings on the relation between indigenous peoples and the Spaniards (for example, Gibson 1992 [1964]) or the Portuguese (for example, Hemming 1978, 1987) focused on the Europeans' role, be it heroic or iniquitous, and viewed indigenous peoples merely as an object of an economic, political or spiritual conquest, attention has shifted since the 1960s to how indigenous peoples experienced conquest and colonisation. Miguel Leon-Portilla's '*Visión de los vencidos*' (1959), as well as his later works and those that build on them, shows to what degree this traditional depiction relies on a biased sample of sources. A history of the vanquished, which itself was criticised as inadequate for its perpetuation of colonial frames and interpretations (for a useful survey on Hispanic America, see Lockhart 1992; Lockhart/Soudsa/Woods 2007), was to replace the history of the victors. In legal history, the teachings of the School of Salamanca, for a long time considered as an expression of *The Spanish Struggle for Justice in the Conquest of America* (Hanke 1949), now seemed just *Another face of Empire* (Castro 2007).

Recent scholarship followed up on these developments. Increasing cross-fertilisation between archaeology, philology, anthropology and historical research on indigenous peoples has fostered the progressive emancipation from European periodisation and analytical frames springing from Europe and North America (see the contributions to the seminal *Cambridge History of the Native Peoples of the Americas*, 1999ff., especially the surveys by MacCormack 1999; Spalding 1999; Macleod 2000 as well as Monteiro 1999; Wright/Carneiro de Cunha 1999 on Portuguese America). In some recent attempts, European conquest and colonisation are represented not as the fateful dawn of history, but as an episode in a longer story of imperial rule on the American continent, especially in the form of the Incan and Aztec empires (Restall 2015). This entails problematising stereotypes like the 'conquest', the encounter between 'the Castilians' or 'the Portuguese' and 'the natives' in favour of reconstructing complex multi-ethnic relations of competition and cooperation between various European, indigenous and other actors (see, for example, Matthew/Oudijk 2007; Terraciano 2008; Kellogg 2016; Schwaller 2016).

Obviously, this shift of perspective in no way negates the devastation caused by disease, war, subjugation to foreign cultural systems and economic exploitation. The integration of the American continent into the world economic system caused an immense and asymmetric transfer of resources from America to Europe and other world areas. It transformed the political and legal system. Spanish imperial politics instituted power structures that maintained supremacy by conferring limited authority to various subsidiary bodies. In many cases, superior ruling elites of indigenous societies were disempowered, while at the same time hereditary lords and local elites (*caciques*, *kurakas*) served as mediators, collected tribute and organised coercive labour of the common people (*macehuales*, *runa*). Some indigenous societ-

ies were transformed into less stratified systems, hierarchically reorganised and physically resettled. Thus, Latin American indigenous peoples became part of the Spanish and Portuguese empires and were subjected to their imperial rule – a system of governance that consisted of overlapping jurisdictions, leaving margins of autonomy and comprising zones of more or less intense penetration by colonial authorities and culture.

However, it is precisely due to this intense reorganisation of societies and the underlying legal practices that it is often difficult to delineate the indigenous and non-indigenous worlds. The European invaders based their power simultaneously on brutal extermination and submission, but also on recognition and the limited empowerment of indigenous peoples. The alliances and interactions between the conquerors and the conquered were malleable. Some regions were subjected to aggressive transformation, while others seem to have maintained more autonomy. There were zones of intense contact and exchange. Many recent studies have illuminated how intergroup communication employed multilingual practices in secular and church life (for New Spain, see, for example, Nesvig 2012; Schwaller 2012). The so-called ‘*indios ladinos*’, referring to Catholic and literate members of indigenous communities (Andrien/Adorno 1991; Charles 2010), and *mestizos*, as the most numerous segment of society, who were yet extremely ambiguous in their practices of belonging (see, for example, Rappaport 2014), attract increasing interest. These groups sometimes combined the binary categories of a *república de indios* and a *república de españoles*, a ‘useful fiction’ (Graubart 2016, 3) that has long shaped politics as well as historiography. Whereas for a long time, the concept of “blood purity” (*limpieza de sangre*) was seen as a tool of exclusion, it has become clearer that this concept was also used against elites, and served for racial passing (Böttcher, Hausberger et al 2011). Research on the continuity of indigenous rule, which has persisted over centuries in some instances, and on its changing institutions and practices is now more refined, aided by improved mapping of (often spatially limited) colonial power (on the ‘myth of completion’, see Restall 2003, 64-76). In fact, many regions that were especially prone to conflict, like that of the Mapuche, are now seen as zones of autonomy that was tolerated, if not legally sanctioned, until well into the 19th century (Bengoa 2007). After independence, some indigenous peoples even considered themselves completely independent from the new nation-states – just as it is the case today, when indigenous peoples claim their status as “people” in terms of legal autonomy.

In addition to this discovery of porous boundaries and parallel lives, it is becoming clearer up to what extent indigenous community councils (*cabildos indigenas*), which had long been ignored due to a paucity of written records, have been acting with considerable margins of independence (see Graubart 2016; Yanakakis/Schrader-Knifki 2016). Similarly, there is also growing appreciation for the degree to which social and political rule built on and instrumentalised precolonial structures, as was the case, for instance, in the same spatial reorganisation which was meant to break previous power structures (e.g. Mumford 2012), the economic organisation of labour services and tribute collection. Recent attention to indigenous agency, especially the role of cultural brokers and translators (Dueñas 2015), indigenous elites (Ramos/Yanakakis 2014), their extensive networks and economic activities (Glave

Testino 1989; Richter/Thompson 2012), in addition to many investigations of cultural translation and the hybridisation of cultural systems have shaken the image of a small group of Europeans indiscriminately dominating huge demographic majorities (for the early Andean region, see Estenssorro Fuchs 1998; Lamana 2008; Lovell/Lutz et al. 2013; Dueñas 2015). The field of relevant actors now includes previously ignored groups, like the descendants of slaves trafficked from Africa (O'Toole 2012; McKinley 2016), indigenous women (Graubart 2007) and indigenous individuals who left their communities behind to live as vagabonds or *forasteros* in urban contexts (Wightman 1990). Current historiography depicts processes of negotiation, translation and learning in societies characterised by ethnic discrimination as a part of a broader system of inequality, but also by stark variation in their regional and historical contours. In the end, they were all Imperial subjects (Fisher/O'Hara 2009). The legal system is increasingly seen as an arena of encounter, and it has consequently been studied more intensely since the 1980s (for the Andean region as an important starting point, see Stern 1982; for New Spain, see Borah 1982), not least as a source for ethnohistorical research (Kellogg 1995). Generally speaking, historians emphasise the significance of the legal system as an arena of negotiation as well as a source of power and cohesion in the Spanish Empire (Ruíz Medrano/Kellogg 2010).

The drive in historical scholarship to revalorise indigenous actors and to overcome enduring stereotypes has also shed new light on the independence movements and the emergence of the nation-state and its structures in the 19th and 20th centuries. It has become clear that, already by the end of Spanish rule in Hispanic America, the room for indigenous elites to manoeuvre had shrunk considerably. The Bourbon Reforms, upward social and economic mobility of creoles, abortive mass rebellions, like that of Tupac Amaru (1780-1783) with its roughly 100 000 casualties, and the political transformations that followed independence and constitutionalisation gravely compromised the autonomy of indigenous peoples. The sometimes-catastrophic effects on indigenous peoples wrought by constitutionalism, nation-building and the first wave of economic globalisation in the second half of the 19th century are becoming ever clearer (see the survey in Hill 1999; Larson 2004; Mayer González/León Portilla 2010; Mallon 2011; for Brazil, see Devine Guzmán 2013). The growth of the institutions attendant to the nation-state, especially the production of ideological and infrastructural conditions amenable to the centralisation of rule, only reinforced this process. Many indigenous freedoms in law or in fact ended with the integration of vast regions that had remained outside state control. National citizenship, new technologies of rule, like surveying and the introduction of cadastres, immigration policies, racist and social Darwinist ideology, and the creation and selective implementation of legal orders based on abstraction, uniformity and the protection of liberal property rights in the 19th and early 20th centuries have been analysed, among other perspectives, in terms of their impact on indigenous peoples. The history of indigenous peoples' suffering due to forms of totalitarianism and (state) terrorism, with some regional variation, and the history of the 'emergence of the indigenous' in 20th century has just begun to be written (Bengoa 2007).

The history of indigenous laws and indigenous people's rights

The traditional discipline of legal history as practiced at law schools in Latin America has only partially adopted these more recent views of general historiography and integrated them into its analytical framework, both in the case of the more traditional research on colonial Spanish America, often referred to as *derecho indiano*, as well as in the case of Brazilian legal history (on the research tradition of the *derecho indiano*, see Tau Anzoátegui 1997; Duve/Pihlajamäki 2015). Since their beginnings in early (or for Brasil later) 20th century, both legal historiographic communities were more interested in writing the prehistory of the various national legal systems that had emanated from independence than in their indigenous pasts (see for a legal historical perspective on the problems of writing the history of indigenous law Trazegnies Granda 2002). When looking at the rights of indigenous peoples, legal history focused on aspects like their legal status, royal legislation to protect them and the adaptation of Castilian institutions to the particularities of the New World (cf. Manzano Manzano 1967; Zorraquín Becú 1986, Menegus Bornemann 1992; Trazegnies Granda 2010; Novoa 2016). This state-centred perspective is even visible in authors like Miguel Bonifacio, a Bolivian legal historian who devoted much of his scholarly activity to indigenous rights. Studies treating processes of legal mestization and hybridisation remained in the minority (González de San Segundo Sombra 1995), partly because researchers relied almost exclusively on the colonial archives, in particular on the Spanish-language records they contained. In the same vein, there was little attention to the widespread dispossession and legal marginalisation of indigenous peoples in 19th and 20th-century constitutionalism.

In the last three decades, history of indigenous rights and indigenous law has become a lively field of research, not least because of the above mentioned transformations in the general context and the converging interest of general historians and legal historians, but also due to seminal and provocative studies of Spanish legal historian Bartolomé Clavero (for example Clavero 1994, 2005). Since then, many studies have shown the complexity of the juridical operations which were used to determine the legal status of indigenous people. Privileges like those which *ius commune* had developed for the so-called *miserabiles personae* (Duve 2008, 2011) or categories like being native (Herzog 2003; 2014) could be applied to indigenous people as well as to those from Iberian origin, blurring accepted boundaries between the allegedly separate worlds of colonized and colonizers. Moreover, research has shown to what extent indigenous elites made use of royal courts to defend themselves both against the abuses of local colonial authorities and against other indigenous groups (for early New Spain, see the pioneering work of Borah 1983; Kellogg 1995; Owensby 2008; Yannakakis 2008; for Andean regions, for example, see Stern 1982; Mumford 2008; de la Puente 2015; de la Puente/Honores 2016; Dueñas 2015; for a comparative survey, see Yannakakis 2013). It has become clear in several cases that the use of judicial institutions throughout the colonial period was not restricted to elites, but was rather open to larger parts of the indigenous population (Owensby 2008; Ramos/Yannakakis 2014). This corresponds to general findings on indigenous literacy, which have expanded the notion of the 'lettered city' far beyond the limited

supposition of colonial elites (Dueñas 2010; Rappaport/Cummins 2012; Ramos/Yannakakis 2014). Recent research has also drawn attention to the fact that even marginalised groups, like slaves of African descent, made use of ecclesiastical courts (de la Fuente 2007; McKinley 2010), as did indigenous people (Traslosheros/Zaballa 2010; Zaballa 2011). There were even cases of notaries from African descent (Espelt-Bombin 2014). Interestingly, the strategic use of colonial courts also implied the use of indigenous materials as evidence, which in turn were produced and reproduced in pragmatic judicial contexts (Ruiz Medrano 2010).

One aspect of these findings seems especially noteworthy in the context of this chapter: indigenous peoples' use of royal and ecclesiastical courts and the introduction of indigenous law in these claims were not without consequences for the indigenous legal traditions themselves. When trying to argue their claims, indigenous actors had to translate their own legal regimes, like their concept of what the Christian tradition calls 'property', for instance, into the language and logics of the colonising society (Graubart 2017). This translation led to the counterintuitive result, as Tamar Herzog has emphasised, that it was precisely the respect for native rights that brought about a major reorganisation of these rights and contributed to their transformation. Similarly, Spaniards defending themselves against indigenous claims sometimes cited pre-conquest law, and resettled communities were granted land rights according to Spanish legal concepts, thereafter adopting these concepts as their own (Herzog 2013, 2015). With the passage of time, indigenous claimants could often draw upon early translations of indigenous rights that were adopted and used by indigenous peoples as their own, despite having transformed indigenous traditions as, for example, in the case of the *Relación de Michoacán* (on these processes, see Mundy 2000). In other words, indigenous actors' use of secular and ecclesiastical courts led to a certain blending of traditions – a typical situation that legal anthropologists have proposed calling 'interlegality' (Hoekema 2005).

Yet indigenous peoples acted not only as litigants at crown courts and ecclesiastical tribunals, but also administered justice in lower courts. Administrative reforms, like Francisco de Toledo's ordinances, explicitly granted indigenous communities and their *cabildos* in his realm, the Viceroyalty of Peru, the right to hear all civil litigation on claims of minor economic value and other conflicts, like land use. They also granted jurisdiction over their subjects' labour to indigenous leaders (see Graubart 2015; 2016). In this jurisdictional activity, indigenous authorities drew on both indigenous and colonial laws, appropriating semantics, concepts and practices from both orders (de la Puente/Honores 2016). For New Spain, recent studies have emphasised the vernacularisation of Spanish and Christian legal thought and the blending of traditions in the local administration of indigenous justice. At least in some 17th and 18th-century cases, indigenous authorities even defended the existing colonial legal order against what they called the 'old law': the pre-conquest indigenous law (Yannakakis/Schrader-Kniffki 2016). In some cases, it has also been shown how authorities from indigenous councils communicated with local and peninsular authorities, participating actively in the process of normative production (Dueñas 2015a). Representatives of influential groups of mestizos, often at least closely related to authorities in indigenous communities, used early

church councils, like the Third Provincial Council in Lima 1582-83, to lobby for their interests, achieving favourable changes in ecclesiastical and royal legislation (Duve 2010).

Of course, these studies are necessarily tied to specific local contexts and periods. They do not admit generalisation. However, taken together with the apparently frequent processes of 'racial passing' and flexible ascriptions to different ethnic groups, these complex patterns of 'consumption of justice' clearly indicate porous boundaries and a considerable dynamic of exchange and hybridization between indigenous and non-indigenous justice systems.

3. Methodological challenges

These developments call for some remarks on key challenges for future research in legal history, especially regarding method. To the extent that legal historiography is not only dedicated to the legal past, specialising in the different modes of law and their historical functions, but also tries to connect its findings with problems and questions in current juridical scholarship, three aspects seem especially noteworthy, and they are closely related to general methodological problems of global legal history as part of legal scholarship (Duve 2017).

Multinormativity

The first aspect that requires more intense study for the sake of more nuanced historiography and for a better conceptual purchase on current legal issues is how to analyse situations commonly referred to as 'legal pluralism'.

The concept of 'legal pluralism' is popular, but not unproblematic (Benton/Ross 2013). It has succeeded in destabilising state-centred perspectives on the past and other legal regimes, which tend to be legalistic, sometimes anachronistic and Eurocentric, beyond mere Western modernity. However, the case of indigenous peoples' laws in the colonial period shows that it might also lead to a misunderstanding of the complex and profoundly different ways of administering justice. The often-cited practice of 'forum-shopping', well-known to modern jurists, seems to indicate that the choice of courts implies a choice of law, but this only obtains to a very limited extent. When indigenous communities claimed their property rights, they might have used the colonial legal order, but this legal order recognised indigenous law, accepted indigenous forms of proof and translation of indigenous concepts. By the same token, judges in indigenous courts might not restrict themselves to 'indigenous law'. They might even oppose the traditional indigenous rights as the 'old law' and favour a normativity that had emerged in a long process of blending cultural traditions by (cultural) translation. Can such hybrid normativity be adequately represented by the concept of legal pluralism? A concept like interlegality, which André Hoekema (2005) developed precisely to address the interpenetration of different legal orders, might be more helpful despite its framing in European terms of majority/minority, which is inapplicable to Latin American cases.

But even after replacing ‘plural’ with ‘inter’, the problem of ‘legal’ and ‘legality’ remains. Focusing on the ‘legal’ aspect privileges state-centred perspectives and tends to create a semantic difference between different layers of normativity, granting the quality of ‘law’ to some and denying it to others, like custom. Already this bias might seem sufficient to abstain from its use. Moreover, it falls short when the goal is to understand the importance of normative spheres that are not law in a state-centred sense, or not even part of the usual ‘non-law’, like custom, but that might be considered religious normativity, including rites, religious obligations, or even consensus about what should be done and avoided. They are seen as simply different to what the Western tradition habitually calls ‘law’, and perhaps not even part of the classical canon of ‘non-law’. While such distinctions between written law, custom, moral, might apply to Western legal past (although even this is doubtful), they do definitely not fit indigenous normativities. Neither does the concept of ‘legal pluralism’ leave a space to integrate the normativities that emerge from a praxeological perspective on human action: implicit knowledges that underlie practices, are contingent but not random, and might have decisive effects on how normative options are translated into concrete cases. How, for example, can we explain practices of not applying prescriptions, sometimes without any explicit rule, that seem to fit and have been applied in other cases? How do the aesthetic and material dimensions, the presence of certain objects or conditions and their perceptions, which seem to be so important for indigenous administration of justice, enter into the analysis? Research on indigenous laws needs analytical tools that grasp the underlying assumptions about consensual – and accordingly stable – normativities that affect all sorts of cultural reproduction as well as the cultural translation of concepts into different times and languages. Some of these phenomena have been addressed by the recent French sociology of conventions (Diaz-Bone/Thévenot 2010; Diaz-Bone/Didry/Salais 2015). Here, conventions are understood as interpretative frames that coordinate operative situations. Such conventions develop out of concrete situations and can be stabilised network structures. They are related to specific forms of cognition and are applied with a normative intention.

The combination of these two perspectives – the norm-theoretical approach of ‘normative and jurisdictional pluralism’ or interlegality, along with the more action-theoretical approach of the sociology of conventions – helps to describe the complexity of normative orders as well as the process of normative appropriation. Yet, even together they fail to grasp the dynamics leading to normativity’s continuous (re)production, especially in diverse epistemic settings. Above all, even when combined, they do not escape the danger of essentialising normative orders, treating these as if they were stable. Cultural studies, social science and recent historiography on indigenous peoples, by contrast, have shown that the production of normativity by groups can only be understood dynamically, situationally and relationally. Thus, any analysis of these normative spheres is incomplete without reflection on the dynamics of producing normativity in an internally diverse setting. Any representation of indigenous peoples’ normative orders under colonial rule must consider the mechanisms of ethnicity construction. To understand complex societies and how their regulatory regimes reproduce themselves, legal history needs to draw upon social scientific scholarship on such

dynamics as, for example, ongoing debates about ethnic boundary-making and conviviality (Wimmer 2013; Vertovec 2015). An open concept like multinormativity, which is designed to analyse situations of translating normativities in diverse epistemic settings, might help to reconstruct this complexity (Duve 2017).

Freezing differences

Another specific danger of the current re-indigenisation by juridification is intimately related to historical discourse: the fallacy of essentialising the identities, traditions and practices of groups that have succeeded in establishing themselves as relevant actors. Since indigenous peoples are usually identified genealogically, the conservation of their social practices, customs, traditions and their self-identification as, for example, in ILO 169, bears a certain danger of ‘freezing differences’ (Costa 2012) in the sense of creating seemingly stable historical identities through law (Kuper 2003). Another reason for concern is that, in order to obtain recognition as indigenous peoples, cultural stereotypes and preferences often prevail that romanticise and exoticise their referents or perpetuate and privilege other cultural patterns (for a survey of the debate and its problems relating to Brazil, see Carneiro da Cunha/Almeida 2000). On the one hand, indigenous peoples run the risk of becoming trapped in their own traditions without the opportunity to develop them productively. On the other hand, other groups demanding autonomy then run the risk that their demands be ignored or that their protests could even be criminalised. At the risk of sounding indelicate, it might be the case that, in many cases, the driving force behind the process of recognising indigenous peoples’ rights is not so much the desire to restore historical tradition but simply the political calculation to grant more autonomy to certain groups that succeeded in asserting their claims in the political debate. On the long run, it might be inevitable to admit this.

Nothing pure

Another provocative question of major significance to legal history is related to the continuous transformation of legal traditions, to the flexibility of collective ascriptions that constitute and reconstitute themselves, and the inevitable interrelatedness of their normative orders: is there even such a thing as ‘indigenous rights’? They obviously exist – at least in a conceptual sense – as is evidenced by actors invoking them in their claims and arguing about their content. Moreover, it should be clear that there are no ‘pure’ traditions, especially not in legal spaces that were, like most of Latin America, in at least intermittent contact with other normative systems. The problem lies in the fiction of purity and historical stability, even if actors do not claim, as does the Bolivian constitution, traditions ‘whose existence predates the Spanish colonial invasion’.

How do we deal with this, however, given that national and international law presuppose the existence of these ‘indigenous laws’ and trigger related processes of ethnogenesis and tradition-building? Legal history would do well to draw attention to the fundamental con-

ceptual problems that arise from this kind of use of history in judicial contexts. This entails fostering debates about how different epistemic traditions clash in court, not only from a theoretical perspective (Kovach 2009; Sousa Santos 2014) but also considering the pragmatics of judicial contexts. It might, therefore, be necessary to reflect more deeply on what is variously referred to as ‘forensic legal history’: a methodological reflection on the use of legal history in court (Delafontaine 2015).

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