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Law and Diversity:  
European and Latin American  
Experiences from a  
Legal Historical Perspective

Vol. 1: Fundamental Questions

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Monist or Pluralist Legal Tradition  
in 19th-Century Peru?  
| 177–207



**MAX PLANCK INSTITUTE**  
FOR LEGAL HISTORY AND LEGAL THEORY

## Monist or Pluralist Legal Tradition in 19th-Century Peru?

It is likely that Ralf Seinecke never imagined that a Peruvian scholar with a cursory knowledge of German legal theory would comment on his text or that his contribution would have a direct and significant impact on Latin American legal scholarship, particularly in the fields of legal history and legal pluralism. In my view, and in a positive turn of the law of unintended consequences, this is bound to happen when Latin American scholars realize how important pluralistic legal thought was for the iconic German legal thinkers they study, and sometimes worship. Hopefully, this will generate a chain reaction of reinterpretations and research aimed at reassessing the role of legal pluralism in the historical and contemporary configuration of Latin American law.

To comment on his contribution, I first refer to Seinecke's careful rendering of the central role pluralistic legal thought played in shaping the ideas of some of the most important German thinkers of the last two hundred years. I am not interested in rehearsing his main theses, but, rather, in highlighting some aspects that may be useful for exploring implicit pluralistic legal thought and its institutionalization in Latin America, particularly in Peru. Second, I stress the short circuit between legal history and legal anthropology, and mainly legal pluralism. Despite the calls for a rapprochement, the strong bias towards conflating legal pluralism with ethnic and cultural diversity hinders any fruitful dialogue between these disciplines. Thus, the different and conflicting regulatory regimes enforced throughout Peruvian modern history are neither presented nor theorized as exemplifying legal pluralism. Third, I offer some examples of the officially multiplex legal world that 19th-century Peruvians inhabited. Legal pluralism was not only a sociological reality acknowledged by the authorities but also a state-sanctioned normative and institutional multiverse, albeit unsystematic and conflictive, giv-

en the secular structural weakness of the modern Peruvian state.<sup>1</sup> It is only at the beginning of the 20th century, when centralization was accomplished in several legal fields, that official legal pluralism recedes and specializes on the ‘Indian question’. This development has led legal anthropologists and pluralists to make the false and reductionist equation between legal pluralism and ethnocultural diversity.<sup>2</sup> Finally, I conclude that in order to reassess the history of Peruvian law, it is important to take into account how central legal pluralism was to German legal scholarship. Legal historical and anthropological studies should coalesce in this inquiry.

## 1 German pluralistic legal thought

Against the backdrop of the Peruvian experience, there are three important reasons for writing a response to Seinecke’s essay. First, Seinecke provides an operational definition that is useful for delimiting his area of interest from cultural or political pluralism. Thus, as he puts it: “Legal pluralism juxtaposes different legal orders, conflicting jurisdictions, coexisting legislators, and competing concepts of law”.<sup>3</sup> Second, his writing is located “in the field of history of science” – and focuses on jurisprudence – and not in “the political and institutional history or the history of applicable law”.<sup>4</sup> Third, his thesis is that “the traditions of pluralistic legal thought never fully disappeared from German jurisprudence” and were a central issue for the German jurists of the 19th and 20th centuries, even if the legal pluralism of the Old Reich perished in 1806.<sup>5</sup> If this is clearer during the period between 1806 and 1871 (year of the German unification) or towards 1900 (enactment of the BGB), the key point is that after such decisive steps towards political and legal centralization, legal pluralism was still a sociological reality that challenged German jurisprudence.

- 1 “In Latin America, generally speaking, both the state and the law have historically been quite weak [...] and the reach and capacity of the state, including its legality, remain extremely uneven across geographic and social divides”, HILBINK/GALLAGHER (2019) 37. The rule of law is still an unfulfilled promise.
- 2 I warned against this wrong equivalence back in 2001, but old habits die hard. See GUEVARA GIL (2009) 62.
- 3 See the contribution by Seinecke in this volume (118).
- 4 See the contribution by Seinecke in this volume (119).
- 5 See the contribution by Seinecke in this volume (119).

For exploring how German jurists have dealt with legal pluralism in different contexts and debates, Seinecke pays attention to four diagnostic elements: law without a state; alternative law; interlegality;<sup>6</sup> and *nomos* (the normative universe we inhabit).<sup>7</sup> Showing how important these issues were for prominent jurists like Savigny, Gierke, Kelsen, Radbruch, Ehrlich, F. von Benda-Beckmann, and for Teubner, he concludes that “the history of legal thought in Germany is replete with references to legal pluralisms” and identifies three types: “legal pluralism before and beyond the nation-state, legal pluralism inside the nation state, and, finally, transitional legal pluralism”.<sup>8</sup> Savigny and Teubner represent the first one. Both defended the autonomy of law at different levels. Savigny “developed a general private law without a German nation state”; while Teubner proposed “a global legal pluralism without a world state”.<sup>9</sup> Gierke, Ehrlich, and F. von Benda-Beckmann studied pluralism within the nation-state. Gierke “put the autonomous law of cooperatives next to the law of the state” and “understood both realms as legally independent and autonomous”. Ehrlich’s “living law” was a perfect example of ‘law without a state’ and F. von Benda-Beckmann “reconstructed the interlegal integration of indigenous law into applicable state law”. Lastly, Radbruch “called for higher legal principles as alternative law”, as a way to reestablish the rule of law and democracy after the brutal arbitrariness of the Nazi regime.<sup>10</sup>

It is fascinating to learn from Seinecke’s account that these scholars were not referring to a distant *topos Uranus*, where legal uniformity or diversity appeared as ideal types or abstract entities for their joyful speculation. On the contrary, they were reflecting on the significant legal, political and cultural changes affecting their social and intellectual worlds, their *nomoi*. Thus, we learn that “[i]n the 19th century, Friedrich Carl von Savigny’s Roman law was still applicable in principle” and that Otto von Gierke’s cooperative autonomy statutes and customary law or Eugen Ehr-

6 Interlegality includes “the common Roman law and the Canon law, the imperial and territorial law, the statutes and codifications, the religious, rural and indigenous law, the supra-statutory law, global contract law and, finally, the socio-legal normativity”. See the contribution by Seinecke in this volume (169).

7 See the contribution by Seinecke in this volume (124).

8 See the contribution by Seinecke in this volume (166).

9 See the contribution by Seinecke in this volume (166–167).

10 See the contribution by Seinecke in this volume (167–168).

lich's "living law" referred to empirical legal orders at the end of the 19th and [...] the beginning of the 20th century".<sup>11</sup> Similarly, Radbruch identified higher principles from the "work of centuries" but also from the alternative judicial practice developed after 1945, while Benda-Beckmann studied how indigenous Malawi law was turned into applicable state law, and Teubner "claimed a reality of contractual practice in transnational law" as the building block of a global legal pluralism.<sup>12</sup> These earthly concerns were, precisely, the solid foundations of their long-lasting contributions.

The lesson of this sustained intellectual enterprise for the historical and anthropological study of legal diversity in 19th-century Peru, and beyond, is clear and sound. We cannot foreclose our research agenda on legal pluralism just because we assume legal centralization was triumphantly underway immediately after the collapse of the Spanish empire, or because some influential scholars wrongly assume that the only cause of legal pluralism is ethnic difference or cultural diversity. We have to look for it not for ideological but for scientific reasons – even if "the validity of non-state law was no longer self-evident" and despite "the proliferating law of the nation state".<sup>13</sup>

## 2 A disciplinary short circuit

There seems to be a widespread consensus about a monumental change in 19th-century legal domain.<sup>14</sup> As K. Benda-Beckmann and Turner have put it, before that period, legal pluralism provided the "condition of possibility" for pre-modern empires" and was a key building-block of the "normative logic of statehood", both for empires and colonial states. However, with "the establishment of nation states and ideologies that canonized the state-people nexus in the nineteenth century, the prevalence of legal pluralism came to be seen as problematic". In light of this exclusionary view of 'the nation',

11 See the contribution by Seinecke in this volume (169).

12 See the contribution by Seinecke in this volume (169).

13 See the contribution by Seinecke in this volume (170).

14 For example, BENTON/ROSS (2013) 8, describe "a long 19th century turn away from jumbled jurisdictions to the imagination of a more hierarchical and streamlined administrative order"; and DECOCK (2017) 103, portrays a movement from legal pluralism "to the culture of 'legal monism' or 'legal absolutism' consecrated by the codification movements in the nineteenth and twentieth centuries".

“emerging nation states sought to eliminate all traces of legal pluralism in domestic legal ideology”, though de facto legal pluralism continued to operate in Western countries and their colonial domains.<sup>15</sup> This claim, circumscribed to the ideological realm, needs to be tested against the jurisprudential multiverse of that century. The reason is that ethnic or national identity is not the only source of the multiplex normative and institutional frameworks in force in modern nation states.

A similar narrative has become standard and commonsensical in Latin American legal anthropology. Its prevalence blocks the way for a fruitful dialogue with legal history and prevents the diachronic study of non-ethnic legal diversity.

For example, Mark Goodale, a renowned legal and Latin American anthropologist, stresses that legal pluralism is not an issue that deserves historical scrutiny in the region. His point is that the theoretical and ethnographic explorations of legal pluralism were undertaken in other parts of the world “because ‘official’ legal pluralism was never adopted either during the colonial era, or by the newly independent nation states”.<sup>16</sup> Thus, in Latin America, “de jure legal pluralism was never prevalent, because colonial governments – and the nation-state after independence – were never able to create unified, but multiple, legal orders as part of wider strategies for social and political control”. In his monist interpretation, “After the conquest, ‘law’ became by definition ‘state law’”, although he admits to the existence of a de facto legal pluralism.<sup>17</sup>

Rachel Sieder, another very influential and respected legal anthropologist, shares this view, but with a historical caveat. For her, “In Latin America, Spanish colonial rule was [...] characterized by hierarchical and racialized legal pluralism (the *Leyes de Indias*)”. Contrary to Goodale, she acknowledges an “officially sanctioned legal pluralism involving distinct legal jurisdictions and codes for different racial, ethnic, or religious groups”.<sup>18</sup> In the 19th century, the newly founded republics abrogated the de jure legal pluralism that made up the colonial legal framework and imposed a monist model “sub-

15 BENDA-BECKMANN/TURNER (2018) 256. They are referring to the colonial worlds of Asia, Africa and Oceania.

16 GOODALE (2008) 217. Italics added.

17 GOODALE (2008) 218.

18 SIEDER (2019) 52.

jecting native peoples to Liberal laws, which rejected recognition of cultural difference and promoted assimilation in theory at the same time as they reproduced exclusionary racial hierarchies in practice”.<sup>19</sup> Under state law monopoly, indigenous normative systems were marginalized or criminalized. “Yet despite the absence of de jure legal pluralism, in many countries, a de facto form of indirect rule came to characterize relations between states and indigenous peoples”, creating long-lasting interlegal normative and institutional arrangements such as Mexican *ejidos* or Andean peasant communities.<sup>20</sup> This de facto legal pluralism is at the core of the new Latin American constitutionalism since the late 1980s. For Sieder et al., the recognition of indigenous peoples’ rights and the call for multicultural and plurinational states represent “*a radical break with monist republican traditions*”.<sup>21</sup> Apparently aware that Latin American modern law was not as monolithic as they assert, Sieder and her coauthors recognize the “need for more long-run historical analyses and debate with historians of law and society in Latin America”.<sup>22</sup>

Finally, Yrigoyen, a Peruvian prominent lawyer and activist in the field of indigenous peoples’ rights, shares and spreads this unsubstantiated assertion: “The liberal States of the nineteenth century were organized under the principle of legal monism.” In her view, “[t]he monocultural nation-State, legal monism, and a model of citizen suffrage (for white, illustrious, property-owning men) formed the backbone of the horizon of [monist] liberal constitutionalism” predominant in that century.<sup>23</sup>

The problem with this kind of simplistic explanations of decades of complex legal, social, and historical processes is that they overlook important nuances and intricacies: For example, the “archipelago of communities”<sup>24</sup> fostered by liberal ideology in 19th-century Latin America, the discrete temporal viscosity within each legal sphere, or the enduring effectiveness of the

19 SIEDER (2019) 52.

20 SIEDER (2019) 52.

21 SIEDER et al. (2019) 6. Italics added.

22 SIEDER et al. (2019) 17. VALVERDE (2014) also calls for overcoming the disciplinary divisions between legal historians, geographers, and anthropologists when studying spatio-temporal assemblages.

23 YRIGOYEN (2015) 157.

24 LEVRAU/LOOBUYCK (2018) 4.

Spanish *Derecho Antiguo* (colonial laws and fora). And, as lawyers know very well, the devil remains in the details.

### 3 19th-century Peru: A multiplex legal world

In the Peruvian case, the focus cannot be on jurisprudence alone, which is at the center of Seinecke's study, for it must also be directed to the normative and institutional dimensions of the law. This is in no way a derogatory statement. Brilliant legal minds, such as Lorenzo de Vidaurre (1773–1841), José Silva Santisteban (1825–1889), José Toribio Pacheco (1828–1868), Francisco García Calderón (1834–1905), Manuel Vicente Villarán (1873–1958), and other jurists studied by Carlos Ramos and Fernando de Trazegnies, were very active in the 19th century.<sup>25</sup> The simple reason why such comparison is impossible on the plane of jurisprudence alone is that in Peru no comparable school of thought developed on the issue of legal pluralism as such well into the 20th century.<sup>26</sup> Moreover, as Ramos states, “the image of a full time legal scholar completely devoted to academic reflection was unthinkable in 19th-Century Peru.”<sup>27</sup> They worked as judges, lawmakers, and lawyers, or acted as politicians and even conspirators siding with warring caudillos. This is why republican codes were prepared by commissions and not by single jurists like Andrés Bello in Chile, Dalmacio Vélez Sarsfield in Argentina, or Augusto Teixeira de Freitas in Brazil.<sup>28</sup> In addition, this is also why a radical break from the *Derecho Antiguo* was more difficult. Their legal knowledge was embodied, embedded, and enacted in their daily practice as socio-legal agents, which, at the same time, was deeply rooted in an old legal nomos that proved very difficult to eradicate by the new legal universe.<sup>29</sup>

25 RAMOS (2000, 2001, 2002, 2003); TRAZEGNIES (1979). See, for example, PACHECO (2015 [1854]); SILVA SANTISTEBAN (2015 [1856]); GARCÍA CALDERÓN (1879); VILLARÁN (1998 [1915–1916]).

26 GÁLVEZ (2015) provides the best account of the history of legal anthropology and legal pluralism in Peru. Fernando de Trazegnies, Francisco Ballón, Ana Teresa Revilla, Patricia Urteaga, and Jorge Price stand out as pioneering and original scholars in these fields.

27 RAMOS (2001) 44.

28 RAMOS (2001) 44–45; RAMOS (2000) 46; RAMOS (2003) 37–40.

29 For the notions of embedded, enacted and embodied knowledge, see ZILBERSZAC (2019).



The Peruvian jurists I mention conceived their books or codification projects as bricolages that show clear traces of legal pluralism and the tension between the old and new ideas about the law. For example, Manuel Lorenzo de Vidaurre, a graphomaniac by all accounts, published drafts of criminal (Boston, 1828), ecclesiastical (Paris, 1830) and civil codes (Lima, 1834–1836).<sup>30</sup> In the first one, crimes were sanctioned following the Hispanic legislation, including infamous punishments and penalties applied by the inquisition. Vidaurre’s doctrinal and normative sources were *Las Siete Partidas* (1256–1265), the glosses of Gregorio López (1555), and the *Nueva Recopilación* (1567). Thus, his claim that the Enlightenment inspired his work does not hold.<sup>31</sup> In a similar way, his draft of a Civil Code is a contradictory composite. While proclaiming liberal values, the project envisaged the extension of slavery until 1870; or, while declaring that liberal property shall prevail over all forms of entailed dominium (e. g., *censo reservativo*, *consignativo*, *enfiteútico*; see below), the draft abolished the first two but kept in place the emphyteusis and *capellanías* (endowments for masses for the salvation of a soul). Overall, this project is based on the *ius commune* developed in Castilian law, in particular in *Las Partidas*, the glosses of Gregorio López, and the “docto Cobarrubias”, but also grounded on the Enlightenment and rationalist philosophy for the parts on marriage, contract and property law (with the exception noted).<sup>32</sup>

On his part, José Toribio Pacheco wrote an interesting book on the history of Peruvian constitutional law based on the 1839 Constitution. He was convinced that the “real constitution of a nation dwells in the customs and habits of the people”. Unfortunately, in his view, “a large part of the Peruvian population remains mired in gross ignorance, possessing only, if at all, animal instincts”. The political and social problems facing mid-19th-century Peru were not due to the new system of government adopted but had to do with “the character and customs of its people”. Under this mindset, he opposed recognizing political rights to indigenous people. “An Indian who has turned 25 years old next to his llamas, only having access to their instincts, is a citizen, is a fraction of the sovereign, and has a vote in munic-

30 RAMOS (2000) 163, 198, 216.

31 RAMOS (2000) 169–183.

32 RAMOS (2000) 228–268.

ipal elections.” Only literate persons should hold the right to vote and become part of the nation. Yet, he believed that legal engineering could change the “customs of the masses”, slowly and incrementally.<sup>33</sup> In particular, law had a civilizing mission towards the indigenous population still following their instincts and, at most, their barbaric customs.

In the field of personal law, Pacheco observed that foreigners were subject to the laws of their homelands, while their property rights in Peru were subject to Peruvian law. This dual jurisdiction created problems for determining their legal age for signing valid contracts concerning their property rights. He also noted that the legal age for civil matters in case of emancipated persons was reduced to 21 years, while the legal age for political rights was invariably set at 25 years. This created an unfair and contradictory dual regime that put these persons under two legal temporalities (see below).<sup>34</sup>

Another jurist, José Silva-Santisteban, identified some elements of legal pluralism in 19th-century constitutional texts, particularly in the 1860 Constitution, but did not reflect on their relevance for the formation and operation of the legal system. He shows, for example, the different jurisdictions that were simultaneously at work, such as the ecclesiastical, military, treasure or miner’s tribunals, the merchant’s guilds, the Justices of the Peace, and the printing juries for libel cases.<sup>35</sup> He was adamantly against the recognition of personal jurisdictions (*fueros personales*), but in favor of granting special fora (*fueros reales*) to particular groups of persons such as priests or militaries. Even in this case, he thought they should be judged under national laws and courts “in everything they practiced as men or citizens”.<sup>36</sup> His liberal ideology also led him to question the social life of entailed property and welcomed its abolition in the 1860 Constitution.<sup>37</sup>

In his monumental *Diccionario de la Legislación Peruana*, Francisco García Calderón carefully registered and defined all the imaginable words referred to the legal multiverse of his time. His objective was to offer a clear and “full picture” of “all the laws and decrees included in our codes” because the string of laws and subsequent repeals since independence had produced

33 PACHECO (2015 [1854]) 92, 95, 110, 120, 172.

34 PACHECO (2015 [1854]) 164–168.

35 SILVA SANTISTEBAN (2015 [1856]) 257, 384.

36 SILVA SANTISTEBAN (2015 [1856]) 265–266, 304.

37 SILVA SANTISTEBAN (2015 [1856]) 304.

“chaos and darkness”. For this, he dissected the national codes and legislation of the young republic and, aware of their validity and importance, of relevant parts of *Las Siete Partidas* (1256–1265), the *Nueva Recopilación de Castilla* (1567), the *Recopilación de las Leyes de Indias* (1680) and the royal decrees (*cédulas reales*) compiled by Matraya Ricci in his *El Moralista Filaléptico Americano* (1819).<sup>38</sup> His entries for property and entailed forms of property, special jurisdictions (ecclesiastical, mining, trade, military), classification of persons, family and inheritance law, among other legal domains, are indispensable for understanding Peruvian law. Although he did not analyze them as pieces of the puzzle of legal pluralism, his work is a crucial source for understanding the laws, doctrines, and *nomoi* of 19th-century Peru.<sup>39</sup>

Finally, Manuel Vicente Villarán also provides some hints about legal plurality in his study of constitutional law. For example, he discussed the right to vote granted to indigenous people. He argued that even illiterate Indians could and should vote because most of them paid taxes, owned a workshop, or possessed land. Thus, they could resort to different legal grounds to exercise this right. In his political imagination, as opposed to that of Pacheco, they were part of the nation, and rightly so. He also favored trials of military personnel and priests in state courts for ordinary offences but acknowledged the need to keep their special jurisdictions due to their differentiated social roles. In this regard, Villarán carefully studied the prosecution of crimes committed by the president or his ministers. For the president, the senate was transformed into a chamber of justice that decided if he was to be judged by the Supreme Court.<sup>40</sup> It is clear that he noticed the operation of different forms of justice but did not conceive them as cases of legal pluralism.

Despite the importance of these works, they do not form a robust doctrinal corpus comparable to German jurisprudence concerned with legal pluralism. This is why I have selected legislation as the main field for observing this issue. Even though I use different sources, Seinecke’s account of 19th-century German jurists’ debates is very useful to reassess the links between liberalism and legal pluralism for that same period in Peru.

38 GARCÍA CALDERÓN (1879), vol. I, VII–VIII.

39 See his dictionary in the two volumes and a supplement: GARCÍA CALDERÓN (1879).

40 VILLARÁN (1998 [1915–1916]) 552–574, 668–699.

If it is clear by now that the Spanish empire was not an absolutist polity but a *composite monarchy*<sup>41</sup> that was the epitome of legal pluralism<sup>42</sup> in terms of its conflictive normative diversity and institutional complexity, there is still a tendency to think that the new liberal republics were obsessed, *ab initio*, with legal standardization and centralization. An influential historian like Jorge Basadre, for example, offers an evolutionist account of the history of law in 19th-century Peru: colonial law was followed by a period he calls Intermediate Law (*Derecho Intermedio*, 1821–1852) – fractured and influenced by French and Spanish Law – and all the remaining decades were dedicated to homogenize and unify the law.<sup>43</sup> While he offers counterexamples challenging his own narrative, pointing to the enduring judicial and contractual use of colonial law,<sup>44</sup> the impression is that the struggle against legal pluralism was a *raison d'être* of the new republic.

However, this might not be the case. António Manuel Hespanha reminds us that “19th-century liberalism proposed and promoted a policy of multiplying the sources of government of society – *governance* as opposed to *government*”.<sup>45</sup> As such, liberalism was a breeding ground for legal pluralism, not the contrary, and this explains why alternative jurisdictions, legislations and *nomoi* were officially recognized and fully enforceable until the 20th century. For sure, this trend was also rooted in Spanish American *constitucionalismo jurisdiccionalista* (i. e., Cádiz 1812) which, in turn, derived from a long-standing political culture, in which multiple authorities had the power to declare the law (*iurisdictio*) in a preordained and natural order.<sup>46</sup>

Furthermore, by mid-19th century, most Latin American countries were experiencing a rapprochement of liberal and conservative forces. Fearful of “anarchy and unbridled majoritarianism”, they devised constitutions and legislation aimed at the “counter-majoritarian organization of power that

41 YUN-CASALILLA (2019).

42 BENTON/ROSS (2013).

43 BASADRE (1984) 358–360; see RAMOS (2003) 28. For a critique of the state as the protagonist of 19th-century legal history, BASTIAS (2018) 325.

44 BASADRE (1984) 383–398; TRAZEGNIES (1991, 2008). RAMOS (2003) 168–260, also shows a myriad of cases in which colonial laws and institutions remain alive along the century.

45 HESPANHA (2019) 23. See MORELLI (2007) 134.

46 On jurisdictional constitutionalism, GARRIGA/LORENTE (2007) 19; on the jurisdictional conception of political power, see GARRIGA (2007) 59–65; BASTIAS (2018).

concentrated authority in the Executive and cemented elitist measures of selection for both senate and judiciary”.<sup>47</sup> A case in point is the 1860 Peruvian Constitution.<sup>48</sup> This “peculiar model of (unbalanced) checks and balances, which wanted to combine the Spanish monarchical/conservative model with the liberal model of the United States”<sup>49</sup> created a normative framework full of “complexities, confusions, and conflicts within ‘state law’” that, in the end, fostered legal pluralism.<sup>50</sup>

In Seinecke’s exploration of German jurisprudence, there is no mention of the issue of temporal legal pluralism, which, I think, is critical to understanding the workings of the law in different periods.<sup>51</sup> Similar to definitions that emphasize spatial synchronicity, it can be characterized as “the coexistence, in the same place and at the same time, of different and sometimes incommensurable [normative] temporalities”.<sup>52</sup> As Valverde points out, “clashes between legal traditions with different epistemologies often involve fundamental differences about the relation between law and temporality”.<sup>53</sup> But what is less appreciated “is that one and the same ‘culture’ can easily contain conflicting temporal and spatial logics, and that those conflicts are not necessarily zero-sum games in which a ‘dominant’ spatiotemporality drives out older or less prestigious ones”.<sup>54</sup>

Despite the standard evolutionist narrative already mentioned, this is a more accurate rendering of the history of Peruvian law, in which “multiple and conflicting temporalizations of law clearly coexisted throughout nineteenth-century legal thought” and practice.<sup>55</sup> In fact, legal change acquired different rhythms in 19th-century Peru. Observing these discrete timeframes, Foucault concluded: “each transformation may have its particular index of

47 GARGARELLA (2019) 27.

48 VILLARÁN, (1998 [1915–1916]) 565; CARPIO/PAZO (2016) 40.

49 GARGARELLA (2019) 28. See VILLARÁN (1998 [1915–1916]) 571.

50 BENTON/ROSS (2013) 4.

51 It remains to be seen how German legal scholarship dealt with temporal legal pluralism, but at least Franz and Keebet von BENDA-BECKMANN have addressed it. See, for example, BENDA-BECKMANN (2001); BENDA-BECKMANN/BENDA-BECKMANN (2014a, 2014b).

52 VALVERDE (2014) 62. In general, MECCARELLI/SOLLA SASTRE (2016) 20, define temporality as “the coexistence of diverse temporal conditions in the historical-legal experience”.

53 VALVERDE (2014) 62. ENGEL (1987) provides clear anthropological examples. Also, GREENHOUSE (1989).

54 VALVERDE (2014) 62.

55 VALVERDE (2014) 64. Also, GREENHOUSE (1989) 1636.

temporal ‘viscosity’.<sup>56</sup> Jurisdictional autonomy, for example, “implies the constitution of particular temporalities intrinsic to the system”,<sup>57</sup> not only vis-à-vis other systems (political, economic) but also within the legal system. In general, “problems will inevitably surface when legal orders following discordant temporal logics operate in relation to one another”.<sup>58</sup> Thus, besides the weight of the old legal *nomos* and the functional role of legal pluralism in the liberal project, temporal plurality is one of the reasons why legal centralization and monopolization proceeded in slow motion and were accomplished, *de jure*, only at the beginning of the 20th century. Even today, the ethnographic record shows that “the abstract, linear and divisible time familiar to European modernity is at variance with differently conceived *temporalities*”.<sup>59</sup>

A research agenda inspired by this insight would offer an opportunity to counterbalance the overwhelming spatialization of legal pluralism in Peru and elsewhere.<sup>60</sup> Franz and Keebet von Benda-Beckmann remind us that anthropology of law is fraught with spatial metaphors.<sup>61</sup> This mode of imagining legal pluralism tends to block our understanding of the relevance of “less spatial forms of jurisdiction”, such as the spiritual or the personal fora for militaries, miners and merchants, that remain so prevalent and persistent.<sup>62</sup> In this multiverse, persons were subject to the demands of competing jurisdictional and normative frameworks, each one with its particular spatiotemporal and categorical regimes for framing social relations.<sup>63</sup> It is in this sense that we need to “consider the time element as an inner feature of the legal problem in hand”, with critical consequences on its nature, scope, and progression.<sup>64</sup>

56 ORTIZ (1989) 33. The quote is from FOUCAULT (1979) 294.

57 BASITAS (2018) 330.

58 BENDA-BECKMANN/BENDA-BECKMANN (2014b) 21.

59 COSTA (2016) 46.

60 The solution is to focus on the *chronotope*, the way in which legal “time and space interact and shape each other” and how, in plural contexts, this dynamic creates “conflicting spatialtemporalities”, VALVERDE (2014) 67, 71.

61 For example, “‘semi-autonomous social fields’ (Moore 1973), ‘rooms’ and ‘landscapes’ (Galanter 1981, 1983), ‘structural places’ (Santos 1985), and the ‘external-internal’ (Kidder 1979)”, BENDA-BECKMANN/BENDA-BECKMANN (2014a) 47, note 3.

62 VALVERDE (2014) 63. On the external ecclesiastical Catholic jurisdiction and the sacramental jurisdiction of the soul, the “court of conscience”, see DECOCK (2017) 107.

63 BENDA-BECKMANN/BENDA-BECKMANN (2014a) 35–43.

64 MECCARELLI/SOLLA SASTRE (2016) 19.

For example, clerics lived in a time out of time, in a segregated space and enjoyed special jurisdiction. They could only profess at twenty-five years of age, notwithstanding the fact that civil adulthood was set at twenty-one. Regular clergy could not live outside their convent, unless they obtained license from their superiors and notified civil authorities; and they had to give up their belongings when professing.<sup>65</sup> Although they were alive, they did not have the right to write a will, receive an inheritance, or sign contracts, unless or until secularized, in which case they recovered their civil rights and overcame civil death.<sup>66</sup> The reasoning for that is that the body invested with a sacred persona was legally removed from secular affairs and subject to a particular normativity.

Terms are also a good example of differential experiences of time. The 1852 Civil Procedure Code established discrete deadlines and completion terms for trials and proceedings. These terms were suspended due to two patriotic holidays (July 28th and December 9th) and two court recesses for Christmas and Easter celebrations. Terms could also be extended, according to a time-space scale (*término de la distancia*) if the defendant found himself more than three leagues away from the court.<sup>67</sup> This way of establishing the terms was at odds with the manner prescribed by the 1853 Commercial Code for trade contracts: “In all computations of days, months and years, it shall be assumed a day of twenty-four hours, the months according to the Calendar, and a year of three hundred sixty five days.”<sup>68</sup> Or, with the stipulations set out in article 1557 of the 1852 Civil Code: “The rural year is counted in each place and for each kind of estate starting from the time that, according to the nature of the crop, it is customary to receive them in leasing.”<sup>69</sup> Thus, legal personae experienced the flow of time in different ways and with different consequences, depending on the forum in which they were acting. Temporal plurality, born out of legislation or contractual

65 CÓDIGO CIVIL DEL PERÚ (1852), articles 12, 83, 87, 88–91, 94.

66 CÓDIGO CIVIL DEL PERÚ (1852), articles 685.4, 709.6. See TRAZEGNIES (2008) 265–266; SILVA SANTISTEBAN (1856 [2015]) 331.

67 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 447, 455–457. For example, the term was extended by four days if the defendant was six or less leagues away. And one more day was added for each six leagues.

68 CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ (1853), article 198.

69 CÓDIGO CIVIL DEL PERÚ (1852), article 1557.

obligations as in the case of three life-long emphyteusis, also characterized this entangled legal world.

Now I turn to the institutional and normative dimensions of 19th-century Peruvian law. As for the multiple fora in force, the Civil Procedure Code of 1852 provides several hints of the complex legal world 19th-century Peruvians inhabited. First, besides the ordinary jurisdiction, it recognized the workings of the following courts: The Seven Judges Tribunal,<sup>70</sup> the War Seizures Tribunal (*Juzgado de Presas*), Water Tribunals, the Merchant's Guild, the Mining Tribunal, the Tithes Tribunal, the Catholic Ecclesiastical Jurisdiction, a Military Tribunal, a Customs, Tax and Seizures Tribunal, and private arbitration.<sup>71</sup> Additionally, the code prescribed that the Mining, Merchant, Custom, Tax and Seizures, and War Seizures Tribunals would “proceed according to their special laws” and shall only subsidiarily follow the ordinary ones.<sup>72</sup> These provisions did not affect the Ecclesiastical, Tithes or Military Tribunals, and it is highly unlikely that the Water Tribunals adapted their procedure to the code, given their strength and high degree of specialization. Thus, in fact, with the exception of the Seven Judges Tribunal, special jurisdictions kept their rules in place. Interestingly, sixty years later, De la Lama portrayed a similar jurisdictional patchwork, including printing juries for libel cases and Justices of the Peace.<sup>73</sup>

As for the normative frameworks, we have to keep in mind that codification is a mirror image of officially sanctioned legal pluralism. Thus, the validity of Spanish colonial law and fora, well into the 19th century, can be derived from the dates of promulgation of the main republican codes as well as from its contents. Codification was not only a systematic normative innovation. It was also a matter of pouring old wine into new wineskins. I hope it will become clear that, contrary to mainstream narratives on legal centralization, *the recognition of normative and jurisdictional pluralism was part and parcel of the construction of Republican law.*

70 A special chamber appointed by Congress to determine the legal responsibilities of higher state officials. See ESCOBEDO (2016) 166, footnote 120.

71 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 11, 12, 57.

72 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 1821, 1822.

73 LAMA (1907) 9–10; ESCOBEDO (2016) 123–128.



Along this process, Peru, during its first century or so as a nation-state, issued several codes with the imprint I just mentioned: the Civil and the Civil Procedure Codes in 1852; the Commercial Code in 1853; the Criminal and Criminal Procedure Codes in 1862; and the Mining and Water Codes in 1901 and 1902. At the beginning of the 20th century, the country started replacing the first republican codes. In 1902, a Commercial Code was promulgated; in 1912, a Civil Procedural Code; in 1920, a Criminal Procedural Code; in 1924, a Criminal Code; and in 1936, a Civil Code.<sup>74</sup>

Early on, Peru's two *Libertadores* attempted to provide new laws for the new republic that had been declared independent in 1821 by Jose de San Martin and finally freed from the Spanish and monarchist forces by Simon Bolívar in 1824. The former attempted to issue a new body of laws to replace the old and countless norms that could be traced back to the *Fuero Juzgo* (1241), *Las Partidas* (1256–1265), and the *Recopilación de las Leyes de Indias* (1680).<sup>75</sup> Bolívar commissioned the drafting of a Civil and a Criminal Code to a group of jurists.<sup>76</sup> But political turbulence forestalled their mission.<sup>77</sup> Another ruler, Marshal Andres de Santa Cruz, as part of his attempt to unite Peru and Bolivia, issued Civil, Criminal and Judicial Procedural Codes in 1836. But he had to put them on hold in 1838 due to the fierce opposition his government faced. As a result, “the laws and decrees in force before their promulgation keep all their strength and vigor”, which meant the reestablishment of colonial legislation.<sup>78</sup> It is important to stress here that this first republican codification experiment was an adaptation of the Napoleonic Code that included “Castilian law of las Siete Partidas [1256–1265], las Leyes de Toro [1505] and the Novísima Recopilación [1805]”.<sup>79</sup>

The Civil Code of 1852 is another example of pouring old wine into new wineskins. It is clear that while it followed the Code formally, in essence, it

74 BASADRE (1956) 393.

75 RAMOS (2000) 230. See ORTIZ (1989) 49.

76 Dictatorial decree issued in Lima, January 31, 1825, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1825009.pdf>.

77 BASADRE (1984) 327.

78 Quoted in RAMOS (2001) 102. Months earlier, a similar step to restore colonial law was taken by President Luis José de Orbegoso, Lima, July 31, 1838, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838027.pdf>.

79 RAMOS (2001) 143.

adhered to Las Siete Partidas de Alfonso X (1256–1265) and the Novísima Recopilación (1805).<sup>80</sup> It has been called a “condensation of common law” (*Derecho Común*) because it epitomized the “Roman Law and the *Ius Commune* of medieval and Spanish jurists.”<sup>81</sup> Bravo Lira suggests that it shares similarities with Spanish pragmatic literature like the *Febrero Novísimo de Tapia*, published in 1828, but, in fact, it is representative of colonial law.<sup>82</sup>

Several institutions represent the deep historical roots that, in turn, reflect the socially stratified Peruvian society. Going by Henry Sumner Maine’s famous aphorism – “the movement of the progressive societies has hitherto been a movement *from Status to Contract*” (1861) – Peru was by no means a progressive society. The vernacularization of modern liberal law stood in great tension with a legal corpus and a social structure that closely resembled that of the *Ancien Régime*. This created a normative pluriverse full of contradictions and alternative legal fields that contested the policy of legal centralization. For example, “the book on personhood, based on Roman, Canonical and Castilian laws, adopts from the outset a status-based stand.”<sup>83</sup> As already mentioned, clerics enjoyed a special status and jurisdiction with different time, space and behavioral regulations, including one that kept them under civil death, with no property or contractual rights, while remaining a sacred person. The code also provided a channel of communication between the secular and ecclesiastical spheres. To obtain dispensations, pardons, or graces, from the papacy, the clergy and their superiors had to go through “the Supreme Government.”<sup>84</sup> By far, the most important one was the centuries-old *recurso de fuerza*, a legal remedy granted to anyone who claimed their rights were being violated by “the excesses and abuses of ecclesiastical judges”. In these cases, they could seek redress by filing a claim before the Superior Courts of the republic.<sup>85</sup>

80 RAMOS (2001) 35.

81 RAMOS (2001) 268.

82 RAMOS (2001) 268. The reference is to the *Librería de Escribanos*, published originally by José Bermúdez Febrero in 1772 and annotated (*adicionado*) by Eugenio de Tapia, RAMOS (2000) 126.

83 RAMOS (2001) 281. For a comparison of the influences of the Code and the *Febrero*, see TRAZEGNIES (2008) 258–260.

84 CÓDIGO CIVIL DEL PERÚ (1852), article 92.

85 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 1763–1783. See GARCÍA CALDERÓN (1879) II, 1631–1632; ORTIZ (1989) 51.

The legal classification of persons included slaves.<sup>86</sup> Although slavery was abolished two years after the promulgation of the Civil Code (1854), the inclusion of this category reveals the endurance of old laws and customs in which normative pluralism was predominant, given the power conferred on the masters to organize and rule the lives of their slaves. Besides, it took decades to abolish it. Worst of all, slavery was replaced by other forms of radical subordination. These created semi-autonomous social fields that removed workers from the ambit of state law protections. Between 1849 and 1874, more than one hundred thousand Chinese immigrants traveled to Peru under servile conditions that had been agreed upon in indentured contracts (*contrata chinera*), and thousands of indigenous peoples and peasants were sent to mines, haciendas, and plantations under *contratos de enganche*, which in the end indebted and impoverished them.<sup>87</sup> These contracts were not included in the Civil Code but were subject to administrative regulations.<sup>88</sup>

Marriage was also a clear example of interlegality and recognition of a traditional normative framework that far exceeded the short life of the new liberal contractual order: “Marriage is celebrated in the Republic following the formalities established by the Church in the Council of Trent.”<sup>89</sup> However, the Catholic Church did not exercise a jurisdictional monopoly over marriage. Ecclesiastical courts adjudicated cases of annulment and canonical divorce; civil judges dealt with disputes over betrothal, alimony, childcare, legal fees, and return of properties; and criminal courts resolved cases of adultery, injuries and offences.<sup>90</sup> In the social world, both secularization and the flow of non-Catholic migrants – the feared *Lutherans* – weakened the Catholic-inspired normative grip over marriage. Trazegnies presents a case in which a former priest wished to marry an Evangelical Protestant who was a minor. Against the opposition of the state official in charge of protecting minors, a judge ruled in favor of the marriage. In his liberal interpretation,

86 CÓDIGO CIVIL DEL PERÚ (1852), articles 95–110.

87 On Chinese migration and *contrata chinera*, TRAZEGNIES (1994). On *enganche*, TRAZEGNIES (1991); RAMOS (2006) 69–152. On the legal road to abolish slavery, RAMOS (2006) 17–67.

88 “The codes did not take the trouble to address such an unpleasant aspect of reality”, RAMOS (2001) 45.

89 CÓDIGO CIVIL DEL PERÚ (1852), article 156. See TRAZEGNIES (2008) 264–265.

90 CERVANTES BEGAZO (2018) 32.

neither of them was Catholic: she was Protestant and he was an apostate with no ties to the church because civil legislation had abrogated the validity of perpetual vows or ties (*vinculaciones*). Besides, their children would not be deemed sacrilegious because the groom was an apostate.<sup>91</sup> By the end of the century, a dual legal model was sanctioned. In 1897, Congress passed a law allowing the marriage of non-Catholics, including inter-confessional couples, before provincial mayors, which opened the path for civil marriage.<sup>92</sup>

Property relations are another field in which the Civil Code offers examples of diverse regulatory regimes operating simultaneously and at odds with the liberal precepts of the Napoleonic Code that attempted to merge ownership rights. In addition to the typical form of consolidated liberal property, the code regulated three forms of dismembered ownership. These were the *censo enfiteútico*, *reservativo*, and *consignativo*. All were based on the distinction between *dominium directum* (ownership) and *dominium utile* (possession, use and enjoyment). In the *censo reservativo*, the owner transferred both kinds of dominium in return for a fee. In the emphyteusis, a long-term contract that was valid for up to three generations (*tres vidas*), only the *dominium utile* was transferred in exchange for an annual payment (*canon*). Finally, in the *censo consignativo*, the owner retained both and received a capital, in return for which he had to pay a *renta* (interest on loan) to his lender.<sup>93</sup> This entanglement of rights and duties unleashed a constellation of social, economic and legal relations that were not only framed by the Civil Code but also by customs, long-term contracts of up to 150 years, and even *ad perpetuam* entailments. It took decades to dismantle this alternative regulatory regime. Only the new Civil Procedure Code of 1912, which included provisions to consolidate property rights expediently, “finished the long history of unentailing property in Peru.”<sup>94</sup>

It is interesting to observe that the Civil Code was conceived as the flagship of normative monopolization, including legal reasoning, as if a whole and enduring legal culture could be effaced from the new *nomos* by fiat lux. In 1849, President Ramón Castilla promulgated a law prescribing how the

91 TRAZEGNIES (2008) 266–267.

92 CERVANTES BEGAZO (2018) 33–34; RAMOS (2006) 299–317.

93 See CÓDIGO CIVIL DEL PERÚ (1852), articles 1885–1920; GARCÍA CALDERÓN (1879) 1, 380–387; RAMOS (2001) 303–309; TRAZEGNIES (2008) 261–262.

94 RAMOS (2001) 309; BASADRE (1984) 380.

code was to be interpreted. Among other measures to ensure the proper use of the new legislation, the law stated: “Once the new codes [Civil and Civil Procedure] are enacted, it is absolutely forbidden, under pain of nullity and liability, to base decrees, judgements and sentences in Civil matters on other laws, doctrines or texts different from the articles of the codes.” More importantly, “It is forbidden equally to the lawyers and the parties to quote or back their claims, pleas and reports in other texts than the prescriptions of the codes.”<sup>95</sup> The law was referring to “the principles of jurisprudence, the rules of the common law (*Derecho Común*), and natural equity.”<sup>96</sup> The Civil Code also included self-referential provisions to fill in the normative lacunae and to prevent judges from applying other sources like the legal doctrine, customs or jurisprudence: “judges cannot refrain from applying the laws, and can only judge according to them.”<sup>97</sup>

The procedures were also restricted to the ones prescribed, but three important rules opened the jurisdictional spectrum recursively. First, it stated that all pending lawsuits at the time of enacting the new codes were to be adjudicated according to the laws in force when the contracts or deeds from which they originated took place. Second, it also ordered that “pre-existing laws should be applied in new lawsuits if the contracts or deeds from which they derived require the enforcement of such laws”. Third, the law expressly stipulated “merely ecclesiastical lawsuits will be handled and judged following Canon Law”.<sup>98</sup> These provisions and the traditional *nomos* make it hard to imagine how positivist legal reasoning could flourish overnight.

For example, the incorporation of the conclusive oath (*juramento decisorio*) in the Civil Procedure Code of 1852 is another evidence of interlegality. By establishing it as a full proof in trials, the republican legislator acknowledged the Catholic ethos of Peruvian society and the importance of religious beliefs for orienting social behavior, even of litigants. As Decock will agree, this is an instance of “collaborative legal pluralism” in which secular law

95 Law issued on December 29, 1849, article 5, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

96 Law issued on December 29, 1849, article 8, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

97 Article VIII of Preliminary Title of the Civil Code, 1852, quoted in RAMOS (2001) 277.

98 Law issued on December 29, 1849, articles 15, 16, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

recognized the “the court of conscience” and “the sacramental jurisdiction of the interior or the soul (*forum conscientiae*)”.<sup>99</sup> Such was the authority granted to the *juramento decisorio* of the defendant that it ended the trial, and the ruling had the same value as if it had been substantiated based on other full proofs (e. g., public deeds or expert witness depositions).<sup>100</sup>

The normative framework of the special military jurisdiction (*Fuero Militar*) is yet another relevant example of the Peruvian pluriverse. The Military Ordinances issued by Charles III in 1768 constituted its normative core.<sup>101</sup> It is important to stress that this was a personal forum that encompassed the persons, goods, and relationships of militaries and militiamen enrolled in the armies of a very convulse era. As Annino reminds us, the 1768 Ordinances “granted full jurisdiction to officers, not limited to military discipline. An officer was also a judge in civil, criminal and patrimonial matters”. Property owned by military personnel and their families were exempted from ordinary jurisdiction. If a landlord or a peasant entered the royal army, the independence armies, or the warring factions of republican caudillos, they could invoke the military special jurisdiction to protect their large or small properties.<sup>102</sup>

It took forty years after independence to formally abolish this powerful personal jurisdiction.<sup>103</sup> However, a caveat was extended to its operation: “The special Courts and Tribunals as well as their special Codes will remain in force until the law reforms them conveniently.”<sup>104</sup> Liberal jurists, like Silva Santisteban, accepted the survival of the military jurisdiction because complex societies demand functional differentiation based on the nature of things and not on personal privilege.<sup>105</sup> Since the first republican Military Code was promulgated in 1898, it is safe to say that the old Bourbon Ordinances, albeit amended partially, regulated military affairs over the 19th century. This, again, opens a new set of research questions on the issue of legal

99 DECOCK (2017) 104, 107.

100 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 696–709.

101 CARLOS III (1815 [1768]).

102 ANNINO (2017) 49. CARLOS III (1768 [1815]), tratado VIII, título I, articles 1–10. See MORELLI (2007) 138–139.

103 CONSTITUCIÓN DEL PERÚ (2006 [1860]), article 6.

104 CONSTITUCIÓN DEL PERÚ (2006 [1860]), article 136. SILVA SANTISTEBAN (2015 [1856]) 304, 393–394; VILLARÁN (1998 [1915–1916]) 565.

105 SILVA SANTISTEBAN (2015 [1856]) 265.

pluralism, shopping forum, and the peasant and indigenous engagement with this jurisdiction.

Merchants also developed their own legal worlds. In 1853, Peru literally adopted, albeit with some modifications, the 1829 Spanish Commercial Code.<sup>106</sup> Until then, traders were under the jurisdiction of the Tribunal del Consulado de Lima (Merchant's Guild). The tribunal was composed of three wholesale traders elected by all the merchants of the city. It was in charge of applying its ordinances issued in 1627 and the Ordinances of Bilbao (1737). Lima's Guild and its provincial Deputy Guilds became 're-established' in 1829 "according to the Ordinances of its erection", as long as they did not contradict the new republican laws.<sup>107</sup> In terms of the interlegal quality of this special jurisdiction, it is interesting to observe that Lima's traders could appeal to a Merchant's Tribunal comprising one lawyer and two merchants. In the rest of the country, two judges of the provincial Superior Court and one merchant formed the appeals court. As a final step, all parties could appeal to the Supreme Court for annulment.<sup>108</sup> The 1853 Code kept this pyramidal system of specialized mixed courts in place for trading disputes, expressly stating that the colonial Ordinances of Bilbao were abrogated only in the parts that contradicted the new code.<sup>109</sup> The final republican assault against this special forum was launched in 1886 and 1887, suppressing both the Tribunal and its Deputy Guilds, and assigning the enforcement of the Commercial Code to the ordinary courts.<sup>110</sup>

Colonial ordinances were not the only source of the new code. Custom was recognized as a privileged normative source. For example, trade contracts were interpreted on the basis of the contract, the deeds of the parties, "the common usage and generally observed practice" of merchants, and the good

106 *CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ* (1853) includes a law issued by Congress on December 23, 1851 (article 1: "The Republic adopts the Spanish Commercial Code with the necessary changes required by the circumstances"). In turn, the 1829 Spanish code was a composite of the 1737 Bilbao Ordinances and the French Commercial Code of 1807. See CHANDUVÍ (2020) 137–138.

107 Law dated December 2, 1829, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1829048.pdf>; ORTIZ (1989) 54–56.

108 LAMA (1907) 5.

109 *CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ* (1853), articles 1234, 1269; see BASADRE (1956) 379.

110 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1887017.pdf>; <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1886061.pdf>. The 1853 code would be replaced in

judgement of persons with expertise in a given trade branch (article 191). In a similar way, the seller was required to keep the merchandise in good condition as per the contract, “trade use”, or legal obligation (article 310.2). The commission agent could delegate some of his duties by following “general trading customs” (article 79, also 70) and had to adapt the terms of his credit sales to the “uses adopted in the plaza where the sale takes place” (articles 97, 100). Bills of exchange were cashed at an exchange rate adjusted to the “use and custom of the plaza” (article 449). Customary law was also applicable for sea trade. Thus, the officer in charge of a shipment could only practice shoddy trade as authorized by the owner of the cargo or “the customs of the port where the ship was dispatched” (article 727), and the food supply for the crew had to follow the “use and custom of navigation” (article 1016.1).

What is important to observe in both instances – special judicial circuit and normative contents – is the leading role played by merchants in the regulation of their affairs. Merchants, appointed as judges, enforced centuries-old regulations and local customs to adjudicate cases. And in their daily business they applied their special and customary laws. Inclusion in this special jurisdiction was based on the habitual economic activity of its members, which could also be performed by women, foreigners and those underaged.<sup>111</sup> Ethnic adscription or national origin were not grounds for inclusion or exclusion. It follows that indigenous and mestizo merchants, for example, also came under the aegis of the special legislation, the Tribunal del Consulado, and, later, the particular forum established by the Commercial Code of 1853. Future research would still need to uncover how, and in what conditions, they participated in this legal and economic field, but on the question of jurisdictional and normative pluralism, the Merchant’s Guild is a case in point.

Likewise, miners and mining had a history of legal autonomy. Until the enactment of the 1901 Mining Code, this activity was regulated by the colonial ordinances issued in 1787 for the Peruvian Viceroyalty.<sup>112</sup> A Royal Mining Tribunal in Lima was the jurisdictional and administrative authority

1902 with a body of law largely based on the 1885 Spanish code, see CHANDUVÍ (2020) 148.

111 CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ (1853), articles 1, 3, 7, 8, 9, 11.

112 At the same time, these Ordinances were an adapted version of the *Ordenanzas de Minería de la Nueva España* issued in 1783: BASADRE (1984) 264–265. According to one author, they “influenced the United States mining law”: in BASADRE (1956) 391, fn. 15.



over several mining provincial councils (*Diputaciones de Minería*). These bodies, formed by professional miners, were in charge of enforcing their special law. In 1829, the republic ‘reestablished’ this special forum according to the colonial ordinances.<sup>113</sup> Its jurisdictional powers were confirmed in 1835 and intermediate appellant’s courts (*Juzgados de Alzadas*) were introduced as a way of strengthening the system.<sup>114</sup> But the Tribunal was already suspended in the following year and its jurisdictional role ascribed to Provincial Councils and the ordinary Superior Courts.<sup>115</sup> In 1875, the Tribunal was suppressed and its administrative functions transferred to a Bureau of the Ministry of Finance. However, Provincial Councils were kept in charge of adjudicating mining rights, following their special ordinances.<sup>116</sup> Finally, in 1877, a law ordered that ordinary judges could replace miners in case there was no council in the province, in abrogation of the ordinances and all laws that were opposed to it.<sup>117</sup> This means that the longstanding colonial regulations were in force, either as positive norms or as customary law. Moreover, the old institutional architecture was resilient. Thus, in 1907, De la Lama described the existence of first instance mining courts, formed by two deputies, and of appellate tribunals composed of two superior judges and one miner.<sup>118</sup> Again, since inclusion or exclusion in this special forum was not ethnically based, it remains to be seen how indigenous and mestizo miners, not to mention women (e. g., widows) or foreigners, operated in this legal field.

Finally, the Water Law was also pluralistic par excellence in spatial, temporal, normative, and institutional dimensions. By definition, Water Law is applied locally, and given the nature of the resource, it is usually shared by different social groups, be that indigenous, mestizo or white, leading to a dynamic of cooperation and conflict between, for example, haciendas, mines, peasants, and towns. Each force field creates a different waterscape with particular normative and institutional configurations.

The standard temporal narrative is that two colonial ordinances were in force until the promulgation of the 1902 Water Law Code.<sup>119</sup> Originally

113 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1829049.pdf>; ORTIZ (1989) 56.

114 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1835056.pdf>.

115 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1836103.pdf>.

116 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1875054.pdf>.

117 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1877027.pdf>, articles 20, 27.

118 LAMA (1907) 10.

119 GUEVARA GIL (2013) 56–57.

devised for the capital's hinterland and published in 1793 by Judge Ambrosio Cerdán de Landa y Pontero, the *Tratado de las aguas de los valles de Lima* was based on the ordinances of Viceroy Francisco de Toledo (1577) and Judge Juan de Canseco (1617) as well as the court rulings and the evolving local water management customs. During the course of the 19th century "it was enforced in almost all the country".<sup>120</sup> The second prominent corpus of water regulations was compiled in 1700 by the deacon of the Cathedral of Trujillo, Antonio de Saavedra y Leyva, for the valley of Trujillo in the North coast.<sup>121</sup>

The nature of the institutional and normative history of this forum is convoluted.<sup>122</sup> In 1836, Special Water Tribunals (*Juzgados Privativos de Aguas*) were "reestablished in this capital [Lima] and in all the settlements where they served before independence". In the adjudication of cases, the judge was joined by "two farmers", who were landowners in important valleys, and this decision stressed self-regulation.<sup>123</sup> Following the mandate of the 1839 Constitution, a *Juzgado Privativo de Aguas* was instituted in Cajamarca in 1848.<sup>124</sup> And in 1868 a law recreated the Special Water Tribunal of Lima because "the ordinance in force [Cerdán's, 1793]" was not being "adequately observed".<sup>125</sup>

To complicate the matter, there was interference from other judicial circuits in their jurisdictional autonomy in at least two instances. In 1855, President Ramón Castilla decreed the "merging of the special water jurisdiction to the lower court of the ordinary jurisdiction, both for the distribution of water turns and for ruling on disputes".<sup>126</sup> Fifteen years later,

120 BASADRE (1984) 265; MARILUZ URQUIJO (1951) 3–5. It was so important as official law that it was modified as late as in 1895; <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1895107.pdf>.

121 BASADRE (1956) 391–392; BASADRE (1984) 265–266.

122 There is no systematic account of the history of Water Law in Peru.

123 Presidential decree, May 26, 1836, article 1, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1836046.pdf>. Two years later, the jurisdictional and management functions were divided between a judge who adjudicated by himself and the special commissioners for water management <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838078.pdf>, articles 1, 2.

124 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1848034.pdf>.

125 Law promulgated on November 11, 1868, first consideration, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1868035.pdf>. One year before, a Presidential Decree ordered the same recreation, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1867008.pdf>.

126 Decreed issued on June 4, 1855, article 1. It also recognized the validity of the "Ordinances and special laws for water distribution" and ordered regional prefects to convene

Lima's Special Water Tribunal was ordered under a new law to "review the appeals of the criminal and civil lawsuits filed against the rulings of the Justices of the Peace" due to the overload of ordinary courts.<sup>127</sup>

Despite this winding institutional life, the water forum was normatively strengthened. In 1838, a Presidential Decree sanctioned that "in water affairs nobody benefits from forum exemption and water judges cannot be challenged, unless a legal and proven cause". It also determined that coastal valleys should use water "in accordance with the turns and allocations prescribed in the Ordinance of D. Ambrosio Cerdan, Judge of the late *Audiencia*, which is declared in force and integral part of this decree".<sup>128</sup> According to Jorge Basadre, in 1841 President Agustín Gamarra (again) ratified Cerdan's Ordinances.<sup>129</sup> Similarly, in mid-century, the 1700 Ordinances of Deacon Saavedra were stretched to regulate water management in two more important valleys of the northern coast.<sup>130</sup>

Water management and conflict resolution had another source of plurality, namely the laws and regulations on the role of municipalities in local affairs. For example, the 1834 Organic Law on Municipalities granted the boards of towns (*villas*) and cities the authority to manage water resources "according to existing ordinances". The Organic Law issued in 1853 also bestowed upon them the power to oversee water distribution, establish rules to prevent floods, and "appoint one of its members to act as a *Juez de Aguas*, without charging fees". When several municipalities shared a water source, they were required to appoint a common special water judge and could "enact water ordinances". Three years later, another law further bolstered this scheme and stressed the division of labor between water judges and water managers. An 1861 law and an 1866 ordinance reiterated the role

"popular meetings" to prepare new ordinances (article 5), <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1855054.pdf>.

127 Law promulgated October 29, 1870, single article, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1870030.pdf>. In 1867, a Presidential Decree assigned the same jurisdictional role to Water judges, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1867008.pdf>, articles 1, 2.

128 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838087.pdf>, chapter I, article 6; chapter II, article 1.

129 BASADRE (1956), 392, refers to a decree issued August 4, 1841. This is not included in <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX>.

130 Presidential decree issued on April 12, 1856, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1856105.pdf>.

municipalities should play in water governance, ordering these bodies “to respect the customs of people living in small towns or in the countryside” unless the common good or morality warranted direct intervention in those social fields. Lastly, the laws of 1873 and 1892 ratified that municipalities were in charge of urban and rural water management and retained the division of labor between water managers and judges or tribunals.<sup>131</sup> Even a modest share of historical imagination would lead to the conclusion that in the vast Peruvian territory, hundreds if not thousands of waterscapes were formed, each with its own normative and institutional peculiarities. Most likely, these shared a common bedrock that originated in colonial legislation and customary law, which represented prominent sources of legal pluralism.

#### 4 Final remarks

Ralf Seinecke’s thought-provoking article opens up new avenues of research in legal history – on the central role of legal pluralism, not only in German jurisprudence but also in the legal history of Latin America, particularly of Peru.

Due to the lack of comparable sources, I have written a decentered comment. 19th-century Peruvian legal scholarship did not address the issue of legal pluralism. This is the reason why I have used legislative sources to find out if legal pluralism claimed the same place of importance in the Peruvian legal landscape as it held in German jurisprudence during the same period as depicted in Seinecke’s account.

Exploring some of the major normative fields and special jurisdictions in force, I conclude that legal pluralism was paramount in the pluriverse Peruvians inhabited. Even codification, supposedly the epitome of legal centralization and standardization of liberal law regimes, was a vehicle for strengthening pluralism. The republican codes were not drafted as new bodies of systematic modern law. They included or recognized important bundles of old colonial regulations. At the same time, republican courts appealed to *Derecho Antiguo* to ground their rulings, while different officially sanctioned jurisdictions kept their institutional autonomy and special normativities in place. In this complex normative and institutional world, temporal legal pluralism crisscrossed the life and deeds of sociolegal agents.

131 GUEVARA GIL (2013) 57–59, includes detailed references of the laws and ordinances mentioned.

Future research should use Seinecke's insights for questioning the standard narrative on the evolution of Peruvian legal history in the 19th century. The idea that old colonial laws were replaced by a *Derecho Intermedio*, which was, in turn, substituted by full-blown codification as an expression of modern liberal ideology and law, does not hold. An alternative reading of the normative, institutional and ideological multiverse of that period should attempt a new periodization, taking into account the undeniable significance of legal pluralism – normative, institutional, and temporal.

It is more rewarding to portray this period in terms of a *tertium quid*. 19th-century Peruvian law was not an either-or between the *Ancien Régime* and liberalism. The organic and status-based colonial society was not progressively and completely superseded by a liberal, individualistic and modern order.<sup>132</sup> Legal pluralism is, precisely, the code word for understanding the temporal, jurisdictional, and normative entanglements that characterized legal performances and social life in that century.

Finally, the fact that ethnic and cultural differences were not the foundations of these legal spheres does not mean indigenous people or the peasantry lived in an isolated and separate legal universe. They were not excluded, by definition, from participating in the military, mining, merchant or Water Law jurisdictions, among others. Thus, it is wrong to assume that only the constitutional recognition of their rights (1920) granted them legal agency. It remains a research question as to how they behaved as legal agents before. Understanding their deeds in that plural world will help refashion our image of 19th-century Peruvian law. In addition, it will help overcome the current disciplinary short circuit between legal history and legal anthropology, opening new avenues for a much-needed interdisciplinary dialogue.

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132 BASTIAS (2018) 328; MORELLI (2007) 133, 147.

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