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Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing *Derecho Británico Indiano*

Most of the essays in this volume, proceeding in the spirit of Victor Tau Anzoátegui's distinguished scholarship, pursue "new horizons" in the study of Spanish American law. Co-editors Thomas Duve and Heikki Pihlajamäki charged me with a different mission. They asked me, a student of British North American law in an Atlantic framework, to compare the legal history of the Spanish and British empires with one eye on Tau Anzoátegui's work and the other on the papers produced for the volume.

If there is a concept central to both Tau Anzoátegui's writings and to many of the essays in this volume, it is the *derecho indiano* – its meaning, implications, development, and variability, and the changing ways that scholars have understood it. From the perspective of the English Atlantic, what stands out is the lack of an analogous notion that refers to the collective legal order of the British North American colonies.[1] Section I of this essay will explore why scholars of the English Atlantic do not think in terms of a *derecho británico indiano*. Its absence has powerfully shaped scholarship on the intellectual history of law (Section II) and on the trajectories of change perceived in the legal development of the two empires (Section III).

I. *Derecho Indiano* and the (Missing) British American Continental Legal Order

Historians of Spanish American law have put the concept of the "*derecho indiano*" at the center of their field. This is true whether they treat the term restrictively as a shorthand for legal doctrines, institutions, and personnel, or whether, more expansively, they include within the term, as Tau does, the

1 I will focus on the colonies that became the United States. Strictly speaking, the British Atlantic would have included English Canada and the English Caribbean.

values and "spirit" of the law and the interactions with politics and the wider society that animated the juridical order. The ongoing learned debates over the nature and meaning of the *derecho indiano* have made the term highly contested, which has only underscored its importance as an object of study. Indeed, historians who go so far as to recast the *derecho indiano* less as a set of doctrines than as an intellectual culture, and who contend that its successes and failures owed less to its institutional framework than to the social networks and political interests surrounding those institutions, nonetheless insist on its centrality as the starting point for discussing Spanish American law. Some of the papers in this conference – for instance, by Ezequiel Abásolo, Luigi Nuzzo, and Heikki Pihlajamäki – represent the third generation of reflection on these themes, if we consider Tau and his contemporaries the second generation, and their predecessors such as Ricardo Levene and Rafael Altamira the first generation.[2]

Historians of British American law, looking upon all of this, are impressed by the sophistication and intensity of these debates. But even more, they are struck by the absence of a workable analogue in their world to the *derecho indiano*. When they discuss the legal orders of the British Atlantic, they think in terms of "constitutions," distinguishing among three types. First, a mix of charters, bills of rights, statutes, longstanding institutions, and customs organized, or "constituted," power within Great Britain itself. Second, each colony in America developed its own constitution, commonly resting on its charter, supplemented by colonial statutes, customs, and habits of wielding power. Third, an unstable, disputed "imperial constitution," built out of conventions accumulating from the latter seventeenth century onward, structured government between Britain and its colonies across the Atlantic. Each colony handled local affairs, while the Crown and parliament oversaw matters of general concern such as war and peace, diplomatic affairs, coinage, and intercolonial and foreign commerce. The Empire provided a structure for review of colonial legislation by the Crown's Privy Council and for appeal of judgments by colonial supreme courts. With characteristic unclarity, the imperial constitution offered choice of law rules suggesting when colonies might develop their own particular law, when they might deploy the diverse array of sources contained within the rubric

2 Abásolo (2015); Nuzzo (2015); Pihlajamäki (2015).

of the "laws of England," and when English law would override "repugnant" colonial ordinances.[3]

Conspicuously absent among these three constitutions was a fourth: a collective legal order of the colonies of the English Atlantic, a *derecho británico indiano*. Is this concept seldom found in the writings of scholars of British America because they had no political or ideological reason to invent it? The formation of the notion of a Spanish American *derecho indiano* is instructive here. The concept, developed by Ricardo Levene, came into use among historians only in the middle third of the twentieth century. It allowed scholars to treat the law of the Spanish Indies from a cosmopolitan, pan-Hispanic perspective that escaped from the limitations of national historiography. To speak of a *derecho indiano* was to emphasize how the various Latin American nations shared a legal-cultural inheritance, an inheritance that their forebears had not merely received from Castile but had helped construct.[4] There was no corresponding need to deploy a legal historical concept to underscore the common heritage of the constituent parts of the United States since it was already a single nation rather than, as in Latin America, a grouping of independent countries created out of a once unified empire.

Ideology and politics aside, the more significant reason why historians do not think in terms of a *derecho británico indiano* is that the historical record is not conducive. Suppose, as a thought experiment, we imagine what a hypothetical *derecho británico indiano* would have looked like. Its features can be modeled, by analogy, on the Spanish American *derecho indiano*. The purpose of this thought experiment is not to argue that a *derecho británico indiano* actually existed in any meaningful sense and has been overlooked. Not until the closing stages of the colonial period do hints of one emerge. Rather, the point is, ultimately, to invite reflection on the implications of Spanish American – but not British American – legal history being organized around the study of a collective continental legal order.

3 Greene (1987) 67–68, 74–76; Greene (2011) 49–54, 63–66. See also Bilder (2004) 1–4; Brown (1964) 1–22; Hulsebosch (2005) 72–74; Hulsebosch (1998) 319–379; Smith (1950); Smith (1969); Smith (1970).

4 Pihlajamäki (2010); Pihlajamäki (2015); Nuzzo (2015). Cf. Tau (1997) 28–33, which contends that the work of García-Gallo more than Levene's made "*derecho indiano*" the central concept for the field.

A *derecho británico indiano* would have included, first, an array of institutions that recurred from colony to colony (akin to the *audiencias*, *cabildos*, *corregidores*, and so forth that could be found in New Spain, Peru, and other areas). Second, this collective legal order of the English American colonies would have expressed through law a dominant set of ideological and political commitments spanning the continent. In the case of the Spanish Empire, these included, for instance, the representation of the king as a guarantor of justice to his vassals, a commitment to evangelization, and a disdain for representative assemblies. Third, the collective legal order would have had a branch of law for overseeing a unified religious establishment. Fourth, it would have included principles determining which situations would be governed by indigenous customs and which by fusions of indigenous and settler law. Fifth and finally, a sizable corpus of law issued from the metropolis and governing day to day life in the colonies – something akin to what the Spanish Empire collected in the *Recopilación* – would have brought some unity to an English collective legal order. But in reality, as opposed to in our thought experiment, the different English settlements disagreed in their religious and secular institutions, ideological commitments, policies towards native law, and social and economic legislation.

As a result, historians sometimes treat the law of each English colony as a singular entity (the law of Massachusetts, of Virginia, and so forth). Or, more commonly, they think in terms of regions, with some dispute about how to organize them. A typical division includes New England, the Middle Colonies or the Delaware Valley, the Chesapeake, the Deep South, and the Caribbean islands. To be sure, students of the Spanish American *derecho indiano* also assume regionalism – but of a different sort. Peripheral settlements, they note, employed varieties of the *derecho indiano* less learned than the versions that obtained in the cores of New Spain and Peru. The choice of law rules contained within the *derecho indiano* allowed corporations, indigenous communities, and viceroys, *audiencias*, *cabildos*, and other governing institutions to create norms that differed from place to place. The geographical variation that was expected, even praised, within the *derecho indiano* did not call into question its primacy as the overall framework for Spanish American law.[5]

5 Altamira (1945) 144–183; Cutter (1995) 32–43; González (1995) 11–67; Tau (1992a) 181–183, 313–319; Tau (2001) 53–79, 96–100, 151; Tau (1997) 85–92.

By contrast, the regionalism of British American law was of a more profound character. Seventeenth century settlers came over with widely varying goals, forming colonies at different points in time with distinct institutional structures and legal cultures. First, where the sixteenth century Spanish Empire imposed Castilian-governing institutions upon New Spain and Peru, the English Empire insisted on no comparable similarities among its various colonies.[6] The mode of appointment of senior executive and judicial officials differed among colonies. The governor and his council commonly nominated judges and subordinate executive officials and served as an appellate tribunal. The governor and council owed their appointment variously to the king (in "royal" colonies such as Virginia), or to private individuals who "owned" settlements (in "proprietary" colonies such as Pennsylvania), or to popular election (in "corporate" colonies such as Connecticut).

Second, institutional and legal cultural variation occurred because the initial settlers who established colonies selected among institutions and legal norms familiar from home, adopting some, reshaping or rejecting others, in regionally specific processes. Consider the contrast between Massachusetts (the dominant colony in New England) and Virginia (the leading colony in the Chesapeake). Committed Puritans led the settlement of early Massachusetts. Determined to create a more righteous and Christianized society, they insisted that the state and churches work together in guiding or driving people toward moral regeneration. Church members alone voted in colony-wide elections in order to preserve control by the godly. Yet within the confines of this religious mission, the colony strove for a communal and consensual model of authority. Settlers annually elected their officials and participated widely in local offices. Massachusetts codified its laws and provided decentralized tribunals at the county and town level, dispensing prompt and relatively nontechnical justice. Virginia planters, by contrast, primarily sought material gain rather than social regeneration. Tobacco barons who controlled land and servant labor exercised legal authority as a result of their economic and social prominence. Virginia notables dispensed a style of justice more authoritarian than the colonial norm in order to govern an agitated population that was disproportionately young and male.

6 Lang (1975) 221–222.

The primary unit of government was the county rather than the town (as in Massachusetts). The colony's slight institutional presence beneath the county level and its dispersed settlement, heavy-handed elite, and propensity towards violence combined to undercut the effectiveness of legal decisions. The most distinctive feature of Virginia and the other southern and Caribbean colonies was the law of slavery. England did not have a law of slavery itself, nor did it create a slave code for its American colonies in the fashion of the French and Spanish empires. Virginia and the Southern and Caribbean colonies, but not Massachusetts, developed the distinctive policing apparatus that accompanied slave law. Masters, for example, enjoyed legal protection if they accidentally beat slaves to death; colonies offered public support for the private recapture or killing of runaways; and restrictions were placed on the ability of whites and slaves to socialize and trade with each other.[7]

Space restrictions preclude comparing other regions in seventeenth century English America. But the contrast of Massachusetts and Virginia suggest a conclusion: The profound regionalism of British America appears far less as a set of variations within a shared legal order than does Spanish American regionalism, which grew up under the framework of the *derecho indiano*. The absence of a *derecho británico indiano* has shaped how scholars have pursued the legal history of the two empires. This is apparent in the study of the intellectual history of law.

II. Intellectual History

On occasion similar questions have driven the intellectual history of British and Spanish American law. Historians have explored both empires' justifications for colonization and dispossession of indigenous peoples. And they have stressed the prominence of law as a political vocabulary for negotiating with imperial administrators. Yet for all this, significant differences stand out in how scholars have pursued the intellectual history of law in the two empires. First, in the mix of approaches to legal history, intellectual history occupies a more prominent place in Spanish American than in British American historiography. This is, in part, the result of the much greater amount of intellectual "raw material" in Spanish America. Since so many key administrators of the Empire were *letrados*, they left behind much more high-level

7 Konig (2008); Nelson (2008) 3–79; Tomlins (2010) 221–226, 267.

intellectual reflection on law than did their British counterparts, who were typically laymen. There was no counterpart in the British Empire to the great importance of neo-Thomist legal theory among churchmen and jurists, which inspired reflection on the intersection of eternal law, natural law, and positive law in both state and church. British Protestants, lacking oracular confession, did not produce manuals for confessors. Confessor manuals undertook a sustained engagement with law by asking which ordinances bound conscience (as per Romans 13:5), and determining whether violation of laws binding conscience subjected the offender to mortal sin or only to venial sin. Scholars seeking to write intellectual histories of Spanish American law have much more to work with than British American historians.

The absence of a *derecho británico indiano* helps account for a second difference. Intellectual histories of British American law, particularly in the seventeenth century, organize themselves regionally to such an extent as to downplay commonalities among the various settlements. By contrast, the more plentiful intellectual histories of Spanish American law typically treat the New World as a unit harboring variations rather than as a series of lightly connected regions. In support of this proposition, consider some of the distinguished intellectual histories of Spanish American law produced by Tau and by participants in this volume. First, Tau has famously written on the transition in the Spanish American Empire from a predominantly casuistical style of legal reasoning towards one that is more reliant on systemization.[8] Brian Owensby's essay extends Tau's framework by exploring the treatment in Spanish American legal culture of conscience, simultaneously the means and end of casuistry.[9] Second, Tau and others have stressed the importance of natural law and the "common good" within Spanish American legal reasoning. This work has several variants. "Common good" and natural law might be treated as a touchstone for assessing whether positive laws and customs are valid or not and whether officials might suspend ordinances by invoking the formula "*obedezco pero no cumplo*" ["I obey, but do not comply"].[10] Or one might argue that for all the legalistic rhetoric of the Spanish Empire, officials based their actions far more on natural law, religious injunctions, and amorphous, self-interested notions of the com-

8 Tau (1992b).
9 Owensby (2015).
10 Tau (2002); Tau (1992a) 59–126; Tau (2001) 143.

mon good than on the requirements of positive law.[11] Or the common good and natural law might be taken as the measure of the respective obligations of the Crown, officials, and vassals in a just social order. From this perspective, the identification of the common good and natural law would be the key to resolving disputes in areas as diverse as *amparo* petitions, land *composiciones*, citizenship [*vecindad*], and Indian labor and tribute requirements.[12] Historians pursuing each of these topics have mixed evidence from New Spain, Peru, the Yucatan, and other regions. In so doing, they adopted a continental perspective.

In contrast to Spanish American historiography, the legal-intellectual history of British American casuistry and conscience, common good, and natural law commonly follows regional lines from settlement through, roughly, the middle third of the eighteenth century. To be sure, the broadest outlines of these intellectual frameworks were similar in the various regions of the English Atlantic. But in the mid-level propositions, in the ways that settlers drew upon and applied these overall frameworks, the regions differed. Let us begin with the notion of the "common good." Jacobean promoters of Virginia promised "honor and glory" to settlers who pursued the common good of the new colony rather than their own self-interest.[13] Massachusetts' leaders emphasized the honor of God rather than personal glory, producing a differently inflected notion of the common good, one linked to the religious mission of the colony. Both Massachusetts and Virginia settlers thought about the common good in the Ciceronian idiom characteristic of early modern Europe, which implored citizens to identify their private good with the collective, shared good of their community. This framework recognized that since communities varied, so would the particular form of the common good that each pursued.[14] The common good defined by the leaders of Puritan Massachusetts would naturally differ from that of slaveholding Virginia, from Quaker Pennsylvania, and from heterogeneous New York with its substantial Dutch population.

Understandings of conscience and casuistry likewise varied regionally. New England Puritans, Rhode Islander dissidents inspired by Roger Wil-

11 See, e. g., Herzog (2004); Herzog (1995).

12 Herzog (2015); Herzog (2003); Owensby (2008); De Solórzano Pereira (1996) 206–275 (Indian labor requirements).

13 Fitzmaurice (2003) 77.

14 Miller (1994) 2–3, 21–87.

liams, and Pennsylvania Quakers, far more than settlers in the slaveholding south, made conscience a central category of their political life and legal culture and studied casuistical (or "cases of conscience") literature. Historians consequently either organize studies of early American conscience and casuistry by colony or make sure to elucidate the differences among the settlements.[15] Along with Connecticut and New Haven colonies, but distinct from settlements outside of New England, Massachusetts drew on the judicial law of Moses to establish the obligations of conscience.[16] Massachusetts' ministers and magistrates used casuistical reasoning to reconcile the godly mission of their colony with the practical exigencies of reason of state, including the need to maintain religious unity. They held that the state might coerce dissenters from Puritan fundamentals on the grounds that these wayward settlers had sinned against their own conscience. Roger Williams, exiled out of Massachusetts to help found Rhode Island, famously drew the opposite conclusion and denied the right of the civil magistrates to pressure Christian believers whose conscience led them to minority views. William Penn, the organizer of Pennsylvania, synthesized the leading arguments for religious liberty of conscience circulating in mid-seventeenth century England and adjusted them for a colonial context – believing, for example, that tolerance would encourage responsible people to immigrate to his colony and would reduce the factionalism epidemic in new settlements.[17] The regional rather than continental nature of the legal-intellectual history of the British Empire before the middle third of the eighteenth century is a subset of – and further proof of – the absence of a common legal order, of a *derecho británico indiano*.

But by the mid-eighteenth century, pronounced regional variations began to abate. Consider natural law. The law of nature supplied arguments deployed across the different colonies to justify English sovereignty over North America and the rules for dispossessing native Americans.[18] Regional variation occurred when leaders of the various colonies drew on natural law

15 For examples of the former, see Mosse (1957) [Massachusetts]; Morgan (1967) 130–142 [Rhode Island]; Gaustad (1991) [Rhode Island]; Dunn (1967) [Pennsylvania]. For an example of the latter, see, e. g., Murphy (2001).

16 On which, see Ross (2012).

17 Mosse (1957) 88–106, 132–145; Murphy (2001) 48–55, 58–60, 173–181.

18 Fitzmaurice (2003) 137–149, 158; Pagden (1995); Tomlins (2010) 93–132; Yirush (2011) 12–13.

to discern the obligations of conscience or to define the common good in their differing communities.[19] By the middle third of the eighteenth century, these uses subsided while settlers resisting an intrusive British Empire increasingly drew on natural law as a resource against the Crown and imperial administrators. Colonists claimed that their natural right to migrate to America, enter upon its unimproved open lands, and form political societies implied a further right to dispossess natives beyond what the Crown would allow and to claim the full protection of English common law against royal and proprietary efforts to limit its applicability. In the decade of agitation leading to the American Revolution, controversialists included natural law among their arsenal of arguments.[20] From the mid-eighteenth century onward, then, variations in the use and interpretation of natural law tracked more onto political factions (prerogative vs. popular parties and Whig vs. Tory) than onto regions, as was the case in the seventeenth century. There was, in short, at least a partial convergence among regions in their treatment of natural law. This convergence encouraged scholars to write legal-intellectual histories of the Revolutionary era less in regional frameworks than on a continental-wide scale (in the style of Spanish American legal-intellectual historiography). With this in mind, we might ask whether the term "convergence" meaningfully describes the overall direction of change in other aspects of British American legal culture, and in Spanish American law.

III. Trajectories of Change in Spanish and British American Law

The initially regional organization of the British American legal systems powerfully shapes the story that scholars tell about the transition of colonial law from the seventeenth to eighteenth century. The perceived trajectory of change differs significantly from that in Spanish America. Let us start with the latter. Historians of Spanish American law speak of how a framework established by roughly the 1570s underwent a long, gradual period of stabilization, maturation, or consolidation until, arguably, the 1750s. The *derecho indiano* in the center of this picture underwent, it is said, continual but incremental change. Tau's history of the relative shift from casuistical to

19 Adding to the complexity, minority ethnic groups such as the Germans cultivated differently inflected understandings of natural law. See Roeber (2001).

20 Botein (1980); Wright (1931) 13–99; Yirush (2011) 17, 138, 156, 223–258.

systematic reasoning might be read in this vein. So, too, accounts of the greater professionalization of Spanish American law, with the multiplication of letrados as judges or as "judicial advisors."[21]

The dominant narratives of change deployed by British American legal historians are more dynamic in that they feature a rupture, or a significant reorientation, of the colonial legal systems between the seventeenth and eighteenth centuries. The most important of these stories is "anglicization." This development has two parts. The first concerns an alteration in dispute resolution and the character of litigation. Few trained lawyers immigrated to seventeenth century America. The colonial court systems were overwhelmingly staffed not by legal professionals but by laymen who administered nontechnical, arbitral, and discretionary justice and brushed aside inconvenient ordinances. Magistrates selected more for their social prominence than their legal competence praised fairness and looked down on legal "niceties." Settlers concentrated on the substance of disputes and dispensed with the intricacies of English legal procedure, with its complicated rules of pleading and obscure terms of art. Community leaders commonly valued arbitration over litigation. By the late seventeenth century, important elements of this inherited system were under stress. The rate of litigation increased faster than population in the eighteenth century. Where neighbors might arbitrate disagreements in order to restore peace in a face-to-face community, population growth and dispersion and the expansion of long-distance trade and credit networks meant that more disputes arose among strangers "at arm's length" determined to prevail at trial even at the cost of fracturing relationships. Commercialization, especially trans-Atlantic trade, created pressures for a more predictable, more lawyerly and formal legal system, one more attentive to English precedents and procedures. As tribunals increasingly respected rather than recoiled from legal technicality, litigants found it in their interest to hire lawyers who dissected pleadings and sought delays and reviews. This further undermined the simplicity and accessibility of colonial justice. The colonial legal system became more like England's, became more "anglicized," as it moved from a "communal, informal mode of resolving disputes to a rationalized, lawyerly," technical mode.[22]

21 Bravo Lira (1989) 11–37; Haring (1963) 69–70; Muro Orejón (1970); Tau (1992b); Zorraquín Becú (1994) 416.

22 Botein (1981); Dayton (1995); Dayton (1993) 10 [quote in Dayton (1995)]; Hoffer (1998) 76–85, 93–97; Mann (1987); Murrin (1983); Rosen (1992). Although these inter-

The British colonies "anglicized" in a second way in that their intensely regional legal cultures lost some of their distinctiveness and converged towards the legal order of England. The Puritan commitments of New England, the Quaker experiment in Pennsylvania, the Dutch heritage and the Stuart monarchs' absolutist initiatives in New York, and the Catholic presence in Maryland faded in the eighteenth century, losing their seventeenth century salience. Although marked economic, social and demographic differences continued to divide the regions of eighteenth century British North America, increasing imperial oversight of colonial lawmaking and judicature reduced the distinctiveness of regional legal orders. The king's Privy Council began taking appeals from colonial courts and vetting legislation. Britain appointed English barristers as judges on supreme tribunals and introduced customs inspectors, admiralty judges, and other imperial administrators into the colonies. Through these mechanisms the Empire reconfigured colonial judiciaries along more uniform and hierarchical lines, eliminated the appellate jurisdiction of Assemblies, and suppressed practices that were too puritan, Quaker or Dutch or that interfered with imperial control of trade and the royal prerogative. This partial convergence of regional legal orders was part of a larger North American anglicization noticeable in the formation of a deeper, more self-conscious British identity and the growing resemblance of elite culture and values, military structures, and consumption patterns across the colonies and the metropolis.[23]

Comparing the dynamic transformations captured by the rubric of "anglicization" to the incremental changes of the *derecho indiano* in the mature Spanish American Empire suggests two (somewhat speculative) hypotheses – one brief, and one more extensive. To begin with, might we suppose that the eighteenth-century British colonies not only converged towards each other and towards England but also towards the Spanish Empire by developing certain features of a collective legal order, this hitherto missing analogue to

related processes have been taken as evidence of the "anglicization" of colonial law, important elements of them have also been organized under other rubrics, such as legal "modernization." On the latter, see the debate between Priest (2001), and Mann (2002), and Priest's reply, *ibid.*, 1881–1887.

23 Botein (1983) 50–67; Breen (1984) 221–223; Breen (1986); Greene (1988) 170–177; Murrin (1966). To be sure, regional legal orders only partially converged. On the importance of communications patterns in preserving some measure of diversity among the colonies' legal orders, see Ross (2008).

the *derecho indiano*? In eighteenth century British America, institutional forms grew more similar among the regions; the Empire articulated more elaborate choice of law rules for meshing metropolitan legal norms with settler norms, backed up by a more intrusive imperial review of legislation and adjudication and provision for appeals to a crown council; and finally, Britain engaged in more direct regulation of colonial society through parliamentary legislation, gubernatorial instructions, and crown-controlled tribunals such as vice-admiralty courts. These developments are reminiscent of analogous features in the *derecho indiano*. Perhaps some measure of convergence between the Spanish and British empires occurred in the eighteenth century as elements of a collective legal order emerged that were absent or muted in the regionally distinctive seventeenth century English colonies living under a lax empire. Although no *derecho británico indiano* existed on the eve of the American Revolution, were there intimations of one?[24]

I will develop my second (speculative) hypothesis at greater length. British American anglicization is about the reorientation of a legal order on account of powerful social forces: population growth and dispersal, greater participation in transatlantic trade, and a newly intrusive English Empire. Was there an analogy in the Spanish Empire – a story about the recreation of a legal order under the pressure of profound demographic, political, and economic change? In search of this story, we should look not at the settler side of the *derecho indiano* (which featured consolidation and incremental change), but at the Indian side. The Spanish Empire famously used law and bureaucracy to regulate the lives of indigenous peoples – to calibrate their tribute and labor requirements, to gather together dispersed Indians through *congregaciones*, and to develop semi-autonomous governance under Spanish oversight in the republic of the *Indios*. Within this general framework, there were specific ways in which the changing relationship of the *derecho indiano*

24 What I am suggesting is related to, but ultimately different than, the convergence of the political cultures of the two empires in the late seventeenth century and early eighteenth century observed by historians. Venality and creolization of officeholding in Spanish America granted settlers a larger degree of self-rule. Meanwhile, the pressures of a more intrusive British Empire encouraged English settlers to learn how to lobby and manipulate an imperial bureaucracy. As a result, the differences in British and Spanish American political culture narrowed. Elliott (2006) 378–379. By contrast, I have sketched out – really, speculated about – a (partial) convergence in the legal orders of the two empires.

to indigenous peoples between the mid-sixteenth and mid-eighteenth century brings to mind elements of the anglicization story.

First, "anglicization" refers to the transformation of litigation in the North American colonies, a move towards a more technical, lawyerly, and formal system, one more responsive to English precedents and procedures. Indigenous communities in Spanish America underwent a (partial) Hispanicization in how they handled disputes. As is well known, natives became adept at using Spanish legal tools, from petitions and lawsuits to appeals and *amparos*, in order to protect communal lands, participate in newly formed private land markets, reduce tribute and labor exactions, defend against the overreaching of officials, and mediate political conflicts.[25] As Indians grew more knowledgeable about Spanish law, they began to import into their legal affairs and governance of their own communities Spanish procedures and concepts learned in conflicts with settlers and imperial officials. One sees this in land records used within Nahua communities, in conflicts among ethnic groups and Andean *ayllus*, and in disputes about succession to major chieftainships. Native commoners appealed to Spanish legal concepts and tribunals when fighting to reduce duties owed to Indian notables. Indigenous *governadores* and *alcaldes* mixed native usages with Spanish legalisms when they judged other Indians or conducted *residencias* for Indian officials.[26] By the end of the seventeenth century, lawyers needed to do less translating of the accounts of indigenous complainants and witnesses into Spanish legal categories as natives became more familiar with legalistic terminology.[27] To look at these developments comparatively is to notice that indigenous internalization of Spanish legal procedures and concepts, what Tau provocatively calls "*mestizaje jurídico*," resembles anglicization in certain respects.[28] For anglicization likewise involved both an external dimension (the deployment of English legal technicalities by settlers disputing with imperial officials) and an internal dimension (the refashioning of settlers' legal culture as they became habituated to more lawyerly and formal English legal procedures and concepts).

25 Kellogg (1995) 13, 51; Owensby (2008) 20, 41–44, 88–89, 95–100, 127–128, 137–140, 157, 295–93; Stern (1993) 116–119.
26 Gibson (1964) 180–181; Lockhart (1992) 166–167; Stern (1993) 132–134.
27 Kellogg (1995) 13, 82.
28 Tau (1997) 102.

Second, anglicization alludes to a more "English" style of governance in the colonies. This involved the creation of more hierarchical judiciaries, the elimination of Assembly appellate jurisdiction, and the displacement of some measure of Creole control by the appointment of customs inspectors, vice-admiralty judges, and English barristers in the colonial supreme courts. By the latter seventeenth century, the Crown not only began accepting appeals from colonial supreme courts, but demanded that statutes be sent for vetting, which could lead to editing or abrogation. The Board of Trade sent questionnaires to the colonies asking about their laws and customs, a proactive way of beginning the process of inspection. As Spanish American historians have detailed, over time Castile pressed for a more intrusive governance of indigenous communities. This occurred in stages. From the mid-sixteenth century onward, the Empire drew on models of Spanish municipal government to impose *cabildos* with *alcaldes* and *regidores* on native community units.[29] The imperial bureaucracy from the local *corregidor* through the Council of the Indies scrutinized indigenous customs and bylaws, reserving the right to eliminate native usages that violated natural law, reason, or Christian doctrine. The Empire's screening process did only extend to usages brought before its tribunals. Crown officials interviewed Indian elders and conducted ethnographic and historical surveys in order to determine – and begin the triage of – native customs.[30] By the latter eighteenth century, in some parts of Spanish America, newly appointed local officials answerable to the Crown intervened more extensively into Indian affairs within native communities. Subdelegates and *jueces españoles* inserted among the Yucatan Mayans increasingly adjudicated intra-Indian disputes that previously would have been handled by native leaders.[31] Viewing these developments with an eye on the anglicization of British North American colonial governance reveals some intriguing similarities. In both cases, one sees the (partial) reordering of governing structures along metropolitan lines; a modest shift from indirect to direct rule through the appointment of officials more responsive to imperial priorities than to local audiences; and the vetting of

29 Gibson (1964) 166–181; Horn (1997) 44–85; Lockhart (1992) 28–58.

30 Borah (1983) 43; Tau (2001) 134–143.

31 Farriss (1984) 355–366. In other areas, such as New Spain, the Bourbon reforms do not appear to have made much difference in the governance of Indian communities. Gibson (1966) 173.

locally generated customs and bylaws, both reactively (as a byproduct of litigation and appeals) and proactively (through crown-initiated surveys and questionnaires).

Third and finally, anglicization refers to the fading distinctiveness of the legal cultures in the English colonies and the convergence of those legal cultures toward each other and toward England. The strictures of the *derecho indiano* likewise pushed for a (partial) convergence of the distinct indigenous legal cultures among the Nahuas, the Yucatan Mayas, and the Andean peoples. Over the sixteenth and seventeenth centuries, the wide variety of institutional forms that had previously obtained among indigenous towns and villages in Mexico, the Yucatan, and the Andes were subordinated as the Spanish imposed upon native communities throughout the Americas an administrative structure modeled on Castilian municipal government: the *cabildo* with its *alcaldes*, *regidores*, *escrivanos*, and other minor officials. Like their Spanish counterparts, Indian officers in all of these regions came to enjoy legal authority – as a formal matter – because of their connection to the king rather than by hereditary succession. Indian hierarchical chains of command reaching downward from the provincial level withered away.[32] As indigenous governance withdrew from provincial networks to concentrate in cabildos with structural similarities throughout the Americas, as Indian officials traced the source of their power back to the Crown, as native judicature and administration increasingly incorporated Spanish legal concepts and looked upwards to imperial tribunals and councils for appeals and redress of grievances, then the legal cultures of Nahua, Yucatan, and Andean communities began to look more like each other, and somewhat more like Castile, than they had at the time of conquest. At least to some extent, they converged. Let me be clear about what I am not saying: that indigenous communities and the colonies of British North America were socially or legally similar. Instead, more modestly, I claim that there were suggestive parallels in their direction of movement – in the "convergence" that each underwent and in the transformations they experienced in dispute resolution and governance structures. If this is true, might scholars of British American law looking to establish a Spanish American comparative perspec-

32 Farriss (1984) 148–150, 158–159; Gibson (1964) 166–167; Owensby (2008) 37, 212–213, 227.

tive on their dominant narrative of legal "anglicization" be better served by looking to the experience of indigenous peoples than of Castilian settlers?

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