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Between America and Europe
The Strange Case of the *derecho indiano* | 161–191

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Between America and Europe
The Strange Case of the *derecho indiano*

1. The right to memory and lost identities

On December 15, 2010, the United States recognized the *Universal Declaration of Indigenous Populations*. Their recognition followed the one of Canada, Australia and New Zealand thereby reinforcing the hopes of those who considered the Declaration to be an important instrument for the defense of indigenous populations and the reparation of the wounds inflicted on them by history.[1] It is common knowledge that the *Declaration* was approved by the General Assembly of the United Nations in 2007 with the unfavorable vote of the United States, Canada, Australia, New Zealand and the abstention of 11 countries. It was not easy to obtain the approbation of all members because of the resistance of many states to recognize the native populations who lived in their own territories as nations holding collective rights.[2] As a matter of fact, already in 1982 a special working group composed of representatives of the indigenous populations was formed at the Sub-commission on the Prevention of Discrimination and the Protection of Minorities. In 1993 the *Working Group on Indigenous Populations* prepared and presented to the Sub-commission an initial project that was approved one year later.[3] It seemed that everything was going well but after the

1 The Announcement of the United State's support for the United Nations Declaration on the Rights of Indigenous Peoples was given by President Obama during the Tribal Nations Consultation in Washington, D.C.

2 United Nations Declaration on the Rights of Indigenous Populations, 13/12/2007, http://www.un.org/esa/socdev/unpfii/en/declaration.html.

3 The *Working Group on Indigenous Populations* is an organ created by the U.N. Economic and Social Council, and it is part of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Project was approved by the Sub-Commission with the Resolution 1994/45 (26/8/1994). With the same resolution the Sub-Commission had also submitted the draft to the U.N. Human Rights Commission. On 29/6/2006 the

approval the project got lost in the U.N. corridors and it appeared again many years later. It is a long story, but I neither want to reconstruct it nor confront the theoretical and practical problems it entailed.[4] I will take instead the Declaration as a starting point for a more general consideration on *derecho indiano* and on the research prospects it might suggest to jurists and legal historians.

The *Universal Declaration of Indigenous Populations* is based on memory. It assumes the defense of memory as an instrument for the definition of indigenous identity and the protection of indigenous rights. The individualization of a new legal subjectivity, the indigenous people, a collective subject whose full right to self-determination is recognized, is possible only by recognizing their right to manifest, practice, teach their cultural traditions, celebrate their spiritual and religious ceremonies, pass on their history, their culture and their language to future generations. In the text there is no definition of indigenous people. This should not astonish us since it was not contained in the project of 1993. In fact it was not necessary. This new subject did not need any definition because it did not ask for state recognition or legitimation. It is not necessary because it is already given, it is a historical subject that existed before the states. But it claims, precisely through the use of memory, the preservation and reinforcement of its political, social and legal system.[5]

draft was adopted by the Human Rights Council but the U.N. General Assembly adopted the Declaration only on September 13, 2007 (Resolution 64/295) with 143 votes in favor, 4 against it (Canada, Australia, New Zealand, United States) and 11 abstentions. The protection of the indigenous identity is a right already recognized in 1989 by the ILO Convention 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries). It was the first treaty concerning the protection of indigenous rights adopted by the International Labor Organization and ratified by 27 states.

4 See Nuzzo (2002); Nuzzo (2011).

5 In 1983 Martinez Cobo, *special rapporteur* of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1983/21 Add.1–7 (1983) wrote that the community, the people and the indigenous nations are those who "having a historical continuity with pre-invasion and pre–colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories or parts of them. They form at present non dominant sectors of society and they are determined to preserve and develop and transmit to the future generations their ancestral territories, and their ethnic identity, as the basis for their continued existence as people."

In order to exist again as a people it is necessary to be able to remember. But remembering is not memory. It is part of the distinction with which memory works. The other issue is forgetting. As a matter of fact memory is based on a series of selective operations of remembering and forgetting. As Raffaele De Giorgi wrote, the memory is the unity of the distinction between remembering and forgetting.[6]

Remembering and forgetting are the distinctions through which memory works and at the same time we could say, with a certain simplification, they are the two poles around which both the issue of indigenous peoples' claim for identity and the discourse of colonialism have been structured and from which, in the course of time and in different ways, strategies of assertion or denial of indigenous subjectivity have been developed. In other words, outside of memory, remembering and forgetting become the conditions that make the existence of an indigenous legal subject possible or impossible. Only memory of oneself and of one's own history can produce identity and thus subjectivity. On the contrary, those who lack memory or those whose memory was stolen or overwritten do not exist. Franz Fanon reminded this very effectively many years ago opening a meeting on the relationship between national culture and fights for freedom. According to Fanon the colonial dominion had produced a "cultural obliteration." In other words it disconnected the subjected peoples from their culture denying the local reality, introducing new juridical relationships and producing their systematized subjection.[7] The consequences were dramatic. The consciousness of the impossibility of becoming white or of eliminating the "hated negritude" led to wrong-footing of the colonial ego, to the irreparable schizophrenia of identity. Many years later in the post-colonial debate the uncertainties about identity became a foundation of power.[8] The reconstruction of one's past through a long and painful process of re-memorization on the one hand confirmed the impossibility of rejoining one's original identity; on the other hand it was a tool for imagining a new hybridized subjectivity in which the identity of the colonized and of the colonizer melted. Thus it became impossible to overcome the conflict between the "colonial self and the colonized other" and at the same time to establish both the mutual dependence of the

6 De Giorgi (2004) 142–61.

7 Fanon (1971) 61.

8 Fanon's central position in post-colonial studies is declared by Chakrabarty (2000) 17.

two once opposing identities and their continuous fluidity. Paradoxically subaltern studies revealed the deepest violence of global capitalism exactly at the moment when its strategies confirmed the uniqueness of the world and gave a peaceful representation of it, based on the dialectic relationship between opposite concepts of center and periphery. They built a theory of subalternity that, starting from Gramsci's concept of hegemony, overtook the binary logic of first world / third world, colonizer / colonized and passed from the dialectic self / other to the dissemination of the images of the self and of other. The result was a new subjectivity, precisely a hybridized one, residing in the body of a new protagonist upon which colonial modernity had built its reasoning and that asked to be the maker of its own history.[9]

The political battle for the recognition of one's own diversity and one's own right to memory imposed therefore new approaches to historiography. This last one entrusted with the task of revealing the inadequacy of legal and political categories of Western thought in order to favour the comprehension of the world's complexity, and the relationships of power pre-existing its use, thus determining the selection of facts to be told and the way in which they had to be narrated.[10] At the same time the methodological renewal produced by decentralized forces coming from post-colonial and subaltern studies overcame the special and theoretic limits of the previous historiography and allowed us to make more complex narrative canons of Western historiography and the discursive practices of international lawyers.[11]

However, there is a still a lot to be done, as the strange case of the *derecho indiano* seems to confirm.

2. Claiming an Identity: the Road Map of García Gallo

The editors have suitably called this volume *New Horizons of Spanish Colonial Law*, but what does hide behind the expression "Spanish Colonial Law"? What does it hint at, or what is its equivalent in Castilian? The most immediate translation, *derecho colonial español* is not of great help. No specialist in Spain or Central and South America would recognize the subject of their

9 The existing literature is already endless: Bhabha (1994); Prakash (1994); Prakash (1995) 4 ff.; Guha (2002).

10 Mezzadra (2008) 56–72.

11 Craven (2008); Nuzzo (2012).

studies in this translation. We might say that Spanish Colonial Law is the politically correct version of a legal discipline that is well-founded in the Hispanic academic tradition: the *derecho indiano*.

Anyhow, it is not easy to provide a definition. It seems easier to say what the *derecho indiano* was not: it was not an indigenous law. Carlos Petit maliciously defined it as the exotic version of *ius commune*, and Bartolomé Clavero, more polemically, a "derecho generado o reconocido por parte de Europa para dicha geografía y dicha humanidad, como si ésta careciera de cultura y así de capacidad para regirse por sí misma, así como para determinar la reglas de recepción y acomodamiento de la gente sobrevenida y extraña de entrada para ella."[12] In any case it was a European law that on one hand the legal historiography imagined to have arrived in America with the first *conquistadores*, on the other hand it was used to tell the story of the West Indies in the same way as the legal history of European countries had been told.

Moreover, the expression *derecho indiano* itself was the result of an invention. It was absolutely unknown to the 16th, 17th and 18th centuries' jurists who used the expression *derecho de las indias* or *de los Reynos de Indias*. On the contrary it was invented by the Argentinean Riccardo Levene, leading scholar of the Argentinean school of legal historians, and founding father of the discipline together with the Spanish in exile Rafael Altamira.[13] According to Levene the *derecho indiano* had to be identified with all the law in force in the West Indies. It was an extremely rich prescriptive set of provisions of a different origin and nature that met in a single system able to "organizar el gobierno espiritual y temporal de las indias, establecer la condición de sus habitantes, regular la navegación y el comercio y sobre todo convertir a los indigénas a la fé católica."[14]

But the loyalty to the idea of system and the sharing of the aims that the *derecho indiano* would bring about did not prevent the historiographic representations offered by the doctrine from being univocal. Simply put, one might say that until the end of the 1970s (or rather until Alfonso García Gallo's positivistic approach undisputedly prevailed) the system of *derecho*

12 Petit (1993a) 665; Clavero (2004–2005) 543.

13 On the relationship between Rafael Altamira and Ricardo Levene, see Tau Anzoátegui (1997a).

14 Zorraquín Becú, cited in Tau Anzoátegu (1997b) 33 (ft. 19).

indiano was based on the supremacy of Castilian legislation and on a certain image of the Spanish monarchy in which from the outset the signs of a modern state were there to be seen. Then, with the end of Francoism, the fading of García Gallo's star and Spain's entrance into Europe it was also possible to rediscover the legal and customary elements of the medieval legal experience. At the same time Spanish legal history started to be included in the history of *ius commune* and the common European juridical tradition.[15]

I will begin with García Gallo. The legal history in Spanish speaking countries is characterized by his activity on the Iberian Peninsula as well as in Latin America and by his extremely rich scientific contribution.[16] He was able to make himself responsible for Edoardo de Hinojosa y Naveros' heritage, mythicizing his figure, acting as his pupil and at the same time methodologically criticizing his work and his school. He took upon himself the burden of projecting a new history of law, thinking of it in the first place as a legal-scientific discipline, in which the legal historian is both a jurist and a scientist. The first images of this renewed history of Spanish law as a juridical science were collected in two works published between 1948 and 1952 dedicated to Hinojosa. The first one introduced a complete re-edition of the latter's work and the other was the result of a conference held at the *Instituto nacional de estudios jurídicos*, and the following year published in the *Anuario de historia del derecho español*.[17]

The methodological change that García Gallo called for was not simple: he had to introduce Edoardo de Hinojosa y Naveros' work, commemorate the hundredth anniversary of his birth and at the same time trace out the guide-lines of his own history of law. He had to impose a turning point in Spanish legal historiography through a deep renewal of the conceptual instruments it used. At the same time he had to hide the changes in his own point of view inside a discourse and a representation that, both on a political and legal level, focused on continuities more than fractures.[18]

15 Nuzzo (2008).

16 On García Gallo's role at the *Instituto internacional de Historia del Derecho Indiano* founded in Buenos Aires in 1966 with Ricardo Zorraquín Becú and Alamiro de Avila Martel, see Martiré (1996).

17 García Gallo (1948); García Gallo (1953b); a critical analysis of the relationship between García Gallo and Hinojosa in Vallejo (1998).

18 These fractures were evident in García Gallo (1941), where he criticized Hinojosa's thesis on the Germanic component of Spanish law expressed in Hinojosa (1910).

The history of law was a legal science that needed its own methodology in order to be told. This on the one hand would free legal scholarship from political constraints, and from the economic and more generally the socio-cultural context. On the other hand it would prevent singling the jurist out as the main partner of the legal historian. Moreover, the legal historian was also a jurist and as such felt the duty to remove his subject, the law, from the influence of other disciplines and in particular freeing it from cultural contaminations that would alter its identity and it is precisely identity the issue.

Whilst reconstructing the route through which the legal systems and the institutions had developed, García Gallo did not speak of medieval law, but rather of a present law that regulated the daily aspects of social life. Thus he entrusted the historian with the delicate task of remembering and selecting which were the element for constructing the memory and identity of the jurist and the country and what, once again, was to be condemned to oblivion.

The problems the legal historian had to face with dealing with the issue of *derecho indiano* were not different. Also in this case the re-definition of disciplinary identity continued to be his main aim. Moreover, while in Spain García Gallo had identified Hinojosa as the founder of the discipline, thus contributing to mythicize his profile and presenting himself as his heir, in Central and South America the absence (from his point of view, obviously) of a school which complied with a strict legal method, took him to propose himself as the true founder of the *derecho indiano*.[19]

At the beginning of the 1950s García Gallo adjusted his strategy. He exalted the role of law as a legal source in the 16th century Indies and subjected the methodologies used by the legal historians when studying the *derecho indiano* to severe criticism.[20] Even if he recognized Rafael Altamira's and Ricardo Levene's centrality and their importance for the discipline, the approach of the two scholars, with their openness towards history,

19 See Tau Anzoátegui (1992b); about García Gallo's beginning as an Americanist historian see the critical analysis of Clavero (2007).

20 The articles are: *La ley como fuente del derecho en Indias en el siglo XVI* (1951); *Panorama actual de los estudios de historia del derecho indiano* (1952), and *El desarollo de la historiografía jurídica indiana* (1953), all published in García Gallo (1972a). In the following years he often turned to treating methodological problems reaffirming the already expressed theses or refining his positions. Particularly useful: García Gallo (1967); García Gallo (1971); García Gallo (1972b).

sociology and politics, had inexorably jeopardized the subject of their studies. According to García Gallo they lacked legal sense, the recognition of the centrality of the legal dimension and the will to study it "con espíritu y técnica de juristas."[21] "La vocación histórica o sociológica de la mayor parte de los cultivadores estudiosos de la Historia del derecho indiano les lleva a atender a los fenómenos sociales con olvido de los propiamente jurídicos y a no valorar estos en su propio alcance sino con criterio extraño al derecho. La construcción dogmática, que constituye la tarea principal de los juristas científicos – se ocupen del derecho romano, medieval o del actual – apenas se ha intentado. […] El estudio dogmático perfectamente compatible con el histórico del derecho indiano, tarea que incumbe a los juristas y no a los historiadores está sin hacer […]. La Historia del Derecho debe ser para el jurista un modo de conocer el Derecho, y no la Historia o la sociología. Por ello ha de estudiarse con orientación, espíritu y técnica jurídica."[22]

An historian of *derecho indiano* has therefore to engage in the discovery of his identity as well as the one of his discipline and contribute to build a national conscience by reconstructing the history of its "national positive law." Also, since the law had its identity, it was necessary to read it being aware of its evolution, forgetting the historical and social concern and limiting the attention to political, social and economic aspects.[23] Consequently the history of the *derecho indiano* (too long entrusted to historians, at the expense of jurists' attention) also had to be considered as a scientific discipline since the law, being a subject more than a simple technique, was a true

21 García Gallo (1967) 112. But already in García Gallo (1948) CX he reiterated Altamira's "sociological concern" that "relegated law to a secondary level" and that "he was no researcher of Hinojasa's kind." To this point Vallejo (1998) 778 writes "Un investigador del tipo de Hinojosa de García Gallo es lo que Altamira claramente no era. No es que relegase Altamira lo jurídico a un segundo plano, sino que defendía una posición metodológica que entendía que hacer la historia del derecho implicaba bastante más que hacer la historia, estrictamente del Derecho; y no se trataba entonces de hacer sociología, sino de seguir haciendo historia del Derecho sin perder de vista sus manifestaciones y condicionantes más diversos."

22 García Gallo (1952) 55 ff. He confirmed these positions nineteen years later: García Gallo (1967) 112.

23 García Gallo (1967) 107–119. The quoted paragraph is taken from García Gallo (1972b) 1078. He confirmed these positions in the review of Paradisi (1973) and criticized the methodological opening it contained: García Gallo (1974) 741–752; a comparative lecture of the methodological positions of García Gallo and Paradisi in D'Ors (1977).

science. Lawfulness, being a neutral and evaluating knowledge capable of translating general values into laws and juridical concepts, was based on the distance which separated it from the violent world of politics and socio-economic struggles, and its capacity to build and represent itself as a unique, closed and self-referential system, capable of recognizing its own trueness. The *derecho indiano* was therefore essentially a legislative system.[24]

In a territorial organism that, just as it happened in 16th century in France, assumed the form of a state where the main theologians, jurists and political thinkers took an active part in the process of absolutistic and bureaucratic centralization, the law seemed the most apt instrument for the realization of the sovereign's will. It also enabled the renewal of the sovereign' s centrality and it was at the same time the clearest instrument of civilization.[25] Thus, on the one hand the positivistic tension and the state aspirations introduced a functional legal paradigm to read, from a unitary point of view, any discourse on power and on political subjects as well as those not institutionally active in the Indies.

On the other hand the legalistic dimension in which the *Conquista* was absorbed allowed historiography to introduce a break between the desires of the monarchy for the defense of the rights of the natives and its constant insistence on their evangelization and the violent reality for the Indian population. The laws of Burgos and Valladolid, the *Leyes Nuevas*, the *Ordenanzas* of 1573 (to give only the most renowned examples) translated the religious concerns of the sovereigns, reflected Ferdinando and Isabella's promises to Alessandro VI and initiated a virtuous network between three poles: the imperial chanceries and the jurists of the Crown, the universities and the theologians of Salamanca, the Indian territories and indigenous

24 In the Indies the concept of law, after being initially identified with the norms in force in the Reign of Castile and automatically bestowed overseas, in the years immediately after the Conquista absorbed both the *ordenanzas*, le *cedolas*, le *reales provisiones*, le *instrucciones* and the *cartas* issued with a general character for all overseas countries, those addressed to a province as well as to a certain place. In both cases, for García Gallo the Indian provisions were a special law put on top of a hierarchic scale of sources that could be integrated in a unique system by a subsidiary Castilian law, defined general or common. García Gallo (1951); García Gallo (1967); on this issue see Tau Anzoátegui (1992d).

25 Pietschmann (1980). As regards Italian legal historiography, that up to the 1980s was not very attentive to the relationship between law and politics in 16th century Spain, see Piano Mortari (1987).

populations. Christian yearnings, political reasoning and juridical logic competed in the definition of their *status* allowing Morales Padrón to see in the Burgos laws "el primer cuerpo básico del estatuto indigena" and García Gallo to justify up until the 1970s the co-existence, in this fundamental prescriptive body, of the recognition of human nature and freedom of the indigenous population while maintaining the system (of exploitation) of the *encomienda*.[26]

3. Claiming an identity: Francesco Calasso and the system of *ius commune*

The construction of a national legal identity and the project of a methodological renewal of the history of law followed by García Gallo demanded the recovery and the exaltation of the institutional profiles as well as the legislative activity carried out by the sovereigns of Castile. Yet in order to achieve these objectives it was necessary to undertake a deep change in the mindset in the way the role performed by Roman law in Spain and its heritage was perceived.

Spain, under the dictator Franco, imposed a proudly different (legal) history from the European one. It was a Christian and nationalistic history focused on the primacy of legislation and of state; a history where the juridical literature had a secondary role and where only an echo of the *ius commune* could be heard. Through the *ley de las sietes partidas*, the great drawing up of Alfonso X in 1265, the Romanist and canonistic tradition had also entered the reign of Castile and from there the West Indies. But as a consequence of a precise political strategy aimed at the territorial unification, it had become a common law with national character

In Spain, as García Gallo maintained in a conference held in Rome in the middle of the 1950s and published in the *Revista de studios politicos*, the *ius commune* for the first time passed through a crisis highlighting its incapacity to offer appropriate answers to the new needs. The American experience then pitilessly revealed its inadequacy.[27] Its principles, he continued, were used to

26 Morales Padrón (1979) 308–310; García Gallo (1977) 755–756.

27 García Gallo (1955). The *Revista de estudios politicos*, at which García Gallo during the 1940s collaborated assiduously, was the organ of the *Instituto de Estudios Politicos*, the ideological laboratory of the regime, founded in 1939 following the model of the *Istituto italiano di cultura*.

incorporate the Indies into the Crown of Castile and to define the juridical titles which legitimized the dominions. But when the *ius commune* reached the Indian coasts, through the *Requerimiento*, its weakness became evident and the scornful answer of two Cenú *caciques* was enough to cause the whole system to be debated.[28]

As Fernandéz de Oviedo remarked, after reading the document, the two Caciques denied the validity of Alexander VI's donation and consequently the legitimacy of the dominion claimed by the Spanish sovereigns and confirmed their inalienable rights on those territories. García Gallo imagined them and represented them to us as "firmes en sus convicciones jurídicas" and considered their answer "consciente y concluyente: la validez del derecho común fue rechazada y a él opuso el propio derecho indígena." The consequences of this gesture were enormous. "Por primera vez se negaba al derecho común su vigencia universal y se le rechazaba en la resolución de los problemas del Nuevo Mundo."[29]

In the damp forests of Cenú and for an audience, as the Italian one, with little familiarity with the Indies, García Gallo put an inglorious end to a universal juridical knowledge, heavy with triumphs in Europe, and at the same time stressed that the insufficiencies of *ius commune* had also caused a beneficial "Spanish reaction." And this time the answers were both adequate and immediate. On a doctrinal level Francisco de Vitoria had substituted the *ius commune* with the "system" of *ius gentium* and on a legislative level the Crown had issued important legislation inspired by systematic tensions and the Christian dimension of the old *ius commune* which had recognized the principles of freedom and independence of the autochthonous populations.

I am not sure whether Francesco Calasso, the legal historian of "La Sapienza University", had also been invited to the meeting at the Spanish Institute of Rome that day and, if he had been sitting among the audience, what he might have thought about the sad destiny García Gallo reserved to *ius commune* or about his legislative approach to legal history. García Gallo's

28 The Requerimiento too had a state character. In fact García Gallo (1955) 157 writes that "este Requerimiento, pleno de amenazas a quien lo aceptase, tampoco era distinto del que cualquier Gobierno actual, antes de emplezar la fuerza, hace a cualquier grupo de sediciosos para que acaten el poder establecido"; on the discursive strategies of the *Requerimiento* see Nuzzo (2004) 13–85.

29 García Gallo (1955) 158.

discourse (particularly his attention towards national identity and the extensive use of the term system) enabled us to reconstruct the threads that connected the Spanish professor to the Italian legal culture and particularly the influence exercised by his system of *ius commune*. Even if the García Gallo's project of methodological renewal had imposed the re-evaluation of the role played by *ius commune* or presupposed its complete nationalization, it still needed the idea of a system introduced, by Calasso to endow the medieval juridical experience with a scientific character and to connect *ius commune* and *iura propria*.

Certainly the differences were not negligible. García Gallo's theoretical construction, simply based on the binomial law and nation, was far from the refined doctrine of Calasso. Moreover, both shared the objective of redefining the identity of the discipline and using legal history as an instrument for the construction of a national juridical identity. Calasso's historiographic proposal required the recovery of the historical authenticity of medieval law and the reconstruction of the economic, political and social relationships in which the juridical texts and their authors were immersed. It was no longer the time for a "history of Roman law during Middle Age" as Savigny had done, for old contrapositions between Romanists and Germanists (or Italianists) nor for sterile exercises of dogmatic reconstruction. As a matter of fact, in the Middle Ages "a new spirit" had already taken possession of the old body of Roman law, and put new energies into it and determined a deep transformation unifying that law with "its own experience", its needs and "rivivendolo ed esaltandolo come norma del proprio operare".[30] Roman law was no longer the hard core of the medieval juridical experience, but rather the *ius commune* and the historian of Italian law was its authorized cantor. It was not only a problem of discipline or an academic struggle aimed at achieving more room for the history of Italian law inside the law faculties. Examining the historicity of *ius commune* meant considering the existence of an Italian law free from the Italian state and recognizing an Italian juridical identity before the national unification.[31]

Following Santi Romano's institutionalist theory, Calasso identified law with the legal system and sustained its plurality. "La constatazione della pluralità, però, come ha scritto Pietro Costa, non era per Calasso la conclu-

30 Calasso (1954) 33; Calasso (1939); see Conte (2009) 27–32.

31 Iglesia Ferreirós (2000).

sione dell'indagine, ma la sua premessa; serviva a porre correttamente un problema, che per Calasso è *il* problema rispetto al quale le considerazioni 'istituzionalistiche' sono strumentali: questo problema è il problema dell'unità."[32] As a matter of fact, according to Calasso, the construction of a national legal history required the reassembling of a plurality of norms inside a unitary system. The *ius commune* united the histories in one great Italian history seeming to be a system of systems. At the same time Croce's idealism and Romano's theory itself did not allow Calasso to break free from the images of state and law and led him to consider the system of *ius commune* as a legislative system, or at least to consider the legislative component as the prevalent one.[33] The history of *ius commune* was now the "storia di questo sistema unitario, e non soltanto del diritto romano comune, e meno ancora della scienza del diritto o della giurisprudenza. Chè infatti, scienza e giurisprudenza furono l'organo potentissimo della evoluzione del sistema: ma essendo questo un sistema legislativo, la posizione dommatica dell'attività del giurista o del giudice vi rimase sempre ed esclusivamente quella di attività interpretativa, sul fondamento logico e giuridico, e quindi con tutte le norme e i limiti che ogni attività interpretativa può avere in un sistema legislativo."[34]

Thus Calasso understood the historicity of medieval law and stressed its specificity with regards the Roman law opposing at first the dogmatic approaches of Pandectistic school and then the neo-pandettistic revival of the 1950s. Moreover, in order to transform that "new" law into a scientific knowledge and into an instrument to legitimate a discipline in search of redemption inside the European academy, he needed to recover Savigny's notion of system. Furthermore, Calasso could not but use the system. Independently from its legislative and doctrinal connotation it was not identified with a logical principle necessary for the exposition and the organization of the subject matters, or with a historic product functional for a precise political juridical project. On the contrary, it was on one hand a constitutive principle of law and it was impossible to set it aside without losing the scientific nature and the truth of one's own discourse and of one's own

32 Costa (1999). Paradisi (1980) remains fundamental.

33 Paradisi (1980) 217 ff.

34 Calasso (1939) 129; see also Calasso (1948). Costa (1999) 38 uses the above quoted paragraph.

subject; on the other hand, it was an interpretative model good for selecting the heterogeneous prescriptive materials that it should be able to coordinate and build upon the reality it was to describe.[35]

In 1951 – the same year when some fundamental works that Calasso had dedicated in the 1930s to the problem of *ius commune* were collected in a well-known volume called *Introduzione al diritto commune* – an essay by García Gallo on the concept of law and its role inside the system of sources in 16th century Indies appeared. The Spanish scholar did not miss the Italian editorial novelty quoting it and recommending it to his pupils as a fundamental lecture.[36] He needed those pages for the construction of a unitary and scientific concept of *derecho indiano*. They gave him the conceptual framework to keep the old Castilian law and the new law issued for the overseas territories together. As a matter of fact his theoretical representation did not need a *ius commune* neither as Roman law nor as law produced by the jurists' interpretation. In the first case because the Roman law had already been nationalized; in the second case because Calasso himself had already streamlined its creative dimension. Moreover, the theoretical representation of García Gallo was freed both from historicity and spirituality in which Calasso had instead immerged it because any historical and religious tension had already been selected and made positive. Thus, only two prescriptive systems remained in opposition: Castilian and Indian, and with them the "old" problem of unity.[37] This made Calasso's work still useful. The solution was in those pages, in the idea of the system that he theorized and in the idea of the state he still evoked. Castilian laws and laws for the West Indies, like *ius commune* and *ius proprium* were the elements that inside a state framework, in a dialectic tension between the general and the particular, and between common and special, were able to intrinsically and organically connect in a unitary system.[38]

35 Mazzacane (1998).

36 "El primer libro que me hizo leer fue el *Medioevo del diritto* de Calasso" stresses Villapalos (1996) 14 reminding the first teachings he got from García Gallo.

37 On the relationship between Calasso and the philosophic culture of idealist roots Ajello (2002) 118 ff., 400 ff.; from a different point of view also Iglesia Ferreirós (1999b) insists on the problem of unity.

38 García Gallo (1951); García Gallo (1971) 177: "el ordenamiento juridíco no es tan sólo un conjunto de normas, sino uno auténtico sistema regido por principios y desarrollado de modo armónico."

4. Claiming an Identity: Carl Schmitt and the Discovery of the New World

The end of Franco's regime and the overcoming of the nationalistic approach of Spanish historiography made first the re-discovery of *ius commune* possible and then enabled its projection onto the West Indies, imaging there the existence of a unitary and organic system. It was based on the dialectical relationship between the general and the specific, as it also seemed to happen in the *respublica christiana*.

Before following the *ius commune* during its transoceanic journey I think it is time to dwell upon the editorial news that was published in Europe at the beginning of the 1950s. While Calasso was re-writing the history of medieval legal thought through the concept of *ius commune* and García Gallo was including the Spanish Indies within a legislative, Christian and nationalistic system, the German jurist Carl Schmitt published *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*.[39] In this book he turned again to international law and, following the same spatial approach to policy that had marked his work in the Twenties, traced the history of the *ius publicum europaeum* from its beginning to its dissolution.[40] Schmitt's history not only described Europe's lost identity under the blows of Kelsen's formalism and legal universalism, whilst taking the relationship between *Ordnung* and *Ortung* as a narrative archetype. It also expressed the desire for new amity lines and with them the desire for a new *nomos* and a new process of space subdivision.

The American claims of a new Western hemisphere, the equalization between colonial territories and national territories, the move (following the peace conference in Paris) from a European order to a universal one, the turn of a discriminatory concept of war and of the pre-modern identification between enemy and criminal, had produced the dissolution of the inter-European state system through which the international relationships had been juridically organized for four hundred years. It saw in territorial

39 Schmitt (1950a).

40 See especially Schmitt (1940); Schmitt (2005). Schmitt's interest in international law increased during the 1930s, see the articles Schmitt (1995) edited by Maschke; on the meaning of *Großraum* in Schmitt see Schmöckel (1994) 124 ff.; Carty (2001); on the relationship between geopolitics and Schmitt's *Großraum* see Losano (2010) 59 ff.; Galli (2010) 864–877.

states its protagonists and in the discovery of a new world its pre-condition. The voyages of Columbus allowed Europe to know a free and unlimited space that was ready to be textualized and occupied. The Bulls of Alexander VI were the instruments for achieving these aims: they confined the American territories and the Ocean within a legal text and enabled the *Landnahme* of the Catholic powers, Spain and Portugal. They ensured a *konkrete Ordnung* with the acts of land taking and land distributing that was a founding principle for organizing the political communities and justifying the positivity of the law (*Recht*).[41] As it is well known the pope gave the new lands to the Castilian sovereigns in order to spread the word of Christ and exposed the indigenous population to the Catholic religion. In this way he attributed a heavy moral obligation to Ferdinando and Isabella and established a legal title that legitimized the Spanish presence in America in front of the natives as well as the other European powers.

With another Bull he defined the spatial limits of the Spanish dominion. A line traced one hundred miles west from the Azores and running from the North Pole to the South Pole distinguished two different areas. One was reserved for the expansion of the Spaniards; the other could be occupied by the Portuguese, and, at the same time (by opposing to the space of the *respublica christiana*) demarcated the West Indies as an empty and non-qualified spatial and territorial entity.

Europe needed that empty space for its own existence. "La civiltà europea – Carlo Galli wrote – esiste solo perché è in grado di impossessarsi del nuovo mondo, di occuparlo, di spartirlo, e di confinare là – nello spazio del non Stato – l'inimicizia assoluta, la limitazione della guerra nell'Europa degli Stati, che si riconoscono l'un l'altro come *hostes aequaliter justi*; è resa possibile dalle guerre illimitate condotte contro i nativi in America (ma anche in Asia e in Africa) e anche fra le potenze europee tra di loro, fuori dal continente europeo."[42] But the *rajas* of Alexander VI were not enough for the definition of a new *Nomos* of the world. Marked on the Ocean, they ignored its alterity. They had only a simply distributive function and, presupposing the Pope's superior authority, still affirmed the unity of the *respublica christiana*.

41 Schmitt (1950a) 81 ff. (it. ed. 1991); see also Schmitt (1953).
42 Galli (2010) 877–889.

The emergence of a new order needed, on the contrary, a real revolution with respect to the ordering of territorial spaces. It imposed the overcoming of that unity. According to Schmitt it was possible only when England, "l'isola che si fece pesce," entered the debate thanks to a new "religione guerriera": Calvinism.[43] The amity lines between England and France that appeared for the first time in a secret clause of the Cateau Cambresis treaty, produced the definitive disappearance of a world and defined the structure of European international law. They ratified the existence of two opposite spaces: one, the European land, realm of law and peace; the other, the Ocean and the still unknown American territories. They were free from law and far from the international treaties, and appeared as real and permanent war theaters in which Western colonial impulses could be vented. Beyond the amity lines the possibilities became endless; there was no more peace and the agreements between European powers had no validity.[44]

Four hundred years later the dissolution of the *ius publicum europeum* and the deep crisis of the political subjects on whom it was based, ordered the search for a new *Nomos*. The perspective, nonetheless, remained a spatial one. In a conference entitled *La unidad del mundo*, held in Spain in 1951, Schmitt expressed his desire to bring about a "tercera fuerza," India, Europe, the British Commonwealth, the Hispanic World, the Arabian System or one more force that had not yet been defined. It could break the "worrying dualism" – between East and West, communism and capitalism, enabling the opening of new macro-spatial perspectives and with them making it possible to single out a principle for their balance and the definition of a new international law.[45] It was a new law but with a clear analogy with the 19th and 20th centuries' law of nations. In fact also this one "se basaba en un equilibrio de potencias, gracias al cual se conservaba su estructura. Tambien el ius publicum europaeum implicaba una unidad del mundo. Era una unidad Europeocéntrica, no era el poder político centralista de un único dueño de este mundo, sino una formación pluralista y un equilibrio de varias fuerzas."[46] Nevertheless, to reform the unity of the world, a new

43 Schmitt (1954) (it. ed. 2002, 85).

44 A synthesis of the historiographical debate in: Cassi (2004) 102–114; a critical analysis of the conquest as a production of a new social space in Nuzzo (2004) 87 ff.; Ruschi (2004–2005) 407 ff.

45 Schmitt (1950–1951), it. ed. 347.

46 Schmitt (1950–1951), it. ed. 348.

Christian philosophy of history was also necessary. As a new *katechon* it could overcome the dualism between the Marxist philosophy of history and the weak historical relativism of the capitalistic West based on progress and technique. Thus it could offer, through an "irrupción concreta de lo eterno en el tiempo," a firm answer to the advancement of dialectic materialism.[47]

Franco's Spain was the geographical space from which it was possible to start the reconstruction of the European identity and the achievement of these aims. Everything began in Spain and in Spain everything could have a new beginning. The Spanish conquest of a New World and the doctrine of Francisco de Vitoria had brought the scientific and cultural foundation of a new law of nations, producing the first change of the structure of international law.[48] After the end of the Second World War (within a confused and divided Europe) the nationalistic and ultra-conservative Spain seemed to Schmitt the last bulwark. "È una coincidenza significativa – Schmitt wrote in a conference held in 1962 at the Instituto de estudios politicos of Madrid on the occasion of his appointment as a honorary member – che lo slancio sincero della ricerca mi abbia sempre condotto verso la Spagna. Vedo in quest'incontro quasi provvidenziale una prova in più del fatto che la guerra di liberazione nazionale in Spagna rappresenta una pietra di paragone. Nella lotta mondiale che si combatte oggi essa è stata la prima nazione a vincere con la propria forza e in maniera tale che ora tutte le nazioni non comuniste devono legittimarsi davanti alla Spagna sotto questo aspetto."[49]

Spain repaid Schmitt's interest.[50] At the end of the Twenties Schmitt received his first invitation to hold a conference in Spain and his texts started to be translated. Franco's seizure of power ten years later and the necessity for a stronger theoretical legitimation of the regime made Schmitt a constant presence within the political and legal Spanish debate.[51]

47 Schmitt (1950–1951), it. ed. 354; see also Schmitt (1950b) ed. by G. Agamben.

48 Schmitt (1943) (ed. it.).

49 Schmitt (1962) 218–219.

50 In addition to the friendly relations with Álvaro d'Ors, Herrero (2004), the relationship between Schmitt and Spanish intellectuals are testified by Becchi (1998) 185, n. 14. The marriage of his daughter Anima with Alfonso Varela Otero, a legal historian who taught at the University of Santiago de Compostela, strengthened Schmitt's bond with Spain, see Mehring (2009) 509–510.

51 The conference was held in 1929 at the *Centro de Intercambio Intelectual Germano-Hispano*, Madrid and was devoted to Donoso Cortes.

The historiography reconstructed the relationship between Schmitt and Spain and underlined the reception and uses of Schmitt's legal theory in the Iberian Peninsula.[52]

Recently Ignacio de la Rasilla del Moral, reconstructing the "zero years of the Spanish international law," showed the effect of Schmitt's article, *El concepto de imperio en el derecho international*, published in the first volume of the *Revista de estudios politicos*, on the representation of a new Franchist Order and underlined how an "endogamous line of continuity" ran through the German jurist, connecting the intellectual as Legaz Lecambra and Francisco Conde with the international lawyers of the post war years.[53]

In these subsequent pages I will not mention the relevance of Schmitt in the cultural debate of Franco's Spain. I will, instead, attempt to highlight evidence of omissions.

As a matter of fact he was never cited by García Gallo or by the historians of *derecho indiano*, even though in Spain Schmitt was a highly demanded lecturer, his texts were translated in Castilian, his reflections on the history of the *ius publicum europaeum* assumed the Spanish conquest as starting point, Vitoria was one of his protagonists, a legal historian, Otero Varela, was his son in law and Álvaro d'Ors, the most important Spanish professor of Roman law, had friendly relations with him.[54]

Why? I will put forward two assumptions and leave the reader to choose the one he or she might like best.

The omission could be either the spontaneous fruit of the shabby nationalism of the legal historians of Franco's Spain that were not really interested in what was happening outside the borders of their country and their discipline, or the consequence of their scientific limitation of understanding the theoretical force of Schmitt's construction. Otherwise this omission could be the consequence of a historiographic strategy that was targeted at the anti-formalist approach of Schmitt or it could be the consequence of his interpretation of Vitoria free from the common universalistic stereotypes.

52 See especially Beyneto (1983); López García (1996).

53 Rasilla del Moral (2012). I would like to thank Ignacio de la Rasilla del Moral for sending me his article.

54 It is interesting to underline the absence of any references to Schmitt in the work of García Gallo (1957–1958) 467–476 on Alexander's Bulls that is opened with a bibliographical recognition.

It could also be due to the refusal to recognize in the conquest or in the violence of the *Landnahme* the qualifying factor of the Spanish presence in the West Indies or the starting point of the international law's constitutive process.[55]

5. Claiming an Identity: Víctor Tau Anzoátegui and the New Horizons of the *derecho indiano*

During the 1970s the legal historiography started to become aware of the need for a deep methodological renewal under the pressure of the social and economic transformations that were sweeping through Europe. In addition, the more sensitive Spanish jurists took part to this debate.[56] In 1977 the Peset brothers and two years later Bartolomé Calvero harshly criticized the methodology of García Gallo and revisited the image that Hinojosa's school had imposed.

They came back to highlight the historical dimension of the law, underlining its relationship with social reality and economic structure, locating the most relevant reasons for Spanish historiographic backwardness and indifference towards a European historical phenomenon as *ius commune* and the constitutional history of 19th century Spain in the nationalistic glorification of the Hispanic diversity.[57] And while García Gallo still in 1979 held fast to his dogmatic approach and ascribed the little attention given by Spanish jurists to *ius commune* to the importance of the German component of Spanish law in the early Middle Ages, Francisco Tomás y Valiente took the last step toward overcoming García Gallo's method.[58] He closed a revisionist process he started in 1976 in an article with the same

55 *Der Nomos der Erde* was translated into Spanish only in 1979, but the guidelines of the book already appear from the conferences and the article translated into Spanish that I have quoted in these pages.

56 Scholz (1980).

57 Peset José Luis y Mariano (1977); Peset (1978); Clavero (1979). The first signs of the Spanish methodological renewal are already in Clavero (1974). The same Sevillan Review *Historia, Instituciones, Documentos* directed by Martínez Gijón was one of textual space where the new themes and the treatment of methodological problems could be afforded freedom within the pages of the *Anuario* that was not possible in Madrid at the time. Almost twenty years later Petit (1993b) 407 defined it as "último recurso al alcance de disidentes".

58 García Gallo (1980). But see also García Gallo (1986) and (1988).

title as the famous conference García Gallo held in Rome.[59] According to Tomás y Valiente the article affirmed that it was no longer possible to conceive legal history as García Gallo did in 1952, but also that "la dirección hacia la que García Gallo había orientado teóricamente la Historia del derecho en España, vista sobre todo desde la triple perspectiva del Manual, de sus propios fundamentos y de la caracterización global del Anuario, no parecía convincente."[60]

When Spain joined the European Community in 1986, Helmut Coing presented at the *I Simposio Internacional del Instituto de Derecho Común* a paper meaningfully entitled *España y Europa, un pasado jurídico común*. He recognized the end of Spanish diversity and the belongings of the Spanish culture to European history. The director of the most important European institute of legal history, the Max Planck Institute in Frankfurt am Main, enabled Spain to gain access to the shared memory of the old *ius commune*, and affirmed the role played by the 16th century Spanish theologians in the process of the transformation of law as a legal science.[61] Unquestionably, the history recited by the director of Max Planck was nothing more than "the old *translatio studii* with a few superficial patches to cover its nakedness, a few sops to the peddlers of unstable legal currency."[62] That is an umpteenth version of the myth of the history of European law: it was conceived in Italy, developed in France, improved in Holland and apexed at the Pandectistic school in Germany. Coing, nevertheless, introduced for his Spanish public an important variant: he certified the existence of the *ius commune* in the juridical Spanish inheritance, legitimizing the work carried out by the Iberian legal historians, and admitted the champions of the Second Scholastic in the European legal history.

Three years later, in 1989, in a conference organized by the *Centro di studi per la storia del pensiero giuridico moderno*, Spanish historiography was ready to go on stage, and submitted itself to a kind of 'group psychotherapy' in front of the Italian colleagues.[63] In the introductory paper Tomás y Valiente

59 Tomás y Valiente (1976a); see also Tomás y Valiente (1976b).
60 Tomás y Valiente (1981) 3640.
61 Coing (1986).
62 Osler (1997).
63 Clavero / Grossi / Tomás y Valiente (1990) 633–654, see the review by Serrano González (1990).

definitively denyed the representation of the *escuela de Hinojosa* offered by him. Tomás y Valiente disclosed the ideological manipulation of García Gallo and challenge the very existence of a school of Hinojosa and later of García Gallo.[64] This was not the only thing. The organizers were conscious that a conference on *Hispania* had to investigate the legal projection of its image on the overseas dominions. Thus they entrusted Víctor Tau Anzoátegui with the task of explaining the exoticism of the *derecho indiano* and its relationships with the *ius commune* and the Castilian law. And Tau Anzoátegui (not forgetting the paper presented by Coing in Murcia, first quotation), furthermore claimed that it was impossible to understand and describe the *ius commune* in Spain "sin tener debidamente en cuenta ese singular fenómeno de expansión jurídica en el espacio Atlántico."[65]

Subsequently the *derecho indiano* and its protagonists as well as Castilian law and its jurists were knocking at the door of European legal history. There were "un único sistema jurídico de raíz europea continental", and "una única unidad de estudio" into which *ius commune*, Castilian law and *derecho indiano* merged. García Gallo and his innumerable works kept offering Tau the methodological coordinates and the irreplaceable portrait of a centripetal system. The object of those methodological coordinates and of that system, however, appeared to be much more complex in the paper presented by Tau Anzoátegui than it seemed if one read the texts of García Gallo or those legal historians that in the same years also saw in the West Indies the European systemic relationship between *ius commune* and *iura propria* imagined by Calasso for medieval Italy, and used the Christian values of *ius commune* for reading the Crown's engagement in favor of the natives and for justifying their submission.

Víctor Tau Anzoátegui kept on declaring his debt to García Gallo, but at the same time proudly remembered his affiliation to the school of Ricardo Levene and, following the historiographic tradition inaugurated by Levene and Altamira (that García Gallo had always criticized because of their lack of legal disposition), sought to restore the complexity of the *derecho indiano*.[66]

64 Tomás y Valiente (1990); Tomás y Valiente (1993–1994); see also Sánchez-Arcilla Bernal (2003) 7–19, 48–68.

65 Tau Anzoátegui (1990); Martiré (2001) and (2003).

66 The great attention devoted by the Argentinean school towards history had already been testified by Martiré (1969); on Argentinean legal history see Abásolo (2008).

Within a common history the derecho indiano was a different type of knowledge and its identity could not easily be bridled by the idea of legislative or jurisprudential system. Besides, the system of García Gallo was not an historical reality, but a projection of his positivistic and nationalistic theory.[67] Tau Anzoátegui recognized the merits of the Spanish professor and underlined his timid approach to the new methodological proposals during the 1980s, but he did not fail to keep distance from him. Some years later, for example, in a methodological work on the prospects of the *derecho indiano*, he not only recognized that "persiste en la historiografía, en dosis muy altas, la fuerza modeladora de la cultura legalista," but also invited the legal historians to reconstruct the (broken?) relationships between law and the social net and to substitute "a cultura legalista con una cultura jurídica."[68] Only a juridical culture could have truly enabled the "situar la ley dentro del ordenamiento en su verdadero lugar, según la materia y las épocas, y habría hecho posible una 'lectura inteligente' – que no es ingenua ni maliciosa – de los textos legales, interrogándolos a la luz de una concepción amplia del fenómeno jurídico."[69] The awareness of this complexity made it possible to devote attention to the other sources of law: customs, doctrine, and jurisprudence.[70] It was something of a desire that Tau Anzoátegui himself attempted to satisfy with two important books published in 1992. The first, *La ley en Hispanoamérica*, was in fact devoted to the different sources of the *derecho indiano*, and the second, meaningfully titled *Casuismo y sistema*, was a historical investigation on its *espíritu*.[71]

Moreover, Tau Anzoátegui was searching for the identity of the *derecho indiano*, but the discovery or the re-discovery of the legal pluralisms to which its research was leaning, was no longer a problem that had to be overcome, nor was it the starting point of an investigation necessarily addressed at focusing a superior unity. The system had not disappeared and hanged dangerously with its German rigor over the unordered world of the Spanish Indies. Similarly, the idealistic tension that sustained his project could have reproduced the dream of a spiritual and legal unity, making it again possible

67 Tau Anzoátegui (1992b) 63.
68 Tau Anzoátegui (1997b) 41.
69 Tau Anzoátegui (1997b) 43.
70 See Tau Anzoátegui (1986) and (1989).
71 Tau Anzoátegui (1992c) and (1992a).

to tell the old story of a conquest without conquest nor conquered populations in which the radical native alterity could be dissolved without residuals.

Nevertheless, in the theoretical representation of Tau Anzoátegui the system had an element that counter balanced it. Beyond and against the system there was another category of interpretation, the *casuismo*. It was too an "anachronistic" concept, as Tau Anzátegui himself underlined. It was a word that once again had nothing to do with facts but that rather dealt with interpretations, helping us to enter into a "cultura común refractaria a la idea de sistema."[72] The *derecho indiano* was an *ordenamiento casuista*, a pluralistic order that reflected the pluralism of the political world of Spanish Indies and was able to bravely resist attempts to rationalize the system

Setting the "creencia casuistica" against "idea sistematica," Tau Anzoátegui took back the texts to their contexts and brought back the law into the social world, enabling the critics of a idealistic approach to share his "underground" explorations "debajo de la legislación, la jurisprudencia o la actividad judicial."[73] "El derecho indiano – Tau Anzoátegui wrote in the epilogue – aparece como un ordenamiento abierto a distintos modos de creación – normas legales, costumbres, jurisprudencia de los autores, práctica judicial, ejemplares, equidad, etc. – con ciertos principios rectores y leyes generales, pero con vastos espaciós para disposiciones particulares, privilegios, excepciones y dispensas. La materia, las personas, el tiempo y las circustancias eran atendidas preferentemente en la solución de los casos dentro una sociedad que lucía sus estamentos o estados."[74]

At the five hundredth anniversary of the discovery of America (within a solid historiographic tradition and for the readers with fairly conservative tastes) he offered a deeply innovatory lecture on the American world that, I

72 Petit (1993a) 676. "A riesgo de sorprender al mesurado Víctor Tau con formulaciones radicales – Carlos Petit wrote, 669 – situaré *Casuismo y sistema* en el terreno así acotado de una historíografia de creación que, siendo jurídica, encuentra además implicaciones en la experiencía de derecho presente y aún puede proyectarse hacia el futuro." This brings Petit to conclude (671): "la formación que acredita Víctor Tau es sólidamente tradicional, mas ya lo sería menor su mismo pensamiento; *Casuismo y sistema*, a despecho de la nutrita bibliografía que lo acompaña, sería entonces un libro radicalmente (post)moderno."

73 Petit (1993a) 668.

74 Tau Anzoátegui (1992a) 570.

like to think, could have caused doubts and perplexities in García Gallo and in his numerous scholars.

In *Casuismo y sistema* Víctor Tau Anzoátegui did not directly face the problem of the natives. However, the construction of the legal indigenous order as a casuistic order that was open to the diversities and to the necessities of praxis, allowed a more conscious reflection on the role of the indigenous populations in the Hispanic American society and at the same time encouraged reflection on the control strategies used by the jurists to deny native diversity. The legal pluralism did not anticipate postmodern feelings nor did it arrange them in an ordered and constitutional plan for rights and different subjects that were destined to be sacrificed on the altar of legal formalism of modernity. On the contrary, through different means swinging between protection and repression – the application of some old legal status to indigenous, their introduction into Spanish procedural law, the imposition of the Castilian language, forced urbanization and obviously their conversion to the Catholic faith – it had the aim of one day overcoming the diversity of indigenous populations and erasing their memory.

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