Foundations of Governance and Law: An Essay on Law's Evolution in Colonial Spanish America

Bases de la gobernabilidad y del derecho: un ensayo sobre la evolución del derecho en Latinoamérica colonial

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Abstract

The contemporary legal systems of Latin America were all established on institutional foundations that had evolved during not only the course of four centuries of Spanish and Portuguese colonial rule, but also from the fusion of pre-existing institutions formed in previous evolutionary processes. This article is an attempt first to develop an analytical framework in which such developments can be meaningfully analysed and second to identify the principal features of these prior regimes. It begins with a detailed set of propositions defining law, its basic elements and attributes as well as a theory of legal evolution. It continues with an application of this framework in the context of the Aztec and Inca civilizations, the evolution of law on the Iberian Peninsula, and finally the principal features of Spanish colonial law that ultimately emerged in the context of the Latin American colonial experience.

Key Words
Law and Authority, Legal Evolution, Indigenous Institutions, Spanish Institutions, Colonial Law.

Resumen

Los sistemas jurídicos contemporáneos de América Latina se basan no solo en principios institucionales que evolucionaron durante cuatro siglos de dominio colonial de España y Portugal, sino también en la fusión de instituciones que ya existían, surgidas de procesos evolutivos previos. Este artículo desarrolla un marco analítico para estudiar la importancia de dichos procesos e identificar los rasgos principales de esas instituciones. Empieza por una serie de proposiciones detalladas que definen el derecho y sus atributos, y plantea una teoría sobre su evolución jurídica. Continúa con la aplicación de dicho marco analítico al contexto de las civilizaciones azteca e inca, la evolución del derecho en la Península Ibérica, y finaliza con las características más destacadas del derecho colonial español, surgidas durante la dominación colonial en Latinoamérica.

Palabras clave
Derecho y autoridad, Evolución legal, Instituciones indígenas, Instituciones españolas, Derecho Colonial.

Introduction

The focus of this essay is the evolution of law in pre-independence Latin America.[1] The primary aim is to articulate a generally applicable theory or framework that explains the evolution of law in Latin America as, hopefully, a meaningful guide for future research. The Latin American historical experience exemplifies a particularly significant combination of trajectories of political and legal evolution. Any study of law in Latin America, however, poses special challenges and opportunities. In common with most other regions of the world, contemporary Latin America shares a dual evolutionary heritage. Its foundational political and legal institutions initially evolved both within native Amerindian cultures and separately within Spanish Iberia prior to their imposition during the colonial era. In this respect Latin America may seem little different than other regions of the world that experienced European colonization. For contemporary Latin America, however, the foundational evolutionary story does not end with colonial rule. Unlike nineteenth and twentieth century colonial experience in Africa and Asia, the countries of Hispanic America, along with the United States, gained independence at the dawn of the modern era. Sixteenth century Castilian models were less attractive to the founding fathers of the new republics than those presented by the United States and France. Indeed, neither the political structures of a sixteenth century Castilian kingdom nor its thirteenth century code, the *Siete Partidas*, which functioned as fundamental law in its colonial empire, could compete as models with either the new Constitution of United States and the new French private law codes. Thus unlike other former West European colonies, as independent states they did not simply adopt the legal institutions and structures of the colonial regime. Instead, a process of emulation of what we might call "best practices" today occurred throughout Latin America. Both political and legal Spanish colonial institutions were rejected in favor of "modern" legal models.

Often masked by the ostensible homogeneity of Spanish colonial rule and shared patterns of reform upon independence are equally important foundational disparities and contrasts among the Amerindian communities, the various viceroyalties of the colonial period, as well as national differences thereafter, all of which that

[1] This essay is based on Chapters Two and Seven of a work in progress entitled *Rivers, Revenues, and Rice: Law's Political Evolutions.*

have combined to produce equally consequential disparities since independence among the individual countries in the region. The stark contrasts in the post-independence evolutionary trajectories even of neighboring states that otherwise appear to share much in common –such as Chile and Argentina, Colombia and Venezuela, not to mention Costa Rica and Nicaragua– raise especially challenging questions. We can hardly begin to answer such questions, however, without least a basic framework for analysis. Developing such a framework is, as noted, the primary objective of this essay.

We need to keep in mind at the outset that by imposition or emulation, Western political structures and law have become universal. All states in the world today have by default or design organized their political and legal institutions in West European terms. Hence intrinsic to the structures, institutions, and processes of law are fundamental legal concepts as well as conceptions of law itself derived directly from the West European legal tradition. These tend in comparative terms to be extraordinarily broad and inclusive. The prevailing notions of legitimacy, justice, statehood, and political authority, not to mention the understanding of law as predominantly a system of private law enforced through litigation, are simply taken for granted.

Eurocentric conceptions and assumptions might well suffice were we solely concerned with law in the context of Western Europe. Once we expand our inquiry beyond Europe's borders, we need a shared understanding of what we mean by the most basic concepts and terms of analysis. The lack of universally accepted definitions poses special problems for comparative law, at least for comparisons across time and cultures. Without common points of reference meaningful comparison of legal systems in different, particularly non-Western, cultural and institutional contexts becomes difficult if not impossible. How are we to categorize the norms and rules imposed and enforced by Aztec or Inca rulers prior to the Spanish conquests? And what of the norms that guided everyday behavior in villages subject to Aztec or Inca rule both before and after the Spanish conquests. If all such rules are treated uniformly as law, how shall we draw meaningful distinctions among them? If not, which should be considered legal and which should not. Many comprehensive comparative law efforts founder in their failure to offer an analytically useful conception of law. At the outset of a comparative venture, to articulate some definition as a common basis for comparison is essential. The problem is to identify basic elements and processes as well as attributes common to law across time and cultures at all stages of development. For such an effort, a better focus than Latin America would be hard to find. The historical experience in Latin America presents both challenges and opportunities that allow us not only to understand the dynamics of legal change within the region but also to begin to develop meaningful definitions and approaches for more generalized comparative legal studies. This essay thus commences with a definitional framework and proceeds to a discussion of its relevance not only for Latin America but also as a general theory for the evolution of law.

1. Law's definition

Law may be defined in various ways. For our purposes, however, legal rules and principles as well as the institutions that make and enforce law are instrumentalities of those who rule. Moreover, in all contexts "law" encompasses two separate but interrelated core elements – norms and sanctions – and correlative institutions and processes for making legal norms and enforcing them by imposing of legal sanctions for their violation. Law similarly rests on two foundational features. The first is political authority or legitimacy. The second is power.

1.1 Authority and power

The terms authority and legitimacy, as used here, are nearly synonymous. Both express broadly based societal recognition and acceptance of an entitlement to deference and respect, leadership and command. In normative terms, those who request or demand obedience within the scope of their authority should be obeyed. In descriptive terms, those who exercise authority in fact receive deference and respect and thereby possess the capacity to influence what others do and how they behave. In contrast, as defined for the purposes of this analysis, power means simply the capacity to coerce. In English and Spanish the two terms are frequently used interchangeably. Any distinctions have to be further explained.[2] The terms *Authorität* and *Macht* in German more accurately reflect the difference.

Authority is essential. Like custom the viability of legal norms as viable rules or "living law" ultimately depends upon voluntary compliance and consent.[3] In the end habit and consent sustain law even in regimes of terror, which risk losing or failing to acquire the capacity to legitimate norms and sanctions as their political institutions and legal processes themselves lose or fail to acquire legitimacy. A community's sense of legitimacy is grounded in culture and custom. Shared religious symbols, social myths, and "folk ways" sanctified by habit and expectation are among the common sources. Like custom, rulers also acquire a mantle of acceptance. Political legitimacy thus may be a simply a function of time or "habitual legitimacy" to use Rodney Barker's phrase.[4] Rules as law are, nevertheless, more resistant than as custom to changes in community attitudes and impulse in that their legitimacy, unlike custom, is effected by a law making process instead of direct consent. The factors that contribute to political legitimacy ultimately also determine legal legitimacy. Because legal rules acquire legitimacy from the legitimacy of the political authority that promulgates or enforces the law,[5] rules articulated in a statute, judicial decision, or administrative regulation are legitimate as law ultimately as a result of the legitimacy of those processes themselves. Moreover, because process rather than belief and behavior legitimates legal rules, law mak-

2 As in Spanish the *poder de derecho* and *poder de hecho*.

3 See Tom R. Tyler, *Why People Obey the Law*, New Haven, Yale University Press, 1990.

4 Rodney Barker, *Political Legitimacy and the State*, Oxford, Clarendon Press, 1990, pp. 29-33.

5 See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, G. Roth & C. Wittich, eds., Berkeley, University of California Press, 1978, pp. 212-215.

ing institutions have the capacity to create consensus and thus to introduce new rules. Conversely, if either the actors or the processes they use for promulgating a rule as law are deemed illegitimate, the rules they create also risk being considered illegitimate. If, however, the institutions for law making are themselves viewed as legitimate, they legitimate the rules they create. Thus the legitimacy of legal rules is in this sense derivative.

The attribute of derivative legitimacy underscores the crucial importance of broad societal acceptance of the legitimacy of political authority. The capacity of contemporary political systems to introduce new legal norms and law making institutions is explained at least in part by social recognition of the legitimacy of the institutions or the authority of those that create them.[6] This acceptance of authority is therefore fundamental to capacity to adapt to institutional and economic transformation with minimized political and social upheaval.

A normative theory of law would posit two additional sources for the legitimacy of law and legal rules. The first is simply the underlying authority of the particular rule. Even if we question the legitimacy of the law maker or the promulgation process, for some merely as a matter of moral duty, legal rules should still be and again generally will be obeyed. Thus in most if not all theocratic political orders that define certain legal rules as deistic commands, all such rules for believers have moral authority and ought to be obeyed. Note, however, that what matters is the authority or legitimacy of the particular rules identified in some manner as "God given" not their legitimacy as law.

Law itself, however, may have normative authority. If, for example, the members of a community share the belief that all law emanates from a deistic command, by definition all legal rules have normative authority and should be obeyed. Note also, however, that here too the legitimacy of law and legal rules remains derivative in effect in that ultimately those who govern determine which norms or rules are deemed to be "law".

We also need to differentiate law making from law enforcing. Law enforcing differs from law making with respect to the underlying conditions for its effectiveness. Law making, as noted, depends upon the legitimacy or the authority of the legal norms or those who make them or, better yet, both. Authority with or without power and power with or without authority are of course possible. Authority and power become mutually necessary only with respect to enforcement. We can imagine, for example, a relatively simple political order based on kinship ruled by a small group of household heads by custom and convention –by definition, therefore, an authoritative, legitimate norm– led by the eldest. To the extent they wish to change customary or conventional rules regarding succession to the household headship or the designation of the eldest as leader, they face problems of authority and power. First, the ruling household heads must have sufficient

[6] See, e.g., James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, New York, Russell Sage Foundation, 2004, Chapter 8.

political authority to make a new norm– that is, for the community to accept the new norm as legitimate, the community must have also accepted the law making authority those who made it. Such community consensus eliminates the need for any mechanism for enforcing the new rule. By definition community acceptance of its legitimacy produces compliance--in other words, the derivative legitimacy of the rule.[7] The viability rule will thus depend like any customary rule upon community acceptance and conformity. If the legitimacy of the new rule is effectively challenged, however, its formal enforcement becomes necessary. To the extent that the rulers can coerce compliance, they may be able to effect the change. But unless and until the community accepts the legitimacy of the new rule, those who rule will continue to need the capacity to coerce compliance. In such event our simple hypothetical polity risks transformation from one of authority without power to one of power without authority. By definition, the former remains a legal regime. The latter does not.

1.2 Justiciability

Having defined law first and foremost as recognized by of those who rule, the politically recognized institutions and processes of law making in contemporary legal systems enable us to identify legal norms and rules and to distinguish such legal norms and rules from their non-legal counterparts, which may be similar or even identical in function as well as content, Within all developed political orders, certain institutions and processes are endowed or entrusted with "law making" competence or authority. Norms recognized as binding rules or principles by these institutions through their respective processes for law making or enforcement can be considered "legal" rules. Similarly only those sanctions recognized and imposed through accepted processes by law-enforcing institutions with the requisite competence can be considered "legal" sanctions. Moreover, because only rules deemed to be "legal" are enforceable through these processes by virtue, as explained below, of the attribute of "justiciability," law enforcement always in effect involves the formal recognition of a rule as a rule of law. Hence law-enforcing processes in effect always have a law-making function as well.

The justiciability of legal rules –that is, their capacity for formal enforcement– is a primary attribute of law. As noted, in all communities legal norms can be and commonly are enforced by a variety of extralegal means, some purely social or customary, others more formal and institutional. Only certain institutionalized enforcement proceedings within any legal regime, however, are recognized as appropriate for the enforcement of legal rules. This being so, conversely, any norms that are actually enforced in some formal legal enforcement process are thereby recognized and become legal rules. Take, for example, a purely customary rule that allows the members of a community to forage for wood in private forestland. Such a rule may be enforced for years by community tolerance and refusal to ostracize or otherwise

[7] John Owen HALEY, *Authority without Power: Law and the Japanese Paradox*, Oxford and New York, Oxford University Press, 1991, p. 6.

penalize such conduct, yet it is still not recognized as a legal rule. However, once a "right" to forage is raised formally, say, in a lawsuit for trespass by the proprietor, the adjudicator must determine the viability of the customary rule. A decision for the proprietor represents in effect an expansion of private property rights displacing the customary norm, but a decision in favor of the putative trespasser in effect redefines custom as an institutionalized legal rule or, in the private law context, a right. Thus the self-defining nature of law is most evident in the context of enforcement. Since only legal norms are enforceable in formal legal proceedings, law-enforcing processes are in effect also law-making processes. Hence any law-enforcing process, especially adjudication, is both a law making and a law-enforcing process.

1.3 Public and Private Law Orders

Most studies of law tend to focus on legal rules and the processes for their recognition or creation and overlook the mechanisms for their enforcement. The consequence is to neglect a pivotal feature of all legal orders and the determinative role that law enforcement plays. Our analysis of this role begins with two propositions.

The first is that enforcement frees the viability of a legal norm from consensus. This can perhaps be best stated negatively: unless a legal rule is enforced its viability depends like custom directly on consensus. This pertains with respect to the legitimacy of the content of the particular norm itself or the legitimacy of the norm as law or both. As illustrated by a taboo, the effectiveness of a statute prohibiting the taboo without any penalty depends upon voluntary compliance –that is, consent– or social sanctions for noncompliance. In both instances, the effectiveness of the rule depends on community acceptance. In other words, the rule largely functions as a customary norm. However, as explained above, the value of having a legal rule (rather than simply customary convention or a "private" institutionalized rule [e.g., a company rule]) is its indirect or derivative legitimacy and thus its consensus-creating capacity. The "legalization" of a rule helps to foster or at least buttress consensus.

The second proposition follows from the first. If enforcement determines whether legal rules are viable independently from consent, then, to this extent, those who control the enforcement process control the viability of the legal rule. Prosecutorial discretion, broadly defined to include control over all forms of law enforcement, thus becomes or should become the central focus of any inquiry as to the role and efficacy of law in any community. The answer to the question of who exercises such discretion tells us much about who governs.

Control over the law enforcement process in most legal systems can be divided into two basic categories. In what I shall call regulatory or *public law regimes*, control over enforcement is entrusted to those with the political authority to govern, such as officials in law-enforcing bureaucracies. They may be prosecutors or police, magistrates or judges, or administrative officials of all sorts. Whatever the label, government officials in such regimes monopolize control over the coercive

mechanisms for law enforcement. Although in some instances private parties may initiate enforcement by complaint or petition, the prosecution of the case and control over its ultimate resolution, whether by settlement or the application of sanctions, rests with those who exercise political authority. Prosecutors, for example, exercise that discretion in most contemporary criminal justice systems with the notable exception of Germany and other countries that have adopted a system of mandatory prosecution influenced by the German legality principle.[8]

In *private law regimes,* in contrast, discretion or control over the means of formal law enforcement is exercised by private parties, whose authority to exercise such "prosecutorial" powers is delineated in a variety of forms, such as standing, capacity, or indeed, the concept of legal rights. A private law regime requires some mechanism to allocate the power to control the application of remedies and sanctions, to determine who could bring what action against whom and for what remedy. A means is found in the concepts of "rights" and "duties" insofar as these notions serve to delineate persons with the legally recognized capacity to enforce prescribed substantive legal rules, whether made by legislative, judicial, or administrative organs or, as in the case of contracts, private citizens with rule-making capacity. Consequently, all private law regimes require some concept of legal "rights" and "duties" or their equivalent. The enforcement of the Athenian wealth tax (*eisphora*) by citizen-initiated enforcement actions in the law courts[9] exemplifies "private law" enforcement of what we would consider today to be a public law duty.

Private law as process is central to the Western legal tradition as derived from Roman law. Roman law was after all primarily a system of rights defined as the claims of individuals to protection by specific procedures and remedies. Latin and other West European languages do not distinguish between "law" from "right". The words *ius*, *Recht*, *droit*, *derecho* denote both. In this sense Roman law is by definition a system of rights. Stripped to essentials, the notion of a legal right or rights in Western law expresses the capacity of the individual to activate and control the process of enforcing legal norms. Although today the term in English is used more broadly –for instance, to define property– other terms such as interest, estates, entitlements, or simply the Latin *dominium* are more appropriate. The notion of a legal right is meaningful, therefore, only when it entitles the holder to legal protection upon demand. The maxim *ubi ius ibi remedium* ("where there is a right, there is a remedy") is more than an aphorism. It expresses the crux of private law.

A concept of rights is not necessary, of course, for the enforcement of legal rules. Duties alone suffice. Imperial China did not require a concept of rights for enforcement. The word "law" (*fa*) meant punishment. Codes and statutes were administrative or penal. Legal rules were uniformly proscriptive. There were no rights

[8] The German principle of mandatory prosecution required under the legality principle (*Legalitätsprinzip*) was not coincidentally influenced by Friedrich Carl von Savigny (1779-1861), Germany's preeminent nineteenth century Roman private law scholar. By restricting prosecutorial discretion, German criminal law enforcement paralleled private law enforcement in that it ensured what were in effect legally enforceable claims—in effect "rights" to enforcement— by crime victims.

[9] See, e.g., Rudi Thomsen, *Eisphora: A Study of Direct Taxation in Ancient Athens*, Copenhagen, Glydenmdal, 1964).

only duties. Although "civil" or private law rules as defined in substantive terms today can be identified in traditional East and South Asian law[10] –that is, rules governing family, contracts, property, commercial transactions, and other private matters– they were generally expressed either as "minor matters" that could be compromise in the interests of resolving the dispute or, if significant to those who ruled as commands, violation of which was subject to some prescribed penalty or to what is best described as administrative enforcement by an essentially regulatory state. Viewed from this perspective, courts are above all else law-enforcing institutions. From a litigant's perspective, at least, the primary function of litigation is to enforce legal rules, not to resolve disputes. The essential difference between private lawsuits and criminal or administrative proceedings is that private parties instead of state officials control the process of enforcement.

Do the distinctions matter among public, private and customary processes for law enforcement? The answer lies first, as noted, in management and control. As defined the mechanisms for law enforcement differ essentially in who manages and controls them. Control over the enforcement of the legal rules considered significant by those who govern is entrusted nearly always to one or more official, public agencies. In all public law regimes enforcement processes are controlled by officials who determine whether and which legal rules are to be enforced. Those who rule and their agents have the discretion to enforce the law and in exercising that discretion what legal norms will be enforced. In the simplest political orders the rulers themselves may exercise this discretion; in the most complex, agents of the state, administrative officials, the police and prosecutors have this choice. The appropriateness of the choices they make may become issues of control between the governing principals and their prosecutorial agents but their subjects, those who are governed, do not get to choose. As noted, private parties –the victims of a crime or of some administrative infraction– may file complaints and may thereby have some voice in initiating the enforcement process, but their voice diminishes once the process of enforcement is initiated. They may petition or plead, but they do not determine whether to proceed or to stop. They cannot end the process by withdrawing their complaint or reaching a settlement with the offender. The bargains reached with those accused of violating the applicable rules –are negotiated between public officials and the miscreant not the victims, those affected most by the infraction of the legal norm. Universally justified in terms of "public interest"– the rhetorical rubric for the policy preferences of those who rule or seek influence--public law enforcement by definition lodges prosecutorial discretion and control in the hands of those who exercise political authority and power.

Private law enforcement also involves formal, state-sponsored law enforcement but in contrast to public law enforcement is subject to the control of private parties–in other words, the subjects of political authority. Private law enforcement thus usually represents either a willingness by rulers to give up control or, more commonly,

[10] See, e.g., Laws of Manu, Chapter VIII, Sections 3-7, trans. Buhler, Indian History Sourcebook, www.fordham.edu/halsall/india/manu-full.html. [site last visited 02/08/06].

recognition of their inability to control at least fully the process. Needless to say, this is a pivotal notion in any analysis of the evolution of political institutions.

Nor is adjudication of private law rules necessarily distinct from the adjudication of public law rules. In the evolutionary transitions from meditation, to adjudication, to the prosecutorial and administrative enforcement of regulatory law, the basic distinctions drawn here are rarely clearly delineated. As, for example, the adjudication of claims for compensation based on wrongful injury moved toward criminal prosecution with non-compensatory sanctions, at least in Western Europe, the adjudicative procedures and control over prosecution changed only gradually. Even today, those convicted of crimes may be required to pay compensation. Well into the contemporary era private prosecution of crimes remained a prominent feature in most if not all European legal systems. Only with increasing revenues and the further development of governmental structures, did public prosecutors become the norm.

The conceptualization of law and the legal rules also matters. How, for example, do rulers justify collection of revenues? Is law or legal authority necessary? For most rulers traditionally, legal justification was irrelevant. Tax collection was simply intrinsic to their legitimacy or authority as rulers. (Their ability to collect is a separate issue related to their coercive capacity.) For instance, the authority of those who ruled imperial China required no legal basis or formulation. Law conceived as a set of regulatory rules enforced through penal sanctions was not relevant as a source or justification of such authority. Nor did classical Roman law provide much assistance. Importantly Roman rulers could legally justify tax collection and all manner of takings under the unlimited authority they exercised as holders of *imperium*. Otherwise, legal concepts related to public authority remained embryonic at best. In Western Europe, however, legal concepts were decisive not only in justifying but also enforcing their appropriations of wealth from producers. The development and use of royal estates and fiefs in Western Europe, gave rulers proprietary interest in the produce of specific land with "rents" rather than "taxes" their principal source of revenue. As a result Western Europe, the adjudicatory processes of a private law order with overlords as the ultimate adjudicators became the primary legal means for enforcing the proprietary claims of warrior retainers.

The processes of both public and private law enforcement are, to repeat, formal and official. They involve resort to established state institutions and state actors. The difference is who exercises prosecutorial discretion and control. To focus on the norm or rule subject to enforcement as public or private law and to ignore the processes themselves deflects attention from the pivotal difference in who controls. Private law enforcement limits the role of those who rule, the state and state actors with one pivotal exception—judges. Those who rule and their agents do not control the process. Even judges in purely private law enforcement do not initiate or determine whether to proceed or whether to terminate the process. They may determine and permit the sanction but for the most part not its actual application.

We again need to differentiate the enforcement of legal rules in systems of private ordering, which by definition do not involve political authority. The most frequently encountered examples involve institutional processes that resemble or parallel the public or political processes for law enforcement, but, as noted, customary enforcement is also a form of private ordering. Again what matters is who controls. Because enforcement ultimately determines the efficacy of the legal rules, those who control the public or private enforcement control the recognition and the continued viability of the norms.

As explained above, law enforcement processes inexorably serve dual purposes. To the extent that law enforcement or its threat affects behavior, those who control enforcement control the efficacy of the legal rule. Not all legal rules are ever formally enforced, and one can at least imagine a political order in which all legal rules are left to informal means of enforcement with consequences detailed above. The legal enforcement of norms whatever their source also involves their formal and official recognition and thus an independent phase in their "making" as law. For example, a customary rule subject to formal law enforcement becomes viable as a legal rule and indeed, as described above, inevitably acquires the attributes of the legal rule. For this reason, whether intended or not, through the articulation and enforcement of particular norms as either rules or standards, adjudicatory or "judicial" processes by those who rule are, or necessarily become, law- making processes in which judges have a decisive voice. By the same token, as noted above with respect to law making by adjudication,

We also talk of private law making by contract, yet it is not the adoption of the contract rule by private consent but the enforcement of the agreement that transforms the provisions of the contract into legal rules. Were, for whatever reason, a contract to be deemed legally unenforceable, then the rules set out by agreement would have neither the force nor legitimacy of law; rather they would remain formally unenforceable despite the fact that they might well be readily enforceable through marketplace or other non-legal sanctions. In this sense, there can be no informal law making.

Law operates within the dynamics of this framework. Rules are made and unmade, enforced and left to atrophy. Some are customary others institutional. Some may be considered law; all impose a kind of order. The nature of the order depends only in part on the institutional arrangements for both law making and law enforcing-the traditional concern of lawyers and political scientists. Equally relevant are "cultural" factors: the habits that constitute custom and the values that both shape and sustain consensus and legitimacy. But culture too is dynamic. What I have described here as a "legal" process is in reality a process of social change. Habit and values are not exempt. They, too, change. What distinguishes one legal order from another, therefore, is less the role or rule of law, but who makes and enforces law by whatever means, and thus whose consensus and whose values control. In short, who enforces, governs. Ultimately, law's evolution is political.

1.4 Recognition

Not all rules and sanctions recognized and applied by those who exercise political authority are deemed to be law. All legal orders have at least implicitly two separate categories of rules. The first encompasses those norms regarded as the law in that system. The second, however, includes those rules that define which norms are to be included in the first category. The selection of norms and rules defined, again to borrow from H. L. A. Hart, as the "primary" legal rules of the law in a particular legal order[11], is determined by 'secondary' rules of recognition. Such "secondary rules" are the product of developed political orders, but even in contemporary legal systems, they are not universal but are most often particular to individual legal systems. Legal comparativists who focus on contemporary legal systems may be able to rely on the relevant rules of recognition that determine the validity of the "primary" rules. However, contemporary rules of recognition are of little help for comparison of legal traditions in separate cultures or political systems at different stages of evolution. A more useful starting point is to identify how law develops and what features seem to be common to all or most at identifiable stages along an evolutionary trajectory.

Both the recognition of legal norms (law making) and their enforcement (law enforcing) involve the exercise of political authority or power or both. Consequently, however defined in terms that would include the most primitive societies, law emerges in evolutionary terms at the initial stages of the development of political institutions along with sources of political legitimacy and the capacity of emerging rulers to coerce. Whatever the prior source or reason, once a norm or rule is articulated or enforced through one or more authorized law-making processes, it then becomes by (our) definition a legal rule or norm.

As social and political structures became more complex, some aspects of customary ordering also became institutionalized producing rules and means of enforcement. As hierarchies of control evolved, various processes for rule making and enforcement emerged. We thus need to distinguish rules and sanctions recognized and enforced within consensual and non-governmental –that is, private– communities from those made and enforced by those with political authority who ruled even though they may have been functionally equivalent. Rules and processes for enforcement may be identical in every respect and yet differ as to the processes for their making or their recognition as law. Only certain institutions in any society have the authority to legislate or the authority and capacity to enforce legal norms. These and only these constitute the institutions and processes of the legal system. In effect law becomes self-defining.

Take for example, the Inca empire. Although no formal judicial structure as described below under the Aztecs has been identified,[12] the Incas like the Aztecs and

[11] H. L. A Hart, *The Concept of Law*, Oxford, Clarendon Press, 1994, pp. 77-96.

[12] Sally Falk Moore notes that one Spanish source *(Relación)* mentions a court of a dozen judges from the villages (*ayllus*) in the Cuzco region but dismisses its trustworthiness for lack of collaborating observations. Sally Falk Moore, *Power and Property in Inca Peru*, New York: Columbia University Press, 1958, p. 117.

other polities in Mesoamerica relied on an essentially penal command and control system of subjugation. All subject households and communities tribute (mit'a) in the form of labor. Apart from mit'a labor, the Inca rulers regularly selected young girls for ritual sacrifice (but also marriage or service) from subject communities. For similar purposes they also frequently received offerings of daughters from subject chieftains who seeking favor or fearing disapproval, thereby, to paraphrase Irene Silverblatt, further corroding community kinship identity and autonomy.[13] Few early empires had greater capacity to coerce, mobilize, and move people as readily or as effectively as the Inca.

We may assume that some form of dispute resolution within communities and within the Inca elite did exist, but they functioned outside of the established political order. Based on Spanish chronicles, Sally Falk Moore concludes that Inca officials had the authority to investigate and try persons for offenses, "the higher the official, the more important to the state were the matters he could decide."[14] She lists in an appendix over seven dozen different offenses related by Spanish chroniclers. The categories include offences related to caste property, breach of rules affecting the government, homicide, sexual offenses, theft, and such "miscellaneous" offenses as sleeping in the daytime and burning bridges. Death was the most common penalty. (Those caught sleeping in the daytime were reportedly only subject only to a beating.) We may reasonably conclude that the Incas had created an early but paradigmatic regulatory legal order.

The Inca rulers surely allowed various norms, some purely customary, some perhaps made by some form of communal or elite-dominated process, to be recognized and enforced with the subordinated communities. To the extent that they remained outside of the Inca legal order, they may best be considered as extralegal. Only to the extent that they were recognized or enforced within the Inca legal order can they be considered as "law" for our purposes.

The Tribunal of Water in medieval Valencia provides another example. The Tribunal functioned within the Muslim agricultural communities surrounding the city of Valencia as an irrigation court to resolve disputes and enforce rules established for water flows and timing for those who depended on irrigation for their livelihood. Putting aside the status of the Tribunal under the Muslim regime prior to Aragon's conquest, James I of Aragon incorporated it as an integral component of the irrigation system. He formally recognized the Tribunal by law and thereby integrated it into the legal structure for administration of the new Kingdom of Valencia. The Tribunal could, however, been allowed simply to continue as a nongovernmental organ for adjudication of claims related to water usage from the local irrigation systems. The Tuna Court described by Eric Feldman for the contemporary Tokyo fish market[15] functions in this manner as a private ordering system. Function-

[13] Irene Silverblatt, "Imperial Dilemmas, the Politics of Kinship, and Inca Reconstructions of History," *Comparative Studies in Society and History*, vol. 30, 1988, p. 92.

[14] Moore, *Power and Property in Inca Peru*, p. 117.

[15] Eric Feldman, "The Tuna Court: Law and Norms in the World's Premier Fish Market," *California Law Review*, vol. 94, 2006, pp. 313-369.

ally, it might seem, there is no difference. Yet, as in the case of the rules of subordinated Inca villages, if changes to the system or those who manage are desired or even when decisions are challenged, the distinction between institutionalized private and public adjudicatory organs becomes significant. For private systems, decisions made within the community with all variations are determinative. For legal orders, those who govern –those who make or enforce the law– decide.

The intervention by those who govern may regularly take the form of mediation or adjudication depending upon the extent of their power to impose their preferences, but not until relatively advanced stages of political development are rulers generally able both to legislate and to enforce their preferred proscriptions. Centralized political authority governing through an increasingly complex variety of organized specialized agents with both effective authority and the capacity to coerce are common features of such orders. And as political institutions evolve so do understandings about the nature and concept of law.

1.5 Law's Political Evolution

The processes of law –the making and enforcement of legal rules– evolve in tandem with the evolution of political authority and power. Both begin with simple societies and end with centralized bureaucracies. As explained, however, the trajectories of authority and power are not identical. They develop along separate evolutionary tracks. What matters most, however, are, as explained, the trajectories of power and concomitant modes of law enforcement. In the progression of power, three stages can be identified, each characterized by a separate mode of law enforcement: mediation, adjudication and prosecution. Each differs with respect to the degree of deference those who manage the process must give to those against whom the legal rule is being enforced. Mediation requires consent. Adjudication allows settlement and withdrawal of the suit by the complainant. The defendant's cooperation or assent is also necessary unless the adjudicator has the capacity directly or indirectly to force compliance with the decision. Prosecution vests control in law-enforcing officials. Prosecution along with administrative regulation assumes an increasing number of enforcing agents in an increasing variety of specialized roles as well as the expanded availability of coercive force. In the process of the progression from one stage to another, the modes of enforcement also tend to change. Mediation rends to yield to adjudication and, in turn, adjudication to prosecution. In this progression, notwithstanding the transitions and enduring remnants of past regimes, those who govern exercise increasingly greater degrees of control as private ordering yields to private law regimes and private law regimes to public law regimes.

2. Law's Political Evolutions in Pre-Independence Latin America

Since political systems and legal institutions have evolved along multiple trajectories, law's evolution has varied accordingly. Multiple stories can be told. From

an evolutionary perspective, Latin America offers two entirely separate developmental trajectories. One reflected the varied institutional developments within the indigenous communities of the region; the other, the particular features of the evolution of law and governance on the Iberian peninsula. For the Amerindian communities of Hispanic America, the imposition of colonial rule disrupted an otherwise discrete progression. Yet, the political and legal structures that had evolved in Iberia along a separate trajectory also underwent significant change. Various geographical, economic, and institutional constraints that had shaped the political and legal evolutionary progression in Iberia no longer applied. New ones, however, emerged. Thus law's evolution in Latin America began to progress along another set of distinctive trajectories. Intra-regional differences did matter.

2.1 Pre-Colonial Trajectories: Law's Political Evolution in the Amerindian Empires

Law's evolution commenced in Latin America as elsewhere with the emergence of social and political organization in sedentary agricultural communities.[16] The earliest communities of pre-colonial America as elsewhere can be presumed to have been customary orders. In Mesoamerica, for example, by 1200 BCE sedentary agricultural communities are believed to have formed in significant numbers in the rich alluvial region of the central coastal area along the Gulf of Mexico. In such orders, custom and consent prevail as sources of social norms or, to use a contemporary expression, "civility," with social disapproval and collective community sanctions the primary means for their enforcement. The earliest known communities were defined by ties of kinship. Degrees of mutual dependency and the need for cooperative endeavor held them together. This proved to be particularly the case in the earliest sedentary agriculture communities of Southeast Asia, China, and Japan that relied on a network of small irrigation systems for the cultivation of wet paddy rice. In these and other early agricultural communities political and social authority tended to be undifferentiated, rudimentary, and relatively weak. Law, as we understand it and as defined here, did not exist. Only as some form of political authority emerged from within or without did communal norms and sanctions begin to yield to rules and principles recognized and enforced by those with political authority and, with the advent of warrior rulers, the capacity to coerce. From these beginnings what we recognize today as law emerged.

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[16] For studies of political and legal evolution generally, see Timothy Earle, ed., *On the Evolution of Complex Societies: Essays in Honor of Harry Hoijer*, Malibu, Udena Publications, 1984.; Samuel Edward Finer, *The History of Government*, 3 vols., Oxford and New York Oxford University Press, 2d ed. 1998.; E. Adamson Hoebel, *The Law of Primitive Man*, Cambridge, MA, Harvard University Press, 1954.; Robert H. Lowie, *The Origin of the State*, Harcourt, Brace & Company, 1927.; Henry Sumner Maine, *Lectures on the Early History of Institutions*, 7th ed., Port Washington, NY Kennikat Press, 1966.; Leopold Pospíši, *Anthropology of Law*, New York, Harper & Row, 197.; Elman R. Service, *Origins of the State and Civilization: The Process of Cultural Evolution*, New York, W.W. Norton & Co., 1975.; Steadman Upham, *The Evolution of Political Systems: Sociopolitics in Small-Scale Sedentary Societies*, Cambridge and New York, Cambridge University Press, 1990.; Paul Vinogradoff, *Outlines of Historical Jurisprudence*, 2 vols., Oxford: Oxford University Press, 1920-22.

The evolutionary trajectory of Mesoamerica also paralleled other civilizations as hundreds of small chiefdoms emerged with separate languages, ethic identities, and particular deities. They tended to cluster around urban centers that served as political as well as ceremonial and religious capitals. Several exercised at different intervals a significant degree of control or domination over surrounding communities. Among the earliest were the Olmecs. During what is referred to as the Formative or Pre-Classical period of Mesoamerican civilization (2000 bce to 100 ce) they had established major centers in the Veracruz heartland. From artifacts found in locations as distant as the Valley of Mexico, Olmec influence may have extended far beyond these centers. However, Olmec domination had waned by 400 bce. No cultural group regained similar domination of the tropical lowlands until the Mayans of the Classical Period (100-900 ce). Instead the centers of high culture and power shifted westward to the central highlands and the Oaxaca Valley, where, some argue,[17] the valley's Zapotec chiefdoms had formed a defensive confederation. From an administrative center at Monte Albán, the Zapotec engaged in successful conquest of the surrounding communities establishing an empire in the late Formative period. By the beginning of the Classical period, however, all agree the central Mexican highlands were dominated by three urban kingdoms at Teotihuacan, Cholula, as well as Monte Albán. About 900 ce, the Toltecs, a group of northern nomadic warriors, had, once settled, conquered and consolidated the many small chiefdoms of central Mexico into an empire ruled from their capital, Tula (also known as Tollan, or Tolan). Skilled temple builders, their influence spread through much of Mesoamerica, the Toltec influence on the Post-Classic Maya of Yucatan is evident.[18] Toltec dominance ended sometime during the mid to late twelfth century with the abandonment of Tula.

The Aztecs were late arrivals. Broadly defined,[19] they comprised nearly two dozen separate ethic groups –including the Acolhua, Tepaneca, Culhua, Chalca, Xochimilca, and others– united by a common Nahuatl language, religious beliefs and ritual practices as well as claim to a common ancestral home in the north called Aztlan. Led by priests, each of these groups in turn arrived and settled in the Valley of Mexico and later the surrounding valleys from the beginning of the 13th century. The last to arrive were the Mexica, who were left with the least wanted land in an area known as Chapultepec ("grasshopper hill").[20] Each of the three principal Aztec arrivals established cities and polities ruled by their respective warrior chiefs and warrior nobility, gradually assimilating all but a few of the existing tribes, such as the Otomui, who maintained their separate cultural identity within the developing Aztec (Mexica) empire. The Tepaneca were the first to establish a degree of domination within the Valley of Mexico, aided, it appears, by the Mexica first as

17 See Robert N. Zeitlan, "The Isthmus and the Valley of Oaxaca; Questions about Zapotec Imperialism in Formative Period Mesoamerica," *American Antiquity*, vol. 55, no. 2, 1990, pp. 250-261; Robert N. Zeitlan and Arthur A. Joyce, "The Zapotec-Imperialism Argument: Insights from the Oaxaca Coast," *Current Anthropology*, vol. 40, no. 3, 1999, pp. 383-392.

18 For a contrary view, see Michael E. Smith, *The Aztecs*, Malden, MA Blackwell Publishers, 2nd ed. 2003., p. 33.

19 See id. at 35.

20 Nigel Davies implicitly equates the Mexica with the Aztecs, treating other presumably *Nahuatl* speaking groups, such as the Tepaneca and Chalca as separate, competing tribes. See Nigel Davies, *The Aztec* Empire, Norman, Oklahoma, University of Oklahoma Press, 1987.

mercenary warriors and later as vassals. The Mexica victory in a Triple Alliance with the city-chiefdoms of the Alcolhua (at Texoco) and dissident Tepaneca (at Tacuba) over the Tepaneca in 1428 ensured Mexica dominance in central Mexico and the preeminence of their capital Tenochititlán. During the ensuing century until the arrival of the Spaniards, the Mexica along with their allies expanded their control, creating one of the two great native empires of the Western Hemisphere.

The pattern of conquest and rule by the Mexica resembles that of each of the empires of Mesopotamian and the eastern Mediterranean. As a result of military conquest or acquiescence, one by one an estimated 50 or so city-chiefdoms in the Valley of Mexico and an additional 450 in central Mexico were subordinated to Tenochititlán supremacy. In each instance the subject chiefdoms were forced to relinquish land, pay tributes-in-kind, and to provide labor (and human sacrifice) as well as soldiers to their Tenochititlán overlords. In return their hereditary elites were absorbed into the Aztec administration. Even local deities as idols were physically brought to the Aztec temple in Tenochititlán as subordinate or captive gods. Existing rulers generally retained their positions, but the Aztecs reorganized the local polities into administrative units with distinct offices, thereby initiating a process with the potential to transform personal rule. Those chiefs or high ranking nobles who pledged loyalty to the Aztecs or Aztec replacements for those who resisted were given Aztec titles and official positions. Other higher ranking nobles were similarly assimilated into the governing structures. All functioned in effect as collectors of tribute with each level subject to those above them for the required amounts. The majority of the population –free commoners– were cultivators. They remained organized into kinship-based communities. Nearly all productive land, not set aside for individual households, was communal. As in pharaonic Egypt, the produce from designated fields tilled by commoners was allotted respectively to temples, lineage nobles, or to satisfy community-owed tribute payments. Subject to forced labor for the nobility were commoners of conquered communities, who in combination with slaves constituted an estimated thirty percent of the population.[21] Slavery was generally the result of military conquest or, apparently most often, by ruler or paternal decision to punish wayward subjects or children. All persons, including the offspring of slaves, according to Josef Kohler, were born free.[22]

Aztec and other Mesoamerican rulers exercised absolute authority. They were the supreme law-givers and functioned as supreme judges. However, as Judith Zietlan and Lillian Thomas remind us with respect to Zapotec rulers, "traditional expectations" and "ancient ways and rites" on which their political authority was grounded imposed countervailing customary constraints to enhance the well-being of the community.[23] They were advised by the highest ranked members of the nobility and, according to *Kohler,* the Mexica rulers in Tenochititlán, had at their

[21] Mark A. Burkholder and Lyman L. Johnson, *Colonial Latin America*, Oxford and New York, Oxford University Press, 3rd ed. 2001, p. 8.

[22] Josef Kohler, *Das Recht der Azteken*, Stuttgart, Verlag von Ferdinand Enke, 1892, p. 42; translated by Carlos Rovalo y Fernández and published in Spanish as Spanish as *El Derecho de los Aztecas*, México D.F., México, 1924 , p. 32.

[23] Judith Francis Zeitlan and Lillian Thomas, "Spanish Justice and the Indian Cacique: Disjunctive Political Systems in Sixteenth Century Tehuantepec," *Ethnohistory*, vol. 39, 1992, p. 298.

side at all times persons with specialized offices –one for military affairs (the tlacochcálcatl) and others for law, the cults, and the treasury.[24] In addition, among the most telling aspects of Aztec rule was the embryonic transformation of personal rule, exemplified by election of Aztec rulers in each of the three– Mexica, Texoco, and Tecuba–domains. In Texoco and Tecuba, only sons of the prior ruler were eligible. However, for the Mexica, the pool comprising lineage-related candidates, most often the sons of prior monarchs, was somewhat larger. The electors, generally four in number, were in each case members of nobility chosen by the residents of their respective capitals.[25]

Numerous hostile chiefdoms and tribes surrounded the Aztecs north and south. They sought by alliances to fend off the advancing Aztecs. Among the most significant were the autonomous and semi-autonomous communities in the Oaxaca Valley and surrounding areas to the Pacific Ocean. They included the re-emergent Zapotec as well as the Mixteca, who had entered the region as conquering warriors successfully subjugating smaller, less powerful indigenous communities, Although competitors for control of the valley, they shared belief, a common oral language, and a written pictographic writing system. Both groups included stratified urban kingdoms with their respective capitals at Tehuantepec and Tapanatepec at opposite ends of the valley. Little is known about their law or modes of enforcement but as with other early warrior kingdoms, a small group of nobles with lineage ties exercised effective control over the majority of the population and resources.[26]

As these hierarchies of control evolved, various processes for rule making and enforcement also emerged. Law in the Aztec empire was administrative and penal. No evidence has yet to be offered, however, of any official forum for impartial resolution of private disputes or rules related to compensation for wrongs. Mechanisms for resolution of private disputes undoubtedly existed, and, as in all known societies, there were what may be classified as private law rules related to inheritance, property, contract, commercial transactions, and private wrongs. However, the rules made and enforced by those who governed the stratified city-chiefdoms of Mesoamerica were designed to maintain political control, access to resources, and order. Infractions had severe penal consequences, most often death or slavery. The tribunals could proceed in some cases, by Kohler's account,[27] simply on the basis of public rumor without accusation, particularly, for adultery. They did establish hierarchies of specialized administrative-judicial tribunals. Local neighborhood magistrates elected by residents investigated and determined minor criminal infractions and may perhaps have mediated private disputes. As in the case of the scribes of Deir el-Medina in pharaonic Egypt,[28] they reported major infractions to

[24] Id., pp. 14-15.

[25] Id., pp. 23-25; Lucio Mendieta y Nuñez, *El Derecho Precolonial*, México, D.F., Porrúa Hermanos y Cía., 1937., pp. 15-17.

[26] See Judith Frances Zeitlan, *Cultural Politics in Colonial Tehuantepec*, Stanford, Stanford University Press, 2005., and Kevin Terraciano, *The Mixtecs of Colonial Oaxaca*, Stanford, Stanford University Press, 2001.

[27] Kohler, *Recht*, p. 108, *Derecho*, p. 75.

[28] See A. G. McDowell, *Jurisdiction in the Workmen's Community of Deir El-Medīna*, Leiden, Nederlands Instituut voor het Nabije Oosten, 1990.

higher authorities.[29] Other tribunals were established with tiers for appeals culminating in multi-member supreme councils. Special trib unals for family, tribute, and trade also existed. Although described as "courts" with "judges" by both Spanish chroniclers and contemporary writers,[30] they might be more accurately labeled as administrative organs staffed by ruling elites designed to ensure compliance with tribute requirements and ruler-made proscriptions. The jurisdiction of the Texcoco Supreme Council, as described by Offner,[31] for example, included an array of offenses, including treason, homicide, various sexual offenses, theft, drunkenness, as well as violations of sumptuary regulations and property infractions. The council also had jurisdiction over disputes regarding official status and offices. The Aztec system can thus be reasonably labeled a "legalistic" system with, as Offner himself notes, striking parallels with China.[32]

The Inca empire in contrast exemplifed a system of power and control. All agree that during the century prior to Pizarro's arrival and conquest in the 1530s, a centralized, administrative empire fundamentally resembling pharaonic Egypt had emerged to form the largest and most populated polity in the Americas, stretching along the Andes from north of the border separating contemporary Ecuador and Colombia to the Maupe River in central Chile. The administrative structure was fully pyramidal. At the apex was the Sapa Inca, notionally the paramount deity as well as temporal ruler. In the words of Nigel Davies, "as the theoretical possessor of all lands, mines and herds, the Inca was the state."[33] Below him were the members of the ruling elite, a ll, presumptively at least, descendants of the present or former Inca. All resided in Cuzco, itself a sacred city. Supported entirely by Inca revenues, the members of this elite were thus deprived of any local base and potential resources that might enable independent or subversive political activity. The Incas divided their domain into four major administrative regions, each of which comprised 80 provinces and over 160 subdistricts. The smallest units were the kinship-based communities.[34]

Two unique features of Inca rule buttressed their control. The first was a counting system of knotted cords –quipu– interpreted by trained specialists, most if not all of whom also resided in Cuzco. The second was a technologically advanced and remarkably extensive system of roads that united the Inca domain. The quipu enabled the Inca rulers to keep track of people and tribute. The system of roads provided access to the most remote reaches under their control and to regulate all travel. Along the Inca roadways, particularly at vital intersections, Inca officials manned administrative centers throughout the empire to monitor and control all travel and transportation of goods. Their coercive capacity was equally extensive. In response to resistance or rebellion entire communities were uprooted, scatte-

29 Lucio Mendieta y Núñez, *El Derecho Precolonial*, p. 20.

30 See, e.g., Francisco Avalos, "An Overview of the Legal System of the Aztec Empire," *Law Library Journal*, vol. 86, 1994, pp. 259-276; Jerome A. Offner, *Law and Politics in Aztec Texcoco*, Cambridge, Cambridge University Press, 1983, pp. 55-66.

31 Jerome A. Offner, *Law and Politics*, p. 151.

32 Id., pp. 80-82.

33 Nigel Davies, *The Incas*, Niwot, Colorado, University Press of Colorado, 1995, p. 114.

34 Burkholder and Johnson, *Colonial Latin America*, p. 12.

red, and resettled. Another echo of Deir el-Medina, they also created communities of specialized laborers—weavers, potters and producers of other luxury goods.

2.2 Pre-Colonial Trajectories: Law's Political Evolution in the Medieval Iberian Kingdoms

In the wake of Roman disintegration, the Visigoths had formed the first integrated medieval kingdom, the first consolidated kingdom of Western Europe. Its rulers were among the first in Europe to use written laws (in Latin) as a means of national unification. It had also resolved the problem of succession through election by nobles and clergy rather than heredity. The process implicitly recognized kingship as an office and made the political legitimacy of its holder dependent on the will and welfare of the community, thereby combining features of both the Roman and Gothic communities. A primary function of the king in Visigothic Spain as other West European kingdoms, was the role of a supreme adjudicator for the community. The most advanced and influential legislation of the kingdom was the *Fuero Juzgo* or the *Liber Judiciorum* (also known as the *Libro de las Leyes* or *Lex Barbara Visigothorum*). Developed over four reigns –Kings Chindasvinth (641-652), Reckesvinth (652-672), Ervig (680-687), and Egica (687-701)– the *Fuero Juzgo,* written in Latin, continued to be applied with modification in Castile and later all of Spain and its empire into the nineteenth century. It exemplifies the early emphasis of West European law. The king is viewed above all as a dispenser of fair justice through royal courts, even admonished to order judges "to practice moderation" in their adjudicatory functions (Book Twelve, Title One).[35] Law's enforcement is presumed to be adjudicatory. The second book sets out in detail the requirements for adjudicatory procedures, the role of judges, lawyers, and witnesses, as well as authentication of documents. No distinction is made between civil and criminal offenses. Both are enforced within essentially the same adjudicatory framework.

The Visigothic kingdom had begun to restore Iberian prosperity with agriculture and trade within the Mediterranean ambit. All to naught, however, as the kingdom ended abruptly with the Muslim conquest under Jabal al-T-riq in 711 CE and the establishment of the Umayyad province of al-Andalus ruled from Damascus. This was Iberia's transformative event. The making of medieval Spain thus begins with the *Reconquista*, the seven century long recovery of the peninsular from its Muslim rulers. The process began in the mountainous northern reaches of the peninsula that remained beyond Muslim control. Here took shape a cluster of tiny, independent kingdoms between the Bay of Biscay and the Cantabrian mountains, in the foothills of the Pyrenees, and at their eastern edges the along the Mediterranean coast. The first in time was Asturias –later consolidated with Galacia and named León, after the capital city on the southern flank of the Cantabrian mountains. Their rulers initially sought legitimacy by claiming Visigothic ancestry. In the center was the breakaway vassal kingdom of Castile. A third, Aragon, represented a consolidated group of Carolingian counties that separated under counts-turned-

[35] Quoted in Van Kleffens, *Hispanic Law*, p. 77.

autonomous rulers at the turn of the century. Nestled in the southern Pyrenees between Castile and Aragon was Navarre. Finally, closely tied to Aragon with a long history of relative independence under the Carolingian empire was the County of Barcelona in Catalonia. By the beginning of the tenth century, two centers had formed, one in the west by Léon and Castile, now united, the other in the east by Aragon, Navarre, and, on occasion, Barcelona. Castile and Aragon were thenceforth to lead the crusade to recover the peninsula from Muslim rule and to dominate all of Iberia. (During this period Portugal was a semi-autonomous county under the sovereigns of Leon and Castile. It did not become a fully autonomous kingdom until the twelfth century.)

The rulers of the remnant Iberian kingdoms, particularly the kings of Castile, were among the most effective early European rulers in consolidating their realms. As leaders of military campaigns with fervent religious justification and papal support, within their domains they exercised authority and, initially, a significant degree of centralized control. Their military successes further enabled them to control and redistribute both land and tribute from the polities into which the Caliphate ultimately fragmented. However, with the notable exception of the capture of Toledo in 1065, until the thirteenth century the Reconquista hardly progressed. The Tagus and Ebro rivers marked the borders between the Catholic kingdoms in the north with the newly established Almohad empire. Encouraged by the apparent Almohad weakness, the Banu Nazari (Nasrid) began their ultimately successful revolt. The Iberian kings took immediate advantage, capturing Mallorca (1229), Valencia, Alicante and Balearic Islands (1235), and finally Cordova and Seville in 1248. By mid century, the Reconquista was largely complete. By 1294 only Granada under Nasrid rule survived as an Iberian Islamic polity, paying tribute to both Castile and Aragon, until 1492 overwhelmed by a united Spanish force under the joint rule of Queen Isabella of Castile (1451-1504) and Ferdinand II of Aragon (1452-1516). Their successor, Charles I (1500-1558) –Charles V of the Holy Roman Empire– was the first king to rule a united Spain.

Spain may have been united, but it was neither politically nor legally homogeneous. As an increasing number of urban centers were assimilated into the Spanish kingdoms, a variety of special charters or *fueros* were granted. Some degree of uniformity prevailed, but in many instances special privileges, particularly in the Kingdom of Aragon, were granted. As result, the authority and powers of Charles I and his successors were legally constrained. There were other, political constraints. In the initial phases, the kings of Castile had redistributed conquered land and granted tax immunities to those equipped with horses who served as cavalrymen along the frontiers. One consequence was the creation of commoner-knights (*caballeros-villanos*) and a growing class of small peasant landholders. In the later stages of the *Reconquista*, however, royal grants of newly acquired land to military orders and court favorites become common. As a result throughout Andalusia and Lower Extremadura large sheep-raising estates with absentee landlords and a small number of subordinated Muslim laborers replaced the rich, irrigated Muslim farms. Collective action through the formation of the Mesta, a Castile-wide association of sheepherders, substantially augmented the political influence of

these mostly noble landowners. However, having lost the extensive Muslim trade networks, the *Reconquista* set back commercial growth for decades. For Castile commerce remained mainly internal. In contrast, Aragon with its long Mediterranean coast profited. By design or necessity, the kings of Aragon presided over an expanding cluster of self-governing polities. Castile, however, was both politically and legally the dominant kingdom.

By the middle of the thirteen century, Castile had become among the most institutionally advanced in Western Europe. Within two generations, it had more than doubled in territorial size and population. In 1252, four years after reclaiming Cordova and Seville, Fernando III (born 1199) died, leaving his newly extended realm to his son, crowned Alfonso X (1221-1284) to become known in history as Alfonso the Wise. The first and foremost task facing the new king was to unify and to govern an effectively integrated kingdom characterized by extremes of religious, linguistic, and economic diversity. Thwarted in his aspirations to establish a new Spanish empire extending from the Pyrenees through North Africa, he endured continual conflicts with the nobility within Spain, whose control he attempted to wrest, as well as rivals within the Holy Roman Empire, although elected King of the Germans (Romans), he was denied. Overthrown by his son, Sancho IV (c.1257-1295), Alfonso died in Seville in 1284. Viewed today as a precursor of the Renaissance, Alfonso was a military leader, poet, promoter of the arts and sciences, and, above all, the maker of laws.

Law making was his grandest accomplishment. He is credited with having directed if not personally drafted the *Espéculo,* the *Fuero Real* and finally the *Siete Partidas,* Western Europe's first and most enduring law code Both the *Fuero Real* and related *Espéculo* are believed to have been completed in around 1254 or 1255. Their relationship –whether separate or related legislation– remains contested,[36] but most agree that they like the *Siete Partidas*, were designed to provide a uniform set of legal principles, proscriptions, and procedures for the much expanded kingdom of Castile. Joseph O'Callaghan posits that the *Fuero Real* was not one code but the title of the various codes represented by the *Espéculo,* kept at court as model, that were granted (or perhaps imposed) by the king as codes of municipal law to supplement prior local laws and create a more uniform system for the cities of Castile.[37] In language, style, form, and substance, they presage the *Siete Partidas.*

Compiled between 1256 and 1265 and written in Castilian instead of Latin, the *Siete Partidas* is one of the first comprehensive compendia of legal rules and principles to be written in a vernacular European language. Phrased both as admonitions and preferred principles as well as mandatory commands, its provisions, as indicated by the title, are divided by subject-matter into seven parts. The first

[36] For this and other issues in dispute related to the *Fuero Real*, the *Espéculo,* and the *Siete Partidas*, see Alfonso García Gallo, "Nuevas Observaciones sobre la obra legislativa de Alfonso X," *Anuario de Historia del Derecho Español*, vol. 46, 1976, pp. 609-670; Aquilino Iglesia Ferreiros, "Alfonso X el Sabio y su obra legislativa: algunas reflexiones," *Anuario de Historia del Derecho Español*, vol. 50, 1980, pp. 531-561. cited in O'Callaghan, *Alfonso X, the Cortes, and Government in Medieval Spain*, p. III1.

[37] Joseph F. O'Callaghan, *Alfonso X, the Cortes, and Government in Medieval Spain*, p. III 3-4.

begins with definitions and general observations but, reflecting an emphatic assertion of royal authority, deals principally with matters of Catholicism and the Church, including the sacraments, qualifications and behavior of bishops, the clergy, and monks, as well as provisions for church income, heresy, and excommunication, and even the location of cemeteries, The second part deals with the king, the royal household, and the nobles. Its provisions also cover knights, royal officials, including judges, waging war, and schools. The primary theme of the third part is justice: the courts, adjudicatory procedure, and rights in rem (property). Part four treats feudal and family relationships. In the fifth are provisions on a common array of economic transactions under Roman law –loans (both *mutuum* and *commodatum*), sales, gifts, deposit, partnership– with mention of merchants and markets, wages and rents, ships and salvage, innominate promises, suretyship, taking care of another's property, pledges, payment and releases. Provisions on inheritance and succession occupy the sixth part with the seventh devoted to criminal offenses.

Adjudication was a principal emphasis. Alfonso, it should be noted, had enabled the effective extension of the Crown's adjudicatory jurisdiction by restructuring the royal courts whose members included the judges that adjudicated ordinary cases (*alcaldes de la corte del rey*); the *justicia mayor*, who maintained order and made arrests on demand by the king; and the *adelantado mayor* who adjudicated cases involving the nobility, the military orders, and towns.[38] Part Two includes admonitions on the qualification of judges, and Part Three details the procedures and processes to be followed. Judges, the king advises, should be of "good lineage," "good understanding," "orderly and wise," "literate," "impartial." Above all they should be "loyal" and "love the King" [Part Two, Title 9, Law 18]. The rationalization of adjudicatory procedures parallel the reforms, noted above, for ecclesiastical courts. Part Three sets out the qualifications, authority, and duties of judges, the parties, attorneys and advocates, the nature and effect of admissions and confessions, definition and requirements of oral and documentary evidence as proof, qualification of witnesses, regulation of arbitration and arbitral awards, even provision for judge-appointed examiners

Crime and its prosecution were equally dominant concerns. The legend of Law 4 in Title One, Part One asks the question: "Why the laws (*leyes*) have the name? In an answer that echoes the Chinese legalists, the lawgiver writes, because the law (*ley*) "something to be read (*leyenda*), in which instruction is contained, and punishment is set down, to bind and control the life of man, in order that he may not commit wrong, and to demonstrate and point out the good that he should do and practice." The provisions on adjudication and judicial procedure generally apply to all cases without differentiation between criminal as civil actions. Part Three, for example, primarily concerns civil suits, the provisions apply to all cases in which a party seeks compensatory redress for wrongs or prosecutes based accusation. For example, in prosecutions based on accusations Law 12 of Title 14

[38] See Joseph F. O'Callaghan, *The Learned King: The Reign of Alfonso X of Castile*, Philadelphia University Press, 1993), pp. 31-47.

explicitly disallows proof by presumptions that might otherwise be permitted as proof (see Law 11 on the presumption that an heir may profit by a contract in actions to enforce a debt).

The first title of Part Seven concerns accusations –who can bring an accusation, against whom and how an accusation can be made. All cases require a complaint, information, or accusation, except for five categories of crimes: forgery, false witness, openly committed or notorious wrongs or wrongs that cannot be concealed, and wrongful use of the office of guardian. Only these offenses may the king or judges by Law 28). As expected, treason, the subject of the entire second title, is the principal crime (Part Seven, Title Two, Preamble). Combat and injury to reputation (infamy) are covered in the next two titles. The remaining sections deal with deceit (including counterfeiting), homicide, violence, larceny, theft, robbery, fraud, sexual crimes, and sorcery. Part Seven also includes special provisions on Jews and Muslims. Title 31 sets out the penalties for each offense in a manner that, as noted in an official compilation published in 1807, satisfies Enlightenment notions of appropriate proportionality.[39] The title begins in Law 1 with the two aims of punishment –as "reparation for sin" and deterrence– similarly presaging Enlightenment views.

In all cases where appropriate the principal penalty is compensatory –such as return of stolen goods or their value– combined, however, for more egregious instances Title 31, Law 4 lists seven categories of punishment: death, life imprisonment with labor for the king, banishment with forfeiture of all property, banishment without forfeiture, loss of office or right to practice a profession, and finally corporeal punishment. Imprisonment is also listed but only for slaves. Otherwise, imprisonment is allowed only to secure persons (freemen) awaiting trial.

Whether when written the *Siete Partidas* were formally promulgated and became effective as law is doubtful. It can be viewed as an effort to buttress the authority of a consolidating but fatally weak monarch. The *Siete Partidas* similarly claimed more than Alfonso X could actually deliver. Opposition by the nobility as well as the Church appear to have prevented their implementation. Not until 1348 when Alfonso XI (1312-50) by the *Ordenamiento de Alcalá* commanded that they be "held and received" as law. From that time into the nineteenth century, however, they functioned as the fundament of Spanish law.

The adjudicatory structures central to Spain as well as other West European kingdoms continued to develop. In 1371 Enrique II recreated the Royal Council, whose members, nearly all lawyers, were responsible for general administrative oversight and functioned as the court of final appeal for criminal cases. During the same year the first *audiencias* was established in Valladolid. Also staffed primarily by law-trained professionals, the *audiencia* were responsible for civil appeals within their districts. By this time universities with a primary curriculum in canon and civil law had been established at Alacá de Henares, Barcelona, Lleida, Palencia,

[39] *Las Siete Partidas del Rey Don Alfonso el Sabio*, vol. 1, Madrid, Emprenza Real, 1807, p. ix.

Salamanca, Santiago de Compostela, Valladolid, Valencia, and Coimbra (Portugal). During the sixteenth and first quarter of the seventeenth centuries, two more in Spain (Sevilla and Zaragosa) and three in Hispanic America (in Santo Domingo, Mexico City, and San Marcos in Lima). Their legal curriculum reflected the revolution that had emanated from Bologna in the reform of canon law begun by Gratian (dates unknown), as well as the discovery and scholastic study of Justinian's sixth century codex , centering on classical Roam private law as compiled in the *Corpus Juris Civilis*. By the end of the fourteenth century, all Castilian officials were required to be *letrados*– that is, to hold a university diploma, nearly always in civil or canon law or both.[40]

The emphasis on adjudication and private law in the political evolution of Western Europe generally and Spain in particular was buttressed by the Roman Catholic Church. No single feature of early West European history rivals its foundational influence. Within the diversity spawned by European geography, migrations, and warfare, it supplied the one constant, unifying feature. Around the Bishop of Rome a new order formed. Adapting administrative structures and the language of the Western Empire, the Church emerged as its principal organizational and cultural remnant. With dedicated personnel and an overriding evangelical mission to the Pagan tribes, within a millennium the Latin Church under the Bishop of Rome had extended the Christian faith and its organizational reach throughout the former Western Empire well beyond the Roman frontiers. The Latin Church replicated the structure of the Empire. As Roman control waned, the Church reestablished a hierarchical administrative system that remains unique even among the organized religions. The Church also inherited the language of the empire. By adopting Latin, the Church provided a common written language for all of Western Europe and also ensured access to the written legacies of the Roman Empire– including law. All early written laws were in Latin and thus by default the customary norms and legal rules of the Germanic tribes and other non-Romans had to be expressed in the legal terminology of Roman law. This process in itself ensured Roman legal influence. For our purposes two fundamental aspects of the Church's influence need to be stressed. The first is that the Church epitomized a regime with authority but without coercive power. Not coincidentally, such regimes tend to rely on adjudication of disputes brought by litigants as a primary means for the enforcement and recognition of legal rules. Ecclesiastical courts throughout the Church's domain played a foundational role from inception in the development of adjudication and private law. The availability of a supranational system of courts also enabled the making of a continental *ius commune* that encompassed both adjudication and private law with the additional emphasis on a conceptual system of natural legal rights as reformulated by twelfth and thirteen century canon law jurists and theologians.

The Church's most influential legal innovation was the reconception of natural rights within a universally valid and mandatory hierarchy of legal principles and rules. Gratian initiated the change. In the *Concordia discordantium canonum* (*Con-*

[40] See Julio Valderon Baruque, *Historia de Castilla y Leon*, vol. 5, Valladolid, Ámbito Ediciones, 1985, pp. 83-84.

cord of Discordant Canons), or simply the *Decretum*, he articulated an understanding of law that drew on the studies of the *Corpus Juris Civilis* and scholastic methods to reconstruct and rationalize the existing and often conflicting corpus of canons. The ear concluded with the work of Thomas Aquinas (1225-1274). Gratian and Aquinas shared a common vision of law within a hierarchical system of principles and rules with God's law as supreme. Ruler-made legal rules were subordinate. Writing in Latin, law was by definition a system of rights. For Gratian at least customary rules were also law. Private law rights –right to property, of contracts, to compensation for wrongs– were at least implicitly core elements of any system of laws. Within the theological context within which they wrote, their schema was both universally applicable and mandatory. Western European understandings of law as a system of legal rights were thenceforth to have an evangelical cast.

2.3 Law's Political Evolution in Colonial Spanish America

Created in the sixteenth century, the governing structures of Colonial Spanish America reflected the allocations of functions and governmental powers that characterized Spain as the most legally advanced European state. Within four decades after the first landing by Columbus in the West Indies, the Spanish (Castilian) Crown had created territorially the largest and most fully structured colonial empire in history. With the Philippines added, it spanned two oceans and three continents. Hispanic America alone encompassed a territory over thirty times the size of the Spanish kingdoms. No monarchs before or since had as extensive authority over as much territory or as many people. The estimated Amerindian population of central Mexico alone is estimated to have been over three times the total population of the Iberian peninsula, Portugal included. Within the first century by the most credible calculations between 200,000 and 250,000 Europeans, nearly all from Spain, had emigrated to the new colonies.[41] What began an enterprise of wealth-seeking adventurers encouraged by a queen and her advisors to establish fortified entrepôts on what were believed to be the fringes of East Asia soon evolved into a territorial domain under expanding royal control. In the process structures of governance reflecting well-established Iberian institutions and practices were introduced, adapted, and ultimately reconstructed within the distinctive environment of the American lands. In the process structures of governance reflecting well-established Iberian institutions and practices were introduced, adapted, and ultimately reconstructed within the distinctive environment of the American lands. Forming the basic law throughout the colonies was the Fuero Juzgo and the Siete Partidas supplemented by thousands of subsequently enacted Castilian laws —accessible in the four volume Nueva Recopilación de Castilla of 1567– and by steady flow of special royal laws, edicts, decrees, and orders that revised or added to the otherwise applicable private law rules and introduced tens of thousands new regulatory rules and institutions in response to special needs and Crown concerns in the colonies. They were consolidated and published in

41 Nicolás Sánchez-Albornoz, "The Population of Colonial Spanish America," in Leslie Bethell, ed., *The Cambridge History of Latin America*, vol. 2, Cambridge, Cambridge University Press, 1984, pp. 3- 35, at pp. 15-16.

1680 as the Recopilación de Leyes de las Indias.[42] One consequence was the first significant transplantation outside of Europe of the broad conception of law as a system of rights with corresponding adjudicatory modes of enforcement that had evolved on the Iberian peninsula for over a millennium since the collapse of the Roman Empire in the West.

The Castilian Crown did not simply impose the laws and practices that had evolved through the fifteenth century in its newly acquired American domains. Freed from both the political and legal constraints that had evolved within the Iberian kingdoms, one might conclude that the Crown could freely innovate in designing a system of governance and legal order. Not so. Aside from the natural and technological barriers that restricted direct control of such distant and vast territories from the peninsula, equally if not more significant ideological constraints shaped the institutions and structures of the new Spanish empire. Like all imperial systems in the ancient world, the Crown moved rapidly to introduce regulatory and administrative controls. A waning of private law and adjudication seemed inexorable. The first administrative organs to be established was the House of Trade (Casa de Contratación) in 1503. Two decades later in 1524 the Council of the Indies (Real y Supremo Consejo de las Indias) was formed. These two organs under the Crown would remain the principal superintending and law-making bodies of Spanish colonial rule for over two hundred years until the Bourbon reforms of the late eighteenth century. Both were located in Spain and subject only to royal command.

The primary function of the House of Trade was to encourage and regulate trade. Located in Seville until 1717 when moved to Cadiz, the House of Trade operated the merchants' guild (*consulado*), which enjoyed a royal monopoly for all trade with the colonies. Its responsibilities also included licensing and regulating all shipping and emigration, tax and tariff collection, administering royal revenues form the colonies, supervising the convoy system (*flota*) of semi-annual shipments, particularly the shipments of gold from Manila through Mexico to Spain, and adjudicating disputes relating to trade and navigation. Local *consulados* with licensing authority and exclusive jurisdiction to adjudicate commercial disputes were gradually established in the principal cities throughout the colonies. They became the governing organs for local merchants, regulating in minute detail nearly all aspects of local trade and commerce. The Casa and *consulado* continued to function until 1790. Although they remained, it appears under the control of merchants and thus retained the form of a private ordering system within the merchant community, no European polity had previously integrated otherwise autonomous merchant guilds so broadly into a regulatory administrative structure.

The Council of the Indies was created concomitant with the arrival of the first Spanish administrative officials in México (and twelve years before Pizarro had completed the conquest of Perú). Answerable only to the Crown, for whom it functioned as

[42] For a detailed overview, see Matthew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004, pp. 19-32, 45-53.

an advisory body, the Council was in effect the principal governing body for the American colonies as the primary legislative and highest administrative organ of the empire. In addition to extensive legislative and supervisory functions, which included verification of official accounts, it was responsible for nominating the persons to fill all high colonial posts and confirming officials appointed by those in the colonies. The Council in combination with the House of Trade moved the colonial regime well along the evolutionary trajectory toward an imperial public law order. With increasing immigration into the colonies and the problems of attempting direct rule more apparent, a more coherent structure for administration and oversight was necessary. Thus in 1535 Charles I created the Viceroyalty of New Spain (Virreinato de Nueva España), the first of what ultimately became four viceroyalties. It initially included all of North and Central America north of the Isthmus of Panama under Spanish control. The Viceroyalty of Peru (Virreinato de Perú) was established in 1542. Not until 1717 were the territories encompassed today by Colombia, Ecuador, Panamá, and Venezuela removed from the jurisdiction of the Peruvian Viceroy and placed under the new Viceroy of New Granada (Virreinato de la Nueva Granada) with its capital at Santa Fé de Bogotá. The Viceroy of Río de la Plata (Virreinato de Río de la Plata) centered in Buenos Aires was not created until 1776.

Within the colonies the primary administrative and judicial organ was modeled after Castilian medieval courts—the audiencia The first audiencia was founded in Santo Domingo in 1526. In the sixteenth century, nine additional audiencias were established in Mexico City (1527), Panama (1535), Lima (1542), Guatemala (1542), Guadalajara (1548), Santa Fé de Bogotá (1548), Charcas (1559), Quito (1563), and Manila (1583). Two others were created in the seventeenth century for Santiago de Chile (1609) and for a brief time Buenos Aires (1661). Over a century later the audiencia in Buenos Aires was reestablished (1783) and new ones created in Caracas (1786) and Cuzco (1787). The audiencias combined judicial, administrative, and consultative functions. Their "services in keeping watch over the activities of viceroys and governors, and in checking the private conduct of colonists were," in the words of John Lynch, "invaluable at all times and in all parts of Spanish America."[43] Mark Burkholder aptly likens the resulting judicial and administrative structure to two sets wheels. The hub of the first was the Crown with spokes of authority and oversight reaching out to the audiencias, each of which functioned as the hubs of a second set of separate wheels with their spokes extending to the provinces.[44] Each audiencia was also subdivided into local districts –named variously corregimientos, alcaldes mayores, gobernaciones– that like the audiencia to which they reported, exercised both administrative and judicial functions.

Although the administrative functions of the audiencias should not be overlooked, for our purposes what is significant were their judicial functions. From the start each audiencia generally had three to judges trained in civil law or canon law or

[43] John Lynch, *Spanish Colonial Administration, 1782-1810: The Intendant System in the Viceroyalty of the Río de la Plata*, London, The Athlone Press, 1958, p. 237.

[44] Mark A. Burkholder, "Bureaucrats," in Louisa Schell Hoberman and Susan Migden Socolow, eds., *Cities & Society in Colonial Latin America*, Albuquerque, University of New Mexico Press, 1986, p. 80.

both. As described by Mark Burkholder, the path to appointment as an audiencia minister first required letrados qualification with evidence of university education in law –generally a transcript– that with other background and career documentation was reviewed by the Secretariat of the Council's Cabinet (Cámara), which issued a resumé (relación de méritos y servicios) of the applicant's qualifications. With this resumé in hand, the aspiring office-holder (pretendiente) could then seek the royal appointment in the form of a formal recommendation (consulta) by the Council Cabinet. Audiencia ministers and other officials could also receive posts without the review and advice of the Cabinet simply by royal decree or sobre consulta, which was also based on royal decree, either to fill a new or vacant post or to replace an official promoted to another position, categorized separately as a resulta.[45] Only applicants selected on the basis of a consulta had demonstrable merit. Posts filled by decree or sobre consulta included offices the Crown sold –a practice that would greatly expand at the end of the sixteenth century as royal finances became increasing dire.[46] A 1606 cédula gave their holders a right that could be "renounced" in favor of another person that in effect gave them a negotiable title to office.[47] In the initial appointments to colonial office, the Crown adhered to two fundamental policies. Those nominated for royal appointment should be persons with demonstrable merit and should be Spanish-born. As noted, university-training in law was required as a mandated qualification for all judicial posts. Unless a letrado, even the viceroys who presided over the audiencias in their respective capitals could not by law participate as an adjudicating judge.

With the establishment of the viceroyalties, the *audiencia* did lose some administrative and legislative tasks but remained the primary judicial organ for the colonies, serving principally as courts of civil, criminal and administrative appeal, and, as noted above, both a agency for review and substitution for absent or vacant viceroyalties. Adjudication also remained a principal mode of law enforcement. The *audiencia* thus continued to play a pivotal role. As the colonies expanded and new officials were needed, their judicial functions became more pronounced. Many new ministers and offices were added to assist the *oidores*. They included *alcaldes* who, if trained in the law, could serve as adjudicating judges or assist in the proceedings, *fiscales* responsible for royal revenues and other royal interests, and, the local level, *corregidores*, who commanded district militia in addition to their broad administrative and judicial responsibilities. Each *audiencia* also employed a clerical staff of reporters and scribes. Added as well to the expanding colonial bureaucracy were other royal offices designed to ensure local adherence to Crown policies. They included two with supervisory and investigative authority: the *residencia*, judges responsible for reviewing the conduct of officials upon their retirement or termination, and *visitadores*, who were specially commissioned by the Crown with broad investigatory authority. At the local level by mid century each town established for Spanish subjects was governed by a *cabildo* with extensive legislative and administrative authority. The *cabildo* selected the local *alcalde* judge as well as administrative officials, such as the *regidor* and *procura-*

45 Burkholder and Chandler, *Biographical Dictionary*, pp. xvi-xvii.
46 Id.
47 Burkholder, "Bureaucrats," p. 82.

dor. The *cabildos*, were in turn subject to district officials—the *alcaldes mayores* in New Spain and the *corregidores* in most of the other colonies. Its members were elected. For Amerindians, as described subsequently, colonial policy produced a separate system of governance, restructuring existing native communities and in many instances compelling resettlement in new Amerindian townships.

The central role of adjudication within the colonial scheme is not surprising. Fundamental notions of private law and adjudication were, however, too deeply embedded within Spanish as well as, more generally, West European conceptions of governance and law to be either discarded or ignored. Moreover the integration of natural law theory and Roman private law had become a constitutional component of Spanish and European political ideology and jurisprudence.

2.4 Legal Rights, Adjudication, and the Amerindian Communities

The full impact of Spanish rule on the indigenous peoples is well beyond the scope of this study. Most of the consequences of Spanish rule for the Amerindian communities are well-known. Disease arrived with the Spaniards. Death followed. The rapidity and the extent of the ensuing depopulation were catastrophic. Disease was not the sole nor, in the first years, the principal cause. Enslavement, brutal exploitation, especially in placer mining labor, and forced resettlement also contributed to the catastrophic loss of life. The first arrivals took full personal advantage of their legal privileges and status. They satisfied their immediate needs for food, construction, and gold with enslavement and coerced labor. Their mistreatment of the native population so appalled newly arrived Dominican friars that they initiated the first efforts to recognize the "natural rights" of all Amerindians. Their campaign had formal success. Isabella had faced an initial test when a number of natives were dispatched by Columbus for sale in Spain. Upon their arrival she is credited for having blocked their intended sale pending an inquiry into the legality of their enslavement under Castilian law. The issue was not resolved, however, before they had been assigned to galleys to await an outcome. Presumably most died in the interim. She did not decide the issue until in a royal *cédula* issued in 1503, she determined that the native peoples under Spanish dominion were free, but, she added, that, for wages to be assessed as appropriate by local chiefs (*caciques*) in consultation with local Spanish officials, they could be forced to build buildings, gather and mine gold, and till the fields to satisfy the needs of settlers and the Crown.[48]

Three Dominican brothers –Alonso de Espinal, Antonio de Montesinos, and Bartolomé de las Casas– were among the first to protest both in Hispaniola and Spain. Las Casas, a former encomendero himself, became the leading publicist for humane (Christian) treatment of Amerindians throughout the colonies. He joined the Dominicans in 1522. Las Casas is well-known for his writings following his

[48] Lesley Byrd Simpson, *The Encomienda in New Spain: The Beginning of Spanish Mexico*, Berkeley, University of California Press, 1966 ed., p. 13.

debate in 1550 with Dominican Juan Ginés de Sepúlveda, the leading apologist for Spanish rule, at the celebrated assembly (junta) of jurists and theologians convened at Valladolid by Charles I. In 1511-1513, after purportedly listening to de Espinal's description of the treatment of natives in Hispaniola, Ferdinand II had already promulgated the Laws of Burgos, restricting the number of encomiendas and the number of natives allotted. In addition the Laws of Burgos attempted to regulate in detail the amount of work, pay, provisioning, living quarters, hygiene, and care required for the subject natives. The Laws also prohibited any punishment by encomenderos, reserving such authority to Royal juridical officials.[49] In 1537 Pope Paul III also responded with the Bull entitled Sublimis Deus, which prohibited the enslavement of Amerindians and recognized their right to possess property. Largely ignored the Laws of Burgos failed to bring about the desired changes. In 1542 Charles I issued the New Laws, which recognized Amerindians as free vassals of the Castilian Crown and authorized the audiencia to investigate and punish any infractions against them. They terminated all allotments of natives to officials at all levels as well as the clergy and church institutions. The New Laws also provided for lawsuits among Amerindian subjects to be based on native usages and customs.[50] The remaining question was whether the New Laws would or could be enforced.

By mid century most fundamental issues of legislative authority may have been resolved, but overlapping adjudicatory jurisdiction continued to produce conflicts. The Crown's administration of its American colonies reflected its undisputed authority to legislate an array of regulatory controls not available even in Castile, where as noted previously, its authority and powers were less fettered than in any of the other Spanish kingdoms. The Crown did not hesitate to respond legislatively to perceived problems. The Council issued an overwhelming volume of regulatory legislation. Effective enforcement was another matter. The formidable barriers to effective communication across the Atlantic (and the Pacific for the Philippines) in the sixteenth century imposed severe constraints. Many contested claims could only be finally resolved by the Crown and its official agents in Spain.[51] Pronouncements made in Spain were not necessarily heeded by those in the colonies. Simply put, the Crown lacked the capacity to coerce compliance. Those who ruled the Spanish kingdoms also suffered a conflict in interests reflected in the promulgated rules. Fully protecting the Amerindian from exploitation would, as one official after another reminded the Crown also reduce the Crown's share of the wealth such exploitation produced. The Crown was as dependent on native labor as the settlers. Within the vice-royalties of New Spain and Peru, the Spanish authorities had initially envisioned a dual structure with separate "republics" or "commonwealths," one of Spanish settlers, the other of native peoples. Some had argued to the contrary

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49 For fuller treatment and English translation, see Lesley Byrd Simpson, *The Laws of Burgos of 1512-1513: Royal Ordinances for the Good Government and Treatment of the Indians*, San Francisco, J. Howell Books, 1960. See also Simpson, *The Encomienda*, pp. 32-34.

50 Simpson, *The Encomienda*, pp. 129-132. See also http://www.fordham.edu/halsallod/1542newlawsindies.html (site last visited 4/18/08).

51 See Lauren Benton, *Law and Colonial Cultures*, Cambridge and New York, Cambridge University Press, 2002, pp. 80-102.

for a single, integrated regime. In the end, a combination of the two prevailed.[52] Existing native communities were administratively incorporated as native townships (cabeceras) and subdivided into village subunits (sujetos) and neighborhood wards (barrios) wards with existing chiefs, designated as caciques or, in Peru, kurakas, and ruling nobles, designated principales, co-opted as administrative officials into but subject to the colonial regime. Thus in the viceroyalties of New Spain and Peru, with largest Amerindian population, indigenous communities in significant numbers were incorporated into the colonial administrative structure. For most of these communities, particularly those in Peru that had been long subject to Inca control, Spanish colonial rule merely replaced one set of rulers with another. However, Spanish rule included more than simply the incorporation of indigenous communities within a newly imposed regulatory order. They were also assimilated into an entirely different conceptual system of law. Among the most transformational aspects of colonial rule was thus the foundational recognition of law as a system of legal rights.

The pervasive emphasis on judicial processes in colonial administration led to the meticulous provision for both judicial and administrative appeals ultimately to the Crown. These were empowering innovations however imperfect and limited in actual realization and effect, especially when combined with the recognition that the native inhabitants of the colonial territories enjoyed the legal capacity as claimants with legally enforceable rights to participate in judicial processes, including the right to redress through a colonial version of *amparo*. The creation of the General Indian Court of Colonial Mexico was an unprecedented innovation. At no time before had a conquered and subordinated people outside of Western Europe been accorded such extensive participatory and protective voice in governance. Almost immediately individual and collective litigants emerged within Amerindian communities throughout the colonies.

Amerindian lawsuits have been a much studied aspect of Spanish colonial rule. Woodrow Borah, Susan Kellogg, Judith Zeitlan, and Steve Stern are among the most prominent scholars in the United States to examine and assess their impact in Mexico as well as Peru.[53] They all express agreement that Borah's conclusions with respect to New Spain applied throughout the colonies. In Borah's words:

So the Indians of New Spain found, after enduring the shocking losses and disruptions of the first years of conquest, found that once a relatively orderly royal administration began [...], they could haul any official into court and challenge his decisions; that any grant of land could be disputed; that boundaries and political arrangements could be challenged; and that any private person or corporate en-

[52] See Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real*, Berkeley, University of California Press, 1983, pp. 29-34.

[53] See Woodrow Borah, *Justice by Insurance*; Susan Kellogg, *Law and the Transformation of Aztec Culture*, Norman and London, University of Oklahoma Press, 1995.; Steve J. Stern, *Peru's Indian People and the Challenge of Spanish Conquest*, Madison, WisconsinI, University of Wisconsin Press, 2nd ed. 1993.; and Judith Frances Zeitlan, *Cultural Politics in Colonial Tehuantepec*, Stanford, Stanford University Press, 2005.

tity could be held for redress for damage done or be forestalled through petition for an order of amparo.[54]

Litigation for Amerindians thus became, again to quote Borah, "the principal means for carrying on the long series of disputes unleashed by the Conquest over land, status, any virtually all other relationships" to the amazement of those who ruled "that subjects so meek showed such ferocity and tenacity."[55]

The official response to increasing litigation by the Crown's Amerindian subjects also reflected the assumption that native complainants had a legal right to redress. During the second half the century faced with native depopulation and increasing immigration, and the perceived need to strengthen royal control, viceroys first in Peru and then in Mexico initiated a series of reforms. Among their principal aims was to increase effective Amerindian access to legal redress.

As colonial legal institutions matured from the late sixteenth through the seventeenth centuries, three interrelated trends contributed to a political and social structure characterized by stratification, corruption, and subordination, The first trend was the expansion of a wealthy elite concentrated in the administrative capitals and major commercial centers. Wealth, particularly in New Spain, tended to concentrate increasingly in city-dwelling, rural landowners with large and productive estates (haciendas granaderas).[56] As described by Susan Ramírez, these "grand" hacendero families dominated not only livestock and agricultural production but also all facets of domestic, intra-colony, and export commerce in the commodities and related goods produced on their estates.[57] Some may have early ecomendero origins, but many were wealthy investors using the gains of their success and connections as well-established merchants, high-ranking officials, or new peninsular arrivals with the benefit of official patronage. Although the sources of wealth may have differed, similar patterns pertained throughout the colonies. Combining wealth with influence they constituted an elite caste that increasingly dominated colonial society and the instruments of governance.

A second was a loosing of the Crown's centralized administrative control. Two fundamental policies had long guided the initial appointments to colonial office. Those nominated for royal appointment should be persons with demonstrable merit and should be Spanish-born. As noted, university-training in law was required for all judicial posts. Although from the start the Crown did sell some offices and most appointments could be renounced in favor of a named successor and thus became negotiable, the Crown generally adhered to both principles until 1558 when a bankrupt Philip II introduced the notion of an office as a source of revenue and began to sell the relatively low-ranking posts of notary or scribe (*escribano*) and

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54 Woodrow Borah, *Justice by Insurance*, p. 40.

55 Id.

56 For a survey of the literature through the early 1970s on the origins, and significance the *hacienda*, see Magnus Morner, "The Spanish American Hacienda: A Survey of Recent Literature and Debate," *The Hispanic America Historical Review*, vol. 53, 1973, pp. 183-216.

57 Susan E. Ramírez, "Large Landowners," in Louisa Schell Hoberman and Susan Migden Socolow, eds., *Cities & Society in Colonial Latin America*, Albuquerque, University of New Mexico Press, 1986, p. 19.

municipal standard bearer and *cabildo* member (*alférez*). With the issuance of a *cédula* in 1606 listing a full range of salable district and municipal offices, the sale of local posts escalated. As a result by the early seventeenth century most local offices were held by creoles, sufficiently wealthy to afford their purchase. In 1633 even administrative posts with responsibility for Crown revenues became salable. By 1677 even the offices of *alcalde mayor* and *corregidor* could be purchased.[58]

For the highest judicial offices, however, the *letrado* requirement remained a barrier to appointment of creoles unless sufficiently wealthy to afford a university education in Spain. However, by 1600 universities had been established either by royal grant or papal bull in nearly all of the *audiencia* cities. (Both the University of Mexico and the University of San Marcos in Lima claim to have been the first.) The principal faculties were theology and law, the graduates of which would have had the opportunity to study either canon law or civil law thereby acquiring *letrado* status. The consequence was a dramatic increase in the number of creole appointments to high judicial office as an *audiencia* minister. Burkholder documents the numbers. Creoles constituted at least a quarter of all appointments to the colonial *audiencias* between 1610 and 1687. The percentage increased to 45 percent of the appointments made between 1687 and 1750.[59]

The third trend was increasing clientage and other forms of subordination. The subordination of Amerindians living outside of native communities had long existed. In Peru *yanacona* natives who without allegiance to a chief were tied to settlers for personal service, are exemplary of long-standing practices. While wealthy ruling elites developed, several other subordinated groups that included non-Amerindians also began to emerge. The first at least in central Mexico were the free agricultural workers tied effectively to the *haciendas granaderas* that buttressed the elite status of the large landowners. Debt-peonage is a much studied and contested feature of Spanish America. It is sufficient for our purposes to note its legal foundations and its social and political consequences. Debt-peonage originates in a credit transaction that requires the borrower to work for the lender to pay off the incurred debt. Like crop-sharing agreements, such transactions may be beneficial to both debtors and creditors by enabling access the debtor to otherwise unavailable sources for gain, such as land or seed, and to the latter in the form of a dependable supply of labor without payments in cash for wages. Issues of fairness and manifest abuse arise in relation to the context and terms of the arrangements. Used as a means for long-term indebtedness that legally binds workers for what may become lifetime employment, it prevents labor mobility and impedes agricultural wage competition to the benefit of the landholder. Throughout history, it also tends to create communities of subordinated workers dependent on their patron landholders. The emphasis on private law and legalistic character of Spanish colonial rule arguably made such arrangements additional validity and justification. With elite control over the judicial organs in the colonies, challenges to their legality would presumably have become even less likely to succeed.

[58] Burkholder, "Bureaucrats," pp. 84-87.
[59] Id. p. 90.

Elite dominance of the principal sources of wealth and governmental offices had other predictable consequences. Elite merchants could more readily dominate the *consulados* and thereby the rules regulating commercial entry and practice. They were also in the most favorable position to channel goods into distant markets or, more ominously, to the Amerindian communities through *repartimientos de mercancía*. Other less wealthy creoles were similarly privileged in contrast to the growing number of free Africans and racially mixed in colonial cities. Whatever legal rights and protections the subordinated and less privileged members of colonial society have enjoyed in theory were again increasingly subject to enforcement by creole officials. The number judges and other officials who were apt to share the paternalistic values and concerns of the Crown dwindled with creole replacement of *peninsulares*. The economically less advantaged of all non-Amerindian descent were also left unprotected by the prohibitions against fees, charges and "gifts" officials legal professions could charge. With limited prospects of effective recourse to law, their best bet as a strategy of survival was to ally themselves to those with position and power. Under such circumstances the growth of urban as well as rural clientage was a predictable outcome.

By mid century these trends became an acute concern in metropolitan Spain. As the Hapsburg wars in Europe continued to drawn the royal treasury and revenues from the Americas stagnated and American silver shipments declined, the Crown and its advisors searched for ways to expand sources for revenue in the colonies with new tax levies. In response "[n]ative sons and peninsular-born Spaniards with strong local connections (radicados)," to quote Kenneth Adrien, "used their political power to delay, obstruct, and ignore" the Crown's new demands.[60] The century proceeded with an advancing decline in the Crown's capacity to enforce effectively the regulations most central to its primacy interests and thus to reverse its loosening hold on governance in its overseas empire.

In 1700 Philip V, the first of five Bourbon kings, ascended to the Spanish thrones, ending Hapsburg rule. The toll of the Hapsburg wars and the resulting military conflict over the Spanish succession prompted reexamination of existing structures of governance within Spain and its American (and East Asian) empire. Under Philip fundamental governing institutions were reorganized on French patterns. His first orders of business was fully to unite the Spanish kingdoms by abolishing the fueros of Aragon and Valencia and dissolving the Council of Aragon and transferring its authority to the Council of Castile (1707). He had the Cortes of Castile similarly absorb the procurators of both Aragon and Valencia. With similar measures a decade later he effectively incorporated Catalonia within the Castilian governing structure. He then abolished the Council of Castile along with the other state councils –including the Council of the Indies– with their mixed administrative and judicial functions, substituting in their stead specialized secretaries (ministries) under the Crown for foreign affairs, finance, justice and ecclesiastical matters, war, navy, and the Indies sheared of any general adjudicatory responsibi-

[60] Kenneth J. Adrien, "Corruption, Inefficiency, and Imperial Decline in the Seventeenth-Century Viceroy of Peru," *The Americas*, vol. 41 (1984), p. 4.

lities. In 1711 Philip appointed several men as intendents (intendentes del ejército) to oversee army finances. Their success apparently prompted the king to extend the system nationwide, and by 1718 intendents had been appointed to administer each of the Spanish provinces. The extension of these metropolitan reforms to the colonies awaited Charles III, his son by a second wife, who was crowned in 1759 after the short reign (1746-1759) of Philip's first son, Ferdinand VI. Under Charles the intendant system was introduced in the colonies. The resulting revitalization of Crown controls exercised by officials directly responsible to the Crown produced predictable antipathy and reaction in the colonies and is widely credited as a significant stimulus for independence and creole supremacy.

By the end of the eighteenth century the formal political and legal structures of the Spanish colonial empire reflected the allocations of functions and governmental powers that were to characterize the emerging imperial regimes of the most militarily, economically, and technologically advanced European states. The mix of judicial and regulatory controls along with executive dominance, social and economic privilege, and extensive subordination were shared features of most if not all West European imperial regimes. They were also to be replicated in varying measures in the independent states they were to spawn thereafter. What differentiated the colonial regime of Spanish America, however, was its duration –over four centuries– and the variable mix of indigenous peoples and European immigrants. Few other colonial regimes had so great a number of both. By the early nineteenth century and the emergence of over a dozen separate republics, embedded patterns within both the Amerindian and creole communities within the colonial structure would prove resistant to change. Many would appear and reappear over the course of the following two centuries within the very different constitutional and judicial structures of the new Latin American republics. Colonial legacies contributed significantly political and legal foundations on which the new evolutionary trajectories of post-independence Latin America would commence.

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