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The "Recopilación de Indias" and its discourse

The Spanish monarchy, the Indies and the seventeenth century

I

Introduction

The "Recopilación de Indias" was published in 1680 after nearly a century of preparative work. By nature a compilation of laws, it consisted of a collection of existing Spanish royal legislation related to the Americas, structured according to central themes such as the church, the *Consejo de Indias* or the *Casa de Contratación*. It made locally intended laws general in application, pertaining to all authorities concerned and to all times.

Its creation involved a process of editing.[1] Laws judged similar or close in nature were gathered together and word use and structure were made similar in all laws. As a newly created body of laws, it had a language and a message of its own, inrespective of whether specific acts were allowed or forbidden. As a product of the royal discourse and the royal wish, it revealed a logic of obedience and of commandment. It showed methods of convincing and drew a portrait of the relations between the legislator and its destined public. It used certain key words and a specific tone. The re-creation of the law allowed for changes. The texts were modified, especially as far as language and accents and the differentiation between vital and unimportant parts were concerned. Ancient laws were reproduced in a contemporary manner, and the process of doing so allowed the use of new words and the formulation of value judgments. The

[1] Editing work as differentiated from a systematic codifying work, absent in the *recopilación*.

selection and editing process created new texts, at times fairly different from the original source-laws.[2]

The *recopilación*, as in fact most of the "Laws of the Indies" ("derecho Indiano"), contained what we now call "administrative law". It entailed a variety of decrees, instructions and orders given by the kings to the authorities, both in Spain and America. More than a declaration of principles, this law was the final result of the correspondence between the metropolitan and the American institutions, in which the king indicated to his officers the manner in which they were to proceed, responding to particular needs evoked by them or by other possible interlocutors. The law, therefore, although a monologue, was the result of a certain direct or semi-direct dialogue between higher and lower authorities.

I analyzed the *recopilación* in order to learn more about the working relations within the Spanish bureaucracy: which words are used or not used and what is the structure and the logic of the arguments. Since working with the whole *recopilación* was not practical, I chose to focus my attention on a particular set of laws: those dealing with ordering and at times punishing the social behavior of the greater public and of the bureaucrats themselves. My material included all laws concerning the establishment of the administration of justice: the rules, the tribunals, the legal process and the sentence execution. Choosing materials by subject and not by coincidental setting within the *recopilación* (such as "second book – third title") lowered the possibility of receiving a false picture due to the particularity of a certain section, written, perhaps, in special circumstances or by someone who had hardly participated in the rest of the work. Furthermore, most of the substantial rules concerning "social control" were either unwritten laws or simply belonged to the laws of Castilia, with power in America in cases when the Indian law was silent (legal "laguna"). As a result, their content in the *recopilación* was often deprived of true instructions. They were rather an allusion to an "elsewhere existing law" and a wish or an order (this remains to be seen) for compliance. Containing little flesh, yet much

[2] A few aspects of the question are studied in: Magnus Mörner, Análisis crítico de un grupo de leyes indianas, in: Historia (Santiago de Chile) 8: Homenaje a Jaime Eyzaguirre (1969), p. 387–402; Eduardo Martiré, Guión sobre el proceso recopilador de las leyes de Indias, in: Recopilación de leyes de los reinos de Indias. Estudios históricos jurídicos, ed. by Francisco Icaza Dufour, México 1987, p. 27–41 and Antonio Muro Orejón, Estudio general del nuevo código de las leyes de Indias, Sevilla 1979.

skin, they were, to a degree, ideal witnesses to the relationship, the language and the structure of speech within the administration.

Historians of American-Indian law often bestowed criticism on what they called the "over-use" or the "over-importance" given to the *recopilación*.[3] They claimed it was too inventive and selective, too removed from the legal reality of its time. Partly due to confusion and errors, but mainly as a result of an expressed royal wish, some laws were not included in the *recopilación* while others lost their original meaning. The selection and the abbreviation of texts was encouraged, since the idea was to create a workable tool of government, a practical guide for the bureaucrats.

It seems legitimate to hold the view that the *recopilación* is not an accurate representation of the legal reality and that it is wrong to use it in order to establish whether an individual act is allowed or prohibited. At the same time, though, looking at the *recopilación* as a collective body of laws and as an independent product of the administration, one can perceive its loyalty to the spirit of things. It shows clearly what is important in the eyes of the legislator during the seventeenth century (time of its elaboration and publication), and how it finds expression. It represents a scheme for a desired administrative machinery, since it summarizes and abbreviates the rule in the American domains. Used in order to study the Spanish bureaucracy as a whole and not a specific legal situation in particular, the accuracy or completeness of the *recopilación* is of little importance. If any weight should be given to the modification of texts in the *recopilación* or their absence in it, it is rather a positive one, since these new texts are often the result of the intentional creative work which we wish to trace and understand.[4]

[3] For example: Rafael Altamira, Estudios sobre las fuentes de conocimiento de la historia del derecho indiano. La costumbre jurídica en la colonización española, in: Separata de la Revista de la Escuela Nacional de Jurisprudencia (México) nu. 31 to 40 (1949), p. 25, 35–36 and also in his book: Manual de investigación de la historia del derecho indiano, México 1948; Alonso Garcia Gallo, Estudios de historia del derecho indiano, Madrid 1972, p. 55–93 and Ricardo Levene, in: Academia Nacional de la Historia, Obras de Ricardo Levene, vol. 3: Introducción a la historia del derecho indiano y vida y escritos de Victorian de Villava, Buenos Aires 1962, p. 224.

[4] Benjamin Gonzalez Alonso, Derecho e instituciones en la Castilla de los Austrias. Notas sobre su consideración por la reciente doctrina histórico-jurídica española, in: Hispania. Entre derechos proprios y derechos nacionales. Atti dell'incontro di studio Firenze–Lucca 25–26–27 maggio 1989, (Per la storia del pensiero giuridico moderno 34/35), Milano 1990, vol. 1, p. 87–133, mentions the political dimension of the recopilación and its "lack of innocence".

In a lecture given in 1970 Michel Foucault, speaking of the human drive for truth ("la volonté de la vérité"), distinguished ceremonial truth (depending on the identity of the speaker or on the way it was pronounced) from content-orientated truth, (depending on the sense, the form and the object of the thing said). According to him, the first kind of truth left the scene for the second during some stage of history. One of the examples he put forward in order to support this view was the penal system. He said:

> "[...] le système pénal a cherché ses assises ou sa justification, d'abord, bien sûr, dans une théorie du droit, puis à partir du XIX siècle dans un savoir sociologique, psychologique, médical, psychiatrique: comme si la parole même de la loi ne pouvait plus être autorisée, dans notre société, que par un discours de vérité."[5]

The view that pre-nineteenth century law was based on a discourse of authority is rather common. Be it the supremacy of God, of king, of the legal theory or of tradition, it is presumed that the legal system of the ancient regime was supported by a discourse of "ceremonial truth", that evoked authority and form, and not by one of "content-orientated truth". Was it really so? I believe that the case before us allows for a good opportunity to check the Spanish American legal penal discourse of the seventeenth century.

My search will begin with an overview on the words employed by the *recopilación*, and continue to examine the structure of the discourse and its content.[6]

II

The legal discourse of the "Recopilación de Indias"

1. *The vocabulary*

Imperative words

The *recopilación* contains a few key imperative words. It calls for obedience to the law using repetitive formulas that result in a *leitmotiv*. The king "ordena y manda" or "declara y manda".[7] While

[5] MICHEL FOUCAULT, L'ordre du discours. Leçon inaugurale au Collège de France prononcée le 2 Décembre 1970, Paris 1971, p. 21.

[6] In the present work I have used the fourth edition, of 1791, published by the Consejo de la Hispanidad in 1943. The references to the laws will follow the formula: number of law, number of title and number of book.

[7] The king "encarga y ruega" when he addresses the ecclesiastical authorities due to

the insistence on the obligation to comply with the monarch's commands is natural, the formula used in order to give form to this idea should be looked at. The two terms used are almost synonyms. Furthermore, they both recall legislative acts ("mandar" – "mandamiento"[8], "ordenar" – "ordenanzas" and "ordenamiento"[9] and "declarar" – "declaración"[10]). The ebb and flow in the use of the same root in order to designate the wish of the king and to name the law creates an association between the two phenomena and gives further strength to the repetitive and obligatory sense of the formula. The words chosen in order to command also imply a positive evaluation of the decision of the king: "ordenar" is to put an end to the confusion, "mandar" is to have power over something and "declarar" is the discovery of something important which was ignored beforehand.

While the king commands, the subjects have to "guardar, cumplir y executar" or in the shorter form "guardar y cumplir" or "guardar y executar". At times the word "guardar" is replaced by "obedecer" or by "observar". The use of a three-verb formula of obedience when a double-based formula is judged sufficient in order to command, seems to be an indication of the relative importance of discipline. The formula itself describes, it seems, a gradation in the degrees of compliance: honor, respect and defend the law ("guardar") then comply ("cumplir") and, lastly, accomplish ("execute"). It must be said, though, that according to the different dictionaries consulted, the three verbs can also be considered as simple synonyms meaning "execute".[11]

The formulas of command and obedience are not unique to the *recopilación* but within it they arrive at a perfection: They recur in most laws studied, exhibit inner redundancies, associations and a pedagogy in the exposition. Their employment in a short and handy

the fact that these were not, officially, subordinate to him. Theoretically only subject to Rome, the ecclesiastics were named and paid by the king. As a result, they were neither under the king's authority nor free of it.

[8] "Mandamiento" is usually the general name given to all precepts promulgated by the authorities.

[9] The name of a set of precepts ordering a specific domain.

[10] An official interpretation of the law.

[11] It seems that the order in which these terms are put, as well as the existence of the formula "obedecer y no cumplir" (that allows to respect the law, yet to withhold its execution) make the first option described more plausible. The monarch's order, expressed gradually, is easier to follow and to obey. It is almost a didactic speech that starts with the easiest in order to progress to the more difficult, marking the degrees and the pace to take.

manual which attempts briefness and wishes to avoid unnecessary repetitions is especially interesting. It reveals their importance and probably their necessity in the working relations between higher and lower authorities.

Terms of value-judgement

The leading evaluative terms in the *recopilación* are the verbs and the nouns stemming from the root "convenir": "conviene", "no conviene" and "inconveniente". They are used in order to legitimize the instructions given by the law (measures should be taken as it "conviene", i. e. it is suitable or good).[12] At times they indicate the motivation to act or they evaluate the results obtained by the legislator's work (It is judged that an action is suitable, "es conveniente" in its nature[13]). A third use recalls the "inconvenientes", the difficulties or problems giving cause for a corrective action.[14]

"Convenir" is a relative verb that sends the reader to an exterior set of values. What is convenient in a particular culture and within a specific historical setting can be judged cumbersome in another. Yet, the convenience is a notion that centers the attention on the aim to achieve, and not on the method: the result of the decision or the action is evaluated as "useful" or "profitable". At stake is the ability to perform and neither the "justness" nor the "goodness" of the proceedings to take.[15]

A second, less frequent group of value-judgement terms expresses a "necessity". It accentuates the concentration on the result, while devaluating the action itself, which becomes obligatory, dispossessed of will or spontaneity. "Era necesario" to take a corrective measure or to give an institution the power needed in order to function well. Another term expressing necessity is "hacer falta", fairly rare in the *recopilación*.[16]

The reference to justice ("es justo") appears only three times in the texts read: It is just that the subjects should become familiar with the

[12] See, for example, law 1,4,5 of 1631 and law 18,8,7 of 1531.
[13] See, for example, law 37,1,2 of 1592, law 114,15,2 of 1537.
[14] See, for example, law 2,2,7 of 1609 and 1618.
[15] All the dictionaries consulted translated "conveniente" as "efficient" or "profitable".
[16] See, for example, law 37,1,2 of 1592, law 17,8,7 of 1618 and the "cedula" that accompanies the *recopilación* of 1681.

laws, and a "just motive" legitimizes twice the modification of earlier orders.[17] The rare appearances of "justice" as a motivation and an explication within the discourse is somewhat surprising. While the meaning of "justice" is usually in dispute, it is traditionally considered the ideological basis of the ancient Spanish regime and its presence in it is not questioned.[18]

The absence of "justice" on the discursive level may be the result of the transformation of the oral local semi-private penal law into the royal system of law, general and written. According to the legal theory of the Middle Ages, when "speaking" the law, the king expressed an exterior and objective order. The rules were not decided by him, but rather revealed to him and were therefore necessarily "just". Their proclamation equaled their application: the king pronounced particular decisions, yet they were considered to withhold inside a certain legal-moral rule, thought of as "The Law". The appearance of written law, designed to handle recurring situations, created a divorce between the system of justice and the justice as a value and between the law and its application.[19] Although the political theory obliged the king to adhere to considerations of justice, his decisions no longer were a mere expression of a just-divine rule. "El rey es justicia" became "el estado es derecho". Although "justice" retained its im-

[17] See, respectively, the "cedula" that accompanies the *recopilación* of 1680 and laws 37,1,2 of 1592 and 18,8,7 of 1664. Not included in this enumeration are references to the "administration of justice".

[18] See, for example, Jean M. Pelorson, Les letrados. Juristes castillans sous Philippe III. Recherches sur leur place dans la société, la culture et l'Etat, Poitiers 1980, p. 155; Guillermo Morón, La sociedad y los marcos de su ordenación jurídica. Un estado universal, in: Enrique Barba, Iberoamérica, una comunidad, Madrid 1989, p. 315–331 and Garcia Gallo (note 3), p. 100 and 206. In this respect one must not confuse "justice" with the "administration of justice". While the first is a value judgement on the acts carried, the second is closer to administration than to justice. It treats justice simply as another branch of government: "es justo que todo lo proveido y acordado llegue a noticia de todos, para que universalmente sepan las leyes con que son gobernados, y deben guardar en materia de gobierno, justicia, guerra, hacienda y las demas [...]" (the royal decree that introduces the *recopilación*, of 1681). The difference between justice as a value and justice as a regulative system finds another expression in the belief that "tambien hacer injusticia es administrar justicia" if and when the laws are respected. See also Louis Marin, Le portrait du roi, Paris 1981, p. 23–36; José Manuel Pérez Prendes y Muñoz de Arracó, "Facer justicia". Notas sobre actuación gubernativa medieval, in: Moneda y Crédito (Madrid) nu. 129: Homenaje a José Antonio Rubio Sacristán (1974), p. 17–90 and Francisco Puy Muñoz, Las ideas jurídicas en la España del siglo XVIII (1700–1760), Granada 1962.

[19] The written-general law becomes common in Castilia from the middle of the 15th century; see José A. Maravall, Estado moderno y mentalidad social (siglos XV a XVII), Madrid 1972, vol. 2, p. 424.

portance in the legal philosophy, its place had changed: while the "siete partidas" (the first written Castilian code of the thirteenth century) repeats constantly that its law is "just", the *recopilación* sends the reader to the convenience and the necessity.

The "importance" of an action to be taken is mentioned only once in the *recopilación*. Like "justice", "importance" recalls a moral obligation and not a material aim.

The authorities' duties

The laws of the *recopilación* speak, in general terms, of "delito", not specifying its type and usually treating it in the plural form. They state repeatedly that crimes are committed and that the authorities are under an obligation to punish them (the crimes). The couple "delito-castigo", where the punishment rests with no precision either, recurs endlessly in the texts, as an echo of the religious doctrine that requires the punishment of sins:

> "Mandamos a las Audiencias, que en el conocimiento de los negocios y pleytos civiles y criminales guarden las leyes de estos nuestros reynos de Castilla en los casos que por las de este libro no hubiéremos dado especial determinacion, y provean de forma que los *delitos no queden sin castigo* dentro y fuera de las cinco leguas."[20]

The punishment is perceived as an automatic reaction of the authorities when faced with the breaking of rules. The rapid identification of the wrongdoing with the repressive response, without requiring a legal process in between, may be explained by the nature of the existing penal system, according to which people could be punished even when their alleged crime was not fully proved and also by the absence of the process in the legal mentality.[21]

The absence of the process is recalled again by the fact that the laws of the Indies seem to punish the acts and not the actors. While

[20] Law 66,15,2, of 1545. See also law 9,10,5 of 1620.

[21] I will refer later to the question of the legal mentality and the process. As for the absence of proofs see Francisco Tomás y Valiente, El derecho penal de la monarquia absoluta (siglos XVI-XVII), Madrid 1969, p. 172 and 200. Tomás y Valiente speaks of degrees of approximation to the truth in the penal process, where incomplete evidence may be enough to condemn and punish. María Paz Alonso and Antonio Manuel Hespanha, Les peines dans les pays ibériques (XVII–XIX), in: Recueils de la Société Jean Bodin 57: La Peine 3, Bruxelles 1989, p. 195–225 recall the possibility to punish "administratively", without any legal process, when a quick and effective response is considered profitable.

the idea of punishment is present in thirty-six cases, only in ten of them the person who commits the act is mentioned ("delincuente", "blasfemo" etc.). When there is no discursive need to identify the actor, the process, which is the legal form that transforms crimes into criminals, is further pushed aside. It seems as though the discourse wishes to avoid the crimes more than to punish the individuals. The notion of "dangerous classes", popular during the nineteenth century, does not seem proper in the earlier centuries. The *recopilación* speaks of dangerous acts and not of dangerous people.

While the concentration on the notion of crime may be the result of the still strong communal ties, and the religious doctrine that sees in all men potential sinners, the absence of the process may also be contributed to the persistence of tradition. The enunciation of the law orally combined the rule with its application, and made the process unnecessary. The modern law separates the two, making the existence of a complimentary method of application obligatory. Although the legal process is already necessary and important in the system held by the *recopilación*, it does not yet win place in its discourse, as though the conceptualization of its role is slower than the creation of its actual place. An indication of this slow emergence of the legal process can be viewed in the *recopilación* itself. In it, one witnesses a progress in the separation of the penal proceedings from the civil ones. In laws based on "cedulas" from the sixteenth century there is a tendency to employ "pleito" and "proceso" indifferently. Laws based on newer "cedulas" distinguish between the two, designing the first as civil and the second as penal. Slowly but surely, the process begins to take shape and win importance.

When people are not dangerous, the fear is often stigmatized in the actions. Thefts and homicides become the prototypes of dangerous activities. Common, they are used in the discourse as the symbols of evil and are mentioned whenever it wishes to recall specific hazardous acts that must be avoided at all costs.

In addition to crimes, society is confronted with "exceso", "desorden" y "abuso".[22] These types of transgression highlight the preoccupation of the authorities vis-à-vis activities that may put the social system of rules at risk. According to the *recopilación*, each person must occupy an accepted and familiar place within society. Neither confusion (desorden), nor a break of a set line of behavior (exceso), nor

[22] See, for example, law 27,3,3 of 1614.

wrong or excessive usage of opportunities (abuso) is permitted. The *recopilación* reveals a wish to fix people in their position, in their behavior and their beliefs. It deals mostly with situations in which people are found in a relatively free state, with no responsibilities or strong social links: vagabonds, members of religious orders outside their convents or spouses without their partner. The remedy applied is to "re-attach" these people to society: the vagabonds must learn a profession, the religious must enter a convent and the husbands must make "matrimonial life" with their wives.[23] The wish to keep order is typical in colonial situations in which the possibility to take liberty in social ties is widely present and seems especially dangerous, since society is in a period of development and change.

2. *The organization of the discourse*

The discourse of the *recopilación* is organized in three types of sentence sequences:[24] a simple decision (lack of a sequence), a simple sequence and a complex-cyclical sequence.

The most common form in the *recopilación* is the simple decision, where neither justification nor explanatory evidence is added to the law in order to support its existence:

> "Los ministros y jueces obedezcan y no cumplan nuestras cédulas y despachos, en que intervinieren los vicios de obrepción y subrepción, y en la primera ocasion nos avisen de la causa por que no lo hicieren."[25]

[23] See, for example, law 1,4,7 of 1568 and 1628 and law 2,4,7 of 1595. People suspected because of their race (blacks and gypsies) preoccupy the texts to a lesser degree. The prohibition of card games has its root, it seems, in the disapproval of the association of people proceeding from different classes, more than the simple paternalistic concern about the fortune of the subjects: "algunos ministros togados [...] debiendo dar mejor ejemplo en todas sus acciones, corregir y castigar excesos, los cometian, y consentian, teniendo en sus casas tablajes públicos, con todo género de gentes, hombres, y mujeres donde de día, y de noche se perdian y aventuraban honras, y haciendas. [...]" (law 3,2,7 of 1609). For this aspect of the games see Lowel Gudmundson, Los juegos prohibidos y el régimen colonial en Costa Rica, in: Revista de Historia (Costa Rica), año 3, nu. 5 (1977), p. 171–185. On the obligation to have "matrimonial life" see María (de) Cuesta Figueroa, Maria Elena y Silva Rieto y Matoras, Consideraciones jurídicas acerca de la obligación de los casados a hacer vida maridable. Salta y Jujuy (siglos XVII y XVIII), in: Revista Chilena de Historia del Derecho 13: Actas del XVIII congreso del Instituto Internacional de Historia del Derecho Indiano (1987), p. 129–144.

[24] A sequence, as far as I am concerned, defines a set of propositions synthesizing the problem (the motivation for the decision) and its solution (the decision taken).

[25] Law 22,1,2 of 1620. See also law 14,1,2 of 1583, 1580, 1612, 1614 and 1628 and law 20,20,2 of 1556.

The simple sequence, second in importance in the *recopilación* has two versions. It can begin with the problem (the motivation for the decision) in order to arrive at the solution (the decision), or it can operate in reverse:

Problem: the necessity for an official recompilation of laws.

Solution: the king orders the publication of the *recopilación*.[26]

This form that starts with the preoccupation in order to arrive at its relief is more common than the inverse one. It is pedagogical in nature, showing the importance attributed to the reaction of the public and exposing an attempt to win its favorable view.

The complex cyclical sequences repeat the motivation or the decision twice. At times it is an exact reproduction. Other times the cycles are not symmetrical, exposing two different decisions or two diverse motivations:

problem: many culprits avoid punishment through appeal process	→	*solution*: one must not suspend the execution of the punishment because of an appeal	→	*problem*: it is the only method by which judges of first instance will be respected.[27]

[26] This is the decree accompanying the *recopilación* of 1680: "Por cuanto habiendo sido informado de la grande falta que hacía para el gobierno de mis Reynos, y Señorios de las Indias Occidentales, Islas y Tierrafirme del Mar Océano la Recopilación de Leyes, que por mandado de los Señores Reyes mis gloriosos Progenitores se habia comenzado, y continuado hasta este tiempo, en que por la gracia de Dios se ha acabado: y habiéndose consultado, y suplicado por el Consejo de Indias le diese la autoridad, fuerza y virtud, cuanta necesitan las Leyes para ser publicadas, cumplidas y ejecutadas como conviene: y porque asimismo es conveniente, que toda esta materia corra, y tenga la ultima perfeccion por el tribunal que le dio principio: por la presente ordeno, y doy licencia, y facultad para que por cuenta, y disposicion de mi Consejo de las Indias cualquier impresor de estos Reynos pueda imprimir el Libro de la dicha Recopilacion de Leyes. [...]" Another example is law 23,6,7 of 1537. The inverse argumentation is found in laws 14,8,7 of 1600 and 17,8,7 of 1618.

[27] Law 9,10,5 of 1620: "Por evadirse los reos de las penas en que estan condenados por sus delito, y especialmente en casos militares, apelan a las audiencias, con que se suspende la ejecucion, y dilata el castigo en perjuicio del buen ejemplo y disciplina militar, que consiste en la obediencia y respecto de los superiores. Y por obviar semejantes cautelas, mandamos a los Presidente, Oidores y Alcaldes de Crimen, que no impidan ninguna ejecucion de las que pudieren y debieren hacer, conforme a derecho, los Presidentes, Gobernadores o Capitanes Generales, y los demas Jueces ordinarios de sus distritos, en los casos que no se deben admitir las apelaciones, para efecto de suspender, y dejen que las causas corran por su camino ordinario conforme a derecho, asistiendo con particular cuidado, ejemplo y buen gobierno al castigo de los delitos que le debieren tener, de forma que los ministros ordinarios y militares sean respetados en

The redundancy of sources and the importance of tradition and continuity (or an appearance thereof) may explain the existence of the cyclical sequences. Yet, the need for briefness and clarity makes them fairly rare in the *recopilación*. Most of the laws seen, and almost in equal parts, express a simple no-sequence decision (51 cases) or a simple sequence (42 cases). There are only three cases of cyclical sequences,[28] all of them concerned directly with the administration and contain an obligation that is suspected as somewhat unnatural or with which it is difficult to comply. It is as though in these cases a further emphasis on the necessity of the decision must be added. It utilizes the ancient tactic according to which the best way to convince is through repetition.

3. *The contents of the discourse*[29]

According to the discourse the laws are an instrument of government: "se gobiernan por las dichas leyes" and the courts are organs of government, not just of "justice". Hardly any decision-making power is attributed to the administrators. The art of governing justice is portrayed as the art of obedience to a certain rational: the law.[30]

The laws are "sabios". The matters are "más bien vistas y mejor entendidas" before the decision (in form of a law) is taken. As a consequence, a convenient solution is always guaranteed.[31] If and when the laws fail to obtain the desired result, it is immediately presumed that the blame is on the officials, ignorant of the law or negligent in its application. It is often emphazised that when the laws are applied, all the problems recognized by the legislator are solved. In other words, the laws are always conceived as an efficient instrument of government, always easy or at least possible to apply.[32] While the Spanish political theory is tolerant to criticism

sus personas y ordenes."

[28] A comparative study of 23 "cedulas" treating the same themes (chosen from Antonio Muro Orejón, Cedulario Americano del siglo XVIII, Colección de disposiciones legales indianas desde 1680 contenidas en los cedularios del Archivo General de Indias, Sevilla 1956–1977, 3 vol.) demonstrated that the circular complex sequences are the most common form of construction of "cedulas".

[29] The contents of the discourse, as far as applicable here, are the ideas, implicit and explicit, expressed in the texts.

[30] See also José García Marín, La burocracia castellana bajo los Austrias, Sevilla 1976, p. 37–72.

[31] Law 26,1,1 of 1622, law 12,2,2 of Felipe II and 1636.

[32] The insistence on the preparatory work preceding the promulgation of the laws,

of the law, it limits the possible arguments. These can be legitimately based on the changing of times and circumstances or on false information that influenced the decision. In these cases the application of the law can be suspended, and new, true and detailed information can be given.[33] The frequent use of this prerogative to "obedecer y no cumplir" the laws brought the kings to attempt to limit the ongoing dialogue with the administration:

> "Nuestras Reales Audiencias se abstengan de representarnos inconvenientes y razones de derecho en lo que por Nos le fuere mandado, pues cuando lo disponemos y ordenamos están las materias más bien vistas y mejor entendidas, y así lo guarden y observen precisa y puntualmente."[34]

Since the laws are good, the bad administration is attributed to the negligence of the authorities. Although the explicit desire of the king is to achieve obedience to the laws, implicitly he requires not only the implementation of the law, but also the realization of the results envisaged by it. "Viva el rey, muera el mal gobierno" is not only a popular saying, but rather a reality in the king-administration relationship. The king bases his claim on the presumption that all royal actions are guided by a benevolent quasi-divine intention. If and when this fails to materialize, the king is not to blame, since the fault is always presumed to be found in the implementation (misinterpretation of the order or else a failure to apply it correctly) and not in the decision. This mechanism leaves the king isolated from the question of the success achieved by his policies, protecting in this manner the royalty and the system itself, while directing the criticism at the periphery and at rather transient spheres of power, such as the royal officials.[35]

made both openly and implicitly, allows to question José A. Maravall (note 19), vol. 2, p. 403–37 according to which the laws have their origin in the royal wish rather than in the royal intelligence. Although it is the wish, which is expressed, it is clearly exposed as the final step in a long line of deliberations.

[33] See, for example, law 16,1,2 of 1620 and 1621 and law 22,1,2 of Felipe II and of 1620.

[34] Law 26,1,2 of 1622.

[35] The king "relied upon the general assumption that royal acts were intended to be beneficial even if this intent was not immediately evident to the governed. When a miscalculation occurred, that provoked active or violent opposition, the king remained shielded behind the assumption of benevolence while his ministers accepted responsibility for not following the monarch's true intent". Colin M. MacLachlan, Spain's empire in the new world. The role of ideas in institutional and social change, Berkeley 1988, p. 21. See also José García Marín (note 30), p. 129–145.

The *recopilación* centers its attention on the space known to and visited by the large public, according to the principles of "fluidity" (where everyone circulates), and "appearance" (what opposes visibly the supremacy of the king or his order).[36] The visibility and the publicity of crimes and responses to crimes are of utmost importance in the royal discourse. Public and scandalous wrongdoing receive more attention than grave crimes. In the same fashion, the exemplary punishment is intended to compensate the rarity of the intervention. The "ejemplo público" is considered to be an especially effective response, since it attains the attention of the greater public. It is required that the reaction of the king should be present in the perception of the subjects, as though the effect on the spectators' imagination is more important (or more viable) than the attempt to intervene directly in the social scene.[37] The spectacle of punishment is the answer.[38]

4. *The justifications*

The decisions taken by the king are justified and explained by three classes of arguments: vague, traditional and logical. The vague explanation gives no true information on the reason for the decision. It consists of an expression, usually "conviene" or "hace falta" and in fact could be treated as a lack of justification.[39] The traditional justification calls for the authority of God, king (their wish, their service or the obligation of the subjects towards them) and those of the

[36] These notions are taken from PHILIPPE ROBERT, Au théâtre pénal. Quelques hypothèses pour une lecture sociologique du «crime», in: Déviance et Société 9 (1985), p. 89–105 (96–97) and in: Privatisation of social control, (a paper presented in the European colloquium on research on crime and criminal policy in Europe, Oxford, July 1988), dact., p. 6–8.

[37] See, for example, law 60,15,2 of 1620. TOMÁS Y VALIENTE (note 21), p. 368–369; HESPANHA (note 21), p. 39 and MACLACHLAN (note 35), p. 42.

[38] See LOUIS MARIN (note 18), p. 41 and MACLACHLAN (note 35), p. 109–112.

[39] One could argue that these "vague" justifications are actually traditional ones, since "conviene" can be understood as "convenient to the service of the king, of God, of the community, etc." Yet this implies a logical jump, not necessarily true. It becomes especially difficult when other evaluative terms are involved. "Necessary", for example, can indicate a necessity in the service of the king, but more simply in can direct the reader to the need to solve the problem and nothing more. At any rate, the mere decision made by the authors of the *recopilación* to leave these evaluative terms alone and with no further explanation is in itself significant, and may indicate a certain wish to capture the imagination of the readers.

communal legendary interests ("la quietud y el sosiego publico", "el bien commun" and "la paz"). The logical justification intends to convince the reader. It contains details and tries to show that the decision taken is the best or the only one possible: the laws must be read annually so that the administrators will know and understand what is expected of them.[40] In the same manner:

> "Con mucho acuerdo y deliberación deben ser hechas las leyes y establecimiento de los Reyes, porque menos necesidad pueda haber de las mudar y revocar, y así mandamos que cuando los de nuestro Consejo de las Indias hubieren de proveer y ordenar las leyes y provisiones generales para el buen gobierno de ellas, sea estando primero muy informados, y certificados de lo antés proveido en las materias sobre que hubieren de disponer, y procediendo la mayor noticia, e informacion que se pueda de las cosas y negocios, y de las partes para donde se proveyeren [...]."[41]

Some laws employ two kinds of justification. When the "santa hermandad" (an institution which deals with the prevention and the punishment of crimes committed outside the city limits) is established in America, both logical and traditional justifications are evoked: the success of the said institution in Spain and the possibility for the same luck in America (a logical explication) and the obligation to administer justice (a traditional explication):

> "Teniendo consideracion al beneficio, que resulta en estos nuestros Reynos de Castilla de la fundacion y exercicio de la Hermandad, y habiendo reconocido cuanto conviene que se conserve y aumente en las Provincias de las Indias, por la distancia que hay de unas poblaciones à otras, y refrenar los excesos cometidos en lugares yermos, y despoblados [...] con grave detrimento de los caminantes y personas, que habitan en partes desiertas, sin vecindad, ni comunicacion de quien les ayude en las necesidades, robos é injurias que padecen: Tuvimos por bien de que en las Ciudades y Villas de las Indias hubiese Alcaldes de la Hermandad, ò por lo ménos uno, segun permitira el número de vecinos; y porque nuestra Real Justicia sea administrada con mas autoridad, cuidado y buena disposición: Estatuimos y fundamos en las Ciudades,

[40] Law 36,1,2 of 1622. See also law 114,15,2 of 1537: "En las ejecutorias que por nuestras Audiencias fueren despachadas, se ponga relación de la demanda y excepciones de las partes, y las sentencias de los Jueces, y autos del proceso y otras cualesquieras escrituras, que sean substanciales y necesarias, de forma que vayan como convenga, y no se dé causa, que por dejar de ponerse los instrumentos necesarios, hayan de volver las partes a seguir los pleytos."

[41] Law 12,2,2 of Felipe II and 1636.

Villas y Lugares. [...] oficios y cargos de provinciales de la Hermandad [...]."[42]

The frequency of each type of justification is the following:

justification	*frequency*
no justification or a vague one	40 laws
a logical justification	26 laws
a traditional justification	22 laws
traditional and logical together	5 laws
traditional and vague together	2 laws
logical and vague together	0 laws

The justifications attached to the laws are a form of dissuasion. The Castilian legal theory of the sixteenth and seventeenth century considers the motivation of the law as an essential part of it, yet leaves the legislators at liberty regarding the contents and the construction of the explication. In the *recopilación*, it seems, the importance of this requirement is rather small. Most of the laws contain no justification or only a vague one. Curiously, the use of logical justifications is more common than the appeal to traditional arguments. Furthermore, when a new institution is established (for example the "sala de crimen" or the *recopilación* itself) a double justification is usually employed, as if there is an attempt to enlist in its favor all possible arguments. On the contrary, most laws containing no justification or only a vague one deal with procedural or technical problems: the geographical division of authority, the validity of laws or the obligation to publish certain decisions. It seems that there is a logic behind the distribution of the justifications, and when it was most needed, it was more liberally employed.

The justifications do not always respond to the real motivation. Although evidence is frequently missing, there are occasions in which the texts themselves reveal the twist in their argument. It is said, for example, that many crimes are committed by escaping black slaves and that it is imperative to remedy to the situation. Yet the punishment obeys a different logic: the time of absence from service and the number of previous escapes, neglecting completely the criterion of the nature of the supposed criminal act. It seems that the protected value is the service of slaves rather than the prevention of crime.[43] The texts can also begin with one argument and end with another, giving the impression of an

[42] Law 1,4,5 of 1631.
[43] Law 21,5,7 of 1571 and 1574.

attempt to mask, at least partially, the true preoccupation. Other laws bring forward arguments that seem hypocritical: law 14,8,7 of 1600 establishes that "gentilhombres" cannot be condemned to forced labor, since they are "de poco servicio y de mucho ciudado en guardarlos de que se ausenten". Needless to say, it is doubtful whether this privilege of the nobility was truly based on such utilitarian and logical considerations.

The wilfulness of the twisted arguments and their ability to influence the public can be questioned. The process of the recompilation of a few decrees into one new law cannot, in itself, give but a partial explanation to the phenomenon: twisted arguments exist also in laws based on a single decree. Since it seems doubtful that the public is not aware of the existence of other non-mentioned motivations or is unable to pinpoint the true justification, it seems that the arguments should be regarded not only as mechanisms employed in order to convince, but also as symbolic instruments: the king reveals reasons for the law, since the legal theory obliges him to do so, but in reality, no one is interested in them. While their absence may diminish the strength and the legitimacy of the law, their content may have little importance, as long as they exist.

III

Conclusion

The circumstances of the seventeenth century created a law that attempted to convince readers of its value. The words utilized, the structure and the contents all joined in an effort to demonstrate to the public that the law was not only the product of authority, but was also good and worth upholding. The methods of persuasion employed were numerous: repetition (with its didactic value, stimulating the memorization and maybe the identification), the use of words that emphasized the relation between the royal wish and the law, that accentuated the goal that was to be achieved and recalled the utilitarian motivation of the decision taken: if one followed the law, one benefitted. The "justice" and the "importance", present in the political theory, were almost absent. Although theoretically the effectiveness was condemned in the name of moral values, its superiority as a technique of government was recognized.[44]

[44] See José L. Abellán, Historia crítica del pensamiento español, vol. 3: Del Barroco a la Ilustración (siglos XVII y XVIII), Madrid 1981, p. 71–72 and 112–121.

The discourse often employed a pedagogical progression in the persuasion. It exposed the motivation for the rule before arriving at the rule itself. It did not explain the relatively technical solutions, yet in new decisions it gathered in its favor all possible arguments. The justifications used were adapted to the times. They recalled the traditional authority of God, of the king and of the community, but more often they exposed a rather solid argument that made the obedience to the law the most logical thing to do, the recipe for happiness. It was held to be profitable and not only obligatory to follow.

The contents of the law continued the promotion campaign. The law was wise and well reasoned. It was capable of solving any problem as long as the circumstances had not changed or the true ones were not unknown. The only thing needed was the cooperation of the authorities. The king benefitted from a presumption of innocence, while his officials suffered a presumption of responsibility and culpability. The insistence on the result to obtain rather than on the obedience itself was another form of persuasion. It considered the law an instrument, not an end in itself. It was to be obeyed not just because it existed or because it was promulgated by authority, but rather because it was capable of obtaining beneficial results.

Since the discourse centered its argument on the capacity and the success of the laws, public crimes and public punishments became especially important. What was seen was more important than what was done. The presence of the king's justice was above all psychological.

The tactics and the preoccupations followed the times. The Spanish empire was a construction dependent on compromises, that wished to achieve both flexibility and stability. A persuasive discourse, calling for adhesion, using justifications, repetitions and twisted arguments seemed proper for a system that used chains of paper and ink rather than metal ones.[45] The laws had a nearly imploring tone that seemed to beg the administration to respect them. In the same manner, when faced with the breaking of the rules, the king did not punish, threat or

[45] J. H. Elliott, España y América en los siglos XVI y XVIII, in: Historia de América Latina, ed. by Leslie Bethell, vol. 2: América Latina colonial: Europa y América en los siglos XVI, XVII, XVIII, Barcelona 1990 [original title: Cambridge History of Latin America, Cambridge 1984], p. 3–44 (6).

use angry words. He brought the matter to his council and listened to what the "fiscal" (the representative of his interests in the council) had to say. After long deliberations, he decided, exposing his motives and his justifications, to order again the same thing as his predecessors. He used firm words: "I order, I command", but he did nothing more than repeat something already in existence. The lasting impression was one of impuissance rather than power. The lack of coercive forces that could take corrective actions on a significant scale brought about the adoption of a persuasive politics, dependent on argumentation and reconciliation. The king constituted a soft political system, where the use of force was minimal and the logic far more complex than that of authority in itself.[46]

The royal legislation was often pushed aside by the Roman law or by local and customary laws occupying a large part of the legal space.[47] In the search for obedience, the royal law could depend only partially on the authority of the monarch. It also needed to demonstrate that the royal creation was not inferior to its competitors. This was especially important in the field of penal law, where the king's intervention was relatively new and not yet completely defined. The defence of individuals by the monarch and the absorption of private matters into the public sphere had to be presented as an effective method, since it was neither the only one, nor the most natural, nor the cheapest. The king had to sustain a new instrument of order in the face of competition of parallel systems and in a climate of compromise and a lack of repressive means.

In seventeenth century Spain flourished a fairly new genre of pedagogical-political literature which pretended to educate the poli-

[46] Arlette Lebigre, La justice du Roi. La vie judiciaire dans l'Ancien France, Paris 1988, portrays the monarch and its law as "paper tigers". According to her, the French monarchy "conscient de son impuissance à assurer l'ordre et la sécurité [...] compensait ses carences en se payant de mots [...] une inflation verbale qui doit autant au besoin de se donner bonne conscience qu'à la volonté d'intimider [...]" (p. 139–140, 147). In the *recopilación*, the wish to intimidate is not present. It seems rather as though the Spanish king "ordena, pero persuade y aconseja": see also Academia Nacional de Historia (note 3), p. 111 and 224.

[47] See, for example, Reig Peset, Derecho romano y derecho real en las universidades del siglo XVIII, in: Anuario de historia del derecho español 45 (1975), p. 273–339; Abelardo Levaggi, Derecho indiano y derecho romano en el siglo XVIII, in: Anuario histórico jurídico ecuatoriano 5 (1980), p. 269–309; Carlos Petit, Derecho Commun y derecho castellano. Notas de literatura jurídica para su estudio (siglo XV-XVIII), in: Tijdschrift voor rechtsgeschiedenis 50 (1982), p. 157–195; Carlos Díaz Rementeria, La costumbre indígena en el Perú hispánico, in: Anuario de estudios americanos 36 (1976),

tical leading group. Its method was twofold. On the one hand, it employed logical arguments: on the other, it attempted to catch the interest of the readers by "seducing" their senses.[48] It treated politics as series of tactics and sustained that actors and acts could be manipulated: all it needed was a good plan. It attached great importance to experience, since it believed that human behavior repeated itself. Imitation was considered a primary psychological tool and it was recommended as an educative method. Practice became, therefore, an important part of any instruction: "la verdadera escuela es el escritorio [...], el mejor maestro es un oficinista veterano, capaz de trasmitir su experiencia y el buen discipulo debe esforzarse en conocer los misterios de la práctica [...] la rutina [...] los formularios [...]."[49]

It criticized the abstract scholastic rationalization. Non-academic by nature, its authors did not belong to the universities. They wrote in Spanish (not in Latin) and their texts did not answer the formal requirements of structure and style. According to them, books were made to serve a utilitarian end and not to encourage pure philosophical discussions. They idealized the practical manual that gathered together pieces of advice which were easy to locate and understand, written in order to help the administrators to execute their duties more efficiently.

The practical legal literature formed part of this literary movement. Beginning in the seventeenth century, practical manuals covering different fields of the royal law began to appear in great numbers. The "letrados" who wrote them were practitioners and not *sapientes*. They wrote in Spanish and described their experience and their daily practice as men of law. They ignored the Roman law and did not enter into vague theoretical discussions.[50]

p. 189–215 and Enrique Gacto, Aproximación a la historia del derecho penal español, in: Hispania entre derechos (note 4), p. 501–530.

[48] Francisco Tómas y Valiente, Gobierno e instituciones en la España del Antiguo Régimen, Madrid 1982, p. 197–205 and 266–270, José L. Abellán (note 44), p. 62–69 and José A. Maravall, Teoría española del estado en el siglo XVII, Madrid 1954, p. 21–45.

[49] José M. Mariluz Urquijo, El saber profesional de los agentes de la administración pública en Indias, en Estructuras, gobierno y agentes de administración en la América española (siglos XVI-XVIII), in: Trabajos del VI congreso del Instituto Internacional de Historia del Derecho Indiano, Valladolid 1984, p. 251–276 (259).

[50] Examples of such literature are: "politica para corregidores y señores de vasallos [...], y para jueces eclesiasticos y seglares, y de sacas, aduanas y de residencias, y sus oficiales: y para regidores y abogados [...]" by Jerónimo Castillo de Bobadilla, as the

The royal legal discourse was influenced by the utilitarian ideas and by the educational enterprise attempted, progressively, in textbooks. It utilized tactics that appealed to reason, but also addressed the emotions, for example the innocence of the king versus the culpability of the administrators, destinators of the discourse. It employed didactic writing and a persuasive tone. Seen from this perspective, the *recopilación* was simply another practical manual of royal law, (although special since promulgated by the central authority) designed to educate the administrators and help them in their daily routine.[51]

The *recopilación* was a product of its time. It responded to the abilities of the monarch within a persuasive system of government, in a climate of competing parallel legal systems and the blossoming of pedagogical practical literary currents. It was influenced by the relatively recent transition of the oral particular law into generally intended written law, of the semi-private settlement of crimes into the public royal penal system. It was no wonder, therefore, that it did not base its claim solely or mainly on a "ceremonial truth" that appealed to authority and form.[52] It was deeply rooted in a certain "content-oriented truth" that attempted to convince the public that law was a valuable instrument in order to obtain desirable, logical results. The word of the law as such had no power. It needed as a companion a discourse of truth.

books of Hevia bolaños, Alonso de Villadiego Vascuñana y Montoya and Gregorio Fernandez de Herrera Villarroel.

[51] Due to the nature of the sources employed and the scope of the investigation, one is left wondering what was the effect of the royal enterprise. It is unclear whether the discourse reached its destiny and whether it managed to convince and influence.

[52] See the introduction.